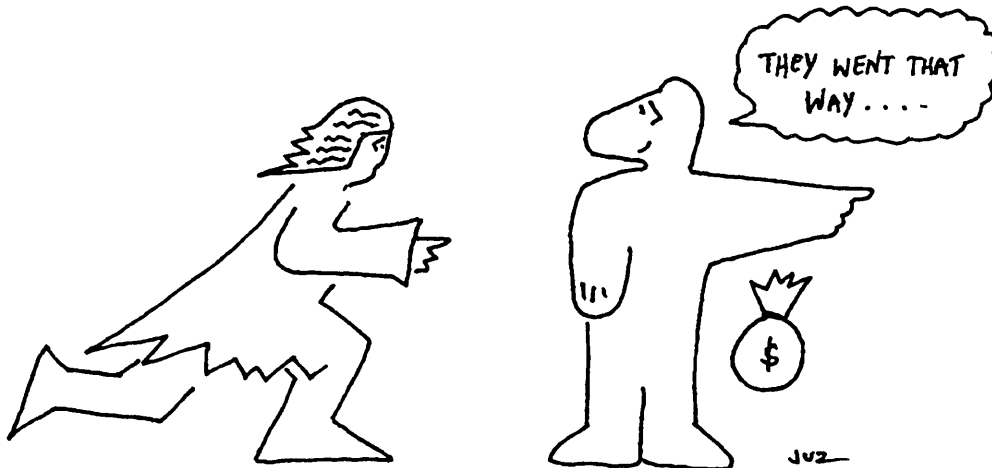


COSTS SHIFTING

who pays for litigation



In October this year, the ALRC released *Costs shifting — who pays for litigation* (ALRC 75). **Philip Kellow** provides an overview of the report.

Philip Kellow was team leader and is now team leader on the Standing reference.

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Access to justice and costs rules

All Australians, regardless of means, should have access to high quality legal services and effective dispute resolution mechanisms necessary to protect their rights or interests. Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to use the litigation system.

The ALRC was asked to review the impact on the litigation system of the costs allocation rules — the laws and practices that determine who pays the legal costs incurred by the parties to court and tribunal proceedings. The two best known rules are the ‘loser pays’ rule, which is the rule most commonly applied in civil proceedings, and the rule that each party bear his or her own costs, which is the starting point in family law proceedings.

The ALRC found that the costs allocation rules sometimes operate unfairly and can deny access to justice. In particular, the ‘loser pays’ rule can deter

people from pursuing meritorious claims or defences because of the risk of having to pay a portion of the other party’s costs if unsuccessful. There were two other principal findings.

- It was clear that access to justice is affected as much by the *amount* litigants have to pay in legal costs as by *who* has to pay those costs.
- It was also clear that most litigants had very little idea of the amount of legal costs they would be required to pay and that it was difficult to predict this in advance.

The recommendations in the report reflect these findings. The ALRC proposes that the current broad discretions on awarding costs should be replaced by a clear, systematic framework of costs rules designed to support effective control of legal costs and to allow adjustments where access to justice would otherwise be denied.

A package of interrelated costs allocation rules

The costs allocation rules recommended by the ALRC are interrelated. They include a number of key elements and themes.

- Courts and tribunals must manage the litigation process to keep costs in proportion to the matter in dispute. Costs rules should assist them to do so by allowing caps on the costs that may be recovered, discouraging behaviour that wastes

court and parties' time, encouraging settlement and promoting compliance with other procedures and directions intended to streamline proceedings. In the report these costs orders are called disciplinary and case management costs orders.

- The costs allocation rules should not prevent people with claims or defences that have merit from presenting their case properly or from negotiating a fair settlement. This is fundamental to equality before the law.
- The development, enforcement and administration of the law is enhanced by public interest litigation. The costs allocation rules should not impede these types of cases.
- Legal costs are an important consideration when a party decides how to deal with a dispute. Parties need to be able to estimate their exposure to costs when deciding to start or continue with litigation or some other form of dispute resolution. Accordingly, the costs rules must specify how costs are to be apportioned and set out any exceptions. Information about the amount and likely allocation of costs should be given to the parties both prior to and during legal proceedings.
- As a basic principle, where costs are to be shifted for all or a specified part of proceedings, a party who is awarded costs should be entitled to recover the reasonable costs that he or she has incurred in the course of the litigation. Reasonable costs are those costs reasonably required to prepare and conduct the litigation. This principle should apply irrespective of whether costs are calculated according to a scale, by reference to market rates or by some other means.

General costs allocation rules

The general costs allocations rules recommended for each jurisdiction are:

- *Civil and judicial review proceedings.* The general rule that the loser pays the winner's costs should be retained in civil and judicial review proceedings subject to certain exceptions. The rule must recognise the need for costs orders which reinforce the court or tribunal's control of the proceedings (disciplinary and case management costs orders) and the need to ensure that people are able to pursue meritorious claims or defences regardless of their

resources (the 'material effect' exception) and that people wishing to pursue public interest litigation are not discouraged from doing so (public interest costs orders).

- *Family, industrial and AAT proceedings.* In these proceedings each party should bear his or her own costs subject to a disciplinary or case management costs order or an order for costs in favour of a party who would otherwise not have sufficient resources to present his or her case properly or to negotiate a fair settlement. The parties in family law cases may also be subject to an order for the costs of a child's separate representative. In addition, the costs of Administrative Appeals Tribunal proceedings may be apportioned according to specific legislation.
- *Criminal proceedings.* The same costs rules should apply in summary and indictable matters. In all criminal proceedings a person who is acquitted should be able to recover his or her costs unless the court is satisfied that such an order is not appropriate. When deciding whether another costs order should be made the court must consider the conduct of the parties, the reasons for the acquittal, the public interest and whether the defendant acted unreasonably during the course of the police investigations. The prosecution should not be entitled to costs except where the defendant failed to comply with orders of the court, unreasonably prolonged the proceedings or unreasonably withheld significant evidence until late in the proceedings. The federal Attorney-General should examine whether, and in what circumstances, it would be appropriate for a person to recover the costs he or she incurs as a result of an investigation where no charges are laid or charges are laid but no indictment is presented.
- *Federal tribunals.* In proceedings before a federal tribunal, including a merit review tribunal other than the Administrative Appeals Tribunal, each party should bear his or her own costs unless the legislation establishing the tribunal provides otherwise.
- *Appeals against an order for costs.* Costs orders should be determinative. Accordingly, an appeal against a costs order may only be made with the leave of the appellate court. Leave to appeal should only be given if it can be shown that the discretion as to costs miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters.

Costs shifting

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Other reforms

- **Costs orders against non-parties.** Courts and tribunals should continue to be able to order costs, in appropriate cases, against people who are not formally a party to proceedings. Generally, friends of court (*amicus curiae*) should not receive or have to pay costs.
- **Unrepresented litigants.** At present a person who appears without legal representation is unable to recover his or her costs of preparing and conducting the litigation. The ALRC considers that, subject to certain safeguards, an unrepresented litigant should be able to recover these costs if awarded costs under the relevant costs allocation rules.
- **Costs allocation agreements.** Costs allocation agreements that seek to quantify or apportion litigation costs between the parties should only be enforceable if made in contemplation of the particular proceedings being determined by the court or tribunal and will be subject to any costs orders made by the court or tribunal. A costs agreement not made in contemplation of the particular proceedings should not be enforceable.
- **Indemnity schemes.** These schemes provide an indemnity against adverse costs orders. They help people who would otherwise not be prepared to risk an adverse costs order to litigate. They also allow a party to recover at least part of his or her costs if successful against a party who has been given an indemnity or who

has obtained a order under the 'material effect' exception removing or capping his or her liability for costs. The ALRC recommends the creation of a federal legal assistance indemnity scheme and the expansion of the Commonwealth test case and appeals assistance funds.

- **Enforcing costs orders.** For costs allocation rules to achieve their objectives a party must be able to enforce a costs order made in his or her favour. Current enforcement mechanisms can be expensive, cumbersome, time-consuming and ineffective. Further work is needed to develop quicker, cheaper and more effective ways of enforcing costs orders. This may involve courts having a greater role in monitoring and dealing with complaints about non-payment.

Implementation

In the ALRC's view it is important to ensure that the new rules are not introduced in a way that creates inconsistencies with State and Territory costs rules. It is also important that they do not themselves become a source of lengthy and expensive litigation.

The ALRC therefore makes recommendations about the need for Australian courts to have the same costs allocation rules, the development of rules and procedures for administering the new costs allocation rules, the relationship of this report with other reforms to the litigation process and the need for the operation of the rules to be regularly reviewed.

