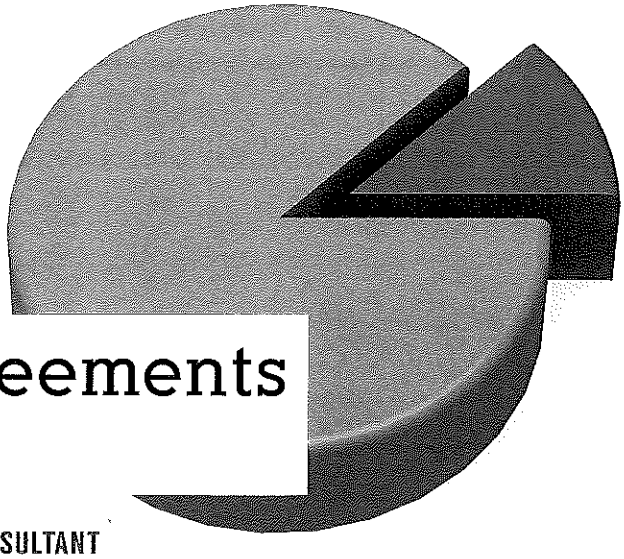

Conditional Costs agreements involving uplift fees

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Conditional costs agreements with uplift have been permitted in South Australia since 1993 but the position with respect to these agreements has been affected by the 2014 amendments to the *Legal Practitioners Act.*

Practitioners should note that the new provisions in Schedule 3 to the Act relating to uplift fees differ from those in other jurisdictions. The minimum threshold of risk is more onerous for practitioners, who should exercise extreme caution when using such agreements.

Conditional costs agreements involving uplift fees are of their nature contingency fee arrangements, in which the payment of the lawyer's fee is contingent on a specified event, usually the success of an action. Other types of contingency fee arrangements are speculative or conditional (without uplift) and percentage and award based agreements under which the lawyer receives payment calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates. These award-based costs agreements, also called contingency fee agreements, are prohibited in South Australia and their use may attract a penalty of up to $50,000 (see clause 27 of Schedule 3 of the *Legal Practitioners Act* 1981).

Speculative or conditional fee agreements without uplift have long been used as a means whereby clients can attain access to justice. As long ago as 1960 the High Court affirmed their legitimacy in the matter of *Clyne v NSW Bar Association* (1960) 104 CLR 186 setting out their long history and pointing out that provided the client had a good cause of action or defence and the solicitor does not bargain with the client for a share of the proceeds then the solicitor does not commit the wrong of either champerty or maintenance.

Maintenance is defined as aiding a party in litigation without just cause. Champerty is a form of maintenance and involves assisting a party in a suit in which one is not naturally interested with a view to receiving a share of the proceeds of the litigation.

Until 1992 when the *Criminal Law Consolidation Act* was amended, conditional fee agreements with uplift were illegal, since they resulted in the lawyer receiving a share of the proceeds of settlement, and were seen as offending against the laws relating to those medieval offences and torts of maintenance and champerty. By *Schedule 11* to the *Criminal Law Consolidation Act* the offences of maintenance and champerty were abolished as was liability in tort for conduct contributing to maintenance or champerty. Champertous contracts may still be determined to be illegal as against public policy, and special provisions still apply to legal practitioners.

As part of the legislative reform at that time, amendments to the *Legal Practitioners Act 1981* was permitted a legal practitioner to make a written agreement with a client for payment of a contingency fee, to be calculated on a basis of fulfilment of a condition stated in the agreement subject to the Law Society's Professional Conduct Rules (previous section 42 (6) (c) of the Act). The Professional Conduct Rules were amended to permit practitioners to enter contingency fee agreements and in the event of success be permitted to charge an uplift of up to double the fees to which the practitioner would otherwise be entitled if those fees were charged according to the Supreme Court scale. Most recently the provisions as to complying contingency costs agreements were to be found in Australian Solicitors' Conduct Rule 16C. This Rule also prohibited practitioners from entering agreements under which any amount payable was calculated by reference to a percentage of any judgment, settlement or monetary sum to be recovered by the client.

These provisions have now been superseded by Schedule 3 to the *Legal Practitioners Act.* In Part 5 Costs agreements are covered generally and the requirements for conditional costs agreements and conditional costs agreements involving uplift fees are set out.

Subject to certain exceptions, before entering a costs arrangement of any sort practitioners must comply with the mandatory disclosure regime set out in Schedule 3. There are additional disclosure requirements required of practitioners entering conditional costs agreements and further disclosures must be made before entering a conditional costs agreement involving uplift fees(clause 15). There have been a number of matters in Victoria where courts have declined to include claims for uplift fees in making awards for party/party costs. In the matter of *Jarvis v Cranston* [2008] VCC 1445 the Judge declined to include the claim for uplift and reviewed a number of other relevant cases. It may therefore be prudent to disclose to the client that the uplift may not be recoverable on a party/party basis. It is important to ensure compliance with the additional requirements set out in clause 26 of Schedule 3 noting that a penalty of up to $50,000 may apply if a law practice enters a conditional costs agreement involving uplift fees in contravention of this clause.

The basic provisions as to conditional costs agreements are set out in clause 25 of Schedule 3. They may not be used in criminal matters or matters involving child protection, custody, guardianship or adoption or for family law, migration or child support matters. Conditional costs agreements may provide that the payment of some or all of the costs is conditional on the successful outcome of the matter to which those costs relate. The agreement must set out the circumstances which constitute a successful outcome. The agreement may provide that the client

pay for disbursements irrespective of the outcome of the matter. These agreements must be in writing, in clear plain language and signed by the client. They must include a statement that the client has been informed of the client's right to seek legal advice before entering into the agreement and contain a cooling off period of not less than five clear days during which the client by written notice can terminate the agreement.

Clause 26, which permits practitioners to enter conditional costs agreements including provision for the payment of an uplift fee, circumscribes their use in several ways. The basis of the uplift fee must be separately identified in the agreement. The agreement must include an estimate of the uplift fee, or if that is not reasonably practicable, a range of estimates and an explanation of the major variables that will affect the calculation. This estimate is in addition to the other fee estimates all practitioners acting in litigious matters are required to disclose to their clients. If the agreement relates to a litigious matter it must not provide for the payment of an uplift fee unless the risk of the claim failing and the client having to meet his or her own costs is significant. Finally, the uplift must not exceed 25 per cent of the legal costs (excluding disbursements) otherwise payable.

Conditional costs agreements involving uplift fees are similar in effect to the complying contingency costs agreement permitted under ASCR 16C. However there are some differences. The old rule had a slightly different focus in that the agreement was to provide that in the event of the action being unsuccessful, the practitioner would not charge the client or would charge the client only disbursements or some defined amount or proportion of disbursements. Under the new regime such agreements are conditional on the successful outcome of the matter which must be defined in the agreement. Under the old rule it was permissible to charge an uplift fee constituting up to double the fees to which the firm or practitioner would otherwise be entitled if those fees were charged according to the current applicable Supreme Court scale. The uplift now permitted must not exceed 25 per cent of the legal costs (excluding disbursements) otherwise payable, whatever the base method of charging even if not scale.

There is one other material difference between the Rule and the new provisions. Under the Rule such agreements related to matters "where in the professional judgment of practitioner the client's claim ha(d) some prospect of success but where the risk of claim failing and of the client having to meet his or her own costs (was) significant". The threshold test in the new provisions is that if a conditional costs agreement relates to a litigious matter the agreement must not provide for the payment of an uplift fee unless the risk of the claim failing, and of the client having to meet his or her own costs is significant.

As noted in Chapter 18 Volume 2 of *Productivity Commission 2014 Access to Justice Arrangements,* Inquiry Report, No 72, Canberra at p 602:

> *By waiving fees until the outcome of the claim is known the lawyer.....effectively provides upfront funding for the claim and shares in the financial risk of litigation.*
>
> *Private funding can provide an important avenue to accessing justice for litigants who lack (liquid) financial resources but have meritorious claims"*

Practitioners using such agreements need to note that Courts tend to interpret the provisions as to conditional costs agreements and uplift strictly. Although the relevant Victorian provisions differ slightly from the South Australian provisions, a recent judgment of the Victorian Court gives insight into the way in which such agreements can go awry to the disadvantage of a solicitor. Bell J in *Russells v McCardel* [2014] VSC 287 prefaced the judgment by saying:

> *People engaged in legal proceedings and seeking legal services are typically in a position of unequal bargaining power when negotiating with and choosing a lawyer. While some clients are relatively sophisticated, most have limited knowledge of the law and legal procedures and may be emotionally involved in the case. By contrast, lawyers possess legal expertise as well as the detachment and objectivity which comes from professional training and experience.*
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> *That being so, most clients are in a position of vulnerability when it comes to reaching agreement about the fees and disbursements that might be charged under any retainer. Without information expressed in clear and plain language about the extent of their monetary liability, they may find it very difficult to make informed decisions about engaging a particular lawyer or choosing between competing lawyers. All too often the legal costs charged are unexpectedly high; time-consuming and expensive disputes are the unhappy consequence.*
>
> *Clarity, freedom of informed choice and proportionate legal expenses are important not only for the relationship between lawyer and client but also for the operation of the system of justice. Remembering that lawyers enjoy a statutory monopoly that can only be justified in the public interest, excessive legal costs undermine public confidence in the legal system and present a significant barrier to obtaining access to justice, which is a fundamental human right.*

The Judge went on to consider in particular the requirements of the "estimates of the uplift fee" and for the agreement to be in "clear plain language" and "signed by the client". These are expressions which also appear in the South Australian provisions. The Judge found that all these requirements were found wanting and confirmed that the agreement subject of the appeal was void restricting any claim for costs to the applicable scale. Each of these requirements was strictly interpreted in favour of the client and the Judge's reasoning merits the attention of practitioners contemplating the use of conditional costs agreements involving uplift fees.

The writers are not aware of any statistics as to the use of conditional costs agreements involving uplift fees in South Australia. However the disconnect between the aspirations for access to justice and the strict costs regime now applying in South Australia warrants careful consideration, particularly to ensure that practitioners are properly rewarded for carrying litigious matters that may last for years. B