Litigation Support Fund: a reflection on the New South Wales experience

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Two key questions were addressed on the basis of the Law Foundation`s experience in operating the Litigation Support fund : can such a fund be financially viable and can it contribute to access to justice?

Background: Contingency Legal Assistance Funds (CLAFs)

Models Of CLAFs

1 The term `contingency legal assistance (or aid) fund' (CLAF) is not precise. Schemes are variously referred to as CLAFs, litigation lending, contingency lending schemes, disbursement assistance schemes and, in the Law Foundation's case, litigation support funds. However described, there are two basic approaches:[1]

- schemes that cover partial, or total, legal fees and disbursements for litigation
- schemes that only cover disbursements for litigation.

2 In this report `CLAF' is used as a generic term to refer to both approaches unless otherwise specified.

3 A key characteristic of a CLAF is that it can support only litigation which results in a money verdict: a litigant is provided with assistance on the basis that if they are successful they will repay the CLAF at least the amount borrowed and, typically, a fee as a premium for the risk of the matter not being successful. For unsuccessful matters the litigant is not under any obligation to repay the amount borrowed. Depending on the conditions of the scheme, an unsuccessful plaintiff may still have to pay the other side's costs.

Funding models

4 A source of income is necessary because most CLAFs are established to be financially viable *i.e.* self-sustaining and not dependent on public subsidy. Financial viability can be defined as:

- requiring only moderate injection capital for its maintenance
- maintaining sufficient recurrent capital for its activities
- achieving a return at least equal to the opportunity cost of the organisation investing those funds.

5 The detailed financial goals of CLAFs to date have rarely been specified, at least in public documents.

6 CLAFs vary in the way that the fee is calculated. These include:

- charging an interest rate on the amount borrowed
- charging a percentage of the damages awarded, in jurisdictions where this is legal
- charging a maximum or fixed fee
- imposing no fee, or only a small administrative charge.

Overseas

England

7 The first definite proposal for a CLAF in a common law jurisdiction was made in a report on motor accident cases in 1966 in the UK. It was proposed by an organisation called Justice, which later prepared a more detailed proposal in 1978 as a submission to a Royal Commission on Legal Services. By 1986 the majority of litigation lawyers at a national conference of civil litigation solicitors held in the UK supported proposals for establishing a CLAF. A Law Society (England and Wales) working party report, *Improving Access to Civil Justice*, released in 1987, proposed the establishment of such a scheme as part of a package of alternative methods of funding litigation. This was later adopted in a 1989 White Paper by the Lord Chancellor as an initiative to be implemented.

8 When conditional fees for solicitors were introduced in 1995, the Law Society, with Accident Line Protect, introduced an insurance scheme for personal injury matters (excluding medical negligence) by which clients can pay a premium to protect them against paying the other sides' costs. However in October 1997 a major cutback in legal aid for all matters with a monetary claim again led to interest in trialling a CLAF.

9 In March 1998 the Blair government published a consultation paper, *Access to Justice with Conditional Fees,* which proposed that legal aid be withdrawn from personal injury and most civil matters, and that instead, the restrictions on conditional fee arrangements be relaxed.[2] Despite this, no fund has been established within the UK to date. While debate still surrounds this reform it is likely to create fresh impetus for a UK scheme.

Hong Kong

10 The first CLAF in a common law jurisdiction was established in Hong Kong in 1984 with a capital base of $HK1 million (AUD150,000 at the time; equivalent to AUD290,000 in March 2000). A commercial operation, this CLAF operated under very restricted criteria for many years because its small capital base was able to support only personal injury claims and a limited number of low risk civil claims. Despite this, it became financially viable within three years, and by September 1992 it had supported 442 applications with only 2 being unsuccessful. The surplus cash of the Fund at that stage had increased to $HK2 million.

Australia

Early developments

11 Australian jurisdictions observed the English developments, but the first real impetus for activity began in 1988 when the Law Council of Australia prepared a report on CLAFs. The Council recommended the establishment of a scheme in Australia to improve availability of legal services.

12 The NSW Legal Aid Commission established a working party which included representatives of the NSW Attorney General's Department, the NSW Law Society and the NSW Combined Community Legal Centres Group. This working party produced a report in 1989, which found there was merit in establishing a CLAF with the aim of being self-funding within five years. The working party proposed a CLAF as a way of providing assistance for personal injury cases and property claims in tort, and for breaches of contract in commercial disputes. It proposed that after the Fund became financially viable, coverage could extend to public interest cases and environmental disputes. Solicitors' fees were to be paid at legal aid rates, and applicants would be subject to means and merit tests.

13 The proposal was debated at the Legal Aid Commission, in the context of plans by the Commission to substantially cut its funding of civil matters: a CLAF was seen as a way of maintaining an involvement in these matters. Ultimately, the proposal was rejected by the Commission because of concerns that scarce legal aid funds would be diverted to establish a source of assistance which would discriminate in favour of litigants whose cases had prospects of a money pay out. It was argued convincingly within the organisation that legal aid funding should be allocated according to legal need and economic disadvantage, rather than on the basis of other criteria relevant to a CLAF model.

State-based funds

14 The first CLAF in Australia was established by the Law Society of Western Australia in 1991, with funding from the Lotteries Office. It covered legal fees and disbursements, and payment of the other side's costs in unsuccessful cases.

15 In 1992 the South Australian Law Society introduced a CLAF as part of a package of reforms to allow speculative fee arrangements in South Australia. The Litigation Assistance Fund covers legal fees and disbursements, and in 1995 the Law Society also established a separate fund which covers disbursements only.

16 The Northern Territory established a CLAF in March 1993, a joint initiative of the Attorney General's Department, the Legal Aid Commission and the Northern Territory Law Society. It was administered by the Legal Aid Commission, and was funded with a grant of $200,000 to cover disbursements only.

17 In October 1994 the NSW Law Foundation established a CLAF, the Litigation Support Fund (LSF).

18 In early 1997 the Victorian Law Institute, in partnership with the Attorney General's Department, established a fund with a capital of $1 million, covering disbursements only. By 1997, every mainland state in Australia had contingency legal assistance funds in operation, although by that time the NSW and WA funds were not accepting new applications.

19 The creation of these funds over a six year period, despite considerable uncertainty about their utility and viability, demonstrates the continuing pressures on legal policy makers to find alternative methods of funding litigation, at a time of reduced public funding for legal aid services.

Commonwealth proposal

20 In May 1994 the Access to Justice Advisory Committee, established by the Commonwealth Government, presented its final report, *Access to Justice: an Action Plan*. Chapter 10 of the report contained a review of the arguments for and against CLAFs. The report concluded that such funds have the potential `to provide a significant source of assistance to people wishing to pursue arguable claims *in a limited class of cases*' (emphasis added)[3]. The extent to which CLAFs promote access to justice would, the authors said, depend on the stringency of merit requirements. The committee anticipated that in the initial stages such funds would have very strict merit considerations to ensure financial viability, but as funds grew a wider range of matters could be promoted without threatening the self-funding nature of the scheme.

21 The committee found that the Commonwealth had a role to play in encouraging the development of CLAFs in all Australian jurisdictions, administered at a local level by legal aid commissions or legal practitioner organisations. The committee recommended that the Commonwealth, in consultation with legal aid commissions and professional associations, establish self-funding CLAFs in each jurisdiction, and monitor and evaluate their performance. It was not clear whether existing schemes would be used or new funds established.

22 The Commonwealth Government's response to the report was released as a package of budget commitments in 1995. Up to $4 million was committed for each of three years to establish these funds in each State.

23 The then office of Legal Aid and Family Services undertook a series of consultations with existing funds. It was reported to have prepared guidelines for a scheme ready to commence at the beginning of 1996. However the Federal government changed

soon after, and it was announced in the 1996/97 budget that the proposal had been cut as part of cost saving measures in the Attorney General's portfolio.[4]

Relationship with legal aid

24 CLAFs are typically seen as a supplement rather than as an alternative to legal aid funding. Despite this, considerable impetus was given to the development of CLAFs in Australia by the majority of state-based Legal Aid Commissions, reducing funding to civil matters during the early 1990s. CLAFs have usually been operated by either Legal Aid Commissions or Law Societies, although a fund in Hong Kong has operated as an independent commercial operation.

Speculative fees

25 The impetus created by legal aid cutbacks has perhaps been offset by speculative fee arrangements where an uplift is charged.[5] Speculative fee arrangements operate on much the same range of matters as CLAFs, and, it can be argued, therefore make such Funds unnecessary. This was a crucial debate within the Law Foundation throughout the operation of its CLAF, and will be examined in detail later in this report.

Champerty and maintenance

26 The Law Foundation considered whether the charging of the proposed percentage fee for the loans was in breach of the prohibition against champerty and maintenance, which had the effect of preventing a third party having a direct financial interest in the conduct of litigation.

27 The *Maintenance and Champerty Abolition Act 1993* (NSW) was introduced by the NSW government to complement the speculative fee arrangements under the *Legal Profession Reform Act 1993* (NSW). However, while this abolished the crime of maintenance, it did not prevent a contract being declared illegal by statute or on public policy grounds (s6). When read with section 188 of the *Legal Profession Act 1987* (NSW), the effect is to prevent solicitors in NSW charging a percentage of an award on part of their costs agreement.

28 There is still debate in NSW whether a third party to litigation is in the same position as a solicitor in being prevented from charging a percentage fee, as s188 is only directed to the legal profession[6]. However, the Law Foundation Board chose a conservative position, and redesigned the CLAF to earn income by a mechanism other than a percentage of the verdict amount.
29 The Law Foundation calculated the financial return to the CLAF if the fee was in fact 3% of median actual verdict moneys, based on the research data (see Ch. 5). From this, a range of fixed fees was set that would provide much the same return to the CLAF as if a percentage was charged. Setting a maximum fee rather than a percentage meant that the CLAF had no direct interest in the size of the eventual award.

30 At the same time the Law Foundation received advice from counsel that the coverage of party-party costs for unsuccessful actions was likely to amount to offering insurance, and as such would be subject to all the regulatory requirements of insurance cover. The Law Foundation did not wish to operate the Fund as an insurer, and the proposal was restructured so as not to extend to costs after the event, but to cover only disbursements.

Financial viability

31 There are two key questions to be answered from the Law Foundation's experience in operating the Litigation Support Fund:

- Can a CLAF be financially viable?
- Can a CLAF contribute to access to justice?

32 This Chapter explores the first of these questions; Chapter 7 examines the access to justice implications.

Viability of CLAFs generally

33 The main attraction of CLAFs is that, unlike legal aid funding, they do not require regular funding, and can aim to grow over time.

34 Scepticism that this is possible accounts for the very slow development of such funds in Australia, and the very limited outlays by those who have set up funds. To date only the Queensland fund has exceeded the $1 million committed by the first fund established in Western Australia in 1991. The early attempts by the Law Foundation to attract commercial capital are also instructive, with two banks and an insurer all declining to risk their own funds in a joint venture during the development of the LSF.

35 Doubt about the viability of CLAFs is understandable: their success depends on the inherent unpredictability of litigation which features variables such as:

- the ability of the lawyers running the case
- the reliability of the evidence for the plaintiff
- the decision of the plaintiff about how far to proceed once an offer of settlement has been made
- the outcome of the case if it proceeds to court
- the length of time of the litigation.

36 Further, there are variables not inherent in litigation, but over which a CLAF has no control:

- the size of the damages award: is it sufficient to repay the amount lent?

- the reliability of the solicitor in accounting for amounts owed
- legislative and policy changes.

37 Factors over which a CLAF has some control are:

- skilled merit assessment
- effective monitoring of draw downs
- effective monitoring of cashflows
- effective monitoring of progress of matters.

Legislative risk

38 Legislative change had a fundamental and unpredictable impact on the LSF. The impact of the changes to the Legal Profession Act in 1993, and the introduction of the Consumer Credit Code in 1996, were two factors that affected the structure and viability of the Fund. At the same time, government initiated changes aimed at reducing court delays, and the move in 1997 to have most personal injury claims heard in the District Court, reduced the length of time for matters to be completed and resulted in an increased rate of return to the Fund.

Empirical data to predict risk

39 There is clearly a financial risk in operating a CLAF. The Law Foundation spent considerable resources obtaining actuarial projections for various models so as to identify the risk sensitivities of the assumptions that were necessary for a viable fund. The success rate, and the length of time of matters, were the most sensitive assumptions.

40 The great advantage the Law Foundation had in establishing the Fund was that it had access to the relevant court data which was used to run through simulations based on various scenarios. When an unexpected event, such as the Consumer Credit Code, occurred, the model could be revised and any impact on viability measured.

41 A CLAF which has not undertaken an empirical risk assessment is largely operating in the dark, at least until it has sufficient case experience to be able to predict future patterns. The difficulty for small funds, as all the current Australian CLAFs are, is that their viability will generally not be known before most of the funds are committed.

42 With cases taking at least 18 months to completion, and in some cases up to five years, the LSF assumed that capital would decline to less than $200,000 by the end of the 2nd year of full operation. By that stage, if it began to become apparent that cases were taking much longer than the median assumption of 21/2 years, the LSF would be faced with a serious liquidity problem -- it would have to restrict the number of applications it could support and the capital would grow much more slowly than anticipated. If, by then, it became apparent that fewer than 50% of cases were succeeding, it would be too late to save the depletion of the original capital.

Legal fees and costs orders

43 The risks are greater for a CLAF which covers legal costs as well as disbursements, if only because the outgoings are concentrated on fewer matters. An even greater risk is present if a CLAF covers adverse costs orders for unsuccessful parties, as there is potential to lose more than was originally committed to the matter.

44 If a CLAF is to cover costs orders, it would be most prudent to do this by way of cover from an insurer. Such an arrangement is likely to constitute insurance, and the Law Foundation deliberately avoided going down this path. The experience of the Law Foundation at the time was that the risk is uninsurable, although UK schemes now provide `after the event' insurance cover.

45 It is the case, however, that a CLAF which covers both legal fees and costs orders is most likely to assist litigants who would otherwise not pursue a case because of the risk of a costs order against them. One conclusion that has been drawn from the Law Foundation's experience is that, in the short to medium term, the more financially viable the LSF, the less likely it is to contribute to access to justice: there is a significant trade off between the two. It seems possible, however, with poor planning, to have a CLAF which achieves neither.

Size of capital

46 The Law Foundation considered much larger schemes of $5 million and $3 million before arriving at the $1 million capital base for the LSF. The advantage of a larger capital base is that more matters can be supported: the benefits from this are largely to do with access to justice issues rather than financial viability, although a large fund is able to grow at a faster rate. The Law Foundation was simply unable to afford to commit funds to a larger fund without an overdraft facility or the borrowing of funds.

Definition of viability

47 The term is used to indicate that, at the least, a fund simply does not need to receive any further funds. For the Law Foundation, the definition was that the Fund, including its cost of operation, produced a greater return than would be obtained by prudent investment of the funds. This definition of viability allows for growth of the Fund, and higher risk profiles in matters supported, heightening access to justice. The Fund has exceeded that benchmark.

Conclusion

48 A financially viable fund will have:

- reliable data on which to assume the likely average cost of individual matters to be supported
- reliable data on which to assume the likely duration of matters supported

- healthy projected cashflows based on the assumption
- limits on the number of matters to be supported per time period, and the impact factored into cashflows
- understanding of the impact of different overall success rates on its capital
- limited exposure to any individual solicitor or firm
- focused its matters on a limited range of actions with strong likelihood of success
- a fund fee sufficiently high to cover losses from unsuccessful matters
- an effective system of merit assessment
- administration costs able to be covered from fund income
- its measure of viability clearly stated.

49 Time is the only barrier to knowledge. Even before a CLAF is established, the use of court data and a systematic risk assessment can, to an extent, predict the prospects of financial success.

50 By these criteria the LSF was a financially viable CLAF. The further question is the extent to which the LSF enhanced access to justice.

Development of the Litigation Support Fund (LSF)

Origins of the Law Foundation initiative

51 In the late 1980s, several of the Law Foundation's other activities pointed to the relevance of some form of litigation funding:

- the Law Foundation's establishment of Legal Expense Insurance Ltd in 1987 in a joint venture with GIO Insurance
- the creation of the Civil Justice Research Centre (CJRC) by 1991, which had the investigation of CLAFs as part of its original research agenda
- the Law Foundation's establishment of the Public Interest Advocacy Centre (PIAC), and the recognised difficulty of the funding of public interest litigation generally.

Initial model

52 A first proposal, developed in July 1992, involved an initial capital of $5 million, supporting over 1,000 cases per year, in a joint venture with an insurer. This proposal was submitted to MIRA Actuarial Consultants to test the various assumptions and risk profile to determine the proposed CLAF's financial viability.

53 MIRA's initial view was that the project would be financially unattractive because the underwriting of the risk would be so high that the cost for a potential plaintiff to use the CLAF would not be viable.

54 At the same time the CJRC had, as part of another study, obtained extensive data on the costs and duration of litigation in the Common Law divisions of the NSW District and Supreme Courts. This invaluable empirical data was used to predict the risk sensitivity of the scheme, and to develop realistic assumptions based on actual litigation practices.

55 The proposal was remodelled so that only disbursements would be covered: the previous proposal had also covered lawyers' fees. This CLAF, again requiring a $5 million capital, was based on charging 3% of the plaintiff's award as a fee, and on supporting 300 cases per quarter. Any costs ordered against the unsuccessful plaintiff would be covered by the Fund. The model assumed a 95% success rate, and predicted the capital would grow to $13.4 million in ten years and $41.3 million after twenty years.

Final model

56 The revised proposal was based on a smaller capital base, with a fixed fee, and without the party-party costs coverage. This is the model which was implemented in November 1994.

57 Final actuarial projections were based on:

- initial capital of $1 million (equivalent to $1.11 million in March 2000)
- a conservative estimate of average time to completion: ten quarters or two and a half years
- supporting 100 cases per quarter

58 Based on a 95% success rate, the proposed CLAF would be worth $6.5 million after 10 years, and $24 million after 20 years; it remained viable at a lower success rate of 90%. The actuarial projections highlighted the extent to which financial viability was sensitive both to the success rate of the litigation, and to the time to settlement

The Fund in operation 1994-1997

59 The LSF began operating in November 1994 and was closed to new applications from 29 April 1997. In early 2000 the LSF is still receiving repayment of funds advanced during that period.

Restricted operation

60 In November 1994 the level of demand for the LSF was unknown. Rather than overwhelm it before administrative structures and processes were in place, it was decided to promote the LSF only to accredited personal injury specialists.

61 These represented around 250 solicitors, a small proportion of all solicitors practicing in personal injury. In late 1994, these solicitors were sent an introductory letter and pamphlet; if they were interested in the scheme they were asked to write to the LSF to request application forms and guidelines.

62 By 30 June 1995 only 14 applications had been received; the LSF was structured to support ten times that level in the same period.

Evaluation

63 During September and October 1995 the Law Foundation commissioned Keys Young Consultants to survey accredited specialists. The survey found that many accredited specialists only represented defendants or, if they did plaintiff work, had arrangements with trade unions to fund such actions. By targeting accredited specialists the LSF was only addressing a very small group of potentially interested solicitors.

64 Some feedback from the survey suggested that the fee appeared excessive, and that the idea of the LSF was difficult to `sell' to clients. Some solicitors had had poor experiences of either legal aid or bank lending schemes and so were unwilling to try this new `product'.

65 Nevertheless, the survey found that there was a demand for the LSF, particularly among firms outside the CBD, and that the low take up was because of the early stage of the LSF development; most solicitors suggested it needed to be promoted more widely.

Full operation

66 From August 1996 the LSF operated on an unrestricted basis, open to all NSW solicitors.

67 The Fund was promoted through various targeted distribution channels:

- NSW solicitors practicing in personal injury
- the NSW division of the Australian Plaintiff Lawyers Association
- Regional Law Society Presidents
- Legal Aid Commission staff in the civil law section
- the *Law Society Journal.*

68 Applications to the LSF increased substantially, to the extent that original demand assumptions were being reached. In November 1996 alone, 26 applications were received and solicitors were being advised not to submit multiple applications until the extent of demand was understood. There was every indication that demand among NSW solicitors would enable the Fund to operate according to original demand assumptions of 150 matters supported per quarter.

Suspension

69 New consumer credit regulation, the Credit Code, was introduced in NSW on 1 November 1996. This was part of a national uniform consumer code which greatly widened the coverage of matters previously exempt from credit legislation.

70 In anticipation, the Law Foundation had sought legal advice as to whether the wider coverage of the new Code would include public interest schemes such as the LSF. The advice was that the LSF would be covered, and that its documentation would not meet the prescriptive requirements set out in the new Code. The advice was also that the fee needed to be replaced by an interest rate, based on a daily balance of funds withdrawn. The Law Foundation applied immediately for an exemption from the Code on public interest grounds.

71 As a decision on the exemption would not be made immediately, it was necessary to suspend the operation of the LSF from 1 November 1996, and to look into restructuring it so that it would comply with the Code. As it eventuated, the Law Foundation was not advised by the Code Committee of a decision (in the negative) on the exemption application until January 1998.

Credit Code compliance

72 Pending applications were held until changes were made to the structure of the Fund to comply with the Code; solicitors were asked not to submit any further applications.

73 The restructure resulted in:

- replacement of the Fund fee with an interest rate
- a new loan agreement document
- alterations to existing documentation
- additional documentation.

74 Under the Code the LSF was required to set the cost of the loan by reference to a daily interest rate rather than by a fixed money fee; any reasonable interest rate could be charged, provided the applicant was fully advised of that rate.

75 The rate for the LSF was set by reference to a market interest rate indicator, to reduce the need to revise promotional material each time interest rates moved. Participating solicitors were surveyed for their view as to the maximum rate they believed they could justify to a client considering using the Fund; 25% was a commonly suggested maximum.

76 The original actuarial projections were reprojected to take account of the financial impact on the LSF of switching from fixed fees to an interest rate. This exercise established a range of interest rates which were dependent on different success rates for the Fund.

77 The Law Foundation determined an interest rate that it felt was reasonable in the market, associated with a necessary success rate which was feasible. Applications that had been pending were approved on this basis.

Termination

78 A continuing issue for the Law Foundation was that, on the one hand, the LSF required a substantial portion of the Law Foundation's reserves to be tied up for a long period; on the other hand, it promised a continuing flow of income at a time when the Law Foundation was seeking new sources of funds.

79 After debate, the decision was made to close the LSF because:

- it could not be shown that the LSF would give litigants access to the legal system they would not otherwise have
- it is not a core activity of the Law Foundation to operate such a LSF on a permanent basis
- there were other competing uses to which the Law Foundation's reserves could be put.

Structural considerations

Scheme design

80 The actuarial modelling of the LSF was based on assumptions that were made in relation to the following factors:

- initial capital
- cases taken on by the Fund
- expenses
- size of gross costs
- timing of gross costs
- success ratio
- time to completion
- share of District Court/Supreme Court cases
- fund earning rate of interest
- inflation rate
- tax rate
- Fund fee.

Fund fee -- pre November 1996--

81 The Fund fee represented the amount repayable by a client if successful in their supported matter, in addition to repaying the amount lent by the Fund. If a matter was unsuccessful there was no obligation to pay either the amount lent or the Fund fee.

82 The Fund fees were set within a range for the Supreme Court and for the District Court. The Fund fee was a maximum figure, with a guarantee under the funding agreement to the solicitor and client that they would not be charged more, regardless of when the pay out was received.

83 The maximum Fund fee would be set for a matter seeking the maximum in disbursements and estimated by the merit assessor to take no more than the longest period allowed for, three and a half years to completion. A matter seeking a lower level of disbursements, or likely to be completed more quickly, had a Fund fee correspondingly reduced.

84 The size of the Fund fees were the source of some adverse comment by solicitors, and were probably one of the main reasons for the initial low pick up of the Fund (see Keys Young evaluation, in chapter 5, p.15).

85 At the completion of a matter the final amount of the Fund fee was calculated by using a formula as to:

- whether the matter has equalled or exceeded the estimate of time to completion when the Fund fee was originally set
- the percentage of the total amount approved it has drawn down.

86 The Fund fee was crucial to the economic viability of the scheme. For the capital of the Fund to continue to grow, it was essential that Fund fee income be received as planned.

Interest fee -- post November 1996--

87 The most significant change to the design of the Fund during its operation was the forced replacement of the Fund fee by an interest-based scheme, as a result of the Consumer Credit Code (see chapter 5). For all matters approved after the 1 November 1996 the Fund charged an interest rate calculated on an average daily balance of the amount actually drawn down by the solicitor.

88 This new fee calculation was set by reference to the National Australia Bank Bankcard interest rate, with a loading for risk. The amount of this interest rate was set by surveying perceptions of the market as to the perceived fairness of the scheme -- a fax-

back survey of solicitors was conducted across a range of potential interest rates within the limits of financial viability, to gauge likely responses of clients.

89 Replacing the Fund fee with an interest rate meant that the projected growth of the Fund was to be much smaller, but still in excess of earnings if invested in term deposits over the same period.

Disbursements covered

90 The Fund covered all disbursements related to the litigation except counsels' fees. Claims were allowed for any costs incurred from the date the application was lodged with the Fund.

91 As the operation of the scheme progressed this was relaxed to a limited extent; the costs of reports obtained before the application was lodged were permitted if the application was approved, provided they had not already been paid for, *i.e.* the client still owed the expert for the reports.

Costs awarded against plaintiff

92 If a matter was unsuccessful the Fund would not indemnify the plaintiff for any losses incurred as a result of the litigation. Efforts were made during the development of the Fund to an insurer to cover this risk but it proved to be uninsurable.

Legal aid eligibility

93 While legal aid in NSW is generally not available for personal injury matters, it became apparent that there was one area of overlap with the Fund; legal aid in New South Wales is currently available for personal injury claims by children. The Fund revised its guidelines in late 1995 so that such applications were only considered if legal aid had been sought and refused.

Inflation

94 The actuarial projections of the Fund was conservative in assuming an inflation rate. A lower inflation rate than that projected meant that, in real terms, the growth of the capital of the Fund was quicker than predicted.

Scheme guidelines

Types of matters

95 The initial guidelines for the LSF stated that it would accept applications from `individuals who wish to institute proceedings for damages for personal injury...'. While the largest category of such claims in New South Wales is motor vehicle accidents, the range of claims covered by the guidelines were (in order of decreasing frequency):

- motor vehicle accidents
- common law industrial accidents
- occupiers liability
- medical negligence
- product liability.

96 The appendix of this report provides statistics on the breakdown by claim type of the applications to, and approvals by, the LSF.

97 In some other states such as South Australia the equivalent CLAF covers a much larger range of matters, such as probate, contractual disputes and debt matters. Although a CLAF can cover any civil claim for which a monetary payment can be obtained, the LSF was limited to personal injury matters because:

- this was the largest area of civil litigation
- there was no legal aid coverage in NSW for most personal injury matters
- there is a very high likelihood of success for plaintiffs in such matters, with the possible exception of medical negligence
- an insured defendant is usually available
- the likelihood of pre trial settlement is high
- there is a willingness of the private legal profession to carry such matters on a speculative basis
- there is the availability of statistical data on hearing times, level of expenses and payouts.

98 Because of the Fund's assumption that a 95% success rate was required to achieve financial viability, other civil claims with a money outcome were considered too high risk to be economically feasible.

99 The Law Foundation confined the LSF to personal injury matters because of the likelihood of a pay out from an insured defendant. This is the same reason why private solicitors are willing to `carry the costs' on a speculative basis. Personal injury matters where a practitioner is less likely to take a matter on a speculative basis, medical negligence and product liability, are also the two areas where the Funds merit assessment would be less likely to support a matter. The access to justice implications of this are discussed in the final chapter.

100 The only occasion on which the limitation to `personal injury' matters caused some debate was in relation to an action for false imprisonment. After discussion with a merit assessor it was agreed that if damages, including emotional distress, were sought in the statement of claim, such a matter would be within the definition for purposes of the Fund.

Jurisdiction

101 The Fund accepted applications for proceedings in the Common Law Division of the NSW District and Supreme Courts. It is in these jurisdictions that the majority of personal injury matters within NSW are lodged. The Law Foundation relied on the statistical data from the CJRC study of both of these jurisdictions as a basis for the Fund's actuarial projections.[7] Based on the data, the actuarial projections assumed the Fund would need to support a mix of cases in the Supreme Court and in the District Court. The proportions reflected Supreme Court matters being more expensive and longer, and so tying up larger amounts of the Fund's capital and taking longer to reach completion.

102 While the jurisdictions for which applications were considered remained unchanged, the limits of funding approvals for each jurisdiction had to be reviewed as major amendments were made to the jurisdictional limits of the District Court.

Funding limits

103 Individual applicants were limited to approvals of a maximum amount for a matter in the District Court, and a different maximum in the Supreme Court, based on the median figures for costs of Supreme Court and District Court matters identified by the CJRC study. Matters with expenses above these median figures were excluded to minimise the risk to the Fund; as a prudential matter, it was undesirable to commit too much money to any one case.

104 During the operation of the Fund this limitation was relaxed to some extent provided the practitioner undertook to carry all disbursements above the limits set. During the operation of the Fund, jurisdictional limits of the District Court rose from a maximum of $250,000 to an unlimited jurisdiction for motor vehicle accidents, and up to $750,000 for other personal injury accidents. This meant that most actions which were previously heard in the Supreme Court would now be heard in the District Court. A consequent consideration, therefore, would be whether, and to what extent, to raise the cap on District Court disbursements.

105 The limits effectively precluded many medical negligence actions, which typically are much more expensive than the more straight forward personal injury actions such as motor vehicle claims. In one application for a medical negligence claim, the entire $10,000 was sought for the cost of one overseas medical expert to provide evidence. While the limit was a consequence of risk minimisation in the original actuarial projections, it clearly has implications for the efficacy of such a Fund in enhancing access to the legal system.

Timing

106 The original guidelines of the Fund stated that applications had to be made prior to the filing of the statement of claim. By supporting matters at an early stage, the intention was that, over time, a full risk profile of all matters supported by the Fund could be established. However, this limitation proved too inflexible in practice, and was relaxed in the first six months of the scheme's operation when demand was very low. In fact, the later in the legal process an application was made, the more beneficial it proved to be to the Fund; a merit assessment was easier to make, and the funds advanced would be returned more quickly.

107 Supporting matters after a Statement of Claim has been issued does, however, raise the question as to whether the Fund was supporting matters which would have been litigated in any case.

Duration of matters

108 A fundamental aspect of the scheme's design was the assumption made about length of matters. Using the CJRC court data, the Law Foundation determined that the median time for completion for a Supreme Court or District Court matter was three and a half years (14 quarters). Consequently, limits were set on the maximum hearing time for a matter that the LSF would tolerate.

109 The length to completion of a matter was crucial to the assumptions of the Fund, as the viability of the Fund depended on supported matters paying back the capital borrowed and a Fund fee in sufficient time for the Fund to continue making loans. If matters took longer than expected to repay the Fund, there was the risk that the Fund would have to temporarily shut down until enough of the capital returned to resume lending. In fact, over the life of the LSF the time to hearing reduced significantly, speeding up the rate at which the LSF could recover the loans.

Timing of draw downs

110 The timing of draw downs from the Fund was crucial to the cashflow, and to the number of approvals in each period that could be made. After an application was approved, solicitors were only provided with payment upon presentation of invoices for expenditure incurred.

111 Using the patterns demonstrated in the CJRC data of actual cases, the Fund was based on assumptions regarding the proportions of the loan which would be drawn down at progressive stages of the litigation. With these assumptions, the Fund could commit itself to a much larger number of approvals per period than if the whole amount approved needed to be paid out or could be identified from the start.

Success rate

112 The financial viability of the Fund depended on the assumed success rate. If the matter was unsuccessful there was no obligation to repay the Fund the amount borrowed, and no guarantee was sought from the solicitor, unlike earlier bank litigation lending schemes. The original projections for the scheme assumed, conservatively, a 95% success rate.

113 There was a margin of comfort with the 95% figure; a 90% success rate provided a lower return than if the money were simply invested in term deposits. At lower success rates the Fund would begin to decrease and would require top up funding to maintain its capital.

114 Predicting the success of the supported litigation was crucial to the Fund's viability. However, to be a `success' for the Fund, the plaintiff must not only be awarded damages but:

- these must be sufficient in the award to cover the costs incurred and the fee or interest, and

- the solicitor must ensure that repayment was made to the Fund.

115 The merit assessment included an assessment of the likely quantum. Of the first 70 matters successfully concluded, one matter was able to repay only 75% of the amount borrowed and no additional Fund fee. Matters expected at the outset to receive damages of less than $10,000 were generally not supported on a cost/benefit basis, as they were unlikely to cover costs and disbursements.

116 A solicitor may have overlooked paying the Fund when settlement monies were paid. While the Fund agreement bound the client, enforcing this agreement would be costly and undesirable. The risk was reduced by regular monitoring of the progress of matters, sending solicitors quarterly `fax back' forms to report on progress.

117 The achievement of the success rate relied heavily upon the merit test applied by the Law Foundation, and on the monitoring of matters after approval.

118 The solicitor's own assessment of merit also assisted in the achievement of a high success rate for the Fund. As the solicitor was taking a matter on the same `no win -- no pay' basis as the Fund, they would make their own judgement on the prospects of success before applying on behalf of a client. If the practitioner was inexperienced in this area of law their view may not have much relevance, but for more experienced practitioners this was an important contributor to minimising risk for the Fund.

119 The appropriate success rate assumptions depended on the type of actions covered by a scheme of this type. The much lower typical success rate for medical negligence and product liability matters would require a very high fee to compensate for losses. The more risk in the litigation, the less likely a fund of this type would be financially viable. For that same litigation, however, such schemes would assist litigants who would otherwise not pursue a cause of action. This is the access to justice/financial viability tension which is at the heart of a discussion about CLAFs.

Limits to individual solicitors

120 As a risk minimisation strategy, there was a limit to the number of applications any one firm of solicitors could have approved at any one time. The limit was set in terms of a percentage of all approvals which were in the hands of one solicitor.

Case approvals

121 The level of initial capital, and the various assumptions in the Fund, limited the number of approvals the Fund could make per quarter. To support a higher number of cases than the limit risked a situation where the Fund would temporarily have to cease lending until repayments began coming back. A fallback plan was to ration approvals made to any one firm if demand exceeded the level of applications required.

122 Switching to an interest-based fee meant a slower build up to the Fund capital. This reduced the number of cases that could be supported, and consequential remodelling of the Fund reduced the limit of approvals per quarter.

Administrative procedures

123 The Fund was developed on the basis that it would stand alone, supporting its own administrative costs, rather than be part of a larger bureaucracy. Administration was kept to the minimum necessary level without adversely affecting the risk profile. Consequently some accountability provisions were given lower priority. The guidelines stated specifically that there was no right of appeal for any decision of the Fund. To balance this, opportunity was given to unsuccessful applicants to reapply at no additional cost; on a few occasions extra evidence led to a later approval.

124 At full capacity, operation of the LSF required only part-time management and administrative support.

125 From our experience it appears to be feasible to fund a CLAF such as the LSF with all administrative costs recouped from application fees.

Administrative process overview

126 The process follows four basic steps from application to approval:

- application submitted
- application reviewed to determine whether within guidelines and all information attached
- application considered by a merit assessor
- decision to approve, reject or decline the application.

Submission by solicitor

127 The application form required the solicitor to certify that they had explained the Fund to the client, and that they would enter a conditional cost agreement with the client if the application was approved.

128 Some personal details (employment status, age, etc.) were sought to assist building a statistical profile of clients applying; the omission of this information did not affect the decision on the application.

Review by manager

129 The application was then checked for compliance with the guidelines by the Manager. This was an important step to the client because the application fee was not refundable.

130 A nominal application fee was charged:

- to discourage frivolous applications with no prospects of success
- to cover the costs of paying for merit assessor's advice and contribute to other administration costs.

131 As most clients had little financial means, this fee was for some clients a barrier to using the Fund; many firms paid this expense themselves.

132 Very few applications were submitted entirely outside the guidelines for the scheme. The application form itself was usually well understood and completed. Problems with applications were primarily in providing insufficient supporting documents upon which to assess merit.

133 The level of documentation required for merit assessment varied, depending on the type of matter. For many cases an accident claim report and a client statement with some indication of injury was often sufficient; for others an expert report was required. Frequently the Fund was placed in a `Catch 22' situation: the solicitor was coming to the Fund because their client could not afford expensive expert reports, yet the Fund could not approve the application unless it had an expert report to assist the merit assessment. The firm was asked to carry the cost of the expert report on the understanding that the application could be then reassessed. If it was then considered to have merit, this cost would be reimbursed, although if it did not, the solicitor had to carry the cost.

Merit assessment

134 During the establishment of the Fund, various approaches to merit assessment were considered:

- use of in-house staff with legal aid experience
- a panel of practicing solicitors
- a recently retired judge.

135 In the end the Law Foundation approached barristers whose main practice was in the personal injury area. They agreed to advise on the basis of a small fee per application, a substantial reduction on their regular fee, which reflected their support for the scheme from a public interest perspective.

136 Applications were sent to merit assessors each week. The assessors advised on the extent to which liability was apparent, provided estimates of quantum of damages, length of the case, cost of disbursements, and whether the case had merit. The test for merit was essentially whether the case had reasonable prospects of success.

137 This system of assessment proved very successful in meeting the needs of the Fund. The advantages were:

- it was efficient and cost-effective, relying in large part on the expertise of the counsel
- the knowledge of the solicitors applying
- low administrative costs.

Final decision

140 In most cases the LSF followed the recommendation of the merit assessor; on a few occasions the advice of a second merit assessor was sought.

Rejected applications

141 Applications were rejected on the ground that it was judged not to have sufficient merit. If insufficient information was initially provided to determine merit, the solicitor was able to resubmit the application later without an additional application fee. Applications clearly outside guidelines, or with no supporting documentation, were returned without assessment so as to protect the client's application fee.

Agreement

142 When a matter was approved the solicitor was sent a letter advising of the amount able to be borrowed, and an accompanying agreement.

143 Prior to 1 November 1996, the Law Foundation entered into a loan contract with both the solicitor and the assisted person. After that date, the Consumer Credit Code prescribed that the contract must be with the client as borrower; the Code also prescribed the format of the loan agreement.

Payments

144 No payments were made from the LSF until the Law Foundation received the fully executed agreement.

145 All payments were made to the solicitor, and the Fund had no direct contact with the client unless the client discontinued the litigation or changed solicitors. To maximise the use of the Fund's capital, payments were claimed as they occurred during the litigation. To minimise the risk of fraud or error, payments were reimbursed to the solicitor on proof of payment having being made, or by cheque payable directly to the expert, court or other source of the expense.

Monitoring of progress

146 The client was obliged under the agreement to advise the Fund of progress of the matter. Progress was most effectively monitored by a fax-back survey sent to solicitors on a quarterly basis. Solicitors were asked to indicate the current stage of the litigation, and to note any significant dates such as hearing dates.

Completed matters

147 Frequently when a matter appeared likely to settle, the solicitor contacted the Fund to request a figure for what was owed. If the matter was approved before 1 November 1996, consideration was given to reducing the Fund fee from the maximum if:

- the matter settled earlier than predicted
- the client drew down less funds than originally approved.

148 For matters after 1 November 1996, the interest was simply calculated automatically using a formula on the daily balance of amounts drawn down from the dates they were drawn.

Access to justice

149 While the financial viability of a CLAF can be judged purely on the basis of experience -- if it loses all its money it is not financially viable -- the more important policy question is whether such an activity improves access to justice: "does the existence of a CLAF mean that litigants who would otherwise not be able to pursue meritorious claims are able to do so?".

150 The experience of the Law Foundation is that a CLAF appears to have only a slight and indirect impact on improving access to justice.

Access to justice considerations during development

151 Improving access to justice was the principal reason for the Law Foundation establishing a CLAF. Rapid contraction of civil legal aid funding in NSW in the early 1990s resulted in a strong call to experiment with alternative funding mechanisms. Initial proposals for a CLAF covered a wide range of matters, including public interest litigation. The LSF was first presented as offering wider coverage than the Hong Kong model which, while economically viable on a different basis, was able to cover only matters with high probability of success.

152 As the prospects for attracting capital to the proposed LSF dimmed, and the assumptions were submitted to actuarial assessment, the scope of the proposal narrowed substantially; ultimately it covered only personal injury matters in the District and Supreme Courts. The LSF's capacity to improve access to justice across a wide range of matters was limited by projections as to the LSF's financial viability.

153 In the planning, however, financial viability and profitability were seen as stages towards the goal of a CLAF improving access to justice. Once the LSF began to grow above its initial capital, it would support public interest litigation which had a higher risk profile than conventional personal injury matters. This would be possible because of the greater financial resources of the LSF, and its ability to run greater risks in its lending.

154 That position was not achieved, only because the LSF ceased operating. The LSF operated long enough at full capacity for it to be clear that the capital was returning with repayments, and would continue to do so, as projected. It did not, however, operate through to the stage where the capital had actually been returned in full and was growing above its initial level.

155 The following discussion about a CLAF's ability to improve access to justice is therefore based on the operation of the LSF, limited, as it was, to personal injury matters.

Access to justice considerations and speculative fees

When lawyers will take the risk

156 In NSW there is a well-established practice of personal injury lawyers carrying their own costs and disbursements for clients unable to pay before receiving a money verdict. The lawyer receives the actual fees due, not a percentage of the verdict, hence the reference to fees recovered on a `speculative' basis.

157 This approach was supported, until the mid 1990s, by banks' litigation lending schemes, and was encouraged in the early 1990s by the withdrawal of legal aid funding for most personal injury matters. Further encouragement came in 1993, under changes to the *Legal Profession Act (NSW)* which allowed lawyers to charge a 25% uplift on regular costs and disbursements for matters taken on a speculative basis.

158 Speculative fees therefore reward lawyers for taking the risk of running matters on this basis. If a lawyer is confident of the success of a matter, it may be more profitable to cover the disbursements and recover the uplift fee, rather than using a CLAF. If the funds were as readily available from the CLAF as from the lawyer, the difference between the two approaches may be in the net payment to the client, depending on the terms on which the CLAF would advance the funds.

159 To be financially viable, a CLAF must support matters which both produce a money verdict and have very good prospects of success. These are the very matters that a lawyer will usually be willing to accept on a speculative basis. The existence of a CLAF, therefore, simply shifts the small risk of failure, together with any rewards for accepting that risk, from the lawyer to the CLAF.

160 The best that could be said of a CLAF in NSW, such as the LSF, might be that it provided a choice for clients as to how to fund a matter and that the LSF had little impact on whether or not the matter was pursued at all. The main beneficiaries of the LSF would have been lawyers who shifted to the LSF the risk of a matter being unsuccessful, and at the same time reduced pressure on their practices' overdrafts.

When lawyers can't take the risk'

161 Not all lawyers, however, are prepared to carry the costs of disbursements, even for matters with merit. In any one case a lawyer may carry disbursements to a certain level, but then reach a point at which the exposure to the risk of the case failing is too great to continue. Similarly a lawyer may carry disbursements to a certain level for a number of cases, and reach a point at which the exposure to practice as a whole is too great to continue to take on further clients.

162 The experience of the LSF was that smaller firms in suburban Sydney and in NSW country areas are quite simply not able to sustain a large volume of speculative matters, and the LSF did assist them to take on additional clients.

163 When seeking a lawyer, a person does not know which firms will carry costs and which will not. A firm may, for example, have a policy of only taking certain types of matters on a speculative basis, such as simple motor accident claims. Many firms conducting a speculative fee practice in, say, motor vehicle or occupier's liability personal injury matters, will decline matters which appear to have merit but require several expensive expert reports, such as medical negligence or product liability cases.

164 The availability of a CLAF can make a difference in these circumstances, enabling a lawyer to pursue a remedy for an injured person despite the person's inability to pay disbursements and the lawyer's inability to carry the costs. The necessary qualification to this is that the CLAF will, necessarily, have to be satisfied as to the merit of the case and complex cases requiring experts' reports to determine liability are difficult to assess as having a high likelihood of success. Only a CLAF with a large asset base, and a good business on high return matters, could afford to assist in such circumstances.

Evidence of unmet need

165 Evidence that firms do in fact turn away matters with merit was obtained in a survey the Law Foundation undertook early in 1997. A survey of 600 lawyers was undertaken, using a database of personal injury lawyers who had previously received information about the LSF.

166 The survey included questions asking:

- whether the lawyer's firm turned away clients because they could not afford disbursements, and
- whether the availability of the LSF would enable the lawyer to act for clients who would have been turned away, or would in fact be used to pay disbursements the solicitors would have carried.

167 The survey found that 64% of firms, when faced with an impecunious client, carried the costs of disbursements, and used an expert who carried those costs for experts' reports. Eighteen percent said they turned impecunious clients away; this indicates a possible unmet legal need if those clients did not then pursue a meritorious claim. Lawyers were asked how frequently, in their view, clients whom they turned away would not then pursue meritorious claims: 23% thought this happened often, and 32% occasionally.

168 To understand the extent of this unmet legal need would require more sophisticated research than was possible, such as a qualitative exploration of the decision making process of firms, and tracking the subsequent conduct and decisions of clients who are turned away

Other considerations

169 Some of the firms who conduct high volume speculative work in personal injury matters may do so with an `assembly line approach', and may give a lesser degree of personal service to clients as a result. A CLAF would allow clients access to a higher level of service, by widening the range of law firms available to a client. The experience of the LSF, however, only raised this possibility and was not conclusive; none of the research conducted around the operation of the LSF was directed towards this hypothesis.

170 As well, a CLAF may be preferable to a speculative fee arrangement because knowledge by a defendant that the plaintiff has external financial backing might encourage early and reasonable offers of settlement, or at the very least might allow a plaintiff to prepare their case to a much higher standard than if a lawyer were covering the costs. This might be especially so for more expensive matters involving industrial accidents or medical negligence. Again, however, the experience of the LSF only raised this possibility and was not conclusive; none of the research conducted around the operation of the LSF was directed towards this hypothesis.

Access to justice versus financial viability

An unavoidable tension

171 As was anticipated during development of the LSF, financial viability and access to justice were in tension with a limited capital base. The LSF experience demonstrated that the greater the returns from a CLAF the greater the likelihood that it has been structured in a way that will not significantly contribute to access to justice. The more a CLAF enhances access to justice, the more at risk its funds will be.

172 The LSF experience indicates strongly that a CLAF will only assist access to justice if it moves into areas where lawyers currently will not take matters on a speculative basis. Product liability and medical negligence matters are the most obvious matters in the personal injury area. Other high risk matters with the prospect of a money verdict, such as discrimination cases, small businesses' contractual disputes, and public interest environmental actions, could also be considered in this category.

173 The plan for the LSF in its development was a short term/long term trade-off: a financially viable LSF would develop a corpus of funds which can then be used to support riskier matter with greater risk. Experience showed that this is simply to restate the essential tension: a CLAF would be able to support these matters only because it has sufficient funds to cross-subsidise a non-financially viable subset of the CLAF.

174 Even in individual matters the conflict arises: both the CLAF and the client have an interest in winning, but there are many situations in the course of the litigation where the two interests diverge. For instance, when the client is made an offer of settlement by the defendant it is usually in the CLAF's best interest for the offer to be accepted, as it receives the income owed to it and at an earlier stage. The client, however, has an interest in receiving the highest amount possible and may not wish to settle at that stage; at this point the two interests may diverge.

A continuing role for CLAFs

175 Despite the debatable contribution CLAFs makes to access to justice, there is a place for them in Australia. Many solicitors in NSW saw a need for the LSF, and they continue to inquire about its availability. Seventy five percent of those responding to the Law Foundation's 1997 survey said they intended to use the LSF if it remained in place.

176 In Victoria and South Australia the legal professional bodies currently manage CLAFs (see Appendix B) . It could be argued it is as part of its member services for legal professional bodies to run CLAFs -- assuming their access to the large capital sum which would be required if the CLAF was to be available to most of its litigator members.

177 Jurisdictions around Australia are, through their operation of various versions of CLAFs, involved in a major experiment, the results of which will become apparent over the next few years. From the Law Foundation's experience in operating the LSF, it is likely that some or all of these will generate a stream of long term revenue, depending on the integrity of their projections and procedures. The CLAFs which do most to support cases which would otherwise not be funded are the most likely to run into financial difficulty.

178 While it may generate revenue, the contribution a CLAF can make to enhancing access to justice will always be open to debate. However, the Law Foundation's experience in operating its Litigation Support Fund leads us to conclude that contingency legal assistance funds can be financially viable only at the expense of genuinely enhancing access to justice.

Appendices

The figures which appear in this Appendix are correct as of 31 December 1999. At the conclusion of this chapter are projections for the future returns to the Fund had it continued, based on returns to date.

A.1 Success rates to December 1999

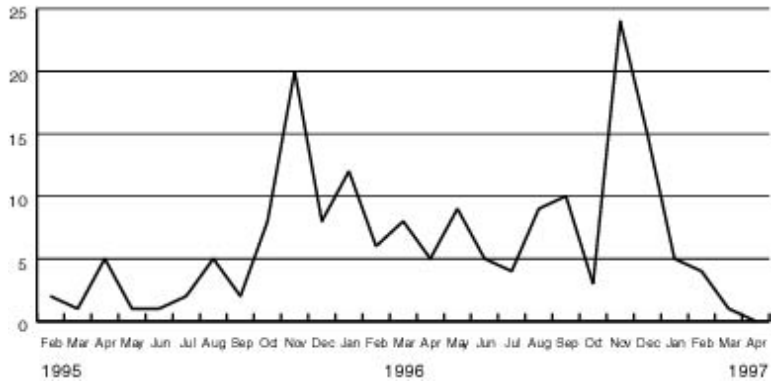
Total approvals	108
Total resolved	89
Total successful	84
Current matters	19
Success rate	94.3%

A.2 Income to date

Total loans approved over life of Fund	$507,916.75
Net income to date	$70,477.00

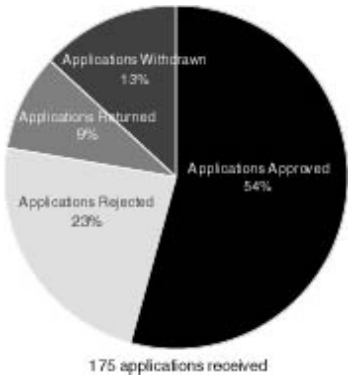
Of the 89 matters resolved to December 1999, 13 settled before any money was drawn from the Fund. In the majority of these cases no fee was charged and so no income was received. The availability of the Fund may have contributed to early settlement in some matters.

A.3 Applications received over period of operation



The LSF was opened to all solicitors in NSW from September 1996. The LSF ceased entering new agreements on 1 November 1996.

A.4 Approval/rejection rates



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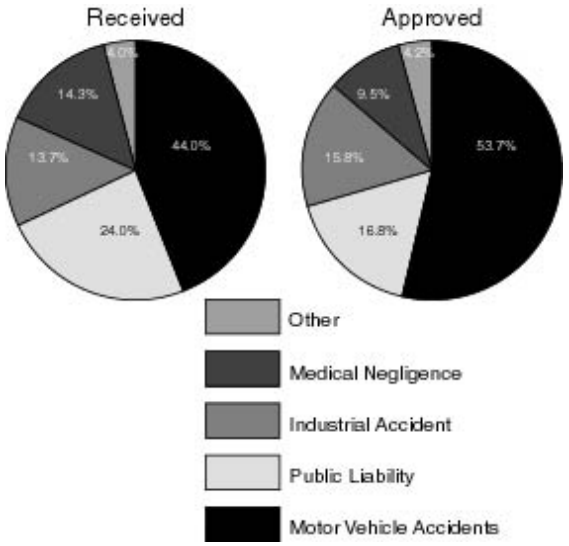
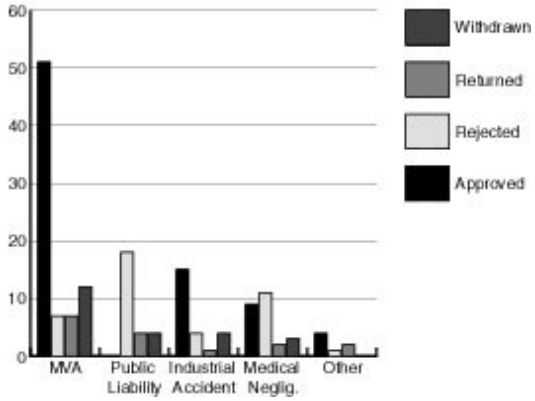
Applications returned' refers to matters that had inadequate documentation to submit to merit assessment.

A.5 Types of matters (applications and approvals)

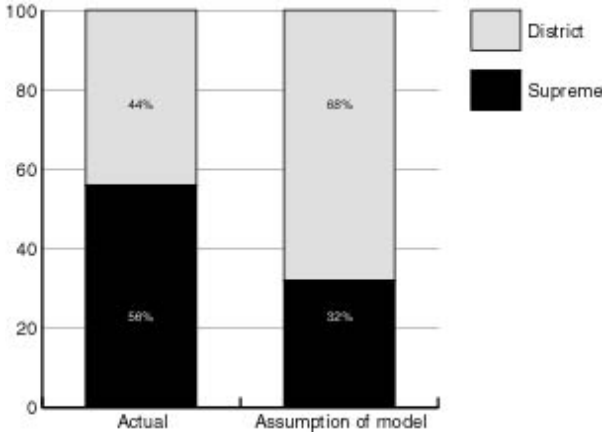


A.6 Approval/rejection by type of matter



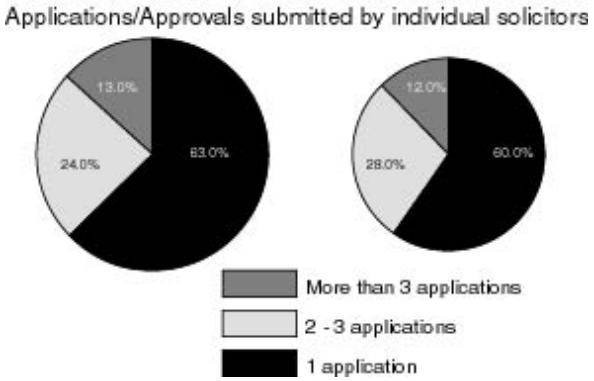
The very high approval rate for motor vehicle accidents contrasts with a high rejection rate for medical negligence claims.

A.7 Supreme Court/District Court breakdown -- approvals only --



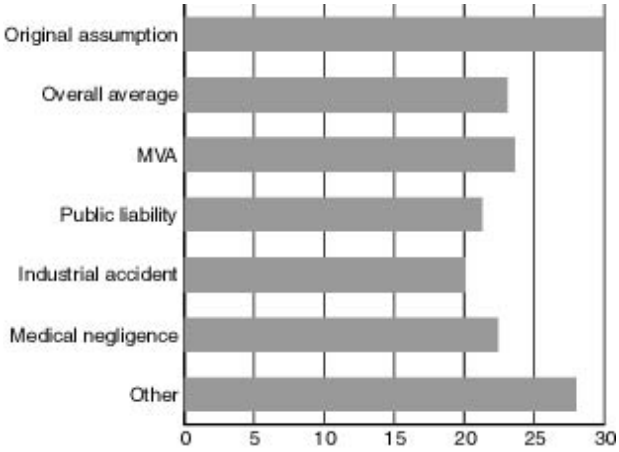
The imbalance between District and Supreme Court matters reflects the fact that solicitors found the Fund most useful for the more expensive Supreme Court, rather than District Court matters where they were better able to cover a low level of disbursements.
If the Fund had continued, some restriction of Supreme Court matters would have had to be imposed so as to tend towards the model assumptions. This would be necessary to ensure regular flow of funds back to the Fund, Supreme Court matters taking longer to completion. However, 1997 amendments to jurisdictional limits meant that most matters supported by the Fund would be heard in the District Court in any case. This would have required a re-projection of expected times to completion in the modelling of the Fund.

A.8 Frequency of applications



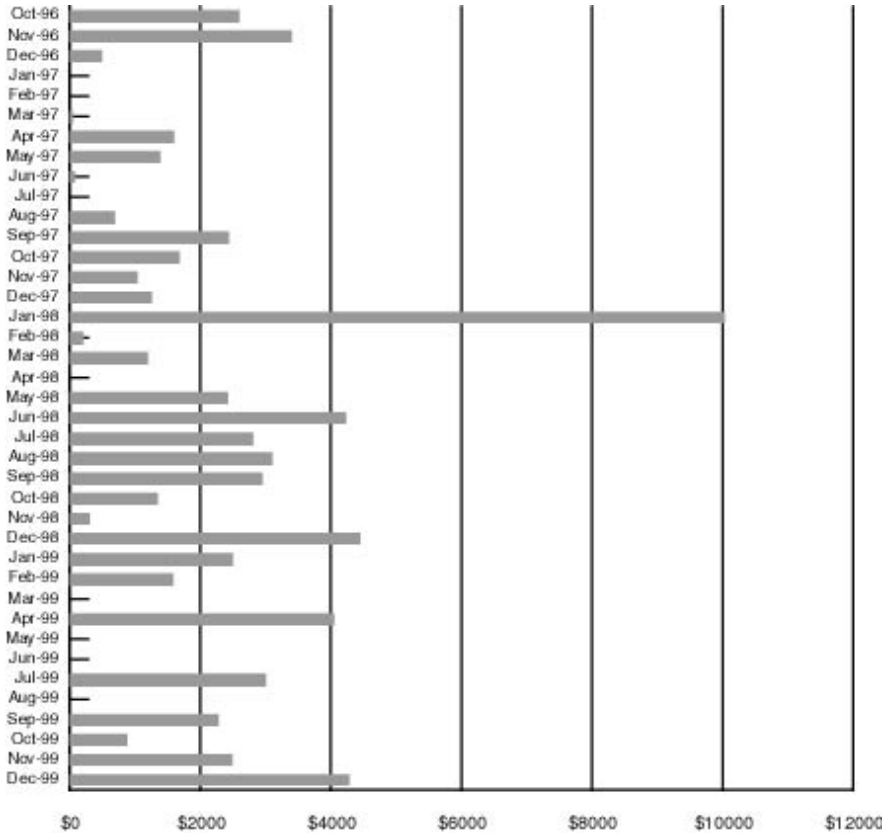
Solicitors were encouraged to submit one application before submitting further or multiple applications. Solicitors rejected on their first application rarely submitted a second.

A.9 Completed matters: average length for each type of matter

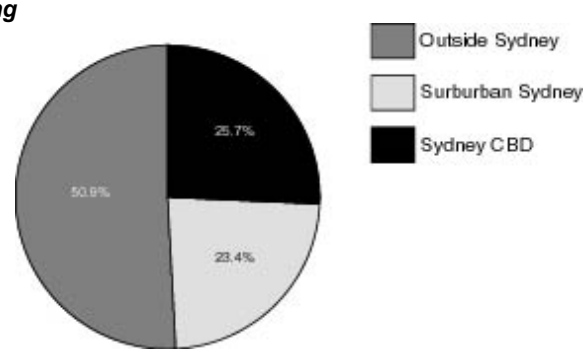


The time to completion is significantly quicker than predicted by the data used in the modelling. This reflects reductions in court delays and improvement in court management since that time. The impact of this change on the Fund has been to enhance the Fund's viability -- the quicker the flow back in the Fund, the faster its growth.

A.10 Net returns from completed matters by month

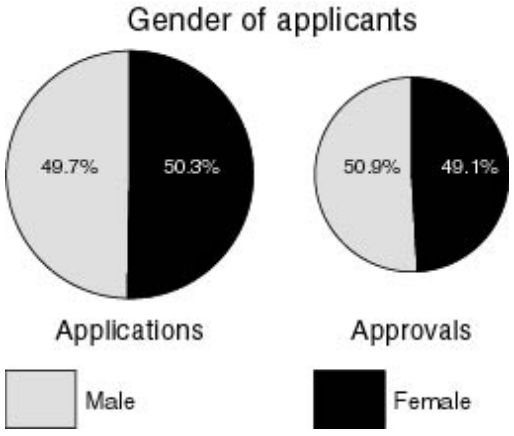


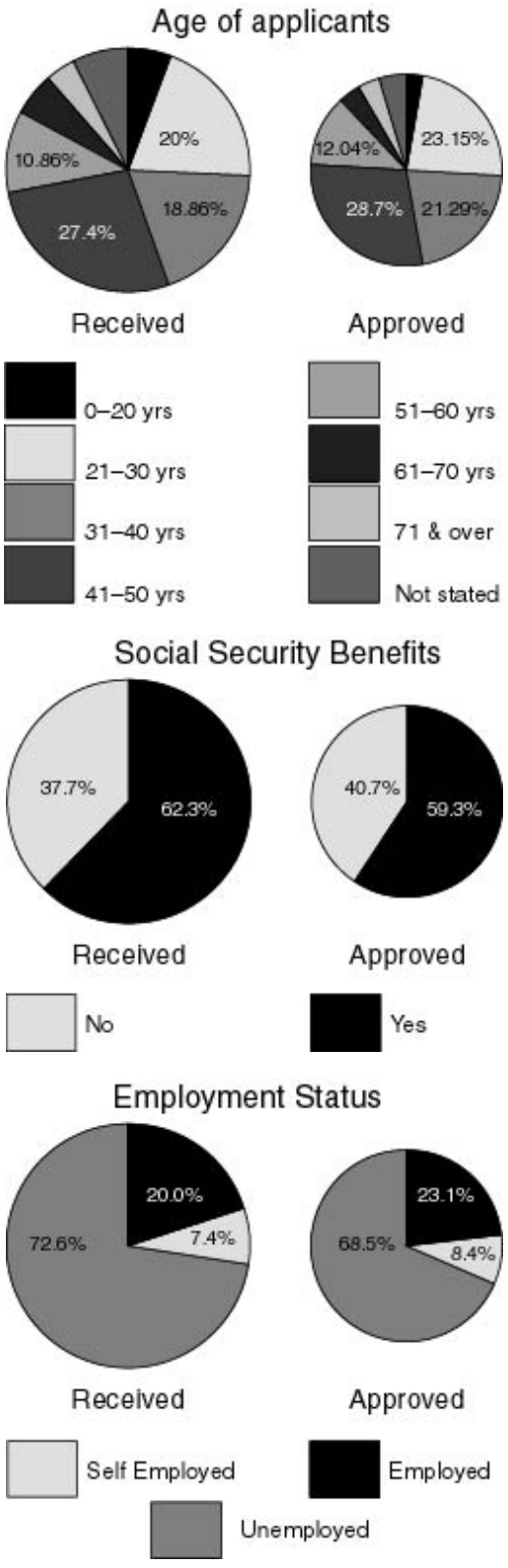
A.11 Location of solicitors applying



The figures indicate a high level of useage by non-metropolitan solicitors. It may be that these firms are less able to carry substantial disbursements than larger firms.

A.12 Client profile





B Funds in other jurisdictions

This report is an assessment of the Litigation Support Fund, not of any other fund. There is room for research which assesses the success of each fund, according to criteria such as financial viability and enhancement of access to justice after all funds have been operating for a longer period. The comments below are a comparison of structure, not of performance.

	South Australia		**Western Australia**	**Victoria**	**Northern Territory**	**Queensland**	**Commonwealth**
Name of Fund	Litigation Assistance Scheme	Disbursements Only Assistance Fund	Litigation Assistance Fund	LawAid	NT Contingency Legal Aid Fund	Civil Law Legal Aid Scheme	National Contingency Disbursements Fund
Auspicing body	Law Society of South Australia	Law Society of South Australia	Law Society of Western Australia	Law Institute of Victoria and Victorian Bar Council	Northern Territory Legal Aid Commission	Legal Aid Queensland and Office of Public Trustee	Office of Legal Aid and Family Services, Attorney

							General's Department
Date begun (and ended)	1992	1996	1991, suspended 1994	1997	1993	1993	1996, but closed in same year
Initial Capital	$1 million	Surplus funds	$1 million	$1.68 million	$200,000	$4 million	$4 million for each of 3 years
Type of assistance	legal fees and disbursements	disbursements only	legal fees and disbursements	disbursements only	disbursements only	disbursements and up to $2,000 of legal fees	disbursements only
Type of matters	all civil matters excluding family law or local court matters	all civil matters excluding family law	all civil matters excluding family law for which total costs will exceed $4,000	all civil matters excluding family law	any matter for which there is possibility of monetary award	all civil matters where there is a power in a court or tribunal to award costs, including business dispute, excluding family law	guidelines never released
Maximum support for individual matter	no maximum; support reassessed at each major stage	no maximum; support reassessed at each stage	no maximum; support reassessed at each stage	no maximum; support reassessed asTrustees deem appropriate	no maximum	no maximum; support reassessed at each major stage	as above
Amount of Fee/how calculated	15% of total damages	25-100% of amount lent - fixed at merit assessment	15% of total damages recovered	up to 10% of total damages recovered but usually 5.59%	25% on out-standing balance calculated on a daily rate	no fee, only obligation is to repay amount borrowed	as above
Merit Test Method	panel of 3 practitioners	panel of 3 practitioners	panel of 3 solicitors	Trustees	in house committee	in house staff	as above
Means Test	eligible up to twice annual average wage for the State	eligible up to twice annual average wage for the State	inability of applicant to meet fees from income and assets	inability of applicant to fund matter from income and assets	flexible	same means test used for legal aid applicants	as above
Currently operating	yes	yes	yes	yes	yes	yes	no

Publication details

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The proposal for the LSF was conceived by the then Law Foundation Director, Terence Purcell, and developed by him with George Gulzinski, MIRA Consultants Limited, Lee Nicholls and Steven Reynolds. Operation of the LSF was further refined during its operation by Steven Reynolds, Simon Rice and Dallas Lewis.

The LSF operated under the overall direction of the Law Foundation Board of Governors, assisted by a steering committee with representatives from the Legal Aid Commission and the Law Society of New South Wales.

Background: Contingency Legal Assistance Funds (CLAFs)

Overseas

[2] Legal Action April 1998 pp.6-7

Australia

[3] Access to Justice Advisory Committee (1994) Access to Justice: an Action Plan Commonwealth of Australia, p. 268

[4] Attorney General`s portfolio 1996/97 Budget Information 3.

[5] Access to Justice Advisory Committee (1994) Access to Justice: an Action Plan Commonwealth of Australia, pp. 266-270.

[6] Law Society Journal March 1999

Financial viability

Development of the Litigation Support Fund (LSF)

The Fund in operation 1994-1997

Structural considerations

[7] See Initial model, 5 Development of the Litigation Support Fund (LSF)

Administrative procedures

Access to justice

Appendices

Publication details

Acknowledgments

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