Productivity Commission Inquiry
Access to Justice Arrangements draft report – Submission on behalf of Allens

Allens is grateful for this opportunity to comment in response to the Productivity Commission's draft report dated April 2014. In response to the draft inquiry report, we refer generally to our submission of November 2013. In the submission below, we address those issues that we consider most pertinent.

Chapter 11 — Court processes

Draft Recommendation 13.4

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.

We welcome the Productivity Commission's draft recommendation on this issue.

Information request 13.1

The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- *the legal professional providing pro bono representation*
- *the not for profit body providing or coordinating the pro bono service*
- *a general fund to support pro bono services.*

The Commission is interested in any other options that could be examined.

The most appropriate means of allocating the awarded costs is to the legal professional providing representation. Although the work, to be genuinely pro bono, is done without expectation of fees and although in almost every instance, there are no fees recovered in pro bono matters, on the rare instance that some small proportion of the actual cost of the work to the practitioner is recoverable, it should be for that practitioner to allocate the money in accordance with the practitioner's preferences. For barristers, pro bono work means fees forgone and it is appropriate that they be able to benefit directly where fees are recovered. For law firms, participation in pro bono programs carries significant costs, not just in staff salaries and disbursements but in administration and membership of pro bono referral agencies. To allow the firms to recover some proportion of the fees on occasion and determine for themselves how to spend that money is appropriate.

Chapter 18 — Private funding for litigation

Private funding by a lawyer

Draft Recommendation 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- *The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.*

We submit that the ban on contingency fees should remain. Lifting the ban is likely to affect significantly the independent judgement of lawyers and undermine the rationale for permitting third party (non-lawyer) litigation funding. Further, any access to justice improvements that contingency fees may facilitate is outweighed by the costs of permitting this type of billing arrangement.

Allens is an independent partnership operating in alliance with Linklaters LLP.

Independent judgement of lawyers affected

In our view, there remain significant differences between conditional fees and contingency fees. Contingency fees are charged and calculated on a fundamentally different basis to conditional fees. The former is directly referenced as a percentage of any award or settlement that results from the legal action. As we have highlighted, contingency fees therefore give the lawyer a purchased share in the litigation and a *direct* financial interest in decisions affecting the litigation and its outcome.

It has been argued that contingency fees align the interests of the lawyer with the client on the basis that the incentive for both parties is for the largest payout and the lowest costs. Whilst this may be true in some limited cases, it obscures the reality of how such fee arrangements affect lawyers' incentives. Unlike other people or entities that fund litigation, lawyers have control of the conduct of litigation. In giving lawyers a direct interest in the financial outcome of the legal action, contingency fees therefore generate a number of potential sources of conflicts of interest that affect a lawyer's duty to their client and to the court. Not all of these conflicts were addressed in the draft report. It is not only the potential for contingency fees to erode the purpose of compensatory damages that is a cause for concern. To reiterate Allens' previous submission, contingency fees may motivate the lawyer to:

- encourage vulnerable plaintiffs to agree to an inappropriate contingency fee, for example, a contingency fee that does not reflect the work required in resolving their claim and/or the degree of risk of the claim being unsuccessful;
- adopt an inappropriate position or strategy in anticipation of a large award of damages and, consequently, a large fee, even where a client would have been satisfied with, for example, a non-monetary resolution to the dispute, such as an immediate and fulsome apology;
- refrain from pursuing viable causes of action or appropriate interlocutory steps on the basis that these will increase legal costs;
- encourage an unreasonably high contingency fee or fail to inform a client that a certain contingency fee is not in their financial interest;
- seek to settle a claim prematurely in order to capture the greatest fee for the least amount of work; or
- pursue large, high value claims to the point where it is no longer commercial for the defendant to continue, thereby forcing the defendant to settle regardless of the merit of the plaintiff's claim.

In the examples given above, it is the lawyer's independent financial interest in the litigation, and therefore their personal interest in decisions that affect the course and outcome of the case, that fosters conflict with the lawyer's duty to the client and the court. Such a direct conflict does not arise in relation to conditional fees as they are calculated by reference to the work undertaken by the lawyer, and cannot be charged by reference to the value of the claim.

Rationale for third party (non-lawyer) litigation funding undermined

Third party (non-lawyer) litigation funding is generally accepted in Australia. However, as stated in our previous submission, permitting contingency fees may undermine the rationale behind permitting third party (non-lawyer) litigation funding and threaten the basis on which the High Court has been willing to accept that third party (non-lawyer) funding does not represent an abuse of process.[1] As noted by the minority in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*[2] (***Fostif***), it is important to ensure that solicitors remain independent if the risks associated with third party (non-lawyer) litigation funding are to be managed appropriately.

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[1] This contention was not addressed in the draft report.

[2] (2006) 229 CLR 386.

Risks that might arise in this context include the possible conflicts of interest between the funder and the client arising from the quantum of fees charged, the decision to settle a class action and the terms of settlement. Class members are generally motivated by personal concerns, whereas litigation funders are profit driven. Group members may therefore wish to settle the proceeding for an amount less than the funder considers suitable.[3] In this situation, client access to an independent adviser with no financial interest in the decision is vital to protect the interests of those in the class.[4] It is also for this reason that the ban on contingency fees is necessary to prevent plaintiff law firms from setting up litigation funding vehicles. When the plaintiff firm is both the legal representative and the litigation funder (seeking to receive a percentage of the damages award), there is a direct conflict between their fiduciary duty to the client as legal adviser, and their interest in returning a profit from their financial investment in the litigation.[5]

Court supervision is not enough

Lawyers are certainly subject to various obligations relating to conflicts of interest. These obligations include fiduciary duties to the client and ethical duties to the court. The courts' supervisory powers also go some way towards managing the potential for conflicts of interest to arise. For example, the *Civil Procedure Act 2010* (Vic) provides that a court may make any order it considers appropriate in the interests of justice to remedy any breach of the Act's overarching obligations.[6]

However, a blanket ban on contingency fees aligns with the usual and, in our view, correct approach to regulating conduct concerning fee arrangements, which is to avoid situations that give rise to such conflicts of interest in the first place. The Victorian Bar practice rule prohibiting a barrister from fixing a fee for advice based upon 'the possible entrepreneurial value of such advice to the solicitor or the client' is a further example of this approach to regulation.[7] There are three reasons that support this approach rather than relying on the will of the lawyer to regulate his or her own ethical conduct. First, a ban on contingency fees reinforces the *appearance* of a lawyer's independence, which is crucial to public confidence in the legal profession and the administration of justice. Second, notwithstanding the various professional and ethical obligations in place to manage conflicts of interest, it is difficult to measure the degree to which lawyers may be subconsciously affected when they hold a personal interest in the financial outcome of the litigation. Third, and related to the second reason, it can be difficult to monitor and enforce breaches of fiduciary and ethical duties at an individual level.

Access to Justice

Permitting contingency fees is unlikely to improve access to justice meaningfully. As noted in our previous submission, removing the restriction on contingency fees is unlikely to have a significant effect on access to justice in those areas of greatest unmet legal need. There is also evidence to suggest that there are already sufficient sources of litigation funding in place. The increasing numbers of securities class actions in recent months, for example, demonstrate that Australia is already a litigious society.[8] In addition, it is

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[3] Vince Morabito and Vicki Waye, ‘Reining in Litigation Entrepreneurs: A New Zealand Proposal’ (2011) 2 *New Zealand Law Review* 323, page 354.

[4] Permitting contingency fees therefore raises the possibility that third party (non-lawyer) litigation funding is inappropriate in circumstances where the lawyer engaged has a purchased share in the litigation.

[5] The involvement of a law firm with a litigation funder in the case of Claims Funding Australia led to the Attorney-General, George Brandis, criticising such arrangements as giving rise to 'conflicts of interest and moral hazards'. See Chris Merritt, 'Regulation is on the cards', *The Australian*, 8 November 2013.

[6] *Civil Procedure Act 2010* (Vic), s29.

[7] *Victorian Bar Practice Rules* (Vic), r109(e).

[8] John Emmerig and Michael Legg, 'Australia rivals US as nation of litigators', *The Australian*,11 April 2014.

difficult to assess how, and to what extent, rules governing legal costs affect an individual's decision to pursue legal action.[9]

Notwithstanding the contention that contingency fees may improve access to justice by providing upfront funding to litigants who may not otherwise be able to pursue their legal action, the costs of permitting contingency fees outweigh the benefits. Given the reasons stated above and in our previous submission, permitting contingency fees is a solution that ultimately has the potential to impede a prospective litigant's access to justice and undermine public confidence in the administration of justice more generally.

Information Request 18.1

The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:

- *Is the 25 per cent uplift for conditional billing appropriate? What are the benefits and costs of changing this limit?*
- *Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration by given to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?*

The Commission has asked what percentage limits should be imposed in relation to conditional fees and contingency fees. Allens submits that the 25% uplift for conditional fees should not be increased for the reasons identified in the draft report.

Second, if contingency fees are permitted, a 'sliding scale' in combination with a limit on the percentage of any award or settlement that a lawyer can take is necessary to mitigate the risks associated with contingency fees, and prevent the significant erosion of compensatory damages. A 'sliding scale' should not be a substitute for an absolute cap on contingency fees. In determining the appropriate limits on contingency fees, the United Kingdom model should be the starting point.[10] In the United Kingdom, not only are contingency fees capped, they also cannot be charged on a plaintiff's damages for future pecuniary loss. In addition, when the United Kingdom introduced contingency fees, it increased awards of general damages for non-pecuniary loss such as pain, suffering and loss of amenity by 10%.

Further consultation required to address the following considerations

The Productivity Commission states that it is further considering appropriate restrictions that will ensure adequate consumer protection. We agree with that position. We consider that the Commission should have particular regard to those matters we identified in our previous submission at page 18.[11] Further, we suggest that close consideration be given to exposing lawyers who charge on a contingency fee basis to express regulatory requirements that they incur the risk of an adverse costs order, meet and/or contribute to security for costs and be subject to prudential requirements. As contingency fees give the lawyer a share of the proceeds of litigation in the event of success, it would be unjust if they may be able to escape liability for costs in the event of failure. In addition, any contingency fee agreement should be filed with the court upon the commencement of proceedings and served on defendant(s) at the same time as the writ or other originating process.

Draft Recommendation 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards.

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[9] Michael G Barter, 'The case against contingency fees' (1990) 17(7) *Brief* 8, page 8.

[10] As recognised in the draft report, the maximum payment that a lawyer can recover from a claimant is capped at 25% of damages (excluding damages for future loss) in personal injury cases; at 35% of damages in employment tribunal cases (where matters can be conducted by people other than lawyers), and at 50% of damages in all other cases.

[11] Submission 111 to the Productivity Commission's Access to Justice Arrangements public inquiry, 22 November 2013.

Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

We welcome the Productivity Commission's draft recommendation on this issue.

Allens submits that a self-regulatory industry code would be insufficient given the self-interest of litigation funders to maximise commercial profits. We suggest that the Commission have regard to our previous submission when considering the ethical and professional standards that should apply to third party litigation funding companies.

Chapter 23 — Pro Bono Services

Draft recommendation 23.2

The Commonwealth Government and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

We welcome the Productivity Commission's draft recommendation on this issue. The Victorian system of approval for matters is a reasonably effective one.

Information Request 23.2

The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?

It is unlikely that an industry body approval of a pro bono matter would alleviate law firm pro bono providers' concerns about undertaking work that may be or may be perceived to be at odds with the interests of the law firm's commercial client.

There are some instances of arrangements between law firms and commercial clients, whereby the client gives in principle approval to the law firm taking on work for pro bono clients against the client. An example is arrangements that have been made by some firms that participate in Justice Connect and QPILCH's homeless legal clinics with some banks agreeing that the firms may act on minor matters for homeless clients against the individual bank. In these cases, the commercial clients have recognised the efficiency value for them of dealing with represented clients and the public benefit of having legal assistance provided to the most needy. These arrangements are highly effective and it would be useful for industry bodies to encourage them and communicate information about best practice in this context. However, to be useful to a law firm, the approval must come from the client itself and not from a third party.

Information request 23.3

The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?

All jurisdictions should require government legal service providers to adopt the National Pro Bono Resource Centre pro bono target, consistent with the approach of the Commonwealth Government.

Governments should require their legal providers to achieve the target or describe specific actions being taken to achieve the target within a reasonable time.

Draft Recommendation 23.3

Any pro bono targets used by governments as incentives in tender arrangements should remain flexible. Reporting required for pro bono targets should be clear and simple.

Reporting should be clear and simple. The current Victorian reporting arrangements are unnecessarily complex. The categories of work that can be done to satisfy the targets should be carefully considered to ensure only actual pro bono legal work is eligible and not broader categories of volunteer work or financial support. Those contributions have their role but are distinct from skilled legal work undertaken by members of the profession. Reframing the categories to favour work for disadvantaged individuals over work for not for profits would be a very effective way for government to increase the emphasis on this type of direct service provision.

Information request 23.4

The Commission is seeking views on the most efficient form of pro bono targets. How should they be expressed (in hours, dollars or some other means)? How do the reporting requirements of the two current targets (one for the Commonwealth and the other for Victoria) compare in terms of limiting compliance costs?

The targets should be expressed in hours.

Draft Recommendation 23.4

The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers should be contingent upon regular, robust and independent evaluation of the services provided.

We welcome the Productivity Commission's draft recommendation on this issue.

Allens
21 May 2014