QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

Submission to the Standing Committee of Attorneys General on litigation funding

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13 SEPTEMBER 2006

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INTRODUCTION

What is QPILCH?

The Queensland Public Interest Law Clearing House Incorporated (QPILCH) is a non-profit community based legal service that coordinates the provision of pro bono legal services in public interest matters. QPILCH also provides direct services through targeted projects, including the Homeless Persons' Legal Clinic, the Administrative Law Clinic, and the Consumer Law Advice Clinic.

Why is QPILCH interested in this review?

QPILCH refers a wide range of matters to its members who provide a range of legal services. Where a referral involves or leads to litigation, we are in effect the facilitator of litigation funding where meritorious cases are assisted on a pro bono basis. In addition, QPILCH was created to improve access to justice in Queensland and so is interested in any means by which Queenslanders access to the courts and justice can be improved.

Over the last year, QPILCH has made several submissions and recommendations that touch on the issue of litigation funding, namely:

- *Submission to Legal Aid Queensland's Review of Civil Law Services,* and
- *Submission to Legal Aid Queensland's Review of the Civil Law Legal Aid Scheme*.
- We are also soon to make a submission to the Queensland Attorney-General, the Hon Linda Lavarch MP, which further canvasses and enlarges on the issues raised in the LAQ submissions.

QPILCH's paper, *Submission to Legal Aid Queensland's Review of the Civil Law Legal Aid Scheme* outlines various recommendations for that scheme and discusses conditional legal assistance funds in general. In order to gain a perspective on the environment relevant to this issue at present, attached to this paper as **APPENDIX 1** is an overview of Queensland's Civil Law Legal Aid Scheme (CLLAS) and other funding schemes in Australia and overseas.

QPILCH facilitates pro bono litigation funding through referral to members for pro bono assistance. Occasionally, it also refers matters for assistance on a speculative fee basis. This gives the organisation an immediate perspective on the "client-legal service provider" relationship, and gives credibility to its insight into the needs of persons who seek free and low cost legal services of this kind.

A barrier to accessing litigation services is the difficulty in covering disbursements even when professional fees are free or provided on a conditional basis.

Some of QPILCH's member firms have begun to take the approach of having a discrete disbursement fund, which enables them to fund outlays in pro bono cases. We see this as a positive and innovative approach, and believe it allows for pro bono cases to be managed in a more organised fashion.

Other members fund disbursements on a case by case basis or will provide pro bono professional services only, asking a client to fund disbursements. We know of at least one case that was not continued because of high disbursements that neither firm nor client was able to meet.

To address the high cost of some disbursements, QPILCH has established a non-legal specialist panel to access free psychiatric specialist services in pro bono cases. To date, however, this has had very limited application, although we hope to extend this system to other specialties.

While pro bono is reasonably undeveloped at this time, even with substantial growth it is unlikely to meet community demand for civil law services. Other mechanisms need to be developed, along with more government funding for civil law, to assist people who cannot afford private legal services and where pro bono is unavailable. We suggest below the need for a range of full fee and disbursement only CLAFs, particularly on a not-for-profit basis. We also suggest the enhancement of speculative arrangements.

Whatever approach is adopted, it is vital to ensure that the relationships between client, firm and funder are properly regulated.

However, it should not be forgotten that both pro bono and speculative services are forms of litigation funding that SCAG needs to keep in mind when formulating policies to improve access to the courts and justice. Before we proceed to address the issues raised in the SCAG paper, we raise below some issues that arise from speculative services that need to be considered.

SPECULATIVE FEES AND OTHER ISSUES

Speculative fee arrangements

QPILCH's paper, *Submission to Legal Aid Queensland's Review of the Civil Law Legal Aid Scheme* examined speculative fee arrangements in a Queensland and Australian context, with some focus on international arrangements.

There are significant attendant risks and problems associated with speculative arrangements, including:

- recent changes to the law (through the *Personal Injuries Proceedings Act 2002* (Qld) (PIPA) and the *Civil Liability Act 2003* (Qld) and other legislation and reforms) have allegedly lead to a decrease in their use by restricting awards and the costs that lawyers can charge, making legal services, particularly in difficult and complex cases, uneconomical
- complaints about abuses by some members of the legal profession, and
- confusion about how speculative arrangements operate.

These circumstances give rise to a number of issues that warrant deeper consideration not afforded by this review because they operate to reduce the attractiveness of speculative fee arrangements, an important access to justice mechanism.

Costs

Solicitor and own client costs

'Standard' or *'party and party'* costs (fees and outlays) are costs that a court may order the unsuccessful party to pay the successful party. These are the allowable costs essentially or directly incurred by a party in conducting their case. *'Indemnity'* or *'solicitor and own client'* costs are costs that the client's lawyer incurs in excess of the court ordered costs for necessary work done in the conduct of the client's case that are not strictly required to conduct the case but are attributable to the particular circumstances of the solicitor and client. In other words, costs over and above the 'standard' costs incurred by a solicitor in relation to a matter.

In Queensland, before 2003, under some conditional fee arrangements, "successful" matters had resulted in a client paying a total amount of fees that exceeded the court award or settlement amount. Therefore, the *Queensland Law Society Act 1952* (Qld) was amended so that where a client is "successful" in a personal injuries claim, the lawyer cannot charge professional fees of

more than half of the net award or settlement (after the deduction of outlays) received by their client.

It is understandable that a client would be concerned at a significant reduction of their award through costs. It is important that full disclosure occurs as early in the process as possible so clients can weight up the risks but also the effort that litigation entails with the likely return if successful. For many, a gain is better than no gain at all, but for some a small gain at a huge emotional and physical cost is not a success or worth pursuing. Unfortunately, for many people, the effort and impact of litigation is not envisaged at the start of proceedings, or at least is underestimated at the time they feel motivated to pursue their legal rights.

However, the position of the firm must also be considered. Litigation is costly and time-consuming and the quantum of damages difficult to estimate. NSW legislation, to be adopted in Queensland in 2006 under the model professional legislation, further limits the costs lawyers can charge in some damages cases. This will potentially place further pressure on speculative casework. For people/corporations with limited means, it is usually the hard and complex cases that, even if meritorious, and the ones with low likely returns that have the greatest difficulty in finding legal assistance. The time-cost of gathering information, sifting data, assessing the issues, analysing the law, and preparing and proceeding with litigation outweighs the potential benefit or, even if the likely benefit is substantial, law firms can have great difficulty in committing the firm's resources to prolonged and time-consuming work.

Despite civil law reform over the years, little has been done in terms of effectively reducing the expense of litigation and finding ways to make speculative arrangements more attractive to practitioners. Rather, reforms have made it less attractive, as reforms have concentrated on limiting awards and costs without facilitating access to speculative services and protecting both parties through clear arrangements and appropriate monitoring.

In addition, costs regimes in various areas of law are ad hoc. PIPA made major changes in relation to personal injuries claims (removing costs in claims under $30,000). Costs have also been removed in other jurisdictions, such as in the Queensland Industrial Relations Court (QIRC). In this jurisdiction, larger awards are rarely made and the matter usually focuses on a different sort of outcome, but the cost of the litigation can still be high. The problem for the litigant is that, if there is a no costs or a limited costs regime, what is taken out of any award or settlement by way of costs may leave them with little or nothing.

For example, this occurs frequently in unfair dismissal cases. A case may be worth only $10,000 or less but it costs from $5,000 (very cheap simple trial) to $20,000 or $30,000 to litigate a case. Most do not proceed to trial. The Commission has also capped damages and awards are notoriously low - very few over about $7,000/$8,000. If there were costs in the Commission, there would be more encouragement to litigate. The problem with contract of employment cases is that they can be very expensive to run in the courts and the returns can be very risky. If there is a potentially impecunious employer or an employer which is a service company with no assets or prepared to throw everything at the litigation, there is little incentive for clients to litigate.

<u>Adverse costs orders</u>

While improved speculative fee arrangements would permit clients to fund their own representation, in Queensland they would not be protected against an adverse costs order.

Legal Aid Queensland's CLLAS scheme advises that 'applicants should be aware that if their claim is unsuccessful then there is a possibility that costs could be awarded against them. In

these circumstances no funding will be provided by the Scheme towards these costs.'[1] This is an important factor to consider as persons who utilise CLLAS have already demonstrated they are unable to cover the costs of litigation through the means test. Costs associated with litigation may be quite substantial and thus unsuccessful litigants who already have limited resources may find themselves in further financial trouble. A person who has a meritorious claim may baulk at proceeding with litigation if they risk losing their house through an adverse costs order, irrespective of where the costs for their own lawyer comes from. The wealthy and impecunious are not so deterred.

Under the *Legal Aid Act 1977* (Qld), a legally aided person or other party may apply to LAQ for the costs ordered by a court against a legally aided person. Under the *Legal Aid Commission Act 1979* (NSW), where costs are awarded against a legally aided person, the Commission will pay the costs and the legally aided person will not be liable for them up to an amount of $5,000. In WA, the Litigation Assistance Fund 'underwrites the risk of an adverse-costs award'. However, that fund has been suspended. In the UK, where parties are legally aided, they are immune from costs orders.

This problem could be addressed through the introduction of costs protection orders, where the court makes an order early in the proceedings limiting a party's liability if they lose.

The UK Civil Justice Council, supported by the Court of Appeal in *R v Secretary of State for Trade and Industry [2005] 4 All E R 1*, has proposed protective costs orders, whereby a court can make an order early in proceedings limiting or indemnifying a cost liability in the event of losing. However this will only occur in exceptional circumstances involving the public interest and excludes individual parties.[2]

It has been proposed in the UK that individuals who are outside the legal aid means test but unable to afford private representation be protected through a costs 'protection certificate'. This is similar to the immunity from costs afforded a fully legally aided person, although staggered according to the person's ability to contribute something should an adverse order be made. The application would be subject to the usual merit assessment and would only be offered where the other party was significantly funded.[3]

Costs protection is not unknown in Australia. Under ss6 and 7 of the *Federal Proceedings (Costs) Act 1981* (Cth), the Federal Court can grant a certificate stating that it would be appropriate for the Attorney-General to authorise payment to the respondent of its costs and any costs incurred by the appellant that the respondent is required to pay where the appeal is successful. This would occur where the respondent has no means and an adverse costs order would cause the respondent undue hardship. Under s8 of the Act, the Court can also issue a costs certificate on the application of a party if it orders a new trial in a civil cause. However, these occur after the event, whereas the UK proposal is for the certificate to be provided early in the proceedings.

In Queensland, appellants and respondents in appeals can apply for financial assistance from the Appeal Costs Fund.

Other problems with speculative arrangements

[1] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[2] Beagent J and Hickman J, Costs protection certificates – bridging the funding gap, New Law Journal 16 December 2005.
[3] Ibid.

Recent events have shown that there is significant confusion amongst clients as to what the term "no win, no fee" actually means and difficulties for lawyers in that it requires of the practitioner skills in assessing, managing, spreading and financing risk (Dal Pont 2001, p 402). While this is perhaps easier in personal injuries cases, greater difficulties can arise in other areas of law.

A persistent source of complaint with these arrangements is over differing views of the meaning of 'successful'. Trouble also arises when either the firm changes its view on the client's chances of success or realises the likely award will be too small to cover their costs. There is therefore need for greater awareness of these arrangements.

There are also problems with the way speculative arrangements operate. Even when a matter is unsuccessful, or is not continued, under some conditional fee agreements the client may have to pay the firm. For example, the firm may claim the outlays (expenses incurred by the firm while acting on the client's matter) if not required 'up front' by the firm. In addition, the client is not always aware from the start of the relationship that they may be ordered to pay the costs incurred by the other, winning party. Lack of understanding on the part of some clients or poor returns have lead to dissatisfaction and dispute.

In addition, if the client withdraws their instructions before the case is concluded (or the firm ceases to act for some other reason), the client may be required to pay the firm's professional fees and costs up to that point. This causes problems for the ordinary person who usually does not have the funds to pay, and in any event cannot see logically why they should pay, the firm having promised that payment is only required on successful completion.

It is important for the law governing these agreements to balance the interests of justice and fairness to all parties. Unfortunately, clients seeking these arrangements are often forced to take whatever terms the lawyer offers on a 'take it or leave it' basis, sometimes for good reason, such as where the risk is high. Different CLAFs could potentially make speculative arrangements more attractive to the profession if it was able to offer benefits to both client and lawyer.

UK reforms

In 1995, conditional fees for solicitors were introduced in the United Kingdom.[4] This was an alternative to a CLAF in that clients could take out insurance in a specially introduced insurance scheme for all personal injury matters, which in return for a premium paid protected them against paying costs if awarded against them.[5] However, in 1998, the Blair Government proposed in its paper *Access to Justice with Conditional Fees*, that personal injury and most civil matters no longer be covered by legal aid and instead restrictions to conditional fee arrangements be relaxed to cover those matters.[6]

This resulted in the *Access to Justice Act 1999.* This Act establishes the Legal Services Commission, which funds the Community Legal Service. Under this statute there is an obligation on the Commission to prepare a funding code, and the draft code sets out a number of funding priorities and there is a focus on encouraging conditional fee agreements.

Under the *Access to Justice Act 1999* (UK) ('the Act'), lawyers and clients may make conditional fee agreements ('CFAs') for non criminal and non family law proceedings.[7] This includes any sort of proceedings for resolving disputes (not just court proceedings), whether commenced or contemplated. Under a CFA, a lawyer's fees and expenses (or any part of them) will only be

[4] Law & Justice Foundation of New South Wales (1999), para 2.
[5] Law & Justice Foundation of New South Wales (1999), para 2.
[6] Law & Justice Foundation of New South Wales (1999), para 3.
[7] *Access to Justice Act 1999* (UK), s 27(1).

payable in specified circumstances. CFAs may also provide for a 'success fee' - an increase in fees in specific circumstances (see **APPENDIX 2**).

The Act also establishes litigation funding agreements ('LFAs'), whereby a third party agrees to fund (in whole or in part) the provision of advocacy or litigation services to another person, and the litigant only agrees to pay a sum to the benefactor in certain circumstances.[8] As with CFAs, LFAs cannot be used for criminal and family law matters and are available for disputes other than court proceedings.

CFAs and LFAs are designed to work in tandem with legal costs insurance. Another major feature of the UK reforms was the ability to recover insurance premiums as part of the costs where a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings.[9]

The purpose of these reforms was to make justice more affordable and accessible, to discourage weak claims and encourage early settlement. Underlying this was the desire to ease the administrative burden on those providing and purchasing legal services.[10] The reforms coincided with the abolition of legal aid funding for personal injury claims (excluding medical negligence) and a severe cut to legal aid funding for civil matters. The reforms led to some concerns that marginalised people would be pressured into signing unfair 'no win no fee' agreements that provide for a substantial success fee.[11] However, there are safeguards built in to the *Conditional Fee Agreements Regulations 2000* (UK), which require the lawyer to at least orally inform the client of:

(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement,
(b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so,
(c) whether the legal representative considers that the client's risk of incurring liability for costs where the client has legal costs insurance for that matter, and
(d) whether other methods of financing the costs are available, and, if so, how they apply to the client.[12]

Furthermore, the legal representative must fully inform the client both orally and in writing of the CFA's effect, and if the legal representative considers that any particular method of financing is appropriate (such as obtaining insurance), they must provide reasons for doing so.[13]

Rather than increasing the number of claims (and the number of people accessing the justice system), since the introduction of the UK CFA system, there have been less personal injury claims made each year. Another concern is that CFAs are inappropriate for small claims in the UK, due to rules of 'irrecoverability' of costs in small claims cases – this makes the small claims unattractive for private sector lawyers.

Contingency fees

In this submission we use the terms ‘contingency fees’, as costs (fees and disbursements) which are paid as a percentage of the award, and ‘conditional fees’, as fees which may include an uplift (an additional amount on top of solicitor and own client fees) and are calculated as a percentage

[8] *Access to Justice Act 1999* (UK), s 28.
[9] *Access to Justice Act 1999* (UK), s 29.
[10] Department for Constitutional Affairs (2003) *Simplifying CFAs*, http://www.dca.gov.uk/consult/confees/cfa.htm.
[11] Citizens Advice Bureau (2004) *No win, no fee, no chance*. http://www.citizensadvice.org.uk/macnn/no_win_no_fee_no_chance-2
[12] *Conditional Fee Agreements Regulations 2000* (UK), R4.
[13] *Conditional Fee Agreements Regulations 2000* (UK), R4.

(as much as 100%) of the costs. Both these types of fees are payed only if the claim is 'successful'.

Contingency fee agreements are prohibited in Queensland.

Contingency fees can facilitate access to justice for those who have a good case but cannot afford a lawyer in circumstances where the level of risk is greater than in normal speculative cases, in particular where the potential costs are very large. A class action is an example. They are well understood by most clients, provide an appropriate allocation of risk between lawyer and client, facilitate freedom of contract between lawyer and client, and assist in the deregulation of the profession. Proponents argue that it will increase access to legal services by small litigants. Its detractors suggest it will lead to the American system of contingency fees where a percentage of the damages can be taken for financially supporting the litigation.

Various reports have commented on uplift conditional fees in Australia. The Australian Law Reform Commission's (ALRC) Discussion Paper on a Review of the Federal Civil Justice System considered a number of reports and made its own recommendations on contingency fee arrangements. The ALRC did not support the introduction of contingency fees based on a percentage of the outcome in any matters.

The Trade Practices Commission has recommended that lawyers should be permitted to charge an uplift to a maximum of 25% but not a percentage of the award or financial outcome.

The Access to Justice Advisory Committee (AJAC) report recommended the introduction of conditional uplift fees (except in criminal and family matters, and subject to safeguards) with a maximum uplift factor of 100%, and noted that careful monitoring of conditional fee arrangements should take place.

Two of the major concerns are that contingency fees will create a flood of litigation or encourage people to pursue unmeritorious claims. Litigants are still exposed to the risk of paying the opponent's costs if they are unsuccessful and lawyers are still taking on some risk if the case is unsuccessful and they do not receive payment.

Several CLAFs outlined in **APPENDIX 1** for example require repayment of amounts based on a percentage of the successful award (from 7.5 – 15%) and are therefore in effect contingency schemes.

It is worth considering contingency fee arrangements as a feasible option with appropriate regulation in place to protect clients as a way of promoting access to justice.

Costs reform

The cost of litigation is an obvious barrier to approaching the courts by the disadvantaged.

QPILCH has prepared a paper on costs and fees in public interest litigation, recommending that court costs be reviewed in cases that raise public interest issues and permit the early estimation of costs (in order to foster the selection of cheaper options for low value claims, assist in the assessment of liability and identify attitudes to settlement[14]) and the institution of a costs protection system. We attach a separate briefing paper (see **APPENDIX 3**), which recommends consolidated costs legislation. A consolidated act should also underpin the rules facilitating settlement.

[14] Hodges C, Bartz S, Sherman H, *Lord Woolf's review of the civil justice system in England and Wales, 1994-1996*, APLR Vol 8 #3, May 1997.

In addition, court fees have steadily increased over recent years to the point where many litigants have difficulty meeting the costs of commencing proceedings. Policy has stressed a user pay approach. However such a policy is inconsistent with the aim of a fair and accessible court system. The operation of a harmonious society requires operation of a court system that fulfils its broad function as an arm of government and the settler of disputes. This is in the interest of all citizens and institutions, not just litigants. Taxpayers should maintain the court system and litigants should pay according to means, the complexity of litigation involved and the value of the claims. A consolidated costs statute could include updated appeal costs rules and the regulations to the consolidated legislation could also incorporate the court fee waiver scheme.

All of these issues bear on the issue of litigation funding. Accordingly, a more comprehensive response is needed than just an assessment of the relevant merits of different types of CLAF or litigation insurance. A more extensive investigation of speculative fee arrangements could seek to address these issues.

SCAG DISCUSSION PAPER – DISCUSSION OF ISSUES IN LIGHT OF EARLIER DISCUSSION AND RECOMMENDATIONS

FOR-PROFIT LITIGATION FUNDING

Issue 1: Should laws against maintenance and champerty be repealed in those jurisdiction where that tort or crime continues to exist (Western Australia, Queensland, Tasmania and the Northern Territory)?

The SCAG paper considers that repealing these laws would prevent defendants using ‘collateral’ or ‘satellite’ litigation to stymie proceedings, and harmonise the legislative framework throughout Australia.

Most recently, the High Court’s decision in *Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd*[15] has shown in jurisdictions where the offences of maintenance and champerty are abolished, that “seeking out and encouraging litigation could only be contrary to public policy if there were still a rule against maintaining actions. In the absence of such a rule … there [is] no foundation to conclude that maintaining an action could be contrary to public policy.”[16] However, the Court did not consider it “necessary or appropriate to consider the position in jurisdictions where maintenance and champerty continue to be torts or crimes.”[17]

Kirby J also paid particular attention to the Court of Appeal’s conclusions that the proceedings were not an “abuse of process” that “constituted an impermissible ‘trafficking in litigation’.” He also recognised the importance of litigation funding in providing access to the courts.[18]

Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd has thus opened the door to litigation funding in jurisdictions where maintenance and champerty are abolished as a crime/tort. QPILCH agrees with the SCAG ministers’ identification of maintenance and champerty as being potential barriers to litigation funding arrangements. Repealing these laws, and/or introducing a uniform Australian system in relation to them would be a significant step forward. However, we believe

[15] [2006] HCA 41
[16] O’Donahoo, P. and Downie, S. ‘High Court gives green light to litigation funding’, http://www.aar.com.au/pubs/ldr/foldr30aug06.htm
[17] See n 14
[18] *Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at ¶147

that any such system must be regulated to prevent the potential for abuse that the creation of those offences was intended to prevent.

Issue 2: Should a direct contractual agreement between the solicitor and the plaintiff be required in all funded actions?

The SCAG discussion paper argues that this would guarantee that the broad consumer protections set out in the uniform legal profession laws apply to the lawyer-client relationship.

In Queensland, a written agreement between solicitor and client is required within a reasonable time of starting work for a client.[19] The solicitor/client agreement, costs arrangements and complaints to the Solicitors Complaints Tribunal are currently governed by the *Queensland Law Society Act 1952*.[20]

Currently, section 48 of the QLSA requires:

- Within a reasonable time after starting work for a client, a firm must make a written agreement with the client expressed in clear plain language and specifying the work the practitioner or firm is to perform and the fees and costs payable by the client for the work.
- The fees and costs payable by the client must be specified:
    - as a specified lump sum amount, or
    - calculated either according to a court scale or on the basis of an agreed hourly rate (whether or not including a lump sum amount) including the expected outlays (e.g. court filing fees and medical reports), when you are to pay (e.g. at the start, during or at the end), and what you have to pay if you are unsuccessful (see also speculative agreements below).
- A notice called "Important Notice to Client" in the form prescribed by the QLSA (schedule 9 - which sets out what the agreement must contain), together with a copy of any scale of costs (such as a court scale) for the work provided must be attached.
- The client must be provided with the agreement and notice before signing it.
- An agreement to amend a client agreement must also be in writing.

The agreement may be enforced or challenged in a court in the same way as any other contract (see also dispute over legal fees below).

If a client agreement does not comply with section 48 of the QLSA (or the proposed new provision), the client agreement is void (of no effect). It is not voided by non-performance of the agreement by the solicitor, such as the charging of excessive fees.

Under the proposed model rules, the lawyer must disclose to a client:

- The basis on which fees will be calculated
- The client's right to negotiate the costs agreement, receive a bill, request an itemised bill within 30 days after receipt of a lump sum bill, to be notified of any substantial changes
- An estimate or range of estimates of the legal costs
- Details of billing intervals
- Interest on overdue costs
- Range of costs to be recovered from other party if successful or to pay the other party if unsuccessful
- Plus other information about mediation, challenging the agreement and relevant time limits.

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[19] *Queensland Law Society Act 1952* (Qld), s 48(2)
[20] QPILCH, 'You and Your Lawyer', http://www.qpilch.org.au/_dbase_upl/Lawyers%20Guide.pdf, 11

If full disclosure does not occur, the client need not pay the legal costs and the lawyer cannot take proceedings to recover them unless they have been assessed. In addition, the client can apply for the costs agreement to be set aside.

It is also proposed that a client can apply to a costs assessor for an order that a costs agreement be set aside on the basis it is not fair or reasonable. The costs assessor will consider such matters as whether the client was induced into the agreement, the conduct of the lawyer, whether required disclosures were made to the client. The cost assessor will also have the power to determine if the costs charged are fair and reasonable in relation to the work done.

The requirement to enter the agreement does not apply to urgent work or work if the maximum amount a practitioner or firm charges as fees for the work is $750 or less.

If an agreement is not entered and the client disputes the fees, the solicitor can only charge fees on the basis of scale or if there is no scale, a reasonable amount as determined by a cost assessor.

We recommend that a model solicitor/client agreement is desirable in all situations and should be drafted to outline all relevant rules and disclosures to protect the interests of both parties to the agreement.

Issue 3: Should the criteria for legally acceptable funding agreements be formalised?

The SCAG discussion paper comments that formalising criteria would prevent unnecessary collateral litigation, ideally producing greater certainty and lowering costs.

In *Fostif*, Gummow, Hayne and Crennan JJ (with whom Gleeson CJ and Kirby J agreed on this issue) made several important points on the alleged abuse of process by the litigation funders Firmstones:

- Except as where a contract is to be treated as contrary to public policy or is otherwise illegal, where maintenance and champerty have been abolished[21], any wider rule of public policy relating to them has "lost whatever narrow and insecure footing [which] remained for such a rule."[22]
- Having the litigation funder control the litigation or profit from it would not (jointly or separately) "warrant condemnation as being contrary to public policy or leading to any abuse of process."[23]
- Fears concerning "adverse affects on the process of litigation and … 'fairness' of the bargain struck between the funder and intended litigant"[24] would not "[warrant] formulation of an overarching rule of public policy" that would prevent a litigation funding-type agreement.[25]
- Fears of corruption of court processes are "sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes."[26]

QPILCH agrees that a great deal of certainty could be established through formalising criteria for legally acceptable funding agreements.

[21] as though s 6 *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), considered at ¶86 in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41
[22] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at ¶86
[23] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at ¶88
[24] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at ¶90
[25] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at ¶91
[26] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 at ¶93

Full disclosure is the most important consideration. Failure to disclose may amount to professional misconduct. Alongside disclosure it is necessary to consider the interests of vulnerable clients who enter such agreements on an unequal footing. Failure to disclose should involve severe penalties, such as the inability to enforce the agreement.

Issue 4: If so, should this be in the form of either or both:

- **A list of relevant criteria?**
- **A set of required terms or disclosure requirements in the agreement?**

Or should this be in some other form?

The SCAG paper outlined broad possible criteria from a series of cases from the Supreme Courts of Western Australia and NSW, and in the Federal Court. These included whether the solicitors are chosen by the plaintiff,[27] whether the plaintiff is in a position to make informed decisions regarding the conduct of proceedings[28] and whether the funder has excessive control over proceedings.[29] It raised the alternative of having a narrower approach taken where legislation would set out the necessary features for a valid funding agreement.

QPILCH recommends a system of disclosure involving a set of requirements in the agreement set by legislation or administration rule covering both the relevant legislation and practical points and issues for the client to consider for each clause. The criteria identified in the case law in the SCAG paper all merit consideration in these disclosure requirements. In our view, the agreement should also form the basis of encouraging the parties to positively consider various issues along the litigation pathway such as when and how to consider the issue of settlement negotiations.

Issue 5: Should disclosure and other requirements be imposed on LFCs when they enter into non-insolvency funding agreements?

The SCAG discussion paper suggests that transparency as to the content and terms of funding contracts would allow better oversight of funding arrangements. Litigation funding is an important element in insolvency, allowing creditors to pursue actions which would be otherwise impossible due to a lack of funds. Outside insolvency, litigation funding can assist less well-resourced clients, and provide a way of instituting class actions or complex cases where costs would be excessive for a single plaintiff.

QPILCH agrees that disclosure should be imposed on LFCs when they enter into non-insolvency funding agreements

Issue 6: If so, what should the requirements be?

The SCAG discussion paper suggests that legislation could, for example, cap the proportion of an award that an LFC could claim and require disclosure of all obligations or liabilities imposed on a consumer in a contract.

There are several approaches that can be taken in funding agreements that can have a broad diversionary effect. For instance, providing a cost incentive (asking for a lesser percentage of costs awarded) for clients to settle could prevent long, costly and risky litigation. Settlement could include mediation, arbitration or other forms of ADR. However, there are still

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[27] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483

[28] *Clairs Keeley (a firm) v Treacy* [2005] WASCA 86

[29] See *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, *Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Barr* [2005] NSWCA 240; *Volpes v Permanent Custodians Ltd* [2005] NSWSC 827, *Spatialinfo Pty Ltd v Telstra Corporation Ltd* [2005] FCA 455.

consequences that have to be borne in mind in regards to enforceability of ADR decisions. For an extensive discussion on the impact of ADR on the Queensland system, see Davies' "Civil Justice Reform: Why We Need to Question Some Basic Assumptions."[30]

The impact on LFCs of implementing such alternatives is (at least) twofold. LFCs would benefit from reducing their costs and increasing their client load, with positive access to justice implications. On the other hand, they may see a commercial incentive to bring clients to trial. Nonetheless, this would be mitigated by the cost and risk of doing so. Further studies into these alternatives are necessary.

Ultimately, incorporation of ADR into LFC funding agreements could give benefits to the client and LFC in terms of expediency of time and cost, and to the justice system through minimising litigation.

Issue 7: Should LFCs be subject to prudential regulation?

LFCs that do not hold Australian Financial Services Licenses (AFSLs) (granted by the Australian Securities and Investment Commission (ASIC)) are not required to give clients the level of protection and disclosure required by those that do. That disclosure includes informing the client of the risks and benefits of the arrangements, including fees, commissions and other significant features of the agreement.[31]

QPILCH recommends that LFCs be subject to prudential regulation. This would ensure a stronger protection of LFC clients.

Issue 8: Should LFCs be subject to mandatory disclosure requirements?

The SCAG discussion paper states that under standard agreements with LFCs, plaintiffs are indemnified against adverse outcomes. Disclosure requirements could extend beyond questions of financial risk, to cover matters such as arrangements between the LFC and the lawyers.

In connection with Issue 7, QPILCH recommends that the disclosure requirements imposed by AFSLs be applicable to LFCs.

Outside of financial obligations, incorporating disclosure between LFCs and clients of the relationship between the LFC and lawyers would, ideally, prevent situations where lawyers disregard their duties to the plaintiff, even to the point of breaching their fiduciary obligations to prevent a conflict of interest.[32]

As supervision by the court of these agreements only occurs where challenged by the defendant, the requirements are best incorporated through legislation as opposed to a code of practice.

Issue 9: Should explicit measures to ensure independence of lawyers from LFCs be introduced?

The SCAG discussion paper states that it is inappropriate for lawyers to contract for uplift fees from LFCs in funded matters, and that to date there is no evidence of any proprietary or financial relationships between any law firms and LFCs. However, given the importance of lawyers'

[30] C.J.Q. 2006, 25(Jan), 32-51
[31] *Corporations Act 2001* (Cth), Ch. 7, especially Part 7.9
[32] *Clairs Keeley (a firm) v Treacy* [2005] WASCA 86

independence from LFCs in ensuring properly informed decisions by plaintiffs, it may be that explicit measures to this effect should be introduced.

Particularly in light of the example of *Clairs Keeley (a firm) v Treacy*[33] given in the SCAG paper, it is clear that measures of independence between lawyers and LFCs should be introduced. In *Clairs Keeley*, a solicitor's advice to the LFC's client as to whether or not to proceed with the case was not impartial. As the solicitor was paid regardless of the outcome, with an uplift fee if successful, it was in the solicitor's interest to pursue the matter.

As pointed out earlier, conflicts of interest can arise between a lawyer's and client's interests in speculative matters and this can be compounded where a lawyer not only stands to win or lose their costs but also their stake in a loan arrangement. Clearly, independence of lawyers from LFCs should be mandated. A lawyer's duty to his/her client must remain a primary consideration in all matters.

Issue 10: Should these be in the form of:

- **Prohibitions on certain dealings between LFCs and lawyers?**
- **Standard terms in contracts between LFCs, lawyers and plaintiffs?**

Or some other form?

Measures to ensure independence of lawyers from LFCs may come in the form of both prohibitions on certain dealings between LFCs and lawyers and standard terms in contracts between LFCs, lawyers and plaintiffs. An explicit regulatory framework would only be assisted by a formulation of standard terms in contracts, in order to have plaintiffs be fully aware of the relationships involved.

In addition to prohibiting certain conduct, contracts should be explicit as to how lawyers are remunerated, and have avenues for addressing plaintiffs' grievances.

NOT-FOR-PROFIT LITIGATION FUNDING

Issue 11: What measure should be taken to encourage more organisations to provide not-for-profit litigation funding?

The SCAG discussion paper states that given Legal Aid is generally not available for civil actions, and given the cost and risks of mounting claims, it may be desirable to ensure that not-for-profit litigation funding services are not discouraged. This would allow access to justice for smaller cases.

CLAFs provide an important means for cases with legal merit to proceed to court where ordinarily, due to financial constraints on both the lawyer and the litigant, legal redress is simply unachievable. It is also a means by which smaller firms or independent legal practitioners, who may not be able to bear the associated disbursement costs of running a civil action even on a no-win no-fee arrangement, can offer a legal service to individual cases of legal merit. CLAFs are also important to fund cases that may not lead to an award, such as judicial review.

The risk distribution advantage of CLAFs entails the litigant not having the risk of paying legal fees to their lawyer if their matter is unsuccessful. Therefore, it is only if they gain a monetary award or settlement that they will have to repay any money; they are no more out of pocket if the matter is unsuccessful than they would be if they had never commenced litigation (unless there is an adverse costs order).

[33] [2003] WASCA 229 (3 December 2003) [171]

In addition to Queensland's Civil Law Legal Aid Scheme (CLLAS), other CLAFs to support specific or generalist casework could be created. For example, a fund could support representative, group or class actions, or particular issues such as consumer law or housing, or as in a NSW example, human rights. The CLAFs could even be administered by LAQ, where risk would be absorbed within the LAQ budget and where profits could be used to fund more risky cases or where costs awards are not available. Even CLCs could manage a fund to support test cases. In USA for example, Legal Action of Wisconsin Inc. supports the Equal Access Fund which from 1997 to 2002 was pledged more than $US1m from individual attorneys and law firms in unrestricted funds for legal services. This fund also receives funds through the workplace giving schemes of Milwaukee and Madison. A CLAF could be developed from costs orders that derive from pro bono cases. There are many possibilities.

Other Australian CLAFs provide for successful applicants to not only pay back costs (as occurs with CLLAS) but also a percentage of the award, for example, 7.5% if settled before hearing or 15% if settled at trial. This provides an incentive for litigants to settle. However, it does not necessarily provide an incentive to the lawyers who advise and represent them, so other incentives could be offered through a CLAF to ensure that the interests of lawyer and client coincide.

There is room for a range of different CLAFs in Queensland that have different eligibility criteria (legal aid or higher), payment schemes (i.e. full fees or disbursements only), operation (conditional or contingency), ownership (public or private), operating fees etc to suit different needs and circumstances.

For example, QPILCH has recommended the establishment of two new self-funding CLAFs to address specific needs:

a) A Civil Law Fund established by the State Government, with contributions from philanthropic organisations, successful litigants and reinvested interest to be used for special public interest cases (which are not eligible for CLLAS or LAQ), which can act to rectify hardship (such as assisting defendants in civil disputes in the interests of justice) and innovative service delivery. We suggest that this fund should be established with an amount of $5m.

b) An Environmental Law Fund established by the State Government, with contributions by philanthropic organisations, contributions from successful litigants and reinvested interest to fund important public interest environmental cases. We suggest that this fund should be established with an amount of $1m.

QPILCH's *Submission to Legal Aid Queensland's Review of the Civil Law Legal Aid Scheme* recommended the establishment of these funds in order to encourage more organisations to provide not-for-profit litigation funding. As that paper stated,[34] "the first fund would provide full funding for civil law actions (and other uses such as research), similar to South Australia's *Litigation Assistance Fund*. The purpose of this fund is to assist in cases where a firm cannot be attracted on a speculative or pro bono basis, but the case has prospects of success and an injustice will be done if the applicant is not represented.

The latter fund would fund public interest environmental claims, which are currently unfunded, and where costs and damages awards do not automatically follow the event, although applications for security for costs and damages are frequently made. We have suggested that these funds be established by Legal Aid Queensland or alternatively the Queensland Government but be placed where they can also attract philanthropic funds to make them self-sustaining.

[34] at 16

Issue 12: Do not-for-profit litigation funding schemes operate other than the schemes described above?

QPILCH has conducted a broad review of the litigation funding schemes operating in Australia: see generally at **APPENDIX 1**.

Issue 13: If other not-for-profit schemes are operating, how do they work, and are any statistics available to demonstrate their effectiveness?

CLLAS is a Queensland based disbursement only scheme. As mentioned above, QPILCH made a number of recommendations in its *Submission to Legal Aid Queensland's Review of the Civil Law Legal Aid Scheme*. The LAQ review of CLLAS, which occurred in early 2006, followed a broader review of its civil law services in mid-2005. In our submission, we argued that CLLAS should be reviewed in the broader civil law context. To date, LAQ has not publicly indicated if it has made any changes to CLLAS following the review.

Data on the operation of CLLAS is difficult to access. Earlier in 2006, QPILCH obtained a range of statistical data on the operation of CLLAS for the 2004-05 year from the CLLAS annual report. This document had not previously been published, and the information on CLLAS operations in the LAQ annual report is brief. However, the Public Trustee of Queensland's Annual Report for the 2003-2004 financial year reports that at the end of that financial year the outstanding outlays provided by the Public Trustee to the fund were $753,514 of which the amount of $42,974.00 'was abandoned as unrecoverable when cases were completed unsuccessfully', that is, where the litigation did not result in a monetary award for the client of the scheme.[35]

In 2002-2003 the cost to the Public Trustee of running the civil law legal aid scheme (presumably before repayments as this amount is reported as lower in other sections of the report) was $238,000 in 2003 and $276,000 in 2002.[36]

The information provided in the last annual report would indicate that the scheme in Queensland is in fact underutilised, and usage has actually declined in recent years.[37]

In the period since 1999, there has been an overall fall in the number CLLAS grants; however, over the same period expenditure has risen, due to the fact that costs have increased significantly over the period. In addition, as indicated earlier, both the number of applications and expenditure have risen from a low in 2003-04, although only one year of figures since are available.

What is more important to note, in our view, is that the total expenditure for CLLAS over its entire almost 13 years of operation is just over $3.3M, of which to date, over $2.2M has been recovered. Therefore, the total cost of the scheme to date (excluding administration costs) has been approximately $1.1M (with some potentially still to be recovered).

According to the consultation paper, the "original intention of the scheme was to give priority to funding cases involving children, personal injury claims and cases where, if not litigated, the applicant would lose their home or livelihood. In recent years the scheme has expanded its guidelines to include aid for public interest and test cases."

[35] The Public Trustee of Queensland (2004), p 9.
[36] The Public Trustee of Queensland (2004), p 63.
[37] The Public Trustee of Queensland (2003-2004), p. 9. CLLAS Annual Report 2004-2005

Persons who wish to utilise CLLAS need to comply with the Legal Aid Queensland means test.[38] The means test determines the eligibility of applicants based on a formula of the applicant's assets and income[39]. The purpose of the means test is to target those who are most in need.[40] There will be circumstances in which persons who are unable to realistically afford the cost of litigation will fall outside the Legal Aid means test. For example, Legal Aid Queensland stipulates that assets will not include 'the house you live in, land purchased on which you are building a home, or cash saved for a home purchase (as long as the contracts for building or purchase have been entered into) unless your equity in the property is more than $146,000.' Therefore, if the applicant has saved money for the purchase of a home but has not yet entered into the relevant contracts, he/she will be ineligible for assistance. Further, if the persons' equity in their place of residence exceeds the $146,000 (which is most likely in the current market) they will also be ineligible for assistance. However, these potential applicants may not have the sufficient income to cover the costs of litigation, this is a growing proportion of the community. Thus, CLLAS in effect may be turning away persons who could still benefit from the scheme but fall outside the scope of the means test.

Our CLLAS submission made the following recommendations:

Recommendation 1:
We recommend a full review of speculative fee arrangements in Queensland, and consideration of the issue of costs holistically, with a view to preparing new legislation to promote speculative arrangements and consolidated costs legislation.
[We expand on this issue in the next section of this paper]

Recommendation 2:
We recommend that other initiatives such as new costs funds and legal expense insurance be considered in tandem with a full review of speculative fee arrangements to enhance use of speculative fee arrangements and access to the justice system.

Recommendation 3:
We recommend that a comparative study be conducted to gauge the various merits of the different schemes in terms of assessment, recovery of grants, and increase in the fund.

Recommendation 4:
Following that study, consideration should be given to whether CLLAS could and should be established as a separate fund and whether applicants should be required to pay an application fee and greater returns to the scheme.

Recommendation 5:
We recommend that the advisory committee's decisions, processes and the administrative costs of the scheme should be made transparent.

Recommendation 6:
We recommend that the advisory committee should include representation from the Queensland Law Society, Bar Association and community legal centres.

Recommendation 7:

[38] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[39] Legal Aid Queensland, 'Factsheet 02 – the Legal Aid Queensland Means Test', http://www.legalaid.qld.gov.au/publications/factsheets/PDFs/meanstest2005.pdf.
[40] Buck and Stark (2003), p 428.

We recommend that the types of cases open to a CLLAS application should be unlimited, subject to a broad discretion in the advisory committee.

Recommendation 8:
We recommend that CLLAS should not be limited by the LAQ means test, but by an expanded test that takes account of an applicant's ability to pay for private representation and by a merit test.

Recommendation 9:
We recommend that CLLAS should be accessible by any law firm and community legal centre willing to act in the matter on a speculative basis and that applications should be considered from any source.

We have since prepared a submission to the Queensland Attorney-General which looks at CLLAS in a broader context and recommends that a range of CLAFs targeting different needs be developed. We believe that with a relatively small funding commitment through different self-sustaining platforms, significant gains can be made.

LEGAL EXPENSES INSURANCE

Issue 14: Are litigation insurance products desirable in Australia?

The SCAG discussion paper notes that an important aspect of the service provided by litigation funders is the indemnity for adverse costs orders. LEI provides funding for legal services directly to the client, in exchange for policy payment.

In line with Recommendation 2 made to the CLLAS review above, QPILCH considers litigation insurance products desirable in Australia.

LEI cannot, of course, replace publicly funded legal aid schemes because it is unlikely that such policies will ever be comfortably afforded by low income groups. LEI is, however, an important means of addressing the access to justice issues of low to middle income earners – those who do not qualify for legal aid but are still unable to afford private legal services.[41]

LEI assists those individuals to either respond to legal action taken against them by another party, or to provide those individuals with the ability to adequately pursue their legal rights. LEI also allows individuals to use legal services on a preventative basis, and so issues can often be resolved before litigation is required. Generally, LEI may allow this section of society to become more familiar with the legal system and confident in addressing legal issues.[42]

LEI also spreads the risk associated with financing unpredictable legal costs among subscribers to a scheme, thereby reducing the cost to each participant.[43] As such, there is scope for LEI to reduce the cost of legal services in Australia, and to reduce the non-financial barriers to the timely and cost-effective use of lawyers and the courts.[44]

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[41] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 294;
[42] Goodstone A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>
[43] Tarr (2002) *Report on Legal Expenses Insurance for: Access to Justice Committee Queensland Law Society.*
[44] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 293; Goodstone A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>

For a description of the variety of LEI products and LEI schemes around the world, see **APPENDIX 4**.

Issue 15: If so, what steps should be taken to ensure that the availability of litigation insurance in Australia is not discouraged or prevented?

It has been argued that the adversarial nature of the Australia legal system, with varying legal expenses and the ability to impose costs orders, is not conducive to offering LEI. It is difficult for providers to calculate premiums and judge risk, and to offer affordable policies.[45]

While this issue is not easily resolved, it is suggested that the government may assist by exploring the possibility of setting event-based scales for legal costs incurred in high volume areas, such as family law.[46] The use of scales however would require the vigilance of government to ensure that they keep pace with changing economic circumstances.

Additionally, the issue could be addressed by considering measures to lower the cost of LEI policies. Australian LEI policies have generally been forced to incorporate higher premiums to address the uncertainty of litigation costs, which has also contributed to the reluctance of the market to accept LEI.[47]

However, to remedy those issues, it has been suggested that the cost of LEI policies may be reduced by:

(a) recognising them as tax deductible expenses for an individual;
(b) exempting them from Fringe Benefits Tax where offered as an employee benefit; and
(c) reducing or removing stamp duty.[48]

Further, LEI providers require large sales volumes and a high claims ratio to justify the offering of such products, and to remain commercially viable.

The community attitudes and market practices in Australia do not currently facilitate such conditions. Australian consumers generally underestimate or doubt their need to insure for this type of expense. As such, there is a role for influential bodies in society to publicly endorse and educate regarding the existence and benefits of LEI (although the legal profession should be strictly excluded as it may appear that such schemes are in its own self-interest).[49] The limited reach of Legal Aid needs to be made clear to the public as part of such a process.

To redress these issues, the following steps could be taken:

(a) insurers should undertake sustained promotion of the benefits and necessity of LEI;
(b) governments should also take a role in promoting LEI;
(c) governments and unions should consider developing and promoting LEI schemes within their workplaces, which are specifically targeted to the needs of workers; and
(d) a Federal Government LEI Taskforce could be introduced.[50]

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[45] Goodstone, A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>
[46] Australian Law Reform Commission Report 89: Managing Justice: A review of the federal civil justice system. http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html
[47] Australian Law Reform Commission Report 89: Managing Justice: A review of the federal civil justice system. http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html
[48] Goodstone, A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>
[49] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 293
[50] Tarr (2002) *Report on Legal Expenses Insurance for: Access to Justice Committee Queensland Law Society*. [not yet published]
; Goodstone, A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>

APPENDIX 1 – AUSTRALIAN AND INTERNATIONAL CLAFS

QUEENSLAND

Civil Law Legal Aid Scheme (CLLAS)

Background: CLAAS was introduced in May 1993 after Legal Aid Queensland ceased funding civil law matters where a court or tribunal had the power to award costs in July 1992.[51] CLAAS is funded by the Public Trustee of Queensland and administered by Legal Aid Queensland (**LAQ**).
Available to: Individuals residing in Queensland.
Application Fee: None.
Types of Cases: The Scheme considers all civil litigation cases, including business and commercial disputes, but personal injury cases may be given priority. Personal injury cases received the greatest share of funding in 2004-2005 (24%), as shown in the 2004-2005 Annual Report. In recent years the Scheme has expanded its guidelines to include aid for public interest and test cases.[52]
Excludes: Criminal and Family matters.
Merits Test: In deciding whether to grant aid, the Committee members consider the following aspects of the applicant's claim:

(a) The legal merits of the case, i.e. reasonable prospects of success;
(b) The nature and extent of any benefit the applicant will gain if aid is granted;
(c) The detriment the applicant may suffer if aid is refused;
(d) If the matter is of public interest or is a test case.

Means Test: All applications submitted to CLLAS are subject to the LAQ means test.[53] The applicant must provide proof of their financial means (income and assets), including recent pay slips, copies of pension card or health care card, current account statements from bank or financial institutions. Where the applicant is financially eligible, the application is referred to the Scheme's Advisory Committee. Should the applicant be financially ineligible, the application is refused.
Contribution: If the applicant is just above the means test for LAQ, they may be asked to contribute a small amount to their solicitor, which will help to pay some of the costs of their claim.[54]
Financial Assistance: CLLAS will fund outlays identified in a budget forecast by the legal firm representing the applicant. For matters where aid is approved to progress to trial, the solicitor will be paid $2,000 in cases in the District and Supreme Courts and $500 in the Magistrates Court, on account of professional fees for work completed and to be completed up to and including the trial and disbursements.[55] Disbursements include filing fees, medical reports, but excludes barristers' fees. At the conclusion of the matter, the applicant is required to repay to the Scheme the total amount of the funding provided if there is a successful outcome. However, if the matter is unsuccessful, there is no repayment required, although the applicant will not be given assistance in satisfying any costs order made against them.[56]

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[51] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[52] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[53] Legal Aid Queensland, 'Factsheet 02 – the Legal Aid Queensland Means Test', http://www.legalaid.qld.gov.au/publications/factsheets/PDFs/meanstest2005.pdf
[54] Legal Aid Queensland, 'Factsheet 02 – the Legal Aid Queensland Means Test', http://www.legalaid.qld.gov.au/publications/factsheets/PDFs/meanstest2005.pdf
[55] Legal Aid Queensland, 'Factsheet 02 – the Legal Aid Queensland Means Test', http://www.legalaid.qld.gov.au/publications/factsheets/PDFs/meanstest2005.pdf
[56] Legal Aid Queensland, 'Civil Law Legal Aid Scheme,' http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.

Operation: An applicant must have made an unsuccessful application for Legal Aid. They must also be represented by a practitioner who is approved for such work by LAQ, although this requirement has been lifted recently. Their application must be accompanied by a letter from that solicitor detailing the likely prospects of success and expected quantum.[57] Both solicitor and counsel must undertake to only recover fees if the matter is successfully concluded.

SOUTH AUSTRALIA

South Australia operates two CLAF schemes, each with different criteria and operations.

The Litigation Assistance Fund

Background: The litigation assistance fund has been running since July 1992[58].
Available to: Individuals and companies[59]. Assistance is limited to the public of South Australia[60].
Application Fee: The standard fee is $100 or $250 where urgency is an issue. This fee is non-refundable[61].
Types of Cases: Commercial disputes, inheritance claims, insurance contract disputes, professional negligence claims, public liability and personal injury claims.[62]
Excludes: Criminal, family and de facto matters.
Merits Test: Considerations include:
(a) prospects of success
(b) quantum/likelihood of recovery
(c) matters of public importance (recovery less important in these circumstances)[63]
Means Test: Assistance will only be given to applicants who are unable to meet the expected costs of proposed or actual litigation from their own income and assets.[64] Applicant can have an income of up to $70,000 gross, and assets such as house and car, which are of "reasonable" value[65].
Contribution: Having regard to the applicant's financial circumstances, the Assessment Panel may require the applicant to contribute to the cost of the litigation.[66]
Financial Assistance: The Fund will pay solicitor/client costs in accordance with the appropriate court scale.[67]
Operation of the Litigation Assistance Fund:
(1) Application to be completed by client and solicitor. The applicant's lawyer must provide details of how the claim will be proved, how any defences will be answered, the amount of damages sought and how it will be proved and an estimate of legal costs[68].
(2) 'The Manager shall consider each application for assistance in accordance with the Funds Rules and Guidelines and shall make a report to the Assessment Panel with the recommendation for the disposition of the application'.[69]

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[57] Legal Aid Queensland, 'Civil Law Legal Aid Scheme - Guidelines,' http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[58] Law Society of South Australia, 'Litigation Assistance Fund', http://www.lawsocietysa.asn.au/community/laf.htm
[59] See n 46.
[60] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 6.
[61] The form to apply for assistance can be found at the Law Society of South Australia webpage, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf.
[62] See n 46.
[63] See n 46.
[64] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 11.
[65] See n 46.
[66] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 14.
[67] Law Society of South Australia, 'Litigation Assistance Fund', http://www.lawsocietysa.asn.au/community/laf.htm
[68] See n 59.

(3) Must satisfy means and merit test
(4) 'The Assessment Panel shall consider the Manager's report before formulating its advice to the Trustee on the disposition of each application for assistance'.[70]
(5) If the application is successful, the fund will cover "solicitor/client" costs on the scale appropriate to the jurisdiction
(6) The Trustee may at any time after the approval of an application vary, extend, suspend or cancel such assistance in accordance with the grounds outlined in the 'Rules of Litigation Assistance Fund'[71].
(7) If case is successful:
  - 15 per cent of any award by the Court or upon settlement of each case will go back into the fund; and
  - the fund will be reimbursed for the legal costs and disbursements already paid. [72]
(1) If the litigation is <u>unsuccessful</u>:
  - the client remains liable for the party/party costs of the other party.

Disbursement Only Fund (DOF)

Background: The DOF is an adjunct to the Legal Assistance Fund[73].
Available to: Individuals and companies[74].
Application Fee: The standard fee is $100 or $250 where urgency is an issue. This fee is non-refundable[75].
Types of Cases: Civil and Commercial matters[76].
Excludes: Criminal, family and de facto matters.
Merits Test: Considerations include:
(a) prospects of success
(b) likelihood of recovery
(c) matters of public importance[77]
(d) If it is an application to defend a claim, the counterclaim must exceed the value of the plaintiff's claim.

Means Test: where assets and income available to applicant are insufficient to meet the expected costs of litigation. Application may be rejected if eligible for legal aid.[78]
Contribution: Having regard to the applicant's financial circumstances, the Assessment Panel may require the applicant to contribute to the cost of the litigation.[79]
Financial Assistance: The Fund provides disbursement assistance such as court filing fees, expert's reports, witness fees, transcript and trial fees[80]. Barristers and Solicitors fees are excluded[81]. The fund manager's approval must be obtained before disbursements of $1000 or more are incurred[82].

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[69] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 2.
[70] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 3.
[71] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 17.
[72] See n 46.
[73] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[74] The Law Society of South Australia, 'Trustee for the Litigation Assistance Fund Application form – Disbursements Only Funding Application for Assistance', http://www.lawsocietysa.asn.au/community/dof.pdf.
[75] See n 62.
[76] See n 46.
[77] See n 46.
[78] See n 61.
[79] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 14.
[80] See n 62.
[81] Law Society of South Australia, 'Litigation Assistance Fund', http://www.lawsocietysa.asn.au/community/laf.htm.
[82] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.

Operation of Disbursement Only Fund:

(1) 'The Manager shall consider each application for assistance in accordance with the Funds Rules and Guidelines and shall make a report to the Assessment Panel with the recommendation for the disposition of the application'.[83]

(2) Must satisfy means and merit test

(3) 'The Assessment Panel shall consider the Manager's report before formulating its advice to the Trustee on the disposition of each application for assistance'.[84]

(4) If application is successful:
- trustee pays the disbursements of the solicitor
- solicitor agrees to complete the work on a speculative basis.

(5) If the litigation is <u>successful</u>:
- the client repays the total disbursement PLUS 25 per cent-100 per cent of the total value of the disbursements funded
- the solicitor may charge a solicitor/client fee up to double the fees that the solicitor would be entitled to according to the scale contained in the fourth schedule of the Rules of the Supreme Court.[85]

(6) If the litigation is <u>unsuccessful</u>:
- the client remains liable for the party/party costs of the other party.[86]

TASMANIA

Civil Disbursement Fund (CDF):

Background: Run by the Legal Aid Commission Tasmania. The fund was set up by the Tasmanian Government in 2004, and $250,000 was allocated to it in the 2003-2004 budget.[87]
Available to: Tasmanians requiring financial assistance for their civil cases, not just those who would be eligible for legal aid.[88] Assistance under the scheme is only available to individuals being represented by a solicitor.[89]
Application Fee: None.[90]
Types of Cases: Preference will be given to serious personal injury claims, workers compensation claims and professional negligence claims, with other cases set against competing resources and priorities.[91]
Excludes: Criminal matters, family and de facto matters, MACT/MAB claims, proceedings before the Resource Management and Planning Appeals Tribunal and any other category of claim that the Commission decides.[92]
Merits Test: The committee will determine the merits of the case, taking into account:
(a) the prospects of the case
(b) the quantum of damages
(c) the likelihood of recovery. [93]
Means Test: No general means test applies.[94] However, the applicant must show that, at the time the application is made, the applicant is not in a position to cover the disbursement costs involved in the matter.[95]

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[83] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 2.
[84] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lawsocietysa.asn.au/community/laf.pdf, Rule 3.
[85] See n 46.
[86] See n 46.
[87] Legal Aid Commission of Tasmania, 'Civil Disbursement Fund', www.legalaid.tas.gov.au/CDF.
[88] Legal Aid Commission of Tasmania, 'Civil Disbursement Fund Guidelines' http://www.legalaid.tas.gov.au/CDF/CIVIL%20DISBURSEMENTS%20FUND%20GUIDELINES.pdf, Guideline 3.4.
[89] Civil Disbursements Fund Guidelines – Guideline 4.2.
[90] Civil Disbursements Fund Guidelines – Guideline 2.5.
[91] Civil Disbursements Fund Guidelines – Guideline 4.7 and 4.8.
[92] Civil Disbursements Fund Guidelines – Guideline 4.5.
[93] Civil Disbursements Fund Guidelines – Guideline 4.1.

Contribution: The Commission may require the applicant to contribute to the cost of disbursement having regard to the applicant's financial circumstances[96].

Financial Assistance: May include court filing fees, medical reports, expert reports, interpreter's fees, conduct money, witnesses' expenses, transcript fees, trial fees, solicitor's travelling and accommodation fees. However, the fund will not cover Solicitor's and Barrister's fees, sundry items including telephone, fax, postage, photocopying and courier fees.[97]

Operation of the Civil Disbursement Fund:

(1) Applications will first be assessed by the committee (an advisory committee of the Legal Aid Commission of Tasmania) and then the Commission.[98]

(2) The committee has set 'committee meeting dates' and applications need to be received at least one week prior to the meeting date[99].

(3) If the application is successful the solicitors must be acting on either a:
- no win/no fee basis; or
- reduced or delayed fee (will need to show that the applicant will not be able to fully pay the solicitor's fees for a delayed period of time); or
- pro bono basis (will only apply where the applicant will ordinarily have no other access to the court system and/or whether the matter raises a wider issue of public concern[100]).[101]

(4) The Commission may at any time after the approval of an application for the assistance, vary, extend, suspend, or cancel such assistance on any of the grounds outlined in the 'Civil Disbursements Fund Guidelines'.[102]

(5) If the litigation is successful:
- Disbursements are to be repaid in full plus a premium between 20 per cent - 100 per cent (as set by the commission) of the amount of disbursements paid out.[103]

NEW SOUTH WALES

Pro Bono Disbursement Trust Fund

Background: The Council of the Law Society of NSW established the Law Foundation Pro Bono Disbursement Fund on 18 May 1993. The Law Foundation allocated the sum of $200,000 to be administered by the Trustees.[104] The Fund was intended to cover disbursements already expended by legal practitioners undertaking pro bono work through formal NSW Schemes. .

Types of Cases: Only for matters conducted pro bono or at a significantly reduced cost that have been referred through the Law Society's Pro Bono Scheme, the Bar Association's Legal Assistance Scheme or the Public Interest Advocacy Centre (including PILCH). [105] A solicitor can apply to have a matter formally referred to them under the scheme in order to conduct a matter pro bono and have access to the disbursement fund.[106]

Merits Test: The referral will contain a case summary outlining the merits of the matter (time permitting) including where appropriate, an analysis of the law in relation to the matter[107].

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[94] Civil Disbursements Fund Guidelines – Guideline 3.1.
[95] Civil Disbursements Fund Guidelines – Guideline 3.2
[96] Civil Disbursements Fund Guidelines – Guideline 5.1
[97] Legal Aid Commission of Tasmania, 'Civil Disbursement Fund', www.legalaid.tas.gov.au/CDF.
[98] See n 47.
[99] See n 47.
[100] Civil Disbursements Fund Guidelines – Guideline 4.3
[101] Civil Disbursements Fund Guidelines – Guideline 4.2
[102] Civil Disbursements Fund Guidelines – Guideline 6.1
[103] Civil Disbursements Fund Guidelines – Guideline 1.3
[104] History of Australian Pro Bono Referral Schemes May 2006 www.nationalprobono.org.au/documents/ReferralSchemeshistoryreportfinal.pdf
[105] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[106] See n 92.
[107] Law Society of New South Wales, 'How the Pro Bono Scheme Referral Protocol Benefits Practitioners', www.lawsociety.com.au/page.asp?partid=16408.

Contribution: An assessment will have been made of the client's means and whether they are able (and willing) to contribute to the cost of running their matter. The current trend is to require applicants to contribute at least something to the cost of their matter.[108]

Financial Assistance: Provides assistance by reimbursing solicitors for disbursements in approved matters. The fund will reimburse most disbursements, such as court filing fees (so long as no postponement or waiver has been obtained), medical reports, searches, registration fees and translator fees.[109] The disbursement must be considered necessary by the administrators of the fund and a receipt be provided before any reimbursement will be paid.[110] Costs do not have to be awardable to receive assistance from the fund. However, if the client is successful in their action and recovers costs, the money must be repaid to the fund. Total reimbursement will not exceed:

- for Supreme Court actions, $7500.
- for District Court actions, $7500
- for local court/tribunal actions, $3750
- other jurisdictions/areas - $5500.[111]

Operation:

- Legal Aid must have been refused, and it must be improbable that the individual will be able to otherwise gain legal representation.[112]
- Solicitors are asked to accept a referral. No pressure is placed on solicitors should they be unable to accept for any reason.[113]
- A request may be made to the NSW Bar Association Legal Assistance Scheme for assistance in the location of a barrister willing to accept the matter on a pro bono basis if necessary.[114]
- Further attempts may be made to re refer matters under certain circumstances (for instance, where there is a conflict of interest being discovered OR the matter is being transferred to another jurisdiction etc).[115]

WESTERN AUSTRALIA

Litigation Assistance Fund

Background: The Western Australia Litigation Assistance Fund was established in 1991[116] with $1 million seed funding received from the Law Society Public Purposes Trust and the Lotteries Commission.[117] The fund, which was an initiative of the Law Society of Western Australia[118], was closed to applications prior to August 2003,[119] and is still not currently receiving applications for assistance.[120]

Available to: Individuals who cannot afford to litigate in civil matters.[121]

Application Fee: As the fund is currently at a standstill, there is no information available publicly as to the application procedure and the associated costs.

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[108] See n 92.
[109] See n 98.
[110] See n 98.
[111] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[112] Law Society of New South Wales, 'How the Pro Bono Scheme Referral Protocol Benefits Practitioners', www.lawsociety.com.au/page.asp?partid=16408.
[113] See n 94.
[114] See n 94.
[115] See n 94.
[116] Law Society of Western Australia, 'Litigation Assistance', www.lawsocietywa.asn.au/litigation.html.
[117] Smith (2001), p 17.
[118] See n 103.
[119] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[120] See n103.
[121] Law Reform Commission of Western Australia (1997), p 7; National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.

Financial Assistance: The Litigation Assistance Fund provides financial assistance to successful applicants covering both lawyers' fees and disbursements in return for a fee of 15 per cent should they succeed in their litigation. However, it has been held in the Federal Court of Australia that in an appeal there will be no allowances made for this as the court took the stance that this amount would likely be negotiable – that is despite recognition that the fund agreement with the client is that repayment of assistance be the first charge of any monetary outcome.[122]
Operation of the Litigation Assistance Fund: The client must approach a lawyer who then is responsible for applying to the fund. The fund then 'underwrites the risk of an adverse-costs award'. The plaintiff, if successful in litigation, must repay 15 per cent of the damages award back to the fund. The lawyer, if successful, works for a pre-negotiated flat fee – this is negotiated with the Legal Aid Board and is usually below market rates.[123]

VICTORIA

Law Aid

Background: The Victorian Law Aid Scheme emerged from Part VIA of the *Legal Aid Act 1978* (Vic), introduced in 1995.[124] It was initiated as a joint exercise between the Victorian government, the Law Institute and the Victorian Bar Council.[125] Initially funded with a $1.6 million seeding grant from the Victorian State Government in 1998, the scheme has progressed in its disbursement funding activities, and has made substantial progress towards achieving 'its aims of provision of service and operational viability.'[126]
Available to: Individuals and companies.
Application Fee: A non-refundable fee of $100 must be lodged with the application.
Types of Cases: All forms of civil litigation cases are supported including personal injury claims, claims against institutions involving discrimination or oppressive behaviour, professional negligence claims and wills and estates claims.[127] Law Aid has granted assistance in matters such as violence and abuse in logging demonstrations, High Court appeals, product liability claims, and sexual harassment claims.[128]
Excludes: Law Aid does not cover criminal and family matters, these areas are dealt with under standard Legal Aid Victoria assistance schemes.[129]
Merits Test: Considerations include:

(a) prospects of success
(b) likelihood of recovery
(c) matters of public importance.[130]

Means Test: Applications for Law Aid are assessed on a case-by-case basis, taking into account the individual client's financial means.
Contribution: If the case is successful, the applicant is required to pay 5.5 per cent of the award or settlement to Law Aid (originally, this was set at 10 per cent of the award or settlement)[131], as well as repay all the disbursements incurred on their behalf if those costs are recovered. If unsuccessful, no payment is required.[132]

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[122] *Re: Sevenhill Holdings Pty Ltd; Michael Shane Blades and Lesley Gail Blades And: Danica Musovic; Mick Musovic; Logie Brae Pty Ltd and Ramon English No. Wag 102 of 1990 Fed No. 372*, in the Federal Court of Australia, Western Australia District Registry, per French J (1992).
[123] Ministry of the Attorney General [Canada] website, Publications, *Ontario Legal Aid Review; Chapter 13 '"Other" Civil Law Legal Aid Services*, www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch13.asp
[124] Opas (1998), p 28.
[125] Galbally (2003), p 95.
[126] Galbally (2003), p 95.
[127] Law Aid Victoria, 'Scheme Outlines', http://www.lawaid.com.au/outline.htm.
[128] Galbally (2003), p 95.
[129] Law Aid Victoria, 'Scheme Outlines', http://www.lawaid.com.au/outline.htm.
[130] Law Institute of Victoria, 'Lawyers Offer More Help', http://www.liv.asn.au/media/releases/20001117_lomh.html, 17 November 2000.
[131] Opas (1998), p 30.
[132] Galbally (2003), p 95.

Financial Assistance: The Fund will cover the reasonable legal costs and disbursements of an approved matter. Disbursements that may be covered by the scheme include expert fees, travelling and accommodation expenses, witness fees and court fees.
Operation of Law Aid: Application for Law Aid must be made on the approved application form. It must be completed by the solicitor, who assists their client to complete Sections 1-3 and fills out sections 4-6 themselves. It does require that the solicitor applying for Law Aid on behalf of their client substantially assess the merits of a case, as part 4 of the application requires that a solicitor not apply for Law Aid until all preliminary investigations have been completed and full details of the applicant's case can be provided. This presumably is to assist the trustees in considering whether the application is of sufficient legal merit and the likely financial merit as well.[133]

NORTHERN TERRITORY

Northern Territory Contingency Legal Aid Fund

Background: In September 1993, the Northern Territory Legal Aid Commission noted that there were particular groups in the community who received inadequate or no legal assistance, and this included those plaintiffs with civil law matters where a speculative fee arrangement is not available.[134] In the same year, the Northern Territory established CLAF, a joint initiative of the Attorney General's Department, the Legal Aid Commission and the Northern Territory Law Society. It is administered by the Legal Aid Commission, and funded with a seeding grant of $200,000 from the Law Society Public Purpose Trust. The CLAF provides assistance in civil matters where private practitioners are prepared to speculate their professional fees until the conclusion of the matter and disbursement costs of running the matter are paid out of the Fund.[135] It is designed to cover disbursements only, and therefore does not cover other associated legal costs.[136]
Available to: Northern Territorians requiring financial assistance for their civil cases, not just those who would be eligible for legal aid. In this respect, the criteria is slightly wider than most, in that failure of the legal aid means test does not exclude an applicant from receiving funding for disbursements in civil cases.
Application Fee: There is no application fee associated with making an application for assistance.
Types of Cases: Since the fund commenced in March 1993 there has been a total of 209 applications to the fund. The applications for funding largely relate to personal injury actions such as occupiers' liability, medical negligence and work health. Few applications relating to commercial litigation or family law property settlement have been received.[137]
Financial Assistance: Expenses relating to the cost of medical experts, witnesses, air-fares, et cetera. The fund does not pay for solicitor or barrister costs, cases are taken on a purely speculative basis.[138]
Operation of the Civil Disbursement Fund: There is relatively little information available on the operation of the CLAF in the Northern Territory. Therefore, data such as the amount required on settlement or win, or the exclusionary criteria, are not known.

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[133] Law Aid Victoria, 'Application Form for Civil Litigation Support', http://www.lawaid.com.au/LawAid_application_form.pdf.
[134] Northern Territory Legal Aid Commission (1993), *Submission to the Senate Enquiry into Legal Aid and Access to Justice*, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/submissions/sub82.doc.
[135] See n 121.
[136] Law & Justice Foundation of New South Wales (1999), para 127.
[137] Northern Territory Legal Aid Commission Annul Report 2001-2002 at 11.
http://www.nt.gov.au/ntlac/about_us/AnnualReport0102.pdf#search=%22northern%20territory%20contingency%20legal%20aid%20fund%22
[138] ABC Radio National - The Law Report, 'Behind the scenes of legal funding', http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr230796.htm, 23 July 1996.

HONG KONG

Supplementary Legal Aid Scheme (SLAS)

Background: Hong Kong was the first common law jurisdiction in which a contingency litigation assistance fund was established.[139] The SLAS was a commercial operation established in 1984 and began with a capital base of $HK1 million (AUD $150,000 at the time; $290,000 in March 2000). Due to the small capital base it operated under tight restrictions; finances allowed it only to support personal injury claims and some low risk civil law claims.[140] Within 3 years the fund was financially viable and had supported 442 applications by September 1992 – 440 of which were successful.[141] At that state 'the surplus cash of the Fund…had increased to $HK2 million.[142]
Types of Cases: Those where there is a claim for monetary compensation and a reasonable chance of success.[143] "It extends to personal injury cases; employee compensation claims; and medical, dental, and professional negligence claims."[144]
Merits Test: The merits test revolves around the reasonableness of the claim.[145]
Means Test: The applicant's financial situation must meet eligibility criteria.[146]
Contribution: In terms of outcome, a settlement is considered as a win at trial in terms of requiring a contribution back into the fund. If a claim is settled before trial, the successful plaintiff must pay 7.5 percent into the fund, and if the plaintiff wins at trial, 15 percent is paid back into the fund.[147]

CANADA

While there are many different CLAF schemes operating in Canada, the two most prominent are the Class Proceedings Fund in Ontario and the 'Fonds d'aide aux recours collectifs', translated as the Class Action Aid Fund, in Quebec.

Class Proceedings Fund

Background: The Fund was established in 1992 with a $500,000 grant from the Ontario Law Foundation, to assist representative plaintiffs in financing the disbursements incurred in prosecuting class actions.[148]
Types of Cases: Class actions (civil).
Available to: Applications must comply with extensive requirements, and are assessed by the Ontario Class Proceedings Committee. The Committee considers factors such as the public interest in the issues, the likelihood that the action will proceed as a class proceeding and the funds allocated to other applications. The Committee may also have regard to the merits of the case, the proposed use of the funds and the fund-raising efforts made by the class representative.[149] The Committee will favour cases raising issues of broad public importance or that assist disadvantaged groups or persons.[150]

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[139] Law & Justice Foundation of New South Wales (1999), para 4.
[140] See n 125.
[141] See n 125.
[142] See n 125.
[143] Ontario Ministry of the Attorney-General (1996), chapter 13.
[144] See n 129.
[145] See n 129.
[146] See n 129.
[147] See n 129.
[148] Buckley, Melina, 'The Legal Aid Crisis: Time for Action' at 85. Prepared in June 2000 for the Canadian Bar Association. www.cba.org/cba/Advocacy/PDFfiles/Paper.pdf
[149] Rosenhek, Steven, 'Class actions across the border: A new kind of litigation comes to Ontario' (2001) 10(3) Business Law Today.
[150] Buckley, Melina, 'The Legal Aid Crisis: Time for Action' at 85. Prepared in June 2000 for the Canadian Bar Association. www.cba.org/cba/Advocacy/PDFfiles/Paper.pdf

Financial Assistance: The Fund extends to disbursements (but not legal fees) and indemnifies successful applicants in the event that adverse costs awards are made in favour of defendants at trial. If the case succeeds at trial or on settlement, then the Fund recovers its outlay plus 10% of the award or settlement.[151]
Operation: On the most recently published figures, the Fund retained a balance of over $3,300,000 in 2003.[152] However, despite increasing legislative support for contingency fee funding and a procedural environment that favours class action, the Fund has not been entirely successful.[153] Fewer than a dozen applications were made in the period 2001 to 2003.[154] It is thought that this may be related to the 10% levy on awards, high transaction costs of preparing applications, and the difficulties in finding legal representatives willing to act on a contingency fee basis.[155]

The Fonds d'aide aux recours collectifs ('The Fonds')

Background: The Fonds is an agency that was established in 1978 to facilitate the financing of class actions.[156] The capital of the Fonds is guaranteed by the provincial government, and is maintained by a subrogation from damages awarded to successful plaintiffs.[157] The amount of the levy varies depending on the type of award received, and actually applies in every class action, not just those for which funding was granted.[158] In 2003-4, 65 claims were presented to the Fonds, of which 55 were accepted.[159]
Types of Cases: Class actions (civil).
Available to: The Fonds assesses application for assistance on the basis of whether the action is able to proceed otherwise, the merits of the case and the probability that the class action will eventuate.[160] If accepted, the Fonds will enter into an agreement with the class representative regarding the terms on which funding is to be provided.[161]
Financial Assistance: The Fonds will satisfy attorney or expert fees, and other incidental expenses. The recipient will reimburse the Fonds for the amounts paid by it, and the Fonds is entitled to a levy of the proceeds received in judgment or settlement.[162]

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[151] Riley, Dr Alan and Peysner, Professor John, 'Damages in EC Anti-Trust Actions', 2006 at 8. http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/070.pdf
[152] The Law Foundation of Ontario, 2003, Annual Report at 2.
[153] Riley, Dr Alan and Peysner, Professor John, 'Damages in EC Anti-Trust Actions', 2006 at 8. http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/070.pdf
[154] The Law Foundation of Ontario, 2002, Annual Report and The Law Foundation of Ontario, 2003, Annual Report.
[155] Munro, Lisa, 'Who Can be a Representative Plaintiff under Ontario's Class Proceedings Act, 1992?' at 48-50. Lerners Barristers and Solicitors. www.lerners.ca/commercial_lit/PDFS/Who%20Can%20Be.pdf
[156] Buckley, Melina, 'The Legal Aid Crisis: Time for Action' at 85. Prepared in June 2000 for the Canadian Bar Association. www.cba.org/cba/Advocacy/PDFfiles/Paper.pdf
[157] Riley, Dr Alan and Peysner, Professor John, 'Damages in EC Anti-Trust Actions', 2006 at 8. http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/070.pdf
[158] Buckley, Melina, 'The Legal Aid Crisis: Time for Action' at 86-87. Prepared in June 2000 for the Canadian Bar Association. www.cba.org/cba/Advocacy/PDFfiles/Paper.pdf
[159] Riley, Dr Alan and Peysner, Professor John, 'Damages in EC Anti-Trust Actions', 2006 at 8.

[160] Riley, Dr Alan and Peysner, Professor John, 'Damages in EC Anti-Trust Actions', 2006 at 7.
[161] Buckley, Melina, 'The Legal Aid Crisis: Time for Action' at 86. Prepared in June 2000 for the Canadian Bar Association. www.cba.org/cba/Advocacy/PDFfiles/Paper.pdf
[162] Buckley, Melina, 'The Legal Aid Crisis: Time for Action' at 85. Prepared in June 2000 for the Canadian Bar Association. www.cba.org/cba/Advocacy/PDFfiles/Paper.pdf

APPENDIX 2 - PROVISIONS IN RELATION TO CONDITIONAL FEE ARRANGEMENTS IN THE *ACCESS TO JUSTICE ACT 1999* (UK)

Conditional Fee Agreement Provisions (S58):

“Conditional fee agreements.

27. - (1) For section 58 of the Courts and Legal Services Act 1990 substitute-

"Conditional fee agreements.

58. - (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this section and section 58A-

(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and

(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(3) The following conditions are applicable to every conditional fee agreement-

(a) it must be in writing;

(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee-

(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord

Chancellor.

(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.

Conditional fee agreements: supplementary.

58A. - (1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are-

"(a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and

(b) family proceedings."

(2) In subsection (1) "family proceedings" means proceedings under any one or more of the following-

(a) the Matrimonial Causes Act 1973;

(b) the Adoption Act 1976;

(c) the Domestic Proceedings and Magistrates' Courts Act 1978;

(d) Part III of the Matrimonial and Family Proceedings Act 1984;

(e) Parts I, II and IV of the Children Act 1989;

(f) Part IV of the Family Law Act 1996; and

(g) the inherent jurisdiction of the High Court in relation to children.

(3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c)-

(a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and

(b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(4) In section 58 and this section (and in the definitions of "advocacy services" and "litigation services" as they apply for their purposes) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(5) Before making an order under section 58(4), the Lord Chancellor shall consult-

(a) the designated judges;

(b) the General Council of the Bar;

(c) the Law Society; and

(d) such other bodies as he considers appropriate.

(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.

(7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee)."

(2) In section 120(4) of the Courts and Legal Services Act 1990 (orders and regulations subject to affirmative procedure), for "58," substitute "58(4),".[163]

UK CIVIL PROCEDURE RULES

PART 43 – SCOPE OF COSTS RULES AND DEFINITIONS

Funding arrangement - rule 43.2(k)(i)
A conditional fee agreement or collective conditional fee agreement which provides for a success fee.

Percentage increase – rule 43.2(1)(l)
Percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee.

PART 45 – FIXED COSTS

II Road Traffic Accidents – Fixed Recoverable Costs

Success fee – rule 45.11
(1) A claimant may recover a success fee if he has entered into a funding arrangement ….

(2) The amount of the success fee shall be **12.5% of the fixed recoverable costs** calculated in accordance with rule **45.9(1)**, disregarding any additional amount which may be included in the fixed recoverable costs by virtue of rule **45.9(2)**.

Amount of fixed recoverable costs – rule 45.9
(1) Subject to paragraphs (2) and (3), the amount of fixed recoverable costs is the total of –
  (a) £800;
  (b) 20% of the damages agreed up to £5,000; and
  (c) 15% of the damages agreed between £5,000 and £10,000.

(2) Where the claimant –
  (a) lives or works in an area set out in the relevant practice direction; and
  (b) instructs a solicitor or firm of solicitors who practise in that area,

[163] Access to Justice Act 1999 (UK).

the fixed recoverable costs shall include, in addition to the costs specified in paragraph (1), an amount equal to 12.5% of the costs allowable under that paragraph

(3) … (VAT) may be recovered in addition to the amount of fixed recoverable costs.

III Fixed Percentage Increase in Road Traffic Accident Claims
Percentage increase of solicitors' fees – rule 45.16

Subject to rule 45.18, the percentage increase which is to be allowed in relation to solicitors' fees is –
- (a) 100% where the claim concludes at trial; or
- (b) 12.5% where –
  - (i) the claim concludes before a trial has commenced; or
  - (ii) the dispute is settled before a claim is issued.

Percentage increase of counsel's fees – rule 45.17
Please see print-out

IV Fixed Percentage Increase in Employers Liability Claims
Percentage increase of solicitor's and counsel's fees – rule 45.21
In the cases to which this Section applies, subject to rule 45.22 the percentage increase which is to be allowed in relation to solicitors' and counsel's fees is to be determined in accordance with rules 45.16 and 45.17, subject to the modifications that –
- (a) the percentage increase which is to be allowed in relation to solicitors' fees under rule 45.16(b) is –
  - (i) 27.5% if a membership organisation has undertaken to meet the claimant's liabilities for legal costs in accordance with section 30 of the Access to Justice Act 1999; and
  - (ii) 25% in any other case; and
- (b) the percentage increase which is to be allowed in relation to counsel's fees under rule 45.17(1)(b)(ii), (1)(c)(ii) or (1)(d) is 25%.

PART 48 – COSTS – SPECIAL CASES

II Costs relating to solicitors and other legal representatives

Basis of detailed assessment of solicitor and client costs – rule 48.8
(3) Where the court is considering a percentage increase, whether on the application of the legal representative under rule 44.16 (Adjournment where legal representative seeks to challenge disallowance of any amount of percentage increase) or on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.

<u>PRACTICE DIRECTIONS 43-48</u>

Section 11 – Factors to be taken into account in deciding the amount of costs – rule 44.5

Section 20 – Procedure where legal representative wishes to recover from his client an agreed percentage increase which has been disallowed or reduced on assessment – rule 44.16

Section 54 – Basis of detailed assessment of solicitor and client costs – rule 48.8

APPENDIX 3 – CONSOLIDATED COSTS LEGISLATION

The cost of litigation poses a significant deterrent to people seeking a remedy before the courts who, apart from their own legal costs, may be faced with a crippling order to pay their opponent's costs should they fail. This is particularly concerning where the applicant is pursuing litigation in the public interest, but is unable to continue due to the possibility of a costs order or a preliminary order for security for costs. Such cases raise important and often complex legal issues and must be litigated in superior courts such as the Supreme Court of Queensland.

This paper identifies the problems with current costs order regimes and proposes reform by unifying the law relating to costs in one overarching statute.

Common Law

Costs orders are discretionary. The general rule in Queensland Courts is that costs follow the event (*Uniform Civil Procedure Rules 1999* (Qld), r 789). Courts have departed from this rule and ordered each party bear its own costs where there have been special circumstances justifying departure. Traditional exceptions focus on the conduct of the successful party which disentitles it to costs, or where the plaintiff only obtains nominal damages.

The high water mark for public interest litigants was the decision in *Oshlack v Richmond River Council* (1998) 193 CLR 72. In that case, the primary judge's decision not to award costs to the successful party was upheld by the High Court. The primary judge considered:

- the "public interest" of the matter;
- the appellant had no pecuniary interest in the outcome of the matter;
- a significant number of members of the public shared the stance of the appellant;
- the issues raised were arguable although ultimately unsuccessful; and
- the case was one of the first under new provisions relating to endangered fauna and the judgment would be helpful to the future administration of the provisions and enforcement.

Subsequent cases tend to limit *Oshlack* to its facts and consideration of "public interest" and other factors in determining costs orders is by no means settled.

Legislation

Many legislative instruments provide for costs orders, overriding the general rule in specific matters. Many more do not provide any such guidance. Some Queensland examples, in areas of law commonly regarded as in the "public interest", are:

Anti-Discrimination Act 1991, s 218	In relation to appeals from the Anti-Discrimination Tribunal to the Supreme Court, the court may make any order as to costs that the Court considers appropriate.
Child Protection Act 1999, s 116	Each party pay their own costs of the proceedings
Environment Protection Act 1994, s 505(10)	The Court must order a plaintiff pay costs if the court is satisfied that the proceeding was brought for obstruction or delay. Otherwise, orders as to costs are left to the court's general discretion.
Fair Trading Act 1989, s 98	No provision regarding costs.
Freedom of Information Act 1992, s 98	In relation to proceedings instituted by the State arising out of the performance of the functions of the Freedom of Information Commissioner, the reasonable costs of a party to the proceeding are to be paid by the State.
Guardianship and Administration Act 2000, s 165	In relation to appeals from the Guardianship and Administration Tribunal to the Supreme Court, each party bear its own costs of an appeal unless the court considers • the appeal was frivolous or vexatious • a party has incurred costs because the appellant defaulted in procedural requirements.
Integrated Planning Act 1997, s 4.1.23	Each party bear its own costs
Judicial Review Act	Upon application of any party at any stage, the court may order

1991, s 49	that: • another party indemnify the relevant applicant for its reasonable costs incurred on the standard basis from the time of the costs application • each party bear its own costs of the proceedings. In making such an order, the court must have regard to certain factors, including the financial resources of the applicant, the public interest and the merit of the originating application.

Security for costs and undertaking as to damages
A further barrier to access bearing a close relationship to costs is the possibility the public interest litigant is ordered to give security for costs or, if an injunction is sought, an undertaking as to damages.

Curiously, the UCPR does set out factors which the court must and may consider in determining whether to award an application for security for costs or undertaking as to damages. This includes consideration of the "public importance" of the matter.

Reform
In order to assess the likelihood of whether costs will be ordered, the public interest litigant must first refer to the particular legislation, and if no guidance is given, then negotiate the plethora of unsettled case law on the issue. This provides little comfort to litigants who generally will not be able to obtain a costs order until it is too late, or worse still, face an adverse costs order. Most litigation is commenced to settle a dispute. It undermines our system of justice if only wealthy litigants can safely pursue this course of action.

We suggest unifying the law on costs by introducing overarching legislation dealing with costs in Queensland, subject to any specific provision to the contrary. Such legislation may include:

- that costs are at the discretion of the Court;
- identification of the particular issues the court must/may have regard in exercising their discretion, including consideration of the "public interest";
- allowing for a preliminary costs hearing in particular circumstances so that the issue can be settled from the outset;
- implementing a regime whereby Legal Aid Queensland could issue a "costs protection certificate" to individual litigants in public interest matters which limit or extinguish the litigant's liability for costs, or even require the respondent public authority to pay all or some of the costs;
- expansion of costs funding, for example, as provided under the *Appeal Costs Fund Act 1973* (Qld);
- provisions requiring government to implement policy setting out their position regarding the enforcement of costs orders;
- provisions regarding security for costs and undertakings as to damages.

The benefits of reform are two-fold: first, it will simplify existing law in relation to costs orders and, second, it will provide both the courts and litigants with guidance as to when costs will be ordered, thereby reducing the risk of costs unduly fettering the commencement of otherwise meritorious legal proceedings.

APPENDIX 4 – LEI PRODUCTS AND WORLDWIDE

LEI products
Standard LEI policies: These products are offered as an 'add-on' to other base policies (for example, home and contents insurance) or operate as a stand-alone policy.

With an add-on policy, the customer generally does not choose to take the cover and can opt out if, once provided, they decide against the cover. While it is likely that add-on policies will be most attractive to consumers, a common problem is that sometimes its existence cannot be determined without a close reading of the policy, which many fail to do.[164]

Alternatively, a stand-alone policy is deliberately selected by the consumer and will generally extend to a wider range of legal services than that of an add-on policy. However, such cover is often sought when the applicant anticipates that legal problems are likely to arise. As such, these policies commonly exclude pre-existing matters and circumstances.

Standard LEI policies generally only extend to a specified range of legal issues and contain a range of exclusions. It is common for high volume litigation such as family law disputes to be excluded.[165]

'After the event' LEI: These products involve an interaction between an insurance policy and a litigation loan. An applicant seeks cover when they become involved in a legal dispute. After seeking legal advice as to the expected outcome and their likely exposure, the insurer may offer cover to secure the repayment of a litigation loan, upon the payment of a premium by the applicant.[166]

Prepaid plans: These products do not actually utilise insurance principles, but involve using finance provided by a group of people to obtain finance for legal services. This includes, for example, the bulk purchases of legal services from professional firms or the employment of in-house lawyers. These plans are usually designed for employees, and are either totally employer-funded or jointly funded with employees.[167]

LEI Worldwide
QPILCH's paper, *Submission to Legal Aid Queensland's Review of the Civil Law Legal Aid Scheme* made a thorough analysis of litigation expenses insurance in several jurisdictions. That analysis is presented below. The position of legal expense insurance, giving a worldwide picture, has been canvassed in an unpublished report prepared for the Queensland Law Society by Dr Julie-Anne Tarr[168].

Australia and New Zealand
Currently in Australia, legal expenses insurance ('LEI') is rare, and where it is available, there is little consistency, and what is covered varies greatly between providers. Various forms of LEI have been proposed over time, but in Australia and New Zealand, these types of schemes have encountered strong resistance, while a number of civil law jurisdictions have had overwhelming success.

[164] Tarr (2002) *Report on Legal Expenses Insurance for: Access to Justice Committee Queensland Law Society.*
[165] Australian Law Reform Commission Report 89: Managing Justice: A review of the federal civil justice system. http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html
[166] Australian Law Reform Commission Report 89: Managing Justice: A review of the federal civil justice system. http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html
[167] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 293;
[168] Tarr (2002) *Report on Legal Expenses Insurance for: Access to Justice Committee Queensland Law Society.*

From 1987 to 1995, the Law Foundation of New South Wales and the Government Insurance Office in NSW developed the project, Legal Expense Insurance Ltd. It was intended to provide LEI policies to low and middle income families, and also to specific groups of employees (such as childcare workers). The policies covered a range of legal services, but also provided a telephone advisory service and educational programs, which were ultimately considered to be the 'most worthwhile' achievements of the project.[169] However, few policies were sold and few claims made. The failure of the project was considered to be the result of lacklustre marketing efforts, sceptical public attitudes and operational problems. Additionally, the project was relying on forming relationships with unions and employers, who could obtain the policy for the members and employees, which failed to eventuate.[170]

Alternatively, the Public Service Association LEI scheme, operated by the trade union of that name in South Australia, has successfully operated since 1991.[171] Union members automatically qualify for LEI. Priority is given to assistance with routine and less serious legal problems, while referrals are considered for more serious matters. The scheme is largely based upon a telephone advice line and educational materials. If necessary, legal representation is available, but administrative approval is required and the case must have some likelihood of success.[172] The scheme is considered to be successful due to its targeted approach and incremental growth.[173] The benefits and services offered by the policy were both useful and relevant to the users of the product.

The United Kingdom

In the UK, however, LEI is prolific and is divided into commercial and personal insurance, with the latter being subdivided into stand alone policies, and policies which add on to an existing policy, such as motor or home and contents insurance. The stand alone policies are less popular, primarily because individuals believe the risk of incurring legal costs (and consequently, their need for LEI) is low, or they believe that they will be covered by legal aid if the need arises. Since the UK *Access to Justice* reforms, the strain on legal aid has been alleviated, and the effectiveness of 'costs risks litigation insurance' (also known as 'after the event insurance') has been enhanced. The *Access to Justice Act 1999* (UK) ('the Act') encourages people contemplating litigation to take out insurance to cover themselves against the risk of having to meet both the costs of the other party and his or her own legal costs if the case is unsuccessful. LEI premiums are recoverable in costs under the Act.[174]

Europe and the European Union

In Europe, LEI is usually sold to individuals as an add on policy, and generally covers unforeseeable legal expenses, rather than all legal costs a person may incur. There is also a heavy reliance on unions to provide legal advice and services to employees. However, policies do tend to cover a number of serious and complex legal disputes, the costs of an unsuccessful party and allow choice in legal representation.[175]

The provision of LEI is also regulated by the European Union. LEI has had the most success in Europe in countries where the lawyers' fees are modest, the public perception is that they need

[169] Goodstone, A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>
[170] Goodstone, A, Legal expense insurance: an experiment in access to justice, Law and Justice Foundation of NSW, Sydney, 1999 <http://www.lawfoundation.net.au/publications/reports/lei/index.html>
[171] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 296
[172] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 296.
[173] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 297.
[174] *Access to Justice Act 1999* (UK), s 29.
[175] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) Alternative Law Journal at 293

LEI, and where there are substantial gaps in the legal aid scheme. Empirical research in Europe indicates that the existence of LEI policies has not increased the number of litigious claims.

Historically, Sweden has demonstrated a remarkable adoption of LEI policies. It 1999, it was estimated that approximately 90-95% of households had an LEI policy. LEI policies feature as an add-on to typical household policies and is incorporated at no extra cost to consumer. Furthermore, Swedes have been identified as a culturally risk-averse nation.[176]

Germany has also demonstrated an encouraging take up of LEI. It should be noted though that other mechanisms designed to improve access to justice do not exist (for example, contingency fees). Additionally, these policies are attractive to German insurers, due to the predictability of legal costs. The German legal profession operates on the basis of a fixed-fee schedule. [177]

The interaction between LEI and legal aid has also had an impact on the success of LEI, and is different in each country. For example, under Swedish reforms, an application for legal aid will only be successful if it was reasonable in the circumstances for the applicant not to have an LEI policy. Similarly, in Germany, a person will generally not be eligible for legal aid if they are covered by LEI in a particular area.

In Europe, LEI policies generally cover reimbursement of lawyer's fees and the expenses of the opposing parties, subject to overall limits set by the insurer. LEI is most often sought for motor vehicle related legal expenses, but is also commonly provided for claims in tort, criminal defence, property, employment, social security, and, to a lesser extent, contractual matters. The insurance companies will usually stipulate a minimum amount below which will not be litigated, and this helps to discourage frivolous claims.

Common exclusions for European LEI are actions for damages caused by war, riots, civil commotions, nuclear energy, actions based on intellectual property rights, family law, succession, bankruptcy, constitutional or international matters, tax and fiscal matters, and disputes relating to the LEI contract itself. LEI is also unavailable for intentional acts or for incidents prior to obtaining LEI.

The United States

In the United States, 'prepaid legal expense plans' are more prevalent than LEI. The US environment is quite different to that of Europe and Australia; the legal aid system is weak and under-funded, and contingency fee arrangements and class actions are common, particularly in personal injury matters. There is also an absence of any costs rule in the US.[178]

Most of the prepaid legal expense plans are promoted by unions, funded by employers, and are specifically aimed at providing affordable access to legal assistance for low to middle income earners by way of automatic payroll deduction. Plans usually vary between providers, and contents, quality and scope of the plans are diverse.

South Africa

South Africa has a sophisticated LEI system covering both civil and criminal matters. The most common form of LEI in South Africa is 'after the event insurance' which is taken out after the litigation has commenced to cover the risk of an adverse award of costs, and is available for court or arbitration proceedings.

[176] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 293
[177] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 293
[178] Regan F, 'Whatever happened to Legal Expense Insurance?' (2001) 26(6) *Alternative Law Journal* at 293