

Pricing Practice

Exploring Costs in Victorian Legal Services

A Report for the Victorian Legal Services Board + Commissioner

Catrina Denvir, Jess Mant and Genevieve Grant with Hugh McDonald and Nigel Balmer



Victoria**Law** Foundation

This report is published by Victoria Law Foundation. Victoria Law Foundation supports better justice through research, education and grants and is funded through the Public Purpose Fund administered by the Victorian Legal Services Board.

The office of Victoria Law Foundation is on the traditional lands of the Wurundjeri people of the Kulin Nation. We acknowledge their history, culture and Elders past and present.

Authors – Catrina Denvir, Jess Mant and Genevieve Grant with Hugh McDonald and Nigel Balmer.

This document should be cited as:

Denvir, C., Mant, J., Grant, G., McDonald, H.M. & Balmer, N.B. (2023). *Pricing Practice. Exploring Costs in Victorian Legal Services: A Report for the Victorian Legal Services Board + Commissioner*. Melbourne: Victoria Law Foundation.

Inquiries:

Level 13, 140 William St., Melbourne 3000

Phone: 03 9604 8100

Email: research@victorialawfoundation.org.au

Web: www.victorialawfoundation.org.au

Copyright © Victoria Law Foundation, 2023

ISBN: 978-0-6459099-0-6

This report is available to download at www.victorialawfoundation.org.au/research/

Contents

Executive Summary	4
Pricing models and billing	4
Choosing a lawyer	6
Estimating and communicating anticipated costs	7
Controlling, monitoring and updating costs	8
Conclusions and recommendations	9
The Efficacy of the LPUL Requirements	9
Improving Support for Legal Practitioners	11
Improving Public Capability to Evaluate Legal Costs	12
General Observations of Good Practice	13
Gaps in the Knowledge Base and Avenues for Future Research	13
1. Introduction and Methods	14
1.1 Background and Context to the Study	14
1.1.1 Lawyers' Matter Scoping and Billing Practices: Significant but Unexplored	14
1.1.2 Costs, Innovation and the Economic Context for Legal Services	15
1.1.3 Situating Costs within the Broader Access to Justice Context	17
1.2 Why Costs Matter	19
1.2.1 Cost as Deterrent for Getting Help from a Lawyer	19
1.2.2 Cost as a Factor in Trust in the Profession	21
1.2.3 Cost as a Reflection of Market Inefficiency	22
1.2.4 Response of Regulators	23
1.3 Costs Compliance	24
1.3.1 Uniform Law	24
1.3.2 Court Regulation of Litigation Conduct and Costs	25
1.4 Factors in Costs Complaints	28
1.4.1 Practitioners' Communication with Clients about Costs	28
1.4.2 Initial Scoping of Fees	28
1.4.3 Client Capability and Understanding	29
1.5 About this Study	31
1.5.1 Aims	31
1.5.2 Methods	31
1.5.3 Definitions	33
1.5.4 Structure	34

2. Fee Models & Billing Practices	35
2.1 Pricing Models	35
2.1.1 Variation by Practice Area and Matter Type	35
2.1.2 The Basis of Pricing	37
2.1.3 Selecting a Fee Model	41
2.1.4 Financial Arrangements to Reduce/Defer/Secure Funding for Fees	50
2.1.5 Negotiation	56
2.2 Billing	59
2.2.1 Billing Frequency	59
2.2.2 Billing Arrangements	62
2.2.3 Bill Itemisation	63
2.2.4 Responding to Billing Complaints	66
2.3 Regulatory Insights and Implications	70
3. Choosing a Lawyer	73
3.1 Initial Enquiries	73
3.1.1 Use of Price Guides	73
3.1.2 Use of Intake Tools	75
3.2 First Meeting	76
3.2.1 Purpose of First Meeting	76
3.2.2 First Meeting Format and Charges	78
3.3 Client Price Expectations	82
3.4 Instructing a Lawyer and Accepting Instructions	86
3.4.1 Client Motivations for Proceeding to Instruction	86
3.4.2 Practitioner Motivations for Proceeding to Instruction	87
3.5 Regulatory Insights and Implications	89
4. Estimating and Communicating Anticipated Costs	90
4.1 Estimating a 'Single Figure' Total	90
4.1.1 Scoping a 'Single Figure' Total	90
4.1.2 Factors Influencing the Length of Scope	97
4.2 Factoring in Contingencies	99
4.3 Setting out Costs in Writing	105
4.4 Regulatory Insights and Implications	109
5. Controlling, Monitoring and Updating Costs	114
5.1 Controlling Costs	114
5.2 Responding to Factors that Increase Costs	119
5.3 Tracking Estimates and Updating Costs Disclosures	127
5.3.1 Mechanisms for Monitoring Expenditure	127
5.3.2 Reviewing Estimates and Updating Disclosures	129
5.4 Regulatory Insights and Implications	132

6. Conclusion and Recommendations	134
6.1 The Efficacy of Uniform Law Requirements	134
6.1.1 Specifying a 'Single Figure' Estimate in Writing	134
6.1.2 Minimising Unnecessary Costs	136
6.1.3 Providing Updated Cost Disclosures	136
6.1.4 The Client's Right to a Negotiated Cost Agreement	137
6.2 Improving Support for Legal Practitioners	138
6.2.1 Pricing Models	138
6.2.2 Resources to Assist Compliance and Promote Best Practice	139
6.3 Improving Public Capability to Evaluate Legal Costs	139
6.4 General Observations of Good Practice	141
6.5 Gaps in the Knowledge Base and Avenues for Future Research	142
Appendix A: PLE Guidance Emerging from the Research	144
Appendix B: Interview Topic Guide	146
1. Client base/pricing approach (20–25 minutes)	146
A. General	146
B. Family	146
C. Estates	147
2. Communicating with clients (20–25 minutes)	147
3. Barriers to/motivations for adopting alternative pricing (10–15 mins)	148

Executive Summary

Lawyers' matter scoping and billing practices are central to the cost and market for legal services. As a result, they have a direct relationship with access to justice. Lawyer communication with clients about these practices is a major driver of client understanding and agency in the service relationship. This communication is also an important aspect of the quality of legal services and has a direct bearing on consumer experience. Nevertheless, the issue of costs communications, the efficacy of current regulatory requirements in respect of costs, and the influence of pricing models on the accessibility of legal services remains an under-developed area of research.

In light of this, this exploratory research was commissioned by the Victorian Legal Services Board + Commissioner (VLSB+C) to examine the factors that influence the pricing of legal services, how practitioners communicate with clients regarding anticipated costs, and how service costs and cost communications affect the lawyer-client relationship. This study sheds light on these issues through qualitative analysis of interviews with 17 practitioners working in the area of wills and estates, and family law. These practitioners worked across metropolitan and regional settings, within large firms and as sole practitioners, and employed fixed fee, value, retainer, and hourly rate pricing models. This Summary outlines the principal findings and recommendations that emerged from this project.

Pricing models and billing

Time remains a central measure for price setting, even among practitioners who offer fixed fees and value pricing. As a result, fixed fee services are often constrained to matters where it is possible to predict the time involved in completing a matter. The centrality of time to pricing also limits the potential for clients to negotiate on price.

- Practitioners used a variety of pricing models to cost their legal services, including charging according to hourly rates, the Practitioner Remuneration Order or Court Scales, charging fixed fees for specific packages of legal services, and charging according to other models such as value-based pricing or subscription-based retainers.
- Despite some evidence of a shift away from hourly rates, the basis on which prices are set remains largely rooted in practitioners' time. As such, factors, which extend the length of time a matter takes, play into pricing decisions. These include the internal circumstances of a case and the relationship between the parties concerned, as well as external factors beyond a practitioner's control, such as whether the other side is represented, and the approach taken by that representative.

- Among those interviewed, fixed fee models were typically reserved for transactional matters where practitioners could be confident in the accuracy of their initial estimation of the likely time and effort involved with resolving a matter. Hourly rate models were typically used for matters that were less easily contained or contingent on other parties or circumstances, such as matters involving negotiations or litigation.
- With time remaining a central factor in the quantification of costs for those working under hourly rates and fixed fees, there is little scope for clients to negotiate on price, save where it results in work being excluded from the scope of a matter.
- The requirement to inform clients of the right to negotiate appeared largely hollow in practice. Practitioners are almost always resistant to negotiation efforts and indeed, in many cases set out that they do not negotiate. This is true even where their cost disclosure says otherwise.

Practitioners identified several barriers to adopting alternative pricing models. Some of these barriers appeared to be predicated on a misunderstanding of the way in which different models operated and what they required from practitioners.

- Where value pricing had been trialled by current hourly rate and fixed fee practitioners, it had been directed at clients described as 'high value'. This, and other concerns expressed in respect of value pricing, may point to a misunderstanding of the way in which the value pricing model might operate.
- Some hourly rate practitioners did not have a thorough understanding of how fixed fee pricing should operate. Many rejected it on the basis that a 'one size fits all' approach to pricing services is unrealistic and unviable, despite fixed fee practitioners in the sample rarely taking this approach themselves.

Practitioners adopted a range of strategies to prevent bill-shock and support clients experiencing financial difficulty. However, the range of available billing and pricing options were constrained due to practitioners' aversions to assuming financial risk, uncertainty as to when a bill can be rendered, and their willingness to adopt alternative approaches.

- Many practitioners operated a trust account as a means of collecting payment from clients, but there were a range of alternative payment arrangements instituted, particularly for clients who presented with, or later faced, financial difficulties.
- Many practitioners undertook regular billing of clients as a means of securing income and to reduce the risk of 'bill-shock' and potential cost disputes at the end of a matter. Itemisation of bills was common, although the level of detail within these bills varied.

Choosing a lawyer

Practitioners observed that clients lack the capacity to adequately assess the value of services in light of their costs, and often presented with misconceptions as to the likely cost of services.

- Practitioners reported that the pricing expectations of clients' differed depending on their needs, circumstances, and prior experience of engaging with professional services. Most clients presented with inaccurate expectations about how much legal services cost and how matters may be priced and charged. Due to the nature of legal services as credence goods (a good in which the utility is difficult or impossible for the consumer to evaluate even after consumption) clients face significant challenges assessing the value of services.
- Some practitioners observed that clients often relied on heuristics when deciding between service providers. This included assuming high cost or personal rapport with a practitioner was a guarantee of quality, or seeking the lowest cost service to the exclusion of other considerations.

Although practitioners reported some clients 'auditioning' them as part of an effort to shop-around, this was relatively uncommon. Indeed, many practitioners used the first meeting or the stages prior to it, to perform their own screening/auditioning processes.

- First meetings served as a key stage, after which clients decided whether to proceed with instruction, and lawyers determined whether particular clients were desirable from a business perspective.
- In most cases, lawyers were hesitant to pursue business from clients who were particularly price-sensitive, due to a perceived risk that cost disputes were more likely to arise. As such, practitioners employed several 'filtering' mechanisms – such as charging for the first meeting – to weed out clients who were either incapable or unwilling to engage their services at a certain price.

Estimating and communicating anticipated costs

Practitioners took different approaches to scoping an 'estimate of total legal costs' as required under the Legal Profession Uniform Law Act 2014 (Vic) ('LPUL'). Drawing on the LPUL guidance, practitioners in the sample operated under the assumption that this estimate should constitute a 'single figure'. However, the scope of this 'single figure' and the contingencies that were factored in, varied by practitioner. This can result in highly unrealistic 'worst case scenario' estimates. This variation also limits the ability of clients to make price comparisons across providers.

- In practice, the scope of an estimate varied from client to client and practitioner to practitioner. Some practitioners produced a figure that represented costs to trial, some defined a 'matter' only in relation to the immediate steps to be taken, others chose an approach somewhere between the two.
- This variation was magnified by the contingencies or adverse events that a practitioner factored into their 'single figure' estimates, and whether they assumed a best-case or worst-case scenario. Often these approaches were driven by a practitioner's understanding of what the LPUL required of them, though strategic motivations were also reported.
- There is a need for greater clarity and possibly, standardisation of what is expected of practitioners. At present, it does not appear that the 'single figure' estimate simplifies costs for clients, but rather achieves the opposite. Further, depending on how a 'single figure' is calculated and the extent to which it includes costs for risks that are unlikely to eventuate, it may serve to dissuade some from pursuing their rights, due to the fear of costs.

Efforts to contextualise a 'single figure' estimate through the provision of cost breakdowns risk increasing the cognitive burden for clients, particularly given that many practitioners already feel that clients do not engage fully with cost disclosure documents given their length and complexity.

- 'Single figure' estimates were usually accompanied (in verbal or written format) by a price range which reflected a more realistic assessment of the scale of costs, or provided a breakdown of costs for different stages. The simultaneous use of ranges and single figures arguably increases the cognitive burden for clients, and detracts from the intention of the 'single figure' estimate as the headline cost estimate.
- This cognitive burden was widely viewed as being exacerbated by the additional information that practitioners provide in their cost disclosures to appropriately caveat and condition their own costs. For this reason, practitioners observed accessibility and engagement challenges in relation to disclosure. At the same time, there was reluctance to remove this content, for fear that it may lead clients to misinterpret a 'single figure' as a fixed quote for services.

Controlling, monitoring and updating costs

Practitioners were aware of the requirement to limit actions which might increase legal costs and were often proactive in attempting to mitigate these risks up-front.

- When initially scoping a matter, practitioners often factored in a range of possible risks that if they were to come to bear, would lead to increased costs for the client.
- Practitioners also took a range of strategies to control the costs incurred by clients during their matter. In the context of negotiation/litigation, this included pushing a matter to the next stage where the other side was not seen to be engaging on a bona fide basis.
- At the same time, efforts to curtail costs were capable of being frustrated by external factors such as inexperienced opposing practitioners, uncooperative parties on the other side, emotional responses from the client themselves, or changes to court requirements. These factors were seen as increasing costs in an unanticipated or uncontrollable way.

For many practitioners, costs were a continued part of any strategic decision-making process and were a matter of ongoing discussion with clients. The accuracy of the 'single figure' estimate was actively monitored throughout, with updated disclosures where necessary. However, this necessity varied based on the nature of the 'single figure' estimate provided.

- Many practitioners incorporated cost-benefit analyses into decisions about whether to take particular actions to progress a matter and raised these considerations with clients.
- Practitioners consistently monitored the accuracy of the original estimate provided at the outset of a matter, with some relying on automated reminder systems integrated into client management software, and others on manual systems involving a periodic review of the files.
- There remains uncertainty regarding the effectiveness of the updated disclosures requirement, given the propensity of some practitioners to give higher, 'worst-case scenario' estimates from the outset.
- There is a lack of consistency regarding the methods used to communicate updated cost disclosures, and it remains unclear as to whether all methods are compliant with the LPUL requirements.

Conclusions and recommendations

The Efficacy of the LPUL Requirements

The requirement to provide a cost estimate was seen by practitioners as an important catalyst for ensuring that upfront conversations with clients about costs took place. Practitioners viewed this requirement favourably, and considered that it had improved cost transparency in the legal services sector.

- There was a general view that being able to provide a 'range', as under the previous regime, was preferable to having to provide a single figure.
- The LPUL requirements, whilst onerous insofar as they prompted a firm to introduce new practice management systems and placed greater emphasis on producing an initial estimate of costs and updating that estimate, were not perceived as substantially different to the existing requirement to supply cost information to the courts.

The LPUL requirement to provide an 'estimate of total legal costs' (AKA a 'single figure estimate') may not be operating to enhance costs transparency in the manner intended.

- The requirement to provide a 'single figure' estimate, which considers 'all the circumstances and the most likely outcome', enabled practitioners to adopt different approaches when scoping litigation. This has the effect of reducing rather than enhancing transparency. This inconsistency – to the extent that it exists beyond our sample – is likely to impair clients' ability to engage in price comparisons.
- For negotiation/litigation matters where hourly rates are used, it may be more informative for clients to be provided with an estimated minimum and maximum expenditure for each stage of a matter through to litigation. This might include standardised conditions such as: optimistic (contingencies not included), realistic (likely contingencies included), and conservative (worst-case scenario) as well as standardised inclusions/exclusions for each of the foregoing (**Recommendation 1**). While this may enhance the ability of clients to engage in cost comparisons across providers, we note that such a change would impose an increased administrative burden on practitioners, and this needs to be weighed against the fact that many clients appear not to read cost disclosures.
- Given the requirement to submit a schedule of costs to the courts, more could be done to explore how this data could be used to develop an evidence-informed understanding of anticipated and actual costs from the weight of information held by courts (**Recommendation 2**).

The obligation under the LPUL to minimise a client incurring unnecessary costs should be considered in parallel with courts' case management duties and powers.

- Practitioners generally saw their obligations as being focused on completing work efficiently and providing sound advice to clients that made clear the cost implications of certain decisions. Cost discussions were intricately interlinked with strategic discussions with clients about the progress of their case.
- Practitioners also recognised that courts play an important role in the cost control processes, however there was a general view that courts did not use their powers effectively in this regard.
- There is a need to consider how LPUL requirements dovetail with the courts' case management duties (**Recommendation 3**).

The form in which some practitioners provide updated cost disclosures may not comply with the LPUL requirements. Further, the approaches taken to producing a 'single figure estimate' may obviate the need for updated cost disclosures.

- Some practitioners included updated estimates alongside the regular bills that they issued to clients, although it is not clear whether these were accompanied by the required wording. Given this, there may be benefit in clarifying and reminding practitioners as to the form that updated cost disclosures must take (**Recommendation 4**) and/or further investigating the extent of any non-compliance in this space (**Recommendation 5**).
- The fact that some lawyers may over-scope the 'single figure' at the outset of a case may undermine the requirement to provide an updated disclosure. It is necessary to address this reality as part of any change emerging from recommendations 1 and 2 above (**Recommendation 6**).

The client's right to a negotiated cost agreement is not realised in practice.

- At present it is not clear whether the requirement to include a statement on negotiation – as set out by the LPUL – is intended to encourage more competitive pricing in legal services, or whether it is an effort to encourage clients to exercise agency over the selection of services.
- If the latter, it may be more appropriate for this entitlement to be articulated explicitly, rather than couching it within 'a right to negotiate', and further research to explore how this entitlement may be operationalised in practice, would be beneficial (**Recommendation 7**).

Improving Support for Legal Practitioners

It is unclear how reliable fixed fees are in practice.

- Practitioners offering fixed fees reserved the right to apply and recover additional costs as set out in relevant cost disclosure and agreement documents. Among those interviewed, this right was only exercised where the nature of the work had clearly changed. However, some practitioners in the sample raised anecdotal evidence of fixed fees being used by practitioners to induce clients into instructing them when they had no intention of fixing the fee.
- To the extent that this practice is widespread, it undermines cost transparency and as such is an issue that warrants continued monitoring/further research (**Recommendation 8**).

There remain misconceptions regarding what various pricing models require of practitioners and the client groups for which they are most appropriate.

- There is merit in further exploring how value-pricing is operating in practice, as well as the segment of the market it is currently serving, with a view to identifying barriers to adoption (**Recommendation 9**).
- Concerns regarding the indeterminate scope of matters presents a barrier to the adoption of fixed fee pricing. Some practitioners operated under the assumption that a fixed fee required set prices for certain types of work, rather than operating as a price-cap on a bespoke-priced matter. This coupled with misconceptions regarding elements of value pricing, suggest that practitioners would benefit from greater clarity as to the operation of these pricing models (**Recommendation 10**).

Practitioners produce their own written cost disclosures and cost agreements which can be complex and difficult for clients to understand.

- Whilst some practitioners provided a breakdown of the scale of likely costs for each stage of a matter (particularly litigation), in addition to a 'single figure' estimate, this varied according to the approach that a practitioner took to scoping a matter.
- Practitioners expressed concern that despite the importance of the document(s), clients do not read them, or where they do, they do not take note of specific components.
- While some individual practitioners took innovative approaches to talking clients through these documents, using visual tools, and employing 'touchpoints' to reiterate key information, this practice is the exception rather than the norm. Other practitioners actively encouraged clients to disregard parts of their agreement and focus on the price ranges they provided verbally, or in writing, in the form of cost breakdowns.

- Practitioners questioned whether all the prescribed information for cost disclosure documents was necessary, and whether flexibility could be introduced to enable them to provide information to a client in other ways. Practitioners were hesitant about providing less information, due to fears of non-compliance with the LPUL, or exposing themselves to cost disputes further down the line.
- Further guidance for practitioners and further research directed at enhancing the design of exemplar cost agreements and disclosures that prioritise client comprehension, would be beneficial (**Recommendation 11**).

Improving Public Capability to Evaluate Legal Costs

For clients, making an accurate assessment of what constitutes value for money and/or being able to meaningfully compare fees remains extremely difficult.

- Soliciting prices from more than one potential supplier is time and (potentially) cost intensive for consumers who must have multiple initial consultations with different practitioners to gather price information. This may impede efforts to stimulate competition in the market for legal services.
- Practitioners observed that most clients presented with an inaccurate understanding of how legal fees are costed and unrealistic expectations of the totality of costs.

Given the complexity associated with comparing credence goods across providers, it may be less important to promote price competition and more important to ensure that irrespective of what services cost, they meet minimum levels of quality.

- This reinforces the continuation of independent mechanisms that assist clients to evaluate the quality of the product they are getting, as well as further investigation into which tools will assist clients to compare the more opaque dimensions of competence, capacity, experience, and trustworthiness across service providers (**Recommendation 12**).

Additional public legal education information may help clients to better understand the cost information supplied to them.

- Appendix A sets out advice drawn from discussions with practitioners that could be integrated into VLSB+C's existing Public Legal Education material (**Recommendation 13**).

General Observations of Good Practice

The study revealed several instances of good practice directed at enhancing transparency and assisting clients to stay abreast of cost accruals. These included:

- Regular billing cycles as a means by which to prevent bill-shock and keep clients informed as to how fees are accruing against the single total figure estimate that they are given.
- Raising the matter of costs directly with a client at the initial interview, clarifying exclusions and inclusions associated with a particular fixed fee matter or 'single figure' estimate, and providing price breakdowns in respect of complex or multistage work.
- Setting clear boundaries to help clients understand the professional parameters of the service being provided.
- The adoption of digital tools designed to regularly track billing against the 'single figure' estimate supplied.

These approaches may be suitable to include within the good practice guidance material produced by stakeholders (**Recommendation 14**).

Gaps in the Knowledge Base and Avenues for Future Research

In addition to the proposals for research set out in the recommendations above, further research to examine the issue of pricing from the client perspective and beyond the areas of wills and estates and family law is needed. Research of this nature will help regulators achieve a fuller appreciation of the factors that affect costs and consumers' understanding of legal costs (**Recommendation 15**).

1. Introduction and Methods

This Section provides an overview of the legal and policy landscape that frames the approaches practitioners take to costing and billing their legal services, as well as the regulations that govern how lawyers communicate with clients about costs. This section identifies a significant evidence gap in respect of the approaches that practitioners take to matter scoping and client communication. It further identifies a lack of understanding as to how the regulations are operating in practice, and their effectiveness in promoting transparent cost communications and empowering clients to make informed decisions about legal services. Finally, it sets out the objectives of the present research study, the methods employed and the structure and focus of each of the Sections that follow.

1.1 Background and Context to the Study

1.1.1 Lawyers' Matter Scoping and Billing Practices: Significant but Unexplored

Lawyers' matter scoping and billing practices are central to the cost and market for legal services. As a result, they have a direct relationship with access to justice. Lawyer communication with clients about these practices is a major driver of client understanding and agency in the service relationship. This communication is also an important aspect of the quality of legal services, and has a direct bearing on consumer experience.

Despite broad recognition of the problems generated by the high cost of legal services in Australia, legal costs are notoriously neglected as a subject of research.¹ The empirical evidence gap relating to legal costs and associated professional practices is profound. One rare exception is the Civil Justice Research Centre's 1993 investigation of the costs of civil litigation in Victoria and New South Wales, which examined actual costs and billing arrangements in 501, predominantly personal injury, cases.² That research – now 30 years old – identified that in the majority of studied Victorian cases, fees were calculated on the basis of the court scale, and in 60 per cent of matters 'the fee was agreed at an early stage of the proceedings'.³ Almost a decade ago, the Productivity Commission's *Access to Justice Arrangements* inquiry reported

¹ Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2, 115; see also Gillian K. Hadfield, 'Higher Demand, Lower Supply – A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans' (2010) 37(1) *Fordham Urban Law Journal* 129, 129.

² Deborah Worthington and Joanne Baker, *The Costs of Civil Litigation: Current Charging Practices, New South Wales and Victoria* (Law Foundation of New South Wales, 1993).

³ *Ibid.*

that 'actual evidence in the form of comprehensive estimates of litigation costs in Australia is elusive'.⁴ The situation has not improved, with only occasional and very partial accounts of legal costs ever made public.⁵ There has been little empirical research on how lawyers go about scoping matters, assessing the likely costs and communicating about these issues with clients. The small body of existing work tends to focus on lawyer fees and lawyer behaviour in litigation settings;⁶ the ethical and professional impacts of time-based billing on practitioners;⁷ and practical guidance for lawyers relating to innovative and non-traditional billing approaches.⁸

Recent developments in the legal and policy landscape relevant to costs and billing practices create important impetus for this research. In 2021, the Supreme and County Courts of Victoria conducted an expedited review of how litigious costs are assessed by Victoria's major trial courts. In their 2022 *Report on Litigious Costs*, the courts recommended that the scale method for assessing costs be replaced by guidelines on time costing together with prospective costs budgeting and fixed recoverable costs.⁹ Consultations are ongoing to shape the planned reforms.¹⁰ Additionally, in September 2022, the Legal Services Council embarked on a review of the costs disclosure thresholds in the *Legal Profession Uniform Law* ('LPUL'), with specific attention to the thresholds' effectiveness and regulatory impact.¹¹

1.1.2 Costs, Innovation and the Economic Context for Legal Services

Legal practice and costs operate in a broader economic context of innovation and technological development, which influence the delivery of legal services and client needs and expectations in a range of ways.¹² In particular, new technology has long been identified as a promising tool for fostering innovation in the pricing of legal services. Despite this, practitioners have been slow to maximise the opportunities provided by such offerings as online, unbundled services and automated tools.¹³

4 Productivity Commission (n 1) 115.

5 See, for example, the data on legal costs reported in Ernst & Young, *Review of Selected Performance Indicators of the NSW CTP Scheme 2015* (State Insurance Regulatory Authority, 2016); Kathleen Daly and Juliet Davis, 'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) 33(4) *Current Issues in Criminal Justice* 438, 457 (noting secrecy about legal costs while drawing on data reported by the Royal Commission into Institutional Responses to Child Sexual Abuse); and evidence about costs in class actions in Vince Morabito, *Empirical Perspectives on 30 Years of Class Actions in Australia: The Role Played by Costs Consultants at the Settlement Approval Stage of Federal Class Actions* (Report, 30 March, 2022) <<http://dx.doi.org/10.2139/ssrn.4070059>>; Peter Cashman and Amelia Simpson, 'Costs and Funding Commissions in Class Actions' (Research Paper No. 20-87, Faculty of Law, University of New South Wales, 11 December 2020), <<http://dx.doi.org/10.2139/ssrn.3765081>>.

6 See, for example, Herbert M Kritzer, 'Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?' (2002) 80(7) *Texas Law Review* 1943.

7 See, for example, Susan Saab Fortney, 'Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements' (2000) 69(2) *University of Missouri-Kansas City Law Review* 239; Christine Parker and David Ruschena, 'The Pressures of Billable Hours: Lessons from a Survey of Billing Practices inside Law Firms' (2011) 9 *University of St Thomas Law Journal* 619; Lillian Corbin, 'How "Firm" are Lawyers' Perceptions of Professionalism?' (2015) 8(2) *Legal Ethics* 265.

8 See, for example, Catrina Chen and Michael Legg, 'Costs: The 'Kill Bill' Movement and Alternative Fee Arrangements' (2020) 72 *Law Society Journal* 70; Michael Legg, 'Costs and FLIP: How to Future-Proof your Firm with Effective Alternative Fee Arrangements' (2021) 76 *Law Society Journal: Law Society of NSW Journal* 68; Victorian Legal Services Board + Commissioner, *Innovation in Pricing* (Web Page, August 2021) <<https://lsbc.vic.gov.au/lawyers/legal-costs/innovation-pricing>>.

9 Supreme Court of Victoria and County Court of Victoria, *Report on Litigious Costs* (Report, 2022) 1-2.

10 Supreme Court of Victoria and County Court of Victoria, *Review of Litigious Costs: Stage 1 Implementation* (Consultation Paper, 14 December 2022).

11 Legal Services Council, *Costs Disclosure Thresholds Review – Terms of Reference* (Web Page, September 2022) <<https://legalservicescouncil.org.au/documents/highlights/tor-costs-disclosure-thresholds-review-september-2022.pdf>>.

12 See, for example, Law Society of New South Wales, *FLIP: The Future of Law and Innovation in the Profession* (Report, 2017); Vicki Waye, Martie-Louise Verreynne and Jane Knowler, 'Innovation in the Australian legal profession' (2018) 25(2) *International Journal of the Legal Profession* 213; Jennie Pakula, 'Innovation: What's Holding us Back?' (2020) 94(4) *Law Institute Journal* 20; Jennie Pakula, 'Advice or Information – Should it Matter?' (2022) 96(8) *Law Institute Journal* 32.

13 See, for example, Pakula (2022, n 12).

Billing practices have been a focus of attention in relation to innovation in legal services, with price pressures challenging traditional approaches to legal fees for both corporate and smaller firms.¹⁴ Time-based billing – an approach to charging fees based on hours spent on a matter multiplied by an hourly rate¹⁵ – has dominated the market for legal services in Australia, and impeded the fuller realisation of the cost-related benefits associated with technology-enhanced ways of working.¹⁶ Attention on costs has focused on the inefficiencies of time-based billing and the opportunities created by alternative fee arrangements ('AFAs') for legal services.¹⁷ Key examples of AFAs include:

- conditional fees, where the lawyer's fees are payable only where a 'successful outcome' is achieved, typically with a premium 'success fee' imposed;
- fixed or flat fees, involving the lawyer representing the client for a specified fee regardless of the amount of time involved in the work;
- retainers and subscription fees, where the client subscribes to the lawyer's services and is able to access agreed services for a specified time for a fixed fee or until a specified amount of funds run out; and
- value-based billing, where pricing takes account of the way clients perceive the value of the service offering, often with different levels of service at tiered price points (potentially incorporating elements of time-based billing, conditional fees, fixed fees or a retainer model).¹⁸

There is limited empirical evidence of the preferences clients might have for different fee arrangements, particularly across different matter types. Time-based billing is understood to provoke consumer concern as a result of its uncertainty, whereas fixed fees provide more comfort and can better enable clients to shop around.¹⁹ Importantly, recent analysis from the Netherlands indicates that clients with a range of personal legal problem types (family, employment and consumer disputes) prefer the certainty of fixed fees to the comparative uncertainty of time-based billing.²⁰ Other research suggests that consumers of personal legal services are passive and have little understanding of the costs agreements they enter into, despite the regulatory focus on informed consent.²¹ Regulators are consequently pushed to strengthen market-based regulation of prices and support significant simplification and greater transparency of legal costs.²²

¹⁴ Michael Legg, *The Future of Legal Costs and Legal Fees – Time Based Billing and Alternative Fee Arrangements: A Primer* (Report, The Law Society of New South Wales's Future of Law and Innovation in the Profession Research Stream, UNSW Law (FLIP Stream), 2020) 2-3.

¹⁵ *Ibid* 4.

¹⁶ See, for example, Pakula (2020, n 12); Pakula (2022, n 12).

¹⁷ See, for example, Joshua Yan, 'Out with the Old, in with the Alternative: A Critical Examination of How Lawyers Can Use Alternative Fee Arrangements to Satisfy Increasingly Powerful Clients' (2020) 32(1) *Bond Law Review* 151.

¹⁸ Legg (n 14) 4-9; Herbert M. Kritzer, 'Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say' (2002) 80(7) *Texas Law Review* 1943, 1944, 1966-67; Jawwad Z Raja, Thomas Frandsen, Christian Kowalkowski and Martin Jarmatz, 'Learning to Discover Value: Value-Based Pricing and Selling Capabilities for Services and Solutions' (2020) 114 *Journal of Business Research* 142, 142.

¹⁹ See, for example, ARTD Consultants, *National Legal Profession Reform Project – Consumer Consultation – Report to the National Legal Profession Reform Taskforce* (Report, 20 August 2010) 17 (reporting the most common concern raised about legal costs by consumers in the consultations that preceded the introduction of the LPUL being 'the practice of charging by time which was felt to be frequently abused leading to delayed or dragged out matters and associated increased legal costs').

²⁰ Flóra Felső, Sander Onderstal and Jo Seldeslachts, 'The Pricing Structure of Legal Services: Do Lawyers Offer What Clients Want?' (2022) 61 *Review of Industrial Organization* 123.

²¹ Richard Moorhead, 'Filthy Lucre: Lawyers' Fees and Lawyers' Ethics – What is Wrong with Informed Consent' (2011) 31(3) *Legal Studies* 345, 365; Clare E Scollay, Becky Batagol and Genevieve Grant, 'Exploring Injured Persons' Experiences of Engaging and Using Lawyers in Road Traffic Injury Compensation Claims' (2022) 29(1) *Journal of Law and Medicine* 156.

²² Competition and Markets Authority, *Legal Services Market Study* (Final Report, 15 December 2016) <<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>>.

While some industry research purports to track trends on the prevalence of AFAs amongst legal service providers, these publications focus exclusively on corporate and commercial clients (rather than personal clients) and the design and quality of the research is often opaque.²³ On rare occasions regulators have explored the use of AFAs: in 2010, the Queensland Legal Services Commissioner conducted a Billing Practices Check Survey to promote reflection about cost-related dimensions of legal practice.²⁴ Parker and Ruschena analysed responses from 324 lawyers in 25 firms, reporting that most respondents (91 per cent) indicated that their firm typically used hourly billing; 22 per cent indicated that fixed fees were always or mostly used. While 44 per cent of respondents worked at firms that did some degree of conditional fee work, only 4 per cent indicated that their firm always worked on that fee basis.²⁵ In the United Kingdom, the Legal Services Consumer Panel reported in 2022 that 55 per cent of surveyed consumers reported having been charged based on a fixed fee.²⁶ Sako and Parnham's analysis of technology and innovation in legal services for the Solicitors Regulation Authority (UK) explored the possibility that solicitors might charge differentiated fees based on clients' degree of 'self-service' using firms' online portals, case management tools and telephone advisory services,²⁷ but cautioned against the assumption that offering such solutions would 'become ubiquitous in the near future'.²⁸ These assessments pre-dated the widespread availability of generative Artificial Intelligence tools such as ChatGPT, the impact of which is yet to be fully explored and understood in relation to consumer legal services.

The existing research provides interesting information about billing approaches and their relationship with economic and technological developments, but it does not provide detailed insight into the scoping and communication practices lawyers engage in. Nor does it provide substantial explanations for lawyers' motivations and difficulties in engaging with more innovative fee structures, particularly in the estates and family law domains.

1.1.3 Situating Costs within the Broader Access to Justice Context

Access to justice concerns are commonly cost concerns.²⁹ From earliest days, access to justice concern has centred on those unable to afford services from legal practitioners. Beyond access to justice being an essential ingredient of the rule of law, inability to afford legal services has long been regarded as a primary access to justice barrier.³⁰

Cost concerns extend to the cost of public assistance for those who cannot afford to purchase legal services and widespread mantras observing that there will never be enough public resources to provide lawyers to everyone who is unable to afford one themselves, nor can pro bono legal assistance ever fill the gap.³¹

²³ See, for example, Chen and Legg (n 8) 71-2.

²⁴ Parker and Ruschena (n 7) 626-29.

²⁵ Ibid 636.

²⁶ Legal Services Consumer Panel, *Legal Services Consumer Panel Tracker Survey 2022 – How Consumers are Using Legal Services* (Report, July 2022) 14.

²⁷ Mari Sako and Richard Parnham, *Technology and Innovation in Legal Services: Final Report for the Solicitors Regulation Authority* (Report, University of Oxford, July 2021) 76-78.

²⁸ Ibid 78.

²⁹ Pro bono and low cost assistance was provided to the indigent by private practitioners out of professional obligation and as an assistance to the court. Legal aid in Victoria has been provided for more than a century, although initially limited to criminal matters and the very poor, issues of supply and demand have meant that questions of eligibility and financial means are an enduring access to justice and public policy issue.

³⁰ Productivity Commission (n 1) ch 3.

³¹ The traditional, narrow focus on access to justice as access to lawyers and courts, and particularly access to lawyers in courts, has been supplanted by broader 'bottom-up' approaches that focus on the legal need and capability of diverse users. See, for example, Pascoe Pleasence and Nigel J Balmer, 'Justice & the Capability to Function in Society' (2019) 148(1) *Dædalus, Journal of the American Academy of Arts and Sciences* 140.

Cost concerns also lie at the heart of private practitioner concerns over providing legally aided services, with many having withdrawn from such work due to the rising gap between what they are able to charge private clients, rising costs of legal practice, and the rates public legal aid schemes pay to provide services to publicly-funded clients. This is more acute for some areas of law, and in certain geographic areas, with particular policy concern being the number of family law practitioners in regional areas withdrawing from performing legally aided work.³² Studies have shown that while some practitioners regard legally aided work as a loss maker, even equating it with a form of pro bono, many performing legally aided work do so out of professional obligation and personal commitment to access to justice.³³

The traditional legal services market is consequently widely characterised as failing significant proportions of the community, resulting in deep pools of unmet or latent legal need.³⁴ As creeping webs of law have come to regulate and govern increasing areas of everyday life, setting rights and responsibilities, the scope of legal need and of legal services market failure has extended commensurately.

Time-based legal service costs, in particular, can render purchase of legal services for many frequently occurring, yet low value legal matters, simply uneconomic. For instance, the price of legal assistance to contest most fines will quickly exceed the amount of the fine at issue where legal services are provided at time-based market rates. Thus, fixed fees services may be more accessible and financially viable, but may necessitate that providers are able to perform a sufficient volume of such work to turn a profit.

Lack of cost transparency and clarity can also create fears about possible costs and barriers to seeking private legal assistance. Especially amongst infrequent users of private legal services, empirical studies have shown poor understanding of what private legal practitioners do, what they charge, and how.

The so-called 'missing middle' (or 'missing majority'), composed of those who are 'too poor' to afford legal assistance privately, yet not poor enough to qualify for public legal assistance, as revealed by empirical study, is widely touted as a manifestation of market, regulatory, and public policy failure.³⁵ This failure lies at the heart of recurrent perceptions of a justice system 'in crisis', particularly with respect to the types of ubiquitous civil legal issues people commonly experience in everyday life, and in observations of increasing numbers of unrepresented people appearing in civil court.³⁶

32 TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia: A Research Report* (TNS, 2013); Hugh McDonald et al, *In Summary: Evaluation of the Appropriateness and Sustainability of Victoria's Summary Crime Program* (Law and Justice Foundation of New South Wales, 2017); Victorian Government, *Access to Justice Review: Volume 1 Report and Recommendations* (2016).

33 TNS Social Research (n 32); McDonald et al (n 32).

34 Trevor CW Farrow and Lesley A Jacobs (eds), *The Justice Crisis: The Cost and Value of Accessing Law* (UBC Press, 2020); OECD and Open Society Foundations, *Legal Needs Surveys and Access to Justice* (Report, 2019) 24 (which states that 'a legal need is unmet if a justiciable issue is inappropriately dealt with as a consequence of effective legal support not having been available when necessary to make good a deficit of legal capability. If a legal need is unmet, there is no access to justice').

35 Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice* (University of Toronto Press, 2012); Jo Szczepanska and Emma Blomkamp for Justice Connect, *Seeking Legal Help Online: Understanding the 'Missing Majority'* (Report, November 2020); Law Council of Australia, *Addressing the Legal Needs of the Missing Middle* (Position Paper, November 2021); Gillian K Hadfield, 'More Markets, More Justice' (2019) 148(1) *Dædalus, Journal of the American Academy of Arts and Sciences* 37.

36 Trevor CW Farrow and Lesley A Jacobs, 'Introduction: Taking Meaningful Access to Justice in Canada Seriously' in Farrow and Jacobs (n 34) 3.

Responses to such concerns have been varied. They include deregulation of the legal profession, practice reforms to provide for legal service unbundling, and opening up the legal services market to increased competition from alternative business structures, providers, and forms of assistance.³⁷

At the same time, legal service innovation, enabled by new information technology, has been envisioned as an inevitable market-based response, one that is better equipped to serve the missing-middle, and provide low-cost and cost-effective services for low value matters.³⁸

Technological innovation enabling greater provision of low-cost fixed-fee services, particularly for many transactional and low value matters, is therefore attractive as a means of redressing market failure.

1.2 Why Costs Matter

1.2.1 Cost as Deterrent for Getting Help from a Lawyer

Legal needs surveys have shown several factors are related to whether or not people use lawyers, amongst other types of advisers, when faced with a legal problem.³⁹ One factor is anticipated or perceived cost.⁴⁰ Others include problem type, severity and duration, as well as how problems are characterised and perceived. Use of advisers and lawyers varies considerably by population group, reflecting not only the different types of problems faced, but also opportunity, preference and capability.⁴¹

Patterns of help-seeking and legal problem-solving behaviour reveal that a range of advisers are typically used, and that it is common for people to consult multiple types of advisers. While legal professionals are, unsurprisingly, one of the main types of advisers frequently consulted, they are often consulted after other sources of advice, such as friends, relatives and colleagues, and other types of professionals such as health and welfare professionals.⁴²

Using data collected in 2008, the Legal Australia-wide Survey found significant variation in legal problem-solving behaviour and use of lawyers across the community.⁴³ When advice was sought, lawyers were used for 30 per cent of the legal problems respondents experienced. For 70 per cent of the reported legal problems, however, advice was only sought from non-legal types of advisers. Lawyer use was found to increase with legal problem severity, and tended to be higher in response to particular types of legal matters, such as family matters.⁴⁴ However, the extent to which this reflects perceived cost of getting help from a lawyer and other factors such as legal capability, remains an important ongoing subject of current research.⁴⁵

37 Stephen Mayson, *Consumer Harm and Legal Services: From Fig Leaf to Legal Well-Being* (UCL Centre for Ethics and Law Report, April 2022); Pascoe Pleasence et al, *Reshaping Legal Assistance Services: Building on the Evidence Base* (Law and Justice Foundation of New South Wales Discussion Paper, April 2014).

38 Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution' (2017) 34(1) *Windsor Yearbook of Access to Justice* 112; Hazel Genn, 'Online Courts and the Future of Justice', 2017 Birkenhead Lecture (Web Page) <https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf>.

39 Our use of the term 'legal problem' here should be taken to mean potentially justiciable problems, that is, problems for which people may potentially take legal action or follow a legal route to resolution. See also Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart, 1997); OECD and Open Society Foundations (n 34) 24, 58.

40 Pascoe Pleasence and Nigel J Balmer, *How People Resolve 'Legal' Problems* (Legal Services Board, 2014).

41 Pleasence et al (n 37) 18.

42 See, for example, Pascoe Pleasence, *Causes of Action: Civil Law and Social Justice* (Stationery Office Books, 2nd ed, 2006) 107, where legal advisers are far more likely to be final rather than first advisers.

43 Christine Coumarelos et al, *Legal Australia-Wide Survey: Legal Need in Australia* (Law and Justice Foundation of New South Wales, 2012).

44 Ibid.

45 See, for example, Victoria Law Foundation, 'The Public Understanding of Law Survey' (Web Page) <<https://victorialawfoundation.org.au/research/puls>>.

Legal needs surveys also commonly canvas reasons that those experiencing legal problems have taken no action or not sought help from a lawyer. Cost is commonly cited as one of many reasons.⁴⁶ And amongst those whose only action was to consult friends or relatives, cost is commonly cited as one of many reasons for not doing anything else.⁴⁷ Yet anticipated costs have also been found to be frequently inaccurate, with studies also revealing links between concerns about costs and social disadvantage, and between social disadvantage and lower levels of legal knowledge and capability.⁴⁸

Recent Australian research, however, also provides important new insights. The Community Perceptions of Law Survey ('CPLS') demonstrated how anticipated use of a lawyer varied by problem type and severity for 1,846 respondents across Australia.⁴⁹ The CPLS also included questions on perceptions of lawyers, with a number of items focusing on cost. For example, 98 per cent of respondents agreed or strongly agreed that 'lawyers are expensive', 85 per cent that they are 'too expensive to use' and 61 per cent that they provide 'poor value for money'.⁵⁰ Interestingly, having used a lawyer in the past five years had little relationship to either perceptions of lawyer expense or value for money. Notably, among the small number of respondents who had used a lawyer, but were dissatisfied with the service provided, all indicated that they felt lawyers were 'too expensive to use', and the overwhelming majority (71%) that they were 'poor value for money'. This finding, in particular, points to a relationship between lawyer use and dissatisfaction with services and views about both the cost and value of those services.

Many legal needs surveys have indicated a relationship between income and lawyer use, including those in Australia, Canada, Colombia, Jordan, Macedonia, the Netherlands, New Zealand, Scotland, and Taiwan.⁵¹ Some surveys have found U-shaped relationships between income and lawyer use, (e.g. in Australian and England and Wales was higher amongst those with the lowest and highest incomes, and relatively lower amongst those with middle income, evidencing the 'missing middle'). This relationship is mediated by public subsidy and payment mechanisms for those with the lowest incomes and qualifying for legally aided services; such schemes are central to affording more equal access to lawyers and justice.

⁴⁶ Coumarelos et al (n 43); Pleasence et al (n 37).

⁴⁷ Coumarelos et al (n 43) 99.

⁴⁸ Nigel Balmer et al., *Law... What is it Good For? How People See the Law, Lawyers and Courts in Australia* (Victoria Law Foundation, 2019); Pleasence and Balmer (n 40); Pleasence et al (n 37); Hugh McDonald and Julie People, *Legal Capability and Inaction for Legal Problems: Knowledge, Stress and Cost* (Law and Justice Foundation of New South Wales, 2014); Alexy Buck et al, *Putting Money Advice Where the Need Is* (Legal Services Commission, 2007); Jo Casebourne et al, *Employment Rights at Work: Survey of Employees 2005* (Employment Relations Research Series (No 51), 2006); Laurie Day, Sharon Collard and Carolyn Hay, *Money Advice Outreach Evaluation: Qualitative Outcomes for Clients* (Legal Services Commission, 2008); Suzie Forell, Emily McCarron and Louis Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (Law and Justice Foundation of New South Wales, 2005); Anne Grunseit, Suzie Forell and Emily McCarron, *Taking Justice into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of New South Wales, 2008); Maria Karras, Emily McCarron, Abigail Gray and Sam Ardasinski, *On the Edge of Justice: The Legal Needs of People with a Mental Illness* (Law and Justice Foundation of New South Wales, 2006); Lewis Jon Parle, *Measuring Young People's Legal Capability* (Plenet, 2009).

⁴⁹ Balmer et al (n 48).

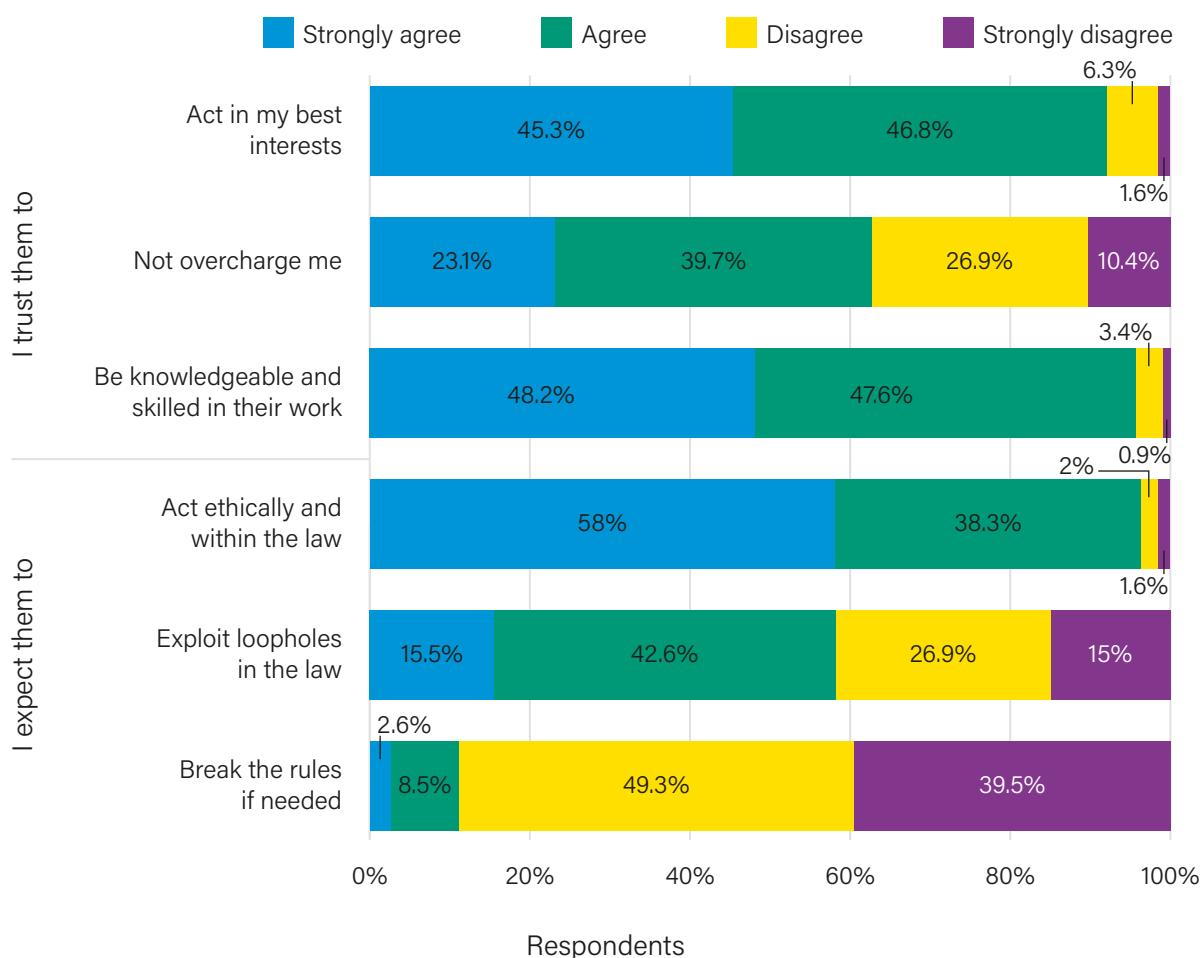
⁵⁰ Ibid.

⁵¹ Pleasence et al (n 37); Janet Currie, 'Healthy, Wealthy and Wise: Socioeconomic Status, Poor Health in Childhood, and Human Capital Development' (2009) 47(1) *Journal of Economic Literature* 87; Paul Scott Prettitore, *Building Legal Aid Services from the Ground Up: Learning from Pilot Initiatives in Jordan* (World Bank, 2014); Ben van Velthoven and Marijke ter Voert, 'Paths to Justice in the Netherlands' (Conference Paper, International Legal Aid Group Conference, 8 June 2005); Ignite Research, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Legal Services Agency, 2006); Pascoe Pleasence and Nigel Balmer, 'Mental Health and the Experience of Social Problems Involving Rights: Findings from the United Kingdom and New Zealand' (2009) 16(1) *Psychiatry, Psychology and Law* 123; Kuo-Chang Huang, Chang-Ching Lin and Kong-Pin Chen, 'Do Rich and Poor Behave Similarly in Seeking Legal Advice? Lessons from Taiwan in Comparative Perspective' (2014) 48(1) *Law and Society Review* 193.

1.2.2 Cost as a Factor in Trust in the Profession

The Public Understanding of Law Survey ('PULS') included a series of six questions gauging the Victorian public's perceptions of trust in lawyers.⁵² Importantly, the questions acknowledge the multidimensionality of trust, focusing on six actions, behaviours or abilities that lawyers might be expected or trusted to have or do (Figure 1). Early analysis of the interim PULS dataset shows that many Victorians do not trust that lawyers will not overcharge them.

Figure 1. What the Public Expects from Lawyers (drawn from PULS data)



Nearly all respondents expected lawyers to act ethically and within the law, with 96 per cent agreeing or strongly agreeing. While a small majority expected lawyers to bend the rules (58 per cent agreed or strongly agreed that they would expect lawyers to exploit loopholes in the law), a significant majority expected them not to break them (89 per cent disagreed or strongly disagreed that they would expect lawyers to break the rules if needed). The overwhelming majority of respondents trusted lawyers to be knowledgeable and skilled in their work and to act in their best interests (96 per cent and 92 per cent agreeing or strongly agreeing, respectively). However, respondents were far less likely to trust lawyers not to overcharge them (63 per cent agreeing or strongly agreeing), with mistrust far more likely to centre around costs and charging than the quality or benefit of lawyers' work.

52 Nigel J Balmer et al, *The Public Understanding of Law Survey (PULS) Annotated Questionnaire* (Victoria Law Foundation, 2022) 52.

1.2.3 Cost as a Reflection of Market Inefficiency

Legal services are provided in a market, despite common professional discomfort with that reality.⁵³ In the absence of reliable information about the price and quality of services, consumers seeking paid legal help are left to rely on insufficient proxies for quality, such as brand and word of mouth.⁵⁴ Consumers of personal legal services have a range of characteristics – experience levels, capabilities, personal resources and other vulnerabilities – that put them at a disadvantage in purchasing services in this market and communicating information about their experience to other consumers.⁵⁵

A well-functioning market for services needs clear price information to be available up front. Information asymmetry between consumers and providers of legal services is regarded as one of the hallmarks of this market. The lack of information consumers can access leads to a lack of competition, as consumers are unable to effectively compare and choose between providers. Further, international evidence suggests that consumers of legal services often do not shop around. In the United Kingdom in 2022, more than half of 3,500 surveyed legal services consumers (57 per cent) did not shop around before choosing a provider (albeit an increase from 22 per cent in 2012). The same study also found that comparison shopping is impeded by high search costs,⁵⁶ with other research finding a lack of incentive for legal service providers to communicate information about price.⁵⁷

Taken together, these characteristics mean that the market for legal services in Australia operates in a way that does not support competition based on price for most clients. Comparison of pricing is not possible, principally because comprehensive pricing information is not readily available at the point a potential client is seeking services. The complexity of legal services and their pricing also mitigates against the development of a more consumer-sensitive market.⁵⁸ In addition to preventing comparisons, the market for legal services does not encourage pricing or service innovation. In particular, information asymmetry and related incentives contribute to the continued dominance of time-based billing.⁵⁹ Hadfield explains that the comparative rarity of fixed fees is a product of the information advantages lawyers have that enable them to retain their more profitable and traditional way of operating on fees.⁶⁰ This state of affairs both prevents and reflects lack of innovation in the market.

53 Gillian K Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' (2000) 98(4) *Michigan Law Review* 953; Genevieve Grant, *Consumers' Experiences of Legal Services: Rapid Review* (Australian Centre for Justice Innovation for the Victorian Legal Services Board + Commissioner, 2021).

54 Ben Martin-Hobbs, 'But Are They Any Good?' *The Value of Service Quality Information in Complex Markets* (Consumer Policy Research Centre, 2018).

55 Frank H Stephen, James H Love and Neil Rickman, 'Regulation of the Legal Profession' in Gerritt De Geest (ed) *Encyclopedia of Law and Economics* (Edward Elgar, 2017) 4300; Camille Chaserant and Sophie Harnay, 'The Regulation of Quality in the Market for Legal Services: Taking the Heterogeneity of Legal Services Seriously' (2013) 10(2) *European Journal of Comparative Economics* 267, 279; Moorhead (n 21).

56 Competition and Markets Authority (n 22).

57 Louisa Choe, 'How Many 'Clicks' Does It Take? Finding Price Information on New Zealand Lawyers' Websites' (2021) 52(3) *Victoria University of Wellington Law Review* 487, 490.

58 Moorhead (n 21) 365.

59 Felső, Onderstal and Seldeslachts (n 20) 139.

60 Hadfield (n 53).

1.2.4 Response of Regulators

Lawyers' costs-related practices – at the outset of engagement with the client, through the duration of the service (including any litigation), and the final billing stage – are a key focus of lawyers' professional responsibilities. Legal costs are also amongst the most common subjects of client complaints and dissatisfaction in relation to legal services.⁶¹ As such, they are critical to consumers' experiences of legal services. In Victoria, the strategic objectives of the Victorian Legal Services Board + Commissioner ('VLSB+C') are to protect and empower consumers, improve legal practice and ethics, and improve access to justice.⁶² The cost of legal services and how practitioners communicate with clients about costs are implicated for each of those objectives.

Regulators recognise that formal complaints provide an important but very partial picture of the costs landscape. These events represent only a fraction of consumer experience in this domain. It is likely that some consumers are exposed to costs-related practices falling short of good quality service, but remain unaware this has happened; others, still, may be aware, but lack the capability or inclination to take remedial steps. These kinds of experiences are likely to be more common amongst relatively inexperienced 'personal plight' consumers of legal services compared with commercial clients.

To address the challenge of legal costs, regulators are increasingly adopting a consumer focus and striving to develop comprehensive, evidence-based understanding of consumer perspectives and behaviour in relation to legal services, pricing and costs. Endeavours in this regard include consumer research (with an emphasis on vulnerable cohorts of consumers)⁶³ and the publication of costs-related resources for consumers and practitioners that emphasise clarity and simplicity⁶⁴. Internationally, improving price transparency has become a focus of regulators in the United Kingdom in the wake of the 2016 Competition and Markets Authority ('CMA') *Legal Services Market Study*, which identified that insufficient information was available about price, quality and service to enable consumers to make optimal choices about legal services.⁶⁵ The CMA recommended that providers of particular kinds of legal services be required to publish information about price to facilitate comparisons by consumers. Those requirements came into force in December 2018, mandating price transparency for services including conveyancing, uncontested probate matters, employment tribunal work and debt recovery up to £100,000. In 2020, the CMA reviewed progress against its recommendations, reporting that while progress had been made, more work was required. While more extensive price information is available online and more consumers are locating and using the information, there is less evidence of positive impacts on competition between service providers.⁶⁶

61 See, for example, Victorian Legal Services Board + Commissioner, *Growth Through Knowledge: Annual Report 2022* (Report, 2022) 13 (noting that overcharging was amongst the most common issues raised in complaints to the regulator in 2021-22); Jennie Pakula, 'What, Exactly, am I Paying For?' *An Investigation into the Root Causes of Costs Dissatisfaction* (Victorian Legal Services Board + Commissioner, 2022).

62 Victorian Legal Services Board + Commissioner, *3-Year Corporate Plan 2022-24* (Report, 2023).

63 See, for example, the UK Legal Services Board Consumer Panel's Consumer Tracker Survey, which reports annually on consumer experiences with choosing and using legal services (Legal Services Consumer Panel (n 26); Pakula (n 61)).

64 VLSB+C (n 61) 12.

65 Competition and Markets Authority (n 22).

66 Competition and Markets Authority, *Review of the Legal Services Market Study in England and Wales: An Assessment of the Implementation and Impact of the CMA's Market Study Recommendations* (CMA, 2020).

1.3 Costs Compliance

1.3.1 Uniform Law

Solicitors' scoping, pricing and related client communication practices are central concerns of the LPUL.⁶⁷ One of the legislative purposes of the LPUL is 'empowering clients to make informed choices' about services and costs (s 3); additionally, the specific objectives for Part 4.3 (Legal Costs) include ensuring clients 'are able to make informed choices about their legal options and the associated costs' and providing that law practices do not charge more than fair and reasonable amounts for legal costs (s 169(a)-(b)).

The LPUL s 172(1) requires that legal costs be fair and reasonable, being both proportionately and reasonably incurred and proportionate and reasonable in amount. A costs agreement provides 'prima facie evidence that legal costs disclosed in the agreement are fair and reasonable' if relevant costs disclosure rules and provisions relating to costs agreements in the LPUL are complied with (s 172(4)).

The core disclosure requirements under the LPUL are that when instructions are initially given (or as soon as practicable after that), a law practice must provide the client with information disclosing the basis on which costs will be calculated and an estimate of the total legal costs (s 174(1)(a)). The client must also be provided with information about their rights to negotiate a cost agreement and billing method, to receive a bill and to request an itemised bill, and to seek the regulator's assistance in the event of a costs dispute (s 174(2)(a)). Should a client seek an itemised bill, they must not be charged for it (s 191). In making a disclosure under s 174(1), the law practice 'must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs' (s 174(3)) and the disclosure must be in writing (s 174(6)). The LPUL further provides that clients have a right to a negotiated costs agreement (s 179), and that costs agreement must be in writing (s 180(2)).

Where there is any significant change to the disclosure, the client must be furnished with information disclosing the change (including information about changes to the legal costs) (s 174(1)(b)). Such information must be sufficient and of a reasonable amount about the way the change impacts upon the legal costs as to 'allow the client to make informed decisions about the future conduct of the matter' (s 174(2)(b)). In circumstances where a litigious matter is to be settled, the law practice must disclose to the client reasonable estimates of the legal costs payable by the client if the matter is settled and any contribution another party is likely to make to those costs (s 177(1)).

⁶⁷ Legal Profession Uniform Law Application Act 2014 (Vic) sch 1.

The LPUL seeks to tailor the regulatory burden to the costs in issue by establishing an alternative approach to acceptable disclosure where the costs are below specific thresholds, namely:

- where total legal costs (excluding GST and disbursements) are not likely to exceed \$750, no disclosure is required (s 174(4)); and
- where total legal costs (excluding GST and disbursements) are not likely to exceed \$3000, instead of complying with s 174(1), a law practice may make a relevant disclosure 'by providing the client with the uniform standard disclosure form' prescribed under the Uniform Rules (a 'short form' disclosure) (s 174(5)).

A costs agreement in contravention of the relevant provisions of the LPUL is void (s 185). Additionally, where a law practice contravenes the disclosure obligations set out above, the costs agreement is void (s 178(1)(a)), and the client will not be required to pay the costs until they have been reassessed or any costs dispute determined (s 178(1)(c)). Such a contravention can constitute unsatisfactory professional conduct or professional misconduct on the part of the principal of the law practice or lawyer involved in the contravention (s 178(1)(d)).

1.3.2 Court Regulation of Litigation Conduct and Costs

For litigious work, court-related regulation provides additional regulation of solicitors' costs practices, on a jurisdiction-specific basis. An overlapping range of legislation, court rules and practice notes and directions all have a role to play here, along with the common law and courts' inherent jurisdiction. These sources of law contribute to the regulation of litigation conduct and costs by requiring costs to be reasonable and proportionate, and in some settings, mandating that costs estimates be made and communicated to clients and the court. Here, we focus on select elements of this landscape that are most relevant to the pricing, scoping and client communication focus of the project.

For wills and estates litigation in Victoria, the *Civil Procedure Act 2010* (Vic) ('CPA') is a significant source of regulation. The CPA's overarching purpose is 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' within civil proceedings' (s 7(1)). Courts must seek to give effect to the overarching purpose in the exercise or interpretation of their power (s 8(1)).

Once estate proceedings are commenced in a Victorian court, the parties and their solicitors owe a range of overarching obligations under the CPA (ss 10(1), 11). These include the obligation to ensure that costs are reasonable and proportionate (s 24). The CPA provides that in exercising any power in relation to a civil proceeding, a court may take into account any contravention of the overarching obligation (including in exercising its discretion as to costs) (s 28). Additionally, s 29 provides that if a court is satisfied that a person has contravened an overarching obligation, the court may make any order it considers appropriate in the interests of justice, including orders that legal costs be payable immediately.

Practice Notes in Victoria's two major trial courts, the Supreme Court and the County Court, also draw on the endorsement provided by the CPA for courts to engage in case management that supports the overarching purpose (s 47). An example is the County Court's Family Property List, which deals with Testator's Family Maintenance proceedings under Part IV of the *Administration and Probate Act 1958* (Vic). The Court recommends that the list is suited to proceedings where the value of the estate is less than \$2.5 million or the amount claimed is less than \$800,000 and estimated legal costs (including disbursements) to the conclusion of mediation are between \$10,000 and \$35,000.⁶⁸ Key features of the requirements of the Practice Note relevant to costs include:

- the standard timetabling orders 'provide information for interested parties in relation to the expected costs of parties in List proceedings' (i.e. between \$10,000 and \$35,000), requiring parties' solicitors to serve the orders on their clients with costs estimates to the conclusion of appropriate dispute resolution and to the end of trial (cl 4.10);
- specification that parties 'must make reasonable attempts to resolve any interlocutory issues by consent', and that 'costs orders may be made against parties or practitioners who fail to do so' (cl 4.22);
- a section dedicated to 'information to be provided to clients', which sets out that the Court, parties and practitioners have a responsibility to ensure costs are reasonable and proportionate to the dispute, and notes that solicitors must provide their clients with timetabling orders as soon as practicable, together with up-to-date estimates of the client's legal costs to the conclusion of mediation and the trial;
- a requirement that each party's total solicitor-own client costs be disclosed to the Court before orders finalising a proceeding will be made, and notice that the Court will inquire further into the costs (by seeking explanations and records) if it is concerned that a party's costs may not be reasonable or proportionate; and
- notice that where the Court is concerned that costs may not be reasonable and proportionate, it may take further steps including referring the matter to the Costs Court, listing a hearing to determine whether sanctions should be imposed under the CPA or the Rules, and making any other order to achieve the overarching purpose in the CPA.

68 County Court of Victoria, *Practice Note PNCLD 4-2023: Family Property List*, 22 March 2023, cl 1.3.

In the Supreme Court of Victoria, the Testators Family Maintenance List Practice Note⁶⁹ similarly provides that:

- for the first directions hearing in a matter, the plaintiff's solicitor must file an affidavit setting out their estimate of the costs in the matter and if a conditional costs agreement has been entered into, the uplift fee involved (cl 7.3);
- parties applying for orders finalising a proceeding must inform the Court of the costs, including disbursements, payable by each of the parties to the proceeding (cl 12.4);
- if the costs payable by a party exceed more than 20 per cent of the total amount disclosed in the affidavit, that party's solicitor must file an affidavit showing how that party's costs, including disbursements, have been calculated (cl 12.4(a)); and
- if it otherwise appears to the Court that a party's costs, including disbursements, may not be reasonable or proportionate, the Court may require that party's solicitor to file an affidavit showing how that party's costs, including disbursements, have been calculated (cl 12.4(b)).

For family law matters, the *Federal Circuit and Family Court of Australia Act 2021* (Cth) provides that the overarching purpose of the family law practice and procedure provisions is 'to facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible' (s 67(1)). The court rules must be interpreted and applied and related powers exercised in a way that promotes the overarching purpose (s 67(3)) and parties and their lawyers must act consistently with the purpose (s 68).

Lawyers in these proceedings must submit information about their costs to the court in advance of major dispute resolution events via cost notices (*Federal Circuit and Family Court of Australia (Family Law) Rules 2021* r 12.06 and *Central Practice Direction – Family Law Case Management*). These costs updates must also be provided in advance of key external and court-based dispute resolution events, and compliance and readiness hearings (before trial in a proceeding).

Taken together, the professional and court-based regulatory requirements relevant to pricing and costs provide a detailed framework shaping solicitor practices and conduct in this area.

⁶⁹ Supreme Court of Victoria, *Practice Note SC CL 7: Testators Family Maintenance List (Second Revision)*, 25 March 2022.

1.4 Factors in Costs Complaints

Existing research identifies a range of approaches and practices associated with the emergence of consumer dissatisfaction and complaints in relation to costs. Here, we explore key examples most relevant to the focus of this research on matter scoping, billing practices and associated communication with clients.

1.4.1 Practitioners' Communication with Clients about Costs

The available research evidence suggests that consumers are frequently confused about legal costs both at the outset of their engagement with lawyers and when disputes are resolved.⁷⁰ One cause of this confusion is the insufficient communication provided by lawyers about legal costs, despite the disclosure obligations in the LPUL (see 1.3.1 above). The recent Supreme and County Court review of Litigious Costs also weighed in on this matter, noting that its consultations (with practitioners and non-consumer stakeholders) revealed that there remains a lack of information available to clients concerning litigious costs and what might be considered 'fair and reasonable' in the circumstances.⁷¹

In 2022 the VLSB+C reported on its Lawyer-Client Relationship Survey, which investigated lawyers' experiences of communication challenges with clients.⁷² Lawyer respondents identified their client's mental health (50 per cent) and low literacy levels (21 per cent) as the major communication challenges they encountered. While the survey identified that clients were engaged in costs discussions, most respondents took a passive approach to communicating about costs with clients; 63 per cent told their client to read the costs disclosure and to let the lawyer know of any questions; one-third talked the client through the disclosure and asked for questions; and less than 20 per cent asked the client to explain their understanding of costs.

1.4.2 Initial Scoping of Fees

Challenges around the initial scoping of fees at the outset of engaging with a client may also give rise to client dissatisfaction. Assessing the likely cost of legal services in the way required by the LPUL requires professional skill, or what Rapoport and Tiano have described as 'billing judgement'. Billing judgement is underpinned by decisions lawyers make 'about what legal work to do and who should handle each task involved in the overall matter'.⁷³ Rapoport and Tiano suggest good billing judgement is evident where the legal services for which lawyers ultimately bill:

- advance a meaningful client goal while alleviating the client's burden;
- are delivered with peak staffing and workflow efficiency; and
- describe the work done in a clear invoice delivered in a timely manner.⁷⁴

⁷⁰ See, for example, Moorhead (n 21); Scollay, Batagol and Grant (n 21); Genevieve Grant and Christine Parker, 'Lawyers' Responsibility for Claimant Health in Injury Compensation Schemes: Developing an Ethical Response' in Prue Vines and Arno Akkermans (eds), *Unexpected Consequences of Compensation Law* (Hart Publishing, 2020) 255–74; Pakula (n 61) 6–9, 12–13.

⁷¹ See Supreme Court of Victoria and County Court of Victoria (n 9) 32.

⁷² Victorian Legal Services Board + Commissioner, *Lawyer-Client Relationship Survey 2022* (Web Page, 21 October 2022) <<https://lsbc.vic.gov.au/news-updates/news/lawyer-client-relationship-survey-2022>>.

⁷³ Nancy B Rapoport and Joseph R Tiano Jr., 'Billing Judgment' (2022) 96(2) *American Bankruptcy Law Journal* 311, 315.

⁷⁴ Ibid.

In some routine and transactional matters, the initial scoping of fees may be uncomplicated. On other occasions, lawyers may underquote in an effort to secure business. Cost estimates that are 'vague or poorly calibrated' may lead to consumer complaints.⁷⁵ In dispute and litigation settings in particular, there may be a degree of genuine unpredictability that adds complexity to the scoping task. Hadfield characterises legal services as being 'at minimum, experience goods – the quality of which cannot be judged prior to consumption – and possibly credence goods – the quality of which cannot be judged by a non-expert even after consumption'.⁷⁶ The credence problem also complicates three things: firstly, the assessment of the nature and degree of service a client requires, secondly the comparable quality of such services, and thirdly the competence of service providers.⁷⁷

Innovative technologies are also creating pricing uncertainties by changing the time particular tasks take (for example, through computer-assisted contract drafting and automated legal research).⁷⁸ Other sources of uncertainty include the entry of Alternative Legal Service Providers in some areas of practice, who deliver high-volume services in niche areas. Lawyer experience in relation to scoping and billing is also a factor in performance in this area.⁷⁹

1.4.3 Client Capability and Understanding

In recent years, the concept of legal capability has been developed to better explain potential clients' legal problem-solving behaviour, and to make sense of the findings of empirical legal studies.⁸⁰ Stemming from the capability approach to disadvantage, legal capability sets out that the ability to make effective use of law and the justice system is affected by several personal and systemic factors.⁸¹ Empirical studies suggest that legal problem-solving is patterned by both the nature of legal problems (i.e. type, severity, recency), and personal and demographic characteristics.⁸²

One important dimension is legal awareness, knowledge and understanding, such as basic understanding of legal rights and responsibilities, dispute resolution processes, available sources of legal help, and the like. In particular, the way in which people frame and characterise the legality of their circumstances has been shown to be an important factor affecting their likelihood of seeking legal help and engaging lawyers.⁸³ This dimension includes knowledge of how private legal services operate, what they do, and what the anticipated costs may be. Many people have to seek help to find a lawyer, such as a 'good one' who has been recommended by family and friends. Some people are expected to have more accurate expectations of private lawyer costs than others, which may consequently affect both legal problem-solving behaviour and use of private lawyers.⁸⁴

75 Jennie Pakula, 'Ten Things I Hate About You: How to Avoid Costs Complaints' (2014) 123 *Precedent* 40, 40.

76 Gillian K. Hadfield, 'Legal Markets' (2022) 60(4) *Journal of Economic Literature* 1264, 1265; Hadfield (n 53) 968.

77 Choe (n 57) 492.

78 Rapoport and Tiano (n 73) 314.

79 Ibid.

80 Balmer et al (n 48); Hugh McDonald, 'Assessing Access to Justice: How Much "Legal" Do People Need and How Can We Know?' (2021) 11 *University of California Irvine Law Review* 693; Pleasence et al (n 37); Pleasence and Balmer (n 31).

81 Pleasence et al (n 37).

82 Balmer et al (n 48); McDonald (n 80); Pleasence and Balmer (n 31).

83 Balmer et al (n 48); McDonald (n 80); Pleasence and Balmer (n 31).

84 Hugh M McDonald and Zhigang Wei, *How People Solve Legal Problems: Level of Disadvantage and Legal Capability* (Issues Paper, March 2016); Balmer et al (n 48); McDonald (n 80); Pleasence and Balmer (n 31).

However, a significant contribution of the concept of legal capability is that legal awareness, knowledge and understanding, in and of themselves, are not determinative of legal problem-solving behaviour, nor use of lawyers. Other dimensions also play important roles. These include personal skills, psychological and emotional factors such as attitudes, trust and confidence in legal professionals and in private lawyers, willingness to get into a dispute and persist to resolution, self-efficacy, experience of trauma, and access to resources, such as ability to pay private lawyers' fees for service.⁸⁵

Importantly, multiple dimensions of legal capability can come to bear at the same time, and in combination can create barriers to effectively acting and responding to legal problems, and effectively making use of professional advisers such as private lawyers. The client-lawyer relationship can be fraught, and as noted above, often occurs in the context of asymmetrical knowledge and power. Clients can be ashamed and embarrassed about experiencing a legal problem and needing legal help, and will also often lack accurate understanding and expectation of the nature of legal work that may be required, what stages and activities could be involved, how long it will take, and what other legal practitioners may charge.

Legal matters are often emotionally charged and stressful.⁸⁶ Meeting legal practitioners can be unusually taxing on cognitive bandwidth, given that high-stress events often impede comprehension, understanding, and recall.⁸⁷ Clients can often be so fearful and anxious about their circumstances, what a legal practitioner may advise and require, and what the likely consequences may be, that they don't take away or fully understand the information they are provided.⁸⁸ For instance, clients often report that they didn't understand everything that the lawyer said to them, but that it was helpful that they were provided with printed materials that they were able to take away and read when they were less stressed.

Client ability and preparedness to disclose necessary relevant information to lawyers can also vary, such as where someone does not disclose what they did not think was relevant for fear of 'wasting the lawyer's time' and increasing cost. Legal practitioner skill, expertise, and the way they serve different clients, are therefore likely to be important factors affecting comprehension and understanding. Consequently, there is unlikely to be a one-size-fits-all approach to legal professional practice which works equally well for the spectrum of diverse clients with different needs and capability. There are, however, likely to be approaches to professional practice that are better, and which are more likely to result in more successful client communication and comprehension.

⁸⁵ Balmer et al (n 48); McDonald (n 80); Pleasence et al (n 37); Pleasence and Balmer (n 31).

⁸⁶ Pascoe Pleasence and Nigel Balmer, 'Mental Health and the Experience of Social Problems Involving Rights: Findings from the United Kingdom and New Zealand' (2009) 16(1) *Psychiatry, Psychology and Law* 123.

⁸⁷ Sabrina Kuhlmann, Marcel Piel and Oliver T Wolf, 'Impaired Memory Retrieval after Psychosocial Stress in Healthy Young Men' (2005) 25(11) *Journal of Neuroscience* 2977; Jennifer S Lerner 'Emotion and Decision Making' (2015) 66 *Annual Review of Psychology* 799; Katrin Starcke and Matthias Brand, 'Decision Making Under Stress: A Selective Review' (2012) 36(4) *Neuroscience & Biobehavioral Reviews* 1228.

⁸⁸ Abigail Gray, Suzie Forell and Sophie Clarke, 'Cognitive Impairment, Legal Need and Access to Justice' (Law and Justice Foundation of New South Wales, 2009); Alexy Buck and Liz Curran, 'Delivery of Advice to Marginalised and Vulnerable Groups: The Need for Innovative Approaches' (2009) 3(7) *Public Space: The Journal of Law and Social Justice* 1.

1.5 About this Study

1.5.1 Aims

The aims of this study were to examine the factors that influence the ways that lawyers set their pricing (including barriers to changing pricing models and attitudes to compliance with the LPUL), communicate with clients regarding anticipated and updated service cost, and how the issue of service cost and cost communication affects the lawyer-client relationship. The specific objectives of the study were:

1. To investigate the factors that influence how lawyers decide upon the fees associated with their services, both among those with more traditional fee models (i.e. time-based and seniority-based rates) and more innovative and modern models (e.g. fixed fee or set-cost services).
2. To explore challenges and perceived barriers with adopting innovative fee models.
3. To understand how lawyers communicate with clients about the issue of service costs, including matter scoping, price estimation, and cost updating.
4. To identify any barriers to client transparency around the issues of costs for legal services.
5. To explore practitioner attitudes to compliance with the LPUL.
6. To identify how different fee models affect lawyer-client (mis)communication and (mis) understanding, and what regulatory action and strategy might support better practice and compliance.

In addressing these research questions, this report provides detailed insight into the issues of legal services pricing and cost communications in Victoria.

1.5.2 Methods

1.5.2.1 Study Design

Given the exploratory objectives of this study, data collection and analysis focused on capturing and presenting the experiences and perspectives of practitioners working in wills and estates and/or family law in Victoria. Before research commenced, the study design received ethical approval from Monash University Human Research Ethics Committee.⁸⁹

Participants were selected using a purposive sampling frame, which was designed to obtain a range of firm sizes, firm locations (metropolitan or regional Victoria), areas of practice (family law and/or wills and estates), and broad approaches to pricing (innovative and/or traditional). The two practice areas of family law and wills and estates were selected due to the notable variability of approaches to pricing (traditional and innovative) in both areas, as well as the volume of complaints to the VLSB+C they generate.⁹⁰

⁸⁹ Monash University Human Research Ethics Committee Project ID: 36405.

⁹⁰ VLSB+C (n 61) 13-15.

To encourage participation, the VLSB+C made initial contact with law firms and practitioners working in these areas across Victoria to raise awareness of the study and its objectives. Following this, practitioners were approached via telephone or email by either Dr Denvir or Dr Mant to ascertain interest in participating in the study. To ensure that practitioners were not influenced in their responses nor pressured to participate in the research, the VLSB+C was not informed of which practitioners ultimately opted to participate in interviews. The initial contact with the research team also involved providing participants with an understanding of the reasons for conducting the research, the broad topics to be covered during interviews, and the opportunity to ask further questions to aid their decision about whether to participate in the study. At this stage, the researchers also set out the practical arrangements in place to ensure the anonymity of participants' contributions, which importantly included the assurance that no identifying data would be published nor shared with the VLSB+C.

Representatives from 17 practices were interviewed, with eight of the interviews conducted by Dr Denvir and nine by Dr Mant, both experienced qualitative researchers. Those interviewed for each practice were typically owners or partners in practices, meaning that they were able to provide a comprehensive overview and understanding of the firm's operations, fee models, billing practices, approach to calculating costs, and approach to communicating with clients. All practices were also Law Institute of Victoria ('LIV') accredited specialists.⁹¹ Nine practices approached did not take part in the study, including five cases where there was no reply to email contact, and four where the required number of interviews had already been conducted or booked with firms with similar characteristics (i.e. with respect to size, location, practice area and approach to pricing) by the time firms returned initial contact.

Of the 17 practices included, eight worked in the field of family law and nine in wills and estates. Practices included a wide range of approaches to pricing, with just under half broadly categorised for sampling purposes as 'innovative', on the basis of using pricing models aside from hourly rates, and just over half as 'traditional', on the basis of using hourly rates models only. Practices also varied in size and location, with smaller and larger firms in regional and metropolitan locations represented throughout the sample. Seventeen interviews were sufficient for the research team to begin to see re-emerging themes and to draw meaningful conclusions without the need for additional interviews (i.e. constituting data saturation).

⁹¹ Law Institute of Victoria, 'LIV Accredited Specialist Directory' (Web Page)
<https://www.liv.asn.au/Web/Content/For_the_Public/Referral/Directory_Search_Specialist_Accredited.aspx>.

1.5.2.2 Data Collection and Analysis

A semi-structured interview guide was developed, tested and refined following discussions within the project team and representatives from the VLSB+C. This included in-depth discussion and refinement of technical terminology around pricing (e.g. concerning fixed fees, hourly rates, conditional pricing, contingency fees and value pricing) to ensure concepts were correctly conveyed and understood. The interview guide is available at Appendix B.

Interviews were conducted by video conferencing software, with interviewers and interviewees in their homes or places of work as convenient. Each interview included a single interviewer and single interviewee. There was a single interview for each participant, with no split or repeat interviews, although interviewees were encouraged to provide further information to clarify any points raised during the interviews after the fact, if they so wished. With consent, interviews were audio (not video) recorded, and field notes made as required. Interviews each lasted approximately one hour, with interviewees receiving a \$200 gift card as thanks for their time.

Interviews were transcribed using a professional transcription service, and transcripts were checked for accuracy by Dr Denvir and Dr Mant. Transcriptions were not shared with respondents unless expressly requested, which none of the 17 did. Interviewees were also offered the opportunity to review any quotations used in the final report, with one interviewee taking up this offer. Individual interviewees maintain anonymity throughout the report, with each assigned a participant number which is used whenever they are quoted directly in the results.

Data was managed and coded using NVivo software, with Dr Denvir and Dr Mant responsible for data coding. The data was coded using reflexive thematic analysis, an approach which involves not only identifying common themes across data that relate to the questions asked during interviews, but also taking proactive steps to ensure opportunities for coders to identify other, unanticipated themes that may arise across the data.⁹² In practice, this comprised two key stages: first, a deductive coding phase which involved identifying initial themes centring around the broad topics covered in the interview guide, and second, an inductive coding phase that involved drawing out new themes and commonalities across interviews that had not been anticipated. Themes across both stages were then refined and organised by the research team to finalise the research findings that are presented within this report.

1.5.3 Definitions

In this report, we routinely refer to different types of pricing models, the definitions of which are outlined above in Section 1.1.2. We also refer to fee or cost estimates, as well as 'single figure' estimates. The distinction between the two is important, and conflation between what in practice are often two very different concepts, vastly amplifies the complexity of the subject matter and client communications.

92 Virginia Braun and Victoria Clarke, 'Reflecting on Reflexive Thematic Analysis' (2019) 11(4) *Qualitative Research in Sport, Exercise and Health* 589.

As described further in Section 4.1 below, practitioners are encouraged to produce a 'single figure' estimate under the LPUL and associated guidance issued by the Commissioner for Uniform Legal Services Regulation. This figure is set out in a written cost disclosure and is intended to give a client an idea of the total possible cost of their matter. However, for reasons discussed in Section 4.1 in greater detail, practitioners are not required to provide this estimate in respect of a fixed scope, or stage of work. Whilst this is less problematic in fixed fee work for reasons that will become apparent later, in negotiation and litigation work it is more complicated. While some practitioners produce a figure that represents costs to trial, some will define (and therefore cost) a matter only in relation to the immediate steps to be taken, without any reference to future work that may be required if those immediate steps do not see the conclusion of the matter. In addition to this, the way in which practitioners calculate 'single figure' estimates vary widely based on different approaches and contingencies that practitioners factor into their estimates.

In some cases, fee estimates and 'single figure' estimates align – often in the fixed fee space. In other cases, they do not. Where they do not, this is usually because the 'single figure' has been calculated to represent a *worst-case scenario*, and not what a client was *likely* to face in terms of costs. As such, in negotiation and litigation work it was common for practitioners to provide additional verbal (and occasionally written) disclosures which, in addition to a 'single figure' estimate, set out the indicative price range of costs a client was expected to incur up to a specific point or as their matter progressed through different stages.

Whilst the cost/s set out in this supplementary information would not always align with the 'single figure' estimate, the factors that informed the calculation of both figures were related. For example, the complexity of a matter would have a bearing both on the 'single figure' estimate provided and on any supplementary price ranges given to a client. For this reason, although the factors influencing price are discussed in Section 2.1.2, and the basis for a 'single figure' estimate is discussed in Section 4.1 and 4.2, the two concepts are interrelated. Readers are therefore encouraged to consider the material in Section 2.1.2, 4.1 and 4.2 in unison.

For the purposes of clarity, where reference is being made to a 'single figure' estimate, as distinct from any other estimates/ranges/indicative cost information provided to clients, the term 'single figure' is used. Similarly, this report uses the term 'client' throughout, rather than distinguishing between clients and prospective clients, although it is recognised that individuals only become clients after having accepted a costs disclosure, signed a cost agreement, or otherwise indicated their intention to instruct a practitioner in their matter.

1.5.4 Structure

The study's findings, drawn from the analysis of the interviews with practitioners, are presented across Sections 2, 3, 4 and 5. These Sections provide an insight into current practices and challenges faced by practitioners across the areas of: fee models and billing, clients' choice of lawyer, estimating and communicating legal costs to clients, and controlling, monitoring and updating these costs throughout a client's matter. The report concludes with Section 6, which draws together the most pressing regulatory implications that emerge from this study, and sets out specific recommendations for regulatory reform and future evaluation.

2. Fee Models & Billing Practices

This Section sets out the various models that practitioners use when pricing their legal services, and the factors that inform pricing decisions. It further examines the motivations for the adoption or avoidance of particular pricing, revealing that fixed fees are typically reserved for matters where a practitioner is confident that they can accurately estimate the likely time/effort involved in the matter at the outset. This finding is used to explain the fact that fixed fees are most often offered for transactional work in wills and estates. More broadly, data presented in this Section suggest that despite a shift away from hourly rates, the time taken to complete a task largely remains as the basis on which prices are set. As such, there is little scope for clients to negotiate on price, save where it results in work being excluded from the scope of the matter. The Section also considers the approaches practitioners take to billing, setting out how billing frequency and itemisation is used to reduce bill shock and help clients understand the nature of the work being performed. It also documents the use of trust accounts, the challenges posed for fixed fee practitioners who choose not to operate a trust account (including the implications under the LPUL), and the options made available to clients who present with, or later face, financial difficulty.

2.1 Pricing Models

2.1.1 Variation by Practice Area and Matter Type

As set out in Section 1.1, there are a range of possible pricing models that practitioners may use to charge clients for legal services. Across interviews, there was evidence that all of these models were being used to some extent. However, hourly rates and fixed fee models were by far the most commonly used across both wills and estates and family law, and model choice was strongly associated with the type of legal matter.

Fixed fees, for instance, were commonly applied to transactional matters in wills and estates work, including will writing and creating powers of attorney. General advice requested over and above that covered by the fixed fee, was subject to an additional 'add-on' to the fixed price, or priced at a practitioner's hourly rate. Testamentary trusts, probate, estate administration, and litigation saw more variation in terms of the pricing models employed. While some practitioners offered fixed fees for probate and the creation of testamentary trusts, trust administration was typically priced by the hour, meaning that expense varied with the amount of assets involved and the time taken to administer them. Due to the unpredictability of external factors that may influence the progress of a matter, negotiation or litigation work was largely based on hourly rates.

Nevertheless, there were a small number of exceptions, with two practitioners pricing both transactional and negotiation or litigation work in line with the Practitioner's Remuneration Order ('PRO') and relevant court scales, and one practitioner who offered fixed fees for all forms of work, including litigation.

Wills and estates appeared to be viewed by practitioners as an area of law in which several matters were capable of being contained and costed according to a fixed fee. In contrast, fixed fee work was far less common among the sample of family lawyers, the majority of whom charged according to hourly rates. This was true even in relation to seemingly transactional matters, such as the formalisation of consent orders or divorces, binding financial agreements, donor agreements, and prenuptial agreements.

Only three family practitioners reported that they routinely offered packages for these transactional matters on a fixed fee basis. Two of these three practitioners explained that their fixed fees would explicitly exclude any negotiation that might otherwise occur in relation to these transactions and that where negotiation was needed, hourly rates would apply. The remaining practitioner explained that it was possible to package certain elements of negotiation or litigation:

For some of those items, we've estimated according to hours spent, and therefore hourly rates. For some of them, we might say that each subpoena is going to be \$1,500 bulk... That's based on experience, that by the time you do everything that you've got to do to prepare and serve a subpoena and look at it, it's about \$1,500.¹

The general preponderance of hourly pricing in family law in respect of both transactional and litigation work appeared to link to two key features of family law practice. Firstly, practitioners are wary to offer fixed fees in initial family law consultations due to the number of external factors that could influence both the time that a matter takes to resolve, as well as the level of expense that may be incurred by the lawyer. These factors may include, for instance, how cooperative and amicable the parties are, the attitude and competency of the lawyer representing the other side, and the emergence of any intervening issues or disputes that arise during the process. The extent to which practitioners factor these variables into their cost estimates is discussed further in Section 4.2, and the ways that lawyers try to minimise the additional costs that can emerge from these factors is explored in Section 5.2.

¹ Practitioner 14.

Secondly, the greater homogeneity of pricing models in family law may also reflect an observed lack of delineation between transactional work and negotiation or litigation work, meaning that if hourly rates typically applied in respect of one domain, they would cascade to the other. Many practitioners spoke of the fact that – in their experience – even a seemingly simple task such as formalising a financial agreement between two parties who appear amicable could result in the practitioner needing to support the parties through negotiation or even litigation if cooperation broke down. This risk that a case could spiral unexpectedly was typically not seen in respect of transactional work in the wills and estates space, where, for example, a disputed estate would present as such from the outset, rather than emerging suddenly in the middle of a transactional matter.

Taken together, the differences identified in relation to matter type suggest that the availability of a fixed fee is largely a function of a practitioner's ability to quantify the amount of work involved at the outset and to be comfortable with absorbing any losses where the scale of that work deviates from prior expectation. Whether it is necessary to scope everything at the outset is of course a question worth considering, particularly in light of the findings set out in Section 4.

2.1.2 The Basis of Pricing

Across interviews, the data revealed that pricing was largely based on time. While this is perhaps unsurprising for hourly rates, it was also true for fixed fees. As distilled by one fixed fee practitioner in wills and estates, pricing came down to a question of *'How much time [is the matter] going to take, that's probably the main thing.'*² As such, the use of fixed fee models did not appear to alter how legal work was priced, save for the fact that disbursements were usually rolled into the fixed fee, as discussed below. Fixed fees therefore, operated predominantly as a price cap on a practitioner's estimate of time.

To calculate how long a matter would take to complete, practitioners referred to a number of different factors, many of which are captured in s 172 of the LPUL, including:

- The complexity of the matter;
- The skill, specialised knowledge, and responsibility involved;
- The place where the business or any part thereof is transacted;
- The amount or value of any money or property involved.

Given that some of these dimensions such as complexity corresponded to an increase in the likely time spent on a matter, this would be reflected in an overall higher fixed fee or hourly rate estimate.

² Practitioner 1.

Of course, practitioners of different specialisms and levels of experience charge different hourly rates, and law firms frequently operate on the basis that some tasks will be delegated to more junior lawyers with lower hourly rates, supervised by a more senior practitioner with a higher hourly rate. As such, the task of calculating the hourly rate to be used as the basis for charging a client was typically approached in one of two ways:

- Average Hourly Rate – under this approach, practitioners would create an hourly rate based on the average of the different hourly rates used by individual lawyers across the firm.
- Single Hourly Rate – under this approach, practitioners would charge according to the hourly rate of the individual lawyer undertaking tasks for the case at any time. This meant that the hourly rate would vary throughout the matter based on the practitioner's level of expertise, save for transactional matters in wills and estates, where it was typically only one practitioner undertaking the work.

Pricing also varied based on the broader dynamics of the market. In some cases, this would see the hourly rate for a specific practitioner increase, as one family law practitioner explained: *'I measure myself against, in particular, two people, and if they go up, I go up.'* This was to avoid *'...look[ing] cheaper than [the competition], because I'm as good as them.'*³ In other instances, particularly fixed fee work such as will writing, the overall price of the work might be adjusted up or down in reference to the fixed fees set by other firms or the demographics of the firm. As one practitioner reported:

*Our marketing coordinator rings around... [to do a] yearly check on pricing. You want to be at the top end. I'm conscious of the broad range of clients that we have. If we set our fixed fee [for] will [writing] too high, we'll lose clients. We need to manage that, balancing up all demographics.'*⁴

The price charged by key competitors was therefore influential for some, but not all firms and practitioners. But while the prices of competitors might influence the hourly rate charged, more commonly it influenced whether, having quantified the likely amount of time spent on a matter, a fixed fee was adjusted up or down before being fixed.

3 Practitioner 9.

4 Practitioner 13.

The tendency of practitioners to set out clear exclusions to fixed fee packages further reaffirms time as central to price-setting amongst those interviewed. This is because these exclusions speak less to the expertise of a practitioner and more to the amount of time a matter required. For example, wills that were lower in price might limit the number of drafts that would be available for comment, or place a threshold on the number of beneficiaries listed. As one practitioner explained, *'We've got clear exclusions... in terms of how many meetings they get with us, how many phone calls and emails, and things we're going to write...'*⁵ Limiting the offer of a fixed fee was also a means of controlling the risk of a matter taking significantly longer than expected (or budgeted for), as was observed by one family practitioner: *'The fact that the parties are communicating, have reached their own agreement, and all of that, it's a good first step. It generally means that we will provide a fixed fee for it pretty comfortably.'*⁶

As indicated by one wills and estates practitioner offering fixed fee services, the urgency of a transactional task could also factor into the basis of pricing.

Pricing according to the PRO or Court Scales, whilst departing from the aforementioned approach in which time taken is multiplied by a practitioner's hourly rate, nonetheless also retains a basis in the quantification of time. For example, within the PRO, attendances are charged by time increment, whilst folio length is effectively a proxy for time spent, given that longer folios – which are more time-consuming – attract higher rates. Similarly, Court Scales set out rates in line with the length of time taken to prepare, read, or examine documents, or to attend court.

Only one practitioner – who offered fixed fees in respect of both transactional and litigation work – had an appreciably different approach to determining pricing. Rather than focusing almost exclusively on the time taken to complete work, this practitioner explained that they adopted a 'value-based pricing model', pricing their services with reference to:

*What value am I providing to the client? Where does it sit in the overall marketplace? What do other people charge? Then whether it takes me 1 hour, 5 hours or 10 hours, that's my own internal process problem. If it takes me 10, that's too bad but if I can do it in 2, then I've done well for myself. In terms of the process of how I determine what I charge, it's really based on where the market is at and what I think that I can charge.'*⁷

5 Practitioner 1.

6 Practitioner 12.

7 Practitioner 2.

This pricing model was seen as distinct from others in that it focused on quantifying the *output* – the deliverable outcome for a matter – rather than the *input* – time spent on resolving a matter. However, this is not to say that time did not factor into an estimate of price given that the speed or the complexity of a matter was used to justify an increase or decrease in the advertised price:

Sometimes... someone will come to me and they need some parenting consent orders and I have a chat to them. I go, "Well, look, actually that's pretty straightforward. You seem to be very easy to talk to and I know I've quoted this much on the website but I can actually do this for you fairly quickly. I'll charge you less."⁸

In common with the approach of fixed fee practitioners described above, this practitioner indicated that specific constraints were set out in relation to fixed fees, in this case, a value-priced fixed fee retainer:

"Look, a fixed fee requires your cooperation." I tell them straight up, I said, "If you're going to be emailing me and phoning me and texting me every single day, we're just not going to be able to work together because you're then abusing the fixed fee retainer." People understand that but it does mean that occasionally, I do have to say to somebody "Look, this isn't working and I'd like to end this relationship."⁹

There were two further elements of this practitioner's approach to pricing that were distinct from that of others in the sample. The first involved their use of a retainer (subscription model) offered for the stages of disclosure and negotiation. This involved a front-loaded fee in the first month, followed by a reduced fee for subsequent months. The second was their use of 'surge' pricing, to reflect market demand and the practitioner's capacity to take on additional work, as they explained:

Depending on how busy I am, I'll actually adjust the fees on my website. If I'm really, really busy, I'll actually adjust my fees up because I think, "Okay, I'm so flat out that I'm only going to take on a client if they're going to really significantly be a good client financially." I'll increase the fees that I'm advertising and that will result immediately in a decreased number of inquiries but the people that do come through, they're willing to pay a higher fee, so I'll take them on. Conversely, if let's say, I've been through some work or some matters have settled – because I have a baseline of how many matters I want to be running at a particular time... If it drops below that and I'm starting to feel like, "Oh, I finished my work for today, I could actually have a matter to work on," then I might drop my fees on my website, take in a few more extra enquiries, and then quickly sign up one or two more clients.¹⁰

8 Practitioner 2.

9 Practitioner 2.

10 Practitioner 2.

But whilst one practitioner in the sample had adopted an approach to pricing that looked beyond just time, for the other practitioners interviewed, time remained the dominant consideration. This may explain why fixed fee services are often offered only for matters where the number of hours involved are relatively predictable, and the likelihood of expending more time on the task than expected, can be minimised. This risks practitioners' cherry-picking clients, something that is important to consider in relation to broader discussions as to the potential for new pricing models to support the needs of the 'missing middle'.

Moreover, given the comments of both fixed fee and other practitioners reported above, fixed fees may not always offer certainty of price, particularly where matters do not end up as contained as may be envisaged from the outset. Here, alternative approaches to scoping, including micro-scoping may be worth further examination as a means by which to minimise risk for clients and practitioners. Further findings regarding scoping are set out in Section 4 where they form part of a broader discussion of the requirement to provide a 'single figure' estimate under the LPUL.

2.1.3 Selecting a Fee Model

2.1.3.1 Fixed Fees

For those practitioners who had adopted a fixed fee model, a principal benefit was that it was seen as a mechanism to better respond to clients seeking price certainty:

I think the firm really wants to be a client-focused firm and listen to what the client wants. I think their view is that clients much prefer fixed fees compared to hourly rates. They want certainty as to how much things are going to cost. Like I said, most of the time, we will give certainty. It's only the exception rather than the rule that we'll have to revise our fixed price if some unexpected work has arisen.¹¹

...from what I can tell, people want certainty. People are terrified of hourly billing once they've had any experience of it. They're just so scared of it, it's just a big unknown. It's like your power bill in a time of rising power costs. It comes in and you're like, "Whoa, I didn't expect that".¹²

Practitioners also viewed the model as more efficient because they could 'just move forward and probably [have] less conversations about costs',¹³ and because it was seen as '...just easier for everybody. You have a fee, you agree on it, it's done. From a consumer point of view...you can just forget about it. You don't have to get anxious about having conversations with your lawyer, or sending an email, or anything like that.'¹⁴

¹¹ Practitioner 1.

¹² Practitioner 2.

¹³ Practitioner 8.

¹⁴ Practitioner 12.

Some practitioners also held the view that these efficiency advantages meant that once all things were considered, fixed fee pricing in transactional matters could end up more profitable than traditional pricing models such as hourly rates. Generally speaking, however, the idea that a fixed fee might enable the practitioner or firm to come out ahead, was less often raised as a motivation and indeed, as one practitioner put it, *'there are some files that blow out ridiculously and you would be financially better off if you'd never seen it before.'*¹⁵ Others observed slim margins associated with certain types of work, with 'simple' will work being a notable example: *'...we don't make any money out of wills. I don't know how anyone can. They are labour intensive and there's a lot of risks associated with them.'*¹⁶ This meant that these types of matters were less desirable than the same work coupled with power of attorney, where it was reported, *'you can make money from it.'*¹⁷ This may raise questions regarding the granularity of scoping which this study's data is not well placed to answer.

For some, fixed fee pricing based on a time-costing model was thought to result in clients' cross-subsiding each other, an issue with which at least one practitioner expressed discomfort:

*I don't know whether ethically I feel comfortable with it... I don't know if I feel comfortable about the idea of just saying, I'm going to charge you \$15,000 for this thing no matter what. I don't see how that's any more ethical than someone charging an hourly rate... Sometimes you make money, sometimes you won't. I think that means that some clients are worse off.*¹⁸

This practitioner had previously offered fixed fees for straightforward divorce proceedings. In explaining why they ceased to offer fixed fees, their response mirrored that of a number of other hourly rate practitioners, saying that, *'even in a simple divorce matter these days, it seems like... you can't predict everything that goes wrong.'*¹⁹

This difficulty coincided with a suspicion on behalf of some hourly rate practitioners, as to the legitimacy or 'fixed' nature of fixed fees. As described in Section 2.1.2, there was evidence among the sample that fixed fees were effectively operating as capped hourly rates, yet, some hourly rate practitioners viewed this cap as spurious in practice:

*The problem people have said for decades, why can't you just give me a quote? "I can't just give you a quote, because you're not asking me just to prepare a document. You're asking me to negotiate with your ex who you've been married to for 10 years. You don't know what's going to happen. I don't know what's going to happen..." Now, there are firms [that] will [provide a quote], obviously. What they tend to do is they [say] it's going to cost 10,000 dollars to get to X stage. We don't do that. I think it's a rort. Put your 10,000 in trust. Thank you very much. They get the 10,000 on trust. They run up the 10,000, they get to 10,000, and then they say, ah, can you put another 10,000 because we're going to give you a new cost agreement. What? It is just outright daylight robbery. It's a disgrace.*²⁰

¹⁵ Practitioner 8.

¹⁶ Practitioner 11.

¹⁷ Practitioner 11.

¹⁸ Practitioner 14.

¹⁹ Practitioner 14.

²⁰ Practitioner 3.

Consumers are likely to attach more certainty to a fixed fee as representing the total amount, in a way that clients of hourly rate practitioners are not, as such, for some, fixed fees were seen as introducing a greater risk of deception:

Fixed fees, I think are often a problem...I saw a friend of mine was using a conveyancer, we don't do conveying, so I wasn't competing, but the conveyancer said, "The fee is \$500 plus GST." Then said, "Oh, there's another \$160 for the mortgage, another \$100 for the discharge of the mortgage, another \$100 to certify the [payment of subdivision]." What they say is \$500, and if you need these things or get add-ons it's a bit like, "Oh, you want doors on the car?" Like, "You want the engine to start? You want a key? You want tires on the wheels?" That is a real problem with the fixed fee model...²¹

Whilst this approach was not observed among the sample, to the extent that it does occur, it risks undermining public trust in the transparency of pricing in legal services. It also impedes a client's ability to compare like-with-like when shopping around on costs, an issue that is discussed further in Section 3.

2.1.3.2 Hourly Rates

For those practitioners who set their pricing according to hourly rates, the inability to accurately set prices at the outset of a matter meant that:

It's impossible to have a fixed fee. Fixed hourly rate, that I can give you...I know that there's chronic criticism by clients and people all over the place about lawyers charging in six-minute increments. I get all that... [but] [t]o be honest with you, I don't see that there's any other model than the hourly rate.²²

Beyond this pragmatic limitation, benefits were also identified. For example, the fact that hourly rates are explicitly linked to the time that a lawyer spends on a case was seen as useful for setting boundaries around client behaviour:

The time costing model is by far the best one in family law because you also control the number of times clients will call you and the amount of work you do and it allows for both you doing things efficiently and... for clients' emotions to be kept in check because they know they're time costing. That's why a lot of firms that move to fixed-rate models almost always abandon them.²³

²¹ Practitioner 11.

²² Practitioner 10.

²³ Practitioner 9.

Hourly rates were also seen as offering the flexibility to provide certain clients with bespoke forms of service which could not be captured in a fixed fee:

I've acted for this lady for 10 years, before her children started school... [t]hey want access to me when they want access to me. I know they're not going to ring me at eleven o'clock at night, but if something hits the fan and the police knock on their door, they know that they can ring me. That doesn't fit within a fixed-fee model.²⁴

Nevertheless, for one practitioner, hourly rates were seen as creating an opportunity for financial exploitation:

If you're trying to maximise and really, really, really put your financial benefit at the forefront of everything that you're doing, then you really want to suck every client dry...[t]hen hourly billing might be the way. To do that, you've got to have a way to grab the people's assets. You've got to have either funds in trust, or you've got to put your caveat on their property, you've got to be getting the money out of the settlement. The reason you have to use those more coercive means of getting paid is simply because people are not willing to pay you...[y]ou're prying that money out of their hands. Now, I don't like to do that. I want people to be willingly opening their wallets and paying me for what I do...I think it's a better vibe. It's just a more comfortable experience for me as a person providing a service.²⁵

This was echoed by other practitioners who had formerly worked under hourly rates and had opted to change their pricing models, who observed that hourly rates were more aligned to the interests of firms than of clients: As one stated: *'I think hourly rates [are] more beneficial for the lawyer...it's easier to reach your budget because you know you're meant to do five and a half billable hours a day and just bill for every six minutes that you do.'*²⁶

Concerns around the incentive for hourly rate practitioners to work efficiently was also the motivation behind at least one practitioner using the PRO and Court Scales, because as they set out:

In my previous practice I would constantly have arguments with the bean counters about – because I had seven lawyers underneath me, and some paralegals – and I would constantly have battles with, "Well we can't charge the client for that." It was a terrible mistake someone's made in the firm, and they've done unnecessary work, or something, and we can't charge the client for that, or there's been a duplication of work...On scale, if I choose to ring the barrister's clerk and make an appointment for a conference with counsel, I'll still only get a clerk's rate for that. It assesses the quality of the work rather than time spent, or the person who did it.²⁷

²⁴ Practitioner 6.

²⁵ Practitioner 2.

²⁶ Practitioner 1.

²⁷ Practitioner 11.

As they explained further, setting prices against the Court Scales encouraged the practitioner to be mindful of who did the work, and often invited active reflection as to whether certain tasks could be delegated to junior practitioners so they could be completed more cost-effectively.

Perhaps unsurprisingly, this was contradicted by hourly rate practitioners who did not agree that hourly pricing was synonymous with inefficiency. As one explained:

I say to people, "Okay, I'm expensive, but I can get something done and settled. You can go to someone else who won't settle up for two years. You'll pay a lot of money. In the end, you'll pay more money, and it'll take two years out of your life. You come to me, I can settle it in six months." I do talk a lot about a value model. That's very relevant in our office because we've got a lot of people who are very, very expensive but very good value. My senior partner is very expensive, but he is very good value.²⁸

Problematically, inefficiency (where it arises) doesn't just impact the client, it also impacts costs for the other side, as observed by one practitioner:

...[there are] matters where I'm on a fixed fee retainer and the parties have pretty much...agreed on what they want, but the other side...is with a lawyer who's charging by the hour and it's just taking months...[b]ecause they want to bill the client for two or three months. It's very frustrating for the person who's retained you on a fixed fee basis.²⁹

The dominance of hourly rates as an approach clearly endures within the legal services market. Some practitioners staunchly defended this model, particularly in matters which are considered challenging to scope from the outset or where clients require bespoke services that cannot be accommodated within a fixed fee model. However, there are also clear limitations associated with this model, as elucidated by those practitioners who had adopted alternatives.

²⁸ Practitioner 9.

²⁹ Practitioner 2.

2.1.3.3 Value Pricing

Attitudes towards value pricing were, as with fixed fees and hourly rates, mixed. As set out in Section 1.1, value pricing can be employed in any pricing model context. What distinguishes it from other models is that it does not quantify cost with respect to time as a unit of measurement. As such, pricing is set in reference to the output – a specified outcome or deliverable agreed with the client – rather than the input – the time required to achieve that output. Explaining the rationale for adopting fixed fee value pricing, the value pricing practitioner in the sample reported:

I think [hourly billing] creates the wrong incentives...there's a misalignment of incentives where the lawyer's incentive is to maximise the time, and the client's incentive is to minimise the time. [A] fixed fee agreement can [align incentives] because there's a specific task that has to be done, and I know that the faster I can do that, the faster I will get paid, and then the more profit I make from that. It encourages you to deliver your services in a more efficient way, but you have to make sure that it's still being done competently...the client knows and agrees to what they pay, and if you can find some efficiencies on how you do that, then you benefit. It makes you do it better.³⁰

It is relevant to note here, however, that this practitioner did not distinguish the benefits of value pricing from the benefits of fixed fees. In other words, the benefits of aligning client and practitioner incentives described here could equally apply to fixed fee pricing that is input focused, rather than output focused. This tendency to conflate fixed fees and value pricing was also observed in respect of other practitioners, particularly those who had conducted some research into value pricing as a potential alternative to their present pricing models. When asked about their views on the value pricing model, one practitioner dismissed the model in its entirety, explaining that 'it's not that different from fixed fee'.³¹ Another practitioner explained their understanding of the value pricing model as follows:

I think the way that they look at value pricing is to try and work out what the value to the client is of that particular work. Theoretically, it's meant to include an uplift for something that's very important to someone. I'm not sure that that's actually what happens. I think it's just fixed fees by another method.³²

Across interviews, therefore, the value based pricing model was perceived as a sub-category of fixed fee pricing, where practitioners vary pricing according to the individual client. As set out at the beginning of this Section, this is not an accurate description of value pricing, but the fact that this perception was prevalent among practitioners raises the possibility that this is the way in which some practitioners implement this model.

³⁰ Practitioner 2.

³¹ Practitioner 12.

³² Practitioner 14.

This notion of offering different prices for different clients sat uncomfortably with some practitioners. One noted that they might struggle with the fact that: *'I'm charging this person and I've done the same work that I did for that person, but I'm charging them more...'*³³ Yet not all practitioners were concerned about the fairness implications. For instance, another rationalised that: *'We know in retail that there are different places selling the exact same thing for different prices. That doesn't stop someone from buying it from the price that's more.'*³⁴ However, the same practitioner also articulated, *'[m]y concern would be, as it is now, that you agree on a value-based pricing with a client. They then decide they don't like that. I think you would lose your costs very quickly on a taxation.'*³⁵

Other practitioners took issue with having to shift to a new model and the time burden that would inevitably involve: *'I'm not going to sit with a client to discuss what our value is to them and spend a couple of hours working out how to charge them when that might take longer.'*³⁶ Relatedly, one practitioner suggested that shifting to value pricing would be more difficult for women and for practitioners working in certain fields, as they explained:

*I think it's hard. Particularly, as women, you've got to really convince people to see the value in what you do. If you are a franchise lawyer or a property lawyer, it's a lot easier. When you're a family lawyer, people do not often see the value in what you do and that's, I believe, that is the reality so it is a little bit harder. I see the value in what I do, but I can certainly understand no one wants to pay you \$20,000 to sort out their parenting dispute. No one sees the value in paying a lawyer to get half of their assets back. If I was a property lawyer, I'd be doing value pricing any day of the week.'*³⁷

This observation points to another potential way in which area of law and type of client may influence practitioners' perceptions as to the suitability of different pricing models. For example, a wills and estates practitioner thought that value pricing would work well for their high-end estate planning clients, as: *'...those sorts of clients value that relationship a lot more than somebody wants to come in, do a will, and maybe never update it again.'*³⁸ This practitioner further explained that although these individuals were a small proportion of their client base, they were actively considering adopting value pricing models specifically targeted at these clients. The idea that value pricing is the domain of high-end clients was also implied in the comments of another practitioner who noted that: *'Some people do, do a value pricing model. Especially people who do the Beverly Hills slick type people or the London finance people.'*³⁹ Yet, despite serving this lucrative end of the market, the same practitioner went on to state that:

*...almost always we come back to using an hourly model. It's I think by far the fairest. You have clients who are really good users of legal services and who don't come to you too often or do that. They get rewarded [under the] hourly model, and you [have] clients who just need all your time and effort and they'll pay for it.'*⁴⁰

33 Practitioner 8.

34 Practitioner 8.

35 Practitioner 8.

36 Practitioner 16.

37 Practitioner 12.

38 Practitioner 8.

39 Practitioner 9.

40 Practitioner 9.

Another observed that value pricing models necessitated the adoption of a sales-oriented mindset. This served as a deterrent for that practitioner, who reasoned that the model would be challenging for junior practitioners to implement:

You become very much sales focused...in the sense of being able to communicate to a client why there's value in this work and why you doing it is better value than the law firm down the road doing it. I think a lot of junior lawyers or a lot of younger people or people haven't had much experience in that part of it or have worked purely in areas of this is the cost and I don't have to think about what the costs are, would really struggle in transitioning to a model where they have to barter for it really...⁴¹

However one practitioner who recounted a trial of what they referred to as value pricing, reported it being easier to implement than expected:

I just said...this is what this job is actually worth...to them and I just said, this is the figure. They didn't blink an eyelid...They're like, "Yes, we want you to do it and we're happy with that. Our affairs are complicated, what we want is complicated, we know it's going to take you time to properly understand it and be across it." ...I think the mentality can be that [clients] don't necessarily value you or that the bill is the hardest part for the client, but for some clients it's not. Part of our strategic plan as a business is to just target more of those people. The people that actually do value what you're doing.⁴²

It is also worth noting that the one value pricing practitioner in the sample was explicitly targeting the middle of the family law market, which suggests that value pricing is not exclusively the domain of wealthy clients.

2.1.3.4 Practitioner Remuneration Order and Court Scales

While a number of practitioners in the sample had adopted the PRO and Court scales as their pricing model, only some provided insight into why. As distinct from hourly rates and fixed fees, one practitioner felt the benefit of the model was its independence and perceived objectivity. 'We've found the court scales and the Practitioner Remuneration Order very helpful because we can explain to the clients that they're independently set by [the] Supreme Court or whatever, and they're reviewed annually.' As such, the practitioner indicated that '[they'd] be very disappointed if they were abolished, those scales, the PRO or the court scale because we don't know what would be a better model at all.'⁴³

⁴¹ Practitioner 8.

⁴² Practitioner 8.

⁴³ Practitioner 5.

The same practitioner also set out that they chose this model because they objected to the unfairness of hourly rates on the basis that clients effectively cross-subsidised each other – the same argument that some hourly rate practitioners advanced to justify their opposition to fixed fees. As they explained:

...time costing...can be very unfair on clients. For example, if we receive a complicated job from a client, which required great input and research and charged that client on time cost. Then the next day, another client came in with an identical job and because of our recent skill, we're able to complete their job in a fraction of the time. It's unfair on the first client because they've probably paid too much for the job and unfair on the second client because they haven't paid enough. It's an arbitrary thing.⁴⁴

Of course, law firms offering services to multiple clients undertake a balancing exercise between those clients in terms of their overall profitability, and this applies to any pricing model. It is possible, therefore, that the traditional dominance of the hourly rates pricing model within legal services is so deeply entrenched that it is not subjected to the same level of scrutiny as fixed fee models, for which this criticism is so widely held.

The idea that unfairness could be advanced as a criticism against any pricing model was reinforced by another practitioner, who set out similar such concerns when explaining why they did not adopt the PRO and Court scale model:

I have thought about doing the scale, the cost consultants come in and cost your file, but I don't know. I got put off when I was at [another firm] because they costed our files and it's like the consultants extract every last dollar out of the files. Again, I've got good precedents and I don't really feel comfortable charging \$2,000 for a piece of work that actually only took me an hour.⁴⁵

Consequently, while the PRO and Court Scales model may be perceived as a more objective method by which to price matters, this model lacks the flexibility inherent in other pricing models that allow practitioners to adapt fees according to the perceived value and actual time taken to perform the work.

Taken together, practitioners' views expressed across these four pricing models, as well as their reasons for adopting or not adopting particular models, points to a common thread: potential unfairness and exploitation of clients. In respect of all models, practitioners observed instances where a model permitted other practitioners to inflate costs or charge fees to clients in an unfair way.

⁴⁴ Practitioner 5.

⁴⁵ Practitioner 12.

In relation to fixed fees, this was observed where fixed fees were set at low levels without exclusions made clear, or where they were the subject of frequent price updates. With respect to hourly rates, this was evidenced in circumstances where practitioners worked inefficiently, padded bills, or were compelled to achieve a certain number of billable hours per day. This was also observed with regards to PRO and Court scales, due to the way in which the rigidity of this method lends itself to charging clients for every small task, rather than taking a holistic approach to pricing their matter. While there were several misunderstandings among practitioners about the way that a value pricing model may operate, there were also concerns regarding the shift to a value pricing model, how to identify value from a consumer perspective and how labour intensive that may be, and the extent to which the middle of the market would be receptive to such an approach.

The criticisms levied across all of these models clearly point to the potential for *any* pricing model to be used in a way that is unfair and exploitative. From a regulatory perspective, this suggests a need to concentrate less on the way in which pricing models charge clients, and more on how this pricing, and the basis for it, is communicated to clients. This is especially relevant in respect of the way in which a 'single figure' estimate is calculated, as discussed further in Section 4.1.

As well as employing different pricing models, practitioners also reported introducing different mechanisms to support clients to reduce, defer or secure funding for fees, as discussed in the section that follows.

2.1.4 Financial Arrangements to Reduce/Defer/Secure Funding for Fees

Practitioners set out a range of alternative financial arrangements that were used to address instances where a client did not have the funds to pay for legal services upfront, or ran out of funds part-way through a matter. These could be categorised as mechanisms designed to reduce costs or otherwise make legal services more affordable or accessible:

1. Reduce necessary fees ('Price Reductions/Free Services');
2. Reduce the necessity of fees (Unbundling);
3. Defer fees (Conditional Fee Agreements); or
4. Support the client to secure funding for fees (Litigation Funding).

Matters falling into the first designation included price reductions or the provision of pro-bono services. Amongst the practitioners interviewed for this study, price reductions or performing work without charge, was typically offered on an ad-hoc basis, as one practitioner explained:

We do pro bono from time to time when I think that someone just should have legal representation for free. We don't advertise it but if someone rings up and says, well, X, Y, Z, and I just say, okay, well so-and-so's turn to do that for free, so that's how we deal with that issue.⁴⁶

In these cases, such an offer was generally based on the practitioner's perception of the individual's deservedness or vulnerability. As one practitioner explained, they sometimes provided discounted services when the matter and client was: *'really deserving and the person genuinely can't afford it...'*⁴⁷ Other practitioners similarly described the circumstances in which they would consider reducing fees or providing free services as follows:

When a person comes in to see me and/or a friend brings them in because they've been financially abused and it's elder abuse or something like that and the money's already gone, they haven't got money. They often don't qualify for legal aid, there's very little legal aid in this area. I tend to just not charge them or I'll say, "I'll charge you a percentage of [Court] Scale only if we are successful in recovering money for you".⁴⁸

Every now and again, we just discount a bill... We will do it very lean. All my lawyers will come to me and say, "This person has no money, and it's really, really difficult. I haven't charged as much as maybe you think I should have...but that's for a reason." Then sometimes I say, "Well then why don't we just reduce it again?" They're absolutely not a problem. If they're deserving people, I have no issue. It's the ones who just don't want to pay. They just want something for nothing.⁴⁹

Perhaps unsurprisingly, given that larger firms would typically have formal requirements in place, the ability of a practitioner to offer fee reductions was often contingent on whether they had control of their practice. As one practitioner explained:

I'll do it at a reduced rate or give my time away or reduce some service. [I'll] do their will for free or something like that. I have that latitude within the practice. I don't have the managing partner sitting on my shoulder with my monthly billing-to-budget ratios.⁵⁰

46 Practitioner 3. Note that the term 'pro-bono' incorporates many different models, and the practitioner in this context was describing the provision of services to a client for free, rather than participation in formal pro-bono schemes.

47 Practitioner 6.

48 Practitioner 11.

49 Practitioner 3.

50 Practitioner 6.

In addition to the reduced managerial pressure described here, another practitioner reported having this flexibility due to fewer financial pressures and overheads, indicating that: *'...I can afford to [offer free services]... most people can't because [they've] got to pay staff, which is probably why I never make a lot of money, but I'll be very happy.'*⁵¹

Other practitioners, however, preferred to maintain a distinction between their charitable and profitable endeavours. As one practitioner explained, they tried not to take on individual cases on a charitable basis: *'I try not to mix [my charitable work] with my profitable work. At the end of the day, this is a business, and there will be better longevity.'*⁵² Rather, this practitioner saw the free educational material they provided as a means by which to reach a much wider range of needy individuals.

Nevertheless, whilst some practitioners were unwilling to offer pro-bono work fee reductions or discounts, a broader range of practitioners were willing to support a client by offering distinct aspects of legal work at affordable prices, under the second approach outlined above. In other words, many practitioners were willing to provide unbundled forms of service to reduce the scope of services and their associated costs.

Within the practice areas canvassed, client demand for unbundled services was reported to be relatively low. Many practitioners explained that clients often wanted to hand the problem over to a professional who could take control and help achieve a particular outcome. Such experiences reflect findings from large scale legal need studies which document how those engaging legal services typically do so with a desire for the professional to resolve the problem for them.⁵³

However, in wills and estates matters, some unbundling was more common. For example, one practitioner observed that: *'it's quite common with probate that they'll just want a solicitor to help them get the grant of probate, but they'll do the estate administration themselves, which is fine.'*⁵⁴ This was a request the practitioner was happy to oblige, although they drew the line at providing piecemeal advice services to those running their own cases. Some others made an arrangement where they stopped work at the point a client's funds ran out, provided that they were not the solicitor on record given that, *'...it's really hard to get off the record without disclosing that you've run out of money, which is not a good look at all.'*⁵⁵ Another wills and estates lawyer cautioned that the demarcation of responsibility was really important where there was unbundling, and needed to be well defined to prevent confusion or duplication of work.

51 Practitioner 11.

52 Practitioner 17.

53 Pascoe Pleasence et al, *Causes of Action: Civil Law and Social Justice* (The Stationery Office, 2006) 93.

54 Practitioner 1.

55 Practitioner 15.

Given the reluctance among many family law practitioners to use fixed fee pricing to undertake transactional work, it is perhaps unsurprising that these practitioners were, on the whole, also far warier of the prospect of offering unbundled services. One family lawyer set out that they would screen price sensitive clients on their ability to self-represent, and make an offer of service unbundling on a case-by-case basis. This would involve the practitioner providing assistance to the client as a self-represented litigant, again without going on the record as the client's solicitor. This practitioner indicated that they had '*...two or three clients like that at any one time*',⁵⁶ Suitable clients were characterised as those who had:

*...a very good idea of what they want. They've filled in a lot of the forms. They might have even had a crack at doing their own affidavit. I can say to them, "Look, pay for an hour and I'll go through all the documents. I'll show you where you've gone wrong. I'll tell you where you need to fix up your affidavit," and some people, for them that's perfect.*⁵⁷

For those that provided unbundled forms of service, some appeared to be willing to provide far more substantial guidance than others, sometimes helping with all aspects of a matter other than court attendance:

*I'll say to the client, "Look, you can't afford to really have us all the way. What we suggest is...we will do the documents because that's the hard part. We will put the evidence before the court and do the documents for you. We'll put your name on the documents so we don't appear on the court record, but you go to the court events because the court event [are] \$10,000 a pop. Four of those, you'll save \$40,000. We'll...back you up before and after. We'll tell you what to do, how to do it, what to ask for, and you...manage the court event yourself." Some clients...opt for that...I'd say probably 20, 25 per cent.*⁵⁸

This practice of offering unbundled services is far from uncommon, given the high proportion of self-represented litigants who appear in family court cases and the diversity of legal assistance and prior advice they secure.⁵⁹ However, the hesitancy of family lawyers to agree to such arrangements were based on clear concerns about the practicalities of unbundling, because clients rarely knew what might be involved, as illustrated by the following practitioner:

*There's often a departure between what the client wants you to do and the steps that actually have to be taken. They might want you just to do an agreement, but what you need to explain to them is that if you're doing a binding financial agreement, you're actually putting your insurance as a practitioner on the line, that you have to do a statement of independent legal advice. It's an integral part of the agreement. In doing that, we write a comprehensive letter of advice... If you ever have your insurer coming after you, they want to see that you've actually given the client the advice that relates to the statement that you'd signed off on...There's a process and this is where the cost is absorbed.*⁶⁰

⁵⁶ Practitioner 2.

⁵⁷ Practitioner 2.

⁵⁸ Practitioner 10.

⁵⁹ John Dewar, Barry W Smith and Cate Banks, *Litigants in Person in the Family Court of Australia* (Family Court of Australia, 2000) 6-7.

⁶⁰ Practitioner 6.

Another practitioner explained that it was often impossible to complete distinct tasks without gaining overall familiarity with the entire matter and reading the file. For example, one practitioner explained that when checking an affidavit, although ‘...[y]ou might be able to correct their evidentiary problems and their relevance problems...you’re not going to be able to do a proper job’.⁶¹ For this reason, this practitioner typically declined to take on such work.

Building on the above, one family law practitioner thought that unbundling required further regulatory oversight. The primary reason for this, in their experience, was that those seeking to defray costs by unbundling tended to be relatively unsophisticated consumers who may not have the legal capability to effectively complete unbundled tasks, and may ultimately prejudice their outcome. As they explained:

*I am pretty wary of that, actually ... I actually think that unbundling of legal services is something that should be looked at more by the legal regulator to see what we could do, but typically, that’s a pretty dangerous territory for lawyers to get into... particularly also in family law, those clients are really cost-conscious. They’re cost-conscious often because they’re not sophisticated, and so they’re often not well-educated. They don’t really understand their legal problem, and so you have the extra issue, what they think their problem is, is actually not the problem, so you get a little way in, and then you realise there’s a whole lot of other stuff that you need to know.*⁶²

As such, practitioners found that while some clients had the knowledge to specify what they wanted and request specific services on an unbundled basis, they did not necessarily appreciate that a particular service could not be dissected from the services surrounding it. This is a problem that speaks not only to a client’s legal literacy, but also the constraints of professional indemnity insurance and ensuring that both the practitioner and the client are operating in the client’s best interests. Whether this could be remedied by having practitioners provide more context to guide the client when unbundling, remains to be seen.

The third approach taken by practitioners when responding to a client in financial difficulty was to arrange for the deferral of fees until after a settlement is reached or an award is made. This was more often made available to those involved in estate disputes; an inevitable function of the fact that anyone seeking to bring an estate claim is required to demonstrate financial need. Those who had evidence of financial need were unlikely to be able to pay for legal services upfront, and executors would often need to wait for a grant of probate.

Extending this offer to other clients and matters appeared to depend firstly on how far the client was into a matter and secondly, whether the matter required disbursement, as deferral of disbursements were less likely to be offered. Others occasionally offered fee deferral, though seemingly not with any enthusiasm, as one practitioner put it: ‘We might very occasionally work on a deferred fee basis for a plaintiff if we can really see they’ve got a really strong claim, but they’ve just got no money right now and they’re getting something in the future. We don’t like doing that.’⁶³

⁶¹ Practitioner 3.

⁶² Practitioner 14.

⁶³ Practitioner 1.

A more complex variation of a cost deferral was also seen in another practitioner's use of conditional cost ('no win, no fee') agreements. Here, the extent to which this mechanism would be offered, or extend to disbursements as well as fees, varied on a case by case basis, with '[a] lot [resting] [o]n the strength of [a client's] claim'.⁶⁴ Another practitioner observed that despite clients often holding 'preconceived ideas about claiming against estates...assumptions that a no win, no fee arrangement [applied]...[w]e don't offer that, so [it's made] clear at the beginning that that's not available'.⁶⁵ Some practitioners were actively opposed to such payment arrangements on the basis that: '...It creates a bit of a conflict at mediation when you've got a lawyer sitting there wanting their fees... I just don't like no win, no fee and those sorts of models because of that, I think it creates a conflict and it's not a happy conflict...'.⁶⁶

Other approaches involved offering deferred fees subject to a charge over a client's assets. As one practitioner explained: '...as long as we've got sufficient equity in the home, we'll take a charge over their property, so we get paid when they settle. A lot of lawyers don't offer that, so we pretty much act as their... bank'.⁶⁷ However, such mechanisms were naturally restricted to those clients who owned real estate, and might be accompanied by an uplift fee:

*We do have an agreement that we can sign with a client to put a caveat onto a property for security for our fees if they want to go that way. We've only recently actually discussed as a team that if we're doing that, we should probably build in an uplift.*⁶⁸

Other alternatives to this included, in relation to family law property matters:

*Entering into an agreement with [clients] where our payment comes from the money they receive for the settlement, which is usually either a property sold, they receive a payment from the other side, or they're refinancing a property and will pay us as part of what they refinance.*⁶⁹

Such arrangements required clients to commit to making regular, nominal, payments against the balance owing over the course of the matter.

The final strategy used to reduce fees was supporting clients to secure funding. This approach, in the words of one practitioner, stemmed from the fact that: 'As a small business, we can't be people's banks. We're probably better off telling them to go and get a credit card with \$15,000 on it than us forking it out for them'.⁷⁰ Typically, supporting clients in this regard involved referring a client to a professional litigation funder or encouraging clients to consider seeing what support their financial institution or bank could offer, though in the words of one practitioner: '[Clients] don't like it. Clients think that we should be the bank and not charge interest. Of course, I try and point out to them that I don't understand why I should have to ... fund their [litigation]'.⁷¹

64 Practitioner 13.

65 Practitioner 5.

66 Practitioner 15.

67 Practitioner 10.

68 Practitioner 16.

69 Practitioner 4.

70 Practitioner 16.

71 Practitioner 3.

In contrast, other practitioners were strongly opposed to the use of litigation funders because they did not ‘...feel comfortable with the information that [funders] require[d the practitioner] to provide’.⁷² One practitioner elaborated on this further, explaining that their views were based on their understanding that:

The first lot of litigation funders that worked in family law required lawyers to provide merits-based information on what they thought the client would get. That then led in a couple of noted occasions [to] the litigation funder taking action against the lawyers. Effectively, what happened is lawyers wouldn’t use them anymore, and they went bust. The new ones that have come up have said, “Oh, no, we don’t require you to give a merits-based assessment.” [But] a lawyer has to sign the contract as well as the client. If you look at their contract, [what you are required to give them] and what you’re actually asserting...we think that leaves you open, and it’s only a matter of time before someone gets sued, so we’re not interested.’⁷³

The same practitioner also went on to note that the new litigation funders: ‘...all work on the basis that they’ll only lend money to clients who’ve got security to give, they’ve got a house, for instance’ and as such, advised their clients to ‘...go to one of the lower-tier lenders if you think you can get that level of funding’.⁷⁴

In sum, there are a variety of strategies practitioners employ to try to reduce fees and make their services more affordable, particularly for those clients who either have limited funds or run out of money part-way through a matter. However, the extent to which practitioners were flexible with costing and payment arrangements appeared to depend on the risk of non-payment that they were prepared to bear.

But while some practitioners were willing to offer fee reductions or free services to especially disadvantaged clients, and others supported clients in financial need via unbundling, entering into formal or informal deferred billing arrangements or referring clients to litigation funders, they were less receptive to efforts to negotiate, as explored in the section that follows.

2.1.5 Negotiation

Under the LPUL s 175(2), practitioners are required to inform clients that they have the right to negotiate on fees, and they are required to include this information within a written costs disclosure. Practitioners, however, reported that the degree to which there was genuine opportunity for clients to negotiate on the costs of legal services varied. One practitioner observed that: ‘...clients certainly are not aware that they are able to ask that.’⁷⁵ This was attributed to clients’ lacking the confidence or capability to negotiate and the approach taken by practitioners when clients did attempt to negotiate.

⁷² Practitioner 14.

⁷³ Practitioner 14.

⁷⁴ Practitioner 14.

⁷⁵ Practitioner 17.

In relation to the former, there was some indication that certain clients appeared to be more willing to try to negotiate than others. While this is likely to reflect their degree of legal capability, those who sought to negotiate were also identified as those who were either particularly price conscious, keen to minimise their overall costs, or had unrealistic expectations of how much legal services should cost. Practitioners reported that these efforts to negotiate might include requesting a price match with another practitioner. Such requests generally received short shrift, with one practitioner describing it as follows:

Most of the time people will negotiate right at the beginning. Especially in terms of litigation, they'll say, "Oh, I've got a matter going to trial in two months' time. My lawyers quoted me \$50,000 to \$75,000, and how much could you do it for?" I'll give them a quotation and then they might say, yes or no. I wouldn't say they're hugely negotiable because if they will come and say, "Oh, but could it be this much, could it be that much?" I just tell them, "Look, I'm not a fishmonger, this isn't the fish market. You're buying my professional services. This is what I know that I can do a good job for, and I'm not willing to do it for less because I don't think I could do a good job within that budget".⁷⁶

As such, whilst practitioners routinely indicated that a negotiation clause was included within their costs disclosure, practitioners largely refused to negotiate with clients. This was true across all pricing models and areas of law, and extended to both transactional and litigation work. The extent of this uniformity suggests that the negotiation term used in practitioners' costs disclosures is largely hollow and in fact was often contradicted by practitioners during verbal conversations, particularly at the first meeting. As the same practitioner explained:

My fees generally are not negotiable. Actually, I communicate to them that they're not negotiable... I know... in the regulations... it says that you have to communicate to clients that they have a right to negotiate the fees... Well, my fees are what they are. They're already at the low end of family law.⁷⁷

In other cases, the required language around negotiation contained in a practitioner's costs disclosure was contradicted by other wording in the document. For instance, one practitioner indicated that their cost agreement also included the terms: '*...that [the client] may be able to find someone who will do work for a different price or on different terms and that the agreement is to our advantage.*'⁷⁸ This language appears to suggest a 'take it or leave it' approach to the fee set out in the cost disclosure, further supported by the fact that this practitioner did not negotiate on their hourly rate.

While practitioners were generally unwilling to negotiate on price, there was some evidence to suggest that some did engage in discussions with clients about what was to be included within the scope of work. In these cases, negotiation was possible where it reflected a reduction in the amount of work, rather than in the cost of conducting work:

⁷⁶ Practitioner 2.

⁷⁷ Practitioner 2.

⁷⁸ Practitioner 14.

It is in the cost agreement notice, isn't it, that you can negotiate fees in the terms. In reality, I've had people ask... "can [you] do something cheaper," but sometimes, you just say, "No," or sometimes, you will say to them, "Okay, I could take this off the package or this," or more typically, I would refer them to a lawyer who does really similar work but is not priced at the same point...I don't genuinely negotiate on price.⁷⁹

This was also echoed by another practitioner in respect of fixed fees, who said: *'I would give them the options about how they can best utilise me given the budget.'*⁸⁰ Naturally, this requires practitioners to be extremely clear about the boundaries of the services agreed.

Similarly, another practitioner reported that they might take the client's circumstances into account when responding to client negotiation attempts, but negotiation still appeared to be predicated on a reduction in the work performed:

The initial calls will come in to my assistant and she'll say, "They only want to make one change to the will. They're a pensioner." I'll say, "We'll do it for \$200 or \$250," or something. We will reduce it, depending on the client...It might be I just can bring up the old will that I've done five years ago and make a change on the computer and print it out. I'm not going to charge full price.⁸¹

In other circumstances, this practitioner reported that they might offer a nominal concession to appease a client, explaining that: *'when it comes to estate planning, I typically won't reduce them...You might take \$100 off of something just to appease them.'*⁸² However, it was also the case that those charging with reference to the PRO or Court Scales would effectively be undercutting those scales if they offered negotiation, and hourly-rate practitioners were, on the whole, very firm about the non-negotiability of their hourly rate.

Taken together, interviews with practitioners suggested that although a negotiation clause is generally included within a costs disclosure, practitioners do not appear to make good on the requirement to actually negotiate. Indeed, for certain forms of billing, including Court Scales, PRO and hourly billing, there is little if any scope to negotiate the price of particular services. It is not clear whether the right to negotiate as required by the LPUL is intended to encourage more competitive pricing in legal services by promoting negotiation, or whether it is actually attempting to communicate to clients that they have agency over their costs and do not have to respond to the proposed scope of legal services in a 'take it or leave it fashion'. If the latter, it may be more appropriate for this entitlement to be articulated explicitly, rather than couching it within 'a right to negotiate'. If such a direct approach were to be taken, it would need to be made clear that the exclusion of certain components of a legal service may have adverse effects, and as such, a practitioner may refuse such a request.

⁷⁹ Practitioner 17.

⁸⁰ Practitioner 15.

⁸¹ Practitioner 13.

⁸² Practitioner 13.

2.2 Billing

2.2.1 Billing Frequency

Although practitioners differed in terms of how frequently they issued bills to clients, monthly billing appeared to be the standard approach, particularly among practitioners who priced their services by the hour. Issuing bills at monthly intervals was viewed by some practitioners as an important means by which ‘...[t]o avoid bill shock’.⁸³ Regular billing was seen as having several benefits, including promoting regular cash flow, manageable payment increments for clients, and reduced stress for both lawyers and clients at the end of the matter when attention turns to the issue of payment. As one practitioner explained: ‘...[monthly billing] makes a really big difference’⁸⁴ when compared to billing at the end of a matter because:

...the concept of having an actual bill with a running total as opposed to a letter that says, “We estimate your fees to date would be this,” makes a huge difference to [clients] understanding, makes them a bit more responsible for their costs too. You’ll find they’re a bit more judicious in keeping communications to what’s necessary and those things.’⁸⁵

The requirement for clients to pay regular amounts towards the costs of their legal services was therefore seen as a useful way to ensure that clients remained mindful of the expenses associated with their matter, and actively involved in avoiding or reducing unnecessary costs.

Efforts to prevent bill shock were also the driving force behind another practitioner’s adoption of fortnightly, rather than monthly, billing:

We try and bill fortnightly. I don’t let these things run up...people like getting smaller bills rather than larger ones. Every three months is very unhelpful, I think...my staff will let them run up a bit and I try and say to them, “they’ll hate this. Then they’ll tell you they can’t pay and what are you going to do then?”⁸⁶

⁸³ Practitioner 12.

⁸⁴ Practitioner 4.

⁸⁵ Practitioner 4.

⁸⁶ Practitioner 3.

Other practitioners adopted a more fluid approach to regular billing, in which bills were not issued according to certain periods of time, but rather rendered at strategic points in a client's case. These strategic points were identified by one practitioner as follows:

It's a golden rule of billing that I was taught...[that] you've got to bill at the height of the J-curve...when you are engaging with the clients and you're ringing them every day because it's intense, litigation is intense. Then there's just months when you don't speak and there's nothing. That's not when you send out a bill. Just send out a bill when they remember how much work was involved, when you remember how much work was involved... If you try and send them out a bill after six months and we're about to enter into a new stage, that's not fair to either them or you... [If you bill at the height of the J-curve] then you can revisit your cost estimate as well, and then they can make their decisions about how to move forward on all of that.⁸⁷

For other practitioners, strategic billing was undertaken at moments where clients were able to observe tangible progress in their matter. As one practitioner explained, they would bill

...[when] you get to a certain level or a certain stage rather than give them a great big bill at the end and get a shock. Even if you give them updates, I think, it's a lot easier when the money's actually coming out of their pocket because they see how they're spending it.⁸⁸

For other practitioners, strategic billing was less to do with client perception of the work done, and more to do with ensuring the affordability of bills for clients. One practitioner for instance, had a policy where any accrual on an account of more than \$500 automatically resulted in the generation of a bill.

Whilst the frequency of billing did not appear to vary depending on the matter in question, at least one practitioner adopted a different approach when billing those who attended for one-off advice sessions, as compared to those whose matter was ongoing. This approach was intended to address the needs of clients, whilst also ensuring that debt recovery did not become problematic. As this family law practitioner explained:

...for people who come to see a family lawyer to get one-off advice because they haven't decided to separate or not yet or don't want their partner to know, often they'll pay you in cash so there's no trace. People wouldn't want to give you their real address because you were going to send an invoice, so you'd have to get another address, and then they didn't pay it. Then the whole thing starts to become rather circular. I just thought if you get them to pay on the day...Then our bookkeeper, who works remotely, does the tax invoice immediately.⁸⁹

⁸⁷ Practitioner 15.

⁸⁸ Practitioner 6.

⁸⁹ Practitioner 6.

In contrast to the above, there were a number of wills and estates practitioners working in regional areas who did not use regular billing, and instead opted to simply bill at the end of a matter. This approach may be explained by the need to wait until money was available from the estate to pay for the legal services rendered, as discussed in Section 2.1.4. This meant that unless there was an interim distribution that enabled an interim bill to be rendered and paid, billing would wait until the end of the matter.

Some variation was also seen in respect of fixed fee practitioners, who would often request payment for the work up-front at the start of the matter. Problematically, however, this option was not available for those without a trust account, meaning they had no choice but to wait until the end of a matter to bill for payment. For one practitioner this was viewed as a major stumbling block in the adoption of fixed fee pricing:

I think that the regulation needs to be more clear about when a fixed fee lawyer can charge their client. For example, if you've agreed on a fixed fee for a particular piece of work and it's not refundable, are you allowed to send out an invoice? At what stage of doing that work can you send out the invoice? I don't think the regulations adequately address that... I don't think [the regulator] has given it much thought at all. I think they just assume that people are going to do the work for a fixed fee and send out an invoice once the work is done and wait for it to be paid. I don't think that's the way that the majority of the business world works these days. You just can't trust people that much, you know?⁹⁰

It was also considered a barrier to the adoption of alternative billing arrangements such as 'bill smoothing' or payment plans by another solo fixed fee practitioner. Understanding how common it is for practitioners to operate trust accounts and to require payment in advance is therefore key to ascertaining the scale of this issue.

90 Practitioner 2.

2.2.2 Billing Arrangements

2.2.2.1 Trust Accounts

Across interviews, it appeared that more practitioners required funds to be paid into a trust than did not. The use of trust funds was especially common in family law, where practitioners frequently explained that their standard practice was to require clients to deposit money into the firm's trust account prior to the commencement of work. Nevertheless, the amount of money that they required to be placed in trust varied. For instance, one practitioner who billed at set \$500 accrual intervals indicated that a client's account would always need at least \$500 in balance. Similarly, another family law practitioner explained that: *'we'll ask [for] between \$500 and \$2,000 upfront at the very beginning [in trust] and then before commencing proceedings, we'll ask for an extra couple of thousand.'*⁹¹ If it was also necessary to instruct a barrister, then the money for that would also need to be placed in trust. The requirement to pay upfront into trust accounts for disbursements in this manner was also employed more widely among other practitioners interviewed.

Other practitioners varied their approach to trust accounts based on the matter in question. As one family law practitioner explained: *'Generally speaking, probably about a third of our clients would pay money on trust prior to the work commencing... If it is children-only, we would always need the money on trust first or an arrangement.'*⁹² Hence, the potential volatility of a matter and the risks associated with a case expanding beyond what was originally anticipated motivated some to require money in advance.

In contrast, there was also some evidence to suggest that the requirement to pay into a trust account upfront could be negotiated in some instances. As indicated by a family law practitioner who ordinarily insisted on payment up-front:

*We've got some clients that say, "Look, I'm not going to pay you upfront. I just will not pay you upfront. I just don't like that idea. I don't pay for anything upfront but you do the service, render an account to me and I'll pay within seven days but I won't pay you upfront." We say, "Fine, that's not our practice. That's not how we do things but we understand your objection and we'll do that but you understand if you don't pay within seven days then we've got the right to say, okay, wait...no more work done".*⁹³

However, two solo practitioners reported not using trust accounts as a result of the administrative and financial burden associated with running them:

*I just don't want to [use] trust accounts. I find them really hard. I know who they're there to protect, but the impact that they have on the choices that I have as a business owner, my end of the scale. It's just hard. I probably find them difficult to work around, so I've just opted out of them.*⁹⁴

⁹¹ Practitioner 16.

⁹² Practitioner 4.

⁹³ Practitioner 10.

⁹⁴ Practitioner 17.

*I choose not to operate a trust account because of the costs involved in doing so. I do have the qualifications, I've done the course, so I've operated a trust account before. It's well within my capability, and it wouldn't take much time, but I choose not to because of the costs of the audits and then all the compliance and all that.*⁹⁵

As discussed in Section 2.2.1, these administrative and financial burdens present challenges for those practitioners operating on a fixed fee basis because *'you typically don't want to be doing any work until the client has paid something. At the same time, you can't just ask them for \$5,000 upfront if you don't have a trust account'*.⁹⁶

Although payment into trust accounts was a relatively common practice, there were instances where practitioners were prepared to deviate from their established trust and billing practices. There was also variation seen in respect of the level of detail provided in the bills issued to clients, as discussed further in the section that follows.

2.2.3 Bill Itemisation

Previous research has raised the question of whether the level of detail provided on a bill adequately enables clients to understand the work involved in resolving their matter.⁹⁷ For example, a large bill with a single line item is unlikely to provide a client with sufficient information to assess the nature of the expenditure being incurred. At the same time, more onerous requirements in respect of bill itemisation need to be considered in light of the fact that time recording is already a significant time burden. Whilst the LPUL grants clients the right to request an itemised bill, it is prudent to consider exactly how detailed these bills are in practice.

As a matter of routine, most practitioners, including many of those who offered fixed fees, time-recorded matters. Given that clients are entitled to an itemised bill if they ask for one, it made sense in the view of one practitioner to time record as a matter of course: *'[Even although we do fixed fees] [w]e record every bit of work we do because if the clients want an itemised invoice, we still need to give them that, which we'll just list the work. We record all our time...'*⁹⁸

However, the level of detail provided within bills often differed. For those practitioners who reported providing greater detail in their bills, the view was that this generally helped clients track what actions had been taken by their practitioner and how their matter was progressing:

*I have always done itemised bills, first up, no request, we just do it. The itemisation typically gives a little bit of description about each item, so it might be a letter to [the] other firm about X issue, which helps the client, I think, track. When they look at the bill, they know what it means.*⁹⁹

⁹⁵ Practitioner 2.

⁹⁶ Practitioner 2.

⁹⁷ Jennie Pakula, 'What, Exactly, am I Paying For?' *An Investigation into the Root Causes of Costs Dissatisfaction* (Victorian Legal Services Board + Commissioner, 2022); Jennie Pakula, 'Ten Things I Hate About You: How to Avoid Costs Complaints' (2014) 123 *Precedent* 40, 40.

⁹⁸ Practitioner 1.

⁹⁹ Practitioner 14.

[I send an itemised bill] every time. It's been captured. I don't understand why firms don't just send the summary. I'm just like, [h]ave it from the start. I've already done the work recording it, so just press print...[It will say] "phone call with executor discussing email dated 24 August or whatever"...I just try and keep it very short, but I certainly give more information than "TA – telephone attendance with executor", I'd be like, "TA with executor and... [t]hen a very brief [description of] what it was about".¹⁰⁰

Others also noted that the level of detail differed depending on the time ascribed to any single activity:

...if, say reading five emails took me an hour during the day, I have to justify why... I'll say, "Email from client receiving instructions about so and so's affidavit," or if it's just an email from client. ...My next entry might be that day or the next day... "considering attachment to email from [the] other side or considering proposed orders from the court." I will say what I've done and if I'm drafting, I will say, "Taking instructions and redrafting your affidavit in reply," or, "your initial affidavit".¹⁰¹

At the same time, it was also observed that the level of detail may differ on account of whether the work was being charged according to a fixed fee or hourly rates. In the view of one practitioner who offered both pricing models, hourly rates demand greater specificity:

If it's fixed fee...[then] just a short description... [For hourly rates] I think it's important to have a [more] detailed description. It's not just "attendance lawyer" it's like, "Well, what did you do?" and a bit of detail.¹⁰²

This practice of providing greater detail for hourly rates as compared with fixed fees was a common approach described by practitioners across the sample. It is possible that given the lack of an overall cap on expenses that a client can incur when they are instructing a lawyer on hourly rates, there is greater risk of scrutiny from clients or a perceived need to be more accountable for charges when using this pricing model. Indeed, it was observed that one of the key benefits of routinely providing itemised bills was that this could help the client understand the scale of work being conducted:

...I've found since we've [started having itemised bills] even if someone's a bit disgruntled about the amount when they actually see the work that's being done, they can't argue with you about it, or they actually realise that there's a lot of work, maybe that's happening that they didn't actually know was happening or was required to happen.¹⁰³

¹⁰⁰ Practitioner 17.

¹⁰¹ Practitioner 15.

¹⁰² Practitioner 13.

¹⁰³ Practitioner 8.

For other practitioners, itemised bills allowed clients to see what they were *not* being charged for and to communicate the gratis components of work that some practitioners routinely included, or to show where time spans had been reduced to account for the lesser efficiency of a junior lawyer (as discussed further in Section 5.2):

*I think what our bills show is that clients are not charged for a lot of stuff, so we'll put in there, "no charge," or whatever. They see everything that's been done, but they can see what they're charged for and what they're not. Let's just say a junior lawyer takes 20 units to write a letter. I think that's too much for that letter. Then the entry would be changed to ... 20 units, but [only] say X amount [charged].*¹⁰⁴

Including detail to justify the charges, as well as to emphasise where practitioners were willing to waive certain charges, may also reassure clients that their lawyer is taking a holistic and cost-conscious approach to their case, especially in relation to hourly rates.

As detailed in Section 2.2.1, there was a view that frequent billing could encourage clients to be more judicious with their expenditure. At least one practitioner confirmed the same was also true of itemisation, explaining: ‘...everyone gets a lined item. [This can help with file management as the client] realise[s] if they stay on the phone for half an hour, it's half an hour's billable work.’¹⁰⁵

Yet, in spite of these benefits, some practitioners nevertheless expressed strong objections to having to provide excessively granular information, drawing an analogy with other service professionals in the health field:

*I don't think you go to the dentist and say, "Well, I know you're charging me \$220 for the filling, but what did you really do? Okay, could you break it down for me? Did you first put a sheet over my mouth, did you then spray some disinfectant? Did you do this, did you do that?" I think that is the wrong answer to the right question...I think the conversation of the client has to be, "You're coming to me to deliver a result. This is the goal that we're working towards. Don't necessarily question me on all the granularity of how that is achieved...if you need to know, I would tell you."*¹⁰⁶

This reflects a backlash against the perceived pressure some practitioners felt to justify the value of their services to clients, with the same practitioner also reporting that it could lead to higher bills:

*I say [to my clients], "Look, I will send you a one line bill and it says, this is what it is, and if you want me to break that down into specific detail, please be aware that the amount may increase, because I'll really start to think about what I did, and I'll probably find things there that I should have charged you for," because it's very time-consuming.*¹⁰⁷

¹⁰⁴ Practitioner 14.

¹⁰⁵ Practitioner 6.

¹⁰⁶ Practitioner 2.

¹⁰⁷ Practitioner 2.

Broadly speaking however, practitioners typically maintained itemised billing records and performed time recording regardless of the fee model used because of their requirement to comply with the LPUL obligations to provide an itemised bill if requested by a client.

2.2.4 Responding to Billing Complaints

Across interviews, practitioners reported the receipt of complaints to be rare, with complaints escalated to the regulator, rarer still.

I personally very rarely have disputes over a bill, very, very rarely, touch wood. In the last 3 years, if I looked at my practice management system recently, I've only got one client in my entire system who didn't pay me for work that I did.¹⁰⁸

We have about 1000 new clients a year on average in the practice, and we probably get maybe 10, usually about 10 to 12 [complaints]. One complaint a month goes to the Legal Service Board Commissioner and usually they drop very quickly because once we disclose our disclosure documents, we disclose our bills, we disclose everything, it's pretty clear that one of the clients is just unhappy and pissed off, because of the situation, and whatever, he just wants a grievance. We resolve those pretty quickly or narrowly.¹⁰⁹

Those practitioners who had worked across family law and wills and estates indicated that in their experience: *'most of the cost complaints come in the family law jurisdiction.'*¹¹⁰

Aside from matter type, the pricing model used was also seen by some as relevant. One practitioner reported that, since shifting to a fixed fee firm, they had observed far fewer complaints: *'All I can say is that we used to have so many people complaining about costs when I was doing hourly rates at previous firms, and no one complains about them now.'*¹¹¹ Yet, further comments from the same practitioner suggested that complaints did arise in respect of fixed fees, particularly where the fixed fee was revised and it was not clear to a client why this revision had taken place, or where the client assumed that even where the scope of work changed, the price would remain the same. These instances were difficult to deal with, as the practitioner explained:

Look, [you've] just got to be quite firm. I don't know how I deal with it. I guess, be understanding as to why they might be frustrated that it's costing more than they initially expected, but just really explain to them, we give you a fixed price so you've got certainty as to how much fixed is going to cost. When we gave you the fixed price, it was anticipated that this type of work would be involved, and now we're clearly doing another type of legal work or extra legal work, and we've got to give you an extra fixed price for that. It's usually hard.¹¹²

¹⁰⁸ Practitioner 2.

¹⁰⁹ Practitioner 10.

¹¹⁰ Practitioner 13.

¹¹¹ Practitioner 1.

¹¹² Practitioner 1.

The experiences of other practitioners, discussed further in Section 5.3.2, suggest that clients were usually understanding about a change to an estimate or fixed fee because they were aware of the circumstances that caused or facilitated the change.

Irrespective of the fee model, practitioners emphasised the importance of engaging the client in a conversation as soon as possible where a complaint arose:

Pick up the phone and speak to someone. It's generally the best way...They might raise an issue about something and you'd be like, "Okay, we'll reduce it by that amount." ...it's a goodwill gesture. ...It's being proactive when the issue comes up and nipping it in the bud.¹¹³

It's always a conversation, hopefully, it depends on the person. Some people don't want to discuss it with you, but you always try and have a conversation, preferably again in person, but if not, then certainly over the phone and try and resolve what the issues are, why they're concerned, and then try and just resolve it. I think nine times out of ten in the same way we advise our clients to compromise and resolve disputes, we should do the same.¹¹⁴

The key thing with cost disputes is to answer them quickly, provide a discount if you can, if you think it's appropriate, and resolve it. Don't let them linger, always make sure it's given to one of the senior partners...and provide an appropriate discount if you think there's been a delay or something wasn't done as efficiently as it could be when you look at the file, then we will be prepared to discount.¹¹⁵

This process was aided by making sure 'that clients know if they want to query something in their account, there [i]s no charge for it'.¹¹⁶ Other practitioners agreed with the need to speak with the client, though, reflecting the size of some firms, delegated that responsibility to the in-house cost consultant. Explaining the basis for each charge was important in communicating how costs accrued in legal services, with practitioners noting that once the client had obtained further explanation for a charge, they were usually satisfied:

The client might ring up and say, "Well, I only [had] one telephone call with [name], and [I've been charged] \$600 and the phone call was only for 12 minutes, how did that happen?" The consultant, she will take them through and usually, she's satisfied to say, "Well, [name] then wrote a letter to the other side, he rang them up on your behalf, he then had to sit down for an hour and looked at some documents. All this work was done without your involvement as a client, but it was done for you." They're usually fine with that... if they're still aggrieved, we ask them to put their queries in writing, and we will respond to them in writing.¹¹⁷

¹¹³ Practitioner 13.

¹¹⁴ Practitioner 8.

¹¹⁵ Practitioner 9.

¹¹⁶ Practitioner 6.

¹¹⁷ Practitioner 10.

Often the client doesn't realise what work's been put into it and I offer to give them an itemised account and explain that they're entitled to ask for that, I have no problem about doing that. I do occasionally do itemised accounts. I would do several every year, I think. They're pretty boring and labour intensive to do, but we have to do it and I'm happy to do it. Usually after I provide that, that's the end of the matter.¹¹⁸

Dialogue with the client might also led to a reduction in a bill on the basis that maintaining a positive relationship with the client was more important in the longer run. In the words of one practitioner: *'I tend to just take it off their next [bill] as a gesture of goodwill because it is usually \$50 and it's not worth [it]. I think the client relationship is worth more...'*¹¹⁹

Similarly, another stated:

Often, they might raise it and we might just agree to discount 10%, 20%, or something...a client might say, "this is outrageous, I didn't expect to have to pay that much", and [I] go, "look, you're at the end. We'll knock \$5,000 off, and let's just get it done".¹²⁰

When it came to clients who failed to pay their bills, practitioners explained that this was relatively rare, particularly where a client had been properly informed about costs. This encouraged practitioners to appropriately manage clients' expectations as to costs. As one practitioner reported: *'People can sometimes ring up and go, "Oh, it's a bit more than I thought." It's not that common because if you manage expectations, you don't usually get it.'*¹²¹ Nevertheless, it was not unheard of for such instances to arise even where expectations were properly managed, because *'...people haven't listened'*.¹²² Challenges around communicating costs to clients are discussed in more detail in Section 4.

A decision as to whether to pursue clients over unpaid bills typically turned on the individual practitioner and the circumstances of the case. Notably, some practitioners were unequivocal they that would not chase a client over an unpaid bill:

If people are not paying me, there's a reason... Either I've done something wrong in terms of the retainer, or the way that I've managed it, or they genuinely might feel that I don't deserve that particular fee to be paid. I'd rather not go there, it would open a can of worms.¹²³

Others did not pursue clients over unpaid bills where they thought it would involve too much effort. For example, clients experiencing mental health difficulties were less likely to be the subject of cost recovery action. This did not mean that every client experiencing mental health issues would or could have their fees waived, the broader context and the efforts of the practitioner in question were relevant factors. One practitioner told the story of a client who, in spite of all the information provided to them about the costs of their matter, concluded that

¹¹⁸ Practitioner 5.

¹¹⁹ Practitioner 12.

¹²⁰ Practitioner 3.

¹²¹ Practitioner 7.

¹²² Practitioner 7.

¹²³ Practitioner 2.

the practitioner was not charging for the work conducted. The client was appreciative of the work and believed the practitioner had done a wonderful job, and yet had become very rigid in their thinking and was operating under the illusion that no costs would apply. This practitioner explained that:

...[the] client had been charged much less than she should have been. All the costs have been assessed. They were less than I'd estimated, and I just thought, "No, I'm not going to let this go this time. We don't make that much money that I can afford to do that," and she had three matters. It cost her, I think \$42,000 in all, in costs and disbursements and barristers' fees, and the other side's costs were all much more than that...so I just said, "No, I'm not letting that one go,"...it's the first time I've done it.¹²⁴

Such examples also lay bare the fact that even with clear communication around costs, adequate support structures in place, and satisfaction with the work completed, costs disputes can and do still arise.

Finally, as was noted by a few practitioners, requirements placed on lawyers with regards to billing were substantially more onerous than those placed on many other service professionals. One practitioner in particular took issue with both limits on the Law Institute's cost service and requirements to set out in a bill that the bill could be challenged, and to give clients what they considered was an excessive amount of time to challenge it:

I do think the Law Institute have done us a grave disservice by saying in their bills that we don't have access to the cost service unless it's less than \$100,000 dispute not that that happens to me much and this rubbish we have to put on it at the end of our bills, a whole lot of blurb that you can dispute this bill, you can do this, you can do that, you can do this and you have a year, a year which is insane. It's terrible... "here's our bill and here's all the ways you can dispute our bill and you have a year to do it." ...Do they act for us or what? That's an insane thing to have. Absolutely insane...It's ridiculous. Which doctor, electrician, plumber, anyone else writes at the bottom of their bill, if you do not agree with this bill you can do A, B, C, D, you can do X, Y, Z and you have up to a year to do it?¹²⁵

That it was possible to challenge a bill, so long after the fact, was also viewed as problematic by other practitioners given that the passage of time impacts on memory recall, even where file notes are made and detailed time recording is completed. These concerns call into question whether the 12 month dispute window appropriately accommodates, on the one hand the need for a practitioner to close off a matter and receive payment in a timely fashion, and on the other, the importance of giving a client space to reflect on and then take action in respect of costs that they believe are unfair.

¹²⁴ Practitioner 11.

¹²⁵ Practitioner 7.

2.3 Regulatory Insights and Implications

Section 2 has set out the way in which practitioners set their fees, their reasons for adopting a particular pricing model, the strategies they employed to reduce fees, the extent to which they negotiated on fees, as well as their billing practices and use of trust accounts. Findings raise several issues relevant to regulation.

First, the approach to pricing taken by the practitioners in the sample reveals that many practitioners, including those using fixed fees, use time as a method of calculating costs. Time also appeared to be implicitly factored into the quantification of costs by the value-pricing practitioner interviewed, though in combination with other factors. The existence of other factors appeared less true of those instances where value pricing had been trialled by hourly rate practitioners. Here a more direct equivalence between time and value seemed to prevail, and this, when combined with the tendency of hourly rate practitioners to restrict value pricing to clients they described as 'high-value', may point to a broader misunderstanding of the value pricing model.

Given the limited inferences we can draw from the current sample of practitioners, there is merit in regulators gathering more data to inform a better understanding of how value pricing is operating in the market and the potential it holds as a mechanism to widen middle income access to justice and prompt a shift away from time-based pricing. Further research would also need to consider the extent to which regulatory uncertainty associated with value-based pricing may inhibit wider adoption, an issue raised by at least one practitioner in the following terms:

*I think it would be difficult if you were doing value-based costing, for example. I haven't done that, so I haven't really looked at how you would fit that in Uniform Law, but I don't think it would fit very neatly in the Uniform Law. I think that's part of the reason why we probably haven't explored that, because I think you would struggle to comply with value-based, particularly if you end up in a cost dispute and your file was given to the cost board to tax. How do they tax a value-based engagement?*¹²⁶

A more detailed exploration of value pricing might also consider how value is conveyed to prospective clients, and how clients understand 'value' in the context of what they are purchasing. As has been noted in Section 1, identifying and demonstrating the value of legal services as a form of credence goods remains a challenge. Establishing how value can be communicated and how it is received by consumers, and providing guidance in relation to this may encourage more practitioners to look beyond just the quantification of time.

126 Practitioner 9.

Second and relatedly, findings set out that fixed fee pricing was relatively rare in respect of negotiation and litigation services. For transactional services, fixed fee pricing typically relied on practitioners being able to confidently assess the amount of work a particular task might involve. Given that this applies to a relatively narrow set of tasks involved in both wills and estates and family law practice areas, we might expect uptake of fixed fee pricing models to continue to be low. Where fixed fees were offered in respect of negotiation and litigation work, they appeared to be tightly conditioned on the nature and predictability of the dispute in question, leading some practitioners to question just how fixed a fixed fee arrangement was in practice. This is an issue discussed in further detail in the sections that follow. What the data in Section 2 suggests therefore, is that fixed fee services are generally only offered for more straightforward tasks, stages, and matters, often only where potentially complicating factors are absent, and where the risk of the matter escalating or becoming involved and drawn out appeared to be minimal.

However, it also appears that some hourly rate practitioners do not have a thorough understanding of how fixed fee pricing usually operates, with many rejecting it on the basis that a 'one size fits all' approach to pricing services is unrealistic and unviable. As detailed above, fixed fee practitioners tended to offer a menu of services, or otherwise produce a bespoke fixed fee depending on the nature of the matter at hand. Further, as is discussed in Section 4 and 5 below, practitioners place a range of conditions on their offer of a fixed fee, typically enabling repricing to kick in where a matter changes beyond the anticipated scope or trajectory.

That practitioners may induce clients with the offer of a fixed fee, which is then subject to regular revision, has the potential to undermine transparency and certainty. Although we did not see evidence of that in our sample, it was an issue that practitioners raised and one that might well be expected to heighten rather than reduce cost complaints if it were to become common practice. Where there is genuine difficulty in setting a fixed price based on the indeterminacy of the matter at hand, micro-pricing – that is, breaking up a matter into much smaller stages than is usually the case – may offer a means by which to minimise risk for clients and practitioners. Whilst micro-pricing was not an approach raised by the practitioners we interviewed nor were they asked to comment on it directly, it may merit further evaluation, particularly with reference to the concerns raised in Section 4.

Beyond having the time, support and consensus to move away from traditional time-based pricing models, there also appeared to be a sense of ambiguity expressed by at least one practitioner as to when a sole practitioner or small firm operating without a trust account can bill a client. One practitioner was strident on the need for more regulatory guidance in this area, and another indicated that their unwillingness to operate a client trust account meant that other bill smoothing mechanisms could not easily be put in place. It also meant that practitioners – arguably those least resourced to do so – end up acting as a client's bank. This has inherent and underlying costs and risks attached which are invariably passed on to the client, irrespective of pricing model.

This Section also found that the requirement to inform clients of the right to negotiate appeared to be largely hollow in practice, given that practitioners are almost always resistant to negotiation efforts and indeed in many cases set out that they did not negotiate. This was true even where the cost disclosure provided to clients said otherwise. Whilst there may be scope for clients to negotiate on payment terms, and practitioners may be amenable to strategies to make their services more affordable through pro bono, substantial discounting and service unbundling, such strategies were widely distinguished from what practitioners assumed cost negotiation entailed. In large part, practitioners rejected what was often seen as clients haggling about either hourly rates or fixed fees. As a consequence, those clients seeking to either shop around on price or negotiate lower prices on the basis of what other practitioners charge, must face the substantial burden of not only understanding the nature of their matter and services included in any quoted fixed or other price, but also of engaging with practitioners who are reluctant to negotiate on the basis of what others may or may not do. It is unclear whether this requirement in the LPUL is intended to encourage competition in the marketplace, or whether it is intended to encourage clients to assert more agency and control over the direction of their matter. If the intention is the latter, then we would argue that alternative wording may be more appropriate to achieving such an outcome and we discuss this further in Section 5.

Finally, as it relates to good practice, practitioners set out the various ways in which they approached billing. Transparent approaches typically included having itemised bills as standard, and billing on a regular periodic basis to prevent bills 'mounting up' and heightening the risk of bill shock. Whilst the appropriateness of mandatory itemisation was met with differing views, and contested estate work poses challenges for regular or interim billing given that money may not be available until the conclusion of a claim, it was nonetheless agreed that regular billing helped avoid bill shock and may therefore merit inclusion as part of good practice guidelines issued to the profession.

With this background in respect of pricing and billing practices in mind, this report now turns to consider how clients go about choosing a lawyer, the extent to which pricing drives the selection of practitioners, and conversely the extent to which it drives the selection of clients.

3. Choosing a Lawyer

This Section explores: how clients make decisions about who to instruct; why lawyers avoid accepting instructions from certain clients; the intake processes used by practitioners and firms; and the timing of cost disclosures. Findings suggests that misunderstandings about the costs of legal services are common, with prospective clients presenting with different pricing expectations, varying degrees of understanding as to how certain factors affect costs, and a limited ability or willingness to shop around and compare different practitioners and firms. Practitioners highlighted the importance of the first meeting for addressing misunderstandings, managing expectations and establishing productive working relationships with clients. This Section identifies that costs are both central to a client's decision to instruct a lawyer and to a lawyer's decision to accept instructions from a client.

3.1 Initial Enquiries

3.1.1 Use of Price Guides

Cost is a significant influencing factor in many clients' decision to instruct a lawyer. Given this, a client's initial approach to a lawyer will often focus on ascertaining the cost of legal services. In response to this demand, many practitioners provided price guides that prospective clients could view on their websites, obtain verbally over the telephone, or receive via email. Whilst at least part of the motivation for providing these price guides was to enhance transparency of costs and attract clients, they were also used to filter out those who did not have the means or willingness to accept a firm's starting prices. This streamlined the first meeting with a client, as follows:

As soon as a client inquiry comes in, and [an] appointment [is] made, we get their email [address], we send them a price guide, we send them an explanatory memorandum about how the process works, so they get an idea of what they receive for those costs. The idea of that is to, in many respects, weed out people that just don't have the appetite for the cost.¹

¹ Practitioner 8.

Price guides were viewed by practitioners as offering insight into the fees that a client might expect to pay, rather than a price guarantee. In this way they operated as a starting point for the addition of further services, particularly in transactional wills and estates matters. As one practitioner explained:

When someone rings and makes an inquiry, they're told what our fixed fee is for [a] will versus what it is to do the whole package with the estate. My people on the phones actually do a fair bit of sales work, they are always trying to upsell into a full package rather than just a will.²

The provision of price guides was however, not without risk, with practitioners observing that providing guide figures prior to an initial meeting risked generating false expectations, confusion and misunderstanding, particularly where the complexity of the client's circumstances took them away from the 'starting point' the price guide was intended to represent. For example, several practitioners reported that they frequently received enquiries from prospective clients who based their price expectations on the advertised fee for basic wills, yet were seeking more elaborate estate planning services. This was seen across practice areas, with practitioners often needing to increase their estimates once further information about the nature of the client's matter, circumstances and desired outcome was obtained. For this reason, some practitioners explained how it was their ordinary practice to provide caveats on their prices guides at the earliest opportunity, *'I'd say, "Yes, just so you know, these are my packages, and you are already outside the exclusions, so just know that it's [only up from there]," and then they know that if they get on the call, it's only going to be that plus. That helps them and me.'*³ Other practitioners did not use pricing guides, and instead, waited until they had met with the client and gathered further detail about their needs, before providing costs information.

Hence for some practitioners, price guides were useful in filtering out those who for financial reasons, were unlikely to convert from a prospective to an actual client. However, others were inclined not to use price guides given the challenges associated with clarifying that prices represented only a starting point. For these practitioners, indicative prices were instead provided in person or via the telephone where client expectations could be better managed. On account of these challenges, determining whether price guides enhance client transparency or facilitate 'shopping around' remains difficult.

² Practitioner 16.

³ Practitioner 17.

3.1.2 Use of Intake Tools

Some practitioners reported going beyond just advertising their prices to screen prospective clients. For example, one practitioner explained that they employed an ‘intake form’ to gather information about an individual, including their assets and financial circumstances. Embedded with artificial intelligence, this form provided immediate feedback to the client as to their suitability for the law firm, minimising time wastage for both if there was limited possibility the enquiry would progress to instruction:

Part of the questionnaire, it asks them financial questions. It asks them about what assets they have, it asks them what their job is, what their income is. The form also has some artificial intelligence...where the form itself will provide them with feedback very quickly if they don't qualify as a client. One of the first questions is, are you expecting to be legally aided? If they say, yes, the form will just inform them straight away, "Thank you for your interest, but we can't help legal aid clients," and then it closes the questionnaire straight away. By having those hard filters, I'm able to make my enquiry process and intake process a lot more efficient because it immediately filters out people who I won't be able to help.⁴

Practitioners were generally enthusiastic about making initial client enquiries more efficient and effective. One practitioner in particular emphasised the value of conceptualising the initial enquiry stage as just one of four key ‘touchpoints’ in the lawyer-client relationship:

I would say my four touch points are, it's on my website, and I'm like, before our meeting these are the prices, sounds like you might be package one or package two. Then... we have our scoping call, and then I'll share my screen and we'll read through it again and I'll be like, "You'll get this and this and this." Then they get the cost agreement and then that probably is the last touch point.⁵

For this practitioner, the intake process comprised four distinct stages through which clients could receive information about costs, ask questions and clarify misunderstandings. In essence, the scoping call (the third touchpoint) was configured as an opportunity to speak to the prospective client one-on-one to determine which of the items on the price guide were required in their circumstances. In practice, this scoping call was akin to a traditional first meeting (as is discussed further in Section 3.2), and provided clients with an opportunity to gain an understanding of the price guide and avoid misunderstanding around what was and was not included in various fixed fee packages.

Consistent with the use of price guides and/or publicly advertising prices, the approaches practitioners adopted to manage initial enquiries were underpinned by three core objectives: to filter out clients who were neither willing nor able to pay for legal services at the firm in question; to provide a broad indication of possible costs in advance of the first meeting; and to ensure clients understood that any advertised pricing was indicative and could only be confirmed after an assessment of their particular circumstances and needs.

⁴ Practitioner 2.

⁵ Practitioner 17.

3.2 First Meeting

3.2.1 Purpose of First Meeting

The first meeting with a client was perceived as crucial stage which often determined whether a client would proceed to instruction. As such, practitioners were keen to emphasise the meeting as an opportunity to establish and set the conditions for the future working relationship between the client and the firm. This necessitated engaging in discussions of costs in a way that did not derail efforts to build a productive relationship:

I don't like talking about costs. It's not my favourite thing. I make myself do it at the first interview because I [am] supposed to. I tend to view my clients as people that I'm helping and I'm helping you, and yes, I'm going to charge, but that's by the by. I do however raise [the issue of] cost. I say to my clients, "This is what my fee is for the work" and they understand that.⁶

Broadly speaking, the first meeting was described by practitioners as an opportunity to effectively scope the matter, to set out what the client could expect from the firm, what the firm would expect from the client, and how costs could be contained. For example, in family law, where the unpredictability of disputes can make it particularly difficult to give clients an upfront indication of an expected outcome, the first meeting often involved setting out 'best case' and 'worst case' scenarios as end points on a spectrum, and emphasising the kinds of factors that influenced where a matter would fall, such as the extent to which both sides were willing to compromise, cooperate, and communicate. These conversations were used to demystify how fees accumulated and how a client's approach could influence cost accrual, as was illustrated by the following practitioner:

It'll be usually: "Oh, well look, I think if we're able to resolve this by agreement with a bit of negotiation back and forth and a bit of just exchange of documents, you're probably looking at seven and a half [thousand dollars]. If it has to go to mediation, you're probably looking at 15 [thousand dollars]. If it had to go to court, you might be looking at 30 to 50 [thousand dollars]. With everything you told me, I'm really confident that your matter would resolve at mediation so you're looking at 15 [thousand dollars]." That's something that they really can understand and probably, I think, alleviates any concerns.⁷

The first meeting was viewed, therefore, as an important opportunity to establish realistic expectations for a client before work began.

6 Practitioner 7.

7 Practitioner 4.

Ensuring that clients had an adequate understanding of how their matters would be charged was generally seen as an important investment of time for lawyers, and as such, several senior practitioners reported that they generally took responsibility for first meetings, rather than assigning these to junior colleagues:

As a business owner, I think some of those cost conversations are easier for me. What I find is trickier is with the staff who really want to be guided by us about what we want, what I want them to charge. They're less likely to, I think, engage in the process of scoping. They find it harder to scope the work, I think.⁸

This meant that matters ran more smoothly and misunderstandings about costs could be minimised.

In addition, practitioners reported using other methods to scaffold costs discussions. One practitioner in particular, as discussed above, reported using visual aids to explain aspects of their price guide alongside an open discussion with the client about their priorities and expectations:

I would start with... "What's your expectation?" or, "What's your ideal outcome?" or, "What would be the best thing to happen?" Then we work backward... "Oh, that can or can't be achieved because – " or, "That could be achieved," or, "There's such a high degree of uncertainty with that cost-wise," so always start with their expectations. The other thing I always say is, "I'm not here to substitute my judgement for yours. What's important to you is important to you, but we can stress test the reality of your ideas against price, time, all these other factors." There's a great table that an estate planning mentor helped me draw for clients. I do all my work on Zoom, and I'll quite often share Canva and draw with them as we go...with a client wanting different ideas, I'll draw them a table, and I'll be like, "Is that going to be fast? Is there certainty? What will the cost be? Who else do we have to involve?" Then option 1, 2, 3, and then we can tick against them...That's probably how I support clients to stress test their own ideas against the reality of legal services. It's hard to price into your business spending that amount of time with people, but it just is a better outcome for them and for me. What's good for them is good for me.⁹

⁸ Practitioner 8.

⁹ Practitioner 17.

For the majority of practitioners, the first meeting was the key device through which to lay a solid foundation for their future working relationships with clients, and clarify matters of cost and service scope. The first meeting was also perceived as an opportunity to build trust with clients, and ensure that they felt confident to invest in the lawyer-client relationship:

One of the things that I never do in my initial conferences, I don't take notes. I have someone else take my notes because the last thing I'd want to do is if I went to see someone and had to pour my heart out, because they don't just want advice, they want you to listen... If I have another lawyer in with me, I rarely take any notes at all because then I can engage with the client. There's the initial establishment of the relationship. They're not looking at the clock. You're not looking at the clock. They're not thinking this is costing them a fortune...I just think it's a really good way of making sure you establish that relationship.¹⁰

I encourage people to bring a support person, whether they're anxious or otherwise, I encourage them to bring a person with them who's going to hear it separately. It's a bit like when you go to the doctor and you're getting a diagnosis of cancer, everything else is gone. You don't hear the rest and they can talk all they like, and then the doctor says, "But I explained it." The same thing happens with lawyers. Oftentimes, anxiety will cloud people's thinking and they just don't take things in. I'm not sure that lawyers are so good at – particularly young lawyers – are so good at recognising that.¹¹

3.2.2 First Meeting Format and Charges

Practitioners reported a range of different approaches when it came to the pricing and duration of first meetings. While the arrangements for first meetings largely reflected the pricing model used in relation to the performance of legal work (as discussed in Section 2), there was evidence of practitioners mixing and matching approaches to pricing, with some hourly rates practitioners offering initial consultations for a fixed fee. Across the sample, there was a relatively even division between:

1. Charging for initial consultations according to usual payment schedules (hourly rates or PRO);
2. Charging a fixed fee for initial consultations (in several instances, this fixed fee was either waived or used as credit towards fees if the client proceeded to instruction);
3. Not charging for initial consultations because it was factored into the cost of fixed fee services;
4. Not charging for initial consultations.

¹⁰ Practitioner 6.

¹¹ Practitioner 11.

In addition, a small number of the practitioners who ordinarily charged hourly rates for first meetings (Approach 1) were participants in the 'Find Your Lawyer' referral scheme facilitated by the Law Institute of Victoria. These practitioners would typically apply additional fees for meetings that went for longer than 30 minutes, as one practitioner who participated in the scheme explained:

Our firm is a member of the LIV Referral Service, which is a half-hour free. If a client approaches us with that referral, provided they get an email confirmation from the LIV, then we do half an hour for free, but we tell the client that it's very difficult to provide them advice in half an hour and that if it goes beyond half an hour, that they'd be charged, and they might [then] get the full information that any other client would get about hourly rates.¹²

Practitioners reported that first meetings typically lasted between 60-90 minutes, with a minority reporting initial appointments of 2-3 hours.

Several practitioners were opposed to the idea of offering first meetings for free, for a range of reasons, including issues of liability and concerns about undermining the value of their own services. As one practitioner explained:

I just find that being honest with people and upfront is just the best. I'll just say to them "Look, you've asked me very detailed questions. I can't answer those unless you're a client for liability reasons and please decide. Do you want to pay for an hour of my time or not?" If ...they don't even want to pay for an hour of your time, it just means they don't value you as a person so why would I be working with them, you know?¹³

In fact, several of the wills and estates and family law practitioners interviewed were critical of those offering 30-minute free meetings under the LIV scheme, and cynical of their value:

We do not do any of that 'first half hour free'. I just don't find that it's worthwhile and I don't think...in the area that I practise, you cannot give any advice in half an hour because the client couldn't possibly convey what it is that they're dealing with. I couldn't possibly advise either on the cost or what they should do at an initial interview and I just find it a dangerous practice in terms of my own practice.¹⁴

Plenty [of] people do it, they don't tell them anything, they don't give them any information, they give them information about a process so they say, "Oh, you can go to mediation." Well, that's great. You could find that out online if you wanted to. No one tells them the answer for free...They might lure them in and they might... get a lot of new clients or half-hour free things where these people are on the books but it doesn't necessarily go anywhere and it doesn't necessarily solve the client's problem or generate any income.¹⁵

¹² Practitioner 14.

¹³ Practitioner 2.

¹⁴ Practitioner 15.

¹⁵ Practitioner 3.

These practitioners explained that duration-limited first meetings would be largely procedural in substance. However, practitioners taking Approaches 3 and 4 as defined above, did not always limit the length of first meetings.

For those practitioners who offered professional time for free (whether under the LIV scheme or not) this was seen as a straightforward strategy for building trust and establishing a good working relationship with the client. In the event that these meetings did not convert into ongoing instructions, such practitioners explained that they were content to write off the time spent as a way to 'give back' to the community or, at least, a way to build a positive reputation:

Our practice here is to offer a free initial appointment for that type of work because you need to be able to scope it. From a business point of view, you can look at it and say, "Well, all right. You might get a few tyre kickers that are going nowhere, but when you do get them, it's worthwhile."¹⁶

I've always thought that offering a free appointment is philosophically our way of giving back... I don't have time to volunteer or do any of that stuff, as a number one. Number two, it's a good kind of marketing. Even if people don't need to engage you, if they've had a good experience, they might remember to recommend you next time, things like that, but...also... The cons [are] that you can end up in busy periods, you can end up...giving a lot of free advice.¹⁷

Additionally, some practitioners found that given the number of initial consultations that did not convert into ongoing instructions, the costs of administering any associated billing would outweigh the benefits of charging for the time they spent conducting first meetings:

...we don't charge for that. I'd rather brush it off. I'd rather be able to say to a client who comes in the door, "I'm sorry, I'm just not going to be able to help you." If you're charging them, I think that's unfair. Oh, well, that's my perspective. If I've made the choice, having filtered the client and decided to see the client as a first interview, 'I get to know you' exercise, then my view is that I won't charge for it. I view it both ways because as I say, there's a cost with seeing the client, but there's [also] a cost of opening a file, sending a bill, following it up... I found it's just easier, just don't charge. It does then build on a relationship going forward because I will say to them, "I'm happy to talk to you and see if I think I can assist you, and thereafter we'll enter into a formal agreement".¹⁸

¹⁶ Practitioner 8.

¹⁷ Practitioner 12.

¹⁸ Practitioner 11.

In contrast to those who did charge for first meetings, or who tried to limit meetings to 30 minutes, practitioners taking Approaches 3 and 4 advocated the benefits of using this time to ascertain sufficient detail and information from clients:

On the whole, free consultations give me enough information to then scope... Sometimes...you can tell that they're just trying to whizz through it. I say to them, "There's no time constraints. I've allowed an hour. You're not being charged for this." If it's not clear to them when they book in, I tell them straight away because you can just tell they're trying to get it all done... I'm like, "Don't worry, I just need all the information. I don't care about the time."¹⁹

A minority of the practitioners interviewed offered first meetings on a fixed fee basis, regardless of how the rest of the matter was charged (Approach 2). Typically, practitioners taking this approach had decided to do so as a compromise between charging for first meetings at usual rates and offering first meetings for free:

We have a fixed fee for our initial conference... I've shifted in the way I approach things. When I started, I used to do the first conference for free and I was giving away tens of thousands of dollars a year. They would get all the advice they wanted and sometimes not come back. A friend of mine did a fixed fee for an initial interview and I thought it through. We tell them that we charge \$650 plus GST for the initial conference. It doesn't matter whether it's one hour or three hours. I usually give them a list of what we want them to bring with them. One of the things you can do by having that initial conference, first of all, at a fixed rate, people don't hold back on the information they give you. You tend to get fairly complete instructions... [you] don't fall into that hole where someone says, "I only want to come in for half an hour," and you miss two-thirds of the story. If it's a fixed fee, people know they can come in, they can talk about things that aren't strictly legally related, but give you the context for the dispute. The other thing too is – And this might sound a little bit mercenary but, if somebody isn't able to pay \$650 plus GST for an open-ended conference, you know they're not going to be able to pay your bill. It's almost a filtering mechanism from the outset.²⁰

The practice of offering an initial consultation for a fixed fee therefore appeared to mitigate the disadvantages of the other approaches discussed, in that it served to allay professional concerns about liability, avoid the risks associated with time limits on first meetings, and provide certainty to clients about cost.

¹⁹ Practitioner 17.

²⁰ Practitioner 6.

3.3 Client Price Expectations

Across interviews with practitioners, it was observed that knowledge of costs and of pricing models, as well as price expectations and sensitivities, varied from client to client. However, broadly speaking, four distinct categories of client were identified:

1. 'Well-informed and/or Professional Clients' (those who have accurate price expectations);
2. 'Pessimistic Clients' (those who expect legal fees to be higher than they are);
3. 'Price Sensitive Clients' (those who expect legal services to be cheaper than they are);
4. 'Inexperienced Clients' (those who have very low levels of knowledge on which to base an expectation of cost).

Those identified as 'Well-Informed' were described by practitioners as possessing a good understanding of the likely cost of services. Given that fixed fee prices were more commonly advertised publicly, 'Well-Informed' clients were seen as more common in the fixed-fee space where indicative information about costs could be obtained without the need for an initial consultation with a practitioner. Of course in practice, with advertised fixed fees existing as a starting point, rather than a definitive estimate of costs, even 'Well-Informed' clients had the potential to be surprised.

Those who exhibited accurate price expectations in respect of hourly rate services were typically experienced legal services consumers. There were also those with a less granular understanding of price, but familiarity with or experience of purchasing professional services that adopted a similar costing model. As a result, these clients also tended to recognise how the progress of the matter and the time involved in bringing a matter to a conclusion would impact upon overall costs:

It depends on the client and usually I can tell. If I'm acting for my CEO or my retired Supreme Court judge... if I'm acting for him, I know he knows. I know that my CEO knows because he's been to lots of mediations and he's dealt with lots of lawyers and he's signed lots of contracts. That's easy.²¹

Practitioners also emphasised that 'Well-Informed' clients were also more adept at shopping-around and would sometimes 'audition' different law firms in order to weigh up the perceived quality of practitioners and the kinds of services being offered.

In other cases, having knowledge of the likely costs involved in using a particular practitioner was a function of being directed to that practitioner by a trusted referrer:

It's typically accountants or financial advisors who are sending those estate planning clients through. They're already paying fees for service where they are. They're prepared to pay if they get a recommendation to use us. It's not questioned.²²

²¹ Practitioner 7.

²² Practitioner 13.

...more often than not, they'll be referred to me by someone, so they will have already self-selected a lawyer who is – I'm expensive. They already know that.... Most people are coming to me because they've been specifically referred to me by someone that they trust, and they're looking for a specialist lawyer who operates at the pointy end of family law. They're not buying on price. What they want is good advice.²³

The remaining three groups were seen by practitioners as exhibiting greater misunderstandings about legal fees or inaccurate perceptions of how much legal services were likely to cost. Of these three groups, practitioners reported that 'Pessimistic Clients' – those who had inaccurate expectations and were fearful about costs – were the simplest to manage. This was because such clients were usually pleasantly surprised to learn costs would be less than expected, and relieved that they could afford legal services. As one practitioner noted:

I think most clients would not, unless they've spoken to friends or family who've been through a similar thing, they actually don't have that level of detail... they'll think it's hundreds of thousands [of dollars]. When you're actually talking, the amount they get, it's actually a relief.²⁴

Similarly, another stated that: 'Some clients are pleasantly surprised about costs. They think the cost might be enormous, and when they get the estimate, they're pleased about it.'²⁵

Practitioners reported that these clients typically did not shop around, did not have the ability or willingness to compare the offerings of different firms and/or often attributed greater complexity to their case than was necessary.

In contrast, practitioners reported that rectifying the misconceptions about costs held by 'Price Sensitive' clients, was more challenging. Practitioners encouraged these clients to shop around at other firms and conduct their own research into costs, so that they would be able to see their prices in the context of what other firms charged:

[If a client thinks the estimate is too much] I invite them to reconsider it. They may want to make inquiries with other firms. I don't have a problem with that. That's something that does happen and I'm able to deal with it. No hard feelings from my end, of course, because I haven't wasted further time on that at that stage.²⁶

Sometimes, for example, with a will, there'll be a surprise that it's more than \$200.... Usually, I will say to people, "Go away and think about it overnight with or without your support person and just let me know. If you don't want me to act for you, that's fine. I don't mind one way or the other, but I'm prepared to act on this basis."²⁷

23 Practitioner 14.

24 Practitioner 3.

25 Practitioner 5.

26 Practitioner 5.

27 Practitioner 11.

In such circumstances, practitioners reported that it was not uncommon for these clients to return to them at a later point with a stronger understanding of how their legal costs compared to others in the market, and to go ahead with instructions on the basis of the fee estimate originally specified.

In general, practitioners emphasised that correcting unrealistic price expectations at the outset was a priority, prior to accepting instructions. Where these price expectations could not be managed, most practitioners were of the view that they would rather lose the potential business from these clients than pursue them:

Well, they usually want to pay very [very little], and a lot of them, not all of them but a lot of them are utterly horrified when they're told it's going to cost hundreds of dollars. A lot of them say, well, I thought it'd be free, and we just let them go.²⁸

The final type of client identified through interviews with practitioners was the 'Inexperienced Client'. These clients were seen as having very limited prior knowledge about legal services and their associated costs. As both wills and estates, and family law are areas in which people are often seeking legal services for the first time in response to a particular circumstance or event, 'Inexperienced' clients were far from uncommon. This client group was seen to be the least likely to shop around, which one practitioner attributed to the fact that '*...they probably don't feel empowered enough to [shop around] ... they might choose based on their connection with you.*'²⁹

As such, clients ranged from sophisticated and well-informed clients, to those who had some knowledge (which was not always accurate), to those who had very limited knowledge on which to base expectations. In practice, price appeared to be significantly more influential for 'Price Sensitive' clients than for others, who tended to consider factors beyond price, such as the reputation of or their personal connection with a specific practitioner. For this reason, 'Price Sensitive' clients were also more likely to attempt to negotiate on costs, even where they lacked the knowledge required to do so effectively.

Both prior experience with legal services, as well as the availability of information regarding prices (which was more common among fixed fee services), were important factors in setting clients' price expectations. However, practitioners also observed that even where a client presented with a good understanding of cost it was necessary to emphasise that legal services costs could be unpredictable, as is discussed further in Sections 4.1 and 4.2.

²⁸ Practitioner 3.

²⁹ Practitioner 17.

Practitioners also observed that even when clients attempted to shop around on the basis of price, the information they gathered was not necessarily meaningful. For example, even where the hourly rates of practitioners were used as a comparator, this was not always informative given that, as one practitioner explained:

... it's not really the hourly rate. You can pay someone an hourly rate. [But] how efficient are they with that hourly rate? I can do what another lawyer would do in three hours, in probably half an hour. They might [also] charge 500 [dollars] an hour, but they're going to cost a lot more than I am. It's not really the hourly rate that's important, it's how effective you are as a lawyer.³⁰

While in the context of fixed fee pricing, it was not always possible to compare service offerings in the abstract, as the experience of one practitioner exemplified:

I said, "I can't quote off the list. My quote would depend on: Are you keeping the shares? Are you selling the shares? Are you transferring the shares? Is anyone buying the property off each other? The spectrum of things that you could do with each and every item is so vast and I can't quote it." Then they sent it to me again. They were like: "We've got a quote from another lawyer, can you quote?" I just wrote back and said, "Look, do you want to take the price off their quote? Then at least I know what their scope is and I can put a price on it, not price matching, but the list isn't enough for me to quote." They were just like, "Oh, forget it." I was like, "Yes, ditto." They did try and shop around, but... the shopping around was meaningless".³¹

In sum, in the experience of practitioners interviewed, pricing expectations were seen to vary significantly according to the individual client, and clients did not always shop around. Where they did, such efforts were not always seen as being effective, or appropriate. Indeed, practitioners were wary of those who selected a provider based on cost alone. More generally, practitioners often faced difficulty redressing erroneous costs expectations, or encouraging clients to see value as more than just the price of services. This was especially true with regards to those who were price sensitive.

30 Practitioner 10.

31 Practitioner 17.

3.4 Instructing a Lawyer and Accepting Instructions

3.4.1 Client Motivations for Proceeding to Instruction

As detailed in Section 3.3, clients presented to law firms with different expectations of cost and cost was often a key factor in the decision to instruct a lawyer, though for different reasons.

At one end of the spectrum there were those who shopped around, and selected the cheapest services. This was in the view of at least one practitioner, ‘a really bad decision.’³² At the other end of the spectrum, there were those – often professional clients – who specifically sought out higher cost services, on the basis that higher cost equated to higher quality. As one practitioner explained:

I sometimes find...say for an accountant, I will say my hourly rate is \$500 plus GST. Other people are \$300 plus GST... and they actually think you are too cheap: [they think] “You mustn’t be very good”. It’s quite remarkable really. I had one real estate agent one day when I told him [what] his will was going to cost...I said, “Well, it’s going to be \$1,800 and I’m happy to do it as a fixed fee at \$1,800. You’ve told me your circumstances.” He said, “Well, I’ve been speaking to another firm and they’re going to be \$5,000 plus GST and I just want to be sure I’m comparing apples with apples...”³³

For professional/well-informed clients, equating cost with quality may reflect a view that the most effective lawyers are likely to charge higher fees, but are also likely to be able to undertake the work more efficiently and provide a better service. However, as the same practitioner observed, higher fees may simply reflect the fact that, ‘it’s a big firm with three layers of people working on it, and all charging [at] their hourly rates’.³⁴

Whilst practitioners observed that those professional and non-professional clients for whom money was no object often shopped around, their shopping was usually confined to the higher end of the market.

...the nature of who I am is [that] I get what are called ‘auditions’. Now, I don’t know whether you’ll be talking to many people who are auditioned, but at a high-end level in family law, people will go to say three solicitors, of which I’m one. I can almost always pick the other two, and they will audition us, so they’ll talk to us [all].³⁵

At the same time, the fact that fees were set high was not the only way in which clients judged quality or were induced to instruct a particular lawyer. One practitioner saw personal connection as a critical dimension. In their view, this reinforced the importance of the initial conference which gave a client ‘...a sense of who’s going to be looking after them’.³⁶

32 Practitioner 7.

33 Practitioner 11.

34 Practitioner 11.

35 Practitioner 9.

36 Practitioner 6.

3.4.2 Practitioner Motivations for Proceeding to Instruction

In the same way that clients selected practitioners, there was also evidence of practitioners selecting clients. Particularly in the context of fixed fee services, selection hinged on the practitioner's assessment of the likely time and effort that would be spent handling a client and their matter, vis-a-vis the income that the matter would generate. However, even among those who did not cap their fees, there was hesitation to take on price-sensitive clients, who were perceived as less likely to take bills at face value and more likely to generate cost complaints. Practitioners who had experience of working with such clients shared insights into the kinds of time-consuming challenges and billing interrogations that these clients might generate:

"Why did you charge me for reading that email?" Oh, I can't imagine why we charge you for reading that email. What else are we going to charge you for? It's like this, it's our time. It's our lives. That's...what we give you. They say things like, "well, I can find out online". Well, find that online. You won't really, because the problem is that the facts, the particular facts change everything. The other fact is that the Family Law Act is the Family Law Act. The case law is incredibly discretionary. It is a very discretionary jurisdiction.³⁷

Given this, clients' sensitivity around costs or propensity to question costing practices often served as a disincentive for practitioners to accept their instructions. Similarly, practitioners were also wary of accepting instructions from clients they felt were likely to begrudge having to pay them for their expertise. As one made clear, 'People who... don't see the value in paying for what you do, then my preference is that they just go somewhere else'.³⁸

Frequently during interviews practitioners would draw comparisons between themselves and practitioners working in other areas of law, or other professionals providing services to people in times of need. As one observed: 'If a surgeon tells you it's going to cost you \$15,000 for a hip replacement, you can either afford it or you can't. If a lawyer tells you that, they're ruthless'.³⁹ As other lawyers explained:

It's the thought of "...something's been taken away from me in my separation and now a lawyer wants to take away more from me". No. You are in a situation and you need to pay to sort it. They don't whinge about commercial lawyers' fees nearly as much or maybe they do.⁴⁰

The nature of the problem is that inherently, they think that their situation is unfair because they're hurt, they're in pain. It's unfair and yes, it is, but life isn't fair. None of it was fair, but you decided. You decided to get married. You decided to be in this relationship. You made the choice. Now, unfortunately, there's some cleaning up to do. It's not someone charging you to rip you off. It's you being in a situation which requires some attention.⁴¹

³⁷ Practitioner 3.

³⁸ Practitioner 12.

³⁹ Practitioner 6.

⁴⁰ Practitioner 3.

⁴¹ Practitioner 3.

Understandably, practitioners were more motivated to take instructions from clients who would value their services and trust in both the soundness of the advice they were given and the legitimacy of the fees charged.

Beyond this, two further factors were identified as dissuasive. The first involved whether or not the other side was represented, with one practitioner indicating '*[They]’d flick on someone who was self-represented on the other side.*⁴² The second involved the perceived mental stability and rationality of the client, where instability and irrationality risked compromising a productive relationship or placing an undue burden on the practitioner. This was explained by one practitioner in the following terms:

*Sometimes they ring up and they go on and on and they demonstrate, completely disordered, unhinged thinking. They’re abusive. They’re just really unpleasant. The ones who talk to them at first instance will say, basically “batshit crazy, not worth it”. We just say “we’re sorry, we don’t have capacity”.*⁴³

Weeding these clients out at the earliest opportunity was important because, as the practitioner further explained: '*We all have our share of them... a lot of them present as quite normal until they’re not.*⁴⁴ This was a pragmatic approach that reflected the practitioner's view that '*there’s only so many of those people that one firm can tolerate at a time.*⁴⁵ As another practitioner observed, where they were taken on as clients, additional scaffolding to support their effective engagement was necessary:

*I do have a number of clients that I have to be very careful about and make sure they have an appointment with their doctor on the day that I’m seeing them and they know they’ve got their strategies in place to be able to deal with giving me instructions on an affidavit or receiving them.*⁴⁶

In this practitioner's experience these clients did not usually exhibit concurrent price sensitivities: '*They’re usually the ones that...haven’t had an issue with costs.*⁴⁷ Given that price sensitivities and greater support needs are each perceived as undesirable in their own right, while not addressed directly in the interviews, it might be expected that exhibiting both presents a particularly undesirable combination.

Taken together, there were a number of factors that discouraged practitioners from accepting instructions. These included whether the client was particularly price sensitive, begrudged having to pay for legal expertise, or was seen as likely to squabble over costs or raise cost complaints. It also included clients who were likely to require more non-legal support than a practitioner or firm had the bandwidth or was qualified to provide, an issue that was not always easy for practitioners to identify at the outset.

42 Practitioner 17. It is worth noting that this comment was from a wills and estates practitioner who reported that they rarely engaged in dispute work.

43 Practitioner 3.

44 Practitioner 3.

45 Practitioner 3.

46 Practitioner 15.

47 Practitioner 15.

3.5 Regulatory Insights and Implications

From the perspective of the practitioners interviewed, most clients were seen as presenting with an inaccurate and/or unrealistic understanding of the costs of legal services. As outlined above, this included both under and over-estimating costs, as well as having no baseline expectation at all. It is perhaps not surprising then that, as emphasised throughout this Section, prospective clients were rarely seen as having the capability to make an accurate assessment of what constituted value for money. For some clients, professional reputation and personal connection were important, however practitioners also observed that some clients conflated cost and quality, while others fixated on obtaining the lowest cost services without regard to quality.

Although practitioners rarely appeared to price services with reference to their competition (as discussed in Section 2), it was also the case the clients did not always engage in an effort to 'shop around'. This is perhaps because information is not always available up-front meaning prospective clients have to go through a time intensive (and potentially cost intensive) process of having multiple initial consultations with different practitioners to gather price information. Even where price guides and fixed fee service package prices are available up-front, practitioners observed that making comparisons across service providers on the basis of price alone can be meaningless without further information regarding scope. Efforts to promote shopping around on the basis of price may also have the effect of further concretising consumers' tendency to conflate price and quality.

It is also the case that those who seek the lowest priced services may well have a limited budget beyond which their finances will not stretch. For these clients, anything beyond the lowest cost may well be seen as a luxury that they cannot afford. Protecting these consumers means ensuring that irrespective of the price of services, a minimum level of quality is delivered. As it stands, several mechanisms to support minimum levels of quality already exist, including registration requirements, oversight requirements, and complaints mechanisms, and these are important in ensuring that a basic level of 'value' is provided.

For those who are not subject to the same financial constraints, service delivery is likely to be enhanced where clients are encouraged to look beyond price to consider other dimensions of service quality. Here, more could be done to improve the ability of clients to assess whether higher costs imposed by one practitioner relative to another, actually reflect a difference in the nature of the services being provided. While it is clear that some clients have identified other dimensions of service provision as offering additional value, such as the rapport they have with a practitioner, many see quality as implicit in price and assume that a higher cost service is better quality or that similarly priced providers are of similar quality. Given this, in Section 6, we set out some specific recommendations for enhancing consumer understanding, which build upon the issues raised in this Section and those that follow.

4. Estimating and Communicating Anticipated Costs

This Section provides detailed insight into practitioners' approaches to producing a 'single figure' estimate, including the process of scoping and the inclusion of contingencies. In addition, this Section considers what additional information (in written or verbal format) such as price ranges for specific stages, are provided alongside a 'single figure' estimate. It also considers how practitioners communicate their fees, including the strategies they use to ensure that information is intelligible. This Section reveals that practitioners take very different approaches to the calculation of a 'single figure' estimate, and to the presentation of costs information. This lack of consistency may inhibit price comparisons, promote confusion, and in extreme cases, may dissuade clients from pursuing legal action.

4.1 Estimating a 'Single Figure' Total

4.1.1 Scoping a 'Single Figure' Total

As discussed in Section 1.3.1, under the LPUL, practitioners are required to provide a written costs disclosure to clients if the work performed for the client exceeds \$750. For matters in excess of \$3000, written disclosure must be supplied, which, among other things, sets out '*an estimate of the total legal costs*' (s 174(1)(a)). What was intended by the term 'total legal costs' under the LPUL was initially unclear, therefore an effort to clarify this was made in 2016 by the Commissioner for Uniform Legal Services Regulation. This detailed that '*an estimate of the total legal costs in a matter, as required by section 174(1)(a) of the LPUL, is a reasonable approximation of the total costs that a client is likely to have to pay in the matter for which instructions have been given, expressed as a single figure, from time to time (the estimate)*'.

The guidance further set out that:

The provision of an estimate or estimates from time to time does not preclude the provision of other information to a client about the steps or stages in a matter and the provision of such information to a client should be encouraged. It will not be inconsistent with section 174(1)(a) to provide costs estimates for each of the stages that the matter might reach, whether individual stage estimates are expressed as a single figure or as a range of figures, PROVIDED the law practice, having considered all the circumstances and the most likely outcome, always gives the single figure estimate of the total legal costs in the matter that section 174(1)(a) requires.¹

The requirement to provide a 'single figure' estimate in light of 'all the circumstances and the most likely outcome' arguably invites more flexibility in a litigation matter. Unlike the creation of a will, the resolution of such matters is, at least in part, dependent upon the willingness of the other side to negotiate and settle. This may also explain why it is easier to set a fixed fee in transactional wills and estates works than in respect of negotiation or litigation, as one practitioner observed:

It's easy to [set a fixed fee in some areas such as wills] because unlike other areas of the law, you know what you're doing. You're going to talk to them, you're going to investigate the financial position, you're going to draft a will, you're going to work with them to make sure the will's right. Then you're going to see them to sign it and that's it. The same with the set of power of attorneys. Whereas you can't do that with litigation because you just don't know what's involved. It's very difficult to ascertain at the beginning what work is required and how much work you'll have to do.²

As such, within the negotiation/litigation space, the nature of the 'single figure' estimate given rests not only on how a practitioner sets their pricing (as discussed in Section 2.1), but the point to which a practitioner scopes the matter, for instance, to completion of a document, to mediation, or to trial. The effect of this is evidenced in three worked examples provided by the Legal Services Council, which illustrate that a practitioner could take a range of different approaches to cost disclosure without falling foul of the disclosure requirements.³

1. Short Term Approach

Under this approach, practitioners provide a 'single figure' estimate in respect of an immediate, discrete task such as sending a letter to the other side. This is then followed by another 'single figure' in respect of the next discrete task, such as further settlement negotiations. This approach is characterised by a series (or drip-feed) of single figures for discrete components of work all the way until a matter reaches court, based on the continued presumption that the matter will resolve at each stage.

¹ Commissioner for Uniform Legal Services Regulation, *Guideline and Direction: Costs Estimates* (March 2016) <<https://legalservicescouncil.org.au/documents/Guidelines%20and%20Directions/Commissioner-Guideline-and-Direction-Costs-Estimates.pdf>>.
² Practitioner 7.
³ Legal Services Council, *Worked Examples – Providing a Costs Estimate for Costs Disclosure Obligations* (11 March 2016) <<https://legalservicescouncil.org.au/documents/Guidelines%20and%20Directions/Worked-Examples-Providing-a-Costs-Estimate-for-Costs-Disclosure-Obligations-11-March-2016.pdf>>.

2. Medium Term Approach

Under this approach, practitioners provide a 'single figure' estimate in respect of an initial discrete task (or series of tasks) on the assumption that this will resolve the matter, followed, where it does not, with an additional 'single figure' estimate in respect of the span of remaining tasks all the way through to taking the matter to court.

3. Long Term Approach

Under this approach, practitioners provide a 'single figure' estimate from the outset of the matter which spans the entire possible length of a case in a 'worst case' scenario, where it ultimately concludes following a court hearing.

On this basis, a practitioner who takes the short-term approach could draw a client into court action, having only provided information about the costs of each stage of work leading up to court and not the global costs of a dispute. This perhaps explains why, for each approach listed above, practitioners are encouraged to provide a client with accompanying indicative estimates or ranges that reflect the different paths a matter could take. However, this additional information is not required by the LPUL. This is problematic given that once litigation commences it is difficult to abandon without incurring additional costs.⁴

All three of the approaches specified above were taken by practitioners interviewed for this study, and use of these approaches varied by matter type and practice area. For example, a long term approach was generally adopted by practitioners for transactional wills and estate matters, that is a 'single figure' would be provided at the outset setting out a discrete series of tasks to be completed within a set timeframe. In contrast, a mix of medium and long term approaches were taken for negotiation and litigation, as described below.

4.1.1.1 Short Term Approach

Formulating a series of 'single figure' estimates was relatively rare, and was reported by only one practitioner in the sample who indicated that they gave clients '*a fixed fee for each stage of that case management pathway*'.⁵ However this 'single figure' estimate was accompanied by further information that disclosed the total cost of subsequent stages of work that might be required up-front and, as such, it avoided the risk of a client being blind as to the entire potential cost of a matter. As this practitioner further explained, '*I'll say, "Look, this particular stage, this is the amount, and for further stages, please see this attachment." Then I attach a very long document which has all the different possible things that could happen and what it costs.*' This meant that, '*in a worst-case scenario if their case was to go all the way to trial, they can see what they'd be charged at every single stage and the total amount.*'⁶

⁴ See Paul Duggan, 'What Do Linda Evangelista and Dale Boucher Have in Common? *PaulDugganBarrister.com* (Web Page, 2 September 2016) <<https://pauldugganbarrister.com/category/uniform-law/>> where the author directs readers to the court rules detailing cost presumptions upon the filing of a notice of discontinuance.

⁵ Practitioner 2.

⁶ Practitioner 2.

4.1.1.2 Medium Term Approach

More often, the practitioners interviewed, particularly those using hourly rate pricing models, tended to adopt the medium term approach. There appeared to be three main rationales for this: firstly, to permit more accurate scoping at a later stage, where there would be more information about the matter; secondly, to scope matters to mediation on the basis that most cases resolved at mediation; and thirdly, to scope matters to mediation because the practitioner and/or client wanted to focus on mediation as the end point.

In terms of the first rationale, this approach was typically adopted where there was uncertainty about the likely trajectory of the dispute. As one practitioner explained in reference to a hypothetical client who had brought \$500,000 into a relationship, and whose partner was adamant that they were entitled to an equal share of assets:

I[d] say [to the client], "Well, I can't really honestly tell you how much this will cost you. I can't. I'm going to send you a cost agreement. I'm going to put \$12,000 on it because I have no idea. I hope it won't cost that much because we'll write to him, ask for him for disclosure, then he will go to a lawyer, you'll be asked for disclosure. You'll have to prove the \$500,000. Then we will try and put some proposals on the basis that you have a contribution argument and a needs argument but I don't know how that will go." If he just says, "Well, no." Then you may end up having to issue proceedings, and in that case, it will cost a lot more.⁷

Similarly, other practitioners emphasised the value of this approach as a means by which to 'park' the need for further discussions regarding litigation, until more information was acquired. As they explained:

[I advise] that we make initial inquiries about things and wait until probate is granted, wait till we have an estimate of an inventory of assets, so that we know the extent of the estate... Then get my further advice about the merits of a claim and be prepared to pay the cost of that part of it.⁸

You'll hire me just for this thing and at the end of this thing we can enter into a new cost agreement because we will then know whether we're going to court or we're having mediation.⁹

Sometimes the 'wait and see' nature of the medium term approach was a response to the tendency of some clients to avoid being completely candid about the nature of their dispute:

Your client might give you the sanitised version so sometimes it's good to just get a little bit into the file, get the initial letter out, or hear from the other lawyer to see, "Well, we need to budget for \$15,000, not \$5,000." You've really got to feel your way with it...I tend to give them an estimate and tell them that we'll update it because you just can't pluck figures out of the air.¹⁰

⁷ Practitioner 3.

⁸ Practitioner 5.

⁹ Practitioner 4.

¹⁰ Practitioner 6.

In other instances, particularly where the 'single figure' estimate did not scope to mediation, it reflected a lack of clarity as to whether mediation would be required.

I just sit down and I'm like, "One letter, one reply, phone call, instructions," and I really just try and think about the typical next steps. I either scope until the next significant event, like a hearing or mediation or a call. I just sent one last week, and I was like, "I actually can't see beyond me sending this first letter." The scope was [a] letter and reply and new instructions from you because I just don't know beyond that."¹¹

Those who scoped to mediation described their approach as follows:

I would almost always say you've come to see me, it'll involve disclosure, valuations, and potentially, a mediation. I estimate the cost to be \$35,000 for all of that if that goes to that point, including formalisation of the documents for settlement. It will be less if the matter resolves in any earlier step... I scope to the end of a mediation and formalisation."¹²

In terms of the fixed price, it's just up until mediation...[the] pre-litigation stage... is a bit difficult because you never know how much pre-litigation negotiation might be required...we'd usually probably just give them a fixed price to draft a letter to the other side, and review their response. Then... once we get that response...give them a further fixed price for the further anticipated work at that point... we [also] give them that total estimate, which could be \$100,000 or something...[which sets out]... how much the matter would cost if it goes all the way to a trial."¹³

Another practitioner indicated that this decision was a strategic one: *'I will present it upfront to the point at the end of mediation... [I want to set] an expectation that [mediation] will settle it...I don't want them to see that we're going to a trial... I don't want to set them up that way.'*¹⁴

Nevertheless, practitioners taking this approach also typically provided verbal disclosures setting out an indicative cost if the matter did go to court, as well as providing a breakdown of the costs of each stage that occurred as a matter progressed from early advice and negotiation, to a trial. For the same practitioner quoted above, providing this information face-to-face was important, because it could be accompanied by body language to convey the seriousness of going to court and the preference for resolving the matter without resorting to court. As they set out: *'I want them to have an understanding of how much it's going to cost, but I want to have that discussion verbally and eyeball them and express that.'*¹⁵

¹¹ Practitioner 17.

¹² Practitioner 9.

¹³ Practitioner 1.

¹⁴ Practitioner 16.

¹⁵ Practitioner 16.

4.1.1.3 Long Term Approach

In respect of transactional work in the wills and estates space, scoping would be tightly defined by the work planned (e.g. establishing a testamentary trust, writing a will, creating a power of attorney) and this scope would represent the totality of the 'single figure' estimate. This approach was less common amongst the family law practitioners in the sample where the division between transactional and negotiation/litigation work was often not as distinct.

Aside from transactional matters in wills and estates where a matter could be scoped (in full) at the outset, many practitioners, particularly those scoping on matters where negotiation or litigation were a possibility, adopted the long term approach. One explanation for this was that many practitioners appeared to believe that this was what was demanded by the LPUL. Several practitioners stated that a 'single figure' estimate for the entire matter, including the costs of going to court, was required under the LPUL, notwithstanding that most matters were likely to be resolved at mediation. As two practitioners explained:

If I have a new client today and... they're saying to me circumstances where I think the matter's likely to resolve at mediation, and that's 9 out of 10 of our clients won't go any further than that. I'm saying to them that, "It's going to resolve at mediation. Your likely cost to that is, say, \$15,000, but if your matter went to court, these are all the steps. You've got about five stages in court and it'd go to a two-day hearing before a judge, and you'd have a day's preparation for that." When I fill in the total cost, I'm actually filling in \$100,000.¹⁶

...if someone comes to me, and we are nowhere near court, but I can see that despite their best endeavours, these people are probably in the category of people who might end up in court. I have to give them the estimate of what's going to happen if they fight about every single issue.¹⁷

This belief that it was necessary to estimate through to trial, meant that estimates would set out costs that were much higher than what might actually be incurred. As one practitioner identified: *'When you look at ours, we've made the quotes so high. It's got to be the extreme case, you know what I mean? You can't underquote so you got to overquote.'*¹⁸ To mitigate the potential financial anxiety that clients might otherwise experience when a practitioner decided to scope to the end of trial, even when trial was not yet a consideration, practitioners reported that these estimates were often accompanied by additional qualifying verbal disclosures. These were typically intended to clarify that the estimate was not necessarily indicative of what the practitioner expected to eventuate in that client's case, but were rather indicative of the costs of having to litigate in the event that it became necessary to do so. For example, one practitioner reported that they would explain at the outset that: *'I am obligated to provide you with a total estimate of costs based on your worst-case scenario. It's not necessarily what I think that you're going to spend, and there are ways and decisions that you can make to reduce those fees...'*¹⁹

¹⁶ Practitioner 4.

¹⁷ Practitioner 14.

¹⁸ Practitioner 10.

¹⁹ Practitioner 14.

Another explained that they broke the estimate down into distinct stages:

I always include stages. We're only obliged to tell them this will cost you \$150,000 if it goes to trial but I always break it down... just being required to quote a global figure isn't a proper representation of what legal fees usually are, which is why we adopt the practice of breaking it down.²⁰

However, this was not the view of all practitioners interviewed, with one stating: 'Any cost consultant will tell you [that] you do not do breakdowns. Breakdowns are wrong, ranges are wrong... Breaking it down into components is dangerous, so I don't.'²¹

Elsewhere, the decision to scope through to trial would sometimes hinge on the nature of the matter and circumstances at hand, with a full disclosure of costs to trial in some circumstances but not in others. As one wills and estates practitioner explained:

I think you are meant to give them right up to trial. Typically, we don't. It depends, even for a Part IV [order for provision under a deceased estate] matter. For a contested [will] validity issue, yes, we would right through the trial. For the Part IVs, typically not.²²

However, this practitioner also went on to say that where estimates were not inclusive of trial costs, they would provide a verbal indication for a client such as: 'Costs up to the trial could be \$100,000 here' on the basis that, 'there's got to be some incentive for people to settle, particularly given [that] sometimes estates can be small, estates get eroded away very quickly'.²³

While a family law practitioner indicated that they would vary their approach to estimation based on the matter, explaining that: 'Because of the Uniform Law and the unique nature of family law that you may end up in litigation, everybody gets a quote for up to an amount for litigation, but not everybody gets that at the beginning, that detailed estimate.'²⁴ In other words, while the practitioner would ordinarily scope to the end of litigation under a long term approach, depending on the client, a medium term approach might instead be adopted so that the first 'single figure' estimate received did not scope all the way through to trial.

²⁰ Practitioner 15.

²¹ Practitioner 9.

²² Practitioner 13.

²³ Practitioner 13.

²⁴ Practitioner 14.

4.1.2 Factors Influencing the Length of Scope

The worked examples provided by the Legal Services Council discussed in Section 4.1.1 imply that a practitioner's view as to the point at which a matter will resolve is determinative in deciding the scope of the matter. In practice, determining the likely resolution point sometimes involved taking a client's view at face value, for example: *'If someone is telling me that this is how they're likely going to resolve their matter and they're confident, I just feel like, "Well, here's the information".'*²⁵

However, while respecting the client's instructions the same practitioner also made clear that they would provide additional information so as to set out and reinforce client understanding of what might happen if things do not go to plan on the basis that:

*...people will think they're amicable until a circumstance changes, that's always really important to build into the price conversation as well. It's very much scoping the work or saying, "This is the way you're telling me now that you'd like it to go. I'll price it. I think your costs will be this... [I'd then] give them that much more of a ballpark figure for if it went down another path so they've got a point of comparison."*²⁶

In general, practitioners were wary of relying on the client's perspective alone, and professional experience formed an important part of assessing scope.

*I would say 9 times out of 10, the client would conclude that first appointment with us having a really good idea of, broadly speaking, what the assets are, and broadly speaking, what the range of the outcome [is] likely to be and what the next steps are. When I say what the outcome [is] likely to be and the next steps, often that's about – just from them describing their partner, the circumstances of the breakup, how long ago it was, all of those sorts of things, you can usually get a pretty accurate understanding of, is this going to be a matter where it's going to be difficult to agree on values, is it going to be difficult to get disclosure and we're going to have to go to mediation, or is it something where there's going to be a bit of negotiation back and forth... You get a bit of a gut feel as to those sorts of things, which means usually we're able to conclude that appointment by saying, "Based on what you've told us so far, we think that the likely course of your matter is going to be this and that the likely costs would be this. The next thing we should do is this, and therefore this is the likely costs."*²⁷

²⁵ Practitioner 12.

²⁶ Practitioner 12.

²⁷ Practitioner 4.

Indeed, professional experience often showed that relying only on the client's determination of need could lead to problems, as clients did not always know what they needed:

Sometimes in the past, [where] I've run into trouble is where a client comes to you and they tell you, "I need this," and you take that at face value, but they've actually misunderstood what they need. Then you give them a fixed quotation for a particular retainer, let's say, to do some consent orders, and you find that they haven't even had any discussions with the other side yet, so it's not consent orders yet. It might never be consent orders. It's really important now for me to just delve a little bit deeper and understand what it is that they're trying to tell me they need.²⁸

Never believe anyone when they say "...we're amicable, and we've reached agreement", so what I do is I give them two estimates. I say, "Well, if you come to me with a deal done in writing, and it covers everything that needs to be done and there's no negotiation required by me with the other side, then this is how much I think you'll spend. If there are things that do need to be negotiated or fleshed out with the other side, then this is how much extra you're going to spend on that," because that's the reality, most of the time [what] you do.²⁹

Deciding how far into the future to scope a matter was also affected by the extent to which practitioners expected scoping through to trial would scare a client away: *'I've discovered that if you start talking to them about costs too much in the beginning, they get frightened and they mightn't take any action at all, and they should take action because they have a good claim.'*³⁰ Similarly: *'You are telling them this huge scary thing...If they're particularly risk averse...there is a risk that someone decides not to pursue their rights because they see this estimate...'*³¹

Taken together, interviews revealed that there were a diverse range of factors that influenced practitioners' approach to scoping. While there were commonalities among practitioners, there appeared to be no unified interpretation of what a 'single figure' estimate should encompass. This inconsistency was further exacerbated by the extent to which a practitioner included or excluded possible adverse events taking place, as discussed in the Section that follows.

²⁸ Practitioner 2.

²⁹ Practitioner 14.

³⁰ Practitioner 7.

³¹ Practitioner 14.

4.2 Factoring in Contingencies

For transactional fixed fee work, the 'single figure' estimate was typically equivalent to the fixed fee set for the work. Given that such work was seen as more easy to scope and less likely to be subject to changes in trajectory over time, contingencies were not included. In contrast to litigation work where the 'single figure' estimate often included the costs of possible future expenses, practitioners undertaking fixed fee transactional work reported not raising the prospect of extra costs until they became a reality: *'You have to wait for them to emerge [you'd only mention additional costs]... if they emerge later on'*³² and *'No, we'll just say if there's extra work. If it turns out there's extra unanticipated work, then we'll give you a fixed price at that point.'*³³

In other instances, additional costs were presented prior to confirmation of the fixed fee, by way of price guides/lists (as discussed in Section 3). This placed clients on notice that additional fees would apply if work was needed that went beyond the scope of the fixed fee.

*It's all in our schedule. It's not that detailed, it really just says, "If you want services, the standard fee, this is what this means." It says if a complex will, this is what this means. If you want to [create] a life interest. If you want a testamentary trust. If you want to give 50 bequests to different charities or children.'*³⁴

*...We've got three different packages depending on what is going to be involved. Then under each of those three packages, we've got the standard extras as well. It's a bit of a menu.'*³⁵

There was also variation in the extent to which additional work falling outside of the fixed fee would trigger additional costs. Usually, small amounts of additional work around the edges of a matter, such as time spent responding to an additional email or time-recording within \$200 of the original fixed fee, would be absorbed by the practitioner. However, interviews revealed that each practitioner differed as to the point at which they would begin to charge for additional work.

For those who used time recording to evaluate their fixed fee, determining whether to charge for additional work depended on how far off they were on this estimate. For instance, one practitioner provided the following example: *'If I've said [for a] very simple will [that] it's \$1,000 for the suite, and I look at my time costing and it's \$1,200, I never worry about that. If I look at my time costing and it's \$2,500, I might charge them more than the \$1,200.'*³⁶ This practitioner explained that their right to amend the fixed fee was made clear in their costs agreement.

³² Practitioner 13.

³³ Practitioner 1.

³⁴ Practitioner 15.

³⁵ Practitioner 16.

³⁶ Practitioner 7.

In some cases, recouping additional costs was a matter for the practitioner to decide in light of their budget obligations. As explained by one practitioner: *'It's really up to the individual lawyer...we've each got budgets to reach, but quite often it happens. If there's a few extra emails or phone calls and things involved, we wouldn't usually charge extra for that.'*³⁷

Indeed, for many of the wills and estates practitioners interviewed, additional time spent on a fixed fee service would normally be written off on the basis that *'it's not worth it. It's not worth having a problem with a client.'*³⁸ or because, as another practitioner explained: *'it's my job to scope the work'*³⁹ and as such:

*[A] fixed fee is a fixed fee. Unless you don't do what is within the scope of that work... unless you say, "Now I don't want a will, I want a family trust, because everything is going into trust," then that's the only time I would change that fixed fee.'*⁴⁰

More generally, practitioners explained that fixed fees were only subject to variation where there had been a significant change in the proposed work or circumstances. In family law, such circumstances might include a financial agreement undertaken according to an agreed fixed fee, which then breaks down. Here, one practitioner indicated that they *'...would either bill a portion of the fixed fee and switch to hourly rates or we could revise the fixed fee.'*⁴¹

In contrast, factoring in contingencies within the 'single figure' estimate was far more common in negotiation or litigation work, which typically (though not always) involved charging according to hourly rates. This is evident from the fact that, as discussed in Section 4.1, some practitioners took a 'long term' approach to producing a 'single figure', by estimating through to the end of litigation even at the outset of a matter. These estimates can be understood as essentially factoring in the cost of court as a contingency and communicating that to the client.

However, contingencies were also reflected in the complexity and not just the span of the 'single figure' estimate (notwithstanding the fact that complexity is also reflected in span). Here, practitioners reported producing estimates that would often represent the worst rather than best case scenario for the client, not just in terms of the client having to pass through every stage including litigation, but also in terms of the possible complications that might be encountered in relation to each stage of their matter. However, the scale and severity of adverse events being factored in, varied by practitioner. This was also often a function of practitioners believing this was what was required of them under the LPUL:

*...What the Uniform Law requires you to do, is to give an unrealistic estimate of costs every single time...You have to factor in all of the bad things that can happen, so I typically give estimates of the cost of litigation now that are much higher than I would previously have done.'*⁴²

37 Practitioner 1.

38 Practitioner 11.

39 Practitioner 15.

40 Practitioner 15.

41 Practitioner 12.

42 Practitioner 14.

As stated by another practitioner: *'...Because you can't give a range, by default, you have to give the upper end of what otherwise would be a range.'*⁴³

Complications that practitioners might factor into their estimates included, for example, knowledge of who the opposing lawyer was when pricing litigation under hourly rates:

*I might also know the lawyer on the other side, so I'll say, "Oh, I can deal with them. They're easy to – " or, "They're really difficult. They're going to make it hard. We're going to have to write five letters to them."*⁴⁴

Practitioners also raised aspects of the nature of the dispute itself, including: *'how much digging we have to do to find that they've had other properties or about their bank account.'*⁴⁵ Similarly, the amount of time required to put together evidence of need in respect of a contested estate was also relevant, as was the likelihood of another person filing an application, because if *'there's now another person, it's a three-party war and so it's going to cost more.'*⁴⁶

Family law practitioners also tended to consider the wider circumstances of the relationship breakdown when considering possible costs. For instance, if a client presented to them with a post-separation financial dispute, practitioners would be aware of the fact that parenting disputes may also arise further down the line. As such, a practitioner might also incorporate factors such as: whether interim orders are required; how long disclosure might take; how long a trial might take (if included in scope); and the potential costs of valuation and disbursements. As practitioners explained: *'We [have to] estimat[e] costs for third parties that we haven't necessarily even engaged yet... [to] make a guesstimate on what we think counsel might charge and their costs.'*⁴⁷ and:

*You have to think about what the valuations will cost because we have to include that in our figure. For instance, if you're going to have a business, it'll automatically be \$50,000 or \$60,000 or \$75,000 or \$100,000 if the business is going to be expensive. The disbursements you have to incur, the amount of disclosure you have to do, whether or not you're going to use a mediator or do a roundtable conference, the cost of a mediator, the cost of venue, high or low, all of those sorts of things. Then your fee is on top of all of that, so you think about all those four factors.'*⁴⁸

Finally, for those practitioners who priced according to court schedules, whether a contested estate dispute would be heard in the County Court or the Supreme Court was also identified as material.

⁴³ Practitioner 5.

⁴⁴ Practitioner 15.

⁴⁵ Practitioner 15.

⁴⁶ Practitioner 11.

⁴⁷ Practitioner 8.

⁴⁸ Practitioner 9.

The range of possible factors that could ultimately impact price invariably led some practitioners to give large, sometimes 'worst case scenario' estimates under the logic that it was better to go higher than lower because it was not easy to halt litigation: *'You've got to go higher because what if you say to your client, "Oh, well, in this litigation, it will be this," and then the next thing it's a lot more and then I say, "Well, you've got to keep going".'*⁴⁹

Some practitioners took this even further, and flagged up additional possible costs associated with the worst case scenario, although did not include those within the estimate. As one explained:

*The worst case scenario has a thing that says that this doesn't take into account various things that might happen like multiple interim hearings... Doesn't take into account anyone appealing, because it's so rare. Sometimes we'll have exclusions because we think that, like we might say, "this doesn't take into account the other side cross applying for parenting orders", for instance, so we only give a quote on financial proceedings. We have a thing in there multiple times that this is based on our experience of the court process at the moment.*⁵⁰

While the tendency to over-estimate was often exhibited by practitioners who were cautious about disappointing clients or falling foul of the LPUL, for others, a higher estimate appeared to be a tactical effort to avoid having to update their disclosure: *'I will often say to people, "Look, and I think it'll be between this and that, but I need to send you a formal cost agreement disclosure statement. I'm going to put the higher figure in so I don't have to update you, but it'll be what it is".'*⁵¹

There was also evidence that some practitioners were willing to adapt their approach and carry more risk in this area. For example, one practitioner explained that they were *'very, very, very careful to not underestimate'* and *'a very high-figure scoper'*⁵², but also alluded to their willingness to take more strategic approaches from time to time: *'...if I want to do the work, I'll find it interesting, or there's something unique or special or looks good for the firm, I will price it well.'*⁵³ Pricing it well did not involve lowering their hourly rate but rather, as the practitioner explained in respect of a particular case they were keen to receive instruction on, *'I just did my estimates very conservative.'*⁵⁴

Conversely, some practitioners explained that they simply estimated on the basis of what an average matter of the type being scoped would cost:

*I would not give the worst-case scenario, but if I felt as we're approaching mediation, particularly, that this is a case where everything is going wrong, and I thought that that initial likely cost estimate was going to be exceeded significantly, I [would] review the cost disclosure. I'd say mediation has not been successful.*⁵⁵

49 Practitioner 7.

50 Practitioner 14.

51 Practitioner 8.

52 Practitioner 9.

53 Practitioner 9.

54 Practitioner 9.

55 Practitioner 15.

But estimating on the basis of the average was not without risk, given that, as one practitioner explained:

They think it's a quote...You can have long cost letters and you can put in capital letters, "THIS IS NOT A QUOTE". [But] they're not reading it, and you say [it] to them, and they're not hearing it. They've got so much else going on in their heads that they just don't hear that bit, they just hear a figure [and when reading a cost letter and disclosure statement, because of their length] people don't read them. What they see is the number that jumps out of them.⁵⁶

As such, where a practitioner provided a realistic estimate of costs based on the 'middle ground' rather than the worst case scenario, and despite their best efforts, this was taken to be a quote, the client would likely be surprised and potentially upset when issued with a costs update.

For that reason, the same practitioner reported that they would decide whether they gave an average or higher estimate on the basis of having met with the client. If there was any risk that the client would take the estimate as a quote, they would increase the estimate so that the risk of a cost update and therefore bill shock, was minimised:

Sometimes I'll give them a range and I'll say, "I'm going to pick the midpoint rather than – because I don't think it's going to go over that and I think it's more likely to be lower." Or sometimes I'll think, look, I'm not sure, I'm just going to add extra just in case. Because I say it's too hard, they think it's a quote.⁵⁷

On this basis, it is clear that 'single figure' estimates are not equal. Different practitioners adopt different approaches to an estimate, may price to different stages, may factor in different types of contingencies, and may or may not include additional price ranges or costs break-downs to a client. The estimates produced by a single practitioner also vary from client to client.

Interestingly, in spite (or perhaps because) of the complexity of scoping, few of the practitioners in the sample reported using data in a systematic way to produce 'single figure' estimates. Indeed, there appeared to be only one practitioner – working in wills and estates – who noted the use of data to inform pricing estimates. This practitioner stated that over the last five years their firm had kept a record of cases and extracted data to enable them to make cost assessments. In particular they examined:

What stage did [the matter] finish, what was our initial advice of what we thought the outcome would be and compare that to what it actually was, what was the initial assessment of how much it would cost and how did that compare to what actually happened?

⁵⁶ Practitioner 11.

⁵⁷ Practitioner 11.

This enabled the practitioner to say for other clients, *'...with a bit of confidence... that this is the likely cost if it heads this direction'*⁵⁸

Another practitioner explained having developed a comprehensive precedent to scaffold the scoping and pricing process, although it was not underpinned by data from previous client matters:

*We've got a table that we do that sets out all of the stages of litigation and the individual things that have to be done for each stage... We complete that according to what are likely to be the issues in dispute, so are we going to have parenting and property? Are we likely to seek interim orders? Are we likely to have a mediation about financial matters and the like? We make an estimate based on experience about how many days a trial would run for, for instance. We take into account – it's complicated at the moment because we have a new court, but we try and anticipate what all the court events will be, and it spits out a number.*⁵⁹

Some practitioners were aware of other firms having, *'models, these computer-generated things, they run and run and run them until they get a ballpark figure of what a certain type of file will cost with two people who live in [Suburb X]. They know that because that's what people in [Suburb X], apparently, do.'*⁶⁰ However, the same practitioner doubted any such system, going on to say that, *'I find that astonishing if that is accurate. I just don't believe it could be, but maybe people in [Suburb X] act differently to people in [Suburb Y].'*⁶¹ This also points to reticence to adopt such tools, and may explain why use of information technology for costing was a rarity among the practitioners interviewed.

⁵⁸ Practitioner 4.

⁵⁹ Practitioner 14.

⁶⁰ Practitioner 3.

⁶¹ Practitioner 3.

4.3 Setting out Costs in Writing

When it came to formalising agreed costs in writing, practitioners tended to either provide cost disclosures and cost agreements in separate documents, or to rely on a combined cost agreement that included all the prescribed information for a disclosure in the same document. However, some indicated that, as they understood it, *'the fee and retainer agreement and the cost disclosure [needed to be] two separate documents [even although] a lot of [it is] repetitive.'*⁶² Other practitioners indicated that if they were only using the short form disclosure, they would not bother having a separate cost agreement.

In general, practitioners expressed enthusiasm during interviews about innovating to streamline, improve, or clarify their costs agreements and/or disclosure documents. For example, one practitioner admired innovative methods of communicating costs disclosures used by some other lawyers:

*I am in a few Facebook groups of different things around legal practice. I've seen people who are now giving their disclosure statements as PowerPoint presentations. Instead of it being this document, it's a PDF that the client flips through, [and] gets all the information in a much better way. I saw someone play around with it and try and do it as an infographic as well.*⁶³

In relation to these documents, practitioners stressed the need for terms to be clearly and tightly defined in order for clients to be aware of what fell inside and outside the scope of the services agreed. Given their packaged nature, this was particularly true for lawyers undertaking fixed fee work:

*I'll put in exclusions as well. I'll say, "This excludes any taxation advice. This excludes any assistance with this or that." Some people, they will come to you and they say, "We've already got an agreement, could you just write it up into consent orders or a financial agreement?" I'll have a discussion with them and then my retainer might say, "Well, this excludes any involvement in the disclosure process. You've told me you've done disclosure between yourselves, so I'm not getting involved in it." There's an exclusion. I say, "I exclude any liability for that. I'm not doing that." There's exclusions of this from the scope.*⁶⁴

*The factors we take into account are listed in the cost agreement. We call it a scoping of legal work. It's quite a lengthy document. These are the factors we've taken into account when coming up with a fixed price fee....*⁶⁵

⁶² Practitioner 12.

⁶³ Practitioner 4.

⁶⁴ Practitioner 2.

⁶⁵ Practitioner 1.

Practitioners also appeared keen to share examples of best practice relating to cost agreements and disclosure documents, and several appeared to have invested a significant amount of time into developing the documents they used with clients:

I actually have spent a lot of time on my cost agreement... "This is the work we all carry out, what's included, the steps, the next meeting, optional meetings... a variation for New South Wales... Then additional charges that may apply [such as] any meeting that you've called or your accountant's called".⁶⁶

This practitioner went on to say that they had also engaged in, '*...lots of collaboration with other practitioners about what's in there*'.⁶⁷ Examples of where they had adapted their documents on the basis of knowledge-sharing with other practitioners included whether the client had a blended family or undocumented loan, and the number of gifts offered in a fixed fee will.

Where it was not possible to tightly define the work to be done in relation to a client's matter such as in relation to litigation, and even in some transactional work, practitioners would often include specific caveats in their document to make clients aware that their estimated costs may change as their case progressed: '*If I'm required to give an estimate in writing under the Uniform Law, I do explain in writing that if there's further work that is needed or further investigation, that I do reserve the right to amend my estimate*'.⁶⁸

One hourly rate practitioner working in family law explained that their practice was to condition the estimate on the basis of '*...the matter proceeding in a straight-forward manner*'.⁶⁹ 'Straightforward' was described as their '*favourite word because it means nothing really*', and this practitioner further noted that clients had never asked for clarification as to the circumstances that would potentially justify departure from the figure specified in the disclosure document.⁷⁰

Practitioners also differed as to whether they provided a cost disclosure when the matter was under \$750, given this is not formally required under the LPUL:

I still do [a written disclosure]. I think one of the things that I think people miss is that when you do the full disclosure, like I've got all these things like...destruction of files, electronic archiving, all of those things have to be in there. I'm like, "That applies to a \$500 matter".⁷¹

66 Practitioner 17.

67 Practitioner 17.

68 Practitioner 5.

69 Practitioner 9.

70 Practitioner 9.

71 Practitioner 17.

Similarly, another practitioner noted that they provided a cost disclosure for every client, except in very limited circumstances, for example if they had a client who came in and said, *'I'm in a relationship. The house is in my husband's name. I don't want to separate. I don't want to do anything. I just want a caveat lodged. That's \$250, \$300.'* The practitioner explained, *'In that case, we wouldn't send out a cost agreement because it's just a very simple job.'*⁷²

Given the tendency to include large amounts of information within these documents, another prominent theme was practitioners' view that it was typically difficult for clients to interpret and digest all of these conditions and caveats. In fact, concern was raised even about the standard templates provided by the LIV: *'I don't think anybody can fully understand the [LIV's] cost agreement or cost disclosure. I think even lawyers struggle with understanding that particular document and all the regulations and all that stuff, to be honest.'*⁷³ As another practitioner summarised:

*The only problem with the Uniform Law is its complexity and the requirement for disclosure for clients that is required in our costs agreement... even the concept that a client would need legal advice before entering into a costs agreement with this lawyer just is nonsensical to me.*⁷⁴

Indeed, a number of practitioners, using a mix of pricing models and operating across wills and estate and family law practice areas, observed that in spite of the importance of these documents, clients often did not read them, or where they did, they did not take note of specific components. As practitioners explained: *'I'm not sure how much people notice the global estimate that's given.'*⁷⁵ and *'...my clients don't read stuff. They're not going to read a cost agreement. They're not going to read that document that we send out.'*⁷⁶ Similarly, another stated: *'Often, clients don't read letters. I think it's a natural human thing, something that they shudder from confronting. A lot of them do, but many clients don't read letters.'*⁷⁷ In alignment, two further practitioners indicated:

*They don't read it. ...I find it completely overwhelming for clients and for lawyers. It's counterproductive. It's off-putting for clients. I've always thought that way, but every time I go and simplify my cost agreement, I cross-check the rules, and I'm like "Ah, shoot. This has to stay..."*⁷⁸

*I don't think clients get it. They don't read it anyway. The thing is, there's so much information that's given to them in a cost agreement, for example, and disclosure statement, that no matter how simple you try and make it, I don't think they get it.*⁷⁹

⁷² Practitioner 10.

⁷³ Practitioner 2.

⁷⁴ Practitioner 15.

⁷⁵ Practitioner 1.

⁷⁶ Practitioner 16.

⁷⁷ Practitioner 5.

⁷⁸ Practitioner 12.

⁷⁹ Practitioner 8.

Concern about clients being unable to navigate or understand these documents led some practitioners to encourage clients to disregard parts of their agreement and focus on the information about costs, which they saw as the part of the document about which clients were most concerned:

Our cost agreement goes for 10 pages... clients never read it. I say to them, "Don't read the whole thing because that's a lot of information you don't really need. Have a look at that page where it sets out the ranges, the hourly rates. That's the page you need to understand".⁸⁰

Further, some practitioners explained that they would attempt to use the short disclosure form whenever they could, including discounting the price, simply to avoid the longer disclosure document: *'Sometimes I'll even do a fixed fee agreement for like \$3,000, so I don't need to do a full one, I can just do the short version one'⁸¹ and 'where possible, I purposely try and keep my fees under \$3,000 on transactional matters so I can use the single-page [disclosure]'.⁸²*

Where that was not possible, practitioners reported implementing other strategies, which they thought aided client comprehension:

...for the family law stuff, what I've done is put a table into that bit where it says what the estimate is. I've put a table in. Sometimes if I feel it necessary, I'll bold and highlight aspects so that if someone actually opens what I've emailed them and they scroll through it, they will see the bold highlighted bits.⁸³

It was also observed that the length of the typical cost disclosure document meant that practitioners needed to spend more time explaining things to clients, setting out what was the important part of the document, and what they should take note of, and allaying fears as to what the agreement means: *'We have to do more work verbally because the cost disclosure or the cost agreement is too long and complex for the client and they don't read it necessarily'.⁸⁴*

As discussed in Section 3.2.1, there is extensive ground to cover in the first meeting with clients, and this is compounded by the need to spend time walking clients through complex cost agreement and disclosure documents. At the same time, the majority of lawyers were hesitant about the idea of providing less information, due to fears of non-compliance with the LPUL, or potentially weakening their position should cost disputes occur further down the line.

⁸⁰ Practitioner 10.

⁸¹ Practitioner 12.

⁸² Practitioner 16.

⁸³ Practitioner 16.

⁸⁴ Practitioner 12.

4.4 Regulatory Insights and Implications

This Section has outlined the different approaches that practitioners take to estimating the costs associated with a client's legal matter, including the strategies they use to communicate these fees to clients, and the ways that they ensure clients have a sufficient understanding of how these fees will accumulate and be charged. Of course, it is appropriate that lawyers take different approaches to these tasks in order to provide bespoke support to clients with different legal situations, needs, and capabilities. However, as detailed here, there are also several challenges associated with the methods used to estimate and communicate legal costs, and these have important implications for how effectively the LPUL regulations concerning costs are working in practice, as well as how practitioners are responding to them.

Overall, the vast majority of practitioners agreed with the principle of requiring lawyers to provide an indication of costs upfront and in writing. However, a large number expressed frustration at the requirement that this should come in the form of a 'single figure' estimate of legal costs:

Being forced to give estimates upfront, that is a good thing and I've learned over the years, that's an important tool in client relationships. If there is resistance about that or horror when they get the estimate, it's better to have an argument at the start of the job, rather than at the middle or at the end. Being required to put it in writing and specify certain things about the detail that goes into it and the rigidity about the estimates, I find that very hard.⁸⁵

[The disclosure requirements are] Fantastic, in one regard. At the end of the day, clients need to know these things. If it's not mandated, a lot of lawyers don't do it. ...The only problem I have with it is that it is very onerous on practitioners because you've got to give so much... When you look at ours, we've made the quotes so high. It's got to be the extreme case, you know what I mean? You can't underquote so you've got to overquote.⁸⁶

As such, the requirement to provide a 'single figure' estimate may undermine cost communications, especially where these estimates are accompanied by extensive conditions and exceptions that erode client certainty and understanding. And yet, for all of the reasons detailed in this Section, conditions, exceptions and over-quoting were often seen as necessary in order to limit a practitioner's exposure to cost disputes and/or perceived non-compliance with the LPUL requirements. Problematically, the diversity of strategies taken in this area may not only impact client comprehension, but may also impair clients' ability to effectively compare estimates from different firms when shopping around.

⁸⁵ Practitioner 5.

⁸⁶ Practitioner 10.

Given the difficulty of producing a single figure, it is perhaps unsurprising that many practitioners expressed a preference for the previous requirements in which they could provide a cost range: *'It's probably better to say, "It'll be between this and this," because if you give them an amount, they think they've got a quote or a fixed fee, and the practice of law is far more fluid than that.'*⁸⁷ As other practitioners confirmed:

*It is a restriction not being able to give the range of costs...that's a real problem. [Having to give the higher end of a range], often that's frightening for clients to get that, so it would be very helpful if we were allowed to give a reasonable range. It's very hard to give estimates with that sort of restriction.*⁸⁸

*We used to be able to give an estimate and then you'd say, "Look, it's going to be between \$25,000 and \$35,000 depending on the work." Now you can't do it so what do you do? Do you go \$30,000, do you go \$25,000, do you do this?... I could stuff that up big time.*⁸⁹

The risk with shifting back to disclosure based on ranges, however, is the potential for practitioners to fail to engage actively with the estimation process and instead provide a relatively meaningless span of potential costs. Indeed, as one practitioner observed in relation to the previous system, *'When it was first developed, people were being a bit cheeky and saying your range of legal cost is something between \$750 and \$50,000, and just thinking, "We'll cover everything".'*⁹⁰

Yet the analysis presented in Sections 4.1 and 4.2 suggests that in practice the 'single figure' estimate requirement may simply exacerbate the problem of opaque cost estimates. With the introduction of the 'single figure' estimate it appears that practitioners often feel compelled to hedge their bets with larger estimates than are likely to be necessary, and to verbally qualify written documents. For this reason one practitioner argued that:

*I think we should be able to give ranges so that clients have got a better idea about actually what the minimum amount that they might have to spend, because if I tell someone, "Look, I think your litigation is going to cost \$300,000 to get to the end of a three-day trial, but I actually think the risk of that is quite low." The most important thing that they need to know is, "But it will at a minimum, cost you this." That's the investment you have to make to get to the stage that I think you'll probably most likely reach agreement at, or these parts of the costs are unavoidable.*⁹¹

Moreover, as discussed in Section 4.1, many lawyers reported that they did in fact give ranges verbally, even if a 'single figure' estimate was specified in their disclosure. This suggests that even though the LPUL requires practitioners to specify a 'single figure', ranges are still used, because they are viewed as more useful for helping clients to understand the scale of likely costs. In these circumstances, a 'single figure' estimate may only serve to confuse a client.

87 Practitioner 6.

88 Practitioner 5.

89 Practitioner 7.

90 Practitioner 4.

91 Practitioner 14.

Some may well be left wondering why the figures set out in writing, and those outlined by the lawyer verbally, are different.

An additional concern that arises from the requirement to provide a 'single figure' estimate of costs is, as discussed in Section 4.2, the tendency for practitioners to mitigate the uncertainty of costs by factoring a wide range of potential contingencies into their estimate. This gives rise to the potential for bill padding to occur on the basis that anything that falls within the scope of an inflated estimate is less likely to be challenged, even where a practitioner has provided verbal reassurance that the estimate was a 'worst case scenario'. Arguably this was also a risk under the previous range estimate system, though it is clear that a shift to a 'single figure' estimate appears to have done little to address this risk.

The risk of confusion is also amplified if verbal reassurance is given that allays a client's fears they will incur the level of expenditure implied by the 'single figure' estimate, but the wording of a binding cost agreement renders that verbal reassurance irrelevant. This is also problematic given that, as detailed above in Section 4.3, many clients reportedly do not read cost agreements or disclosure documents because they are too long and complex, and they therefore rely on practitioners to verbally translate:

I do feel like quite a lot of people will just print out that final page and sign it. That's hopefully because I've had the conversation, and they understand, and they were expecting what that was. I've got a lot of concerns about the document because they don't look at how we charge certain disbursements. They do not look at hourly rates. They do not look at what their rights are or any of that.⁹²

As such, it is necessary to consider whether the cost disclosure requirements effectively and meaningfully inform clients about potential costs. On one hand, they require a practitioner to be forthright about costs, and where costs have not been raised proactively in client meetings, the client has written information detailing the basis on which they will be charged. On the other hand, the way in which practitioners approach scoping and estimating a 'single figure', and the level of detail provided in a disclosure document via cost breakdowns, may have the effect of exacerbating a client's reliance on what they are being told verbally, particularly amongst those clients who do not read the written disclosure supplied.

92 Practitioner 16.

For this reason, one practitioner proposed a more structured approach to cost disclosures with the requirement to use a single disclosure form:

A standardised one document that applies to all matters, it doesn't matter what the value of it is... I know the law society says you can customise these to your own needs... [but]... The reality is if they just said, "There's one document, this is the document. There's a few options which you select, and then the client signs it," that would be just easier for everybody. Even if there was a computer system run perhaps by the law society where every lawyer has a login, and all you have to do is put in the client's details and generate these cost documents, done... Have a standard document and then you have an option. It just says, "Fixed fee agreement. Is this an hourly billing agreement, or is this a hybrid agreement?" and then the contract is just generated.⁹³

Yet, in contrast, another practitioner observed that the present requirements already impose a 'one size fits all' model on work that was too variable:

...the thing I hear from my business law colleagues all the time is that a lot of their work is transactional and advice work. If they're having to do cost agreements to tick all the boxes, they have to almost do it in a litigious court-based way. I think it doesn't reflect the variety of matters that you might have.⁹⁴

This may well be exacerbated by a mandated cost disclosure form.

However, there were also several issues on which practitioners were broadly in agreement. The first is that, despite the dissatisfaction associated with the 'single figure' requirements, the underlying principle of upfront costs disclosure had improved the standards of legal practice for clients and lawyers and, anecdotally, reduced cost disputes: *'Probably we can say that since the Uniform Law was introduced, we've had a lot less cost disputes as a result.'*⁹⁵

Nevertheless, aspects of the LPUL requirements were also widely viewed as arduous for practitioners, with one simply stating: *'I don't think they're very good. The previous regulations weren't [very good]. These ones aren't [very good].'*⁹⁶ Another made clear that the regulations had introduced administrative burdens that made day-to-day legal practice more challenging: *'It is incredibly time-consuming and... annoying, to be honest. We've had to spend a lot of money on our computer systems to make sure that we can keep on top of our requirements...'*⁹⁷

Practitioners also questioned whether all of the prescribed information required for cost disclosure documents was really necessary, or whether flexibility could be introduced to enable them to provide information to a client in other ways:

A few times I've tried to update my cost agreement... one of the questions I have is there's the fee and retainer agreement and the cost disclosure as two separate

93 Practitioner 2.

94 Practitioner 4.

95 Practitioner 9.

96 Practitioner 8.

97 Practitioner 14.

*documents, but a lot of it's repetitive...Maybe some of it could be covered in mandatory factsheets? Then cost agreements. Cost agreements shouldn't be more than three or four pages...*⁹⁸

The same practitioner further observed that additional guidance from the regulator on the design of cost agreements and disclosures would be useful, and went on to explain that:

*We called the Legal Services Board because I was really trying to make my cost agreement as user-friendly as possible...they were like, "No, you need to speak to a cost consultant." I'm like, "No, I'm not going to pay someone \$500 an hour... This should be a service that you provide us." ...I would love some clarity around simplifying our cost agreements, making sure that we're compliant as well, and one document somewhere clearly that tells us what that should look like, that's not 20 pages long.*⁹⁹

Finally, some practitioners raised the question of whether the regulations needed a review to ensure they are up to date and appropriately aligned with the realities of current legal practice. For instance, one suggested that the disclosure threshold was set too low:

*I often wonder now whether the threshold for when a disclosure statement is required is too low in the context of the cost of legal services today. Whenever that was set versus what the reality is about, the profession's not immune from inflation and other issues and I feel like the regulator [is] very slow to catch up on things like that. Certainly, having the minimum threshold at \$750 is not a lot that can be done for under that amount these days and you can make a profit out of it, like by the time you pay all the expenses. I think they should definitely be looking at that.*¹⁰⁰

Taken as a whole, the findings in this Section raise a number of implications for regulatory policy. Most notably, this Section raises questions as to the extent to which the 'single figure' estimate is an effective tool in cost disclosure. Findings in this Section suggest that without a more systematic approach to estimation (notwithstanding the challenges or an assessment of the practicality of such an approach), the 'single figure' estimate does not appear to have benefits over the pre-existing costs range approach that many practitioners prefer.

Indeed, in some instances, given practitioners' tendency to supplement a 'single figure' estimate with cost breakdowns or ranges, the 'single figure' estimate may serve to obfuscate client costs understanding. This is apparent where a client considers the 'single figure' to be a fixed fee (increasing client surprise or frustration where an updated estimate is issued) or a definitive indication of costs (the scale of which may deter them from taking action). While at least some of these challenges come from a practitioner's assumption that a 'single figure' estimate must represent a 'worst case scenario', there is also at least some evidence of gaming and strategic practice occurring which sees the estimate inflated so that the need for a re-estimate will be reduced and/or deflated to induce a client to instruct a specific practitioner. It is with this in mind that the report turns to consider the control, monitoring and updating of legal costs in Section 5.

⁹⁸ Practitioner 12.

⁹⁹ Practitioner 12.

¹⁰⁰ Practitioner 8.

5. Controlling, Monitoring and Updating Costs

This Section sets out the key strategies taken by practitioners to control the costs associated with legal service delivery and to monitor the accuracy of a 'single figure' estimate. It details that many practitioners view considerations of cost as integral to strategic decision-making, and identifies how practitioners seek to promote the agency of clients when it comes to making decisions that have cost implications. It sets out the ways in which practitioners may respond to unanticipated or uncontrollable factors likely to increase the costs of resolving a client's matter, including: inexperienced opposing practitioners; an uncooperative party on the other side; the emotional reactivity of clients; and changes to court requirements. The Section also reveals the range of mechanisms practitioners employ to monitor expenditure. It observes that the extent to which updates are compliant with the LPUL varies, and linking to Section 4 above, that the requirement to provide an update may itself be obviated where practitioners' give higher, 'worst case scenario' estimates from the outset.

5.1 Controlling Costs

Under s 173 of the LPUL: *'A law practice must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs'*. Throughout the course of a client's matter, practitioners reported employing several strategies to operationalise this requirement and to keep total cost in line with the 'single figure' estimate given at the outset of the matter.

These strategies included: not allowing prospective clients to incur costs where they did not need legal services; setting appropriate expectations regarding outcome and conduct; ensuring that where decisions were made they involved a cost/benefit analysis; and ensuring that discussions of strategy also involved a discussion of costs.

For prospective clients, some practitioners set out that they would make clear when they thought instructing a lawyer would be a waste of money. This included where it was deemed too early for the client to consider engaging a lawyer. For example, one practitioner referenced a client approaching retirement who wanted to purchase a house from an estate where he was the executor. Having discussed with the client whether they had considered the financial implications of purchasing the property so close to retirement, the practitioner advised: *'You don't need a lawyer to make the application. You need to really go away and think about [whether you can] afford to do what you want to do.'*¹

Other instances included where the likelihood of a successful claim was so slim as to be implausible, or the services the client wanted could not be provided in the manner requested:

*I have said to people, "You don't have a claim. I cannot make a claim for you. I cannot sign the proper basis certificate. I cannot act for you."*²

*[We have prospective clients who call up and say] "I've got a prenup and the wedding's on Saturday and... apparently I need a lawyer to sign off on it before Saturday." We have to say "No, no. It'll be set aside. If you sign it now, it won't be binding anyway. Even if it is...you'll have to come in. We'll have to understand it. We'll have to ask questions. We need disclosure from the other side." [Then they say] "Well, that's outrageous... I just want to sign the...agreement".*³

This approach also arose in respect of contested estates, where there were no assets in the estate to seek a claim over, or where in the context of a family law dispute, the cost of taking action would leave a client with nothing: *'[I]f we don't see this person having anything at the end, we will discourage them strongly. That's why we don't take on many family law matters that are purely children's matters.'*⁴

Practitioners also advised clients who were seeking to change lawyers, not to do so where the services they were receiving were of a good standard, and changing lawyers would unnecessarily increase their costs. Conversely, advocating for a change where a client was not seen to be receiving value for money could also occur. As one practitioner explained:

*Sometimes you say, "Look, your lawyer's doing a good job." You're negotiating where you're at. Stay where you are. There's no point jumping ship. Sometimes we'll say, "Look, you're being given bad advice. You're never going to get what you are arguing for. You're wasting your time, you're wasting your money." Whatever. Probably, two-thirds of the time they switch over and come to us.'*⁵

1 Practitioner 17.

2 Practitioner 15.

3 Practitioner 3.

4 Practitioner 16.

5 Practitioner 10.

This obligation to minimise cost was also reflected in practitioners reports that they encouraged clients to consider trying less adversarial and less costly dispute resolution processes before they instructed a lawyer: *'If you're both sensible about this, if you work through mediation, counselling, whatever, a dispute resolution process, it will cost you a lot less than if lawyers send letters backwards and forwards between each other.'*⁶

This approach continued where matters proceeded to instruction, with practitioners keen to emphasise to clients the importance of their own behaviour in minimising the costs incurred:

*You need to have a relationship with a client where they understand what they're paying for, how they're paying, and how their behaviour can affect what they're charged. They get it eventually, they stop ringing up five times a day and emailing 40 times a day, but they whinge about it.'*⁷

*I say, "You do not want to be one of these people who spends \$500,000 on a court case,"...If a client's really rambling on the phone, I'll even be the person who says, "This is costing you a lot of money. Perhaps just go away and think about it, and send me an email with your instructions."*⁸

*I always warn them. If they're sending me five emails, which actually makes a lot of people upset, but I go, "Okay, I have to explain to you and I'm directed by the Law Institute to do this, that if you email me five times a day, your bills are going to be a lot higher. You're better off thinking about what you want to ask me and doing it in the one go".*⁹

Invariably, these strategies for helping clients to minimise their own costs were more effective in circumstances where clients had an accurate appreciation of how their legal services were to be charged and the factors that could make their matter more expensive to resolve. Accordingly, this was another way of mitigating client misunderstanding about costs identified in Section 3.3.

Controlling costs also involved practitioners discussing with clients the approach to take in respect of the dispute and the extent to which they engaged with the issues raised by the other party:

*If we're entering into negotiations and I'm getting back a six-page letter every single time, which picks apart every little thing instead of just a one-and-a-half-page letter, the client's going to see that. We will have the discussion saying, "You can see the extent of this response. Do you want me to respond in like and pick apart everything because that's not my style, or are you happy to keep focusing on the core issue?" Then also when you get to that \$2,000 mark, you can clearly see that this person, we're just not getting anywhere. Then the client will have to make the decision because the other party's lawyer is more difficult, what's the strategy from there as well?*¹⁰

6 Practitioner 6.

7 Practitioner 3.

8 Practitioner 9.

9 Practitioner 7.

10 Practitioner 16.

As noted in Section 4.2, the attitude, competence, and behaviour of the opposing lawyer was often cited as a factor that could potentially increase costs and generate a higher 'single figure' estimate. However, practitioners also reported that irrespective of whether these issues were identified at the outset or not, they tended to work towards minimising the additional costs incurred as a result of uncooperative or challenging responses from the other side.

Importantly, practitioners were keen to emphasise that discussions of costs involved ensuring that decisions and actions would move a client towards an outcome that struck an appropriate balance between cost and benefit. This involved acknowledging that in some circumstances, paying a higher amount upfront could reduce the likelihood of incurring further costs later down the line or potentially lead to a more beneficial resolution: *'You might spend another 10 grand in legal fees, but you might make another 100, so it makes good sense for you to keep going. It's just about having the conversations, I think.'*¹¹ Similarly, another practitioner commented that some cost savings could amount to a false economy:

*Without making a disparaging remark about Relationships Australia, anywhere like that, if you pick up the phone and you ring an accredited specialist family lawyer who has got 35 years of experience and charges \$4,000 for a day, you might get a lot further than over the course of 3 months going to 5 sessions, [than] where they've got to fit in around the appointment diary for an institution.*¹²

Practitioners explained that controlling costs also involved working with clients to balance the potential gains to be made by pursuing a matter further. That is, knowing where to stop, accept a settlement and regard the outcome as a success:

*[I would say to a client] "you'd be much better to settle for this amount because you are going to have to spend another \$15,000 if it goes to court. That means if you got your offer today, less \$15,000, it's about what they're offering now." That's generally the conversation and it's not usually the opposite. It's not usually the client saying, "Oh, I'm going to have to spend \$25,000, so I'm going to accept \$50,000 less today." It's usually the reverse. It's usually us protecting the client from that.*¹³

*A client just buzzed me with an email saying, "My husband's made this offer, but I don't think it's good enough. What do you think?" I just went back and looked at my notes and I reckon the offer's okay. I wrote back and I said, "Well, yes, it's in the range. Do you really want to spend an extra \$20,000 or \$30,000 fighting him? Perhaps you want to get this over and done with?"*¹⁴

¹¹ Practitioner 12.

¹² Practitioner 6.

¹³ Practitioner 4.

¹⁴ Practitioner 9.

It also involved knowing when to deliver a blunt appraisal of a client's behaviours and set out the implications of continuing in a certain way, as one family law practitioner observed, drawing on recent experience:

I am so direct with people, but sometimes I think, you've gone too far. I said to a woman on Sunday morning... "Listen, you are sounding like a no-contact Mum. This is how you sound, you need to stop." ...She's thanking me now, but... the only way to help them is to be... honest and truthful.¹⁵

As these quotes suggest, practitioners were keen to work with clients to find resolutions to their matters that were both acceptable and cost-effective and to prevent them from taking action that was likely to increase costs and prejudice an optimal outcome. Importantly, practitioners in the sample revealed a commitment to minimising client costs, even where it curtailed their own future income, or risked a client seeking out a different practitioner who might be more likely to tell them what they wanted to hear.

At the same time, practitioners were keen to make clear that while there was an inexorable link between costs and strategy, decisions had to recognise a client's autonomy. While for some this meant that '*...it's like a joint decision [with the client agreeing that] "Yes, I want to spend this amount"*'.¹⁶ For other practitioners it meant presenting strategic decisions in light of their cost, and conveying the financial implications associated with proceeding in a particular way:

If you want to make that interim application, it will cost you \$25,000. Do you really want to do it? Do you really need to do it? Is it going to delay the overall proceedings? I'm a very, very upfront cost discussor... I'd like clients to make decisions with full awareness of cost. I discuss it all the time. Do you really want to ask for that in disclosure? Do you need to? It's going to cost you money. Do you really need to know what was in that bank account five years ago? Is that really necessary? I talk a lot about costs, and I believe that's why I have very few cost disputes.¹⁷

For most practitioners, costs therefore remained a live and ongoing issue throughout the course of the lawyer-client relationship. This was deemed important because, in the words of one practitioner:

...People are generally fairly distrustful of lawyers and think they charge an arm and a leg. I think that's a general perception. I think it's good to set the groundwork [by making costs clear upfront] and then it's an ongoing dialogue.¹⁸

Costs were therefore a key way in which lawyers involved clients in strategic decisions about their matter. This had the dual effect of ensuring compliance with the LPUL, as well as promoting a client's sense of agency and responsibility for the costs incurred.

¹⁵ Practitioner 3.

¹⁶ Practitioner 4.

¹⁷ Practitioner 9.

¹⁸ Practitioner 6.

5.2 Responding to Factors that Increase Costs

Under Schedule 1, s 174(1)(b) of the LPUL, a law practice:

...must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client...together with the information set out under subsection 2.

It is important to note from the outset, that as set out in Section 4.1, practitioners took different approaches to calculating a 'single figure' estimate. The risk of exceeding an estimate depends, therefore, on how conservative an estimate is at the outset.

When it came to the factors that increased costs beyond what had been specified, these varied by the matter type and pricing model used. In terms of fixed fee work undertaken by wills and estates lawyers, several practitioners reported that increased costs were largely a function of the client making decisions after the point of instruction, which fundamentally changed the nature of what was initially scoped:

If it ends up being a bit more emails and phone calls, and things, then we're not going to change our prices, but if it's clearly exceeding the set work that we've set out, then we will need to have discussion with them and say, it's really exceeding the amount of work that we anticipated and we've got to charge an extra price based on that.¹⁹

Similarly, increased costs were also said to arise where a practitioner identified a problem with a specific document which needed to be rectified:

I let them know fairly early and say, "Oh look, there's a problem with your deed. I'm going to have to do this, I'm going to have to do that." Usually, they're so relieved that I've picked up the problem and that I'm actually doing the work and I'm explaining it all to them that they go, "Fantastic".²⁰

It was noted that clients were usually understanding about increased costs that were driven by their own change of mind:

I say... "if the scope of work changes, then either that will be billed additionally at an hourly rate and this is the rate, or we'll just need to have another discussion about what the fee is." People on the whole are understanding about it...If they balk at that, I say, "Well, the alternative is I'll just give you your money back, and then we'll part ways".²¹

¹⁹ Practitioner 1.

²⁰ Practitioner 7.

²¹ Practitioner 2.

While cost updates appeared to be relatively straightforward in the transactional fixed fee space, when it came to negotiation or litigation, irrespective of whether the matter involved fixed or hourly pricing, the range of factors that were seen to increase costs differed. These included: the other side stalling or failing to engage in the dispute resolution process; clients making strategic decisions based on emotion rather than logic; and changes to court operations, such as the recent merger of the Family Court of Australia and Federal Circuit Court. Additionally, practitioners also observed that certain internal factors could affect costs, such as a more junior practitioner taking longer to complete work than a senior practitioner.

Where increased costs were a function of the lawyers representing the other side, this was typically attributed to an opposing practitioner being unwilling to compromise or advise their clients to settle, or being inexperienced in the subject area. A lack of experience was a particular bugbear for some practitioners with one setting out: *'I would always prefer to get a letter from [firm name] or a letter from [firm name]...[than]...a letter from someone in Cranbourne who doesn't practise family law. I will settle that matter quicker, better, more straightforward, and at less cost with another big family law firm.'*²²

A lack of experience was not just a function of practitioners dabbling rather than specialising in an area of law, it could also reflect their being new to the profession. As another practitioner explained: *'[other firms] put juniors on files, who've got no idea what they're doing, and they're not properly supervising them usually, because of the cost associated with doing that.'*²³

The same practitioner went on to cite an experience in which:

*A lawyer had r[u]ng me in the first conversation. He said, "I just need to start by telling you, this is my first day of practising," and I've said, "This is a very complicated matter. Why am I talking to – Why are you ringing me up?" "Oh, well, I've been asked to ask you these things." I've said, "Well I'm happy to have a go at having a conversation, but I'm not going to keep this up, so you can go back to your principal and say, write to me if you'd like, but don't put a junior on the phone about a very complicated matter." I said to him, "No disrespect to you. You can't be expected to know this stuff. It's a very complicated matter.'*²⁴

This was symptomatic of a broader phenomenon in which firms were seen to *'...promote their staff beyond their station or capability just so they could charge out at higher hourly rates.'*²⁵

Practitioners reported that dealing with an inexperienced practitioner for the opposing party invariably increased costs, because a junior practitioner did not always have the knowledge needed to progress a matter or know what constituted an acceptable settlement offer.

²² Practitioner 9.

²³ Practitioner 11.

²⁴ Practitioner 11.

²⁵ Practitioner 11.

Of course, where that junior lawyer was working for the client, rather than against them, some practitioners indicated a willingness to absorb those costs, as one explained:

If [a junior lawyer is] seeing a concept for the first time, it is going to take them longer. Now, the client is paying a lower hourly rate for that, so it should take more time, but sometimes you see things, and you think, "I just don't think we can charge that amount of money".²⁶

When it came to the other party stalling in respect of a dispute – another behaviour that inflated costs – practitioners would often respond by trying to establish parameters or deadlines around the length of time spent, or the cost expended at a particular stage. Where progress was not being made, then one reported strategy was to recommend that the client escalate a matter by initiating court proceedings:

[I tell clients] if within three to four months we are not able to make substantial progress towards a settlement, then I would recommend to you that we stop this retainer because I think, you're just throwing good money [away] after that... [and instead we]... put that money into initiating court proceedings. I'd say, "Look, I think it's fairly obvious if the other side wants to engage on a bona fide basis or not. If they do, then let's negotiate, let's exchange disclosure, let's try to sort this out amicably. If they don't then let's not waste money on letters every week. Let's just get this into court because then we've got a referee."²⁷

[I advise clients to consider] the timeframe that you want to spend and the amount of money you want to spend exploring, negotiating. I suggest, usually three months, so maybe \$3,000 or \$4,000. Once you've exhausted that three months and that \$3,000 or \$4,000, reassess the situation and say, "Do I want to spend another three months, another \$3,000 or \$4,000, or is this just going nowhere?" You're better off going to court.²⁸

If we were negotiating with the other side, so lots of backwards and forwards, and – we have a computer system that helps us keep an eye on total costs – I might then say to the client, "Look, I'm concerned that you're spending money on negotiating with someone who doesn't negotiate. I think we should move to the next step".²⁹

²⁶ Practitioner 14.

²⁷ Practitioner 2.

²⁸ Practitioner 10.

²⁹ Practitioner 14.

Given that moving to the next step of litigation would also cause a client to incur additional costs in and of itself, practitioners explained that any action of this type was generally accompanied by a discussion of the possible cost implications:

*I'll absolutely say to clients, "I think we should rev them up, but that's going to be a cost to you because I'll have to issue the summons. We will have to be proactive. Being proactive costs us. Does it matter to you?" I'll try and I'll be asking for costs. I'll do a letter to them telling them I'm going to claim indemnity costs and telling them what they'll be, but that's only as good as the judge making that decision, isn't it?"*³⁰

Others observed that unresolved emotional issues could also result in clients taking counterproductive positions on issues. Consistent with the strategies taken to help clients recognise their own role in minimising costs set out in Section 5.1, in these instances, practitioners would set out the financial implications of decisions to encourage clients to shift their mindset in a more productive direction:

*People do come and say it's the principle of the thing...I say, "How much is that worth?"...you've got to tell them, whoever got the Lego blocks when you were five years old is irrelevant, and that is not relevant to this current dispute so it is up to me to say, "Here are the essential elements of either defending or bringing an estate claim, bringing a dispute about the family trust, or bringing a dispute about the superannuation entitlement...We should keep it streamlined. It's your obligation and it's mine."*³¹

*...very often in the area of family law, clients are pushing some agenda or something that they haven't come to terms with as a result of the breakdown of the relationship. They want to push that through the lawyer and they will say something like, "It's a matter of principle," and you explain to them that principles are very, very expensive things and that, "I can do it for you, but this is going to cost you a fortune, so let's try and keep it on a very narrow thing."*³²

Yet, practitioners also identified a common tension between keeping clients on track whilst giving them space to feel heard, particularly in provision claims or disputed wills where 'there's a lot of angst and emotional energy around them'.³³ This required a practitioner to be forthright with a client, to explain '...look, I'm listening to you but I've really got to get this information down...'.³⁴ Sometimes, it was necessary to provide clients with space to air their issues, provided that the cost implications of doing so were made clear to the client. As one practitioner explained in respect of a recent client: '...it's taken me 18 hours more time to do her affidavit than I had estimated and I told her that...and she's perfectly fine about it, and she said, "I need you to understand my full story so that you can extract what you want from it"'.³⁵

³⁰ Practitioner 15.

³¹ Practitioner 15.

³² Practitioner 6.

³³ Practitioner 11.

³⁴ Practitioner 11.

³⁵ Practitioner 11.

Practitioners also described the inherent tension between, on the one hand, supporting clients to have autonomy within the legal process and take an active role in their case, and on the other hand, identifying the legally pertinent aspects of their matter and dealing with these in an efficient, concise, and above all, cost-effective manner.

Given the emotional nature of the issues concerned, this tension was particularly prominent for family law practitioners, with one practitioner taking the approach that it was important to ‘... *be very businesslike about family law, instead of being too sympathetic.*’³⁶ The ability to balance supporting clients to make their own decisions versus preventing them from responding emotionally to developments that occurred in their case was an inherent part of controlling costs. As such, some practitioners were fairly candid when clients demanded too much ‘hand holding’:

*People say, “Oh, they listened. My previous lawyer listened to me when I rang five times a day and spoke for 20 minutes.” I said, “Yes, but that’s why you’ve got those bills.” They’ve got to understand that we’re not there to be their best friends. We’re there to do the business.*³⁷

While the practitioners interviewed reported that they had developed strategies and methods for striking this balance, many were of the opinion that this was something that junior lawyers often struggled with.

A less common, but still important factor that increased costs for clients in an unanticipated way was changes to court processes. As one practitioner explained:

*Sometimes the court would change IT systems...rather than filing hard copies of things, you have to scan, index, bundle, tab, paginate, and do all their work for them, and label all the PDFs and all of that. Now, that takes an enormous amount of time...When the court changes its systems or the government, the State Revenue Office, a lot of government departments now put everything back on the lawyer to do [the work] and just certify and to check. That increases the cost of services unexpectedly.*³⁸

36 Practitioner 9.

37 Practitioner 9.

38 Practitioner 11.

The new Federal Circuit and Family Court of Australia, which took effect in September 2021, was also a cause of unexpected increases in costs for several family law practitioners. As one practitioner explained, for some of their cases, this resulted in costs for some matters exceeding even the worst case scenario estimate they had given:

That's been particularly difficult probably over the last 12 months... no one really knows what [the court is] going to do... [For example] All of a sudden, the court decides they're going to decide to do another hearing that doesn't appear anywhere in the court rules, but they've just decided this judge is going to do it.³⁹

Finally, issues arising at court, such as where an opposing party was seen to lack capacity also had the potential to increase costs, particularly where these issues were not identified at an early stage:

I let them know. I say, "Look, my client's instructions are that the ex doesn't have capacity. You might want to check that out," but they don't...then you get to court. They're in court, and they're in the witness box and they're giving evidence. The judge says, "I'm not satisfied that this person understands what they're doing. Has anyone had them assessed?" "Oh. No, we haven't." "Well, I'm standing it down. I want them assessed before we keep going." You've wasted \$20,000 in court.⁴⁰

Such circumstances were problematic as they led to delays that typically fell outside of the scope of contingencies that a practitioner might be able to reasonably anticipate and factor into an estimate.

Ultimately, irrespective of the source of these costs, the buck stopped with the client:

I charge according to my time and for the same reason if a client's a pain in the ass or there's a lot of complicated matters. It's not my fault. It might not even be the client's fault, it's just the way it tumbles. It should be that they have to pay for it; it shouldn't be an equal fee across the board.⁴¹

Responding to increased costs involved open dialogue with the client, and ascertaining what steps could be taken to try and get costs back on track and what steps they were willing to take:

If I've said... an affidavit might take 3 hours and as we're doing it, I know it's taking much longer because I'm discussing it with the client anyway, that's when I'll be saying to them, "This has taken a really long time. What do you think has been the cause of that? Where do you think we can pull this back in?" It's up to me to communicate that to them. Then we might discuss a way to make it more efficient. Or we might just say, "[how about] if I get someone else to do this, you've got me to do all of these searches. Why don't we get someone else?" Or they say, "no, that's all right. I didn't realise... I want you to do it." Then they're not surprised by the bill.⁴²

39 Practitioner 14.

40 Practitioner 10.

41 Practitioner 7.

42 Practitioner 15.

Practitioners also explained that courts had an important role to play in cost control. For family law practitioners, transparency around costs was not a new requirement, with one explaining that: *'...we've been required under the Family Law Act, since its inception in 1975, to provide estimates of costs at various stages'*.⁴³ In this context, the LPUL requirements, whilst onerous insofar as they demanded new practice management systems and placed greater emphasis on producing an initial estimate of costs and then updating that estimate, were not perceived as substantially different to existing costs disclosure requirements.

Practitioners in the area of wills and estates also explained that the courts were attentive to costs: *'...particularly in that Part IV will challenge space, everyone's very cautious because the courts are watching you very closely'*.⁴⁴

At the same time, however, some practitioners opined that more could be done by the courts to support practitioners attempting to control costs, so that *'...the Uniform Law, the Civil Procedure Act, and the courts [were] working in...tandem'*.⁴⁵ Under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*,⁴⁶ the overarching purpose is to facilitate the just resolution of disputes according to law as quickly, inexpensively, and efficiently as possible. In line with this, parties must conduct the proceedings in a way that is consistent with the overarching purpose. Under r 1.33, if a party fails to comply with an order, the court may order costs, yet this was a power that, as the same practitioner observed, was rarely used in their area (wills and estates):

My former business partner, I used to just laugh... [that]... we're the only ones that say, "Oh, the court told us we had to do something by X date, we must." Everybody else just treats it as optional. ...If I write a letter to somebody saying, "I'm going to seek indemnity costs because I've had to make you get on with your case," there's no cost sanction for that. Costs are just reserved, costs are reserved, costs are reserved. Everything resolves at mediation practically, so those cost issues never get determined... there should be a sanction... It's a very good strategy that some lawyers employ running up costs on the other side.

For this practitioner, if the courts got proactive and started issuing some indemnity costs they were of the view that: *'The message [would] get across to the profession really quickly'*.⁴⁷

⁴³ Practitioner 9.

⁴⁴ Practitioner 13.

⁴⁵ Practitioner 15.

⁴⁶ Consistent with *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 67.

⁴⁷ Practitioner 15.

Yet, other practitioners were less encouraging of intervention by the courts, particularly with regards to their powers to limit costs, citing the potential for courts to make decisions without a full understanding of the facts. This could lead to unfair outcomes where, in the words of one practitioner:

*We've done nothing wrong, we comply with the law, but then the judge might arbitrarily impose a cap on costs at court... In an application to remove a trustee, for example, often the court doesn't realise that a lot of the work has happened before proceedings are issued because going to court is always a last resort, but there might be months and months of correspondence, pushing the trustee to do their job before threatening them and then applying to remove them.*⁴⁸

In such instances, this practitioner also explained that these fees would not be absorbed by barristers, meaning that it is '*...the solicitors who end up bearing shortfalls*'.⁴⁹

Taken together, these findings demonstrate that increased costs in the transactional space often reflected a change in the scope of work. While in litigation, increased costs were attributed to: the other side stalling or failing to engage in the dispute resolution process; clients making strategic decisions based on emotion rather than logic; and changes to court operations. Practitioners reported using several strategies to respond to and manage increased costs. However, it is clear that some circumstances are beyond their control, and some practitioners held the view that costs could be better controlled if courts were more inclined to take a proactive approach where the other side was failing to comply with requirements, or unnecessarily delaying the progress of a matter. Conversely, there were other practitioners who expressed concern about courts' powers in this domain, particularly their power to limit costs.

⁴⁸ Practitioner 5.

⁴⁹ Practitioner 5.

5.3 Tracking Estimates and Updating Costs Disclosures

5.3.1 Mechanisms for Monitoring Expenditure

In order to effectively manage costs, practitioners must monitor the expense that a client has incurred to date, and review how that accrual aligns with the 'single figure' estimate provided.

To help them with this task, several practitioners explained that they relied on specific practice management systems. In one example, a practitioner explained that their practice management system had '*different colour codes that come up on [their] time recording that tell [them] that [they]’re over the estimate.*⁵⁰ Other practitioners described using systems with similar mechanisms for tracking costs accrual:

Our practice management system has an ability that... [means] you can enter your cost and disbursement estimate in there. Once you are within 20% of that in combined billings and [disbursements], it will alert you. We will use that as a prompt to give the client an updated cost estimate. Because our disclosure statement has the hot cost the whole way along... It's saying, "Oh look, it's hit the next stage," or "It's gone in this direction."⁵¹

Our... computer system can now run a report to tell us whether we're within a certain percentage of a staged estimate. Let's just say I estimate for a client that I think that the resolution of their matter might cost up to \$50,000. I might put into our computer system that I want the first flag to be when our costs reach 10 [thousand dollars]. When it does that, I can then look at the cost estimate and say, "okay, are we still on track? Do I still think \$50,000 is right?" Sometimes it is, sometimes it's not. If I thought it [wasn't], then I write to the client and say why and change the cost estimate...because of that requirement in the Uniform Law to re-estimate, that's why we've got this system now that helps us to flag that."⁵²

Others did not use automated reminders to track estimates, favouring manual processes instead:

I put the minutes in my head and I think, I told this client \$15,000 for this negotiation and I reckon I must be getting close. My secretary always laughs at me because I'm a really good estimator. I say, "Oh for this matter, where am I at?" She goes, "Oh, we're \$14,850." I go, "Huh, I knew we were getting close."⁵³

⁵⁰ Practitioner 13.

⁵¹ Practitioner 12.

⁵² Practitioner 14.

⁵³ Practitioner 7.

Irrespective of the method used, tracking and reviewing estimates at key points was common practice among the practitioners interviewed, and was intended to ensure that a client would be updated as soon as it appeared likely that the 'single figure' estimate given would be exceeded. However, the tracking of estimates was not only aimed at ensuring compliance with the LPUL. For one practitioner who provided a 'single figure' alongside a fee breakdown against different stages, tracking expenditure against the indicative range for each stage (and not just the 'single figure' estimate) was considered part of their management of matters more generally. As the practitioner explained, this monitoring was also intended

...to hold us a little bit accountable too. If we have said at this point we will have another discussion because we've spent \$2,000 on negotiations and we're actually not getting anywhere, or we've spent \$2,000 on negotiation and we're really close, so if we spent at just another \$1,000, we might get there.⁵⁴

Here, tracking against the fee range for each stage also operated as '*...an indication of efficiency as well*' as the practitioner wanted '*...staff to be efficient enough to come within the estimates.*'⁵⁵

While practice management tools appeared to greatly diminish the labour associated with monitoring estimates, for some, tracking estimates remained a laborious process that could easily be missed among day-to-day workloads. As one practitioner explained:

...we often find ourselves in situations where we've exceeded the estimates and haven't given [an] up to date disclosure. We end up with a lot of extra work we've not been able to charge. I think that's a very hard thing, a very unfair thing. We're trying to do a good job and through some oversight or some urgency or whatever, there may be an update that's been missed or something like that. I think that's very harsh, that sort of thing... We try to be careful, but we're only human and sometimes there's urgency and volume of work, things can be overlooked. On the day, we're trying to do the best thing by the client, that means extra work, but we can't cut back our work to fit the estimate because that's a dangerous thing, that's unethical, I think, and it could lead to real problems. That's not something that we would deal with.⁵⁶

As this quote indicates, practitioners tended to be wary about the potential consequences of non-compliance with the LPUL as well as barriers to fee recovery. On the whole, however, most practitioners appeared to prioritise compliance and had mechanisms in place – automatic or manual – to ensure that estimates were frequently reviewed and that clients received regular updates on the expected expenditure for their matter.

⁵⁴ Practitioner 16.

⁵⁵ Practitioner 16.

⁵⁶ Practitioner 5.

5.3.2 Reviewing Estimates and Updating Disclosures

Among the participants interviewed, re-estimation and updating of costs typically involved a verbal conversation with the client about the progress of their matter and the expenses incurred, followed by written updated costs disclosure:

There is always a conversation, preferably in person, but if not over the phone, depends on the client...you need to be able to say, this is what's happened, or this is happening, as to why we're deviating from the initial estimate, something must have happened for that to have occurred.⁵⁷

In litigious matters, I would let them know that something's on their way about that. That, for example, we've reached this stage, you've paid the costs so far and the next stage is this. I'll explain the next stage and tell them I'll be sending them an estimate of what those costs are going to be.⁵⁸

Efforts to ensure that clients were verbally informed before an updated costs disclosure letter was sent, were designed to reduce the risk of 'bill shock' or cost disputes by giving clients advance warning of the likely increase to their total bill. As well as to provide clients with an opportunity to step back and review the progress of their case and consider next steps in light of the expenditure incurred.

Nevertheless, this approach was not taken by all of the practitioners interviewed. A minority of practitioners indicated that they would inform the client of an updated costs disclosure via email. This appeared to take the form of a formal update as an attachment: *'I send an email to the client saying, "Look, we're around the \$15,000 mark. I reckon it'll take another two or three in negotiation. We're not far off...Here's a new disclosure".⁵⁹*

For others, the decision about whether to preface an updated disclosure with a phone conversation depended on the type of matter and urgency involved:

If it's a probate administration matter and costs are going to be say \$500 more, we'll write to them. It would typically just be a letter saying, "Costs are going to be X more because of X, Y, and Z." [Whereas] with this litigation matter, I guess, it's going to be probably a half-hour conversation, and then also a written table of where we're at for various stages.⁶⁰

⁵⁷ Practitioner 8.

⁵⁸ Practitioner 5.

⁵⁹ Practitioner 7.

⁶⁰ Practitioner 13.

While some practitioners tended to initiate conversations regarding estimates only where it was at the point of being exceeded, others continuously and proactively updated clients on expected expenditure throughout. This included both the 'single figure' estimate, as well as the indicative range estimates provided to break down the 'single figure' estimate:

Even though I've given them a range, if it's going to move from the lowest of that range and start moving into that middle section, that's...when I'd ring up or have been speaking to them anyway and say, "Look, this is costing us more than we thought..."⁶¹

Even where both verbal and written cost updates were provided, practitioners explained that a client would already be well aware of what had caused an increase in expenditure because 'Usually, they're on that journey with you.' As such, clients were usually understanding of increased costs, '...because they've often had a go at the bureaucracy themselves so understand how frustrating it can be.'⁶²

A slightly different approach to keeping clients informed of cost accruals adopted by some practitioners, was to provide regular updates in bills sent out to clients. As one explained:

We send monthly bills...Every bill...contains an estimate. If, for instance, the advice has changed, then they will get a letter saying, "now that we've reached the end of the advice section [the next stages are] disclosure, valuations, and mediation. We estimate our costs for that part of the case to be \$35,000. You [have] incurred already \$8,000, which means there's \$27,000 yet to be incurred."⁶³

These practitioners further explained that there were benefits to taking this approach as 'the concept of having an actual bill with a running total as opposed to a letter that says, "We estimate your fees to date would be this," makes a huge difference to their understanding, makes them a bit more responsible for their costs too.'⁶⁴ However, it was not clear from the information given whether this update was intended to discharge the LPUL requirements and accompanied by the required wording, or whether it was simply an additional means of supporting transparency.

61 Practitioner 15.

62 Practitioner 15.

63 Practitioner 9.

64 Practitioner 4.

This level of detail was also intended to reinforce to clients the way in which their behaviour could impact upon costs. As the same practitioner noted, regular updates as to expenditure meant that clients were

...a bit more judicious in keeping communications to what's necessary and those things...[t]he monthly billing is actually, I think, the biggest key to people being informed about their costs. We try to do it so that they're always up-to-date, they're kept in the loop of what's happening with the matter so that the bill can just go and they know where it's up to.⁶⁵

Accordingly, while the practice of tracking and reviewing estimates and providing updates to clients was approached in slightly different ways, it was perceived to be an important priority for all practitioners. In part, this appeared to be a function of the potential repercussions of non-compliance with the LPUL, but it also appeared to be considered important in ensuring that cases were run efficiently and effectively, and maintaining productive relationships with clients. Indeed, tracking estimates and providing updates were considered essential in light of the fact that some matters were difficult to scope at the outset, and estimates could not always be guaranteed to be accurate. But beyond this, updated cost disclosures were just one method by which practitioners maintained open lines of communication with clients regarding potential and actual costs.

65 Practitioner 4.

5.4 Regulatory Insights and Implications

The findings presented in this Section raise several considerations with respect to current requirements under the LPUL.

First, taken in conjunction with the analysis set out in Section 4.1 and 4.2, it is clear that the requirement to issue updated cost disclosures can easily be obviated by the tendency for some practitioners to over-scope the 'single figure' estimate at the outset of a case. Indeed, as discussed in Section 4.2, some practitioners may deliberately inflate their estimates so as to avoid the need to issue an updated costs disclosure. In these instances, particularly where matters are billed at the end, rather than at regular intervals throughout, there is the risk that clients will have very little insight into how fees have accumulated. This may be offset where practitioners are upfront about the cost implications of certain courses of action.

Second, it is clear that while some practitioners have implemented systems to support monitoring of costs, these systems were not without cost:

We've had to spend a lot of money on our computer systems to make sure that we can keep on top of our requirements... it's absolutely increased the amount of time that the staff have to spend on this stuff including our admin and accounts teams because someone has to run the report to give to the lawyers that they can check. When the new estimates are done, they all have to be entered into our computer system so that it continues to run. Someone has to chase up the lawyers who are recalcitrant, who haven't done their checking in time. Someone has to do the letters, which we don't charge for to give new estimates. It's a lot... We had to pay a consultant to create the coding out of our existing accounting process. A whole new thing had to be created.⁶⁶

For those unable to manage these costs, reliance on manual processes was necessary, however this brought with it the risk of updates 'slipping through the cracks'. One practitioner opined that the consequences of this were particularly unfair, and that more generally, it was not always possible or in the client's best interest in urgent matters to stop work that would otherwise exceed the estimate until a client had been updated.

Third, as a whole, the interviews revealed a lack of clarity in relation to whether the form in which updates were issued, would satisfy the requirements of s 174(1)(b). This is because it was not always clear whether verbal updates, email updates, or updates provided in regular bills were accompanied by a formal updated disclosure document setting out the required wording.

66 Practitioner 14.

Fourth, practitioners exhibited a strong awareness of their obligations under the LPUL and most made clear that cost discussions were intricately interlinked with strategic discussions. Many practitioners also made clear that they worked hard to minimise inefficiency, monitored the efficiencies of junior colleagues, and would adjust as necessary to ensure that clients were not bearing the entire cost of training new entrants into the profession. In many cases, however, the lower hourly rates of junior practitioners were intended to offset their lesser efficiency.

When it came to their role in controlling costs, practitioners generally saw their obligations as being focused on completing work efficiently, and providing sound advice to clients that made clear the cost implications of certain decisions. This would involve steering them away from emotive or reactive decisions, as detailed in Section 5.2, and redirecting them toward outcomes that would produce a net gain. To this end, some practitioners were often quite blunt about the cost implications of different actions, including the costs that were likely to arise as a result of a client interacting with their lawyer in particular ways. It remained, however, that clients retained the agency to deviate from such advice, particularly given that for some clients controlling cost was simply not seen as a priority.

Finally, some practitioners felt that their efforts to control costs were undermined by what they saw as the unwillingness of the courts to intervene and pull into line those opposing parties and practitioners whom they viewed as unnecessarily prolonging matters, as well as those who failed to comply with court deadlines. Nevertheless, this was countered by a reticence from others for courts to intervene in matters to limit or cap costs. As a result, there was greater support for courts to be proactive to prevent the accrual of costs, as opposed to permitting courts to set limits on cost recovery.

Taken together, this Section suggests that there is a need for further examination of: the level and extent of compliance with the LPUL requirements as to the form that updated cost disclosures take; the workability of these requirements for practitioners in circumstances such as urgent matters; and how court case management powers might be used to better support the requirement for practitioners to limit the accrual of unnecessary costs under the LPUL.

6. Conclusion and Recommendations

This Section sets out the key findings from the report with reference to three key areas: firstly, the efficacy of the requirements mandated under the LPUL; secondly, the support provided for legal practitioners in respect of pricing of services and compliance with the LPUL; and thirdly, the accessibility of legal services pricing models. In each of these Sections, where appropriate, suggestions are made for future action that could be taken to address the issues arising in this report. It is important to note, however, that these recommendations have been formulated in response to the findings emerging from this research. As such, they have not been evaluated with regards to their practicality or subjected to further stress-testing.

6.1 The Efficacy of Uniform Law Requirements

6.1.1 Specifying a 'Single Figure' Estimate in Writing

The requirement to provide a cost estimate was seen by practitioners as an important catalyst for ensuring that upfront conversations with clients about costs took place. Practitioners viewed this requirement favourably, and considered that it had improved cost transparency in the legal services sector. Nevertheless, as outlined in Section 4, the requirement to provide a 'single figure' estimate in light of 'all the circumstances and the most likely outcome' enables practitioners to adopt different approaches when scoping litigation that may reduce rather than enhance transparency. This can be seen in terms of how practitioners produce an estimated overall cost based on the progress of the case itself, adopting either a 'Short Term', 'Medium Term' or 'Long Term' approach. It can also be seen in the extent to which practitioners incorporate contingencies into their overall estimation of cost and whether they price on the basis of a worst case scenario. As such, there remains a lack of clarity under the LPUL as to the most appropriate method by which to produce a 'single figure' estimate as well as whether practitioners ought to take their cue from clients or from their own experience. The inconsistency prevalent under the current system may impair clients' ability to engage in price comparisons.

Given that large estimates are typically accompanied by further cost information provided in written or verbal format, it would also appear that the 'single figure' estimate does not achieve its intended purpose of simplifying costs for clients. On the contrary, it appears to complicate the communication of costs due to the tendency of practitioners to scope to a higher value than is likely to be required and to then provide alternative indications of the likely range of costs at different stages. This leads to an increased information burden for clients which risks them focusing only on a headline figure, or worse, misinterpreting the 'single figure' as a fixed fee price. Where this headline figure is inflated to cover any or all potential costs, then clients may be overwhelmed by the estimate, questioning its value. Conversely, where it provides a realistic indication of costs, which clients interpret as a quote, they may express dissatisfaction if cost updates are required due to unexpected events occurring.

In light of the above, it is not clear that the requirement to produce a 'single figure' estimate of costs is meaningfully enhancing cost transparency. For negotiation/litigation matters where hourly rates are used, it may be more informative for clients to be provided with a mandated schedule of costs in which a practitioner is required to set out an estimated minimum and maximum expenditure for each stage of a matter through to litigation. This might include the following standardised conditions: optimistic (contingencies not included), realistic (likely contingencies included) or conservative (worst case scenario) as well as standardised inclusions/exclusions for each of the foregoing (**Recommendation 1**). While this may enhance the ability of clients to engage in cost comparisons across providers, we note that it would also substantially increase the administrative burden for practitioners. This administrative burden needs to be weighed against the fact that many clients appear not to read cost disclosures, though perhaps the change above may reduce the information burden for clients.

Given the requirement to submit a schedule of costs to the courts at various junctures, more could be done to explore how this data might be used to provide clients facing litigation with a better understanding of the minimum, mean, median and maximum costs and standard deviations observed for different problem types by firm, court or geography. There may well be an opportunity to develop a more evidence-informed understanding of anticipated and actual costs from the weight of information held by courts (**Recommendation 2**).

6.1.2 Minimising Unnecessary Costs

In general, practitioners exhibited a strong awareness of the obligation under the LPUL to minimise a client incurring unnecessary costs, and many had implemented specific systems to monitor expenditure. Practitioners also generally made clear that cost discussions were intricately interlinked with strategic discussions with clients about the progress of their case. This was said to empower clients to become actively involved as decision makers, and to encourage clients to act more judiciously when making decisions likely to incur additional costs.

When it came to controlling costs, practitioners generally saw their obligations as being focused on completing work efficiently, and providing sound advice to clients that clarified the cost implications of certain decisions. This involved steering them away from emotive or reactive decisions, as detailed in Section 5.2, and towards outcomes that would produce a net gain. In some instances, this required being blunt about the cost implications of particular decisions or behaviours.

Practitioners also recognised that courts played an important role in cost control processes, and at least for family lawyers, the LPUL requirements were not perceived as substantially different to the existing requirement to supply cost information to the courts.

However, the interviews also revealed a general view that courts did not use their case management powers as effectively as they could to control costs where one side to a dispute was stalling. In other cases there were concerns expressed that courts were too willing to limit cost recovery. As such, there is a need to consider how the LPUL requirements dovetail with the courts' case management duties (**Recommendation 3**). For example, it may be more effective for courts to take an interventionist approach at the outset by sanctioning bad behaviour, rather than simply limiting the scale of cost recovery.

6.1.3 Providing Updated Cost Disclosures

Data generated through interviews appeared to cast doubt on the effectiveness of the requirement to issue updated cost disclosures, given that some lawyers may over-scope the 'single figure' at the outset of a case. This tendency is particularly problematic where it exists as a means by which to avoid having to issue updated cost disclosures, as was observed in the sample of the practitioners interviewed.

Across interviews, practitioners largely indicated that they had introduced systems to monitor costs, although some still relied on manual tracking methods. There were, however, different approaches taken across the practitioners interviewed as to the form an update took. For example, some practitioners included updated estimates alongside the regular bills that they issued to clients, and it was not clear whether this was accompanied by the required wording. Given this, there may be benefit in clarifying and reminding practitioners of the form that updated cost disclosures must take (**Recommendation 4**), further investigating the extent of any non-compliance in this space (**Recommendation 5**), and considering how to address the reality that cost updates can be subverted where a large 'single figure' estimate is given at the outset of a matter (**Recommendation 6**). Work performed in respect of Recommendation 6 will necessarily go hand in hand with that conducted in respect of Recommendations 1 and 2 as detailed above.

6.1.4 The Client's Right to a Negotiated Cost Agreement

While practitioners reported complying with the requirement to include the prescribed statement regarding negotiation in their disclosure document, negotiation attempts by clients were rarely entertained in practice. This was true across all pricing models, areas of law, and across both transactional and litigation work. The extent of this uniformity suggests that the negotiation term used in practitioners' costs disclosures is a largely hollow promise, with this written term sometimes actively contradicted by practitioners during verbal conversations, particularly at the first meeting, or by other terms in their cost agreement. In fact, interviews with practitioners suggested that there is in practice a widespread 'take it or leave it' approach to the fees set out in cost disclosures. For the most part, negotiation was only possible where it reflected a reduction in the amount of work undertaken, rather than in the cost of conducting work.

At present, it is not clear whether the requirement to include a statement on negotiation – as set out by the LPUL – is intended to encourage more competitive pricing in legal services, or whether it is an effort to encourage clients to exercise agency over the selection of services. If the latter, it may be more appropriate for this entitlement to be articulated explicitly, rather than couching it within 'a right to negotiate' (**Recommendation 7**). In fact, a client who takes this right at face value and seeks to act on it may well be disappointed to learn that it is given short shrift by many practitioners. Any reframing of this right to negotiate, as a right to 'exercise agency over the strategy adopted and services purchased' would also need to ensure that clients are appropriately warned about the implications of limited service provision and the right of a practitioner to refuse to supply services in an unbundled manner. Additionally, further research and evaluation into how to operationalise such a right for clients to exercise agency is needed for this to be practically effective, rather than merely symbolic.

6.2 Improving Support for Legal Practitioners

6.2.1 Pricing Models

Practitioners' choice of pricing model strongly hinges on whether a matter can be categorised as transactional – and therefore perceived as being easily scoped and contained – or whether it is a matter subject to various unknowns, such as negotiation or litigation. As such, fixed fees tended only to be offered where the risk of a matter escalating was relatively minimal. Even in these instances, for the most part, those offering fixed fees reserved the right to apply and recover additional costs as set out in relevant cost disclosure and agreement documents. Amongst the cohort interviewed, this right was only exercised where the nature of the work had clearly changed. But if it is the case that fixed fees are sometimes used to induce clients into instructing a practitioner who has no intention of fixing the fee – as some practitioners raised when offering anecdotal observations – this clearly undermines cost transparency. As such, the extent to which fixed fees are substantively fixed or subject to alteration is an issue that warrants continued monitoring and further research (**Recommendation 8**).

Moreover, the approach to pricing taken by practitioners in the sample reveals that, despite varied pricing models, there has been no rush to shift away from pricing services on the basis of time. The one exception to this was the approach taken by a value pricing practitioner who suggested that time was only one element in their costing equation. Where value pricing had been trialled by practitioners, it was exclusively in respect of high-value clients. Moving beyond this perception – insofar as it persists on a wider scale – will be an important step in any effort to encourage broader adoption. This perception was also accompanied by concern from some as to the extent to which value pricing would pass the 'fair and reasonable' test if a challenge was mounted. Taken together with some of the other concerns raised, this may point to a misunderstanding of what value-pricing means and how to implement it, rather than the failings of the model itself. Evidently there is merit in further exploring how value-pricing is operating in practice, as well as the segment of the market it is currently serving and why (**Recommendation 9**).

In addition to the indeterminate scope of some matters acting as a barrier to the adoption of fixed fee pricing, practitioners occasionally appeared to be operating under the assumption that a fixed fee required set prices for certain types of work, rather than operating as a price-cap on a bespoke-priced matter. This, coupled with misconceptions regarding elements of value pricing, suggest that these are models where practitioners would benefit from greater clarity as to their operation (**Recommendation 10**). Beyond this however, many of the barriers which practitioners identified as inhibiting the adoption of new pricing models appeared to be beyond the scope of regulatory influence, including: concerns about change and new ways of operating that may require new approaches; difficulty getting other partners to support change; or a disinclination to introduce models that require practitioners to actively 'sell' themselves to clients.

6.2.2 Resources to Assist Compliance and Promote Best Practice

In addition to the need for clarity with respect to the regulatory implications of specific pricing models and how they can be implemented, interviews also revealed several areas of practitioner confusion and inconsistency related to the use of written cost disclosures and cost agreements. As detailed in Section 4.3, practitioners used separate documents for their cost disclosure and cost agreements, or combined their disclosure document with their cost agreement. In some circumstances these documents would contain a breakdown of the scale of likely costs for each stage of a matter (particularly litigation), but this varied according to the approach that practitioners took to scoping and cost communications.

While the inconsistency of format described above may not be a high-profile concern in and of itself, what is significant is that a number of practitioners observed that in spite of the importance of the document(s), clients did not read them, or where they did, they did not take note of specific components. While some individual practitioners took innovative approaches to talking clients through these documents, using visual tools and employing 'touchpoints' to reiterate key information, this practice was the exception rather than the norm. Indeed, some practitioners actively encouraged clients to disregard parts of their agreement and focus on the price ranges they provided verbally or in writing in the form of cost breakdowns. Practitioners also questioned whether all of the prescribed information required for cost disclosure documents was really necessary and whether flexibility could be introduced to enable them to provide information to a client in other ways.

At present, the majority of lawyers are hesitant about the idea of providing less information, due to fears of non-compliance with the LPUL, or exposing themselves to cost disputes further down the line. Further guidance for practitioners and further research directed at enhancing the design of exemplar cost agreements and disclosures that prioritise client comprehension, would be beneficial for both clients and practitioners (**Recommendation 11**).

6.3 Improving Public Capability to Evaluate Legal Costs

Several factors appear to influence client choice to purchase services from a lawyer. While professional reputation and personal connection are important for certain client populations, so too is the extent to which a practitioner meets pricing expectations. Nevertheless, for many prospective clients, making an accurate assessment of what constitutes value for money and/or being able to meaningfully compare quotes remains extremely difficult.

From a practitioner perspective, the majority of clients present with an inaccurate understanding of how legal fees are costed and unrealistic expectations of the totality of costs. In theory, fixed fee models are assumed to be more accessible due to the fact that they are predicated on an overall, upfront price for a package of services, which can be compared by prospective clients. However, as discussed in Section 2.1.2 and above, fixed fees are not necessarily a guarantee of an overall cost where the work required goes beyond the scope of the original service agreed. Nor are clients necessarily comparing like with like when looking at fixed fees advertised across providers.

Efforts to stimulate competition in the market for legal services may well be challenged by the extent to which firms feel the need to compete at all, which as discussed in Section 2, appears a relatively low priority. While this may be an artefact of the sample, it is also the case that competition is less relevant in sectors where engaging in price comparisons imposes a relatively high burden on consumers. Soliciting prices from more than one potential supplier is time and (potentially) cost intensive for consumers who must have multiple initial consultations with different practitioners to gather price information.

The findings suggest that it is not easy to enhance competition or transparency in the market for legal services. However, in the context of credence goods, there is reason to believe that it may be less important to promote price competition and more important to ensure that irrespective of what services cost, they meet minimum levels of quality. This can be supported by the continuation of independent mechanisms that assist clients to evaluate the quality of the product they are getting, examples of which include specialist accreditation, as well as registration requirements, continuing professional development, oversight requirements, and accessible complaints mechanisms. It can also be supported by encouraging consumers to see price as only one component of service delivery and providing them with tools to assist them in comparing the more opaque dimensions of competence, capacity, experience and trustworthiness across practitioners (**Recommendation 12**). Such information alongside the continuation of schemes intended to demarcate practitioners with a certain level of expertise (as exemplified by the LIV's accredited specialists list) may assist clients who do not have access to a trusted and able referrer.

In addition, more could be done to assist clients to better understand the cost information supplied to them, and understand what factors influence costs. While there will always be a degree of complexity associated with legal costing models, this does not preclude the utility of public legal education strategies for building capability among the public, and for seeking to equip consumers with the tools and support they need to make more informed decisions when purchasing legal services. For example, there is clear scope to incorporate additional information into public factsheets provided by the VLSB+C, such as 'Meeting a Lawyer', which can operate to build public understanding of how legal pricing works, together with active strategies clients can take to better ensure that they are getting value for money (notwithstanding that assessments of value for money remain difficult). Appendix A sets out a list of tips and advice drawn from discussions with practitioners that could be integrated into VLSB+C's existing Public Legal Education material (**Recommendation 13**).

6.4 General Observations of Good Practice

Various examples of good practice with respect to billing, communication and updating were identified from the discussions with practitioners. These approaches may better support clients, ensuring that they are aware of the costs they are incurring and the basis on which these costs are being incurred.

The first observation of good practice came in respect of those hourly rate practitioners who used regular billing cycles as a means by which to prevent bill shock and keep clients informed as to how fees were accruing against the 'single figure' estimate that they had been given. As discussed in Section 2.2.1, a monthly billing cycle was the most common approach adopted. While perhaps less necessary in the transactional fixed fee space, monthly billing is a practice worth encouraging among all practitioners in the negotiation and litigation sphere – irrespective of the pricing model they employ – as well as among hourly rate practitioners undertaking transactional work.

Second, good practice was observed where practitioners raised the issue of costs in an initial consultation in a direct and upfront manner. This included clarifying exclusions and inclusions associated with a particular fixed fee matter and with a 'single figure' estimate, and providing price breakdowns in respect of complex or multistage work. This went hand in hand with taking a proactive approach to advising clients of the factors within their control that can increase their costs, such as: changing the scope of work; contacting a practitioner at multiple different points with queries that could be consolidated into a single consultation; or frequently changing one's mind about the direction of a particular matter.

Third, particularly in respect of disputed estates and family law matters where heightened emotions can arise, good practice may also involve setting clear boundaries to help clients understand the professional parameters of the service being provided. This may include encouraging clients to seek support from professionals, family or friends where necessary, and particularly where there is a risk that emotions will cloud a client's legal judgement. Similarly, encouraging a client to bring a support person along to consultations to take notes (among other things), may help clients better recall cost discussions.

Finally, practitioners who had implemented digital mechanisms for regularly tracking billing against the 'single figure' estimate supplied, appeared to be far better placed to meet the updating requirements under the LPUL. Whilst some appeared able to rely on their experience or familiarity with a case to keep track of the need to provide an updated costs disclosure, this may introduce the risk of oversight or error. Good practice here may involve the adoption of digital tools in preference to manual processes.

These observations of good practice may merit inclusion in good practice guidance (**Recommendation 14**).

6.5 Gaps in the Knowledge Base and Avenues for Future Research

Having reflected on what this study tells us about, among other things, the way in which practitioners price services, comply with the LPUL, and communicate with clients about costs, it is also necessary to consider what this study does not tell us, and the priorities for further research.

First, as discussed at various points in this report, more could be done to examine how the approach to producing a 'single figure' estimate may be reformed to better permit comparisons across service providers (as raised in the context of Recommendation 1), as well as the extent to which court data could be used to develop an evidence-informed understanding of anticipated and actual costs for the benefit of consumers (as raised in the context of Recommendation 2).

Second, an examination of how the LPUL requirements and the courts' case management duties dovetail is an important part of considering the broader picture with respect to legal costs (as raised in the context of Recommendation 3).

Third, whilst compliance with and knowledge of the LPUL requirements appeared strong among those interviewed, a more detailed review of the extent of compliance with specific LPUL requirements, particularly the form of updated estimates (as raised in the context of Recommendation 5), the effect of over-scoping (as raised in the context of Recommendation 6), and the extent to which fixed fee services may in practice not be a true indication of the total cost incurred by a client (as raised in the context of Recommendation 8), would be beneficial.

Fourth, while this study provided limited preliminary insight into the ways that some practitioners are using value-based pricing models, there remains a prominent gap in current understanding of the methods practitioners use to adjust their pricing to capture the value of a service to a client, as well as an understanding of the uptake of value pricing and the sectors in which it is being used (as raised in the context of Recommendation 9). Similarly, further research is necessary to better understand the barriers to and incentives for practitioners to move away from existing pricing approaches, including the extent to which misconceptions of pricing models exist (as raised in the context of Recommendation 10).

Fifth, further research is needed to consider how cost agreements and disclosures can be designed in a way that enhances understanding, as well as how to expand and build upon current mechanisms geared towards promoting client agency (as raised in the context of Recommendation 11). This could include investigations into how the 'right to negotiate' may potentially be reframed as a 'right to exercise agency' (as raised in the context of Recommendation 7), and into the kinds of tools that may assist clients in comparing the more opaque dimensions of competence, capacity, experience and trustworthiness across practitioners (as raised in the context of Recommendation 12).

Finally, this study has explored issues from a practitioner perspective. However, a full understanding of the issues raised in this report demands an appreciation of the client perspective. It also requires looking beyond the areas of wills and estates and family law. Research of this nature would provide a stronger basis for assessing the operation of the regulations and the merits of any proposed changes to improve pricing transparency. It would also offer a fuller appreciation of the factors that affect costs and consumers' understanding of the same (**Recommendation 15**).

Addressing these gaps in knowledge will provide a more comprehensive evidence-base to inform the development of regulatory policy which enhances the accessibility and transparency of legal services, within Victoria and beyond.

Appendix A: PLE Guidance Emerging from the Research

Advice relating to effective communication with lawyers, such as:

- Do not email or phone your lawyer every time you have a question. If the question is not urgent, you can make a note of it and wait until additional questions come up, allowing you to ask a series of questions at once.
- Keep conversations with your lawyer to the point, and stop a conversation if you need time to think about a matter. If you are being billed by the hour, then keeping your lawyer on the phone while you mull over an issue will increase costs. Unless you want the lawyer to weigh in on your thoughts, or the issue is so time sensitive that a decision has to be made on the spot, you can call your lawyer back once you have thought about it.
- If your lawyer sends you information to read, ensure you read it, rather than asking them to summarise the contents of the correspondence verbally. Summarisation by the lawyer incurs a double expense – that associated with writing the correspondence and sending it to you, and that associated with verbally communicating what the written correspondence says.
- Make sure you are candid with your lawyer about the circumstances surrounding your dispute, your personal affairs, your actions, and the actions of the other side.
- Whilst it is important not to withhold information, you must also be careful not to waste time providing unnecessary detail. Your lawyer will be able to guide you on the information they need, and you should ensure you provide them with the full facts.
- If you suspect the other side in a dispute may lack the mental competence to understand legal processes and to make decisions independently, raise this with your lawyer as soon as possible.

Advice relating to taking an active role in your matter, such as:

- If your lawyer requests that you bring specific documents to a meeting or take specific steps before you meet with them again, make sure you complete these steps/bring these documents. This will avoid you incurring the costs of another meeting once you've done what was needed. If you cannot bring the required documents or undertake the required steps before you are due to speak with/meet with you lawyer, communicate this to your lawyer and confirm whether the planned meeting should go ahead.
- Discuss with your lawyer the strategy they will take when dealing with your dispute, and what the cost implications are of certain decisions. Is it worth continuing to attempt to negotiate with the other side if agreement has not been reached after a certain period of time? Is a particular issue worth pursuing, and what gain is associated with doing so? Every time your lawyer seeks instructions from you, it is an opportunity to re-assess the trajectory of your dispute and the associated cost/benefit of the decisions you have to make.
- Try to separate the emotion involved in a dispute, from the decisions that you will have to make. Ask to bring a support person to your meetings with your lawyer if you think that will assist. They may be able to write down notes to help you remember key points after the fact.

Information geared towards improving public literacy of legal costs, such as:

- For fixed fee work, make sure you are clear on what is included and excluded from the fixed fee, and what the cost of 'extras' might be if they are needed.
- Ask your lawyer if any other practitioners will be sitting in on your meetings, and if they charge for that person to be present.
- Ask your lawyer if there are any junior members of staff who have a lower hourly rate who may be able to undertake aspects of your case under their supervision.
- Ask your lawyer to provide you with regular bills (monthly) so you can track how much you have incurred against the estimate they are required to provide you with. Note that if you are unable to pay your invoices on a monthly basis, then you can ask for longer billing intervals, but still request an update of what costs you have incurred against your lawyer's initial costs estimate.

Appendix B: Interview Topic Guide

1. Client base/pricing approach (20–25 minutes)

A. General

1. Could you describe what your [family/estates] client base looks like?
2. Can you explain your standard approach/process in regards to pricing?
3. Do you find that many clients come to you with an idea of how much services should cost?
4. Do you find that many clients intend to shop around to find a good price for their legal services?
5. Do clients typically present with a desire to purchase only specific types/stages of services?
6. How do you communicate to clients that your fees are negotiable?

B. Family

1. Client A comes to see you to formalise a financial agreement for the division of property in respect of their divorce from their spouse. They have no children. The parties are reasonable and communicative and keen to cooperate. How would you approach pricing the work on this matter?
2. Do you add in detail about the possibility of further costs down the track to your initial disclosure, for example, if the matter turned out not to be as simple as described?
3. Client B comes to see you, and they are also wanting help coming to an arrangement for their finances and children. The parents have not spoken in years. The parents are not on good terms and have different ideas about what the parenting schedule should look like. It is unclear what level of cooperation will be received from the other side. How would you approach pricing this type of matter? Would it differ from the previous example, if so how?

C. Estates

1. Client A comes to see you to set up a will. How would you approach pricing this work?
2. Would you add in contingencies to your quote? For example, if the lawyer has to do additional investigative work into the location and nature of assets and interests in properties or businesses, or where they require an asset audit? Or would you wait until that possibility presented itself and issue a new costs agreement?
3. Client B has come to see you because their mother has recently died and left them a substantially smaller amount of money in their will than their step-brother has received. How would you approach pricing this type of matter? Would it differ from the previous example, how?

2. Communicating with clients (20–25 minutes)

1. How do you communicate the basis of your pricing you described above, to clients?
2. Are there any particular actions you take to ensure that clients understand the costs associated with their case and how those costs are set, or to minimise misunderstanding?
3. Can you explain how you communicate an updated cost disclosure to clients?
4. Do you rely on cost consultants or billing specialists to prepare itemised bills for work undertaken in relation to a client?
5. How do you handle disputes over bills?
6. Are there clients that you would choose not to represent because you cannot meet their service expectations given the level at which your fees have been set, or cannot meet their price expectations if the matter becomes more complicated?
7. How do you manage addressing the concerns of price sensitive clients, versus ensuring that they don't settle for an outcome that is less than ideal, for fear of incurring too much expense?
8. [Traditional Lawyers] How effective do you think the uniform law requirements are in providing a framework for transparent communications around costs, helping the client make an informed decision about purchasing services, and helping the client understand the possible paths the dispute/problem might take?
9. [Innovative lawyers] Do you find it is more challenging to meet any of the uniform law requirements given the pricing model you have adopted?

3. Barriers to/motivations for adopting alternative pricing (10–15 mins)

1. How did the decision to base your fees on [model] come about? Have you always had this model?
2. What do you see as being the advantages and disadvantages of the pricing model/s you use?
3. Have you considered any other models of pricing aside from the model/s you describe above?

