

# Percentage Based Contingency Fee Agreements

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## Final Report of the Working Group

May 2014

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## Foreword

Constraints on legal assistance funding of civil matters and the high cost of resolving disputes leaves limited options available to those who have no choice but to litigate. Contingency fees are desirable as a means of increasing access to justice in the community.

As proposed in this paper, “Percentage Based Contingency Fees” will provide an additional option for clients to fund access legal services. The client may choose other arrangements. Percentage Based Contingency Fees permit the client to pursue his or her legal rights and the lawyer to structure fee arrangements in a way permitting adequate recompense for the risk of conducting litigation in suitable cases on a *no win no fee* basis.

Notwithstanding the tendency to regulate the legal profession as though the practice of law were comparable to any other commercial activity,<sup>1</sup> lawyers nevertheless continue to be restrained from charging for services in ways that have no parallel in the business world.<sup>2</sup>

Restrictions on legal practitioners’ use of contingency fee agreements persist due to vestiges of rules against *champerty* and *maintenance*. Introduced several hundred years ago in response to the interference of corrupt royal officials and nobles in the justice system yet the abuses against which the prohibitions were directed have long since been cured.

Jurisdictions across Canada (the latest of which was the province of Ontario in 2004), the United States<sup>3</sup> and many others worldwide, rely on contingency fee cost agreements as an appropriate instrument by which meritorious claims can be advanced - even where a claimant might not otherwise be able to fund an action.

Further, as part of Lord Justice Jackson’s ‘coherent package of interlocking reforms designed to control costs and promote access to justice’<sup>4</sup>, lawyers in the United Kingdom are now also able to more widely rely on England and Wales’ version of contingency costs agreements. As of April 2013, damages based agreements (DBA) became more widely

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<sup>1</sup> Much has been written about the impact on professions of governmental policy aimed at introducing competition principles and commerciality- see for example CJ Spigelman, *Are Lawyers Lemons? Competition Principles and Professional Regulation* (2003) 77 ALJ 44.

<sup>2</sup> For example- courts retain jurisdiction to set aside *unfair and unreasonable* lawyer- client costs agreements, the later revision of bills of costs, and the application of time frame limitations to lawyers enforcing contractual right to fees. Though originally recognised at common law, such principles have been given legislative expression. See for example provisions at *Legal Profession Act 2004*(Vic) s 3.4.32- by which costs agreements are set aside on the grounds of lack of fairness or reasonableness. See for example G Dal Pont *The Lost Uplift Fee* (2007) 81(1&2) LJ, p. 82.

<sup>3</sup> Though the origins of contingency fee agreements in the US are debated- it is generally accepted that such agreements have existed since at least 1786. While attitudes vary, many Courts have described them as ‘the *poor man’s key to the courthouse...*’- see for example *Matter of Estate of Weeks*, 627 N.E. 2d 736 (1994); 255 Ill. App. 3d 345, 627 N.E. 2d 736 (3d Dist. 1994) and ... ‘often the only effective key to the courthouse for a social security petitioner in combatting the almost unlimited resources of the United States Government...’ in *Frederico v Sullivan*, 1990 WL 166653, at \*1(D. Ariz.1990).

<sup>4</sup> Lord Justice Rupert Jackson, *Review of Civil Litigation Costs; Final Report*, December 2009 at I, available at: <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

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permitted in the UK on the expectation they will ‘*increase the types of litigation funding available to litigants which should thereby increase access to justice.*’<sup>5</sup>

Despite this approach in other jurisdictions, in all Australian states and territories lawyers remain prohibited from entering into contingency fee agreements with their clients.<sup>6</sup>

This is in contrast to the position for non-lawyers, such as real estate agents and other sales agents who charge or are paid by commission. Even in the law, private financiers, such as litigation funders, fund plaintiff actions for profit under contingent fee arrangements. Indeed lingering doubts that may have existed in relation to the operations of litigation funders in Australia have now been judicially allayed- and in the process, the concept of contingency funding arrangements have been legitimised.<sup>7</sup>

Given the crisis Australia faces in legal assistance funding and the growth of unmet legal need (particularly in civil litigation matters), the prevailing theme of this report is the need to reconsider Australian lawyers’ right to enter into Percentage Based Contingency Fee agreements with their clients as a means of levelling the playing field.

Across North America where contingency fees agreements are well established, such agreements are known as the *poor man’s key to the courthouse.*<sup>8</sup> This is because without such a system, ordinary people, many of whom are injured, would have been denied the opportunity to litigate and win meritorious claims against large corporations and institutions, such as drug and tobacco manufacturers, insurance companies, multi nationals and governments.<sup>9</sup>

Contingency fees are a reality of modern litigation and an instrument by which those who have no choice but to litigate to see justice done can be given that opportunity. The recommendations of the Percentage Based Contingency Fee Working Group are framed in this spirit.

I commend them to the Directors of the Law Council of Australia for close consideration.

Noor Blumer

Chair, Percentage Based Contingency Fee- Working Group

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<sup>5</sup> *Ibid* at xix

<sup>6</sup> s 285 *Legal Profession Act 2006* (ACT); s325(1)(b) *Legal Profession Act 2004* (NSW); s320 (1) *Legal Profession Act* (NT); s325, *Legal Profession Act 2007* (QLD); s309(1), *Legal Profession Act 2007* (TAS); s3.4.29(1), *Legal Profession Act 2004* (VIC); s285(1), *Legal Profession Act 2008* (WA).

<sup>7</sup> S Clark, C Harris *The Push to Reform Class Action Procedure in Australia; Evolution or Revolution?* Melbourne University Law Review 2008 (32) 775 at 810 available from:

[http://www.mulr.com.au/issues/32\\_3/32\\_3\\_1.pdf](http://www.mulr.com.au/issues/32_3/32_3_1.pdf)<sup>8</sup> See for example: *Matter of Estate of Weeks*, 627 N.E. 2D 736 (1994); 255 Ill. App. 3d 345, 627 N.E. 2d736 (3d Dist. 1994) and ... ‘often the only effective key to the courthouse for a social security petitioner in combatting the almost unlimited resources of the United States Government...’... *Frederico v Sullivan*, 1990WL 166653, at \*1(D. Ariz.1990); *Harris v Union Elec Co.*, 1985 WL 2996at \*1, Fed Sec. L. Rep. 92, 352.

<sup>8</sup> (E.D. (as characterised by Mr Sheperd, the contingent fee is the ‘poor man’s key to the courthouse’)

<sup>9</sup> See for example: Factsheet about Lawyers’ Income and Fees, *Center for Justice and Democracy, New York Law School*, published 12 July 2012.

## Glossary

<b>After The Event (ATE) Insurance</b>	Insurance against the risk of a costs order requiring payment of an opposing party's costs, by way of a policy purchased after the events at the heart of proceeding. Payment of premiums is ordinarily postponed until the conclusion of the case and is subject to the outcome.
<b>Champerty</b>	The unlawful maintenance of an action/suit, upon agreement to receive a share of the proceeds from the litigation.
<b>Conditional fee agreement</b>	<p>Agreement for costs between a client and solicitor, whereby payment is contingent upon a successful outcome and calculated by reference to the solicitor's usual fee for the work.</p> <p>In Australia, such agreements may include an additional amount, a premium or 'uplift fee', which:</p> <ul style="list-style-type: none"> <li>a) operates as a 'success fee' in addition to the solicitor's ordinary base fees; or</li> <li>b) in circumstances where the solicitor and client had agreed to a discounted fee, entitle the solicitor to claim the usual full fee amount.</li> </ul>
<b>Contingency fee agreement</b>	<p>Agreement for costs between a client and litigation funder whereby upon a successful outcome, costs are calculated by reference to a percentage or share of any judgment or settlement.</p> <p>Lawyers are prohibited from entering contingency fee agreements in all Australian jurisdictions.</p>
<b>Damages-based agreements (DBAs)</b>	Contingency fee agreements that lawyers in the UK may enter with their clients.
<b>Disbursements</b>	Costs properly incurred that are paid or to be paid to parties (not otherwise related to the contingency fee agreement) in relation to a contentious matter eg court fees, experts reports
<b>Maintenance</b>	The unjustifiable support/promotion of civil litigation in which the maintainer has no direct or legitimate interest or without lawful justification.
<b>Third party litigation funders</b>	Commercial litigation funders who pay the cost of litigation and indemnify the litigant against the risk of paying adverse costs (i.e. liability to pay the costs incurred by the respondent) if the case fails. Where a case is successful, the litigation funder will be entitled to receive a contractually agreed percentage of the court awarded lump sum or settlement.
<b>Uplift fee</b>	Additional legal costs (which exclude disbursements) payable under a conditional costs agreement on the successful outcome of the matter to which the agreement relates
<b>Working Group</b>	Law Council's Percentage Based Contingency Fee Working Group

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## Introduction

The Law Council of Australia's Percentage Based Contingency Fee Working Group ('Working Group') presents the Directors of the Law Council of Australia with the following final report and recommendations.

### Background of enquiry

When they met on 16 June 2012, the Directors of the Law Council expressed an interest in exploring the issue of capped contingency fee costs agreements.

On 28 July 2012, the Law Council Executive ('Executive') approved the formation of a Working Group and formulated the Terms of Reference pursuant to which the Working Group would investigate the topic and report to Directors.

The Law Council's Constituent Bodies proposed nominees from amongst whom the membership of the Working Group was selected as follows:

- Dr John de Groot (Queensland Law Society);
- Ms Noor Blumer (Law Society of the ACT);
- Mr Stewart Forbes (Law Society of WA);
- Mr Michael Holcroft (Law Institute of Victoria);
- Mr Terry Stern (Law Society of NSW);
- Mr Roger Traves SC (Bar Association of Queensland);
- Mr Mark Woods (Law Institute of Victoria, Chair of the Access to Justice Committee);
- Mr Simon Morrison, (Australian Lawyers Alliance, Queensland Law Society);

Dr John de Groot, President of the Queensland Law Society in 2012, volunteered to Chair the Working Group until his resignation from the Working Group at the end of 2013. Ms Noor Blumer of the ACT Law Society became Chair of the Working Group as of December 2013.

In December 2013 Mr Morry Bailes joined the Working Group and in February 2014 Mr Ben Slade and Mr John Emmerig also joined the Working Group.

As Mr Emmerig expressed he is philosophically opposed to extending contingency fees to major claim formats in particular - eg class actions – he resigned from the Working Group in May 2014.

### Terms of Reference

Whether the laws in Australia should be amended to permit the charging of fees by legal practitioners, the amount of which is determined by reference to the amount of damages awarded or agreed to be paid, whether by determination by a Court or other body or by agreement between the parties (contingency fees). If so:

- in which areas of the law should contingency fees not be permitted;

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- should the laws, as amended, provide for a “cap” or limit on the contingency fees so recoverable and the quantity of any such “cap” or limit;
  - how should the following elements be addressed: disbursements, refunds, party/party costs and disclosure requirements;
  - how should the entitlements to costs of barristers and solicitors respectively be addressed in the context of a contingency fee agreement;
  - what should be the relationship between any laws as might be recommended and any existing laws relating to “uplift fees”; and
  - what amendments to existing laws are required to permit the charging of contingency fees in all jurisdictions in Australia?

A Background Paper was developed to provide the Working Group with a context to the issues and to highlight matters relevant to the Working Group’s deliberations.

In conducting its enquiries into the matters outlined by the Terms of Reference, the Working Group gratefully acknowledges the comments of:

- the Professional Ethics Committee (chaired by Mr Steven Stevens);
- the Litigation Funding Working Group (chaired by Mr Ben Slade);
- the Family Law Section (chaired by Mr Rick O’Brien); and
- Mr Geoff Provis and the Legal Practice Section’s Personal Injuries and Compensation Committee (chaired by Mr Bill Redpath)

In June 2013, the Working Group presented Directors with a report containing the Working Group’s preliminary recommendations developed to respond to the original Terms of Reference. In addition, the Working Group obtained Directors’ approval to undertake further work to identify safeguards and regulatory control measures that would necessarily complement the introduction of Percentage Based Contingency Fee agreements.

For their part, Directors requested that in July and August 2013, the Working Group release within the Law Council community the June 2013 interim Report as a Discussion Paper. In November 2013, the Working Group presented Law Council Directors with a Consultation Report analysing the responses received to the Discussion Paper.

As a result of the consultation process, the Working Group has revisited and adjusted the policy settings of the proposed scheme contained in its initial Report of June 2013.

The Working Group’s final report has now been updated to contain the Working Group’s considered recommendations including those for safeguards and regulatory controls.

The Final Report also illustrates how legal professional costs under a Percentage Based Contingency Fee agreement would be calculated by way of worked examples.



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## Executive Summary

Based on the research it has conducted, the Working Group makes the following recommendations:

1. The laws in Australia prohibiting lawyers from entering contingency fee agreements should be modified to allow such arrangements in certain areas of legal service delivery. For policy reasons, the proposed 'Percentage Based Contingency Fee' regime is not recommended to apply in family law, criminal law or migration law matters.<sup>10</sup>
2. Contingency fee agreements should encourage, as far as possible:
  - Lawyers, while discharging their professional obligations to the court their clients and others, to pursue the best outcomes for their clients;
  - An environments in which clients are free to propose and accept reasonable settlements or their claims; and
  - All parties to keep costs to proportionate levels.
3. A contingency based funding model can no longer be regarded as contrary to modern public policy and the introduction of Percentage Based Contingency Fee agreements will benefit the users of legal services:
  - **Improving Access to justice:** to help address the needs of Australian plaintiffs in civil matters by creating an additional funding option. Such needs are particularly acute for persons for whom funded legal assistance is not available and legal representation would otherwise be unaffordable (NOTE: the UK's Jackson Report refers to MINELAS - an acronym for middle income not eligible for legal aid support. This term describes a growing sector of the community that is 'too rich' to qualify for legal aid and 'too poor' to finance the cost of legal advice and representation);
  - **Public policy:**
    - the traditional prohibitions of *champerty* and *maintenance* have been largely abolished (legislatively and under the common law). The public policy concerns that once underpinned such actions are giving way to the exigencies of modern litigation funding practices. These same public policy concerns have historically worked against allowing lawyers to use Percentage Based Contingency Fee agreements;
    - the regime for speculative or *no win- no fee* conditional costs agreements (with an uplift fee in all but NSW) is now well established and operates in every Australian jurisdiction. All costs agreements are subject to stringent disclosure and compliance requirements;
  - **Sharing the risks of litigation:** contingency fee agreements allow the risk of litigating to be shared between the lawyer and the client. Clients do not pay their lawyer unless and until they win and, the lawyers, when they win, receive a level of fees that recognises the risks that the lawyers have borne;
  - **Commercial litigation funders:** litigation funders typically use contingency fee agreements with their clients in what are regarded as relatively unregulated circumstances;
  - **Contingency fee agreements are available to litigants in other jurisdictions:** contingency fee arrangements have been available for some time and are well understood by plaintiffs in the US and Canada as well as many other jurisdictions some of which have systems of justice that are similar to Australia's;

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<sup>10</sup> And others areas in which the use of conditional costs agreements is excluded (mentioned below).

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- **Introduction of contingency fee agreements in England and Wales:** pursuant to extensive research culminating in the Review of Civil Litigation Costs Report of 2010 and acceptance of that review's recommendations, contingency agreements (referred to as Damages Based Agreements) became more widely allowable in England and Wales as of April 2013;
  - **Contingency fees can promote efficiency:** lawyers are encouraged to be more selective and efficient because if the case does not 'win', they are paid nothing for their time and typically, nor do they recover expenses they have 'fronted'. This means lawyers cannot afford to bring frivolous or unmeritorious cases and have a strong interest in working hard for their clients to resolve cases as efficiently as possible;
  - **Contingency fees promote earlier resolution:** a key criticism of the justice system is that litigation can seem protracted and critics have suggested that fee structures that adopt time based billings reward inefficiency. Contingency fees remove any incentive to delay and provide a platform for earlier resolution on the part of all stakeholders.
  - **Concise contingency costs agreements:** Written client agreements can be lengthy and too complex for unsophisticated clients. The Working Group is attracted to the relative simplicity of Percentage Based Contingency Fee agreements as an alternative costs agreement option.

## Recommendations

### The Working Group recommends that:

- **the laws prohibiting lawyers from entering and charging for legal services by reference to a proportion or percentage of the amount recovered, should be amended;**
- **an exception to the prohibition against contingency fee agreements should be created allowing lawyers at their discretion to offer clients Percentage Based Contingency Fee agreements where appropriate;**
- **the proposed 'Percentage Based Contingency Fee' regime will not apply in family law, criminal law or migration law matters<sup>11</sup>;**
- **Legal practitioners retain the discretion to decide whether in any particular matter it is appropriate to offer a contingency fee agreement or other type of charging;**
- ***Professional costs* may be charged but cannot be made payable until such time as the *lump sum* is payable;**
- **The Percentage Based Contingency Fee is calculated as a proportion of the *lump sum* that includes all amounts in the nature of damages and compensation, together with interest, which are payable by way of compromise, judgment, arbitration or decision as between the parties of any other nature but does not include amounts to be repaid or credited from such sum to an insurer, Centrelink, Medicare or to any other entity pursuant to statute; and**

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<sup>11</sup> As well as other areas excluded from use under the conditional costs agreement legislative provisions of the jurisdictions (as previously mentioned).

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- **The *lump sum* shall include any amount pursuant to such compromise judgement arbitration or decision as between the parties, that is payable by the unsuccessful party by way of party/party costs including disbursements, whether such are included within the sum payable or are expressed as being as being in addition thereto and by way of costs.**
  - **Percentage Based Contingency Fee agreements in personal injury matters could provide no cap or a cap set at 35% or 40%.**

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## Background

1. In *no win- no fee* costs agreements, the client's payment of some or all of their legal costs is contingent upon a specified event- typically the successful outcome of litigation or resolution of a claim. The *legal profession* legislation<sup>12</sup> in every jurisdiction has for about a decade allowed solicitors to enter into speculative or *no win- no fee* agreement with their clients of a type known as conditional costs agreements.<sup>13</sup> Conditional costs agreements generally provide for a 'premium', 'success' fee or 'uplift' fee.
2. An uplift fee allows lawyers to claim an agreed 'success fee' that is flat amount or an amount that represents a percentage of the lawyer's usual fee that is payable:
  - a) in addition to the solicitor's ordinary or base fees;
  - or
  - b) where the solicitor and client agreed to a discounted fee arrangement- as an amount equal to the solicitor's usual and full fee amount.
3. Contingency fee agreements are also a type of speculative or no win- no fee costs agreement that remain prohibited in Australia. A key difference between contingency fees agreements and conditional costs agreements with uplift, lies in how the amount payable for legal costs is calculated. In contingency fee agreements, legal costs are determined by reference to the value of the damages awarded or settlement or agreement that concludes the matter.
4. As a result of the relaxation of certain proscriptions, it has been suggested that it may be timely and appropriate to reconsider contingency fees in Australia. The stimulus for such reconsideration arises at least in part, from the following events:
  - commercial litigation funders operate on a contingency basis, the burgeoning third party litigation funding industry- together with the Federal Government's indication as of July 2012, to take a 'light touch' regulatory approach<sup>14</sup>
  - judicial dicta which has stated that there is no prohibition on litigation funding arrangements and that such arrangements are not contrary to public policy;
  - growth in litigation and class actions;
  - desire to explore alternative billing models- global dissatisfaction with the billable hour paradigm;
  - desire to improve access to justice; and
  - international developments- contingency fees being permitted in an expanding number of jurisdictions.

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<sup>13</sup> Criminal proceedings and proceedings pursuant to the *Family Law Act 1975* (Cth) cannot be the subject of a conditional costs agreement. In some jurisdictions, some additional matters are also noted as excluded from being the subject of a conditional costs agreement.

<sup>14</sup> *Corporations Amendment Regulation 2012 (No. 6)* dated 12 July 2012. The effectiveness of this 'light touch' regime is likely to impact the protections that exist for consumers who are expected to avail themselves of class actions in seeking access to justice and the volume of litigation commenced against Australian businesses, especially listed corporations who are the target of shareholder class actions.

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5. More recently the April 2014 Draft Report of the Productivity Commission's enquiry into Access to Justice Arrangements<sup>15</sup> made the draft recommendation that the introduction of damages based billing should, subject to 'further public consultation and input' be considered.
  6. Internationally, there are differing views about whether contingency fee agreements should be allowed and, where allowed, how they should be regulated.
  7. Contingency fee arrangements are permitted in the United States and Canada. In the UK, contingency fee agreements have been allowed for about a decade predominantly in employment law tribunal matters. However from April 2013, the UK Legal Aid, Sentencing and Punishment of Offenders Act was amended to allow their general application across a broader range of areas in England and Wales.
  8. The decision to allow Damages Based Agreements more generally in England and Wales follows a series of recommendations presented by Lord Justice Jackson in an exhaustive review of civil litigation funding and costs in the United Kingdom.

### **The state of play - conditional costs agreements with an uplift component**

9. The legal profession legislation in every jurisdiction<sup>16</sup> provides for conditional costs agreements, which allow an uplift fee (success fee) for the solicitor in the event of a successful outcome of litigation.<sup>17</sup>
10. An uplift fee is defined in all jurisdictions (except South Australia)<sup>18</sup> as 'additional legal costs (excluding disbursements) payable under a costs agreement on the successful outcome of the matter to which the agreement relates'.<sup>19</sup>
11. Each jurisdiction's legislative provisions relating to uplift fees, contingency fees and certain limitations on legal costs in personal injury matters is excerpted at **Attachment A**.
12. Conditional costs agreements that contain an uplift component entitling lawyers, in successful cases, to claim a success fee. The uplift is calculated by reference to an agreed flat amount or as a percentage of the lawyer's usual fee. The success fee is charged in addition to the lawyer's base fees. Or, where the agreement provides for the solicitor to act on a discounted fee basis, the uplift fee merely brings the lawyer's total fees up to the usual and undiscounted value of the fees.
13. Uplift fees must not exceed 25% (excluding disbursements) of the legal fees otherwise payable<sup>20</sup> and they render costs agreements subject to additional disclosure requirements regarding:

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<sup>15</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 see Draft Recommendation 18.1 at page 533 available at [http://pc.gov.au/data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

<sup>16</sup> In South Australia the *Legal Practitioners Act 1981* (SA).

<sup>17</sup> In NSW, pursuant to s324 (1), *Legal Profession Act 2004* (NSW), conditional fee agreements which provide for an uplift fee are not permitted in relation to claims for damages.

<sup>18</sup> The term 'uplift fee' is not utilised in South Australia, so that no definition is available.

<sup>19</sup> s261, *Legal Profession Act 2006* (ACT); s302(1), *Legal Profession Act 2004* (NSW); s295(1), *Legal Profession Act* (NT); s302, *Legal Profession Act 2007* (QLD); s283, *Legal Profession Act 2007* (TAS); s3.4.2, *Legal Profession Act 2004* (VIC); s252, *Legal Profession Act 2008* (WA).

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- the law practice's legal costs / usual fees;
  - the basis of calculation for the uplift fee;
  - an estimate of the uplift fee or, if that is not reasonably practicable,
  - the range of estimates of the uplift fee; and
  - an explanation of the major variables that will affect the calculation of the uplift fee.

14. Where they exceed a lawyer's usual fees, uplift fees are often justified as compensation for the lawyer carrying the risk of providing legal services in circumstances in which the lawyer may not be paid unless and until the action is successful.
15. If the action is not successful, the client may depending on the terms of agreement, only be responsible for disbursements.
16. Uplift fees received in successful cases effectively allow law practices the financial capacity to offset losses incurred in unsuccessful cases.

## Conditional Cost Agreements v Contingency Fee Agreements

17. **No principled objection possible.** The concept of no win - no fee speculative arrangements already exists in every Australian jurisdiction by virtue of the conditional costs agreement regimes. Nevertheless one reason that is commonly cited for resisting the introduction of contingency fee agreements is concern that lawyers may be tempted to stoop to unethical conduct to win, thus gaining access to his/her fee.
18. The Working Group is persuaded that the case for the introduction of contingency fee arrangements has been developing slowly in Australia. Amid growing concern for pressure from rising costs and the systemic and enduring under funding of the legal assistance sector, it is difficult to logically sustain the justification for the ban against Percentage Based Contingency Fees on ethical grounds, since conditional agreements (that contain an uplift fee) raise the very same concern.
19. **Complexity of terms of agreements and disclosure.** Conditional cost agreements are usually based on timesheets and hourly billing or the application of scales and typically involve complex and lengthy disclosure and agreement documents.
20. By comparison – where they are allowed, contingency fee agreements are more concise, reportedly much easier to explain to clients and generally easier to understand.
21. **Proportionality.** Percentage Based Contingency fee agreements are (like all no win no fee agreements) linked to the result achieved, rather than the time the lawyer has expended to achieve the result. This 'builds in' proportionality between the lawyer's fees and the pool of funds recovered, which form the basis upon which legal costs are calculated.

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<sup>20</sup> s284(4)(b), *Legal Profession Act 2006* (ACT); s324(5), *Legal Profession Act 2004* (NSW); s324(4), *Legal Profession Act* (QLD); s308(4)(b), *Legal Profession Act 2007* (TAS); s3.4.28(4)(b), *Legal Profession Act 2004* (VIC); s284(4)(b), *Legal Profession Act 2008* (WA).

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## Maintenance and Champerty

22. The common law principles against *maintenance*<sup>21</sup> and *champerty*<sup>22</sup> developed to counter the corruption and abuse of the medieval English court system.<sup>23</sup>

23. The apparent underlying bases for these prohibitions originally included concerns:

- regarding *trafficking* in litigation and the view that the judicial system should not be the site of speculative business ventures;<sup>24</sup>
- that the maintenance of actions would lead to an increase in litigation (a floodgate argument);
- that maintainers may be tempted, for their own personal gain, to engage in behaviour inconsistent with the due administration of justice and the effective resolution of a dispute;<sup>25</sup> and
- about the 'fairness' of the bargain struck between the funder of the litigation and the intended litigant.<sup>26</sup>

24. The Standing Committee of Attorneys General (SCAG), (as it then was), noting the legislative abolition in the Australian Capital Territory,<sup>27</sup> New South Wales,<sup>28</sup> South Australia,<sup>29</sup> Victoria<sup>30</sup> and United Kingdom<sup>31</sup> of *maintenance* and *champerty* as a crime and as a tort, confirmed the view that such causes of action are also now largely obsolete at common law.<sup>32</sup>

25. That said, that statute has abolished the torts of *maintenance* and *champerty* in some jurisdictions does not prevent a contract, including a costs agreement, from being held contrary to public policy or otherwise illegal on the grounds of *champerty*.<sup>33</sup>

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<sup>21</sup> Halsbury's Laws of Australia, [415-1855] defines 'Maintenance' as the unjustifiable support or promotion of civil litigation in which the person has no direct or legitimate interest or without lawful justification.

<sup>22</sup> Halsbury's Laws of Australia, [415-1855] defines '*Champerty*' as an aggravated species of maintenance, whereby the maintainer unlawfully continues with an action or a suit, upon an agreement to receive a share of any proceeds from the litigation. Lord Justice Steyn in *Giles v. Thompson* [1993] 3 All ER 321 at 329 said 'The distinguishing feature of *champerty* is the support of litigation by a stranger in return for a share of the proceeds. '

<sup>23</sup> A Yeo, 'Access to Justice: A case for Contingency Fees in Singapore' (2004) 16 *Singapore Academy of Law Journal* 76, 83-84.

<sup>24</sup> M Legg, , 2012, *Litigation Funding in Australia: Identifying and Addressing Conflicts of Interest for Lawyers*, paper for the US Chamber Institute for Legal Reform, 3, <[http://www.instituteforlegalreform.com/sites/default/files/Litigation\\_Funding\\_in\\_Australia.pdf](http://www.instituteforlegalreform.com/sites/default/files/Litigation_Funding_in_Australia.pdf)

<sup>25</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; 229 ALR 58; [2006] HCA 41; *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42, per Gummow, Hayne and Crennan J at [93].

<sup>26</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; 229 ALR 58; [2006] HCA 41; *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42, per Gummow, Hayne and Crennan J at [90].

<sup>27</sup> Section 221, *Civil Law (Wrongs) Act 2002* (ACT); for the abolition of the common law offences of maintenance, champerty and being a common barrator, see Section 68 of the *Law Reform (Miscellaneous Provisions) Act 1955* (ACT).

<sup>28</sup> Sections 3 and 4 of the *Maintenance Champerty and Barratry Abolition Act 1993* (NSW) repealed by Sch 4 to the *Statute Law Miscellaneous Provisions Act 2011* No 27 with effect from 8.7.2011.

<sup>29</sup> Sub section 1(3) and 3(1) of Sch 11 *Criminal Law Consolidation Act 1935* (SA)

<sup>30</sup> Section 322A of the *Crimes Act 1958* (Vic) and section 32 of the *Wrongs Act 1935* (Vic)

<sup>31</sup> Sections 13 and 14 of the *Criminal Law Act 1967* (UK).

<sup>32</sup> Standing Committee of Attorneys General, *Litigation Funding in Australia; Discussion Paper*, May 2006 available at [Litigation Funding Discussion paper May 06.doc](#).

<sup>33</sup> Sections 4 and 6 of the *Maintenance Champerty and Barratry Abolition Act 1993* (NSW); Sch 11 *Criminal Law Consolidation Act 1935* (SA); section 32 (2) of the *Wrongs Act 1935* (Vic). See also *Campbell Cash and*

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26. In considering issues relating to litigation funding, the SCAG confirmed:

- a) the abolishing legislation does 'not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal'. Courts retain jurisdiction to stay an action or set aside an agreement found to be inconsistent with the public policy considerations upon which the prohibition was based at common law; and
- b) a statutory exception to the rule against *champerty* had already been created in 1995 allowing insolvency practitioners to contract for the funding of lawsuits, if such suits are characterised as company property- pursuant to the insolvency practitioners statutory powers of sale.<sup>34</sup>

## Litigation Funding and Contingency Fees

27. Typically, litigation funding agreements provide for the funder to contract with multiple potential litigants.
28. Pursuant to these agreements, the funder usually also indemnifies plaintiff- clients by accepting the risk of an adverse costs order (the other party's costs, including providing security for costs) in the event that the claim fails. Indeed should the plaintiff be unsuccessful, the funder receives nothing and must meet both the plaintiff's costs as well as any costs order made against the plaintiff.
29. If the claim is successful, the agreement ordinarily provides for the funder to become entitled to the agreed percentage of the funds recovered by the litigants (either by way of settlement or judgment), other types of costs (including for example, project management and claim investigation costs) and for the litigants to assign to the funder the benefit of any costs order they secure.<sup>35</sup>
30. The funders' share of the proceeds can range from 20 to 40 per cent- though typically it is reportedly about one third of the proceeds (usually after reimbursement of disbursements).
31. There is little doubt that recent court cases provide encouragement to the business of litigation funding by non parties for profit as traditional concerns for impropriety of acts of maintenance and *champerty*, diminish. Nevertheless the court always retains an inherent jurisdiction to protect its own processes from abuse by staying improperly maintained proceedings.

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*Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; HCA 41; BC200606677 at[67], [86] per Gummow, Hayne and Crennan JJ.

<sup>33</sup> Section 322A of the *Crimes Act* 1958 (Vic).

<sup>33</sup> Sections 13 and 14 of the *Criminal Law Act* 1967 (UK)

<sup>34</sup> For example, the powers of disposal given to a receiver to dispose of a company's property under the *Corporations Act 2001* (Cth): s 420(2)(b) and (g). See also the powers of disposal accorded to a liquidator by *Corporations Act 2001* (Cth) s 477(2)(c). Statutory powers of sale also arise from provisions of the *Bankruptcy Act* 1966 (Cth), and for trustees in all jurisdictions.

<sup>35</sup> Associate Professor M Legg argues this makes litigation funding more profitable than contingency fees which are limited to the agreed percentage under the agreement. See M Legg *Litigation nation- Revisiting contingency fees, litigation funding and class actions in Australia* (2012) 20 Torts Law Journal 61 at 70.



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32. While courts diverge in their view on the arrangements between the funder and the funded- the High Court provided clarity on its views in the landmark decisions in *Fostif and Trendlen* in 2006<sup>36</sup>.
  33. The majority of the Court accepted that the proceedings at issue- both of which were class action proceedings being funded by a third party funder- were not necessarily an abuse of process or contrary to public policy.
  34. While the attitude of Australian courts' to the law on funded litigation can vary substantially<sup>37</sup> it remains the case that there is no prohibition on litigation funders charging contingency fees calculated by reference to a percentage of the client's award or settlement.
  35. This is so notwithstanding that, unlike lawyers, litigation funders are not subject to professional obligations or ethical standards.

## Law Council position on litigation funding

36. In June 2011, the Law Council released a Policy Paper entitled '*Regulation of third party litigation funding in Australia*'. The Paper notes the Law Council's view that:
  - litigation funding companies have an important role to play in both insolvency and non-insolvency litigation as a means of creating an option for parties that would otherwise be prohibited from pursuing a legitimate claim, due to the cost of litigation;
  - the price of litigation funding, similar to insurance products, will generally correspond with the risk involved in providing those services and should not be controlled by regulation, other than to foster healthy competition among litigation funders;
  - access to justice is the primary public policy consideration that should drive and inform any discussion about litigation funding or any proposed regulation; and
  - litigation funding is a fledgling industry in Australia and should be allowed to develop and expand in the interests of justice.
37. The Law Council also noted that although it is supportive of appropriate regulation of litigation funders, the Law Council does not support the further additional regulation of legal practitioners in relation to their engagement with litigation funders and clients supported by litigation funders, outside of the legal profession regulatory framework.

## Regulation of third party litigation funders

38. Until 2009, the litigation funding industry was unregulated other than by way of the court's general supervision pursuant to the class action provisions of the *Federal Court of Australia Act 1976* (Cth) and legislative counterparts in state provisions.

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<sup>36</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; 229 ALR 58; [2006] HCA 41; *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42.

<sup>37</sup> For example contrast the views of the Supreme Court of Western Australia in *Clairs Keely (A firm) v Traecy* [2004] WASCA 277 with those of the New South Wales Court of Appeal in *Fostif v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83. NOTE: both cases have since been the subject of further appeal.

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39. However, the Full Court of the Federal Court's decision in *Multiplex*<sup>38</sup> (in which the Court held that Maurice Blackburn Pty Ltd and / or International Litigation Funding Partners Inc were involved in the conduct of an unregistered managed investment scheme), determined that litigation funders operate managed investment schemes and should therefore be subject to greater regulation.
40. The Court's decision would have required litigation funding schemes (characterised as managed investment schemes) involving more than 20 potential claimants to register with the Australian Securities and Investments Commission (ASIC). The decision would also have required other obligations under the Corporations Act 2001 (Cth) to be satisfied, including, for example, for the appointment of a suitably qualified responsible entity, unless:
- an exception applies under the *Corporations Act 2001* (Cth), such as the 'sophisticated investors' exemption under Chapter 6D; or
  - an exemption is obtained from ASIC.
41. In response to the decision, the Federal Government provided litigation funders with a temporary exemption from having to comply with the regulatory requirements that the *Corporations Act 2001* (Cth) imposes on managed investment schemes. On 29 February 2012, ASIC announced the further extension of the exemption to 30 September 2012.<sup>39</sup>
42. The Federal Government in July 2012 introduced the *Corporations Amendment Regulation 2012* (No. 6). The amendment provides litigation funders with a permanent exemption from the regulatory requirements of the Australian Financial Services Licence (AFSL) and Managed Investment Scheme regimes- including requirements to:
- be registered or licensed; or
  - comply with the conduct and disclosure rules that apply to others providers of financial products.
43. The regulation now focuses on management (rather than avoidance) of conflicts of interest. Litigation funders are, subject to the *Corporations Amendment Regulation 2012* (No. 6), required to 'have adequate arrangements, and follow certain procedures, for managing conflicts of interest'. Such adequate arrangements include evidence that:
- the person has conducted a review of the person's business operations that relate to the scheme, to identify and assess potential conflicting interests;
  - there is a written procedure for identifying and managing conflicts of interest;
  - the procedures are effectively implemented and regularly reviewed; and

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<sup>38</sup> *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 256 ALR 427; *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147 (20 October 2009)

<sup>39</sup> ASIC website, 29 February 2012, *12-35AD ASIC grants further extension of relief – funded representative actions and funded proof of debt arrangements*, <<http://www.asic.gov.au/asic/asic.nsf/byheadline/12-35AD+ASIC+grants+further+extension+of+relief+%E2%80%93+funded+representative+actions+and+fund+ed+proof+of+debt+arrangements?openDocument>>

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- any conflicts of interest are effectively disclosed and managed.

44. A failure to comply with the requirement to have adequate arrangements in place is a criminal offence, punishable by 50 penalty units.<sup>40</sup>

45. Guidance on the practical application of these requirements from the Australian Financial Services Licence's requirements to manage conflicts of interest is provided in the *Corporations Act 2001* (Cth) and ASIC's Regulatory Guide 181.<sup>41</sup> The Regulation commenced on 12 January 2013.<sup>42</sup>

46. The adequacy of the regulatory requirements imposed by the *Corporations Amendment Regulation 2012* (No. 6) has been questioned- including that the regulation fails to:

- provide capital adequacy requirements, with subsequent concerns that plaintiffs are not protected from under-resourced litigation funders, who ultimately may not have sufficient resources to pay legal fees and meet adverse costs orders<sup>43</sup>; and
- impose restrictions on the control litigation funders may exercise over the financed case<sup>44</sup>.

## Should contingency fee agreements be introduced in Australia?

47. Prior to considering the policy arguments for and against contingency fees and in addition to the matters mentioned above, the Working Group noted:

- the global exploration of alternative billing practices;
- the growing unmet legal need in Australia<sup>45</sup> and the desire to increase funding options that enhance access to justice, particularly in relation to matters and persons who are ineligible for legal assistance; and
- international developments, including in particular the introduction of contingency fee arrangements for general application in England and Wales<sup>46</sup>.

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<sup>40</sup> Section 4AA, *Crimes Act 1914* (Cth) provides that a penalty unit is \$110.

<sup>41</sup> N Mavrikis, Nicholas, R McInnes, Ross and M Legg, 'Litigation Funding now (lightly) regulated', *Clayton Utz Insights*, 19 July 2012, <[http://www.claytonutz.com/publications/edition/19\\_july\\_2012/20120719/litigation\\_funding\\_now\\_lightly\\_regulated.page](http://www.claytonutz.com/publications/edition/19_july_2012/20120719/litigation_funding_now_lightly_regulated.page)>

<sup>42</sup> The *Corporations Amendment Regulation 2012* (No. 6) provides that the provision is due to commence 6 months after the date of registration, being 12 July 2012

<sup>43</sup> Mavrikis, McInnes and Legg, above n 17

<sup>44</sup> C Merritt, 'Federal backing for litigation-funding companies', *The Australian* (online), 20 July 2012, <http://www.theaustralian.com.au/business/legal-affairs/federal-backing-for-litigation-funding-companies/story-e6frg97x-1226430377077>

<sup>45</sup> See for example the National Association Of Community Legal Centre's 2012 *Final Report on Australia National Legal Needs* available at: [http://www.nalc.org.au/resources/National\\_Legal\\_Needs\\_Report\\_Australia.pdf](http://www.nalc.org.au/resources/National_Legal_Needs_Report_Australia.pdf) See also references to the amount and need for *pro bono* legal services in the Government of Australia's, Legal Services Expenditure Report 2011-2012, available at [http://www.ag.gov.au/Publications/Documents/Commonwealth%20Legal%20Services%20Expenditure/O\\_L\\_SC%20-%20Legal%20Services%20Expenditure%20Report%202011-2012.PDF](http://www.ag.gov.au/Publications/Documents/Commonwealth%20Legal%20Services%20Expenditure/O_L_SC%20-%20Legal%20Services%20Expenditure%20Report%202011-2012.PDF)

<sup>46</sup> The use of Damages Based Agreements has always been allowed in employment and other tribunal matters. In 2013 amendments to legislation including changes to section 45 of the *Legal Aid, Sentencing and*

# Arguments for and against the introduction of contingency fees

## What the literature says

48. The scholarly literature on contingency fees mentions the following points as either advantages or disadvantages of such agreements:

Advantages of contingency fee agreements	Disadvantages of contingency fee agreements
<p>Create a more level playing field – potentially opens litigation (including representative actions) that third party litigation funders presently undertake under contingency fee agreements, to competition from lawyers.</p> <p>Act as an incentive:</p> <ul style="list-style-type: none"> <li>• for early assessment of clients' prospects of success;</li> <li>• to vigorously and innovatively pursue cases that have a reasonable prospects of success.</li> </ul> <p>Act as a disincentive to instituting unmeritorious or vexatious proceedings.</p> <p><i>Maintenance and champerty</i> (both as a crime and tort) have been legislatively abolished in the ACT NSW Vic and SA- and are arguably abolished at common law.</p> <p>Both the historical justification and public policy considerations for the prohibitions (on <i>maintenance and champerty</i>) have changed</p>	<p>Removing the financial impediment to litigation may give rise to an increase in unmeritorious litigation (often referred to as US style litigation).<sup>47</sup></p> <p>Concerns about contingency fee arrangements are historically wedded in prohibitions against <i>maintenance and champerty</i>. These prohibitions were founded on reasons including:</p> <ul style="list-style-type: none"> <li>• concerns about 'wanton and officious intermeddling';</li> <li>• fears about the fairness of the bargain struck between the funder and intended litigant; and</li> <li>• fears the maintainer may be tempted to act unethically for personal gain.</li> </ul>

*Punishment of Offenders Act 2012* and section 58 AA *Courts and Legal Services Act 1990* extended the scope of use of DBAs whether or not proceedings have been initiated.

<sup>47</sup> Frivolous litigation undertaken under contingency fee agreements is not likely to be as prevalent in Australia as it is in the US for a number of reasons. Firstly, due to the operation in Australia of the cost indemnity or *loser pays* rule which operates in respect of most civil litigation. Secondly, it is counterintuitive to suggest that lawyers would risk being denied fees pursuing feeble cases under *no win no fee* costs agreements. Thirdly, under the *legal profession legislation* of the Australian Capital Territory at section 284(4)(a), Victoria at section 3.4.28(4)(a), Tasmania at section 308(4)(a) and Western Australia at section 284(4)(a), it is prohibited for a costs agreement to provide for an uplift where the law practice lacks a reasonable belief that a successful outcome of the matter is reasonably likely.

<p>Unlike litigation funders- solicitors are regulated by <i>legal profession legislation</i> and rules of professional conduct, which provide safeguards against unethical conduct.</p> <p>Furthermore, solicitors may more diligently and effectively screen prospective cases, being reluctant to bear the risks of a case that does not have a reasonable chance of success.</p>	<p>Conflicts of interest- may encourage lawyers to</p> <ul style="list-style-type: none"> <li>• settle at a time that maximises fees (early or later prolonging a case but that is inconsistent with client’s interests/ expectations unethical behaviour, with solicitors being tempted to either, in order to maximise their fees.</li> <li>• pressure clients to accept less favourable/advantageous settlements.</li> </ul>
<p>Promotes freedom of contract, providing clients with the ability to choose the fee arrangement that is most suitable to their circumstances.</p>	<p>Power imbalance between solicitor and client may result in a client agreeing to a contingency fee arrangement which does not best suit their interests.</p>
<p>Promotes access to justice for civil action plaintiffs that have meritorious claims and who otherwise have no means of funding litigation, in particular those with strong cases but who are otherwise unable to afford legal assistance.</p>	<p>May encourage litigation, resulting in increased costs and delay to the justice system.</p>
<p>Provides an alternative to the traditional time-billing model which has been criticised by the judiciary, clients and lawyers alike.</p> <p>Represents a pure form of billing- clients pay upon the successful outcome of their case. Fees are thus, result (or output based) rather than based on hourly rates and billing in accordance with scales that are billed on ‘input’ rather than ‘output’.</p> <p>Potentially provides greater clarity, certainty and simplicity regarding the fees for which a client is ultimately liable in a successful action.</p>	<p>Concern that, while contingency fee arrangements are by definition proportionally tied to the damages amount, they may not necessarily be reasonable if lawyers receive large fees that bear no reasonable reflection of:</p> <ul style="list-style-type: none"> <li>• the work required on the case;</li> <li>• the period of time that the lawyers carry the costs of the action until finalisation; and</li> <li>• the risk lawyers take that the claim will succeed and they will be paid.</li> </ul>

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## Ethical concerns and beyond

49. It has been suggested that the most concerning aspect of allowing lawyers to charge contingency fees is the conflict of interests such arrangements would intensify.
50. For instance, Professor Dal Pont refers to concerns raised by cases in which lawyers have been found to have sought to influence when a matter settles in order to maximise fees even if such timing may not be consistent with the client's best interests.<sup>48</sup> However, when the UK's Civil Justice Council investigated this concern it observed and noted at Key Finding 8 of its report that<sup>49</sup>:

*There appears to be no strong evidence that contingency fees provide improper disincentive to settle ... Contingency fees are likely to lead to some incentives to settle earlier than in conditional or hourly rate cases. At some point the benefit to a lawyer in pushing for an increased settlement is outweighed by the cost and risk that they will incur in pushing further. Whilst this may sometimes conflict with what is in the client's interests, it is a conflict which is generally likely to occur at the margins and should be consistent with the need to resolve disputes proportionately. There are also contrary pressures on the lawyer such as the need to maintain their reputation for being hard bargainers with clients and, importantly, with Defendants...*<sup>50</sup>

51. Professor Dal Pont argues:

- the scope for conflict inherent in conditional costs agreements where there is an uplift fee, is heightened in the case for percentage fees which may also encourage lawyers to settle proceedings at a time that is likely to generate greatest fees for least work;
- lawyers may actually pressure clients to accept potentially disadvantageous settlements and guard their interests by inserting in the costs agreements an entitlement to specified fees if the client rejects a fair and reasonable offer; and
- the purchase of a share in litigation is a temptation to engage in misconduct in the pursuit of a successful outcome.<sup>51</sup>

52. However, Professor Dal Pont goes on to acknowledge that the High Court's reasoning in upholding the legitimacy (from a public policy perspective) of the 'pure' funding of litigation<sup>52</sup> challenges the view that percentage fee arrangements are *champertous*.

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<sup>48</sup> G Dal Pont G, *Lawyers Professional Responsibilities*, Thomson Reuter, 5<sup>th</sup> edition, 2012 at [14.120] Professor Dal Pont notes this particular form of conflict is already present in conditional costs agreements that provide for an uplift or success fee.

<sup>49</sup> Civil Justice Council, *Improving Access to Justice; Contingency Fees; A Study of Their Operation in the United States of America; A Research Paper Informing the Review of Costs*, November 2008 at 10 available from:  
<http://www.judiciary.gov.uk/JCO%2FDocuments%2FCJC%2FPublications%2FCJC+papers%2FCivil+Justice+Council+Contingency+Fees+Report.pdf>

<sup>50</sup> *Ibid*

<sup>51</sup> See for example *Re Treppca Mines Ltd (No 2)* [1963] Ch 199 at 219- 220 per Lord Denning MR; *Wallerrsteiner v Moir (No 2)* [1975] QB 373 at 402 per Buckley LJ; *Giles v Thompson* [1994] 1 AC 142 at 153. per Lord Mustill- referred to in Dal Pont *Lawyers Professional Responsibilities*, Thomson Reuter, 5<sup>th</sup> Edition, 2012 at [14.120]

<sup>52</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41: BC 200606677

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53. As a result he concludes that it '*makes it difficult to sustain the view that lawyers should be prohibited in public policy from 'funding' an action in the expectation of profiting as a percentage of the client's winnings*'.<sup>53</sup>

54. Thus Professor Dal Pont recognises the advantages at general law of contingency fee agreements, include:

- access to justice for plaintiffs in civil actions pursuing meritorious monetary claims who otherwise could not afford legal representation;
- being contingent on a successful outcome provides incentive to make early assessment of the merits of a claim and a weighty incentive to vigorously and innovatively pursue the case;
- disincentive to instituting proceedings that have a poor chance of success or are vexatious.<sup>54</sup>

55. Professor Dal Pont also mentions that contingency fee agreements are:

- simple and thus easily understood;
- appropriately allocate risk between lawyer and client;
- provide greater public satisfaction, particularly to the client where the case is not won; and
- facilitate freedom of contract between lawyer and client.<sup>55</sup>

56. Upon analysis the Working Group accepts that contingency fee agreements are not inherently unethical and can no longer be regarded as contrary to public policy. Further there are compelling arguments in support of the introduction of Percentage Based Contingency Fee agreements in the Australian context, the most persuasive of which are:

- a. to promote access to justice;
- b. to provide clients with greater certainty and clarity regarding the fees that they will be liable to pay; and
- c. to promote competition between practitioners and third party litigation funders.<sup>56</sup>

### Improving Access to Justice

57. The Law and Justice Foundation of New South Wales recently released the 'Legal Australia-Wide Survey: Legal Need in Australia' (LAW Survey). The survey appears to represent the most comprehensive survey of its kind in the world and furthermore

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<sup>53</sup> Dal Pont G E, *Law of Costs*, 3<sup>rd</sup> Ed, 2013, LexisNexis Butterworths at [3.47]

<sup>54</sup> *Ibid*

<sup>55</sup> *Ibid*

<sup>56</sup> See for example M Legg *Litigation nation- Revisiting contingency fees, litigation funding and class actions in Australia* (2012) 20 Torts Law Journal 61 at 69.

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- provides the first quantitative assessment of an extensive range of legal needs in Australia.
58. The LAW Survey revealed an estimated 8,513,000 people aged 15 years and over in Australia experience a legal problem. The Law Survey found that 31% of those legal problems are handled without legal advice and 18% of those who are faced with legal problems do nothing.
  59. The survey reports that cost is likely to be a major barrier to obtaining expert legal advice to assist in the resolution of a legal problem - in fact, 27% of respondents identified cost as a barrier to seeking advice.<sup>57</sup>
  60. Such results highlight the extent of unmet legal need in Australia, but also potentially the extent to which the high cost of legal assistance places access to justice beyond the financial means of many Australians.
  61. This problem has been exacerbated by the chronic underfunding of legal assistance bodies; to the point that many people though they fall beneath the Henderson Poverty Line<sup>58</sup> are nevertheless ineligible to receive government-funded legal assistance.
  62. The LAW Survey acknowledges that there is considerable diversity in the experience, handling and outcome of legal problems, such that 'no single strategy will successfully achieve justice for all people. Rather, the approach to justice must be multifaceted and must integrate a raft of strategies to cater for different needs'.<sup>59</sup>
  63. The Working Group believes that Percentage Based Contingency Fee agreements may offer persons with a legitimate and meritorious claim an additional source of funding, regardless of their financial means. In some circumstances such claimants may not otherwise be able to afford access to legal representation or indeed access to the civil justice system.
  64. The availability of Percentage Based Contingency Fee agreements would enable clients to access legal representation, without bearing the financial burden of such representation from the outset and then only if the matter finalises in the client's favour.
  65. As a matter policy, the Working Group proposes that Percentage Based Contingency Fee agreements should not be available in family law, criminal law or migration law matters as well as other areas of constraint that apply in respect of the now well established conditional costs regimes.
  66. This is largely consistent with the approaches taken under the contingency fee regimes in Canada, the United States of America and in England and Wales.<sup>60</sup>

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<sup>57</sup> Law and Justice Foundation of New South Wales, 'Legal Australia-Wide Survey: Legal Needs in Australia; 2012, xvii available at <http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

<sup>58</sup> There are no officially sanctioned parameters by which poverty is in Australia measured. In the 1970's Professor Ronald Henderson developed a methodology to calculate poverty that is one of several that is widely relied upon by organisations including the Smith Family and the Brotherhood of St Laurence.

<sup>59</sup> *Op cit* n 49.

<sup>60</sup> The regulation of contingency fees is, like the broader regulation of the legal profession, largely a matter of provincial or state jurisdictional concern in Canada and the United States of America respectively. All of these jurisdictions as well as England and Wales, prohibit the use by lawyers of contingency fees in family law and criminal law matters (NOTE: the American Bar Association Model Rules of Professional Conduct at Rule 1.5 actually refers to prohibition in criminal and domestic relations cases) - some jurisdictions extend the prohibition to other areas including for example quasi criminal law matters and migration law matters. See **Attachment A** for details of the areas excluded by the conditional costs agreements regimes in Australia.



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67. It has been said that the more pressing legal problems faced by people who are unable to afford legal services typically arise in relation to family law and criminal law matters. Accordingly, the observation has been made that Percentage Based Contingency Fee agreements are unlikely to significantly improve the present state of access to legal services for those persons.
68. However, where they are allowed, the Working Group notes that contingency fee agreements are relied upon across a range of areas of the law. For example, in England and Wales Damages Based Agreements are commonly used in employment law matters, personal injury, and commercial law matters at consumer/micro and enterprise commercial levels- involving larger scale matters.
69. In Canada and the United States, contingency fees agreements are also in common use by lawyers in other areas including for example personal injury, malpractice, product liability, natural disaster, public liability, infrastructure failure, financial and commercial claims.
70. Thus Percentage Based Contingency fee agreements may also be appropriate in consumer cases involving large individual claims. Further they may also represent an effective 'access to justice' mechanism in consumer disputes involving a collective harm where it is combined with the use of class action procedure.
71. In such cases a large number of consumers may have suffered a relatively small loss due to the failure of particular product, but the total amount of the collective claim may be substantial.
72. A contingency fee agreement in conjunction with a class action could work well in such circumstances and would avoid the problem of class members being 'free riders' in litigation, making the class action procedure a more economically attractive option for claimants.<sup>61</sup>
73. The improved resourcing of the legal assistance sector would be a more direct means of better meeting the unmet legal need of those who cannot afford to access legal services. However, the Working Group is satisfied that the availability of an additional funding option under Percentage Based Contingency Fee agreements also has the potential to directly improve the access to legal services of some of those who might otherwise be unable to afford them.
74. Further in a robust legal services market, Percentage Based Contingency Fee agreements will have the indirect effect of reducing reliance on other forms of public or *pro bono* assistance thus increasing the overall capacity for assistance across all areas of law including those areas excluded under the proposed regime.

#### Greater certainty and clarity for clients

75. A further argument that favours the introduction of Percentage Based Contingency Fee retainers is that such agreements will provide unsophisticated clients with greater certainty and clarity regarding the amount of fees that they will be liable to pay at the favourable conclusion of a matter.

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<sup>61</sup> For a more fulsome discussion of the advantages of combining contingency fees with class action procedures see V Morabito, *Federal Class Actions, Contingency Fees and the Rules Governing Litigation Costs*, Monash Law Review (1995) 21, 231; see also C Wells *Report on Contingency Fees in Class Action Litigation*, The Review of Litigation, (2006) 25, 459; and V Morabito *Contingency Fee Agreements with Represented Persons in Class Actions - An Undesirable Australian Phenomenon*, Common Law World Review (2005) 34, 3 (201).

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76. Contingency fee retainer agreements are typically concise and tend to contain terms that are less complex than standard client agreements- particularly those premised on time-billing. This can be an important factor in client satisfaction, and in assisting a client to understand the nature and effect of the agreement and the likely extent of legal costs.
  77. Accurately predicting the time required to undertake a matter in order to determine the likely fees under time billing agreements can be difficult, depending on the variables involved – particularly at the outset of a complex matter and thus leading to the need for lawyers to revise and adjust earlier estimate(s). In many cases, total costs at the end of a matter will exceed an estimate prepared at the outset, potentially leading to client dissatisfaction and in more extreme cases, complaints against the solicitor/law practice.
  78. Although the actual amount of legal costs under a Percentage Based Contingency Fee agreement may at the outset of a matter be just as difficult to predict as they are pursuant to any other form of agreement, contingency fee arrangements arguably provide a simpler arithmetic option for clients. Significantly, the reduction in length and legalese will allow less sophisticated clients to understand and be able to negotiate the terms of legal costs agreements. The Working Group believes there is potential for a reduction in the complexity of written agreements that stands to be achieved by allowing the simpler percentage based model.
  79. A further advantage of a simplified form of costs agreement is that clients will be better placed to compare agreements, not merely in terms of contrast with agreements structured under more complex charging time units and hourly rates but also success conditions and uplift fees if a conditional agreement is also an available option in a matter.
  80. Ready comparison should be possible as between the Percentage Based Contingency Fee agreements offered by different legal services providers. In an uncapped system the basic percentage rate will be open to negotiation. In personal injury matters, the 35% or 40% cap will operate merely as a ceiling, allowing negotiation to occur on the actual percentage of legal costs under the agreement, as well as matters such as which party will front disbursements and which party will bear the risk of an adverse costs order should the claim fail- an issue that may depend on the merits of the claim, the complexity of the circumstances and other matters.

#### Competition with third party litigation funders

81. It has been said that commercial litigation funding has the effect of undercutting claimant and solicitor control of litigation and diminishes the role and function of lawyers in advising claimants. Significantly litigation funding creates conflict among claimants, their lawyers and the litigation funders' investors.
82. The introduction of the Percentage Based Contingency Fee would promote a more level playing field by allowing solicitors to offer terms that are potentially comparable to those of third party litigation funders' agreements. The present prohibitions on Percentage Based Contingency Fee arrangements preclude practitioners from engaging clients on a similar basis to third party litigation funders.
83. Because of the loser pays costs rules and other features of the Australian system of civil litigation, a different dynamic would be created between lawyers' contingency fees

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and litigation funders than is the case in the US. Indeed it has been observed that in Australia:

*Litigation funding may be a competitor for lawyers using contingency fees and as a result may cause the contingency fee to more closely reflect the risk of litigation.*<sup>62</sup>

### Promoting efficiency

84. Percentage Based Contingency Fee agreements could play a role in protecting the civil justice system by making lawyers more selective and efficient. Where they are allowed- lawyers who act on a contingency fee basis assume considerable financial risks which are carried to the finalisation of the matter.
85. That lawyers might have an interest in the outcome of litigation- whether their clients recover and the *quantum* of that recovery, has been argued as both an advantage and disadvantage of the contingency fee model. Invariably however, if the case does not win, lawyers are paid nothing for their time and those of the expenses that they have 'fronted'. In the Australian context, this means that they cannot afford to bring frivolous or unmeritorious cases.<sup>63</sup>
86. Further as lawyers are unpaid while a case remains on foot there would be incentive for lawyers working under Percentage Based Contingency Fee agreements to working hard for their clients to resolve cases efficiently.

## **What is an appropriate model?**

87. In considering the features of an appropriate model for contingency fee arrangements in Australia, the Working Group considered models in operation in the United States, Ontario, Canada<sup>64</sup> and the Damages Based Agreements of England and Wales.
88. A brief overview of contingency fee agreement models of these jurisdictions is provided at **Attachment B**.

### Costs recovered from a losing opponent

89. Damages Based Agreements have been available in England and Wales in employment and other tribunal work as well as non-contentious work, since 2010. In 2013, Damages Based Agreements were given an expanded scope of operation into many more areas of law.

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<sup>62</sup> M Legg *Litigation nation- Revisiting contingency fees, litigation funding and class actions in Australia* (2012) 20 Torts Law Journal 61 at 69.

<sup>63</sup> Frivolous litigation undertaken under contingency fee agreements is not likely to be as prevalent in Australia as it is in the US for a number of reasons. Firstly, due to the operation in Australia of the cost indemnity or *loser pays* rule which operates in respect of most civil litigation. Secondly, it is counterintuitive to suggest that lawyers would risk being denied fees pursuing feeble cases under *no win no fee* costs agreements. Thirdly, under the *legal profession legislation* of the Australian Capital Territory at section 284(4)(a), Victoria at section 3.4.28(4)(a), Tasmania at section 308(4)(a) and Western Australia at section 284(4)(a), it is prohibited for a costs agreement to provide for an uplift where the law practice lacks a reasonable belief that a successful outcome of the matter is reasonably likely.

<sup>64</sup> Particular consideration was given to the existing contingency fee system in Ontario, Canada, as Lord Justice Jackson has recommended that the wider introduction of damages-based agreement in the United Kingdom, be based on the Ontario model.

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90. The interaction of contingency fees with the costs rules in operation in a jurisdiction's civil justice system should be considered in developing a model for Australian application. Though this is a key point of distinction with the position in the United States, so far as costs are concerned, most civil litigation in Australia, Canada and the UK operates on a loser pays basis<sup>65</sup>. This means that an unsuccessful litigant is usually liable for the legal costs of a successful opponent.
91. The Working Group notes that costs recovered from a losing opponent are treated similarly under the schemes of the Damages Based Agreements and of the Ontario Model. Put simply, under this aspect of the model, due to the operation of the indemnity principle, costs recovered from a losing opponent must, in the case of the UK, be set off pound for pound against the contingency fee to make up the difference between base costs and the contingency fee chargeable to one's own client under the Damages Based Agreement.
92. This means that the solicitor acting for a successful plaintiff can only ever receive the contingency fee made up of the recoverable costs and with the shortfall coming from the clients damages.
93. The treatment of costs recovered from an unsuccessful opponent impacts on the calculation of the contingency fees and is a key distinction between the following models:
- a) 'Ontario model' – remuneration of a lawyer is limited to the agreed percentage of damages recovered<sup>66</sup>; and
  - b) 'Success Fee model' – a lawyer is entitled to costs recovered by way of a success fee.
94. The distinction between in the operation of these two models is highlighted by the following calculation of costs scenario:

*Solicitor and C enter into a 25% contingency fee agreement*

- *C recovers \$100,000 in damages from D*
- *C recovers \$10,000 in costs from D*

*Depending upon which model is in operation the solicitor could recover:*

- a) *\$25,000 all up (\$15,000 from the damages + \$10,000 from D (the Ontario model); or*
- b) *\$25,000 from the damages + \$10,000 from D (the Success Fee model)*

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<sup>65</sup> Award of costs of this kind are sometimes referred to as *part and party costs* and usually include disbursements. The duty to pay *party and party costs* ordinarily arises from an order of the court or tribunal. Such an order for costs ordinarily amounts to approximately two thirds of the successful litigant's costs and is therefore more like a partial indemnity for professional legal fees and expenses incurred by that party in the course of litigation.

<sup>66</sup> The Ontario model operates in Ontario and shares the following features with the Damages Based Agreements of England and Wales. Importantly for the purposes of the illustrative examples, central distinguishing features of the Ontario model include that jurisdictionally, costs shifting principles apply. This means that where base costs are recovered from an opponent over which the claimant prevails- the contingency fee agreement between the claimant and their lawyer complies with indemnity principles whereby base costs are retained by the lawyer but are deducted (as a setoff) the contingency fee to make up the difference or shortfall between base costs and the contingency fee.

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95. The differences between the two models (the Ontario Model and the Success Fee Models) are explained in a note by the Civil Justice Council Working Party on Contingency Fees, provided at **Attachment C**.
96. The Working Group accepts that where the relationship between costs and damages means there is little or no contingency fee available to reward solicitors for risk, even meritorious claims risk becoming uneconomic to prosecute.

### **In what areas of the law should contingency fees not be permitted?**

97. The Working Group is persuaded that in keeping with the general approach taken to contingency fee agreements in other jurisdictions- the proposed regime for such agreements in Australia should exclude the following areas.

#### Excluded areas of law.

98. The use of conditional costs agreement is legislatively proscribed in several areas of law including criminal law and family law matters and others<sup>67</sup> (see **Attachment A**).
99. The Working Group proposes that were Percentage Based Contingency Fee agreements to be introduced into Australia, the regulatory regime should be consistent and adhere with the regime that governs the use of conditional costs agreements, including with respect to excluded areas.

#### The special case of Personal Injury Matters

100. The use of contingency fee agreements in personal injury litigation is the subject of much academic research and writing. The Working Group has considered whether Percentage Based Contingency Fee agreements would be suitable in the context of personal injury matters in Australia particularly in light of overseas experience and the approach taken in England and Wales in deciding to open this area of law to the use of Damages Based Agreements in 2013.
101. In Australia, most jurisdictions have legislation that governs the litigation of personal injury matters. Some of this legislation limits the legal costs that can be charged to a lawyer's own client and caps the party and party costs that can be recovered. These legislative provisions include for example, the Queensland rule that applies to speculative fee agreements relating to personal injury matters- known as the *50/50 no win- no fee rule*<sup>68</sup>.
102. The rule provides the formula for calculation of legal costs in speculative personal injury matters and can apply to effectively cap fees that lawyers can charge their client:
- start with the amount of the settlement or judgment, including any costs to be paid by the other side

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<sup>67</sup> See for example section 283 of the *Legal Profession Act 2008* (WA) which excludes use of conditional costs agreements in criminal proceedings; proceedings relating to child protection, custody, guardianship or adoption; proceedings under the *Family Law Act 1997* (WA); *Child and Community Services Act 2004* (WA); *Family Law Act 1975* (Cth); *Migration Act 1958* (Cth); *Child Support (Assessments) Act 1989* (Cth) or proceedings prescribed by regulations.

<sup>68</sup> The rule is contained at ss 345-347 of the *Legal Profession Act 2007* (Qld) and applies only in relation to personal injury matters that are conducted on a speculative basis.

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- deduct any refunds the client has to make and all disbursements, to arrive at a balance
  - apply the percentage to the balance.

#### Caps on party and party costs in personal injury claims

103. The civil liability law reforms that began in 2001 were formulated to decrease the number of claims litigated as well as the *quantum* of court determined awards of compensation. These legislative measures have translated into further constraints that impact on the recoverability of party and party costs in personal injury claims.

104. The statutory objective is to ensure that the lawyers representing clients in small personal injury claims know from the outset that recoverable fees as between the parties would be capped where the amount ultimately recovered, does not exceed a prescribed threshold amount. These legislative measures are also intended to bring certainty to parties anxious to know their maximum exposure in the event of losing the proceedings having regard to the notion that *cost should be proportionate to the importance and complexity of the subject matter in dispute*.

105. The Court may order that costs be excluded from the cap for services provided under the following provisions in response to any action by the other party that was not reasonably necessary to advance the latter's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim.<sup>69</sup> This form of capping does not prevent the court awarding costs against another party, assessed on an indemnity basis in respect of legal services provided after the making of an offer of compromise where the court makes an award in terms no less favorable to that party than the terms of the offer.

#### **Queensland and the Northern Territory**

106. Where damages exceed \$50,000, the ordinary rules for determining costs apply for fixing the amount that can be recovered for party and party costs. However, where the court awards damages \$50,000 (or less), the Personal Injuries Proceedings Act 2002 (Qld) restricts recoverable costs by reference to the mandatory final offers that parties are required to have exchanged when the claim is not settled<sup>70</sup> as follows:

107. Where the award is \$30,000 or less<sup>71</sup> and this

- is less than the claimant's offer but more than the respondent's offer- no amount for costs is awarded;
- is equal to or exceeds the claimant's offer – costs are awarded to the claimant on an indemnity basis as from the day the proceedings started but not for costs up to that date;
- is less than or equal to the respondent's offer - costs are awarded to the respondent on a standard basis as from the date of the start of the proceedings- but no award for costs for up to that date.

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<sup>69</sup> *Civil Laws (Wrongs) Act 2002* (Act) section 183; *Legal Profession Act 2004* (NSW) section 341.

<sup>70</sup> *Personal Injuries Proceedings Act 2002* (Qld) at section 39. See also similar requirement where the matter relates to a motor vehicle accident claim at section 55F *Motor Accident Insurance Act 1994* (Qld).

<sup>71</sup> *Personal Injuries Proceedings Act 2002* (Qld) at section 56(2).

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108. Where an award of damages is between \$30,000 and \$50,000, specific caps apply<sup>72</sup> as follows:

- if the amount awarded is more than the plaintiff's offer but less than the respondent's offer – costs are awarded to the claimant on a standard basis up to a maximum of \$2,500;
- if the amount awarded is equal to or exceeds the claimant's offer- costs up to the date that proceedings were started are awarded on a standard basis up to a limit of \$2500, and costs on or after the date on which the proceedings started are awarded on an indemnity basis;
- if the amount awarded is less than or equal to the respondent's offer- costs up to the day proceedings were started are awarded to the claimant on a standard basis up to a limit of \$2,500, and costs on or after the day on which the proceeding started are awarded to the respondent on a standard basis.

109. The provisions of the *Personal Injuries (Civil Claims) Act 2003*(NT) have yet to commence. Though modelled on the Queensland legislation<sup>73</sup>, the act prescribes costs consequences in the event that a damages award is equal to or more than the maximum amount prescribed by regulation<sup>74</sup> and other matters.

### **Australian Capital Territory**

110. In the ACT, if the amount recovered on a claim for personal injury damages does not exceed \$50,000, the maximum costs for legal services<sup>75</sup> (exclusive of disbursements and counsel's fees where counsel is briefed to appear) are fixed at 20% of the amount recovered or \$10,000, whichever is greater.<sup>76</sup>

111. If more than one law practice provides legal services, the maximum costs so fixed are to be apportioned between them or (failing agreement) as ordered by the court hearing the proceedings.<sup>77</sup>

### **New South Wales**

112. The legislative provisions in operation in NSW are similar to the ACT's though the NSW scheme is located in the legal profession legislation<sup>78</sup> and the threshold amount of damages below which maximum cost for legal services fix is \$100,000.

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<sup>72</sup> *Personal Injuries Proceedings Act 2002* (Qld) at section 56(3).

<sup>73</sup> *Personal Injuries (Civil Claims) Act 2003* (NT) sections 20(1) to 20(4)- requiring reference to the claimants and respondent's final offers of settlement and providing consequences by reference to the amount of the award of damages.

<sup>74</sup> *Personal Injuries (Civil Claims) Act 2003* (NT) section 20(4) this amount is to be prescribed by regulations that have not as yet commenced operation.

<sup>75</sup> Under the *Civil Laws (Wrongs)Act 2002* (Act) at section 180 reference to 'costs' does not include disbursements for services other than legal services; (b) disbursements that are counsels fees on a brief to appear in an action; or (c) any other disbursements.

<sup>76</sup> *Civil Laws (Wrongs)Act 2002* (Act) section 181(6) allows the amount to be modified by regulation.

<sup>77</sup> *Civil Laws (Wrongs)Act 2002* (Act) section 185.

<sup>78</sup> *Legal Profession Act 2004* (NSW).

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113. Having regard to the net effect of the existing regime, the Working Group is satisfied there is scope for Percentage Based Contingency Fee agreements to operate efficiently and to the benefit of clients of legal services in personal injury matters.
114. The Working Group notes the legislative protections in the context of more modest personal injury claims. However, the Working Group agrees that client protection by way of a general cap is appropriate if Percentage Based Contingency Fee agreements are to apply to personal injury litigation in order to safeguard against the risk of erosion of compensation.
115. The Working Group has debated at length the particularly difficult issues that arise in relation to setting a proposed level for a percentage cap in personal injury matters. Out of an abundance of caution the Working Group recommends that a cap should be set at either 35% or 40%.

### Children and Individuals with Disabilities

116. Children and vulnerable persons who enter into agreements or are parties to legal action are the subject of protections from a range of sources under the Australian legal system.
117. The Working Group notes that the statutory disclosures and protections prescribed under the existing conditional costs regime and is satisfied of the appropriateness of allowing Percentage Based Contingency fee arrangements to be available to all users of legal services on a similar basis.

## **Should there be a limitation or ‘cap’ on the quantum of Percentage Based Contingency Fee agreements?**

### Caps/ limits vary in nature

118. In recommending that Percentage Based Contingency fee agreements should be constrained by cap in personal injury matters, the Working Group has carefully considered the effect of regimes as to caps and limits on contingency fee agreements in overseas jurisdictions.
119. Some jurisdictions impose caps based on the quantum of damages on a sliding scale basis, some limits apply in respect of certain types of damages, the stage at which proceedings in a matter settle or are determined and in some jurisdictions on the area of law involved- or a combination of variables such as sliding scale in a particular area of law. For example:
- the state of Alaska imposes a general limit requiring that contingent fees be calculated exclusive of punitive damages;<sup>79</sup>
  - in Colorado attorneys’ fees are limited in class actions litigation against public entities;<sup>80</sup>
  - in Connecticut in personal injury, wrongful death and property damage actions- there is a sliding scale that costs are not to exceed 1/3 of the first

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<sup>79</sup> Alaska Statute, Title 9 Article 60- Attorney’s fees ALASKA STAT. § 9.60.080 available at <http://www.legis.state.ak.us/basis/statutes.asp#09.60.080>

<sup>80</sup> Colorado Revised Statutes, Title 13, Article 17 Costs- attorneys fees COL. REV. STAT. §13-17-203 available at <http://www.lexisnexis.com/hottopics/colorado/>



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\$300,000; 25% of the next \$300,000; 20% of the next \$300,000; 15% of the next \$300,000; 10% of anything above \$1.2 million,<sup>81</sup>

- New Jersey limits attorney's contingent fee in tort actions to 33 1/3% of the first \$500,000, 25% of the next \$500,000; 20% of the next \$500,000, and a reasonable percentage approved by the court for any amount exceeding \$2 million. New Jersey also imposes a 25% cap for a pre-trial settlement on behalf of a minor or incompetent plaintiff.<sup>82</sup>
- England and Wales' Damages Based Agreements contain limitations based on the nature of the matter eg 35% in employment law matters and uncapped in higher value commercial matters (discussed in more detail below).

120. Setting caps that limit legal costs is regarded as a mechanism to safeguard against overcharging under contingency fee systems. Such protection may be of particular assistance to unsophisticated clients whose compensation may otherwise be significantly reduced as a result of the contingency fee payable upon a successful outcome.

121. However the Working Group is also aware from research studies on the operation of contingency fees in the United States, that capping can make it less likely lawyers can afford to risk bringing particular cases. The risk that a matter is uneconomical to litigate potentially provides wrongdoers/ liable parties with immunity for their actions and limits the scope of the potential increased access to justice that Percentage Based Contingency Fee agreements could otherwise offer.

122. The Working Group acknowledges that in every Australian jurisdiction, rigorous regulatory costs regime provisions apply to all legal practitioners- especially with relation to disclosure, compliance, complaint and costs assessment.

123. Further the Working Group notes that the UK's Civil Justice Council has acknowledged that the imposition of caps increases the number of cases that are 'dropped' and reduces the level of damages for which cases are settled,<sup>83</sup> neither of which is necessarily a desirable outcome in every case.

124. In a study undertaken by Tabarrok and Helland, it was concluded that there was a significantly larger rate of dropped cases in US states where there are capped contingency fees (18%), as compared against states with non-capped contingency fees (5%).<sup>84</sup>

125. A related concern that arises in relation to the imposition of a cap is that the prescribed maximum of the cap may become accepted as the *de facto* standard or default percentage to be applied thus weakening a client's ability to negotiate below the cap.

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<sup>81</sup> Connecticut General Statutes CONN. GEN. STAT. §52.251C available at [http://search.cga.state.ct.us/dtsearch\\_pub\\_statutes.html](http://search.cga.state.ct.us/dtsearch_pub_statutes.html)

<sup>82</sup> New Jersey Court Rule 1:21-7 s, N.J. Ct. R. § 1:21-7 available at <http://www.judiciary.state.nj.us/rules/r1-21.htm>

<sup>83</sup> See for example R Moorehead and P Hurst, 'Improving Access to Justice: Contingency Fees a study of their operation in the United States of America', (2008) *Civil Justice Council*, 19, <<https://www.lawassist.co.uk/client/pdf/Improving%20Access%20to%20Justice.pdf>

<sup>84</sup> A Tabarrok, and E Helland, *What Do We Know about Contingency Fees?* (Presentation to American Enterprises Institute, 22 September 2004), See also: <http://www.aei.org/press/two-cheers-for-contingent-fees-press/> Note: Study was based on medical malpractice cases and looked at 16 states; 8 states with capped contingency fees and 8 states with non-capped contingency fees

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126. It has also been recognised that capping could also have the effect of discouraging solicitors/law practices from thoroughly assessing the risks that arise in the particular circumstances of the case and negotiating commensurately (based on degree of risk, chances of success, resources that will be required and how much work and time is involved) with their client an appropriate level of contingency fee in the event of a successful outcome.
127. Further, caps impact on freedom of bargaining and are inappropriate in some cases or for some types of clients (such as for sophisticated users of legal services) or in relation to certain types of civil litigation (particularly in relation to commercial cases).
128. Further a downside of regulation that imposes caps is that it destroys the link between the percentage charged and the risk that the circumstances and merits of the case.

### United States of America

129. In the US, about half the states impose caps on the quantum of contingency fees that attorneys there can claim. The contingency fee amount agreed between a client and the solicitor is arguably seen as a reflection of market forces and the market price for legal services.
130. Research has established that in practice, the contingency fee ordinarily agreed upon is most frequently around 33%.<sup>85</sup> Fees in excess of 50% are rare and all contingency fee agreements are subject to judicial review for the general overarching requirement that fees must be reasonable.<sup>86</sup>
131. Although caps on the percentage basis of contingency fee agreements operate in some states, researchers on the operation of contingency fees in the United States<sup>87</sup> have observed the impact of the following regulatory mechanisms:

a) *Market forces.*

Market forces are seen to operate more effectively where the claimant bears the cost of the contingency fee out of the compensation. In the US, a percentage fee of 33% is common. The report however notes that it would be misleading to suggest that there is a market rate, given the lack of evidence that there is much competition between claimant lawyers.

b) *Prescribed percentages or caps.*

In the US, maximum percentages are imposed to limit the size of success fees chargeable on larger damages awards.

c) *Ex post facto control.*

Ex post facto control may occur through application to a judge on the basis that a success fee is unreasonable, and/or by cross-checking through a lodestar (hours x

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<sup>85</sup> R Moorehead and P Hurst, 'Improving Access to Justice: Contingency Fees a study of their operation in the United States of America' (2008) *Civil Justice Council*,

<<https://www.lawassist.co.uk/client/pdf/Improving%20Access%20to%20Justice.pdf>

<sup>86</sup> *Ibid*

<sup>87</sup> *Ibid*

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hourly rate) calculation. This method has the advantage of building some discretion into the system.<sup>88</sup>

### Ontario and Canadian Provinces

132. In Ontario, the Lieutenant Governor in Council is authorised to make regulations governing contingency fees, including prescribing a maximum percentage that can be charged as a contingency fee. However to date the Solicitors Act R.S.O.1990, c at S 15, sets no maximum percentage – effectively contingency fees under the Ontario model remaining an uncapped system.

133. Arguments in support of this position include that:

- the setting of a maximum percentage would place Ontario out of line with the majority of Canadian jurisdictions, which do not set maximum percentages;
- the setting of a maximum would lead to the relevant percentage subsequently becoming the minimum percentage applied by all; and
- safeguards against possible abuse of contingency fees already exist through professional ethical standards, including a solicitor's general duty, including:
  - to render a fair and reasonable account; and the ability for an account to be reviewed by the court or an assessment officer through a standard assessment process.

134. It is common practice for contingency fees to range between 20-45% of the amount received in the proceeding. The relevant percentage rate should reflect the difficulty of the matter, risks, the costs of bringing the action and the likelihood of success.

135. About half the other Canadian provinces impose caps in a one or more area of law - broadly speaking in the order of 10- 45% on contingency fee rates.

### England and Wales

136. The system of Damages Based Agreements was extended as of April 2013 and is subject to some limitations that attach to area of law in which the relevant matter arises. The caps proposed by the Civil Justice Council Working Party are as follows:

- Employment matters - 35%;
- Personal injury matters: 25% (on the basis that the contingency fee excludes unrecovered disbursements and any After The Event insurance premium);
- Commercial cases divide into three categories i) commercial; ii) consumer; and iii) micro enterprise:
  - i) commercial- no cap, on the basis that such matters are likely to involve sophisticated purchasers of legal services and the view that freedom of bargaining should not be inhibited;
  - ii) Commercial (Consumer) 50%; and
  - iii) Commercial (Micro enterprise (as defined)) 50%

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<sup>88</sup> *Ibid*, 23-24

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# Regulatory Controls

## History of Reforms

137. The preceding part of this Report considered the state of the law regarding contingency fees in Australia and overseas as well as arguments for and against their introduction.
138. The Working Group accepts that the case for contingency fees has been building slowly over several years in Australia and acknowledges that researchers and law reform agencies have also previously considered whether contingency fee costs agreements should be introduced into Australia.
139. In particular the Working Group notes that in 1989 the Council of the Law Institute of Victoria approved and adopted a policy for the introduction of contingency fees in Victoria.<sup>89</sup>
140. In 1992, in response to a review of arguments for and against proportionate fees, the Law Reform Commission of Victoria (as it was then) formed the view that the weight of the arguments favoured allowing the charging of fees on a contingency fee basis.<sup>90</sup> The Commission confirmed the position taken in an earlier discussion paper<sup>91</sup> to that inquiry in which the Commission concluded that the prohibition on charging proportionate fees should be lifted.
141. During the course of a broad 18 month examination of the civil justice system, the Victorian Law Reform Commission (as it had become) again endorsed the introduction of proportionate fees into Victoria when the issue was reconsidered in 2008.<sup>92</sup> As part of the empirical research the Commission conducted, it found that ‘the fees charged by law firms in many cases comprise a significantly higher percentage of the amount in issue than is likely to be the case where fees are capped at a specified proportion of the amount in dispute.’<sup>93</sup>
142. The Productivity Commission’s draft recommendation in 2014<sup>94</sup> calling for restrictions on damages based billing to be removed is a strong indicator that there may be a political appetite for law reform in this area. The terms of the Commission’s draft report and the draft recommendation are considered in greater detail below. Ultimately, the recommendations of the Productivity Commission’s Final Report will also bear on the proposed scheme for Percentage Based Contingency Fee agreements.

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<sup>89</sup> Law Institute of Victoria, *Funding Litigation; the Contingency Fee Option*, July 1989.

<sup>90</sup> Law Reform Commission of Victoria, *Access to the Law; Restrictions on Legal Practice*, Report No 47 (1992)

<sup>91</sup> Law Reform Commission of Victoria, *Access to the Law; Restrictions on Legal Practice*, Discussion Paper No 23(1991) 53.

<sup>92</sup> Victorian Law Reform Commission, *Civil Justice Review; Report 14*, 2008 particularly at Chapter 11 on Reducing the Cost of Litigation at 7.8.

<sup>93</sup> Victorian Law Reform Commission, *Civil Justice Review; Report 14*, 2008 particularly at Chapter 11 on Reducing the Cost of Litigation at 7.8.2.

<sup>94</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 available at [http://pc.gov.au/\\_data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/_data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf). Draft Recommendation 18.1 provides: *Australian governments should remove restrictions on damages- based billing subject to comprehensive disclosure requirements. The restrictions should be removed for most civil matters, with the prohibition on damages- based billing to remain for criminal and family matters, in line with restrictions for conditional billing.*

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143. The following part of the Report will focus on the regulatory control measures that the Working Group considers necessary and appropriate to the introduction of a scheme for Percentage Based Contingency Fee agreements in order to ensure consumers of legal services are adequately protected.

#### Resolving ambiguity

144. Much of the scholarly literature refers to *conditional costs agreements* and *contingency fee agreements* interchangeably- as though these terms denote the same thing or one type of agreement as a sub species or category of the other. The Working Group regards both *conditional costs agreement* and *contingency fee costs agreements* to be types of speculative fee agreements which operate on a *no win- no fee* basis.

145. The Productivity Commission recently made a similar observation:

*...conditional and contingent fees are sometimes confused in policy discussion due to jurisdictional differences and the fact that, under the broad definition of the word, they are both 'contingent' on the outcome of legal action...*<sup>95</sup>

146. In this report 'contingency fees' means costs agreements for legal fees that are:

- Payable if a client 'wins' or the client's matter is brought to a satisfactory (to the client) conclusion; and
- Calculated by reference to a proportion or percentage of a sum recovered.

147. The Working Group uses the expression Percentage Based Contingency Fee to further denote the essential nature of the agreement and to distinguish this proposed form of contingency fee agreement from others.

148. In this report a conditional costs agreement is one that is conditional on a successful outcome, but is not charged by reference to a proportion of the damages or settlement, with or without an uplift fee<sup>96</sup>.

#### Diversity of views

149. There is a diversity of views on contingency fees and they continue to be the subject of extensive heated debate. By far the greatest concern raised is that billing based on a percentage of the damages or settlement that is recovered, could intensify the conflict for lawyers that already exists in relation to conditional billing. A major concern is that personal injury claimants may end up paying legal fees from recovered funds intended for their future care costs.

150. In this regard the Productivity Commission's Draft Report into Access to Justice Arrangements observed:

*'...that linking fees to damages creates a more pronounced conflict for lawyers is based on a false delineation of the funds used to pay for legal action into 'damages' funds and other funds held by the litigant. Legal fees under any billing*

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<sup>95</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 at page 529 available at [http://pc.gov.au/data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

<sup>96</sup> *Conditional costs agreements* are dealt with in greater detail above in the Report.

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*agreement reduce the litigants overall financial gain from legal action and can be measured as a proportion of the amount recovered. Damages based agreements simply make this proportion explicit at the outset of the agreement. The Commission remains unconvinced that, compared to conditional billing, this is a distinguishing feature of damages based billing that leads to worse incentives for lawyers*

*Moreover, others contend that damages based billing aligns the incentives of the lawyer with their client more effectively than conditional billing. Under damages based billing the lawyer's fee is results based and does not increase with the hours worked. This creates an incentive for the lawyer to keep costs low in order to increase their payoff from the case...'<sup>97</sup>*

## Approach

151. Public policy and civil litigation frameworks give rise to different issues in relation to how contingency fee agreements function, depending on the jurisdictional context. For example the proliferation of contingency fees in the US is often criticised for generating frivolous litigation. However frivolous litigation is not as likely to occur in the Australian context for the following reasons:
1. The operation in Australia of the *costs follow the event* or *loser pays* rule applies in respect of most civil litigation but rarely applies in the US.
  2. It is counterintuitive that lawyers would risk being denied fees by pursuing weak cases under *no win no fee* costs agreements.
  3. The legal profession regulatory regime<sup>98</sup> prohibits a law practice from entering a conditional costs agreement where the legal practitioner or law practice does not have a reasonable belief that a successful outcome of the matter is reasonably likely. A similar requirement should apply to Percentage Based Contingency Fees agreements.
  4. In some jurisdictions, lawyers are required to certify their belief that a claim has reasonable prospects of success on the available evidence or face serious sanctions and personal costs ramifications if they commence or continue proceedings that fail that test.<sup>99</sup>
152. Other matters that may have an impact on the function of and the demand for contingency fee agreements include, for example, the availability of legal expenses insurance, subsidised health care, no- fault liability schemes and tort law reform initiatives.
153. The Working Group established earlier in this report that contingency fees are not inherently unethical or contrary to modern public policy. The potential for abuse appears to be at the heart of fears and concerns that are raised in literature. The challenge therefore becomes the need to develop regulatory responses that address the risks while preserving the potential improvement in access to justice that such agreements could bring.

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<sup>97</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 at page 531 available at [http://pc.gov.au/data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

<sup>98</sup> See the *legal profession legislation*<sup>98</sup> of the Australian Capital Territory at section 284(4)(a), Victoria at section 3.4.28(4)(a), Tasmania at section 308(4)(a) and Western Australia at section 284(4)(a). In South Australia the requirement is contained in the Australian Solicitors Conduct Rules 2011 at Rule 16C 3.6.

<sup>99</sup> See for example the *Legal Profession Act 2004* (NSW) at section 345, *Civil Law(Wrongs) Act 2002* (ACT) at section 188.

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## Capping Fees

154. The Working Group has accepted that the proposed regime for the Percentage Based Contingency Fee should not provide for capping - other than possibly in the area of personal injury law.
155. The Working Group is mindful of the outcomes of empirical studies that establish that capping appears to increase the number of cases that are dropped prior to completion and reduces the quantum of damages in those cases that are settled.<sup>100</sup>
156. The Working Group believes the downside of arbitrary capping is that it will weaken the link that relates the percentage to the risk and thus that can hamper competition and negotiation. This is particularly so if there is an expectation that legal service providers will be able and willing to compete with each other and also with litigation funders (who offer services in an uncapped and largely unregulated environment) potentially impeding clients' (particularly commercial clients') negotiations on costs. It is also likely that the cap becomes the default contingency fee even in litigation of a lesser risk.<sup>101</sup>
157. In terms of the need for capping the Draft Report of the Productivity Commission observed:

*'...there is some concern that if conditional and damages based fees were to coexist, lawyers would offer conditional agreements for low value claims and damages based agreements for high value claims (where they may receive a larger sum without corresponding increases in effort). Lawyers may have the ability to discriminate between methods due to consumers' imperfect information (chapter 6). A way to deter this is to impose percentage caps on a sliding scale as in California (box 18.1) or as recommended by the Taylor review in Scotland (2013). A sliding scale tapers the growth of the lawyer's portion to the settlement. While the lawyer's payment still increases, it does so at a progressively slower rate as certain thresholds are passed. This ensures that lawyer's fees for large claims are not out of proportion to their costs.'*<sup>102</sup>

158. The Working Group is divided on the need for a cap on Percentage Based Contingency Fees in personal injury matters, and, if a cap is to be applied, whether its level should be at 35% or 40%. The Working Group anticipates that Directors of the Law Council will determine what the recommendations should be in this regard.

## Fitting into the Australian regulatory framework

159. The Working Group recommends that as far as possible the regulatory scheme for Percentage Based Contingency Fee agreements should be consistent with the existing scheme for conditional costs agreements - and thus be subject to the full suite of disclosure, costs and compliance measures already in operation in the regulatory framework of every jurisdiction. The Working Group is committed to promoting

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<sup>100</sup> R Moorehead and P Hurst, 'Improving Access to Justice: Contingency Fees a study of their operation in the United States of America', (2008) *Civil Justice Council*, 19, <<https://www.lawassist.co.uk/client/pdf/Improving%20Access%20to%20Justice.pdf>

<sup>101</sup> See M Legg *Litigation nation- Revisiting contingency fees, litigation funding and class actions in Australia* (2012) 20 *Torts Law Journal* 61 at 64.

<sup>102</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 see Draft Recommendation 18.1 at page 532 available at [http://pc.gov.au/\\_data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/_data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

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consistency of regulatory approach and is satisfied that the conditional costs agreement regime operates efficiently.

160. In this regard, the Productivity Commission stated that:

*'...there is little controversy about the operation of conditional billing in Australia-stakeholders generally agree that it promotes access to justice. Conditional billing is also subject to 'regulatory requirements including; its use being limited to particular civil matters, a 25 per cent limit on the uplift fee. These regulations seem to provide an appropriate framework for consumer protection.'*<sup>103</sup>

### **Disclosure**

161. The Productivity Commission's Draft Recommendation 18.1 calls for restrictions on damages based billing to be removed subject to comprehensive disclosure requirements.<sup>104</sup>

162. It has been said that the key objective of costs disclosure is to ensure adequate consumer protection.<sup>105</sup>

163. Costs disclosure obligations can arise under from a number of sources.<sup>106</sup> The legal profession regulatory legislation<sup>107</sup> is however the main source of the costs disclosure obligations law practices must make. These include disclosure of the following matters:

- The basis upon which costs will be calculated, including whether a scale or fixed cost provisions (NSW & NT), practitioner remuneration orders (Vic) or costs determinations (WA) applies to any of the costs;
- The client's right to
  - Negotiate a costs agreement with the law practice;
  - Receive a bill from the law practice;
  - Request an itemised bill after receiving a lump sum bill;
  - Be notified of any substantial change to the matters required to be disclosed;
- If reasonably practicable, an estimate of the total legal costs, or otherwise a range of estimates and an explanation of the major variants that will affect their calculation;
- details of the intervals at which the client will be billed, if any;
- the rate of interest, if any, that the law practice charges on overdue unpaid legal costs;
- if the matter is litigious, an estimate of the range of costs that may be recovered if the client's matter is successful or that the client may be required to pay if the client's matter is unsuccessful;
- the client's right to progress reports;
- details of the person that the client may contact to discuss legal costs;

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<sup>103</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 see Draft Recommendation 18.1 at page 533 available at [http://pc.gov.au/\\_data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/_data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

<sup>104</sup> Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 at page 531 available at 531 [http://pc.gov.au/\\_data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/_data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

<sup>105</sup> J North, *Costs Disclosure and Review: A National Perspective* (2004) 27 UNSWLJ 243 at 246.

<sup>106</sup> See for example disclosure matters arising from the commencement of the *Access to Justice (civil Litigation Reforms) Amendment Act 2009* (Cth) and those of the *Civil Procedure Amendment Act 2012* (Vic)

<sup>107</sup> See the *legal profession legislation* of the ACT section 269; NSW section 309; NT section 303; Qld section 308; Tas section 291; Vic section 3.4.9; WA section 260.



- in the event of a dispute about the legal costs, the measures that are open to the client and their timeframes; for example taxation or costs assessment and the procedure for setting aside of costs agreements;
  - If a law practice plans to retain another law practice on behalf of the client, the first law practice must disclose to the client details of the matters mentioned at the first third and fourth dot points above in relation to the other law practice<sup>108</sup>.
164. The conditional costs regime of the legal profession legislation imposes the following further disclosure obligations. Conditional costs agreements must<sup>109</sup>
- be in writing in clear and plain language and signed by the client;
  - contain a statement that the client has been informed of the right to seek independent legal advice before entering the agreement;
  - though exceptions<sup>110</sup> are provided (for example, such as for sophisticated clients) a cooling off period of not less than five clear business days is prescribed during which the client may terminate the agreement by written notice; and
  - set out the circumstances that constitute the successful outcome of the matter<sup>111</sup>
165. As long as it is separately identified in the costs agreement, the legal profession legislation allows a conditional costs agreement to provide for the payment of a premium or uplift on costs that is otherwise payable under the agreement upon the successful outcome of the matter (save for NSW where the uplift is not allowed in relation to a claim for damages<sup>112</sup>).<sup>113</sup>
166. All costs agreements under the legal profession legislation require extensive disclosure to be made to the client about costs. However, where reasonably practicable, a conditional costs agreement must also contain an estimate of the uplift, or otherwise a range of estimates of the uplift fee and an explanation of the major variables that affect its calculation.<sup>114</sup>
167. Prior to entry into a conditional costs agreement a law practice must provide written disclosure to the client (other than sophisticated clients) of its estimated legal costs, the uplift fee and the reasons that the uplift fee is warranted.<sup>115</sup>
168. As observed above, the legislation of several jurisdictions prohibits a costs agreement from providing for an uplift fee where the law practice lacks the reasonable belief that a successful outcome of the matter is reasonably likely.<sup>116</sup>

<sup>108</sup> See the *legal profession legislation* of the ACT section 270; NSW section 310; NT section 304, 318(5); Qld section 309; Tas section 293; Vic section 3.4.10, 3.4.27(4A); WA section 261

<sup>109</sup> See the *legal profession legislation* of the ACT section 283(4), 283(5); NSW section 323(4a), 323(4b); NT section 318(4), 318(5); Qld section 323(4); Tas section 307(4); Vic section 3.4.27(4), 3.4.27(4A); WA section 283(4).

<sup>110</sup> See the *Legal Profession Act* of the ACT section 283(3)(c)-(e); NSW section 323 (3)(c)-(e); NT section 318(3)(c)-(e); Qld section 323(3)(C)-(e); Tas section 307(3)(c)-(e); Vic section 3.4.27(3)(c)-(e); WA section 283(3)(c)-(e)

<sup>111</sup> See the *legal profession legislation* of the ACT section 284(2); NSW section 324(3); NT section 319(2); Qld section 324(2); Tas section 308(2); Vic section 3.4.28(4); WA section 284(2).

<sup>112</sup> See *legal profession legislation* of NSW section 324(1)

<sup>113</sup> See the *legal profession legislation* of the ACT section 284(2); NSW section 324(2); NT section 319(1); Qld section 324(1); Tas section 308(1); Vic section 3.4.28(1); WA section 284(1).

<sup>114</sup> See the *Legal Profession Act 2006* (ACT) section 284(3); *Legal Profession Act 2004* (NSW) section 324(4); *Legal Profession Act 2006* (NT) section 319(3); *Legal profession Act 2007* (Qld) section 324(3); *Legal Profession Act 2007* (Tas) section 308(3); *Legal Profession Act 2003* (Vic) section 3.4.28(3); *Legal Profession Act 2008* (WA) section 284(3).

<sup>115</sup> See the *Legal Profession Act 2006* (ACT) section 274; *Legal Profession Act 2004* (NSW) section 314; *Legal Profession Act 2006* (NT) section 308; *Legal profession Act 2007* (Qld) section 313; *Legal Profession Act 2007* (Tas) section 297; *Legal Profession Act 2003* (Vic) section 3.4.14; *Legal Profession Act 2008* (WA) section 265.

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169. Conditional costs agreements may provide for disbursements to be payable irrespective of the outcome of the matter.<sup>117</sup>

#### Australian Legal Profession Regulation; Key features

170. A selection of the controls embedded in the legal profession regime that regulate lawyer - client costs are as follows. For instance, the legal profession legislation of every jurisdiction makes specific provision for the review, whether via taxation or assessment of lawyer client bills of costs. The client's statutory right to seek an independent review of a bill of costs<sup>118</sup> is matter that must be disclosed by his/her lawyer upon entering the costs agreement. Furthermore the legislation provides that the right to assessment cannot be contracted out of (other than by sophisticated clients).<sup>119</sup>

171. The client's right to seek a review of a bill of costs is supplementary to the common law principle that Courts retain jurisdiction to set aside or modify costs agreements that lack fairness and reasonableness.<sup>120</sup> The concepts of fairness and reasonableness are in this context determined having regard to a number of factors.<sup>121</sup>

172. Where a costs agreement is determined (by the Court or costs assessor) to be not fair or reasonable, the legal profession legislation (other than in SA) directs the Court or (or in Victoria the costs assessor) to determine the fair and reasonable legal costs in relation to the work to which the agreement relates.

173. In Tasmania and Western Australia fair and reasonable costs are in those circumstances determined by reference to an applicable scale or remuneration order, in Queensland the court may apply an applicable scale of costs for this purpose.<sup>122</sup>

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<sup>116</sup> See the *Legal Profession Act 2006* (ACT) section 284(4)(a); *Legal Profession Act 2007* (Tas) section 308(4)(a); *Legal Profession Act 2003* (Vic) section 3.4.28(4)(a); *Legal Profession Act 2008* (WA) section 284(4)(a).

<sup>117</sup> See the *Legal Profession Act 2006* (ACT) section 283(3)(b); *Legal Profession Act 2004* (NSW) section 323(3)(b); *Legal Profession Act 2006* (NT) section 318(3)(b); *Legal profession Act 2007* (Qld) section 323(3)(b); *Legal Profession Act 2007* (Tas) section 307(3)(b); *Legal Profession Act 2003* (Vic) section 3.4.27(3)(b); *Legal Profession Act 2008* (WA) section 283(3)(b).

<sup>118</sup> See the *Legal Profession Act 2006* (ACT) section 304(1) to Sup Court; *Legal Profession Act 2004* (NSW) section 350(1); *Legal Profession Act 2006* (NT) section 332(1); *Legal profession Act 2007* (Qld) section 335(1) see also the relevant Rules of the UCPR at rule 743A ad743E; *Legal Profession Act 2007* (Tas) section 319(1); *Legal Profession Act 2003* (Vic) section 3.4.38(1); *Legal Profession Act 2008* (WA) section 295(2).

<sup>119</sup> *Legal Profession Act 2006* (ACT) section 288(3); *Legal Profession Act 2004* (NSW) section 328(2); *Legal Profession Act 2006* (NT) section 304 A; *Legal profession Act 2007* (Qld) section 344; *Legal Profession Act 2007* (Tas) section 338; *Legal Profession Act 2003* (Vic) section 3.4.48 A; *Legal Profession Act 2008* (WA) section 309. NOTE: in SA the factors relevant to determining the fairness and reasonableness of costs agreements are contained in the SA Professional Rules

<sup>120</sup> NOTE: the legislation deviates from the common law in that only in the ACT, Qld, SA, and WA is the jurisdiction vested in the Court. In Vic jurisdiction vests in the Victorian Civil Administrative Tribunal and elsewhere in costs assessors. See *Legal Profession Act 2006* (ACT) section 288(1); *Legal Profession Act 2004* (NSW) section 328(1); 328 (1A); *Legal Profession Act 2006* (NT) section 323(1); *Legal profession Act 2007* (Qld) section 328 (1); *Legal Profession Act 2007* (Tas) section 312 (1); *Legal Profession Act 2003* (Vic) section 3.4.32 (1); *Legal Profession Act 2008* (WA) section 288(1)

<sup>121</sup> *Legal Profession Act 2006* (ACT) section 288(3); *Legal Profession Act 2004* (NSW) section 328(2); *Legal Profession Act 2006* (NT) section 323(2); *Legal profession Act 2007* (Qld) section 328 (2); *Legal Profession Act 2007* (Tas) section 312 (2); *Legal Profession Act 2003* (Vic) section 3.4.32 (2); *Legal Profession Act 2008* (WA) section 288(3). NOTE: in SA the factors relevant to determining the fairness and reasonableness of costs agreements are contained I the SA Professional Rules.

<sup>122</sup> *Legal profession Act 2007* (Qld) section 328 (5)(a)

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174. Other than in South Australia, the legal profession legislation requires a costs assessor (or the Costs Court in Vic) which, in the course of assessment considers that the costs the law practice has charged are grossly excessive, or that another matter is raised that may amount to misconduct on the part of the lawyer, to refer the matter for consideration as to where disciplinary action should be taken.<sup>123</sup>

175. Legal professional disciplinary structures and processes vary across the Australian jurisdictions. However, any breach of the legal profession regulatory regime<sup>124</sup> is conduct capable of constituting unsatisfactory professional conduct or the more serious finding of professional misconduct. Such a finding allows a range of sanctions to be imposed. The sanctions available vary in severity from a caution to being struck off the roll of practitioners and imprisonment. Available sanctions include, for example:

- Removing the practitioner's name from the roll of practitioners<sup>125</sup>;
- Suspending, cancelling, or imposing condition upon the practitioner's practising certificate<sup>126</sup>
- Cautioning or issuing a reprimand to the practitioner<sup>127</sup>
- Fining the practitioner- maximum fine ranging \$10,000 to \$100,000<sup>128</sup>
- Imprisonment.<sup>129</sup>

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<sup>123</sup> *Legal Profession Act 2006* (ACT) sections 303(1), 303(2); *Legal Profession Act 2004* (NSW) sections 393(1), 393(2); *Legal Profession Act 2006* (NT) sections 370(1), 370(2); *Legal profession Act 2007* (Qld) sections 343(3), 343(2): a costs assessor that reduces the legal costs payable by 15% or more may refer the matter for disciplinary action; *Legal Profession Act 2007* (Tas) sections 332(1), 332(2); *Legal Profession Act 2003* (Vic) sections 3.4.46(1), 3.4.46(2) A; *Legal Profession Act 2008* (WA) sections 307(1), 307(2).

<sup>124</sup> Including a breach of the Australian Solicitor's Conduct Rules 2012 or their counterpart equivalent in all jurisdictions.

<sup>125</sup> *Legal Profession Act 2004* (NSW) ss 565(3), 588(2); *Legal Profession Act 2007* (Qld) ss 461(3), 484(2); *Legal Practitioners Act 1981* (SA) ss 89(2)(d), 90AF(6); *Legal Profession Act 2007* (Tas) ss 480(3), 508(2); *Legal Profession Act 2004* (Vic) s 4.4.37(2); *Legal Profession Act 2008* (WA) ss 444(2)(b), 463(2); *Legal Profession Act 2006* (ACT) ss 431(3)(b), 460(2); *Legal Profession Act 2006* (NT) ss 528(3), 552(2).

<sup>126</sup> *Legal Profession Act 2004* (NSW) ss 540(2)(d), 562(2)(b)–(d), 562(3)(b)–(d), 562(4)(j); *Legal Profession Act 2007* (Qld) ss 456(2)(b)–(d), 456(3)(b)–(d), 456(4)(j); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(d), 82(6)(a)(iii)–(iv), 89(2)(b)–(c), 89A(c)–(d); *Legal Profession Act 2007* (Tas) ss 471(b)–(d), 472(b)–(d), 473(n); *Legal Profession Act 2004* (Vic) ss 4.4.17(b)–(d), 4.4.18(b)–(d), 4.4.19(j); *Legal Profession Act 2008* (WA) ss 439(a)–(c), 440(b)–(d), 441(m); *Legal Profession Act 2006* (ACT) ss 425(3)(b)–(d), 425(4)(b)–(d), 425(5)(i); *Legal Profession Act 2006* (NT) ss 525(3)(b)–(d), 525(4)(b)–(d), 525(5)(i).

<sup>127</sup> *Legal Profession Act 2004* (NSW) ss 540(2)(a)–(b), 545(1)(f), 562(2)(e); *Legal Profession Act 2007* (Qld) ss 456(2)(e), 458(2)(a); *Legal Practitioners Act 1981* (SA) ss 77AB(1)(c), 82(6)(a)(i), 89(2)(a); *Legal Profession Act 2007* (Tas) ss 454(2)(a), 456(7)(a), 471(e), 476; *Legal Profession Act 2004* (Vic) s 4.4.19(k); *Legal Profession Act 2008* (WA) ss 426(2)(a), 439(d); *Legal Profession Act 2006* (ACT) ss 413(2)(a)–(b), 425(3)(e), 429(c); *Legal Profession Act 2006* (NT) ss 499(2)(a), 525(3)(e).

<sup>128</sup> *Legal Profession Act 2004* (NSW) ss 562(4)(a), 562(7); *Legal Profession Act 2007* (Qld) ss 456(4)(a), 458(2)(b); *Legal Practitioners Act 1981* (SA) ss 82(6)(a)(ii), 82(6)(b)–(c); *Legal Profession Act 2007* (Tas) ss 454(2)(b), 473(a); *Legal Profession Act 2004* (Vic) s 4.4.19(b); *Legal Profession Act 2008* (WA) ss 426(2)(b), 441(a); *Legal Profession Act 2006* (ACT) ss 413(2)(e), 413(3), 425(5)(a), 427; *Legal Profession Act 2006* (NT) ss 499(2)(b), 499(3), 525(5)(a).

<sup>129</sup> *Legal Profession Act 2004* (NSW) ss 5(1)(h), 643, 675; *Legal Profession Act 2007* (Qld) ss 25(1)(2); 74(1), 115(2), 121(1)(a), 121(2)(a), 354(1)(b); *Legal Practitioners Act 1981* (SA) ss 76(4), 76(4B), 77A(4); *Legal Profession Act 2007* (Tas) ss 13(1), 551, 585; *Legal Profession Act 2004* (Vic) s 2.2.2(1), 3.3.21(1), 5.5.15; *Legal Profession Act 2008* (WA) ss 502; *Legal Profession Act 2006* (NT) ss 150, 166, 600.

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## Conclusion

### Features of the Percentage Based Contingency Fee scheme

176. The Working Group notes the work being undertaken by the Productivity Commission as part of its enquiry into Access to Justice Arrangements and notes that amendments to the South Australian legal profession regulatory legislation are proposed. Pending assessment of the Productivity Commission's final recommendations, the Working Group endorses the following key features of a scheme for Percentage Based Contingency Fees:

- Lawyers should be entitled to enter into Percentage Based Contingency Fee agreements with clients whose claims sound in damages, subject to the principles and exceptions identified below;
- Percentage Based Contingency Fee agreements should provide for the amount of the lawyer's *Professional costs* to be calculated by reference to a fixed percentage of the damages award, including any award of costs;
- The fixed percentage of damages claimable by lawyers as *professional costs* under Percentage Based Contingency Fee agreements should not be capped except in personal injury matters;
- Professional costs should include solicitor's and counsel's fees that become payable only when the lump sum is payable - that is, only upon "success" in the matter;
- The *lump sum* is the pool of funds (comprising amounts awarded or recovered, interest and costs payable from other parties) upon which the lawyer's professional fee is calculated under a Percentage Based Contingency Fee agreement. The *lump sum* amounts are payable whether the matter concludes by way of compromise, judgment, arbitration or decision as between the parties of any other nature and which are:
  - amounts in the nature of damages and compensation, together with interest, and
  - amounts for costs<sup>130</sup> including disbursements, (whether or not such are included within the sum payable or are expressed as being in addition thereto). For example, where the court makes an award for costs against an unsuccessful litigant, the amount of the award also forms part of the pool of funds upon which the lawyer for the successful litigant calculates his or her fee under a Percentage Based Contingency Fee agreement.
  - However, the *lump sum* does not include amounts that the client must repay or credit to an insurer, Centrelink, Medicare or to any other entity pursuant to statute.

### Terms of Reference; Summary of Responses

The Working Group provides Directors with the following responses to the Terms of Reference:

- 1. *Whether the laws in Australia should be amended to permit the charging of fees by legal practitioners, the amount of which is determined by reference to the***

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<sup>130</sup> The term *costs* refers to the amount paid for legal services. In Australia, the *cost indemnity rule* operates in most civil litigation meaning that an unsuccessful litigant may be liable to pay the professional legal costs and expenses incurred by the successful litigant. Costs of this kind are referred to as *part and party costs* and they usually include disbursements.

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***amount of damages awarded or agreed to be paid, whether by determination by a Court or other body or by agreement between the parties (contingency fees);***

The Working Group responds that the laws of Australia should be amended to permit lawyers to charge fees by reference to the amount of damages awarded or agreed to be paid under a scheme for Percentage Based Contingency Fee agreements.

**2. *If so in which areas of the law should contingency fees not be permitted;***

The Working Group agrees that the regulation of Percentage Based Contingency Fees should align and be consistent with the regulatory regime of conditional costs agreements, including with regards the areas of law that are prohibited.

Thus the Working Group recommends that Percentage Based Contingency Fee should not be available in family law, criminal law and migration law matters as well as other areas that are excluded under conditional costs agreements.<sup>131</sup>

**3. *Should the laws as amended, provide for a “cap” or limit on the contingency fees so recoverable and the quantity of any such “cap” or limit;***

The Working Group notes the preliminary views of the Productivity Commission in this regard, and the Commission views on capping on a sliding scale. The Working Group awaits the Commission’s final recommendations in this regard.

The Working Group recommends that the scheme for Percentage Based Contingency Fee agreements should cap fees at 35% or 40% in personal injury matters only.

**4. *How should the following elements be addressed: disbursements, refunds, party/party costs and disclosure requirements; and***

*Disbursements*<sup>132</sup>

The Working Group recommends that under Percentage Based Contingency Fee agreements, the lawyers will advance the cost of disbursements as part of the contingency for reimbursement from the gross recovery but acknowledges that in some cases the agreement may provide for the client or some other entity to fund the disbursements.

Where an amount is recovered for disbursements from an opposing litigant, whether by award, agreement or otherwise, those funds will form part of the pool of funds (known as the *lump sum*) upon which the Percentage Based Contingency Fee is calculated.

The *lump sum* (which is the pool of funds upon which the Percentage Based Contingency Fee is calculated) includes any amount payable as between the parties by way of the client’s legal costs including disbursements- whether an amount for disbursements is included in the sum payable or an amount for disbursements is expressed as being in addition to the costs so recovered.

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<sup>131</sup> In addition to family law, criminal law and migration law matters, the *Legal Profession Act 2009 (WA)* at section 283(2) also prohibits conditional costs agreements in matters involving proceedings that relate to child protection, custody, guardianship or adoption; *Children and Community Services Act 2004 (WA)*; *Child Support Assessment Act 1989 (Cth)*.

<sup>132</sup> See Glossary of terms above. For purposes of this report the *disbursements* are taken to mean those costs properly incurred that are paid or to be paid to parties (not otherwise related to the contingency fee agreement) in relation to a contentious matter eg court fees, experts reports

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### *Refunds*

The Working Group recommends that amounts the client must refund repay or credit to insurers, Centrelink, Medicare or any other entities pursuant to statute **will not** form part of the pool of funds (known as the *lump sum*) upon which the Percentage Based Contingency Fee is calculated.

### *Party and party costs*

Party/party costs will be included as part of the *lump sum* used to calculate the relevant percentage. This is necessary for consistency, as many matters are resolved on an 'inclusive' of costs basis.

### *Disclosure*

The Working Group notes that the Productivity Commission's Draft Recommendation 18.1 refers to removing restrictions on damages based billing subject to *comprehensive disclosure requirements*.

The Working Group has reviewing the existing disclosure requirements of the regulatory legislation as well as the enhanced disclosure requirements of the conditional costs regime.

The Working Group recommends that the scheme for Percentage Based Contingency Fees should build on the safeguards and protections of the conditional costs agreement regime including the enhanced disclosure requirements of that regime (subject to the final recommendations of the Productivity Commission (if any) for further costs disclosure requirements that might constitute *comprehensive disclosure*).

## **5. How should the entitlements to costs of barristers and solicitors respectively be addressed in the context of a contingency fee agreement;**

While technically fused, the legal profession in all jurisdictions tends to operate on a divided basis particularly in respect of advice work in certain specialist areas and appearance work before superior courts. Accordingly the question often arises, as to whether barristers' fees should be treated in the same way as other disbursements in the litigation or as a separately funded item.

The Working Group recommends that the Percentage Based Contingency Fee should cover the *professional costs* of all the lawyers involved in the matter- both solicitor's and counsel's fees.

If more than one lawyer or law practice is involved in the matter, it is expected that the lawyers will determine their respective entitlements under the Percentage Based Contingency Fee between themselves. Where they are unable to reach agreement, the lawyers may apply to the court to determine their respective entitlements.

As a general rule, barristers briefed by lawyers subject to conditional fee agreements, will agree to also undertake the work on a 'speculative' basis.

In choosing to offer a Percentage Based Contingency Fee agreement, a lawyer will consider whether or not the lawyer has relationships with capable counsel with whom the lawyer can strike a fair deal on the percentage. Alternatively, the lawyer may decide that the case justifies the usual fee of the barrister, and counsel's usual fee will be paid from the amount calculated for professional costs pursuant to the agreement. Many cases will be finalised without counsel, particularly if a settlement is achieved at an earlier stage.

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**6. The relationship between any laws as might be recommended and any existing laws relating to “uplift fees”;**

The Working Group recognises and emphasises the desirability that regulation of lawyers’ billing practices should be coherent and consistent wherever possible. In this regard, the Working Group acknowledges the successful operation of conditional costs agreements and if introduced would seek to achieve similar results and benefits from Percentage Based Contingency Fee agreements.<sup>133</sup>

The Working Group thus recommends that the scheme for Percentage Based Contingency Fee agreements should be aligned with and consistent to the fullest extent possible with the regulatory arrangements in place for conditional costs agreements.

The Working Group acknowledges that Percentage Based Contingency Fee agreements will be subject to the statutory restrictions on costs contained in relevant civil claims, motor vehicle and workers compensation legislation.

**7. The amendments necessary to existing laws to permit the introduction of laws in Australia to permit the charging of contingency fees.**

The Working Group has considered the existing regulatory requirements of the conditional costs agreement regime and also the Productivity Commission’s Draft Recommendation 18.1 which calls on Australian governments to remove restrictions on damages based billing.

The Working Group recommends that:

1. the specific prohibitions against a law practice from entering into a contingency fee costs agreement contained in the *legal profession legislation*<sup>134</sup> and the *Legal Practitioners Act 1981 (SA)*<sup>135</sup> should be amended; and
2. specific provisions allowing Percentage Based Contingency Fee agreements should be introduced to operate:
  - a. as an exception to the laws prohibiting contingency fee agreements; and
  - b. subject to a regulatory regime that imposes similar requirements to the requirements that regulate conditional costs agreements with uplift fees, including those for disclosure and compliance obligations.

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<sup>133</sup> A similar observation is made by the Productivity Commission in Australian Government, *Access to Justice Arrangements; Productivity Commission Draft Report*, April 2014 at page 533 available at [http://pc.gov.au/data/assets/pdf\\_file/0003/135336/access-justice-draft-overviews.pdf](http://pc.gov.au/data/assets/pdf_file/0003/135336/access-justice-draft-overviews.pdf)

<sup>134</sup> That is agreements under which the amount payable to the law practice is calculated by reference any part of the award or settlement or the value of property that may be recovered in any proceedings to which the agreement relates- see *Legal Profession Act 2004 (NSW)* section 325; *Legal Profession Act 2007 (Qld)* section 325; *Legal Practitioners Act 1981 (SA)* ss 89(2)(d), 90AF(6); *Legal Profession Act 2007 (Tas)* section 309; *Legal Profession Act 2004 (Vic)* s 4.4.29; *Legal Profession Act 2008 (WA)* section 285; *Legal Profession Act 2006 (ACT)* section 285; *Legal Profession Act 2006 (NT)* section 320.

<sup>135</sup> In South Australia the relevant provisions are contained in the *Legal Practitioners Act 1982 (SA)* at section 16C and the South Australia’s *Australian Solicitors conduct Rules (SA)*.





## Attachment A: - State and Territory legislation; Provisions relating to Uplift Fee and Contingency Fee Agreements

<b>Australian Capital Territory (ACT)</b>	
<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the uplift fee (including an estimate of the fee or a range of estimates of the uplift fee);</li> <li>• reasons why the uplift fee is justified;</li> <li>• the client's right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>1</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>2</sup></p> <p>Criminal proceedings or proceedings under the <i>Family Law Act 1975</i> (Cth) cannot be the subject of a conditional costs agreement.</p>
<b>Uplift fee cap / limitation</b>	<p>For a litigious matter, the costs agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely and the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.<sup>3</sup></p>
<b>Personal injury provisions</b>	<p>Under the <i>Civil Law (Wrongs) Act 2002</i> (ACT), the maximum costs allowable for legal services, in claims of \$50,000 or less is the greater of:</p> <ol style="list-style-type: none"> <li>a) the relevant percentage (20%) of the amount sought to be recovered by the plaintiff; and</li> <li>b) the relevant amount (\$10,000).<sup>4</sup></li> </ol> <p>The Court retains discretion to allow additional costs if appropriate given the complexity of the claim or the behaviour of one or more of the parties to the claim.<sup>5</sup></p>
<b>Contingency Fee Agreements</b>	<p>Contingency fees are prohibited under section 285 of the <i>Legal Profession Act 2006</i> (ACT).</p>

<sup>1</sup> Section 283(3), *Legal Profession Act 2006* (ACT)

<sup>2</sup> Sections 274 and 284, *Legal Profession Act 2006* (ACT)

<sup>3</sup> Section 284(4), *Legal Profession Act 2006* (ACT)

<sup>4</sup> Section 181, *Civil Law (Wrongs) Act 2002* (ACT)

<sup>5</sup> Section 184, *Civil Law (Wrongs) Act 2002* (ACT)

### New South Wales (NSW)

<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the law practice’s legal costs;</li> <li>• the uplift fee (including the basis of calculation, an estimate or range of estimates of the uplift fee and an explanation of the major variables that will affect calculation of the uplift fee);</li> <li>• reasons warranting the uplift fee;</li> <li>• the client’s right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>6</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>7</sup></p> <p>Criminal proceedings or proceedings under the <i>Family Law Act 1975</i> (Cth) cannot be the subject of a conditional costs agreement.</p>
<b>Uplift fee cap / limitation</b>	<p>If a conditional costs agreement relates to a litigious matter, the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.<sup>8</sup></p>
<b>Personal injury provisions</b>	<p>Under the <i>Legal Profession Act 2004</i> (NSW), for personal injury claims up to \$100,000, the maximum costs for legal services are as follows:</p> <ul style="list-style-type: none"> <li>• In the case of legal services provided to a plaintiff – maximum costs are fixed at 20% of the amount recovered or \$10,000, whichever is greater,</li> <li>• In the cases of legal services provided to a defendant – maximum costs are fixed at 20% of the amount sought to be recovered by the plaintiff or \$10,000, whichever is greater.<sup>9</sup></li> </ul> <p>The maximum costs however do not affect solicitor-client costs under a costs agreement, provided such a costs agreement complies with the prescribed legislative requirements.<sup>10</sup> The law practice is subject to additional requirements</p>

<sup>6</sup> Section 323(3), *Legal Profession Act 2004* (NSW)

<sup>7</sup> Sections 314 and 324, *Legal Profession Act 2004* (NSW)

<sup>8</sup> Section 324(5), *Legal Profession Act 2004* (NSW)

<sup>9</sup> Section 338, *Legal Profession Act 2004* (NSW)

	<p>to disclose to the client, the exclusion of maximum costs and how costs will be calculated under the costs agreement.<sup>11</sup> Further limitations are also outlined in Section 26U of the <i>Civil Liability Act 2002</i> (NSW), which provides that the maximum costs for legal services provided to the plaintiff in connection with a victim claim<sup>12</sup> that is eligible to be satisfied from a victim trust fund are as follows:</p> <ul style="list-style-type: none"> <li>• if the amount recovered on the claim exceeds \$100,000 but does not exceed \$250,000 – maximum costs are fixed at 18% of the amount recovered or \$20,000, whichever is greater;</li> <li>• if the amount recovered on the claim exceeds \$250,000 but does not exceed \$500,000 – maximum costs are fixed at 16% of the amount recovered or \$45,000, whichever is greater;</li> <li>• if the amount recovered on the claim exceeds \$500,000 - maximum costs are fixed at 15% of the amount recovered or \$80,000, whichever is greater.</li> </ul>
<p><b>Contingency Fee Agreements</b></p>	<p>Contingency fees are prohibited under section 325 of the <i>Legal Profession Act 2004</i> (NSW).</p>

<sup>10</sup> Section 339, *Legal Profession Act 2004* (NSW)

<sup>11</sup> Regulation 116, *Legal Profession Regulations 2005* (NSW)

<sup>12</sup> Under section 26K of the *Civil Liability Act 2002* (NSW):

"victim claim" means a claim for personal injury damages in respect of:

- (a) an injury to a person caused by conduct of an offender that, on the balance of probabilities, constitutes an offence, or
- (b) the death of a person caused by or resulting from an injury to the person caused by conduct of an offender that, on the balance of probabilities, constitutes an offence.

## Northern Territory (NT)

<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the law practice’s legal costs;</li> <li>• the uplift fee (including the basis for calculation and an estimate or range of estimates of the uplift fee);</li> <li>• reasons warranting the uplift fee;</li> <li>• client’s right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>13</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>14</sup></p> <p>A matter that involves criminal proceedings, proceedings under the <i>Family Law Act 1975</i> (Cth) or proceedings prescribed by the regulations<sup>15</sup> cannot be the subject of a costs agreement.<sup>16</sup></p>
<b>Uplift fee cap / limitation</b>	<p>A conditional costs agreement relating to a litigious matter must not exceed the percentage prescribed by the regulations of the legal costs, excluding disbursements otherwise payable.<sup>17</sup></p>
<b>Personal injury provisions</b>	N/A
<b>Contingency Fee Agreements</b>	<p>Contingency fees are prohibited under section 320 of the <i>Legal Profession Act</i> (NT).</p>

<sup>13</sup> Sections 318(3), *Legal Profession Act* (NT)

<sup>14</sup> Sections 308 and 319, *Legal Profession Act* (NT)

<sup>15</sup> s80F, *Legal Profession Regulations 2008* (NT) states:

‘For section 318(2)(c) of the Act, proceedings under the following Acts are prescribed:

- (a) Adoption of Children Act;
- (b) Community Welfare Act;
- (c) Crimes (Victims Assistance) Act (repealed);
- (d) Victims of Crime Assistance Act.’

<sup>16</sup> Sections 318(2), *Legal Profession Act* (NT)

<sup>17</sup> Section 319 (4), *Legal Profession Act* (NT)

The Regulations do not appear to provide a percentage maximum for legal costs that can be claimed in a costs agreement relating to a litigious matter.

**Queensland (QLD)**

<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the law practice’s legal costs;</li> <li>• the uplift fee (including the basis for calculation and an estimate or range of estimates of the uplift fee);</li> <li>• reasons warranting the uplift fee;</li> <li>• the client’s right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>18</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>19</sup></p> <p>Criminal proceedings or proceedings under the <i>Family Law Act 1975</i> (Cth) cannot be the subject of a costs agreement.<sup>20</sup></p>
<b>Uplift fee cap / limitation</b>	<p>A conditional costs agreement relating to a litigious matter must not exceed 25% of the legal costs, excluding disbursements otherwise payable.<sup>21</sup></p>
<b>Personal injury provisions</b>	<p>Subject to sections 345-347 of the <i>Legal Profession Act 2007</i> (Qld), speculative personal injury matters are subject to a cap, known as the 50/50 rule.</p> <p>Application of the rule has been describe as follows by the Queensland Legal Services Commissioner:</p> <p><i>The Rule, in brief, is that a law practice is entitled to charge a client in a speculative personal injury matter no more than half the amount to which the client is entitled under a judgement or settlement after deducting any refunds the client is required to pay and the total amount of disbursements for which the client is liable.</i><sup>22</sup></p>
<b>Contingency Fee Agreements</b>	<p>Contingency fees are prohibited under section 325 of the <i>Legal Profession Act 2007</i> (QLD).</p>

<sup>18</sup> Section 323(3), *Legal Profession Act 2007* (QLD)

<sup>19</sup> Sections 313 and 324, *Legal Profession Act 2007* (QLD)

<sup>20</sup> Section 323(2), *Legal Profession Act 2007* (QLD)

<sup>21</sup> Section 324(4), *Legal Profession Act 2007* (QLD)

Note that s324(5) provides that the Act does not affect the right of a law practice to discount its fees, so that the legal costs referred to in s324(4) are the law practice’s un-discounted fees.

<sup>22</sup> Queensland Legal Services Commissioner, ‘Guidelines for Charging Fees in Speculative Personal Injury Matters’, 23 May 2008, <[http://www.lsc.qld.gov.au/data/assets/pdf\\_file/0004/97798/guidelines-for-charging-fees-in-speculative-personal-injury-matters.pdf](http://www.lsc.qld.gov.au/data/assets/pdf_file/0004/97798/guidelines-for-charging-fees-in-speculative-personal-injury-matters.pdf)>

**South Australia (SA)**

<b>Conditional costs agreements</b>	A legal practitioner may make an agreement providing for payment of a contingency fee to be calculated on a basis set out in the agreement, on fulfilment of a condition stated in the agreement (i.e. a conditional costs agreement with an uplift fee). <sup>23</sup> Criminal and matrimonial matters cannot be the subject of a complying contingency costs agreement. <sup>24</sup>
<b>Uplift fee cap / limitation</b>	A complying contingency costs agreement can provide for a solicitor-client fee which constitutes up to double the fees to which the firm or practitioner would otherwise be entitled if fees were charged according to the current scale contained in the rules to the Supreme Court. <sup>25</sup> A contingency costs agreement is also subject to the broader condition that fees charged must be fair and reasonable, which will be assessed on the basis of a number of factors including: the nature and urgency of the matter, the jurisdiction involved, the nature of the client and whether the client has received independence advice about the fees or agreement. <sup>26</sup>
<b>Personal injury provisions</b>	N/A
<b>Contingency Fee Agreements</b>	A practitioner or firm of practitioners is prohibited from entering into a contingency agreement, described as a 'costs agreement under which the amount payable, or any part of the amount payable, to the practitioner or firm of practitioners is calculated by reference to a percentage of any judgment, settlement or monetary sum to be recovered by the client.' <sup>27</sup>

<sup>23</sup> Section 42, *Legal Practitioners Act 1981 (SA)*

<sup>24</sup> Rule 16C.3.1, *Australian Solicitors' Conduct Rules (SA)*

<sup>25</sup> Rule 16C.2.9, *Australian Solicitors' Conduct Rules (SA)*

<sup>26</sup> Rule 16C.2, *Australian Solicitors' Conduct Rules (SA)*

<sup>27</sup> Rule 16C.1, *Australian Solicitors' Conduct Rules (SA)*

## Tasmania (TAS)

<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the law practice’s legal costs;</li> <li>• the uplift fee (including the basis for calculation and an estimate or range of estimates of the uplift fee);</li> <li>• reasons warranting the uplift fee.</li> <li>• the client’s right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>28</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>29</sup></p> <p>A matter that involves criminal proceedings or proceedings under the <i>Adoption Act 1988, Children, Young Persons and Their Families Act 1997, Youth Justice Act 1997 or Relationships Act 2003</i> or under the <i>Family Law Act 1975 (Cth)</i> cannot be the subject of a costs agreement.<sup>30</sup></p>
<b>Uplift fee cap / limitation</b>	<p>For a litigious matter, the costs agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely and the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.<sup>31</sup></p>
<b>Personal injury provisions</b>	N/A
<b>Contingency Fee Agreements</b>	<p>Contingency fees are prohibited under section 309 of the <i>Legal Profession Act 2007 (TAS)</i>.</p>

<sup>28</sup> Section 307(3), *Legal Profession Act 2007 (TAS)*

<sup>29</sup> Sections 297 and 308, *Legal Profession Act 2007 (TAS)*

<sup>30</sup> Section 307(2), *Legal Profession Act 2007 (TAS)*

<sup>31</sup> Section 308(4), *Legal Profession Act 2007 (TAS)*

**Victoria (VIC)**

<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the law practice’s legal costs;</li> <li>• the uplift fee (including the basis for calculation and an estimate or range of estimates of the uplift fee and an explanation of the major variables that will affect calculation of the uplift fee);</li> <li>• reasons warranting the uplift fee.</li> <li>• the client’s right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>32</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>33</sup></p> <p>Criminal proceedings or proceedings under the <i>Family Law Act 1975</i> (Cth) cannot be the subject of a costs agreement.<sup>34</sup></p>
<b>Uplift fee cap / limitation</b>	<p>For a litigious matter, the costs agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely and the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.<sup>35</sup></p>
<b>Personal injury provisions</b>	N/A
<b>Contingency Fee Agreements</b>	Contingency fees are prohibited under section 3.4.29 of the <i>Legal Profession Act 2004</i> (VIC).

<sup>32</sup> Section 3.4.27, *Legal Profession Act 2004* (VIC)

<sup>33</sup> Sections 3.4.14 and 3.4.28, *Legal Profession Act 2004* (VIC)

<sup>34</sup> Section 3.4.27(2), *Legal Profession Act 2004* (VIC)

<sup>35</sup> Section 3.4.28, *Legal Profession Act 2004* (VIC)



**Western Australia (WA)**

<b>Conditional costs agreements</b>	<p>Conditional costs agreements involving an uplift fee are permissible, subject to written disclosure advising the client of:</p> <ul style="list-style-type: none"> <li>• the law practice’s legal costs;</li> <li>• the uplift fee (including the basis for calculation and an estimate or range of estimates of the uplift fee and an explanation of the major variables that will affect calculation of the uplift fee);</li> <li>• reasons warranting the uplift fee.</li> <li>• the client’s right to seek independent legal advice before entering into the agreement; and</li> <li>• a cooling off period of not less than five clear business days, during which the client may, by written notice terminate the agreement.<sup>36</sup></li> </ul> <p>This additional disclosure is not required if the client is a sophisticated client.<sup>37</sup></p> <p>A matter that involves:</p> <ul style="list-style-type: none"> <li>• criminal proceedings;</li> <li>• proceedings that relate to or involve child protection, custody, guardianship or adoption; or</li> <li>• proceedings under the Family Law Act 1975 (Cth), the Migration Act 1958 or the Child Support (Assessment) Act 1989; or</li> <li>• proceedings prescribed by the regulations,</li> </ul> <p>cannot be the subject of a costs agreement.<sup>38</sup></p>
<b>Uplift fee cap / limitation</b>	<p>For a litigious matter, the costs agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome is reasonably likely and the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.<sup>39</sup></p>
<b>Personal injury provisions</b>	N/A
<b>Contingency Fee Agreements</b>	Contingency fees are prohibited under section 285 of the <i>Legal Profession Act 2008 (WA)</i> .

<sup>36</sup> Section 283, *Legal Profession Act 2008 (WA)*

<sup>37</sup> Sections 265 and 284, *Legal Profession Act 2008 (WA)*

<sup>38</sup> Section 283(2), *Legal Profession Act 2008 (WA)*

<sup>39</sup> Section 284(4), *Legal Profession Act 2008 (WA)*

## Attachment B: International approaches to contingency fees

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### United States of America (USA)

1. Contingency fees are permitted in the USA. The American Bar Association's Model Rules of Professional Conduct provide the following in relation to contingency fees:

#### **Rule 1.5(c)**

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingency fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

2. Rule 1.5(d) provides that contingency fees are not permissible in relation to a domestic relations matter or for representing a defendant in a criminal case.
3. The Rule should also be regarded in the context of the general proposition in Rule 1.5(a) that 'A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.' The Rule proceeds to list the factors to be taken into consideration in determining the reasonableness of a fee including:<sup>40</sup>
  - the time and labour required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - the fee customarily charged in the locality for similar legal services;
  - the amount involved and the results obtained;
  - the time limitations imposed by the client or by the circumstances;
  - the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - whether the fee is fixed or contingent.
4. Research on contingency fees in the United States suggests that many agreements will provide for a contingency fees of approximately 33%, with contingency fees rarely exceeding 50%.
5. The default costs position in the US, under what is frequently referred to as the "American Rule", is that each party to proceedings must bear his or her own costs, regardless of the outcome.<sup>41</sup>

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<sup>40</sup> Note that these criteria are similar to that proposed in Australia under the Legal Profession National Law.

<sup>41</sup> Australian Law Reform Commission, 1995, *Costs Shifting – who pays for litigation*, Report 75 (1995), Appendix C, < <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC75.pdf> >

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6. There are however exceptions to this general position including by:
    - contract – the parties may contractually agree that the losing side will pay the winning side’s attorney’s fees;
    - bad faith – where the court finds that litigation has been brought in bad faith or finds that a party has conducted the litigation process in bad faith; and
    - statute – in some states, legislation provides that the losing side will pay the winning side’s legal fees in certain circumstances.<sup>42</sup>

## United Kingdom (UK)

7. In 2009-2010, Lord Justice Jackson undertook a review of civil litigation costs and funding in England and Wales, including consideration of conditional fee agreements and contingent fees.
8. The review highlighted numerous issues raised by the possible introduction of contingency fees including:
  - the increased potential for conflicts of interest between the client and solicitor;
  - the potential reduction in damages to a claimant due to the need to meet the contingency fee;
  - a danger that solicitors may be over-compensated, with the contingent fee being disproportionate to the amount of work carried out;
  - insufficient regulation; and
  - concerns that contingency fees may attract the ‘worst excesses of US litigation’.
9. On the other hand, interested parties also argued that contingency fees would promote freedom of contract and enhance access to justice, in particular for those who would otherwise find it difficult to fund a claim or for defendants opposing a weak claim brought by wealthy and oppressive claimants.<sup>43</sup>
10. In Lord Justice Jackson’s final report, *Review of Civil Litigation Costs*,<sup>44</sup> a series of proposed civil litigation reforms were outlined, including a recommendation for the wider introduction of *damages-based agreements* (DBAs).<sup>45</sup>

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<sup>42</sup> Root, David, ‘Attorney Fee-Shifting in America: Comparing, Contrasting and Combining the American Rule and the English Rule’, (2004-2005) 15(3) *Indiana International and Comparative Law Review* 583-618

<sup>43</sup> Lord Justice Jackson, 2009, *Review of Civil Litigation Costs: Final Report*, p126-131. Available online at: <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

<sup>44</sup> Lord Justice Jackson, 2009, *Review of Civil Litigation Costs: Final Report*, available online at: <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

<sup>45</sup> In England and Wales, DBAs are permitted in relation to ‘non-contentious’ matters, with DBAs being commonly used in the context of matters before the employment and tax tribunals.

a) See Ministry of Justice, 2010, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson’s Recommendations*, Consultation Paper CP

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11. More specifically, Lord Justice Jackson recommended that:

- both solicitors and barristers should be permitted to enter into contingency fee agreements in respect of contentious civil matters;
- costs should be recoverable against opposing parties on a conventional hourly rates basis, rather than by reference to the contingency fee; and
- contingency fees should be properly regulated and should not be valid unless the client has received independent advice.

12. Lord Justice Jackson expressed the view that the perceived advantages of contingency fees arguably outweigh the perceived disadvantages. These advantages included:

- the ability for applicants to have numerous funding options available and the freedom to choose the option that is most appropriate to their case;
- the view that the 'no win no fee' principle already exists in the current English legal system, as a result of the operation of conditional fee agreements, thereby precluding theoretical objections to allowing DBAs in civil litigation;
- that solicitors will have additional incentive to maximise the damages awarded to their client, as this will positively impact on their own fee;
- the promotion of efficiency, as solicitors attempt to reduce their own costs to maximise their profits; and
- the arguably simpler model that DBAs provide, by comparison to conditional fee agreements.

13. Lord Justice Jackson also expressed the view that to safeguard against potential conflicts of interest, advice on the following matters should be provided:

- available options;
- implications of each of the options; and
- the need to obtain independent advice.

14. The conventional hourly rates basis proposed by Lord Justice Jackson was modelled on the system operating in Ontario, Canada. In Ontario, the contingency fee must be borne by the client and is irrecoverable from an unsuccessful defendant. An unsuccessful party will therefore not be required to pay higher costs if the opposing party has entered into a contingency fee agreement with their lawyer.

15. The Law Society of England and Wales supported the proposed introduction of DBAs, as an additional method of funding litigation. However, the Law Society expressed the view that independent advice, as proposed by Lord Justice Jackson, was unnecessary given the absence of evidence that solicitors were providing inappropriate advice in relation to conditional fee agreements (which are arguably more complex). In addition, existing regulations already impose considerable cost disclosure requirements. The proposed requirement for independent advice might therefore merely result in additional costs.

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13/10, p70. Available online at: <http://www.justice.gov.uk/downloads/consultations/jackson-consultation-paper.pdf/>

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16. Following Lord Justice Jackson's review, the *Legal Aid, Sentencing and Punishment of Offenders Bill* was introduced to implement some of the proposed reforms, including provisions to permit a client and solicitor to enter into a damages-based agreement.

17. The *Legal Aid, Sentencing and Punishment of Offenders Bill* received royal assent on 1 May 2012 and came into force in April 2013.

#### Recommendations of the Contingency Fees Working Party

18. In April 2012, the Civil Justice Council established an eleven person expert Working Party to further consider the practical and policy issues associated with the introduction of DBA. The Working Party was asked to consider the following issues:

- a) whether the percentage that solicitors should be entitled to recover should be limited or require approval in certain circumstances;
- b) whether, and if so, in what circumstances a solicitor acting under a DBA should be liable for adverse costs;
- c) whether it should be possible to enter into partial DBAs; and
- d) whether there should be an obligation to notify opposing parties that the solicitors have entered into a DBA.<sup>46</sup>

19. On 25 July 2012, the Working Party released its report on damages based agreements.<sup>47</sup> The report notes that, from 1 April 2013, DBAs may be used in the following types of civil dispute categories:

- employment;
- personal injury; and
- commercial (note that this category may be further subdivided into commercial, consumer and micro-enterprise).

20. In response to the issues highlighted for consideration above, the Working Party made the following recommendations.

- a) *Should the percentage that solicitors are entitled to recover be limited or require approval in certain circumstances?*

The Working Party recommended that a percentage cap should be placed on DBA's as follows:

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<sup>46</sup> Legal Futures, *Fancy a piece of the action? High-powered group to advise on introduction of contingency fees*, 17 April 2012, <<http://www.legalfutures.co.uk/latest-news/fancy-a-piece-of-the-action-high-powered-group-to-advise-on-introduction-of-contingency-fees>>; Herbert Smith, *Litigation e-Bulletin* (online), May 2012, <<http://www.herbertsmith.com/NR/rdonlyres/6EBE8A37-898A-42E2-B341-FCA4E7606DEF/0/Recentlitigationdevelopments1May2012.htm#workingparty>>

<sup>47</sup> Civil Justice Council, *Report of the Working Party on Damages Based Agreements (Contingency Fees)*, 2012, <<http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Pre-action%20protocols/contingency-fees-working-party-report1.pdf>>

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- Employment: Section 5 of the *Damages Based Regulations 2010* provides for a 35% cap including VAT. The Working Party recommended that in employment cases, the cap should remain at 35%;
  - Personal injury: The Working Party recommended that a 25% cap on the contingency fee in personal injury cases be applied (on the basis that the contingency fee excludes unrecovered disbursements and any ATE (After The Event) premium);<sup>48</sup> and
  - Commercial
    - Commercial: The Working Party recommended that there should be no cap on the contingency fee, given that such matters are likely to involve sophisticated purchasers of legal services and the view that freedom of bargaining should not be inhibited.
    - Consumer: The Working Party recommended a cap of 50%.
    - Micro-enterprise: The Working Party recommended a cap of 50%.

The Working Party recommended that DBAs reflect the Ontario model (although the approach was not to be referred to as the 'Ontario model'), the practical implications of which were outlined above.

The Working Party also recommended that, where the DBA relates to a claim on behalf of a child or patient, the Court should approve the costs at the same time as approving the settlement.

*b) Should a solicitor acting under a DBA be liable for adverse costs and if so, in what circumstances?*

The Working Party recommended that lawyers should not be liable for adverse costs under a DBA, except in circumstances where the lawyer has agreed to indemnify the client from adverse costs liability (in which case such lawyers may be entitled to a higher reward, in recognition of the greater risk of liability). This position is consistent with existing arrangements where a lawyer acts under a conditional fee agreement. Third party funders will however continue to be liable for adverse costs where they provide finance to a matter under a DBA.<sup>49</sup>

In a note by the Working Party, the posited rationale for this approach is that there was no justification for those operating under DBAs to be treated differently than those acting under conditional fee agreements. The note states that the courts have 'traditionally recognised the need to protect legal advisers who have acted for a claimant on a pro bono basis from exposure to orders and that protection has been extended to those who act under a conditional fee agreement... The rationale for this approach is that the public interest is served by facilitating access to justice

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<sup>48</sup> Note: After The Event insurance can be purchased by individuals or businesses after a dispute has arisen, to provide some protection against costs orders. Premium payments of ATE insurance are ordinarily postponed until the conclusion of the case and are subject to the outcome.

The Law Society of England and Wales has provided the following description of After The Event Insurance: 'The cost of the insurance policy usually works the same way as a 'no win no fee' agreement, i.e. it is only payable if you win (and then the other side will pay it). If you lose, the policy will pay for the other side's costs and your disbursements.'

<sup>49</sup> Herbert Smith Freehills, 'Working party recommends no cap on contingency fees for commercial cases', *Litigation Notes* (online), 7 August 2012, < <http://hsf-litigationnotes.com/2012/08/07/working-party-recommends-no-cap-on-contingency-fees-for-commercial-cases/> >

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by such arrangements in cases where publicly funded legal assistance is not available'.<sup>50</sup>

c) *Should it be possible to enter into a partial DBA?*

The Working Party did not make any specific recommendations on this point, however noted that they had no objections to blended fee arrangements, which already exist in the context of contingency fee agreements.

d) *Should there be an obligation to notify opposing parties that the solicitors have entered into a DBA?*

The Working Party recommended that there should not be an obligation to notify the opposing party, circumstances where a lawyer has entered into a DBA.

## Ontario, Canada

21. In light of Lord Justice Jackson's suggestion that the UK contingency fee system be based on the Ontario model, further consideration is given to the operation of this model.
22. Ontario made legislative provision for contingency fees in 2004, following the 2002 passage of Bill 178, *An Act to amend the Solicitors Act to permit and to regulate contingency fee agreements*.
23. Contingency fee agreements are subject to the following conditions, as specified in the *Solicitors Act R.S.O 1990*:
  - all contingency fee agreements must be made in writing;
  - contingency fees are prohibited in criminal, quasi-criminal and family law matters;
  - solicitors are not permitted to collect both the pre-determined contingency fee and legal costs paid by another party, unless approved by a judge;
  - clients may collect full payment for an award of costs, even if it exceeds the amount payable under a contingency fee agreement, if the award is used to pay the client's solicitor; and
  - courts may review contingency fee contracts and endorse negotiated fees above the prescribed standards where it is fair to do so.
24. As noted above, a lawyer under a contingency fee agreement is not entitled to receive legal costs in addition to the contingency fee. Section 28.1(8) of the Ontario *Solicitors' Act* provides that 'A contingency fee agreement shall not include the fee payable to the solicitor, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as part of a settlement', unless a court approves and exceptional circumstances apply.<sup>51</sup>

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<sup>50</sup> Nicholas Bacon QC, 'Adverse Costs Rules and DBA's – Should the existing rules be changed?', *Contingency Fees/DBAs Working Party Report, Annex 8*, 29 May 2012,

<sup>51</sup> Mulheron, Rachael, 'Ontario case report', *Contingency Fees/DBAs Working Party Report, Annex 9*, 29 May 2012, 13-14

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25. The *Solicitors Act* also authorises the Lieutenant Governor in Council to make regulations governing contingency fees, including prescribing a maximum percentage that can be charged as a contingency fee. To date, no maximum percentage has been set.
26. Arguments in support of this position include that:
- the setting of a maximum percentage would place Ontario out of line with the majority of Canadian jurisdictions, which do not have maximum percentages; and
  - the setting of a maximum would lead to the relevant percentage subsequently becoming the minimum percentage applied by all.<sup>52</sup>
27. Furthermore, safeguards against possible abuse of contingency fees are seen to exist through professional ethical standards, including a solicitor's general duty to render a fair and reasonable account; and the ability for an account to be reviewed by the court or an assessment officer through a standard assessment process.<sup>53</sup>
28. It is common practice for contingency fees to range between 20-45% of the amount received in the proceeding. The relevant percentage rate should reflect the difficulty of the matter, risks, costs of bringing the action and the likelihood of success.<sup>54</sup>
29. The Law Society of Upper Canada passed a new rule of professional conduct in October 2002, in relation to contingency fees. The Rule came into effect in October 2004. Rule 2.08(3) provides as follows:

**Contingency Fees and Contingency Fee Agreements**

(3) Subject to subrule (1) except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided. [Amended – November 2002, October 2004]

Rule 2.08(3) was accompanied by the following commentary:

In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it,

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<sup>52</sup> Melnitzer, Julius, 'Ontario officially ends Prohibition on Contingency Fees', *Corporate Legal Times* (online), (November 2004), 28, <[http://www.cba.org/ccca/EN/About\\_CCCA/pdf/Ontario\\_Ends\\_Prohibition\\_Contingency-Fees\\_CLT\\_Canada1104\\_Nov2004.pdf](http://www.cba.org/ccca/EN/About_CCCA/pdf/Ontario_Ends_Prohibition_Contingency-Fees_CLT_Canada1104_Nov2004.pdf) >

<sup>53</sup> Ministry of Justice website, *Issue: Maximum percentage*, (online), <<http://www.attorneygeneral.jus.gov.on.ca/english/about/contingency/overview4.asp> >

<sup>54</sup> Polten, Eric, Weiser, Christiane and Klünspies, David, *Rules of Costs and Fees for Lawyers – A Comparison of German Law and the Law of the Province of Ontario/Canada*, (2011), 13, <<http://www.poltenassociates.com/Resource-Links/Legal-Fees-English.pdf> >



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the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which agreement under the Solicitors Act must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable

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## Attachment C: Annexure from UK Civil Justice Working Party on Damages Based Agreements<sup>55</sup>

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<sup>55</sup> Stutt, Colin, 'Contingency Fees – How they might work with Inter Partes Costs', *Contingency Fees/DBAs Working Party Report, Annex 9*, 21 June 2012



## Report of the Working Party on Damages Based Agreements (Contingency Fees)

1. The terms of reference of the Working Party (WP ) were set out by Lord Justice Jackson on behalf of the Civil Justice Council in a note (**annex 1**) dated 1<sup>st</sup> March 2012 during the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill. The WP has held four meetings (17<sup>th</sup> April, 30<sup>th</sup> May, 20<sup>th</sup> June and 18<sup>th</sup> July) and provided an interim report to the CJC Executive Committee on 5<sup>th</sup> July.
2. In this document the term “DBAs” refers to damages based (contingency fee) agreements which are lawful under s.45 Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012, amending s.58AA Courts and Legal Services Act 1990 (CALSA), previously amended by s. 154 Coroners and Justice Act 2009 (regulating DBAs in employment matters).
3. The use of DBAs in employment and other tribunal matters has always been lawful whether or not proceedings were initiated. Section 45 LASPOA extends s.58AA CALSA beyond the narrow scope of employment DBAs to **all** DBAs by removing from s.58AA all references to employment matters. Section 45 (9) LASPOA also makes it clear that proceedings in relation to DBAs *“includes any sort of proceedings for resolving disputes (and not just proceedings in court) whether commenced or contemplated”*. The WP has therefore produced this report on the basis that the **recommendations** apply to all DBAs in all proceedings for resolving disputes whether issued or not.
4. The Damages Based Regulations 2010 were introduced to regulate the use of DBAs in employment cases only. However, because the new s.58AA CALSA covers **all** DBAs the WP **recommends (1)** that there should be only **one** corresponding set of regulations for all cases where the funding mechanism is by way of a DBA ( but not by a CFA which is covered by separate regulations ), whatever the nature of the claim and whether proceedings are issued or not.
5. In addition to its terms of reference the WP was requested by the Ministry of Justice (MOJ) to provide a definition of a DBA. The WP **recommends (2)** that the statutory definition of a DBA in s.58AA (3) (a) CALSA relating to DBAs in employment tribunals should apply to **all** DBAs.

6. The WP was also asked to assist with a definition of “personal injury” because special considerations apply when a DBA is used in a personal injury claim. The WP simply **recommends (3)** that the current general definition of personal injury in CPR 2.3, recently applied to the Qualified One Way Costs Shifting (QOCS) regime, should also be adopted in relation to DBAs. (This means that a professional negligence claim arising from a personal injury claim is **not** a personal injury claim).
7. In only four meetings over four months the WP has been required to debate the many complex issues that appear in this report and in the annexed papers which analyse the arguments for and against in more detail. In several areas there have been differences of opinion and the view on the best solution has not always been unanimous.
8. The terms of reference do not direct the WP to any particular model of DBA. However the WP has used as its starting point the (so called) “ Ontario ” model for the following reasons :
  - In Chapter 11 of his Final Report Lord Justice Jackson refers (paragraph 4.11) to the “satisfactory Canadian experience”, and in his recommendation in favour of the introduction of contingency fees (paragraph 5.1) he says: *“Both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients. However, costs should be recoverable against opposing parties on the conventional basis and not by reference to the contingency fee”*, which is the basis of the Ontario model.
  - In paragraph 237 of its consultation paper (November 2010) the MOJ says: *“The reform of CFAs proposed by Sir Rupert in effect means that the success fee would be payable to claimants in successful cases. For DBAs he proposes costs shifting on the conventional basis, that is to say that fees chargeable under a standard hourly basis could be recovered from the defendant. Where the fee agreed under a DBA exceeds what would be chargeable under a standard hourly basis claimants would be paying that difference from their damages”*, which is the basis of the Ontario model.
  - In conclusion number 13 of the Lord Chancellor’s Response to consultation (March 2011) the Government says : *“Successful claimants will recover their base costs (the lawyer’s hourly rate fee and disbursements) from defendants as for claims whether funded under a CFA or otherwise but in the case of a DBA the costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the claimant to any shortfall between the costs recovered and the DBA fee”*, which is the basis of the Ontario model.

- At a meeting of the CJC Executive Committee on 5<sup>th</sup> July Robert Wright (MOJ) confirmed that the Government intention is to introduce DBAs on the basis of the Ontario model.
- The words “specified financial benefit “in section 58AA (3) (a) (I) CALSA are not inconsistent with the Ontario model. (**annex 2**)

9. For the avoidance of doubt the Ontario model operates on the basis that :

- Costs shifting applies;
- Base costs recovered from a losing opponent belong to the client; and
- By a contingency fee agreement retainer that complies with the indemnity principle the base costs are retained by the lawyer and are deducted from damages (set off against) the contingency fee to make up the difference (shortfall) between the base costs and the contingency fee.

However, although comparison with the use of DBAs in Ontario has been of considerable assistance in its deliberations, the WP **recommends (4)** that the DBA that is approved for use and regulated in England and Wales is **not** referred to in the Rules and Regulations (see **annex 6**) as the “Ontario” model.

10. The WP has debated at considerable length the particularly difficult issues that arise in relation to the proposed **level** of the percentage cap on the contingency fee in personal injury cases (see later). In **annex 3** the WP reviews two optional contingency fee models in personal injury cases, one still described as the “Ontario model”, the other described as the “Success fee model”, each with worked examples. The essence of the Ontario model is that the lawyer is not entitled to the full percentage contingency fee. It is a contingent contingency fee which governs total remuneration for all lawyers involved after taking into account all base costs recovered. This could result in the client retaining 100% of damages (see worked examples in **annex 3**). The alternative to the Ontario model would be to allow the lawyer to retain a contingency fee in all cases in addition to the costs recovered so that the contingency fee functions very much like a success fee in a CFA. Some members of the WP saw advantages in this model if properly regulated and it is discussed in some detail in **annex 3**. There is a concern that where the ratio between costs and damages means that there is little or no contingency fee available to reward the lawyers for risk (even allowing for recovery of base costs between the parties costs) the case will not be taken because it will be uneconomic. The argument then follows that the contingency fee should therefore be allowed as a success fee **in addition to base costs**. The uneconomic argument has some resonance with the related issue of the **scope** of the cap in personal injury cases (see later).

On balance, the WP prefers and **recommends (5)** the Ontario model, which is the basis of all its further recommendations below, but adds the important caution that care will need to be taken in determining precisely what elements of unrecovered costs (solicitor's fees, counsel's fees, VAT, ATE premium and disbursements) may be taken from the contingency fee after prior deduction of recovered base costs and disbursements.

11. The response of the WP to the eight terms of reference set out by Lord Justice Jackson on behalf of the CJC is as follows :

- i. **To consider the conflicting interests which are in play when proceedings are brought or defended on a DBA, in particular the interests of the clients, the lawyers, those to whom the lawyers instruct and opposing parties.**
  - Members of the WP who are representatives of the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) have advised that their respective regulations already deal with professional and ethical issues of conflict generally and in respect of the now well established “no-win, no-fee” method of funding civil cases. However, the WP **recommends (6)** that the SRA and BSB review their current guidance to ensure that the use of new DBAs is adequately covered alongside the existing guidance in relation to CFAs.
  - The position of opposing parties is dealt with in paragraph vii below
- ii. **To make recommendations as to what, if any, regulations ought to be made in the public interest under s.58 AA (3) and (4) for example limiting the percentage that the lawyers should be entitled to recover or requiring court approval in certain circumstances.**

The WP has deliberated at length on the complex issues that arise under this term of reference and has taken into account the following documents that have contributed to the debate (**annex 4**):

- Should a cap be imposed on the contingency fee to be deducted from damages? Do different considerations apply to commercial cases? ( Spencer/Smith)
- What cap, if any, should be imposed on the contingency fee to be deducted from damages (draft options) (Spencer)
- Options for contingency fee caps and controls (Stutt)
- Cap on success fees (PIBA)
- Why ten per cent? (Jackson)
- Client protection and the ability to challenge costs charged under a damages based agreement (Bacon)
- Legal aid reform : application of the supplementary legal aid scheme(SLAS) (MOJ)
- DBAs in employment cases (Moorhead)

- Something for nothing : employment tribunal claimants’ perspectives on legal funding (Moorhead)
- Caps on Success Fees in CFA cases and contingency fees in DBA cases (Pickering)

From April 1<sup>st</sup> 2013, the funding mechanism of a DBA may be used in three types of civil dispute: employment, personal injury and commercial. The latter type of case needs to be sub-divided into (i) commercial and (ii) consumer and (iii) micro –enterprise as defined in the FSA Handbook (DISP 2.7.3 and 2.7.10) to which different considerations apply when considering whether to limit the percentage (“the cap”) on the costs that can be taken out of the contingency fee.

**In employment cases**, section 5 of the Damages Based Regulations 2010 already limits the cap to 35% including VAT. The WP can see no reason to interfere with the existing (and as recent as 2010) statutory control on the level of contingency fee in employment cases funded by a DBA. The WP therefore **recommends (7)** that in employment cases the cap should remain at **35%**.

**In personal injury cases** the position is quite different. In his final report (Chapter 12 on contingency fees, paragraph 4.11 on personal injuries litigation) Lord Justice Jackson said: *““However, the cap on deductions from damages should be the same for CFAs and contingency fee agreements. I therefore recommend that no contingency fee deducted from damages should exceed 25% of the claimant’s damages, excluding damages referable to future costs or losses”*. Subsequently the MOJ has made clear in its consultation paper (November 2010) and Report (March 2011) that it intends to adopt Lord Justice Jackson’s recommendation that the level of the contingency fee in personal injury cases should be capped at a maximum of 25% of damages and that the scope of the cap should be limited to past losses and general damages (pain, suffering and loss of amenity). The WP has considered the potential consequences of both of these proposals.

Some members of the WP are cautious about agreeing that the cap should be 25% without certainty as to what should be included in / excluded from the cap for reasons expressed above and in **annex 3**. However, on the basis that the contingency fee excludes unrecovered disbursements and any ATE premium the WP **recommends (8)** that the cap on the contingency fee in personal injury cases should be **25%**.

In balancing the arguments on the **scope** of the cap the WP has taken into account:

- Lord Justice Jackson’s tenth implementation lecture (“Why ten per cent?”) on 20<sup>th</sup> February 2012 when he said (footnote 13) : *“The Personal Injuries Bar Association (PIBA) and the Bar Council have recently sent to me forceful submissions that the 25% cap should apply to ALL damages, as it did before April 2000. I can see the sense of allowing that dispensation in appropriate cases provided that the success fee is only payable by the client as it was pre-April 2000. The reason why I proposed ring*

*fencing damages in respect of future loss was out of deference to the vociferous submissions of PIBA, APIL and others in 2009”.*

- Arguments that there is a danger of denied access to justice in cases where the effect of the limited cap on the damages/costs equation makes it uneconomic for the lawyer to accept instructions (see again **annex 3**)
- The difficulty of defining the “appropriate cases” in which the limited cap should not apply, without burdening the Courts with having to decide probably numerous and complex applications for dispensation.
- The problem of global offers of settlement which by definition make it impossible for the claimant’s lawyers to separate out the different heads of damage to which the cap should apply, leading to the risk of solicitor/client disputes requiring Court resolution and /or complaints to the professional regulatory organisations.
- The fear that an unlimited cap would lead to lawyers in large damage cases receiving “windfall” costs, a risk that was also present when CFAs were first introduced in 1995 using the Law Society’s 25% voluntary cap that did not give rise to client dissatisfaction or complaint.
- The appreciation that in a large damages case (or indeed in any case whatever size or nature ) the percentage contingency fee may be agreed at less than 25% particularly as market forces under the new costs regime post April 2013 may lead to increased competition between lawyers as to the percentage charged.
- The fear of excessive inroads into damages required for future care if the contingency fee is deducted from future care costs and future losses. It appears from Lord Justice Jackson’s tenth lecture (see above) that various legal and other organisations, no doubt all concerned about the consumer interests of seriously injured claimants, made representations about this aspect. However, as above in relation to the risk of windfall costs, under the initial CFA regime between 1995 and 2000 there is no history of client dissatisfaction or complaint.(75% of something is better than 100% of nothing.)
- Whether, in addition to the % cap, there should be a further cap on the total remuneration the lawyers can receive e.g. no more than double their costs. However, this argument must be balanced against the basic rationale of the no win – no fee model that the winning cases have to pay for the losing cases which is a particularly critical issue for barristers willing to take the risk of losing and not being paid.
- The relationship between DBAs (and CFAs) and QOCS, particularly where a part 36 offer is not beaten by the claimant, will be made even more difficult when the damages available for contingency fee costs have to be calculated taking into account a limited cap.
- The common purpose that (as applied in type 1 CFAs in 1995) all personal injury claimants whose cases are funded by a DBA or a CFA or under SLAS (even though



the levy does not go to the lawyers) should be guaranteed a minimum of 75% of their damages recovered.

- The arguments, options and examples in **annex 3**
- All the papers listed in **annex 4**

After very careful consideration of all the above arguments the WP **recommends (9)** that **(i)** in personal injury cases conducted on a DBA the contingency fee (comprising solicitor's fees and counsel's fees plus VAT) but excluding disbursements and ATE premium should be capped at a maximum of 25% and **(ii)** the damages from which the contingency fees can be taken should **not** be limited and **(iii)** the base costs recovered between the parties should be deducted from the contingency fee.

As stated above, **commercial cases** (non-personal injury and non-employment) divide into three categories: (i) commercial (ii) consumer and (iii) micro enterprise as defined in the FSA Handbook (fewer than 10 employees and a turnover or balance sheet that is less than 2 million Euros).

Category (i) is likely to involve sophisticated purchasers of legal services entering into contractual arrangements where freedom of bargaining should not be inhibited. The WP considered this carefully, but on balance **recommends (10)** that in this category of commercial case there should **not** be a cap on the contingency fee.

Categories (ii) and (iii) are open to argument that some level of protection is required at a level that is less than a personal injury claim (25%) and less than an employment claim (35%). If a protective cap is to be applied to categories (ii) and (iii) the WP would **recommend (10)** that it should be 50%. However, the WP was divided on the issue of whether a cap should be applicable for sub-categories (ii) and (iii) of commercial/consumer claimant.

The WP was also requested to consider whether in certain circumstances the percentage contingency fee recoverable under a DBA should be approved by the Court. It is straightforward to **recommend (11)** that in the usual way, where the DBA relates to a claim on behalf of a child or patient the Court should approve the costs at the same time as approving the settlement.

The WP has also considered the special factors that apply to multi party/group/collective actions and having looked at the case law on DBAs in group/collective actions in Ontario and Australia (**annex 5**) concludes that special controls are necessary in this area of complex litigation where large numbers of claimants are involved and funding options very limited. Although it is normal for solicitors representing numerous clients in a group action to apply to the Court for a Group Litigation Order there is no compulsion to do so. The definition of a group action is often regarded as a claim involving more than ten claimants with the same generic cause of action. The WP therefore **recommends (12)** that when

lawyers who wish to use a DBA to fund a multi - party/group/collective action make an application to the Court for a Group Litigation Order (GLO) they should simultaneously apply to the Court for approval of the level of the contingency fee within the regulated cap on the % deduction from damages. If a GLO is not sought the level of the contingency fee will be open to challenge by the clients at the end of the case.

In the context of group /collective actions and although it is not strictly within the WP's terms of reference, it is relevant to draw attention to the Government's proposal (currently under consultation by BIS) to introduce the "opt out" model for collective actions in competition (cartel) cases but to simultaneously propose a ban on the use of contingency fees in such actions. The WP takes this opportunity to say that it believes this policy is misguided because the collective action is precisely the type of civil claim that will benefit from the introduction of DBAs to ensure access to justice.

Having decided on its recommendations as to the level and scope of cap in different types of DBA case, the WP is also asked in this term of reference to recommend "what if any regulations should be made in the public interest under s 58AA (3) and (4)..." to implement its recommendations. Other aspects of the control and contents of a DBA by way of regulation are raised in terms of reference (iii) to (viii) below.

In all of these areas it has not been the task of the WP to draft (a) the contents of the Statutory Instrument to implement the commencement of lawful DBAs or (b) amendments to the Civil Procedure Rules or (c) amendments to the rules / guidance of the regulators of the legal professional organisations (under the oversight of the Legal Services Board). Instead, and consistent with paragraph 4 above, the WP has reviewed in **annex 6** the current provisions of the DBA Regulations 2010 together with s.58AA CALSA as amended and s.45 LASPO. **Annex 6** also contains the WP's suggested contents of a DBA, including where the DBA is entered into by a claims management company providing claims management services ( s.58AA(3)(a)).

The WP has sought to make proposals that will studiously avoid the risk of repeating the so called costs wars that followed the type 2 CFA regulatory regime introduced in 2000 and the risk of a regulatory imbalance between the requirements of a DBA and a CFA which is now a "light touch" regime. The WP **recommends (13)** that those who draft the rules and regulations consider the suggested draft in **Annex 6** and pay attention to the desirability of consistency of approach in the regulation of DBAs and CFAs, allowing for the basic differences in the two models. The WP adds some cautionary words about the cap. Any % cap on the level of the contingency fee will need to be prescribed by regulations and in order to implement the "Ontario model" as described in paragraphs 8 and 9 above the cap will need to be defined in more detail than for employment matters in the current DBA Regulations 2010.

**(iii) To make recommendations as to what, if any, rules of court in relation to assessment of costs ought to be made in the public interest under s.58AA (6)**

Consistency of approach demands that the same regime should apply to the assessment of costs in a DBA as the current regime that applies to CFAs. The WP therefore **recommends (14)** that CPR 44 is amended where necessary to include reference to DBAs.

**(iv) To make recommendations as to what matters should be provided for in any DBA**

In the same way that the WP has not drafted the wording of a statutory instrument or the detail of rules and regulations it has not drafted a model DBA. Any attempt to do so would have been an impossible task given the wide variety of cases that may be funded by a DBA. However **annex 6** proposes the essential provisions that should be included in a lawful DBA. Once again the WP is alert to the danger of encouraging satellite litigation and avoiding further Costs Wars. It is therefore not attracted to the detailed list of “dos and don’ts” in a DBA under the Ontario Solicitors Act Regulations 195/2004. In the 15 years since CFAs have been lawful the legal profession’s various specialist litigation associations have produced their own varieties of model CFA. The WP therefore **recommends (15)** that the same steps should be taken by the specialist associations and professional bodies in relation to model DBAs.

**(v) To consider whether, and if so in what circumstances, a lawyer acting under a DBA should be liable for adverse costs.**

Under the costs shifting regime that operates in our jurisdiction the risk of an unsuccessful party (or their lawyers) having to pay adverse costs if the case is lost is a particularly important issue where litigation is conducted under the no win - no fee model. Since 1995 when CFAs were first introduced the risk of an adverse costs order against an unsuccessful claimant has been covered by the advent of the now mature after the event (ATE) insurance market. However, the introduction of QOCS will essentially remove the risk of adverse costs in a personal injury case whether conducted on a CFA or a DBA. The future of the ATE market in personal injury cases is a matter of speculation that is outside the remit of the WP.

In non- personal injury cases (in reality commercial cases excluding employment) where QOCS does not apply, scope may remain for the ATE market to offer cover to claimants (or sometimes defendants) against the risks of an adverse costs order if they lose their case whether on a CFA or a DBA (**annex 7**). However, there may also be a risk of an adverse costs order against the claimant’s lawyers if allegations are made that they have conducted themselves in a manner that breaches the rules against maintenance and/or ‘champertous’ behaviour. Where lawyers are instructed to act on a CFA the Court of Appeal decision in *Hodgson v Imperial Tobacco* provides that they are immune from an adverse costs order. It would be consistent and sensible to extend the same immunity to lawyers acting on a DBA.

The WP therefore **recommends (16)** that some appropriate mechanism (possibly the CPR) is adopted to extend “Hodgson immunity”, or such protection as the Court of Appeal has held exists, from adverse costs to lawyers acting on a DBA.

The issues that arise in this area of adverse costs are complex and have required much consideration by the WP (**annex 8**) including the question whether a third party litigation funder (TPLF who provides commercial funding of costs in return for a share of damages) in a DBA case should be liable for limited adverse costs under the same principle as the Court of Appeal in the *Arkin* case which involved a CFA. Again, consistency of approach as between CFAs and DBAs in the treatment of the adverse costs immunity of TPLFs is desirable.

The WP therefore **recommends (17)** that some appropriate mechanism (possibly the CPR) is adopted to make it clear that the *Arkin* principle also applies to a TPLF who provides commercial finance in a DBA case. There has been some speculation about the effect of Alternative Business Structures (ABSs) on the liability of TPLFs for adverse costs where the TPLF has an ownership share in the ABS. However, the WP does not feel that this is a matter that could at this stage be the subject of rules or regulation and is best left to the Courts to resolve if and when a question arises in a particular case.

There has also been some speculation about the situation where in a DBA case the lawyer agrees with the client to be liable (or partially liable) for adverse costs in return for a higher contingency fee. If such an agreement is made the resolution would be a matter of contract between the lawyer and the client against whom the adverse costs order is made. This is not an area where the WP feels that it is necessary to make a recommendation.

**(vi) To consider whether it should be possible to enter partial DBAs, analogous to the “no win, low fee” CFAs.**

There is no reason why the situation in relation to so called blended fee arrangements which are sometimes used in CFA cases (mainly in commercial cases) should be any different for DBAs. In either scenario (CFA or DBA) the no win-no fee element would have to comply with the statutory framework, the CPR and the professional regulations, for example in relation to the cap on the contingency fee element. The WP does not feel it necessary to make any specific recommendation on this point.

**(vii) To consider whether there should be an obligation to notify opposing parties that the lawyers have entered into a DBA.**

In CFA cases the abolition of recoverability of success fees and ATE premiums together with the introduction of QOCS is likely to remove the need for the claimant’s lawyers to give notice to the other side that they are acting on a CFA. Once again for reasons of consistency between CFAs and DBAs the same approach should be adopted for DBAs. The WP therefore

**recommends (18)** that there should not be an obligation to notify the opposing party that lawyers have entered into a DBA and that appropriate amendments are made to the CPR.

**(viii) To take account of the experience of DBAs (a) in employment tribunal cases in England and Wales and (b) in the Courts of Ontario, liaising as appropriate with both judges and practitioners in those jurisdictions.**

As illustrated by the various annexes to this report (particularly **annex 9**) the WP has undertaken as much research as has been possible in the time available into the experience of practitioners and the judiciary where DBAs are used in other jurisdictions and in employment cases in this jurisdiction. The legislation in the UK and Canada that the WP has considered is listed in **annex 10**. A list of the WP's fifteen recommendations is included at **annex 11**.

The WP hopes that the recommendations in this report assist the smooth introduction of contingency fees as an important addition to the funding options for providing access to justice in civil cases and wishes to thank all those who have helped its deliberations and the CJC Secretariat for its support.

25<sup>th</sup> July 2012

<b>ATTACHMENT D</b>		
<b>Examples using 30%</b>		
<b>Public liability where Workers comp paid</b>		
settlement \$500k + costs\$150k incl pay		
Settlement sum for damages	\$ 500,000.00	
Amount agreed for costs	\$ 150,000.00	
Total recovered		\$ 650,000.00
Refund of workers comp paid	\$ 20,000.00	
Refund to Centrelink	\$ 5,000.00	
Refund to Medicare	\$ 1,000.00	
Total 'lump sum'		\$ 624,000.00
Legal fees 30% of lump sum	\$ 187,200.00	
less Counsel's fees	\$ 40,000.00	
Solicitor's fees (30% - counsel's fees)	\$ 147,200.00	
Actual outlays/ disbursements	\$ 30,000.00	
Total solicitor client fees and disb'ts		\$ 217,200.00
Client receives		\$ 406,800.00
<b>Product liability claim</b>		
total recovered \$75k incl costs		\$ 75,000.00
Refund to Medicare	\$ 3,000.00	
Total 'lump sum'		\$ 72,000.00
Legal fees 30% of lump sum	\$ 21,600.00	
less counsel's fees	\$ 5,000.00	
Solicitors fees (30% - counsel's fees)	\$ 16,600.00	
Disbursements	\$ 6,000.00	
Total solicitor/client fees and disb'ts		\$ 27,600.00
client receives		\$ 44,400.00
<b>Motor Accident claim</b>		
settled for \$55,000.00	\$ 55,000.00	
plus \$15,000 costs	\$ 15,000.00	
total recovered		\$ 70,000.00
Refund to Medicare	nil	
Refund to Centrelink	nil	
refund to CTP insurer	\$ 5,000.00	
Total 'lump sum'		\$ 65,000.00
legal fees 30% 'lump sum'	\$ 19,500.00	
counsel's fees	nil	
disbursements	\$ 2,000.00	
Total Solicitor/client fees and disb'ts		\$ 21,500.00
Client receives		\$ 43,500.00
<b>Examples using 25%</b>		
<b>Public liability where Workers comp paid</b>		
settlement \$500k + costs\$150k incl pay		

Settlement sum for damages	\$ 500,000.00	
Amount agreed for costs	\$ 150,000.00	
Total recovered		\$ 650,000.00
Refund of workers comp paid	\$ 20,000.00	
Refund to Centrelink	\$ 5,000.00	
Refund to Medicare	\$ 1,000.00	
refunds to be deducted from total		\$ 26,000.00
Total 'lump sum'		\$ 624,000.00
Legal fees 25% of lump sum	\$ 156,000.00	
less Counsel's fees	\$ 40,000.00	
Solicitor's fees (25% - counsel's fees)	\$ 116,000.00	
Actual outlays/ disbursements	\$ 30,000.00	
Total solicitor client fees and disb'ts		\$ 186,000.00
Client receives		\$ 438,000.00
<b>Product liability claim</b>		
total recovered \$75k incl costs		\$ 75,000.00
Refund to Medicare	\$ 3,000.00	
Total 'lump sum'		\$ 72,000.00
Legal fees 25% of lump sum	\$ 18,000.00	
less counsel's fees	\$ 5,000.00	
Solicitors fees (25% - counsel's fees)	\$ 13,000.00	
Disbursements	\$ 6,000.00	
Total solicitor/client fees and disb'ts		\$ 24,000.00
client receives		\$ 48,000.00
<b>Motor Accident claim</b>		
settled for \$55,000.00	\$ 55,000.00	
plus \$15,000 costs	\$ 15,000.00	
total recovered		\$ 70,000.00
Refund to Medicare	nil	
Refund to Centrelink	nil	
refund to CTP insurer	\$ 5,000.00	
Total 'lump sum'		\$ 65,000.00
legal fees 25% 'lump sum' (no counsel)	\$ 16,250.00	
counsel's fees	nil	
disbursements	\$ 2,000.00	
Total Solicitor/client fees and disb'ts		\$ 18,250.00
Client receives		\$ 46,750.00
<b>Commercial Contract claim: Success fee at 25%</b>		
Court damages award	\$ 4,000,000.00	
Party/party costs award	\$ 900,000.00	
Total recovered		\$ 4,900,000.00
Less: Counsel's fees	\$ 300,000.00	
Less: Outlays	\$ 100,000.00	
Balance of award		\$ 4,500,000.00
Legal fees 25% of damages award	\$ 1,000,000.00	
Client receives		\$ 3,500,000.00

<b>Commercial Contract claim: Ontario</b>		
Court damages award	\$ 4,000,000.00	
Party/party costs award	\$ 900,000.00	
Total recovered		\$ 4,900,000.00
All legals: 25% of damages award	\$ 1,000,000.00	
Less: Counsel's fees and outlays	\$ 400,000.00	
Solicitor receives after disbs		\$ 600,000.00
Client receives		\$ 3,900,000.00
<b>Commercial Contract claim: 25% of award</b>		
Court damages award	\$ 4,000,000.00	
Party/party costs	\$ 900,000.00	
Total court award		\$ 4,900,000.00
All legals: 25% of total court award	\$ 1,225,000.00	
<b>Less: Counsel's fees and outlays</b>	\$ 400,000.00	
Solicitor receives	\$ 825,000.00	
Client receives		\$ 3,675,000.00
<b>Commercial Contract claim: Success fee at 30%</b>		
Court damages award	\$ 4,000,000.00	
Party/Party costs award	\$ 900,000.00	
Total recovered		\$ 4,900,000.00
Less: Counsel's fee and outlays	\$ 400,000.00	
Balance of award		\$ 4,500,000.00
Legal fees at 30% of damages	\$ 1,200,000.00	
Client receives		\$ 3,300,000.00