The costs circus

By Duncan Graham

An inordinate amount of professional and court time is taken up by issues relating to costs. The bar should investigate ways to remedy this. One method would be to introduce percentage fees in civil litigation.

Barristers are generally conservative. As a group, they resist change. They are frightened by it. Or they are apathetic towards it if it does not directly affect them. This attitude explains why barristers are so vulnerable to unpalatable practices being forced upon them by government. The apparent willingness to accept their rights being trampled on by others also explains why barristers are soft targets for the media. Recent media publicity about legal costs is likely to herald further inroads into practice at the bar.

I have previously suggested specialisation as a means of improving practice at the bar. Changing the way fees are charged and the system by which responsibility for costs accrues is another way in which practice as a barrister may be improved.

Costs issues create problems at a number of levels. At the client interface, legislation requires voluminous explanations about the fees that will be charged. Costs agreements contain many clauses that the average lay person litigant cannot possibly understand. The unstated premise to the whole costs disclosure legislation is that lawyers are intrinsically dishonest or, at the very least, greedy. The profession should not continue to accept this innuendo. No other profession requires its members to jump through so many hoops before being paid.

Costs problems arise at the interlocutory stage. Too often, an interlocutory argument is substantively resolved, only for a needless costs argument to supervene, leading to hours being spent in court waiting to get on to argue which party should bear the costs burden of the application. Given that many seem incapable of realising that the costs of an interlocutory application are largely irrelevant to the overall resolution of proceedings, it would be preferable if the question never arose at all.

Costs also interfere with pre-trial dispute resolution. The lack of certainty about what a plaintiff may get in his or her hand often derails negotiations. A conflict may arise in speculative litigation between the client's interests and that of the lawyers in being paid.

In relation to hearings, there is a vast jurisprudence on offers of compromise, Calderbank letters, etc. We have costs assessments, appeals on costs, textbooks on costs. The fact there are different categories of costs confuses further. A great deal of correspondence involves threats of indemnity costs orders, personal costs orders and the like against the loser.

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Finally, difficult costs issues arise with 'no win, no fee' litigation. Barristers who charge on a 'no win, no fee' basis are only entitled to recover fees at hourly or daily rates not significantly different from those charged by their colleagues who do not charge on this basis. If barristers were not prepared to enter 'no win, no fee' retainers, many deserving litigants would not be able to assert their rights in court. The fact that these are mainly personal injury cases means that, by and large, the profession and the government could not care less. Plaintiff personal injury lawyers are generally perceived as 'ambulance chasers' or 'rip off merchants'. While there may, in the past, have been some spectacular negative examples of how not to charge in 'no win, no fee' situations, the vast majority of barristers who charge in this way are done a great disservice. Most barristers, despite the cab rank rule, refuse to accept 'no win, no fee' cases because they do not have the gumption to run the risk of losing. In every other profession in which a professional engages in a speculative transaction, a success fee is charged. Often both a success fee and a base fee are charged. There is no other way to compensate the professional for the risk he or she accepts in providing professional services on a speculative basis, the debt that invariably has to be carried for the period of the transaction, and the associated stress caused by the fear of financial loss. Why lawyers, particularly sole practitioners such as barristers, cannot be similarly protected is unclear.

It is a circus.

Costs and fees in the legal profession should be contrasted with the situation that exists in other professions. No other profession wastes as much time on these issues as lawyers.

Two changes would help ameliorate many of these difficulties. The first is to adopt a 'user pays' rather than a 'loser and user pays' system. The second is, at least in civil litigation, to permit percentage fee arrangements in which the lawyers for a party would be paid a percentage of the damages recovered.

In the Australian adversarial system, costs are paid on a 'loser and user' basis. The losing party must pay a proportion of the costs of the successful party together with its own costs. In personal injury 'no win,

no fee' litigation, no fees are paid by an unsuccessful plaintiff to his or her lawyers. The 'loser and user pays' system is responsible for the laws about offers of compromise, Calderbank letters together with all the acrimonious correspondence between solicitors about costs. It is a system that seeks to punish either the losing party or its representatives for commencing or defending proceedings. While unmeritorious cases may occasionally be commenced, such claims should theoretically not see the light of day if solicitors and barristers performed their professional duties properly and made sensible and appropriate assessments of the prospects of success. Costs penalties should not be used to supplant the proper role of the barrister in assessing the merits of a case.

The threat of the losing party paying costs may be thought of as a device to reduce the amount of litigation. If so, it is not a device that is working. It is unlikely that changing the costs system will result in the floodgates being opened and a deluge of litigation pouring into the registries. With smaller cases, the percentage fee cap will make it as uneconomical to prosecute some cases as presently exists.

The mere mention of a percentage fee structure is usually met by anxiety about introducing an American-style system into the country, which will have the same destructive consequences as the introduction of the cane toad. Everyone is familiar with the United States' 'user pays' system for costs. Plaintiff lawyers are paid out of the damages recovered if their clients are successful. Defendants must pay their own costs. This fear is unwarranted if only for the absence of multimillion dollar exemplary damages payouts in Australia. There will be no plaintiff lawyers flying around in Gulfstream jets like 'kings of torts'.

A percentage fee regime would avoid most, if not all, of the problems currently experienced with costs.

Clients would have simplicity and certainty. They do not need to know about the differences between ordinary costs and indemnity costs. They would understand that the lower the damages recovered, the lower the lawyer fees. They would understand that their own success is tied to the interests of the lawyers. There would be an incentive on the part of the lawyers to do their best for the client because they would then be maximising their own return. The current conflict between a client's interest and the lawyers' interests in their fees would be removed.

As the system would be on a 'user pays' basis, court time would not be wasted on interlocutory costs spats. Gone would be the letters filled with vitriol and the threats of personal costs orders and indemnity costs.

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Percentage fees were recently considered by the Victorian Law Reform Commission in its Civil Justice Review. It concluded that the absolute prohibition on percentage contingent fees should be reconsidered. It suggested that the manner in which percentage fees should be introduced and regulated and the nature of any safeguards should be something for a costs council. The commission did not think percentage fees should be limited to speculative personal injury matters. It saw no reason why a plaintiff or defendant should not be able to agree to a percentage fee arrangement rather than the traditional method. The New South Wales Bar should embrace the recommendations. At the very least, it should be willing to explore the merits of the introduction of a percentage fee regime, and the abolition of the 'user and loser pays' system we inherited from Britain. Given that litigation funders are allowed to charge a percentage of the damages recovered, there seems no sensible reason why lawyers should not be permitted to do the same, particularly in high-risk litigation and where the lawyers are the ones actually doing the work and bearing the risk.

When I have discussed these issues with other barristers, the main complaint I have received is that a percentage fee structure will lead to lawyers doing little work on a matter so as to maximise the profit. I cannot see this happening. First, by making lawyers' fees proportionate to the damages, the incentive is to work harder and maximise the outcome. More importantly, there will never be a positive outcome unless significant work is undertaken. The days of 'rolling your arm over' hoping for a successful outcome are long gone.