

Choice – the best consumer protection

By Clara Davies



I see the President's Page as a forum to express personal, sometimes controversial, views intended to trigger debate. I would therefore emphasise that the views expressed here do not represent the current views of ALA but are, rather, my own.

The *United Nations Guidelines for Consumer Protection* note that a key goal for any government in achieving or maintaining adequate protection for its people as consumers is to encourage the development of market conditions that provide consumers with greater choice at lower prices.¹

In many areas of the legal profession, particularly personal injuries law, freedom of choice for clients, (consumers) is limited – removed by government regulation. Arguably the most highly regulated profession in this country, legal services is one of the few areas where fees are restricted by regulation, thereby limiting consumer choice. The legal profession suffers as a result of this regulation but, more importantly, so do our clients.

Personal injury clients in Australia generally have the benefit of 'no win/ no fee' conditional fee arrangements. Such arrangements facilitate access to justice for many who might otherwise be denied the benefit of legal advice and representation. However, within the 'no win/no fee' framework, the manner of charging legal fees is virtually uniform. Most PI lawyers and/or law firms charge scale costs; the scale being set either by the courts or by firms themselves. It is rare for fixed fees or hourly rates to form the basis of a conditional fee arrangement. Firms generally don't depart from the conditional fee/scale costs structure, as they don't wish to differentiate

themselves in the marketplace on a costs basis.

One unfortunate consequence of this situation is lack of choice. Ultimately clients choose to engage a practitioner or firm for reasons other than cost, as the current PI marketplace doesn't facilitate such competition.

However, were the current prohibition against contingency fees to be removed, I believe that the PI marketplace would open up. PI lawyers would be encouraged to offer something other than the standard conditional fee/scale costs arrangement. Market forces would drive different service fee arrangements and consumers would thus benefit from a range of options and freedom of choice, enhancing competition in the marketplace and leading to lower prices.

Put yourself in the shoes of your average client for a moment. Legal costs arrangements must seem very complicated and overwhelming.

When clients first make contact with PI lawyers, most expect legal fees to be charged on a contingency basis – thanks to the influence of American television. Even if you spend time explaining legal costs to your clients, most still think that they will pay a percentage of their damages in fees. Once you mention any concept that makes reference to percentages, such as the 50/50 costs reduction rule or the allowable uplift ('success fee'), most clients automatically revert back to thinking of contingency fees.

I am an advocate for contingency fees. From the client's perspective, the concept of a contingency fee is simple, especially when compared to current legal fee arrangements. Contingency fees set an expectation for the client from the outset and

provide absolute certainty. The client is also assured that their lawyer will seek the best possible outcome within a reasonable timeframe. Nonetheless, I would also be the first to argue that there would need to be regulation of such arrangements. In 2005, the UK Civil Justice Council² considered contingency fees in the context of '...promoting access to justice', and concluded that regulated contingency fees should be considered.

But this debate is not just about contingency fees. It is about the development of conditions that allow for freedom of choice in the marketplace. Open up the marketplace, and you achieve consumer protection through the natural development of market conditions that provide consumers with greater choice at lower prices. Closing the marketplace down will limit options for both businesses and consumers, and ultimately result in a situation where lack of choice can cause disadvantageous outcomes for consumers. ■

Notes: 1 Department of Economic and Social Affairs, *United Nations Guidelines for Consumer Protection* (as expanded in 1999), United Nations, NY, 2003. 2 UK Civil Justice Council, *Improved Access to Justice – Funding and Proportionate Costs*, Report and Recommendations, August 2005.

Clara Davies is National President of the Australian Lawyers Alliance and a partner at Burt & Davies in Victoria.

PHONE (03) 9605 3111

EMAIL davies@burtdavies.com.au