

MEMORANDUM

**TO: MEMBERS OF THE EXECUTIVE COMMITTEE OF
COMMBAR**

FROM: STEWART M. ANDERSON & CARYN VAN PROCTOR

**RE: MEMORANDUM ON THE LAW COUNCIL OF AUSTRALIA
PAPER ENTITLED “PERCENTAGE BASED CONTINGENCY
FEES (PBCF)”**

DATE: 27 JUNE 2014

1. The Chairman of the Bar, William Alstergren QC has asked for input by CommBar to the PBCF paper and draft resolution prepared by Law Council of Australia dated 14 June 2014.
2. We recommend that the Committee endorse the final report and the recommendations of the PBCF Working Group for the reasons set out below.

History of “no win no fee”

3. No win no fee cost agreements have been permitted in every jurisdiction in Australia for at least the last 10 years. The concern at the time of the introduction of no win no fee cost agreements was that they would result in lawyers being tempted to stoop to unethical conduct to win and thus gaining access to the contingent fee. The Working Group of the Law Council was persuaded after considering the evidence and analysis that it had undertaken that no such threat to unethical conduct was contributed to or exacerbated by the existence of no win no fee agreements.
4. The Working Group observed:

“The Working Group is persuaded that the case for the introduction of contingency fee arrangements has been developing slowly in Australia. Amid growing concern for pressure from rising costs and the systemic and enduring underfunding of the legal assistance sector, it is difficult to logically sustain the justification for the ban against Percentage Based Contingency Fees on ethical grounds, since conditional agreements [no win no fee agreements] (that contain an uplift fee) raise the very same concern.”

5. The Working Group identified at least the following reasons why PBCF agreements should be permitted:
 - (a) *No principled objection possible* – No win-no fee speculative arrangements already exist in every Australian jurisdiction by virtue of the conditional costs regimes. Percentage Based Contingency Fees are a logical extension to an existing regime which has not resulted in adverse conduct in relation to lawyers' professional standards.
 - (b) *Complexity of terms of agreements and disclosure* – Conditional costs agreements/no win no fee agreements are usually based on time sheets and hourly billing or application of scales and typically involve complex and lengthy disclosure and agreement documents. By comparison a Percentage Based Contingency Fee Agreement is more easily and readily understood by the client.
 - (c) *Proportionality* – Percentage Based Contingency Fee Agreements are (like all no win no fee agreements) linked to the result achieved, rather than the time the lawyer has expended to achieve the result. This “builds in” proportionality between the lawyer's fees and the pool of funds recovered, which form the basis upon which legal costs are calculated.
 - (d) *More level playing field for litigation funders* – Percentage Based Contingency Fees would create a more level playing field for third party litigation funders. It would enable solicitors/lawyers to compete with litigation funders.
 - (e) *Incentive to resolution of cases* – Percentage Based Contingency Fees would require lawyers to assess at an early stage their client's prospects of success. It would also promote lawyers to vigorously and innovatively pursue cases that have a reasonable prospect of success. As a consequence, Percentage Based Contingency Fees act as a disincentive to instituting unmeritorious or vexatious proceedings.
 - (f) *Maintenance and champerty historical relic* – both as a crime and a tort, maintenance and champerty have been legislatively abolished in the ACT, NSW, VIC and SA. Both the historical justification and the public policy considerations for prohibitions on maintenance and champerty have now changed.
6. We attach for the Committee's convenience an extract of the recommendations of the Working Group as Annexure A to this memorandum.
7. We observe that the Working Group's report does not refer to the possibility that in cases in which lawyers enter into Percentage Based Contingency Fees, a Court may more readily accede to an application for security for costs. We refer

to the Full Court's decision in *Madgwick v Kelly* (2013) 212 FCR 1 at [41] to [48] (and in particular to [47]).

8. We note that there is a distinction between the current uplift regime and Percentage Based Contingency Fees, in that the current regime ensures that a lawyer cannot receive more than 125% of the lawyer's fees for actual work done. There is no limit on the disproportion between an amount that might be recoverable under a Percentage Based Contingency Fee arrangement and the work actually done by the lawyer. That of course, is not necessarily an issue that will concern our members.
9. We also note that the Working Group's recommendation is for Percentage Based Contingency Fees to be uncapped, except in personal injury matters.
10. Having considered the matter, we are of the opinion that Percentage Based Contingency Fees may be considered to be a logical and necessary next step to ensuring those who may not have the financial resources to fund litigation still have access to quality legal advice. Charging for the provision of the legal services on a percentage basis may also more readily understood by the client.
11. We recommend that the Committee endorse the recommendations of the PBCF Working Group.

STEWART M. ANDERSON QC

CARYN VAN PROCTOR

27 June 2014