LAWYER CANCELLATION FEES

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Nearly 30 years ago an Australian judge remarked that the charging of cancellation fees by counsel was a new phenomenon, before branding it as one to be questioned. The interim has witnessed a broadening of this practice, grounded in addressing the opportunity cost for barristers when a matter does not proceed to final adjudication according to schedule. At a time when both legislators and judges lament the costs hurdles to accessing justice, and in the absence to date of any scholarly treatment of the cancellation fee topic in the Australian literature, it is apt to investigate and examine the varying judicial and professional views that have emerged in this context. The article concludes by calling for at least some professional pronouncement in this space.

I INTRODUCTION

Cancellation fees have become a feature of everyday life. Whether it concerns the costs of travel, accommodation or other services, we are nowadays hardly surprised to find contractual terms whereby payments are forfeited by reason of cancellation. Cruise ship passenger contracts present a typical illustration; in this context, as in others punctuated by cancellation fees, there is usually a tiered structure of forfeiture depending on a variety of factors, one of which is almost invariably the time frame within which cancellation is sought. There are nonetheless few standard forms, which even within the same environment may make it difficult for consumers to make informed and effective comparisons. Indeed, vis-a-vis cruise ship passenger contracts, a commentator has observed, inter alia by reference to cancellation fee clauses, that the terms of many such contracts are 'unclear' and 'objectively unreasonable from the point of view of the passenger'.[1]

Even professional services have not been immune from the encroachment of cancellation fees. Recent times have witnessed, for instance, medical practitioners

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1 Rosemary Gibson, 'Cruise Ship Passenger Contracts: The Trip of a Lifetime or a Voyage through Clauses, Conventions and Confusion?' (2018) 32(2) *Australia and New Zealand Maritime Law Journal* 17, 35.

charge cancellation fees to patients who fail to attend appointments without compelling cause. Whether in the professional or the broader consumer context, though, a commonality is the practical inability of the consumer to negotiate the terms of cancellation. Instead, like the ever-increasing phenomenon of 'clickwrap' online terms, the consumer 'takes it or leaves it'. This assumes, in any event, that the consumer is both minded to read the relevant terms and capable, as a result, of comparing prospective services providers. As foreshadowed above, the latter cannot be assumed; often, it appears, nor can the former.

It is unsurprising, therefore, that many consumer contracts containing cancellation fees are not the product of negotiation (in the traditional contract sense, 'bargain'). Inherent information symmetry marks an imbalance here. As on other occasions that share these features, legislators have responded. In particular, statutory initiatives via the *Australian Consumer Law*, under the guise of 'unconscionable conduct' and 'unfair contract terms',[2] to the extent that these encompass substantive unfairness, may provide a vehicle through which to challenge cancellation clauses.

It should not be assumed, though, that the *Australian Consumer Law* sounds a death knell for cancellation fees. Consumer protection legislation is not directed at unduly interfering with the proper conduct of business. As legitimate commercial reasons may underscore cancellation fees, it would be an overreach for statute to outlaw them altogether. The main commercial justification is that the service provider has contractually undertaken to supply the service to the consumer on or within a set time frame, and thereby placed it beyond power to contract with another consumer for that same service at or during the time specified. This is essentially an 'opportunity cost' notion. Unless the service provider can charge a cancellation fee to a consumer who ultimately does not use the contracted service, it may be out of pocket due to inability to substitute that consumer with another on the same terms. The latter may not always be assured and, in view of likely administration costs, nor should it necessarily be conceived as revenue neutral.

II EMERGENCE IN LEGAL PRACTICE

Against this backdrop, that cancellation fees should surface within legal practice should perhaps not prove entirely surprising. In this environment, however, cancellation fees target not clients who miss appointments (as, say, patients of a medical practice) or who elect not to board a flight or vessel. Instead, a lawyer cancellation fee is triggered typically where a court hearing is avoided because the matter is settled or adjourned. In this context, it is not unusual for expert

2 See *Competition and Consumer Act 2010* (Cth) sch 2 pts 2–2 (unconscionable conduct), 2–3 (unfair contract terms).

witnesses to charge a cancellation fee;[3] privately-appointed mediators may do likewise.[4] Indeed, it has been suggested that

> [t]he time has not yet come, but may soon come, where should late applications to vacate [court-annexed] mediations be made the orders will only be made on terms that parties meet the Court's full internal costs thrown away by the vacation of the mediation date.[5]

The latter would de facto function as a cancellation fee.

Yet there is practically no scholarly writing on lawyer cancellation fees (and not much on cancellation fees more generally). From an Australian perspective to date, the most detailed treatment appears in a four-page piece (albeit in small print) by a New South Wales silk (and costs assessor) in the journal of the New South Wales Bar Association.[6] Publication in a Bar journal is no accident. As elaborated under the ensuing heading, justifications proffered for the legitimacy of cancellation fees charged by counsel — 'for time set aside for a hearing which has been adjourned or for time set aside when a case does not last as long as was expected'[7] — allegedly have no (or much less) carriage when it comes to instructing solicitors.

Although the trigger for lawyer cancellation here differs from that involving, say, persons who miss appointments or fail to board a flight, the underlying rationale remains extant. In a case where the appropriateness of counsel's cancellation fee was in issue, the Supreme Court of New South Wales opined that it was

> not unreasonable that if the matter is successfully concluded on the first day of the trial and other work has been foregone, [counsel's] *opportunity cost* should be recompensed in the manner that the parties have agreed, namely, by the payment of a cancellation fee.[8]

The opportunity cost rationale witnessed reiteration some years later via the following pronouncement under the auspices of the Queensland Bar Association:[9]

> Obviously, as part of day-to-day practice, barristers are briefed to appear in Courts and Tribunals. The sitting dates and also time for preparation are then allocated in the barrister's diary. If a matter settles (or is adjourned) before or

3 See, eg, *Attia-Haik v Macaione* [2018] FamCA 204, [10] (Loughnan J), where hearing dates vacated.

4 See, eg, *Verhoeven v Verhoeven* [2018] FamCA 118 [52] (Forrest J), where part of mediator's cancellation fee was allowed to be recovered by the successful party.

5 *Xie v Lin* [2018] NSWSC 116, [12] (Slattery J).

6 Mark Brabazon, 'Cancellation Fees' [2017] (Summer) *Bar News* 43.

7 *Commissioner of Police (NSW) v Hoffman* (2014) 18 District Court Law Reports (New South Wales) 320, 333 [34] (Neilson DCJ) ('*Hoffman*').

8 *Levy v Bergseng* (2008) 72 NSWLR 178, 201 [104] (Rothman J) (emphasis added) ('*Levy*').

9 Letter from President Peter J Davis to Bar Association of Queensland, 15 May 2014, 1 (emphasis added).

> during the trial, there is a possibility of *loss of opportunity* of the barrister to earn another similar fee on the dates that were allocated. Sometimes, a cancellation fee may be charged by the barrister to compensate him or her for that loss of opportunity to earn a fee.

In this sense, the barrister is ostensibly in a position similar to the airline, cruise ship operator or hotel, in contracting to supply a service over a time frame that is ultimately not required, thereby losing the opportunity to contract with (and be paid by) another client/customer to provide that service during that time frame. Moreover, compensation for that loss, and associated costs, is justified, it may be argued, because the service provider is 'blameless' — but the client/customer is not — when it comes to the triggering event.

III CONFINED TO COUNSEL?

As foreshadowed above, when it comes to the legal profession the issue of cancellation fees has centred on barristers. On the apparently sole occasion where a solicitor's cancellation fee has been aired before a court, involving an application to recover that fee (notably as between party and party),[10] the presiding judge (again in New South Wales) responded coolly, as follows:[11]

> I do not consider that it is reasonable or usual for a solicitor to charge a cancellation fee. There is a good deal of criticism of barristers charging cancellation fees but the practice seems to be reluctantly accepted in certain areas … including for criminal trials. A solicitor's practice operates in an entirely different way from a barrister's practice. It is not expected that if a trial does not eventuate a solicitor will be left stranded with no work for a period of time even if he or she had expected to be present in court for all or most of the trial.

In other words, as the opportunity costs for solicitors, by reason of the way they conduct practice, are lower than those of barristers in the same scenario, the former cannot justify cancellation fees whereas, at least in some circumstances, the latter can. Allied to this notion is that, unlike barristers, solicitors can generate some of their income from activities aside from directly providing legal advice for a fee. As explained by a Queensland silk:[12]

> [T]he solicitors' branch of the profession … can make money by charging a mark-up on the salaries paid to employees, whether qualified solicitors or unqualified

10 Davies J remarked that it was a 'matter of contract between the applicant's father and the solicitor if the latter demand[ed], [pursuant to the] former['s] agree[ment] to pay, a cancellation fee': *R v Carbone (No 2)* [2017] NSWSC 346, [68] ('*Carbone*'). As to the distinction in approach in this context between solicitor-client costs and party-party costs: see below Part V(B).

11 *Carbone* (n 10) [67] (Davies J).

12 Anthony JH Morris, 'Are Cancellation Fees a Penalty?' [2016] (77) *Hearsay: Bar Association of Queensland* <https://www.hearsay.org.au/are-cancellation-fees-a-penalty/>.

> clerks or 'paralegals', in respect of time made available (and work performed) by them; and, in addition, there are profits to be made from photocopying or scanning documents, conducting searches, and other purely clerical functions. A solicitor can therefore be lying on a beach in Acapulco, yet still be generating an income — something which a barrister decidedly cannot do.

Another advantage for solicitors, it has been said (again by a barrister), is that '[m]ost solicitors … overcome the economic disadvantage of clashing dates' — which counsel cannot countenance because, when hearings are involved, they undertake work for a particular client to the exclusion of other potential work — 'by sharing their work with their partners and underlings or if necessary by briefing barristers in their stead'.[13] The same writer adds that, '[u]nlike public servants and private employees, whose regular wages protect them against down time, barristers must make other arrangements to protect themselves from the prospects of down time'.[14]

Yet the assumption that practice by association with other solicitors necessarily obviates opportunity costs for individual solicitors who have allocated trial time may be taking the argument too far. It implies that solicitors *always* have something else (remuneratively) to do with their time whereas barristers may not. It, in any case, overlooks the fact that the majority of solicitor practices in Australia are sole practitioners.[15]

Accordingly, if cancellation fees can prove legitimate on certain occasions, it may be queried why they should be confined, in the lawyer-client context, to counsel's work. If the rationale is truly grounded in opportunity cost, a blanket barrister-solicitor distinction seems too blunt an instrument to reflect the policy issue(s) at stake. While it may be accepted that, by reason of their practice structure and work, (some) barristers may suffer greater 'exposure' to opportunity costs than solicitors when a matter is settled or adjourned, questions of degree can logically be met via inquiry into the quantum of any cancellation fee rather than simply the nature of the engagement. Of course, that this may unhinge a 'Pandora's box', in quantifying individual solicitors' opportunity costs, may at least partly explain the broader reticence to breach the distinction in question. But to the extent that the core justification remains grounded in opportunity cost, nor can the reasonableness of barristers' cancellation fees be immune from matters of quantification. The point is addressed in greater detail later in the paper.[16]

13 Michael P Amerena, *Barristers' Fees: Cost Disclosure, Retainers, Assessment, the Private List and the Right to Sue* (Brief, 27 October 2011) 10 [41].

14 Ibid.

15 Urbis, Law Society of New South Wales, *2018 National Profile of Solicitors* (Report, 17 June 2019) 3 <https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>.

16 See below Part VII(B).

IV FROM UNHEARD OF TO COMMON

What follows nonetheless maintains the orthodox focus on barristers as beneficiaries of cancellation fees. The first Australian judicial foray into the topic — by Wilcox J in *Commissioner of the Australian Federal Police v Razzi (No 2)* ('*Razzi*')[17] in 1991 — reveals a belief that fees of this kind are a relatively recent phenomenon. His Honour characterised such a practice as 'of very recent origin', remarking that 'in 21 years at the Bar, from 1963 to 1984, I never heard of such fees being asked'.[18] And he was unconvinced of the premise underscoring cancellation fees — namely, that the barrister is left without remunerative work should a case not proceed or finish early — other than 'perhaps for beginners at the Bar who are unlikely in any event to be able to command' such a fee.[19] Instead, 'for most established barristers', observed his Honour, the problem is over-employment; 'some unexpected time out of court [would, in any case, present] a welcome opportunity to catch up with chamber work'.[20]

It should be mentioned that his Honour's remarks pertaining to cancellation fees were obiter and his antipathy was arguably intensified by the fact that the fees were being sought upon an application to recover costs as between party and party. Yet even assuming a basis for recovering cancellation fees as between counsel and client, Wilcox J surmised: 'I would require a deal of persuasion ever to make an order which would have the effect of permitting a party to recover such payments from someone else'.[21] This reflects the longstanding notion that a beneficiary of a costs order rarely receives a full costs indemnity; in other words, not every cost charged as between lawyer and client is met by an unsuccessful opposing litigant. As elaborated below,[22] the distinction between, on the one hand, costs orders between party and party, and on the other hand, recovery from one's own client, is hardly irrelevant when it comes to probing the legitimacy or otherwise of cancellation fees.

The foregoing did not mean that Wilcox J ignored the 'problem' facing barristers where cases are settled, suddenly adjourned or otherwise consume less time than estimated. In these circumstances, 'the barristers briefed in the matter found themselves unexpectedly out of court', and '[v]ery often … would have refused other work because of the case and its estimated duration'.[23] But, said his Honour, 'barristers generally accepted that any financial loss caused by such

17 (1991) 30 FCR 64 ('*Razzi*').

18 Ibid 67.

19 Ibid.

20 Ibid.

21 Ibid.

22 See below Part V(B).

23 *Razzi* (n 17) 67.

circumstances was to be borne by them'.[24] This did not, however, mean that barristers would be entirely out of pocket. In an approach branded as 'fair', any disadvantage to counsel was 'balanced against the advantage conferred by the rule which permits barristers to charge a full fee on a matter settled after delivery of the brief but before any hearing'.[25]

Wilcox J here was referring to the traditional method of barrister charging for a court hearing, namely a brief fee and, if necessary, refreshers. Preparation for trial being 'incidental to the central task for which counsel's fee is paid',[26] the brief fee was 'taken to include a good deal of time spent in reading facts and law in preparation for trial'.[27] It covered preparation 'up to at least a substantial part of the day … and … night before the hearing, [and] for time spent in court before the first refresher'[28] (traditionally set at two-thirds of the brief fee), which usually commenced after the first day of the trial.[29] The brief fee (sometimes termed 'fee on brief') thus ensured that counsel was paid up until the end of the first day of the trial. It was viewed as distinct from what today may be characterised as a cancellation fee;[30] rather than focusing on fees foregone by reason of future occurrences, any concerns surrounding brief fees targeted past events, namely whether the engagement of counsel was premature.[31]

The 'advantage' Wilcox J envisaged was that the brief fee was payable whether or not the matter was settled or adjourned[32] (although there was nothing to preclude counsel reducing the fee in this event).[33] This reveals that, despite the distinction between brief fees and cancellation fees, there remains some confluence between them. This point derives some (albeit perhaps indirect) support from the following remarks uttered by a New South Wales District Court judge in 2014:[34]

> The administration of justice in this State could collapse if barristers who were retained for a hearing in advance of the hearing date were not entitled to charge for leaving aside the time that they did for a hearing which ultimately never

24 Ibid.

25 Ibid.

26 *Prudential Finance Ltd v Davander Nominees Pty Ltd* [1992] 1 VR 468, 475 (Ashley J).

27 *Ralkon Agricultural Co Pty Ltd v Aboriginal Development Commission* [1986] FCA 229, [16] (Forster J).

28 *Magna Alloys & Research Pty Ltd v Coffee (No 2)* [1982] VR 97, 109 (Fullagar J).

29 *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 9)* [2011] FCA 661, [57] (Logan J).

30 *Hoffman* (n 7) 333 [34] (Neilson DCJ).

31 See GE Dal Pont, *Law of Costs* (LexisNexis Butterworths, 4th ed, 2018) 630–1; *Hoffman* (n 7) 327–9 [22]–[27] (Neilson DCJ).

32 See also *Pearce v Tower Manufacturing and Novelty Co (No 2)* (1899) 24 VLR 757; *Hoffman* (n 7) 335–7 [40]–[42] (Neilson DCJ).

33 Indeed, in *Hoffman* (n 7), Neilson DCJ remarked that while counsel 'was entitled to charge a fee for a brief on hearing when the matter settled when it did. The only matter which might have disentitled [counsel] to charge that fee would have been other court work which he might have found for 23 March 2012 [being the first day of the trial]': at 338 [45].

34 Ibid 337 [43] (Neilson DCJ).

> takes place because the matter is settled. The logical outcome of the plaintiff's argument to me is that if the matter settled two days before, three days before, four days before, five days before, six days before (et cetera) the hearing, counsel is not entitled to charge any brief fee. The logical outcome of the submission was that only if counsel actually embarked on preparing the matter for hearing, for example, after 4pm on the day before the hearing was due to commence, would he be entitled to charge any brief fee. … Practice at the Bar would radically alter as those who take longer to prepare cases because of a lack of expertise or experience would be entitled to charge more than counsel with expertise and experience who did not need as long to prepare a matter for hearing. That would not be in the public interest at all.

Be that as it may, that the fee on brief (plus refresher) approach has since been almost entirely superseded by charges calculated on the hours and days a barrister devotes to the engagement ('time' seemingly ahead of 'task') — indeed, the transition appeared to have well under way at the time *Razzi* was decided[35] — has led some to view Wilcox J's antipathy towards cancellation fees as a relic of another era.[36] Within two years of the decision in *Razzi*, evidence presented to the same court was that cancellation fees were 'normal or common at the time' (here referring to the late 1980s), albeit usually confined to senior counsel.[37] In 2006 a Family Court judge was led to understand that cancellation fees were 'a common practice at the Sydney Bar'.[38]

In 2008 the Supreme Court of New South Wales observed that 'while it is true that a significant number of barristers resisted … demanding cancellation fees, it is a not uncommon practice'.[39] In 2017 the same court identified as

> a reasonably common and accepted practice for counsel privately briefed in the criminal area (and in some parts of the civil area for that matter) to stipulate for a cancellation fee for part of the time set aside to conduct a lengthy trial.[40]

Most recently, a Family Court judge referred to cancellation fees as 'a very common provision in barristers' fee agreements in family law'.[41]

35 It is interesting to note, to this end, the observation of the (then) President of the Northern Territory Bar Association, made in the immediate aftermath of Wilcox J's remarks in *Razzi* (n 17), that in the Territory many counsel already charged on a time basis: Graham Hiley, 'The Bar on Barristers' Cancellation Fees' (1991) 6 (September) *Balance: Official Publication of the Law Society of the Northern Territory* 13, 13.

36 See, eg, *Levy* (n 8) 199 [95] (Rothman J); *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd (No 2)* [2014] WASC 345 (S), [39] (Edelman J) ('*The Pilbara Infrastructure Pty Ltd*').

37 *Stefanou v Fairfield Chase Pty Ltd* [1993] FCA 605, [54] (Einfield J) ('*Stefanou*'). See also: at [45], [57].

38 *K v V* [2006] FamCA 252, [108] (Faulks DCJ).

39 *Levy* (n 8) 199 [95] (Rothman J).

40 *Carbone* (n 10) [62] (Davies J).

41 *Foley v Foley* [2018] 58 Fam LR 52, 69 [118] (Benjamin J) ('*Foley*').

V CATALOGUING THE CASE LAW TRAJECTORY

In view of the foregoing, it is instructive to peruse the post-*Razzi* judicial airings relating to barristers' cancellation fees. This forms a backdrop against which to assess the concerns underscoring these fees and, in view of no attempt to outlaw them — whether by regulators[42] or the judiciary (despite recent condemnation by the Family Court)[43] — how any such concerns can be addressed or managed. The foreshadowed airings are pursued below in broadly (but not entirely) chronological order, not only for reasons of convenience but in an attempt to discern, if possible, an underlying trend.

A *Post*-Razzi *Change in Practice*

As in *Razzi* by way of obiter remarks, in a 1993 decision Einfeld J in *Stefanou v Fairfield Chase Pty Ltd* ('*Stefanou*') confessed 'serious concerns and reservations about the principle of cancellation fees', adding that '[a] requirement to pay counsel anything for work not done is or ought to be as unconscionable in the law as anywhere else'.[44] No doubt his Honour was influenced, in making these statements, by the terms of the cancellation fee agreement in question. He characterised 'the concept that $75,000 could be payable for two hearings vacated on at least three weeks notice' as 'quite unjustified and excessive'.[45] This situation was, in his opinion, 'even more demonstrable' as to another set of cancellation fees arising from the retainer being terminated more than two months ahead of the hearing date.[46] In each case, moreover, 'no credit was sought or obtained for alternative work obtained by the barristers in the abandoned or lost periods'.[47] Yet in the face of evidence that cancellation fees were not an uncommon practice in commercial litigation to secure counsel of choice, coupled with the client being 'no fool, baby or pushover',[48] his Honour was not willing to intervene in what was a lawyer-client dispute.

Four years later, in a brief judgment on review of a costs assessment as between

42 No present pronouncement by a professional or regulatory body appears to explicitly address the issue of cancellation fees. Brabazon records that the *New South Wales Barristers' Rules*, via r 85A, operative from 1992 to 1994, proscribed a barrister from charging a cancellation fee in addition to the normal brief fee except with the agreement of the instructing solicitor. He notes that similar provision existed at the time in a 'jointly agreed statement by [the] Bar Council and the Law Society': see Brabazon (n 6) 43–4. Wilcox J's recommendation 'that it would be desirable for Bar Councils and Law Societies to examine [cancellation] fees, and perhaps issue a ruling or some guidelines, before the practice becomes firmly entrenched' has, it seems, fallen on deaf ears: *Razzi* (n 17) 67.

43 See below Part V(C).

44 *Stefanou* (n 37) [55].

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid [46].

lawyer and client, Master Malpass similarly gave weight to the client's informed entry into a costs agreement containing a cancellation fee.[49] The Master was accordingly disinclined to upset the assessor's determination as to the reasonableness of the fee (bearing in mind that it was only $3,500).

The ensuing judicial foray into barristers' cancellation fees awaited the 21st century. Confronting McDougall J in *Wilkie v Gordian Runoff Ltd* ('*Wilkie*')[50] in 2005 was whether it was reasonable for a client to agree to pay cancellation fees to his counsel. The backdrop was a hearing 'expected to occupy some 6 to 12 weeks', for which 'both senior and junior counsel [would] be required to devote at least 2 months', and perhaps 'in excess of 4 months, to virtually full time work in preparation'.[51] Each counsel stipulated that 20 days' fees 'be payable regardless of the duration of the hearing (or, indeed, regardless of whether the hearing proceeded at all)'.[52] His Honour held that, in these circumstances, it was reasonable for the client to agree to pay this cancellation fee.[53] Its quantum was nonetheless directed to be resolved by a referee.[54]

Cancellation fees were again the subject of judicial airing, this time before the Family Court, the ensuing year in *K v V*.[55] Faulks DCJ, having lamented the shift from task-based charging (implicit to some degree in brief fees) to time-costing,[56] opined that '[t]he practice of charging cancellation fees falls into a similar category and if anything is even less justified'.[57] Also informed by a perceived lack of bargaining power in family law clients when it comes to negotiating fee agreements, his Honour branded 'the practice of charging cancellation fees in family law matters at least' as one 'not to be encouraged', before urging 'individual barristers and the various Bar Associations to review their practices'.[58] That *K v V* was a claim for costs *as between party and party*, where issues of contractual freedom between lawyer and client are secondary, prompted the court not to endorse or approve the application of any agreement about cancellation fees.[59]

The same approach had been adopted the year before by Connolly J in *R v Martinello*,[60] where accused's counsel charged a cancellation fee for the entire ten days on which the matter had been listed for trial. In refusing to encompass

49 *Lawrence v Hannaford* (Supreme Court of New South Wales, Master Malpass, 26 March 1997).
50 [2005] NSWSC 873 ('*Wilkie*').
51 Ibid [13].
52 Ibid.
53 Ibid [22].
54 Ibid [25].
55 [2006] FamCA 252.
56 Ibid [111].
57 Ibid [112].
58 Ibid [113].
59 Ibid [118].
60 [2005] ACTSC 109 ('*Martinello*').

this fee within a costs order as between party and party (even on a solicitor-client basis), his Honour noted that the rules of court made no mention of cancellation fees,[61] before expressing an unawareness of 'any practice in the civil side of this court where cancellation fees are generally regarded as appropriately caught within a general form of costs order'.[62] Though conceding that the position 'may be different' in the face of an indemnity costs order, he cautioned that 'there may be some significant public policy issues as to whether the practice of cancellation fees ought be endorsed or encouraged by this court'.[63] It seems that the practice vis-a-vis costs as between party and party is similar in South Australia, where in 2014 Judge Dart stated that '[i]t has long been the case that cancellation fees are not allowable on an adjudication'.[64]

In 2008, returning to the lawyer-client scenario, *Levy v Bergseng* ('*Levy*') involved highly specialised proceedings, where counsel was 'being asked to forgo other paid work, and set aside six weeks'.[65] '[I]f the matter [was] successfully concluded on the first day of the trial and other work [had] been foregone', it seemed not unreasonable, opined Rothman J, that counsel's 'opportunity cost should be recompensed' via an agreed cancellation fee (20 days).[66] His Honour endorsed the costs assessor's determination that a reasonable fee should be calculated on 15 days' work.[67] At the same time, he warned against viewing his decision as more broadly precedential, remarking as follows:[68]

> Nothing in this judgment should be taken as a general proposition that all counsel in all cases can reasonably and justly charge cancellation fees. In most cases, and for most counsel, cancellation fees would be unjustifiable. This judgment deals only with this appeal, relating as it does to senior counsel engaged 'on spec' in particularly specialised work for which the lead time is lengthy and during which he has, in fact, foregone other paid court work.

B *Application beyond Solicitor-Client Costs?*

The foregoing, to the extent that it suggests a bright-line distinction between

61 Cf *The Pilbara Infrastructure Pty Ltd* (n 36) where Edelman J noted that although '[i]t appears that it is not as uncommon today for a party to agree to pay a cancellation fee for a senior barrister … whether that fee should be borne by the other party to the litigation is a different matter [given that the Scale of costs] has not yet included in it the recoverability of costs for work which was not done': at [39].

62 *Martinello* (n 60) [9].

63 Ibid [10].

64 *BHP Billiton Ltd v Parker (No 2)* [2014] SASC 6, [25] ('*BHP*'). 'Adjudication' in this context is the South Australian equivalent of the taxation or assessment of costs as between party and party.

65 *Levy* (n 8) 201 [104] (Rothman J).

66 Ibid.

67 Ibid 203–4 [114]–[115].

68 Ibid 203 [111].

lawyer-client costs and party-party costs,[69] when it comes to the (potential) allowability of barristers' cancellation fees, may be a little misleading. While it is true that merely because a court (or costs assessor) gives effect to a costs agreement containing cancellation fees — thereby acknowledging (ostensible) freedom to contract upon certain terms — hardly means that those fees are allowable as between party and party, this is not always so. At least two cases reveal that, in the face of costs 'thrown away' by the default of the party against whom costs are ordered, there is potential for the order to include (part of) the successful/innocent party's barristers' cancellation fees.[70]

This was an upshot of Faulks DCJ's reasons in *Galvan v Galvan* ('*Galvan*').[71] That five years earlier his Honour in *K v V* refused to allow a cancellation fee to come within a costs order,[72] coupled with the fact that in *Galvan* he made no reference to *K v V*, suggests that the scenarios were sufficiently discrete. In *Galvan* the wife was held entitled to costs thrown away as a result of the husband's adult children being joined as parties during the final hearing, prompting an adjournment by reason of being unprepared to meet the case.[73] Those costs included, inter alia, a cancellation fee in the amount of $4000 (representing two days thrown away) for the wife's counsel.[74]

Similarly, in *R v Carbone (No 2)* ('*Carbone*')[75] Davies J allowed, as between party and party, a cancellation fee, in a costs agreement between the accused and his counsel, where an adjournment of the trial was the fault of the Crown. His Honour did, however, reduce the sum recoverable by approximately 25%.[76]

C *Coming Full Circle?*

The most recent, and indeed most expansive, judicial exposition on barristers' cancellation fees appears in the reasons of Benjamin J in *Foley v Foley* ('*Foley*').[77]

69 'Lawyer-client' costs target the costs charged by a lawyer to his or her own client; 'party-party' costs are costs payable by a litigant to a (usually successful) opponent by way of indemnity pursuant to a court order. In the *Legal Profession Uniform Law Application Act 2014* (NSW) these are described in terms of, respectively, 'Uniform Law costs' and 'ordered costs': at s 63.

70 Cf *Foley* (n 41) where Benjamin J countenanced that '"cancellation fees" would not be allowable pursuant to [costs] orders made between parties, unless it was in factual circumstances such as [those] set out in *Wilkie* … [n]amely a six to twelve week hearing and months advance in terms of preparation': at 74 [149]. His Honour nonetheless added that '[e]ven then, it would only likely apply in the shadow of an indemnity costs order or a practitioner/client costs order', and '[a]ny such cancellation fee would be of very modest proportions': at 74 [149].

71 [2011] FamCA 1033 ('*Galvan*').

72 [2006] FamCA 252, as to which see above Part V(A).

73 *Galvan* (n 71) [34].

74 Ibid [36].

75 *Carbone* (n 10).

76 Ibid [55], [63].

77 *Foley* (n 41).

Though accepting that cancellation fees are common practice and that not all judges explicitly oppose them,[78] his Honour stridently criticised the practice. Viewing it 'entirely reasonable' for barristers to charge 'reasonable and fair fees for preparation work which was actually done', Benjamin J voiced 'grave difficulty in endorsing, as fair and reasonable or proportionate, terms in fee agreements which provide for barristers to be paid for doing nothing'.[79] Resembling the seminal remarks in *Razzi*, his Honour noted that as barristers' work is 'not all appearance', but 'inevitably includes advising, conferences, preparation and research. There is little or no reason why … busy barristers cannot apply the time lost on other matters'.[80] Fairness dictated, he surmised, that the cost should 'not be visited upon often inexperienced litigants as they find their way through the emotional and complex world of family law and relationship breakdown'.[81]

VI CONCERNS UNDERSCORING CANCELLATION FEES

This review of the case law reveals perhaps one thing ahead of any other: the absence of any judicial pronouncement endorsing the practice of barristers charging cancellation fees. Moreover, whereas some members of the judiciary may be somewhat ambivalent in this regard, multiple judges have broached concerns surrounding the practice.

A *Increasing the Cost of Litigation*

The principal disquiet, unsurprisingly, centres on cancellation fees as an (unjustified) addition to the cost of litigation. Irrespective of changes in the charging practices of counsel, which appeared at the forefront of Wilcox J's mind in *Razzi*, his Honour's observations should not be seen as entirely passé. His remark — that '[a]t a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and the legally-aided, any new practice which further increases costs requires meticulous justification'[82] — arguably carries even greater weight some 30 years later, when calls to ameliorate access

78 In particular, his Honour noted that Neilson DCJ in *Hoffman* (n 7) and Rothman J in *Levy* (n 8) 'both adopted a somewhat laissez-faire approach to barrister's cancellation fees': *Foley* (n 41) 73 [134].

79 *Foley* (n 41) 73 [137]–[138].

80 Ibid 73 [140].

81 Ibid.

82 *Razzi* (n 17) 67.

to justice have only intensified.[83]

B *Over-Remuneration*

A related matter is that cancellation fees can cause barristers to be over-remunerated. In line with Wilcox J's observation that most experienced barristers struggle more with over-employment than under-employment,[84] the concern that barristers best positioned to command a cancellation fee are those least in need of its so-called protection is not without significance. Unless the costs agreement makes provision whereby counsel gives the client 'credit' for work undertaken during the hiatus covered by the cancellation fee,[85] there is a distinct prospect of counsel being concurrently remunerated by two (or more) clients. Moreover, it has come to attention of one judge that 'it has been known for counsel to be paid more than one cancellation fee in respect of the same period of hearing time'.[86]

It is curious, to this end, that Rothman J characterised the cancellation fee agreement in *Levy* as 'no different to a consultant or person working on commission charging a fee for work based on a percentage of the amount involved or value of property', where '[t]he cost bears no direct relationship to the time spent on work, but is still a cost for the provision of the work in question'.[87] Although his Honour was here addressing only a technical point,[88] his parallel is intriguing. After all, percentage fee agreements for legal services are outlawed by statute,[89] in part due to their capacity to generate a fee outcome disproportionate to the work involved.

83 In the family law context, when addressing cancellation fees, it has been judicially observed that '[s]ometimes costs in family law proceedings are out of kilter with the reasonable expectations of parties and the community to enable accessible justice': *Foley* (n 41) 68 [113] (Benjamin J). This is no new phenomenon: see, eg, *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, where, in a case involving a $500,000 legal bill for a divorce, Kirby P made the following observation: 'Little wonder that the legal profession, and its methods of charging, are coming under close parliamentary, media and public scrutiny. Something appears to be seriously wrong in the organisation of the provision of legal services in this community when charges of this order can be contemplated, still less made. … If such costs, in what was substantially a single matrimonial property case between a married couple, are truly regarded as reasonable, there may be something seriously wrong in the assessment of reasonableness within the legal profession which this Court should resolutely correct.': at 422.

84 *Razzi* (n 17) 67.

85 See below Part VII(E).

86 *K v V* [2006] FamCA 252, [109] (Faulks DCJ).

87 *Levy* (n 8) 200 [99].

88 Namely whether a fee agreement, which includes a cancellation fee, is nonetheless an agreement about the costs of the provision of legal services.

89 *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law 2014* (NSW) s 183; *Legal Profession Act 2006* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3 cl 27; *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 183 ('*Legal Profession Uniform Law* (Vic)'); *Legal Profession Act 2008* (WA) s 285. Cf an amendment to the *Supreme Court Act 1986* (Vic), via the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), by adding a new s 33ZDA, which for class actions envisages that a court will be able to make a group costs order calculated as a percentage of any award or settlement that may be recovered in the proceeding.

C *How Counsel Is Incentivised*

There is also the issue of what cancellation fees may incentivise. How the law governs the lawyer-client relationship is hardly immune from questions of incentive. Most fundamentally, fiduciary duties characterise that relationship in an effort to obviate lawyers assuming positions whereby interest may conflict with duty. That the charging of fees, it has been judicially observed, 'necessarily can involve a direct conflict of interest'[90] — the lawyer's interest is for the greatest fee, and the client's for the lowest fee — is ordinarily assuaged by informed client consent coupled with various unique avenues that the law adopts as backstops to monitor unreasonable fees.[91]

Cancellation fees, though, tread a further step, namely (as more than one judge has observed) an entitlement to be paid for work that is *not* performed (albeit for which counsel was available to perform). How this could potentially incentivise counsel to act *contrary* to a client's interests troubled Einfeld J in *Stefanou*,[92] where a costs agreement set charges on the basis of full hearing fees for any five or seven days when a hearing did not take place. That this could 'incenti[vise] [counsel] to shorten the hearing … or encourage the Court not to sit on some days so that they can receive seven or some lesser number of days fees without being required to appear', was a fee regime 'too open to abuse to be generally approved by the Courts', said his Honour.[93]

D *How Clients Are Incentivised*

Questions of incentive are not confined to barrister behaviour. Cancellation fees are capable of impacting upon client choices when it comes to settling a dispute. As most lawyers charge on an hourly basis, the longer the litigation proceeds, ordinarily (aside from 'no win, no fee' engagements) the greater the costs owed to a client's lawyers. And the client cannot be assured of being indemnified for that liability; this is most unlikely to ensue should he or she prove unsuccessful, and even success rarely guarantees such an indemnity. Settlement will, in the usual case, thus confine a client's costs liability. But, as noted by Benjamin J in *Foley*, if the client 'has or will be liable to pay the barrister irrespective of the settlement, the cost saving inducement is lost'.[94] The push to negotiated settlements, which is a centrepiece of civil procedure reforms and case management, accordingly risks being skewed by the spectre of liability for cancellation fees.

90 *Barfield v Friedman* (Supreme Court of Western Australia, Parker J, 5 September 1997) 32.

91 For instance, the law relating to costs disclosure, costs agreements and the taxation/assessment of costs.

92 *Stefanou* (n 37).

93 Ibid [56]. Though 'not suggesting in the slightest that [the counsel involved] would have given a moment's contemplation to such an approach': at [56].

94 *Foley* (n 41) 73 [142].

E *In the Nature of a Penalty?*

In the context of incentivising behaviour, it is perhaps unsurprising that some have sought to portray barristers' cancellation fees as a penalty. After all, what traditionally lay at the core of a penalty was a payment of money stipulated as *in terrorem* — a condition intended to frighten or intimidate — of the party in default. In an article published in a professional journal in late 2016, a Queensland silk sought to debunk this belief on the basis that, in the vast majority of cancellation fee cases, 'the liability to pay … arises without any default on the part of the client'.[95] This statement rested on the notion that the penalty doctrine is confined to payments consequent upon breach of contract. While there may be compelling reasons in policy and principle for maintaining this position,[96] in the wake of the High Court of Australia's 2012 decision in *Andrews v Australia and New Zealand Banking Group Ltd*,[97] Australian law no longer recognises such a constraint. This is hardly to say that an Australian court will brand barrister cancellation fees as penalties, but simply that it would be a mistake to approach these as immune from such a characterisation.[98]

VII REGULATING CANCELLATION FEES

Despite the above concerns, which cannot be downplayed, and what has been described as '[a] source of much potential distress for clients and solicitors',[99] there has been no step at a regulatory level to outlaw barristers' cancellation fees. Nor has there emerged any attempt to regulate these fees in a dedicated fashion. It stands to reason, accordingly, that the parameters of legitimacy surrounding cancellation fees remain the subject of the law governing costs agreements generally.

A *'Unusual' Expenses*

As court rules or costs scales, where applicable, make no mention of cancellation fees, the first matter to make explicit is that any charging and recovery of such fees must rest upon a contractual foundation. In other words, it must form part of

95 Morris (n 12).

96 Which availed themselves to the United Kingdom Supreme Court in *Cavendish Square Holdings BV v Makdessi* [2016] AC 1172.

97 (2012) 247 CLR 205.

98 At the same time, it may be observed that the various statutory initiatives directed at protecting the consumer of legal services — including costs disclosure, setting aside costs agreements, and the process of assessment/taxation — conspire to reduce the need for equity to intervene via the penalty doctrine.

99 Law Society of New South Wales, *Working with Barristers* (3rd ed, 2017) 18.

a costs agreement, and in turn meet the applicable statutory requirements.[100] As is well known, those also prescribe various costs disclosure obligations which, outside of a direct access matter,[101] oblige the instructing solicitor to disclose details of counsel's legal costs and billing arrangements.[102] In making this disclosure, the solicitor (and barrister in a direct access matter) cannot overlook what is known as the rule in *Re Blyth & Fanshawe; Ex parte Wells*,[103] representing 'a 19th Century example of what would now be called consumer protection'.[104] It dictates that costs of an unusual sum or nature (an 'unusual expense') are not allowed as between lawyer and client unless they have been authorised by the client after full prior disclosure, including the fact that they might not be allowed as between party and party. Baggallay LJ in the seminal case phrased the rule in the following terms:[105]

> [I]f an unusual expense is about to be incurred in the course of an action it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party whatever may be the result of the trial.

The rule functions to oblige solicitors to disclose to clients what are termed 'unusual expenses', and seek client authority before incurring those expenses, or otherwise risk personal liability therefor in the event of assessment/taxation.

An expense can be 'unusual' either because it is not ordinarily incurred, or due to its quantum.[106] An example of the latter is counsel's fee that (well) exceeds an understood or recommended scale.[107] Despite judicial observations concerning the increasing commonality of barristers' cancellation fees, the very nature (as

100 As to the regulation of costs agreements see Dal Pont, *Law of Costs* (n 31) ch 3.

101 In this event, the costs disclosure obligation applies directly to the barrister vis-a-vis the lay client.

102 *Legal Profession Act 2006* (ACT) s 269; *Legal Profession Uniform Law 2014* (NSW) s 174; *Legal Profession Act 2006* (NT) s 303; *Legal Profession Act 2007* (Qld) s 308; *Legal Practitioners Act 1981* (SA) sch 3 cl 10; *Legal Profession Act 2007* (Tas) s 291; *Legal Profession Uniform Law* (Vic) (n 89) s 174; *Legal Profession Act 2008* (WA) s 260.

103 (1882) 10 QBD 207.

104 *BHP* (n 64) [3] (Judge Dart). Indeed, it has been suggested that the rule has limited application in modern practice against the backdrop of statutory costs disclosure obligations: *Mineral Resources Ltd v Mesa Minerals Ltd (admin apptd)* [2020] WASC 36, [20] (Boyle JR).

105 *Re Blyth & Fanshawe; Ex parte Wells* (1882) 10 QBD 207, 210. See also: at 212 (Lindley LJ); *Re Broad & Broad* (1885) 15 QBD 420, where Lord Esher MR stated that '[a] more wholesome rule than that which was laid down in … *Re Blyth & Fanshawe*, I never heard of', and branded it as a rule not requiring 'my authority to support it', and as 'an exceedingly good rule': at 421–2.

106 *Re Felton* (1943) 60 WN (NSW) 16, 20–1 (Maxwell J).

107 *In the Marriage of Stanistreet* (1987) 89 FLR 419, 422 (Treyvaud J) (citations omitted); *Weiss v Barker Gosling (No 2)* (1993) 118 FLR 218, 245 (Fogarty J) (citations omitted). See also *BHP* (n 64) where the fees chargeable by proposed (interstate) counsel would exceed those charged by local senior counsel, Judge Dart ruled that a warning that counsel's 'charges are slightly higher than those for Queen's Counsel in South Australia' and that 'we may not be able to recover from the defendant the entirety of [counsel's] fees if we are successful in defending the appeal' was insufficient to position the client to make an informed choice about whether or not to incur the costs: at [28].

well as quantum) of such a fee properly locates it as 'unusual'. It is unsurprising, therefore, to find authority to this effect.[108] After all, most lay clients would be unfamiliar with such a practice, and instead would expect to pay only for services that are provided. Moreover, as noted earlier,[109] courts have evinced a tendency to disallow cancellation fees on taxation as between party and party.[110] Out of caution, it has been suggested, to this end, that:[111]

> From an instructing solicitor's point of view, if such cancellation fees are sought from barristers, it would be prudent for the solicitor to require the client to enter into a separate agreement direct with the barrister or alternatively require the barrister to indemnify the solicitor against any repayment of fees (and perhaps the costs of the assessment or taxation) should the cancellation fee be challenged.

B *Review of Cancellation Fee Agreements*

That the agreement to charge cancellation fees fulfils the statutory requirements, and is the subject of appropriate disclosure to the client (including for being an unusual expense), is not a guarantee of its effectiveness. The legal profession legislation provides an avenue whereby a costs assessor (or equivalent) can modify the effect of a costs agreement.

The Model Laws' schema requires assessment of the *amount* of disputed costs under a costs agreement 'by reference to the provisions of the costs agreement' if a relevant provision of the agreement specifies the amount, or a rate or other means for calculating the amount of the costs, and the agreement has not been set aside.[112] But this does not preclude an assessor from inquiring into whether it was reasonable to perform work at all, or to perform it at the rate provided in the costs agreement. As to the latter, for instance, if a costs agreement provides for a charge at a particular hourly rate for work requiring the skill of a lawyer, and (for want of appropriate support staff or otherwise) the lawyer does work that does not require that skill, he or she is not entitled to charge for it under the costs agreement.[113] If so, there is little to preclude an assessor (or ultimately a court) from finding that a cancellation fee agreement is not reasonable, whether by reason of its breadth or the amounts charged thereunder. (In any case, the issue could conceivably have been already or alternatively addressed, whether by the

108 See, eg, *BHP* (n 64) (involving the failure to disclose to the client that counsel was contractually entitled to charge cancellation fees that would not be allowed on adjudication).

109 See above Parts V(A), V(B).

110 Cf in the context of class actions: see below Part VII(D).

111 *Foley* (n 41) 75 [154] (Benjamin J).

112 *Legal Profession Act 2006* (ACT) s 300A(1); *Legal Profession Act 2006* (NT) s 339(1); *Legal Profession Act 2007* (Qld) s 340(1); *Legal Practitioners Act 1981* (SA) sch 3 cl 47(1); *Legal Profession Act 2007* (Tas) s 328(1); *Legal Profession Act 2008* (WA) s 302(1).

113 *LM v K Lawyers (No 2)* [2015] WASC 245, [9]–[16] (Boyle JR).

assessor or the court depending on the jurisdiction,[114] under the statutory power to set aside a costs agreement on the grounds of its substantive unfairness[115] to the client.)[116]

While no precise equivalent provision appears in the *Legal Profession Uniform Law* — as it applies in New South Wales and Victoria from 1 July 2015 — it does require a costs assessor, on a costs assessment, to determine whether, inter alia, costs under an agreement (as opposed to the agreement itself) are fair and reasonable.[117] While it declares that a costs agreement is prima facie evidence that costs disclosed therein are fair and reasonable if the disclosure requirements have been met, and the agreement does not contravene any of the statutory requirements,[118] what is 'prima facie' differs from what is 'conclusive'. There may accordingly be evidence to rebut the prima facie position, which may translate to the assessor altering the *effect* of provisions in costs agreements to reflect what are fair and reasonable costs. The extensive obiter remarks of Benjamin J in *Foley*, in querying whether 'terms in fee agreements which provide for barristers to be paid for doing nothing' can be viewed as fair and reasonable, were intended to be persuasive in terms of assessment of costs.[119]

C *Characteristics of 'Reasonable' Cancellation Fees*

The perimeter(s) of reasonableness surrounding cancellation fees can be probed by considering instances where a judge has been convinced of its existence. In *Levy* what influenced Rothman J was that 'senior counsel [had been] engaged "on spec" in particularly specialised work for which the lead time [was] lengthy and during which he [had], in fact, foregone other paid court work'.[120] His Honour nonetheless emphasised that this outcome held only for the appeal in question, adding that 'for most counsel, cancellation fees would be unjustifiable'.[121] In *Carbone*, Davies J upheld a two week cancellation fee for a criminal trial fixed for four to five weeks,[122] and what substantiated reasonableness for McDougall J in *Wilkie* was a hearing 'expected to occupy some 6 to 12 weeks', for which 'both senior and junior counsel [would] be required to devote at least 2 months, and [perhaps exceeding] 4 months, to virtually full time work in preparation'.[123]

114 This jurisdiction vests in the court in the Australian Capital Territory, Queensland, South Australia and Western Australia; in the Northern Territory and Tasmania it vests in a costs assessor.

115 Under the guise of 'unreasonableness': see Dal Pont, *Law of Costs* (n 31) 56–60.

116 As to this jurisdiction see ibid 47–50.

117 *Legal Profession Uniform Law 2014* (NSW) s 199(2); *Legal Profession Uniform Law* (Vic) (n 89) s 199(2).

118 *Legal Profession Uniform Law 2014* (NSW) s 172(4); *Legal Profession Uniform Law* (Vic) (n 89) s 172(4).

119 *Foley* (n 41) 73 [138]. See also 74 [148].

120 *Levy* (n 8) 203 [111].

121 Ibid.

122 *Carbone* (n 10) [61].

123 *Wilkie* (n 49) [13].

What emerges from these authorities, interestingly all from New South Wales, is that claims or defences with a long lead time of sustained and specialised work, coupled with the prospect of a lengthy hearing, are those most likely to support cancellation fees. (It may be observed, in passing, that the increasing complexity of modern litigation may therefore nourish the market for cancellation fees.) That cases exhibiting these features are commonly candidates for the retainer of senior counsel explains in part why cancellation fees are most frequently the domain of this arm of the profession. As noted earlier, senior counsels' expertise in any case better positions them to bargain for a cancellation fee.

D *Application Vis-a-Vis Class Actions?*

By way of illustration, prima facie class actions and representative proceedings — to the extent that they may exhibit the above characteristics — appear legitimate candidates for cancellation fees. Support for this view derives from the remarks of Ball J in *Smith v Australian Executor Trustees Ltd (No 4)*,[124] a case where the reasonableness of costs surfaced upon the court's appraisal of whether a settlement was a fair and reasonable compromise of the claims in a representative proceeding.[125] Although an expert costs consultant declined to express a definitive opinion regarding whether cancellation fees would be an unusual expense in New South Wales, his Honour stated that, from his own experience, 'they are not in cases which have been set down for a lengthy period of time'.[126] Yet before the Federal Court the ensuing year in *Webb v GetSwift Ltd (No 5)* Lee J noted that 'evidence [that] significant costs would be thrown away [should] the class action hearing … be vacated at short notice' was 'based on a number of premises', one being that cancellation fees would be charged.[127] This premise may not have been 'well-founded', he surmised, because the charging of cancellation fees was 'an unusual eventuality in [his] experience'.[128]

The respective judges were, of course, dealing with different scenarios, and attendant different inquiries, albeit both emanating out of New South Wales. Lee J was faced with an application to vacate a hearing date by reason of alleged apprehended bias. His Honour refused the application. Any risk that the matters going to alleged bias could resurface in future could be addressed by making another judge available at short notice to hear the class action during the time already allocated. Lee J accordingly had confidence that the matter would

124 [2018] NSWSC 1584, [22] ('*Smith*').

125 On court approval of settlements of representative actions: see generally Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Lawbook, 2nd ed, 2012) ch 15 (and as to costs, in particular, see 642–5).

126 *Smith* (n 124) [60].

127 [2019] FCA 1533, [30].

128 Ibid.

ultimately be heard as scheduled, thus removing (or at least diluting) the trigger for any cancellation fee. The position could conceivably have been different had the trial date been vacated, as this may have left counsel with some gap in workload. At the same time, by speaking of the 'charging' of cancellation fees being an 'unusual eventuality',[129] his Honour may have been targeting an *outcome*, namely that such fees would *actually be charged*. What he may have had in mind was that, even if contractually entitled to charge a cancellation fee, it was 'unusual' for counsel to actually do so.

Ball J, on the other hand, was confronted with an inquiry into the reasonableness of legal costs upon the settlement of a representative proceeding. This squarely brought into focus the reasonableness of charging a cancellation fee in the circumstances. That his Honour did *not* consider such a fee to represent an 'unusual' expense — at least in a representative proceeding set down for a lengthy hearing (itself hardly uncommon) — may suggest a more yielding judicial approach to cancellation fees. Or at a minimum a more yielding one in the context of representative proceedings.

E *What Impacts upon Reasonableness of Cancellation Fees?*

Yet the more prevalent judicial concern (or at any rate restraint) when it comes to the legitimacy of cancellation fees may serve to confine Ball J's observations to a limited range of proceedings/scenarios. Even so, as foreshadowed earlier, the absence of a clear proscription on cancellation fees leaves the door open for counsel to contract on this basis. But in view of the aforementioned constraints the law places on costs agreements — in particular when it comes to inquiries into fairness and reasonableness, whether pertaining to the agreements or the costs charged thereunder — it cannot be said that all cancellation fee agreements will prove legitimate.[130]

A New South Wales judge has remarked, to this end, that what is reasonable depends 'more on the amount of the fee demanded, and the events by reference to which it is payable, rather than the concept'.[131] This dovetails into the generic requirement, prescribed by the *Legal Profession Uniform Law*, that the costs charged by a law practice must be 'proportionately and reasonably incurred' and 'proportionate and reasonable in amount'.[132]

129 Ibid

130 See Davis (n 9) 2: 'Any cancellation fee negotiated (and included in the retainer agreement) and ultimately charged, must be fair and reasonable in all the circumstances'.

131 *Wilkie* (n 49) [17] (McDougall J).

132 *Legal Profession Uniform Law 2014* (NSW) s 172(1); *Legal Profession Uniform Law* (Vic) (n 89) s 172(1).

So far as the amount of the fee is concerned, there is nothing to preclude a judge referring the matter to a costs assessor or referee.[133] A judge may nonetheless feel confident in quantifying the reasonable costs recoverable in this context, typically by way of discounting the sum claimed.[134] Moreover, it has been observed that, as in the case of cancellation fees for many other services, 'one should expect [barristers'] cancellation fees to progressively decrease in amount the more notice is given of the settlement or adjournment of the hearing concerned'.[135] This makes sense given the opportunity cost justification for cancellation fees; after all, earlier notice gives counsel the opportunity to undertake other gainful tasks. It is unsurprising, therefore, to find judicial recognition of the point. In *Levy*, Rothman J viewed the following as a marker of reasonableness and proportionality:[136]

> The cancellation fee, agreed to by the parties, varied depending upon the period between the date of the cancellation of the hearing and the date upon which the hearing was to have otherwise occurred. It is therefore not the case … that the length of the cancellation fee was not relative to the time period before the hearing during which the cancellation fee might be triggered.

Beyond a 'tiered' cancellation fee structure, it has also been suggested that 'perhaps with the exception in some cases of very short hearings, cancellation fees ought not reflect, save in the most exceptional circumstances, anywhere near the whole of the appearance fees which may have been earned if the hearing had progressed'.[137] Indeed, so far as costs recovery between party and party is concerned, the New South Wales Costs Assessment Rules Committee has declared that '[c]ancellation fees, over and beyond the first day of a brief on hearing, should not be allowed'.[138]

Implicit in the foregoing is that 'boiler plate' ('one size fits all') cancellation clauses should be approached with caution.[139] This stems from the notion that what is fair, reasonable and proportionate is fact and retainer-specific. Moreover, 'standardised' fees imply an absence of bargaining power ('take it or leave it'); a judge has observed, in this context, that '[l]itigants may have no choice in the market place except to agree to such terms but that does not make them reasonable'.[140]

133 As did McDougall J in *Wilkie* (n 49) [23]–[25].

134 As did Davies J in *Carbone* (n 10) [55], [63] (a reduction from $81,000 to $60,000).

135 Amerena (n 13) 11 [43].

136 *Levy* (n 8) 202 [107].

137 Amerena (n 13) 11 [43].

138 Costs Assessment Rules Committee, *Costs Payable between Parties under Court Orders* (Guideline, 16 March 2016) 2 [6] nn 7–8 (regarding senior counsel and junior counsel respectively) <http://www.supremecourt.justice.nsw.gov.au/Documents/Forms%20and%20Fees/Costs%20Assessment%20Forms/Guidelines_costs_payable.doc>.

139 *Foley* (n 41) 64 [93] (Benjamin J).

140 *K v V* [2006] FamCA 252, [112] (Faulks DCJ).

In view of the opportunity cost rationale, the Queensland Bar Association has aligned reasonableness with paying regard 'to the loss which the barrister might suffer as a result of the case not going ahead'.[141] It follows that another marker of reasonableness (and proportionality) is provision for the cancellation fee to be reduced (offset) by reference to other work that counsel obtains during the period covered by the fee.[142] A corollary to this is arguably an obligation to mitigate the fee payable by seeking further appropriate work during that period. In *Levy*, terms of a barrister's engagement that provided for the reduction of the cancellation fee by an offset of any fees earned in respect of other paid court work carried, according to Rothman J, 'a necessary implication that other paid court work, befitting the experience, expertise and seniority of [the barrister], would be sought, and if offered, obtained'.[143] His Honour viewed this as a condition implied on the ground of business efficacy to give 'effect to the totality of the provisions relating to the charging of cancellation fees'.[144]

VIII TRANSLATION TO DISCIPLINARY SPHERE?

As noted at the outset of this paper, the law countenances the legitimacy of cancellation fees in a variety of (primarily) consumer contexts. This is not to say that fees of this kind, despite being agreed by way of contract, are above suspicion. The bolstering of consumer law in the passage of time has witnessed scope for greater intrusion into contractual terms, by reference to unconscionability and, more recently, unfairness.

But in none of the traditional consumer scenarios is the stronger party an officer of the court. Nor is he or she ordinarily presumed to owe fiduciary obligations to the other party/ies. Nor, moreover, is the relationship punctuated by longstanding legal rules governing the costs charged under its auspices. The barrister-client engagement exhibits each of these characteristics, which could legitimately be seen as erecting further hurdles to the appropriateness of cancellation fees within that relationship. Yet as this paper has revealed, and despite expression of judicial concern, the unique nature of the relationship has not proven a barrier to charging of cancellation fees.

141 Davis (n 9) 2.

142 See, eg, *Carbone* (n 10) where counsel had identified three occasions during the cancellation fee period when he obtained other work, which were allowed for via a reduction of the cancellation fee by 10%. This did not, however, preclude Davies J from further reducing that fee: at [62]. Cf *Levy* (n 8) where Rothman J remarked that 'to declare [a] cancellation fee unreasonable because it takes no account of non-court work undertaken is, as a proposition of general principle, one that does not withstand scrutiny': at 202 [108]. His Honour nonetheless conceded that '[t]here is, no doubt, a point at which the amount of non-court work may be such that it could not have been undertaken while the hearing proceeded': at 202 [108]. In any event, he expressly characterised the case as one on its own facts, adding that '[i]n most cases, and for most counsel, cancellation fees would be unjustifiable': at 203 [111].

143 *Levy* (n 8) 202 [109].

144 Ibid.

This is not to say, however, that cancellation fees cannot surface on the ethical radar, such as to give impetus for professional discipline. While the factors that may support the reasonableness of cancellation fees should logically provide some protection against disciplinary proceeding and sanction, their absence has the capacity to translate a civil matter into a disciplinary one. The issue has yet to be addressed in Australia but came before the New Zealand Legal Complaints Review Officer in *MN v HT*.[145] There the applicant, a silk, unsuccessfully applied for review of the determination by the relevant Standards Committee that a bill of costs which included a trial cancellation fee of $120,000 (the trial had been vacated due to the applicant's client pleading guilty to charges) constituted 'unsatisfactory conduct' pursuant to the *Lawyers and Conveyancers Act 2006* (NZ) s 12(b). The latter refers to 'conduct of the lawyer … that would be regarded by lawyers of good standing as being unacceptable, including — (i) conduct unbecoming a lawyer … or (ii) unprofessional conduct'.

In approaching this inquiry, the Legal Complaints Review Officer referred to r 9 of the *Lawyer and Conveyancers Act (Lawyers: Conduct and Care) Rules 2008* (NZ), which like Australian statutory provisions speaks in terms of lawyers not charging more than a 'fair and reasonable' fee for the services provided. The applicant's submission was that setting aside eight weeks for the trial made him 'unable to accept instructions for which he would have otherwise earned $120,000'.[146] The Legal Complaints Review Officer viewed this as 'a difficult proposition to accept', as the applicant had 'not provided evidence of work he was obliged to turn away because he had committed himself to the trial and not everything undertaken by a barrister demands attention within an immediate timeframe'.[147] She noted that the applicant's stance also discounted the possibility of new work emerging during the cancellation fee period, raising a prospect that he 'would be paid doubly for that period of time'.[148] That possibility, said the Legal Complaints Review Officer, 'is certainly unfair and unreasonable'.[149]

To uphold the legitimacy of the cancellation fee would dictate that 'a lawyer can be paid for no work at all', which was likewise branded 'not fair and reasonable'.[150] This should not be taken as suggesting that cancellation fees are per se unprofessional in New Zealand. Indeed, the Committee (as well as the respondent client) accepted that a cancellation fee of $40,000 was fair and reasonable.[151] But 'a fee three times a fair and reasonable charge', opined the Legal Complaints Review Officer, 'begins to fall into the category of misconduct, and hence referral

145 [2017] NZLCRO 109.

146 Ibid [20].

147 Ibid [21] (Mr Thresher).

148 Ibid [22].

149 Ibid.

150 Ibid [23].

151 Ibid [36].

to the Lawyers and Conveyancers Disciplinary Tribunal'.[152] It should be noted that in New Zealand the statutory concept of 'misconduct'[153] targets more serious wrongdoing than 'unsatisfactory conduct'.

The disciplinary sensitivities to overcharging are unlikely to differ greatly between Australia and New Zealand. It may be borne in mind that, unlike their New Zealand counterpart, the Australian legal profession legislation makes explicit provision for overcharging within its misconduct descriptions. They identify 'charging more than a fair and reasonable amount for legal costs',[154] or 'charging of excessive legal costs',[155] as capable of constituting unsatisfactory professional conduct or professional misconduct. This ostensibly lowers the disciplinary bar from the common law threshold of 'gross overcharging'.[156] It is accordingly conceivable that a scenario such as that presented in *MN v HT* could trigger a similar disciplinary response in Australia.

IX WHERE DOES THIS LEAVE US?

It is interesting to note that a practice that was at the outset perceived as potentially unethical for barristers — witness the remarks of Einfeld J in *Razzi* — appears to have become almost mainstream. Of course, experience reveals that the bounds of ethical conduct, whether involving lawyers or more generally, are not always rigid. For instance, it has been judicially acknowledged that the ethical standards required for disclosure upon admission to practice have intensified in time.[157] The elapsing of time has also witnessed a broader array of wrongdoing capable of generating a disciplinary inquiry.[158] Some ethical trajectories have trod the opposite path — for instance, the veering from treating lawyer advertising as unethical — although almost invariably there is a consumer protection/benefit element to this swing.[159] It is difficult to say the same regarding barristers' cancellation fees.

There remains, in any event, something of an elephant in the room when it comes to the legitimacy of cancellation fees. Late in 2019 the High Court delivered

152 Ibid.

153 As defined by the *Lawyers and Conveyancers Act 2006* (NZ) s 7.

154 *Legal Profession Uniform Law 2014* (NSW) s 298(d); *Legal Profession Uniform Law* (Vic) (n 89) s 298(d).

155 *Legal Profession Act 2006* (ACT) s 389(b); *Legal Profession Act 2006* (NT) s 466(1)(b); *Legal Profession Act 2007* (Qld) s 420(b); *Legal Practitioners Act 1981* (SA) s 70(b); *Legal Profession Act 2007* (Tas) s 422(1)(b); *Legal Profession Act 2008* (WA) s 404(b).

156 As to the parameters for overcharging that enters into the disciplinary sphere see also GE Dal Pont, 'Contextualising Lawyer Overcharging' (2016) 42(2) *Monash University Law Review* 283; GE Dal Pont, *Lawyer Discipline* (LexisNexis Butterworths, 2020) ch 12.

157 *Re OG (A Lawyer)* (2007) 18 VR 164, 203 [123] (Warren CJ, Nettle JA and Mandie J).

158 Chiefly by the broadening of statutory concepts of misconduct: see generally Dal Pont, *Lawyer Discipline* (n 156) ch 2.

159 In the context of lawyer advertising see GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 7th ed, 2021) 669–72.

its reasons in *Bell Lawyers Pty Ltd v Pentelow* ('*Bell Lawyers*'),[160] wherein it confined to history what had become known as the '*Chorley* exception'.[161] This exception functioned to treat lawyer-litigants differently, from the standpoint of quantifying recovery under the costs indemnity rule, from lay litigants. A lay litigant can receive no indemnity for the value of work performed in conducting litigation, primarily because he or she has not incurred 'costs' — namely fees payable to a certificated lawyer for legal services — for this purpose.[162] The *Chorley* exception dictates that a lawyer-litigant could, under the indemnity rule, recover the same costs as if he or she had engaged legal representation (except for items such as obtaining instructions or attendances, unnecessary by reason of being his or her own client).[163]

Of course, *Bell Lawyers* itself had nothing to do with barristers' cancellation fees. And each member of the High Court, in any event, spoke against extending the *Chorley* exception to barristers (and a 6:1 majority saw it as inapt vis-a-vis solicitors too). Nor did the case deal with charges between lawyer and own client — a scenario that presupposes legal representation rather than self-representation — but instead the recovery of costs between party and party. But to the extent that barristers (or solicitors) cannot secure an indemnity for the value of legal work they perform in their own matter, there is a question mark over whether any such indemnity should extend for legal work (for a client) that has not been performed. The curial reticence to allow cancellation fees as between party and party reflects this.

There is, in any event, an opportunity cost notion in the lawyer-litigant scenario. A self-represented lawyer saves the cost of engaging a legal representative but, in so doing, incurs an opportunity cost. This stems from not being able to charge for the time he or she would otherwise have devoted to client matters. *Bell Lawyers* indicates that this opportunity cost is not recoverable should the lawyer otherwise have secured a costs order in his or her favour. Although, as conceded above, barrister cancellation fees inhabit a different space, it may be queried whether the law should countenance payment for opportunity cost in this regard.[164] And, to the extent that the cancellation fees benefit one arm of the profession but not (usually) the other, an apparent favouring of barristers may not sit well with the High Court's drive, via its decision in *Bell Lawyers*, to oust perceived 'privileges'

160 (2019) 372 ALR 555 ('*Bell Lawyers*').

161 Named after *The London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872.

162 *Cachia v Hanes* (1993–4) 179 CLR 403.

163 See Dal Pont, *Law of Costs* (n 31) 191–5.

164 The point derives some indirect support from the recent remarks of the Victorian Court of Appeal in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15, where the principal issue concerned whether *Bell Lawyers Pty Ltd v Pentelow* extended to work performed by other lawyers in a large partnership. In concluding that it did, their Honours refused to accept the argument that 'the partnership should be permitted to ameliorate the opportunity cost of not having [its] employees available to external remunerative work': at [100] (Whelan, McLeish and Niall JJA). The reference to 'opportunity cost' in this context is, it is submitted, telling.

from the profession.[165]

Be that as it may, enough of a shadow remains over the charging of cancellation fees by barristers as to justify a clearer pronouncement, or at least some guidance, by professional or regulatory bodies. In the interim, the case law reveals that cancellation fees should hardly be seen as *de rigueur*, but fenced by careful consideration with a view to the client's interests and objectives. But if a barrister does claim a cancellation fee, the following course (apparently somewhat tongue-in-cheek) has been recommended: 'perhaps invite him or her down to the office to do some work since they are not in court and getting paid for doing nothing!'[166]

165 See *Bell Lawyers* (n 164) where Kiefel CJ, Bell, Keane and Gordon JJ, made remarks as to 'an air of unreality in the view that the *Chorley* exception does not confer a privilege on solicitors in relation to the conduct of litigation': at 561 [25].

166 Paul Taylor and Charles Ackroyd, 'Barrister's Cancellation Fees: Payment for One's Non-service!', *Pattison Hardman* (Web Page, 3 February 2017) <http://pattisonhardman.com.au/barristers-cancellation-fees-payment-for-ones-non-service/>.