Retainer Agreements for "No Win/No Fee" Clients

There appears to be an increasing use by solicitors of agreements with clients under which the solicitors will not charge to conduct litigation (almost always for a plaintiff) if the action fails. Whilst such agreements have a long history, and as long ago as 1960 the High Court held that it was ethical for a solicitor to agree that he or she would charge his or her normal rates if the action succeeded and would charge nothing if it failed, their current popularity is based on the use of retainers that provide that nothing will be charged if the action failed, and an increased amount will be charged if the action succeeds. However, if one is going to enter into an agreement with a client to conduct litigation on a no win/no fee basis, the retainer needs to be specially drafted to accommodate both the specific restrictions imposed by Conduct Rule 16C on such retainers, and the general requirements of fairness and reasonableness under section 42(7) of the *Legal Practitioners Act*. Further, those requirements are likely to change shortly when the costs provisions of the *Legal Practitioners (Miscellaneous) Amendment Act* 2013 come into force, most likely on 1 July 2014.

This paper seeks to deal with such issues. It should be noted that the paper is limited to "*no win/no fee*" agreements for individual clients. No win/no fee agreements are also common in representative actions, but representative actions involve a host of other considerations, arising from their representative nature, which go far beyond the scope of this paper. Further, the paper does not purport to provide a whole precedent retainer, but only to deal with the special clauses necessary for valid no win/no fee charging. The Law Society is in the process of preparing a precedent retainer agreement for unsophisticated clients for use under new costs regime to be brought in under the *Legal Practitioners (Miscellaneous) Amendment Act* 2013. This legislation has been enacted, but it is anticipated that the costs provisions of it will not be proclaimed to come into force until the middle of next year. It is accordingly recommended that anyone intending to use no win/no fee retainers after that legislation comes into force obtain a copy of that precedent retainer and supporting papers, and utilise

this paper in conjunction with these materials. In the interim, the Law Society has currently available a precedent retainer under the current rules (although it is not adopted to no win/no fee arrangements).

Historical Overview

It is not possible to fully understand the current law with regard to no win/no fee agreements without understanding its historical background. During the middle ages, no win/no fee agreements were barred by the existence of the crimes and torts of maintenance and champerty. Maintenance occurred when a non-party without lawful justification assisted a party to civil proceedings, usually financially. Champerty was an aggravated form of maintenance in which a share of the proceeds of the litigation was to be received by the maintaining party as consideration for the assistance given. Whilst there do not appear to have been any prosecutions for the crimes of champerty or maintenance in recent years, there have been examples of actions in tort. It was established that, a defendant who has had an unsuccessful action against it maintained by an outside party and who is awarded costs, and cannot recover those costs from the plaintiff because the plaintiff is impecunious, can sue the maintaining party for its legal costs. Theoretically it might have been possible to obtain an injunction to stop unlawful maintenance, but in practise this would be rare because it would be very difficult to be able to prove the maintaining of the action during its currency. Most cases in which there have been successful actions in maintenance arose in situations where upon bankruptcy of the unsuccessful maintained party, their papers which become available to the defendant through a liquidator or trustee in bankruptcy appointed by them showed the existence of a maintenance agreement.

However, there were a large number of justifications for maintenance which would legalise that which was otherwise criminal and tortious. One was, for example, allowed to maintain one's spouse and one's relatives and various persons with whom one had a commercial

relationship relevant to the litigation prior to the commencement of the litigation. As to solicitors, it was held by the High Court in *Clyne v NSW Bar Association* (1960) 104 CLR 186, that it was lawful for a solicitor to act for a plaintiff on the basis that they would only recover their normal costs if they succeeded and nothing if they failed, provided they had satisfied themselves that the plaintiff had a reasonable cause of action. However, this was a defence to maintenance rather than to champerty, and it remained the case that a solicitor who bargained for extra remuneration in return for their legal work, in return for not charging if the action failed, could potentially be liable for champerty.

The situation changed in South Australia in 1992, when the legislation which, is now Schedule 11 of the *Criminal Law Consolidation Act* 1935 provided in clause 3 as follows "*(1) Liability in tort for conduct constituting maintenance or champerty at common law is abolished; (2) The abolishing of criminal and civil liability for maintenance and champerty does not affect – (a) any civil causes of action accrued before the abolition; (b) any rule of law relating to the avoidance of a champertous contract as being contrary to public policy or otherwise illegal; (c) any rule of law relating to misconduct on the part of a legal practitioner who is party to or concerned in a champertous contract or arrangement*". Accordingly, whilst a legal practitioner could no longer be prosecuted or sued in tort for entering into a champertous contract, the principle that a champertous contract was unenforceable as contrary to public policy (which had existed before presumably on the basis that it was technically criminal) remained, and the possibility remained that it could be regarded as professional misconduct to enter into a champertous contract. Although the writer is not aware of any local authority on the point, he is of the view that the repeal of the crimes and torts would not have precluded a solicitor being liable for professional misconduct if he entered into a champertous contract, even if only on the basis that the solicitor had failed to disclose the fact that the contract was unenforceable, and thus was grossly overcharging the client by seeking to charge them on an improper and unenforceable basis.

However, there was considerable pressure to allow solicitors to charge more if they entered into no win/no fee agreements, in order to improve access to justice for impecunious clients. This was reflected in amendments to the *Legal Practitioners Act* which now in section 42(6) provides "*A legal practitioner may make an agreement in writing with a client for – (c) subject to any limitations imposed by the Society's Professional Conduct Rules or Regulations – payment of a contingency fee to be calculated on a basis set out in the agreement on fulfilment of a condition stated in the agreement*". The limitations of this provision must be noted. The agreement must be in writing (as in any event the case with any agreement to charge above scale costs). It must be calculated on a basis set out on the agreement on fulfilment of a condition stated in the agreement. An agreement which was so vague as to not meet these conditions will be unenforceable. Finally it was "*subject to any limitations imposed by the Society of Professional Conduct Rules or the Regulations*". The Regulations under the Legal Practitioners Act do not touch on the points and one is thus taken to the Professional Conduct Rules, now constituted by the Australian Conduct Rules at Rule 16C.

It should be noted that Rule 16(C) is a specific South Australian addition to the Conduct Rules, as in other States these matters are not dealt with in the Conduct Rules but by legislation. Such legislation is shortly to come into force in South Australia, as is dealt with in a later section of this paper. The relevant rules read as follows –

"*16C Contingency Fees*

16C.1 A practitioner or firm of practitioners must not enter into a costs agreement under which the amount payable, or any part of the amount payable, to the practitioner or firm of practitioners as calculated by reference to percentage of any judgment, settlement or monetary sum to be recovered by the client.

16C.2 A practitioner or firm of practitioners shall not charge fees which are unfair or unreasonable. In considering whether the fees or the terms of a costs agreement are unfair or unreasonable regard should be had to:–

16C.2.1 The nature of the matter;

16C.2.2 The amount at stake in the matter;

16C.2.3 The jurisdiction involved;

16C.2.4 The urgency of the matter;

16C.2.5 The ability of the client to understand and appreciate the terms of the agreement;

16C.2.6 The knowledge, experience and position of the client;

16C.2.7 Whether the client has received independent about the fees or the agreement;

16C.2.8 Whether the practitioner or firm has explained to the client any difference between the costs provided for by the agreement and the costs provided for by any relevant scale and the effect thereof on what can be recovered by a costs order;

16C.2.9 Whether the costs agreement is a complying contingency costs agreement as defined below. A complying contingency costs agreement which provides for a solicitor/client fee which constitutes

up to double the fees to which the firm or practitioner would otherwise be entitled if those fees were charged according to the scale contained in the current applicable schedule of the rules of the Supreme Court will be regarded as prima facie fair and reasonable;

16C.2.10 The experience, reputation and ability of the lawyer or lawyers performing the services;

16C.2.11 Any other relevant matter.

16C.3 A complying contingency costs agreement is one:

16C.3.1 Which relates to a litigious matter other than a criminal or matrimonial matter;

16C.3.2 Which is entered into either at the commencement of the practitioner's retainer from the client or after initial investigation of the matter;

16C.3.3 Which provides that in the event of the action being unsuccessful, the practitioner either:

16C.3.4 Will not charge the client; or

16C.3.5 Will charge the client only disbursements on some defined amount or proportion of disbursements;

16C.3.6 Which relates to a matter where in the professional judgment of the practitioner the client's claim has some prospect of success but where the risks of the claim failing and of the client having to meet his or her own costs are significant;

16C.3.7 Where the practitioner has before the signing of the agreement informed the client of the client's right to obtain independent legal advice and of the right to have the agreement reviewed by the Supreme Court pursuant to section 42(7) of the Legal Practitioners Act and of the right to have the fees charged reviewed by the Conduct Board under section 77A of the Legal Practitioners Act and the agreement specifically records this;

16C.3.8 Which:

(1) Is in writing and in plain English and sets out clearly the terms of the agreement and is signed by the client;

(2) *Contains the provision that the client shall have a cooling off period of five clear business days from the signing of the contract during which he or she may, by giving notice in writing to the practitioner, terminate the contingency fee agreement".*

It is clear that under 16C(1) a percentage remuneration is specifically forbidden, and that any such retainer is in direct breach of the Conduct Rules and thus in breach of section 42(6), and is thus unenforceable, as well as constituting unprofessional conduct.

It should be noted that although there are elaborate provisions defining what is a complying contingency fee agreement, and although it is stated that such a complying agreement is prima facie fair and reasonable, it is not expressly stated that a non-complying agreement is invalid. Accordingly, it would seem that technically the mere fact that a contingency costs agreement was not a complying contingency costs agreement would not invalidate it. However, clearly the onus will be on the solicitor to justify a non-complying agreement and it is suggested that, normally a non-complying agreement is going to be regarded as unfair or unreasonable. Unless one is dealing with an extremely sophisticated client (of the nature of for example a fellow solicitor or a liquidator) or unless perhaps the client has received actual advice from an independent legal practitioner on the matter, it is strongly suggested that you do not seek to proceed with a no win/no fee agreement which is not a complying costs agreement. The Court might well apply the old law and hold that save as specifically authorised, champertous fee agreements are invalid and unprofessional.

It is accordingly suggested that following the limitations on complying contrary costs agreements, no win/no fee agreements not be used in criminal or matrimonial matters. They will be unlikely to be useful in criminal matters in any event, as it is rare for a client to obtain any monetary benefit from a successful criminal action. Were it not for specific terms of the rule however, they might be useable in matrimonial matters, in which a successful applicant might expect to obtain a payment out of matrimonial estate.

Further, Conduct Rule 16C.1 thus makes it clear it is not possible to have the American style contingency fee in South Australia whereby the solicitor bargains for a percentage share in any judgment to be received. How then will remuneration be arranged? It would obviously be possible to merely state that the solicitor would charge nothing if they lost and their normal fees if they won (which has been permissible since at least 1960 under *Clyne's* case). *Clyne's* case would probably also authorise an agreement under which one charge normal fees if you won, but lesser fees if you lose, although it would not be a complying contingency fee

agreement. Such arrangements might be entered into on some occasions, where for example one is acting for family or friends or in a pro bono matter where one is essentially willing to act for nothing and is merely hoping for a recovery if you are successful in obtaining costs. However, in most cases, the solicitor will want to get a financial reward for the fact that they will be funding the matter and bearing the risk of not being paid should the action fail. Rule 16C.2.9 provides "*A complying contingency costs agreement which provides for a solicitor/client fee which constitutes up to double the fees to which the firm or practitioner or otherwise would be entitled if those fees charged according to the scale contained in the current applicable Schedule to the Rules of the Supreme Court will be regarded as prima facie fair and reasonable*".

The reasoning behind this is that this assumes that the Supreme Court fees are prima facie fair and reasonable, and then takes the view that doubling those fees would be sufficient remuneration for a solicitor taking a matter which is likely but not certain to succeed. If one takes an action which has a 50% chance of success, and charges double Supreme Court scale fees, then over a series of such actions, one would expect to recover on average over numerous actions (taking into account the increased fees as against the lost actions) at Supreme Court scale.

Of course, there is a difficulty where a solicitor's normal rates are higher than Supreme Court scale in any event. A solicitor whose normal rates are close to double Supreme Court rates any way (eg, someone charging perhaps $500.00 per hour), will find little commercial attraction in a complying contingency costs agreement. The wording of the rule also leads to problems for those solicitors who wish to do this work and do not wish to express their charges in terms of Supreme Court scale. If a solicitor charges according to an hourly rate, it is presumably then necessary to translate that rate into Supreme Court scale terms in order to ascertain whether there is a complying contingency costs agreement. It should be noted in this regard that it is not sufficient to do a simple comparison with the hourly rate for a solicitor's

attendances of skill under Item 7 of the Supreme Court scale. This is because an hourly rate would normally capture much time which is not captured at all under the scale (eg, research and internal conferences). See the remarks of Master Lunn on this point in *McNamara v Kasmeridis*. Accordingly, when doing lump sum costs assessments, the Courts will normally deduct at least 15% from the time captured under a time charged costing agreement when converting it to a scale rate. See for example *Sparnon v Apand Pty Ltd* (FCA, Von Doussa J, No SG26/99, 4 March 1998, unreported, BC9800513), and *Auspine Ltd v Australian Newsprint Mills Ltd* (1999) 93 FCR 1. A higher deduction may be applied when an excessively large team is devoted to a matter. If an hourly rate is expressed, it should thus be significantly less than twice the solicitor's attendance as of skill hourly rate under the scale. At its highest it should certainly not exceed 185% of that rate. Further, there would be an argument that as long as the agreement had the potential to lead to fees of over 200% of scale in some circumstances, it was not a complying agreement. Even if this view is not adopted by the Court as the solicitor has the onus of proving the validity of a retainer agreement (see *McNamara v Kasmeridis*), it might well be the case that on a disputed solicitor/client taxation the solicitor might have to prepare a notional scale bill to show that charges did not exceed double scale which would involve substantial and probably unrecoverable expenses. All in all the writer would recommend against contingency costs agreements, unless you are willing to charge on a double Supreme Court scale. The risks as set out above are high and the general attitude of South Australian Courts has been to interpret legislative client safeguards favourably to the client. However, the position will change after the new legislation comes into force as discussed below.

16C.3.2 provides that a complying contingency costs agreement "*is entered into either at the commencement of the practitioner's retainer from the client or after initial investigation of the matter*". The reason for this is to acknowledge the position that, a client is in a poor bargaining position when changing solicitors when one solicitor has been acting for a considerable time. There will be considerable disruption and additional expense in changing

solicitors and it has thus been held that in those cases retainer agreements entered into require greater explanation than the ones entitled to at the commencement of a matter. It is thus not open to a solicitor to act for a year or two in a matter for a client under a normal retainer, to suddenly find that there is a chance that the action may fail, and then tell the client that if they wished to continue acting, they will need to enter into a contingency costs agreement and pay higher fees if they win.

16C.3.4 is interesting in that it provides that to be a complying contingency costs agreement the client will either not have to be charged or charged disbursements only. Given that the technical meaning of disbursements is likely to apply, it would thus seem that a costs agreement which provides for the payment of "*disbursements*" but defines them so as to include matters such as photocopying and facsimile transmissions (which are not technically disbursements in that they are payments to the solicitor and not to a third party) would not be a complying contingency costs agreement. Any solicitor entering into a complying contingency costs agreement under which the client is to be liable for "*disbursements*" even if the action fails, must thus define disbursements as being limited to actual out of pocket expenses and not as allowing recovery of internal office administrative fees.

16C.3.6 restates matters which would probably in any event be the position at common law. It is not proper to bring a claim where there is no chance of success. Indeed, solicitors who do so face the risk of being made personally liable for the costs. One should not therefore bring an action which is doomed to failure but which has a hope of perhaps procuring a payment from the other side by reason that taking it to trial might reveal embarrassing matters. However, this requirement is not unique to contingency fee agreements. What is unique is the requirement that it must be a case where "*the risks of the claim failing and of the client having to meet his or her own costs are significant*". This in effect reflects a policy judgment that if the claim is certain to succeed (one need only imagine a claim for personal injuries for a passenger in a motor vehicle which is rear ended whilst sitting at traffic lights), then in effect

the solicitor should be prepared to accept payment at the end of the matter on normal rates rather than seeking increased contingency fees. Presumably in such a case a solicitor who seeks to compensate for a long delay between work and payment would need to charge interest on interim bills rather than seeking a fee uplift.

16C.3.7 requires advice to be given before the signing of the agreement of the client's section 42(7) and section 77A review rights, and that this be recorded in the agreement. Normally this would be effected by having the agreement state this, giving the agreement to the client and requiring that the client take it away, consider it and if they consider it desirable obtain independent legal advice before signing it. The requirement that the practitioner is to give the advice "*before the signing of the agreement*" suggests that if the agreement is merely handed to the client for signature without either giving them a chance to take it away or having these clauses drawn to their attention, but there will not be a complying contingency costs agreement. Even apart from this, in such a case there might in any event be a strong argument that the agreement was not fair and reasonable, as fairness dictates that the client be given an opportunity to properly consider retainer terms.

16C.3.8 requires the agreement to be in writing (which is the case in any event under the *Legal Practitioners Act*) and "*in plain English*" and be one which "*sets out clearly the terms of the agreement*". Thus, any significant ambiguity or uncertainty in the terms of the agreement, in addition to being likely to be construed against the solicitor could lead to the agreement being held to be not a complying costs agreement on these grounds.

Also the agreement must be "*signed by the client*". This is not a requirement of a normal retainer agreement (see *McNamara v Kasmeridis* (2005) 92 SASR 382) but is of a complying contingency costs agreement. Accordingly, you should refuse to act for a client under a contingency fee agreement unless the client signs it.

The 5 business day cooling off period under Rule 16C.3.8(2) is mandatory if you wish to have a complying contingency costs agreement, however it can easily be incorporated into the agreement. It is unclear whether if one does any work in the five days during which the client has cooling off rights, whether one can charge for it under the contingency terms. It would seem however that one could at least recover for it on Supreme Court scale.

The above sets out the current law as to contingency fees. However, there is before Parliament currently a Bill which will change that law considerably for retainers entered into after it comes into force, as part of a general bringing of South Australia law into line with that prevailing in other States. It is accordingly necessary to be aware of this law so that retainers can be modified when it comes into force.

Drafting the Retainer

Turning from the law to drafting, there are six main issues in drafting no win/no fee agreements, so they are both complying contingency costs agreements under Rule 16C, and also fair and reasonable under the general requirements for retainers laid down in section 42(7) of the *Legal Practitioners Act*. Two are definitional, three involve reconciling the solicitor's commercial interests with the need for the retainer to be fair and reasonable within the meaning of section 42(7), and the sixth is the need to comply with the formalities set out in Rule 16C.

Required Formalities

There is no great difficulty in drafting retainer clauses to comply with the procedural requirements for complying contingency costs agreements, as set out in Australian Solicitors Conduct Rules 16C.3.7 and 16C.3.8. An example of such clauses is set out below.

"*Advice as to Rights*

You have the right to obtain independent legal advice as to this costs agreement before signing it.

After signing the costs agreement, you have the right to have the agreement reviewed by the Supreme Court pursuant to section 42(7) of the Legal Practitioners Act, and the right to have the fees charged under it reviewed by the Legal Practitioners Conduct Board under section 77A of the Legal Practitioners Act.

You may, within five clear business days from entering into the agreement, terminate the agreement by giving written notice of termination to us."

Definitional Problems

Both aspects of the broad statement "*no win/no fee*" can cause definitional problems. The first is what is meant by a win. To take an extreme example, turning firstly to the "*no win*" side of the definition, clearly there are circumstances which would uncontroversially not be a win. A plaintiff who sues and obtains no relief clearly has not won. However, there are many circumstances where it might arguable whether or not there has been a win. Supposing a plaintiff sues alleging misleading and deceptive conduct and loss suffered through it and obtains a bare declaration that there has been misleading and deceptive conduct, but it is found there is no loss, so there are no damages and no order is made as to costs. Or take a more straightforward situation, where the plaintiff succeeds in proving a breach of duty and obtains nominal damages only. If a plaintiff has incurred costs which would, on scale rates or on the solicitor's normal rates, amount to $500,000.00, and then obtains a judgment for nominal damages of $100.00 and no order as to costs, could it be said that the plaintiff has

won when, if the plaintiff's solicitors are entitled to their costs on the basis there has been a win, his net position will be that he is $499,900.00 worse off than if he had not sued.

Clearly the lesson here is that it is not enough to state that there will be no charges if the client does not win, and what is a win should be carefully defined. If it is not carefully defined, then the Courts are likely at best to take a pro-client view in interpreting it in any ambiguous situation, and at worst hold that it is contrary to Australian Solicitors Conduct Rule 16C.3.8(1) and is invalid. The leading Australian authority appears to be *Baker Johnson Lawyers v Jorgensen* (2002) QDC 201, where a plaintiff succeeded in establishing liability but only obtained a small judgment, which meant that if he had to pay the solicitor's costs under the no win/no fee agreement, he wold have been substantially out of pocket. The judge held that no win/no fee had to be interpreted in a commercial way, and that there was not a win unless the client had a net monetary benefit. Accordingly, he took the view that the plaintiff would not regarded as having won unless he obtains sufficient monies from the other side to exceed the legal costs he would have to pay to his solicitor. As this was not the case it was held there was no win and the solicitor was not entitled to fees. It is submitted that other judges are likely to take a similar view. This flows from two things. Firstly, in almost every case the fee agreement will have been drawn by the solicitor and thus would be subject to the contra proferentum rule that where one party has drawn an agreement, ambiguities in that agreement should be construed in favour of that party.

Secondly, as a lawyer is a fiduciary, agreements between a fiduciary and the person to whom they owe duties, are normally construed in favour of the person to whom the duty is owed. Accordingly, unless a solicitor wishes to by default adopt a definition of victory favourable to the client, the definition of victory should be carefully stated.

In a damages case for example, it might be stated that victory means obtaining a judgment of at least $X. An alternative definition consistent with the *Jorgensen* case, would be that

success is achieved if a judgment is obtained in excess of the solicitor/client costs payable by the client. It will be generally be damages cases in which no win/no fee agreements are used, although conceivably a no win/no fee agreement could be used in a case in which non-monetary relief is sought on the basis that it is expected that if there is success, there will be a costs order obtained against the other side which would enable a solicitor's costs to be paid. In that case, presumably the definition of success would presumably be the obtaining of an order for costs.

The second definitional issue arises out of the "*no fee*" part of the statement. There are two main problems here. The first is that, if as is common place what is being funded is litigation, then it is not the case that there may be no expense to the client if the action fails, because the client may be ordered to pay the other side's costs of an unsuccessful action. Accordingly, any no win/no fee agreement must not be expressed so as to imply that the client will have to pay nothing to anyone if the action fails. A statement that "*You will pay nothing if you lose*" would probably be deemed to be misleading, and could lead to a professional negligence action to recover costs payable to the other side if the action fails and the client argues they would not have brought the action if they realised this. It is this suggested that firstly, the "*no fee*" undertaking should be expressed in terms of no fees for legal services to your solicitor, and secondly, that the retainer agreement should have a specific clause that warns the client that, in the event that the action fails, they may be liable to pay fees to the other side. Such a clause in the standard form retainer, together with some estimation of such costs in the cover letter (assuming that one is adopting the common practise of a boiler plate standard retainer terms together with a cover letter which in effect contains individual terms of the contract) would protect in this regard.

The second issue is that of disbursements. Sometimes solicitors may wish to run a matter on the basis that they will not charge for legal costs, but will charge disbursements. Conduct Rule 16C.3.5 allows this, but if so, this should be made clear and it is then necessary to very

carefully define what is meant by disbursements. As discussed above, technically, disbursements only cover out of pocket expenses by the lawyer and a statement that "*You will only be liable for our disbursements*" will be likely to be implied as covering only, for example, matters such as filing fees, expert accounts and counsel accounts. While office administrative services such as photocopying and sending facsimiles are often referred to by solicitors as disbursements, technically they are legal costs (as is confirmed by the fact that they are often dealt with in Court fee scales). Accordingly, charging for these if the action fails will mean that one is charging for costs in the event of failure, and would prevent the retainer from being a complying contingency costs agreement. Draft clauses defining success and defining fees are set out below. It should be noted that, as recommended above, the success fee has been defined as double Supreme Court scale. Solicitors wishing for a time based success fee will need to seek to draft to attempt to overcome the problems this gives rise to and Rule 16C as discussed above, but will run a high risk of the Court finding the retainer to be invalid.

"*No Win/No Fee Retainer*

We act for you on the basis that we will not charge any amount [will charge disbursements only] unless you are successful in the proposed action. In the event that you are successful we will charge for our legal work at double the rates provided for by the Supreme Court scale from time to time. A copy of the current Supreme Court scale is attached."

As to the definition of success, see the precedent provision set out below under the "*Fair and Reasonable*" heading.

If you intend to charge disbursements even in the event of failure, a clause to the effect of the following should be included.

"*Disbursements*

Disbursements are out of pocket expenses to third parties paid or incurred by us on your behalf such as barristers' fees, Court fees and experts' charges. They do not include our internal office expenses such as photocopying or facsimiles performed by us."

Fair and Reasonable

A retainer agreement must be both fair and reasonable. To meet the test under section 42(7) of the *Legal Practitioners Act* which in turn reflects a longstanding common law position. Reasonable has been held to mean substantively reasonable, and fair to mean procedurally fair (see the discussion of these requirements in *McNamara v Kasmeridis*). Secondly, a retainer agreement must meet the specific ethical rules relating to retainer agreements, which have been imposed by legislation and/or Solicitors' Ethics Rules.

Looking firstly at the generalised fairness and reasonableness requirement, the fairness requirement does not differ greatly in a no win/no fee retainer from a normal retainer. The usual requirements are that, the client must have an opportunity to actually consider the agreement (either through a detailed discussion by the solicitor or giving the retainer agreement to the client to take away and think about), and that any entrenchment on the client's common law rights must be made clear to the client that they are giving up rights that apply. Thus, for example, if the effects of the retainer is that the client will pay higher than the scale costs which will otherwise apply, the client must be advised of this. Set out below are clauses giving such advice and advise as to possibly paying the other side's costs in the context of a double scale contingency charge in a District or Supreme Court action.

"*Higher Fees*

In the event that you are successful in the proposed action, as defined in this agreement, you will as a result of signing this agreement, be liable to pay higher fees to us than if you had not signed the agreement. In the absence of a special agreement we would be entitled to charge you on the Supreme Court scale (a copy of which is provided to you with this agreement), whereas under this agreement in the event of success you will pay double the Supreme Court scale rate. Further, any order for recovery of costs from the other side in the event you are successful is likely to be calculated on the Supreme Court scale, so that any such recovery is likely to be for half or less of the costs we will charge you.

Liability for Other Side's Costs

If you discontinue the action, or lose at trial, it is likely that you will be ordered by the Court to pay an amount, likely to be calculated on the Supreme Court scale, towards the other side's legal costs. Thus although you will not have to pay us [alternatively – will only have to pay our disbursements] if you lose, you may still face a substantial costs liability to the other side".

However, reasonableness requirements can be tricky. There are two main areas in which they could come into play. The first is the common practise of solicitors in no win/no fee retainer agreements under which they are substantively funding the action, to require of the client either that they agree to accept settlement offers if the solicitor deems them adequate, or that obtaining a settlement offer of a certain amount or which are deemed adequate by the solicitor, shall amount to success under the terms of the agreement.

In general, the decision whether to accept a settlement offer is one for the client. It would not be regarded as an adequate reason, in the absence of an express retainer agreement to that effect, to decline to act for a client that they have rejected a settlement offer. This is unproblematic in the case of a client who is paying the bills. If they want to reject a reasonable offer they will suffer the consequences in that they will have to pay the solicitor's costs if the action fails.

However, there is a clear conflict of interest which arises in a case where a solicitor is funding an action. Here, if the offer is accepted, the solicitor will be paid, but if it is not accepted and the action fails, the solicitor will not be paid. It may be in the interests of a solicitor to accept an offer when it is not in the interests of a client, or equally it may be in the interests of both the client and the solicitor to accept the offer, but the client may have an inflated view of the worth of the claim and may not be willing to do this. There is not a great deal of law in this area, and the following suggestion is the tentative views of the writer as to what will be permissible retainer agreements.

Probably the best retainer agreement to cope with this position, and one which the writer is fairly confident will be hard to successfully challenge would be to provide in the initial retainer agreement that success be defined as obtaining a judgment or an offer of a certain amount. If that certain amount is offered and rejected by the client, the client then has to pay the solicitor's fees, this puts considerable pressure on the client to accept the offer, as if it is not accepted the solicitor can demand their fees which they are prima facie unlikely to pay. In practical terms further, if the client and solicitor have agreed beforehand as to what will be success, it is unlikely that having obtained an offer for that amount the client will reject it.

However, such a figure will often be difficult to arrive at, at the start of a retainer, as at that time information will be incomplete. For example, if information comes forward to show the client's case to be difficult, it may well be reasonable to accept an offer of much less than was

originally hoped for. Accordingly, some retainer agreements attempt to define success as the obtaining of an offer of any amount the solicitor deems acceptable, or to require the client to accept any offer the solicitor deems to be acceptable. In the view of the writer such provisions could probably be subject to successful challenges being unreasonable. The potential conflict between the client and the solicitor's interests set out above, would mean that if a solicitor could deem an offer to be acceptable in their unfettered discretion, they might do so in their own interests rather than those of the client.

It is however in the view of the writer probable that a provision which defines success being obtained as obtaining a reasonable offer, would probably be deemed to be reasonable. The writer suspects that the Court would accept an argument that the fact that the solicitor is being obliged to fund the action, means it is not unreasonable for them to be relieved of that obligation if the client will not accept an objectively reasonable offer. Further, such clauses are common in real estate sale agency contracts, and are enforced by the Courts too. Of course, if no amount is fixed and the offer is merely referred to by terms of objective reasonableness, this does lead to problems when there is a genuine dispute between client and solicitor as to whether an offer is reasonable (bearing in mind that the test for reasonableness will be reasonableness in the interests of the client). Obviously, it will be undesirable to have to have that tested by Court litigation. A lawyer who refused to act further without fee because they took the view that the client unreasonably refused an offer could find themselves potentially the subject of a professional negligence action if a Court was to hold subsequently that the client had been right and the lawyer had been wrong in assessing the reasonableness of the offer. If the Court is convinced that the action would have succeeded had the lawyer continued to act but the action failed because the lawyer ceased to act, the lawyer could be liable in damages for the amount of the lost claim. It is suggested therefore that if there is a "*reasonableness*" test on accepting offers, there be a device set up to enable a quick and binding determination as to reasonableness. It might well be appropriate to provide for a quick arbitration on the point, to be determined by, a barrister agreed between the parties or

appointed by the President of the Law Society. Given that the client is likely to be impecunious, it will be probably be necessary for the solicitor to pay the costs of such arbitration in the first instance, but with appropriate ability to have those costs refunded by the client, should the solicitor's position be upheld. Such a clause appears below.

"Success is defined to constitute any one or more of the following:

1. *Obtaining a Court judgment or settlement in excess of the amount of costs and disbursements payable to us under this retainer;*

2. *Obtaining an offer of settlement which it is reasonable for you to accept and which we recommend in writing should be accepted, but which you do not accept;*

3. *If there is a dispute between you and us as to whether it is reasonable for you to accept any offer of settlement, it shall be resolved by the provision of a written and reasoned opinion as to such reasonableness provided by a barrister appointed by agreement of you and us, or in default of agreement by the President of the Law Society of South Australia, who shall act as an expert and not an arbitrator, and whose determination shall be final;*

4. *We shall pay the costs of any such barrister's opinion in the first instance, but in the event that the barrister finds the offer to be one which it is reasonable for you to accept, we shall be entitled to recover the reasonable costs of such opinion from you."*

It should be noted that success is defined as obtaining a judgment or settlement rather than obtaining payment under the judgment or settlement. This is to avoid the problem that

otherwise, it would not be possible to tax costs against a judgment debtor who had not yet paid, as the liability to pay costs (and thus under the indemnity principle the ability to recover them) would not accrue until payment.

The second substantive problem in drafting retainer agreements is providing for the situation in which the solicitor may wish to stop acting because it becomes clear that the action is unlikely to succeed or the costs to the solicitor of running it are going to exceed any likely return. This is not a problem in cases which the solicitor is being paid by the client as, subject to the solicitor's obligation to refuse to act in a case which has no reasonable prospect of success, a solicitor who has advised the client that the matter is likely to fail and has received advice to continue will still receive payment. However, a client who is not having to pay any solicitor's fees themselves, and who may be unconcerned by the prospect of having a costs order made against them because they have no assets, may take the view that even if there was only a very small chance of the action succeeding, that if no settlement offer can be obtained from the defendant, it is in their interests to pursue even a faint chance to trial, as the costs of doing so are being borne by the solicitor and not themselves. A normal retainer will cover this in a no win/no fee situation by having an ability for the solicitor to require the plaintiff to pay into trust sufficient monies to cover trial costs. However, where ex-hypothesi there is no obligation to pay costs unless the action succeeds, such a clause would be inappropriate.

It would obviously be possible for the solicitor to specify in the retainer that they may cease to act if they come to the view there is no reasonable prospect of success, since this merely parallels the ethical obligation not to run hopeless cases. However, there can clearly be cases with a reasonable chance of success but which is not commercially desirable to run. For example, it is going to costs $2 million to run a very lengthy trial and there is a 25% chance of succeeding and obtaining $100,000.00, a solicitor will presumably not want to advance funding for such a trial.

One possibility is simply to not deal with this in the retainer and to rely upon very careful pre-action screening to make sure that there is no such situation arises. However, it is possible for factual and legal situations to change dramatically after litigation has been issued. An unexpected High Court decision for example may mean that the legal basis for a claim is totally destroyed. Scientific research may show that the damages which were thought to be due to the wrongful action of the defendant are in fact due to something else entirely. The writer's tentative view is that it is probably possible to have a retainer agreement which stipulates that the solicitor may withdraw from the action should it be the case that the action becomes one which would not be funded by a client who was fully capable financially of funding the action, but that it had to do so at their own expense. Again, it is suggested that in cases of dispute as to this the dispute should be resolved by an independent barrister. A draft clause to this effect is set out below.

"The solicitor may cease to act for the client if:

(a) for any reason it becomes unethical for the solicitor to act for the client;

(b) the client instructs the solicitor to cease acting;

(c) the chances of success of the action decrease to the extent that a client having the economic ability to pay the costs of the proceedings, and any costs which might be ordered against the client if the action fails, would not continue with the action;

(d) any dispute between the client and the solicitor as to whether the test in (c) above is met shall be resolved by a written and reasoned opinion provided by a barrister appointed by agreement of the parties or in default of agreement by the

President of the Law Society of South Australia, who shall act as an expert and not as an arbitrator, and whose determination shall be final;

(e) the solicitor shall pay the costs of any such barrister's opinion".

It should be noted that the clause merely provides that in such a circumstance the solicitor may cease to run the action. It does not provide that the solicitor is entitled to any remuneration for running action down to withdrawal (unless the action succeeds under another solicitor, so that the definition of success is altered). In the writer's view a provision for remuneration in these circumstances would probably be held to be unfair and unreasonable as being contrary to the no win/no fee nature of the agreement. Prima facie, when a solicitor bails out on the grounds that the action is uneconomic to run, it is unlikely that any other solicitor will replace him and the action is likely to be abandoned and be unsuccessful. In those situations, where the action is likely to be unsuccessful through no fault of the personal plaintiff, providing for fees would undercut the whole no win/no fee theory.

Another drafting problem is what occurs if the client wishes to dismiss the solicitor. A provision preventing the client from dismissing the solicitor would almost certainly be struck down as unreasonable. Accordingly, it is not possible to stop the client sacking the solicitor just before settling, in the hope of avoiding paying the solicitor's fees. The problem exists in non-contingency fee matters as well, and the common law has solved it by giving the solicitors a lien for fees over any moneys they have substantially assisted in recovering (see GE Dal Pont, Lawyers Professional Responsibility, 3rd Edition at pages 366 to 370). The contingency fee agreement should therefore make it clear that if success is achieved after the solicitor ceases to act, the solicitor is entitled to be paid and retains a lien on the moneys. Given the common law, it may not be strictly necessary to expressly provide for this in the agreement, but it is probably wise to do so, both to practically bring home the point to the client and to

avoid any argument as to non-compliance with Rule 163.8(1). A precedent clause is set out below.

"*Cessation of Acting*

Should we cease to act for you, we will not then be entitled to bill you for our work, but should you subsequent to our ceasing to act achieve success in the action (as defined in this agreement) you will then be liable to pay us for our work on the basis set out in this agreement, and in that event we shall have a lien for our fees over any moneys you receive under that success.

You agree to, at our reasonable request, keep us informed as to the progress of the action subsequent to us ceasing to act, and to provide a copy of this retainer agreement to any other solicitor who subsequently acts for you in the action."

New Legislation

The *Legal Practitioners (Miscellaneous) Amendment Act* 2013 has been recently enacted by Parliament. Upon the costs provisions being proclaimed, the regulation of contingency fees will change substantially and will largely be determined by the provisions of the new Schedule 3 to the *Legal Practitioners Act*. See in particular clauses 25 to 27 of Schedule 3, which are set out in full below.

"***25–Conditional costs agreements***

(1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate.

(2) A conditional costs agreement may relate to any matter, except–

(a) a criminal matter; or

(b) a matter that relates to or involves child protection, custody or guardianship or adoption; or

(c) proceedings under any of the following Acts of the Commonwealth:

(i) the Family Act 1975;

(ii) the Migration Act 1958;

(iii) the Child Support (Assessment) Act 1989; or

(d) any other matter of a kind prescribed by regulation.

(3) A conditional costs agreement–

(a) must set out the circumstances that constitute the successful outcome of the matter to which it relates; and

(b) may provide for disbursements to be paid irrespective of the outcome of the matter; and

(c) must be–

(i) in writing; and

(ii) in clear plain language; and

(iii) signed by the client; and

(d) must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement; and

(e) must contain a cooling-off period of not less than 5 clear business days during which the client, by written notice, may terminate the agreement.

(4) Subclause (3)(c)(iii), (d) and (e) do not apply to a conditional costs agreement made under clause 24(1)(c).

(5) Subclause (3)(c)(iii), (d) and (e) do not apply to a conditional costs agreement made with a sophisticated client.

(6) If a client terminates an agreement within the period referred to in subclause (3)(e), the law practice–

(a) may recover only those legal costs in respect of legal services performed for the client before that termination that were performed on the instructions of the client and with the client's knowledge that the legal services would be performed during that period; and

(b) without affecting the generality of paragraph (a), may not recover the uplift fee (if any).

26–Conditional costs agreements involving uplift fees

(1) A conditional costs agreement may provide for the payment of an uplift fee.

(2) The basis of calculation of the uplift fee must be separately identified in the agreement.

(3) The agreement must contain an estimate of the uplift fee or, if that is not reasonably practicable–

(a) a range of estimates of the uplift fee; and

(b) an explanation of the major variables that will affect the calculation of the uplift fee.

(4) If a conditional costs agreement relates to a litigious matter–

(a) 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; and

(b) the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable.

(5) A law practice must not enter into a costs agreement in contravention of this clause.

Maximum penalty: $50,000.

27–Contingency fees are prohibited

(1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is 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.

(2) Subclause (1) does not apply to the extent that the costs agreement adopts an applicable scale of costs."

Comparison of Old and New Provisions

There are a number of differences between the old and the new provisions, although their basic structure is similar. Firstly, it should be noted that there is a wider definition of matters which cannot be the subject of conditional costs agreements. Not only are criminal and family law matters excluded, but matters under the *Migration Act* are also excluded. However, it should be noted that the exclusion is only for matters "*under*" the various Acts referred to. It would therefore seem that, for example, a common law claim for false imprisonment that succeeds because *Migration Act* formalities were not complied with, would not be a claim "*under*" the *Migration Act* and thus could be the subject of a contingency fee agreement. It should be noted that unlike the current position where in order for there to be a complying contingency fee agreement it is necessary that the lawyer recover none of his or her costs in the event of success, clause 25(1) provides that a costs agreement may provide that "*Payment of some or all of the legal costs is conditional on the successful outcome of the matter*". Thus for example, it would be possible to reserve a right to charge internal administrative expenses or a flat defined fee regardless of the outcome. The agreement must, per clause 25(3)(c) be in

writing in clear plain language and be signed by the client. It should be noted that this differentiates it from the normal range of fee agreements in South Australia which the client can accept by conduct. Accordingly, if you are drafting a conditional costs agreement, any standard boiler plate used in your normal retainer agreements as to acceptance by conduct should be excluded.

Clause 25(3)(a) states that the costs agreement "*must set out the circumstances that constitute the successful outcome of the matter to which it relates*". It is thus arguable that an agreement that just says you do not pay unless you win and does not define what is meant by winning, may not be a valid conditional costs agreement. However, using the definition discussed previously in this paper should be sufficient to set out the circumstances that constitute the successful outcome.

Clause 25(3)(b) provides that the agreement "*may provide for disbursements to be paid in respect of the outcome of the matter*". Again, as previously discussed this probably means disbursements in the technical sense of out of pocket expenses, but given that one can provide that some costs may be payable even in the event of that the matter does not succeed, this is no longer vital for the validity of the agreement. Clause 25(3)(d) provides that the agreement "*must contain a statement that the client has been informed of the client's right to seek independent legal advice before entering into the agreement*". Two things are necessary for this to be met. Firstly, obviously there must be such a statement in the agreement itself. Secondly, the advice must be given before entering into the agreement. Accordingly, it is not appropriate to simply hand the client the agreement and ask them to sign it. It is suggested that normally the agreement should either be handed or posted to the client and they should be asked to consider it and then come back in for signing if they wish. Probably the best way of proceeding would be to post it out under cover of a letter which specifically draws their attention to their right to seek independent legal advice and then to have a confirmatory clause in the agreement itself.

Clause 25(3)(e) has a requirement that there be a cooling off period of not less than five clear business days. Weekends and public holidays are thus excluded, although it would seem that time would run over the Christmas break apart from actual public holidays like Christmas Day and Boxing Day. The days must be clear. This would mean that if the client signs the agreement on a Friday, they would have until the following Monday to terminate the agreement.

Clause 25(4) provides that subclauses "*(3)(c)(iii), (d) and (e) do not apply to a conditional costs agreement made under clause 24(1)(c)*". Clause 24(1)(c) refers to costs agreements between "*a law practice and another law practice that retains that law practice on behalf of a client*". This would cover the situation where the primary solicitor for a client engages a barrister, an interstate agent or a costs consultant to act for the client. In such a case the requirements of signing, being advised of independent legal advice and the cooling off period do not apply.

Under clause 24(5) certain requirements do not apply to a conditional costs agreement "*made with a sophisticated client*". A sophisticated client is a client to whom various sorts of disclosures are not required under the Act. Sophisticated clients are listed in clause 13(1)(c) and include legal practitioners, public companies and subsidiaries of public companies, foreign companies and subsidiaries of foreign companies, large proprietary companies, financial services licensees, liquidators, administrators or a receiver, professional services partnerships of more than 20 members, the Crown, government departments or public authorities of the States, Territories or Commonwealth and participants in a joint venture in some circumstances. Whilst such persons do not have the benefit of most of the disclosure requirements imposed by the amending legislation, it should be noted that with regard to a conditional costs agreement the only matters they exempted from are signature, cooling off and advice as to seeking independent legal advice.

With regard to the cooling off period, it should be noted that clause 25(6) provides that if the client terminates an agreement within the cooling off period, the law practice may recover for work done on the client's instructions which the client knew would be performed within that period but may not recover any uplift fee.

Turning from the formalities set out in clause 25 to the substantive provisions in clause 26, clause 26(1) provides that the agreement may provide for the payment of an uplift fee and 26(2) provides "*the basis of calculation of the uplift fee must be separately identified in the agreement*". Thus for example, presumably if one is charging 25% more than one's normal costs, one would have to identify this is how one is proceeding. Clause 25(3) provides the agreement must contain an estimate of the uplift fee or if this is not reasonably practical, a range of estimates of the uplift fee and an explanation of the major variables that affect the calculation of the uplift fee. Clause 26(3) appears to require not just an indication of the basis on which the uplift is charged eg, a 25% increase, but an estimate of how much in dollar terms is likely to actually be paid reference to the uplift fee. Of course, in the common circumstances of which the uplift fee is a percentage of the work done, rather than a flat fee, this in effect requires the giving of an estimation of the amount of work that is to be done. However, this is something which will be required under the new legislation in all cases, whether or not contingency fees are charged. It should be noted that there is no restriction on the nature of an uplift fee which may be charged in a non-litigious matter in the legislation. However, there does remain the fact that under this new legislation the requirement that a retainer agreement be fair and reasonable will still exist. Accordingly, it is still possible that a truly outrageous uplift fee in a matter might be held to be unreasonable. However, lack of any other regulation does seem to mean that it is now open for solicitors to charge, for example, a significant flat success fee in a matter such as doing work for an initial public offering in the same way as merchant bankers have traditionally done.

However, litigious matters are likely to constitute the considerable majority of conditional costs agreements. To the writer's knowledge, to date, conditional costs agreements are normally mostly being used in risky litigious matters to compensate the solicitor for the risk of the action failing. Clause 26(4)(a) is similar to the existing regulations in that it provides "*The agreement must not provide for the payment of an uplift fee unless the risk of the claim failing, of the client having to meet his or her own costs, is significant*". What is very different is that 26(4)(b) provides "*The uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable*". The key words are "*otherwise payable*". These seem to indicate that the 25% uplift, need not be on scale fees, as was the uplift under the current provisions, but may be an uplift on one's normal legal costs. Thus for example, if a solicitor is charging normally $400.00 per hour, that solicitor might provide that he will not charge if he or she loses but if he or she wins they will charge $500.00 per hour as a 25% uplift.

The change from an uplift of up to 100% of scale costs to an uplift of 25% of costs otherwise chargeable, will have different effects on different types of firms. It will probably make contingency fee arrangements less attractive for those plaintiff personal injury firms which normally charge scale in any event, in that an addition of 25% to scale is much less remunerative than an additional 100% to scale. It probably will however make the contingency fee arrangements somewhat more attractive for commercial firms which may not have been attracted to a contingency fee arrangement because their fees may not have been that far off double scale in any event. It should be noted that under clause 26(5) it is a criminal offence for a law practice to enter into a costs agreement in contravention of clause 26 attracting a $50,000.00 fine. It would seem that a failure to adhere to the procedural requirements in section 25 will only result in the costs agreement being invalid, however a failure to comply with the provisions in clause 26 is a criminal offence, and thus presumably also professional misconduct.

Clause 27 is similar to the old law in that it prohibits costs agreements "*under which the amount payable to the law practice, or any part of that amount, is 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*". Again this is a criminal offence with a $50,000.00 penalty. Neither under the old nor the new provisions will it be open for an Australian lawyer to stipulate, as an American lawyer may that they will do the work, charge nothing if they win and take one quarter or one third of the damages they lose. Clause 27(2) makes an exception that clause 27 does not apply "*to the extent the cost agreement adopts an applicable scale of costs*". This is to cover the circumstance where a solicitor agrees to fix their solicitor/client costs by reference to a Court scale which has provisions for remunerating work by reference to the amount of the recovery. The main example in South Australia would be the Magistrates Court scale, which has several fee items which are based on the amount of recovery.

There are specific provisions as to the effects of breaching these provisions on costs agreements. Clause 29(4) provides that if a costs agreement is entered into in contravention of clause 26, the solicitor is not entitled to recover an uplift fee and must repay any amount of uplift fee to the client. More drastically, clause 29(5) provides that if a law practice has entered into a costs agreement in contravention of clause 27 (that is, a remuneration for a percentage of the recovery) they are "*not entitled to recover any amount in respect of the provision of legal services to the matters which the costs agreement related must repay any amount received in respect of those services from the person from whom it was received*". Thus if you agreed to conduct an action on the basis you would take one quarter of the damages, and you were successful, it would be open to the client after the success to turn around and state they will not pay you anything because of clause 29(5). The drastic effect of clause 29(5) is clearly a deliberate decision to deter solicitors from entering into such arrangements. Clause 29(6) provides that if amounts which should be repaid are not repaid "*the person entitled to be repaid may recover the amount from the law practice as a debt in*

a Court of competent jurisdiction". This would seem to give the client an alternative option to a taxation of suing for repayment. The writer suspects however that what is likely to occur in such a case is a stay of the action pending a taxation of costs in the Supreme Court to determine the validity of the retainer.

The writer sets out below a draft clause for an agreement with an unsophisticated client for a litigation matter which complies with the necessary formalities and provides for a 25% uplift fee on the solicitor's normal time charged fees. It should be noted that the required explanation of the major variables with respect to the calculation of the uplift fee cross-references to the major variables dealt with in giving the overall fee estimate (which is required under the new legislation). It must be stressed that the new legislation changes many matters other than contingency fees, and persons seeking to enter into contingency fee arrangements after the new costs provisions come into force most likely on 1 July 2014, should note these provisions as additions to a general retainer drafted to be consistent with the new rules. The Law Society will shortly be launching such a precedent retainer.

"*Conditional Costs Agreement*

We will not charge you [or will charge disbursements only, or some defined disbursements], unless there is a successful outcome to the proposed litigation (as defined in this agreement), but in the event that we are successful we shall charge an uplift fee of 25% on our usual hourly rates.

Our normal hourly rates are:

Partner	*$*	*per hour*
Senior Associate	*$*	*per hour*

Solicitor	*$*	*per hour*
Junior Clerk	*$*	*per hour*

and thus our rates to be charged by us under this agreement, including the 25% uplift, are as follows:

Partner	*$*	*per hour*
Senior Associate	*$*	*per hour*
Solicitor	*$*	*per hour*
Senior Clerk	*$*	*per hour*

Notification of Rights

It is mutually confirmed that before entering into this agreement you were informed of your right to seek independent legal advice concerning the agreement.

Cooling Off Period

You have the right to, within five clear business days from the signing of this agreement, terminate the agreement by written notice to us.

Estimation of Uplift Fee

As our uplift fee is 25% of the fees which we would normally charge under our hourly rates, its amount is determined by the number of hours we spend on your matter. The uplift fee is estimated to be 25% the estimated range of fees set out in our fee estimate above, and is thus a range from $..... to $..... The major variables that will affect the calculation of the uplift fee are the major variables as dealt with above in our estimate of your likely total legal charges."

Incorporated Practices

Incorporated practices should note that at the Commonwealth level, there is draft legislation being considered to regulate litigation funding. It is based on the corporation power so it will not affect unincorporated practices. At this stage it is unclear whether the legislation will apply to incorporated law practices or only to external funders, or whether it will limited to funding of class actions and of course, if the government changes, the future of the legislation is unclear. However, incorporated practises are advised to keep an eye on this area.

Party/Party Issues

Although the main subject of this paper is the preparation of a valid no win/no fee retainer, there are also party/party consequences of a no win/no fee retainer which solicitors should be aware of. Firstly, you will obviously have to recognise that if there is going to be an additional charge for entering into a no win/no fee retainer, then it is very unlikely the client will be able to recover this charge in the event of success. Clearly a normal party/party costs order will not recover the charge, as party/party costs are strictly allowable on a scale basis and a no win/no fee agreement will charge on a higher than scale basis. There is authority that a solicitor/client order (such as that obtained with a successful plaintiff's offer) will not cover a

contingency free charge (see *Pomeroy v Staresko (No 2)* (SADC, Brebner CJ, D3739, 23 December 1997, unreported and *Evans and Evans v Rivett Aboricultural and Waste Equipment Hire Pty Ltd* (2006) SADC 13).

It is theoretically possible that an indemnity costs order might carry with it a right to recover a no win/no fee loading. Under an indemnity costs order one can prima facie recover all costs charged, and it is necessary for the paying party to possibly show them to be unreasonable. See *Jarvis v Cranston* (2008) VLC, 17 October 2008, Case No CI-07-04997, for a Victorian County Court review of the various Victorian authorities on that point (although in that case the judge refused to award an uplift fee on the basis it was not a legal cost but a funding arrangement). It might be the case that the paying party could not affirmatively prove that the plaintiff could have got legal services without agreeing to pay a no win/no fee loading. However, it will almost never be the case that where there is a no fee agreement, one would be entitled to indemnity costs. Basically the Courts award indemnity costs in the cases where one party has abused or come close abusing the processes of the Court by bringing a hopeless claim or running a hopeless defence. However, as it is an ethical prerequisite of entering into a no win/no fee agreement with a loading that the solicitor have satisfied themselves that there is a substantial risk that the action might fail, it would be extraordinary if in such a case an action in which there was a substantial risk of failure (and in which the other side must therefore have a substantial risk of succeeding, would attract indemnity costs.

However, if one has succeeded in getting a judgment in the action which qualifies as a success under the retainer, the mere fact that you would not have been able to charge costs if the action was lost will not preclude you from getting party/party costs, as upon success the client is liable to pay you and thus the i9demnity principle (under which one cannot recover more for party/party costs than one is liable for costs to one's solicitor) is satisfied.

Secondly, interlocutory costs orders may present problems. Whilst Rule 265(2) provides that prima facie interlocutory costs orders are not enforceable until the conclusion of the action, it is possible for the Court to depart from this Rule and it will often do so in cases where one party has been repeatedly at fault (as in for example cases where several Statements of Claim are struck out). If this occurs, and an immediately payable costs order is made and is sought to be enforced, the solicitor may be in the difficult position of having to choose either to pay the costs out of their own pocket or see for example their client's house sold up pending the outcome of the litigation. Further, if a solicitor acting under a contingency fee agreement obtains an interlocutory costs order in favour of his client, it would be open for the other side to argue that an order for immediate payment cannot be justified because the client will have no liability to the solicitor, and thus no costs to be indemnified against, unless and until the action concludes successfully.

Finally, it should be noted that some kinds of no win/no fee arrangements may render the solicitor potentially liable to personal costs orders. The principle is the mere fact that one is proceeding under a no win/no fee arrangement with a loading for success does not render the solicitor personally liable for costs, see *Cook v Pasminco* (2006) 107 FCR 44. However, one of the reason that the writer is reluctant to draft retainers that provide that the solicitor may make decisions in an contingency fee action which override the client's instructions, is that in such a case the solicitor would seem to be very exposed to an order that the solicitor pay the costs of the client personally. If the solicitor reserves to himself the right within the retainer to make all procedural decisions in the matter and then, against the client's wishes brings an application that fails, it is likely that the Court, if it becomes aware of those circumstances, would order the solicitor rather than the client to pay those costs. Further, even though the fact the solicitor will be profiting from litigation is not in itself sufficient to justify a costs order against the solicitor, it may be of some assistance to the other side if they are seeking costs against the solicitor, an otherwise borderline situation. If for example a claim is made that the solicitor should pay the costs because they were responsible for bringing baseless litigation,

the fact that the solicitor has a financial stake in the litigation might tip the balance against the solicitor in a closely run discretionary decision.