

# WHO SHOULD PAY?

## New ways to split the legal bill

**People cannot pursue or defend their legal rights unless they find some way to meet the legal bill.**

Finding ways of sharing or meeting that legal bill is the central theme of the Australian Law Reform Commission (ALRC) review of how legal costs are allocated. This is an essential part of making justice accessible to all Australians.

The ALRC has released a paper, *Litigation Costs Rules*, putting forward draft recommendations aimed at making the system fairer and more predictable.

After further public consultation, a final report will be completed by September, 1995.

At present the basic rule in Australian courts is that the loser of a case pays the winner's costs as well as their own (the cost indemnity rule).

ALRC President Alan Rose said: "This rule aims to allow people to litigate if they have a good case, expecting that their costs will be refunded, while discouraging frivolous litigation.

"When parties have unequal resources, however, the costs indemnity rule may lead to injustice.

"An individual or small company with a valid claim against a large company may be deterred from suing for fear of being saddled with the large company's legal costs.

"The ALRC proposals will allow courts to tailor costs orders to meet the circumstances of the parties so that neither is stopped from presenting their case properly or negotiating a fair settlement because of the risk of an adverse costs order.

"Another issue is public interest in litigation, which is often valuable in clarifying, reforming and developing the law. The ALRC considers that the costs rules should recognise the significant wider benefits of such litigation.

"Unequal resources are only one part of the problem.

"The bigger issue is the need to help the courts control proceedings

and keep costs down through disciplinary and case management costs orders. This will benefit everyone — large and small business, governments and individuals."

### **Main points of the ALRC litigation costs rules — draft recommendations**

#### *Civil Proceedings*

The loser pays rule should be retained as a general rule. It provides certainty about the allocation of costs and assists parties to pursue or defend their legal rights. However certain safeguards are necessary:

- Notwithstanding any other orders about costs, a court may use disciplinary costs orders to ensure compliance with its rules and procedures, to discourage frivolous litigation, to control the costs of proceedings and to encourage settlement;
- Where the litigation is in the public interest a court may make some

other order about the shifting of costs or the amount of costs that may be recovered;

- Where a party is unable to present their case properly or to negotiate a fair settlement because of how much they might have to pay if they lose, a court may make some other order capping or shifting costs.

#### *Family law proceedings*

In general, each party should bear his or her own costs in family law proceedings, subject to disciplinary costs orders or orders that are necessary for a party to be able to present their case properly or negotiate a fair settlement.

#### *Criminal proceedings*

There should be uniform costs rules for federal criminal proceedings in all Australian jurisdictions. The prosecution should always pay its own costs.

The prosecution should also pay the defendant's reasonable costs if:

- the defendant is acquitted in summary proceedings; or
- the charges are withdrawn or there is no case to answer in trials.

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