

ALRC 75

Costs Shifting — who pays for litigation

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Commission Reference: ALRC 75

The Australian Law Reform Commission was established by the *Law Reform Commission Act 1973*. Section 5 provides for the Commission to review, modernise and simplify the law. It started operation in 1975. The main office of the Commission is at Level 10, 133 Castlereagh Street, Sydney, NSW, 2000, Australia. The Commission also maintains a small office in Canberra.

Terms of reference

COSTS INDEMNITY RULE

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- the need for a fair, efficient and effective legal system;
- the Action Plan set out in the Report of the Access to Justice Advisory Committee; and
- recent and proposed reforms to the legal profession and the courts,

REFER to the Law Reform Commission for inquiry and report under the *Law Reform Commission Act 1973* the following matters:

(a) the advantages and disadvantages of the present arrangements governing the award of costs in proceedings before courts and tribunals;

(b) whether any changes should be made to the way costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction; and

(c) any related matter.

The Commission shall consider, among other matters:

- the effect on access to justice of the practice of ordering an unsuccessful party in proceedings to pay the legal costs of the successful party ('the costs indemnity rule')
- the appropriateness of present exceptions to the cost indemnity rule
- alternatives to the cost indemnity rule including
 - that parties bear their own costs, either in general or in particular situations or jurisdictions;
 - that, in particular situations or jurisdictions, either plaintiffs only or defendants only, if unsuccessful, pay their own costs but not those of other parties;
 - that, in particular situations or jurisdictions, legal costs are to be regarded as a direct result of the injury or wrong that has resulted in the litigation and therefore included in the assessment of damages awarded to successful plaintiffs; and
 - that, in particular situations or jurisdictions, costs are awarded against the unsuccessful party only if the proceedings have been commenced or defended unnecessarily;
- the effect of costs rules on unrepresented parties; and
- the effect on people accused of criminal offences of the laws and practices that limit the awarding of costs against prosecutors where the charges are withdrawn or dismissed or the accused person is acquitted.

IN PERFORMING its functions in relation to the Reference the Commission shall

(i) consult widely amongst the Australian community and with relevant bodies, and particularly with the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers;

(ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments to implement their recommendations, including:

- the Report of the Access to Justice Advisory Committee;
- the Report of the Senate Standing Committee on Legal and Constitutional Affairs on the cost of justice
- relevant reports of the Law Reform Commission
- the report by the Trade Practices Commission, *Study of the Professions Legal*; and
- the reports of the New South Wales Law Reform Commission on the legal profession; and

(iii) consider and report on the application of costs rules in any other country.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with s 6(1)(d) of the Law Reform Commission Act to consider and present proposals for uniformity between the laws of the Territories and laws of the States.

THE COMMISSION IS REQUIRED to make a final report not later than 30 September 1995

Dated 28 June 1994

Michael Lavarch

Attorney-General

Overview

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 Commission 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 Commission 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 this report reflect these findings. The Commission 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 Commission 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 as follows.

- ***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.

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 Commission 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 an order under the 'material effect' exception removing or capping his or her liability for costs. The Commission recommends the creation of a federal legal assistance indemnity scheme and the expansion of the Commonwealth test case fund and appeals assistance fund.
- ***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 Commission'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 Commission 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.

1. Introduction

This review

1.1 On 28 June 1994 the federal Attorney-General, the Honourable Michael Lavarch MP, asked the Australian Law Reform Commission (ALRC) to examine whether any changes should be made to the way costs are awarded in proceedings before courts and tribunals exercising federal jurisdiction.

1.2 The Commission was asked to have particular regard to the practice in some courts of ordering an unsuccessful party in proceedings to pay the legal costs of the successful party (the costs indemnity rule).

1.3 The terms of reference for the review are set out at the front of this report.

Access to justice

1.4 This inquiry arose from a recommendation by the Access to Justice Advisory Committee (AJAC) in its report *Access to justice an action plan* (AJAC Report).¹ AJAC was concerned that the costs indemnity rule may adversely affect access to justice. It may deter people from pursuing meritorious cases because of the risk of having to pay a portion of the other party's costs in addition to their own costs if unsuccessful.²

1.5 The concept of access to justice involves several elements. It includes the requirement that all Australians, regardless of means, should have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights or interests.³ Costs allocation rules are just one of a wide range of factors that influence access to, and the effectiveness of, legal services and courts, tribunals and other dispute resolution schemes. The Commission examined the costs allocation rules within this context to understand their impact and to assess the contribution they do and could make to access to justice.

The Commission's review process

1.6 The effects of the current costs allocation rules and of the possible alternatives to them are not amenable to precise measurement. The Commission adopted a range of approaches to help it assess how costs allocation rules have an impact on the use of the legal system and the way litigation is conducted.

- In October 1994 the Commission released an issues paper *Who should pay? A review of the litigation costs rules*.⁴ The paper formed the basis of consultations and public hearings held around Australia. The names of those who made oral submissions at the public hearings are listed in appendix E. The Commission also received over one hundred written submissions on the matters raised in the paper. A list of these submissions is set out in appendix D.
- The responses to the issues paper were used by the Commission to prepare a draft recommendations paper *Litigation costs rules*⁵ which was released for comment in June 1995. The paper formed the basis of further consultations with representatives of the judiciary, legal profession, business and consumers. The Commission also received over seventy written submissions on the draft recommendations proposed in the paper. A list of these submissions is set out in appendix D.
- The Commission examined the laws and practices concerning the allocation of costs in each type of case that comes before federal, State and Territory courts and tribunals.
- The Commission met with representatives of courts, tribunals, the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers. A list of these consultations and meetings is included in appendix E.
- Information was collected on types of litigation and profiles of litigants to build a picture of actual litigation practice.

- The costs rules and practices in the United States and other countries were examined to help identify possible reforms and potential concerns. The different legal systems and conditions suggest that the overseas experience is only of broad relevance to Australia.
- The Commission considered a range of economic analyses on the impact different costs rules have on the decision to file a claim, the amount spent on litigation and the decision to settle or litigate once a claim is filed. These analyses are based on various assumptions and generally are not backed by empirical data. This means that the conclusions that can be drawn from them must be treated cautiously.

Costs allocation rules in all Australian jurisdictions

1.7 The Commission looked at how costs are awarded in proceedings before federal, State and Territory courts and tribunals. Such a wide review was necessary because most Australian courts are able to exercise some federal jurisdiction.⁶ In addition, the similarities and differences between the various courts and tribunals helped the Commission assess the effects of the costs rules and the consequences of potential reforms. The Commission's recommendations have been developed in light of the desirability of uniform or complementary costs allocation rules in all Australian jurisdictions.

A need for more developed rules

1.8 The Commission considers that the costs allocation rules need to be formulated more precisely and to take into account aspects of Australian legal practice and conditions that have not been systematically considered. There are a number of areas of litigation where the current costs allocation rules appear to be contributing to injustice, making negotiations or resolution of a dispute more difficult, costly or open to abuse than ought to be the case.⁷

1.9 The Commission proposes a package of costs allocation rules that is intended to promote an accessible, economical and efficient court and tribunal system in Australia.

The scope of the Commission's recommendations

1.10 The recommendations in this report focus on the costs allocation rules for proceedings before federal courts and tribunals. However, the Commission considers that, as far as possible, the recommendations should be adopted in all Australian courts and tribunals. The need for uniformity and other issues concerning the implementation of the recommendations are discussed in chapter 20.

Outline of this report

1.11 This report sets out the Commission's final views on the reforms it proposed in its draft recommendations paper. An overview of this report and the proposed reforms is included at the front of this publication. In summary

- Part 2 sets out a general framework for costs allocation rules and examines the context in which costs allocation rules must operate.
- Part 3 contains the general costs allocation rules for civil proceedings, administrative law proceedings, family law proceedings, criminal proceedings, proceedings in the Industrial Relations Court of Australia and proceedings before federal tribunals. It also considers the rules for appealing against costs orders.
- Part 4 sets out the exceptions to the general costs allocation rules. These include disciplinary and case management costs orders, costs orders where a party's ability to present his or her case properly or to negotiate a fair settlement is materially affected by the risk of an adverse costs order, public interest costs orders and costs allocation agreements.

- Part 5 contains recommendations concerning the disclosure of costs, costs and non-parties such as friends of the court and intervenors, the ability of unrepresented parties to recover costs and the use of indemnities against adverse costs orders.
- Part 6 examines the problems of enforcing costs orders and implementation of the Commission's recommendations.

A list of the Commission's recommendations is set out in appendix F.

Acknowledgments

1.12 The Commission thanks the members of its Advisory Group for their expert advice and assistance during the course of review.⁸ The Commission also acknowledges the important contribution of all those who made written submissions, attended the public hearings or participated in meetings and consultations. Finally, it thanks Justin O'Farrell for the cartoons used in IP 13 and this report.

2. A general framework for costs allocation rules

Introduction

2.1 This chapter discusses the significance of costs rules to access to justice, the need for courts and tribunals to have the power to make costs orders and why that power must be exercised in accordance with costs allocation rules. It then sets out a general framework in which the Commission considers the costs allocation rules should operate.

Access to justice and costs rules

The problem of cost

2.2 Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can become an intolerable burden.

2.3 This is not only a problem in Australia. In his interim report this year to the Lord Chancellor of England, Lord Woolf commented

Throughout the common law world there is acute concern over many problems which exist in the resolution of disputes by the ... courts. The problems are basically the same. They concern the processes leading to the decision made by the courts, rather than the decisions themselves. The process is too expensive, too slow and too complex. It places many litigants at a considerable disadvantage when compared to their opponents. The result is inadequate access to justice and an inefficient and ineffective system.⁹

2.4 Many recent reports in Australia have sounded the same concerns over cost, delay and complexity in our litigation system.¹⁰

2.5 These problems were confirmed by many of the oral and written submissions made to the Commission in the course of this review. The following responses are typical of the concerns expressed.

The legal system is too expensive, available only to the very rich or to those eligible for legal aid. The average person, especially self-funded retirees like us, cannot safely seek access to the law.¹¹

To me, a sixty year old woman, [having to pay \$50 000 for my own costs and those of the other party] was like a jail sentence. I worked for a wage seven days a week for many years to pay the plaintiff's costs.¹²

It would be hard for you to imagine the devastation I felt when I received my legal bill [for \$19 000 in family law proceedings]. I am a sole parent supporting my children on a pension and supplementing this with [part-time work]. ... Life is very difficult for a sole parent and to now find another \$16 000 (I already paid \$3000 during the proceedings) is unbelievable.¹³

[Mr Cameron was acquitted of an offence by a District Court jury. He and his wife] had to borrow \$20 000 to pay for our legal costs and at this time are still in the process of paying it back which will take about ten years. ... It has been an enormous financial burden for us to bear.¹⁴

I have been involved in a building dispute [involving \$49 000] where we had a contract with a builder and the builder has not maintained or honoured the contract. ... Before we went to court I had already spent \$30 000, I was told that it was going to cost another \$25 000 to go to court. ... In total it finished up costing \$130 000, that is only my part of the costs. ... I [also] had to pay the other party's costs. [This] was around \$36 000.¹⁵

I am a small business of three people. If I had sought legal representation from day one the matter would not even get to court. The costs would have forced my company to be bankrupted, but the advice I'm given is that my case has got legal merits.¹⁶

Reforming the litigation process

2.6 The problems of cost, delay and complexity are interrelated. They must be addressed through tighter management of the litigation process. AJAC considered that

it is a very important element in improving access to justice that courts, justice departments, the legal profession and law reform bodies continue to re-examine existing procedures and develop and implement reform proposals designed to increase the efficiency of both courts and the practitioners who work in them.¹⁷

2.7 Effective control of legal costs therefore requires a range of reforms, including providing alternative methods of resolving disputes, promoting the early settlement of disputes, narrowing the issues in dispute and the evidence required and providing flexibility in the way disputes can be investigated and evidence collected. Many of these reforms are already being pursued by the courts and others. Much of the emphasis in these reforms, and in this report, is on improving the courts' ability to manage the litigation process so that it operates effectively and economically.

The significance of costs orders

2.8 Costs allocation rules are essentially concerned with who should pay, not with how much should be paid. But these two issues are related. If the amount is very large, the principles of fairness underlying a particular way of allocating costs must be balanced with the competing principle that a person should not be denied access to justice simply because he or she cannot afford the legal costs. The incentives and deterrents that costs allocation rules have on how much the parties spend on litigation must also be recognised.

2.9 The Commission has therefore considered litigation costs rules and costs orders as one of a range of factors that influence access to, and the effectiveness of, courts, tribunals and other dispute resolution schemes. In formulating its recommendations the Commission has sought to provide a general framework for costs orders that will help the courts to manage the litigation process, to control costs and to provide access where costs act as a barrier.

The use of costs orders

2.10 The ability to award costs is an important power for courts and, in some cases, for tribunals. It can be used to achieve or to contribute to a range of outcomes for litigants and for the litigation process.

2.11 A power to award costs does not imply a general rule on costs shifting. For example, a power to award costs to ensure compliance with court and tribunal rules and procedures does not imply any general rule as to costs shifting it would apply whether the starting point was each party bearing his or her own costs, the costs indemnity rule or some other principle. Similarly, using an award of costs to achieve other outcomes such as facilitating settlement, encouraging alternative dispute resolution, compensating successful litigants and deterring unnecessary litigation does not require a general rule on costs shifting. Costs awards could be made only in relation to specific costs in specific circumstances to achieve the particular outcome.

2.12 The Commission considers that costs awards can be a useful and appropriate mechanism to achieve particular outcomes (whether disciplinary or otherwise). It therefore recommends that federal courts should continue to have a power to award costs and to determine by whom and to what extent costs are to be paid in relation to the whole or any part of proceedings before the court. The power should be exercisable at any stage of the proceedings. Tribunals should also have a power to award costs but only where it is appropriate to their objectives and procedures.¹⁸

2.13 The relevant court or tribunal rules need to specify when the power to award costs can be exercised and, in particular, whether it should be exercised to implement a general principle of costs shifting (such as the costs indemnity rule) or only in relation to specific costs in specific circumstances.

Recommendation 1 - power to award costs

Each federal court should have the power to award costs and to determine by whom and to what extent costs are to be paid in relation to the whole or any part of proceedings before it. The power to order costs should be exercised in accordance with the relevant court rules.

The preference for rules rather than a broad discretion

2.14 The Commission considers that the power to award costs must be exercised in accordance with costs allocation rules. The decision to award costs should not be a matter solely at the discretion of the court or tribunal.

2.15 Although such a discretion provides flexibility and allows the costs in each case to be apportioned in light of its particular circumstances, it also creates uncertainty and the opportunity for lengthy and expensive arguments about how the discretion should be exercised. In some cases it may not be clear why the discretion has been exercised in a particular way.

2.16 The need for guiding principles has been recognised by the legislature and by courts and tribunals. Legislation, court and tribunal rules and previous judicial decisions already guide courts and tribunals as to how costs must be apportioned. For example, it is rare for a court to depart from the costs indemnity rule in civil proceedings.

2.17 The Commission considers that to ensure predictability, transparency and minimum transaction costs the apportionment of costs must be in accordance with costs allocation rules. These rules should specify the basic presumption as to how the costs of litigation are to be apportioned and set out the exceptions, if any, to that presumption. For example, in chapter 4 the Commission proposes that in civil proceedings the loser should pay the winner's costs subject to certain exceptions such as disciplinary costs orders.¹⁹

Formulating the costs allocation rules

Objectives of the costs allocation rules

2.18 In formulating the costs allocation rules the Commission has had regard to a number of broader objectives that help define the contribution the rules may make to an accessible, efficient and just legal system. These objectives are listed below.

- Costs allocation rules should
 - guide courts and tribunals and litigants as to how the costs of proceedings are to be apportioned
 - be available to courts and tribunals as one mechanism for encouraging compliance with rules and procedures that help them to perform their role efficiently, fairly and without unnecessary cost to the community or to those who use the courts
 - be easy to understand and simple to apply
 - reduce, not encourage, disputes about costs
 - reduce, not increase, the total costs of litigation
 - reflect and make all participants aware of the full costs of litigation and the factors contributing to those costs.
- Cost allocation rules should not
 - be used to control the causes of actions that can be brought before courts and tribunals²⁰
 - impede access to courts and tribunals.

The Commission recognises that not all the objectives can be achieved by the same costs allocation rules.

Other factors

2.19 The recommendations have also been developed having regard to the actual costs of litigation and to the reality of who actually pays those costs and who actually uses courts and tribunals in Australia. These factors are discussed in chapter 3.

Controlling the costs of litigation

2.20 A key element in improving access to justice is making legal services and dispute resolution mechanisms more affordable. Controlling costs does not mean removing costs. Litigation and dispute resolution will always involve the costs of identifying issues and evidence, assessing options for resolving those issues and presenting a party's case in the course of negotiations or a hearing. These costs will arise regardless of whether they are paid, in whole or in part, by the taxpayer, the parties or someone else.

2.21 The costs allocation rules have some effect on the amount spent on litigation but are not a good mechanism for controlling the level of expenditure. In particular, the costs indemnity rule acts as an incentive to spend more on legal services.²¹ One way to negate this incentive is to limit the costs that may be recovered under the rule to those permitted under court scales, reasonable costs assessments or other mechanisms.

2.22 However, the Commission considers that the most effective way to control the costs of litigation is to control the issues and the evidence that may be disputed in each case. In some jurisdictions, but not all, this control is part of the function of case management. Courts and tribunals are currently working on how their procedures can be used to control the conduct of litigation and thereby the cost.²² The Commission supports this work and considers that it should be given a high priority. Procedural controls will not be able to deal with all the factors that make litigation expensive but they can make a substantial contribution to reducing the costs incurred by the parties and by courts and tribunals.

2.23 The costs allocation rules recommended by the Commission are intended to complement procedural controls, case management systems and other mechanisms for controlling the costs of litigation.

Reasonable costs should be recoverable under the costs allocation rules

Determining what costs should be recovered where costs are ordered

2.24 If costs are to be shifted from one party to another, the amount of costs that may be recovered under a costs order should be determined in light of the outcomes that the costs shifting is intended to achieve. For example, if the costs shifting is intended simply to compensate one of the parties then he or she should recover all the costs he or she has incurred. However, if the costs allocation rules are designed to encourage settlement then it may be appropriate to discount the amount recoverable by a party who has refused a settlement offer.

Reasonable costs should be recovered

2.25 The Commission considers that generally, subject to certain safeguards and exceptions, costs shifting should be used to assist litigants to pursue meritorious claims and defences. The ability to recover costs helps to ensure that these litigants are not deterred from pursuing their rights by the possibility of being out of pocket even though successful. In some cases their recovered costs may finance the litigation.

2.26 For costs shifting to achieve outcomes such as these the costs that can be recovered must be determined in a way that ensures the party who is entitled to recover is not out of pocket except to the extent necessary to safeguard against unnecessary work or charges which are unreasonable given the circumstances of the case.

2.27 The Commission recommends that, as a basic principle, where it is appropriate for costs to be shifted for all or a specified part of the litigation, a party who is awarded costs should be entitled to recover the reasonable costs that he or she has incurred in the course of preparing and conducting the litigation or that

part of the litigation specified in the costs order. The reasonable costs are those costs reasonably required to prepare and conduct the litigation.

Recommendation 2 - reasonable costs to be recovered where costs are ordered

A party who is awarded costs should be entitled to recover the reasonable costs that he or she has incurred in the course of preparing and conducting the litigation or that part of the litigation specified in the costs order. The reasonable costs are those costs reasonably required to prepare and conduct the litigation.

Determining 'reasonable costs'

2.28 It is outside the Commission's terms of reference to recommend how reasonable costs should be determined. However, it seems that in many, if not all, jurisdictions the distinction between party and party costs and solicitor and client costs, and the scales used to determine those costs, are considered inadequate for determining what costs are reasonable.²³ It is also too early to assess the advantages and disadvantages of the approach in New South Wales where a party is entitled to recover a fair and reasonable amount for work that was reasonably required for the litigation.²⁴

2.29 AJAC recommended that in federal matters the use of scales should be abolished and that costs should be assessed by reference to reasonable market rates for the services properly performed on behalf of the successful party for the purposes of the litigation.²⁵ However, the federal Government has indicated that fee scales will remain until a fully open and competitive legal services market is achieved.²⁶ In the meantime, the fee scales applying in federal courts are to be reviewed with the aim of developing a simpler structure and more accurate charging rates.²⁷

2.30 The Commission considers that the procedures for determining what costs are reasonable should take into account the amount and complexity of the issues that need reasonably to be resolved to ensure that the costs are proportionate to the case and the claim, but without regard to the resources and the stature of the parties or to the extent of legal services actually employed. Whether reasonable costs are to be determined by reference to scales, market rates or some other measure is a matter for further examination.

Timing of costs orders

Costs orders should be made sooner rather than later

2.31 As a general principle costs allocation rules should enable the parties to estimate their exposure to costs accurately at the beginning of the proceedings. This will lead to more predictability and certainty which will assist in achieving the desired outcomes of the rules.

2.32 Where there are circumstances requiring a special costs order that order should, as far as possible, be made at the beginning of the proceedings. For example, an order under the proposed exceptions to the costs indemnity rule should be made at an early stage of the litigation as the terms of such an order may influence the future conduct of the matter.²⁸

2.33 However, it will not always be possible to do this. In some cases the court or tribunal may not have sufficient information to make an order at the beginning of the proceedings. There will also be orders, such as disciplinary costs orders, that may arise from time to time during proceedings. Other mechanisms are required to deal with these situations.

Indicating the likely costs order

2.34 In practice courts and tribunals may be unwilling or unable to make a final costs order at the beginning of the proceedings. However, they may be able to indicate the type of order they expect to make in the absence of other circumstances coming to light during the proceedings. For example, a court may be reluctant to make a public interest costs order until it has had an opportunity to assess the significance of the

action in light of the evidence.²⁹ It may, however, be prepared to indicate that such an order will be made unless the evidence is unfavourable.

2.35 The Commission recommends that a court or tribunal should, at any stage of proceedings, be able to indicate the costs order it is likely to make at the end of the proceedings subject to any change in circumstances coming to light in the course of the proceedings.

Recommendation 3 - court or tribunal may indicate likely costs order

A court or tribunal should, at any stage of proceedings, be able to indicate the costs order it is likely to make at the end of the proceedings subject to any change in circumstances coming to light in the course of the proceedings.

Interim costs orders

2.36 Interim costs orders are orders that may be made from time to time during proceedings. They enable the court or tribunal to allocate the costs of the proceedings at relevant points in the litigation process. Interim costs orders are an important part of the range of mechanisms available to a court or tribunal to influence the way in which the parties conduct the litigation and explore their alternatives.

2.37 For example, an interim costs order may specify how the costs of a particular claim or defence are to be apportioned or may impose a cap on the costs that may be recovered for a particular part of the proceedings. They may also be used to order a party to provide funds to enable the other party to prepare his or her case properly.³⁰

2.38 To provide certainty and minimise dispute, an interim costs order should only be reviewable where the court or tribunal's discretion has miscarried by reason of manifest error, consideration of irrelevant matters or fraud by one of the parties.³¹

2.39 An interim costs order should be enforceable immediately unless the court or tribunal orders otherwise. It is particularly important that the purposes of an interim disciplinary costs order are not defeated because the order cannot be enforced until the conclusion of the proceedings.

Recommendation 4 - interim orders as to costs

At any stage of proceedings the court or tribunal may, either on its own motion or on the application of a party, make an interim order as to how all or part of the costs

- arising from a particular stage of the proceedings, or
- of the whole proceedings are to be apportioned pursuant to the relevant costs allocation rules.

Recommendation 5 - interim costs order enforceable immediately

An interim costs order may be enforced immediately unless the court or tribunal orders otherwise.

Reserving costs

2.40 If a court is unable to say who should pay the costs of a motion, application or other proceeding it may reserve costs until the matter is concluded or an order is made. In the Federal Court, costs that are reserved will follow the event unless the court otherwise orders.³²

2.41 The Commission does not propose any changes to this rule. It considers that in civil and administrative law proceedings reserved costs should follow the event subject to the exceptions set out in Part 3.

Costs of interlocutory proceedings

2.42 In most courts an order for costs in an interlocutory proceeding cannot, unless the court otherwise orders, be enforced until the principal proceeding is concluded or a further order is made.³³ It is argued that this rule stops poorer litigants dropping their case because their funds have been exhausted as a result of having to pay adverse costs orders arising from interlocutory proceedings.³⁴ In practice, courts usually reserve the costs of interlocutory proceedings.³⁵

2.43 The Commission does not propose any changes to this rule except that a disciplinary costs order made in relation to an interlocutory proceeding should be enforceable immediately. The impact of such an order should not be diminished by allowing payment of the costs to be left until the principal proceedings have concluded.

Submissions before a costs order may be made

2.44 Before making a costs order the court or tribunal must give the parties an opportunity to make submissions. This reflects the current law and practice and ensures that orders are made in accordance with natural justice.

2.45 The Commission expects that in most cases submissions will only be required if the court or tribunal is considering a costs order that is not in accordance with the relevant general costs allocation rule. For example, in a civil proceeding a court would expect to hear submissions on the imposition of a disciplinary costs order against a party but not on whether costs should follow the event.

2.46 The court or tribunal should require submissions to be brief. The indicative orders proposed in recommendation 3 can be used to encourage this.

Recommendation 6-submissions before a costs order may be made

Before making a costs order the court or tribunal should invite and consider submissions from the parties and from any other person who may be the subject of the order.

Collecting a costs award

2.47 Collecting the costs under an award can be very difficult, particularly when the party liable to pay it refuses to do so. This is a serious problem. It undermines the rationale and value of costs allocation rules.

2.48 There is no easy solution to the problem of ensuring payment of a costs order. It cannot be addressed in the costs allocation rules themselves without raising serious obstacles for a party with limited resources.

2.49 The Commission considers that the problem is better addressed as a question of enforcement of costs awards rather than as part of the formulation of costs allocation rules. The enforcement of costs orders is discussed in chapter 19.

An interrelated system of costs allocation rules

2.50 It is important to recognise that the costs allocation rules recommended by the Commission are interrelated and are intended to operate as a package. For example, table 2.1 sets out how the rules will operate in civil proceedings and table 2.2 indicates how the amount of costs to be paid by the unsuccessful party may be calculated.

Table 2.1

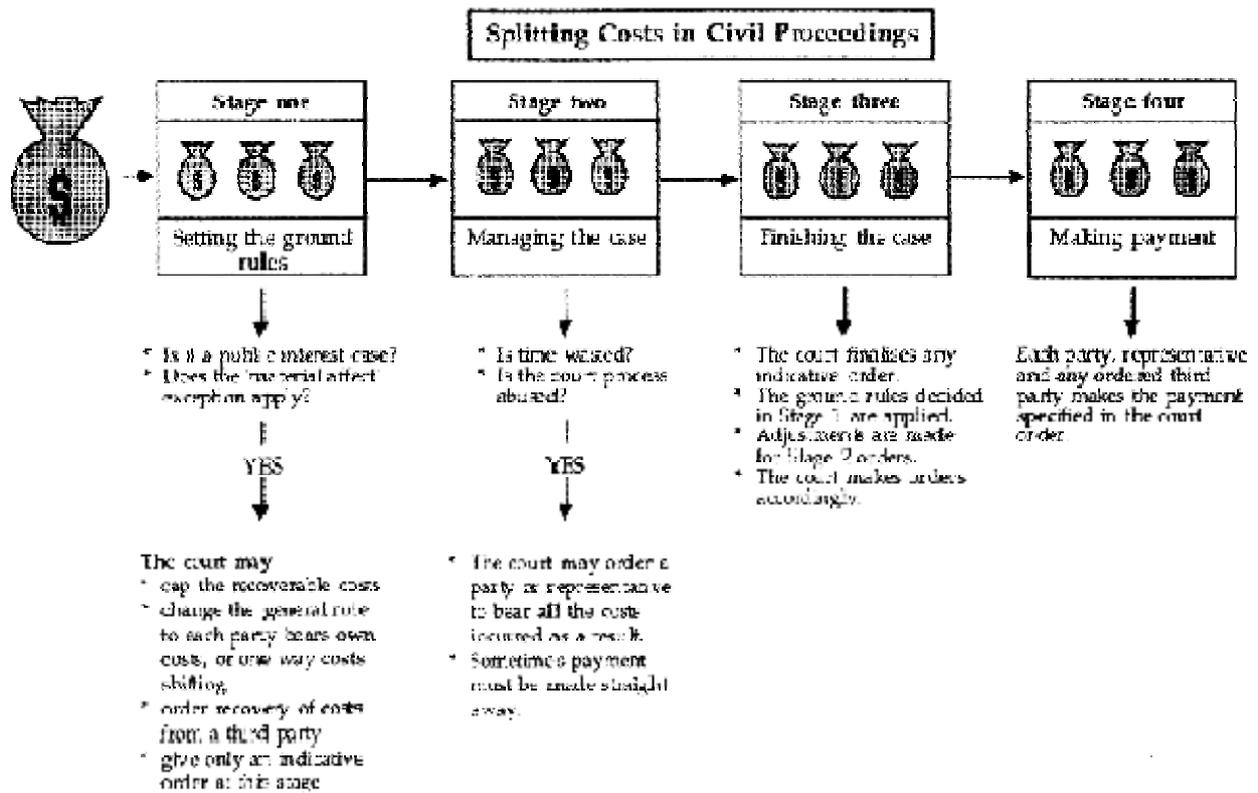
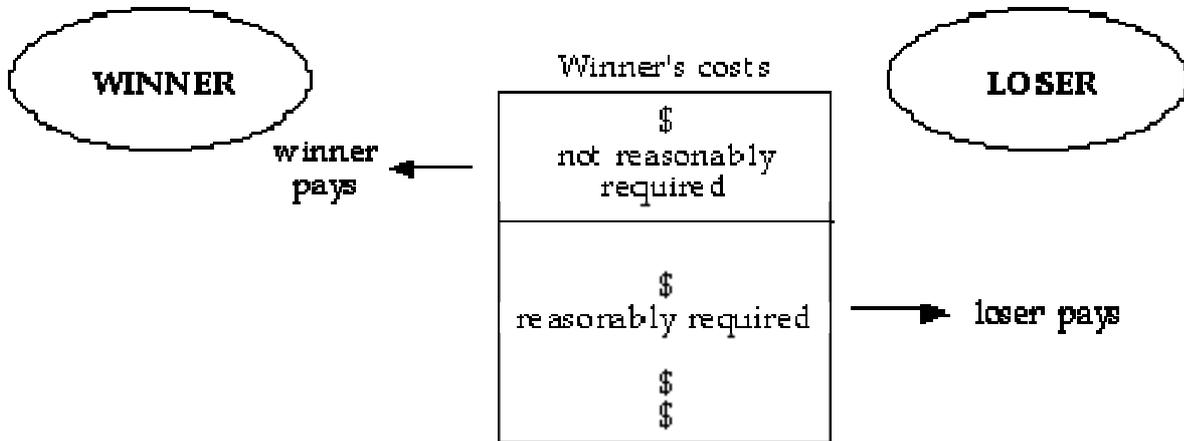


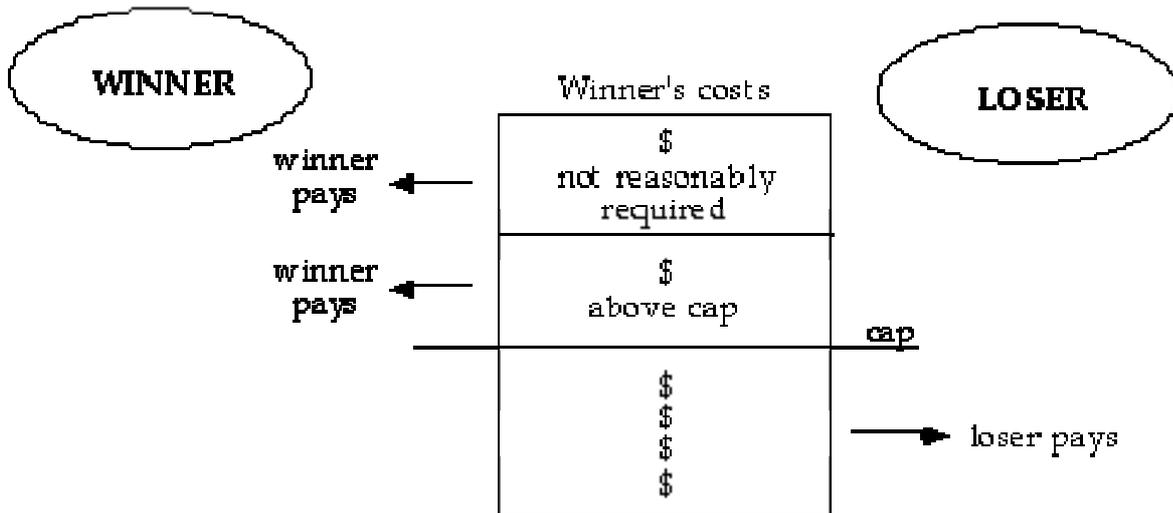
Table 2.2

**Calculating the cost
- one example**

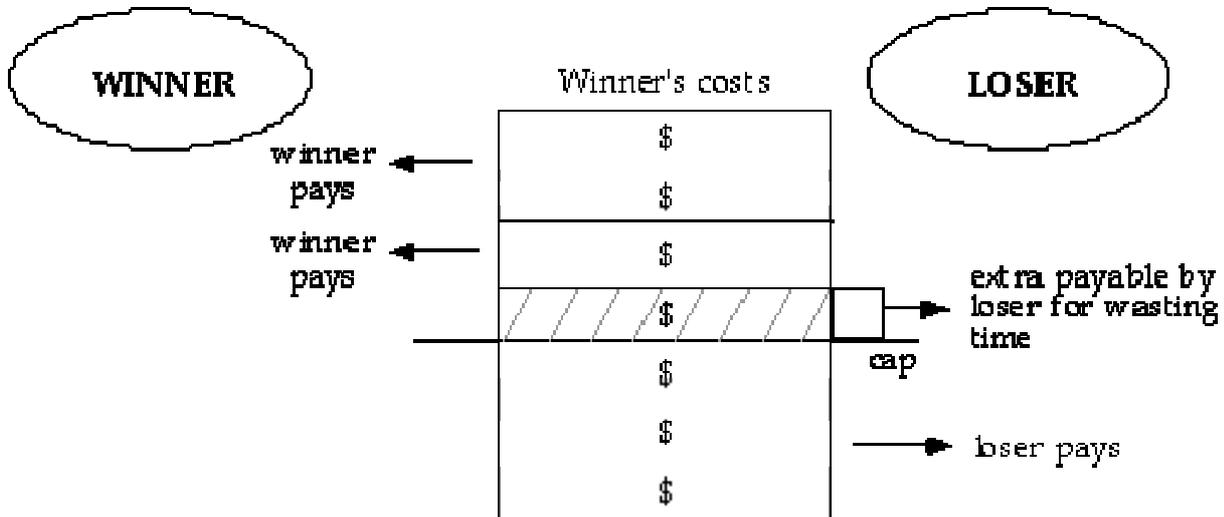
1. First, apply the general rule



2. Then, apply any cap or special order



3. Then, apply any disciplinary and case management orders



3. The practical impact of costs allocation rules

Introduction

3.1 The test for determining the contribution that costs allocation rules make to the legal system is the impact of the rules in practice. Legal costs are a significant factor in any litigation and therefore rules on who is to pay those costs impact on the use of the courts.

3.2 On an individual case level, there are many indications that the current costs allocation rules operate unjustly in some situations. It seems that this can occur regardless of the general costs rule applied. The Commission heard of a number of different types of civil cases where the 'loser pays' rule was preventing a person from presenting his or her case or negotiating a fair settlement.³⁶ The 'material effect' exception is intended to address these types of cases.³⁷ The Commission also heard of industrial and family law cases where the rule that each party bears his or her own costs was having an unjust effect.³⁸

3.3 On a broader level, it is clear that costs allocation rules influence the ways in which litigation is and can be financed. This must guide the choice of general costs rules in each jurisdiction. The ability to finance litigation through, for example, insurance, speculative or contingency fees or legal aid is central to facilitating access to courts and tribunals.

3.4 This chapter discusses these broader financing issues. It looks at the costs of litigation, the ways in which litigation is financed and the pattern of cases coming before courts and tribunals. The information currently available is not sufficient to form precise conclusions but it is enough to broadly indicate how the costs rules affect who can afford to use courts and tribunals.

3.5 The chapter also comments on the need for courts and tribunals to improve their data collection. Currently no court or tribunal in Australia collects data on its costs orders either in terms of who has been ordered to pay or how much. This limits the analysis of the impact of the costs rules.

The costs of litigation

The size of the issue

3.6 The costs of litigation are substantial. In 1992-93 the legal services industry generated \$5.1 billion from the sales of goods and services.³⁹ A rough guesstimate is that about 35 per cent or \$1.8 billion was spent on legal services relating to litigation.⁴⁰

The significance of a party's own legal costs

3.7 Litigation costs primarily consist of the cost of legal advice and assistance and of disbursements. These costs far outweigh court charges and other litigation costs.

3.8 A study in 1993 by the Civil Justice Research Centre (CJRC Study) found that in civil litigation in New South Wales the average solicitor's fee was more than \$6000 in a District Court case and over \$20 000 in an action before the Supreme Court.⁴¹ The average cost of disbursements (including barristers' fees) was over \$2000 in a District Court case and more than \$13 000 in a Supreme Court matter.⁴²

3.9 By comparison the fees levied by courts and tribunals for issuing, filing or obtaining court documents are low. For example, the Federal Court charges \$300 for filing an application and \$500 for setting a matter down for hearing. The cost of starting proceedings in intermediate courts like the District Court of South Australia is about \$200 and in magistrates courts the cost is up to \$110 depending on the value of the claim.

Legal costs as a proportion of the claim

3.10 There are no clear figures on the relative size of a party's legal costs compared to the amount of the claim. It is likely that legal costs as a percentage of the claim will vary widely depending on the types of claim and the course of the litigation. As a rough guide

- anecdotal comments to the Commission suggested that in personal injury and professional indemnity insurance litigation, legal costs for disputes not resolved before the hearing average about 30 per cent of the damages award
- confidential information from one insurance company indicated that the average amount of legal costs incurred for all claims (whether litigated to judgment or settled) was 17 per cent of total costs (including damages paid).

Implications for costs allocation rules

3.11 These figures support the comment made in many submissions and consultations that the principal costs in any legal dispute are those of a person's own legal advisers.⁴³ It was also commented frequently that this factor is usually more important than the risk of an adverse costs order when deciding whether to start or continue proceedings.⁴⁴ This carries several implications.

- To promote access to justice, costs allocation orders must take into account not only the risk of an adverse costs order but also their impact on the ways in which a party's own legal costs are financed. For example, the 'loser pays' rule may in some cases be a method of financing a party's own costs.⁴⁵
- The party's own costs are likely to be much lower in particular proceedings (such as some tribunal proceedings) where legal advice or representation is not necessary or allowed. In those circumstances a different general costs rule, such as each party bears his or her own costs, is likely to be more appropriate.
- The costs allocation rules will only help to control the amount of litigation costs (and thereby improve access to justice through lower costs) if they help to control the amount of legal advice and representation that parties need to conduct the litigation.

Controlling legal costs

3.12 Submissions and consultations indicated that the impact of costs allocation rules on controlling costs is indirect and generally minimal.⁴⁶

3.13 Current costs allocation rules were considered to help control costs in three main ways. They can

- deter litigation altogether, regardless of the merit of the claim⁴⁷
- encourage settlement⁴⁸
- very occasionally, sanction a party's legal representatives for unnecessary delay or failure to comply with directions.⁴⁹

3.14 The most effective way of controlling costs is to narrow the issues in dispute and to limit the evidence required. In many jurisdictions this is treated as an objective of case management.

3.15 Case management systems have been introduced in most Australian courts and tribunals. While details of the systems vary between jurisdictions, case flow management and differential case management (DCM) schemes are in most cases intended to

- increase early settlement of matters by requiring greater disclosure of each party's case earlier in the litigation process
- bring those cases that cannot settle to trial in the shortest possible time
- reduce the length and complexity of trials by narrowing the issues in dispute

- reduce the costs of litigation by reducing delays, avoiding the need for multiple appearances in court because of adjournments and, under DCM schemes, by ensuring less complex cases are managed in a way that will avoid unnecessary procedures.

3.16 Generally, submissions considered case management to be an essential component of an effective judicial system.⁵⁰ However, there has been some disagreement in relation to whether case management actually reduces the costs of litigation.⁵¹ Some submissions commented that it increases the costs by requiring lawyers to attend court more often and by requiring most of the preparation of a case to be done at the beginning of litigation, before it is known whether it will go to trial.⁵²

Other costs

3.17 There are some other litigation costs that also need to be considered. Parties bear the cost of having to use their own time and resources to instruct lawyers, receive advice, attend court and so on. For example, to attend court an individual may have to take leave from his or her work or make arrangements for child care. A company director or employee responsible for legal proceedings involving the company may have less time to deal with other company business. These costs can be especially significant for unrepresented parties who must also undertake the tasks that would otherwise be performed by a lawyer.⁵³ None of these costs are recoverable under current costs allocation rules.

Who pays for litigation?

A wide range of sources of finance

3.18 The reality of who actually pays the costs of litigation in courts or tribunals is more complex than is implied by the current costs rules, and in particular by the 'loser pays' rule. Litigation is not financed only by plaintiffs or defendants. In practice litigation may effectively be financed in whole or part through a number of other sources, many of which rely on or assume the existence of the current costs allocation rules.

3.19 The principal sources of finance, aside from the parties' own resources, are insurance, speculative or contingency fee arrangements and legal aid. Tax deductions also have a significant role in spreading the costs of litigation.

Insurance

3.20 Insurance companies are major participants in litigation, particularly in personal injury cases.⁵⁴ In broad terms about 50 per cent of District and Supreme Court civil litigation in New South Wales relates to personal injury or property damage claims. A similar pattern is evident in other States and Territories.

3.21 In a high proportion of these cases the defendant is insured and the dispute concerns the amount of damages rather than liability. It is therefore common for courts to order the defendant to pay the plaintiff's costs pursuant to the costs indemnity rule. Those costs are then paid by the defendant's insurance company in accordance with the insurance policy.

Speculative and contingency fees

3.22 Speculative and contingency fee arrangements arise where a litigant and his or her lawyer agree that the lawyer will receive no remuneration for the work he or she performs unless the litigation is successful.⁵⁵ These arrangements do not relieve the litigant from the risk of an adverse costs order if the litigation is unsuccessful.

3.23 Anecdotal evidence to the Commission indicated that speculative and contingency fee arrangements are commonly used by plaintiff's lawyers in personal injury cases throughout Australia. They are also used, although less frequently, for other claims for damages. Occasionally they are used where non-monetary relief such as a declaration or injunction is sought.

3.24 In these arrangements the lawyer is effectively financing his or her client's own litigation costs. The lawyer bears those costs if the action is unsuccessful and recovers them out of the damages award or costs order in favour of his or her client if the action succeeds.

3.25 Speculative and contingency fees are likely to continue as a significant element in the financing of litigation. Most Australian jurisdictions permit some form of speculative or contingency fees. The federal Government is considering the introduction of contingency fee arrangements in federal matters in those States and Territories where such arrangements are not currently permitted.⁵⁶ The federal Government will also provide funding of \$10.5 million to establish a national disbursements assistance fund to meet up-front costs of litigation where the lawyers are acting on a contingency or no fee basis.⁵⁷

Legal aid

3.26 The legal aid commissions in each State and Territory provide assistance to litigants who satisfy the relevant means and merit tests and who have a type of matter for which aid is granted.

3.27 Legal aid assists a substantial number of individual litigants, mainly in criminal and family disputes. In 1993-94 the commissions provided over \$240 million in assistance.⁵⁸ In some cases a commission may also pay all or part of the costs awarded against an assisted litigant.⁵⁹

3.28 Most legal aid commissions require an assisted party to make a financial contribution to the cost of the litigation and in some cases to repay all or part of the grant. In 1993-94 over \$23 million was recovered in this way.⁶⁰

Contingency legal aid funds

3.29 Contingency legal aid (or assistance) funds (CLAFs) are self-funding schemes designed to pay the legal fees and disbursements of eligible clients in civil litigation.⁶¹ If the litigation is successful the CLAF obtains any costs awarded to the assisted litigant and a fund fee.⁶² If the litigation fails then the CLAF does not recover anything and the assisted party will usually be liable for the successful party's costs.

3.30 CLAFs tend to limit their assistance to civil cases where the assisted party is seeking to recover a monetary or property award. CLAFs now operate in a number of States and Territories.⁶³

Other government assistance

3.31 The Commonwealth provides financial assistance to eligible persons through a number of statutory and non-statutory schemes. For example, assistance may be given under the *War Crimes Act 1945* (Cth),⁶⁴ *Administrative Appeals Tribunal Act 1975* (Cth),⁶⁵ *Trade Practices Act 1974* (Cth)⁶⁶ and the Public Interest and Test Case Scheme.⁶⁷ Similar assistance is available under schemes operating in some States and Territories.⁶⁸ In addition, statutory bodies such as the Australian Securities Commission (ASC) may bring proceedings on behalf of a party for breaches of certain regulatory schemes.⁶⁹

Other types of financing

3.32 Litigation may also be financed through a number of other arrangements.

- Legal expenses insurance (LEI) schemes are designed to provide insurance cover, upon the payment of a premium, for the cost of specified legal services. These policies usually cover services such as representation in minor criminal, consumer and motor vehicle matters, mediation in family law matters and provision of alternative dispute resolution processes where applicable. Most policies also provide a 24 hour telephone advice service. LEI policies may be offered to groups or individuals or take the form of add-on benefits to existing insurance policies.⁷⁰
- Pro bono legal work is free legal work undertaken by barristers and solicitors in various States and Territories individually and as part of formal pro bono schemes operated by law societies or bar associations.⁷¹ For example, in 1993-94 the members of the WA Law Society provided legal assistance to 134 applicants.⁷²

- Various employee and employer organisations support litigation by their members.⁷³ For example, in 1993-94 trade unions brought 210 unlawful termination of employment claims in the Industrial Relations Court of Australia.⁷⁴
- Some organisations fund or provide other resources for public interest or test cases.⁷⁵ The opportunity to recover costs through the costs indemnity rule often encourages such assistance.

Tax deductibility

A significant factor

3.33 Businesses are major users of the court system. Legal expenses incurred on revenue account in carrying on the business are generally tax deductible. No precise figures are available on the level of legal costs claimed as a tax deduction each year. However, based on recent surveys, a rough guesstimate is that \$700 million may be claimed as deductions from assessable income for legal costs incurred in litigation by businesses each year.⁷⁶ At a 36 per cent tax rate this represents a loss of taxation revenue of approximately \$250 million.

The perception of injustice

3.34 During the consultations it was clear that many people saw the tax deductions available to business litigants as an unfair advantage.⁷⁷ Some people thought that it was anomalous that significant tax deductions could be made available to business litigants for legal expenses without any assessment of the merit of the case or the reasonableness of the expense while by contrast government support through legal aid was subject to strict merit tests and control over legal expenditure.

3.35 Others considered that tax deductibility reduced the deterrent effect of the costs indemnity rule on business litigants and encouraged excessive expenditure, thus making the litigation in relative terms much riskier for opponents who cannot claim their legal expenses as tax deductions.

3.36 In the comments made to the Commission these effects and the sense of inequality and injustice were seen as interrelated.

Commercial litigants have an advantage. They can afford to engage more readily in litigation and prolong it. They can afford to hire more expensive representation. Tax deductibility for litigation costs should be abolished and the savings to consolidated revenue transferred to legal aid funding.⁷⁸

AFCO considers that tax deductibility of legal expenses for business is a major contributor to excessive legal costs. It is inherently inequitable because it is not available to individual consumers.⁷⁹

The business litigant who can claim a tax deduction has not had to bear the full cost of litigating. Why is it that the business litigant is given this special right and not the ordinary person, particularly the disadvantaged litigant?⁸⁰

3.37 These perceptions are important in their own right because they affect the litigant's assessment of the amount the litigation might cost and therefore whether he or she can afford it. The costs factor will weigh more heavily on the litigant unless, for example, he or she is satisfied that costs will be controlled or capped at an affordable maximum. If these perceptions are also objectively accurate they raise broader questions as to whether it is appropriate to provide this kind of financial support to business litigation.

Special considerations

3.38 Tax deductions are different in nature from other factors contributing to the financing of litigation. This needs to be taken into account.

- Unlike legal aid, they are not a government outlay. They represent a reduction in the amount of tax payable, not a payment to a litigant.
- They are only available to the extent that the litigant has assessable income from which they can be deducted.

- They are effectively only available after the legal expense has been paid.
- They are designed to meet the economic and other objectives of the tax system. Any effect they have on litigation is therefore indirect. Any reforms concerned with this indirect effect should be structured so that they do not undermine the objectives of the tax system.

3.39 Some submissions also commented that, notwithstanding perceptions, there is in fact no injustice when one party is able to claim its legal costs as a tax deduction but the other party is not.⁸¹ It was submitted that in practice business litigants do not take tax deductibility into account when deciding whether to start or pursue litigation.⁸² It was also submitted that dispute resolution is an inevitable and essential part of running a business and therefore it is appropriate for the tax system to recognise this.⁸³

The Commission's view

3.40 In the Commission's view it is appropriate for courts and tribunals to take the tax deductibility of legal costs into account when determining whether a party has sufficient resources to present his or her case or to negotiate a fair settlement and when determining whether any adjustment should be made to the general costs allocation rule applying to the case. Tax deductions form part of the financial context for the payment of costs and are therefore relevant in that respect.

3.41 Any adjustments that may be required as a result of a party being able to claim all or part of his or her costs as a tax deduction can be effected through the costs allocation orders made by the court or tribunal. It is not necessary for changes to be made to the availability of the tax deduction in any particular case.

3.42 The impact of the tax system on litigation should be examined further. Inquiries of the Australian Taxation Office (ATO) indicate that data is not currently collected on the aggregate amount of tax deductions claimed each year for legal expenses or, more particularly, for litigation expenses. The Commission considers that data of this kind should be collected either by the ATO or the Australian Bureau of Statistics (ABS).

Who uses courts and tribunals

Introduction

3.43 A picture of who uses courts and tribunals is useful in two ways. It is a guide to who is currently getting access. It also indicates who is affected by the costs allocation rules.

3.44 Few courts and tribunals collect data on the types of litigants who conduct litigation before them. However, it is possible to obtain a broad picture of litigants by looking at the types of matters being litigated.

Federal jurisdictions

3.45 At a federal level the pattern of cases suggests a marked difference between the types of litigants using each court and tribunal.

- The Federal Court deals primarily with commercial, bankruptcy and administrative cases. Overall in 1993-94 it dealt with 22 261 matters.⁸⁴
 - In the General Division about 55 per cent of cases involve at least one party that is a commercial or business entity pursuing a corporations law or trade practices matter. Over 10 per cent of matters in the General Division involve government organisations responding to an administrative law matter.⁸⁵
 - Bankruptcy cases have a different character because the bankrupt will rarely be able to pay any adverse costs order. Of the 14 166 bankruptcies before the Federal Court in 1993-94, 30 per cent concerned individuals in business activities and 70 per cent concerned individuals in non-

business activities.⁸⁶ Almost half of all bankruptcies involved persons not in any remunerative employment including pensioners and persons engaged in home duties.

- In 1993-94 the Family Court opened 54 496 files,⁸⁷ nearly all of which involved individuals. The litigants in this jurisdiction generally have different financial resources from business and government entities litigating in the Federal Court.
- In the Industrial Relations Court of Australia (IRC) most actions are brought by individuals against their employer.⁸⁸ In 1994-95 the IRC finalised 7943 matters.⁸⁹
- Most matters before the Administrative Appeals Tribunal (AAT) involve a government department and an individual. In 1993-94 the AAT finalised 6019 applications.⁹⁰

State and Territory courts

3.46 The pattern of civil cases in State and Territory courts shows a significant emphasis on personal injury cases involving insurance companies.

3.47 Over half the cases dealt with by intermediate courts, such as the District Court of New South Wales and the Victorian County Court, involve natural persons pursuing personal injury claims.⁹¹ Between 10 and 20 per cent of cases before State and Territory Supreme Courts involve at least one party that is a commercial body or business entity in a commercial dispute.⁹²

3.48 An examination of the personal injury cases before the New South Wales Supreme Court Common Law Division during its 1992 Special Sittings provided a 'snapshot' of users as at December 1991. All plaintiffs were natural persons and most commonly were male, aged between 25 and 45 and earned between \$20 000 to \$30 000 per annum. Nearly all defendants were, or were funded by, businesses, government organisations or insurance companies.⁹³

Conclusion

3.49 While it is not possible to obtain a complete picture of who uses courts and tribunals, these figures give some indication of who presently has access to them. It appears that

- individuals have access to the courts primarily for claims relating to personal injury, disputes with government, employment disputes and family law
- businesses are the biggest user of the Federal Court and insurance companies are a significant user of state and territory courts.

3.50 The pattern of cases also suggests that different courts and tribunals have quite a different mix of litigants. The costs allocation rules therefore need to be considered and developed separately for each jurisdiction.

Who does not use courts and tribunals

Introduction

3.51 The Commission also sought information on who does *not* use courts and tribunals and why, so that the impact of the costs rules as a deterrent could be analysed. Comprehensive information on this issue is not available and the research to date does not present a clear analysis. Anecdotal evidence suggests that costs are a significant factor in decisions to start or continue litigation, at least in some situations. However, studies by the Motor Accident Authority and the ABS suggest that there are many factors that determine whether a party will treat an event as needing a legal solution. They also suggest that, at least at the stage of deciding whether or not to seek legal advice or make a legal claim, costs are not important.

3.52 The anecdotal evidence and studies are briefly outlined below.

Legal aid

3.53 A significant number of applications for legal assistance are refused each year on the bases of merit, means tests and failure to meet other policy guidelines. In 1994-95 over 38 000 legal aid applications were refused.⁹⁴ In addition, anecdotal evidence suggests that a significant number of people do not apply for legal assistance because of the stringent means tests applied by legal aid commissions.

Motor accident compensation

3.54 A survey of people treated for road accident injuries at Westmead Hospital New South Wales during 1990-91 examined the reasons why victims did not make third party compensation claims.⁹⁵ Over 40 per cent of the injured persons had not sought compensation through the courts. The survey found that generally the reasons for not making a claim were based on informed decisions as to the extent of injuries, the likelihood of success, litigation being seen as too much trouble or not financially worthwhile or other personal reasons.

Survey by the Australian Bureau of Statistics on the use of legal services

3.55 In 1990 the ABS conducted a survey on the use of legal services in New South Wales.⁹⁶ The survey attempted to assess the extent of met and unmet legal need and the accessibility of legal services. It dealt with a number of selected legal events that included litigious and non-litigious matters.⁹⁷ The survey indicated that

- 18.8 per cent of the population of New South Wales had been involved in at least one of the selected legal events in the year to October 1990. About 9 per cent were involved in a contentious matter such as property damage, personal injury or a family dispute.
- Of the people involved in a legal event, 42.5 per cent did *not* seek legal advice. In most of these cases advice was not sought because the event was not considered to be a legal matter (57.6 per cent) or advice was not needed (31.1 per cent). Only 3.2 per cent did not seek advice because it was too costly.

Particular situations where costs prevent access

3.56 Anecdotal evidence from the Commission's consultations and submissions indicates that in some situations individuals and small businesses have claims with merit but cannot afford to use the court system and are not eligible for legal aid.⁹⁸ In particular, cases involving small claims or non-monetary relief are often not pursued.⁹⁹

3.57 Other situations where the current costs rules were seen as preventing access or making it difficult for parties to negotiate fair settlements included disputes involving

- professional negligence, especially medical negligence
- mortgagors defending themselves against action taken by mortgagees
- liquidators and creditors¹⁰⁰
- environmental challenges¹⁰¹
- government tenders where the tenderer is a small business
- debt recovery in small claims courts¹⁰²
- employee's termination payments.¹⁰³

3.58 These examples indicate that there is a wide range of potential situations in which the costs rules may operate unjustly. They also indicate that difficulties can occur regardless of the general costs allocation rule

that is adopted in the first five examples the 'loser pays' rule applies and in the last two examples the general rule is that each party bears his or her own costs.

Lack of statistical information

3.59 Throughout this inquiry the Commission noticed that there is a need for better data on the types of matters that come before courts and tribunals and on the litigants who use them and on what costs are incurred and how they are allocated. Considerable statistical information is currently collected by courts, tribunals and other bodies. However, the lack of an overall guiding statistical body or guidelines has led to widespread inconsistency in the collection, grouping and reporting of these statistics. This makes it very difficult to compare information from different bodies. Further, information on costs awards, characteristics of litigants and funding of litigants is rarely collected. Most courts are unable to give figures on the proportion of litigants that are individuals or corporations.

3.60 Statistical information on the work of courts and tribunals is important for efficient case management and administration. Data on who uses courts and tribunals, who pays for litigation and why litigation is brought will help to develop policies for improving access to courts and tribunals. AJAC expressed similar concerns in the AJAC Report.¹⁰⁴

3.61 The Commission agrees with AJAC that a well directed and uniform system for the collection of court and tribunal statistics is required to coordinate individual courts and tribunals and to ensure consistency and relevance. AJAC recommended that such a venture would best be coordinated jointly by the Australian Institute of Judicial Administration (AIJA) and the ABS, with assistance from the Australian Courts Departments Management Group.¹⁰⁵ The Commission agrees with this view.

Recommendation 7 - coordinated collection program for court and tribunal statistics

The Commission supports the recommendation by AJAC that the Australian Institute of Judicial Administration and the Australian Bureau of Statistics undertake a statistical collection program for Australian courts and tribunals. The collection of these statistics should have two objectives

- the identification of best practice court procedures for use in the improvement of court efficiency and case management
- the collection of information on the characteristics of litigants to assist policy makers to identify access problems suffered by particular groups in the community.

These statistics should be made publicly available. The Australian Institute of Judicial Administration and the Australian Bureau of Statistics should be provided with adequate resources to undertake their roles in this program.

4. Civil proceedings

Introduction

4.1 In civil proceedings the unsuccessful party will usually be ordered to pay the legal costs of the successful party. This rule assists parties to finance their litigation, is a factor in the settlement process and helps minimise the potential for damages awards to be eroded by the costs of litigation. The rule also deters people from pursuing claims and defences. This chapter examines the effects the costs indemnity rule has on litigants, courts and the litigation process. It also looks at some alternatives to the rule. The Commission concludes that the costs indemnity rule should be retained in civil proceedings subject to certain exceptions. A summary of the main costs allocation rules recommended for civil proceedings is set out in table 4.1.

Current costs allocation rules

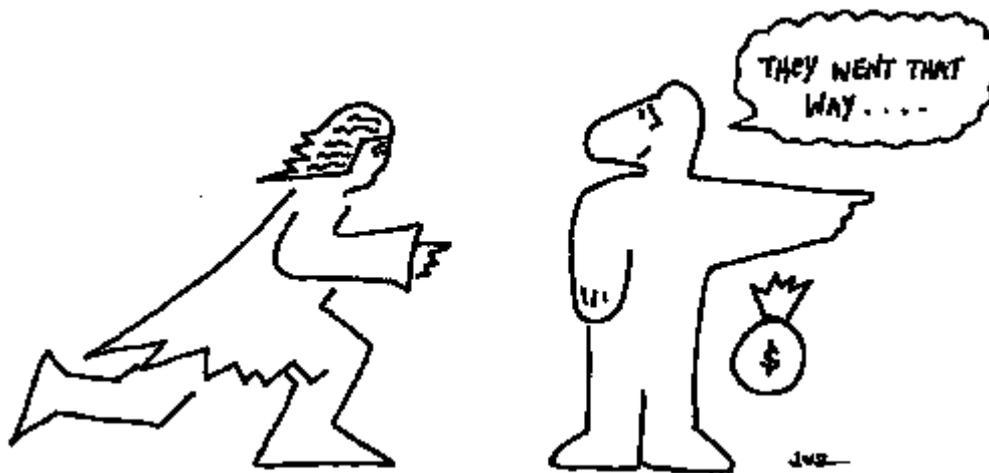
4.2 All courts have the power to award costs in civil proceedings at their discretion.¹⁰⁶ The discretion is absolute except that it must be exercised judicially, and not capriciously or arbitrarily, and it cannot be exercised on grounds unconnected with the litigation.¹⁰⁷ However, the courts have developed guidelines on the way in which the discretion is to be exercised. Ordinarily, costs will be awarded to the successful party to proceedings unless there are special circumstances justifying some other order.¹⁰⁸ This means that the unsuccessful party must pay the legal costs of the successful party.¹⁰⁹ This rule is known as the costs indemnity rule. The courts have identified a number of circumstances where other orders may be appropriate.¹¹⁰ The exercise of the discretion is also guided by a number of rules in each court.¹¹¹ [6](#)

Table 4.1

Summary of the main costs allocation rules recommended for civil proceedings

In civil proceedings — costs follow the event

- I pay my costs and your reasonable costs if I lose.
- You pay your costs and my reasonable costs if I win.
- However, if
 - the litigation is a public interest case
 - one of us is unable to present his or her case properly or to negotiate a fair settlement because of the risk of an adverse costs orderthen some other order may be made as to the shifting of costs or to the amount of costs that may be recovered.
- Notwithstanding any other orders as to costs
 - I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.
 - I can recover any costs I incur as a result of another party's unmeritorious claims or defences or abuse of the court or tribunal process.
 - Our ability to recover costs from each other (if any) may be limited by the imposition of costs caps and settlement rules.



4.3 The costs indemnity rule is also the basic costs allocation rule for civil proceedings in the United Kingdom, Canada, Japan and most European countries. The principal exception is the United States where the general rule is that each party must pay his or her own costs except where the litigation is vexatious or an abuse of process. Overseas costs allocation rules are discussed in appendix D.

The objectives of the costs indemnity rule

4.4 The objectives of the costs indemnity rule have not been clearly defined. The discretion to order an unsuccessful party to proceedings to pay the successful party's costs evolved in the equity jurisdiction, apparently in response to the concern that a person should not suffer loss as a result of having to assert or defend his or her rights.¹¹² Over the years, other reasons for the costs indemnity rule have been identified by the courts and by others involved with the legal system.

4.5 The most common reasons given for the rule are that it

- compensates successful litigants for at least some of the costs they incur in litigating
- allows people without means to litigate
- deters vexatious or frivolous or other unmeritorious claims or defences
- encourages settlement of disputes by adding to the amount at stake in the litigation
- deters delay and misconduct by making the responsible party pay for the costs his or her opponent incurs as a result of that delay or misconduct.

Effects of the costs indemnity rule

Introduction

4.6 To help determine what, if any, changes are necessary to the costs indemnity rule the Commission examined the effects it has on litigants and on the litigation process. In particular, the Commission was interested to determine the extent to which the rule achieves its objectives. The Commission's findings are discussed in the following sections.

Compensating successful litigants

4.7 The costs indemnity rule compensates successful plaintiffs and defendants for the costs of litigating by allowing them to recover at least a proportion of their costs from the unsuccessful party. The rationale is fairness. It is argued that it is unfair for a party to be out of pocket as a result of pursuing a valid claim or defending an unjustified suit.¹¹³

4.8 As the costs that may be recovered under the rule are limited to legal costs determined in accordance with certain rules, the full cost of litigating is rarely recovered by the successful party.¹¹⁴ However, most submissions to the Commission considered the rule to be fair notwithstanding that the indemnity is only partial.¹¹⁵

Financing litigation

4.9 The costs indemnity rule is widely recognised as one mechanism for financing litigation.¹¹⁶ It plays an important role in facilitating cases being taken on a speculative fee or contingency fee basis, especially where it is certain that the other party has the resources to meet any costs orders (such as insurers, large corporations, banks and government). However, the effectiveness of the rule as a means of facilitating litigation varies according to the type of case and the circumstances of the litigant. For example, it will provide less assistance in cases where the outcome is uncertain and the litigant is risk averse. The rule is also of less assistance in proceedings which do not involve a monetary award as the costs that may be recovered are usually insufficient to meet the reasonable costs of the litigation.¹¹⁷

4.10 The Commission was given examples of litigants who would not have been able to pursue their legal rights but for the rule.¹¹⁸ It also received examples of litigants who suffered hardship as a result of not being able to recover costs even though successful.¹¹⁹

4.11 By helping to finance litigation the rule helps reduce the demand for legal aid and other assistance schemes.¹²⁰ The rule allows legal aid commissions and similar assistance schemes to recover all or part of their grants when the assisted party is successful.¹²¹ For example, in 1993-94 legal aid commissions recovered almost \$10.5 million in this way.¹²²

Deterring unmeritorious claims and defences

4.12 It is not possible to measure accurately the extent to which the costs indemnity rule deters claims and defences that may be frivolous, vexatious or without merit. Although it seems that the rule deters a proportion of these claims and defences,¹²³ it also appears that people who wish to pursue these claims or defences will often not be deterred by the risk of an adverse costs order.¹²⁴

4.13 The risk of an adverse costs order seems to the Commission to be an inefficient mechanism for filtering frivolous, vexatious or unmeritorious claims and defences. Deterring unmeritorious claims and defences is more appropriately addressed by case management and other procedural controls designed to identify and deal with such claims and defences at an early stage of proceedings.¹²⁵

Deterring meritorious claims and defences

4.14 It is not possible to determine accurately whether and to what extent the costs indemnity rule deters people with meritorious claims or defences from pursuing them. However, it appears that the risk of an adverse costs order can deter or help to deter claims or defences that should properly be pursued, especially where a party is risk averse.¹²⁶ Submissions to the Commission indicate that the rule is most likely to deter

- people who may suffer substantial hardship, such as the loss of their home, car or livelihood, if required to pay the other party's costs,¹²⁷ and
- people or organisations involved in public interest litigation who have little or no personal interest in the matter.¹²⁸

The impact of the costs indemnity rule on these types of litigant is examined in more detail in chapters 12 and 13.

Encouraging settlement

4.15 The cost indemnity rule can contribute to the settlement of a dispute but is rarely the determining factor.¹²⁹ The key to achieving settlement seems to be disclosure of all relevant information by each party,

identification of the issues in dispute and realistic assessment of the strengths of each party's case. In many cases this does not occur until the matter is actually before the court or tribunal.

4.16 The anecdotal evidence as to the uncertain impact of the costs indemnity rule on settlement is consistent with the conclusions of various economic studies. A number of economic analyses have compared the impact on settlement of the costs indemnity rule with that of the rule that each party bear his or her own costs (the American rule).¹³⁰ The studies indicate that settlement is less likely under the costs indemnity rule than under the American rule if the parties are risk neutral and optimistic of success. This is because the settlement range (being the overlap, if any, between the maximum amount a defendant is willing to pay to settle the dispute and the minimum amount a plaintiff will accept) is smaller under the cost indemnity rule than under the American rule.¹³¹ However, the depressing effect of the costs indemnity rule on the settlement rate is offset by

- any risk aversion of the parties (in which case settlement is more likely under the costs indemnity rule than under the American rule because the costs of failure are higher)
- the costs indemnity rule encouraging greater convergence of the parties' estimates of the possible outcome (this is because the cost to a party of exaggerating the probability of prevailing is greater under the costs indemnity rule).

There is no agreement in the studies to date on whether the net settlement rate is higher or lower under the costs indemnity rule than under the American rule.

4.17 The relationship between costs rules and settlement is examined further in chapter 11.

Influencing the use of alternative dispute resolution

4.18 Submissions to the Commission indicate that the risk of an adverse costs order is not a significant factor when a party is deciding whether to use alternative dispute resolution (ADR).¹³² Parties generally use ADR because it is quicker, cheaper (particularly in terms of each party's own legal costs) and less formal than using a court. The relationship between costs rules and ADR is examined in chapter 11.

Increasing the cost of litigation

4.19 The Commission considered a number of economic analyses of the costs rules. Most of these found that the total cost of litigation to the parties is expected to be higher under the costs indemnity rule than under a rule that each party bears his or her own costs.¹³³ The costs indemnity rule encourages more expenditure per law suit because it raises the effective stakes of the litigation¹³⁴ and lowers the expected marginal cost of legal services.¹³⁵

Encouraging the efficient and economic conduct of litigation

4.20 It seems that by itself the costs indemnity rule is not an effective mechanism for discouraging parties from using expensive and, in some cases, unnecessary procedures. The rule may even encourage the use of such procedures. The manner in which litigation is conducted and the associated costs may be controlled more effectively by courts and tribunals through case management and other mechanisms. To encourage compliance with their rules and directions the courts should have specific powers to award costs against a party who fails to comply with its rules, directions and orders.¹³⁶

Some litigants affected less than others

4.21 The costs indemnity rule seems to have less impact on those who have sufficient resources to litigate (who tend to make litigation decisions on the basis of their own costs) and those with 'nothing to lose'.

Alternatives to the costs indemnity rule

Introduction

4.22 In IP 13 the Commission identified, and invited comments on a range of costs allocation rules that might replace, at least in some types of civil litigation, the rule that costs follow the event.¹³⁷ This section looks at some of these rules and the responses to them.

Parties bear their own costs

4.23 Under this approach each party to the litigation would bear his or her own costs subject to certain exceptions (sometimes called the 'user pays' rule).¹³⁸ For example, the costs allocation rules could specify that each party will bear his or her own costs except where

- the claim or defence was instituted or continued vexatiously or without reasonable cause
- the court orders a party to pay the costs incurred by the other party as a result of any unreasonable act or omission in the conduct of the litigation.

4.24 This approach allows each party to determine the scale of its representation and to negotiate fees without that decision having ramifications for the other party. It also discourages parties from unnecessary expenditure as there is no possibility of passing that burden over to the other party. The exceptions provide a safeguard against costs incurred as a result of the claim or defence being vexatious or without reasonable cause and of the other party's failure to conduct the matter in accordance with the court's rules and directions.

4.25 However, the user pays rule does have a number of disadvantages.

- It does not provide any assistance to a party who cannot pursue a valid claim or defence because the party cannot pay for his or her own costs. Any assistance to cover those costs would need to be provided externally (for example, from legal aid) or, in cases where damages are being sought, under a contingency fee arrangement where the costs are paid from the award.
- The ability of legal assistance schemes to recover funds which can be used to assist other eligible litigants would be reduced.
- It may weaken the position of poorer litigants where the other party is able to finance prolonged litigation.¹³⁹
- Any deterrent effect that the risk of an adverse costs order may have on unmeritorious claims or defences would be weakened. Some commentators argue that the introduction of the user pays rule combined with an increase in availability of contingency fee arrangements will lead to Australia becoming a highly litigious society, suggesting that this has been the experience in the United States.¹⁴⁰

Only a few responses to IP 13 and DRP 1 supported a user pays rule in civil actions.¹⁴¹

One-way costs shifting

4.26 Under one-way costs shifting only one party (usually the plaintiff) is able to recover his or her costs if successful.¹⁴² If the other party is successful then each party bears his or her own costs. One-way costs shifting is intended to encourage litigation by removing the risk to a party of an adverse costs order while still allowing him or her to claim costs if successful. It can be used to

- promote particular types of litigation such as environmental, consumer protection and other matters where there is a public interest in maximising private enforcement of the relevant laws¹⁴³

- assist specific types of party in certain types of litigation, such as a party seeking the review of a government decision.¹⁴⁴

A one-way costs shifting rule is usually subject to the court having power to order any party to pay the costs incurred by the other party as a result of the claim or defence being vexatious or without reasonable cause and of the party's failure to conduct the matter in accordance with the court's rules and directions

4.27 While some responses to IP 13 supported the use of one-way costs shifting in certain types of litigation (particularly public interest cases),¹⁴⁵ most submissions opposed such a rule.¹⁴⁶ Many responses considered it inequitable to have a general rule providing for one party to be deprived of an entitlement to claim costs while remaining liable to pay costs if the other party succeeds.¹⁴⁷ One-way costs shifting also means that the party who is unable to recover costs may be unable to pursue a valid claim or defence if the party cannot afford his or her own costs.¹⁴⁸ It is undesirable for costs allocation rules to be based on whether a party is a plaintiff or defendant as there are many disputes, particularly those arising from a breach of contract, where either party may initiate proceedings.

Costs as part of the damages award

4.28 Another form of one-way costs shifting is for a plaintiff's legal costs to be regarded as a direct result of the injury or wrong that led to the litigation.¹⁴⁹ Litigation costs would therefore be part of the damages suffered by the plaintiff. The award of damages would include a component as compensation for these costs. This means that a successful plaintiff would receive his or her costs but a successful defendant would not. The court would have a discretion to award costs to a successful defendant where the litigation was vexatious. This approach could only apply to proceedings where a plaintiff is seeking damages and could not be used where the plaintiff is seeking an injunction or other non-monetary relief.

4.29 Most submissions to IP 13 opposed this approach.¹⁵⁰ In addition to sharing the same problems as those of other one-way costs shifting rules,¹⁵¹ a number of responses considered it undesirable to base the costs rules on the type of relief sought.¹⁵² Such an approach could discourage claims for non-monetary relief in cases where that is the most appropriate solution to the dispute. Including costs as part of the damages award may also mean that costs will be discounted where there has been contributory negligence or a failure to mitigate.¹⁵³

The Commission's conclusions

A general rule that costs follow the event

4.30 The Commission considers that the appropriate starting point for costs allocation rules in civil proceedings is that the unsuccessful party should pay the successful party's legal costs. The principal reason for retaining this rule is the contribution it makes to the financing of meritorious litigation. This contribution will be enhanced if the amount of costs that may be recovered is the reasonable costs of the work reasonably required for the litigation.¹⁵⁴ The responses to IP 13 and DRP 1 indicate widespread support for the rule that costs follow the event being retained as the starting point for costs allocation in civil proceedings.¹⁵⁵

4.31 The presumption that costs follow the event has the advantage of

- assisting parties to finance their litigation, particularly by facilitating the use of speculative and contingency fee arrangements
- allowing legal aid commissions, contingency legal aid funds and other assistance schemes to recover the grants made to assisted parties who are successful
- being a factor in the settlement process
- helping minimise the potential for damages awards to be eroded by the costs of litigation.

These contributions to the litigation process override the possible adverse effect and significance of the incentive to spend more on litigation that is inherent within the loser pays rule. The effect of that incentive is better controlled by court procedures.

4.32 Where a number of distinct claims or defences are joined in one action there is more than one 'event'. In this type of case the 'event' will go the plaintiff's way on each claim that succeeds and the defendant's way on each claim that fails. This means a plaintiff will be entitled to costs for each distinct claim on which he or she succeeds and will be liable for costs for each claim that fails.

Exceptions to the general rule

4.33 The Commission considers that the general rule must be subject to certain safeguards. In particular, the rule must recognise the need for costs orders which reinforce the court or tribunal's control of the proceedings and the need to counter any deterrent effect it may have on public interest cases and cases involving people who have meritorious claims or defences but limited resources.

4.34 In DRP 1 the Commission proposed a number of exceptions to the general rule.

- ***Disciplinary and case management costs orders.*** These orders assist a court to control the conduct and cost of the proceedings by helping it to enforce procedural rules and directions, cap costs and encourage the parties to fully consider settlement.¹⁵⁶
- ***Material adverse effect on a party's ability to litigate or negotiate.*** 4.35 Courts should have the power to make alternative costs orders, such as a cap on the costs payable, when they are satisfied that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if he or she is required to pay the other party's costs.¹⁵⁷
- ***Public interest costs orders.*** These orders recognise the potential benefit to government, industry and the community of public interest litigation and test cases that will clarify and develop the law or resolve important factual matters.¹⁵⁸

The responses to these proposals are discussed in chapters 11, 12 and 13 respectively.

Certainty

4.35 At present costs are awarded at the discretion of the court. However, this discretion is rarely exercised and in most cases costs will follow the event except where specific case law or rules of court provide otherwise. The grounds for varying the usual order are not well developed. This leads to uncertainty in the application of the law and legal advisers are reluctant to advise firmly on what costs order will be made. The Commission therefore recommends that costs orders be made in terms of a specific rule subject to specific exceptions. This will encourage predictability and certainty as to how costs will be allocated.

Recommendation 8 — the costs rules for civil proceedings

In civil proceedings, costs shall follow the event subject to

- the rules relating to disciplinary and case management costs orders
- the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to
 - present his or her case properly or
 - negotiate a fair settlement
- the rules relating to public interest costs orders.

Small claims tribunals and courts

4.36 Each State and Territory has established a consumer claims tribunal or small claims court to deal with small civil claims.¹⁵⁹ The tribunals and courts can deal with issues concerning goods and services to the value of \$5000, except in New South Wales where the Consumer Claims Tribunal has a monetary jurisdiction of \$10 000 for consumer matters.¹⁶⁰ Their main features are an emphasis on conciliation or settlement of disputes, informal hearings where technical rules of evidence do not apply, limited rights to legal representation and limited rights of appeal from decisions of the tribunal or court. These tribunals and small claims courts have no, or only limited, power to order one party to pay the costs of the other party to the dispute.¹⁶¹

4.37 There is less need in these tribunals and courts to provide the mechanism of costs awards to finance meritorious claims and defences. Introducing the general rule that costs follow the event could be counterproductive, leading to an inappropriate increase in legal representation and formality. The Commission therefore considers that each party should continue to bear his or her own costs in proceedings before a small claims court or tribunal.

Costs and *amicus curiae*, intervenors and other third parties

4.38 The costs allocation rules relating to *amicus curiae* (friend of the court), intervenors and other third parties are discussed in chapter 16.

Appeals

The current situation

4.39 The costs of an appeal in civil proceedings are at the discretion of the appellate court. The appellate court may also make orders for the costs of and incidental to the proceedings giving rise to the appeal. Ordinarily, the unsuccessful party will be ordered to pay the successful party's costs of the appeal and of the earlier proceedings in the absence of circumstances justifying some other order. Where the appeal succeeds on a ground not raised at first instance the successful appellant will ordinarily not be awarded costs of the appeal although the court may allow him or her part of the costs of the original proceedings.¹⁶²

The Commission's view

4.40 There was general support for the principle that the costs allocation rules for appeals should be the same as those applying to the proceedings giving rise to the appeal.¹⁶³ However, a number of responses to DRP 1 noted that their concerns about the proposed exceptions to the rule that costs follow the event in the initial proceedings also apply to appeals.¹⁶⁴

4.41 The Commission recommends that appeals in civil proceedings should be subject to the same costs allocation rules as those applying to the proceedings giving rise to the appeal with an additional power to deal with the situation where the appeal succeeds on a ground not raised at first instance which could and should have been raised at that time. It is not appropriate for a party to incur costs in an appeal as a result of the other party's failure to raise all the matters relevant to the litigation at the first instance.

Recommendation 9 — the general costs rules for appeals in civil proceedings

In appeals in civil proceedings costs shall follow the event subject to

- the rules relating to disciplinary and case management costs orders
- the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to
 - present his or her case properly or
 - negotiate a fair settlement
- the rules relating to public interest costs orders
- the appeal succeeding on a ground not raised at first instance which could and should have been raised at that time.

Recommendation 10 — orders the court may make if appeal succeeds on ground not previously raised

If a court finds that the appeal in civil proceedings succeeded on a ground not raised at first instance that could and should have been raised, the court may make such orders as to the costs of the appeal as it considers just. The orders the court may make include an order that

- each party bear his or her own costs of the appeal
- the unsuccessful party only pay the successful party's costs of the appeal up to a cap set by the court.

An order under this provision will be subject to the court's powers to make disciplinary and case management costs orders and other costs orders where it is satisfied that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to properly present his or her case or to negotiate a fair settlement.

Appeals assistance funds

4.42 The Commission supports the use of appeals assistance funds to indemnify unsuccessful respondents for all or part of the costs of the appeal. These funds are discussed in chapter 18.

5. Administrative law proceedings

Introduction

5.1 The administrative actions and decisions of government may be reviewed in a number of ways. They may be subject to judicial review by a court, administrative review by a tribunal¹⁶⁵ or investigation by an ombudsman. The costs rules in administrative law proceedings vary according to the type of review a party pursues. This chapter looks at those rules and concludes that the existing costs allocation rules should be retained subject to certain exceptions. The main rules recommended for administrative law proceedings are set out in Table 5.1.

Judicial review

The current rules

5.2 Administrative decisions and actions of Commonwealth officers and Ministers may be reviewed by the High Court¹⁶⁶ or by the Federal Court.¹⁶⁷ In judicial review proceedings the court determines whether a discretionary power allowed by a statute has been validly exercised by the administrative decision maker. In practice, most judicial review proceedings involving Commonwealth officers and Ministers are dealt with by the Federal Court. The costs in judicial review matters are at the discretion of the court.¹⁶⁸ This discretion will ordinarily be exercised to order the unsuccessful party to pay the costs of the successful party unless there are special circumstances.

The need for reform

5.3 The concerns about the costs allocation rules in judicial review proceedings are similar to those in relation to civil proceedings generally.¹⁶⁹ In particular, although the ability to recover costs if successful can assist parties who are able to obtain legal representation on a speculative fee basis, the risk of an adverse costs order can deter proceedings by

- people who may suffer substantial hardship including the loss of their home, car or livelihood if required to pay the other party's costs
- people or organisations involved in public interest litigation who have little or no personal interest in the matter.

Table 5.1

Summary of the main costs allocation rules recommended for administrative law proceedings

In judicial review proceedings — costs follow the event

- I pay my costs and your reasonable costs if I lose.
- You pay your costs and my reasonable costs if I win.
- However, if
 - the litigation is a public interest case
 - one of us is unable to present his or her case properly or to negotiate a fair settlement because of the risk of an adverse costs order

then some other order may be made as to the shifting of costs or to the amount of costs that may be recovered.

- Notwithstanding any other orders as to costs
 - I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.
 - I can recover any costs I incur as a result of another party's unmeritorious claims or defences or abuse of the court or tribunal process.
 - Our ability to recover costs from each other (if any) may be limited by the imposition of costs caps and settlement rules.

In Administrative Appeals Tribunal proceedings — each party bears his or her own costs

- I pay my costs and I might have to pay all or part of your costs if you are otherwise unable to present your case properly or to negotiate a fair settlement.
- You pay your costs and you might have to pay all or part of my costs if I am otherwise unable to present my case properly or to negotiate a fair settlement.
- Notwithstanding any other orders as to costs
 - I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.
 - I can recover any costs I incur as a result of another party's unmeritorious claims or defences or abuse of the court or tribunal process.
 - Our ability to recover costs from each other (if any) may be limited by the imposition of costs caps and settlement rules.

Possible reforms

5.4 The Commission is aware of the arguments for one-way fee shifting in administrative law matters on the basis that the review of government decisions leads to better and more accountable government and that this is in the public interest and should be encouraged.¹⁷⁰ However, while many judicial review proceedings will be in the public interest, many will be more concerned with the individual circumstances of the applicant or involve commercial interests.

The Commission's view

5.5 The Commission does not favour a rigid scheme of one-way fee shifting. It prefers the proposed costs allocation rules for civil proceedings which preserve many of the desirable features of the costs indemnity rule while ensuring that those who wish to bring public interest cases or who are affected by the risk of an adverse costs order are not impeded from litigating. This approach was supported by the responses to DRP 1.¹⁷¹

Recommendation 11 — Costs rules for judicial review proceedings

In judicial review proceedings, costs shall follow the event subject to

- the rules relating to disciplinary and case management costs orders
- the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to
 - present his or her case properly or
 - negotiate a fair settlement
- the rules relating to public interest costs orders.

Review by the Administrative Appeals Tribunal

The current rules

5.6 Many administrative decisions by federal agencies may be subject to merits review by the AAT whereby it 'steps into the shoes' of the decision maker and may exercise the powers available by law to him or her. The AAT does not have a general power to award costs. This means each party bears his or her own costs. However, in some types of matters the AAT may award costs against the government decision-maker if the applicant is successful.¹⁷² The AAT may also award costs to a successful claimant in compensation matters.¹⁷³

No general power to award costs

5.7 The Commission considers that the general costs allocation rule in proceedings before the AAT should continue to be that each party bear his or her own costs. There is widespread support for this approach.¹⁷⁴

5.8 A rule that costs follow the event would be inappropriate for a number of reasons.

- Proceedings before the AAT are fundamentally different in their nature and purpose from proceedings before the courts. The general functions conferred upon the AAT are administrative in character. Unlike a court, the AAT may determine what decision should be made in the exercise of an administrative discretion in a particular case and adjudicate upon the merits of a decision or the propriety of any policy upon which the decision was based. The AAT effectively becomes the administrative decision maker but a court may only determine whether a discretionary power allowed by a statute has been validly exercised. The role of the AAT as an inherent part of the administrative decision making structure could be undermined if access to it is impeded by the risk of an adverse costs order.
- There is a real likelihood that the risk of an adverse costs order would deter many applicants. Most applicants to the AAT are individuals seeking the review of a decision concerning income support. In 1993-94 the AAT received 6009 applications of which 1065 concerned employment and retirement benefits and 2850 concerned social welfare payments.¹⁷⁵
- As the government is always a party to proceedings before the AAT the risk of an adverse costs order is likely to have more affect on the applicant than the respondent agency.
- The introduction of a general costs shifting rule could lead to greater formality and technicality and give agencies an undue financial interest in defending their decisions on review.

Exceptions to the general rule

5.9 In DRP1 the Commission proposed the following exceptions to the general rule that each party should bear his or her own costs.¹⁷⁶

- ***Costs allocation pursuant to particular legislation.*** The current practice of empowering the AAT to order costs in favour of applicants under particular legislation should continue.
- ***Disciplinary and case management costs orders.*** The ability of the AAT to control the conduct of proceedings before it may be enhanced by having the power to make disciplinary costs orders where its rules or directions are not followed. Parliament is currently considering a Bill to amend the AAT Act to allow the AAT to award costs against a person or his or her representative who has engaged in conduct in which the party or representative ought not to have engaged where that conduct has caused another party to the proceedings to incur costs that would not otherwise have been incurred.¹⁷⁷ Disciplinary and case management costs orders are discussed in chapter 11.
- ***Proceedings where the inability to recover costs will materially affect a party's ability to present his or her case properly or to negotiate a fair settlement.*** Proceedings in the AAT are subject to a range

of rules and procedures concerning the conduct of the matter. They often involve complex issues of law or fact and hearings are often adversarial in nature. In a large proportion of hearings the parties are represented by lawyers or other advocates. In these circumstances it is possible that the inability to recover costs may affect the ability of some parties to obtain the assistance necessary to present their case properly or to negotiate a fair settlement. The costs allocation rules should allow the AAT, as soon as possible after the start of proceedings, to award costs to a party in these circumstances. The ability to seek a costs order under the third exception will complement the current sources of government assistance for eligible applicants through legal aid and grants by the federal Attorney-General under the AAT Act.¹⁷⁸

5.10 Responses to DRP 1 generally supported these exceptions.¹⁷⁹ However, one submission did not consider it appropriate for the AAT to have a power to make disciplinary costs orders.¹⁸⁰ Some government agencies opposed the third exception on the ground that it might be misused.¹⁸¹

Recommendation 12 — Costs rules in the Administrative Appeals Tribunal

In proceedings before the AAT each party should bear his or her own costs subject to

- the provisions of particular legislation
- disciplinary and case management costs orders
- an order for costs in favour of a party where the AAT is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

Review by other merit review tribunals

The current rules

5.11 There are a number of other tribunals that review administrative decisions by federal agencies in specific areas of decision-making. These include the Immigration Review Tribunal (IRT), Refugee Review Tribunal (RRT), Social Security Appeals Tribunal (SSAT) and Veterans Review Board. Like the AAT, these merit review tribunals 'step into the shoes' of the decision maker and may exercise the powers available by law to him or her. None of these specialist tribunals have a general power to award costs.¹⁸² This means each party bears his or her own costs.

No general power to award costs

5.12 The Commission considers that the rule that each party bear his or her own costs in matters before a merit review tribunal is appropriate given their objectives and procedures. The rule is consistent with the objectives of these tribunals to be fair, just, informal, economical and quick. It also reflects the non-adversarial nature of proceedings and the limited role of legal representatives. In some tribunals the government is not represented at all.¹⁸³ The introduction of a general costs shifting rule could lead to a more adversarial approach to proceedings, produce greater formality and technicality and give agencies an undue financial interest in defending their decisions on review. Responses to DRP 1 supported a general rule that each party bear his or her own costs in tribunal proceedings.¹⁸⁴

Exceptions to the general rule

5.13 In DRP1 the Commission proposed that merit review tribunals should be able to order a party who disobeys its directions or rules or who otherwise misbehaves to pay the costs of the other party incurred as a result of that disobedience or misbehaviour.¹⁸⁵ Although this exception received some support,¹⁸⁶ a number of responses were concerned that disciplinary costs orders may be inappropriate in tribunals where only the applicant appears.¹⁸⁷

5.14 In its submission, the IRT noted that, given the complexity of many immigration cases, it may be appropriate for the IRT to be able to order costs in favour of a party where it is satisfied that the order is

necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.¹⁸⁸ However, the IRT also noted that applicants to the IRT who appear without advisers have the same chance of success as applicants with advisers.

The Commission's view

5.15 The Commission considers that costs rules should not adversely affect the ability of tribunals to provide a fair, just, informal, economical and quick mechanism for the review of administrative decisions. Given the range of procedures used by tribunals to achieve this objective it may not be appropriate or necessary for all of them to have a power to make disciplinary costs orders. The preferable approach is for the legislature to provide such a power where it considers it is necessary having regard to the complexity of the tribunal's jurisdiction, the likely conduct of the parties and whether the proceedings are adversarial in nature.

Recommendation 13 — Costs rules in other merit review tribunals

In proceedings before federal merit review tribunals (other than the AAT) each party should bear his or her own costs unless the legislation establishing the tribunal provides otherwise.

Appeals

Appeals from judicial review

5.16 The costs of an appeal in judicial review proceedings are at the discretion of the appellate court. The appellate court may also make orders for the costs of and incidental to the proceedings giving rise to the appeal. Ordinarily, the unsuccessful party will be ordered to pay the successful party's costs of the appeal and of the earlier proceedings in the absence of circumstances justifying some other order. Where the appeal succeeds on a ground not raised at first instance the successful appellant will ordinarily not be awarded the costs of the appeal although the court may allow him or her part of the costs of the original proceedings.¹⁸⁹

5.17 In general terms, the costs allocation rules in an appeal should be the same as those applying to the proceedings giving rise to the appeal, except where the appeal succeeds on a ground not raised in the earlier hearings. Responses to DRP 1 supported this approach.¹⁹⁰

Recommendation 14 — The general costs rules for appeals in judicial review proceedings

The costs allocation rules for appeals in civil proceedings should apply in appeals in judicial review proceedings.

Appeals from the Administrative Appeals Tribunal

5.18 Both the applicant and the respondent agency to AAT proceedings have the right to appeal to the Federal Court on questions of law.¹⁹¹ At present the costs of an appeal are at the discretion of the court but will usually be awarded against the unsuccessful party.

5.19 The Commission considers that the costs allocation rules for appeals to the Federal Court from the AAT should be the same as the rules for appeals in judicial review proceedings. As appeals from the AAT concern questions of law and are conducted in accordance with the more formal and technical rules of court it will usually be necessary for the parties to have legal representation. The rule that costs follow the event subject to certain safeguards is appropriate in these cases.¹⁹² Responses to DRP 1 supported this approach.¹⁹³

Recommendation 15 — Costs allocation rules for appeals from the Administrative Appeals Tribunal to the Federal Court

Appeals from the AAT to the Federal Court should be subject to the costs allocation rules for appeals in judicial review proceedings.

Appeals from other merit review tribunals

5.20 In most merit review tribunals the applicant and the respondent agency may appeal to the AAT for a complete reconsideration of the matter.¹⁹⁴ In these appeals each party must pay his or her own costs. However, in proceedings before the IRT and the RRT the parties only have the right to appeal to the Federal Court on questions of law on grounds specified in the *Migration Act 1958* (Cth).¹⁹⁵ The costs of an appeal are at the discretion of the court but will usually be awarded against the unsuccessful party.

5.21 The Commission considers that

- in the case of appeals from the IRT and the RRT to the Federal Court, the costs allocation rules that apply to appeals in the Federal Court should apply as these appeals concern questions of law and are conducted in accordance with the more formal and technical rules of court
- in the case of appeals from other merit review tribunals such as the SSAT to the AAT, the costs allocation rules that apply in proceedings before the AAT should apply.

Responses to DRP 1 supported this approach.¹⁹⁶

Recommendation 16 — Costs allocation rules for appeals to the Federal Court from the IRT and RRT

Appeals from the Immigration Review Tribunal and the Refugee Review Tribunal to the Federal Court should be subject to the costs allocation rules for appeals in judicial review proceedings.

Recommendation 17 — Costs allocation rules for appeals to the Administrative Appeals Tribunal from other merit review tribunals

Appeals from merit review tribunals such as the Social Security Appeals Tribunal and the Veterans Review Board to the AAT should be subject to the costs allocation rules for proceedings before the AAT.

Appeals assistance funds

5.22 The Commission supports the use of appeals assistance funds to indemnify unsuccessful respondents for all or part of the costs of the appeal. These funds are discussed in chapter 18.

6. Family law proceedings

Introduction

6.1 This chapter examines the costs allocation rules for proceedings under the *Family Law Act 1975* (Cth) (Family law Act). It concludes that each party should continue to bear his or her own costs but the current exceptions should be replaced with new rules designed to enhance a court's control of proceedings and to facilitate litigation in certain situations. The chapter also looks at when a separate representative can seek or be subject to an order for costs. The main costs allocation rules recommended for family law proceedings are set out in table 6.1.

The current rules

6.2 In cases under the Family Law Act the general principle is that each party bears his or her own costs.¹⁹⁷ However, the court may make an order for costs if circumstances justify it.¹⁹⁸ When considering whether to make a costs order the court must take into account

- the financial circumstances of the parties
- whether any party is being assisted by legal aid
- the conduct of the parties
- whether the proceedings were necessitated by the failure of a party to comply with an order of the court
- whether any party has been wholly unsuccessful
- any settlement offer in writing that has been made by a party
- other matters the court considers relevant.¹⁹⁹

6.3 The court may also make an order for costs in relation to frivolous and vexatious proceedings.²⁰⁰

Table 6.1

Summary of the main costs allocation rules recommended for family law proceedings

In family law proceedings - each party bears his or her own costs

- I pay my costs and I might have to pay all or part of your costs if you are otherwise unable to present your case properly or to negotiate a fair settlement.
- You pay your costs and you might have to pay all or part of my costs if I am otherwise unable to present my case properly or to negotiate a fair settlement.
- Both of us might have to reimburse the legal aid commission for the cost of providing a separate representative.
- Notwithstanding any other orders as to costs
 - I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.
 - I can recover any costs I incur as a result of another party's unmeritorious claims or

defences or abuse of the court or tribunal process.

- Our ability to recover costs from each other (if any) may be limited by the imposition of costs caps and settlement rules.



Concerns about the current rules

Introduction

6.4 Although there is widespread support for the rule that each party bear his or her own costs in family law proceedings,²⁰¹ a number of concerns have been raised about the terms and operation of s 117.

Costs orders are seldom made

6.5 Orders for costs pursuant to s 117 are not made as frequently or as systematically as might be expected. This has been attributed to differing approaches within the court to these orders and to the fact that in many cases either no application for costs is made or, where an application is made, the court is often not given sufficient evidence of the factors set out in s 117(2A) to enable it to make an order.

Effect of s 117 unclear

6.6 The Family Law Act and Family Court practice notes give little guidance as to how the factors in s 117(2A) are to be weighed against each other. For example, they give no indication of the extent to which the financial circumstances of the parties should be taken into account²⁰² or the relative effect of the conduct of the parties to the litigation.²⁰³

Need for disciplinary costs orders

6.7 Under s 117 the court must consider the conduct of the parties in the proceedings when determining whether a costs order should be made. Many submissions noted that judges were reluctant to make costs orders even in severe instances of misconduct.²⁰⁴

6.8 The Joint Select Committee which reported on the provisions and operation of the Family Law Act recommended that the court make costs orders more often, especially where one party unnecessarily causes the other party to incur legal costs, and use costs orders more vigorously against parties who have not complied with court directions or who have not been ready to proceed when required.²⁰⁵ The Family Law Council has endorsed these recommendations.²⁰⁶

Costs orders to finance litigation

6.9 The ability to recover costs can help some people fund litigation. At present, the Family Court may make interim costs orders to assist a party to undertake legal proceedings.²⁰⁷ Such orders are made where one party has control of most of the matrimonial assets and funds and the other party is unable to fund his or her

action. The court may direct that the funds be treated as costs, lump sum maintenance or a partial property settlement.²⁰⁸ However, it appears that such awards are made infrequently.²⁰⁹

A new costs rule for family law proceedings

6.10 The Commission considers that the current starting point for costs allocation rules in family law proceedings that each party bear his or her own costs is appropriate. It is also appropriate for a costs order to be made where factors such as those listed in s 117(2A) justify it. However, there is a need for the costs rules in family law proceedings to give greater guidance on how those factors should be weighed up.

6.11 The factors listed in s 117(2A) are largely reflected in two exceptions to the general rule in civil proceedings. These are disciplinary and case management costs orders,²¹⁰ which reinforce the court's control of the proceedings, and orders where a party is unable to present his or her case properly or to negotiate a fair settlement.²¹¹

6.12 Family law costs rules also need to make specific provision for the costs of a child's separate representative. This is discussed later in this chapter.²¹²

6.13 The Commission therefore recommends that s 117 be replaced with a rule that each party to the proceedings bear his or her own costs subject to

- a disciplinary or case management costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party
- an order made in relation to the costs of a child's separate representative.²¹³

6.14 This recommendation will provide greater guidance to the courts and to the parties as to when costs may be ordered. Courts will still be required to have regard to the conduct of the parties, each party's financial circumstances and most of the other matters set out in s 117. The need to have regard to 'such other matters as the court considers relevant' has not been retained. The Commission considers that such a clause creates uncertainty and is not necessary given the range of disciplinary and case management costs orders available under this recommendation.

Recommendation 18 — General rule in family law proceedings

Each party to family law proceedings shall bear his or her own costs subject to

- a disciplinary or case management costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party
- an order made in relation to the costs of a child's separate representative.

Costs allocation rules and separate representatives

The current situation

6.15 The Family Court is able to appoint a separate representative for a child involved in a dispute within its jurisdiction.²¹⁴ The appointment may be made by the court on its own motion or on the application of the

child, an organisation concerned with the welfare of children or any other person.²¹⁵ A separate representative acts as an independent and impartial representative for a child and makes submissions to the court based on the welfare of the child.²¹⁶ In most cases, the relevant State or Territory legal aid body funds the separate representative. The increasing use of separate representatives in proceedings involving children has had a significant impact on the budgets of legal aid commissions.²¹⁷

6.16 It is unclear whether, and to what extent, a separate representative can seek or be subject to costs orders. The Family Court has noted that costs could be awarded for or against a separate representative by treating him or her as a party to the proceedings or pursuant to the court's inherent power to order costs against non-parties.²¹⁸ In *Pagliarella v Pagliarella [No3]*²¹⁹ the Court held that it had power to award costs against the Legal Aid Commission representing a child. Some commentators have suggested that the Family Court may, pursuant to s 65 of the Family Law Act, order one or both of the parties to pay all or part of the costs of a separate representative.²²⁰

The Commission's draft recommendation

6.17 In DRP 1 the Commission proposed that the Family Court should be able to order one or both parties to pay the costs incurred by a legal aid commission that provides separate representation.²²¹ It also proposed that a separate representative should only be liable for costs pursuant to a disciplinary costs order.²²²

6.18 These proposals attempted to address a number of concerns, including

- the potential conflict of interest if a separate representative is funded by one or both parties
- the potential for argument about who should fund a separate representative and the effect such an argument may have on relations between the parties and the separate representative
- the possible adverse affect on the ability of a separate representative to act in the best interests of the child if he or she is a party to the proceedings and liable to an adverse costs order.

6.19 The Commission considered it preferable for the costs of a separate representative to be allocated at the instigation of the court and not of the parties. This should help to reduce the potential for argument and for conflict of interest.

Responses to DRP 1

6.20 Most submissions supported the proposed reforms.²²³ However, concern was raised about the impact that such an order may have on the child.²²⁴ For example, it could reduce the standard of living a parent could offer the child or the extent to which parent-child contact is financially possible. The Commission agrees that the court should consider the impact on the interests of the child when determining whether to make a costs order in favour of a separate representative.

6.21 Many submissions considered that the grounds for disciplinary and case management costs orders should be used to determine whether a cost order for the separate representative's costs is necessary.²²⁵ The Commission considers that the main criteria should be the best interests of the child. Disciplinary and case management costs orders will still be available to the court if the parties' conduct requires them.

6.22 Concern was also expressed about the appropriateness of allowing disciplinary costs orders to be made against separate representatives. Such orders may be inappropriate as separate representatives are funded by legal aid commissions and perform a public service.²²⁶ The Commission considers separate representatives should be subject to disciplinary and case management costs orders. These orders help the court to control the proceedings and should be available to ensure that separate representatives comply with the court's procedures and directions.

Recommendation 19 - Costs orders in favour of separate representatives

At any stage of family law proceedings the court may, on its own motion, order the parties to make provision for reimbursing the legal aid commission for all or a defined part or parts of the costs of the legal aid commission in providing representation of the child or children the subject of the proceedings unless such an order would be contrary to the best interests of the child or children.

Recommendation 20 - Costs orders against separate representatives

A separate representative should not be liable for the costs of the other parties other than pursuant to a disciplinary or case management costs order.

Guardians and medical treatment

6.23 Substantial expense may be incurred by parties defending or challenging a guardian's right to make decisions about a child's medical treatment.²²⁷ The Commission considers that the cost implications of such actions need further examination to determine if special provisions are required.

Appeals

The current situation

6.24 The costs of an appeal to the Full Court of the Family Court are determined in accordance with s 117 of the Family Law Act which provides that each party bears his or her own costs unless the court orders otherwise. In practice the Full Court usually awards costs against the unsuccessful party to an appeal.

Proposed reforms

6.25 In DRP 1 the Commission suggested that the costs allocation rules for appeals should be the same as those applying to the proceedings giving rise to the appeal. However, the rule must be flexible enough to deal with situations where a cost sanction or a cost allowance is required, such as where the appeal succeeds on a ground not raised in the earlier hearings.

6.26 Responses to the proposal were mixed. Some submissions considered the costs indemnity rule should apply to Family Court appeals to discourage unmeritorious and unnecessary appeals.²²⁸

The Commission's view

6.27 The Commission recognises that there may be value in the courts awarding costs to the successful party in appeals. However, given the nature of family proceedings the Commission prefers that such awards be made under the guidelines set out in recommendation 21. This ensures that special circumstances of the parties and case management are properly considered. Some Family Court matters may raise issues that are in the public interest. The Commission considers that appropriate costs orders should be made in such circumstances.²²⁹

Recommendation 21 - The general costs rules for appeals in family law proceedings

Each party to an appeal in family law proceedings shall bear his or her own costs subject to

- a disciplinary or case management costs order
- a public interest costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party
- the appeal succeeding on a ground not raised at first instance that could and should have been raised at that time.

Recommendation 22 - Orders the court may make

If a court finds that the appeal succeeded on a ground not raised at first instance that could and should have been raised at that time, the court may make such orders as to the costs of the appeal as it considers just. The orders the court may make include an order that the successful party pay all or part of the unsuccessful party's costs of the appeal.

An order under this provision will be subject to the court's powers to make disciplinary costs orders.

Appeals assistance funds

6.28 The Commission supports the use of appeals assistance funds to indemnify parties for all or part of the costs of the appeal. These funds are discussed in chapter 18.

7. Criminal proceedings

Introduction

7.1 This chapter examines the ability of the Crown and a defendant to recover costs in criminal proceedings. Particular attention is given to the need for strengthening the link between costs orders and compliance with court procedures and directions in criminal matters.

7.2 In reviewing the costs rules for criminal proceedings, the Commission has aimed to develop a single costs model that can be applied to all federal matters in all jurisdictions. To ensure uniformity, the Commission considers that this model should also apply to criminal proceedings under State and Territory laws.²³⁰

7.3 A summary of the main costs allocation rules for criminal proceedings is set out in table 7.1.

A federal model for costs in criminal proceedings

Federal offences and State and Territory courts

7.4 Federal offences arise under the *Crimes Act 1914* (Cth) and federal laws dealing with such areas as customs, immigration and trade practices.²³¹ Most criminal proceedings for federal offences are conducted in State and Territory courts²³² which deal with them according to their own rules of procedure unless the Constitution or another law of the Commonwealth provides otherwise.²³³ This means that the costs rules applied in most criminal proceedings for federal offences are the rules applicable in the State or Territory that conducts the proceedings. It is therefore possible for those charged with federal offences to be liable to different treatment depending on where the charges are heard.

Table 7.1

Summary of the main costs allocation rules recommended for criminal proceedings

In criminal proceedings - one way costs shifting
<ul style="list-style-type: none">• The prosecution always pays its own costs unless the accused unreasonably failed to comply with the court's directions or the legislation creating the offence provides for a right to recover costs.• The prosecution also pays the defendant's reasonable costs if he or she is successful in obtaining a dismissal, acquittal or withdrawal of charges in a criminal proceeding unless the court is satisfied that, in all the circumstances of the case, some other order as to costs should be made.

Table 7.2

A simplified table of current costs rules in criminal proceedings

Summary Proceedings	
Power to award costs to either party	Restrictions on awarding costs in favour of successful defendant
Australian Capital Territory South Australia Tasmania Victoria Western Australia	New South Wales Queensland Northern Territory

Trials		
No power to award costs for or against the Crown	Power to award costs against a person convicted of an indictable offence but not against the Crown	Power to award costs to defendants in limited situations but not to the Crown
Australian Capital Territory Northern Territory Queensland South Australia	Queensland Victoria Western Australia	New South Wales Tasmania

Competing interests of justice

7.5 Criminal proceedings can impose a substantial financial burden on defendants. There are competing interests of justice in determining who should bear that burden. On the one hand it is prima facie unjust if an innocent person pleads guilty or suffers financial hardship as a result of being unable to recover the costs of a successful defence. On the other hand the administration of criminal justice may be adversely affected if the initiation and conduct of prosecutions are unduly influenced by the risk of an adverse costs order.

Current costs rules in criminal proceedings

Different costs allocation rules for summary proceedings and trials

7.6 The laws of criminal procedure differ for trials and summary proceedings. Trials are generally conducted before a judge and jury and deal with indictable offences.²³⁴ Indictable offences are more serious and attract heavier penalties than summary offences.²³⁵ Summary proceedings are generally heard before a magistrate or a single judge and deal with less serious offences.²³⁶ In almost all Australian jurisdictions the cost rules for trials are different from those for summary proceedings. In many jurisdictions the rules also vary according to whether the party seeking costs is the prosecutor or the defendant. The current costs rules for summary proceedings and trials are set out in table 7.2.

Costs rules for summary proceedings

7.7 In all Australian jurisdictions the courts have a statutory discretion to award costs in summary proceedings. However, the discretion is subject to different conditions in each State and Territory.

7.8 In most jurisdictions the court has a broad power to award costs to either party in summary proceedings.²³⁷ The court usually has power to make such orders as it thinks are just and reasonable in the circumstances of the case. It appears that costs orders are regularly made in these jurisdictions.²³⁸

7.9 In New South Wales, Queensland and the Northern Territory there are restrictions on awarding costs in favour of a successful defendant. The degree to which the court's discretion is restricted varies. In New South Wales the court must be satisfied that the investigation or prosecution was conducted improperly or unreasonably or that there are other exceptional circumstances before a successful defendant will be awarded costs.²³⁹ The Queensland provision is only marginally less restrictive.²⁴⁰ In the Northern Territory the legislation focuses on the conduct of the defendant rather than the prosecution. A successful defendant may be awarded costs unless he or she unreasonably or intentionally contributed to the initiation or continuation of the proceedings or was acquitted on a technicality.²⁴¹

Costs rules for trials

7.10 In the Australian Capital Territory, Northern Territory, Queensland and South Australia no costs may be awarded for or against the Crown in trials. In Victoria and Western Australia the court may, in certain circumstances, award costs against a person who is convicted of an indictable offence.²⁴²

7.11 Costs may be awarded to defendants in limited situations in New South Wales and Tasmania.²⁴³ In New South Wales and South Australia, there are limited powers to award costs in minor indictable matters where the defendant elects to have the matter dealt with in the same way as a summary offence.²⁴⁴

Funding for legal costs in criminal proceedings

Availability of legal aid

7.12 Legal aid commissions in each State and Territory provide assistance to defendants who satisfy the relevant means and merits tests and who are at risk of imprisonment or other serious penalty if convicted. In 1994-95, 88 520 applications for legal aid in criminal matters were granted.²⁴⁵ The Commission estimates that, across Australia, between 30 to 50 per cent of defendants in magistrates courts and 50 to 75 per cent of defendants in other courts are assisted by legal aid.²⁴⁶

Impact where legal aid is not available

7.13 People accused of criminal offences who are not eligible for legal assistance must fund their own defence. In some types of criminal proceedings an individual who is not eligible for legal assistance may be unable to conduct his or her defence properly. In some cases (eg proceedings where the maximum penalty is a fine below \$1000), a person may plead guilty rather than defend the proceedings because of the costs involved.²⁴⁷ Allowing defendants to recover the reasonable costs of a successful defence may reduce the incidence of financial hardship and encourage innocent people to defend charges against them.

Responses to the Commission's draft recommendations

Different costs rules for summary proceedings and trials

7.14 In DRP1 the Commission proposed different costs rules for summary proceedings and trials in light of

- the existence of the committal process and other mechanisms designed to prevent unmeritorious matters going to trial
- the greater availability of legal aid for an accused in a trial given the seriousness of indictable offences
- the possibility that the risk of a costs order may have a greater deterrent effect on the prosecution in a trial than in summary proceedings given the greater costs involved.²⁴⁸

7.15 Most responses rejected this approach and supported the introduction of a single set of costs rules for summary proceedings and trials.²⁴⁹ This was on the basis that

- committal proceedings are an inadequate filter as the magistrate usually has insufficient evidence to determine the real merits of the case²⁵⁰
- screening of cases by the DPP may not be a reliable filtering process because some cases are prosecuted as a matter of policy even though there may not be enough evidence to convict²⁵¹
- a significant number of defendants in indictable matters do not qualify for legal aid and may suffer substantial hardship in presenting their case²⁵²
- the risk of an adverse costs order will not affect the administration of justice by deterring the prosecution from bringing appropriate cases to court.

Costs rules in criminal proceedings

7.16 There was general support for the Commission's proposal that a defendant acquitted in summary proceedings should be able to recover his or her reasonable costs.²⁵³ A similar rule already exists in most

jurisdictions in Australia.²⁵⁴ Such a rule allows innocent defendants to defend charges without the risk of financial hardship. It also encourages the prosecution to consider the merits of each charge carefully.

7.17 There was less support for the Commission's proposal that the prosecution should only have to pay the accused's costs of a trial if the charges were withdrawn or the court finds there is no case to answer.²⁵⁵ Many responses considered this approach to be too narrow and identified a number of concerns including that

- charges may be withdrawn or there may be no case to answer for reasons that have nothing to do with the merits of the case²⁵⁶
- costs rules should not deter the prosecution from withdrawing charges on public interest grounds²⁵⁷
- the decision to award costs should take into account the reason for the success of the defendant costs may not be appropriate where, for example, the acquittal is due to a technicality²⁵⁸
- exposing the prosecution to costs would encourage better filtering of cases²⁵⁹
- the rule should specify the costs that could be recovered as there is some uncertainty as to when a trial actually starts.²⁶⁰

Disciplinary costs orders

7.18 In DRP1 the Commission proposed that in any criminal proceedings the successful defendant's ability to recover costs should be subject to a disciplinary or case management costs order.²⁶¹ This proposal attracted qualified support. Concern was expressed that

- a disciplinary or case management costs order may act as an additional penalty on the defendant
- such orders may be inappropriate given that the criminal justice system lacks an effective case management program²⁶²
- disciplinary or case management costs orders must be balanced against the right of the defendant to put the prosecution to proof on all matters.

The Commission's view

Same costs rules for all criminal proceedings

7.19 The Commission considers that there is no compelling reason for maintaining different costs rules for summary and indictable matters.

Presumption that a person who is acquitted should recover costs

7.20 In order to avoid hardship suffered by some criminal defendants in presenting their case, the Commission considers it appropriate that a person acquitted of a criminal charge should recover his or her costs. However, this rule must be balanced against the need for an effective and efficient criminal justice system. A court should have the power to make a different costs orders in appropriate circumstances.

7.21 The Commission notes that this recommendation will have financial implications for many prosecuting authorities. In some cases it may be necessary for the relevant government to provide the additional resources an authority may need to meet its obligations under the proposed costs rule.

Circumstances where a different costs order may be appropriate

7.22 For criminal cases to be managed effectively, courts should be able to use costs orders to enforce their procedures and directions. However, the Commission recognises that disciplinary or case management costs

orders as proposed for proceedings in civil, family and other matters are inappropriate for criminal proceedings.

7.23 Accordingly, the Commission recommends that the court, when considering whether it is inappropriate for a successful defendant to recover his or her costs, should have regard to

- the conduct of the parties, such as the conduct of the defence and the cooperation of the accused in complying with the directions of the court
- the reasons for the dismissal, acquittal or withdrawal of the charge, such as whether it was based on technical grounds
- the public interest
- whether the accused acted unreasonably during the course of the police investigations.²⁶³

The reasonable costs of a trial

7.24 Where a costs award is made, it is appropriate that the reasonable costs of the committal and of any previous trials regarding the same charges be recovered unless the court orders otherwise. Reasonable costs are those costs reasonably required to prepare and conduct the litigation.²⁶⁴

Who must pay a successful defendant's costs

7.25 Where police or the DPP bring the prosecution the Commission expects, as is current practice, that costs will be paid by the Crown and not the informant.²⁶⁵ A private informant will continue to be personally liable for any adverse costs.

Recommendation 23 - successful accused in criminal proceedings to recover costs

The prosecution shall pay the reasonable costs of an accused who is successful in obtaining a dismissal, acquittal or withdrawal of charges in a criminal proceeding unless the court is satisfied that, in all the circumstances of the case, some other order as to costs should be made.

When considering whether to make some other order as to costs the court should have regard to

- whether the dismissal, acquittal or withdrawal of charges was based on technical grounds or the public interest
- whether the accused unreasonably declined an opportunity before a charge was laid to explain his or her version of the events or to produce evidence likely to exonerate him or her which could have avoided a prosecution
- whether the accused conducted the defence in a way that unreasonably prolonged the proceedings
- whether the accused was acquitted on a charge, but convicted on another
- whether the accused unreasonably failed to comply with directions of the court.

Recommendation 24 - definition of 'criminal proceeding'

For the purposes of recommendation 25, 'criminal proceeding' includes summary proceedings, committals, trials and any associated proceeding.

Recommendation 25 - other orders the court may make

If the court is satisfied that some other costs order should be made, the court may order that

- no costs be awarded to the accused
- part of the costs be awarded to the accused.

Recommendation 26 - definition of reasonable costs

The reasonable costs of a trial shall include the reasonable costs of the committal and of any previous trials concerning the same indictment.

Costs incurred prior to charges being laid or an indictment being presented

Introduction

7.26 Significant legal and other costs may be incurred by a party being investigated for an offence and preparing for court proceedings. Where the police do not charge the party or the prosecution decides not to present an indictment to the court the party is not able to recover his or her costs. This is because the court has no jurisdiction over the matter.

7.27 The Commission is concerned that this situation can cause considerable injustice. One submission described a case of this kind where costs in excess of \$80 000 were incurred but as no indictment was presented the court was powerless to grant costs.²⁶⁶

7.28 Similar concerns may arise in relation to the costs incurred as a result of investigations by the Australian Securities Commission, National Crimes Authority and other regulatory and investigatory agencies which do not result in charges being laid.

Recovering costs where no indictment is presented

7.29 The Commission has recommended that, as a general rule, a defendant should be able to recover his or her costs where an indictment is withdrawn.²⁶⁷ It would therefore be anomalous for costs awards to be available in this situation but not where charges are laid but an indictment is never presented.

7.30 One solution could be to allow a defendant in such circumstances to recover his or her costs either by an application to the court that would have otherwise dealt with the matter or by some other mechanism. Some safeguards would be required. For example, in principle a defendant should not be able to recover costs where

- the decision not to present the indictment was part of a negotiated settlement with the defendant or was based on technical grounds or the public interest
- the defendant unreasonably obstructed the investigation or unreasonably failed to comply with any lawful direction.

7.31 There are other factors that would need to be considered including any policy guidelines adopted by prosecution authorities when deciding whether or not to present an indictment and, at the broader level, the competing interests of justice described below.

Recovering costs where no charges are laid

7.32 Concerns about an unjust burden of costs also arise in relation to any official investigation where no charges are laid, regardless of whether the investigation is by the police or by a regulatory or investigatory body which has the power to compel a person to give it information. However, there are competing interests of justice. On the one hand it is prima facie unjust if an innocent person suffers a financial burden as a result of being unable to recover the costs of an investigation that does not establish any offence or wrongdoing. On the other hand the administration of laws and regulations intended to protect the public may be adversely affected if the initiation and conduct of investigations are unduly influenced by the possibility of an adverse costs order.

7.33 It would also be undesirable for costs to be awarded where no charges were laid because of a settlement negotiated with the person being investigated. This is particularly relevant to investigations by bodies such as the Trade Practices Commission where it may be agreed that an undertaking or other remedy provided by the person being investigated better serves the public interest than a criminal trial.

7.34 In addition, allowing a person to recover his or her investigation costs raises a number of practical issues. These include

- how such a rule would relate to the costs provisions in, for example, the *Australian Securities Commission Act 1989* (Cth)²⁶⁸ and the *National Crimes Authority Act 1984* (Cth)²⁶⁹ which require witnesses to be reimbursed for lost wages and other expenses (but not legal costs)
- which court would deal with applications and would the proceedings be criminal or civil
- what costs may be recovered and how are they to be assessed.

The Commission's view

7.35 These issues were not canvassed in the Commission's inquiry and further consultations are required both with relevant agencies and with those affected by investigations. In addition, the apportionment of legal costs incurred in criminal and investigative procedures that do not lead to court action is outside the Commission's terms of reference. Accordingly, the Commission does not make any recommendations at this stage.

7.36 However, these issues raise important questions about where the balance should be struck between the public interest in effective law enforcement and the interest in ensuring innocent people do not suffer a financial burden as a result of engaging reasonable legal representation during investigations. They require further examination. Accordingly, the Commission considers that

- the federal Government should, through the Standing Committee of Attorneys-General, examine the question of whether, and in what circumstances, a person who has been committed to stand trial should be able to recover his or her legal and other costs where no indictment is presented
- the federal Attorney-General should examine the question of whether, and in what circumstances, it would be appropriate for a person to recover the legal and other costs he or she incurs as a result of an investigation by the police or by an investigatory or regulatory agency where the matter does not result in charges being laid.

Prosecution's costs in criminal proceedings

The current situation

7.37 In most jurisdictions the court has a broad power to award costs to the prosecution in summary proceedings.²⁷⁰ In contrast, the power to award costs against a person who is convicted of an indictable offence is only available in Victoria, Tasmania and Western Australia.²⁷¹ However, these provisions are rarely used.²⁷²

A limited power to award costs to the prosecution

7.38 In DRP1 the Commission proposed that the prosecution should be able to recover costs only pursuant to a disciplinary and case management costs order or an order that costs be awarded as part of the penalty.²⁷³ This proposal received general support.²⁷⁴ Such an approach reflects the view that it is generally inappropriate for a defendant who is found guilty of an offence to be liable for the costs of the prosecution given that

- he or she is already subjected to some form of penalty
- a prosecutor is performing a public duty and is backed by the resources of the state
- in many jurisdictions the sentence imposed on a defendant who is found guilty after trial does not attract the discount which would be given for a timely plea of guilty²⁷⁵
- the prosecution can use its power to seize and forfeit assets of criminals on conviction.²⁷⁶

7.39 However, the prosecution should be able to recover costs where a defendant has failed to comply with orders of the court, unreasonably prolonged the proceedings or unreasonably withheld significant evidence until a late stage of the proceedings. The imposition of costs in these situations reinforces the court's ability to reduce the complexity, duration and costs of trials.

7.40 It is also appropriate for the prosecution to recover costs pursuant to specific legislation establishing an offence. For example, such a power may be appropriate under environmental protection legislation as the prosecuting authorities are often reluctant to proceed because of the high anticipated cost, the nature of the crime and the fact that the potential defendant is generally a corporation profiting from the alleged breach of the legislation.²⁷⁷

Recommendation 27 - no costs for successful prosecution

The prosecution should not be able to recover costs unless

- the court is satisfied that the accused unreasonably failed to comply with the court's directions
- the legislation creating the offence provides for a right to recover costs.

Appeals

The current situation

7.41 In most Australian jurisdictions the general rule is that no costs are awarded in criminal appeals.²⁷⁸ However, there are a number of exceptions to this rule.

- Courts dealing with appeals from a magistrate's court in relation to a summary offence may award costs to either party. In most jurisdictions the appellate court may award costs at its discretion.²⁷⁹ In New South Wales the District Court may only award costs to a successful defendant if it is satisfied that the investigation or prosecution was conducted in an unreasonable or improper manner or that there are other exceptional circumstances relating to the conduct of the prosecution that make a costs order appropriate.²⁸⁰ In Western Australia an appellate court must award costs to a successful defendant unless his or her conduct deliberately or unreasonably contributed to the initiation or continuation of the proceedings or certain other circumstances specified in the legislation exist.²⁸¹
- In New South Wales an appellate court may award costs to a defendant whose conviction is quashed and the indictment discharged or the information dismissed.²⁸² The court must be satisfied that, among

other things, the defendant did not unreasonably contribute to the initiation or continuation of the proceedings.²⁸³

- In Tasmania an appellate court may make such orders as to costs as it thinks fit.²⁸⁴

The Commission's view

7.42 Submissions on this issue generally supported the Commission's proposal that the costs allocation rules for appeals should be the same as those applying to the proceedings giving rise to the appeal.²⁸⁵ Accordingly, the Commission recommends that the costs rules for criminal appeals should

- make no distinction between appeals in summary and indictable proceedings
- assist the court to control the conduct of criminal appeals
- allow the court to examine the reason for the success of the appeal when determining whether costs should be awarded. (for example, if it was based on technical grounds then a costs award may not be appropriate)
- allow a court to consider whether the appeal succeeded on some grounds but not others when making the costs award²⁸⁶
- not award costs for the prosecution unless the accused unreasonably failed to comply with the court's directions or the legislation creating the offence grants a right to recover costs.

7.43 The costs rules should also deal with the situation where the appeal succeeded on a ground not raised at first instance which could and should have been raised at that time.

Recommendation 28 - costs in criminal appeals

The prosecution shall pay the reasonable costs of an accused who successfully appeals against a conviction or sentence or who successfully defends an appeal by the prosecution unless the court is satisfied that, in all the circumstances of the case, some other order as to costs should be made.

When considering whether to make some other order as to costs the court should have regard to

- whether the accused succeeded on technical or public interest grounds
- whether the accused conducted the appeal in a way that unreasonably prolonged the proceeding
- whether the accused was successful on only some of the grounds of appeal and failed on others
- whether the accused unreasonably failed to comply with directions of the court
- whether the appeal succeeded on a ground not raised at first instance which could and should have been raised at that time.

Recommendation 29 - no costs for prosecution on successful appeal

The prosecution should not be able to recover the costs of a successful appeal unless

- the court is satisfied that the accused unreasonably failed to comply with the court's directions
- the legislation creating the offence provides for a right to recover costs.

Recommendation 30 - other orders the court may make

If the court is satisfied that some other costs order should be made, the court may order that

- no costs be awarded to the accused
- part of the costs be awarded to the accused.

Appeals assistance funds

7.44 The Commission supports the use of appeals assistance funds to indemnify unsuccessful defendants for all or part of the costs of the appeal. These funds are discussed in chapter 18.

Costs certificates in criminal proceedings

7.45 A statutory scheme for costs in criminal proceedings exists in New South Wales, Tasmania and Western Australia.²⁸⁷ This scheme enables a court to grant a costs certificate to successful defendants if it is reasonable to do so having regard to certain matters. A costs certificate entitles a defendant to the reasonable costs of his or her defence.

7.46 The Commission supports these schemes as a mechanism for allowing innocent defendants to recover their costs under the current system. It also considers that these schemes complement the proposed recommendations by acting as a safeguard for defendants in specific circumstances. The federal appeals assistance fund discussed in chapter 18 would allow a defendant to recover his or her costs if the hearing was aborted due to the death or disability of the judicial officer hearing the matter or the dismissal of the jury.

8. Industrial Relations Court of Australia

Introduction

8.1 The Industrial Relations Court of Australia deals with disputes under the *Industrial Relations Act 1988* (Cth) (IR Act).²⁸⁸ Most applications before the IRC are claims of unlawful termination of employment involving an individual and an employer.²⁸⁹ This chapter reviews the current costs rules in the IRC in light of its specialised jurisdiction and stringent case management program. A summary of the main rules recommended for IRC proceedings are set out in table 8.1.

Procedures before the IRC

8.2 The IRC's procedures are relatively informal and one-third of the applicants appear in person.²⁹⁰ Matters are initially referred to a Judicial Registrar for mediation or to the Industrial Relations Commission for conciliation.²⁹¹ Approximately 87 per cent of matters are resolved in this way.

8.3 The costs of IRC proceedings are controlled by strict case management and limits on the use of discovery, affidavits and other procedures.

Costs orders in the IRC

8.4 Under the IR Act a successful party may only recover costs if the other party instituted the proceedings vexatiously or without reasonable cause.²⁹² The 'proceeding' includes any part of a proceeding including an appeal or interlocutory proceeding.²⁹³ The wording of the section means that only the respondent to an application or to an appeal has an opportunity to recover costs. These costs rules place a heavy onus on the IRC to ensure the proceedings before it are conducted efficiently and economically so that the parties do not incur unnecessary expense.

Table 8.1

Summary of the main costs allocation rules recommended for Industrial Relations Court proceedings

In proceedings before the Industrial Relations Court of Australia - each party bears his or her own costs
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- | |
|---|
| <ul style="list-style-type: none">• I pay my costs and I might have to pay all or part of your costs if you are otherwise unable to present your case properly or to negotiate a fair settlement.• You pay your costs and you might have to pay all or part of my costs if I am otherwise unable to present my case properly or to negotiate a fair settlement.• Notwithstanding any other orders as to costs<ul style="list-style-type: none">— I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.— I can recover any costs I incur as a result of another party's unmeritorious claims or defences or abuse of the court or tribunal process.— Our ability to recover costs from each other (if any) may be limited by the imposition of costs caps and settlement rules. |
|---|

The operation of the costs rules

8.5 The rule that each party should bear his or her own costs is consistent with the informal nature of IRC proceedings and the limited involvement of lawyers. It encourages parties to resolve their dispute quickly and without the need for a hearing. Where a matter does go to a hearing the rule encourages the parties to keep costs low. Anecdotal evidence suggests that the rule helps ensure that the IRC is accessible.

8.6 However, the rule does have some disadvantages. Parties who do use legal representation can incur substantial costs, particularly if the matter goes to a hearing. In many cases these costs may exceed the amount in dispute. In addition, the cost of proving that proceedings were instituted vexatiously or without reasonable cause will often outweigh the costs that may be recovered. There is also concern that the rule does not allow an applicant to recover costs where the respondent's defence is vexatious or without reasonable cause.

Proposed reforms

8.7 The Commission considers that the general rule in the IRC should continue to be that each party bears his or her own costs. However, it is concerned that the IRC should have broader powers to use costs orders as a sanction for non-compliance with its procedural rules and directions. Accordingly, the Commission recommends that the general rule should be subject to disciplinary and case management costs orders.²⁹⁴ Under these orders the IRC will still be able to award costs where proceedings are instituted vexatiously or without reasonable cause.

8.8 The Commission is also concerned that there may be cases where a party is unable to present his or her case properly or to negotiate a fair settlement because he or she cannot afford legal representation. This may arise, for example, where a legally represented employer or employee is determined to have the matter go to a hearing. In these cases it may be appropriate for the IRC to make a costs order to allow the litigation to proceed on an equitable footing.

Recommendation 31 - costs in proceedings under the Industrial Relations Act 1988 (Cth)

Each party to proceedings shall bear his or her own costs subject to

- a disciplinary or case management costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

9. Federal tribunals

Introduction

9.1 In addition to the tribunals that review administrative decisions,²⁹⁵ the Commonwealth has established other tribunals and Commissions to hear and determine claims under particular federal laws. For example, the National Native Title Tribunal conducts inquiries and makes determinations in relation to claims or issues concerning native title.²⁹⁶ The Human Rights and Equal Opportunity Commission (HREOC) hears and determines complaints brought under federal anti-discrimination laws.²⁹⁷ This chapter examines whether federal tribunals and Commissions should have a power to award costs and, if so, the types of costs orders they should be able to make.

The current situation

9.2 Most tribunals and Commissions do not have power to order one party to pay the legal costs of the other party to proceedings. Accordingly, each party bears his or her own costs. However, some tribunals are able to award costs under the legislation establishing them.²⁹⁸

Can federal tribunals award costs?

9.3 An issue arises as to whether federal tribunals are able to make enforceable costs orders. If the ability to make costs orders involves an exercise of judicial power then they may only be made by courts established under Chapter III of the Constitution.²⁹⁹ As tribunals are not Chapter III courts they would not be able to apply or authorise coercive measures to enforce any costs orders they may make.

9.4 In *Brandy v HREOC*³⁰⁰ the High Court also held that a tribunal cannot enforce its determinations by registering them in the Federal Court. This means costs orders cannot be enforced in this way either.

9.5 It is not clear whether the ability to enforce costs orders is an exercise of judicial power. The High Court has suggested that federal tribunals can make binding orders and decisions against the Commonwealth.³⁰¹ However, their powers in relation to other parties are uncertain.

9.6 The government is currently considering how to respond to the decision in *Brandy*. One solution is to allow the court system to exercise those powers found by the High Court to be judicial. This approach will allow determinations to be enforced but does not address the general issue of whether tribunals may make costs orders.

9.7 The following recommendations are formulated on the assumption that tribunals do have constitutional power to make costs orders and that an effective mechanism for enforcing these costs orders will be available.

Responses to the Commission's draft recommendations

9.8 In DRP 1 the Commission proposed that in proceedings before a federal tribunal each party should bear his or her own costs subject to disciplinary and case management costs orders.³⁰² This recommendation received general support.³⁰³ However, some responses expressed concerns about whether it is appropriate or necessary

- to have a single costs rule for all federal tribunals given the different functions that each performs³⁰⁴
- to allow all tribunals to make disciplinary and case management costs orders.

The Commission's view

Power of tribunals to award costs

9.9 Most tribunals are intended to be a fair, just, informal, economical and quick mechanism to resolve disputes arising under particular federal legislation. They are usually established to avoid the cost and complexity of court proceedings. The need for a particular tribunal to award costs will depend on the complexity of its jurisdiction, the nature of the parties who come before it and the procedures it uses. It is therefore not possible to provide a single costs allocation rule for all federal tribunals.

9.10 The Commission considers that the preferable approach is for the legislature to determine whether it is appropriate and necessary for a tribunal to be able to order costs.

Disciplinary and case management costs orders

9.11 The Commission accepts that it is probably not necessary for all tribunals to have the power to make disciplinary and case management costs orders. However, it considers that tribunals which are able to award costs should be given the power to make a disciplinary and case management costs order.

Recommendation 32 - each party should bear his or her own costs in tribunal proceedings

In proceedings before a federal tribunal each party should bear his or her own costs unless the legislation establishing the tribunal provides otherwise.

10. Appeals against costs allocation orders

Maintaining the current situation

10.1 In most jurisdictions an appeal against a costs order may only be made with the leave of the court.³⁰⁵ As the awarding of costs is a matter for the discretion of a court, leave to appeal will only be given if it can be shown that the trial judge's discretion has miscarried either by reason of some manifest error or by consideration of irrelevant matters.³⁰⁶ In DRP 1 the Commission proposed that the current situation regarding appeals against costs orders should continue.³⁰⁷ This proposal was generally supported,³⁰⁸ although one submission considered that the appellate court's discretion to grant leave to appeal should not be limited.³⁰⁹

The Commission's view

10.2 Costs orders must be determinative and must not become the subject of protracted and expensive appeals. It would be counterproductive if, for example, costs orders intended to achieve a disciplinary or case management outcome were undermined by an unlimited right of appeal, or if costs orders were allowed to become a substantive issue in dispute, adding to the total costs of litigation rather than reducing them. Costs orders should be treated primarily as ancillary to orders available to a court to manage and control the litigation. Accordingly, costs orders should be subject to appeal only in limited circumstances.

Recommendation 33 - appeals against an order for costs

There should be no right of appeal against an order for costs. An appeal against a costs order may, however, 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.

11. Disciplinary and case management costs orders

Introduction

11.1 In this chapter the Commission recommends a range of disciplinary and case management costs orders that may be used by a court or tribunal to enforce its control of the litigation process. Disciplinary costs orders include costs orders made in relation to controlling the conduct of proceedings³¹⁰ and to filtering claims and defences.³¹¹ Case management costs orders are costs orders made to encourage settlement of the dispute or to control the costs of the proceedings. They include costs orders associated with formal settlement procedures³¹² and the capping of costs.³¹³

11.2 To perform their functions efficiently and without unnecessary cost to the community or to the parties, courts and tribunals have developed (and are continuing to develop) rules and procedures to deal with

- the use of unnecessary or unduly expensive procedures
- claims or defences that are unreasonable or are frivolous or vexatious
- matters that are argued in the wrong jurisdiction (eg small claims in a superior court) or that are more appropriately dealt with in another dispute resolution forum
- cases where settlement is not fully or seriously explored by the parties at all or not until a late stage of the proceedings
- matters where the likely cost of the proceedings is out of proportion to the complexity or value of the issues in dispute.

The ability to make disciplinary and case management costs orders is an important mechanism for encouraging parties and their legal representatives to comply with these rules and procedures.³¹⁴ Courts and tribunals should have the power to make such orders regardless of whether the general costs allocation rule is that costs follow the event or that each party bear his or her own costs.

Controlling the conduct of proceedings

The Commission's draft recommendation

11.3 In DRP 1 the Commission proposed that a court or tribunal should be able to make a disciplinary costs order against a party, his or her legal representative or any other person involved in the litigation who, in the opinion of the court or tribunal,

- does not comply with a procedural rule or an order of the court or tribunal
- causes unnecessary delays
- significantly increases the costs of the matter by unreasonably pursuing one or more issues on which he or she fails
- causes the other party to incur costs that were not necessary for the economic and efficient conduct of the proceedings, including costs incurred as a result of seeking leave to amend his or her pleadings or particulars or seeking an extension of time
- engages in conduct that, in the opinion of the court or tribunal, hinders the efficient and just determination of the issues in dispute
- has unreasonably refused to negotiate a settlement or participate in alternative dispute resolution

- otherwise abuses the processes of the court.³¹⁵

Many of the grounds set out in this proposal were based on the laws and practices already used by courts and by some tribunals to control the conduct of proceedings that come before them. Some of these laws and practices are contained in the rules of each court and tribunal.³¹⁶ Others have been developed by the courts in the exercise of their general discretion as to costs.³¹⁷

11.4 The Commission also proposed that where a court or tribunal is satisfied that there are grounds for a disciplinary costs order, it may make such orders as to costs as it considers appropriate including an order that the party, legal representative or other person (as the case may be) pay all or part of the costs incurred by the other party to the proceedings or by the court or tribunal as a result of the breach, delay, conduct or abuse of process.³¹⁸ In some cases a disciplinary costs order may be used to deprive a successful party of all or part of his or her costs.

Responses to the draft recommendation

11.5 There was general support for the Commission's proposal.³¹⁹ However, concerns were expressed about a few of the proposed grounds.

11.6 The Federal Court considered that courts should continue to be able to refuse to award a successful party the costs of issues on which he or she fails even where it was reasonable to pursue those issues.³²⁰ However, the Commission considers that this approach may deter parties from pursuing meritorious claims and defences in circumstances where it is reasonable to do so. Given the disciplinary nature of these costs orders it is appropriate that they be limited to situations where issues are pursued unreasonably.³²¹

11.7 Some responses considered that allowing a disciplinary costs order to be made against a party or his or her legal representative who engages in conduct that was not necessary for the economic and efficient conduct of the proceedings may conflict with the professional obligation of a lawyer to vigorously pursue the interests of his or her client.³²² The Commission considers that a lawyer also has an obligation to conduct litigation efficiently and without unnecessary expense to his or her client, to the other parties, to the court or tribunal and to the community. In *R v Wilson and Grimwade*³²³ the Supreme Court of Victoria described this responsibility in the following terms.

Let it be understood ..., without qualification, that part of the responsibility of all counsel in any trial, criminal or civil is to cooperate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present adversary system of litigation is to survive, it demands no less. ... This is not to deny that counsel are entitled and obliged to deploy such skill and discretion as the proper protection of their clients' interest demands. Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law; and neither privilege nor duty will survive the system of justice of which the court is part.

A lawyer must balance his or her obligations to the client and to the justice system when determining how to conduct the proceedings. Moreover, the rule does not prevent a party or his or her lawyer from pursuing the case vigorously it simply requires that party or lawyer to bear the costs incurred by the other parties as a result of the decision to conduct the matter in that way when it is not necessary to do so.

11.8 One submission was concerned that it may be difficult to know when a refusal to negotiate or to participate in ADR may be unreasonable and that this could cause some parties to accept unfair settlements.³²⁴ The Commission is confident that courts and tribunals will develop appropriate guidelines as to when a refusal may be considered to be unreasonable. For example, a party's refusal to participate in ADR may be considered unreasonable if it contributes to the proceedings being unnecessarily protracted.³²⁵

11.9 Concern was also expressed about allowing a court or tribunal to make a disciplinary costs order in favour of itself. This was considered to be unjust and to create a conflict of interest. The Commission agrees with this concern and has amended its recommendation accordingly.

The Commission's view

11.10 The imposition of costs on parties who do not comply with court or tribunal rules, directions and orders is an important part of a court or tribunal's ability to control the proceedings brought before it. The economic and efficient progress of proceedings reduces the costs of litigation to the parties, to the court or tribunal and to the community. For this reason the Commission considers it appropriate for courts to have specific powers to make disciplinary costs orders against parties, lawyers and any other persons involved in the litigation who breach their rules and directions or who otherwise abuse the litigation process. It is also appropriate for some tribunals to have these powers.³²⁶

11.11 Before making a disciplinary costs order the court or tribunal must give the parties an opportunity to make submissions.³²⁷ This reflects the current law and practice and ensures that orders are made in accordance with natural justice.

Recommendation 34 - grounds for a disciplinary costs order

At any stage of proceedings a court or tribunal should be able to make a disciplinary costs order against a party, his or her legal representative or any other person involved in the litigation who, in the opinion of the court or tribunal,

- does not comply with a procedural rule or an order of the court or tribunal
- causes unnecessary delays
- significantly increases the costs of the matter by unreasonably pursuing one or more issues on which he or she fails
- causes the other party to incur costs that were not necessary for the economic and efficient conduct of the proceedings, including costs incurred as a result of seeking leave to amend his or her pleadings or particulars or seeking an extension of time
- engages in conduct that, in the opinion of the court or tribunal, hinders the efficient and just determination of the issues in dispute
- has unreasonably refused to negotiate a settlement or participate in alternative dispute resolution
- otherwise abuses the processes of the court.

Recommendation 35 - terms of a disciplinary costs order

If the court or tribunal is satisfied that there are grounds for a disciplinary costs order, it may make such orders as to costs as it considers appropriate including an order that the party, legal representative or other person (as the case may be) pay all or part of the costs incurred by the other party to the proceedings as a result of the breach, delay, conduct or abuse of process.

Special orders against legal and other representatives

The current situation

11.12 Courts already have an express power to order a party's solicitor to pay or forego costs where the court is satisfied that he or she is responsible for costs having been incurred improperly or without reasonable cause or that extra costs have been incurred by undue delay or any other misconduct or default.³²⁸ The ability to make representatives responsible for the costs arising from their conduct recognises that in many cases a party has little or no control over the way his or her case is conducted. There have been concerns that these orders are rarely made and that as a result the parties often bear the costs of their lawyers' poor conduct.

The Commission's draft recommendation

11.13 In DRP 1 the Commission proposed that this power be extended to making costs orders against barristers and other representatives who may appear on behalf of parties in courts or in jurisdictions such as the Administrative Appeals Tribunal.³²⁹ This proposal received general support.³³⁰

The Commission's view

11.14 The Commission recommends that courts and, where appropriate, tribunals should have the power to order a party's legal or other representative to pay or forego costs where the court or tribunal is satisfied that he or she is responsible for costs having been incurred improperly or without reasonable cause or that extra costs have been incurred by undue delay or any other misconduct or default. These orders would be in addition to the other disciplinary costs orders recommended by the Commission. Before making such an order the court or tribunal should invite and consider submissions from the representative who may be the subject of the order.³³¹

Recommendation 36 - costs orders against legal and other representatives

A court or tribunal should be able to

- disallow the costs as between the representative and the party
- direct the representative to repay to the party any costs which the party has been ordered to pay to any other party
- direct the representative to pay to any other party the costs incurred by that party

where, in the opinion of the court or tribunal, the representative was responsible for all or part of the costs being incurred improperly or without reasonable cause or being wasted by undue delay or by any other misconduct or default.

Filtering unreasonable claims and defences

Introduction

11.15 There are situations where a claim or defence is unreasonable but cannot be struck out under the rules controlling vexatious and frivolous litigation.³³² While case management is a more appropriate mechanism for identifying and dealing with these types of claim or defence, the costs allocation rules may contribute to the filtering process by imposing a financial sanction on parties who conduct litigation without reasonable cause. For example, the courts have held that a successful party who unnecessarily or unreasonably commences, continues or encourages litigation may be denied an appropriate amount of his or her costs.³³³

The Commission's draft recommendation

11.16 In DRP 1 the Commission invited comments on whether a court or tribunal should be able to order a party or his or her legal representative to pay the costs incurred by the other parties to the proceedings as a result of a claim or defence that, in the opinion of the court or tribunal, is not well grounded in fact or is not warranted by existing law or a good faith argument for the extension, modification or reversal of the existing law.³³⁴

11.17 This proposal was based on the wording of Rule 11 of the US Federal Rules of Civil Procedure.³³⁵ Rule 11 has been used by the courts to streamline the litigation process by deterring baseless claims, defences and motions³³⁶ and to encourage a party to make reasonable inquiries into the facts and the law before filing a claim, defence or motion so as to prevent situations where all the parties incur unnecessary costs in litigating a matter which a 'modicum of investigation' would have avoided.³³⁷

11.18 DRP 1 also sought comments on an alternative, stricter model where a court or tribunal could order a party or his or her legal representative to pay the costs incurred by the other parties to the proceedings as a result of a claim or defence that, in the opinion of the court or tribunal, is not well grounded in fact or is unreasonable. A claim or defence would be unreasonable if

- it is not warranted by existing law or is merely arguable or speculative, or
- it is not a good faith argument for the extension, modification or reversal of the existing law that is appropriately dealt with by the court or tribunal.

Responses to the draft recommendation

11.19 While there was general support for a rule allowing a court or tribunal to order costs against a party who pursues an unreasonable claim or defence,³³⁸ a number of concerns were expressed in relation to both proposals. Some responses were concerned that such a rule should not discourage test cases or exclude claims and defences that may develop the law.³³⁹ There was also concern that the term 'unreasonable' be defined.³⁴⁰ Other responses argued that the rule should not apply to lawyers as it would conflict with their other professional obligations³⁴¹ including their duty to follow a client's instructions.³⁴²

The Commission's view

11.20 The Commission considers that parties wishing to pursue unreasonable claims or defences should be required to pay the costs that may be incurred by the other parties as a result. Such a rule will not discourage test cases provided they are well grounded in fact or are based on a good faith argument for the extension, modification or reversal of the existing law.

11.21 The Commission also considers that it is appropriate for lawyers to be subject to the rule given their role in the conduct of proceedings. The costs rules should encourage parties and their representatives to proceed only with claims or defences which are well grounded in fact or are based on a good faith argument for the extension, modification or reversal of the existing law.

11.22 This approach recognises that the parties are often in a better position than the court or tribunal to make this assessment, especially at the start of proceedings when the issues to be litigated should be identified. The rule will also help to counter any risk that the 'material effect' and public interest exceptions to the costs indemnity rule may lead to an increase in unreasonable claims or defences.³⁴³

11.23 The Commission has altered its proposed rule in light of the comments it received to DRP 1 to provide some guidance as to what constitutes an unreasonable claim or defence.

11.24 As with other costs orders, before making an order under this rule the court or tribunal must give the party or his or her lawyer (as the case may be) an opportunity to make submissions.³⁴⁴

Recommendation 37 - unreasonable claims or defences

A court or tribunal should be able to order a party or his or her legal representative to pay the costs incurred by the other parties to the proceedings as a result of an unreasonable claim or defence.

A claim or defence will be unreasonable if, in the opinion of the court or tribunal, it is not well grounded in fact, or

- not based on the existing law or on a good faith argument for the extension, modification or reversal of the existing law.

Filtering claims and defences that are frivolous, vexatious or in the wrong jurisdiction

Vexatious litigants and frivolous proceedings

11.25 Courts already have specific powers to deal with vexatious litigants and vexatious proceedings.³⁴⁵ In some courts these powers are expressed in terms of 'vexatious or frivolous' proceedings. A vexatious litigant has been considered by the courts to be a person who persistently and without reasonable cause sues or prosecutes others. Proceedings will be vexatious if they are

- instituted with the intention of annoying or embarrassing the other party
- brought for collateral purposes, and not for the purposes of having the court adjudicate on the issues to which they give rise
- irrespective of the motive of the litigant, so obviously untenable or manifestly groundless as to be utterly hopeless.³⁴⁶

The meaning of 'frivolous' is less clear. It is often used as an adjunct to 'vexatious'. When it has been considered the courts have interpreted it as describing cases that are obviously unsustainable³⁴⁷ or so obviously untenable that they cannot possibly succeed.³⁴⁸ The courts have been very cautious in regard to exercising their power to stay or dismiss vexatious or frivolous proceedings.

11.26 As a person who is vexatious will often not be deterred from pursuing his or her action by the risk of an adverse costs order, the primary role of the costs allocation rules is to reinforce the court's control of the proceedings and its powers to stay or dismiss the action. This approach was supported by the responses to DRP 1.³⁴⁹ The Commission considers that the courts should continue to have specific powers for dealing with these types of proceedings and litigant and that the powers should also be available, where appropriate, to tribunals.³⁵⁰

Recommendation 38 - vexatious or frivolous proceedings

Federal courts and tribunals should be able to award costs against a party whose proceedings are stayed or dismissed on the ground of being vexatious or frivolous.

Proceedings in an inappropriate jurisdiction

11.27 Where a plaintiff litigates successfully in a superior court for relief within the jurisdiction of a lower court, he or she will either be denied costs or receive a substantially lower amount unless the court orders otherwise.³⁵¹ In practice, a superior court will generally allow a plaintiff to recover full costs if the action, although small, raises an important point of law³⁵² or has some other feature that means it was properly brought in that court.³⁵³ The Commission considers that this rule should remain.

Costs and the use of alternative dispute resolution

11.28 The Commission does not consider it appropriate to use the costs allocation rules to force people to use ADR schemes. For example, a party who pursues a claim in court should not lose his or her right to recover costs if successful on the ground simply that he or she failed to use an alternative dispute resolution scheme first. The use of costs allocation rules in this way would increase the risk of some classes of litigant being effectively denied the chance to seek judicial determination of their case. In any event, there are already a number of financial and other incentives for using court-based and industry-based ADR schemes in preference to courts.

11.29 However, the costs allocation rules can be used to encourage parties to participate in ADR as a means of resolving the matter or narrowing the issues in dispute. One approach is for courts, tribunals and legal advisers to make the parties aware of the existence of ADR schemes and for case management to identify

and direct appropriate cases to ADR. Where a party has an opportunity to participate in ADR and unreasonably refuses to do so a court or tribunal should be able to take this into account when considering whether to make a disciplinary costs order.³⁵⁴ A disciplinary costs order may also be used as a sanction for non-compliance with a direction or rule requiring the parties to use ADR.

Encouraging settlement

Influence of costs allocation rules

11.30 The costs indemnity rule and other costs allocation rules seem to have little influence on the rate of settlement. The possibility of an adverse costs order is often used to draw to a party's attention the advantages of settlement. However, consultations indicated that settlement is most likely to occur after full disclosure of each party's case so that the issues in dispute can be identified and each party is able to assess the relative strength of its case and the reasonableness of any settlement offers. In some cases the possibility of an adverse costs order may be a factor in favour of settlement but it is rarely the determinative one.

Strengthening the link between settlement and costs allocation rules

11.31 The link between costs allocation rules and settlement can be strengthened by indirect and direct means. Costs rules are one mechanism for encouraging compliance with case management and other court procedures designed to identify quickly the issues and evidence in dispute. They help courts and tribunals create the necessary conditions for settlement to be seriously explored. A court or tribunal can also influence the attitude of the parties towards settlement by indicating to the parties that it will take into account their conduct in relation to settlement negotiations when considering the terms of any costs order.³⁵⁵ Courts and tribunals may also use formal settlement procedures to encourage parties to resolve the matter before it goes to trial.

Current formal settlement procedures

11.32 Most courts already have rules that link the question of costs to the acceptance or refusal of a formal settlement offer.³⁵⁶ Under these rules, either party to proceedings may serve an offer on the other party.

- If a defendant refuses an offer by the plaintiff and the plaintiff obtains judgment for an amount equal to or greater than the offer, the defendant is liable for the plaintiff's solicitor and client costs from the day the offer was made in addition to the plaintiff's party and party costs up to that date.
- Where a plaintiff refuses a defendant's offer and the plaintiff obtains judgment for less than the offer, the defendant is liable for the plaintiff's costs up to the date of the offer and the plaintiff must pay the defendant's costs incurred after the date of the offer. In this situation costs are assessed on a party and party basis.

In some instances a court may make similar orders where an informal offer which exceeds the result was made by letter before the hearing (Calderbank letters).³⁵⁷

An alternative model

11.33 In DRP 1 the Commission invited comments on an alternative procedure for formal settlement offers.³⁵⁸ This alternative model was developed in light of recommendation 2 which will reduce the gap between a plaintiff's actual and recoverable costs. This will in turn reduce the incentive for a defendant to consider an offer from the plaintiff. The model sought to

- replace the gap between a plaintiff's party and party costs and his or her solicitor and client costs with a percentage uplift of the plaintiff's reasonable costs as the incentive for a defendant to accept an offer from the plaintiff

- ensure that the incentives for making or accepting an offer are the same for each party by requiring the defendant to pay a proportion of the plaintiff's reasonable costs notwithstanding that the verdict is for an amount less than the defendant's offer³⁵⁹
- require the party making the offer to provide details of how the amount was determined so that the other party is able to assess the reasonableness of the offer and, if the matter goes to trial, the court or tribunal is able to determine whether the verdict was better or worse than the offer.

Responses to the alternative model

11.34 The majority of responses did not support the model proposed by the Commission.³⁶⁰ Some submissions considered that the percentage uplift was an arbitrary measure that could create a windfall for the plaintiff that is inconsistent with the principle that costs orders are indemnities for costs incurred and not penalties against the unsuccessful party.³⁶¹ Others were concerned that the proposal for ensuring that each party has the same incentive to make or accept an offer would prejudice defendants as they would remain liable for a proportion of the plaintiff's costs even though they had offered to settle for an amount in excess of the verdict.³⁶² A few responses questioned the need for a party making an offer to provide details of how it was determined.³⁶³

The Commission's view

11.35 Incentives for settlement are an important part of the legal system. The Federal Court noted in its submission that even a small reduction in the rate of settlement would increase the workload of courts well beyond their capacity.³⁶⁴

11.36 Costs allocation rules can contribute to the settlement process by encouraging compliance with procedures that help create the necessary conditions for settlement and by allowing courts and tribunals to have regard to any informal attempts by the parties to settle. The costs rules should not discourage the use of Calderbank letters and other mechanisms which parties use to settle their disputes before a hearing.³⁶⁵

11.37 Costs allocation rules can also contribute to the settlement process as part of a formal procedure for settlement. The Commission supports the use of formal settlement procedures that encourage the parties to settle on reasonable terms and to do so sooner rather than later in the proceedings. The existing procedures seem to be well suited to cases such as personal injury claims where liability is rarely in issue and the dispute generally concerns quantum. In these cases the procedures provide a significant incentive to the defendant to make an offer and to consider any counter offer from the plaintiff. The incentive for both offer and counter offer is the amount of the plaintiff's reasonable costs from the date of the offer. The existing procedures seem less suited to other cases (such as trade practices claims) where liability is the principal issue.

11.38 In light of the responses to DRP 1 the Commission does not recommend any particular changes to the existing procedures. However, these procedures should be monitored by the courts to assess their impact more closely. It is likely that they will need to be developed further as changes to the methods of assessing costs result in changes to the proportion of the actual costs incurred by a party that may be recovered under costs orders. Any further developments should take into account the following points.

- Changes to existing procedures should be based on further research, undertaken by a body such as the CJRC after the recommendations in this report have been implemented, on
 - whether the gap between a party's 'reasonable costs' (as contemplated in recommendation 2) and his or her actual costs is, on average, less than the current gap between party and party costs and solicitor and client costs
 - if so, whether the reduction in that gap has any effect on settlement rates
 - whether the use of Calderbank letters and formal settlement procedures in cases where the principal issue in dispute is quantum is greater than their use in cases where liability is the principal issue.

- In light of this research, consideration should be given to whether, and in what types of matter, formal settlement procedures should provide an incentive both to plaintiffs and defendants to make offers and to consider counter offers in order to be effective. It is possible that in some types of matter the procedure needs only to provide an incentive to one of the parties.
- When devising the incentive to make offers or to consider counter offers the relationship with actual costs incurred is only one factor to be considered. It is equally, if not more, important to ensure that the incentive does not encourage wasteful expenditure (which an actual costs indemnity will tend to do). Generally the incentives should operate even handedly unless there are good grounds for providing an incentive only to one party.
- When considering whether to apportion costs under the procedure the court or tribunal must have regard to whether the person making the offer allowed the other party a reasonable time to assess the offer.³⁶⁶
- Costs orders available under settlement procedures should be subject to disciplinary and other case management costs orders.

Capping costs

A power to cap costs

11.39 In DRP 1 the Commission proposed that a court or tribunal should be able to specify the maximum amount that may be recovered pursuant to an order for costs.³⁶⁷ The maximum amount specified in such an order would not include an amount that a party is ordered to pay pursuant to a disciplinary costs order. The Commission suggested that the relative resources of the parties should be one of the factors considered by a court or tribunal when deciding whether to cap the costs.³⁶⁸

11.40 The proposal was based on the Federal Court's power to cap costs.³⁶⁹ The Court has indicated that the amount set under the rule should be reasonable having regard to the amount of the claim, the complexity of the issues, the extent of the work involved in the matter up to and including the hearing and the costs otherwise likely to be incurred.³⁷⁰ However, in *Woodlands v Permanent Trustee Company Limited & Others*³⁷¹ the Court adopted a different approach. In that case it set a cap of \$12 500 having regard to the capacity of the applicants to pay this amount and to the fact that, had the proceedings been commenced in the Supreme Court of New South Wales, the respondents could not have recovered more than \$12 500 as the applicants were entitled to the costs indemnity available under the *Legal Aid Commission Act 1979* (NSW).³⁷²

Concerns about a power to cap costs

11.41 Although most submissions supported a power to cap costs,³⁷³ some expressed concerns.

11.42 A number of submissions were concerned that if the maximum amount specified by the court is too low the rule may cause the parties additional hardship by increasing the gap between their solicitor and client costs and the costs they recover.³⁷⁴ Some submissions questioned the ability of the courts to set a realistic cap.³⁷⁵ One response considered that, in order to ensure an appropriate cap is set by the court, the parties may have to disclose information that may signal their litigation strategy or otherwise prejudice the conduct of their case.³⁷⁶

11.43 Responses to the proposal were also concerned that the imposition of a cap may hinder a party's ability to prepare and present his or her case³⁷⁷ and that the same cap should apply to all the parties to the proceedings.³⁷⁸ A number of submissions objected to the court or tribunal having regard to the relative resources of the parties when deciding whether to cap the costs.³⁷⁹

11.44 One submission noted that the certainty about costs provided by a cap could be achieved more satisfactorily by establishing a clear basis for determining what costs are recoverable under a costs order.³⁸⁰

This would allow parties to accurately predict the actual costs of proceedings and to conduct their cases accordingly.

The Commission's view

11.45 The power to cap the costs that each party may recover allows a court or tribunal to set a budget so that management of the case may be tailored according to appropriate financial limits. The imposition of a cap allows each party to make an informed assessment of the costs and risks involved and to weigh them against the potential benefits. It can encourage the efficient and economic conduct of the proceedings. The imposition of a cap does not prevent a party who wants to spend more than the specified amount from doing so it simply prevents those additional costs being passed on to the other party.

11.46 The Commission is confident that courts and tribunals, with the assistance of the parties, can determine a maximum amount that is realistic in the circumstances of the case. The amount of information a party discloses under the rule will depend on how he or she balances, on the one hand, the party's desire to ensure that the court or tribunal has sufficient information to set a realistic cap against, on the other hand, the desire to maintain the confidentiality of information that is not otherwise required to be disclosed to the court.

11.47 Notwithstanding the Federal Court's decision in *Woodlands*,³⁸¹ the Commission considers that the general power to set a cap should be based on an objective assessment of the costs reasonably required to resolve the dispute and should apply to both parties. This general power should be viewed as part of the budgeting and case management function of the courts. Limiting the power to an objective assessment of what is reasonably required for the case will limit the scope of the court's inquiry and allow the cap to be determined quickly and economically.

11.48 The Commission's proposed 'material effect' exception to the costs indemnity rule will allow a court or tribunal to tailor a costs order (including the imposition of a cap) in light of a party's resources.³⁸² This will require a lengthier inquiry but should be required less frequently.

11.49 The Commission supports the use of a power to cap costs. It should still be possible to make a disciplinary costs order where a cap has been specified. That is, the maximum amount specified in such an order should not include any costs a party may be ordered to pay pursuant to a disciplinary costs order.

Recommendation 39 - capping costs

A court or tribunal should be able to specify, by order made at a directions hearing, the maximum amount that may be recovered pursuant to an order for costs. An amount that a party is ordered to pay pursuant to a disciplinary costs order is in addition to the maximum amount specified by the court or tribunal.

12. The 'material effect' exception

Introduction

12.1 In this chapter the Commission recommends that the rule that costs follow the event should not apply to people whose ability to present their case properly or to negotiate a fair settlement is materially and adversely affected by the risk of having to pay the other party's costs. In these cases the court should be able to make another costs order such as capping the liability for costs or requiring each party to bear his or her own costs. The chapter examines the need for the exception and its likely operation in light of the responses to DRP 1.

The need for this exception

12.2 AJAC was concerned that the costs indemnity rule may deter people from pursuing meritorious claims or defences because of the risk of having to pay a portion of the other party's costs in addition to their own costs if unsuccessful.³⁸³ This concern was confirmed by many of the responses to IP 13. It was widely recognised that the costs indemnity rule can deter, or help to deter, some litigants from pursuing genuine claims or defences.³⁸⁴ The people most likely to be adversely affected in this way are those who may lose their home, car or livelihood or suffer some other substantial hardship if required to pay the other party's costs.³⁸⁵

12.3 The Commission is satisfied that the risk of costs following the event can materially and adversely affect the ability of some people to properly present their case or, more significantly, to negotiate a fair settlement. It considers that the costs allocation rules must provide some protection to people with meritorious cases who are affected in this way.

The Commission's draft recommendation

12.4 In DRP 1 the Commission proposed that a court should be able to make alternative costs orders, such as a cap on the costs payable, when it is satisfied that a party's ability to present his or her case properly or to negotiate a fair settlement would be materially and adversely affected if he or she were required to pay the other party's costs.³⁸⁶ To assist the court and the parties to identify these cases the Commission suggested that there be a presumption that a party's ability to present his or her case properly or to negotiate a fair settlement would be affected in this way if he or she would suffer substantial hardship if required to pay the other party's costs. This presumption would allow a party who satisfies the criteria to know before proceedings are commenced or a defence is filed that he or she may pursue his or her claim or defence without the risk of an adverse costs order. However, he or she would still be subject to disciplinary and case management costs orders including those that may flow from an assessment of the case's merits.

Responses to the draft recommendation

Concern that the exception is unjust to successful parties

12.5 A number of submissions considered that the exception is unjust as it would deny a successful party the right to recover his or her reasonable costs simply because the other party has limited financial resources.³⁸⁷ One submission opposed the exception on the basis that it was contrary to the doctrine of legal equality.³⁸⁸ Many of these responses expressed the view that financial hardship should be addressed through legal aid, other assistance schemes and contingency fees and not by altering the costs allocation rules.³⁸⁹

12.6 The Commission accepts that the exception may lead to wealthier litigants having to bear a greater costs burden than may be the case under the current costs allocation rules. However, the Commission does not accept that this is unjust. As outlined in chapter 2, there are many factors to be considered when determining a just allocation of costs. The allocation is not simply a matter of determining who has 'won' the case. The current costs allocation rules recognise this by framing the power to award costs as a discretion. A fundamental factor that must be taken into account in any system of justice is the need to ensure that the

costs allocation rules do not result in a party being unable to present his or her case properly or to negotiate a fair settlement.

12.7 In addition, the Commission does not accept that the exception will infringe the doctrine of legal equality.³⁹⁰ Equality under the doctrine cannot be limited to formal equality. It must acknowledge and address the practical reality of social and economic inequality. Social and economic inequality have implications for equality before the law. The exception focuses on enabling parties to present their case and to negotiate fair settlements activities which are intrinsic to legal equality. Without that ability parties would not be *legally* equal they would not be equal before the law.

12.8 The Commission considers that the financial circumstances of the parties is a relevant and rational basis for allowing courts and tribunals to determine whether and to what extent a party should be liable for the other party's costs. This is not a novel approach. The Commonwealth has already specified that the financial circumstances of the parties is a matter to be considered by the court when it is deciding whether to make an order for costs in family law proceedings.³⁹¹

12.9 The disadvantages experienced by people with limited financial resources are only partly addressed by legal assistance schemes and contingency fee arrangements. These schemes and arrangements are not available to all litigants and in most cases they do not relieve an assisted litigant from the risk of an adverse costs order. The Commission considers that the exception will complement legal assistance schemes and contingency fee arrangements.

Concern that the exception will cause hardship to a successful party

12.10 Some responses were concerned that the exception could cause substantial hardship to a successful litigant who, being unable to recover the reasonable legal costs of his or her case, may be forced to give up his or her home, car or livelihood in order to pay his or her legal costs.³⁹² This situation may arise where both parties have limited financial resources and are relying on the recovery of costs if successful to pay for the litigation.

12.11 Under the proposed scheme, a court will be able to consider the financial circumstances of all the parties when determining the terms of an alternative costs order. As far as possible, the terms of such an order should not prejudice the ability of any party to present his or her case properly or to negotiate a fair settlement. For example, the court or tribunal may decide that in the circumstances of the case it is appropriate that each party bear his or her own costs. Alternatively, it may decide that costs should continue to follow the event but subject to a cap that each party can afford.

12.12 In addition, a successful party who will suffer substantial hardship because he or she is unable to recover all or part of his or her costs from the unsuccessful party as a result of a court or tribunal order under the exception may apply to the federal legal assistance indemnity fund for the reasonable costs he or she has incurred.³⁹³

Concern that the exception will encourage unmeritorious litigation

12.13 A number of submissions were concerned that the exception would encourage unmeritorious litigation and discourage settlement.³⁹⁴ This concern is based on the view that the risk of an adverse costs order deters claims and defences that are without merit and acts as an incentive to settle the dispute rather than proceed to a hearing.

12.14 The extent to which the costs indemnity rule deters unmeritorious claims and defences and encourages settlement cannot be measured accurately. In chapter 11 the Commission recommends a number of disciplinary costs orders that will enhance the ability of courts and tribunals to filter and control claims and defences that are frivolous, vexatious or without merit.³⁹⁵ Disciplinary and case management costs orders will also encourage parties to seriously consider settling their dispute.³⁹⁶

12.15 The Commission considers that the availability of disciplinary and case management costs orders will ensure that litigants wishing to pursue unmeritorious claims or defences are not encouraged by the possibility of an alternative costs order under the exception.

Concern about the criteria for determining substantial hardship

12.16 In DRP 1 the Commission suggested that, when considering whether a party would suffer substantial hardship, a court should have regard to whether the party would lose his or her home, motor vehicle or livelihood as a result, in part or whole, of having to pay the other party's costs.³⁹⁷

12.17 Responses to this proposal were concerned that

- the list of factors should not be exhaustive³⁹⁸
- the court should also have regard to whether the party would be made bankrupt as a result of having to pay the other party's costs³⁹⁹
- a party with an asset worth far more than the expected amount of adverse costs should not obtain the benefit of a costs order under the exception as he or she will not suffer substantial hardship as a result of an adverse costs order⁴⁰⁰
- there are cases, such as the enforcement of a mortgage or other security interest, where a party's house or car is the subject of the proceedings and will be lost regardless of whether there is an adverse costs order⁴⁰¹
- the rule could be abused by corporate entities and individuals who re-arrange their financial affairs in order to satisfy the criteria for 'substantial hardship'⁴⁰²
- the factors do not contemplate financial hardship that may be suffered by a corporation as a result of adverse costs orders.⁴⁰³

12.18 The Commission does not favour a non-exhaustive list of factors for determining substantial hardship. Such a list may create uncertainty and the potential for lengthy and expensive argument. In any event, when deciding whether a party's ability to properly present his or her case or to negotiate a fair settlement will be materially and adversely affected if he or she is required to pay the other party's costs, the court may have regard to any relevant factors. The court is not limited to the substantial hardship test, the main purpose of which is to create a presumption that certain parties may come within the exception. However, the Commission does accept that the list of factors for determining substantial hardship should include whether a party will be made bankrupt as a result of an adverse costs order.

12.19 The situation where a person may lose a house or motor vehicle but be left with significant assets may be addressed in a number of ways. For example, where a person will have to sell a house worth \$1 million if required to pay an adverse costs order for \$150 000, a court

- may not be satisfied that the person would suffer substantial hardship if the property is sold
- may be satisfied that substantial hardship exists but does not consider that the party's ability to present his or her case properly or to negotiate a fair settlement is materially and adversely affected by the risk of adverse costs
- even if satisfied that the exception applies, may take the party's financial resources into account when settling the terms of the alternative costs order (for example, the cap may be set higher to reflect the underlying wealth).

12.20 It is unlikely that a party to proceedings seeking the sale of his or her home or motor vehicle under a security would be able to claim substantial hardship on the basis that he or she will lose the home or motor vehicle if required to pay the other party's costs. If the party is unsuccessful he or she will lose the home or motor vehicle regardless of an adverse costs order. In any event, even if substantial hardship could be shown the other party could rebut the presumption by showing that, as the loss of the house or motor vehicle is inevitable if the party loses the case, the risk of an adverse costs order would not materially affect the ability of the party to conduct his or her case properly or to negotiate a fair settlement.

12.21 The Commission accepts that the rule could be abused by corporate entities and individuals who establish trusts, transfer assets or otherwise arrange their financial affairs in order to satisfy the criteria for 'substantial hardship'. This problem already arises where parties seek to avoid an order for security of costs, a costs order or the judgment itself. One solution is for a court, when determining whether a party's ability to litigate is materially affected by the risk of an adverse costs order, to consider whether the applicant appears to have arranged his or her financial affairs so as to divest him or herself of legal title to assets or income at a time when the litigation was pending or had commenced. If so, the court may refuse to make an order under the exception. A court may also have regard to any trusts, relatives or other third parties that may support the litigation when settling the terms of a costs order.

12.22 The Commission also accepts that the factors for determining substantial hardship have little application to corporations. This means a corporation that will suffer financial hardship as a result of an adverse costs order will not be *presumed* to come within the exception. However, a corporation may still obtain a costs order under the exception if it can nonetheless satisfy the court that the risk of an adverse costs order will materially and adversely affect its ability to present its case properly or to negotiate a fair settlement. The financial impact on the corporation of an adverse costs order may be considered by the court when making its determination.

Concern about who should determine substantial hardship

12.23 In DRP 1 the Commission invited comments on whether an administrative body, such as a legal aid commission, should assess claims of substantial hardship rather than a court.⁴⁰⁴ Responses to this issue were equally divided.⁴⁰⁵ Some submissions suggested that applications should be assessed by a court registrar.⁴⁰⁶ There was also concern that the question of substantial hardship should be determined in accordance with the principles of natural justice.⁴⁰⁷

12.24 The Commission considers that substantial hardship should be determined by a judge.

- The exception must work in harmony with, and as part of, the judge's management of the case. The questions of whether substantial hardship exists and how the case should be managed because of it are related and need to be dealt with together. Assessment by an administrative body or a registrar would seriously fragment the management process.
- The conduct of applications for substantial hardship will need to be rigorously controlled applications should not become a trial within a trial.⁴⁰⁸ The Commission considers that the authority and powers of a judge allow him or her to control the conduct of applications more effectively than an administrative body or registrar might be able to.
- The exception must work in harmony with, and as part of, the judge's management of the case. The questions of whether substantial hardship exists and how the case should be managed because of it are related and need to be dealt with together. Assessment by an administrative body or a registrar would seriously fragment the process so that the unsuccessful party would always seek a review. This would add to the expense of the proceedings and cause further delays. Some parties may use the review process to exhaust the resources of the other party. It is therefore preferable for a judge to determine the issue and to limit appeals to the circumstances discussed in chapter 10.

12.25 The Commission expects the courts to develop and publish guidelines on the procedures and evidence for determining substantial hardship⁴⁰⁹ and to publish decisions that will help guide the conduct and determination of future applications.

Concern about considering the parties' financial resources when making an order

12.26 In DRP 1 the Commission suggested that the court should have regard to the resources of the parties and to the circumstances of the case when deciding on the terms of an order made under the exception.⁴¹⁰ It also suggested that, when considering the 'resources of the parties', the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties is being

affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.⁴¹¹

12.27 There were concerns that

- when considering the 'resources of the parties' a court should not have regard to legal aid,⁴¹² insurance⁴¹³ or tax deductibility⁴¹⁴
- only the financial circumstances of the person seeking an order under the exception should be considered.⁴¹⁵

12.28 The Commission considers that the orders made under the exception should reflect, as far as possible, the extent to which a party could satisfy an adverse costs order without the risk of such an order materially affecting his or her ability to present his or her case properly or to negotiate a fair settlement. The extent to which a party can pay an adverse costs order is affected by such mechanisms as legal aid, insurance and tax deductibility. By helping a party to meet the costs of his or her own representation, these mechanisms can help preserve whatever financial resources he or she may have available to pay an adverse costs order. Without this information a court would find it difficult to determine an appropriate cap or other order.

12.29 The Commission also considers that orders made under the exception should be just in all the circumstances of the case. To this extent the financial circumstances of each party may be relevant. However, in all cases the only factors relevant when determining whether any alternative costs order needs to be considered are the financial resources of the party seeking the order and, after that threshold test has been satisfied, in most cases the main factor when determining an appropriate order will be the capacity of the applicant to pay an adverse costs order.

Concern about whether courts and tribunals are able to consider legal aid

12.30 One submission was concerned that legal aid legislation in most States and Territories would have to be amended to allow courts to consider legal aid as a financial resource.⁴¹⁶ It argued that under the *Legal Services Commission Act 1977* (SA), for example, a court may not take into account the fact that a party is receiving legal assistance when it makes a costs order and it is an offence to disclose the fact or terms of a grant of legal aid to a court.⁴¹⁷

12.31 The Commission does not agree with this interpretation of the legislation. The relevant provisions of this Act

- preserve the right of an assisted person to recover costs notwithstanding that he or she has not actually incurred any costs because of the grant of assistance⁴¹⁸ the Act would not prevent a court from considering a grant of assistance when making an order under the exception
- make it an offence for members and employees of the Legal Services Commission and its committees to disclose information about people applying for assistance⁴¹⁹ it is not an offence for an assisted party to provide information about the assistance he or she may be receiving.

Accordingly, the Commission does not consider there is any need to amend legal aid legislation as suggested.

Concern that financial information may be exploited

12.32 Some submissions were concerned that the information about a party's financial resources that must be disclosed under the exception may be exploited by the other parties to the proceedings.⁴²⁰ For example, if the information disclosed by a party indicates that his or her grant of legal aid is almost exhausted the other party may decide to prolong the litigation or make a low settlement offer knowing that the party is facing financial difficulties.

12.33 This is an important issue but not a new one. It is already common for each party to proceedings to assess the resources of the other parties and, in some cases, for a party with substantial resources to try to take advantage of the other party's weaknesses (financial or otherwise).

12.34 The guidelines to be developed by the courts to implement the exception should address this issue. They should seek to limit the opportunities for information about a party's financial resources to be exploited. For example, the guidelines might allow indicative costs orders to be made at the beginning of proceedings on the basis of general information about whether a party expects to be supported by legal aid throughout the proceedings. A final order would be made only after evidence at the end of the proceedings on what legal aid was in fact made available.

12.35 The court's management of the case to ensure that it is conducted efficiently and economically will also help to reduce the opportunities for a party who has substantially greater resources to take advantage of the other party.⁴²¹

Concern about how the exception will work in practice

12.36 A number of responses expressed concern about how the exception would work in practice.⁴²² In particular, many considered that the tactical advantage of obtaining an order under the exception would cause applications to be vigorously pursued and opposed.⁴²³ As a result, applications would be long and expensive. The court and the parties may have to deal with complex issues concerning the applicant's financial circumstances such as identifying and valuing his or her assets and property.

12.37 It is important that applications under the exception are not abused or allowed to become a source of delay and additional costs. The courts should strictly control the time and cost of applications. In most cases an applicant's financial circumstances should be provided by affidavit.⁴²⁴ Formal valuation evidence should rarely be necessary. If there is insufficient information for a court to make an order under the exception at the time of the application it may, at that time, indicate the costs order it is likely to make at a later stage of the proceedings.

12.38 The cost and complexity of proceedings under the exception are difficult to anticipate. However, the Commission expects that applications under the exception will involve a similar level of time and resources as applications for security of costs or for an order specifying a cap under the Federal Court Rules. It may take some time to establish procedures and precedents that will guide the process and discourage applications that are outside the criteria.

Concern that courts should be able to review an order if circumstances change

12.39 A few submissions considered that courts should be able to review an order made under the exception if the applicant's circumstances change during the course of the litigation.⁴²⁵ The Commission is concerned that providing a general right of review could lead to uncertainty and encourage further disputes. A preferable approach is for the court, if it considers it necessary, to make the costs order subject to there being no change in the applicant's circumstances. If a court considers it is unable to make an order under the exception at an early stage of proceedings it may, at that time, provide an indication of the order it is likely to make at a later stage.⁴²⁶

The Commission's view

12.40 The Commission recommends that a court should be able to vary the rule that costs follow the event where it is satisfied that a party's ability to present his or her case properly or to negotiate a fair settlement is materially and adversely affected by the risk of an adverse costs order. Such a power will provide some assistance to people who are unable to pursue meritorious cases or to negotiate fair settlements because of the risk of costs following the event.

12.41 The central objective of the recommendation is to ensure that the costs indemnity rule does not impede access to courts and tribunals. The exception will improve access to justice by helping parties to have access

to effective dispute resolution mechanisms necessary to protect their rights or interests. It will complement, but not replace, the assistance available under legal aid schemes and contingency fee arrangements.

12.42 The recommendation focuses on the ability of the parties to present their case properly or to negotiate a fair settlement. The presumption based on substantial hardship will assist the court and the parties to identify cases where it is appropriate to make a costs order under the exception. It will allow a party who satisfies the criteria to know before proceedings are commenced or a defence is filed that he or she may pursue his or her claim or defence without the risk of an adverse costs order. However, substantial hardship is not the only indicia of 'material effect' and it will be possible for the courts to consider all the circumstances of a case when deciding whether, and on what terms, a costs order should be made under the exception.

12.43 The Commission acknowledges that applications under the exception have the potential, at least in the beginning, to be an expensive and time-consuming interlocutory step in proceedings. However, the exception must be understood in the context of an enhanced scheme of disciplinary and case management costs orders that will control unreasonable claims and defences and promote settlement. The Commission is confident that courts will develop procedures and precedents which will ensure that applications under the exception are resolved quickly, economically and efficiently.

12.44 The Commission's recommendation will allow courts to tailor costs orders to meet the circumstances of the parties so that neither is stopped from presenting his or her case properly or from negotiating a fair settlement because of the risk that costs will follow the event. Costs orders under the exception will permit a court to limit a party's liability for adverse costs so that the risk is in proportion to the party's capacity to pay.

Recommendation 40 - alternative costs orders where a party's ability to litigate or negotiate is materially and adversely affected

A court may, at any stage of the proceedings, upon the application of a party, make an alternative costs order if it is satisfied that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of the party to

- present his or her case properly or
- negotiate a fair settlement.

Recommendation 41 - presumption that a party's ability will be materially affected

The court shall presume, unless satisfied otherwise, that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if the court is satisfied that the party would suffer substantial hardship if required to pay the other party's costs.

Recommendation 42 - substantial hardship

When determining whether a party would suffer substantial hardship the court shall have regard to whether the party will

- lose or be forced to vacate his or her home
- lose a motor vehicle or the use of a motor vehicle reasonably necessary for domestic, employment or business purposes
- lose his or her employment or livelihood
- be made bankrupt

as a result, in part or whole, of being required to pay the other party's costs.

Recommendation 43 - orders the court may make if satisfied that a party's ability will be materially and adversely affected

If a court finds that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if costs follow the event, the court may make such orders as to costs as it considers just having regard to the resources of the parties and to the circumstances of the case. The orders the court may make include an order that

- each party bear his or her own costs
- the affected party, if unsuccessful, only pay the successful party's costs up to a cap set by the court
- another person, group, body or fund, in relation to which the court has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

An order under this provision will be subject to the court's power to make disciplinary costs orders.

Recommendation 44 - determining the resources of the parties

When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

13. Public interest costs orders

Introduction

13.1 Public interest litigation is an important mechanism for clarifying legal issues to the benefit of the general community. In this chapter the Commission examines the concept of public interest litigation and the current approach to cost allocation in such matters. The Commission concludes that public interest litigation is of significant benefit to the community and that it should not be impeded by costs allocation rules.

What is public interest litigation?

13.2 No clear definition of public interest exists in legislation or case law. The courts have preferred to leave the definition open and to determine the question of public interest on the basis of the circumstances of each case. However, the courts give some guidance as to how the question is to be approached. A widely accepted approach is to see whether the case affects the community or a significant sector of the community or involves an important question of law. It also seems that particular types of cases are more likely to be found to be in the public interest. These include cases involving issues of national security or concerning the efficient and fair administration of justice. For the purposes of this report, public interest litigation includes test cases.

Current cost allocation in public interest litigation

Current approach

13.3 Courts are able to vary the usual order that costs follow the event where they are satisfied that the case is in the public interest. For example, in some public interest cases they have declined to award costs against an unsuccessful plaintiff⁴²⁷ or ordered an unsuccessful respondent to pay the other party's costs on an indemnity basis.⁴²⁸ In *Woodlands & Ballard v Permanent Trustee & Ors*⁴²⁹ the Federal Court ordered that the maximum costs that could be recovered on a party and party basis would be \$12 500. The public interest in the case was a significant factor in making the order.

13.4 However, these orders are relatively uncommon. In most cases the courts have tended to take the view that a party should not be deprived of his or her right to seek costs if successful,⁴³⁰ or be required to pay indemnity costs if unsuccessful,⁴³¹ merely because the litigation may be in the public interest.

At what stage in public interest proceedings may a costs order be made?

13.5 Although courts may award costs at any stage of proceedings,⁴³² they will usually make no order until the matter is finished and the result, conduct of the parties and the level of public interest can be considered.

The need for reform

The benefits of public interest litigation

13.6 The benefits that arise from public interest litigation include

- development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to less disputes and less expenditure on litigation)
- economies of scale
- impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law)

- contribution to market regulation and public sector accountability by allowing greater scope for private enforcement
- reduction of other social costs by stopping or preventing costly market or government failures.

13.7 For example, public interest litigation has made a significant contribution to the development of environmental law.⁴³³

Costs allocation rules and public interest litigation

13.8 Costs allocation rules can significantly influence the bringing and conduct of public interest litigation and test cases.⁴³⁴ In particular, the costs indemnity rule generally has a deterrent effect on this type of litigation.

13.9 In an address to an International Conference on Environmental Law in 1989, Justice Toohey stated

There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.⁴³⁵

13.10 Some jurisdictions have introduced systems of one-way fee shifting where a party found to be acting in the public interest, usually the plaintiff, is able to recover costs if successful but pay nothing if unsuccessful.⁴³⁶

13.11 The Commission considers that the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules.

Other reforms

13.12 It is important to recognise that reforms to the costs allocation rules are just one of a number of factors that may reduce the barriers to public interest litigation. For example, public interest litigation could also be facilitated by reforms to the rules of standing and other technical barriers, and by increasing the assistance available to one or more of the parties under public interest litigation funds.⁴³⁷

A public interest costs order

The Commission's draft recommendation

13.13 In DRP 1 the Commission proposed that a court or tribunal should be able to make a public interest costs order if it is satisfied that

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
- the proceedings involve the resolution of an important question of law
- the proceedings otherwise have the character of public interest or test case proceedings.⁴³⁸

Responses to the draft recommendation

13.14 Most responses supported the introduction of a public interest costs order.⁴³⁹ However, concerns were raised that

- the orders may impinge on individual rights⁴⁴⁰
- the proposed criteria are uncertain⁴⁴¹ which may

- allow the court too much opportunity to avoid making an order⁴⁴²
- allow the court to make an order in inappropriate cases
- the orders will encourage litigation, much of which may be unmeritorious⁴⁴³
- the orders are unnecessary as the common law is sufficient⁴⁴⁴
- applications for an order will add to the expense and time of proceedings.⁴⁴⁵

13.15 A number of submissions argued that public interest litigation should be supported by a public fund and not by changes to the costs allocation rules.⁴⁴⁶ The Commission considers that both of these mechanisms should be available. Public interest litigation funds are discussed in chapter 18.

The Commission's view

13.16 The proposed criteria for determining whether proceedings are in the public interest reflect those already developed by the courts. They preserve the ability of a court or tribunal to determine whether litigation is in the public interest in light of all the circumstances of the case.

13.17 The Commission acknowledges that there is a risk that applications for public interest costs orders could become an expensive and time-consuming interlocutory step in proceedings. However, the Commission is confident that courts will develop procedures and precedents which will ensure that applications are resolved quickly, economically and efficiently. The making of indicative costs orders will also assist in an efficient resolution of issues.⁴⁴⁷ The Commission expects that applications will require a similar level of time and resources as applications currently made pursuant to the court's discretion as to costs.

13.18 The Commission does not expect public interest costs orders to result in a flood of litigation. Existing legislative provisions aimed at encouraging public interest litigation have not led to a significant increase in the number of litigants.⁴⁴⁸ Moreover, the rule must be understood in the context of an enhanced scheme of disciplinary and case management costs orders that will improve the ability of courts and tribunals to control unreasonable claims and defences and to ensure that proceedings are conducted in an efficient and economical manner.⁴⁴⁹

13.19 A court or tribunal should be able to make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter. The extent of the private or commercial interest of each party to public interest litigation should be considered by the court when deciding the terms of any costs order.

Recommendation 45 - public interest costs orders

A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
- the proceedings will affect the development of the law generally and may reduce the need for further litigation
- the proceedings otherwise have the character of public interest or test case proceedings.

A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.

Objects clause

13.20 One submission suggested an objects clause could be used to help guide the parties and the courts when considering whether the circumstances of a case warrant the making of a public interest costs order.⁴⁵⁰ Objects clauses have been used frequently in legislation to aid interpretation of an Act.⁴⁵¹ For example, the *Environmental Planning & Assessment Act 1979* (NSW) and the *Nature Conservation Act 1992* (Qld) both use objects clauses to clarify their purposes.

13.21 The Commission considers that an objects clause would make the rules for public interest costs orders more certain and would help to ensure that courts make such orders in appropriate cases. The legislation establishing public interest costs orders should include a clause stating that the object of such orders is to assist the initiation and conduct of litigation that affects the community or a significant sector of the community or that will develop the law.

Recommendation 46 - objects clause

The legislation establishing public interest costs orders should state that the object of such orders is to assist the initiation and conduct of litigation that affects the community or a significant sector of the community or will develop the law.

Terms of a public interest costs order

The Commission's draft recommendation

13.22 In DRP 1 the Commission proposed that if the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to

- the resources of the parties, including whether any party is in receipt of legal aid or other assistance or is able to claim its legal costs as a tax deduction
- the likely cost of the proceedings to each party
- the ability of each party to present his or her case properly or to negotiate a fair settlement
- the extent of any private or commercial interest each party may have in the litigation.

The orders the court or tribunal may make, subject to disciplinary costs orders, should include an order that

- each party bear his or her own costs
- the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
 - not be liable for the other party's costs
 - only be liable to pay a specified proportion of the other party's costs
 - be able to recover all or part of his or her costs from the other party
- another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.⁴⁵²

The terms of this proposal received broad support.⁴⁵³

Concerns about the possible terms of a public interest costs order

13.23 The Commission is aware of the concern that an 'innocent' party should not be deprived of its right to recover costs merely because the litigation is in the public interest.⁴⁵⁴ The Commission recognises this view⁴⁵⁵ but considers that there may be public interest cases where an order giving immunity against an adverse costs order is reasonable in light of all the circumstances of the matter. For example, where a party has a substantial commercial interest in the outcome it may be appropriate to grant an immunity to the other party if he or she has little or no personal interest in the matter and is properly pursuing it in the public interest.

Concerns about the court having regard to the parties' financial resources

13.24 Some submissions queried the relevance of legal aid or tax deductibility when settling the terms of a public interest costs order.⁴⁵⁶ The Commission considers that public interest costs orders should reflect, as far as possible, the extent to which a party could satisfy an adverse costs order without such an order affecting the party's ability to pursue the litigation. The extent to which a party can pay an adverse costs order is affected by such mechanisms as legal aid, insurance and tax deductibility. Without this information a court would find it difficult to determine an appropriate cap or other order.⁴⁵⁷

The Commission's view

13.25 In formulating the terms of a public interest costs order, the court should consider all the circumstances of the proceeding and of the parties before them. The aim of the order should be to assist the litigation to proceed. Public interest costs orders should be subject to disciplinary and case management costs orders.

Recommendation 47 - terms of a public interest costs order

If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to

- the resources of the parties
- the likely cost of the proceedings to each party
- the ability of each party to present his or her case properly or to negotiate a fair settlement
- the extent of any private or commercial interest each party may have in the litigation.

The orders the court or tribunal may make include an order that

- costs follow the event
- each party bear his or her own costs
- the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
 - not be liable for the other party's costs
 - only be liable to pay a specified proportion of the other party's costs
 - be able to recover all or part of his or her costs from the other party
- another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

An order under this provision will be subject to the power of the court or tribunal to make

disciplinary and case management costs orders.

Recommendation 48 - determining the resources of the parties

When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

Timing of a public interest costs order

13.26 In DRP 1 the Commission proposed that a public interest costs order should be made at any stage of the proceedings.⁴⁵⁸ This received general support.⁴⁵⁹

13.27 The Commission considers that a public interest costs order will facilitate public interest litigation most effectively if made at the start of proceedings. This will assist the parties to know their position throughout the proceedings. The Commission recognises that the issue may lead to a substantial dispute between the parties that might be more easily resolved if the order was not made until the conclusion of the proceedings. However, it considers that, on balance,⁴⁶⁰ the court should be empowered to make the order at any time including at the start of the proceedings.

Recommendation 49 - timing of a public interest costs order

The court or tribunal may make a public interest costs order at any stage of the proceedings including at the start of the proceedings.

Reviewing a public interests costs order if circumstances change

13.28 A few submissions considered that courts should be able to review a public interest costs order if the circumstances of the case change during the course of the litigation.⁴⁶¹ The Commission is concerned that providing a general right of review could lead to uncertainty and encourage further disputes. A preferable approach is for the court, if it considers it necessary, to make the costs order subject to there being no change in circumstances.

13.29 Alternatively, where there is insufficient information for a court to make a public interests costs order at the start of proceedings it may, at that time, indicate the costs order it is likely to make at the end of the proceedings subject to any change in circumstances coming to light in the course of the proceedings.⁴⁶²

Statutory power to commence proceedings 'in the public interest'

13.30 The Commission is aware that some statutory authorities have the power to commence certain proceedings if they are in the public interest. For example, the ASC may bring proceedings on behalf, or in the name, of persons who have suffered damage as a result of conduct that has been the subject of an ASC investigation.⁴⁶³ The ASC must be satisfied that it is in the public interest for it to commence such an action. In determining this question it takes into account factors such as the financial capacity of the person who has suffered damage, the seriousness of the alleged conduct or breach and whether the action is an appropriate test case. A decision to commence the proceeding may be subject to challenge under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The ASC bears the cost of the proceedings but may recover its costs if the action is successful.⁴⁶⁴

13.31 The Commission considers that actions commenced under such powers are significantly different in nature to the public interest litigation considered in this chapter. The regulatory agency takes action effectively on behalf of others and with a defined costs regime for the action. It is not necessary for the broader public interests costs regime discussed in this chapter to apply. Accordingly, while cases of this kind

may often have the character of public interest or test proceedings, in the Commission's view it would not be appropriate for the court to make a public interest costs order in these cases.

Maintenance and champerty

13.32 Private financing of proceedings has become a common and acceptable method of assisting individuals or groups with limited resources to gain access to the courts. This is reflected in the increasing trend for litigation to be financed by groups such as trade unions, special interest groups and government organisations. The common law crime and tort of maintenance prohibits a person with no interest in the litigation from financing a party unless there is a legally justifiable motive. The courts recognise that the charitable support of claims and the existence of a common interest are justifiable motives, but the application of these exceptions has failed to produce consistent guidelines. The law also prohibits a person or group financing litigation to share in its proceeds. This is called champerty.

13.33 The laws of maintenance and champerty have the potential to impede public interest litigation. They are rarely enforced and have been abolished in the United Kingdom,⁴⁶⁵ Victoria⁴⁶⁶ and New South Wales.⁴⁶⁷ The Commission has discussed the issues surrounding maintenance and champerty in previous reports.⁴⁶⁸

13.34 The Commission re-affirms its previous recommendation that maintenance should be abolished as a crime, a tort and as the basis of a defence to an action for breach of contract.⁴⁶⁹ It also supports the abolition of the law of champerty, notwithstanding concerns that this could lead to abuses of justice by the undesirable outside financing of, and speculation in, lawsuits.⁴⁷⁰ The Commission considers that these abuses can be controlled by a court's inherent power to terminate proceedings if an abuse occurs and by awarding costs against a maintainer who has supported an unsuccessful party. Contracts involving maintenance and champerty should continue to be illegal if they are contrary to public policy.⁴⁷¹

14. Costs allocation agreements

What are costs allocation agreements?

14.1 A costs allocation agreement arises where parties agree on how the costs incurred as a result of litigation are to be quantified or apportioned between them. Such an agreement may be made before or after litigation has commenced. These agreements are already being used in some situations. For example, some contracts include provisions requiring one party to pay the legal costs of another party on a full indemnity basis if there is a dispute. The extent to which these provisions have been enforced by the courts is not clear. In *Maher v Network Finance Ltd*⁴⁷² the New South Wales Court of Appeal held that a mortgagee could recover its litigation costs pursuant to the terms of the mortgage. The Federal Court Rules recognise agreements between parties as to the payment of all or part of the costs incurred as a result of proceedings.⁴⁷³

Advantages of costs allocation agreements

14.2 The use of costs allocation agreements has a number of advantages. An agreement requires parties to consider the question of costs before, or at an early stage of, litigation. It can provide greater certainty as to the amount of costs and how they are to be borne. An agreement also allows the parties greater flexibility to deal with costs in the manner most appropriate to the circumstances of their case. Costs allocation agreements have been used for these purposes in test cases involving the finance industry.

Disadvantages of costs allocation agreements

14.3 There are some disadvantages. In particular, there is a risk that an agreement may be unreasonable or unjust, especially where one party enjoys greater bargaining power.⁴⁷⁴ In some cases it could be used to impose a costs burden that would deter a weaker party from pursuing his or her rights. This would effectively be an ouster of the court or tribunal's jurisdiction to hear any dispute between the parties. The introduction of safeguards to ensure that agreements do not contain terms that are unreasonable or unjust could add to the duration and expense of the substantive proceedings.

The Commission's draft recommendation

14.4 In DRP 1 the Commission considered that, on balance, the disadvantages outweigh the advantages of costs allocation agreements.⁴⁷⁵ It proposed that the terms of a costs allocation agreement should be subject to any court or tribunal order as to the costs arising from litigation between the parties.⁴⁷⁶ Most responses supported the draft recommendation.⁴⁷⁷

The Commission's view

14.5 The Commission considers that a costs allocation agreement should be subject to any court or tribunal order as to the costs arising from litigation between the parties. The power of the court or tribunal to make a costs order should not be limited only to cases where it finds that the agreement is unconscionable or otherwise unenforceable.

14.6 The Commission also considers that only a costs allocation agreement made in contemplation of particular proceedings should have effect. Costs clauses in loan agreements, leases and other contracts should therefore not be enforceable where, as in most cases, they are not made in light of particular proceedings that have already commenced or are likely to commence. This will help to ensure that each party has accepted the terms of a costs agreement after considering the nature of the dispute, the likely costs and other relevant factors. It will reduce the risk of costs clauses in mortgages or other standard agreements being used to impose a costs burden on a weaker party who may be unaware of the clause or of its significance in any subsequent dispute.

14.7 The Commission recognises that in practice this recommendation will mean that costs allocation agreements will rarely be used. The alternative of allowing agreements made at anytime to be enforced subject to safeguards against unfair or unjust provisions would be counterproductive, inviting lengthy and

costly disputes which could undermine the value of having such agreements. The Commission's recommendation will not affect the ability of each party to decide not to seek costs against the other party or, if costs have been awarded, not to enforce that award.

Recommendation 50 - costs allocation agreements to be subject to costs orders

Where the parties to proceedings have made a costs allocation agreement in contemplation of the particular proceedings being determined by the court or tribunal, costs shall be apportioned in accordance with the terms of that agreement 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.

15. Disclosure of costs

Introduction

15.1 This chapter examines the need for litigants to know what cost allocation rules apply to their matter and how those rules may operate in the circumstances of their case. It also looks at the need for litigants to be regularly informed about the costs of their matter. The Commission's recommendations focus on the obligations of courts, tribunals and lawyers to provide this information.

The need for disclosure

15.2 Throughout the Commission's consultations and public hearings it was evident that people in the community need more information about the courts and the legal system and that information about costs needs to be given early and frequently.⁴⁷⁸ Many of the difficulties people had experienced with the legal system may have been avoided by the provision of clear, simple and independent information about the law, lawyers and use of the courts.⁴⁷⁹

15.3 AJAC noted that there is considerable support within the community, including the legal profession itself, for requirements that lawyers disclose to clients information about fees and related matters at the earliest opportunity.⁴⁸⁰ A number of jurisdictions already have rules requiring lawyers to provide written information on such matters as how their fees are determined and an estimate of the total cost of the litigation.⁴⁸¹ The federal Government will be legislating to require lawyers in federal matters to inform their clients about likely costs, lawyers' charges, alternative dispute resolution and complaints mechanisms about lawyers.⁴⁸² The early provision of this information means a client is in a much better position to make decisions about engaging a lawyer, pursuing litigation or seeking alternative courses of action.

Information to be provided about the costs rules

15.4 In DRP 1 the Commission proposed that clients be made aware of the costs allocation rules that apply to their matter and of how those rules may operate in the circumstances of their case.⁴⁸³ The Commission favoured the approach used in family law proceedings where a lawyer, before entering a fee agreement, must give his or her client a copy of a pamphlet prepared by the Family Court setting out the main costs rules. Although this approach focuses on the costs between solicitor and client, it is a useful model for helping clients understand the relevant costs allocation rules.

15.5 The Commission also proposed that the current legislation and rules requiring lawyers to disclose fee arrangements to their clients be amended to include a requirement to provide information about the relevant costs allocation rules and advice on their ramifications.⁴⁸⁴ A failure to provide such information should attract the same sanction as a failure to comply with other requirements under the relevant fee disclosure rules.

15.6 These proposals received substantial support from all sectors of the community.⁴⁸⁵ The Commission endorses the suggestions that the pamphlet

- should contain a list of independent help contacts⁴⁸⁶
- should be provided in languages other than English, or alternatively, should include contact details for translations.⁴⁸⁷

15.7 The Commission acknowledges that there is a cost associated with the publication and distribution of such pamphlets. However, the Commission considers that this is outweighed by the overall benefit that it will bring to the community.

Recommendation 51 - courts and tribunals to prepare a pamphlet on their costs allocation rules

Each court and tribunal should prepare a short, easy to read pamphlet describing the costs allocation rules applying to each type of proceeding that the court or tribunal can deal with. Copies of the pamphlet should be freely available to legal practitioners and to members of the public.

Recommendation 52 - party to be given pamphlet and written advice of relevant costs allocation rules

A party's legal representative should give the party

- a copy of the relevant costs pamphlet when the party first seeks advice about litigation
- written advice of the relevant costs allocation rules and how they operate when the party first gives instructions to the legal representative to file a claim, defence or cross-claim.

Recommendation 53 - unrepresented party to be given pamphlet on relevant costs allocation rules by court or tribunal

A court or tribunal should give a copy of the relevant costs pamphlet to a party who is not legally represented when the party files a claim, defence or cross-claim.

Disclosure of costs to client

The problem

15.8 In too many cases parties are receiving little or no information on the costs they are incurring until the end of the proceedings. This information can be an important consideration when a party is deciding whether, and in what way, to proceed and can assist in the efficient and economic management of the case. While the fee disclosure rules in some jurisdictions try to address this problem, there will be situations where it is necessary for a court or tribunal to order a party's legal representative to provide details of the costs incurred and an estimate of future costs.

The Commission's draft recommendation

15.9 In DRP 1 the Commission recommended that a court or tribunal should be able to require a legal representative to provide his or her client with details of costs incurred and estimates of further costs based on different assumptions specified by the court or tribunal.⁴⁸⁸ The costs of preparing this information should be borne by the legal representative.

Responses to the draft recommendation

15.10 This recommendation received general support.⁴⁸⁹ However, some concern was raised about the ability of courts to ensure compliance with these orders.⁴⁹⁰ The Commission recognises this concern. It recommends that a legal representative who has been ordered to provide his or her client with a statement of past and future costs should file with the court or tribunal a certificate certifying that the legal representative has complied with the order. The Commission considers that the court has a responsibility to ensure that lawyers comply with its orders and to make further investigations where necessary.

15.11 Concern was also raised about whether these orders may unnecessarily interfere with the lawyer-client relationship.⁴⁹¹ The Commission considers that disclosure of this kind is part of the advice and service that a lawyer should provide to his or her client and is entirely consistent with the lawyer-client relationship. Such orders will assist lawyers to fulfil their obligations to disclose all relevant information to their clients. Similar provisions are currently operating in the Family Court of Australia⁴⁹² and have recently been introduced in the District Court of Western Australia.⁴⁹³

Recommendation 54 - power to order lawyers to inform clients of the costs incurred

At any stage of the proceedings a court or tribunal may order the legal representatives of the parties to provide their respective clients with a statement of the costs they have incurred, the basis on which that amount has been determined and an estimate of the further costs that will be incurred if the matter proceeds. The court or tribunal may specify assumptions on which the estimate is to be based and may require separate estimates to be prepared for different sets of specified assumptions. The costs of preparing this information should be borne by the legal representatives.

Recommendation 55 - compliance with a disclosure order

A legal representative who has been ordered to provide his or her client with a statement of past and future costs must file with the court or tribunal a certificate certifying that the legal representative has complied with the order.

No power to order disclosure of costs to the other party

15.12 There may be situations where it is appropriate that the parties exchange details of the costs each has incurred up to particular stages of the proceedings. This disclosure would help reinforce to each party the need to consider the total costs of the litigation when deciding whether to proceed to the next stage or to resolve the dispute through alternative means. It would also help each party to make an informed assessment of the costs and risks involved in the proceedings and to weigh them against the potential benefits.

15.13 However, there are disadvantages in requiring exchange of this information. There is a risk that a party will deliberately inflate its costs to intimidate the other party. There is also a risk that a party may decide to prolong litigation because, on the basis of the disclosure, it considers the other party has almost exhausted its resources. These orders also impinge on the confidential relationship between a client and his or her legal representative.

15.14 Because of these disadvantages, the Commission does not consider that courts and tribunals should have the power to order the parties to provide each other with a statement of the costs they have incurred. Concerns about the amount that may have to be paid pursuant to an adverse costs order are better dealt with by the rules allowing courts and tribunals to cap the amount of costs that may be recovered.⁴⁹⁴

16. Costs orders against non-parties

Introduction

16.1 The Commission considers that in appropriate cases courts and tribunals should be able to order costs against a person regardless of whether he or she is formally a party to proceedings.⁴⁹⁵ This is already the law and practice in most Australian courts.⁴⁹⁶ This chapter looks at whether any changes need to be made to how this power is exercised, particularly in relation to certain types of people who may be involved in proceedings. The chapter also examines the apportionment of costs where there are two or more unsuccessful parties.

General principle for ordering costs against a non-party

The current situation

16.2 While the general principle is that an order for costs is only made against a party to the litigation, in appropriate cases the court may award costs against a person who is not a party.⁴⁹⁷ When deciding whether to award costs against a person who is not a party to proceedings a court must take into account the connection between that person and the proceedings and the causal connection between that person and the costs.⁴⁹⁸ The connection must be real and direct and it must be material to the issue of costs. The courts have indicated that it may be appropriate to order a person who is not a party to pay costs where that person is the effective litigant standing behind an actual party or where there has been a contempt or abuse of the process of the court.⁴⁹⁹ The rules of some courts specify the non-parties against whom a costs order may be made.⁵⁰⁰

No proposed reforms

16.3 The Commission does not propose any changes to the general principles developed by the courts concerning when it is appropriate to order a person who is not a party to pay all or part of the costs of the proceedings. However, in its recommendations concerning disciplinary and case management costs orders and public interest costs orders the Commission has proposed a number of exceptions to the general principle that costs orders should only be made against parties to the proceedings.⁵⁰¹ For example, under a disciplinary costs order a court may require a party's legal representative to pay the costs arising from particular misconduct.

Amicus curiae

The role of amicus curiae

16.4 The courts have a discretion to permit an appearance by an *amicus curiae* (friend of the court). The role of a friend of the court is traditionally limited to assisting the court on points of law which may not otherwise have been brought to its attention.⁵⁰² A friend may only appear where there is good cause for doing so and the court considers it proper.⁵⁰³ Usually a friend may not file pleadings, demand service of papers, lead evidence, examine witnesses or lodge an appeal. In some jurisdictions the court will accept a written brief rather than oral submissions by a friend.⁵⁰⁴ He or she may also be able to introduce evidence with the leave of the court.⁵⁰⁵ A friend of the court is not bound by the outcome of the proceedings. The role of a friend and the circumstances where one may be appointed have received little examination in Australian courts.⁵⁰⁶

Costs and friends of the court

16.5 The involvement of a friend of the court can add to the cost of proceedings to the parties and to the court. The extent to which a friend will increase the costs of the proceedings depends on the part he or she is to play in them. For example, submitting a written brief will have little impact on the costs but where a friend presents lengthy oral argument or leads evidence the additional costs can be significant. However, the role of a friend and the nature of his or her participation should be specified by the court when granting leave to appear. A court should permit a friend to do only those things that are necessary for him or her to fulfil his or her role.

16.6 Although it would seem that a friend of the court cannot recover his or her costs,⁵⁰⁷ the question of whether costs can be awarded against a friend does not appear to have been addressed in Australia. One response to IP 13 argued that the uncertainty about a friend's liability for costs has deterred many people and organisations who may otherwise have sought to intervene in proceedings on that basis.⁵⁰⁸

The Commission's draft recommendation

16.7 In DRP 1 the Commission proposed that, provided a friend's role and manner of participation are specified by the court when granting him or her leave to appear, as a general rule a friend should not recover or be liable for costs other than pursuant to a disciplinary or case management costs order.⁵⁰⁹ However, where a court allows a friend to play a greater part in the proceedings than was originally specified it should also address at that time the question of whether and to what extent the friend should pay any additional costs that may result.

16.8 Although one response considered this approach to be too restrictive,⁵¹⁰ other submissions supported the proposal.⁵¹¹

The Commission's view

16.9 The Commission considers that friends of the court can make a valuable contribution to the development of the law and resolution of disputes.⁵¹² People or organisations wishing to appear as a friend should not be deterred by the risk of an adverse costs order. The need to obtain the court's leave to appear is sufficient protection against frivolous or unreasonable interventions. It is not appropriate for a friend to recover costs given that he or she is participating in the proceedings voluntarily. However, to ensure that the court is able to control the proceedings it must be able to make disciplinary and case management costs orders against all those who appear before it. In light of these factors, the Commission recommends that a person appearing as a friend of the court should not recover or be liable for costs other than pursuant to a disciplinary costs order.

16.10 Provided the role and manner of participation of the friend are specified by the court when granting him or her leave to appear, the cost to the parties of the friend's involvement can be factored into their respective budgets for the case. This may influence how they conduct the proceedings. If a friend's role changes at a later stage of the proceedings then the parties may incur costs in addition to those which they have provided for under their budgets. In this situation it is appropriate that the friend's liability for costs be reviewed by the court.

Recommendation 56 - costs allocation rules and amicus curiae (friend of the court)

An *amicus curiae* (friend of the court) should not recover or be liable for costs other than pursuant to a disciplinary or case management costs order. Where a court allows a friend to play a greater part in the proceedings than was originally specified the court should also address at that time the question of whether and to what extent the friend should pay any costs incurred by the parties as a result of the friend's greater involvement.

Other intervenors

The current situation

16.11 In some cases a person may be able to intervene in proceedings to protect his or her interests which may be different from those of the parties.⁵¹³ Intervention may be granted as of right or by leave of court. With the exception of the right of the Attorney-General to intervene in any civil litigation that may affect the prerogatives of the Crown,⁵¹⁴ in Australia the courts have no inherent power to permit a third party to intervene in proceedings. However, courts have been given the power to allow intervention either under specific statutes or under rules of court.⁵¹⁵

16.12 A person accepted as an intervenor becomes a party to the proceedings with all the privileges of a party. He or she can appeal, tender evidence and participate fully in all aspects of the argument.⁵¹⁶ An

intervenor may seek or be subject to orders for costs. Unless there are special circumstances an intervenor will not be ordered to pay more than the additional costs incurred by a party as a result of the intervention.⁵¹⁷ It seems that costs orders are rarely made in favour of intervenors.⁵¹⁸

No change to the current law

16.13 At this stage the Commission considers that no changes should be made to the current costs rules applying to intervenors.⁵¹⁹ An intervenor should be subject to the costs allocations rules applying to the proceedings in which he or she has intervened.

Personal liability for costs of liquidators, trustees and other representatives

Litigation involving people with no personal interest in the proceedings

16.14 Litigation is often commenced, defended or instigated by people who are performing particular duties or functions pursuant to legislation or a legal instrument such as a deed or will. In most cases these people (referred to as 'representatives' in this report) have no personal interest in the proceedings. They include trustees, executors and liquidators. Although in most cases any adverse costs order arising from the proceedings will be met by the estate or fund, a representative may become personally liable for the other party's costs if the estate or fund is unable to satisfy the order or if the representative has acted outside the terms of his or her authority or otherwise behaved improperly or negligently.

16.15 A number of responses to IP 13 indicated that the risk of personal liability for costs may affect the ability of a representative to pursue actions that may be in the best interests of the fund or estate.⁵²⁰ In these situations the costs allocation rules create a conflict of interest between the representative and the fund or estate he or she is administering.

The Commission's view

16.16 The Commission considers that this problem should be addressed. However, the costs allocation rules are not an appropriate mechanism for solving these problems. The costs allocation rules should establish a general framework for the allocation of costs and should not create special costs rules for people performing particular functions or duties. The Commission considers it preferable that the personal liability of representatives for costs be addressed in the legislation governing each type of representative.

Multiple parties

Apportioning costs between multiple defendants

16.17 Joining parties can create special problems where the plaintiff succeeds against some parties but not others. While it is still a matter of discretion, the courts have developed particular orders for these situations. Under a Bullock order⁵²¹ the plaintiff pays the successful defendant's costs and adds them as a disbursement to the plaintiff's costs against the unsuccessful defendant. Under a Sanderson order⁵²² the unsuccessful defendant pays the costs of the successful defendant. A court will not make these orders unless satisfied that it was reasonable and proper for the plaintiff to have sued the successful defendant and that there was something in the conduct of the unsuccessful defendant that makes the order a proper exercise of discretion.⁵²³

16.18 Where costs are awarded against all the defendants they will be jointly and severally liable for the payment of those costs unless the court or tribunal orders otherwise. In many cases this will not be an issue as the defendants will be backed by the same insurer. However, where one defendant has assets and the others do not, that defendant will effectively be liable for all the costs.

Apportioning costs between multiple plaintiffs

16.19 In some cases there will be more than one plaintiff. Where costs are awarded against all the plaintiffs they will be jointly and severally liable for the payment of those costs unless the court or tribunal orders

otherwise. If some of the plaintiffs are successful and others are not the court will usually allow only the successful parties to recover their costs. In some situations the court may make a Bullock or a Sanderson order in favour of the successful defendant.

Is there a need for reform?

16.20 The current rules and practices for allocating costs where there are multiple plaintiffs or defendants may be inadequate. In DRP 1 the Commission invited comments on whether any reforms are needed and, if so, the nature of those reforms.⁵²⁴ It also suggested that one option for reform would be to introduce costs allocation rules requiring the court or tribunal to apportion a costs award between the unsuccessful parties. Each unsuccessful party would only be liable for the portion of costs awarded against it. There would be no joint liability. To avoid argument about how liability for costs should be apportioned between the unsuccessful parties certain presumptions could apply.⁵²⁵

16.21 Few submissions commented on the allocation of costs where there are multiple parties. Although there was some support for apportioning a costs award between the unsuccessful parties in certain types of litigation,⁵²⁶ the need for, and appropriateness of, such reforms is still not clear.

Further investigation required

16.22 The Commission does not propose any changes to the current law. However, the adequacy of the rules and practices for allocating costs where there are multiple plaintiffs or defendants should be reviewed in light of recent moves to limit the liability of some professional advisers and tradespeople to the proportion to which they were responsible for the loss.⁵²⁷

Representative actions

What is a representative action?

16.23 Representative actions are proceedings in which one person takes legal action on behalf of a number of people who are affected by a common problem.⁵²⁸ The rules of most Australian courts provide for representative actions where a number of people have the same interest in the proceedings.⁵²⁹ There is also special provision for representative proceedings in the Federal Court under Pt IVA of the Federal Court Act.

Representative procedures: concurrent interests

16.24 The representative procedure used in most Australian courts is similar to the one available under the Federal Court Rules.

Where numerous persons have the same interest in a proceeding the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against, any one or more of them as representing all or as representing all except one or more of them.⁵³⁰

This procedure is available where a number of parties have the same interest to secure a determination in one action rather than in separate actions.⁵³¹ Costs will usually be awarded against the party representing the other members of the group if their claim or defence is unsuccessful. The courts have held that the represented parties are not liable for costs if the action is unsuccessful.⁵³² If the action is successful then the court may award costs in favour of the representative party.

Pt IVA of the Federal Court Act

16.25 Pt IVA of the Federal Court Act provides a comprehensive regime for representative actions in the Federal Court. A person (the representative party) may bring an action on behalf of seven or more persons where all have claims against the same person. The claims must give rise to at least one substantial common issue of law or fact and must be in respect of, or arise out of, the same, similar or related circumstances.⁵³³ It does not matter that the relief sought for each person represented is not the same.⁵³⁴ In proceedings brought under Pt IVA, the Court can award costs against the representative party, a person appointed by the Court to

represent a sub-group or an individual group member who has been given leave to appear.⁵³⁵ The Court cannot award costs against any other person on whose behalf the proceedings have been commenced.

No changes to the current law

16.26 The Commission does not propose any changes to the specific costs allocation rules currently applying in representative proceedings.

17. Unrepresented litigants

The current situation

17.1 In *Cachia v Hanes*⁵³⁶ the High Court held that a successful litigant who is not represented by a lawyer is not entitled to be recompensed for work done in the preparation and conduct of his or her case. The Court also held that, in the absence of legislation or rules of the court to the contrary, it is not permissible for the loss of earnings of a litigant incurred in the course of presenting or conducting his or her case to be recovered as a disbursement. In addition, an unrepresented party can only recover the costs of any legal assistance he or she may have obtained from a lawyer if that lawyer appears on the court's record. An unrepresented litigant who gives evidence may be able to recover his or her expenses as a witness.

Legislation in the United Kingdom

17.2 In the United Kingdom unrepresented litigants may recover their costs for work done and for any other expenses or losses incurred in connection with the legal proceedings.⁵³⁷ These costs may be allowed on taxation or other determination.⁵³⁸ The amount recoverable for any item is capped at two-thirds of the amount which would have been allowed if the litigant had been represented by a solicitor⁵³⁹ unless the litigant appeared in the High Court or the Court of Appeal, in which case the same amount paid for work done by a solicitor may be allowed.⁵⁴⁰ Where the taxing officer concludes that the litigant has not suffered any pecuniary loss in doing any work to which the costs relate, the litigants may only recover £2 for each hour that was reasonably spent on the work.⁵⁴¹

Should unrepresented parties recover costs?

17.3 Most responses to IP 13 and DRP 1 supported the introduction of rules to allow unrepresented litigants to recover costs.⁵⁴² However, two main concerns were raised.

- The costs rules should not encourage parties to appear without legal representation.⁵⁴³ Proceedings involving an unrepresented litigant tend to be longer, place greater demands on the court and cause the other party to incur additional costs. The lack of legal knowledge of many unrepresented parties places a great burden on court administration or on the court itself to ensure that the work necessary for the litigation is done.⁵⁴⁴ This inevitably increases legal costs for the opposing party and the demand on court resources.⁵⁴⁵
- An unrepresented litigant should not be able to recover costs that cannot be recovered by a represented litigant.⁵⁴⁶ For example, a represented litigant must bear the cost of having to use his or her own time and resources to instruct lawyers, receive advice and attend court. Similar limits should be placed on the costs that an unrepresented litigant may recover.

The Commission's view

17.4 The Commission considers that an unrepresented litigant should not be excluded from recovering his or her costs. This is especially important where the other party has been the subject of a disciplinary cost order. If an unrepresented party cannot recover costs then such an order will be ineffective. It is also important that courts are accessible without legal representation. Legal representation should be used because of the value it brings to the litigant and to the court system. It should not be driven simply by the costs allocation rules.

17.5 An unrepresented litigant should be entitled to recover disbursements and to recover his or her own costs for preparing and presenting the case. However, to ensure that the interests of all parties and of the court system are taken into account, an unrepresented litigant's own costs should be limited to lump sum amounts set out in a schedule. These amounts should be calculated according to the type and complexity of the matter. In appropriate circumstances a court may allow an unrepresented litigant to recover costs in excess of the relevant lump sum.

17.6 The Commission accepts that an unrepresented litigant should not be in a better position than a represented litigant. Accordingly, the lump sum amounts should be calculated on the basis that the costs recoverable by an unrepresented litigant

- should not exceed the reasonable costs of a lawyer performing the work reasonably required to conduct the litigation
- should not exceed the amount of costs actually incurred by the litigant
- should not include costs that would not be recoverable by a represented litigant.

Recommendation 57 - unrepresented parties may recover costs

A party who does not have legal representation should be able to recover his or her costs in accordance with the relevant rules.

Recommendation 58 - the costs an unrepresented party may recover

An unrepresented party who is awarded costs may recover disbursements (including witness expenses and any reasonable legal costs) and his or her own costs for work reasonably necessary to prepare and conduct his or her case subject to the following conditions.

- The party's own costs should be limited to that allowed under a schedule setting out lump sum amounts according to the type and complexity of the matter. These amounts should not exceed the reasonable costs of a solicitor performing the same work.
- An unrepresented litigant should not be able to recover any costs in relation to the litigation that would not be recoverable by a represented litigant.
- A court may allow an unrepresented litigant to recover costs in excess of the relevant lump sum in appropriate circumstances provided that it does not exceed the amount of costs actually incurred by the litigant.

18. Indemnity schemes

Introduction

18.1 One mechanism for altering the impact of the costs indemnity rule and of the exceptions to that rule proposed by the Commission is to increase the availability of indemnities against adverse costs orders. An indemnity

- allows people who would otherwise not be prepared to risk an adverse costs order to litigate
- allows a party to recover at least part of his or her costs if successful against a party who has been given an indemnity
- compensates parties who incur costs as a result of successful appeal or of a case being aborted due to the judicial officer or jury being unable to determine the matter.

An indemnity may also be available to a party who may suffer substantial hardship because he or she is unable to recover all or part of his or her costs as a result of a court or tribunal order under the 'material effect' exception discussed in chapter 12.

18.2 Indemnities may be provided through legal assistance schemes, public interest litigation funds, appeals assistance funds and private schemes. These indemnities may be funded by various methods including government grants, a small levy on all court users, interest earned on solicitors' statutory trust accounts⁵⁴⁷ or insurance premiums. They need to be structured so that they do not undermine the fair allocation of other government funding such as that for legal aid.

Legal assistance indemnity schemes

The current situation

18.3 Some legal assistance schemes provide assisted litigants with an indemnity against an adverse costs award. For example, the *Legal Aid Commission Act 1979* (NSW) provides that, except in certain circumstances, where a court or tribunal orders a legally assisted person to pay costs the Legal Aid Commission is liable to pay the costs up to a specified sum (now \$12 500).⁵⁴⁸ The limit of \$12 500 was sufficient to pay the full costs in 59 of the 71 matters paid under the scheme in the period 1992-94.

18.4 Most other legal aid commissions are not required to pay all or any part of the costs awarded against an assisted party but may choose to do so.⁵⁴⁹ The Legal Aid Commission of Western Australia can be ordered by a court to pay all or part of the costs awarded against an assisted party provided such an order is just and equitable and that the unassisted party would suffer undue hardship if no order were made.⁵⁵⁰

The impact of indemnity schemes

18.5 In IP 13 the Commission invited comments on the impact indemnity schemes may have on access to, and conduct of, litigation.⁵⁵¹ Most of the responses to the issue considered that such schemes help to ensure an assisted litigant suffers no greater deterrence in protecting legal rights than a non-assisted litigant while protecting the ability of non-assisted litigants to recover at least a proportion of their costs if successful.⁵⁵² The main concerns about indemnity schemes were that the amount of costs that may be recovered is often less than the costs that an unassisted party is entitled to recover⁵⁵³ and that a party with an indemnity may be less willing to settle his or her matter.⁵⁵⁴

The Commission's draft recommendation

18.6 Many of the submissions to IP 13 supported an increase in the availability of indemnity schemes.⁵⁵⁵ In light of this response the Commission proposed that the Commonwealth should establish a legal assistance indemnity fund to provide eligible litigants with an indemnity against an adverse costs award.⁵⁵⁶ This proposal received general support.⁵⁵⁷

A federal legal assistance indemnity fund

18.7 The Commission recommends that the Commonwealth should establish a federal legal assistance indemnity fund to provide litigants who satisfy certain criteria with an indemnity against an adverse costs order. The fund should also be available to reimburse a party who may otherwise suffer substantial hardship because he or she is unable to recover all or part of his or her costs as a result of a court or tribunal order under the 'material effect' exception discussed in chapter 12.⁵⁵⁸ A federal indemnity scheme could be administered by the Attorney-General or by State and Territory legal aid commissions.

Features of a federal legal assistance indemnity fund

18.8 The federal legal assistance indemnity fund should have the following features.

- The indemnity fund should
 - provide an indemnity against an adverse costs order to a person who satisfies a merit test and a means test (an assisted litigant)
 - reimburse the costs incurred by a successful party who would otherwise suffer substantial hardship because he or she is unable to recover all or part of his or her costs from the unsuccessful party as a result of a court or tribunal order under the 'material effect' exception to the rule that costs follow the event.
- The indemnity fund should only pay costs up to a specified limit. If there is no limit the fund would be exposed to an unlimited liability and be difficult to fund adequately. The limit should be set at an amount that reflects the reasonable costs of litigation in most cases.
- An assisted litigant should not be liable for the payment of the whole or part of the costs awarded against him or her except where the scheme determines that liability exists.
- The fund should be available to all parties to the proceedings who have been awarded costs against an assisted litigant provided they have separate interests in the proceedings. This means each successful party can recover his or her costs from the fund up to the limit of the indemnity.
- The assistance should be available in all proceedings except that the fund should have a discretion as to whether and to what extent the costs will be paid in
 - an appeal against quantum
 - an action where the assisted litigant succeeds against some but not all of the other parties
 - an action where the assisted litigant unreasonably refused an offer of compromise
 - family law proceedings.
- The indemnity should not apply to disciplinary costs orders made against an assisted litigant or against a party who has been granted an immunity against all or part of an adverse costs order under the 'material effect' exception.

Recommendation 59 - federal legal assistance indemnity fund

The Commonwealth should establish a legal assistance indemnity fund to

- provide an indemnity against an adverse costs order to a person who satisfies a merit test and a means test
- reimburse the costs incurred by a successful party who would otherwise suffer substantial hardship because he or she is unable to recover all or part of his or her costs from the unsuccessful party as a result of a court or tribunal order under the 'material effect' exception to the rule that costs follow the event.

Public interest litigation fund

The Commonwealth test case scheme

18.9 The federal Attorney-General's Department administers a non-statutory scheme that provides funding for public interest litigation and test cases. Until recently the scheme only funded cases concerned with an important unresolved question of Commonwealth law. In June 1995 the Prime Minister announced that the scheme would be expanded. Over the next four years \$2.9 million will be available under the scheme for cases of national importance arising under Commonwealth, State or Territory laws or under the common law.⁵⁵⁹

18.10 In practice few grants have been made under the scheme. For example, during 1993-94 the Department contributed \$47 301 and agreed to provide a further \$50 000 towards public interest litigation and test cases.⁵⁶⁰ The scheme does not provide an indemnity against an adverse costs order to an assisted party.⁵⁶¹

Proposed reform

18.11 In IP 13⁵⁶² and DRP 1⁵⁶³ the Commission invited comment on whether there should be a fund to indemnify a party in public interest litigation against an adverse costs order. There was general support for the establishment of such a fund.⁵⁶⁴

The Commission's view

18.12 The Commission recommends that the Commonwealth test case fund should, in appropriate cases, indemnify an assisted party against the whole or part of an adverse costs order. It also recommends that a court should be able to direct the fund to meet all or part of the costs of one or more parties to the proceedings pursuant to its powers to make public interest costs orders.

Recommendation 60 - public interest litigation fund

The assistance available to litigants under the Commonwealth test case fund should include an indemnity against the whole or part of an adverse costs order. The fund should also be subject to the power of a court to make a public interest costs order whereby the fund may be required to pay all or part of the costs of one or more of the parties to the proceedings.

Appeals assistance funds

The current situation

18.13 The Commonwealth and most State and Territories have established statutory schemes to enable a court to issue a costs certificate to an unsuccessful respondent in an appeal that succeeds on a point of law or results in a change to the amount of damages awarded by the trial judge.⁵⁶⁵ The court must also be satisfied that it is proper for the respondent to be given a certificate. A costs certificate entitles the respondent to an indemnity against any costs awarded to the appellant. The extent of the indemnity provided by a costs

certificate is specified in the legislation establishing the scheme. In most schemes the indemnity will be an amount equal to the appellant's costs of the appeal and the respondent's costs calculated as one half of the costs payable to the appellant up to a prescribed maximum amount.⁵⁶⁶ The schemes are funded from either general revenue⁵⁶⁷ or from a levy on court and tribunal application fees.⁵⁶⁸

Appeals assistance funds to be retained

18.14 The Commission considers that appeals assistance funds should be maintained.⁵⁶⁹ It is not appropriate that private parties bear the full costs of an appeal due to an error of law by a court or where an appeal is required due to the uncertainty of the law. These funds should also be available to compensate parties who have incurred the costs of a trial or hearing that is aborted through no fault of the parties. The responses to DRP 1 were of the view that governments should continue to provide appeal assistance funds.⁵⁷⁰

Features of appeals assistance funds

18.15 Appeals assistance funds should have the following features.

- A certificate for costs should be available in the following situations
 - an appeal which is successful on a question of law or an amount of damages awarded
 - in the case of criminal appeals, an appeal against conviction or penalty which is successful
 - a case aborted due to the death or disability of the judicial officer hearing the matter
 - a case aborted due to the dismissal or lack of agreement of a jury.
- The court hearing the matter should determine whether to grant a certificate for costs relating to all or a specified part of the proceedings.
- The amount of costs that may be granted should be the reasonable costs of each party to the proceedings up to a limit prescribed for each court and tribunal. The limit should be an amount that reflects the reasonable costs of litigation in most cases.
- The costs of an appeal should include the costs of earlier appeals provided the earlier appeal was due to an error of law or the uncertainty of the law.
- The Commonwealth, a State, a Territory or a corporation with paid up capital of \$200 000 or more should not be eligible to apply for a grant of a costs certificate.

18.16 A certificate should not be granted in relation to the obligation to pay costs pursuant to a disciplinary costs order. To allow an indemnity in these cases would negate the impact of the order on the party being sanctioned by the court or tribunal.

The Commission's view

18.17 The Commission recommends that the federal appeals assistance fund should be available in all appeals before federal courts or tribunals including criminal appeals. The fund should have the features set out in paragraph 18.15.

Recommendation 61 - federal appeals assistance fund

The federal appeals assistance fund should be available in all appeals before federal courts or tribunals including criminal appeals.

Private indemnity schemes

18.18 An indemnity against an adverse costs order may be provided under some industry dispute resolution schemes. These schemes allow for a consumer to be indemnified in test cases where the matter is referred to court for resolution. For example, the Banking Industry Ombudsman may, on the submission of a bank, allow test cases to be resolved by a court on the condition that the bank pay the other side's costs on a solicitor and client basis.⁵⁷¹

18.19 Indemnities may also be provided under insurance schemes. The Law Society of England and Wales is to run an 'after the event' insurance scheme which will pay any costs awarded against a party who has entered a conditional fee agreement with his or her solicitor in personal injury litigation.⁵⁷² A wider insurance scheme providing an indemnity in all cases conducted on a conditional fee basis is being organised by a private firm.⁵⁷³ This form of insurance is not available in Australia.

18.20 The Commission considers that private indemnity schemes can make a valuable contribution to improving access to the court system. It supports their continued development.

A retrospective costs reimbursement scheme

18.21 One submission to the Commission proposed a scheme for the retrospective reimbursement of costs incurred by an unsuccessful litigant whose case subsequently makes a significant contribution to the operation and application of Australian law.⁵⁷⁴ Under the scheme, an unsuccessful party in a civil case that is subsequently followed, applied or cited as support by an Australian superior court would be entitled to an annual payment of, say, 4 per cent of the final costs paid by him or her and recorded by the court minus any assistance received under litigation support provisions up to a maximum of 72 per cent of those costs. The payments could be claimed up to 10 years after the highest decision. Payments would cease if the decision is overturned or overruled by a relevant higher court.

18.22 The Commission has focused in this report on arrangements designed to improve the ability of parties with limited resources to enforce or defend their rights through the courts. A retrospective costs reimbursement scheme has a different focus, acting more as a financial incentive for the development of the law through the courts than as a mechanism for providing access to justice. It is also likely to be difficult and expensive to administer. Accordingly, the Commission does not support the introduction of such a scheme.

19. Enforcing costs orders

Introduction

19.1 The ability of the costs allocation rules to achieve their objectives depends on a party being able to enforce a costs order made in his or her favour. For example, if costs cannot be recovered then costs allocation rules will be ineffective as a means of financing litigation, sanctioning misconduct or contributing to the settlement of disputes. This chapter looks at the enforcement mechanisms currently available to parties who have been awarded costs.

Current enforcement mechanisms

19.2 Costs orders are often difficult to enforce, especially against a party who has few or no resources or who is determined not to pay. Costs orders are recovered as a judgment debt in the same way as an order for damages or other monetary relief. The main court enforcement mechanisms include

- an order that the judgment debt be paid by instalments
- an examination notice requiring a debtor to attend court and to be examined about his or her financial circumstances
- a garnishee order allowing the creditor to deduct all or part of the judgment debt from the debtor's wages or bank account
- a writ of execution allowing certain property of the debtor to be seized and sold by officers of the court with the proceeds going to the creditor.

Consultations suggested that these enforcement mechanisms can be expensive, cumbersome, time-consuming and often ineffective. They usually involve the preparation, filing and service of further court documents and, in many cases, require further attendances at court. Even after pursuing these processes it may still not be possible to obtain payment from a party who is determined not to pay.

Security for costs

19.3 One mechanism for ensuring that all or part of a costs order will be enforced is an order for security for costs. Most courts are able to order a party to pay money into the court or otherwise give security for payment of costs.⁵⁷⁵ The purpose of this order is to ensure that litigants do not unreasonably or by artificial means avoid a costs order made against them and to ensure that those who stand to benefit from the litigation also run the risk of its burdens. In practice, most orders for security for costs are made against the plaintiff. An order for security for costs also focuses the attention of the parties and the court on the possible apportionment and expected amount of the costs of the litigation at an early stage of the proceedings.

19.4 When deciding whether to order security for costs the court must balance the risk of exposing an innocent defendant to the expense of defending the action with the risk of unnecessarily shutting out from relief a plaintiff whose case if litigated would result in the relief being granted. The discretion to order security must be exercised in light of all the circumstances of the case. However, relevant factors include

- whether the plaintiff has a bona fide claim with strong prospects of success
- whether requiring security will be oppressive or bring the action to an end
- the means of the plaintiff and of any persons who stand behind the litigation
- whether the wrongful conduct of the defendant might be seen to contribute significantly to the plaintiff's impecunious condition

- whether the plaintiff is resident outside the jurisdiction
- whether there has been delay in applying for security
- the amount of costs likely to be incurred.

It seems that in most cases a natural person will not be required to give security in the absence of special circumstances.⁵⁷⁶

19.5 Although there is some support for increasing the availability of security for costs,⁵⁷⁷ the Commission considers that there is little potential for expanding the role of these orders. Increasing their availability also increases the risk of a party being prevented from having his or her case determined by the court or tribunal. It would also undermine the financing role of the costs indemnity rule discussed in chapter 4.

Mareva injunctions

19.6 Mareva injunctions⁵⁷⁸ are designed to prevent the removal or dissipation of assets where that would defeat the enforcement of the successful party's judgment. They may also be used to preserve the assets of a party ordered to pay costs.⁵⁷⁹ However, Mareva injunctions will usually only be granted where there is a risk that the assets of the other party will be removed or dissipated so as to defeat the enforcement of the court's orders.⁵⁸⁰ The Commission considers that Mareva injunctions are of limited assistance given the cost of obtaining them and their relatively narrow application.

The Commission's view

19.7 The Commission considers that more work is required to develop better ways of ensuring that costs awards can be enforced quickly and without additional expense to the enforcing party. The inability to enforce costs orders quickly, cheaply and effectively is a major problem that undermines the purposes of making costs orders. However, it must also be recognised that no enforcement regime will be able to address the situation where a party who has been ordered to pay costs does not have the means to satisfy that order.

19.8 The Commission considers that, in light of the importance of costs orders to litigants and the litigation process, courts should have a greater role in ensuring compliance with costs orders. For example, it may be appropriate for the court that makes a costs order to monitor compliance and to deal with complaints about non-payment.

19.9 Enforcement may also be enhanced through the case management processes being developed by courts and tribunals. For example, there may be situations where it is appropriate for a court to stay proceedings until an interim disciplinary costs order has been paid. This and other enforcement mechanisms should be examined in the context of reforms to the way in which courts and tribunals control the proceedings that come before them.

20. Implementation

Introduction

20.1 This chapter looks at a number of issues concerning the implementation of the Commission's recommendations. In particular, it 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 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.

Uniform costs allocation rules

The need for uniformity

20.2 In general, most Australian jurisdictions already have the same costs allocation rules. This is particularly important given that most Australian courts are able to exercise some federal jurisdiction.⁵⁸¹ It is only in criminal proceedings that costs allocation rules vary substantially between the States and Territories. This means that the parties to an action under a federal law (other than a prosecution) will be subject to the same costs rules regardless of which court deals with the proceedings.

20.3 The Commission considers it undesirable to substantially alter the costs allocation rules for proceedings before federal courts and tribunals without the same changes being adopted by State and Territory courts and tribunals. Nor is it desirable to have one set of costs allocation rules for federal matters and another for matters brought under State or Territory law. In either case, a lack of uniformity would create confusion, add to the expense of litigation and encourage forum shopping whereby a party will choose to litigate in the court or tribunal with the most favourable costs rules. It is also unfair for people to be treated differently depending on where the litigation is conducted.

20.4 The Commission recommends that, as far as possible, the changes to the costs allocation rules recommended in this report should be adopted in all Australian courts and tribunals.

Recommendation 62 - uniform costs allocation rules

As far as possible the reforms to the costs allocation rules recommended by the Commission should apply in federal, State and Territory courts and tribunals.

One mechanism for achieving national reforms

20.5 One mechanism for encouraging the uniform adoption of reforms to the costs allocation rules is the Standing Committee of Attorneys-General (SCAG). SCAG comprises the Attorneys-General of the Commonwealth, each State and Territory and New Zealand. It seeks to achieve uniform legislation in appropriate cases or to harmonise legislative and other action within the portfolio responsibilities of its members.

Recommendation 63 - Standing Committee of Attorneys-General

The federal Government should, through the Standing Committee of Attorneys-General, encourage the uniform adoption of reforms to the costs allocation rules in federal, State and Territory courts and tribunals.

Developing rules and procedures prior to implementation

20.6 Many of the Commission's recommendations give rise to a number of practical issues that need to be considered before they are implemented. For example, practice directions will need to be developed for

applications under the 'material effect' or the public interest exceptions to the costs indemnity rule to ensure that they do not become an expensive and time-consuming interlocutory step in civil proceedings.

20.7 The courts will need to develop rules and procedures which will allow applications under the exceptions to be resolved quickly, economically and efficiently. These procedures will be supported by the Commission's recommendations for a system of disciplinary and case management costs orders which will help courts control unreasonable claims and defences and promote settlement.

20.8 It is desirable that procedures are in place when the new costs allocation rules come into effect. One way to develop these procedures is for members of the judiciary, lawyers and representatives of those who use the litigation process to examine and report on how the rules are likely to operate in practice and on what procedures, if any, will be necessary if the new rules are to operate efficiently and economically. As these issues will be relevant to all Australian courts, the Commission suggests that the Attorney-General should ask the AIJA to coordinate this process and oversee the development of any rules, practice notes and other guidelines which may be required. The federal Government should provide the AIJA with the resources it needs to coordinate this process.

Recommendation 64 - assessing the impact of new costs allocation rules prior to implementation

Before the costs allocation rules recommended by the Commission are implemented, the federal Attorney-General should arrange for an examination by members of the judiciary, lawyers and other interested individuals and organisations of the way in which the rules will probably work in practice. The Attorney-General should ask the Australian Institute of Judicial Administration to coordinate this examination and, in light of that examination, to coordinate the development of rules, guidelines and practice notes for implementation of the new rules.

Controlling the conduct of court and tribunal proceedings

20.9 The most effective way to control the costs of litigation is to control the issues and the evidence that may be disputed in each case. Courts and tribunals are currently working on how their procedures can be used to control the conduct of litigation and thereby the cost.⁵⁸² Costs allocation rules can make an important contribution to the effectiveness of these procedures. For example, the disciplinary and case management costs orders recommended by the Commission are intended to promote compliance with procedural rules and directions of courts and tribunals.

20.10 The Commission considers that costs allocation rules should be seen and developed as part of a package of procedural controls, case management systems and other mechanisms for controlling the costs of litigation.

Recommendation 65 - mechanisms for controlling litigation and the costs allocation rules

The costs allocation rules recommended by the Commission should be adopted as part of a package of procedural controls, case management systems and other mechanisms for controlling the conduct, and thereby the costs, of litigation.

Reviewing costs allocation rules

20.11 In chapter 2 the Commission indicated that particular costs allocation rules have been formulated to achieve particular outcomes. For example, disciplinary costs orders are intended to enhance the ability of courts and tribunals to control the proceedings that come before them. The 'material effect' exception to the costs indemnity rule is designed to negate the deterrent effect the risk of an adverse costs order may have on people of limited means who wish to pursue meritorious claims or defences.

20.12 It is important that the operation of costs allocation rules is regularly monitored and assessed to determine whether the rules are achieving the desired outcomes. The assessment should also examine

whether the rules are making dispute resolution more expensive and, if so, whether that additional expense is justified by the desired outcome. The AIJA would be an appropriate body to coordinate the monitoring and assessment of the operation of costs allocation rules.

Recommendation 66 - review of the operation of costs allocation rules

The federal Attorney-General should arrange for the operation of costs allocation rules to be monitored and assessed by a body such as the Australian Institute of Judicial Administration to ensure that they are achieving the desired outcomes without unnecessary expense to the court, tribunal, parties or community.

Appendix A: Participants

The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1973* for the purposes of this reference comprises the following:

President

Alan Rose AO

Deputy President

Sue Tongue

Members

Chris Sidoti

Michael Ryland

Justice John von Doussa

Officers

Team Leader

Philip Kellow

Law Reform Officers

Anne Sutherland-Kelly (to December 1994)

Sabina Lauber (from January 1995)

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Joshua Thompson (February to May 1995)

Elizabeth Hayes (April to May 1995)

Jackie Saisithidej (from May 1995)

Project Assistants

Jan Brennan (to January 1995)

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Joanna Longley *Librarian* (to August 1995)

Merryl Charleston *Librarian* (from August 1995)

Anna Peden *Library Officer* (to January 1995)

Emma Joneshart *Library Officer* (from April 1995)

Advisory Group

Ms Liza Carver, Executive Member, Australian Federation of Consumer Organisations and Solicitor, Public Interest Advocacy Centre

Mr Steve Edwards, Associate Director Legal, Australian Finance Conference

Mr Peter Gandolfo, Solicitor and Chairman, Legal Aid Commission of Victoria

Mr Neville Henwood, Solicitor and Past President, Northern Territory Law Society

Judge Robert M Lunn QC, District Court of South Australia

Justice Jane Mathews, President, Administrative Appeals Tribunal

Ms Susan Pattison, Pattison Hardman Pty Ltd

Mr Ray Rinaudo, Solicitor and Member, Law Council of Australia Access to Justice ACommittee

Mr Ted Wright, Visiting Fellow, Department of Law, University of New England

Appendix B: Abbreviations

AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i> (Cth)
ABS	Australian Bureau of Statistics
ABS Survey	Australian Bureau of Statistics <i>Legal and accounting services, Australia 1992-93</i> ABS Sydney 1995
ADR	alternative dispute resolution
AIJA	Australian Institute of Judicial Administration
AJAC	Access to Justice Advisory Committee
AJAC Report	<i>AJAC Access to justice: an action plan</i> Access to Justice Advisory Committee Canberra 1994
ALRC	Australian Law Reform Commission
ALRC 27	ALRC Report No 27 <i>Standing in Public Interest Litigation</i> AGPS Canberra 1985
ALRC 46	ALRC Report No 46 <i>Grouped Proceedings in the Federal Court</i> AGPS Canberra 1988
ALRC 68	ALRC Report No 68 <i>Compliance with the Trade Practices Act 1974</i> ALRC Canberra 1994
ALRC 69(1)	ALRC Report No 69 Part I <i>Equality Before the Law: Justice for Women</i> ALRC Sydney 1994
ALRC 69(2)	ALRC Report No 69 Part II <i>Equality Before the Law: Women's Equality</i> ALRC Sydney 1994
ALRC DRP 1	ALRC Draft Recommendations Paper No 1 <i>Litigation costs rules</i> ALRC Sydney 1995
ALRC IP 13	ALRC Issues Paper No 13 <i>Who should pay? A review of the litigation costs rules</i> ALRC Sydney 1994
ARC	Administrative Review Council
ATLA	Association of Trial Lawyers of America
ATO	Australian Taxation Office
CJRC	Civil Justice Research Centre
CJRC Report	T Beed & I McEwin <i>Lawyers in civil litigation</i> CJRC Sydney 1990
CJRC Study	D Worthington & J Baker <i>The costs of civil litigation</i> CJRC Sydney 1993
CLAFs	contingency legal aid funds
Constitution	<i>Constitution Act 1900</i> (Cth)
DCM	differential case management
DPP	Director of Public Prosecutions
Family Law Act	<i>Family Law Act 1975</i> (Cth)
Federal Court Act	<i>Federal Court of Australia Act 1976</i> (Cth)
HREOC	Human Rights and Equal Opportunity Commission
IR Act	<i>Industrial Relations Reform Act 1993</i> (Cth)
IRC	Industrial Relations Court of Australia
IRT	Immigration Review Tribunal
ISC	Insurance and Superannuation Commission
Justice Statement	Attorney-General's Dept <i>The Justice Statement</i> Attorney-General's Dept Canberra 1995
LAFS	Legal Aid and Family Services, Attorney-General's Dept (Cth)
LEI	legal expenses insurance
NSWLRC DP 36	New South Wales Law Reform Commission Discussion Paper No 36 <i>Barratry, Maintenance and Champerty</i> Sydney 1994
RRT	Refugee Review Tribunal
SCAG	Standing Committee of Attorneys-General
SSAT	Social Security Appeals Tribunal
Supreme Court Rules (ACT)	Rules of the Supreme Court of the Australian Capital Territory (ACT)
Supreme Court Rules (Qld)	Rules of the Supreme Court of Queensland (Qld)
Supreme Court Rules (Tas)	Rules of the Supreme Court of Tasmania (Tas)
Supreme Court Rules (Vic)	Rules of the Supreme Court of Victoria (Vic)

Appendix C: Overseas costs allocation rules

Cost allocation rules in the United States

The American Rule

The American rule is that each party to proceedings must bear his or her own costs except where the litigation is vexatious or an abuse of process.⁵⁸³ In support of this rule the United States Supreme Court has argued that

since litigation is at best uncertain one should not be penalised for merely defending or prosecuting a law suit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel ...⁵⁸⁴

One-way fee shifting

Since the 1960s both Congress and State legislatures have introduced laws that provide that a successful plaintiff can recover his or her costs but a successful defendant cannot. This is a form of one-way fee shifting. These laws are intended to promote social reform by encouraging litigation in public interest matters, such as civil rights and the environment.⁵⁸⁵ They are generally not available in actions in tort or contract. The extent to which these laws promote litigation is unclear. At least one study has criticised the use of one-way fee shifting as a mechanism for implementing social change as it relies on litigants, lawyers and judges whose reasons for acting may be inconsistent with what the legislature hoped to achieve.⁵⁸⁶

A costs indemnity rule in the United States

In 1994 the Common Sense Legal Reforms Bill⁵⁸⁷ (the Bill) was introduced into Congress. The Bill proposes to introduce a loser pays rule for certain federal litigation. Supporters of the Bill argue that the introduction of a costs indemnity rule is needed to control the amount of litigation in the United States.

Level of litigation in the United States

Concerns have been expressed that without the costs indemnity rule there would be an epidemic of unreasonable litigation. The high level of litigation said to exist in the United States is often given as an example of what could happen in Australia. However, the high level of litigation in the United States is the product of a number of factors, many of which do not exist in Australia. For example

- in the United States many people rely heavily on obtaining compensation in the courts as there is no comprehensive medical insurance scheme and only a limited welfare system
- the amount of damages awarded in United States courts tends to be more generous than in Australian courts, possibly because damages are assessed by a jury rather than a judge
- lawyers in the United States are able to enter contingency fee agreements based on a percentage of the damages award these types of agreements are not proposed in Australia (except in Queensland).

There may also be doubts about the extent to which the level of litigation in the United States is due to individual litigants. Various studies have indicated that

- tort cases make up a very small proportion of all cases⁵⁸⁸
- most new cases filed in the federal courts are criminal⁵⁸⁹
- most civil proceedings are commenced by the United States government and business.⁵⁹⁰

The high level of litigation in the United States is the product of many factors. It is not possible to attribute the level to any single factor such as the costs allocation rule.

Other overseas experience

United Kingdom

The general rule in the United Kingdom is similar to that in Australia. Costs are at the discretion of the court. In civil proceedings the discretion will usually be exercised so as to order an unsuccessful party to pay the costs of the successful party. The exceptions to this rule are similar to those in Australia.

In contrast to the United States, the United Kingdom has a social welfare structure that provides some financial support to individuals who may otherwise have looked to the legal system for compensation. It also has a legal aid program which operates mainly in the area of criminal law. The legal aid program has recently come under considerable criticism for the lack of sufficient resources available for civil law litigation.

European countries other than the United Kingdom

The basic rule prevailing in most other European countries is that the losing party must pay not only his or her own costs but also those of the winner.⁵⁹¹ There is variety among the countries in the nature and range of the exceptions and qualifications to this rule. There are three broad classes of exception

- those that focus on the conduct or state of mind of the successful party
- those that recognise special situations in which the unsuccessful party's good faith seems to deserve special recognition, such as justifiable doubts about the interpretation of a document or statute
- those that recognise differences in the economic position of the parties and seek to prevent economic hardship.

Distinctive procedural devices offered in European codes include

- ***Excusable ignorance of material facts.*** Under the Swedish code, if the plaintiff prevails on the basis of facts of which the defendant had no actual or constructive knowledge the costs will be split among the parties.⁵⁹²
- ***Substantial mutual doubts about facts.*** Where each party litigates in good faith on the basis of doubts about the facts the costs may be split between the parties.
- ***Doubts about the law .*** The Norwegian code permits a splitting of costs in the event of legal doubts. In Italy the court may split costs between the parties where a change in legislation or case law during the course of the proceedings impacts on a case.
- ***Appeals.*** An appellant who does not succeed must pay the costs of the other party. However, if a successful appeal is due to new facts that could have been presented in the lower court, costs of the appeal can be awarded against the appellant.⁵⁹³
- ***Unnecessary procedures.*** The prevailing party is entitled to reimbursement only for those costs that were necessary to obtain a favourable decision.⁵⁹⁴ A restrictive calculation method for costs is preferred to promote procedural economy and enforce openness and co-operation. In some countries this excludes the fee of the advocate. If a party causes costs by unnecessary or uneconomical procedural acts it will be barred from demanding reimbursement for its own costs and must reimburse the other party regardless of the outcome.⁵⁹⁵ In some instances costs caused by unnecessary procedures must be paid by the attorneys or representatives who negligently initiated the procedures,⁵⁹⁶ or by the court if it handled the case inappropriately.⁵⁹⁷
- ***Actions among relatives.*** Courts divide costs between parties who are related to each other by blood or marriage regardless of outcome in recognition of the special economic and social ties and dependencies that often exist between such parties.⁵⁹⁸

Japan

The general rule in Japan is that the loser pays the winner's costs. The recoverable costs do not include attorney's fees except where they are part of the damages award. Because attorney's fees tend to be the largest component of legal costs incurred by a party, it is rare for a Japanese party to enforce the relatively small costs award made in his or her favour. The items that can be recovered include

- court filing fees
- service of document fees
- travelling expenses, lodging expenses and daily allowances of witnesses and court interpreters
- fees and expenses incurred in obtaining expert opinions
- typing expenses for preparing complaints
- translation costs
- travelling expenses, daily allowances and lodging expenses of counsel if the hearing is conducted outside the original jurisdiction of filing.

A judge has a discretion as to the amount of these costs that will be allowed in the costs award and can apportion the costs according to the level of success of either party. These principles apply at all levels of the civil court system. The family court has special rules because of the emphasis on conciliation in that court.

Appendix D: List of submissions

Submissions to Issues Paper 13

ACT Council of Social Services (ACTCOSS)	<i>Submission 2</i>
Administrative Appeals Tribunal (AAT)	<i>Submission 84</i>
Administrative Review Council (ARC)	<i>Submission 106</i>
Allen Allen & Hemsley	<i>Submission 38</i>
Association of Labor Lawyers (Qld)	<i>Submission 72</i>
Auscript	<i>Submission 65</i>
Australian Corporate Lawyers Association (ACLA)	<i>Submission 107</i>
Australian Credit Forum	<i>Submission 76</i>
Australian Federation of Consumer Organisations (AFCO)	<i>Submission 90</i>
Australian Finance Conference (AFC)	<i>Submission 55</i>
Australian Institute of Company Directors	<i>Submission 100</i>
Baker & McKenzie	<i>Submission 34</i>
Baker, Don J	<i>Submission 35</i>
Beasley, RG	<i>Submission 61</i>
Black, John	<i>Submission 41</i>
Brott Danby, Cipa	<i>Submission 19</i>
Business Council of Australia (BCA)	<i>Submission 50</i>
Business Forum on Consumer Issues (BFCI)	<i>Submission 102</i>
Business Software Association of Australia	<i>Submission 109</i>
Byrne, Jenny	<i>Submission 8</i>
Cameron, P & J	<i>Submission 60</i>
Carden, AG	<i>Submission 77</i>
Clayton Utz	<i>Submission 73</i>
Commonwealth Director of Public Prosecutions DPP (Cth)	<i>Submission 24</i>
Confidential	<i>Submission 78</i>
Confidential	<i>Submission 71</i>
Confidential	<i>Submission 4</i>
Confidential	<i>Submission 48</i>
Darveniza, Brendan	<i>Submission 69</i>
Department of Courts Administration (NSW)	<i>Submission 97</i>
Director of Public Prosecutions (WA) (DPP (WA))	<i>Submission 9</i>
Environmental Defender's Office (EDO)	<i>Submission 32</i>
Environmental Law Community Advisory Service (SA) (ELCAS)	<i>Submission 98</i>
Ernst & Young	<i>Submission 83</i>
Federal Court of Australia	<i>Submission 108</i>
Financial Counselling Services (Qld)	<i>Submission 68</i>
Forbes, James	<i>Submission 36</i>
Gardiner, PA	<i>Submission 66</i>
Grey, Joan	<i>Submission 21</i>
Gruen, Ann & Fred	<i>Submission 103</i>
Hammet, Michael	<i>Submission 62</i>
Industry Commission, Office of Regulation Review	<i>Submission 89</i>
Insolvency Practitioners Association of Australia (IPAA)	<i>Submission 87</i>
Institution of Engineers, Australia	<i>Submission 99</i>
Insurance Council of Australia (ICA)	<i>Submission 64</i>
Ipp, The Hon Justice, Supreme Court of Western Australia	<i>Submission 12</i>
Keeling, Alan	<i>Submission 63</i>
Keim, Stephen	<i>Submission 67</i>
KPMG	<i>Submission 56</i>
Law Institute of Victoria (LIV)	<i>Submission 25</i>
Law Society of New South Wales	<i>Submission 74</i>
Law Society of South Australia	<i>Submission 94</i>

Law Society of the Australian Capital Territory	<i>Submission 79</i>
Law Society of Western Australia	<i>Submission 18</i>
Law, Veronica	<i>Submission 3</i>
Lawrence, Sarah	<i>Submission 13</i>
Legal Aid Western Australia (LAWA)	<i>Submission 16</i>
Legal Aid and Family Services, Attorney-General's Department	<i>Submission 96</i>
Legal Aid Commission of New South Wales (LACNSW)	<i>Submission 47</i>
Legal Aid Commission of Tasmania (LACTAS)	<i>Submission 33</i>
Legal Aid Office (Qld) (LAO (Qld))	<i>Submission 80</i>
Legal Services Commission of South Australia (LCS (SA))	<i>Submission 46</i>
Lindon, Len	<i>Submission 40</i>
Local Court of New South Wales	<i>Submission 1</i>
Lyle, Charmaine	<i>Submission 39</i>
Mackay, J	<i>Submission 58</i>
Magistrates Court of South Australia	<i>Submission 81</i>
Mahoney, The Hon Justice, Supreme Court of New South Wales	<i>Submission 10</i>
McIntyre, Peter M	<i>Submission 14</i>
Mildren, The Hon Justice, Supreme Court of the Northern Territory	<i>Submission 42</i>
Ministry of Fair Trading (WA)	<i>Submission 88</i>
Munt, LJ	<i>Submission 7</i>
Murphy, Damien	<i>Submission 105</i>
Nelson, David	<i>Submission 31</i>
New South Wales Bar Association	<i>Submission 85</i>
Newhouse, Paul	<i>Submission 53</i>
Northern Territory Police	<i>Submission 5</i>
NRMA Insurance Limited	<i>Submission 93</i>
Odijk, Herman	<i>Submission 6</i>
Owens, John A	<i>Submission 82</i>
Pesce, G	<i>Submission 29</i>
Polin, Martin	<i>Submission 49</i>
Prata, Enzo	<i>Submission 15</i>
Price Brent Solicitors	<i>Submission 17</i>
Pritchard, David	<i>Submission 28</i>
Public Interest Advocacy Centre (PIAC)	<i>Submission 91</i>
Public Policy Assessment Society (PPAS)	<i>Submission 20</i>
Queensland Chamber of Commerce and Industry (QCCI)	<i>Submission 44</i>
Queensland Police Service	<i>Submission 104</i>
Richards, Shirley	<i>Submission 27</i>
Riddiford, Pamela	<i>Submission 54</i>
Searle, Dianne	<i>Submission 30</i>
Sheehan, Peter SW	<i>Submission 23</i>
Sotiropoulos, Chris	<i>Submission 75</i>
South Australia Police	<i>Submission 86</i>
South Australian Housing Trust	<i>Submission 43</i>
State Government Insurance Commission (SA) (SGIC (SA))	<i>Submission 26</i>
Stoney, Alex BM	<i>Submission 37</i>
Stubberfield, JR	<i>Submission 52</i>
Symons, M	<i>Submission 59</i>
Townsville Community Legal Service (Townsville CLS)	<i>Submission 45</i>
Trilby, Misso & Company	<i>Submission 11</i>
Victorian Bar Council	<i>Submission 70</i>
Victorian Employers' Chamber of Commerce and Industry (VECCI)	<i>Submission 92</i>
Walker Tate & Associates	<i>Submission 51</i>
Walsh & Partners	<i>Submission 22</i>
Welsman, Sandra J	<i>Submission 57</i>
White, Colin	<i>Submission 95</i>
Wilcox, The Hon Chief Justice, Industrial Relations Court of Australia	<i>Submission 101</i>

Submissions to Draft Recommendations Paper 1

Aboriginal and Torres Strait Islander Commission (ATSIC)	<i>Submission 166</i>
Administrative Appeals Tribunal (AAT)	<i>Submission 159</i>
Administrative Review Council (ARC)	<i>Submission 175</i>
Attorney-General's Dept (Cth)	<i>Submission 185</i>
Attorney-General's Dept (NT)	<i>Submission 126</i>
Attorney-General's Dept (SA)	<i>Submission 182</i>
Australian Bankers' Association (ABA)	<i>Submission 154</i>
Australian Consumers' Association (ACA)	<i>Submission 173</i>
Australian Corporate Lawyers Association (ACLA)	<i>Submission 145</i>
Australian Customs Service (ACS)	<i>Submission 170</i>
Australian Federation of Consumer Organisations (AFCO)	<i>Submission 155</i>
Australian Finance Conference (AFC)	<i>Submission 150</i>
Australian Plaintiff Lawyers' Association (Qld) (APLA (Qld))	<i>Submission 125</i>
Australian Securities Commission (ASC)	<i>Submission 184</i>
Australian Veterans and Defence Services Council (AVDSC)	<i>Submission 176</i>
Baker & McKenzie	<i>Submission 178</i>
Carden, AG	<i>Submission 163</i>
Commonwealth Director of Public Prosecutions (DPP (Cth))	<i>Submission 115</i>
Confidential	<i>Submission 139</i>
Confidential	<i>Submission 142</i>
Confidential	<i>Submission 147</i>
Confidential	<i>Submission 158</i>
Consumer Credit Legal Centre (NSW) (CCLC (NSW))	<i>Submission 129</i>
Department of Employment, Education and Training (Cth) (DEET)	<i>Submission 174</i>
Department of Environment, Sport and Territories (Cth)	<i>Submission 165</i>
Department of Immigration and Ethnic Affairs (Cth) (DIEA)	<i>Submission 162</i>
Department of Social Security (Cth) (DSS)	<i>Submission 157</i>
Department of Veterans' Affairs (Cth)	<i>Submission 151</i>
Director of Public Prosecutions (WA)	<i>Submission 167</i>
Environmental Defender's Office (EDO)	<i>Submission 183</i>
Federal Chamber of Automotive Industries (FCAI)	<i>Submission 143</i>
Federal Court of Australia	<i>Submission 181</i>
Grey, Joan	<i>Submission 148</i>
Immigration Review Tribunal (IRT)	<i>Submission 169</i>
Industrial Relations Court of Australia (IRC)	<i>Submission 116</i>
Insurance Council of Australia (ICA)	<i>Submission 144</i>
KPMG	<i>Submission 168</i>
Law Council of Australia (LCA)	<i>Submission 172</i>
Law Society of New South Wales	<i>Submission 140</i>
Law Society of Western Australia	<i>Submission 160</i>
Lawrence, Sarah	<i>Submission 123</i>
Legal Aid Commission of New South Wales (LACNSW)	<i>Submission 156</i>
Legal Aid Commission of Victoria (LACV)	<i>Submission 134</i>
Legal Aid Office (ACT) (LAO (ACT))	<i>Submission 117</i>
Legal Services Commission of South Australia (LSC (SA))	<i>Submission 161</i>
Lulham, Ian	<i>Submission 120</i>
Lunn QC, Judge, District Court of South Australia	<i>Submission 124</i>
Mahony, Sue	<i>Submission 118</i>
Minerals Council of Australia	<i>Submission 179</i>
Motor Accidents Authority of New South Wales (MAA)	<i>Submission 171</i>
Mott, J	<i>Submission 119</i>
Murphy, Damian	<i>Submission 138</i>
Nelson, David	<i>Submission 110</i>
Newhouse, Paul	<i>Submission 121</i>
Northern Territory Police	<i>Submission 152</i>

NRMA Insurance Limited	<i>Submission 164</i>
NSW Police Service	<i>Submission 132</i>
Odijk, Herman	<i>Submission 112</i>
Prata, Enzo	<i>Submission 122</i>
Price Brent Solicitors	<i>Submission 113</i>
Public Policy Assessment Society (PPAS)	<i>Submission 111</i>
Queensland Chamber of Commerce and Industry (QCCI)	<i>Submission 136</i>
Queensland Police Service	<i>Submission 137</i>
Reinhardt, Greg J	<i>Submission 131</i>
Sotiropoulos, Chris	<i>Submission 128</i>
South Australian Housing Trust	<i>Submission 135</i>
State Government Insurance Commission (SA) (SGIC (SA))	<i>Submission 141</i>
Supreme Court of South Australia	<i>Submission 153</i>
Supreme Court of the Australian Capital Territory	<i>Submission 149</i>
Telstra Corporation Limited	<i>Submission 177</i>
Victoria Police	<i>Submission 146</i>
Victorian Bar Council	<i>Submission 127</i>
Victorian Employer's Chamber of Commerce and Industry (VECCI)	<i>Submission 130</i>
Walker Tate & Associates	<i>Submission 133</i>
Welsman, Sandra J	<i>Submission 114</i>
Western Australia Police Department	<i>Submission 180</i>

Appendix E: List of consultations

Public hearings

The following people made oral submissions at the Commission's public hearings.

Ahrens, Michael & Salgo, Andrew - Baker & McKenzie	Sydney
Alfris, Eva	Melbourne
Baker, Trevor St - ERM Consultants Pty Ltd	Brisbane
Bannister, Alan	Adelaide
Bates, Gerry - Tasmanian Greens	Hobart
Beasley, Robert	Townsville
Bride, Edward	Perth
Carter, Peter - Australian Plaintiff Lawyers Association (Qld)	Brisbane
Collins, Richard	Perth
Creswick, Phyllis	Sydney
Damate, Ernie - President, Filipino Community (Vic)	Melbourne
Darveniza, Brendan	Melbourne
Del Borello, Peter	Perth
Drakopoulos, Thomas - Ethnic Communities Council of Queensland	Brisbane
Fisher, Douglas & Reilly, Anthony - Environmental Defenders Office (Qld)	Brisbane
Gardiner, Pamela	Darwin
Goldwasser, Irene	Melbourne
Goreznski, Peter	Sydney
Green, Harry - Institution of Engineers Australia (SA)	Adelaide
Gubby, Ingrid - Redfern Legal Centre	Sydney
Gunawan, Lyn	Melbourne
Haigh, David - James Cook University	Townsville
Halliday, Peter - Law Watch Australia	Melbourne
Harris, Elizabeth - Costs consultant	Melbourne
Irvine, Margot - Criminologist	Melbourne
Keford, Jacki - Solicitor	Melbourne
Keim, Stephen - Barrister	Brisbane
Law, Veronica	Brisbane
Lindon, Len - Barrister	Melbourne
Lucas, Paul - Labor Lawyers Association (Qld)	Brisbane
Mackenzie, James	Melbourne
Macklin, Tony - Barrister	Brisbane
Mason, Barbara - Crime Stoppers	Brisbane
McCartney, Peter	Melbourne
McDonald, Colin - Barrister	Darwin
Nelthorpe, Dennis - Australian Federation of Consumer Organisations	Melbourne
O'Shea, Paul - Financial Counselling Services (Qld)	Brisbane
Reich, Anne - Consumer Credit Legal Centre	Sydney
Reilly, Anthony - South Brisbane Immigration and Community Legal Service	Brisbane
Rice, Simon - Kingsford Legal Centre	Sydney
Roderick, David	Adelaide
Ryall, John	Hobart
Scanlon, John - Environmental Law Community Advisory Service	Adelaide
Silvester, Lex - Barrister	Darwin
Skyring, Alan	Sydney
Smith, Greg - Legal Aid Commission of Victoria	Melbourne
Stein, Justice Paul - Land and Environment Court of NSW	Sydney
Stenning, Henry	Sydney
Tilmouth, Sydney - Barrister and Member, Criminal Law Section, Law Council of Australia	Adelaide
Uren QC, Graham - Victorian Bar Council	Melbourne

Other consultations

The Commission consulted the following people and organisations in the course of the reference.

Administrative Appeals Tribunal
Administrative Review Council
Australian Capital Territory Council of Social Services
Australian Consumers Association
Australian Federation of Consumer Organisations
Australian Finance Conference
Australian Insurance Lawyers Association
Australian Plaintiff Lawyers Association (NSW)
Australian Securities Commission
Baker & McKenzie
Business Forum on Consumer Issues
Byrne, Paul - Barrister
Chamber of Commerce and Industry (Qld)
Civil Justice Research Centre
Consumer Credit Legal Service (Vic)
Consumer Law Centre
Council of Small Business of Australia
County Court of Victoria
Cox, Helen - Barrister
Criminal Court of Western Australia
Darwin Community Legal Service
Department of Justice (NT)
Director of Public Prosecutions (ACT)
Director of Public Prosecutions (NT)
Director of Public Prosecutions (Qld)
Directors of Legal Aid Commissions
Disney, Julian - Centre for International and Public Law
District Court of South Australia
Environmental Defenders Office (NSW)
Family Court of Australia
Federal Court of Australia
Federation of Community Legal Centres (Vic)
Francey, Neil - Barrister
Freehill Hollingdale & Page
Insurance Council of Australia
Jones, Gavin - Court of Petty Sessions (WA)
Kingsford Legal Centre
Law Council of Australia
Law Cover
Law Institute of Victoria
Law Society of New South Wales
Law Society of Queensland
Law Society of South Australia
Law Society of Tasmania
Law Society of the Australian Capital Territory
Law Society of the Northern Territory
Law Society of Western Australia
Legal Aid Commission of New South Wales
Legal Aid Commission of Victoria
Legal Aid Western Australia
Legal Aid Office of Queensland

Legal Aid Office of the Australian Capital Territory
Legal Expenses Insurance Ltd
Legal Services Commission of South Australia
Legal Services Commissioner (NSW)
Litigation Law and Practice Committee, Law Society of NSW
Local Court of New South Wales
Local Court of Western Australia
Macarthur Regional Law Society
Magistrates Court of the Australian Capital Territory
Magistrates Court of the Northern Territory
Motor Accidents Authority of New South Wales
National Association of Community Legal Centres
Norrish QC, Stephen - Barrister
Northern Territory Chamber of Commerce
Northern Territory Legal Aid Commission
Parkes Legal Service
Public Interest Advocacy Centre
Queensland Bar Association
Selby, Hugh - ANU Legal Workshop
Shaw QC, MLC, The Hon Jeff - Attorney-General of NSW
Supreme Court of New South Wales
Supreme Court of Queensland
Supreme Court of South Australia
Supreme Court of the Australian Capital Territory
Supreme Court of the Northern Territory
Townsville Community Legal Service and Welfare Rights Service
Victorian Bar Council
Welfare Rights and Legal Centre (ACT)
Western Australia Bar Association
Williams, Phillip - Melbourne Business School

Appendix F: List of recommendations

2. A general framework for costs allocation rules

Recommendation 1 — power to award costs

Each federal court should have the power to award costs and to determine by whom and to what extent costs are to be paid in relation to the whole or any part of proceedings before it. The power to order costs should be exercised in accordance with the relevant court rules.

Recommendation 2 — reasonable costs to be recovered where costs are ordered

A party who is awarded costs should be entitled to recover the reasonable costs that he or she has incurred in the course of preparing and conducting the litigation or that part of the litigation specified in the costs order. The reasonable costs are those costs reasonably required to prepare and conduct the litigation.

Recommendation 3 — court or tribunal may indicate likely costs order

A court or tribunal should, at any stage of proceedings, be able to indicate the costs order it is likely to make at the end of the proceedings subject to any change in circumstances coming to light in the course of the proceedings.

Recommendation 4 — interim orders as to costs

At any stage of proceedings a court or tribunal may, either on its own motion or on the application of a party, make an interim order as to how all or part of the costs

- arising from a particular stage of the proceedings, or
- of the whole proceedings

are to be apportioned pursuant to the relevant costs allocation rules.

Recommendation 5 — interim costs order enforceable immediately

An interim costs order may be enforced immediately unless the court or tribunal orders otherwise.

Recommendation 6 — submissions before a costs order may be made

Before making a costs order the court or tribunal should invite and consider submissions from the parties and from any other person who may be the subject of the order.

3. Practical impact of the costs rules

Recommendation 7 — coordinated collection program for court and tribunal statistics

The Commission supports the recommendation by AJAC that the Australian Institute of Judicial Administration and the Australian Bureau of Statistics undertake a statistical collection program for Australian courts and tribunals. The collection of these statistics should have two objectives

- the identification of best practice court procedures for use in the improvement of court efficiency and case management
- the collection of information on the characteristics of litigants to assist policy makers to identify access problems suffered by particular groups in the community.

These statistics should be made publicly available. The Australian Institute of Judicial Administration and the Australian Bureau of Statistics should be provided with adequate resources to undertake their roles in this program.

4. Civil proceedings

Recommendation 8 — the costs rules for civil proceedings

In civil proceedings, costs shall follow the event subject to

- the rules relating to disciplinary and case management costs orders
- the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to
 - present his or her case properly or
 - negotiate a fair settlement
- the rules relating to public interest costs orders.

Recommendation 9 — the general costs rules for appeals in civil proceedings

In appeals in civil proceedings costs shall follow the event subject to

- the rules relating to disciplinary and case management costs orders
- the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to
 - present his or her case properly or
 - negotiate a fair settlement
- the rules relating to public interest costs orders
- the appeal succeeding on a ground not raised at first instance which could and should have been raised at that time.

Recommendation 10 — orders the court may make if appeal succeeds on ground not previously raised

If a court finds that the appeal in civil proceedings succeeded on a ground not raised at first instance that could and should have been raised, the court may make such orders as to the costs of the appeal as it considers just. The orders the court may make include an order that

- each party bear his or her own costs of the appeal
- the unsuccessful party only pay the successful party's costs of the appeal up to a cap set by the court.

An order under this provision will be subject to the court's powers to make disciplinary and case management costs orders and other costs orders where it is satisfied that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to properly present his or her case or to negotiate a fair settlement.

5. Administrative law proceedings

Recommendation 11 — costs rules for judicial review proceedings

In judicial review proceedings, costs shall follow the event subject to

- the rules relating to disciplinary and case management costs orders
- the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to
 - present his or her case properly or
 - negotiate a fair settlement
- the rules relating to public interest costs orders.

Recommendation 12 — costs rules in the Administrative Appeals Tribunal

In proceedings before the AAT each party should bear his or her own costs subject to

- the provisions of particular legislation
- disciplinary and case management costs orders
- an order for costs in favour of a party where the AAT is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

Recommendation 13 — costs rules in other merit review tribunals

In proceedings before federal merit review tribunals (other than the AAT) each party should bear his or her own costs unless the legislation establishing the tribunal provides otherwise.

Recommendation 14 — the general costs rules for appeals in judicial review proceedings

The costs allocation rules for appeals in civil proceedings should apply in appeals in judicial review proceedings.

Recommendation 15 — costs allocation rules for appeals from the Administrative Appeals Tribunal to the Federal Court

Appeals from the AAT to the Federal Court should be subject to the costs allocation rules for appeals in judicial review proceedings.

Recommendation 16 — costs allocation rules for appeals to the Federal Court from the IRT and RRT

Appeals from the Immigration Review Tribunal and the Refugee Review Tribunal to the Federal Court should be subject to the costs allocation rules for appeals in judicial review proceedings.

Recommendation 17 — costs allocation rules for appeals to the Administrative Appeals Tribunal from other merit review tribunals

Appeals from merit review tribunals such as the Social Security Appeals Tribunal and the Veterans Review Board to the AAT should be subject to the costs allocation rules for proceedings before the AAT.

6. Family law proceedings

Recommendation 18 — general rule in family law proceedings

Each party to family law proceedings shall bear his or her own costs subject to

- a disciplinary or case management costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party
- an order made in relation to the costs of a child's separate representative.

Recommendation 19 — costs orders in favour of separate representatives

At any stage of family law proceedings the court may, on its own motion, order the parties to make provision for reimbursing the legal aid commission for all or a defined part or parts of the costs of the legal aid commission in providing representation of the child or children the subject of the proceedings unless such an order would be contrary to the best interests of the child or children.

Recommendation 20 — costs orders against separate representatives

A separate representative in family law proceedings should not be liable for the costs of the other parties other than pursuant to a disciplinary or case management costs order.

Recommendation 21 — the general costs rules for appeals in family law proceedings

Each party to an appeal in family law proceedings shall bear his or her own costs subject to

- a disciplinary or case management costs order
- a public interest costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties, including whether either party is in receipt of legal aid or another form of assistance, and the likely costs of the proceedings to each party
- the appeal succeeding on a ground not raised at first instance that could and should have been raised at that time.

Recommendation 22 — orders the court may make

If a court finds that the appeal succeeded on a ground not raised at first instance that could and should have been raised at that time, the court may make such orders as to the costs of the appeal as it considers just. The orders the court may make include an order that the successful party pay all or part of the unsuccessful party's costs of the appeal. An order under this provision will be subject to the court's powers to make disciplinary and case management costs orders.

7. Criminal proceedings

Recommendation 23 — successful accused in criminal proceedings to recover costs

The prosecution shall pay the reasonable costs of an accused who is successful in obtaining a dismissal, acquittal or withdrawal of charges in a criminal proceeding unless the court is satisfied that, in all the circumstances of the case, some other order as to costs should be made.

When considering whether to make some other order as to costs the court should have regard to

- whether the dismissal, acquittal or withdrawal of charges was based on technical grounds or the public interest
- whether the accused unreasonably declined an opportunity before a charge was laid to explain his or her version of the events or to produce evidence likely to exonerate him or her which could have avoided a prosecution
- whether the accused conducted the defence in a way that unreasonably prolonged the proceedings
- whether the accused was acquitted on a charge, but convicted on another
- whether the accused unreasonably failed to comply with directions of the court.

Recommendation 24 — definition of 'criminal proceeding'

For the purposes of recommendation XR, 'criminal proceeding' includes summary proceedings, committals, trials and any associated proceeding.

Recommendation 25 — other orders the court may make

If the court is satisfied that some other costs order should be made, the court may order that

- no costs be awarded to the accused
- part of the costs be awarded to the accused.

Recommendation 26 — definition of reasonable costs

The reasonable costs of a criminal trial shall include the reasonable costs of the committal and of any previous trials concerning the same indictment.

Recommendation 27 — no costs for successful prosecution

In criminal proceedings the prosecution should not be able to recover costs unless

- the court is satisfied that the accused unreasonably failed to comply with the court's directions
- the legislation creating the offence provides for a right to recover costs.

Recommendation 28 — costs in criminal appeals

In criminal appeals the prosecution shall pay the reasonable costs of an accused who successfully appeals against a conviction or sentence or who successfully defends an appeal by the prosecution unless the court is satisfied that, in all the circumstances of the case, some other order as to costs should be made.

When considering whether to make some other order as to costs the court should have regard to

- whether the accused succeeded on technical or public interest grounds
- whether the accused conducted the appeal in a way that unreasonably prolonged the proceeding
- whether the accused was successful on only some of the grounds of appeal and failed on others
- whether the accused unreasonably failed to comply with directions of the court
- whether the appeal succeeded on a ground not raised at first instance which could and should have been raised at that time.

Recommendation 29 — no costs for prosecution on successful appeal

The prosecution should not be able to recover the costs of a successful criminal appeal unless

- the court is satisfied that the accused unreasonably failed to comply with the court's directions
- the legislation creating the offence provides for a right to recover costs.A6.1

Recommendation 30 — other orders the court may make

If the court is satisfied that some other costs order should be made, the court may order that

- no costs be awarded to the accused
- part of the costs be awarded to the accused.

8. Industrial Relations Court of Australia

Recommendation 31 — costs in proceedings under the Industrial Relations Act 1988 (Cth)

In proceedings under the *Industrial Relations Act 1988* (Cth), each party shall bear his or her own costs subject to

- a disciplinary or case management costs order
- an order for costs in favour of a party where the court is satisfied that the order is necessary to permit that party to present his or her case properly or to negotiate a fair settlement taking into account the resources of the parties and the likely costs of the proceedings to each party.

9. Federal tribunals

Recommendation 32 — each party should bear his or her own costs in tribunal proceedings

In proceedings before a federal tribunal each party should bear his or her own costs unless the legislation establishing the tribunal provides otherwise.

10. Appeals against costs allocation orders

Recommendation 33 — appeals against an order for costs

There should be no right of appeal against an order for costs. An appeal against a costs order may, however, 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.

11. Disciplinary and case management costs orders

Recommendation 34 — grounds for a disciplinary costs order

At any stage of proceedings a court or tribunal should be able to make a disciplinary costs order against a party, his or her legal representative or any other person involved in the litigation who, in the opinion of the court or tribunal,

- does not comply with a procedural rule or an order of the court or tribunal
- causes unnecessary delays
- significantly increases the costs of the matter by unreasonably pursuing one or more issues on which he or she fails
- causes the other party to incur costs that were not necessary for the economic and efficient conduct of the proceedings, including costs incurred as a result of seeking leave to amend his or her pleadings or particulars or seeking an extension of time
- engages in conduct that, in the opinion of the court or tribunal, hinders the efficient and just determination of the issues in dispute
- has unreasonably refused to negotiate a settlement or participate in alternative dispute resolution
- otherwise abuses the processes of the court.

Recommendation 35 — terms of a disciplinary costs order

If the court or tribunal is satisfied that there are grounds for a disciplinary costs order, it may make such orders as to costs as it considers appropriate including an order that the party, legal representative or other person (as the case may be) pay all or part of the costs incurred by the other party to the proceedings as a result of the breach, delay, conduct or abuse of process.

Recommendation 36 — costs orders against legal and other representatives

A court or tribunal should be able to

- disallow the costs as between the representative and the party
- direct the representative to repay to the party any costs which the party has been ordered to pay to any other party
- direct the representative to pay to any other party the costs incurred by that party

where, in the opinion of the court or tribunal, the representative was responsible for all or part of the costs being incurred improperly or without reasonable cause or being wasted by undue delay or by any other misconduct or default.

Recommendation 37 — unreasonable claims or defences

A court or tribunal should be able to order a party or his or her legal representative to pay the costs incurred by the other parties to the proceedings as a result of an unreasonable claim or defence. A claim or defence will be unreasonable if, in the opinion of the court or tribunal, it is

- not well grounded in fact, or

- not based on the existing law or on a good faith argument for the extension, modification or reversal of the existing law.

Recommendation 38 — vexatious or frivolous proceedings

Federal courts and tribunals should be able to award costs against a party whose proceedings are stayed or dismissed on the ground of being vexatious or frivolous.

Recommendation 39 — capping costs

A court or tribunal should be able to specify, by order made at a directions hearing, the maximum amount that may be recovered pursuant to an order for costs. An amount that a party is ordered to pay pursuant to a disciplinary costs order is in addition to the maximum amount specified by the court or tribunal.

12. The 'material effect' exception

Recommendation 40 — alternative costs orders where a party's ability to litigate or negotiate is materially and adversely affected

A court may, at any stage of the proceedings, upon the application of a party, make an alternative costs order if it is satisfied that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of the party to

- present his or her case properly or
- negotiate a fair settlement.

Recommendation 41 — presumption that a party's ability will be materially affected

The court shall presume, unless satisfied otherwise, that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if the court is satisfied that the party would suffer substantial hardship if required to pay the other party's costs.

Recommendation 42 — substantial hardship

When determining whether a party would suffer substantial hardship the court shall have regard to whether the party will

- lose or be forced to vacate his or her home
- lose a motor vehicle or the use of a motor vehicle reasonably necessary for domestic, employment or business purposes
- lose his or her employment or livelihood
- be made bankrupt

as a result, in part or whole, of being required to pay the other party's costs.

Recommendation 43 — orders the court may make if satisfied that a party's ability will be materially and adversely affected

If a court finds that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely affected if costs follow the event, the court may make such orders as to costs as it considers just having regard to the resources of the parties and to the circumstances of the case. The orders the court may make include an order that

- each party bear his or her own costs
- the affected party, if unsuccessful, only pay the successful party's costs up to a cap set by the court
- another person, group, body or fund, in relation to which the court has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

An order under this provision will be subject to the court's power to make disciplinary and case management costs orders.

Recommendation 44 — determining the resources of the parties

When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

13. Public interest costs orders

Recommendation 45 — public interest costs orders

A court or tribunal may, upon the application of a party, make a public interest costs order if the court or tribunal is satisfied that

- the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community
- the proceedings will affect the development of the law generally and may reduce the need for further litigation
- the proceedings otherwise have the character of public interest or test case proceedings.

A court or tribunal may make a public interest costs order notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.

Recommendation 46 — objects clause

The legislation establishing public interest costs orders should state that the object of such orders is to assist the initiation and conduct of litigation that affects the community or a significant sector of the community or will develop the law.

Recommendation 47 — terms of a public interest costs order

If the court or tribunal is satisfied that there are grounds for it to make a public interest costs order, it may make such orders as to costs as it considers appropriate having regard to

- the resources of the parties
- the likely cost of the proceedings to each party
- the ability of each party to present his or her case properly or to negotiate a fair settlement
- the extent of any private or commercial interest each party may have in the litigation.

The orders the court or tribunal may make include an order that

- costs follow the event

- each party bear his or her own costs
- the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
 - not be liable for the other party's costs
 - only be liable to pay a specified proportion of the other party's costs
 - be able to recover all or part of his or her costs from the other party
- another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties.

An order under this provision will be subject to the power of the court or tribunal to make disciplinary and case management costs orders.

Recommendation 48 — determining the resources of the parties

When considering the 'resources of the parties' the court must have regard to the financial circumstances of each party and to whether the financial capacity of any of the parties to pay an adverse costs order is being affected in whole or part by legal aid, contingency fees, insurance, fighting funds, tax deductibility or any other factor.

Recommendation 49 — timing of a public interest costs order

The court or tribunal may make a public interest costs order at any stage of the proceedings including at the start of the proceedings.

14. Costs allocation agreements

Recommendation 50 — costs allocation agreements to be subject to costs orders

Where the parties to proceedings have made a costs allocation agreement in contemplation of the particular proceedings being determined by the court or tribunal, costs shall be apportioned in accordance with the terms of that agreement 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.

15. Disclosure of costs

Recommendation 51 — courts and tribunals to prepare a pamphlet on their costs allocation rules

Each court and tribunal should prepare a short, easy to read pamphlet describing the costs allocation rules applying to each type of proceeding that the court or tribunal can deal with. Copies of the pamphlet should be freely available to legal practitioners and to members of the public.

Recommendation 52 — party to be given pamphlet and written advice of relevant costs allocation rules

A party's legal representative should give the party

- a copy of the relevant costs pamphlet when the party first seeks advice about litigation
- written advice of the relevant costs allocation rules and how they operate when the party first gives instructions to the legal representative to file a claim, defence or cross-claim.

Recommendation 53 — unrepresented party to be given pamphlet on relevant costs allocation rules by court or tribunal

A court or tribunal should give a copy of the relevant costs pamphlet to a party who is not legally represented when the party files a claim, defence or cross-claim.

Recommendation 54 — power to order lawyers to inform clients of the costs incurred

At any stage of the proceedings a court or tribunal may order the legal representatives of the parties to provide their respective clients with a statement of the costs they have incurred, the basis on which that amount has been determined and an estimate of the further costs that will be incurred if the matter proceeds. The court or tribunal may specify assumptions on which the estimate is to be based and may require separate estimates to be prepared for different sets of specified assumptions. The costs of preparing this information should be borne by the legal representatives.

Recommendation 55 — compliance with a disclosure order

A legal representative who has been ordered to provide his or her client with a statement of past and future costs must file with the court or tribunal a certificate certifying that the legal representative has complied with the order.

16. Costs orders against non-parties

Recommendation 56 — costs allocation rules and amicus curiae (friend of the court)

An *amicus curiae* (friend of the court) should not recover or be liable for costs other than pursuant to a disciplinary or case management costs order. Where a court allows a friend to play a greater part in the proceedings than was originally specified the court should also address at that time the question of whether and to what extent the friend should pay any costs incurred by the parties as a result of the friend's greater involvement.

17. Unrepresented litigants

Recommendation 57 — unrepresented parties may recover costs

A party who does not have legal representation should be able to recover his or her costs in accordance with the relevant rules.

Recommendation 58 — the costs an unrepresented party may recover

An unrepresented party who is awarded costs may recover disbursements (including witness expenses and any reasonable legal costs) and his or her own costs for work reasonably necessary to prepare and conduct his or her case subject to the following conditions.

- The party's own costs should be limited to that allowed under a schedule setting out lump sum amounts according to the type and complexity of the matter. These amounts should not exceed the reasonable costs of a solicitor performing the same work.
- An unrepresented litigant should not be able to recover any costs in relation to the litigation that would not be recoverable by a represented litigant.
- A court may allow an unrepresented litigant to recover costs in excess of the relevant lump sum in appropriate circumstances provided that it does not exceed the amount of costs actually incurred by the litigant.

18. Indemnity schemes

Recommendation 59 — federal legal assistance indemnity fund

The Commonwealth should establish a legal assistance indemnity fund to

- provide an indemnity against an adverse costs order to a person who satisfies a merit test and a means test
- reimburse the costs incurred by a successful party who would otherwise suffer substantial hardship because he or she is unable to recover all or part of his or her costs from the unsuccessful party as a result of a court or tribunal order under the 'material effect' exception to the rule that costs follow the event.

Recommendation 60 — public interest litigation fund

The assistance available to litigants under the Commonwealth test case fund should include an indemnity against the whole or part of an adverse costs order. The fund should also be subject to the power of a court to make a public interest costs order whereby the fund may be required to pay all or part of the costs of one or more of the parties to the proceedings.

Recommendation 61 — federal appeals assistance fund

The federal appeals assistance fund should be available in all appeals before federal courts or tribunals including criminal appeals.

20. Implementation

Recommendation 62 — uniform costs allocation rules

As far as possible the reforms to the costs allocation rules recommended by the Commission should apply in federal, State and Territory courts and tribunals.

Recommendation 63 — Standing Committee of Attorneys-General

The federal Government should, through the Standing Committee of Attorneys-General, encourage the uniform adoption of reforms to the costs allocation rules in federal, State and Territory courts and tribunals.

Recommendation 64 — assessing the impact of new costs allocation rules prior to implementation

Before the costs allocation rules recommended by the Commission are implemented, the federal Attorney-General should arrange for an examination by members of the judiciary, lawyers and other interested individuals and organisations of the way in which the rules will probably work in practice. The Attorney-General should ask the Australian Institute of Judicial Administration to coordinate this examination and, in light of that examination, to coordinate the development of rules, guidelines and practice notes for implementation of the new rules.

Recommendation 65 — mechanisms for controlling litigation and the costs allocation rules

The costs allocation rules recommended by the Commission should be adopted as part of a package of procedural controls, case management systems and other mechanisms for controlling the conduct, and thereby the costs, of litigation.

Recommendation 66 — review of the operation of costs allocation rules

The federal Attorney-General should arrange for the operation of costs allocation rules to be monitored and assessed by a body such as the Australian Institute of Judicial Administration to ensure that they are achieving the desired outcomes without unnecessary expense to the court, tribunal, parties or community.

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1 Access to Justice Advisory Committee Canberra 1994, Action 5.3.
2 AJAC Report para 5.62.
3 AJAC Report para 1.9.
4 ALRC Issues Paper No 13 *Who should pay? A review of the litigation costs rules* (ALRC IP 13) ALRC Sydney 1994.
5 ALRC Draft Recommendations Paper No 1 *Litigation costs rules* (ALRC DRP 1) ALRC Sydney 1995.
6 State and Territory courts may exercise federal jurisdiction pursuant to the *Judiciary Act 1903* (Cth) s 39(2), 68 the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and parallel State and Territory legislation specific federal legislation such as the *Trade Practices Act 1974* (Cth) s 86.
7 Examples of the adverse effects of costs allocation rules are given in ch 4.
8 The names of the Group members are listed in appendix A.
9 Lord Woolf Access to Justice: Interim Report to the Lord Chancellor on the civil legal system in England & Wales Lord Chancellor's Department London 1995, 4.
10 See, eg, Senate Standing Committee on Legal and Constitutional Affairs *The cost of justice: foundations for reform* AGPS Canberra 1993; AJAC Report; Attorney-General's Department *The Justice Statement* (Justice Statement) AGPS Canberra 1995.
11 Confidential Submission 4.
12 V Law Submission 3.
13 J Byrne Submission 8.
14 P & J Cameron Submission 60.
15 P Del Borello Hearing.
16 P Gorenzski Hearing.
17 AJAC Report para 17.6.
18 This issue is discussed in ch 5 and 9.
19 Disciplinary costs orders are discussed in ch 11.
20 This principle refers to the type of claim, not its merit. If the legislature wants to deter certain types of litigation then it should legislate to that effect by reducing or removing the jurisdiction of the court or tribunal to hear such matters or by providing that litigation cannot be pursued until certain requirements are satisfied.
21 See para 4.19.
22 The federal Government will be funding a project to assist the Federal Court and the Family Court to simplify their procedures: Justice Statement, 60.
23 These rules are discussed in ALRC IP 13 para 4.26-36.
24 Legal Profession Act 1987 (NSW) s 208A. The person assessing the costs may have regard to the skill and responsibility displayed on the part of the barrister or solicitor, the complexity of the matter, the quality of the work performed, where the legal services were provided, the time frame for the work and the outcome of the matter: s 208G.
25 AJAC Report, Action 5.4.
26 Justice Statement, 47.
27 Justice Statement, 48.
28 Exceptions to the costs indemnity rule are discussed in Part 3.
29 Public interest costs orders are discussed in ch 13.
30 See, eg, *Breen v Breen* (1992) DFC 95-123.
31 Appeals against costs orders are discussed in ch 10.
32 Federal Court Rules O 62 r 15.
33 See, eg, Federal Court Rules O 62 r 3(3), 14; Supreme Court Rules (NSW) Pt 52A r 9(1).
34 Federal Court Submission 108.
35 Federal Court Submission 108.
36 See para 3.56-58, ch 4 and 12.
37 See ch 12.
38 See para 3.56-58, ch 6 and 8.
39 Australian Bureau of Statistics *Legal and Accounting Services, Australia 1992-93* Catalogue No 8678.0 1995 (ABS Survey).
40 Statistics from the Australian Bureau of Statistics (ABS) on sources of income for legal services do not identify income generated from litigation services. The guesstimate that 35 per cent relates to litigation is based on the Civil Justice Research Centre (CJRC) research in 1989 on lawyers in civil litigation which included information on the distribution of lawyers by the areas of practice in which most time is spent: T Beed & I McEwin *Lawyers in Civil Litigation* CJRC Sydney 1990 (CJRC Report). The guesstimate relies on a number of assumptions about the comparability of the CJRC and ABS information and the relative revenue generated by lawyers in different types of practice. These assumption cannot be verified and therefore the guesstimate should be treated as only a rough indication of the possible aggregate amount of litigation costs in 1992-93.
41 D Worthington & J Baker *The costs of civil litigation* Civil Justice Research Centre Sydney 1993, 14.
42 CJRC Study, 17.
43 eg J Black *Submission 41*; Confidential *Submission 48*; P Riddiford *Submission 54*; J Mackay *Submission 58*; AFCO *Submission 90*; J Mackenzie *Hearing*; L Gunawan *Hearing*; P Del Borello *Hearing*.
44 eg J Grey *Submission 21*; J Mackay *Submission 58*; AFCO *Submission 90*; L Gunawan *Hearing*; P Del Borello *Hearing*.
45 See para 4.9.
46 eg J Byrne *Submission 8*; P McIntyre *Submission 14*; P Riddiford *Submission 54*.
47 See para 4.12.
48 See para 4.15, 11.30.
49 See para 11.13.
50 Law Society of WA *Submission 18*; LACTAS *Submission 4*; Allen Allen & Hemsley *Submission 38*; C Lyle *Submission 39*; LAO (Qld) *Submission 80*; Magistrates Court of SA *Submission 81*; Federal Court *Submission 108*.
51 AJAC Report para 17.18.
52 See, eg, G Pesce *Submission 29*; AFC *Submission 55*.
53 See ch 17.
54 NRMA Insurance *Submission 164*.
55 Under a speculative fee arrangement, if the action is successful the lawyer receives the usual fee only. A contingency arrangement provides that, if the action succeeds, the lawyer receives the usual fee plus an agreed extra amount. If that amount is a flat amount or a percentage of the usual fee it is called an 'uplift' contingency fee. If it is a percentage of the damages award it is called a 'percentage' contingency fee.
56 Justice Statement, 50.
57 Justice Statement, 106.

58 Attorney-General's Department *Annual Report 1993-94* AGPS Canberra table 33.3. Federal funding to legal aid commissions is to increase
by \$16.8 million over four years to assist them to deliver more services in civil and family law: Justice Statement, 103.
59 See para 18.3.
60 This figure is for all States and Territories except Queensland: Legal Aid and Family Services (LAFS), Attorney-General's Department.
61 eg South Australian Legal Assistance Fund; Western Australian Litigation Assistance Fund.
62 The fund fee is usually calculated as a percentage of the value of the award.
63 For a detailed description of CLAFs see the AJAC Report ch 10.
64 War Crimes Act 1945 (Cth), s 19.
65 Administrative Appeals Tribunal Act 1975 (Cth), s 69.
66 Trade Practices Act 1974 (Cth), s 170.
67 This is a non-statutory scheme that assists eligible persons for cases of national importance arising under Commonwealth, State or Territory
laws or under the common law. Over the next four years \$2.9 million will be available under the scheme: Justice Statement, 107-8.
68 eg *Fair Trading Act 1987* (NSW) s 12(1).
69 *Australian Securities Commission Act 1989* (Cth) s 50.
70 LEI schemes are examined in the AJAC Report: para 10.6, 10.14-17.
71 eg Clayton Utz *Submission 73*.
72 Law Society of WA *Annual Report 1993-94* Perth 1994.
73 eg Australian Employers Federation; Medical Defence Union, some trade unions.
74 Industrial Relations Court of Australia *Annual Report 1993-94*, 7.
75 eg Australian Conservation Fund; Greenpeace; Tasmanian Conservation Trust.
76 This is based on the CJRC Report which found that 43 per cent of time spent by lawyers working in commercial law is spent on commercial
litigation work and the ABS Survey which found that \$1637.4 million was earned from legal services in commercial, finance and business
law during 1992-93. The guesstimate is based on several assumptions about the CJRC and ABS research that cannot be verified. It therefore
should be treated as only a rough guide. See footnote 5 supra.
77 ACTCOSS *Submission 2*; H Odijk *Submission 6*; G Pesce *Submission 29*; Townsville CLS *Submission 45*; R Beasley *Submission 61*; AFCO
Submission 90; PIAC *Submission 91*. See also AJAC Report para 8.14; Trade Practices Commission *Study of the professions - legal* TPC
Canberra March 1994, 214.
78 ACTCOSS *Submission 2*.
79 AFCO *Submission 90*.
80 Townsville CLS *Submission 45*.
81 QCCI *Submission 44*; AFC *Submission 55*; ICA *Submission 64*; Law Society of NSW *Submission 74*; VECCI *Submission 92*.
82 AFC *Submission 55*; NRMA Insurance *Submission 93*.
83 PPAS *Submission 20*; AFC *Submission 55*; VECCI *Submission 92*; NRMA Insurance *Submission 93*; Law Society of SA *Submission 94*;
BFCI *Submission 107*.
84 This figure includes over 14 000 applications and petitions in bankruptcy: Federal Court of Australia *Annual Report 1993-94* AGPS
Canberra.
85 Federal Court of Australia *Annual Report 1993-94* AGPS Canberra.
86 Inspector-General in Bankruptcy *Bankruptcy Act 1966 Annual Report 1993-94* AGPS Canberra, 51.
87 Family Court of Australia *Annual Report 1993-94* AGPS Canberra 1994.
88 The Industrial Relations Court was the only court found by the Commission to collect comprehensive statistics on the parties that use its
services.
89 Industrial Relations Court of Australia *Annual Report 1993-1994* IRC 1994.
90 AAT *Annual Report 1993-94* AGPS Canberra.
91 This estimate is based on the number of personal injury claims heard by intermediate courts. A similar inference may be made about the
Supreme Court of NSW.
92 This estimate is based on the number of commercial matters heard in State and Territory Supreme Courts.
93 T Matruglio *So who does use the court?* Civil Justice Research Centre Sydney 1993.
94 Figure provided by LAFS.
95 Motor Accidents Authority of NSW *Survey of people injured in road accidents* Sydney 1993.
96 ABS *Usage of legal services, New South Wales, October 1990* ABS Sydney 1991.
97 The selected legal events were accidents causing injury, family disputes (such as custody, access, maintenance), disputes with a landlord,
disputes with an insurer, disputes with a bank or other credit provider, disputes with government over administrative decisions, property
damage, discrimination, making or altering wills and conveyancing.
98 eg where there is no specialist credit tribunal, disputes between individuals or small businesses and large credit institutions often go
unlitigated despite a genuine claim: Financial Counselling Service (Qld) *Hearing*.
99 eg ACTCOSS *Submission 2*; P McIntyre *Submission 14*; J Grey *Submission 21*; S Richards *Submission 27*; Townsville CLS *Submission 45*; J
Mackay *Submission 58*; R Beasley *Submission 61*; S Keim *Submission 67*.
100 P McIntyre *Submission 14*.
101 EDO *Submissions 32 & 183*; S Keim *Submission 67*; G Bates *Hearing*; D Haigh *Hearing*.
102 Financial Counselling Services (Qld) *Submission 68*.
103 J McKenzie *Hearing*.
104 AJAC Report para 17.7, 17.47-68.
105 AJAC Report para 17.68, Action 17.2.
106 Judiciary Act 1903 (Cth) s 26; Federal Court of Australia Act 1976 (Cth) (Federal Court Act) s 43; Supreme Court Act 1970 (NSW) s 76;
Supreme Court Act 1986 (Vic) s 24; Supreme Court Act 1867 (Qld) s 58; Supreme Court Act 1935 (SA) s 40; Supreme Court Act 1935
(WA) s 37; Supreme Court Civil Procedure Act 1932 (Tas) s 12; Supreme Court Act 1933 (ACT) s 23; Supreme Court Act 1979 (NT) s 86;
District Court Act 1973 (NSW) s 148B; District Court Act 1991 (SA) s 42; District Court of Western Australia Act 1969 (WA) s 64; County
Court Act 1958 (Vic) s 78A; Local Courts (Civil Claims) Act 1970 (NSW) s 34; Magistrates Court Act 1989 (Vic) s 131; Magistrates Court
Act 1991 (SA) s 37; Magistrates Court (Civil Division) Act 1992 (Tas) s 33; Local Court Act 1904 (WA) s 81; Magistrates Court (Civil
Jurisdiction) Act 1982 (ACT) s 238; Local Court Act 1989 (NT) s 30.
107 TPC v Nicholas Enterprises Pty Ltd & Ors (1979) 28 ALR 201; Cretazzo v Lombardi (1975) 13 SASR 4.
108 Ritter v Godfrey (1920) 2 KB 47; Donald Campbell & Co v Pollak [1927] AC 732; Hughes v Western Australian Cricket Assoc (Inc) & Ors
(1986) 8 ATPR 40-676; TPC v Nicholas Enterprises Pty Ltd & Ors (1979) 28 ALR 201. This principle has been enshrined in the Rules of a
number of courts: eg Supreme Court Rules (NSW) Pt 52A r 11; Supreme Court Rules (WA) O 66 r 1; Supreme Court Rules (SA) r 101.02.
109 This is often described as 'costs following the event'.
110 eg other orders may be made where

- a party only succeeds upon a portion of his or her claim, in which case it may be reasonable for the successful party to bear the expense of litigating that portion upon which he or she has failed: *Forster v Farquhar* (1893) 1 QB 564; *Hughes v Western Australian Cricket Assoc (Inc) & Ors* (1986) ATPR 40-748
- the costs of the matter have been increased significantly by one or more issues on which the successful party failed, in which case the successful party may not only be deprived of the costs of those issues but may also be ordered to pay the other party's costs of them: *Cretazzo v Lombardi* (1975) 13 SASR 4
- the successful party has unnecessarily or unreasonably commenced, continued or encouraged the litigation or has acted improperly: *Ritter v Godfrey* (1920) 2 KB 47; *Donald Campbell & Co v Pollak* [1927] AC 732; *Hughes v Western Australian Cricket Assoc (Inc) & Ors* (1986) ATPR 40-749.

eg a party who applies for an extension of time or who amends pleadings or discontinues proceedings without consent must pay the costs incurred by the other parties unless a court orders otherwise: see, eg, Supreme Court Rules (NSW) Pt 52 r 13, 12, 16.

B Cairns *Australian Civil Procedure* (3rd ed) The Law Book Company Limited Sydney 1992, 487.

See, eg, AFC Submission 55; ICA Submission 64; ABA Submission 71; NSW Bar Association Submission 85; NRMA Insurance Submission 93; Law Society of SA Submission 94; BFCI Submission 102; Federal Court Submission 108.

This is discussed in ch 2.

cf Law Society of WA Submission 18; KPMG Submission 56; ACLA Submission 107.

See, eg, V Law Submission 3; Law Society of WA Submission 18; PPAS Submission 20; LIV Submission 25; G Pesce Submission 29; LACTAS Submission 45; LSC (SA) Submission 46; AFC Submission 55; ICA Submission 64; Clayton Utz Submission 73; Law Society of NSW Submission 74; Confidential Submission 78; Australian Credit Forum Submission 76; Law Society of ACT Submission 79; LAO (Qld) Submission 80; Magistrates Court of SA Submission 81; NSW Bar Association Submission 85; AFCO Submission 90; VECCI Submission 92; NRMA Insurance Submission 93; Law Society of SA Submission 94; BFCI Submission 102; ACLA Submission 107; Federal Court Submission 108; L Silvester Hearing; C McDonald Hearing; E Harris Hearing.

The question of what costs should be recovered under a costs order is discussed in ch 2.

eg it is quite common in personal injury cases for the plaintiff's solicitor to recover only his or her costs if the action is successful. In some cases the solicitor will accept the costs recovered from the other party as full and final satisfaction of his or her account, although it is more common for the balance of the solicitor's fees to be deducted from the award. In Darwin solicitors will act for applicants in refugee cases in the knowledge that their costs will be paid only if a costs order is obtained against the Commonwealth as respondent.

eg the Commission heard from employers and employees who have succeeded in cases before the Industrial Relations Court and been substantially out of pocket. In one case an employee obtained an order for \$12 000 but had to pay his solicitor \$10 000.

See, eg, ACTCOSS Submission 2; LIV Submission 25; Townsville CLS Submission 45; Association of Labor Lawyers (Qld) Submission 72; ACLA Submission 107.

G Pesce Submission 29; LACTAS Submission 33; LSC (SA) Submission 46; Association of Labor Lawyers (Qld) Submission 72; Law Society of NSW Submission 74; Magistrates Court of SA Submission 81; LAFS Submission 96.

This figure is for all States and Territories except Queensland: LAFS.

See, eg, LIV Submission 25; LACTAS Submission 33; Townsville CLS Submission 45; BCA Submission 50; Walker Tate Submission 51; AFC Submission 55; ICA Submission 64; Victorian Bar Council Submission 70; Clayton Utz Submission 73; Law Society of NSW Submission 74; VECCI Submission 92; NRMA Insurance Submission 93; LAFS Submission 96; Federal Court Submission 108.

eg AFC Submission 55; Federal Court Submission 108.

See ch 11.

eg Local Court of NSW Submission 1; ACTCOSS Submission 2; V Law Submission 3; L Munt Submission 7; Price Brent Submission 17; J Grey Submission 21; Walsh & Partners Submission 22; S Richards Submission 27; LACTAS Submission 33; Allen Allen & Hemsley Submission 38; Townsville CLS Submission 45; LACNSW Submission 47; BCA Submission 50; Walker Tate Submission 51; J MacKay Submission 58; R Beasley Submission 61; Financial Counselling Services (Qld) Submission 68; ABA Submission 71; Law Society of NSW Submission 74; Confidential Submission 78; Magistrates Court of SA Submission 81; NSW Bar Association Submission 85; IPAA Submission 87; AFCO Submission 90; PIAC Submission 91; ACLA Submission 107; Federal Court Submission 108. cf LIV Submission 25; AFC Submission 55; Victorian Bar Council Submission 70; Association of Labor Lawyers (Qld) Submission 72; Law Society of ACT Submission 79; N Xeonophou Hearing; S Tilmouth Hearing; R Beasley Hearing; D Fisher Hearing; E Damate Hearing; Justice Stein Hearing; S Rice Hearing; I Gubbay Hearing; A Reich Hearing.

See, eg, ACTCOSS Submission 2; V Law Submission 3; J Grey Submission 21; S Richards Submission 27; Townsville CLS Submission 45; LACNSW Submission 47; J MacKay Submission 58; Financial Counselling Services (Qld) Submission 68; Law Society of NSW Submission 74; AFCO Submission 90; PIAC Submission 91.

See, eg, S Keim Submission 67; EDO Submission 32; AFCO Submission 90; PIAC Submission 91; ELCAS Submission 98.

See, eg, D Pritchard Submission 28; LACTAS Submission 33; Allen Allen & Hemsley Submission 38; LSC (SA) Submission 46; BCA Submission 50; ICA Submission 64; ABA Submission 71; Magistrates Court of SA Submission 81; NSW Bar Association Submission 85; AFCO Submission 90; NRMA Insurance Submission 93; Federal Court Submission 108.

See, eg, S Shavell 'Suit, settlement, and trial: a theoretical analysis under alternative methods for the allocation of legal costs' (1982) 11 *Journal of Legal Studies* 55; J Hause 'Indemnity, settlement, and litigation, or I'll be suing you' (1989) 18 *Journal of Legal Studies* 157; P Hersch 'Indemnity, settlement and litigation: comment and extension' (1990) 19 *Journal of Legal Studies* 235; J Donohue 'The effects of fee shifting on the settlement rate: theoretical observations on costs, conflicts and contingency fees' (1991) 54 *Law and Contemporary Problems* 195; T Rowe 'Predicting the effects of attorney fee shifting' (1984) 47 *Law and Contemporary Problems* 139; B Smith 'Three attorney fee shifting rules and contingency fees: their impact on settlement incentives' (1992) 90 *Michigan Law Review* 2154; E Snyder & J Hughes 'The English rule for allocating legal costs: evidence confronts theory' (1990) 6 *Journal of Law, Economics and Organization* 345.

eg assume that X has a claim against Y for \$1500 that will cost nothing to settle but will cost \$1000 to litigate.

- Under the American rule, with both parties expecting that they will win, X expects a net gain of \$500 from trial (the claim minus the legal fees) and Y expects a net loss of \$1000 (no damages but a loss of unrecoverable legal fees). This means the settlement range is \$500 to \$1000. Any amount in that range paid by Y to X would mean that each is no worse off than each would expect to be if the matter went to trial.
- Under the costs indemnity rule, X expects a net gain of \$1500 from trial (the claim unreduced by legal fees) and Y expects no net loss or gain (no damages and legal fees reimbursed). Settlement will not occur as the settlement range is negative. Any payment by Y would make him or her worse off than if the matter went to trial.

LACTAS Submission 33; QCCI Submission 44; BCA Submission 50; ABA Submission 71; Magistrates Court of SA Submission 81; AFCO Submission 90; VECCI Submission 92; NRMA Insurance Submission 93; Law Society of SA Submission 94; BFCI Submission 102; Federal Court Submission 108. However, some submissions did consider the costs indemnity rule to be a significant incentive for parties to use alternative dispute resolution: ACTCOSS Submission 2; G Pesce Submission 29; Townsville CLS Submission 45; ICA Submission 64.

133 See, eg, R Braeutigam, B Owen & J Panzar 'An economic analysis of alternative fee shifting system' (1984) 47 *Law and Contemporary Problems* 173; A Katz 'Measuring the demand for litigation: is the English rule really cheaper' (1987) 3 *Journal of Law, Economics and Organization* 143.

134 ie the rule raises the marginal value of expenditure and will induce the parties to invest more resources in affecting the outcome.

135 ie in considering whether to purchase additional legal services, the litigant considers not their real resource cost but the real cost discounted by the possibility that he or she will win the law suit - in other words, the rule subsidises expenditure on legal services.

136 Disciplinary and case management costs orders are discussed in ch 11.

137 IP 13 ch 6.

138 The model was raised in IP 13 ch 6 and DRP 1 ch 2.

139 This argument also applies to the costs indemnity rule.

140 See, eg, ICA Submission 64; NRMA Insurance Submission 93; Law Society of SA Submission 94; Australian Institute of Company Directors Submission 100; ACLA Submission 107. cf ACTCOSS Submission 2; G Pesce Submission 29; AFCO Submission 90. The evidence available on the United States experience is equivocal. The costs rules applying in the United States and their effects are discussed in Appendix C.

141 ACTCOSS Submission 2; Price Brent Submission 17; SGIC (SA) Submission 26; Townsville CLS Submission 45; J Owens Submission 82; Walker Tate Submission 133.

142 This model was raised in IP 13 para 6.13-16.

143 eg one-way costs shifting has been widely used in the United States to promote particular types of litigation under legislation such as the Civil Rights Attorney's Fees Award Act 42 USCA 1988 (1982), Civil Rights Act 42 USCA 1973 (1976) and the Clean Air Act 42 USCA 17604 (1976).

144 eg under the Judicial Review Act 1991 (Qld) a party seeking an order that a government decision-maker provide reasons may recover his or her costs if successful (in whole or in part) in obtaining the relief sought but may only be ordered to pay costs if wholly unsuccessful and the application did not disclose a reasonable basis, was frivolous or vexatious or was an abuse of process: s 50. In the United States the Equal Access to Justice Act 28 USCA 2412 (1988) allows individuals and small businesses to recover legal costs in cases against the government where the government's position is not 'substantially justified'.

145 EDO Submission 32; LACTAS Submission 33, LACNSW Submission 47; AFCO Submission 90; PIAC Submission 91.

146 ACTCOSS Submission 2; LAWA Submission 16; SGIC (SA) Submission 26; G Pesce Submission 29; AFC Submission 55; ICA Submission 64; Victorian Bar Council Submission 70; ABA Submission 71; Clayton Utz Submission 73; Law Society of NSW Submission 74; NSW Bar Association Submission 85; Ministry of Fair Trading (WA) Submission 88; VECCI Submission 92; NRMA Insurance Submission 93; Law Society of SA Submission 94; Federal Court Submission 108. cf H Odijk Submission 6; P Newhouse Submission 53; Financial Counselling Services (Qld) Submission 68.

147 See, eg, LAWA Submission 16; SGIC (SA) Submission 26; G Pesce Submission 29; ICA Submission 64; Victorian Bar Council Submission 70; ABA Submission 71; NSW Bar Association Submission 85; Ministry of Fair Trading (WA) Submission 88; Law Society of SA Submission 94; Federal Court Submission 108.

148 LAWA Submission 16; ICA Submission 64; NSW Bar Association Submission 85; Federal Court Submission 108.

149 This model was identified by AJAC: AJAC Report para 5.66. It was raised in IP 13 para 6.14.

150 ACTCOSS Submission 2; Law Society of WA Submission 18; SGIC (SA) Submission 26; G Pesce Submission 29; Townsville CLS Submission 45; ICA Submission 64; Association of Labor Lawyers (Qld) Submission 72; Law Society of ACT Submission 79; Magistrates Court of SA Submission 81; Ministry of Fair Trading (WA) Submission 88; NRMA Insurance Submission 93; Federal Court Submission 108. cf H Odijk Submission 6.

151 See para 4.27.

152 SGIC (SA) Submission 26; Townsville CLS Submission 45; Federal Court Submission 108.

153 Federal Court Submission 108.

154 See recommendation 2.

155 LAWA Submission 16; PPAS Submission 20; LIV Submission 25; G Pesce Submission 29; LACTAS Submission 33; Allen Allen & Hemsley Submission 38; BCA Submission 50; M Hammett Submission 62; Association of Labor Lawyers (Qld) Submission 72; Clayton Utz Submission 73; Australian Credit Forum Submission 76; A Carden Submission 77; Confidential Submission 78; Law Society of ACT Submission 79; Magistrates Court of SA Submission 81; NSW Bar Association Submission 85; Ministry of Fair Trading (WA) Submission 88; Law Society of SA Submission 94; Australian Institute of Company Directors Submission 100; BFCI Submission 102; Federal Court Submission 108; Business Software Submission 109; Wilcox J Submission 116; LAO (ACT) Submission 117; J Mott Submission 119; Judge Lunn Submission 124; Attorney-General's Dept (NT) Submission 126; Victorian Bar Council Submission 127; CCLC (NSW) Submission 129; VECCI Submission 130; G Reinhardt Submission 131; LACV Submission 134; QCCI Submission 136; D Murphy Submission 138; Law Society of NSW Submission 140; FCAI Submission 143; ICA Submission 144; ACLA Submission 145; AFC Submission 150; Supreme Court of SA Submission 153; ABA Submission 154; AFCO Submission 155; LACNSW Submission 156; Law Society of WA Submission 160; LSC (SA) Submission 161; Dept of Environment (Cth) Submission 165; KPMG Submission 168; ACS Submission 170; MAA Submission 171; LCA Submission 172; ACA Submission 173; DEET Submission 174; Telstra Submission 177; Baker & McKenzie Submission 178; ASC Submission 184; Attorney-General's Dept (Cth) Submission 185.

156 DRP 1 ch 6.

157 DRP 1 para 4.4-10.

158 DRP 1 ch 7.

159 See Consumer Claims Tribunal Act 1987 (NSW); Small Claims Tribunals Act 1973 (Vic); Small Claims Tribunals Act 1973 (Qld); Magistrates Court Act 1991 (SA); Small Claims Tribunals Act 1974 (WA); Magistrates Court (Small Claims Division) Act 1989 (Tas); Small Claims Act 1974 (NT); Small Claims Act 1974 (ACT).

160 The Consumer Claims Tribunal can deal with building disputes to the value of \$25 000.

161 Consumer Claims Tribunal Act 1987 (NSW) s 12; Small Claims Tribunals Act 1973 (Vic) s 33; Small Claims Tribunals Act 1973 (Qld) s 35; Magistrates Court Act 1991 (SA) s 38; Small Claims Tribunals Act 1974 (WA) s 35; Magistrates Court (Small Claims Division) Act 1989 (Tas) s 28; Small Claims Act 1974 (NT) s 29; Small Claims Act 1974 (ACT) s 29.

162 National Australia Bank Ltd v KDS Construction Services Pty Ltd (1987) 163 CLR 668.

163 See, eg, LACV Submission 134; Law Society of NSW Submission 140; AFC Submission 150; AFCO Submission 155; LACNSW Submission 156; Telstra Submission 177

164 The exceptions are discussed in ch 11, 12 and 13.

165 The Administrative Review Council proposes a number of reforms to federal merit review tribunals in its report *Better decisions: Review of Commonwealth merit review tribunals* AGPS Canberra 1995.

166 Constitution s 75.

167 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 8.

168 *Judiciary Act 1903* (Cth) s 26; *Federal Court of Australia Act 1976* (Cth) s 43.

169 These are discussed in ch 4.
170 See, eg, PPAS *Submission 20*; J Black *Submission 41*; Townsville CLS *Submission 45*; AFCO *Submission 90*; ARC *Submission 106*;
LACNSW *Submission 156*.
171 Draft recommendation 8.1. See, eg, LACV *Submission 134*; Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW
Submission 156; DSS *Submission 157*; DIEA *Submission 162*; ACS *Submission 170*; Telstra *Submission 177*.
172 eg *Freedom of Information Act 1982* (Cth) s 66; *Land Acquisition Act 1989* (Cth) s 131.
173 *Safety Rehabilitation and Compensation Act 1988* (Cth) s 67; *Seafarers Rehabilitation and Compensation Act 1992* (Cth) s 91-2.
174 Law Society of NSW *Submission 140*; Confidential *Submission 147*; Veterans' Affairs *Submission 151*; AFCO *Submission 155*; LACNSW
Submission 156; AAT *Submission 159*; Dept of Environment (Cth) *Submission 165*; ATSIIC *Submission 166*; ACS *Submission 170*; DEET
Submission 174; ARC *Submission 175*; Telstra *Submission 177*.
175 Administrative Review Council *Review of Commonwealth Merits Review Tribunals: Discussion paper* Administrative Review Council
Canberra 1994, appendix A2.2.
176 Draft recommendation 8.2.
177 Law and Justice Amendment (No 2) Bill 1995 (Cth) cl 2(2).
178 s 69. These grants are rarely made. Excluding grants in war services cases, the Attorney-General made grants worth \$8634 in 1992-93 and
\$5843 in 1993-94. Legal aid commissions provided assistance in AAT matters of almost \$1.7 million in 1992-93 and over \$1.5 million in
1993-94. Figures provided by LAFS.
179 Law Society of NSW *Submission 140*; Confidential *Submission 147*; Veterans' Affairs *Submission 151*; AFCO *Submission 155*; LACNSW
Submission 156; AAT *Submission 159*; Dept of Environment (Cth) *Submission 165*; ATSIIC *Submission 166*; ACS *Submission 170*; DEET
Submission 174; ARC *Submission 175*; Telstra *Submission 177*.
180 Law Society of NSW *Submission 140*.
181 ACS *Submission 170*; DEET *Submission 174*.
182 Tribunals may not be able to make enforceable costs orders. Under Chapter III of the Constitution, a tribunal cannot exercise federal judicial
power. This means that it may not be able to enforce any costs order it may make. This issue is discussed in more detail in chapter 9.
183 eg IRT, RRT, SSAT.
184 Draft recommendation 8.3. See, eg, Law Society of NSW *Submission 140*; Confidential *Submission 147*; Veterans' Affairs *Submission 151*;
AFCO *Submission 155*; LACNSW *Submission 156*; AAT *Submission 159*; Dept of Environment (Cth) *Submission 165*; ATSIIC
Submission 166; ACS *Submission 170*; DEET *Submission 174*; ARC *Submission 175*; Telstra *Submission 177*.
185 Draft recommendation 8.3.
186 Confidential *Submission 147*; AFCO *Submission 155*; LACNSW *Submission 156*; DIEA *Submission 161*; ARC *Submission 175*; Telstra
Submission 177.
187 See, eg, DSS *Submission 157*.
188 IRT *Submission 169*.
189 *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668.
190 Draft recommendation 8.4. See, eg, LACV *Submission 134*; Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW
Submission 156; LSC (SA) *Submission 161*; DIEA *Submission 162*; ACS *Submission 170*; Telstra *Submission 177*.
191 *Administrative Appeals Tribunal Act 1975* (Cth) s 44.
192 The basis for this approach is discussed in ch 4.
193 Draft recommendation 8.5. See, eg, LACV *Submission 134*; Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW
Submission 156; DIEA *Submission 162*; ACS *Submission 170*; Telstra *Submission 177*.
194 eg *Social Security Act 1991* (Cth) s 1283, 1285; *Veteran's Entitlement Act 1986* (Cth) s 175.
195 s 475-6.
196 Draft recommendation 8.6, 8.7. See, eg, LACV *Submission 134*; Law Society of NSW *Submission 140*; Veterans' Affairs *Submission 151*;
AFCO *Submission 155*; LACNSW *Submission 156*; AAT *Submission 159*; DIEA *Submission 162*; TELSTRA *Submission 177*.
197 s 117(1). The same principle applies under the *Family Court Act 1975* (WA) s 73A(1).
198 Family Law Act s 117(2); *Family Court Act 1975* (WA) s 73A(2).
199 Family Law Act s 117(2A); *Family Court Act 1975* (WA) s 73A(3).
200 Family Law Act s 118; *Family Court Act 1975* (WA) s 82A.
201 H Odijk *Submission 6*; PPAS *Submission 20*; LACTAS *Submission 33*; NSW Bar Association *Submission 155*; Law Society of NSW
Submissions 74 & 140; LACV *Submission 134*; AFCO *Submission 155*; LACNSW *Submission 156*; LSC (SA) *Submission 161*; LCA
Submission 172; Attorney-General's Dept (Cth) *Submission 185*. See also Family Law Council *Comments on the Report of the Joint Select
Committee on the Operation and Interpretation of the Family Law Act* Government Printer Canberra 1993, 79.
202 s 117 (2A)(a).
203 s 117(2A)(c)-(f).
204 J Byrne *Submission 8*; Law Society of NSW *Submission 74*; LAO (Qld) *Submission 80*.
205 Commonwealth of Australia *The Family Law Act 1975 Aspects of its Operation and Interpretation Report of the Joint Select Committee on
Certain Aspects of the Operation and Interpretation of the Family Law Act* AGPS Canberra 1992.
206 Family Law Council *Comments on the Report of the Joint Select Committee on the Operation and Interpretation of the Family Law Act*
Government Printer Canberra 1993, 79.
207 *Breen v Breen* (1992) DFC 95-23.
208 These orders are made under Family Law Act s 74, 79, 117. See also LCA *Submission 172*.
209 J Byrne *Submission 8*; G Pesce *Submission 29*; Law Society of NSW *Submissions 74 & 140*.
210 See ch 11.
211 See ch 12.
212 See para 6.15-23.
213 See para 6.15-23.
214 The Family Law Council is currently undertaking a review of the role and current law relating to separate representatives: Family Law
Council *Involving and Representing Children in Family Law* Discussion Paper Canberra May 1995.
215 Family Law Act s 65.
216 *Bennett v Bennett* (1991) FLC 92-191.
217 In 1992-93 legal aid commissions provided assistance for 682 separate representatives and in 1991-2 assistance was provided for 624
separate representatives: LAFS *Legal Aid in Australia 1992-93 Statistical Yearbook* AGPS Canberra March 1994. Since these statistics were
collected the decision of the Full Court in *Re: K* (1994) FLC 92-461 has expanded the types of cases in which separate representative can be
appointed.
218 *Separate Representative's case* (1993) 16 Fam LR 485 (Nicholson CJ and Fogarty J). Strauss J strongly dissented on the first alternative,
arguing that to put a separate representative in the position of a party would undermine the nature of the role.

219 (1994) FLC 92-460.
220 T Lindenmayer & P Doolan 'The Role, Powers and Status of the Separate Representative' (1994) 8 *AJ Fam L* 89.
221 Draft recommendation 9.2.
222 Draft recommendation 9.3.
223 E Prata *Submission 122*; LACV *Submission 134*; Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW *Submission 156*;
LSC (SA) *Submission 161*.
224 LSC (SA) *Submission 46*; J Stubberfield *Submission 52*.
225 E Prata *Submission 122*; LACV *Submission 134*; Law Society of NSW *Submission 140*; LACNSW *Submission 156*; LSC (SA) *Submission 161*;
Attorney-General's Dept (Cth) *Submission 185*.
226 LCA *Submission 172*.
227 eg *Marion's case* (1992) 175 CLR 218; *Sarah's case* (1994) FLC 92-449.
228 Victorian Bar Council *Submission 127*; Law Society of NSW *Submission 140*; LCA *Submission 172*.
229 Public interest costs orders are discussed in ch 13.
230 See ch 20.
231 The Commonwealth has no general legislative power to make laws about crime: Constitution s 51. However, offences may be created under
a statute giving effect to Commonwealth legislative power.
232 *Judiciary Act 1903* (Cth) s 68 confers jurisdiction on State and Territory courts in federal criminal cases.
233 *Judiciary Act 1903* (Cth) s 79.
234 However, most jurisdictions allow for many indictable offences to be dealt with summarily.
235 eg a person convicted of an indictable offence such as assault occasioning actual bodily harm may be imprisoned for up to 5 years in most
jurisdictions.
236 The penalties that may be imposed summarily are less than those that may be imposed on indictment: eg the maximum prison sentence that
may be imposed summarily is 1 year in the ACT (*Crimes Act 1900* (ACT)s 476) and 2 years in SA (*Summary Procedure Act 1921* (SA) s
5(2)).
237 *Magistrates' Court Act 1930* (ACT) s 244; *Summary Procedure Act 1991* (SA) s 189; *Magistrates' Court Act 1989* (Vic) s 131; *Costs in*
Criminal Cases Act 1976 (Tas) s 4, 5; *Justices Act 1959* (Tas) s 77; *Justices Act 1902* (WA) s 151, 152. In WA costs may also be awarded to
a successful defendant in summary proceedings and subsequent appeals under the *Official Prosecutions (Defendants' Costs) Act 1973* (WA)
s 5, 6.
238 Judge Lunn *Submission 124*; Court of Petty Sessions (WA) statistics; Dept of Courts Administration (NSW) statistics.
239 *Justices Act 1902* (NSW) s 81(4). A successful defendant in summary proceedings in NSW may also be granted a costs certificate under the
Costs in Criminal Cases Act 1967 (NSW) s 2, 3.
240 *Justices Act 1886* (Qld) s 158A.
241 *Justices Act 1928* (NT) s 77.
242 *Crimes Act 1958* (Vic) s 545; *Criminal Code Act* (WA) s 674.
243 *Costs in Criminal Cases Act 1967* (NSW) s 2; *Costs in Criminal Cases Act 1976* (Tas) s 4, 5.
244 *Summary Procedure Act 1991* (SA) s 103(3); *Justices Act 1902* (NSW) s 51B, 81(1); *Justices Act 1886* (Qld) s 157.
245 Figures provided by LAFS.
246 This conclusion is based on anecdotal and other evidence. Precise figures on the proportion of criminal defendants that are legally aided are
not available. Some statistics are available on the number of criminal matters before the courts in each jurisdiction and the number of grants
of legal aid in criminal matters in those jurisdictions. However, they are not comparable and allow only limited inferences. The need for
better statistics is discussed in ch 3.
247 P Sheehan *Submission 23*.
248 Para 10.10.
249 eg ACTCOSS *Submission 2*; H Odijk *Submission 6*; Townsville CLS *Submission 11*; DPP (Cth) *Submissions 24 & 115*; G Pesce *Submission 29*;
Law Society of SA *Submission 26*; Law Society of NSW *Submissions 74 & 140*; LACV *Submission 134*; SA Police *Submission 86*. cf
DPP (WA) *Submission 9*; NSW Police *Submission 132*; D Murphy *Submission 138*; Attorney-General's Dept (Cth) *Submission 185*.
250 Judge Lunn *Submission 124*.
251 Judge Lunn *Submission 124*.
252 Confidential *Submission 48*; A & F Gruen *Submission 103*; ASC *Submission 184*.
253 DRP 1 draft recommendation 10.1. See, eg, V Law *Submission 3*; H Odijk *Submission 6*; DPP (Cth) *Submission 24*; G Pesce *Submission 29*;
Townsville CLS *Submission 45*; J Mackay *Submission 58*; P & J Cameron *Submission 60*; Law Society of NSW *Submission 74*; Law Society
of ACT *Submission 79*; LAO (Qld) *Submission 80*; Law Society of SA *Submission 94*; Dept of Courts Administration (NSW) *Submission 97*;
DPP (Cth) *Submission 115*; Judge Lunn *Submission 124*; Qld Police *Submission 137*; Victoria Police *Submission 146*; DPP (WA)
Submission 167; Attorney-General's Dept (Cth) *Submission 185*.
254 See para 7.8-9.
255 DRP 1 draft recommendation 10.2. See, eg, LACV *Submission 134*; Law Society of NSW *Submission 140*; LSC (SA) *Submission 161*; DPP
(WA) *Submission 58*.
256 Judge Lunn *Submission 124*; ASC *Submission 184*.
257 DPP (Cth) *Submission 115*; Attorney-General's Dept (Cth) *Submission 185*.
258 DPP (WA) *Submission 167*.
259 Judge Lunn *Submission 124*; Attorney-General's Dept (Cth) *Submission 185*.
260 DPP (Cth) *Submission 115*; Supreme Court (ACT) *Submission 149*; DPP (WA) *Submission 167*.
261 Draft recommendation 10.1, 10.2.
262 Judge Lunn *Submission 124*.
263 DPP (Cth) *Submissions 24 & 115*; Judge Lunn *Submission 124*; Qld Police *Submission 137*; Victoria Police *Submission 146*; DPP (WA)
Submission 167.
264 See para 2.27.
265 The current practice is discussed in *Latoudis v Casey* (1990) 170 CLR 534, 544 (Brennan J).
266 A & F Gruen *Submission 103*.
267 Recommendation 23.
268 s 89. Under s 89(3) the ASC may pay such amount as it thinks reasonable on account of the costs and expenses that a person incurs in
complying with a requirement under the rules concerning ASC investigations. As a matter of statutory interpretation the ASC could exercise
this discretion to reimburse legal expenses. However, this does not seem to be the ASC's current practice.
269 s 26.
270 See para 7.8.
271 *Crimes Act 1958* (Vic) s 545; *Criminal Code Act 1924* (Tas) s 425; *Criminal Code* (WA) s 674.

272 DPP (Cth) *Submission 24*. See also J Satori 'Costs in Criminal Proceedings after *Latoudis v Casey*' (1991) 18(1) *MULR* 154, 167-8.
273 Draft recommendation 10.3.
274 H Odijk *Submission 6*; Law Society of WA *Submission 18*, PPAS *Submission 20*; DPP (Cth) *Submissions 24 & 115*; G Pesce *Submission 29*;
SA Police *Submission 86*; Dept of Courts Administration (NSW) *Submission 97*; LACV *Submission 134*; LACNSW *Submission 156*; Dept
of Environment (Cth) *Submission 165*; AVDSC *Submission 176*.
275 See, eg, *R v Pickett* [1986] 2 Qd R 441. In New South Wales the court must take into account whether a person charged with an offence
entered a timely and honest plea of guilty and, if so, reduce the sentence accordingly: *Crimes Act 1900* (NSW) s 439.
276 *Proceeds of Crime Act 1987* (Cth); *Crimes (Confiscation of Profits) Act 1986* (SA); *Crimes (Confiscation of Profits) Act 1986* (Vic); *Crimes*
(Confiscation of Profits) Act 1988 (NT); *Crimes (Confiscation of Profits) Act 1988* (WA); *Crimes (Confiscation of Profits) Act 1989* (Qld);
Crimes (Confiscation of Profits) Act 1993 (Tas).
277 Dept of Environment (Cth) *Submission 165*.
278 See, eg, *Criminal Appeal Act 1912* (NSW) s 17(1); *Crimes Act 1958* (Vic) s 578; *Criminal Law Consolidation Act 1935* (SA) s 363(1);
Criminal Code 1995 (Qld) s 436(1).
279 See, eg, *Justices Act 1886* (Qld) s 226; *Justices Act 1902* (WA) s 199.
280 *Justices Act 1902* (NSW) s 125.
281 *Official Prosecutions (Defendants' Costs) Act 1973* (WA) s 5, 6.
282 *Costs in Criminal Cases Act 1967* (NSW) s 2.
283 *Costs in Criminal Cases Act 1967* (NSW) s 3.
284 *Criminal Code Act 1924* (Tas) s 414.
285 Draft recommendation 10.4-10.6. See, eg, DPP (Cth) *Submission 115*; E Prata *Submission 122*; Judge Lunn *Submission 124*; LACV
Submission 134; Victoria Police *Submission 146*; LACNSW *Submission 156*.
286 Victoria Police *Submission 146*.
287 *Costs in Criminal Cases Act 1967* (NSW) s 2, 3; *Costs in Criminal Cases Act 1976* (Tas) s 4(2); *Official Prosecutions (Defendants' Costs)*
Act 1973 45 (WA) s 5, 6.
288 This jurisdiction was exercised by the Industrial Division of the Federal Court of Australia until 30 March 1994: *Industrial Relations Reform*
Act 1993 (Cth).
289 96 per cent of matters before the IRC are for unlawful terminations: IRC statistics.
290 From 30 March 1994 to 30 June 1995, 38 per cent of applicants appeared in person, 23 per cent were represented by their union, 37 per cent
were represented by a solicitor and 1 per cent were unspecified: Industrial Relations Court of Australia *Annual Report 1993-1994*.
291 The federal Government recently announced that it will amend the IR Act to allow parties to unlawful termination disputes to participate in
binding arbitration before the Industrial Relations Commission with a right of appeal to a Full Bench of the Commission.
292 s 347(1).
293 See eg, *Grout v Gunnedah* (1995) 129 ALR 372; *CFMEU v BHP Refractories* (unreported) Industrial Relations Court 17 March 1995;
Bysouth v Tawlord Nominees (unreported) Industrial Relations Court 27 June 1995; *Coker-Godson v National Dairies* (unreported) Industrial
Relations Court 4 August 1995.
294 Disciplinary and case management costs orders are discussed in ch 11.
295 These are discussed in ch 5.
296 *Native Title Act 1993* (Cth) Pt 3, Pt 6 Div 5.
297 *Racial Discrimination Act 1975* (Cth) Pt 3 Div 3; *Sex Discrimination Act 1984* (Cth) Pt 3 Div 3; *Disability Discrimination Act 1992* (Cth) Pt
4 Div 3.
298 eg Companies Auditors and Liquidators Disciplinary Board, Copyright Tribunal.
299 *Constitution Act 1900* (Cth) s 71-80.
300 (1995) 127 ALR 1.
301 *Brandy v HREOC* (1995) 127 ALR 1.
302 Draft recommendation 11.1.
303 LACV *Submission 134*; D Murphy *Submission 138*; Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW *Submission*
156; Telstra *Submission 177*.
304 SA Housing Trust *Submission 43*; VECCI *Submission 130*; D Murphy *Submission 138*.
305 eg Judiciary Act 1903 (Cth) s 27; Supreme Court Act 1970 (NSW) s 101(2)(c); Supreme Court Act 1935 (WA) s 60(1)(e).
306 Maiden v Maiden (1909) 7 CLR 727, 742.
307 Draft recommendation 15.1.
308 Judge Lunn *Submission 124*; LACV *Submission 134*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; Attorney-
General's Dept (Cth) *Submission 185*.
309 Law Society of NSW *Submission 140*.
310 See para 11.3-14.
311 See para 11.15-29.
312 See para 11.30-38.
313 See para 11.39-49.
314 ACTCOSS *Submission 2*; V Law *Submission 3*; H Odijk *Submission 6*; Price Brent *Submission 17*; Law Society of WA *Submission 18*;
PPAS *Submission 20*; G Pesce *Submission 29*; LACTAS *Submission 33*; D Baker *Submission 35*; Townsville CLS *Submission 45*; C
Sotiropoulos *Submission 75*; LAO (Qld) *Submission 80*; Magistrates Court of SA *Submission 81*; NSW Bar Association *Submission 85*;
AFCO *Submission 90*; NRMA Insurance *Submission 93*; Law Society of SA *Submission 94*; Australian Institute of Company Directors
Submission 100; Federal Court *Submission 108*.
315 Draft recommendation 6.1.
316 eg a party who applies for an extension of time or who amends pleadings or discontinues proceedings without consent must pay the costs
incurred by the other parties unless a court orders otherwise: see, eg, Supreme Court Rules (NSW) Pt 52 r 13, 12, 16.
317 eg the courts have held that where the costs of the matter have been increased significantly by one or more issues on which the successful
party failed, the successful party may not only be deprived of the costs of those issues but may also be ordered to pay the other party's costs
of them: *Cretazzo v Lombardi* (1975) 13 SASR 4.
318 Draft recommendation 6.2.
319 See, eg, C Sotiropoulos *Submission 128*; LACV *Submission 134*; D Murphy *Submission 138*; Law Society of NSW *Submission 140*; ACLA
Submission 145; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; LSC (SA) *Submission 161*; NRMA Insurance
Submission 164; DEET *Submission 164*; Telstra *Submission 177*; Baker & McKenzie *Submission 178*.
320 Federal Court *Submission 181*. This reflects the decisions in *Cretazzo v Lombardi* (1975) 13 SASR 4 and *Hughes v Western Australian*
Cricket Assoc (Inc) & Ors (1986) ATPR 40-748. This power will continue to apply in actions involving a number of distinct claims or
defences: see para 4.32.

321 See also recommendation 34.
322 Law Society of NSW *Submission 140*; LCA *Submission 172*.
323 [1995] 1 VR 163.
324 ACLA *Submission 145*.
325 See, eg, *Capolingua v Phylum Pty Ltd (as Trustee for the Gennoe family and others)* (1989) 5 WAR 137.
326 The power of tribunals to award costs is discussed in ch 5 & 9.
327 See recommendation 6.
328 See, eg, Federal Court Rules O 62 r 9; Supreme Court Rules (NSW) Pt 52A r 43; Supreme Court Rules (Vic) r 63.23; Supreme Court Rules (WA) O 66 r 5; Supreme Court Rules (Tas) O 80 r 9; Supreme Court Rules (ACT) O 65 r 8; Supreme Court Rules (NT) r 63.21; Supreme Court Rules (SA) r 101.06.
329 Draft recommendation 6.4.
330 Attorney-General's Dept (NT) *Submission 126*; C Sotiropoulos *Submission 128*; LACV *Submission 134*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; AAT *Submission 159*; NRMA Insurance *Submission 164*; DEET *Submission 174*; AVDSC *Submission 67*; Telstra *Submission 177*.
331 See recommendation 6.
332 The rules for frivolous and vexatious litigation are discussed in para 11.25.
333 *Ritter v Godfrey* (1920) 2 KB 47; *Donald Campbell & Co v Pollock* [1927] AC 732; *Hughes v Western Australian Cricket Assoc (Inc) & Ors* (1986) ATPR 40-749.
334 Draft recommendation 6.5.
335 28 USCA (1992).
336 *Business Guides Inc v Chromatic Communications Enterprises Inc* 112 L Ed 2d 1140 (1991).
337 *Foster v Michelin Tire Corp* 108 FRD 412 (1985).
338 E Prata *Submission 122*; C Sotiropoulos *Submission 128*; LACV *Submission 134*; D Murphy *Submission 138*; ACLA *Submission 145*; AFC *Submission 150*; ABA *Submission 154*; AFCO *Submission 155*; LACNSW *Submission 156*; NRMA Insurance *Submission 164*; ATSIC *Submission 166*; DEET *Submission 174*; AVDSC *Submission 176*; Telstra *Submission 177*. cf Law Society of NSW *Submission 140*; LCA *Submission 172*.
339 eg Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW *Submission 156*; ATSIC *Submission 172*.
340 eg D Murphy *Submission 138*; AFCO *Submission 154*.
341 LCA *Submission 172*.
342 LACNSW *Submission 156*.
343 These exceptions are discussed in ch 12 and 13 respectively.
344 See recommendation 6.
345 eg High Court Rules O 26 r 18; Federal Court Rules O 21; Family Law Act s 118.
346 *Attorney-General (NSW) v Wentworth* (1988) 14 NSWLR 481.
347 *AG for Duchy of Lancaster v London & Northwestern Railway Co* (1892) 3 Ch 274.
348 *Burton v Shire of Bairnsdale* (1908) 7 CLR 76.
349 Draft recommendation 6.6. See, eg, C Sotiropoulos *Submission 128*; LACV *Submission 134*; QCCI *Submission 136*; Law Society of NSW *Submission 140*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; DEET *Submission 174*; Telstra *Submission 177*.
350 Parliament is currently considering amendments to the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) that would allow the AAT to award costs against a person or his or her representative who has engaged in conduct in which the party or representative ought not to have engaged where that conduct has caused another party to the proceedings to incur costs that would not otherwise have been incurred: Law and Justice Amendment (No 2) Bill 1995 (Cth) cl 2(2). The question of whether federal tribunals can exercise such powers under the Constitution is discussed in ch 9.
351 eg Federal Court Rules O 62 r 36A; Supreme Court Rules (ACT) O 65 r 7(2); Supreme Court Rules (NSW) Pt 52A r 33; Supreme Court Rules (Vic) r 63.24, 63.25; Supreme Court Rules (WA) O 66 r 17.
352 *Burke v Lunn* [1976] VR 268.
353 *Cromer v Rickards' Tivoli Theatres Ltd* [1921] SASR 325.
354 See recommendation 34.
355 See recommendation 34. In some jurisdictions the courts are already required to consider the conduct of the parties towards settlement when making costs orders: eg Family Law Act s 117(2A).
356 eg Supreme Court Rules (NSW) Pt 22; Supreme Court Rules (NT) O 26 Pt 1-3; Supreme Court Rules (Qld) O 26; Supreme Court Rules (Vic) O 26.
357 *Calderbank v Calderbank* [1975] 3 All ER 333.
358 Draft recommendation 6.7.
359 The existing model provides different incentives for making or accepting an offer depending on whether a party is the plaintiff or the defendant. A plaintiff who refuses an offer risks having to pay the defendant's party and party costs in addition to his or her own costs from the date of the offer. However, a defendant who refuses an offer only risks having to pay the gap between the plaintiff's party and party costs and solicitor and client costs in addition to his or her own costs from the date of the offer. In general terms the model places greater pressure on a plaintiff to accept an offer as he or she has more at stake because the amount of a defendant's party and party costs will usually exceed the gap between a plaintiff's party and party costs and solicitor and client costs for a given period.
360 Judge Lunn *Submission 124*; Victorian Bar Council *Submission 127*; VECCI *Submission 130*; Law Society of NSW *Submission 140*; SGIC (SA) *Submission 141*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; A Carden *Submission 163*; NRMA Insurance *Submission 164*; KPMG *Submission 168*; Telstra *Submission 177*; Baker & McKenzie *Submission 177*. cf E Prata *Submission 122*; Attorney-General's Dept (NT) *Submission 126*; C Sotiropoulos *Submission 128*; LACV *Submission 134*; ACLA *Submission 145*; AVDSC *Submission 176*; Attorney-General's Dept (Cth) *Submission 185*.
361 Judge Lunn *Submission 124*; VECCI *Submission 130*; Law Society of NSW *Submission 140*; ACLA *Submission 145*; AFCO *Submission 155*.
362 Victorian Bar Council *Submission 127*; Law Society of NSW *Submission 140*; SGIC (SA); *Submission 141*; LACNSW *Submission 156*; Baker & McKenzie *Submission 177*.
363 VECCI *Submission 130*; Baker & McKenzie *Submission 177*. cf AFCO *Submission 155*.
364 *Submission 108*.
365 The disciplinary costs orders proposed in recommendation 34 will support the continued use of Calderbank letters and other informal settlement mechanisms.
366 In some jurisdictions the formal settlement procedure allows a party 14 days to consider and accept an offer by the other party: see, eg, Supreme Court Rules (SA) r 40.03. This approach is more certain than leaving it to a court to decide whether the party had a reasonable time to assess the offer.

367 Draft recommendation 6.8.
368 DRP 1 para 6.23.
369 Federal Court Rules O 62A r 1.
370 *Sacks v Permanent Trustee Australia Ltd* (1993) 118 ALR 265, 268.
371 (unreported) Federal Court of Australia 27 July 1995.
372 s 47. It is not clear whether this section applies to proceedings in the Federal Court. If it did apply then it would not have been necessary for
the Court to set a cap. Indemnities against adverse costs orders are discussed in ch 18.
373 See, eg, H Odijk *Submission 6*; G Pesce *Submission 29*; Townsville CLS *Submission 45*; Federal Court *Submission 108*; LACV *Submission*
134; Law Society of NSW *Submission 140*; AFC *Submission 150*; Supreme Court of SA *Submission 153*; AFCO *Submission 155*; LACNSW
Submission 156; LSC (SA) *Submission 161*; AVDSC *Submission 176*; Telstra *Submission 177*.
374 LIV *Submission 25*; LACTAS *Submission 33*; Law Society of SA *Submission 94*; Law Society of WA *Submission 160*; Baker & McKenzie
Submission 178.
375 Law Society of WA *Submission 160*; Baker & McKenzie *Submission 178*.
376 Baker & McKenzie *Submission 178*.
377 Victorian Bar Council *Submission 127*.
378 Telstra *Submission 177*.
379 See, eg, AFC *Submission 150*; ABA *Submission 154*; NRMA Insurance *Submission 164*.
380 Attorney-General's Dept (Cth) *Submission 185*.
381 See para 11.40.
382 This exception is discussed in ch 12.
383 AJAC Report para 5.62.
384 eg Local Court of NSW *Submission 1*; ACTCOSS *Submission 2*; V Law *Submission 3*; L Munt *Submission 7*; Price Brent *Submission 17*; J
Grey *Submission 21*; Walsh & Partners *Submission 22*; S Richards *Submission 27*; LACTAS *Submission 33*; Allen Allen & Hemsley
Submission 38; Townsville CLS *Submission 45*; LACNSW *Submission 47*; BCA *Submission 50*; Walker Tate *Submission 51*; J MacKay
Submission 58; R Beasley *Submission 61*; Financial Counselling Services (Qld) *Submission 68*; ABA *Submission 71*; Law Society of NSW
Submission 74; Confidential *Submission 78*; Magistrates Court of SA *Submission 81*; NSW Bar Association *Submission 85*; IPAA
Submission 87; AFCO *Submission 90*; PIAC *Submission 91*; ACLA *Submission 107*; Federal Court *Submission 108*; N Xeonophou *Hearing*;
S Tilmouth *Hearing*; R Beasley *Hearing*; D Fisher *Hearing*; E Damate *Hearing*; Justice Stein *Hearing*; S Rice *Hearing*; I Gubbay *Hearing*;
A Reich *Hearing*. cf LIV *Submission 25*; AFC *Submission 55*; Victorian Bar Council *Submission 70*; Association of Labor Lawyers (Qld)
Submission 72; Law Society of ACT *Submission 79*.
385 See, eg, ACTCOSS *Submission 2*; V Law *Submission 3*; J Grey *Submission 21*; S Richards *Submission 27*; Townsville CLS *Submission 45*;
LACNSW *Submission 47*; J MacKay *Submission 58*; Financial Counselling Services (Qld) *Submission 68*; Law Society of NSW *Submission*
74; AFCO *Submission 90*; PIAC *Submission 91*; D Fisher *Hearing*; S Tilmouth *Hearing*.
386 DRP 1 para 4.7-10.
387 eg Victorian Bar Council *Submission 127*; FCAI *Submission 143*; ICA *Submission 144*; ACLA *Submission 145*; ABA *Submission 154*;
NRMA Insurance *Submission 164*.
388 AFC *Submission 150*.
389 eg Victorian Bar Council *Submission 127*; FCAI *Submission 143*; ICA *Submission 144*; ABA *Submission 154*; NRMA Insurance *Submission*
164; Attorney-General's Dept (Cth) *Submission 185*.
390 This doctrine is discussed in *Leeth v The Commonwealth* (1991) 174 CLR 455, 485 (Deane & Toohey JJ). See also ALRC Report No 69 Part
II *Equality Before the Law: Women's Equality* (ALRC 69(2)) ALRC Sydney 1994.
391 Family Law Act s 117(2A).
392 SA Housing Trust *Submission 135*; ACLA *Submission 145*; Federal Court *Submission 181*.
393 This fund is discussed in para 18.2-8.
394 ABA *Submission 154*; FCAI *Submission 143*; Attorney-General's Dept (NT) *Submission 126*; KPMG *Submission 168*; MAA *Submission*
171; ASC *Submission 184*.
395 See para 11.15-29.
396 See para 11.30-38.
397 Draft recommendation 4.3.
398 CCLC (NSW) *Submission 129*; AFCO *Submission 155*; LACNSW *Submission 156*.
399 CCLC (NSW) *Submission 129*; ABA *Submission 154*; AFCO *Submission 155*; LACNSW *Submission 156*.
400 P Newhouse *Submission 121*; ABA *Submission 154*; AFCO *Submission 155*; Federal Court *Submission 181*.
401 Law Society of NSW *Submission 140*; ABA *Submission 154*.
402 Law Society of NSW *Submission 140*; Federal Court *Submission 181*.
403 ASC *Submission 184*.
404 DRP 1 para 4.10.
405 Submissions supporting court assessment included I Lulham *Submission 120*; D Murphy *Submission 138*; ABA *Submission 154*; Law
Society of WA *Submission 160*; LSC (SA) *Submission 161*; Federal Court *Submission 181*; ASC *Submission 184*. Submissions supporting
administrative assessment included P Newhouse *Submission 121*; E Prata *Submission 122*; LACV *Submission 134*; SA Housing Trust
Submission 135; LACNSW *Submission 156*.
406 CCLC (NSW) *Submission 129*; AFCO *Submission 155*.
407 Supreme Court of SA *Submission 153*; ABA *Submission 154*; Telstra *Submission 177*; Baker & McKenzie *Submission 178*; Federal Court
Submission 181.
408 See also the concerns expressed in para 12.36-38.
409 See para 12.38.
410 Draft recommendation 4.4.
411 Draft recommendation 4.5.
412 LAO (ACT) *Submission 117*; AFCO *Submission 155*; LACNSW *Submission 156*; LSC (SA) *Submission 161*; EDO *Submission 183*.
413 KPMG *Submission 169*.
414 AFC *Submission 150*.
415 Baker & McKenzie *Submission 178*.
416 LSC (SA) *Submission 161*.
417 s 20(1), 31A.
418 s 20(1).
419 s 31A.
420 See, eg, AFCO *Submission 155*; EDO *Submission 183*.

Disciplinary and case management costs order help courts to control the conduct of proceedings: see ch 11.

See, eg, Judge Lunn *Submission 124*; Victorian Bar Council *Submission 127*; C Sotiropoulos *Submission 128*; D Murphy *Submission 138*; Law Society of NSW *Submission 140*; Supreme Court of the ACT *Submission 149*; LSC (SA) *Submission 161*; NRMA Insurance *Submission 164*; Federal Court *Submission 181*.

See, eg, Judge Lunn *Submission 124*; Supreme Court of the ACT *Submission 149*; Federal Court *Submission 181*.

eg In *Woodlands v Permanent Trustee Company Limited & Others* (unreported) Federal Court of Australia 27 July 1995 the Court relied on affidavit evidence to determine the applicant's financial circumstances when considering whether to impose a cap on party and party costs under the Federal Court Rules O 62A.

See, eg, ACLA *Submission 145*; ABA *Submission 154*; Federal Court *Submission 181*.

See recommendation 3.

See, eg, *Kent v Cavanagh* (1973) 1 ACTR 43; *Arnold v Queensland* (1987) 73 ALR 607; *Prineas v Forestry Commission of NSW* (1983) 49 LGERA 402; *Campbell v Minister for Environment and Planning* (unreported) Land and Environment Court of NSW 24 June 1988; *Rundle v Tweed Shire Council [No 2]* (1989) 69 LGERA 21; *Liverpool City Council v Roads and Traffic Authority (No 2)* (1992) 75 LGERA 210; *Darlinghurst Residents' Association v Elarosa Investments Pty Ltd [No 3]* (1992) 75 LGERA 214; *Cooper and Wilton v Maitland City Council* (unreported) Land and Environment Court of NSW 17 June 1992; *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236.

eg *AFCO v Tobacco Institute of Australia* (1991) 100 ALR 568.

(unreported) Federal Court of Australia 27 July 1995.

See, eg, *Australian Conservation Foundation v Forestry Commission (Tas)* (1988) 76 LGERA 381, 386; *Botany Municipal Council v Secretary, Department of Arts, Sport, Environment and Territories* (1992) 34 FCR 412, 417.

See also *Tobacco Institute of Australia v AFCO* (1993) 113 ALR 257, 283 (Hill J).

See, eg, Federal Court Rules O 62 r 3(1).

EDO *Submissions 32 & 183*; S Keim *Submission 76*. See, eg, *Vaughan-Taylor v David Mitchell-Melcann & Anor* (1991) 73 LGERA 178 and *Vaughan-Taylor v David Mitchell-Melcann & Anor* (1991) 73 LGERA 366 (establishing the need for environmental impact statements as part of certain government decision making); *Tasmanian Conservation Trust Inc v The Minister for Resources & Anor* (1995) 127 ALR 580 (the Woodchipping case).

eg *AFCO Submission 155*; *DIEA Submission 162*; Federal Court *Submission 181*; *EDO Submissions 32 & 183*.

Quoted in *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236.

eg *Private Attorney General Statute CCP 1021.5* (1977) (California).

Public interest litigation funds are discussed in ch 18.

Draft recommendation 7.1.

ACTCOSS *Submission 2*; V Law *Submission 3*; H Odijk *Submission 6*; EDO *Submission 32*; LACTAS *Submission 33*; L Lindon *Submission 40*; Townsville CLS *Submission 45*; S Keim *Submission 67*; Financial Counselling Services (Qld) *Submission 68*; *AFCO Submission 90*; CCLC (NSW) *Submission 129*; LACV *Submission 134*; Law Society of NSW *Submission 140*; *AFCO Submission 155*; LACNSW *Submission 156*; LSC (SA) *Submission 161*; *DIEA Submission 162*; Dept of the Environment (Cth) *Submission 165*; A Carden *Submission 166*; ACA *Submission 173*.

Supreme Court of SA *Submission 153*; ABA *Submission 154*; Telstra *Submission 177*.

VECCI *Submission 130*; ABA *Submission 154*; Telstra *Submission 177*; Baker & McKenzie *Submission 178*.

ATSIC *Submission 166*; ACA *Submission 173*; EDO *Submission 183*.

VECCI *Submission 130*; QCCI *Submission 136*; FCAI *Submission 143*; Federal Court *Submission 181*.

Law Society of WA *Submission 160*.

eg Federal Court *Submission 181*.

LAWA *Submission 16*; A Stoney *Submission 37*; AFC *Submission 55*; Confidential *Submission 71*; Association of Labor Lawyers (Qld) *Submission 72*; Victorian Bar Council *Submission 127*; FCAI *Submission 143*; AFC *Submission 150*; ABA *Submission 154*; LCA *Submission 172*; Baker & McKenzie *Submission 178*.

See para 2.34.

Justice Stein *Hearing*.

See ch 11.

EDO *Submission 183*.

Under the *Acts Interpretation Act 1901* (Cth) the interpretation of an Act that promotes the purpose of the Act is to be preferred: s 15AA(1). Accordingly, an objects clause which states the purpose of the Act can be a useful tool. The use of objects clauses as an aid to statutory interpretation was recommended by the House of Representatives Standing Committee on Legal and Constitutional Affairs: *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* AGPS Canberra 1993.

Draft recommendation 7.2.

eg CCLC (NSW) *Submission 129*; LACV *Submission 134*; Law Society of NSW *Submission 140*; *AFCO Submission 155*; LACNSW *Submission 156*; *DIEA Submission 162*; ACA *Submission 173*.

See, eg, ICA *Submission 64*.

This view was accepted by the Commission in ALRC Report No 68 *Compliance with the Trade Practices Act 1974* (ALRC 68) ALRC Sydney 1994 para 5.26.

AFC *Submission 150*; LACNSW *Submission 156*.

This issue is also discussed in para 12.26.

Draft recommendation 7.3.

S Mahony *Submission 118*; CCLC (NSW) *Submission 129*; LACV *Submission 134*; Law Society of NSW *Submission 140*; *AFCO Submission 155*; LACNSW *Submission 156*; ACA *Submission 173*.

QCCI *Submission 136*.

See, eg, S Mahony *Submission 118*.

See para 2.34.

Australian Securities Commission Act 1989 (Cth) s 50.

Australian Securities Commission Act 1989 (Cth) s 91.

Criminal Law Act 1967 (UK) s 13, Sch 4, s 14(1).

Abolition of Obsolete Offences Act 1969 (Vic).

Maintenance and Champerty Abolition Act 1993 (NSW).

ALRC Report No 27 *Standing in Public Interest Litigation* (ALRC 27) AGPS Canberra 1985 para 335-41; ALRC Report No 46 *Grouped Proceedings in the Federal Court* (ALRC 46) AGPS Canberra 1988 para 315-18. See also New South Wales Law Reform Commission Discussion Paper No 36 *Barratry, Maintenance and Champerty* Sydney 1994 (NSWLRC DP 36).

ALRC 27 para 341; ALRC 46 para 318.

NSWLRC DP 36 para 2.19-2.37.

471 eg *Maintenance and Champerty Abolition Act 1995* (NSW) s 6; *Criminal Law Act 1967* (UK) s 14 (2); *Wrongs Act 1958* (Vic) s 32(2).
472 (1986) 4 NSWLR 694.
473 O 62 r 6.
474 eg women are often in a weaker bargaining position: see, eg, ALRC Report No 69 Pt I *Equality Before the Law: Justice for Women* (ALRC
475 69(2)) ALRC Sydney 1994.
476 para 5.3.
477 Draft recommendation 5.1.
478 eg LACV *Submission 134*; Law Society of NSW *Submission 140*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*;
479 ATSI *Submission 166*; AVDSC *Submission 176*. cf Attorney-General's Dept (Cth) *Submission 185*.
480 eg S Tilmouth *Hearing*; A Bannister *Hearing*; D Fisher *Hearing*; P Del Borello *Hearing*; M Irvine *Hearing*.
481 The need for community legal education was also recognised in the Justice Statement: 132.
482 AJAC Report para 4.29. See also Lord Woolf *Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England*
483 & *Wales* Lord Chancellor's Department London 1995, 200, 206.
484 See, eg, the list compiled in the AJAC Report para 4.13-20.
485 Justice Statement, 46.
486 Draft recommendation 3.1.
487 Draft recommendation 3.2.
488 LAWA *Submission 16*; P Riddiford *Submission 54*; A Keeling *Submission 63*; P Gardiner *Submission 66*; Magistrates Court of SA
489 *Submission 81*; C Sotiropoulos *Submission 128*; LACV *Submission 134*; Law Society of NSW *Submission 140*; Confidential *Submission*
490 *147*; Supreme Court of the ACT *Submission 149*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; AAT
491 *Submission 159*; DIEA *Submission 162*; Telstra *Submission 177*; Attorney-General's Dept (Cth) *Submission 185*; B Mason *Hearing*.
492 AFCO *Submission 155*.
493 DIEA *Submission 162*.
494 Draft recommendation 3.3.
495 E Prata *Submission 122*; Victorian Bar Council *Submission 127*; C Sotiropoulos *Submission 128*; LACV *Submission 134*; AFC *Submission*
496 *150*; Supreme Court of SA *Submission 153*; AFCO *Submission 155*; LACNSW *Submission 156*; DIEA *Submission 162*; AVDSC *Submission*
497 *176*; Telstra *Submission 177*.
498 E Prata *Submission 122*; AFC *Submission 150*.
499 Judge Lunn *Submission 124*; Attorney-General's Dept (NT) *Submission 126*.
500 Practice Direction No 2 of 1991.
501 Practice Direction No 2 of 1995 requires that, within 7 days of the initial pre-trial conference, the solicitor for each party must give that party
502 a written memorandum setting out the approximate costs and disbursements incurred to date, the estimated future costs and disbursements
503 until the trial, the estimated duration and future costs and disbursements of the trial and the estimated party and party costs that may be paid
504 if the litigation fails. The solicitor is required to file a certificate with the court to verify compliance with the practice direction.
505 These are discussed in paras 11.39-49.
506 See recommendation 1.
507 See, eg, *Supreme Court Act 1970* (NSW) s 76(1)(b); *Supreme Court Act 1986* (Vic) s 24(1); *Supreme Court Act 1935* (SA) s 40(1); *District*
508 *Court Act 1973* (NSW) s 148B(1)(c); *County Court Act 1958* (Vic) s 78A(1); *Local Courts (Civil Claims) Act 1970* (NSW) s 34(1)(b); *Local*
509 *Court Act 1989* (NT) s 301(1). However, some courts can only award costs against a party to proceedings: eg *District Court of Western*
510 *Australia Act 1969* (WA) s 64(1).
511 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178; *Bischof v Adams* [1992] 2 VR 198.
512 *Bischof v Adams* [1992] 2 VR 198.
513 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 202 (Dawson J).
514 See, eg, Supreme Court Rules (NSW) Pt 52A r 4.
515 See ch 11 and 13.
516 *Bropho v Tickner* (1993) 40 FCR 165, 172.
517 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 82.
518 eg NSW Land and Environment Court. These briefs are widely used in the United States.
519 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 82 ALR 509.
520 The Commission examined friends of the court in ALRC 27 para 2.84-90 and will be reviewing their role in its current reference on standing.
521 The circumstances where a friend may be appointed in proceedings under the *Administrative Decision (Judicial Review) Act 1977* (Cth) were
522 considered by the Federal Court in *United States Tobacco Co v Minister for Consumer Affairs* (1988) 82 ALR 509 (Einfeld J) and (1988) 83
523 ALR 82 (Full Court).
524 Bray CJ in *Blackwood Foodland Pty Ltd v Milne* [1971] SASR 403 said that the opposing party can in no circumstances be ordered to pay
525 the costs of counsel acting in the capacity of friend (at 411).
526 PIAC *Submission 91*.
527 Draft recommendation 12.1.
528 AFCO *Submission 155*.
529 eg LACV *Submission 134*; Law Society of NSW *Submission 140*; LACNSW *Submission 156*; ACA *Submission 173*; Attorney-General's
530 Dept (Cth) *Submission 185*.
531 ALRC 27 para 304.
532 Intervention is discussed in ALRC 27 para 274-83.
533 *Adams v Adams* [1971] P 188.
534 eg Family Law Act s 92; Federal Court Rules O 6 r 8.
535 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391.
536 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 310.
537 ASC *Submission 184*.
538 The rules concerning intervenors are being reviewed by the Commission in its current reference on standing.
539 Ernst & Young *Submission 83*; IPAA *Submission 87*.
540 This order derives its name from the decision in *Bullock v London General Omnibus Co* [1907] 1 KB 264.
541 This order derives its name from the decision in *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.
542 *Lackersteen v Jones (No 2)* (1988) 93 FLR 442.
543 para 12.7.
544 eg the liability of defendants for costs could be presumed to be in proportion to their relative liabilities for the damages award or equally
545 where the relief did not indicate a relative liability (eg injunctions, declarations). The liability of plaintiffs for costs could be presumed to be

in proportion to their relative claims or equally if the relief sought did not indicate a relative liability. The presumptions would be subject to disciplinary and case management costs orders, public interest costs orders and the 'material effect' exception.

526 E Prata *Submission 122*; Judge Lunn *Submission 124*; Law Society of NSW *Submission 140*.

527 eg under the *Development Act 1993* (SA) the liability of a joint defendant in a building dispute is limited to the proportion of responsibility assigned to it by the court: s 72. See also Commonwealth of Australia *Inquiry into the law of joint and several liability: Report stage two* Attorney-General's Dept Canberra 1995.

528 Representative actions were examined by the Commission in ALRC 46. Representative actions can be distinguished from 'class actions': [Class actions are a] radical form of legal procedure ... developed by the courts of the United States ... The scope of the proceedings is typically much larger, the parties roped in far more numerous and uncertain, the relief sought is typically different and the costs rules and procedures fashioned are alien to [representative actions]. *Esanda v Carnie & Anor* (1992) 29 NSWLR 382, 391 (Kirby P).

529 There is no provision for representative proceedings before the High Court or before the Magistrates or Local Courts of each State and Territory.

530 Federal Court Rules O 6 r 13. See also Supreme Court Rules (ACT) O 19 r 10; Supreme Court Rules (NSW) Pt 8 r 13; Supreme Court Rules (NT) r 18.02; Supreme Court Rules (Qld) O 3 r 10; Supreme Court Rules (SA) r 34.08; Supreme Court Rules (Tas) O 18 r 9; Supreme Court Rules (Vic) r 18.02; Supreme Court Rules (WA) O 18 r 12.

531 *Carnie v Esanda Finance Corp Ltd* (1995) 127 ALR 76, 78 (Mason CJ, Deane & Dawson JJ).

532 *Markt & Co Limited v Knight Steamship Co Ltd* [1910] 2 KB 1021, 1039.

533 s 33C(1).

534 s 33C(2)(a)(iv).

535 s 43(1A).

536 (1994) 120 ALR 385.

537 *Litigants in Person (Costs and Expenses) Act 1975* (UK).

538 *Litigants in Person (Costs and Expenses) Act 1975* (UK) s 1(1).

539 *Rules of the Supreme Court 1965* (UK) O 62 r 28A(2).

540 *Rules of the Supreme Court 1965* (UK) O 62 r 28A(1).

541 *Rules of the Supreme Court 1965* (UK) O 62 r 28A(3).

542 Local Court of NSW *Submission 1*; H Odijk *Submission 6*; DPP (WA) *Submission 9*; P Sheehan *Submission 23*; G Pesce *Submission 29*; Townsville CLS *Submission 45*; J Stubberfield *Submission 52*; R Beasley *Submission 61*; NSW Bar Association *Submission 85*; AFCO *Submission 90*; Law Society of SA *Submission 94*; Federal Court *Submission 108*; Judge Lunn *Submission 124*; LACV *Submission 134*; AFCO *Submission 155*; AAT *Submission 159*; Law Society of WA *Submission 160*; LCA *Submission 172*; ACA *Submission 173*; Attorney-General's Dept (Cth) *Submission 185*.

543 LAO (Qld) *Submission 80*; Federal Court *Submission 108*; AFC *Submission 150*; LACNSW *Submission 156*; Telstra *Submission 177*.

544 *Cachia v Hanes* (1994) 120 ALR 385. See also Federal Court *Submission 108*.

545 A Dawson *Some personal litigants and the Federal Court of Australia* 1992 unpublished (submitted to the Centre for Court Policy and Administration, University of Wollongong, Faculty of Law). See also LACNSW *Submission 156*; Telstra *Submission 177*.

546 Local Court of NSW *Submission 1*; DPP (WA) *Submission 9*; Law Society of WA *Submission 18*; G Pesce *Submission 29*; NSW Bar Association *Submission 85*; Law Society of SA *Submission 94*; Judge Lunn *Submission 124*; Law Society of NSW *Submission 140*; Supreme Court of SA *Submission 153*; Law Society of WA *Submission 160*; DEET *Submission 174*.

547 In each State and Territory solicitors must deposit a proportion of the lowest balance standing in their trust account during a twelve month period with the relevant Law Society. The interest earned on this money is then lodged in a Statutory Interest Account administered by the Law Society. See, eg, *Legal Profession Act 1987* (NSW) s 64, 67.

548 s 47.

549 eg *Legal Aid Commission Act 1978* (Vic) s 48; *Legal Aid Commission Act 1978* (Qld) s 35; *Legal Aid Commission Act 1990* (Tas) s 26.

550 *Legal Aid Commission Act 1976* (WA) s 45(1).

551 IP 13 Issues 18-19.

552 ACTCOSS *Submission 2*; G Pesce *Submission 29*; Townsville CLS *Submission 45*; LACNSW *Submission 47*; R Beasley *Submission 61*; LAO (Qld) *Submission 80*; Magistrates Court of SA *Submission 81*; AFCO *Submission 90*; PIAC *Submission 91*; Federal Court *Submission 108*.

553 AFC *Submission 55*; ICA *Submission 64*; LAO (Qld) *Submission 80*; LAFS *Submission 96*.

554 NRMA Insurance *Submission 93*.

555 ACTCOSS *Submission 2*; H Odijk *Submission 6*; G Pesce *Submission 29*; LACTAS *Submission 33*; Townsville CLS *Submission 45*; LACNSW *Submission 47*; Magistrates Court of SA *Submission 81*; AFCO *Submission 90*; PIAC *Submission 91*; Law Society of SA *Submission 94*.

556 Draft recommendation 13.1.

557 eg E Prata *Submission 122*; LACV *Submission 134*; Law Society of NSW *Submission 140*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*; LSC (SA) *Submission 161*; DEET *Submission 165*; ATSIC *Submission 166*; AVDSC *Submission 175*; Attorney-General's Dept (Cth) *Submission 185*.

558 This approach is consistent with the Commission's suggestion in IP 13 that a fund be available to compensate successful parties where the other party has been given immunity from costs: Issue 84. A number of responses supported such a fund: ACTCOSS *Submission 2*; H Odijk *Submission 6*; G Pesce *Submission 29*; C Lyle *Submission 39*; Townsville CLS *Submission 45*; AFCO *Submission 90*; Federal Court *Submission 108*.

559 Justice Statement, 107-8.

560 Figure provided by LAFS.

561 LAFS *Submission 96*.

562 Issue 79.

563 Draft recommendation 13.2.

564 ACTCOSS *Submission 1*; H Odijk *Submission 6*; G Pesce *Submission 29*; L Lindon *Submission 40*; Townsville CLS *Submission 45*; Federal Court *Submission 108*; LACV *Submission 134*; Law Society of NSW *Submission 140*; AFC *Submission 150*; AFCO *Submission 155*; LACNSW *Submission 156*.

565 *Federal Proceedings (Costs) Act 1981* (Cth); *Suitors' Fund Act 1951* (NSW); *Appeal Costs Fund Act 1973* (Qld); *Appeal Costs Fund Act 1979* (SA); *Appeal Costs Fund Act 1968* (Tas); *Appeal Costs Fund Act 1964* (Vic); *Suitors' Fund Act 1964* (WA).

566 eg *Federal Proceedings (Costs) Act 1981* (Cth) s 18.

567 eg *Federal Proceedings (Costs) Act 1981* (Cth).

568 eg *Suitors' Fund Act 1951* (NSW).

569 Draft recommendation 13.3.

570 eg LACV *Submission 134*; Law Society of NSW *Submission 140*; AFCO *Submission 155*; LACNSW *Submission 156*.

571 Australian Banking Industry Ombudsman 'Terms of Reference' *Annual Report 1992-1993* Australian Banking Industry Ombudsman
Melbourne 1993. The General Insurance Claims Panel Scheme and the Life Insurance Complaints Board have similar provisions.

572 F Gibb 'Mackay publishes details of "no win no fee" scheme' *The Times* 21 April 1995; M Napier 'Now more can afford to go to law' *The Times* 11 July 1995; T Shaw '£85 "no win, no fee" scheme launched by Law Society' *Daily Telegraph* 14 August 1995.

573 F Gibb 'Mackay publishes details of "no win no fee" scheme' *The Times* 21 April 1995.

574 S Welsman *Submissions 57 & 114*. Also see S Welsman 'Seeing (some) litigation as national investment' (1995) 33(6) *Law Society Journal* 69.

575 eg Federal Court Act s 56; Family Law Act s 117(2).

576 *Barton v Minister for Foreign Affairs* (1984) 54 ALR 586.

577 AFC *Submission 150*. cf I Lulham *Submission 120*.

578 Mareva injunctions are named after the decision in *Mareva Companiera Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509.

579 *Jet West Ltd v Haddican* [1992] 2 All ER 545.

580 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

581 State and Territory courts may exercise federal jurisdiction pursuant to
— the *Judiciary Act 1903* (Cth) s 39(2), 68
— the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and parallel State and Territory legislation
— specific federal legislation such as the *Trade Practices Act 1974* (Cth) s 86.

582 The federal Government will be funding a project to assist the Federal Court and the Family Court to simplify their procedures: Justice Statement, 60.

583 *Arcambel v Wiseman* 3 Dall 306, 1 L Ed 613 (1796); Act of Feb 26 (1853) 10 Stat 161.

584 *Fleischmann Distilling Corp v Maier Brewing Co* 386 US 719, 87 Sup Ct 1404, 1406 (1967).

585 See, eg, Civil Rights Attorney's Fees Awards Act 42 USCA 1988 (1982); Equal Access to Justice Act 28 USCA 2412 (1988).

586 SC Mezey and SM Olson 'Fee shifting and public policy; the Equal Access to Justice Act' (1977) 77 *Judicature* 13.

587 HR 10, 1995.

588 Of the 98 million new cases filed in 1989, it is estimated that less than 1 per cent were tort cases: Association of Trial Lawyers of American (ATLA) *Points on the number of lawsuits, trends in litigation, cost of tort system, US share of world's lawyers* 1.

589 ATLA *Points on the number of lawsuits, trends in litigation, cost of tort system, US share of world's lawyers* undated.

590 BJ Nace *The Litigation Myth* Unpublished Washington DC 2; RB Conlin 'Litigation Explosion - tempest in a teapot?' (1991) Nov *Trial* 114.

591 eg Austria §41, app 85; Belgium art 1017, app 89; Denmark §312(1), app 90; France art 696, app 102; Geneva art 122(1); Norway § 172, app 114; Spain (b), app 119; Sweden ch 18, §1, app 119; Zurich §64, app 123.

592 Sweden ch 18, §3, app 120.

593 Germany §97(2), app 109.

594 Austria §41(1), app 85; Denmark §312(2), app 91; Geneva art 122(2), app 104; Germany §91(1), app 106; Zurich §66, app 123.

595 Austria §44, 48, app 86-7; Germany §95, app 109; Italy art 92, app 111; Netherlands art 56(1), app 112; Norway §117, app 116; Sweden ch 18 §6, app 120; Zurich §55, app 123.

596 Austria §49, app 87; Denmark §321, app 92; France art 697, app 102; Netherlands art 58, app 113.

597 Austria §51(2), app 87; Denmark §322, app 92; France art 698, app 102; Zurich §66, app 123.

598 Belgium art 1017, app 89; Netherlands art 56(1), app 112; France art 696 by implication.