The price of a ride on the tiger's back

By John de Meyrick. This article is based on a talk given to a recent conference of senior company managers on the subject of legal costs.

An old vaudeville sketch, repeated in the 1946 film *Ziegfeld Follies*, has the client (played by Victor Moore) and his lawyer (Edward Arnold) riding the New York subway. A ticket inspector arrives. The client has lost his ticket and he is asked to pay a $2 penalty. The lawyer tells his client it's unjust and not to pay.

An altercation follows between the ticket inspector and the lawyer in which the client offers to 'pay the two dollars'. But the lawyer takes the money and persists in arguing the matter. Thereafter the sketch progresses through a series of escalating situations in which the case proceeds to court, and then on appeal from court to court, at every stage of which the client repeatedly pleads with his lawyer to 'pay the two dollars' and be done with it.

The sketch concludes with the client behind bars and still begging his lawyer to 'pay the two dollars'. Yet the lawyer presses on until he too is seen to join his (by then) bankrupt client whilst vowing to appeal to the state governor for clemency.

The notion that most, if not all, lawyers are more interested in running up costs than in looking after their client's interests, is a persistent problem with which lawyers continually have to contend.

It is true that some cases prove to be very expensive. Not because the lawyers are greedy and are off on a 'lawyers' picnic' (as commonly said), but because the contending parties are determined to fight to the bitter end, often despite the advice they are given as to the merits of their respective positions. Indeed, some litigants do not want to hear or accept negative advice and just lose faith in their lawyers. In many cases it becomes a psychological imperative that must be played out in court for the sake of inner resolution.

Even then, for some litigants, the umpire's decision is never to be accepted and when all avenues of appeal have been exhausted, if it were possible to invoke the intervention of the queen, or even some heavenly arbiter, they would still want to pursue that option.

Personal pride and reputation are often the driving influences in litigation. This is particularly true of wealthy individuals and companies where the jobs of senior executives can be on-the-line, and where the ability to pay and to claim costs as tax deductions is also a negative factor.

Inevitably, those lawyers who cater for the 'big spenders' (being mostly the 25 or so large commercial law firms in Australia) and the higher fee earners at the bar, will strive to

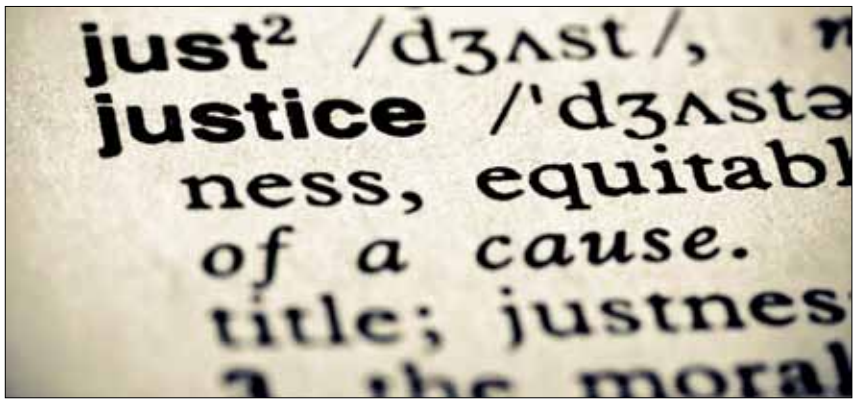
provide the kind of services their clients expect.

That does not mean that clients are giving lawyers the green light to rack up unnecessary costs; nor does it mean that lawyers take the opportunity to do so. It is simply that all clients want the best job done on their case, large or small, and depending on the importance of the matter, as well as the client's expectations and demands, some matters will involve a greater concentration of professional attention and resources than others.

But the most cogent reason why costs become a problem in cases at all levels, is that once the litigants are on the tiger's back and the matter is well advanced, the parties find it hard to get off. Each party by then has far too much at stake to give up.

As costs mount, the initial perceptions of the merits of a case and of what a party has set out to achieve inevitably shift to the cost of failure. Objectivity gives way to an obsessive need to win. Clients stop listening to advice. The parties dig in for the long haul. The costs escalate. The matter takes on a life of its own.

Just how intensely determined some litigants can become is illustrated by that famous old NSW case in 1906, in which a gentleman put a one penny fare in the turnstile at the Balmain wharf then, not having joined the ferry, changed his mind and wished to leave the wharf. He then refused to pay a second penny to go back out through the turnstile onto the street. He took the company to court. The jury found in his favour. But he then lost the case on appeal and the matter went to the High Court and on to the Privy Council in London (as was then permitted) where he still lost, with costs awarded against him. His determination and belief had cost him a 'pretty penny' indeed.[1]



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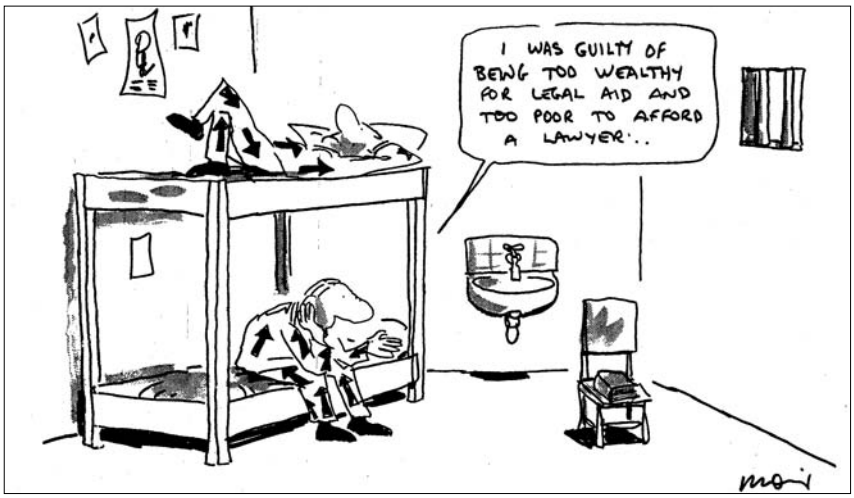
It is this psychological imperative that the legal profession is well able to serve but not able to control in the best interests of the parties or the effective administration of justice when it comes to the costs involved.

Of course, the system can, and does, provide certain access barriers and limits to legal process, including the right of appeal, based on the nature of the litigation, the issues involved and the size of the claim. But within the respective jurisdictional limitations in which each case may be played out, there is not a lot that the profession can do to bring good sense to the process and to control the costs involved if the parties want to fight on regardless. Except to offer some alternative means of dispute resolution (which most litigants find to be an unsatisfactory diversion from the real thing), the legal system provides the boxing ring, the officials, the trainers and managers, and even the spectators if they want to come, so that the parties can slug it out to the last dollar, or worse, to the biggest debt they can incur.

Legal representatives, at the outset of each matter, will invariably be asked to crystal-ball the outcome of the case they are retained to handle, even though the facts are not fully known, not yet tested, and the client in most cases, is not ready to accept anything other than that their cause is both just and winnable. Beyond professional opinion, speculation is, of course, unwise. Yet clients look for assurances and often assume certainty of outcome when qualification and caution may have



Cartoon: Alan Moir

been the reality of the advice that was given.

In many cases, even so, to win may be all the satisfaction a litigant will achieve as the costs and inconvenience, as well as the personal stress and diversion from one's ordinary affairs, often outweigh the worthiness of the original cause. What starts out to be a matter of principle can end as a costly folly.

Society puts a high value on justice. But justice has its price. Some litigants have the means to pay for it. Few really can afford it. Most think that, like Medicare, the government should underwrite it. In many ways our governments do. The cost of providing courts and tribunals is significant.

Yet as every lawyer knows, the costs of most cases for most litigants are beyond what they are easily able to pay, or to pay without incurring some detriment to their financial position; and in an imperfect world where divine justice is unobtainable and man-made justice is not assured, many cases just prove to be an expensive exercise in futility for all concerned.

Even though costs may be awarded (and they are never certain), they are not usually recovered in full, and quite often they are not recovered at all; or they become another long-running dispute with which to contend. Certainly, whatever the outcome, when the sums are done, few litigants can say that they have come out in front.

What starts out to be a matter of principle can end as a costly folly.

Neither the legal system nor the legal profession can deny litigants their day in court; nor do they create the disputes that they are asked to fix. The best they can hope to achieve for most litigants is to provide quick, cheap and effective justice. But if justice is to prevail then the other factors of 'quick and cheap' must be of lesser consideration.

This also raises other issues: What standard of justice should a government provide, and is it able to provide, to satisfy the needs of its citizens? Is justice served if access to the system is contingent upon how much the parties can afford to pay? Is it served where one party has the means to pay and the other does not? If justice is dependent on costs can it be truly just?

From the outset or shortly thereafter, many cases go astray as the parties, or more often just one of them, runs out of money. Mortgaging assets and going deep into debt to fund litigation adds anxiety and stress to the process, as well as problems for the legal representatives who, in many cases are faced with having to abandon the client or to carry the matter financially.

Courts also are affected when the orderly administration of cases is stalled and directions and timetables, etc, are not met, and where unpaid lawyers have to contend between their duty to the court and their duty to the client in not revealing to the court and the other side, their client's inability to pay. To do so will usually have a detrimental effect on a client's case.

Although many parties of moderate means will still want to fight on to the bitter end whatever it takes, the most unfortunate and unfair situation that arises is where one party is financially weak and the other can say that 'money is no

object'. This is a very common situation where the imbalance in financial capacity and the marshalling of larger legal resources by one party against another is a cogent costs factor in many cases where the wealthier party will use every interlocutory means and exhaust every possible process to drive their opponent into debt and failure.

The legal system has tried in various ways to achieve the objective of quick, cheap and effective justice without reduction in standards. Various arrangements have been introduced for seemingly sensible and short-cut ways of settling disputes, as well as a range of costs-control measures, including fee scales and costs regimes, in the hope of curbing the excesses of litigious spending.

Unfortunately, such alternative processes as early evaluation, court ordered mediation and negotiations, informal arbitration, orders for parties to exchange costs estimates, use of court appointed experts and referees, exchange of position statements, etc, do not always best serve their purpose. This is especially so where the bargaining power between the parties and their ability to effectively engage in such processes is uneven.

If unsuccessful, these well-intended measures may only add to the costs. Also, early attempts at knocking heads together within a formal legal setting can simply entrench the determination of parties to press on. The feeling that they are being side-tracked from ready access to justice is an irritating factor for many litigants.

Few litigants ever envisage the time, work and costs involved in managing their disputes. They see the system itself, and all that goes with it, as an impediment to justice. They find it hard to understand why the process is so complex. They cannot see why it should not be a simple matter of appearing before some kind of Judge Judy, telling their side of the story without any need for interrogation or proof, and then coming out the other end having been vindicated with a decision in their favour.

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Also, few litigants are able to understand and accept the raw reality that, in many cases, justice declared is not always justice achieved. For once the order of things has changed, and once wrong has been done, a court may not be able to put it right; and whilst in some cases compensation may be awarded with interest and costs, it is another thing to know if the money will ever be collected. In many cases it isn't.

Thus, it is understandable that the public can so easily regard the legal system as antiquated, over-complex and ineffective and that lawyers are just there to make money. Their money.

That insinuation has also prompted a number of politically-driven costs-control measures that are aimed at legal practitioners on the implied notion that they may not be serving their clients well nor listening to their cries to 'pay the two dollars'.[2]

Lawyers' clients are now regarded as 'consumers of legal services' with lawyers being required to provide clients (oops! customers) with detailed information contained in formal disclosure statements setting out their fees and conditions, formal costs agreements if requested, and estimates of costs where sought (which, having regard to the exigencies of most cases, is a hopeless task). At the same time lawyers are required to advise legal consumers of their rights and the avenues for making complaints about their services and fees, which is all somewhat off-putting and distracting in the building of consumer/lawyer confidence, as well as adding to the costs.

In some states lawyers are also required to assess the merits of their consumer's case at the outset, without knowing the strength of the other side's case or being in possession of all the facts, and to certify under oath at the time of filing, that there are reasonable grounds for believing, on provable facts and a reasonably arguable view of the law, that the claim has reasonable prospects of success. If found to be otherwise the costs may be awarded against the lawyer.

Then there is the ever present threat in certain jurisdictions that a judge may decide that a case is taking too long and has become all too expensive, and to cap the costs. That is, to fix the amount beyond which the successful party may seek its costs from the other side.

This has the unfortunate inference that some one or more of the legal representatives may be to blame for the burgeoning costs when, unknown to the court, the facts may be very much to the contrary.

How capping the costs recoverable by a deserving litigant serves in any practical way to save money or to shorten trials is difficult to envisage (and is probably the reason why most judges are reluctant to impose such orders).

The burden of these various measures, especially for small legal firms (the vast majority of which comprise only one or two practitioners) is both onerous and uncompromising. They also add to the premiums lawyers have to pay for professional liability insurance, which in turn adds to the costs of legal services.

Courts and the legal profession, of course, are there to serve the community. Without them, order and justice in society would simply disintegrate (a situation to be observed in many third world countries). But unlike health and medical services where governments provide significant financial subsidies and support, justice is not well funded.

As is often pointed out, there are no votes in providing more courts or improved legal services and legal aid, no matter how important ready justice may be to the well-being of an orderly democratic society.

Some countries are more litigious than others. Australia has over 38,000 lawyers (one per 573 of the population) compared to the USA where there are, on last count, some 1,116,960 (one per 272 of the population). Asian countries are much less 'lawyer-polluted'. Japan has some 22,000 (one per 5,790 of pop.) and China has over 110,000 (one per 12,100).

The only country where anything like an ideal system of legal aid exists, is Sweden.

Of course, not all lawyers are engaged in litigation. The majority of legal services do not involve courts. But what these figures suggest is that access to justice in many countries has a long way to go, whilst some would say that, in prosperous justice-conscious countries like Australia, it may have gone too far already.

Yet the desire for access to justice is patent. In China, for example, where there are lawyers in only 206 of its more than 2000 counties, the number of lawyers is increasing by around 16 per cent a year.

But whether a legal consumer lives in an emerging justice-conscious nation or one with long-established legal systems and traditions, the costs of providing legal services to a high standard and degree that is still within the means of the ordinary litigant, is a perplexing problem.

In a country like Australia, where the tendency is to look to the government for financial assistance in all areas of social detriment, a cogent case could well be made for a greatly expanded provision for legal aid, especially in cases involving public interest. But such worthy contentions are low rumblings on the political Richter scale. The only country where anything like an ideal system of legal aid exists, is Sweden.

In Sweden, quite generous legal aid is available to about 85 per cent of the population, whilst a very large percentage also has personal legal expense insurance (something that has never really caught on in Australia but is widely adopted by companies in the USA).

Such legal aid that governments provide in Australia (there being eight legal aid commissions) is means tested and only granted to the marginalised and economically disadvantaged members of the community. Such funds are used in the main for persons involved in family law matters, immigration issues, indigenous claims, veterans' affairs, human rights and equal opportunity proceedings and the defence of persons charged with crimes.

Australian governments provide

an estimated $485m per annum for legal aid. This represents only $22 per capita. Much less than most other developed countries (England for example provides $77 per capita.) Federal government expenditure on legal aid has declined in real terms since 1997 by 12 percent; from $176m per year to $155m; whilst the states and territories' contribution has increased in proportion from 28 to 40 percent. Legal aid commissions are also relying more and more on funding drawn from the interest earned on solicitors' trust accounts.[3]

The legal profession and various community services also provide a significant amount of free legal advice to the public, whilst most solicitors and barristers conduct pro bono cases for charitable and community organisations, and other worthy causes.

For example, the top 25 Australian law firms provided in 2008–09 over $52m of pro bono legal work, whilst overall the profession provided an estimated $134m of legal services, free.

More than any other profession, lawyers also lose considerable sums in unpaid fees and in interest on fee-deferred payments. Lawyers are also permitted to take cases on a 'no win no fee' basis, and whilst this is really only practical where liability is not in issue (being mostly personal injury cases against insurance companies) a considerable element of costs is carried at the risk of those lawyers who are prepared to work on that basis. This too adds to the costs of litigation.

One of the unfair aspects of legal costs, is that where legal expenses relate to companies and businesses, they are usually able to be claimed as tax deductible expenses, and with the offset of GST; whereas ordinary private litigants have no such advantage unless they can show that those expenses were in some way directly related to the earning of their income. This puts many ordinary citizens at an added disadvantage.

Another unfair feature of legal costs is that, whether a matter involves important principles of law and justice or is only an ordinary run-of-the-mill case, a litigant with limited finances will not usually have the means to pursue the matter on appeal, whereas a wealthy and dissatisfied litigant will more often waste valuable court time and resources in exhausting every avenue of the law for little or no reason other than to assuage their injured pride.

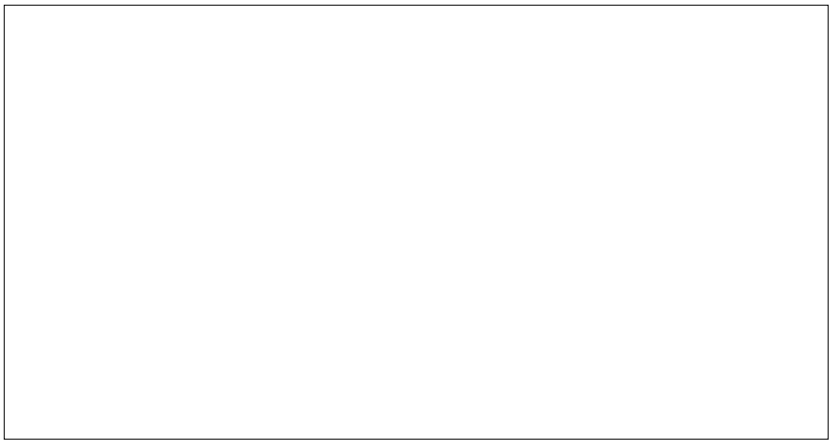
This is demonstrated in the extreme by the 2007 case in which Channel Seven sued News Limited, PBL, Optus, Telstra and other parties in relation to its contention that they had conspired to prevent Channel 7's access to the broadcasting rights to certain sporting events. The case took more than 120 days in court. The costs exceeded $200m, which Justice Sackville of the Federal Court described as 'not only extraordinarily wasteful, but borders[ing] on the scandalous'.[4]

His Honour's view of that case was surely justified, at least as to its cost to the court system and the taxpayer. By contrast, some important matters of law can go unchallenged and/or not be reviewed for years because the parties are financially unable, or unwilling, to pursue the issue further than the decision at first instance.

For example, thousands of

businesses, mostly small, have for years been convicted and heavily fined unfairly for workplace injuries under occupational health and safety laws on the assumption that breach of those laws was absolute. Thus, if an injury or death occurred on the job then *ipso facto* the employer had not provided a safe place, or a safe system, of work.

It took a determined Picton NSW farmer called Graeme Kirk, risking his own money, to pursue this issue to the High Court where, in a recent judgment, the court held that it was not enough to deem someone guilty and in breach of such laws unless it could be shown in what way they might have reasonably prevented the accident occurring. These were not just minor absolute breaches but in some cases serious offences.[5]



Graeme Kirk and his wife Kay celebrate their High Court victory. Photo: Kym Smith / Newspix

In that case, Mr Kirk had employed a friend and part-time experienced farm manger to work on his property. He died when driving an all-terrain farm vehicle that overturned. Mr Kirk was charged with several offences relating to occupational health and safety laws and fined a total of $121,000 by the NSW Industrial Court.

The case, which has clarified the law for other litigants, cost Mr Kirk approximately $1.5m in legal expenses. Yet, even though his case has made a valuable contribution to justice and the community generally, he recently told an ABC reporter that he expected to recover only about one-third of his costs. As well, the case had caused him considerable emotional stress, anxiety, and remorse in being held responsible for the death of a close friend.[6]

There is surely a case to be made for litigants who, in establishing important precedents which enlighten the law for others, and especially in the interpretation and application of statutory law, to have their costs at least partly met by the government. If the minister or the draftsman has not made the law plain, why should a litigant have to pay for its clarification?

The critical issue for litigation today is this: although the door of the court is open to all comers, there is now an increasingly high entrance fee; and once inside, an even higher cost of participation. This is a significant access barrier to justice. With litigation being driven by costs-considerations, the door to the court for many, will slowly close. For some it is already shut.

Unfortunately, it is the lawyers who are being blamed. Not only by politicians and the media, but also by the judiciary. Neither the system nor the users, it seems, are in any way at fault. Yet, as managers in the commercial world would recognise, litigation is not a mass-produced product or a straightforward process that can be easily applied and managed in a cost-effective way. Each case is a journey into the uncertain. No common principles of management apply.

The lawyers' role is to prepare and bring the cases of two (or more) squabbling parties into court through an ever-changing and burgeoning maze of complex rules, regulations, acts, provisions, precedents, forms, orders, directions and other requirements involving detailed conflicting evidence (expert and otherwise) and to then 'lock horns' with their opponents to the satisfaction of the clients and the demands of the court.

Of course, once elevated to the bench a lawyer may see these contests from a different perspective. But it is of little help when some judges who, whilst in legal practice have had to contend with the problems relating to clients and costs and the many requirements of the system, then become overly concerned about the costs being incurred by the parties in matters before them. This says even more surely to the public that lawyers are perhaps not listening to their clients' pleas to 'pay the two dollars'.[7]

The fact is, if parties want to fight, notwithstanding the advice they are given, and the courts are ready to accommodate them, then it is not unreasonable for lawyers to do their best to represent them. But the real issue in the end, no matter what the case may have cost the parties, is that most will come away saying to their lawyers (or thinking), 'Why didn't you know all this at the beginning before so much money was spent on the matter?'

And, that is the problem: How to bring about this realisation and acceptance at the outset of a matter rather than after so much time, effort and expense has been given to it?

Like any contest, in the ring, on the football field or in the court, one cannot predict the outcome with certainty. We can all be the wiser after the case is over. Until then only the judge has the answer. But the judge does not greet you at the door of the court. It can be a long, difficult and expensive preparation and lead-in time before the contest begins (for which the system is to blame, not the lawyers); and even then, if the judge does not have the answer the parties want to hear, the real game may just be starting.

The legal profession in recent years has endeavoured to find solutions to providing a quick and cheap – but above all a just – outcome for the evergrowing demand for legal services. But alas, the answer remains elusive.

There is surely a case to be made for litigants who, in establishing important precedents which enlighten the law for others, and especially in the interpretation and application of statutory law, to have their costs at least partly met by the government.

Meanwhile, lawyers seem ever to be blamed for the ills of the system, and are the butt of cartoonists' jibes as a scheming lot of pettifoggers and shifty operators. It has been so since the Peasants' Revolt of 1381 in England when Wat Tyler and his rowdy mob ran through the streets vowing to 'kill all the lawyers', and blaming judges for enforcing the law in regard to higher poll taxes, and other grievances.

The sentiment has changed little since 1381. Being a lawyer is still a largely thankless, and often unrewarding, occupation.

Addendum

I was once asked: 'When two people want to fight over some issue, it is better to get the heat out of the situation and have it resolved as soon as possible. Courts just drag things out and get in the way. People become frustrated and their anger turns on the courts and the lawyers. Why can't you have some sort of informal trial run with a judge up front without all the paperwork and delays? Surely that would settle many cases before they got started?'

The situation at the lower court level is not the problem. However, it must surely be agreed that, in regard to matters dealt with by the higher courts, the time has come to consider whether the system should continue to operate, without reservation, on the basis that if the parties want to fight then that is what the courts and the legal profession are here to facilitate.

Surely it is just as important that valuable court resources are not wasted on cases that are likely to involve arduous preparation and/or unsatisfactory outcomes as it is to see that litigants are not spending money on the pursuit of unrealistic expectations. As indicated, few clients want to hear anything negative from their lawyers. But they do listen to judges.

So perhaps if 'litigious waste' is to be tackled, then the answer lies with the courts. Also, perhaps

there is merit in relation to higher court matters, in considering some way to bring judicial input to bear 'up-front', as suggested by the questioner. That is, some kind of early judicial intervention based on (say) the pre-arbitral conciliation model used in industrial relations to deal with workplace disputes.

Unlike mediation, the conciliation model allows for outcomes and practical solutions to be suggested in an informal, private, and more intimate small-court setting. At an early stage a judge (not being one who would decide the matter should it proceed to trial) could hear the parties and their legal representatives, together and/or separately and, based on preliminary material, give an 'informed' indication of the practical and problematic issues that may be involved and of how the matter might be played out. Consideration could also be given to the likely costs involved and whether a case might end up being less than satisfactory for either side. Attempts at settlement might be made including assistance in assessing appropriate outcomes, etc.

It is important in this process, if it is to satisfy and assure parties that they are not being side-tracked away from justice, that a judge should undertake this role; and if it is deemed that such functions are derogative of judicial office, then perhaps the role might be served by retired judges, or those nearing retirement who would be prepared to undertake such work.[8]

In any event should a matter not be resolved at this early stage, the process should be followed up at regular and appropriate intervals to ensure that it has not bogged down or 'gone off the rails', and in order to monitor and case manage its progress.

At the risk that such a process might only add yet another layer of costs to the system, if it disposes of a significant number of matters that may otherwise end up becoming expensive, long-running and largely futile sagas, then it will be worth the effort.

The footnotes included here were not part of the talk. They have been added later.

Endnote

1. *Balmain New Ferry Co Ltd v Robertson* [1906] HCA 83; (1906) 4 CLR 379.
2. *Access To Justice (Civil Litigation Reforms) Amendment Bill 2009* (Cth) now Part VB *Case Management in Civil Proceedings, Federal Court Act 1976* (Cth) sections 37M-37N; also s 56 of the *Civil Procedure Act 2005* (NSW). These provisions impose strict controls with penalties on legal practitioners to meet stringent 'overarching' and 'overriding' purpose requirements in the preparation and conduct of litigation. See also: Access to justice: will the costs regime in the Federal Court change? Brenda Tronson. NSW *Bar News* Summer 2009–10, p.30.
3. The federal government's 2010–11 budget has provided an additional $38.5m pa in legal aid contributions over four years. This is the first increase in 15 years.
4. *Seven Network Limited v News Limited and Ors* (2007) FCA 1062.
5. *Kirk v Industrial Relations Commission of NSW; Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW (Inspector Childs)* [2010] HCA 1 on 3/2/10.
6. The Law Report on radio ABC-RN, 16/3/10.
7. The chief justice of South Australia, John Doyle CJ, is reported to have told a recent conference of the SA Bar Association that the costs of litigation are 'closely related to the efficiency of the key participants – and in particular the advocates – and to the time taken to deal with cases'. He was unable to provide any answers, but predicted that whilst it was not too late for barristers to change, which he thought would be difficult, he concluded that the situation would 'probably lead to the system strangling itself'. (*The Australian* Newspaper, Legal Affairs Section, 11 February 2011, page 29. Art: Chief Justice Doyle warns the Bar – Lift Your Game or Disappear). In that same report, the chief justice of the NSW Supreme Court, Jim Spigelman CJ, is quoted as having told a conference of barristers in Sydney, four days earlier, that they risked 'killing the goose' unless they helped clients reduce their legal costs.
8. Judges of state and federal industrial commissions are not fazed by performing these kind of conciliatory functions in appropriate matters.