

Covering middle Australia: WA's new litigation assistance fund

A scheme to fund litigation in Western Australia offers clients a chance to bring litigation that they would otherwise not have been able to afford.

One attraction of the scheme to lawyers is that their fees are "guaranteed." The Litigation Assistance Fund was established by a seeding grant of \$1 million from the Public Purposes Trust to the state government.

Administration of the fund is governed by a trust deed and the Law Society as trustee employs a manager.

The fund pays the legal fees associated with litigation for persons who meet specified criteria which includes that a person must not be eligible for Legal Aid or be able to afford to pay legal fees.

An explanatory memorandum published by the Law Society says: "The Fund essentially recognises and seeks to address the need created by the fact that there is a large group within the community of what may be described as average means but who periodically encounter legal problems calling for resources far beyond those which their means can satisfy."

The litigation must also have good prospects of success.

The general significance of the litigation is also relevant to whether assistance will be provided.

The person in receipt of assistance must agree to pay 15 per cent of the judgment or settlement (if any) to the fund.

This is known as "the Fund Fee" which is essentially a contingency fee.

Amendments have been made to WA legislation which allow the fee to be charged.

The arguments for and against allowing lawyers to charge contingency fees has been canvassed extensively in other jurisdictions.

A short summary of the issues can be read in an article written about the

by Martin Flynn*

debate in Victoria. That piece is *The Contingency Fee Option* by Rod Smith, 1989 Law Institute Journal 959. Although the fund draws its revenue from contingency fees the lawyer providing the service is paid a normal fee from the fund and therefore has no interest in the outcome of the litigation.

This distinction overcomes one of the arguments against contingency fees:



that lawyers' advice and conduct may be tempered by an interest in the litigation.

The nature of the fund does not overcome a number of other valid arguments against contingency fees: the possibility of speculative or vexatious claims, increased insurance premiums for defendants, charging a "percentage" is an inappropriate method to calculate remuneration for professional services and the fact that a successful client having to pay a "percentage" of the proceeds of litigation

towards legal fees is not fully compensated for their claim.

The fund fee is the revenue source for the fund. In assessing early applications to the fund, priority will be given to cases that will maximise the return, ie where the applicant will be a plaintiff.

The fund will pay the legal fees of the assisted person.

Initially this has been set at 85 per cent of the reasonable fee of the solicitor.

The fund has detailed rules to deal with a range of practical matters such as disbursements (paid by the fund), costs orders against the person (not paid by the fund), costs orders in favour of the person (the fund receives the proceeds), the unreasonable refusal of advice by the person (assistance may be withdrawn), and so on.

Apparently the Law Society of South Australia has funding for a similar scheme (*see story next page*). Such a scheme may be appropriate for the Northern Territory.

The scheme aims to meet a need — legal services for those who do not meet the criteria for legal aid.

This need exists in the Northern Territory.

The scheme does not impose an impost on practitioners.

The WA scheme pays 85 per cent of solicitor's fees. Consideration could be given to paying 100 per cent of the solicitor's fee.

The scheme is a potential source of work for solicitors.

Against these reasons for introducing a scheme in the Territory, it will also be necessary to consider the disadvantages of contingency fees mentioned above.

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