

AN ASSESSMENT OF UPLIFT FEES IN
AUSTRALIA: A MEANS TO IMPROVE ACCESS TO
JUSTICE OR CREATING FURTHER PROBLEMS?

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This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch
University

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November

2015

DECLARATION

This thesis has been drafted on account of my own research and contains no material previously published, submitted or written by another person, except when due reference is made within the text.

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November 2015

ABSTRACT

Increasing access to justice is a priority throughout a number of jurisdictions. This is due to the simple fact that legal costs are expensive and not many people can access the courts due to the financial burden of sustaining a legal action. Over the years, various reforms have taken place throughout England, Wales and Australia to promote an increase in the amount of citizens being able to access the courts to vindicate their rights.

This paper focuses on the reform of conditional fee arrangements involving uplift fees. Uplift fees were introduced as an incentive for lawyers to take on more clients on a conditional fee (or no win/no fee) basis. An uplift fee provides the lawyer with an opportunity to charge an increase (of up to 25%) on top of their legal fees rendered at the successful conclusion of a matter for the risk involved in a speculative action.

Uplift fees operate throughout every Australian jurisdiction. Very little discussion has taken place in regards to the potential problems which have and could occur with the uplift fees implementation throughout Australia. This paper conducts a doctrinal analysis of the history of the uplift fee in England, Wales and Australia to identify whether the fee is providing an increase to access to justice or merely moving problems from one area to another.

The paper discovers that the uplift fee is problematic from both a theoretical and practical perspective. Very little statutory safeguards are in place to prevent abuse and problems have been encountered throughout many common law jurisdictions. Any move to fix these problems merely create other unforeseen problems. Empirical evidence also suggests that uplift fees are not providing the intended outcome of increased access to justice, therefore this paper recommends reform.

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ACKNOWLEDGEMENTS

I would like to say a special thanks to Dr Stephen Shaw. Dr Shaw has provided me with so much guidance and encouragement throughout the last 12 months of this thesis. We share the same passion for legal costs and I appreciate being able to have a person to talk and share developments in this important but often forgotten area of law.

INTRODUCTION

Increasing access to justice for potential litigants is a primary goal throughout a number of jurisdictions.¹ Whenever a dispute arises as to legal rights, every citizen should be able to request a hearing in the courts by an impartial decision maker.² This is in order to obtain justice for any wrong or harm which has occurred to them as a result of another's actions. In fact, common law countries view the concept of being able to access the courts as a right of every citizen and not a privilege.³ Therefore, every person within the jurisdiction acquires this inherent right to access the courts either with or without legal representation.⁴

Theoretically this right makes sense, and should be advantageous for any aggrieved person; however in practice it is a very difficult right to guarantee. This is due to the fact that if a litigant is self-represented (with no legal advocate acting on their behalf), the chances of them genuinely receiving a fair hearing and justice are slim.⁵

In any civil dispute, the reality of hiring a lawyer is expensive and that acts as a considerable deterrent to a citizen who wishes to access his or her rights. Legal costs play a pivotal role in any civil claim as a litigant must be able to afford legal representation to have any real chance of success.⁶ This is where a problem starts to become apparent; many aggrieved persons seeking redress cannot fund their legal fees during the life of their claim. Instead they can only afford the legal costs once, and if, their rights are vindicated and they are awarded damages.⁷ One of the ways that the law has dealt with this barrier on access to justice has been to allow lawyers and clients to enter into conditional fee agreements based on the successful outcome of the case.⁸

¹ Michael Legg, 'Contingency Fees – Antidote or Poison for Australian Civil Justice?' (2015) 39 *Australian Bar Review*, 244.

² Herbert Kritzer, 'To Lawyer or Not to Law Lawyer: Is that the Question?' (2008) 5(4) *Journal of Empirical Legal Studies* 875.

³ *Oceanic Sunline Shipping Company Inc v Fay* (1988) 165 CLR 197.

⁴ Kritzer, above n 2.

⁵ Legg, above n 1.

⁶ Kritzer, above n 2.

⁷ Legg, above n 1, 245.

⁸ *Saunders & Ors v Houghton & Anor* [2009] NZCA 610.

Conditional fee agreements are commonly known as ‘no win, no fee’ or ‘speculative’ retainers. Their introduction was a means of allowing access to justice for aggrieved persons who may have a valid claim, but not the financial means to employ an advocate for the legal proceedings.⁹ This type of charging is looked upon favourably by the courts; in particular it has been stated that ‘justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment’.¹⁰

In the early 1990’s, the governments in every Australian jurisdiction started to decrease funding to the courts and to the various forms of legal aid.¹¹ For that reason new approaches were required to increase access to justice for potential litigants by inciting more legal professionals to use conditional fee agreements.

One particular incentive that was introduced to encourage lawyers to enter into conditional fee agreements was the right to charge a higher fee than usual to compensate them for the risk involved in accepting a client who could not pay their costs unless a successful outcome has been achieved.¹² Lawyers were permitted to charge an extra fee (up to 25%) on top of their legal costs (excluding disbursements) if a successful outcome was achieved. This is known as an ‘uplift fee’ and it provides an incentive for the lawyer to take on a client under a conditional fee agreement. The theoretical justification for the additional fee is that it will promote access to justice by increasing the amount of conditional agreements being entered into between lawyers and their clients.¹³

Uplift fees have been in operation in a number of common law jurisdictions for many years; although Australian jurisdictions have only within the last two decades introduced the fees.¹⁴ Over the years, uplift fees have attracted quite a large amount of

⁹ Stephen Shaw, *The Assessment of Disputes about Legal Costs: A Comparative Analysis of the Western Australian and New South Wales Regimes* (PhD Thesis: Murdoch University, 2013).

¹⁰ *Ladd v London Road Car Co* (1900) 110 LT Jo 80, 33.

¹¹ Peter O’Donahoo and Tim Maxwell, ‘Contingency Fees and Access to Justice in Australia’ (2014) 81 *Defence Counsel Journal* 272.

¹² *Legal Profession Act 2008* (WA) s 284.

¹³ Shaw, above n 9.

¹⁴ England introduced the uplift fee in 1990 through the operation of the *Court and Legal Services Act 1990* (UK). However the fee was labelled a ‘success fee’ and is similar to Australia’s version of the uplift fee.

debate both from overseas and within Australian jurisdictions. Often this debate has originated directly from the legislatures themselves or the courts.¹⁵ In example, when the New South Wales Parliament passed the first Australian laws legitimising uplift fees in 1993, it justified doing so by arguing that the fees would promote access to justice for litigants.¹⁶ It was also expressed as a means of properly aligning the client/lawyer interests by ensuring that only cases with a likely chance of success would proceed.¹⁷

Conversely, uplift fees were facing stringent criticism in the English courts before those fees were introduced in the Australian jurisdictions. This criticism noted that a potential litigant is always facing unequal bargaining power when engaging a lawyer, and that uplift fees only made that problem worse.¹⁸ Further, commentators noted that the theoretical substance of the payment was champertous in nature and should be disallowed.¹⁹

It has become clear to the writer that a vast range of opinions as to the utility of uplift fees and the ethical implications surrounding their use is readily available. However no scholarly discussion has taken place which identifies the effects such a fee has on people who are most likely to utilise it, namely civil litigants and lawyers. It is also unclear whether the fee is providing increased access to justice in Australia or if instead it has been the subject of abuse, as has been feared by the courts.²⁰

Of important note, it seems that prior to Western Australia implementing the uplift, New South Wales disallowed any uplift for damages cases.²¹ Some years after the change to the fee's ambit in New South Wales, Western Australia passed legislation

¹⁵ New South Wales, Parliamentary Debates, Legislative Council. 28 October 1993, 4629 (Elisabeth Kirkby); *Awwad v Geraghty* [2001] QB 570.

¹⁶ New South Wales, Parliamentary Debates, Legislative Council. 28 October 1993, 4629 (Elisabeth Kirkby).

¹⁷ *Ibid.*

¹⁸ For a discussion regarding the law of champerty and the history of the English court's view of an interest by a lawyer being champertous in nature see *Awwad v Geraghty* [2001] QB 570. In particular Schiemann LJ states that the conditional fee arrangement involving an uplift originated from statute and was not a product of the common law.

¹⁹ *Ellis v Torrington* [1920] 1 KB 399.

²⁰ For the Australian court's perspective regarding the strict regulation of uplift fees to stop potential abuse see *Russells (A Fir) v Samuel Lewis McCardel & Others* [2014] VSC 287.

²¹ *Legal Profession Act 2004* (NSW) s 324.

that allowed an uplift of up to 25% to be charged in all types of cases, including damages cases.²²

On 1 July 2015, New South Wales further amended the law of costs through the application of the *Legal Profession Uniform Law*.²³ This amendment once again allows uplift fees to be charged in damages cases. The writer has found no evidence that the reasons such fees were disallowed in 2004 was taken into account by the New South Wales legislature when they reintroduced uplifts for damages cases. The only reasoning offered was a move to align the operation of the fee with the legal market place of Victoria.²⁴ The mutual Act that the two jurisdictions negotiated now contains uplift clauses that seem to have been merely carried over from the *Legal Profession Act 2004* (VIC).²⁵

Obvious gaps in discussion about and reasoning for uplift fees are apparent. This paper aims to conduct a doctrinal examination of the situation surrounding the uplift and then to make an assessment as to whether the fee is of benefit for those seeking to access justice. In the process of doing so, it will determine if uplift fees have also been the subject of abuse. The paper will identify that further reform is required and give pointers to what that reform is.

Firstly, chapter one will consider the uplift fee in a theoretical sense. Lawyers owe many overarching ethical duties to their clients. The fee is considered in the context of potential ethical conflicts which could arise in the uplifts' implementation.

Chapter two will examine the reasoning behind and the introduction of the fee in England, the first common law country to implement a success fee as a percentage amount on top of the legal fees (which is in substance the same as the Australian uplift). The English legislature's reasoning behind implementing the uplift fee is important, as it seems that their view could have been influential to Australia's later introduction of the fee (in 1993). The uplift was in existence over a long period of time in England and

²² *Legal Profession Act 2008* (WA) s 284.

²³ *Legal Profession Uniform Law* s 182.

²⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 26 March 2014, 19-20 (Greg Smith).

²⁵ *Legal Profession Act 2004* (VIC).

Wales before it was dropped in favour of a contingency fee model (which is identical to the American method of charging legal fees) in 2013. For that reason, the English and Welsh perspectives of uplift fees and the problems encountered there are a helpful aid to identifying potential pitfalls which may become problematic in Australia.

Chapter three will then make an analysis of the implementation of the fee into Australian law. Different jurisdictions throughout Australia have, since the fees were introduced, changed their methods and reasoning for charging an uplift. Such methods will be identified and a comparative analysis will be undertaken between the different Australian States.

Chapter four will then analyse the problems encountered with the introduction of uplift fees into the Australian jurisdictions to identify whether reform is necessary to promote the desired result of access to justice.

Finally chapter five will suggest options for reform. The reforms suggested are in light of the problems encountered with uplift fees in both England and Australia. This paper will conclude that the uplift fee in Australia is problematic from both a practical and theoretical perspective. The paper will have argued that although the fee was introduced as a means to promote access to justice for members of society who cannot afford legal fees, a lack of clear guidance and statutory safeguards in relation to using the fees has created problems. It will argue that the various reforms undertaken by the legislators to rectify the difficulties encountered with the fees have merely moved the problems from one area to another. It will argue therefore that further reform is necessary.

I AN ANALYSIS OF THE THEORETICAL PROBLEMS OF CHARGING UPLIFT FEES

Legal costs are the most critical determinant of whether or not people can access the courts.²⁶ This is the most so for those people who are involved in litigation, as costs considerations will be one of the most important considerations in the conduct and the

²⁶ Peter Cashman, 'The Cost of Access to Courts' (Speech delivered to the Bar Association of Queensland Annual Conference, Queensland 16 March 2007).

outcome of the client's case.²⁷ Concerns about legal costs in civil litigation throughout every jurisdiction are inherent and have been well documented (as discussed later in this paper) in scholarly materials and reports since the 1970's.²⁸ There is continuing pressure on many jurisdictions to reform and regulate the process of charging legal fees to allow access to justice whilst at the same time providing the lawyer with a reasonable income for the work performed.²⁹

This pressure for constant reform and regulated charging of fees by a lawyer can be a difficult and perplexing task.³⁰ From the lawyer's perspective, a balancing act must be performed in order to maintain the professional obligation owed to the client and the profession whilst still meeting overheads and making a profit for the legal business. In the writer's view and experience, many seem to forget that if no profit was sustainable for the owners of the firm, very few would remain in business. However at the same time, the charging of legal costs are heavily regulated for a reason, one of which is the potential of abuse by a lawyer charging excessively high costs and taking advantage of people who are in a vulnerable position.³¹ Therefore a lawyer must handle a case in such a way to be profitable but also uphold the overarching duties owed to the client, the courts and the profession.³²

In the client's position, full disclosure from the lawyer about the risks and costs associated with entering a claim in the courts is paramount. The client should not be placed in a vulnerable position which leads to 'access at any cost' that ultimately leads to an unexpected erosion of their settlement monies at the end of litigation.³³ The court's also need to play a role in this balancing act as efficiency is a prerequisite to any proper functioning (and cost effective) legal system.³⁴

²⁷ Cashman, above n 26.

²⁸ As discussed later in this paper, the pressure to increase access to justice has caused many debates leading to reforms in common law countries such as England, Wales and Australia.

²⁹ Cashman, above n 26.

³⁰ *Greggs Lawyers Pty Ltd & Anor v Viki Maree Farrer* [2014] QDC 194.

³¹ *Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430.

³² Shaw, above n 9.

³³ Legg, above n 1.

³⁴ For example: Woolf, *Access to Justice: Final Report*, below n 104, focused a great deal of research into efficiency of the courts to increase access to justice.

How such a balancing act between the lawyer, client and the courts work within the context of allowing lawyer's to charge uplift fees is questionable. There seems to be a great deal of theoretical problems which can arise in the uplift fee's application.

A Uplift fees in the context of a lawyer's overarching ethical obligations– are there potential problems?

Many of the past reforms (such as uplift fees and conditional fee arrangements) undertaken to the civil justice system by the legislatures are aimed at increasing access to justice through changing the way which a lawyer can charge their client, thereby applying a market solution to the problem.³⁵ Market solutions for accessing justice have not been looked upon favourably by scholars.³⁶ In particular scholars have argued that any option for reform based on a market solution is the Government's way of using the legal profession as a scapegoat for the problems of accessing justice. No attention is paid to the lack of funding for legal aid or the subsidies which the Government should be giving to the area to increase access to justice.³⁷

During the process of reviewing reform options, little discussion took place in the debates during the Second Reading Speech in each of the Australian jurisdiction's Parliaments when introducing the uplift fee.³⁸ Rather the implementation of the uplift was a quick and easily solution for the Government which was more palatable than any reform options based on Government funding.³⁹ However in implementing such a quick and easy solution to accessing justice, the legislatures seem to forget or misunderstand how an uplift fee could conflict with a number of ethical duties owed by the lawyer to the client.⁴⁰ For example scholars have argued that the uplift fee could be used as an incentive for lawyers to breach their overarching obligations.⁴¹ They can do this and

³⁵Gino Dal Pont, 'Lawyers Charging and Access to Justice' (Paper presented at the AIJA Conference, Adelaide, 17 September 2006).

³⁶ Ibid.

³⁷ Ibid.

³⁸ See below discussion regarding the implementation of uplift fees throughout each Australian jurisdiction.

³⁹ Dal Pont, above n 35.

⁴⁰ Peter Melamed, 'An Alternative to the Contingent Fee? An Assessment of the Incentive Effects of the English Conditional Fee Arrangement' (2005) 27 *Cardozo Law Review* 2433.

⁴¹ Ibid.

charge excessively high costs by over servicing a case, and therefore obtaining the benefit of an increased uplift.⁴² The detriment possible to the client is that they may not end up with a higher award of damages but rather higher costs payable to the lawyer.⁴³ Alternatively the lawyer could be forced to engage in unethical conduct in reaching a successful outcome in their client's case in order to receive their fees.⁴⁴

The actions undertaken by a lawyer handling the conduct of a client's case could be in conflict with a number of ethical duties owed by the lawyer to their client. In particular the fiduciary duties founded in equity and the requirement for charging fees which are fair and reasonable from both the common law and legislation points of view are put at risk.⁴⁵

i. The fiduciary duty of loyalty

A fiduciary duty of loyalty founded in equity is owed to the client by the lawyer.⁴⁶ This overarching duty of loyalty makes it clear that the fiduciary (the lawyer) must not place themselves in a position where there may be a conflict between the duty owed to the client and his or her own interest ('the no conflict rule').⁴⁷ The application of the no conflict rule by the court is strict and has been stated as being 'unequalled elsewhere in the law'.⁴⁸ This fiduciary requirement is so fundamental that it has been enacted into legislation throughout every Australian jurisdiction.⁴⁹ One of the ways a lawyer can breach their duty is by not acting in the best interests of their client. If the lawyer places their interest paramount over their clients, then it is a breach of the no conflict rule and the lawyer can be sanctioned by a professional misconduct charge and, in extreme cases, loss of their practicing certificate.⁵⁰ Therefore at all times during the conduct of a case a lawyer must resist from acting when they cannot act impartially nor may they profit

⁴² Melamed, above n 40.

⁴³ M Zander, 'If Conditional Fees, Why Not Contingency Fees?' (2002) 152 *New LJ* 79.

⁴⁴ *Smits v Roach* (2002) 42 ACSR 148.

⁴⁵ G E Dal Pont, *Lawyer's Professional Responsibility* (Thomson Reuters, 2013).

⁴⁶ Duncan Webb, 'The Solicitor's Duty' [2008] *New Zealand Law Review* 85.

⁴⁷ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 67 (Gibbs CJ).

⁴⁸ *Moffat v Wetstein* (1996) 135 DLR (4th) 298, 315 (Grainger J).

⁴⁹ For example Western Australia's *Legal Practitioner's Conduct Rules*, rule 6 states that the practitioner is to always have regard to the best interests of the client.

⁵⁰ *Legal Profession Complaints Committee v O'Halloran* [2013] WASC 430.

from their client apart from a fee which is considered reasonable in the circumstances of the case.⁵¹ How such requirements work in the context of an uplift fee are at best, questionable.

The legislatures view when introducing the uplift fee into New South Wales (the first Australian State to implement uplift fees) was that the fee would promote the aligning of interests between the lawyer and client.⁵² It is the writer's opinion that this statement is confusing and not well thought through. In carrying the client's case forward through to litigation, it should not be necessary for a lawyer to receive an extra incentive to align their own interests with their client's.⁵³ The lawyer should be impartial and proceeding in a manner which is in the best interest of the client, otherwise it is a breach of the lawyer's overarching ethical duties owed both to the court and the client.⁵⁴

These problematic work practices which the uplift fee could encourage were already noted in Western Australia in the release of the Justice System Report 10 years before the West Australian Parliament started to consider implementing the fee.⁵⁵ The Justice System Report recommended any uplift to be calculated in reference to the amount of fees recovered on a party/party basis.⁵⁶ This recommendation was a safeguard to stop any potential problems of the lawyer being rewarded for inefficient work or escalating their legal costs in order to receive a higher uplift. As during the party/party costs assessment, the court looks at the circumstances of the case and applies a reasonable fee based on the applicable costs scale. The Western Australian Parliament ignored this recommendation and allowed the uplift on top of the amount of legal services rendered in the invoice issued by the lawyer. This was based on all the other Australian jurisdictions version of the uplift fee at the time.

The potential problems in the context of a lawyer breaching the no conflict rule in situations concerning uplift fees are not just theoretical but rather are problems

⁵¹ Dal Pont, above n 45, 115.

⁵² New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 1993, 4629 (Elisabeth Kirkby).

⁵³ Shaw, above n 9, 80.

⁵⁴ *Legal Practitioner's Conduct Rules* r 6, r 34.

⁵⁵ Law Reform Commission of Western Australia, *Project Summary: Review of the Civil and Criminal Justice System*, Project No 92 (1997-1999).

⁵⁶ *Ibid* recommendation 143.

experienced throughout the English, Welsh and New South Wales jurisdictions. Problems such as lawyers charging high uplift fees for little risk and eroding the client's compensation, charging an uplift when no risk is apparent and pressuring the client into settlement in order to receive payment of their fees have all been reported.⁵⁷ Unfortunately when these problems occur, the client has no recourse available through the courts as long as the correct disclosure obligations are met at the time of entering the costs agreement. It is hard to imagine how in such situations the client and lawyer's interests would be aligned and the lawyer would be thinking of their client's interest as paramount to their own.

Recently, the writer's opinion of the uplift fee promoting inefficient work methods have also been confirmed from the release of the Productivity Commission's *Access to Justice Arrangements* Report ('the AJA Report') published on 3 December 2014.⁵⁸ The AJA Report notes that the current conditional billing arrangements give an incentive for lawyer's to over service their clients and has made recommendations for reform to the current operation of conditional fee arrangements.⁵⁹ Time will tell if any more thorough thought is put into any suggested reforms.

Regardless, the fiduciary duty of loyalty is not the only legal obligation owed by the lawyer which is compromised in the context of charging an uplift fee; the fairness and reasonableness principle of charging legal fees is also problematic.

ii. The reasonableness requirement of charging for legal services rendered

Whenever a lawyer performs professional services on behalf of their client and renders an invoice for the work performed, there is a requirement of fairness and reasonableness which attaches to the amount of fees charged.⁶⁰ The reasonableness requirement also links back to the fiduciary duty of loyalty by not allowing any more than a reasonable

⁵⁷ Legal Fees Review Panel of New South Wales, *Discussion Paper: Lawyers Cost and the Time Billing* (November 2004).

⁵⁸ Productivity Commission, *Access to Justice Arrangements*, Project No 72 (5 September 2014).

⁵⁹ *Ibid* recommendation 18.1.

⁶⁰ For example the *Legal Profession Act* 2008 (WA) s 301, states that the reasonableness of the amount of legal fees charged is a consideration of the taxing officer.

fee for the work performed. The courts are very strict in the application of this principle and are of the opinion that part of their work is to survey the client/lawyer costs to ensure that only fair amounts are charged so that lawyers don't abuse their position. The reasoning behind this way of thinking is well explained by Tadgell J in *Redfern v Mineral Engineers Pty Ltd* where it was stated that:

“The courts’ surveillance over costs as between solicitor and client is assumed with a view to preventing any unfair advantage by solicitors in their charges to their clients. It stems, it seems, from the notion that ordinarily a solicitor is presumed to be in a position of dominance in relation to his client as a result of his presumed knowledge of the law and of what may and may not be properly charged by way of fees. Were a strict view not taken it might be open to a solicitor to overreach his client or otherwise act oppressively towards him on the matter of costs”.⁶¹

The courts are very protective over a client's position; during an assessment of legal costs the fundamental principle is that the legal fee must be reasonable for the work performed in the particular circumstances of the case.⁶² These strong views held by the courts could be the reason why many reports conducted throughout Australia on reforming the civil legal costs regime recommended requiring leave of the court prior to the lawyer entering into an uplift agreement with their client.⁶³

Once full disclosure has been made to a client and the client is still willing to enter into the costs agreement involving the uplift fee, the uplift fee is prima facie fair and reasonable.⁶⁴ This comes from the theory of freedom of contract as the costs agreement is a contract between the lawyer and client and can include any terms as agreed between the parties.⁶⁵ This has been confirmed in the Victorian case of *Legal Services Board v Forster* where it was opined that the legislation allowing uplift fees does not particularly require a ‘successful’ outcome to be achieved but rather any ‘specified’ outcome agreed upon by the parties at the time of contracting.⁶⁶

⁶¹ *Redfern v Mineral Engineers Pty Ltd* [1987] VR 518, 523 (Tadgell J).

⁶² See: *McInnes v Twigg* (1992) 16 Fam LR 185; *Weiss v Barker Gosling* (1993) 16 Fam LR 728.

⁶³ Law Reform Commission of Western Australia, above n 55, recommendation 143.

⁶⁴ Dal Pont, above n 45.

⁶⁵ *Ibid* 116.

⁶⁶ *Legal Services Board v Forster* [2011] VSC 292, 38-40 (Justice Emerton).

Potential ethical problems have been noted with the implementation of uplift fees as a means of increasing access to justice. It is therefore necessary to conduct an analysis of the implementation and lifecycle of uplift fees throughout England and Australia to identify any problems which have occurred.

II THE HISTORY OF THE UPLIFT FEE IN ENGLAND

The original English position on a lawyer charging on the basis of a ‘no win no fee’ agreement was that the legal fee was both unlawful and unenforceable.⁶⁷ This view of conditional agreements was based on the long standing public policy issues of champerty and maintenance which had been in existence since the middle of the last century.⁶⁸ Champerty is the situation in which a lawyer is given a share of the proceeds of litigation as a reward for assistance throughout the claim.⁶⁹ The idea that a solicitor would have a vested interest in the outcome of their client’s case other than in a professional sense was seen as a vehicle for abuse and thus disallowed.⁷⁰ Rather, the legal principle that a lawyer should be giving proper and impartial advice without any regard for the outcome was in practice.⁷¹ Therefore any share of the proceeds given to the lawyer for assistance in a case was a form of reward which was contrary to public policy and champertous in nature.⁷²

Likewise, any form of agreement which was dependent on the outcome of the case was thought of as maintaining the action and was also unenforceable. This was a form of maintenance which involves “the procurement, by direct or indirect financial assistance, of another person to institute or carry on or defend civil proceedings, without lawful justification”.⁷³ Either of these types of legal agreements in the middle of the last century were held to be both a criminal offence and a civil wrong.

⁶⁷ Buddug Williams, ‘JR and Conditional Fee Arrangements’ (1999) 4 *Judicial Review* 161.

⁶⁸ Simon Middleton and Jason Rowley, *Cook on Costs* (LexisNexis Butterworths, 2015) 4.2.

⁶⁹ Dal Pont, above n 45, 62.

⁷⁰ Middleton and Rowley, above n 68.

⁷¹ Melamed, above n 40.

⁷² *Ellis v Torrington* [1920] 1 KB 399.

⁷³ Law Commission of the United Kingdom, *Proposals for Reform of the Law Relating to Maintenance and Champerty*, Report No 7(1) (1966) 9.

In the early 1900's, champerty and maintenance were abolished as criminal offences; although they remained in existence as torts.⁷⁴ Faced with such a bill a client could choose to send the bill for an assessment of costs. In the assessment, the Court could then determine whether the lawyer was receiving a 'fair and reasonable' fee for the work performed or whether the agreement was champertous in nature and maintaining the action. This was to stop the exploitation of vulnerable litigants by making sure protection was available through a civil action to assess costs for the agreement which had been entered into.⁷⁵ The end result being that the Courts could still render any agreement which contravened the long standing public policies of maintenance and champerty unenforceable.⁷⁶

During the 1960s, the English legislatures started to become aware of the increasing problems and practical limitations for accessing justice that faced a large part of society. In particular it was noted that potential litigants were being discouraged from accessing the courts in the English and Welsh jurisdictions.⁷⁷ This was due to the problem of litigants not being able to afford the legal fees of an action during the life of the claim or if they were unsuccessful, not at all. It then became apparent that the civil justice system in England and Wales required an overhaul to address the problems of unaffordability.⁷⁸

A. The *Court and Legal Services Act 1990* – An overhaul of the civil justice system throughout the English and Welsh jurisdictions

As noted above, during the late 1960's the civil justice system throughout England and Wales came under scrutiny for its high legal costs and lack of availability to many people.⁷⁹ Over the next few decades a number of inquiries were commissioned to

⁷⁴ Williams, above n 67.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, Report No 3, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/754/75405.htm>.

⁷⁸ Williams, above n 67.

⁷⁹ Thomas Beke, *Litigation Communication: Crisis and Reputation Management in the Legal Process* (Springer Publishing, 2014) 55.

propose reforms to the civil justice system.⁸⁰ In particular the 1976 Royal Commission on Legal Services, led by Sir Henry Benson, (‘the Benson Commission’) was created. The Benson Commission’s main objective was to ‘examine the structure, organisation, training and regulation of the legal profession and to recommend those changes that would be desirable to the interests of justice’.⁸¹ The Benson Commission report was released on 30 October 1979.⁸²

The Benson Commission proposed wide changes to the civil justice system. The recommendation most relevant to this paper was one of which to allow conditional fee arrangements through enactment of legislation.⁸³ What was clear at the time of the Benson Commission’s inquiry was that the problems of the rising costs of civil litigation was causing a shift in the public policy debate towards allowing conditional fee arrangements as a suitable tool to increase access to justice.⁸⁴ One of the principles that underlay the arguments in support of this type of conditional arrangement was that “lawyers will be required to back their legal judgment of the merits of a case with their own money”.⁸⁵

The Benson Commission report received great praise from the English legislatures and was considered in great detail over a long period of time.⁸⁶ The Parliament followed the Benson Commission’s recommendations and enacted the *Court and Legal Services Act* 1990 (‘CLSA’) on the 1st November 1990.⁸⁷ The CLSA’s effect was to overhaul the civil litigation system in England.⁸⁸ The key provision for increasing access to justice

⁸⁰ For example the *Committee on Legal Education Report* (the Omrod Report) Report No 4595 (1971) and the *Phillips Commission on Civil Procedure* (1981).

⁸¹ Robin White, *A Guide to the Court and Legal Services Act 1990* (Fourmat Publishing, 1991) 4.

⁸² United Kingdom, Royal Commission on Legal Services, *Sir Henry Benson: Final Report* (1979).

⁸³ *Ibid.*

⁸⁴ For an example of the public policy shift towards increasing access to justice through the use of conditional fee arrangements see: *Ladd v London Road Car Co* (1900) 110 Lt Jo 80.

⁸⁵ Williams, above n 67, 162.

⁸⁶ England, *Parliamentary Debates*, House of Lords, 30 October 1979, 333 (Lord Boston of Faversham).

⁸⁷ *Court and Legal Services Act* 1990 (UK).

⁸⁸ *Callery v Gray* (No.1) [2002] UKHL 28, 1.

was s 58(3) of the CLSA.⁸⁹ This provision stated that a conditional fee arrangement “shall not be unenforceable by reason only of it being a conditional fee arrangement”.⁹⁰

From that point on, lawyers and their clients were able to enter into conditional fee arrangements; however cautionary measures were still undertaken. Restrictions were placed on the types of cases which could attract the speculative retainer. The only client/lawyer agreements which could attract a conditional fee were the cases which the Lord Chancellor specified by Order.⁹¹ For a case to satisfy the criteria for being placed under Order, the Lord Chancellor would determine whether the case fell into a certain type of category; that being whether the class of citizens who would require access to courts in the particular area of law would likely have difficulties funding the claim from the outset of proceedings. Once the area of law was considered to be under this category, it was placed under Order; lawyers could then enter into an agreement with their client where they held a direct interest in the outcome of the case (which was part or full payment of their legal fees, contingent on success).⁹² The longstanding public policy that any agreement involving an interest by the lawyer was champertous in nature and maintaining the action was no longer of any relevance for those limited classes of cases.⁹³

However the CLSA did not stop with the enforceable conditional fee arrangement; it also added an incentive for the lawyer to enter into such an agreement. This incentive was to allow a ‘success’ fee to be charged on top of the legal services fee rendered if a successful outcome was achieved.⁹⁴ The theoretical justification for the success fee was that it provided a means of compensating a lawyer for the risk of nonpayment.⁹⁵ Upon the CLSA’s enactment, no limits (percentage caps) were placed on the success fee so in

⁸⁹ *Court and Legal Services Act 1990* s 58(3).

⁹⁰ *Ibid.*

⁹¹ By July 1995, conditional fee arrangements were allowed in only a small number of cases. These included personal injury, cases before the European Commission on Human Rights and insolvency cases.

⁹² Beke, above n 79.

⁹³ *Ibid.*

⁹⁴ *Court and Legal Services Act 1990*, s 58(2).

⁹⁵ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77.

effect lawyers were permitted to charge an unlimited percentage increase of their legal fees for the successful outcome of a case.

After the Event Insurance (‘ATE insurance’) was also encouraged to be used in conjunction with conditional fee arrangements.⁹⁶ This was an insurance policy which a litigant could take out (after their claim arose but before litigation commenced) to protect themselves against any adverse costs order in the event of litigation. Thereby when ATE insurance was coupled with a conditional fee arrangement, the litigant theoretically had no risk of losing money on legal costs in the event of an adverse costs order.⁹⁷

The CLSA made it clear that when a party lost the case and was subjected to an adverse costs order, they were not required to indemnify the successful party for either the ATE premium or the success fee. The legislatures at the time of the CLSA’s enactment held the view that it was not the losing litigant’s fault that the other party could not afford their legal representative through the life of the claim.⁹⁸ Thereby the winning litigants, once successful in their case, were required to pay for their own success fee and the ATE insurance premium out of their own settlement monies.⁹⁹ However, over a period of some years it became increasingly apparent that this fee arrangement was not working and that further changes were required.

B. The Lord Woolf Report – A recommendation to restructure the civil litigation system and legal costs once again

By early 1993 it was clear that the reforms implemented by the CLSA were not working as well as hoped.¹⁰⁰ Defects in the civil justice system were still apparent, specifically in the areas of legal costs. Legal Aid applications were increasing at an unprecedented

⁹⁶ Ministry of Justice Research Series ‘*Scoping Project on No Win No Fee Agreements in England and Wales*’ (Ministry of Justice, December 2009) 4.

⁹⁷ *Ibid* 4.

⁹⁸ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77.

⁹⁹ *Court and Legal Services Act 1990* (UK) s 58(2).

¹⁰⁰ Williams, above n 67.

rate but at the same time, a large amount of those applications were being rejected because of their volume and competitiveness for funding.¹⁰¹

In 1993 Lord Henry Woolf ('Lord Woolf') was appointed to undertake a review of the civil justice system to identify why problems that were supposed to have been addressed through the CLSA were still apparent.¹⁰² Lord Woolf's preliminary report was released in 1994.¹⁰³ He noted defects such as the system being too slow at bringing cases to a conclusion; legal costs being too expensive and often in excess of the value of the claim; and an inequality between the powerful and the poorer litigants.¹⁰⁴ In Lord Woolf's view this mainly stemmed from the Government's Legal Aid system. At that point in time, Legal Aid was costing the Government of the day a large amount of money and was an ineffective means for allowing most financially disadvantaged people access to justice.¹⁰⁵

In 1996, Lord Woolf released his final report ('the Woolf Report').¹⁰⁶ The Woolf Report recommended sweeping reforms to the civil justice system in order to address the problematic areas of rising legal costs and inequality of access to justice between the poor and rich. One of the recommendations was to change the structure of the conditional fee arrangement.¹⁰⁷ In particular the Woolf Report recommended allowing lawyers to enter into a conditional agreement in any type of claim (except family or criminal law claims).¹⁰⁸ This was a radical departure from the position under the CLSA, which only allowed conditional fee arrangements in a small number of areas.¹⁰⁹ The intention behind the expansion of conditional fee arrangements was to provide access

¹⁰¹ Civil Justice Council, *'Impact of the Jackson Reforms: Some Emerging Themes'* Report Prepared for the Civil Justice Council Costs Forum (21 March 2014).

¹⁰² A Zukerman, 'Lord Woolf's Access to Justice: Plus a Change' (1996) 59(6) *Modern Law Review* 773.

¹⁰³ Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).

¹⁰⁴ Lord Woolf, *Access to Justice: Final Report* (1996).

¹⁰⁵ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 79.

¹⁰⁶ Woolf, above n 104, recommendations 59 to 70 outline the changes to the civil costs regime.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* 7.

¹⁰⁹ This was in contrast to the way in which the current law operated under the CLSA in that only a small number of cases allow an uplift. By July 1995, only personal injury, European convention on human rights and insolvency cases were placed under order to allow a conditional fee basis allowing an uplift fee.

to justice for middle income people. Lord Woolf had undertaken empirical research and the final report found that rich people could access justice through being able to afford litigation and truly poor people could have access through Legal Aid grants. This left a large majority of middle income society not being able to access Legal Aid but also not being able to fund any lawyer's fees during the life of a claim.¹¹⁰ The recommended changes to conditional fee arrangements were a means to 'open up access to civil justice to people on modest income who do not qualify for legal aid and dare not risk going to court at their own expense because of the unpredictable cost'.¹¹¹

During the course of researching conditional fee arrangements, Lord Woolf also considered the effect of success fees and ATE insurance policies. As noted above, these reforms had been introduced in 1990 through the CLSA.¹¹² The Woolf Report concluded that in many cases successful litigants were deprived of any real compensation as the monies awarded to them were swallowed up by uplift fees and insurance premiums. This meant that the system operating under the CLSA was not providing any incentive for a potential litigant to access the courts. The Woolf Report recommended changing the structure of the indemnity rule to allow success fees and insurance premiums to be recoverable from an unsuccessful defendant.¹¹³

In the writer's view, changing the structure of the indemnity rule to make the defendant liable for extra legal fees was a problematic solution. The Woolf Report recommended increasing access to justice by requiring the losing litigant to pay extra for the plaintiff not being able to afford litigation in the first place. This is in direct contradiction to the legislator's views when enacting the CLSA; that it was unfair to expect the defendant to foot the bill for the plaintiff not being able to afford their own legal fees. It is apparent that this recommendation was a quick fix to try and increase the amount of people accessing the courts without any forethought into other problems which could arise. The plaintiff when entering into the costs agreement with the lawyer would have no incentive in negotiating a reasonable percentage of uplift. This is due to the simple fact

¹¹⁰ England, *Parliamentary Debates*, House of Commons, 21 November 1997.

¹¹¹ *Ibid* 1 (Geoffrey Hoon).

¹¹² Civil Justice Council, above n 101.

¹¹³ Woolf, above n 104.

that under no circumstance would a plaintiff be required to pay this fee out of their own pocket as the losing defendant indemnified the plaintiff for the percentage of uplift fee agreed upon in the contract. Therefore a potential for abuse on the part of lawyers and lack of care by plaintiffs seem a likely situation if this recommendation was acted upon.

Just after the release of the Woolf Report, the longstanding view of the judiciary began to change. Developments in case law started to show a softening of the Courts' view towards the idea of permitting an increase of conditional fee arrangements across the board. In particular the Court of Appeal's decision in *Thai Trading v Taylor* was a persuasive argument to allow conditional fee arrangements in all types of cases.¹¹⁴ The echoes of the theoretical problems concerned with the law of champerty (which the Courts had fiercely upheld for so many years) were dying away. In *Thai Trading* the Court of Appeal stated firmly that the theory behind lawyers submitting to a temptation to act improperly if they had a vested outcome in a case was exaggerated.¹¹⁵ Public policy now countered any argument in that respect as access to justice for people of modest means was more important than any potential problems based in outdated theory. After the decision was handed down in *Thai Trading*, it was not long before further changes to the civil justice system started to take effect.¹¹⁶

C *The Access to Justice Act 1999 – Questioning the ambit of the uplift fee throughout England and Wales*

The *Access to Justice Act 1999* ('AJA') was enacted on 27 July 1999.¹¹⁷ The AJA was a means to redesign the court and civil justice systems throughout England and Wales. When introducing the AJA, the Government identified one of their objectives as:

“To make justice affordable to all, to discourage weak claims and encourage early settlement. Allied to this was the desire to ease the administrative burden on those providing and purchasing legal services. These provisions in the Act gave effect to Parliament's intention to increase

¹¹⁴ *Thai Trading v Taylor* [1998] QB 781.

¹¹⁵ *Thai Trading v Taylor* [1998] QB 781 at [790].

¹¹⁶ Williams, above n 67.

¹¹⁷ *Access to Justice Act 1999* (UK).

access to justice by making it easier and more affordable to use conditional fee agreements, insurance policies and equivalent forms of funding”.¹¹⁸

The AJA amended the operation of the current CLSA.¹¹⁹ The main amendment which is relevant to this paper was the restructure of the Legal Aid regime. Legal Aid was no longer available for civil claims.¹²⁰ Rather potential civil litigants were encouraged to enter conditional fee agreements with their lawyer.¹²¹ Two reforms were also made in relation to the ambit of conditional fee arrangements. First was an amendment to allow conditional fee arrangements to be charged in every type of claim (apart from family or criminal law); secondly, success fees and insurance premiums were now recoverable from the Defendant.¹²² The intention of the legislature at the time was to ensure that winning litigants received fair compensation without having it eroded by a success fee or insurance premium.¹²³ The losing party was now liable for the excess legal fees brought about for the plaintiff not being able to afford the litigation in the first place.

However the legislature, as part of the enactment of the AJA, did add regulatory safeguards to try to protect the losing litigants.¹²⁴ There was a provision that allowed a losing defendant the opportunity to challenge the amount of uplift in an assessment of costs.¹²⁵ If the losing litigant held the view that an excessive uplift fee had been charged for the amount of risk undertaken by the lawyer, the uplift could be challenged and ultimately, if it was excessive, voided by the Court. The lawyers who entered into the agreement containing the uplift could not recover the fee and could also be sanctioned for misconduct if any abuse of the uplift provision was proven.¹²⁶

After the introduction of the AJA reforms, it did not take long for problems to arise. In 2005, Citizens Advice released a report on complaints in relation to the operation of the

¹¹⁸ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77; quoting the Government’s introduction of the *Access to Justice Act 1999* available at www.dca.gov.uk.

¹¹⁹ *Ibid.*

¹²⁰ See: *Access to Justice Act 1999* (UK) schedule 2.

¹²¹ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77.

¹²² *Access to Justice Act 1999* (UK) s 29.

¹²³ England, *Parliamentary Debates*, House of Commons, 21 November 1997.

¹²⁴ *Access to Justice Act 1999* (UK) s 30.

¹²⁵ *Ibid.*

¹²⁶ Williams, above n 67.

civil justice system.¹²⁷ This report noted that an estimated 130,000 complaints had been received relating to conditional fee arrangements and success fees since 2000 (immediately preceding the AJA's enactment). Many of these complaints came directly from litigants and related to the way in which the insurance companies (who underwrote the ATE insurance policy) and the lawyers conducted themselves when a settlement offer was received. In particular many litigants felt that they were pushed into unreasonable settlements or that the insurers had too much control over the progress of the claim. Conversely complaints also came from losing litigants in relation to the payment of the insurance premium and uplift fee which in their view was unfair but nonetheless usually upheld in the Courts.¹²⁸

Not long after the release of the Citizen's Advice report, the Department of Constitutional Affairs released a report (in 2005).¹²⁹ This report noted a drop (5%) of the amount of recorded claims between 2000 and 2005.¹³⁰ This drop in claim rates was a likely demonstration that the AJA was not attaining the desired effect of increasing access to justice. According to the figures, less people were accessing the courts and not more, which was contrary to the intended result of the AJA.

There was however an increase of costs related litigation, which, surprisingly, had not been expected. Losing litigants were often challenging the success fee and insurance premium (the right to do so was the AJA safeguard to stop abuse by lawyers in relation to the amount of uplift charged). This stemmed from a common complaint that the amount of settlement monies which were recovered from the losing litigants was only small in comparison to the costs of the legal fees charged once an uplift and insurance premium were added.¹³¹ Many losing litigants felt aggrieved and often clogged the courts with challenges to the extra legal fees for which they were required to indemnify the successful litigant.¹³² In addition, it seemed that lawyers were 'cherry picking' their

¹²⁷ Citizens Advice, 'No Win, No Fee No Chance' Report prepared in Response to Civil Litigation Amendments (December 2004).

¹²⁸ Ibid.

¹²⁹ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77.

¹³⁰ Ibid.

¹³¹ Williams, above n 67.

¹³² House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77.

cases and often only taking on ones which were very likely to be successful.¹³³ In effect, some lawyers were charging a high ‘risk’ fee when in fact there was little risk of nonpayment. This made an unnecessary rise in the amount of costs the losing litigant had to pay.¹³⁴ For this reason, losing litigants were going back to court to obtain relief from the uplift on the grounds that it was unreasonable for the lawyer to have charged it in the first place.

The debate and uproar from both insurance companies and defendants lasted many years, and was only recently laid to rest with the 2015 decision in *Coventry v Lawrence*.¹³⁵ The AJA still applied to this case as the client and lawyer entered into the conditional agreement involving the uplift fee when the AJA was still in operation. This case involved claimants who lived near a sports stadium and who instituted a claim against the owners of the stadium for nuisance. The claimants were eventually successful in their case and were awarded an injunction together with a small amount of damages. Prior to the litigation, the claimants had entered into a conditional fee arrangement with their solicitors. This arrangement included a success fee and the ATE insurance policy. As the stadium owners lost the case, they were liable for both the premium and uplift fee. The amount of those fees was much higher than the actual value of any damages received by the claimants. The stadium owners challenged the payment and took the case to the Supreme Court arguing that the AJA was incompatible with the European Convention on Human Rights. The majority of the Supreme Court did not agree and held that the AJA was compatible and that success and ATE premiums were recoverable as an expense if they had been necessarily incurred.¹³⁶ It was of no difference that the amount of damages awarded was small compared to the amount of legal expenses incurred.

The case *Coventry v Lawrence* has only recently laid to rest questions about the validity of the AJA and the unfair result of its reforms; that losing litigants were not only responsible for the damages they had caused but also had to pay a premium on the

¹³³ Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009).

¹³⁴ *Ibid.*

¹³⁵ *Coventry v Lawrence* [2015] UKSC 50.

¹³⁶ *Ibid.* 40.

grounds that the successful plaintiff had been unable to fund the litigation upfront. However over the timespan of the AJA's operation, it seemed increasingly clear that Lord Woolf's reforms and the introduction of the AJA was not the answer for increasing access to justice.¹³⁷ Rather it became increasingly apparent that attempts to solve problems in one area had simply created new problems in other areas. The legislature also started to become the subject of criticism for opening up access to justice through a market solution.¹³⁸ In particular, it was noted that no protections were provided to ensure that the market would act effectively.¹³⁹ As a result of this increasing pressure, in November 2008 the Master of the Rolls, Sir Anthony Clarke was called upon to appoint someone to make recommendations for promoting access to justice at a proportionate cost.¹⁴⁰

D The Jackson Reforms and the enactment of the *Legal Aid, Sentencing and the Punishment of Offenders Act 2012* – The current situation in England and Wales

Sir Anthony Clarke was prompt in an appointment, and in 2008 Chief Justice Jackson of the England Court of Appeal was tasked with reviewing the civil justice system. On 21 December 2009, he published his final report ('the Jackson Report') which recommended changes to the system, again in order to increase access to justice at a proportionate cost.¹⁴¹ Of relevance to this paper was the recommendation that both solicitors and counsel be permitted to enter into damages based agreements with their clients, an approach that is similar to the American contingency fee system. The Jackson Report noted that the fact that ATE Insurance premiums and success fees could be recovered as costs was a 'major contributor to disproportionate costs in civil litigation in England and Wales'.¹⁴² The Jackson Report therefore also recommended that:

“success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented, it will lead to significant

¹³⁷ Civil Justice Council, above n 101.

¹³⁸ House of Commons, *Constitutional Affairs – Conditional Fee Arrangements*, above n 77.

¹³⁹ *Ibid.*

¹⁴⁰ Civil Justice Council, above n 101.

¹⁴¹ Jackson, above n 133.

¹⁴² *Ibid* 16.

costs savings, whilst still enabling those who need access to justice to obtain it. It will be open to clients to enter into “no win, no fee” (or similar) agreements with their lawyers, but any success fee will be borne by the client, not the opponent.”¹⁴³

Lord Justice Jackson recognised that a shift back to the earlier CLSA model placed some claimants at a real disadvantage. This was due to the CLSA requiring the winning litigant to pay the extra success fee and ATE Insurance premium from their own pocket and thereby eroding their compensation at the successful conclusion of the matter.¹⁴⁴ To resolve these earlier problems, Chief Justice Jackson recommended a 10 per cent increase in general damages in civil claims involving damages.¹⁴⁵ Therefore a buffer of extra compensation was created to cover any success fees which may be payable for the litigant accessing justice in the first place.¹⁴⁶

On 1 April 2013 the Jackson Report reforms were implemented throughout England and Wales by way of the *Legal Aid, Sentencing and the Punishment of Offenders Act 2012* (‘LSPO’).¹⁴⁷ Chief Justice Jackson’s recommendations, as to ending the right to recover excess legal fees from the losing litigant and the introduction of damage based agreements (like the American legal costs system) were implemented.¹⁴⁸ The 10% increase in general damages was also instituted for personal injury, defamation and nuisance cases when a success fee was included in the retainer.

At this point in time it is still unclear whether these further reforms have been beneficial to the civil justice system in England and Wales. The operation and changes of the indemnity principle, and the uncertainty surrounding the effectiveness of damages based agreements (such as the risk of encouraging an over litigious society as has occurred in America through the use of damage based agreements) have recently led the Law Society to caution lawyer’s against their future use.¹⁴⁹

¹⁴³ Jackson, above n 133.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 112. The recommendation at the time of the report’s publication mainly concerned the problems of compensation erosion in personal injury claims.

¹⁴⁶ Ashurst Lawyers, *Quick Guides: Impact of the Jackson Reforms on Commercial Litigation*.

¹⁴⁷ *Legal Aid, Sentencing and the Punishment of Offenders Act 2012* (UK).

¹⁴⁸ Ibid s 44, 48.

¹⁴⁹ Ashurst Lawyers, above n 146.

In the writer's opinion, the problems of unfairness created through the application of the AJA (recoverability of premiums and success fees from the defendant) still remain. The decision to allow an increase in general damages once again places the losing litigant in a position of covering the successful litigant's extra legal fees for accessing justice. There is no real difference between being liable for a success fee or, conversely, paying an extra 10% on top of the real damages. Either way it is still being paid out of the losing litigant's pocket. Whether or not the Jackson Reforms will provide the desired outcome of increasing access to justice at a proportionate cost seems questionable. As noted above, it seems that the new reforms may just move problems from one area to another. In light of above concerns, the Ministry of Justice (UK) is currently considering further suggestions for improvement in the system.¹⁵⁰ More research needs to be undertaken in regard to the efficacy of current reforms before new ones are decided upon.

III AUSTRALIAN JURISDICTIONS AND THE IMPLEMENTATION OF THE UPLIFT FEE

Like its English and Welsh counterparts, Australia has over the years experienced the same problems with disproportionate legal costs in civil matters. This is one of many issues that acts to create a bar on access to justice.¹⁵¹ However, the Australian jurisdictions did not start to implement any real reform in this area until the late 1970's. In February 1977 the Commonwealth Attorney-General noted that there were real problems with the average citizen's ability to access the courts. In response to these problems, the Commonwealth Attorney-General referred the matter to the Australian Law Reform Commission as a priority.¹⁵²

¹⁵⁰ Ashurst Lawyers, above n 146.

¹⁵¹ Law Reform Commission of Australia, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (2000).

¹⁵² Law Reform Commission of Australia, *Grouped Proceedings in the Federal Court*, Report No 46 (14 December 1988); <<http://www.alrc.gov.au/inquiries/grouped-proceedings-federal-court>>.

The Australian Law Reform Commission compiled their findings over a number of years and finally released their final report, *Grouped Proceedings in the Federal Court* ('Report 46'), in December 1988.¹⁵³ Report 46 found that due to the high cost of entering into any legal proceedings, many individuals and businesses who had suffered small but significant losses were discouraged from claiming compensation in the courts. They simply found that the costs of instituting proceedings, combined with the inherent risks of litigation, made accessing the justice system unattractive. One of the Law Reform Commission's recommendations was to promote cost effective access by allowing lawyers to charge contingency fees (which in effect were an uplift fee as it was a percentage fee based on the lawyer's costs and not on the amount of damages awarded).¹⁵⁴ At the same time, Report 46 also considered that a cautious approach to permitting lawyers to have any direct financial interest in the matter was required and recommended strict statutory regulation of any such reform. The recommendations made in Report 46 included statutory safeguards such as requiring leave of the court before allowing any type of contingency retainer to be commenced. Report 46 considered that the courts should play an active role protecting vulnerable litigants.¹⁵⁵

Report 46 was very influential in the Australian jurisdictions. However it wasn't until the early 1990's that changes started to occur in any of the Australian States. In 1993, the New South Wales Law Reform Commission released their report ('Report 70') recommending reforms to the civil justice system.¹⁵⁶ Report 70 mainly addressed recommendations to handle the amount of complaints made against lawyers; however costs seemed to be a major factor in many of the complaints that the public were making.¹⁵⁷ In response to this report and the problems it identified, New South Wales was the first State to implement changes throughout their civil justice system. These changes included a change to the costs regime of the legal profession.¹⁵⁸ These NSW

¹⁵³ Law Reform Commission of Australia, above n 152.

¹⁵⁴ *Ibid* recommendation 291.

¹⁵⁵ *Ibid*.

¹⁵⁶ Law Reform Commission of New South Wales, *Scrutiny of the Legal Profession: Complaints Against Lawyers*, Report 70 (1993).

¹⁵⁷ *Ibid*.

¹⁵⁸ This was through amendments to the current *Legal Profession Act 1987* (NSW).

reforms were influential in other Australian States and eventually led to the introduction of uplift fees throughout every Australian jurisdiction.

A. The first jurisdiction to implement the uplift Fee – New South Wales

In 1993, New South Wales substantially amended the law regarding legal costs. In particular section 187 of the *Legal Profession Act 1987* (NSW) allowed lawyers to enter into conditional costs agreements with their client.¹⁵⁹ Section 187 also created a right for a lawyer to enter into a conditional costs agreement that contained an uplift fee capped at 25% of the legal costs on the attainment of a ‘successful conclusion’.¹⁶⁰ This uplift fee was (as had been the case in the English and Welsh jurisdictions) a means of promoting access to justice by enticing more lawyers to take on conditional fee arrangements. The New South Wales legislatures’ held the view that this amendment would also create competition throughout the profession and align lawyer/client interests by ensuring only cases with a chance of success would proceed through the courts.¹⁶¹

At the same time, the *Maintenance and Champerty Abolition Act 1993* came into effect.¹⁶² The *Maintenance and Champerty Abolition Act 1993* was put into place to compliment the new amendments to the *Legal Profession Act 1987* (NSW). This enactment abolished the offence of maintenance and champerty so from that time on it was legal for a lawyer to have a financial interest in the outcome of the client’s case by way of a speculative agreement involving an uplift fee.

This was the first step taken by an Australian State in a move to increase access to justice by allowing a lawyer to not only have a direct financial incentive in the outcome of the matter but also to have an extra incentive above his or her normal fees.¹⁶³ As in England and Wales, the longstanding view in Australia had been that lawyers having a direct

¹⁵⁹ *Legal Profession Act 1987* (NSW) s 187.

¹⁶⁰ *Ibid.*

¹⁶¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 October 1993, 4629 (Elisabeth Kirkby).

¹⁶² *Maintenance and Champerty Abolition Act 1993* (NSW).

¹⁶³ The no win/no fee retainer had long been approved by the High Court since *Clyne v New South Wales Bar Association* (1960) 104 CLR 186. However in the traditional no win/no fee retainer, there was no additional financial incentive for the lawyer to enter into such an agreement.

interest in their cases was both a crime and a civil wrong.¹⁶⁴ Prior to enactment of s 187 of the *Legal Professional Act 1987* (NSW) the legislatures were wary of the problems which could arise from the use of conditional fee arrangements; nonetheless they embraced them wholeheartedly.

At the second reading speech of the Legal Profession Reform Bill (No.2) in the New South Wales Parliament, The Honourable Elisabeth Kirkby noted the legislature's desire to allow "freedom of choice in practice, introduce competition in the provision of legal services, open up the profession to external scrutiny and give consumers greater powers when dealing with lawyers".¹⁶⁵ Ms Kirkby's view of how to attain these goals was to move from a regulated system of legal fees to a system whereby market forces played a larger role.¹⁶⁶

Ms Kirkby then noted that any market solution had to include strict safeguards as problems could occur. In such instances lawyers may feel the temptation to deceive the courts and have an incentive to increase unnecessary litigation which could lead to the interests of the lawyer being paramount over that of their clients.¹⁶⁷ These types of situations had been occurring for a long time in America under their system of contingency fees. Thereby the reforms proposed by the New South Wales legislature contained an uplift cap of 25% of the legal fees charged rather than a switch to the American 'percentage of the win' approach.¹⁶⁸

Ms Kirkby also put forward a further argument as to the premium model being different to the American model because upon entering an agreement, the client and lawyer had to specify what amounted to a 'successful' outcome in that specific situation.¹⁶⁹ Further the premium could only be charged on top of the 'reasonable' fee which was estimated in the costs agreement at the time of contracting.¹⁷⁰ It was thought that these type of

¹⁶⁴ *Smits and Ors v Roach and Ors* [2002] NSWSC 241.

¹⁶⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1993, 4625 (Elisabeth Kirkby).

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 September 1993, 3277 (John Hannaford).

¹⁷⁰ *Ibid.*

precautions would negate the problems which had been occurring in other common law jurisdictions such as England, Wales and America by ensuring that the clients were protected from abuse.¹⁷¹

Shortly after the amendments to the law in New South Wales which permitted uplift fees, the Commonwealth Attorney General commissioned and published their own report, namely the *Justice Advisory Committee: Access to Justice (an Action Plan)*.¹⁷² In overview, this report investigated and eventually approved the concept of allowing premiums paid to lawyers for a conditional agreement on the grounds that such arrangements would increase access to justice in Australia. They also recommended that the legislatures include strict safeguards to prevent abuse. These included:

- 1) The practitioner must believe that the risk of failure was ‘significant’;
- 2) The writing of the agreement was to be in plain English and in standard form;
- 3) The agreement must contain the rationale for including the uplift fee;
- 4) The definition of success must be clearly identified;
- 5) A cooling off period after entering into the agreement;
- 6) Information should be given to the client concerning their right to obtain independent legal advice prior to entering the agreement;
- 7) The client should be expressly advised of their right to apply to the court to have the costs agreement set aside for unreasonableness;
- 8) Time based billing should not be the basis for calculating the uplift fee but rather the amount the winning litigant recovered (this was a direct remedy for any potential award a lawyer could gain for being inefficient with their time).
- 9) Any agreement which contains an uplift should be by leave of the court (this is so the judiciary could consider what is reasonable in terms of the uplift).¹⁷³

Even though the New South Wales Parliament claimed to be wary of potential problems which could occur through the use of uplift fees, it seems that their safeguards were

¹⁷¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 September 1993, 3277 (John Hannaford).

¹⁷² Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994) 191-192.

¹⁷³ *Ibid.*

substantially lacking when compared to the recommendations included in the *Justice Advisory Committee Report*.¹⁷⁴ The only safeguards mentioned in the Legal Reform Bill (No.2) (NSW) to prevent abuse were an agreement to what constitutes a successful outcome; and a statutory cap of 25% on the uplift.¹⁷⁵ It is open to argue that when the New South Wales Parliament implemented their version of the uplift fee, not enough safeguards were put into place. This argument is supported by the range of cautionary measures recommended in the *Commonwealth Access to Justice Report*. Many of the problems they anticipated came to fruition after the uplift fee regime had been implemented. The problems in turn led to changes of the ambit of the uplift fee in New South Wales.

i. The first problem – Echoes of the English and Welsh models with uncertainty as to who was liable for the fee

Shortly after the implementation of the uplift fee in New South Wales, problems became apparent. One of the first problems which occurred was the question of which party was liable for the uplift fee on costs assessment. The amendments did not make clear whether the uplift fee could be recovered on a party/party assessment when the losing litigant was ordered to pay the costs of the matter.

After some initial confusion in the courts, and some four years of uncertain litigation and costs assessments, the National Competition Policy Review of the *Legal Professional Act 1987* (NSW) finally laid the matter to rest.¹⁷⁶ In their report it was noted that even though the *Legal Professional Act 1987* (NSW) was silent in regards to party/party costs concerning uplift fees, the uplift was only intended to form part of the solicitor/client costs and therefore was payable directly by the client and could not be recovered on a party/party basis.¹⁷⁷ The defendants should not receive any unfair disadvantages from having a plaintiff sue who could not afford their own legal fees.

¹⁷⁴ Access to Justice Advisory Committee, above n 172.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Cachia v St George Bank Ltd* (Unreported, Supreme Court of NSW, Malpass M, 26 October 1995); Commonwealth of Australia Attorney General's Department, *National Competition Policy Review of the Legal Profession Act 1987: Final Report*.

¹⁷⁷ Commonwealth of Australia Attorney General's Department, above n 176, 12 [II].

After the problem concerning the indemnity for the uplift fee was settled, more complaints started to arise.¹⁷⁸ In particular, it seemed a number of defendants were reporting concerns about the increase of meritless claims by plaintiffs. The concerns raised were based around the defendant incurring significant legal costs and ultimately being successful in the claim but being unable to recover the legal fees due to the plaintiff owning no significant assets.¹⁷⁹ It should be noted that such problems have always occurred in the context of a no win no fee retainer, even when such retainers did not involve an uplift. However these concerns were based on the argument that more meritless cases were proceeding through to litigation because of the amount of clients having what was in effect nothing to lose from the outcome and the lawyer being tempted to take on meritless claims.

Defendants were also arguing that the increase of meritless claims were also compounded by the increase of competition for clients throughout the legal profession. More lawyers were seeing a chance for business through conditional fee arrangements and uplift fees which promoted the creation of more firms.¹⁸⁰ To maintain a steady work flow, more lawyers were then taking on clients with little prospect of success by hoping for a settlement before trial to dispose of the case.¹⁸¹ The defendants could not usually risk the chance of going to trial because even when awarded with costs, the chances of them actually receiving their legal costs were slim due to the client not owning any assets to pay off the defendant.¹⁸² For that reason, a payout settlement, even when the claim had no merit, was the cheapest way to resolve the matter. The insurance companies argued that due to this increase in meritless claims, a rise in insurance premiums were inevitable.¹⁸³

¹⁷⁸ Legal Fees Review Panel of New South Wales, above n 57.

¹⁷⁹ Ibid.

¹⁸⁰ Evidence to the Standing Committee on Law and Justice, Parliament of New South Wales Legislative Council, Sydney, 4 June 1997, (John Hannaford) 60.

¹⁸¹ Ibid.

¹⁸² The writer has personal experience attending pre-trial proceedings and has witnessed the defendant's problematic position in trying to dispose of a case before going to trial because if the defendant were successful, there was practically no chance of them recovering their legal fees against the plaintiff.

¹⁸³ Evidence to the Standing Committee on Law and Justice, Parliament of New South Wales Legislative Council, Sydney, 4 June 1997, (John Hannaford) 60.

Regardless, if New South Wales was experiencing an increase in meritless litigation after the implementation of the uplift fee, it was an irrelevant consideration for the Parliament who enacted the legislation.¹⁸⁴ Upon review of the *Legal Professional Act* 1987 (NSW) by the Review Committee in 1997 (approximately 4 years after the implementation of the uplift fee), the problems encountered by the insurers and defendants were quickly disregarded. Mr Hannaford, Attorney General of the New South Wales Parliament, when giving his evidence in the review of the legislation directly countered the argument by defendants and insurers by stating that “if that means that people are able to gain access to their rights, then that is part of the structure of our legal system”.¹⁸⁵ According to Mr Hannaford, the fee was a means to a desired outcome, an increase to access to justice.¹⁸⁶

In the writer’s view, Mr Hannaford’s reluctance to investigate such accusations by the insurers was problematic. For example, if such claims were being litigated by lawyers when there was no real chance of success, such litigation would be in direct contravention of the lawyer’s obligation to not waste the courts time.¹⁸⁷ Thereby even if the purpose of the uplift fee was being attained, it was being done in a way which directly conflicted with other fundamental safeguards built into the legal system. One such safeguard is the individual lawyer’s responsibility to ease pressure on the courts and not allow meritless claims to go through to litigation. This duty helps make sure that Australia does not turn into a litigious society like the United States.¹⁸⁸ However, the issue of meritless litigation was just one of many problems experienced in New South Wales, as frequently complaints were originating directly from the clients themselves.

¹⁸⁴ Evidence to the Standing Committee on Law and Justice, Parliament of New South Wales Legislative Council, Sydney, 4 June 1997, (John Hannaford) 60.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Legal Profession Conduct Rules* 2010 (WA) r 34.

¹⁸⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 16 September 1993, 3277 (John Hannaford).

ii. The problems experienced throughout New South Wales between clients and their lawyers

It was not only the defendants who were experiencing problems with uplift fees but rather the clients themselves, after entering into the arrangement and obtaining their settlement. One prevalent complaint from clients was that the retainer had lacked the definition of a successful outcome. This problem was supposed to be addressed in the New South Wales legislation, as the *Legal Profession Act 1987* (NSW) required the definition of what was ‘successful’ on each particular agreement as a precondition to the agreement’s validity.¹⁸⁹ What seemed to be forgotten was the way in which a case could change quite fundamentally from the time the retainer was commenced through to its conclusion. It is part of a lawyer’s task to handle their client’s expectations over the life of a claim and they were not always doing so successfully.

Courts try to actively promote settlement and will only allow litigation as a last resort when all other avenues fail. Therefore, a large proportion of cases never go to trial and settle at some earlier stage in the litigation process.¹⁹⁰ In some circumstances, an early settlement without the client having their day in court can lead to the client feeling that their rights have not been vindicated. If such feelings are combined with the client receiving a significantly smaller amount in compensation than what they had originally expected when entering into the agreement with the lawyer, problems can occur.¹⁹¹ The uplift fee may still be payable directly from the client’s compensation. This then leads to an erosion of compensation and an unhappy customer, and unhappy customers are likely to make complaints.¹⁹² This is especially true in the circumstance where the lawyer retains a fee which is higher than the client’s compensation.

This situation seemed common in New South Wales, as many complaints were received by clients who felt their lawyer was taking advantage of them by receiving more in legal fees than they themselves received in compensation.¹⁹³ Many other complaints were

¹⁸⁹ *Legal Profession Act 1987* (NSW) s 186(4).

¹⁹⁰ Mark Brabazon, ‘Legal Costs: Solicitors Relations with Counsel and Clients’ (Paper presented at the College of Law, Sydney, 29 March 2010).

¹⁹¹ Dal Pont, above n 45, 67.

¹⁹² *Ibid.*

¹⁹³ Legal Fees Review Panel of New South Wales, above n 57.

also submitted when an uplift fee was charged in matters when the client themselves did not feel their case was successful.¹⁹⁴ It is not hard to conclude that many of the lawyers who were choosing to use conditional fee arrangements with uplifts were not taking enough care to explain to clients what would be considered a ‘success’ in terms of them collecting the uplift fee. The definition of a ‘successful’ agreement at outset was also problematic in terms of the necessary requirement to change the definition of successful with the changing circumstances of a case over a period of time.

In particular, a small but significant number of complaints were received in instances where the client won their case in the first instance, but lost on appeal. In this regard, the lawyers could still demand payment of their fees even though the final outcome was not successful. This was a technical but expensive problem which was a result of a failure to carefully define what would be considered a successful outcome of a ‘case’ and the ongoing need to change this definition with the circumstances of the case.¹⁹⁵

Some lawyers then started to take advantage of the lack of legislative safeguards and instruction in regards to charging the uplift fee.¹⁹⁶ In particular a significant number of complaints were noted in the *Law Reform Commission’s Discussion Panel’s Report* in relation to uplifts being charged when no risk of loss was apparent.¹⁹⁷ From a policy perspective, the rationale in the New South Wales legislation behind any charging of an uplift was that the lawyer was sharing the risk of an adverse outcome with their client, so that the lawyer was entitled to a premium for the risk. However, on a number of occasions, lawyers were entering into costs agreements when the outcome of the case was virtually guaranteed but still charging the full 25% uplift.¹⁹⁸ In such instances the lawyer was receiving an increase in their legal fees for no apparent reason.¹⁹⁹ Whether this occurrence was through lawyers abusing their position or just unclear guidance by the legislature is unclear. In any event, the volume of complaints led to a review in the

¹⁹⁴ Legal Fees Review Panel of New South Wales, above n 57.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

New South Wales Parliament which eventually changed the law in relation to uplift fees.²⁰⁰

iii. Reform in New South Wales – the choice to expressly discontinue uplift fees being charged in damages cases and further protections implemented to stop any potential abuse by lawyers

On 1 October 1995, the *Legal Profession Act* 1987 was repealed and in its place, the *Legal Profession Act* 2004 (NSW) ('LPA') was enacted.²⁰¹ In this new Act, some of the problems which were encountered were rectified.²⁰² In particular Section 324 of the LPA now expressly stated that "a law practice must not enter into a conditional costs agreement **in relation to a claim for damages** that provides for the payment of an uplift fee on the successful outcome of the claim to which the fee relates".²⁰³ Subsection (2) allows for any other conditional agreement to provide for a payment of an uplift fee with a cap of 25% of costs otherwise payable still remaining.²⁰⁴

The change to the legislation at the time expressly excluded uplift fees being charged in any type of damages cases. Such changes could be viewed as the New South Wales legislature reacting to the complaints received in relation to the various abuses of and problems with uplift fees. However, this was not the only change, as the disclosure regimes were also tightened to prevent abuse occurring and to alleviate problems encountered over the period of time of the uplift fee's operation.

For example when entering a conditional costs agreement, the lawyer now had to identify the basis of the calculation of the uplift fee and if practicable; provide a range of estimates and an explanation of the major variables that will affect the calculation of the uplift fee over the life of the claim.²⁰⁵ This was a way to alleviate any problems associated with early settlement of a claim and an imprecise definition of what amounted to a successful outcome from the viewpoint of both lawyer and client. If a

²⁰⁰ *Legal Profession Act* 2004 (NSW) s 324.

²⁰¹ *Legal Profession Act* 2004 (NSW).

²⁰² Shaw, above n 9.

²⁰³ *Legal Profession Act* 2004 (NSW) s 324(1).

²⁰⁴ *Ibid* s 324(5).

²⁰⁵ *Legal Profession Act* 2004 (NSW) s 324(3), s 324(4)(a)(b).

lawyer entered into any conditional agreement containing an uplift in contravention of section 324, then the costs agreement would be set aside and the lawyer had to repay any monies paid over by the client.²⁰⁶

Further, in response to the defendants and insurers allegation of a problematic increase in meritless claims, amendments were made to discourage lawyers taking on clients in cases without reasonable prospects of success.²⁰⁷ Section 345 of the LPA strictly outlined that no legal proceedings are to be commenced without a legal practitioner who is responsible for the claim certifying that, from the evidence available, there is a reasonable prospect of success in the matter.²⁰⁸ A lawyer failing to do this could be found guilty of professional misconduct and adverse costs orders could be issued against the law practice involved.²⁰⁹

These changes to the LPA could be viewed as a drastic step taken by the legislature in a move to discourage lawyers taking advantage of situations in order to receive unfair increases to their legal fees. This may or may not be directly related to the uplift fee but it can be seen as a reasonable move in terms of curbing the behaviour of lawyers who take on claims with a view to their fees rather than in the best interests of their clients (which is a breach of their overarching ethical obligations).²¹⁰ However, problems still remained with the function of the uplift fee even with restrictions against its use in damages cases as the intent and rationale behind the charging of the fee was again put into question.²¹¹

**iv. Problematic wording in the *Legal Profession Act 2004* (NSW) –
More problems relating to the substance behind the
implementation of the uplift fee**

With the implementation of the LPA and the express prohibition of charging an uplift fee for cases relating to damages, problems started to occur in regards to what the

²⁰⁶ *Legal Profession Act 2004* (NSW) s 324(1).

²⁰⁷ *Legal Profession Act 2004* (NSW).

²⁰⁸ *Ibid* s 347.

²⁰⁹ *Ibid* s 348.

²¹⁰ For a discussion relating to potential conflicts with a lawyer's overarching ethical obligations see Chapter 2 above.

²¹¹ Brabazon, above n 190.

legislature intended by the words ‘in relation to a claim for damages’.²¹² In a legal context, the notion of a damages claim is well understood, but in relation to the wording in this section, it has been argued that a few things remained unclear.²¹³

One ambiguity was whether the wording ‘relate’ concerns a costs agreement for a claim for damages which is not made by the lawyer’s client but rather another party. For example a claim may be commenced in the courts for a debt owed on a contract and the defendant may enter its defence with a counterclaim for damages. Additionally, issues arise when a case remained primarily about one cause of action such as specific performance in equity but also contained an alternative prayer for damages. Further, a case may start out as one cause of action but part way through the claim, a prayer for damages can be included.²¹⁴ In these instances questions remain in regards to whether lawyers are restricted from entering into costs agreement involving an uplift with the client specifically because of the wording ‘in a relation to a clam for damages’ as used in the section.²¹⁵ This is a problem which does not affect the client as much as it does the lawyer. This is because the costs agreement could be rendered void and the lawyer placed on misconduct charges for entering into such an agreement in conflict with the statutory provision, despite the lawyer having no intention to contravene the law at the commencement of the retainer.

Section 324 of the *Legal Profession Act 2004* (NSW) also outlined an uplift cap of 25% on the ‘costs otherwise payable’ in any claim.²¹⁶ Scholarly commentary now raises questions in relation to which type of situations could give rise to costs which are otherwise payable.²¹⁷ There is no definition of what the legislature’s intention was when they included this wording in the section.²¹⁸ At present, there is also no case law available from New South Wales to clarify the law. Fortunately similar issues of

²¹² *Legal Profession Act 2004* (NSW) s 324(1).

²¹³ *Ibid.*

²¹⁴ *Ibid.*

²¹⁵ *Legal Profession Act 2004* (NSW) s 324.

²¹⁶ *Ibid* s 324.

²¹⁷ Mark Brabazon, above n 190.

²¹⁸ *Legal Profession Act 2004* (NSW).

statutory interpretation have been clarified by decisions of the Court of Appeal in Victoria; these supply some much needed guidance.²¹⁹

In two Victorian cases, a dispute arose in relation to the concept and meaning of ‘a premium otherwise payable’ to the solicitors. In Victoria, the word ‘premium’ is used in the Statute in place of the term ‘uplift’.²²⁰ In both cases, the solicitors entered into an agreement with their clients to take a case on what could effectively be described as a contingency fee basis. In effect, the lawyers would render their bills during the life of the claim at only a small proportion of what they would usually charge.²²¹ The agreement then provided for a payment of the lawyers’ additional charges (which rather than \$400 per hour were raised to \$800 per hour) if the client was successful on the matter.²²²

The client’s matters were successful and the legal costs were approximately 125% more than the reduced fee otherwise payable for the case if it had been unsuccessful. The bills of costs went to assessment after complaints from the clients, who argued that the fees were, in a practical sense, a premium for the success of the case and as such were over the statutory cap of 25%. At first instance, it was held that the fees were excessive premiums that were higher than the statutory cap and as such were void.²²³

In both instances the solicitors appealed, and the matters went to the Court of Appeal where it was decided that in such a situation, the retainer had not created an uplift on the fees, but rather the agreement was a part conditional costs agreement. The Victorian Court of Appeal held that this type of charging is expressly allowed under their Act (which is similar to Section 323 of the *Legal Profession Act 2004* (NSW)) and that such agreements were a means for providing access to justice for clients who can only pay a portion of their fees during the claim. The court’s view was that the solicitors were able to enter into a part conditional costs agreement to protect themselves because the litigation entailed too much risk of being paid well below usual rates for many months

²¹⁹ *Coadys v Getzler* (2007) 18 VR 288; *Equiscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250.

²²⁰ *Legal Profession Act 2004* (VIC) 3.4.28.

²²¹ *Coadys v Getzler* (2007) 18 VR 288, 14; *Equiscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250, 2.

²²² *Coadys v Getzler* (2007) 18 VR 288, 14.

²²³ *Equiscorp Pty Ltd v Wilmoth Field Warne* (No.4) [2006] VSC 28, 29-32.

of work.²²⁴ The court found, in each instance, that the fee arrangement was reasonable and consistent within the principles of a part conditional fee arrangement rather than an ‘uplift’ or ‘premium’. The definition of ‘costs otherwise payable’ did not provide a limit of 25% as did the section which allowed part conditional costs agreements.

This interpretation has received criticism and has been argued that it creates yet another avenue open to abuse by lawyers. In particular, it has been argued that:

“a question remains whether the damages uplift prohibition in s 324(1) and the uplift limit in sub-s (5) may simply be circumvented by setting a higher than normal contract rate and making part of the fee conditional and part non-conditional. Equuscorp and Coadys appear to sanction an approach that does not look beyond the terms of the contract. In the situation that I have suggested, ethical and statutory questions of overcharging may also arise”.²²⁵

Therefore it seems that once again, the implementation of the provisions allowing uplift fees creates difficulties in terms of lawyers being able to contract around the safeguards that are supposed to operate to protect clients from abusive charging of the uplift. Even when the legislature provided extra safeguards by disallowing charging uplifts in damages cases, and provided a cap in relation to other types of fees, problems can still arise from either lawyers abusing their position or not understanding the rationale or operation of the uplift. As seen in the discussion of the English system above, an attempt to rectify problems in one area may just create further unexpected problems in others.

However, it now seems that such problems have simply been put aside. This is because as of 1 July 2015, the law in New South Wales regarding the application of uplift fees to solicitors’ usual fees has been amended once again. The *Legal Profession Uniform Law* has now been enacted in New South Wales with the purpose of providing a combined legal services market with Victoria.²²⁶ Once again Section 182 of the Act allows a lawyer to charge an uplift fee in damages matters, provided that the fee meets the fair, reasonable and proportionate requirements of charging.²²⁷

²²⁴ *Legal Profession Act 2004* (NSW) s 323.

²²⁵ Mark Barbrazon, above n 190, 19.

²²⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 March 2014 (Greg Smith) 19-20.

²²⁷ *Legal Profession Uniform Law 2015* s 182.

In the Second Reading speech of the Legal Profession Uniform Application Bill, the stated basis of the reform was to follow the *Legal Profession Act 2007* (QLD).²²⁸ No further basis or reasoning for reintroducing the right to charge an uplift fee in damages cases was outlined.²²⁹ New South Wales once again allows uplift fees to be charged in all types of matters inclusive of damages cases. Time will tell if problems will once again arise in the context of this change.

B. The ambit of the uplift Fee throughout other Australian jurisdictions

Despite the problems and reforms relating to uplift fees in other common law countries and the State of New South Wales, it was not long before other Australian States and Territories introduced the fee.²³⁰ At present, almost every Australian jurisdiction (apart from the Northern Territory), has placed a cap on the amount of uplift which can be charged.²³¹ A lawyer is restricted to an increase of a maximum 25% of the legal costs (otherwise payable but excluding disbursements) incurred for any litigation subject to a conditional fee arrangement. This cap is promoted as a safeguard to prevent abuse by lawyers. The use of a cap differentiates Australia's version of the uplift from the England and Welsh jurisdictions' version. This has not always been the case as over time, both the ambit and protective safeguards of the fee have operated differently throughout each Australian jurisdiction.

i. South Australia

Similar to New South Wales, South Australia introduced the uplift fee in 1993 through amendments to the *Legal Practitioners Act 1981* (SA) ('LPASA').²³² The ambit of the South Australian fee was different to New South Wales version at the time. The LPASA provided that both a client and lawyer could enter into an agreement in writing, subject

²²⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 March 2014 (Greg Smith) 19.

²²⁹ *Ibid.*

²³⁰ *Legal Profession Uniform Law 2015* s 182; *Legal Profession Act 2007* (QLD) s 324; *Legal Practitioners Act 1981* (SA) s 26(4); *Legal Profession Act 2008* (WA) s 284; *Legal Profession Act 2006* (NT) s 319; *Legal Profession Act 2006* (ACT) s 284; *Legal Profession Act 2007* (TAS) s 308.

²³¹ The *Legal Profession Act 2006* (NT) s 319 states that an uplift fee is restricted to the amount prescribed the regulations. At present the regulations do not prescribe any cap on an uplift fee.

²³² *Legal Practitioners Act 1981* (SA) s 42(6)(c).

to the Professional Conduct Rules,²³³ for payment of a contingency fee calculated on any basis which has been set out in the agreement.²³⁴

At first glance this appears to be allowing the lawyer an unlimited percentage increase, however the Professional Conduct Rules did place a limit on the uplift that could be charged.²³⁵ Rule 8.2.10 stipulated that a lawyer could only charge up to double the amount of fees they were entitled had they been charging according to the relevant scale.²³⁶ The end result being that when the fee was introduced into the South Australian jurisdiction, up to twice the scaled allowance could be charged for conditional fee arrangements for any type of matter as long as the client and lawyer agreed upon the percentage and circumstance in writing prior to the commencement of litigation. This type of agreement was then held to be prima facie fair and reasonable.²³⁷

The structure of the fee at the time of introduction into South Australia almost mirrored the implementation of the fee into the English and Welsh jurisdictions. However, unlike the English and Welsh position, the Professional Conduct Rules placed some protective safeguards on the use uplift fees to protect vulnerable clients.

Such safeguards included requiring the agreement to be in plain English, in a prescribed form and a mandated five days cooling off period.²³⁸ The lawyer was also obliged to inform the client of their right to obtain independent legal advice prior to entering the agreement.²³⁹ An additional requirement was also included which allowed the lawyer to enter into a conditional agreement involving an uplift only when there was a significant risk of the claim failing and the lawyer not being able to recover any legal fees.²⁴⁰ The requirement of a significant risk of failing reflects the theoretical justification for charging an uplift fee, that a lawyer should be compensated for taking the risk of not being paid. It also differentiated South Australia's version of the uplift as against its

²³³ *Professional Conduct Rules (SA)*.

²³⁴ *Legal Practitioners Act 1981 (SA)* s 42(6)(c).

²³⁵ *Professional Conduct Rules (SA)* r 8.2.10.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ The prescribed form was in Attachment 1 of the *Professional Conduct Rules (SA)*. The requirement to allow a cooling off period was legislated under the *Professional Conduct Rules (SA)* r 8.2.10.

²³⁹ *Professional Conduct Rules (SA)* r 8.2.10.

²⁴⁰ *Ibid.*

widespread use throughout other jurisdictions many years later, which only allowed uplift fees in cases if success was likely.²⁴¹

The ambit of South Australia's uplift fee was amended recently when it was changed to coincide with other Australian States. On 2 October 2013, the *Legal Practitioners (Miscellaneous) Amendment Act 2013 (SA)* received assent and its amendments to the *Legal Practitioners Act 1981 (SA)* took effect on 1 July 2014.²⁴² Section 26 (4) of the *Legal Practitioners Act 1981 (SA)* contains the same justification for the lawyer charging a fee as a significant chance of failure must be apparent.²⁴³ However a cap of 25% of the legal costs otherwise payable has now been included.²⁴⁴

The writer could not ascertain why such amendments were passed and whether problems were experienced in terms of the percentage of uplift fee charged, as no case law exists in this regard. The Second Reading Speech of the South Australian Parliament also provides little guidance. The only reasoning offered by the Honourable G E Gago for the amendments to the South Australian civil costs regime was that:

“The Bill inserts into the Act the provisions that were proposed in the Legal Profession Bill 2007, specifying what lawyers must tell their clients about the cost of their work. At the moment, there are professional conduct rules about this but they do not have the force of law. The proposed provisions are similar to those in use around Australia. They seek to ensure that clients engaging legal practitioners will be properly informed about what costs they will have to pay, to the extent that that is possible at the outset of a matter. The Bill provides a safe harbour whereby the practitioner can be assured that they have met certain of the costs disclosure requirements by using a standard form. These provisions are designed chiefly to protect more vulnerable clients and do not apply, for example, where the client is the government or a large company or partnership, or where the firm has tendered for the work.”²⁴⁵

Therefore it could be speculated that problems had been occurring and that the Professional Conduct Rules (which provided some guidelines and rules for charging the fee) did not have the force of law. It may be for that reason the South Australian parliament decided to strengthen control over what lawyers could charge. Additionally,

²⁴¹ Dal Pont, above n 45, 68.

²⁴² *Legal Practitioners (Miscellaneous) Amendment Act 2013 (SA)*; *Legal Practitioners Act 1981 (SA)*.

²⁴³ *Legal Practitioners Act 1981 (SA)* s 26(4)(a).

²⁴⁴ *Ibid* s 26(4)(b).

²⁴⁵ South Australia, *Parliamentary Debates*, Legislative Assembly, 30 April 2013, 1752 (G E Gago).

it seemed that the South Australian legislatures at the time held a desire to align their civil costs regime with the rest of the Australian jurisdictions. Nonetheless, they retained their own theoretical justification for charging the uplift fee (being for the lawyer's risk of being able to recover legal fees in cases that may fail) intact.

ii. Victoria

In the early 1990's the legal profession in Victoria (like many other Australian jurisdictions) was highly criticised for its unaffordable cost, lack of availability and the inefficient way it processed matters through the courts.²⁴⁶ The Victorian media at the time was also providing wide coverage of the problem and sensationalising it.²⁴⁷ This compounded the problems and led to a negative public perception of the legal profession and made reform a priority for the Law Reform Commission of Victoria.²⁴⁸ The result was widespread research into the problems with a view to recommending changes to the civil justice system. In 1994, Ms Wade, the Attorney General, released the discussion paper '*Reforming the Victorian Legal Profession: An Agenda for Change*'.²⁴⁹ The paper recommended sweeping reforms to increase access to justice and efficiency in the courts. The recommendations received praise and on 20 June 1996, Ms Wade introduced the Legal Practice Bill (VIC) into the Victorian Parliament.²⁵⁰ The desire and intention behind the restructure of the civil justice system was expressed by Ms Wade, then Attorney General as:

“The government does not pretend the reforms will magically solve the ancient problem of the cost of justice, although it is anticipated that some of the reforms will make the cost of legal representation less expensive. Most certainly, this bill is not a reflection of the lack of regard many members of the community unfortunately have for the legal profession, manifested in the lawyer bashing that frequently appears in the press. The government considers that many members of the profession give valuable service to the community, often by providing their professional services at little or no cost.”²⁵¹

²⁴⁶ Jan Wade, *Reforming the Victorian Legal Profession: An Agenda for Change* (Discussion Paper for Victorian Department of Justice, 1994).

²⁴⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 1996, 983 (Jan Wade).

²⁴⁸ Adrian Evans, 'Acceptable but Not Entirely Satisfied: Clients Perceptions of Victorian Lawyers' (1995) 20(2) *Alternative Law Journal* 57.

²⁴⁹ Wade, above n 246.

²⁵⁰ Legal Practice Bill (VIC).

²⁵¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 1996, 983 (Jan Wade).

Little debate or discussion took place in the Victorian Parliament other than the above comments made by Ms Wade. It also seemed apparent that the then Attorney General held a protective view over the legal professions fees and felt that legal professionals were receiving unjustified criticism by the media.²⁵²

The *Legal Practice Act* 1996 (VIC) ('the 1996 Act') received assent on the 6 November 1996.²⁵³ The 1996 Act implemented a wide range of reforms. The major reform which is relevant to this paper was the introduction of a contingency fee retainer (which was in effect an uplift fee) to reward the lawyer for the risk of non-payment when taking on clients who could not afford their services on a pay as you go basis.²⁵⁴ Victoria enacted almost mirror legislation to the provisions operating in New South Wales at that time. The provisions included the 25% percentage cap on legal costs otherwise payable, the definition of a successful outcome in the conditional costs agreement and the requirement that the lawyer had to have a reasonable belief in the likelihood of success.²⁵⁵ These safeguards were to prevent lawyers from abusing the right to charge an uplift.

Since the introduction of the uplift fee in Australian States, the Victorian jurisdiction has been subjected to the most litigation concerning its operation.²⁵⁶ This is followed closely by New South Wales. As in New South Wales, many of the Victorian cases hinge on the problematic concept of a requirement of a 'successful outcome' in a case and the lawyers taking advantage of a client who does not understand the legal profession and disclosure rules concerning uplift fees adequately.²⁵⁷ As noted earlier,

²⁵² Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 1996, 983 (Jan Wade).

²⁵³ *Legal Practice Act* 1996 (VIC).

²⁵⁴ *Ibid* s 98.

²⁵⁵ *Ibid* s 98(2)-(4).

²⁵⁶ *Maurice Blackburn Pty Ltd v Birmingham* [2009] VSC 20; *Legal Services Board v Forster* [2011] VSC 292; *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250; *Coady's (A Firm) v Getzler & Anor* [2007] VSCA 281.

²⁵⁷ *Maurice Blackburn Pty Ltd v Birmingham* [2009] VSC 20; *Legal Services Board v Forster* [2011] VSC 292.

this same problem was prevalent throughout New South Wales, as evidenced by the large amount of complaints about the fee in that jurisdiction.²⁵⁸

One Victorian example is *Legal Services Board v Forster*.²⁵⁹ This decision demonstrates that even though the 1996 Act implicitly prohibited any uplift charges unless a successful outcome was achieved, the way in which a lawyer drafted the costs agreement can have a real impact on whether or not the fee will withstand scrutiny. In this case the lawyers for the plaintiff received an uplift for their professional services rendered on a conditional agreement even when the client was not successful with them acting as his solicitors. The plaintiff entered into a costs agreement with his solicitors where he had to pay the Supreme Court Scale plus a 25% uplift if he recovered any money through the litigation. In addition, the uplift was still payable if the client breached any of the conditions imposed by his lawyers in the conditional fee contract. The conditions included the client agreeing:

- 1) To advise the solicitors everything relevant to the plaintiff's case openly and honestly;
- 2) To fully co-operate with the lawyers and do everything which is reasonably expected;
- 3) To accept and follow all advice given; and
- 4) Not to change lawyers during the life of his claim.

During the course of the litigation, the plaintiff changed solicitors. The new solicitors obtained a successful conclusion of the plaintiff's case and the previous solicitors argued for their uplift fee. The original solicitors' argument was that although they did not obtain a 'successful' outcome whilst they had the conduct of the case, they should still be entitled to the uplift fee as the client still received a successful outcome with the next solicitors. The plaintiff had breached one of the conditions imposed on the conditional fee agreement which put the solicitors' in the position of not being able to see the matter through to its conclusion. This was one of the issues argued in court and Justice Emerton found that:

²⁵⁸ Legal Fees Review Panel of New South Wales, above n 57.

²⁵⁹ *Legal Services Board v Forster* [2011] VSC 292.

“Section 98 of the 1996 Act allows a conditional costs agreement to impose a premium “on the successful outcome of the matter”. Although s 98(1) does not expressly provide that a premium may *only* be imposed on a successful outcome, its purpose is to provide for a premium to be charged in the specified circumstance and not otherwise.

The client’s undertaking not to breach any of the four conditions is an integral part of the firm obtaining a successful outcome for the client. The firm is entitled to charge the premium upon a successful outcome because it has assumed the risk of a no win/no fee arrangement. The four conditions form part of the management of that risk. To construe s 98 as prohibiting the charging of the premium when the client has effectively prevented the firm from obtaining a successful outcome by his or her own conduct would enable the client to ‘walk away’ from the firm at the eleventh hour (once all the hard preparation work for a trial had been done and the risk had been carried by the firm, in some cases for years) and have another firm harvest the fruits of that endeavour in the form of a successful outcome, without having to pay a premium for the benefit of the no win/no fee arrangement”.²⁶⁰

By reason of the above, Justice Emerton held that the previous solicitors’ costs agreement was valid and the client was liable to pay the uplift fee. This was because ‘by extension’ the conditions were imposed in order for the solicitor’s to obtain a successful outcome.²⁶¹ Justice Emerton also touched on the idea that the legislation did not explicitly state ‘only successful’ outcomes could attract the fee but rather only a specified (and agreed) outcome had to be achieved for the uplift to be charged.²⁶²

In 2004, the 1996 Act was repealed and the *Legal Professional Act 2004* (VIC) (‘the 2004 Act’) was enacted. No substantive changes were made to the ambit of the uplift fee in the 2004 Act. Further as noted above, New South Wales and Victoria have now both enacted the *Legal Profession Uniform Law* to combine their legal services market.²⁶³ In fact, the provision allowing the uplift fee in the *Legal Profession Uniform Law* follows Victoria’s more relaxed provisions. The result of which is still yet to be determined.

²⁶⁰ *Legal Services Board v Forster* [2011] VSC 292, 38 – 40 (Justice Emerton).

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Legal Profession Uniform Law*; New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 March 2014 (Greg Smith) 19-20.

iii. Queensland

The Queensland jurisdiction has allowed the charging of uplift fees since 2004. Unlike in other jurisdictions, this was effected through the operation of *The Legal Profession (Barristers) Rule 2004 (QLD)* ('the LPB').²⁶⁴ At the time, the LPB only applied to barristers. Section 121 of the LPB allowed a barrister to enter into a speculative fee arrangement with a client who is deserving (which is up to the discretion of the Barrister to ascertain whether they would like to act on the basis of a conditional agreement).²⁶⁵ In such cases the barrister was permitted to charge the usual fee plus an extra 50% on top of the legal fees for the risk undertaken. This enactment of the uplift fee at the time differed from other Australian jurisdictions in regards to both the percentage amount (50%) and because solicitors were not allowed to charge an uplift.²⁶⁶

Three years later the *Legal Profession Act 2007 (QLD)* ('LPAQLD') was enacted. Section 324 of the LPAQLD allows a solicitor to enter into a conditional fee arrangement that includes an uplift fee.²⁶⁷ Unlike the barrister's fee, this uplift was capped at 25% of the legal costs otherwise payable. The move to allow uplift fees for solicitors was introduced to the Queensland Parliament by Mr Wettenhall in a Second Reading Speech on 22 May 2007 as "a fair balance between the interests of the client and the rewards to the lawyers and the law firms who undertake speculative action".²⁶⁸ He also argued that it would be a step towards a uniform law throughout Australia as New South Wales and Victoria had already moved in this direction.²⁶⁹ No discussions had taken place in parliamentary debates around any problems which had occurred in the past with the implementation of the fee. However some strict safeguards were included in the LPAQLD which included prescriptive uplift forms of agreement drafted by the Law Society of Queensland and cooling off periods.²⁷⁰

²⁶⁴ *Barristers Rules 2004 (QLD)*.

²⁶⁵ *Ibid* s 121.

²⁶⁶ Dal Pont, above n 45, 67.

²⁶⁷ *Legal Profession Act 2007 (QLD)* s 324.

²⁶⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 May 2007, 1574 (Mr Wettenhall).

²⁶⁹ *Ibid*.

²⁷⁰ *Legal Profession Act 2007 (QLD)* s 323(3).

In 2007, the LPB was repealed and the *Barristers Rules 2007* came into effect.²⁷¹ The *Barristers Rules 2007* still allow a speculative fee agreement between a barrister and a client which includes an uplift fee up to an additional 50%.²⁷²

iv. Northern Territory

The jurisdiction of the Northern Territory seems to be an anomaly. The Northern Territory introduced uplift fees in 2006 by way of the *Legal Profession Act 2006* (NT).²⁷³ Section 319 of that Act allows a premium to be charged on a conditional costs agreement but the premium must not exceed the percentage prescribed by the regulations. Presently, the *Legal Profession Regulations* (NT) does not provide any percentage under their regulations.²⁷⁴ Therefore, it can be assumed that similar to the situation in the English and Welsh jurisdictions, there is currently no percentage limit.

v. ACT and Tasmania

The Acts governing the legal professions in Australian Capital Territory and Tasmania are identical in relation to the procedure and justification for a lawyer charging an uplift fee, so they are being discussed in this paper in unison. The Australian Capital Territory introduced uplift fees by way of the *Legal Profession Act 2006* (ACT) on the 1 July 2006.²⁷⁵ Uplift fees are permissible under a conditional costs agreement as per section 284.²⁷⁶

Likewise, Tasmania introduced uplift fees not long afterwards through the enactment of the *Legal Profession Act 2007*(Tas) on the 15 August 2007.²⁷⁷ Uplift fees in Tasmania are permissible under a conditional costs agreement as per section 308.²⁷⁸ The ambit of the uplift fee throughout the Australian Capital Territory and Tasmania both follow the jurisdictions of New South Wales, Victoria and Queensland. Both Acts require that the

²⁷¹ *Barristers Rules 2007* (QLD).

²⁷² *Ibid* r 121.

²⁷³ *Legal Profession Act 2006* (NT) s 319.

²⁷⁴ *Legal Profession Regulations* (NT).

²⁷⁵ *Legal Profession Act 2006* (ACT).

²⁷⁶ *Ibid* s 284.

²⁷⁷ *Legal Profession Act 2007* (TAS).

²⁷⁸ *Legal Profession Act 2007* (TAS) s 308.

lawyer must have a reasonable belief that the matter will be successful.²⁷⁹ They also place a cap of up to 25% of the legal costs otherwise payable.²⁸⁰

C. Western Australia: the last Australian jurisdiction to implement the uplift fee

Western Australia was the last jurisdiction in Australia to implement an uplift fee. It did so in 2008.²⁸¹ Similar to other common law jurisdictions, Western Australia had been experiencing problems with people being able to access justice over many years, however it wasn't until the 1980's until reform options became a priority. In 1997 the Law Reform Commission of Western Australia ('LRCWA') created a Committee to investigate changes to the civil and criminal justice systems with a view to improving access to justice throughout Western Australia. The Committee comprised of a small but experienced team including: Ralph Simmonds (the then Dean of the Murdoch University Law School and now judge of the Supreme Court), Robert Cock QC (who has since been a principal consultant to the Premier of Western Australia) and Wayne Martin (who is now the Chief Justice of the Supreme Court of Western Australia).²⁸²

The Committee worked efficiently and in 1999 the LRCWA released its final report *Review of the Civil and Criminal Justice System* ('the Justice System Report').²⁸³ The Justice System Report recommended around 400 changes to the civil and criminal justice system as it was then currently operating in Western Australia. Interestingly, the English Woolf report was seen as a major influence to the Committee's recommendations.²⁸⁴ The desire to implement a uniform law in Western Australia to coincide with the operation of Queensland's, Victoria's and New South Wales' legal profession regulation was also influential at the time.²⁸⁵ In a move to align the law with the Eastern States, the Justice System Report advocated the use of contingency fees (in

²⁷⁹ *Legal Profession Act 2006 (ACT)* s 284; *Legal Profession Act 2007 (TAS)* s 308.

²⁸⁰ *Ibid.*

²⁸¹ *Legal Profession Act 2008 (WA)*.

²⁸² Law Reform Commission of Western Australia, *Review of the Civil and Criminal Justice System – 10 Years on* (13 October 2009).

²⁸³ Law Reform Commission of Western Australia, above n 55.

²⁸⁴ *Ibid.*

²⁸⁵ Law Reform Commission of Western Australia, above n 55.

the form of uplift fees).²⁸⁶ However, unlike the Victorian and New South Wales version of the uplift fee, strict preconditions on the decision of whether to use the fee were strongly advised.²⁸⁷

These recommendations included using a conditional fee arrangement involving an uplift fee only as a very last resort.²⁸⁸ Then prior to the lawyer entering into the agreement, a lawyer was to determine and satisfy themselves that the client was financially unable to conduct the litigation.²⁸⁹ This was to be determined on a case by case scenario with reference to the personal circumstances of each potential litigant.²⁹⁰ In conducting this examination, the lawyer was to have regard to the likely costs of the proceedings, the assets and liabilities of the client together with the client's income and expenditure over the next three years.²⁹¹

The Justice System Report also recommended preconditions to entering an agreement involving an uplift such as leave of the court,²⁹² a maximum uplift cap of 100 percent of the usual fees of the practitioner,²⁹³ and finally the uplift to be calculated in reference to the amount of fees recovered from the other side on a party/party basis and not from the practitioner's charges.²⁹⁴ This was to stop lawyers from benefiting from costs brought about by their own inefficiencies.²⁹⁵

The release of the Justice System Report in Western Australia received criticism.²⁹⁶ This criticism was based on various research projects which had been conducted both overseas and within Australia regarding access to justice.²⁹⁷ In particular it had been noted that the task of a lawyer in determining the financial position of their client and

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid recommendation 141.

²⁸⁹ Ibid.

²⁹⁰ Ibid 16.36.

²⁹¹ Ibid.

²⁹² Ibid recommendation 144.

²⁹³ Ibid recommendation 142.

²⁹⁴ Ibid recommendation 143.

²⁹⁵ Ibid 16.36

²⁹⁶ GiGi Visscher, 'Contingency Fees in Western Australia' (2000) 7 *Murdoch University Electronic Journal of Law* 1.

²⁹⁷ South African Law Reform Commission, *Speculative and Contingency Fees*, Project No 9 (1996) 4.86.

the future cost of litigation was problematic.²⁹⁸ This is due to the number of varying factors such as a change of personal circumstances of the litigant or the strategy and approach adopted by the other side during litigation. The process for the client to qualify for entering into a conditional agreement including an uplift also came under fire for its inequality. For example the selection criteria was argued to be artificial as many middle income people would be unable to enter into litigation because of costs issues and even wealthy people may have to liquidate assets in order to pay for their legal fees.²⁹⁹ It was argued that because of the sheer number of companies in existence at the time and the amount of smaller size businesses who could not afford legal representation, companies should also have access to these agreements.³⁰⁰ Therefore, the recommendation to allow only people who could not afford litigation access to contingency arrangements made a mockery of the principal of equality in the law.³⁰¹

The requirement to obtain leave by a court before being allowed to enter a provisional agreement had also been the subject of criticism.³⁰² It was noted that this type of precaution would deter lawyers from entering into conditional fee arrangements as it would increase delays and would just be another obstacle for the lawyer to overcome.³⁰³ Requiring leave of the court was also argued to be likely to increase the workload of the courts, a problem which would just compound the current inefficiency and delays.³⁰⁴ Therefore, many of the safeguards the Justice System Report recommended met with argument that the safeguards themselves would frustrate the point of having uplift fees, which was to increase access to justice. As mentioned earlier, this view of excess safeguards frustrating the purpose of the uplift fee was similar to the opinion of the New South Wales Parliament when they were faced with complaints about the operation of

²⁹⁸ Visscher, above n 296.

²⁹⁹ South African Law Reform Commission, above n 297, 4.89.

³⁰⁰ Visscher, above n 296.

³⁰¹ South African Law Reform Commission, above n 297, 4.89.

³⁰² South African Law Reform Commission, above n 297.

³⁰³ Visscher, above n 296.

³⁰⁴ *Ibid.*

the uplift fee from defendants and insurers. The only factor that seemed relevant was that the uplift fee was increasing access to justice, other problems were of no concern.³⁰⁵

The Western Australian Parliament seem to agree with this view of obtaining the means of accessing justice at all costs. When the law allowing uplift fees was enacted, many of the recommendations by the LRCWA were ignored.

i. The enactment of the *Legal Profession Act 2008* in Western Australia

In 2007 the Parliament of Western Australia introduced the Legal Profession Bill 2007 to reform the legal profession.³⁰⁶ On 24 October 2007 it was read a second time by Mr Jim McGinty (the then Attorney General). The second reading speech did not do much to elaborate on the issues surrounding uplift fees. In fact, it was only stated that:

‘there are some innovative changes contained in this bill. It does, for example, provide for “uplift” whereby a client and a legal practitioner can enter into a formal costs agreement that would enable the practitioner to charge a higher fee than they would otherwise if there is a successful outcome. There are safeguards such as the 25 per cent cap on the uplift if the matter is of a litigious nature; that is, the uplift fee must not exceed 25 per cent of the legal costs otherwise payable.

The prohibition on contingency fees remains; that is, those fees where the legal practitioner is paid a percentage of any award or settlement as their fee. This is in keeping with the recommendations of the Law Reform Commission of Western Australia’s 1999 review of the criminal and civil justice system.’³⁰⁷

Therefore, the only Justice System Report recommendation which received any consideration by the Western Australian Parliament during the second reading speech was the desire to keep away from a contingency fee model where legal fees are charged based on the percentage of settlement (which was the American model of charging legal fees). In fact, the Honourable Justice Martin notes in his paper some 10 years after the

³⁰⁵ Evidence to the Standing Committee on Law and Justice, Parliament of New South Wales Legislative Council, Sydney, 4 June 1997, (John Hannaford) 60.

³⁰⁶ Legal Profession Bill 2007 (WA).

³⁰⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2007, 6696 (Mr McGinty).

introduction of the Committee's report that only very few of the recommendations made in relation to legal costs had been implemented.³⁰⁸

The very experienced Committee's views and recommendations should have been taken into further consideration by the Western Australian Parliament. This is because the Committee's views were informed by sound knowledge of the problematic nature of uplift fees. In particular, the Committee acknowledged the Woolf report and the implementation of the uplift fee throughout other Australian jurisdictions. The desire to move to a more uniform law with other Australian jurisdictions was apparent, however there were reasons why the Committee recommended safeguards that were far more stringent than any operating in other Australian States at the time.

None of the problems that had arisen with the implementation of uplift fees in the other Australian jurisdictions, nor in the English and Welsh jurisdictions, were mentioned in the debate concerning the introduction of the Legal Profession Bill 2007.³⁰⁹ In particular, as mentioned earlier in this paper, just three years prior the New South Wales Parliament had changed the ambit of their fee to cease the right to impose uplift fees in damages cases. Problems had been occurring in relation to the fee but the Western Australian Parliament ignored every warning and failed to implement reasonable safeguards in line with those proposed by the Justice System Report.

The *Legal Profession Act* 2008 came into effect on the 27 May 2008.³¹⁰ Section 284 permits a lawyer to enter into a conditional fee arrangement which includes an uplift fee. Similar to many other jurisdictions throughout Australia, the uplift fee is capped at 25% of the legal costs (excluding disbursements) otherwise payable.³¹¹

Currently, there is no case law in dealing with problems experienced since the implementation of the uplift fee in Western Australia. In the writer's experience of working within the legal profession, very few lawyers are actually aware that they can charge uplift fees. Therefore, further empirical research needs to be undertaken to

³⁰⁸ Law Reform Commission of Western Australia, above n 282.

³⁰⁹ Legal Profession Bill 2007 (WA).

³¹⁰ *Legal Profession Act* 2008 (WA).

³¹¹ *Ibid* s 284.

determine the prevalence and use of the fee within the Western Australian legal profession. It seems likely that because very few lawyers may be using uplift fees the problems that have arisen in other jurisdictions have not have arisen here in Western Australia. That is likely to change as more practitioners adopt uplift fees.

IV AN ANALYSIS OF THE PRACTICAL PROBLEMS ENCOUNTERED WITH UPLIFT FEES THROUGHOUT AUSTRALIA

From the above discussion, the writer has identified the various justifications for implementing uplift fees together with changes to the fees ambit over time throughout the English, Welsh and Australian jurisdictions. It has been demonstrated that problems have been encountered and many reforms have taken place to counter such problems experienced. As discussed earlier in this paper, such reforms seem to merely push one problem into another. Often these problems originate from the first stages of the client's interaction with their lawyer, that being the costs agreement stage.

The lawyer's conduct and disclosure in the initial stages of entering into an agreement with the client is important. In regards to the charging of uplift fees the lawyer must be clear whether the type of claim can attract the fee and if it does, how to work out the percentage fee to be charged. Problems can arise if the rationale for charging an uplift is misunderstood by the lawyer; this can then extend into a misunderstanding by the client.³¹² Such practical problems with uplifts seem to be prevalent throughout the Australian jurisdictions and require analysis to see whether rectification is possible.

A. Unclear guidance on what type of situations can give rise to the charging of the uplift fee

There has been examples where confusion around charging an uplift fee has affected both a lawyer and a barrister. In *Greggs Lawyers Pty Ltd v Viki Maree Farrer* both the lawyer and barrister required an extra third on top of their normal hourly rate for taking the claim through to litigation.³¹³ In both costs agreements, this was described by both

³¹² *Greggs Lawyers Pty Ltd & Anor v Viki Maree Farrer* [2014] QDC 194.

³¹³ *Ibid.*

the barrister and lawyer as an uplift fee due to the complexity of the case. Both costs agreements were not conditional upon success of the case and both the barristers and lawyers legal fees were payable regardless of the outcome. The client ended up paying an extra \$27,002 to the lawyer and \$49,373 to the barrister in the uplift fee alone. The client paid both bills but later elected to have the validity of the costs agreement determined by the court. In this situation, the costs agreements were set aside and both the barrister and the lawyer had to refund the uplift fee to the client. Had the client not taken the costs agreement to the court for determination, he would have been out of pocket by around \$77,000 for no justifiable reason. Such instances of overcharging can also have drastic effects on legal professionals as both the lawyer and the barrister could be subject to sanction by the legal profession regulator.³¹⁴

Conversely there are other situations where lack of clear guidance by the legislature on the ambit of the uplift fee can cause confusion and detriment to the client. As discussed earlier in this paper, there is no clear guidance in relation to whether the whole or only just a portion of the fees payable to the lawyer must be conditional in order to attract an uplift. There have been suggestions from the decision in the cases of *Coadys v Getzler* and *Equuscorp Pty Ltd v Wilmoth Field Warne* that uplift fees can be payable in situations of the lawyer only making a small part of their costs (such as 10%) contingent upon success.³¹⁵ As long as the costs agreement specifically allows for such a situation and has been agreed upon by the parties, then the costs agreement stands.

In the past, there has been a number of complaints concerning the client disputing whether the uplift fee was payable as they did not feel that the case was successful.³¹⁶ As discussed earlier in this paper, the circumstances of a case can change remarkably, depending on the stance taken by the other side and other considerations which may not have been known at the initial costs agreement stage. It may be necessary to update the

³¹⁴ For example not charging a reasonable fee and being struck off the role of practitioners.

³¹⁵ *Coady's (A Firm) v Getzler & Anor* [2007] VSCA 281; *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250.

³¹⁶ Legal Fees Review Panel of New South Wales, above n 57.

costs agreement to reflect changing views of what may be considered a successful outcome in changed circumstances.³¹⁷

In the writer's view, if such amendments are regularly required, then an argument could be raised that such redrafting would take up too much of the lawyer's time and thus discourage the lawyer from entering into conditional agreements in the first place. Conversely if redrafting of the costs agreement does not take place, it may be likely that the client will be dissatisfied. This could lead to a claims being filed in the courts to determine whether the outcome of the substantive matter was 'successfulness' and the courts having to deal with that issue on a case by case scenario. This may mean a real rise in workload for the court's which would hinder the court's efficiency (and thereby limiting access to justice).

It seems that any possible answers to problems merely create further unexpected problems in other areas leaving the utility of the uplift fee open to question.

B. Confusion around the justification for the uplift fee

There is also a large amount of conflicting information in relation to the amount of uplift fees which can be charged and how that works within the theoretical justification for charging the fee in the first place. The theoretical justification for charging an uplift is that it rewards the lawyer for the risk of nonpayment of their legal fees.³¹⁸ However, there is a conflict between the rationale for charging an uplift and its application in each jurisdiction. The question arises as to how much risk has to be apparent for charging the fee and how to identify the percentage amount that it would be reasonable to charge in each individual matter.

For example regulatory bodies are providing reports on the civil justice system which outlines options for reform when they themselves seem confused with the amount of

³¹⁷ Examples are when liability may be admitted after the proceedings have been entered into the court; or medical evidence has been obtained by a medical practitioner a number of years after the first instructions are given to the lawyer. This happens with many personal injury cases as the lawyer must wait until the client's injuries have stabilised to a degree where an assessment of permanent disability can be given in percentage terms to identify the quantum of damage.

³¹⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 September 1993, 3277 (John Hannaford).

uplift to be charged in certain types of cases. In September 2014 the Productivity Commission released a report noting that when charging an uplift, the lawyer evaluates the case and if they are of the opinion that the client has an 80% chance of success in the claim, then the lawyer should charge the full 25% uplift on top of the legal costs.³¹⁹

This view of charging an uplift in cases with a likely chance of success seems to be in line with many of the Australian legislators' views, as many of the respective Acts require that the lawyer considers success to be likely.³²⁰ However it's unclear why the full percentage of the uplift should be charged in circumstances where the client is 80% likely to be successful in their claim. Theoretically if the uplift was implemented to compensate for the risk undertaken by the lawyer, then the uplift percentage should go down when there is less chance of nonpayment. Rather the Productivity Commission seem to note the practice that lawyers are charging the highest permissible amount of uplift for relatively little risk. It is hard to understand how such charging would work within the context of the lawyer charging a fee which is reasonable in the circumstances.

Additionally, in these type of situations, any lawyer working on the basis of a no win no fee retainer would be taking on such a case regardless of whether an uplift fee is available because the chance of success is so high. Therefore, it is also hard to envisage why an uplift in such situations would promote access to justice (the underlying rationale for implementing uplift fees) as the no win no fee retainer would already be providing the access to the courts for cases with a high chance of success. This leaves the uplift with no real purpose other than to create a windfall for the lawyer, a windfall that erodes client's settlement monies.

South Australia has taken to the opposite approach and legislated that the uplift fee can only be charged when there is a risk of failure in a case.³²¹ This provision is in line with the theoretical justifications for charging the fee and may promote access to justice for those clients who need help accessing the courts. However as demonstrated throughout

³¹⁹ Productivity Commission, above n 58, 603.

³²⁰ *Legal Profession Uniform Law* s 182; *Legal Profession Act 2007 (QLD)* s 324; *Legal Profession Act 2006 (NT)* s 319; *Legal Profession Act 2006 (ACT)* s 284; *Legal Profession Act 2007 (Tas)* s 308; *Legal Profession Act 2008 (WA)* s 284.

³²¹ *Legal Practitioners Act 1981 (SA)* s 26(4).

New South Wales, many complaints were made by defendants and insurers claiming a high increase in meritless claims and inevitable rise in insurance premiums to cover the cost of these claims proceeding to court.³²² This is problematic as any claims that proceed to court with no merit are clogging the system and exposing the lawyer to other potential breaches of their overarching legal obligations such as not wasting the court's time.³²³ As noted above, whatever solutions are applied to the problems with uplifts seem to merely create different problems. This may be because the underlying rationale is out of synch with the actuality of the fees.

C. Lack of case law to help interpret the provisions of the Acts in relation to charging uplift fees

How many instances of uplift fees causing unnecessary detriment to either the lawyer or the client is unclear. The writer could identify little case law from any Australian jurisdictions where costs agreements involving uplift fees had their validity determined by the court.³²⁴

One explanation of the lack of case law for setting aside a costs agreement in the circumstances of charging of an uplift could be that a client finds it hard to dispute the agreement's validity. The client would have to go back to court and ask for a determination that the costs agreement be set aside. In the writer's opinion, this would not occur on a frequent basis. Firstly, the client (who had trouble accessing the courts in the first place) would have to go back to the court for determination of the validity of the costs agreement. This could be an expensive exercise and could require the client to engage another lawyer. Secondly, in order for a client to dispute the costs agreement, the client would have to be aware that the amount of uplift charged was not warranted in the circumstances of the case.

It is hard to imagine how a client could understand whether the uplift was reasonable in the circumstances of their case. Many clients who use this sort of retainer are not

³²² Legal Fees Review Panel of New South Wales, above n 57.

³²³ *Legal Profession Conduct Rules 2010 (WA)* r 34.

³²⁴ The case *Greggs Lawyers Pty Ltd & Anor v Viki Maree Farrer* [2014] QDC 194 is one example from the Queensland jurisdiction.

sophisticated users of the legal system. This paper has demonstrated so many conflicting problems with uplift fees that it seems even lawyers find the area confusing. All of the respective Acts in each of the Australian jurisdictions have provided a safeguard which states that the client must be informed of being able to obtain independent legal advice prior to entering into the costs agreement. This may seem an avenue that would ensure a client was aware how much the lawyer can reasonably charge in terms of an uplift in the initial agreement stages. However it is the writer's opinion that this is not an option most clients would actually take up.

Firstly as mentioned earlier in this paper, the circumstances of a case can change dramatically over time and little is usually known at the initial agreement stages. Secondly, it is questionable whether people who are entering into a conditional costs agreement with a lawyer could afford to seek another independent lawyer (which would likely require payment upfront) to assess their case and determine whether the fee being charged is reasonable. Therefore, it seems that despite this supposed safeguard, clients are left in a vulnerable and uninformed position, which was the court's concern from the outset.³²⁵

D. Does the uplift fee provide access to justice or create further problems

When evaluating the utility of the uplift fee, the main point which must be considered is whether or not the fee is increasing access to justice. That was the desired outcome of the legislators who introduced it.³²⁶ During the period 2000 and 2009, England and Wales allowed the fee through the application of the AJA Act. If the uplift was going to provide the desired result of increasing access to justice, one would think that any increase would be seen during this period as plaintiffs using such retainers had no risk of losing any money by bringing their cases to the courts. Over that period in those jurisdictions the defendant was required to indemnify a successful plaintiff for the cost of the uplift fee. Instead empirical research reveals that between the period of 2000 and 2005, the amount of claims filed in the courts dropped 5%. This demonstrates that the

³²⁵ *Ellis v Torrington* [1920] 1 KB 399.

³²⁶ Shaw, above n 9.

introduction of the uplift fee did not provide an increase to access to justice despite the fact that the defendant paid the costs and the plaintiffs' damages did not suffer erosion.

In 2005 only New South Wales, South Australia and Victoria had the uplift fee in operation.³²⁷ The problems had been experienced in New South Wales in relation to operation of the uplift fee had led to amendments which excluded the fee from damages cases.³²⁸ Extra safeguards were also put in place through the *Legal Profession Act 2004* (NSW) to help ensure lawyers were not bringing meritless claims to court.³²⁹ Problems in the understanding or just plain ignorance of the theoretical justification of the uplift fee also led to lawyers charging the full 25% for little risk undertaken.

Despite the wealth of information about problems with the fees, none of those problems were discussed in the debates in the Parliaments of Western Australia, Northern Territory, Queensland, ACT or Tasmania when they each introduced uplift fees into the relevant acts.³³⁰ It seems that the only consideration given was that the uplift fee would increase access to justice by changing the way in which the legal profession can charge.³³¹ It seemed irrelevant that problems may occur from the use of uplifts and it seemed that regardless the legal profession would be the scapegoat for the Parliaments' lack of care and thought when introducing the uplift fee.³³²

In 2013 the LSP was enacted throughout England and Wales which scrapped the use of uplift fees and introduced a contingency fee model of charging based on the amount of damages awarded similar to America. This was done because the use of uplift fees (even when combined with ATE insurance) did not provide the desired result of increasing access to justice.

³²⁷ *Legal Profession Act 2004* (NSW) s 324; *Legal Practitioners Act 1981* (SA) s 26(4); *Legal Practice Act 2004* (VIC) 3.4.28;

³²⁸ *Legal Profession Act 2004* (NSW) s 324.

³²⁹ *Legal Profession Act 2004* (NSW) s 345.

³³⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 October 1993; South Australia, *Parliamentary Debates*, Legislative Assembly, 30 April 2013; Victoria, *Parliamentary Debates*, Legislative Assembly, 20 June 1996; Queensland, *Parliamentary Debates*, Legislative Assembly, 22 May 2007; Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 October 2007

³³¹ *Ibid.*

³³² Dal Pont, above n 35.

It is apparent to the writer that the reforms enacted to allow uplift fees as a method of increasing access to justice are problematic and are not obtaining their desired outcome. There has been no demonstrable increase in the volume of claims filed in any common law jurisdiction since the uplift fees were introduced and jurisdictions such as England and Wales who were first to implement the fee have changed to a different model of charging. Further reform is required in the Australian jurisdictions.

V SUGGESTED REFORMS

It seems clear that a lawyer should receive some form of compensation for entering into conditional agreements, as such retainers include a risk of non-payment. However any recovery of compensation should be no more than is commercially reasonable. From the writer's experience of working within firms that run damages cases, the firms usually have cash flow problems from waiting long periods to get payment for the legal services rendered to the client. To alleviate the cash flow problems many obtain a bank overdraft on which the legal firm pays interest every month. It is the writer's opinion that a fee could be allowed to cover any interest paid to the bank by the lawyer for carrying the fees of the case over such a long period. This could be in the form of an uplift, however it should be restricted to the reasonable commercial costs of not having access to the payment for the work done until after the case has settled or been litigated.

Another option for reform has recently been suggested by the Productivity Commission. On 3 December 2014 the Productivity Commission released their final report *Access to Justice Arrangements*.³³³ The AJA Report was an inquiry into the civil dispute resolution process in Australia, in particular its main focus was on constraining legal costs and promoting access to justice. Recommendation 18.1 recommends reforming the operation of the way which lawyers charge their legal fees.³³⁴ The recommendation suggests lifting the restrictions on damages based billing and allowing lawyers to charge a percentage amount of the settlement sum received. As mentioned earlier in this paper,

³³³ Productivity Commission, above n 58.

³³⁴ *Ibid* 18.1.

similar reforms has recently taken place in England and Wales and have been long operating in America.³³⁵

In the Productivity Commission's view, damages-based billing (the American model) has the potential for more positive outcomes over the use of conditional billing, such as aligning the interests of the parties and removing the lawyer's incentive to over service the client's legal work.³³⁶ This recommendation needs further research to determine whether a move to damages-based billing is going to be any benefit in Australia.

CONCLUSION

In recent years lack of access to justice has become a well-publicised problem. It has been the driver for many reforms undertaken in a number of common law jurisdictions. Alternative methods to solve disputes have been implemented, such as mediation and arbitration, in an attempt to limit costs and to alleviate pressure on the courts.³³⁷ However the courts still sit in the background of these alternatives. A party that wants a judicial solution must have the money to take their dispute to the courts. Justice has a high cost and not many people can afford to pay legal fees during the conduct of the claim.³³⁸

Conditional fee arrangements involving uplift fees were seen as the answer to increasing access to justice for these people. They were to be a means of alleviating this financial pressure on a client while at the same time enticing the lawyer into risking non-payment with an extra reward offered for receiving payment of their legal fees contingent upon success.

Although the fee has quite a long history, little case law and a dearth of scholarly materials exist in regards to its operation. This paper aimed at reviewing the utility of uplift fees and comparing their history throughout various common law jurisdictions

³³⁵ *Legal Aid, Sentencing and the Punishment of Offenders Act 2012* (UK).

³³⁶ Productivity Commission, above n 58, 22.

³³⁷ Dal Pont, above n 35.

³³⁸ *Ibid.*

with a view to deciding if uplift fees achieve the desired outcome of increased access to justice. As they were not seen to be utile the paper proposed some possible reforms.

Chapter one considered the uplift fee in a theoretical sense. It was determined that the theoretical problems of charging an uplift fee were not taken into consideration prior to the fee's implementation. In particular the fiduciary duty of loyalty and reasonableness of charging seem to be in conflict with the uplift fee.

Chapter two examined the reasoning behind and the introduction of the fee in England. The uplift was in use over a long period of time in England and Wales before it was finally abandoned in favor of a contingency fee model (which is identical to the American method of charging legal fees) in 2013.

Chapter three provided a review of the implementation of the uplift fee into Australian law. The different methods of applying the uplift were discussed and a comparative analysis was undertaken between the different Australian States. In doing so, this paper determined that the problems encountered with uplift fees in England and Wales did not seem to be of any influence to the Australian jurisdictions' decision to introduce the fee. Rather, each Australian Parliament ignored any problems and tried to provide a quick fix for increasing access to justice through a market solution.

In chapter four, the practicalities and problems encountered with the introduction of uplift fees into the Australian jurisdictions were then analysed. The chapter identified that uplift fees were likely not providing access to justice but instead creating problems for both lawyers and their clients. This finding suggests that further reform is needed.

Finally chapter five suggested options for reform. One possibility is allowing lawyers to charge a commercial amount of interest on a bill rendered each month but only due at the successful end of the retainer. Alternatively, the Productivity's Commission's recommendation of allowing damages-based billing similar to England and America could be seriously considered. This paper concluded that the uplift fee in Australia is problematic from both a practical and theoretical perspective. The paper argued that although the fee was introduced as a means to promote access to justice for members of society who cannot afford legal fees, lack of clear guidance and statutory safeguards

have led to real problems. Steps taken by the legislators to rectify the difficulties encountered have merely moved the problems from one area to another. The paper concludes that uplift fees are not a tool fit for purpose and that they should be abandoned.

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