

# **COSTS ORDERS IN FEDERAL COURT MIGRATION LITIGATION: AN EMPIRICAL ANALYSIS**

NICHOLAS CARDACI\*\*

*Migration litigation in the Federal Court of Australia ('Federal Court') is frequent, and usually entails costs orders against unsuccessful plaintiffs. Sometimes, the Federal Court fixes the sum of these orders to avoid a taxation of costs. This article undertakes a statistical analysis of 150 Federal Court cases with such fixed costs orders, using a robust statistical methodology. The results of this analysis reveal that costs orders against plaintiffs in migration litigation usually range between \$2,000 and \$5,000. Furthermore, the most typical or average costs order is \$3,600. Given that fixed costs orders are a reliable proxy for taxed costs orders in similar cases generally, these results can be generalised to describe such orders. These findings have implications for lawyers and policymakers alike. They may improve lawyers' advice to their clients and inform policymakers of the extent to which such costs orders are a barrier to justice.*

## *Contents*

I	Introduction .....	172
II	Background .....	173
	A Merits Review .....	174
	B Judicial Review .....	174
	C Costs Orders .....	175
III	Research Data and Methodology .....	177
	A Data .....	177
	B Methodology .....	179
IV	Results .....	180
V	Commentary On Results .....	183
VI	Implications .....	184
	A Estimating Costs for Clients .....	184
	B Access to Justice .....	186
VII	Concluding Remarks .....	186

## I INTRODUCTION

---

\* LLB/B.Comm (Finance) (The University of Notre Dame Australia). I would like to thank Professor Phil Evans for his invaluable editing and advice.

It is trite to say that litigation carries a significant cost for litigants. For the losing party, this cost often includes paying a costs order to the successful party. Paying such orders can be a significant burden, especially for litigants who are already paying fees to courts and lawyers. The issue of costs orders in litigation is very important for policymakers and lawyers alike. As will be explained, it is a major barrier for access to justice. Clearly, costs orders are of great concern to the members of the public that must pay them. Additionally, lawyers are obliged to estimate potential costs orders for their clients in litigation. Before litigating, a potential plaintiff would be wise to ask how much they can expect to pay in costs orders if they lose.

In this article I endeavour to quantify costs orders for plaintiffs or applicants engaged in migration litigation through a robust statistical methodology. This article is limited to litigation that involves appealing a *Migration Act 1958* (Cth) ('*Migration Act*') decision in the Federal Court.<sup>1</sup> The answer may be found in the tradition of empirical legal studies, by statistically analysing court judgments.<sup>2</sup> This approach differs from that of a traditional lawyer, who would estimate costs orders based on prior experience or judgment.<sup>3</sup>

This article proceeds as follows. First, I present a background on the relevant law. I do this by explaining the Commonwealth administrative appeal procedures, and costs orders in litigation. Second, I outline and justify my data collection and statistical analysis methodologies. Third, I give the results of the statistical analysis. Fourth, I comment on the results. Fifth, the implications of the results and commentary for legal practitioners and policymakers are discussed. Finally, I give concluding remarks.

## II BACKGROUND

For the purpose of this article, an administrative decision is an executive exercise of statute-authorised power that confers legal rights or obligations.<sup>4</sup> The Commonwealth of Australia ('Commonwealth') makes many such decisions. These decisions are often, but not always, made upon an application by an

---

<sup>1</sup> This article does not consider the decisions under the Act that are not judicially reviewable. See *Migration Act 1958* (Cth) s 474A; *Administrative Appeals Tribunal Act 1975* (Cth) s 43C.

<sup>2</sup> Empirical legal studies often involve the statistical analysis of legal data and information, including court documents: Felicity Bell, 'Empirical Research in Law', (2016) 25(2) *Griffith Law Review* 262, 265-6.

<sup>3</sup> Harry Surden, 'Machine Learning and the Law', (2014) 89(1) *Washington Law Review* 87, 102.

<sup>4</sup> *Eastman v Australian Capital Territory* [2014] ACTSC 105, [35], [40] citing *Griffith University v Tang* (2005) 221 CLR 99. However, I note that it is not always unambiguous whether a decision is administrative or not: *Director-General of Social Services v Hales* (1983) 47 ALR 281, 305-6

interested party. For example, an application for a Disability Support Pension. Migration decisions are a common class of administrative decisions that are made by Commonwealth administrators, for example the Minister or the Minister's delegates. These decisions are typically made under the *Migration Act*. Such decisions can include revoking a visa, or refusing to issue one. If an administrative decision adversely affects the interests of an interested party, such as those just mentioned, there are processes that can be applied to overturn the decision. These processes are the merits review and judicial review systems. In both systems, adverse costs orders against unsuccessful plaintiffs are possible.<sup>5</sup> Note, however, that only judicial review costs orders relevant to this analysis.

#### *A Merits Review*

If one's interests are adversely affected by an administrative decision, they can apply to have the decision reviewed by a merits review tribunal.<sup>6</sup> The Administrative Appeals Tribunal ('AAT') has been the merits review tribunal responsible for reviewing *Migration Act* administrative decisions since 2015, when it was amalgamated with the Refugee Review Tribunal and the Migration Review Tribunal.<sup>7</sup> Upon review, a tribunal, such as the AAT, will decide whether the original decision-maker made the correct or preferable decision allowed by law.<sup>8</sup> Such tribunals, if they are satisfied that a better decision was available to the original decision-maker, can provide a remedy to the applicant.<sup>9</sup> Importantly, such tribunals are administrative in nature (they are not judicial bodies), meaning that their decisions upon review are administrative rather than judicial, because tribunals lack authority to determine questions of law.<sup>10</sup>

#### *B Judicial Review*

---

<sup>5</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 39B.

<sup>6</sup> John Vrachnas et al., *Migration and Refugee Law* (Cambridge, 3<sup>rd</sup> ed 2012) 324-5; Judith Banniser, Gabrielle Appleby and Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge, 2015) 326.

<sup>7</sup> *Tribunals Amalgamation Act 2015* (Cth)

<sup>8</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 591; *Comcare v Wuth* [2017] FCA 433, [80]; *Hutchinson v Comcare* [2018] FCA 505, [73].

<sup>9</sup> Vrachnas, above n 6, 324. A list of grounds of appeal to the Federal Court and Federal Circuit Court can be found in the *Administrative Appeals (Judicial Review) Act 1975* (Cth). The High Court has a constitutional jurisdiction to judicially review on the ground of jurisdictional error: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 511-3.

<sup>10</sup> Judith Banniser, Gabrielle Appleby and Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge, 2015) 308; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 572.

Administrative decisions, including review decisions made by tribunals such as the AAT, can be judicially reviewed.<sup>11</sup> Judicial review is a court's review of the legality of administrative decisions.<sup>12</sup> The legality of an administrative decision may be an issue where, among other reasons, a decision maker failed to afford procedural fairness to an applicant<sup>13</sup> or failed to consider relevant considerations in making the decision.<sup>14</sup> Several Australian courts have jurisdiction to conduct judicial review. In the Commonwealth jurisdiction, this is vested in the High Court of Australia, the Federal Circuit Court of Australia ('Circuit Court'), and the Federal Court.<sup>15</sup> Judicial review decisions of the Circuit Court can be appealed to the Federal Court.<sup>16</sup> Grounds for such review include either procedural unfairness or a failure to consider relevant material by the original decision-maker.<sup>17</sup>

Judicial review of migration-related administrative decisions is permitted by law, and is very common. In such reviews, the Commonwealth Minister responsible for immigration is the defendant. The Minister for Home Affairs, Peter Dutton, remarked that Ministers responsible for immigration are always the most sued Minister in Australia.<sup>18</sup> While it is beyond the scope of this article to empirically test this claim, the Minister is certainly one of the most (if not *the* most) commonly appearing respondent in the Federal Court.

### *C Costs Orders*

The Federal Court, like other courts, has a discretion to award 'party to party costs' at the conclusion of proceedings.<sup>19</sup> This discretion allows the winning party to be recompensed for any expenses that they (or their solicitor) reasonably incur

<sup>11</sup> Nicholas Cardaci, 'Rus v Comcare: The Rules of Evidence in the AAT' (2017) 19 *The University of Notre Dame Australia Law Review* article 7, 9; Judith Banniser, Gabrielle Appleby and Anna Olijnyk, *Government Accountability: Australian Administrative Law* (Cambridge, 2015) 329; *Administrative Appeals Tribunal Act 1975* (Cth) s 44.

<sup>12</sup> Vrachnas, above n 6, 324-5. Such remedies are substituting the decision with a new decision, or remitting the decision back to the original decision-maker with directions: *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1).

<sup>13</sup> *Administrative Decisions (Judicial Review) Act 1975* ss 5(1)(a), 6(1)(a).

<sup>14</sup> *Ibid*, ss 5(1)(e), 5(2)(b), 6(1)(e), 6(2)(b); Cardaci, above n 11.

<sup>15</sup> *Ibid*, s 44; *Federal Court Rules 2011* rr 31.22, 33.12(1); *Constitution* s 73(ii).

<sup>16</sup> *Federal Court Act 1976* (Cth) s 24(1)(d); *Migration Act 1958* (Cth) s 476(1).

<sup>17</sup> *Administrative Decisions (Judicial Review) Act 1975* (Cth) ss 5, 6.

<sup>18</sup> Neil Mitchell, Interview with The Hon. Peter Dutton, (<http://minister.homeaffairs.gov.au/peterdutton/Pages/Interview-with-Neil-Mitchell,-Radio-3AW.aspx>, 16 May 2017).

<sup>19</sup> *Federal Court of Australia Act 1976* (Cth) s 43(1); *Federal Court Rules 2011* (Cth) r 40.02; Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 9<sup>th</sup> ed 2011) 635; Justice Bernard Murphy, 'The Problem of Legal Costs: Lump Sum Costs Orders in the Federal Court' (2017) *Federal Judicial Scholarship* 3, pt 3 <<http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2017/3.html>>.

in prosecuting their case. This discretion is generally exercised such that the losing party pays costs to the successful party.<sup>20</sup> Upon an order for costs, successful parties do not usually recover the entirety of their costs. Costs orders usually sum to most of the actual costs incurred, but fall short of full recompense.<sup>21</sup> Only where there has been some form of unreasonable behaviour by the losing party that caused costs to be incurred by the winning party would an order for full recompense be made.<sup>22</sup> Such an order is called an ‘indemnity costs order’.

The discretion of the Federal Court to award party to party costs includes the power to award these costs in a specified lump sum at the time of judgment or soon thereafter.<sup>23</sup> Such ‘lump-sum costs orders’<sup>24</sup> are commonly referred to as ‘fixed costs orders’.<sup>25</sup> A fixed costs order is an alternative, among others,<sup>26</sup> to having the sum of the costs order determined through a taxation process.<sup>27</sup> Indeed, the Federal Court seeks to avoid taxation procedures wherever possible.<sup>28</sup> A fixed costs orders means parties escape the expense, delay and aggravation arising out of a taxation of costs.<sup>29</sup> The expediency provided by fixed costs orders explains why the Federal Court heavily favours them, preferring to make them wherever it is practicable and appropriate.<sup>30</sup>

To calculate the sum of fixed costs orders, the Federal Court’s intends to fix costs reasonably and on a logical basis, not arbitrarily.<sup>31</sup> Furthermore, costs are fixed ‘having some rational relationship to the costs reasonably incurred’ and ‘are judged, albeit loosely, upon what would otherwise be recoverable on taxation.’<sup>32</sup>

---

<sup>20</sup> Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 9<sup>th</sup> ed 2011) 635.

<sup>21</sup> *Ibid* 635, 642; *AOT15 v Minister for Immigration and Border Protection* [2016] FCA 1085, [52]; *AAQ15 v Minister for Immigration and Border Protection* [2016] FCA 963, [33].

<sup>22</sup> Cairns, above n 20, 647.

<sup>23</sup> *Federal Court of Australia Act 1976* (Cth) s 43(3)(d); *Federal Court Rules 2001* (Cth) r 40.02; *Costs Practice Note (GPN-Costs) 2016* (Cth) pts 4.4-4.7.

<sup>24</sup> *Costs Practice Note (GPN-Costs) 2016* (Cth) pt 4.

<sup>25</sup> *Aerial Capital Group Ltd v M. M. International (Australia) Pty Ltd* [2017] FCA 1607, [3].

<sup>26</sup> Including alternative dispute resolution and costs estimation procedures: Murphy, above n 19, pt 3 citing *Costs Practice Note (GPN-Costs) 2016* (Cth).

<sup>27</sup> *Costs Practice Note (GPN-Costs) 2016* (Cth) pt 5.1. A taxation procedure involves a court official examining and potentially reducing the successful party’s bill of costs, to determine the appropriate costs order.

<sup>28</sup> *Costs Practice Note (GPN-Costs) 2016* (Cth) pt 3.3.

<sup>29</sup> Murphy, above n 19. This is because, at least in part, ‘granular analyses are avoided and the costs hearing does not become an exercise in accounting’: *Nova Chemicals Corporation v Dow Chemical Company* [2017] FCA 25, [11] (Federal Court of Appeal, Canada).

<sup>30</sup> *Costs Practice Note (GPN-Costs) 2016* (Cth) pt 4.1.

<sup>31</sup> Murphy, above n 19. See also *Nova Chemicals Corporation v Dow Chemical Company* [2017] FCA 25, [15] (Federal Court of Appeal, Canada).

<sup>32</sup> costs are fixed at an amount ‘having some rational relationship to the costs reasonably incurred, judged – albeit however loosely – upon what would otherwise be recoverable on taxation’: *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833, [216].

Put differently, fixed costs orders are intended to approximate what would actually have been recovered in the taxation procedure.<sup>33</sup> In practice, these intentions are implemented by fixing costs at an appropriate percentage of the victor's actual costs.<sup>34</sup> Due to the Federal Court's approach for quantifying the sum of fixed costs orders, these orders are a useful proxy for costs orders generally.

### III RESEARCH DATA AND METHODOLOGY

#### *A Data*

The dataset consists of 150 judgments from the Federal Court (the 'relevant cases'), which were handed down from 2012 to 2017, inclusive (the 'sample period'). This dataset is a sample of a total population of migration cases in the Federal Court from that same period. Such judgements were included if they satisfied the following criteria:

- the case concerned an appeal of an administrative decision relating to migration;
- the appeal was unsuccessful;<sup>35</sup>
- the appeal was from a government department, a court, or a merits review tribunal;
- the applicant was an individual rather than a commercial enterprise;
- the judge handed down a fixed costs order; and
- the judgment contained catchwords.<sup>36</sup>

For each case that had the foregoing characteristics, certain features were collected. These features are the medium neutral citation, quantum of fixed costs,<sup>37</sup> and the catchwords.

---

<sup>33</sup> *Fair Work Ombudsman v Priority Matters Pty Ltd* [2017] FCA 833, [216].

<sup>34</sup> See, eg, *AOT15 v Minister for Immigration and Border Protection* [2016] FCA 1085, [52]; *AAQ15 v Minister for Immigration and Border Protection* [2016] FCA 963, [33]. Fixed costs orders also used in Canada's Federal Court of Appeal: *Nova Chemicals Corporation v Dow Chemical Company* [2017] FCA 25, [16] (Federal Court of Appeal, Canada).

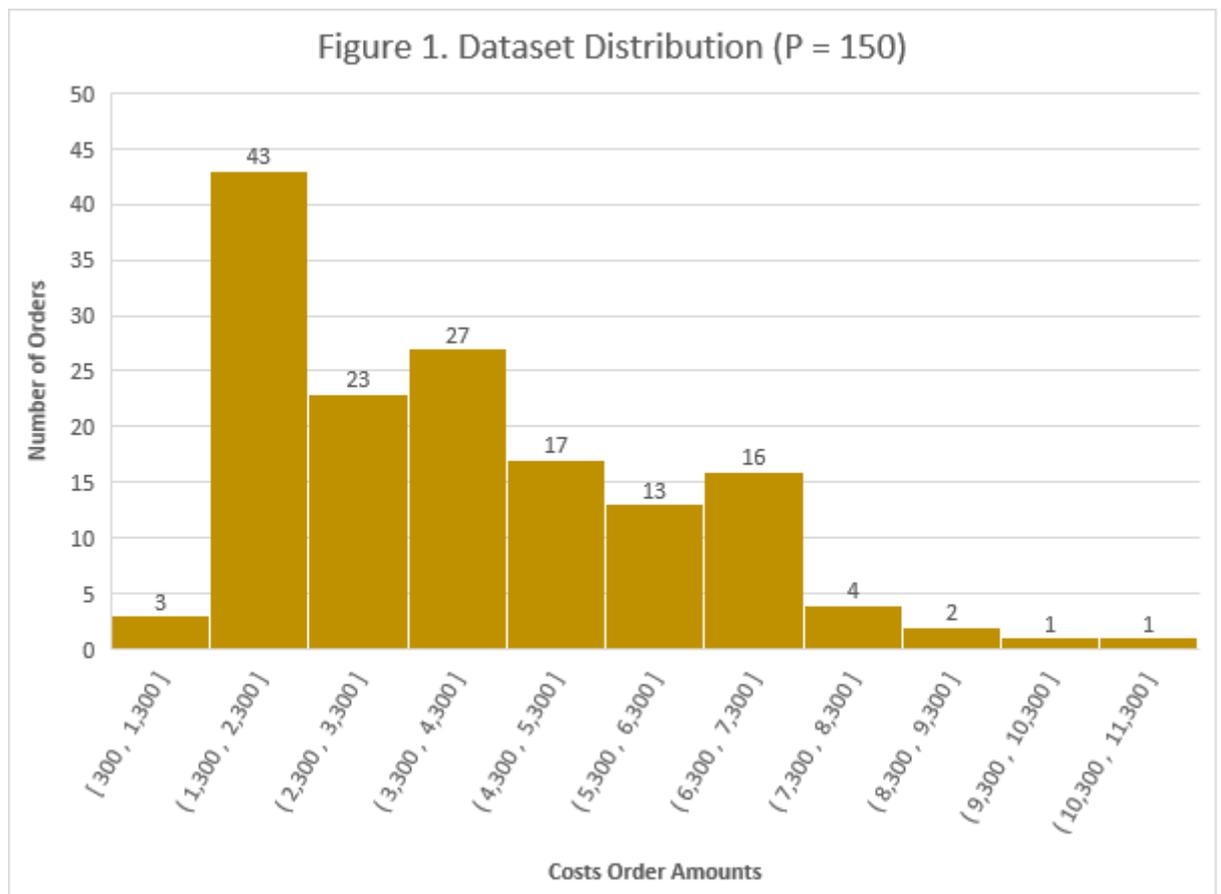
<sup>35</sup> This criterion ensures we are only analysing fixed costs order being paid by the applicant.

<sup>36</sup> This criterion ensured that the case contents could be determined conveniently within the spreadsheet. Only three cases otherwise meeting the inclusion criteria were omitted due to this criterion: *SZSTK v Minister for Immigration and Border Protection* [2013] FCA 1266; *SZVLO v Minister for Immigration and Border Protection* [2016] FCA 1592; *SZQTG v Minister for Immigration and Citizenship (No 2)* [2012] FCA 895.

<sup>37</sup> The quantum recorded excluded cents (i.e. rounded down).

The construction of this full dataset relied on a Python 3 script that automatically ‘read’ all Federal Court judgments from the sample period.<sup>38</sup> Upon reading the cases, the script selected the relevant cases, and then extracted and exported their features to a spreadsheet. I omit a technical description of this script, as it is inappropriate for this publication venue. It will suffice to say that the Python 3 standard library’s regular expressions module was effective in discerning whether any given case had the characteristics sought, and for extracting the relevant features.

Some initial descriptive statistics of the dataset are as follows. First, the dataset had a range of \$300 to \$10,500. Second, the data is positively skewed (meaning that the data is not symmetrical, or normally-distributed). This positively skewed data has a Pearson’s coefficient of skewness of 0.42.<sup>39</sup> As illustrated below in Figure 1, the data is significantly asymmetrical.



<sup>38</sup> The cases were downloaded from Austlii.

<sup>39</sup> No outliers were removed for calculating this. Additionally, we will see that the dataset has a characteristic of positively-skewed data; the median is lesser than the mean. See generally John S. Croucher, *Introductory Mathematics & Statistics* (McGraw, 6<sup>th</sup> ed 2013) 318-9.

### *B Methodology*

A quantitative analysis of the relevant cases in aggregate was conducted on the assumption that these cases' fixed costs orders are representative of Federal Court migration cases generally.<sup>40</sup> From my research of the literature and relevant case law, there is no reason why cases with fixed costs orders are unrepresentative of costs orders in Federal Court migration cases generally. In support of my assumption, Justice Murphy has denied that fixed costs orders are reserved for complex cases:

if there was ever a basis for the view that applications for lump sum costs should be made only in complex cases, in special circumstances, or as an exception to the general rule, that has now been put to bed.<sup>41</sup>

Further judicial support for my assumption comes from Canada's Federal Court of Appeal's holding that there are 'no particular characteristic of a case which must exist before a lump sum costs order can be made.'<sup>42</sup>

From the dataset, I conducted a statistical analysis in Microsoft Excel 2016 to more deeply describe the dataset's fixed cost orders. I analysed:

- the average sum of the fixed cost orders;
- the variation of the fixed cost orders' sum; and
- trends (or lack thereof) in the yearly averages of fixed costs orders over the sample period.

The positive skewness is important, as it impacted which measures I used for finding the foregoing list items. Given this skewness, I used common or popular ('tried and tested') methodologies, and alternative methodologies which are potentially more appropriate given the skewness. To calculate averages, I opted for mean values,<sup>43</sup> and alternatively, median values.<sup>44</sup> To calculate variance, I

---

<sup>40</sup> This assumption is plausible, as courts aim to fix costs around the amounts that a taxation procedure would determine: Murphy, above n 19. See also *Nova Chemicals Corporation v Dow Chemical Company* [2017] FCA 25 (Federal Court of Appeal, Canada), [12].

<sup>41</sup> Murphy, above n 19.

<sup>42</sup> Murphy, above n 19. See also *Nova Chemicals Corporation v Dow Chemical Company* [2017] FCA 25 (Federal Court of Appeal, Canada).

<sup>43</sup> This is a commonly used method for finding averages, See Andy Field, *Discovering Statistics Using SPSS* (SAGE Publications Ltd, 3<sup>rd</sup> ed 2009), 22; Christophe Leys, 'Detecting Outliers: Do not use Standard Deviation around the Mean, Use Absolute Deviation around the Mean' (2013) 49 *Journal of Experimental Social Psychology* 764, 764-5. The mean is not necessarily inappropriate for data that is non-normal. However, the mean is flawed where data is non-normal, as the mean will cannot be the

opted for standard deviation ( $\sigma$ ),<sup>45</sup> and alternatively, quartiles.<sup>46</sup> I defined outliers as values which are three standard deviations greater or less than the mean (the  $\sigma$  method), and alternatively, using an interquartile range ('IQR') method.<sup>47</sup>

Trend estimation of yearly averages of fixed cost order sums calculates trend with Pearson's correlation coefficient.<sup>48</sup> This trend size or magnitude is determined according to Jacob Cohen's guidelines for effect to determine the trend's magnitude (if there is a trend and that it has magnitude).<sup>49</sup> At the conclusion of the findings from the quantitative analysis, I briefly comment on the findings. Further, I will justify whether the findings from the 'tried and tested' or alternative methodologies are to be preferred.

#### IV RESULTS

I first calculated the averages, unadjusted for outliers. The mean value was \$3,894.87. The alternative median value was \$3,608.50. I then proceeded to detect the variance in the dataset. Calculating the variance would allow the detection of outliers, and the subsequent adjustment of the two average figures. The  $\sigma$  of the dataset was calculated to be \$2,051.77. Alternatively, the IQR was \$3,150.<sup>50</sup> I then calculated outliers. Per the 'tried and tested' definition of outlier, any fixed cost orders above \$10,050.19 were considered outliers.<sup>51</sup> The result was finding a single outlier, being \$10,500.<sup>52</sup> The alternative definition of outliers<sup>53</sup>

---

centre of the dataset: M. J. R Healy, 'Non-normal Data', (1994) 70 *Archives of Disease in Childhood*, 158, 159.

<sup>44</sup> The median is robust to outliers: Field, above n 45, 222; Leys, above n 45, 765. By implication, the median is less influenced than the mean by data's skewness: Healy, above n 45, 159.

<sup>45</sup> Standard deviation is a very popular method of measuring variance. However, it is flawed for skewed data: Healy, above n 45, 159.

<sup>46</sup> This method is viable for skewed data: Ibid.

<sup>47</sup> Y. H. Dovoedo and Chakraborti, 'Boxplot-Based Outlier Detection for Location-Scale Family' (2015) 44(6), 1492, 1493 specifies an IQR method for detecting outliers. This is, outliers are defined as values less than  $Q1 - (1.5 \times IQR)$  or greater than  $Q3 + (1.5 \times IQR)$ . This method has the advantage of being robust to data skewness: Peter J. Rousseeuw and Christophe Croux, 'Alternatives to the Median Absolute Deviation', (1993) 88(424) *Journal of the American Statistical Association* 1273, 1273.

<sup>48</sup> Field, above n 45, 170.

<sup>49</sup> Jacob Cohen, 'A Power Primer', *Psychological Bulletin*, (1992) 1, 157; Field, above n 45, 170. By 'effect size' I mean a relevant interpretation of the magnitude of an effect, in this case, the effect of time on the yearly averages of fixed costs orders amounts: Ken Kelley and Kristopher J. Preacher, 'On Effect Size', (2012) 17(2) *Psychological Methods* 137, 138.

<sup>50</sup> Q1 and Q3 are displayed in Figure 3.

<sup>51</sup>  $3,894.87 + (3 \times 2051.77) = 10,050.19$ .

<sup>52</sup> *Moss v Minister for Immigration and Border Protection* [2017] FCA 1243.

<sup>53</sup> Any value less than  $Q1 - (1.5 \times IQR)$  or more than  $Q3 + (1.5 \times IQR)$ .

Alternatively, the IQR method found two outliers,<sup>54</sup> with an upper outlier limit of \$9,875.00.<sup>55</sup> I then adjusted these initial average statistics by recalculating the mean and median excluding the outlier fixed costs orders. When adjusting the mean figure I only excluded the one outlier found by the  $\sigma$  method, and vice versa for the IQR method. The results were an adjusted mean of \$3,850.54, and an adjusted median value of \$3,600.00.

Finally, I undertook trend estimation of costs order sums over time. To do this, I measured the Pearson's correlation coefficient ( $r$ ) of fixed cost order amounts across the sample period between the annual average (as measured by both mean and median, separately) of time (x-axis) and fixed costs order sums (y-axis).<sup>56</sup> To interpret the magnitude of the correlation or trend, I referred to Jacob Cohen's guidelines for effect sizes, and use his effect sizes guideline for  $r$ .<sup>57</sup>

When the yearly average is calculated using the adjusted annual means,  $r$  is equal to  $-0.40822$ . When the yearly average is calculated using the adjusted medians,  $r$  is equal to  $-0.22259$ . Thus, the correlation is stronger when measuring with the adjusted means. Figure 2 below displays the yearly average costs orders, as measured with both median and mean, as well as the trend and correlation over the time series. For convenience, Figure 3 summarises the statistical results.

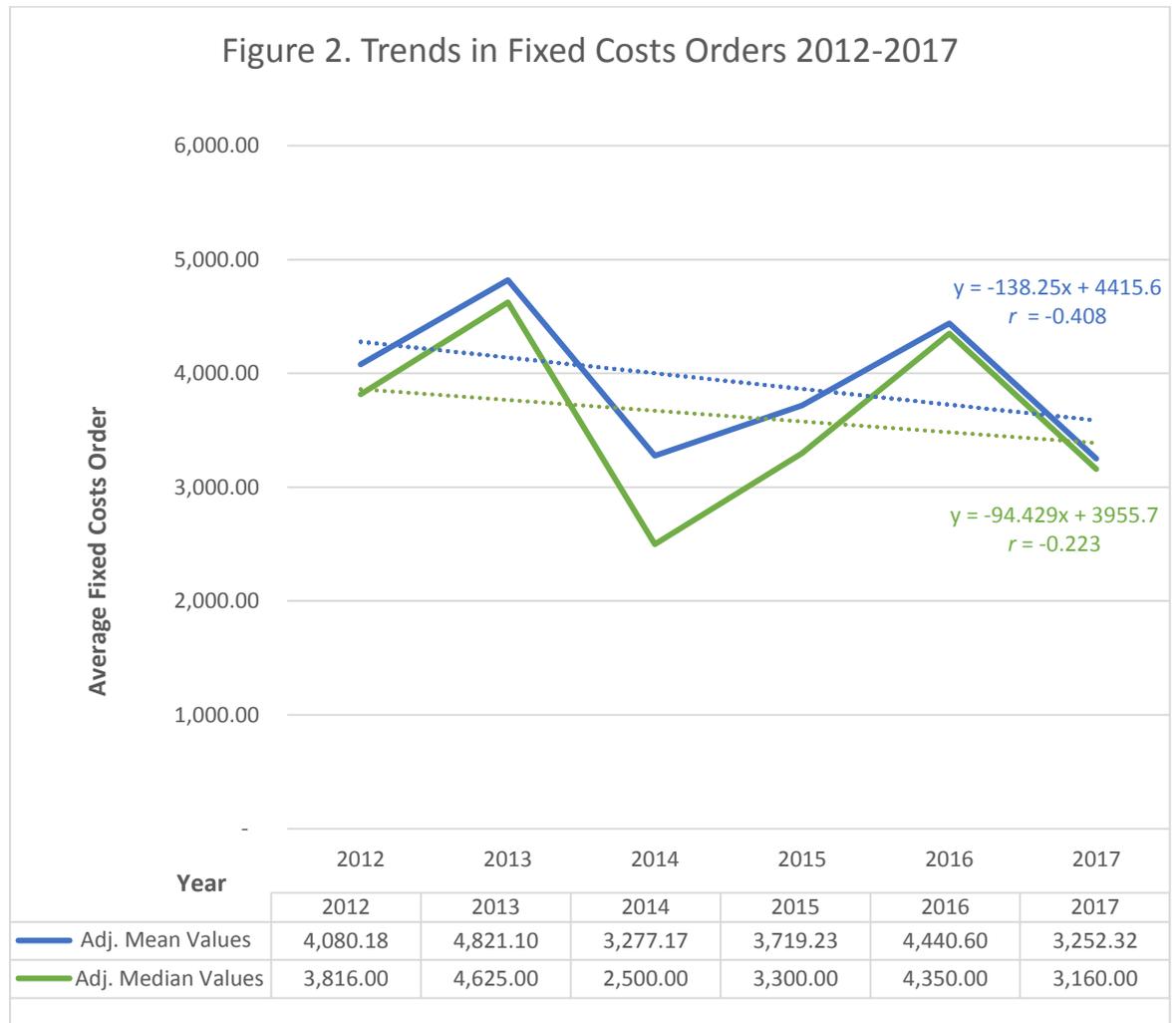
---

<sup>54</sup> Again, *Moss v Minister for Immigration and Border Protection* [2017] FCA 1243 was considered an outlier. Additionally, *SZTFR v Minister for Immigration and Border Protection* [2015] FCA 545 had an outlying costs order of \$10,000.

<sup>55</sup>  $5,150 + (1.5 \times 3,150) = 9,875$ .

<sup>56</sup> This was calculated using Excel 2016's CORREL function.

<sup>57</sup> Cohen, above n 51, 157; Field, above n 45, 170, I have used J. Cohen's effect size guidelines of 0.1 - 0.3 is small, 0.3 - 0.5 is medium, >0.5 is large.



<b>Figure 3. Statistical Results (P = 150)</b>	
<b>Statistic</b>	<b>Value</b>
<b>‘Tried and tested’ methods</b>	
mean (unadjusted)	\$3,894.87
$\sigma$ (unadjusted)	\$2,051.77
Outliers ( $> 3 \sigma$ )	1
mean (adjusted)	\$3,850.54
$\sigma$ (adjusted)	\$1,985.31
$r$ (mean) (3 d.p.)	0.408
<b>Alternative methods</b>	
median unadjusted	\$3,608.50
Q1 (unadjusted)	\$2,000
Q3 (unadjusted)	\$5,150
IQR (unadjusted)	\$3,150

Outliers (IQR method)	2
Median adjusted	\$3,600
Q1 (adjusted)	\$2,000
Q3 (adjusted)	\$5,000
IQR (adjusted)	\$3,000
$r$ (median) (3 d.p)	0.223

## V COMMENTARY ON RESULTS

I now make several observations about the findings. I take this opportunity to remind the reader that because fixed costs orders are representative of costs orders generally, it is reasonable to extrapolate or generalise this article's statistical findings to costs orders in the relevant cases generally.

It is interesting to note that there was minor (but not insignificant) difference between the mean and median values (both adjusted and unadjusted). Between the unadjusted mean and median there was only a difference of \$286.27 (7.35%), and between the adjusted mean and median the difference was even smaller at \$250.54 (6.96%). This is consistent with the mathematical truth that positively-skewed datasets necessarily have higher means than medians.

Both methods of detecting outlying fixed costs orders detected *Moss*<sup>58</sup> as an outlier. However, the IQR method detected a second outlier, being *SZTFR*.<sup>59</sup> Thus, the IQR method excluded more data than the  $\sigma$  method. However, the outlier exclusion did not appear to produce meaningful changes on the average values. The adjustment to the mean value only decreased it by \$44.33 (1.14%), and the adjustment to the median value decreased it only by \$8.50 (0.24%). I conclude from this minor difference that the elimination of outliers and subsequent adjustment of the averages is practically unimportant.

I note that there were different trend sizes found depending on whether the adjusted mean or median values were used for the estimation. When using the annual means, a medium trend or effect size is found. By contrast, using the annual medians gives a small trend or effect size. Of these two results, I prefer the trend estimated using annual medians. This is because the annual medians better represent each year's central tendency of fixed costs orders, given the data's skewness.<sup>60</sup>

<sup>58</sup> *Moss v Minister for Immigration and Border Protection* [2017] FCA 1243

<sup>59</sup> *SZTFR v Minister for Immigration and Border Protection* [2015] FCA 545

<sup>60</sup> Field, above n 45, 222; Leys, above n 45, 765; Healy, above n 45, 159.

One might wish to forecast future annual average costs orders in relevant cases using this data and a regression formula, such as linear regression. However, I have not done so here because the effort would be inaccurate and unhelpful. This inaccuracy is a necessary consequence of the low  $r$  over the sample period; there is little chance that extrapolating the trend to future years would yield accurate average figures. Despite this, it is possible to make a prediction about future average costs orders. That is, that the future average costs orders in the relevant cases will likely be similar to those across sample period or slightly lower. This prediction is plausible, given that there is only a small trend in average costs orders across these years and there is no reason to expect an abrupt or major change to this trend in the near future. To explain, I am not aware of any planned or pending reform or development in the legal profession that would upset this trend.

There are limitations that hinder the usefulness of this data. First, the sample size is relatively small when compared to the total number of migration judgments that were handed down during the sample period. To give a specific figure, which comes from the data collected from the Python script, there were at least 9043 migration judgments in this time period. The second limitation is that the cases were not subdivided further. For example, the cases could be subdivided by the registry in which they were heard, or their subject matter (e.g. concerning a humanitarian visa, concerning a 457 visa). Instead, the cases were treated as homogeneous insofar as they fit the inclusion criteria.

## VI IMPLICATIONS

### *A Estimating Costs for Clients*

This article's information has implications for lawyers practicing in migration law. Specifically, this information could be used as an aid in estimating potential costs for clients. Lawyers have a professional obligation to advise their clients on the magnitude of potential costs generally. Furthermore, lawyers must advise clients involved in litigation of the magnitude of potential costs orders that could be ordered against the client.<sup>61</sup> In Western Australia, the *Legal Profession Act 2008* (WA) s 260, which has analogous provisions in other Australian jurisdictions, provides:

---

<sup>61</sup> *Legal Profession Act 2008* (WA) s 260(1); *Legal Profession Act 2007* (Tas) s 291(1); *Legal Practitioners Act 1981* (SA) Sch 3 pt 10 s 1; *Legal Profession Act 2007* (NT) s 291(1); *Legal Profession Act 2006* (ACT) s 269(1); *Legal Profession Act 2004* (Vic) s 3.4.9(1); *Legal Profession Act 2004* (NSW) s 309(1); *Legal Profession Act 2007* (Qld) s 308(1).

## 260. Disclosure of costs to clients

(1) A law practice must disclose to a client in accordance with this Division —

...

(c) an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable —

(i) a range of estimates of the total legal costs; and

(f) if the matter is a litigious matter, an estimate of —

...

(ii) the range of costs the client may be ordered to pay if the client is unsuccessful;

Lawyers typically make these estimates by relying on previous litigation experience that they or their peers have experienced. While this may be usually sufficient, it would be inappropriate or impossible for a lawyer to make the relevant estimates where their own or their peers' prior experience in migration litigation is limited or non-existent. Such a lawyer would benefit from considering this article's information in fulfilling their professional obligations.<sup>62</sup> Even lawyers that are experienced in migration litigation could benefit from this article's information, as it can confirm or disprove whether their experience is representative of migration cases. Regardless of one's experience, these findings would serve to minimise any risk of inaccurately advising clients of estimated costs orders due to reliance on experience that is unrepresented of migration litigation.

How, specifically, could a lawyer in migration litigation describe the statistical findings when giving the mandated estimates in their advice? This would ideally be done without reference to any statistical terms that require explanation. Rather, using plain language would be preferable. A suggested manner of describing the findings is:

Adverse costs orders in migration litigation usually range between \$2,000 to \$5,000. Further, the most typical costs order is \$3,600.<sup>63</sup>

---

<sup>62</sup> Specifically, the obligations arising from the provisions listed in *Ibid.*

<sup>63</sup> Note that this is employing the adjusted median and adjusted IQR figures.

*B Access to Justice*

In this article, access to justice can be defined as the ability to access the civil justice system without barriers.<sup>64</sup> Access to justice is a pertinent issue in Australia, and it is well known that one of the major barriers to justice is the costs associated with litigation.<sup>65</sup> Those most barred by cost are those who are neither ‘very rich nor very poor’; those with moderate incomes.<sup>66</sup> This is because the wealthy can afford legal services, and the latter can receive benefits to mitigate their disadvantage, such as legal aid or waivers from court fees.<sup>67</sup> One component of costs that commonly limits access to justice is adverse costs orders against plaintiffs or applicants. This is hardly unexpected. In *Oshlack v Richmond River Council*,<sup>68</sup> McHugh J noted that even meritorious cases might not be heard due to the risk of adverse costs order against the plaintiff.<sup>69</sup>

With this article’s information, it is possible to quantify the average costs orders against plaintiffs in migration cases. Such information could contribute to a better understanding of the extent of the barriers to justice that applicants in migration litigation face. Most significantly, this article alerts policymakers that there is indeed a slight decline in the relevant costs orders, which is an encouraging development for access to justice.

## VII CONCLUDING REMARKS

As described above, the results and commentary in this article have implications for legal practitioners and policymakers alike. Practitioners could benefit from using this information in advising their clients and fulfilling their professional obligations. Policymakers may gain insight into access to justice issues. This article has followed the tradition of empirical legal studies by providing insight into law and legal practice that cannot be gleaned from the ‘law on the books’.<sup>70</sup> As for further research in this area, this research’s methodology can be applied to data in other cases. Specifically, other types of cases that are

---

<sup>64</sup> Wayne Martin AC, ‘Access to Justice’ (Speech delivered at the Queensland Bar Association Annual Conference 2018, 3 March 2018) <[http://www.supremecourt.wa.gov.au/\\_files/Speeches/2018/Queensland%20Bar%20Association%20Annual%20Conference%202018%20Access%20to%20Justice.pdf](http://www.supremecourt.wa.gov.au/_files/Speeches/2018/Queensland%20Bar%20Association%20Annual%20Conference%202018%20Access%20to%20Justice.pdf)>.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*; Attorney-General’s Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report (2009) 45-6.

<sup>68</sup> (1998) 193 CLR 72.

<sup>69</sup> (1998) 193 CLR 72, [90] cited in Attorney-General’s Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report (2009) 112.

<sup>70</sup> Bell, above n 2, 264.

high-volume, such as family law cases, would be ideal candidates for further research.