CONTEXTUALISING LAWYER OVERCHARGING

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The law recognises various avenues directed to controlling costs as between lawyer and client, which assume significance in the modern competitive legal market. Competition has prompted many lawyers to pursue an increasingly mercantile approach to legal practice, directed at profit maximisation. The latter reveals a tension not just with avenues to control costs but with traditional notions of professionalism. What lies at the pivot in this tension, and its ethical dimension, is the prospect of professional discipline for overcharging. Contextualised by the foregoing backdrop, this article investigates this ethical dimension, in a quest to flesh out its parameters.

I COSTS IN THE DISCIPLINARY SPOTLIGHT

Across Australia, the legal profession legislation makes explicit that charging excessive legal costs in connection with the practice of law is capable of constituting misconduct for the purposes of professional discipline.[1] Its translation to that legislation in those terms is, however, relatively recent. It emanated from the first genuine steps towards uniform legal profession statutory regulation in the 1990s, more extensively traversing to statute in most jurisdictions in the mid-part of the first decade of the 21st century.

This did not mean that lawyer overcharging only became an issue of professional discipline at the outset of this century. The disciplinary case law reveals that, under earlier statutory conceptions of 'professional misconduct' (or the like) as well as its common law namesake, overcharging was capable of generating a disciplinary consequence. When explicit mention of lawyer charging practices translated to statute, moreover, it was as part of an inclusionary list of various forms of conduct branded as capable of amounting to unsatisfactory professional

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1 The language 'charging excessive legal costs in connection with legal practice' is found in the legal profession legislation in the Territories, Queensland, South Australia, Tasmania and Western Australia: *Legal Profession Act 2006* (ACT) s 389(b); *Legal Profession Act 2006* (NT) s 466(1)(b); *Legal Profession Act 2007* (Qld) s 420(1)(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). In New South Wales and Victoria, which have adopted the *Legal Profession Uniform Law* (*Legal Profession Uniform Law Application Act 2014* (NSW) s 4 and *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 respectively), the above language has been replaced with 'charging more than a fair and reasonable amount for legal costs': *Legal Profession Uniform Law* s 298(d). What impact this change may have produced is discussed in the final part of this article.

conduct or professional misconduct, which targets convictions for offences of a certain nature, events surrounding lawyer insolvency and, most broadly, conduct consisting of a contravention of the relevant Act, regulations or rules.[2]

Legislators, it seems, considered it apt to highlight certain forms of lawyer behaviour capable of producing a disciplinary consequence. It should be noted, though, that while convictions for criminal offences are probative when it comes to matters of professional discipline, it is ordinarily not the conviction itself that informs the disciplinary response but an assessment of the conduct underscoring the conviction.[3] Similarly, a lawyer's insolvency assumes relevance on the disciplinary stage only to the extent that it speaks of underlying matters probative of the lawyer's character or, possibly, reputation and competence.[4]

Instead, mention of 'charging of excessive legal costs in connection with the practice of law' operates ostensibly as a 'stand-alone' criterion capable of generating a disciplinary sanction. It evinces a judgment that the charging of excessive legal costs — in and of itself, independent of any further inquiry — is a disciplinary issue, presumably because it may be *inherently* unethical.

The statutory inclusive list of conduct capable of amounting to unsatisfactory professional conduct or professional misconduct is no more than a patchwork. It makes no express mention, say, of fiduciary breaches, infringements of the duty of confidentiality, the making of false or misleading statements to a court or others — all of which figure more prominently in the disciplinary case law.[5] These, it may be conceded, may constitute a breach of the professional rules (or, in the case of trust-related breaches, the legal profession legislation) in this context, which the legislation in overarching terms identifies as capable of generating a disciplinary consequence. It cannot be assumed, however, that every breach of the professional rules (or the Act or regulations) necessarily merits a disciplinary response, independent of inquiry into matters going to culpability.

The legal profession legislation in each jurisdiction — unlike as regards fiduciary breaches (aside from those relating to trust accounts), infringements of the duty of confidentiality and the making of false or misleading statements to a court or others — regulates the charging of costs as between lawyer and client. It follows that a breach of *any* part of the costs regulatory scheme could amount to unsatisfactory professional conduct or professional misconduct. Indeed, provisions exist within the statutory costs regime that explicitly declare costs-related conduct as capable of being unsatisfactory professional conduct or professional misconduct. The

2 *Legal Profession Uniform Law* s 298; *Legal Profession Act 2006* (ACT) s 389; *Legal Profession Act 2006* (NT) s 466(1); *Legal Profession Act 2007* (Qld) s 420(1); *Legal Practitioners Act 1981* (SA) s 70; *Legal Profession Act 2007* (Tas) s 422(1); *Legal Profession Act 2008* (WA) s 404.

3 The seminal Australian case to this end is *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.

4 See, eg, *Wardell v New South Wales Bar Association* (2002) 50 ATR 302, where a barrister who was made bankrupt on his own petition after his creditors, the largest being the Australian Taxation Office, rejected a proposed scheme of arrangement, was struck from the roll because he had pursued a lavish lifestyle that relegated his tax debt to last priority, revealing 'such a reckless disregard for his obligations as to amount to an intention to avoid them': at [45] (Cripps AJ).

5 See Gino E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 6th ed, 2017) 805–15.

focus has been on a failure to make the requisite costs disclosure,[6] but New South Wales and Victoria under the *Legal Profession Uniform Law* target contraventions of provisions relating to conditional costs agreements,[7] the charging of percentage fees,[8] and contraventions of a requirement that a law practice 'must not charge more than fair and reasonable legal costs'.[9]

Coupled with specific identification of the 'charging of excessive legal costs' (in New South Wales and Victoria, 'charging more than a fair and reasonable amount for legal costs') in the inclusive catalogue of conduct capable of being unsatisfactory professional conduct or professional misconduct, this reveals legislators' apparent wish to place the interaction between charging and matters of ethics and professional conduct at the forefront of lawyers' minds. At the same time, the scholarly literature in Australia reveals relatively little devoted to investigating what is meant by 'overcharging' in the disciplinary context, whether at common law or under statute. The second half of this article probes this point. But it is a point that cannot be suitably approached without some contextual analysis of, and backdrop to, the costs charging environment, which has witnessed a shift in time. The latter is addressed below.

II AGAINST BACKDROP OF DOWNWARD PRESSURE ON COSTS

That issues surrounding lawyer charging, and their relationship to matters of ethics and professional conduct, have received greater airplay should perhaps not prove surprising. The last 25 or so years, in particular, have witnessed a concerted effort by successive governments to place downward pressure on legal costs. The political capital to be achieved by promoting what is termed 'access to justice' has ostensibly increased with time. The obvious link between the cost of legal services and persons' ability to secure access to justice has made that cost a prime target for legislators[10] (who, incidentally, have shown little parallel concern when it comes to increasing court fees).[11]

That lawyers have, for many years (and well before the modern catchcry of access to justice)[12] been subject to a unique formal regime for the independent revision

6 *Legal Profession Uniform Law* s 178(1)(d); *Legal Profession Act 2006* (ACT) s 277(7); *Legal Profession Act 2006* (NT) s 311(7); *Legal Profession Act 2007* (Qld) s 316(7); *Legal Practitioners Act 1981* (SA) sch 3 cl 18(7); *Legal Profession Act 2007* (Tas) s 300(7); *Legal Profession Act 2008* (WA) s 268(7).

7 *Legal Profession Uniform Law* s 181(8).

8 Ibid s 183(3).

9 Ibid s 207(1).

10 The point is developed in Gino E Dal Pont, 'Lawyers' Charging and Access to Justice' (Paper presented at the 24th Annual Australian Institute of Judicial Administration Conference, Adelaide, 17 September 2006).

11 See Law Council of Australia, 'Escalating Court Fees Erode Access to Justice' (Media Release, 1528, 16 June 2015).

12 Taxation of costs as between solicitor and client first secured a statutory foundation via the *Attorneys and Solicitors Act 1728*, 2 Geo 2, c 23.

of costs — the process of 'taxation' (in some jurisdictions nowadays 'matured' into one of costs 'assessment')[13] — has hardly stemmed legislators' zeal to find other avenues to constrain lawyer costs. Nor has the fact that *the general law*, from the 1800s,[14] envisaged that lawyer-client costs agreements could be set aside by a court, within its inherent jurisdiction, for lacking either 'fairness' or 'reasonableness'.[15] 'Fairness', in this context, targeted client understanding of the costs agreement and (importantly) its implications, and accordingly de-facto imposed costs disclosure obligations. Its procedural focus differed from the substantive inquiry that underscored questions of 'reasonableness', as to the actual *terms* of the agreement. Not only was this jurisdiction unique to lawyer-client relations, the substantive inquiry into reasonableness represented what appears one of the very few instances where judges, without legislative authority, assumed a jurisdiction to interfere with terms of a contract for substantive unfairness to one of the contracting parties.

A *The Altar of Competition*

The altar of competition has proven a primary vehicle through which downward pressure on legal costs has been pursued. Price competition between lawyers, to drive down the cost of legal services, was not too long ago seen as unprofessional. In 1951, in views that held sway for some subsequent decades, Lord Goddard CJ made the following observations on an appeal from a disciplinary determination:

> There is nothing worse in any profession than that there should be open fee cutting … It is most undesirable for a profession that, where there is a recognized scale of fees, whether laid down by Act of Parliament or by custom, there should be competition among members of the profession to get or keep business by offering to charge less than the others are entitled to charge.[16]

1 *Competition Rising*

In Australia the early 1990s witnessed the (then) Trade Practices Commission identify various anti-competitive practices it perceived as bedevilling the legal profession, including the promulgation of scales of costs.[17] The latter were viewed as an avenue whereby the legal profession could artificially sustain the cost of legal services.[18] Other usages found within legal practice, including the 'third line forcing' inherent in a barrister requiring another (junior) barrister to be briefed

13 As to the distinction between taxation and costs assessment see G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 474–5.

14 As explained by the English Court of Appeal in *Clare v Joseph* [1907] 2 KB 369 (to the effect that the jurisdiction antedated its statutory replication in s 9 of the *Attorneys and Solicitors Remuneration Act 1870*, 33 & 34 Vict 1, c 28).

15 Dal Pont, *Law of Costs*, above n 13, ch 3.

16 *Re Evill* [1951] 2 TLR 265, 268.

17 Trade Practices Commission, 'Study of the Professions' (Final Report, March 1994) ch 8.

18 The Trade Practices Commission was hardly trailblazing in questioning the appropriateness of scales in this context. See, eg, the critical analysis of scales in Michael Zander, *Lawyers and the Public Interest: A Study in Restrictive Practices* (Weidenfeld and Nicolson, 1968) ch 9.

as a condition of accepting a brief,[19] were likewise branded as anti-competitive and in this sense potentially productive of (unjustifiably) increased cost of legal services.

The broader application of generic competition principles to legal practice proposed by the Trade Practices Commission fostered an attack on the legal profession's monopoly in the provision of certain legal services. It recommended that some fields traditionally within the domain of legal practice be opened to appropriately trained non-lawyers, including conveyancing, wills and probate, uncontested divorce, simple civil claims and welfare advocacy.[20] Not all of these have transpired, but now most Australian jurisdictions deprive lawyers of a monopoly on conveyancing services.[21] While various motivations may have driven the relaxation of the profession's conveyancing monopoly, the most prominent was a belief that it would drive down the cost of conveyancing.

2 *Formalisation of Costs Disclosure*

The same broad time frame saw the introduction of costs disclosure obligations, originally in professional rules, and subsequently enshrined in legal profession legislation.[22] Lawyers remain the only profession to whom extensive costs disclosure obligations are prescribed by the relevant governing statute. While touted as a consumer protection measure[23] — and indeed in many ways it is — costs disclosure also appears to dovetail in promoting price competition. After all, that lawyers are expected to disclose, often coincident with or even before entry into the retainer, their fee structure and an estimate of the likely costs pertaining to the putative matter, may encourage prospective clients to 'shop around' for representation that best meets their price expectations.[24]

3 *Advertising Unblocked*

To this end, the process of acquiring legal services — in what has in modern times been coined the 'legal services market' — is in some way assimilated to the purchase of goods or services 'off the shelf'. The temporal correlation between a loosening of restrictions on lawyer advertising and costs disclosure obligations should therefore occasion little by way of surprise. As with any competitive

19 Trade Practices Commission, above n 17, 82 (described in terms of a 'boycott rule') and ch 5 generally.

20 Ibid 79.

21 See the following legislation that regulates the conduct of conveyancing in the relevant jurisdictions: *Conveyancers Licensing Act 2003* (NSW); *Agents Licensing Act 1979* (NT) (applies to, inter alia, conveyancing agents: s 5); *Conveyancers Act 1994* (SA); *Conveyancing Act 2004* (Tas); *Conveyancers Act 2006* (Vic); *Settlement Agents Act 1981* (WA) pt III.

22 The core provision is now found in: *Legal Profession Uniform Law* s 178(1)(d); *Legal Profession Act 2006* (ACT) s 269; *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 Act 2008* (WA) s 260.

23 John North, 'Costs Disclosure and Review: A National Perspective' (2004) 27 *University of New South Wales Law Journal* 243, 246.

24 Ibid.

market, competitors in the legal services market must, it is reasoned, be able to advertise their wares.[25] Combining lawyer advertising with costs disclosure obligations, legislators no doubt surmised, enables clients to make informed decisions as to the legal service provider(s) they wish to retain. In this market, like most (if not all) markets, projected cost is likely to be a significant influencing factor for the bulk of prospective clients.

B *Competition and Its Costs Progeny*

The upshot of the application of competition principles to legal practice has hardly gone unnoticed, in particular its fostering of a more business-like approach to legal practice. In *APLA Ltd v Legal Services Commissioner (NSW)*, where in the wake of the loosening of advertising proscriptions on legal services it upheld the constitutional validity of statutory restraints on advertising in respect of work injury services, Gleeson CJ and Heydon J remarked as follows:

> In recent years, legislatures decided that it was in the public interest that lawyers should be encouraged to adopt a more mercantile approach to the provision of their services. Some lawyers responded with enthusiasm. Authorities appear to have been surprised to discover that, when lawyers promote their services, litigation increases.[26]

That last sentence, in particular, appears to be a veiled swipe at competition reform for legal services, implicit in which is a questioning whether that reform will necessarily prove the public good, so far as cost or otherwise, for which it is touted. Two years earlier, in an extra-judicial address, the (then) Chief Justice of New South Wales spoke of 'an element of self-fulfilling prophecy in the application of competition principles to the law', in that '[i]f lawyers are treated as if they are only conducting a business, then they will behave accordingly *to an even greater degree than they do now*'.[27]

It is no coincidence that many lawyers, especially in the wake of competition reforms, have elected to charge for legal services pursuant to costs agreements on the basis used by many other service providers in competitive markets, namely an hourly rate. Nor is it a coincidence that the court's historical jurisdiction to set aside unfair or unreasonable costs agreements, mentioned earlier, witnessed

25 The Trade Practices Commission branded a prohibition on lawyer advertising as anti-competitive, seeing restrictions on advertising as limiting 'the flow of valuable market information to consumers with adverse consequences for competition': Trade Practices Commission, above n 17, 171. In the United States, one of the drivers for the Supreme Court's declaration that bans on lawyer advertising were unconstitutional was that '[i]t is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer': *Bates v State Bar of Arizona*, 433 US 350, 377 (1977).

26 (2005) 224 CLR 322, 351 [29].

27 Chief Justice Spigelman, 'Are Lawyers Lemons? Competition Principles and Professional Regulation' (2003) 77 *Australian Law Journal* 44, 50 (emphasis added).

an attendant resurgence.[28] Curiously, the focus of much of the case law going to fairness and reasonableness of costs agreements defies the belief that costs scales unjustifiably and artificially sustain legal costs. The charging of scale costs have hardly proven a badge of unfairness or unreasonableness; quite the converse.[29] Indeed, there is even case authority to the effect that, especially for an unsophisticated client, a failure to disclose that other competent lawyers might charge less — under a scale — for the relevant services could be a badge of unfairness. In the words of Doyle CJ, with whom Gray and David JJ concurred, in *McNamara Business & Property Law v Kasmeridis*:

> the [clients] were not told that if the work to be done was costed according to the relevant scale, the level of charging was likely to be less, and probably significantly less; they were not told that there may be some solicitors who would charge in accordance with the scale, even though time charging at the rate charged was common, and some solicitors would charge more … I agree that it was not necessary for [the solicitors] to demonstrate that no other solicitor would have acted for the [clients] on the basis of charging according to the relevant scale … But the [clients] should have been advised about the difference between time charging and charging according to the scale, and should have been advised that there may be solicitors who would act for them and charge according to the scale.[30]

Questions of unreasonableness, moreover, have disproportionately focused on the application of a set hourly rate to a range of legal service providers within a law practice and/or for work of differing levels of skill.[31]

The preceding catalogue of events, which may not be exhaustive,[32] has highlighted the various avenues, including several of some recency, that have been pursued to place downward pressure on the cost of legal services. So far as they reflect a drive to propel competition, they are not unique. The concept of a competitive market, which is the foundation for Australian (and other) capitalist economies, proceeds on the notion that price competition will optimise the allocation of scarce resources. In so doing, it places the consumer — or, perhaps more accurately, consumers collectively — in a position of relative equality vis-a-vis the providers of goods and services in the relevant markets. The intersection of supply and demand, to this end, determines the price of the relevant good or service.

28 See, eg, the following cases from the early 1990s: *New South Wales Crime Commission v Fleming* (1991) 24 NSWLR 116; *Emeritus Pty Ltd v Mobbs* [1992] ANZ ConvR 17; *Weiss v Barker Gosling [No 2]* (1993) 118 FLR 218; *Stoddart & Co v Jovetic* (1993) 8 WAR 420; *Brown v Talbot & Olivier* (1993) 9 WAR 70; *Twigg v Kung* (1994) 121 FLR 227.

29 See, eg, *Weiss v Barker Gosling [No 2]* (1993) 118 FLR 218; *Passey v Bandarage* [2002] ACTSC 105 (28 October 2002); *McNamara Business & Property Law v Kasmeridis* (2005) 92 SASR 382.

30 (2007) 97 SASR 129, 141 [48]–[49]. Similar remarks had been made by Higgins J five years earlier in *Passey v Bandarage* [2002] ACTSC 105 (28 October 2002) [39].

31 See generally Dal Pont, *Law of Costs*, above n 13, 52–6.

32 It could be argued, for instance, that governmental broadening of university status, and complicity in the tripling in number of law schools (as of 2016 numbering 42) since 1989 and with this an oversupply of law graduates, may represent a de facto avenue of reducing the cost of legal services. An overview in this context is found in David Barker, 'An Avalanche of Law Schools: 1989–2013' [2013] *Journal of the Australasian Law Teachers Association* 1.

Under the auspices of supply and demand, a rational business — upon which free market economic theory is largely based — will charge as much as it can for its goods or services, so as to maximise profit. A business that can sell 1000 items at $10 each, or the same number of items at $20 each, will invariably choose to price each item at $20. This is so even if it can make a reasonable profit at a $10 price. As business proceeds upon the tenet of profit-maximisation, there is no motivation in this instance to charge less than $20. Indeed, to charge the maximum a customer or client is willing to pay for a good or service, *far from constituting overcharging or unethical conduct*, represents good business. In this context, the 'greed is good' moniker largely rings true.

As noted earlier, members of the legal profession have from relatively early times been subject to regulation of costs via the process of taxation (which, it should be noted, is more constrained when a valid costs agreement is in force)[33] and the curial jurisdiction relating to fairness and reasonableness of costs agreements. In more recent times, statutory costs disclosure requirements, supported by prescribed potential (legal and professional) consequences for non-compliance, have served as a de facto control on costs. Aside from the foregoing, which seek to foster client autonomy and protection in relation to legal costs, there stems the question as to why the competitive market that is (now) the business of law should, from a costs perspective, need *any supplementation by some ethical or disciplinary dimension*.

C *Constraints on Competition*

In pondering this question, what must be borne in mind are (at least) four characteristics of legal services, catalogued below, that differentiate it from the conduct of an 'ordinary' business, upon which competition policy is premised. Collectively, in particular, these may speak to a continuing role, and indeed a need, for some such ethical or disciplinary dimension.

1 *Entry Barriers*

There are barriers to entering the practice of law; it is reserved to persons with the requisite qualifications and certification, a point made explicit in legal profession legislation.[34] While the profession's monopoly in this regard may, as highlighted earlier, be less extensive than it once was, the bulk of what can be described as 'legal work' remains within its exclusive domain. Of course, entry barriers and associated monopolies are not confined to legal practice; many fields of endeavour prescribe qualifications and licensing requirements. It is not inaccurate, nonetheless, to state that the majority of business activities within the Australian landscape are subject to few genuine or difficult entry barriers.

33 See Dal Pont, *Law of Costs*, above n 13, 114–15.

34 See generally *Legal Profession Uniform Law* ch 2; *Legal Profession Act 2006* (ACT) ch 2; *Legal Profession Act 2006* (NT) ch 2; *Legal Profession Act 2007* (Qld) ch 2; *Legal Practitioners Act 1981* (SA) pt 3 divs 1–4; *Legal Profession Act 2007* (Tas) ch 2; *Legal Profession Act 2008* (WA) pts 3–8.

2 *Importance of Legal Services*

Presumably a driver in the modern accentuated consciousness surrounding the access to justice catchcry, society appears to place an especial value on legal services, and therefore an ability to access those services. It has been judicially observed, albeit in a different context, that '[t]he sustenance of the law is a benefit of a material kind which enures for the benefit of the whole community' and that 'society cannot exist as such if it is not based upon and protected by justice under law: and nurtured by obedience to law'.[35] As members of the legal profession are the gateway to 'justice under law' for the vast majority of persons, it stands to reason that the legal profession's services are seemingly more fundamental to the operation of free society than the goods or services supplied by most (or, in the minds of some, even all) other businesses. That legislators have found it compelling to heavily regulate the legal profession, arguably more so than other professions, implicitly speaks to this.

3 *Fiduciary Overlay*

The lawyer-client relationship has been recognised from early times as subject to the full force of fiduciary responsibility. As far back as 1862, in a case involving a solicitor transacting with a client, Lord Chelmsford referred to the 'principles established in courts of equity by which persons clothed with a fiduciary character are restrained within the bounds of honesty and fair dealing'.[36] In the same case, Lord Westbury LC conceived of 'no relation known to society, of the duties of which it is more incumbent upon a court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client'.[37] In the lawyer-client relationship, as in other fiduciary relationships, equity superimposes fiduciary obligations to guard against abuse of the (frequent but not invariable) power and knowledge imbalance in favour of the lawyer.

As is well known, a core aspect of fiduciary responsibility is a proscription on the fiduciary on making an unauthorised profit from the relationship. This explains why in the archetypal fiduciary relationship — that between trustee and beneficiary — the trustee was expected to act gratuitously.[38] Translated as between lawyer and client, by charging a client for legal services a lawyer ostensibly commits a fiduciary breach unless those charges are authorised by the client. Client authority here, as in other contexts, rests on informed consent. In turn, as a matter of logic, the latter rests on some degree of costs disclosure by the lawyer, notably antedating modern costs disclosure obligations under statute.

It is perhaps surprising, therefore, that fiduciary law has had relatively little impact in the costs context. There may be reasons for this. The history of the

35 *Incorporated Council of Law Reporting of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659, 669 (Barwick CJ).

36 *Tyrell v Bank of London* (1862) 10 HLC 26, 51; 11 ER 934, 944.

37 Ibid 44; 941.

38 *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049.

legal profession, indeed going back to Roman times,[39] reveals that advocates traditionally provided their services gratuitously, and received any fee by way of honorarium.[40] Indeed, it has been observed that:

> From the very earliest times, in every country where advocacy has been known, it has been the custom to look upon the exertions of the advocate as given gratuitously, and the reward which the client bestows as purely honorary, in discharge not of legal obligation, but a mere debt of gratitude. There can be little doubt that this notion has been encouraged and kept up from a jealous apprehension lest the profession should degenerate into a mean and mercenary calling.[41]

A second, and arguably more compelling, reason emanates from the role performed by the common law jurisdiction, mentioned earlier, to set aside costs agreements for unfairness or unreasonableness, which in many instances obviates a need to rely on fiduciary law. This should not, however, be seen as precluding the use or utility of fiduciary law in the curial arsenal to constrain lawyer charges. In *Re Morris Fletcher & Cross' Bill of Costs*, for instance, involving a Japanese national inexperienced with Australian litigation who retained a law firm under a time charging costs agreement, Fryberg J ruled that the firm should, *in discharging its fiduciary duty*, have disclosed to the client that:

- 'time charging was normal among large commercial firms' but not necessarily for other firms;
- 'there was a risk that time charging might result in a higher bill than … a tasks performed basis';
- 'task based charging was [a] conventional and traditional method of charging' by lawyers; and
- the Federal Court scale, which applied in the litigation, was 'limited [to] the amount chargeable by reference to the tasks performed regardless of the time spent on the task'.[42]

It should be observed, moreover, that no other genuine profession is subject to the full force of fiduciary responsibility. Its potential impact on controlling costs, at least when it comes to client understanding and consent to costs, cannot therefore be ignored.

4 *Professional Status*

The very fact that lawyers carry out their functions as members of a 'profession' has traditionally been seen as placing some restraint on lawyer charging. A former High Court judge, speaking extra-judicially, has observed that 'it was

39 See generally William Forsyth, *The History of Lawyers: Ancient and Modern* (James Cockcroft, 1875) ch 9.

40 This has had a longstanding effect at general law on the recovery of fees by barristers: G E Dal Pont, 'The Recovery of Counsel's Fees' (2004) 23 *The University of Queensland Law Journal* 381.

41 Forsyth, above n 39, 353.

42 *Re Morris Fletcher & Cross' Bill of Costs* [1997] 2 Qd R 228, 243.

the subordination of personal aims and ambitions to the service of a particular discipline and the promotion of its function in the community which marked out a profession'.[43] This remark serves to highlight the 'public service' element that informs the core of professionalism, and how that service cannot always align with a one-eyed drive to personal profit. It also reflects the traditional distinction between a trade, business or occupation, on the one hand, and a profession on the other, identified by Street CJ as follows:

> A trade or business is an occupation or calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are, of course, expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal. Service is the ideal, *and the earning of remuneration must always be subservient to this main purpose*.[44]

Essentially the same point was made by the Supreme Court of the United States, nearly four decades later, in the observation that what, inter alia, distinguishes a profession from 'other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market'.[45] 'For most members of the profession this restraint is a real one', opined a former New South Wales Chief Justice some years hence, aligning it with a lawyer's 'sense of professional responsibility'.[46]

III TRANSLATION TO ETHICS — COSTS REGULATION VS COSTS DISCIPLINE

It is to this 'sense of professional responsibility' — or, perhaps more accurately, the abdication of that responsibility — that the professional disciplinary process is primarily directed. This accordingly speaks to the role of professional disciplinary proceedings in policing lawyer charging, and why questions of lawyer (over) charging must necessarily surface on the disciplinary radar. The challenge,

43 Justice Dawson, 'The Legal Services Market' (1996) 5 *Journal of Judicial Administration* 147, 148.

44 *Re Foster* (1950) 50 SR (NSW) 149, 151 (emphasis added), endorsed in *Legal Services Commissioner v Walter* [2011] QSC 132 (27 May 2011) [19] (Daubney J). See also Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (West Publishing, 1953) 5: 'The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of a public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose'.

45 *Shapero v Kentucky Bar Association*, 486 US 466, 488–9 (O'Connor J) (1988).

46 Chief Justice Spigelman, 'Opening of Law Term Dinner' (Speech delivered at the Law Society of New South Wales Law Term Dinner, Sydney, 2 February 2004). The year before, his Honour lamented that '[t]he ethic of service which emphasises honesty, fidelity, diligence and professional self-restraint may, progressively, be lost' as a result of the business-like focus of legal practice emanating from treating lawyers as if they are merely conducting a business: Chief Justice Spigelman, 'Are Lawyers Lemons?', above n 27, 50.

therefore, is to identify what lawyer charging practices may legitimately produce disciplinary consequences.

Before diving headlong in this core inquiry, it is important to appreciate, in view of the preceding discussion, the difference between the object(s) of professional discipline and the avenues identified to place downward pressure on legal costs. While the latter no doubt accrues for the benefit of society as a whole — or at least that part of society that utilises legal services — the focus is chiefly on the individual client and lawyer relationship. The requirements of costs disclosure, the regulation of costs agreements and the availability of taxation (or assessment) of costs all serve to adjust the incidents of that relationship. They serve to vest legal rights, as part of the civil law, in a client vis-à-vis his or her lawyer. The push to greater competition between law practices, while driven by a belief that it will maximise collective benefit to consumers of legal services, ultimately focuses on the trickle-down benefit enuring to the individual client. Not only will that client be better positioned to make informed decisions when it comes to engaging a lawyer, there is the prospect, by virtue of competition, of selecting the lawyer who charges the least for the desired service. Ultimately, the question relates to costs as between an individual client and lawyer, and avenues to ensure the 'legitimacy' — in a variety of senses — of those costs.

When speaking of professional discipline, conversely, the spotlight is on the relationship between the profession and the public. As a general principle, disciplinary proceedings are not concerned with affording a client an avenue for civil redress against an errant lawyer; the latter is the function of the avenues mentioned in the preceding paragraph. The client (allegedly) wronged is, accordingly, not a party to the disciplinary proceedings, which are pursued by a regulatory officer or body (traditionally by a professional body, such as a law society or bar association). The principal objective of disciplinary proceedings, recognised from early times, is protection of the public.[47] This protective aim operates in tandem with subsidiary aims, which can be described as 'reputational' and 'deterrent'. A failure to discipline individual lawyers who behave unethically may, it is logically reasoned, tarnish the reputation of the profession collectively, and with it public confidence in the law and legal process. It may also hardly deter other lawyers from engaging in unethical conduct.

The foregoing is not to suggest that costs issues arising as between client and lawyer are always mutually exclusive from those surfacing in the disciplinary arena. As noted earlier, infelicities in costs disclosure, in particular, are declared by statute to be capable of generating a disciplinary consequence. At the same time, statute now envisages that the disciplinary process can be utilised, inter alia, to secure a compensation order for a victim of a lawyer's unethical conduct, which can encompass an order relating to the repayment or forfeiture

47 As to the protective aim of disciplinary proceedings see Dal Pont, *Lawyers' Professional Responsibility*, above n 5, 751–5.

of costs.[48] While overlaps of this kind, incidentally all a product of relatively recent statutory initiatives, do straddle the relevant divide, they certainly do not function to wholesale equate the purposes of disciplinary proceedings in costs (or other) matters to those underscoring the regulation of costs as between client and lawyer.

It follows that in addressing the core question over lawyer charging practices that may legitimately produce disciplinary consequences, the differing aim(s) of disciplinary as opposed to civil proceedings cannot be ignored. At the outset, for the purposes of addressing this core question, it should be noted that deliberate lawyer charging for work that is not performed, beyond any civil claim as between client and lawyer, is clearly unethical, and likely to be branded professional misconduct.[49] In one sense, behaviour of this kind is akin to fraud, however defined, and so can perhaps be seen as an 'easy' target for professional discipline. The public clearly need protection from fraudulent conduct, for which the profession's reputation would suffer were it allowed to persist.

Hence, for the purposes of the remainder of this article, the above 'fraudulent' scenario is put to one side. While it is evidently an illustration of 'overcharging', the focus below is on the more difficult question surrounding the disciplinary response to charges for work that has actually been performed. This question is difficult because it requires a disciplinary tribunal (or body) or court to draw what appears a 'line in the sand', as between the quantum of fees that are 'ethical' for the service(s) performed as opposed to a quantum 'sufficiently unethical' to produce a disciplinary consequence.[50] How this task has been approached at common law, and may be pursued under statute, is the subject of discussion below.

IV COSTS DISCIPLINE AT COMMON LAW

A *Confined to 'Gross' Overcharging*

That professional misconduct at common law is defined by reference to behaviour that would be 'reasonably regarded as disgraceful or dishonourable

48 See generally *Legal Profession Uniform Law* pt 5.5; *Legal Profession Act 2006* (ACT) pt 4.8; *Legal Profession Act 2006* (NT) pt 4.12; *Legal Profession Act 2007* (Qld) pt 4.10; *Legal Profession Act 2007* (Tas) pt 4.9; *Legal Profession Act 2008* (WA) pt 13 div 11.

49 See, eg, *Re Eyre* (1856) 1 CBNS 151, 152; 140 ER 64, 64, where Jervis CJ branded as 'very improper conduct' the act of 'extorting from the [client] an excessive sum for costs under the false pretext that something had been done which in fact had not been done'; *Legal Services Commissioner v Baker [No 2]* [2006] 2 Qd R 249, where the charging of costs and disbursements where none are properly chargeable, coupled with an aggressive and remorseless pursuit of unsophisticated and inexperienced clients for fees conceivably owed, led the court to affirm the disciplinary tribunal's order that the solicitor in question be struck off from practice.

50 *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 (6 October 1995) 9, in which Mahoney JA remarked that 'in the context of the present day practice of law, it may be difficult to determine whether, in a particular case, charges are to be so categorised'.

by his professional brethren of good repute and competency'[51] explains why judges reserve the disciplinary jurisdiction relating to costs to instances of 'gross' overcharging. The opprobrium evident in the adjectives 'disgraceful' or 'dishonourable' invites an inquiry necessarily punctuated by degree. The 19th century saw English judges speak, in this context, of charges that are 'exorbitant',[52] 'outrageously excessive',[53] and 'so gross as to be fraudulent'.[54] In what appears to be the leading Australian case, *Re Veron; Ex parte Law Society of New South Wales*, the New South Wales Court of Appeal remarked that '[i]t has long been recognized that the charging of extortionate or grossly excessive costs … may amount to professional misconduct'.[55]

The message seems clear: not every form or instance of 'overcharging' constitutes professional misconduct at common law. Only overcharging from which the public more broadly need protection, that tarnishes the profession's reputation and may prove necessary for the purposes of deterrence is a candidate for disciplinary sanction. Too ready an inclination to translate civil relief as between client and lawyer into a disciplinary issue for the lawyer would downplay the legitimate role for existing controls on client-lawyer costing. It would also risk branding a reduction of a bill on taxation, or the setting aside of a costs agreement, as a judgment on the lawyer's ethics, which may well be unjustified. As most retainers involve imponderables and professional judgment, such a course could render hindsight a barometer of ethical conduct vis-à-vis charging in respect of matters plagued by consequent uncertainty. Also, it cannot be overlooked that, as much legal work is remunerated by way of costs agreements, too ready a step into the disciplinary sphere could undermine the weighty public policy of freedom of contract.

Underscoring the above is that the consequences of professional discipline (whether for overcharging or otherwise) differ in nature and impact from those as between client and lawyer upon costs being adjusted via civil process. Pursuant to the latter, the principal (and often only) outcome for the lawyer is monetary, namely a reduction in the fees that he or she can legitimately recover from the client. No attendant ethical judgment on the lawyer's conduct necessarily attaches. A finding of misconduct, on the other hand, ordinarily represents an ethical condemnation of the lawyer's conduct, with the consequent slight on his or her reputation. The lawyer may be reprimanded and/or fined; in more extreme instances, he or she may be denied the right to practise a profession for which he or she is otherwise qualified. Outcomes of this serious kind should not ensue except upon compelling and necessary grounds. As remarked by Cockburn CJ in 1857, in a case involving an (ultimately unsuccessful) attempt to mete out professional discipline for overcharging:

51 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 761 (Lord Esher MR); 763 (Lopes LJ).

52 *Meux v Lloyd* (1857) 2 CBNS 409, 411; 140 ER 476, 477 (Cockburn CJ).

53 Ibid (Cresswell J).

54 *Re Hill* (1887) 4 TLR 64, 65 (Stephen J).

55 [1966] 1 NSWR 511, 517 ('*Vernon*'), citing *Meux v Lloyd* (1857) 2 CBNS 409; 140 ER 476 and *Re Hill* (1887) 4 TLR 64.

> It is obviously important that officers of the court should be kept under wholesome control with reference to their conduct and dealings with their clients. But, on the other hand, it is equally important that they should not be unduly prejudiced in their professional character by being brought before the court upon light grounds.[56]

It is little surprise, therefore, that in distinguishing overcharging that is professionally actionable from that which is not (even though it may be the subject of proceedings between client and lawyer), the common law sets a high(er) threshold.

B *Identifying the 'Baseline'*

The term 'overcharging' in itself suggests a charge exceeding what it should have been. 'Gross' overcharging accordingly refers to a charge that grossly exceeds what it should have been. The inquiry, as foreshadowed above, is one of degree. As with any inquiry governed by questions of degree, there is utility in a 'baseline' against which to adjudge the events (charges) in question. The latter can ordinarily be identified with certainty and precision; after all, it correlates to the amount charged by the lawyer in the circumstances.

The challenge is to identify a baseline, which must correlate, in the terms of the above remarks, with what the charge *should have been*. It then becomes necessary to determine whether the disparity between that baseline and the amount(s) actually charged is, in the circumstances in question, sufficiently 'gross' or 'exorbitant' to merit professional discipline and, if so, what should be the disciplinary response.

Although by no means an exact science, there are vehicles within the costs law arsenal that may serve as a baseline for this purpose. A court or disciplinary body can adduce expert evidence for this purpose. It may be guided by a quantification of costs by way of taxation (or assessment). Whether via taxation or otherwise, a comparison to the charge calculated according to an applicable scale may also prove probative. While what is charged under a costs agreement may well reflect consensus, it does not immunise the lawyer from a disciplinary finding. Each of the foregoing is elaborated in turn below.

1 *Baseline via Expert Evidence*

As an assessment of professional misconduct at common law is approached from the perspective of 'professional brethren of good repute and competency',[57] there is sense in approaching the baseline by reference to what such persons would charge for the services in question. Indeed, in *Veron* the New South Wales Court of Appeal referred to the opinion of the Law Society, to which it gave 'great

56 *Meux v Lloyd* (1857) 2 CBNS 409, 411; 140 ER 476, 477 (Cockburn J).

57 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 761 (Lord Esher MR); 763 (Lopes LJ).

weight' and indeed adopted as its own,[58] that the fees charged by the respondent solicitor were so 'exorbitant and grossly excessive' as to support a striking off order for professional misconduct.[59] In reaching this conclusion, their Honours also relied on expert evidence from a solicitor who conducted a practice similar to the respondent.[60] This revealed that the usual solicitor and client costs for the type of case in question (involving claims for compensation arising out of road accidents) were between £50 and £80, whereas the respondent had contracted with clients to withhold £1000.[61]

The Court accepted that, '[a]s with all questions of degree, cases may occur in which it is difficult to decide on which side of the border line they fall'.[62] It then referred to Lord Simonds LC who, in explaining why he was not impressed by an argument about the difficulty of drawing the line, cited 'the answer of a great judge that, though he knew not when day ended and night began, he knew that midday was day and midnight was night'.[63] In view of the disparity between the respondent's charges and those of other similarly placed solicitors, the Court in *Veron* had no difficulty in deciding on which side of the line the respondent's conduct fell. Adopting the language of Lord Simonds LC, it was a case, it seems, that was 'as clear as day'.

2 *Baseline via Taxation or Assessment of Costs*

As the law recognises the process of taxation (or assessment) as the principal vehicle through which the reasonableness of legal costs is to be determined, there is sense in utilising that process in identifying a baseline for the purposes of determining whether there has been 'gross overcharging'. While it must be borne in mind, of course, that taxation (or assessment) of costs serves a purpose different from that served by the disciplinary process — the taxation of bills of costs (and its review by the court) 'is not directly concerned with whether the solicitor has acted unethically' whereas the latter is the primary issue in disciplinary proceedings[64] — to ignore what appears to be a huge disparity between costs charged and taxed costs is to ignore what may represent the most compelling evidence of illegitimate overcharging.

The disciplinary case law confirms the point. In *New South Wales Bar Association v Meakes*, for example, an expert report prepared by an experienced costs assessor, which revealed a charge between 50 per cent and 90 per cent above the maximum

58 [1966] 1 NSWR 511, 519.

59 Ibid 518.

60 Ibid 519.

61 Ibid.

62 Ibid 517.

63 *Chapman v Chapman* [1954] AC 429, 445–6.

64 *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 209 (Ipp J), endorsed in *Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 (8 June 2007) [41]–[43] (Beazley JA, with whom Hodgson and McColl JJA concurred on this point; [91], [95] respectively). See also *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575, 593 [46] (French J), 605–6 [110] (Carr J).

rates chargeable by ordinary competent barristers of the respondent's experience in the relevant area of practice, clearly influenced the New South Wales Court of Appeal in a finding of gross overcharging, constituting professional misconduct and justifying a public reprimand.[65]

More extreme overcharging, as adjudged by comparison to taxed or assessed costs, can be visited by a suspension or striking off order. In *Council of the Queensland Law Society Inc v Roche* the relevant bill of costs was almost $620 000 as compared to $240 000 when assessed on an indemnity basis.[66] This disparity, according to McMurdo P, revealed that the fees charged 'were exorbitant and well outside those charged by any reasonable practitioner',[67] and amply supported a suspension from practice. It seems from the judgment of the Queensland Court of Appeal in that case that the lawyer was fortunate to avoid being struck off. No such luck favoured the respondent in *New South Wales Bar Association v Amor-Smith*, where the amount determined by a costs assessor to be 'fair and reasonable' ($32 500) was around one-fifth of the amount actually charged ($151 441).[68] Repeated gross overcharging over a longer period of time, even if the costs disparity is more confined, has also proven amenable to a lawyer's removal from the roll.[69]

3 *Baseline via Scale Costs*

A comparison, whether via a process of taxation (or assessment) or by resort to expert evidence, between the costs that would have been chargeable under a relevant scale, and those actually charged (whether or not under a costs agreement), may also prove probative in the disciplinary environment. The irony here is that while scales of costs have been berated for being anti-competitive, and for sustaining the costs of legal services at too high a level, they may at the same time function to condemn a lawyer who charges a fee unrelated to (and exceeding) an applicable scale.

In *Veghelyi v Law Society of New South Wales*, for example, the appellant solicitor was found guilty of professional misconduct, and struck off, by reason of having grossly overcharged multiple clients.[70] A typical case involved a charge of $1304 for effecting a transaction whereas the scale fee, in the absence of agreement, was $173. More recently, in *Legal Profession Complaints Committee v Penn*, a finding of professional misconduct was made against a solicitor who charged $69 000 in

65 [2006] NSWCA 340 (6 December 2006) [14]–[16].

66 [2004] 2 Qd R 574, 591 [54].

67 Ibid 591 [54].

68 [2003] NSWADT 239 (5 November 2003) [11].

69 See, eg, *Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430 (4 December 2013) (striking off order made against the respondent solicitor who had persisted in overcharging for 12 years, where the fees charged exceeded reasonable fees by between 40 per cent and 130 per cent).

70 [1995] NSWCA 483 (6 October 1995).

the course of acting on behalf of an executor when, according to expert evidence, costs chargeable under the relevant scale would not have exceeded $30 000.[71]

4 *Baseline via Costs Agreement*

Merely because a properly made costs agreement commits a client to fees (well) in excess of what would otherwise have been allowable under an applicable scale, or under taxation (or assessment), is not of itself determinative of misconduct; nor is the fact that a costs agreement is set aside for being not fair or reasonable. There are, again, questions of degree involved. It has been noted, to this end, that a costs 'agreement may not have been "fair and reasonable" but not *so unfair or unreasonable* as to be characterised as "extortionate or grossly excessive"'.[72]

As *Veghelyi* reveals, though, nor does proof of a costs agreement necessarily preserve a lawyer from a disciplinary sanction for overcharging. That a costs agreement unduly favours the lawyer may prompt the court to inquire whether the client possessed an informed understanding of the true nature and effect of its terms. As explained by de Jersey CJ in *Council of the Queensland Law Society Inc v Roche*:

> The circumstance that a solicitor's right to exact certain charges is enshrined in an executed client agreement will not necessarily protect the solicitor from a finding of gross overcharging. For example, as here, the client may not have given his or her 'fully informed consent' to the agreement; or the very extent of the particular charges may itself evidence inexcusable rapacity. It is repugnant to think of a solicitor withholding detail from a client, precedent to an agreement, to the solicitor's advantage and the client's disadvantage.[73]

It is no coincidence that common to each of the cases mentioned in the preceding paragraphs, beyond a finding of gross overcharging, were clients who could not be described as sophisticated when it came to the relevant matter. Indeed, in *Veghelyi* Mahoney JA opined that gross overcharging may amount to professional misconduct precisely because of the relative position of inequality as between client and lawyer:

> it is … relevant to consider first the reason why gross over-charging, as such, may be held professional misconduct. … Clients are, or may frequently be, in a vulnerable position vis-a-vis their solicitors … when making decisions clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what

71 [2015] WASAT 145 (18 December 2015) [8]. The Tribunal issued no specific disciplinary sanction in this context because the solicitor had ceased practice, was impecunious and had, in any case, been the subject of disciplinary penalty in respect of other related misconduct: at [19].

72 *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, 144 [35] (emphasis added). See also *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 202 (Pidgeon J).

73 [2004] 2 Qd R 574, 583–4 [32]. See also *Veron* [1966] 1 NSWR 511, 520 where the New South Wales Court of Appeal downplayed the significance of client assent to the respondent's retention of grossly excessive fees in view of a finding that many of the respondent's clients 'did not understand the true nature or effect of the [costs agreements] which they were called upon to sign'.

> charges are fair and reasonable; they ordinarily assume that the solicitor will make only such charges.
>
> Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage. It is … the fact that that advantage has been misused which may, in a particular case, warrant what the solicitor does being categorised as professional misconduct.[74]

In *Veron*, for example, many of the clients who had assented, under a costs agreement, to the lawyer retaining grossly excessive fees were, the New South Wales Court of Appeal found, 'simple persons of no business training or education and generally were prepared to accept without question what they were told by the respondent [solicitor] as to money matters'.[75] In *Veron*, as in various other cases typically involving personal injury litigation,[76] the abuse, victimisation or exploitation of vulnerable, unsophisticated or dependent clients by way of excessive costs itself speaks of conduct, redolent of moral obloquy,[77] from which the public needs protection, and that tarnishes the profession's reputation. McMurdo P in *Council of the Queensland Law Society Inc v Roche* heralded a more stringent approach against the errant lawyer in this context:

> In light of the clear statements made by the Court in this case, practitioners who continue to breach their fiduciary duty by placing their own and their firm's interests before those of clients, importuning them to enter into costs agreements charging exorbitant fees … can expect heavier deterrent penalties for their professional misconduct. Substantial penalties will be justified to protect primarily the public but also the reputations of the vast majority of decent practitioners to whom such conduct is abhorrent. Where appropriate, the penalty may include striking the name of the offending practitioner from the Roll of Solicitors of this Court.[78]

This echoes a conception, espoused by Jervis CJ back in 1856, of the court's 'duty to see that the power which the law has placed in the hands of the [lawyer] … is not made an instrument of extortion and oppression'.[79]

74 *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 (6 October 1995) 8–9.

75 *Veron* [1966] 1 NSWR 511, 522.

76 Ibid. See, eg, *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138; *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574.

77 In *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138, costs agreements that applied blanket hourly fees to all staff, coupled with charges of a further 30 per cent for care, skill and consideration, and imposed 15 per cent 'interest' on disbursements, all charged without a bona fide assessment of each individual case, were branded by the Full Court of the Australian Capital Territory Supreme Court as 'extortionate', whereby the solicitors 'cheated and, effectively, defrauded their clients of many thousands of dollars intended for their compensation': at 149 [67].

78 [2004] 2 Qd R 574, 592 [57].

79 *Re Eyre* (1856) 1 CBNS 151, 152; 140 ER 64, 64.

C *Shifting the 'Baseline'*

1 *As Between Lawyers and Retainers*

The above discussion of the 'baseline', from which assessments of whether or not a lawyer has engaged in gross overcharging can be made, could prove misleading unless it is understood that the baseline is not uniform, but will likely vary, sometimes significantly, between one retainer and another, and between one lawyer and another.

From the perspective of the retainer, the legitimacy of costs charged may be influenced, inter alia, by the difficulty of the case, the novelty or complexity of the legal issues, and the responsibility involved. Moreover, that a lawyer has undertaken the representation on a speculative basis — wherein he or she is entitled to recover professional fees only on a successful outcome for the client — may, in an appropriate case, afford leeway for a higher charge,[80] and thus a potential (albeit small) buffer from a disciplinary consequence.[81]

It may be impacted upon, from the viewpoint of the individual lawyer, by matters such as his or her experience, and 'the quality of his or her work'.[82] The disciplinary case law also suggests that the legitimacy of costs charged may be affected by the size of the lawyer's firm and the resources employed or available to be employed by it. It has been observed to this end 'what is fair and reasonable for a large firm may be, in the ordinary case, grossly excessive for a sole practitioner'.[83]

Given the above considerations, many of which have qualitative indicia, it is unsurprising that setting a 'baseline' from which to determine whether or not 'gross' overcharging has occurred is rarely amenable to complete precision. The case law reveals that costs experts do not always, or even frequently, agree when it comes to quantifying costs.[84] Also, no two taxing officers or costs assessors will tax or assess a bill in precisely the same way. The room for professional judgment here presents as a further reason why courts and disciplinary tribunals ordinarily confine professional discipline for overcharging to clear cases.

80 A policy recognised by the legitimacy accorded by legal profession legislation to 'uplift fee' agreements: see *Legal Profession Uniform Law* s 182; *Legal Profession Act 2006* (ACT) s 284; *Legal Profession Act 2006* (NT) s 319; *Legal Profession Act 2007* (Qld) s 324; *Legal Practitioners Act 1981* (SA) sch 3 cl 26; *Legal Profession Act 2007* (Tas) s 308; *Legal Profession Act 2008* (WA) s 284.

81 *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574, 591 [54] (McMurdo P). Cf *Veron* [1966] 1 NSWR 511, 523 where the New South Wales Court of Appeal, in the context of a solicitor who charged excessive fees to motor accident injury clients on a speculative basis, remarked that '[a] solicitor is certainly not entitled to charge A excessive costs in order to cover himself against a possible loss in the case of B', and in any case queried the excessive charges in this context 'having regard to the very few unsuccessful claims in motor car accident cases'.

82 *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 214 (Ipp J). See also the parallel factors going to the issue of reasonableness of lawyer fees catalogued in American Bar Association, *Model Rules of Professional Conduct* (2016) r 1.5(a).

83 *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 (6 October 1995) 12 (Mahoney JA).

84 See, eg, *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd [No 4]* [2013] VSC 669 (5 December 2013) (in the party-party context, as to varying views expressed by each side's costs expert).

2 *By Reference to Proportionality*

Any discussion on the setting of a costs 'baseline' for disciplinary purposes would be incomplete were the increasingly important concept of 'proportionality' overlooked. Underscoring the reference to proportionality in the costs context is a belief that it misaligns with public policy and the efficient use of scarce resources if costs are disproportionately high when compared to the amount or value of the subject matter of the retainer. The concept has been described as calling for 'a reasonably proportionate relationship between ends and means',[85] and it is thereby inconsistent with the notion that the ends necessarily justify the means. The importance of proportionality, and its attendant impact upon costs recovery as between party and party, has surfaced in civil procedure legislation and court rules within the last decade.[86] Courts nowadays are known to 'cap' costs, including as between lawyer and client, in an effort to promote proportionality between those costs and what is at stake between the litigants.[87]

Statutes in the Australian Capital Territory, New South Wales and Queensland also impose limits, reflecting notions of proportionality, on costs recovery by lawyers in personal injury actions.[88] That many of the overcharging disciplinary cases involve precisely these types of actions may speak to what prompted these reforms.

It is unsurprising, therefore, that the criterion of proportionality has witnessed mention as regards costs in the disciplinary context. As far back as 1995 a New South Wales judge, having distinguished costs that are 'fair and reasonable' from those that are 'grossly disproportionate', aligned a finding of professional misconduct with the latter.[89] In another, more recent, case of a lawyer likewise struck off for overcharging, the relevant Tribunal was influenced by a costs assessor's determination that the costs charged were 'excessive and *out of all proportion* to the subject matter of the litigation'.[90]

These references to costs proportionality, now to be viewed against the backdrop of the legislative and judicial groundswell directed at proportionality in litigation generally, alert the profession that questions of proportionality assume greater significance in the disciplinary context. If so, in future the 'baseline' — against which the costs charged are compared in determining whether a disciplinary order is justified — will likely be informed, and in cases of low monetary value

85 *Actrol Parts Pty Ltd v Coppi [No 3]* [2015] VSC 758 (23 December 2015) [60] (Bell J).

86 See, eg, *Federal Court of Australia Act 1976* (Cth) ss 37M(2)(e), 37M(3), 37N(1), 37N(4); *Family Law Rules 2004* (Cth) r 1.07(c); *Civil Procedure Act 2005* (NSW) s 60; *Civil Procedure Act 2010* (Vic) ss 24, 28(2); *Rules of the Supreme Court 1971* (WA) order 1 r 4B(1)(e).

87 See Dal Pont, *Law of Costs*, above n 13, 184–90.

88 *Civil Law (Wrongs) Act 2002* (ACT) pt 14.1; *Legal Profession Uniform Law Application Act 2014* (NSW) sch 1 cl 61 (which each apply to both lawyer and client and the party and party context); *Legal Profession Act 2007* (Qld) ch 3 pt 3.4 div 8 (limited to lawyer and client context). See further Dal Pont, *Law of Costs*, above n 13, 190–4.

89 *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 (6 October 1995) 9, 11 (Mahoney JA).

90 *New South Wales Bar Association v Amor-Smith* [2003] NSWADT 239 (5 November 2003) [77]–[80] (emphasis added).

be constrained, by notions of proportionality. The consequence is a potential for charging practices that once did not surface on the disciplinary radar to now make an appearance.

As an aside, it may be observed that the irony so far as costs proportionality is concerned is that the vehicle for charging that best aligns with proportionality ideals — the percentage fee, whereby the lawyer is (typically) paid a percentage of the amount recovered by the client — is proscribed across Australia by the legal profession legislation.[91] It seems that proportionality has virtue except where it may function to over-compensate lawyers for their work (which is a strident criticism of percentage fees).[92] Yet were percentage fees legal, it cannot be assumed that lawyers would be keen to accept a percentage fee retainer in disputes of low monetary value.

V COSTS DISCIPLINE UNDER STATUTE

The preceding discussion of lawyer overcharging in the disciplinary context targeted professional misconduct at common law. It remains extant because the definition of 'professional misconduct' in the legal profession legislation is inclusive, and so does not oust the equivalent concept at common law. In any event, as 'professional misconduct' under statute is defined to include conduct of an Australian legal practitioner 'that would, if established, justify a finding that the practitioner is not a fit and proper person to' engage in legal practice,[93] it appears to be more confined, if anything, than its namesake at common law. After all, a finding of 'professional misconduct' at common law does not rest upon a finding of unfitness to practice, otherwise every instance of professional misconduct at common law would trigger a suspension or striking off order. The disciplinary case law on overcharging reveals this not to be so.

The second limb of the statutory 'professional misconduct' definition refers to unsatisfactory professional conduct that 'involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence'.[94] The legislation defines 'unsatisfactory professional conduct' to include conduct 'in connection with the practice of law that falls short of the standard of

91 *Legal Profession Uniform Law* s 183; *Legal Profession Act 2006* (ACT) s 285; *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 Act 2008* (WA) s 285.

92 Studies in the United States show that lawyers who take on a case on a percentage fee basis can expect to secure a greater fee than they would adopting time charging: see, eg, Herbert M Kritzer, 'The Wages of Risk: The Returns of Contingency Fee Legal Practice' (1998) 47 *DePaul Law Review* 267.

93 *Legal Profession Uniform Law* s 297(1)(b); *Legal Profession Act 2006* (ACT) s 387(1)(b); *Legal Profession Act 2006* (NT) s 465(1)(b); *Legal Profession Act 2007* (Qld) s 419(1)(b); *Legal Practitioners Act 1981* (SA) s 69(b); *Legal Profession Act 2007* (Tas) s 421(1)(b); *Legal Profession Act 2008* (WA) s 403(1)(b).

94 *Legal Profession Uniform Law* s 297(1)(a); *Legal Profession Act 2006* (ACT) s 387(1)(a); *Legal Profession Act 2006* (NT) s 465(1)(a); *Legal Profession Act 2007* (Qld) s 419(1)(a); *Legal Practitioners Act 1981* (SA) s 69(a); *Legal Profession Act 2007* (Tas) s 421(1)(a); *Legal Profession Act 2008* (WA) s 403(1)(a).

competence and diligence that a member of the public is entitled to expect of a reasonably competent' Australian legal practitioner.[95] This concept, though, has carriage in the context of lawyer overcharging only if the latter is a product of a lack of competence or diligence. While instances of such a connection can be readily imagined — typically stemming from a lack of diligence in maintaining appropriate oversight over the costing process[96] — the typical scenarios of overcharging, as evidenced by the tenor of the disciplinary case law to date, have little to do with diligence (or competence).

This may in turn explain why Parliaments opted, as noted at the outset of this article, to make explicit provision linking the 'charging of excessive legal costs in connection with the practice of law' to unsatisfactory professional conduct or professional misconduct.[97] It is legitimate, therefore, to ponder whether or not this statutory language equates to 'gross overcharging' at common law. Should the answer be 'yes', statutory misconduct adds nothing to the common law in this regard. Like the common law, the statutory language recognises that overcharging is not an automatic ticket to professional discipline; implicit in being expressed to be 'capable of' doing so (as opposed to 'is') is a recognition that it may not. It stands to reason that, under statute, like at common law, a disciplinary response rests on matters of degree. It likewise suggests that there must be factors that can influence the determination one way or the other, and there is no reason in principle why those identified earlier vis-a-vis misconduct at common law should not prove probative for this purpose. Any need within the statutory formula to adopt the common law's language of 'gross' overcharging as a vehicle to introduce matters of degree was thereby obviated (even assuming that the word 'gross' is apt for use in statutory language, which seems unlikely in modern drafting). There is logic, accordingly, in construing the phrase 'charging of excessive legal costs' in line with what at common law (under the guise of 'gross overcharging') would amount to actionable misconduct.

With the advent of the *Legal Profession Uniform Law* in New South Wales and Victoria, it may be queried whether the same can be said vis-a-vis its statutory threshold, namely the 'charging more than a fair and reasonable amount for legal costs in connection with the practice of law'.[98] On its face, this wording appears to bring under the disciplinary umbrella costs that fall well short of 'gross overcharging'. That the *Uniform Law* requires a costs assessor, on a costs assessment, to 'determine whether legal costs are fair and reasonable and, to the extent they are not fair and reasonable, determine the amount of legal costs

95 *Legal Profession Uniform Law* s 296; *Legal Profession Act 2006* (ACT) s 386; *Legal Profession Act 2006* (NT) s 464; *Legal Profession Act 2007* (Qld) s 418; *Legal Practitioners Act 1981* (SA) s 68; *Legal Profession Act 2007* (Tas) s 420; *Legal Profession Act 2008* (WA) s 402.

96 See *Scroope v Legal Services Commissioner* [2013] NSWCA 178 (17 June 2013) [45]–[52] (Beazley P, with whom Bathurst CJ and Hoeben JA agreed) which reveals that deficiencies in the law practice's computerised costing system, while they may not mitigate a finding of gross overcharging, may reduce culpability, at least of employee lawyers, to a level of unsatisfactory professional conduct.

97 *Legal Profession Uniform Law* s 298(d).

98 Ibid.

(if any) that are to be payable'[99] appears to bolster this interpretation. For the first time statute correlates the language of costs assessment to that probative of overcharging in the disciplinary sphere.

But should this necessarily be construed as evincing an attempt to (more closely) align disciplinary sanctions for 'overcharging' with the costs assessment process? There are four reasons why, notwithstanding first impressions, this may not be so. First, the *Uniform Law* phraseology could be understood as reflecting no more than what has been recognised for the purposes of common law misconduct, namely that there is sense in adopting the assessed (or taxed) amount as a baseline for comparison in the disciplinary inquiry. Secondly, it must be recalled that, under the statute, 'charging more than a fair and reasonable amount for legal costs' is 'capable of' amounting to misconduct;[100] it need not do so and, as noted above, this introduces matters of degree. Thirdly, the *Uniform Law* gives expression to these matters of degree. It requires a law practice to 'charge costs that are no more than fair and reasonable in all the circumstances and that in particular are proportionately and reasonably incurred; and proportionate and reasonable in amount'.[101] When translated into the disciplinary sphere, this makes the role of proportionality explicit, as opposed to implicit as it appears at common law. Moreover, for the purposes of determining whether costs are fair and reasonable in this context, the *Uniform Law* directs inquiry into whether the legal costs reasonably reflect:

(a) the level of skill, experience, specialisation and seniority of the lawyers concerned;

(b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest;

(c) the labour and responsibility involved;

(d) the circumstances in acting on the matter, including (for example) any or all of the following —

  (i) the urgency of the matter;

  (ii) the time spent on the matter;

  (iii) the time when business was transacted in the matter;

  (iv) the place where business was transacted in the matter;

  (v) the number and importance of any documents involved; and

(e) the quality of the work done; and

(f) the retainer and the instructions (express or implied) given in the matter.[102]

That the above catalogue of factors largely reflects those already identified as germane to the disciplinary inquiry into gross overcharging at common law

99 Ibid s 199(2)(b).

100 Ibid s 298(d).

101 Ibid s 172(1).

102 Ibid s 172(2).

suggests that a similar multi-factorial approach, with similar parameters, applies under the *Uniform Law*.

Fourthly, that the *Legal Profession Uniform Law* adopts a dispute resolution mechanism for costs disputes, whereby the designated local regulatory authority is empowered to make a binding determination about costs in certain circumstances,[103] may be seen as a further indication of a gap between overcharges and disciplinary consequences.

VI CONCLUSION

It appears from the foregoing that the statutory formulations of misconduct directed to overcharging may not alter the existing dynamics espoused by the common law when it comes to professional discipline in this context. Mahoney JA's remark in 1995 that 'fees may be fair and reasonable notwithstanding that they are at the opposite ends of a correspondingly wide spectrum'[104] may accordingly retain some force today. A caveat, however, on this built-in tolerance may be the rise of proportionality, as it gradually infuses the various recesses of costs law.

This should not, however, be treated as an invitation to lawyers to be cavalier in charging. Although the legal profession is subject to various avenues to place downward pressure on costs, or otherwise guard against costs abuses, the increasingly business-like nature of legal practice — deriving not insubstantially from intense competition that forms part of the landscape of the Australian legal services market — no doubt presents as a temptation to 'milk' clients for as much as possible. Reliance on lawyers' collective sense of 'professional restraint' may not succeed in withstanding this temptation in every instance. This in turn serves to accentuate the need for professional discipline for overcharging. The latter, after all, is pivotal to the distinction between legal practice as an unabashed 'business' and a profession grounded in a commitment to 'ethics'.

103 Ibid pt 5.3 (see especially s 292).

104 *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483 (6 October 1995) 12.