



20 December 2005

By fax (2865 2902) and by email at hklrc@hkreform.gov.hk

Our Ref.: C/EPLM, M38458

The Secretary
The Conditional Fees Sub-committee
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong

Dear Sir,

Consultation Paper on Conditional Fees

With reference to the Consultation Paper on Conditional Fees issued by the Law Reform Commission Conditional Fees Sub-committee, the views of the Hong Kong Institute of Certified Public Accountants (“the Institute”) on the paper are set out below.

We note that the term “conditional fee” for the purposes of the consultation paper means an arrangement whereby, in the event of success, the lawyer charges his normal fees with or without a bonus, usually referred to as a “success” or “uplift” fee.

One of the proposals contained in the consultation paper is that the existing prohibitions against the use of conditional fees could be lifted for certain types of civil litigation, including professional negligence cases (Recommendation 2), so that lawyers could choose to charge conditional fees in appropriate cases.

While the Institute has some sympathy for the proposal to enhance access to justice in Hong Kong by introducing a conditional fee regime, we also have concerns that a conditional fee regime could lead to a flood of litigation, some of which may be unwarranted, and that this could exacerbate existing inequities in the system. Potential plaintiffs might be encouraged to take legal proceedings in circumstances where they would not otherwise have done so on the merits of the case, with lawyers more willing to take such cases on in the hope that defendants may be persuaded to settle to avoid the costs of litigation.

We note that, for example, although the paper seeks to distinguish the system in the United States (US), where litigation proliferates, from that in the United Kingdom, Europe and elsewhere, Recommendation 13 appears to introduce into the framework a concept that is an important element of the US system, namely the adoption of a form of contingency payment, based on a share of any



compensation recovered, albeit in relation to the financing of the proposed independent funding body and not the private lawyers that it engages.

The Institute is of the view that a conditional fee regime could have social cost implications and, among other things, implications for small and medium-sized accounting practices, which generally have limited resources. One likely consequence for the accounting and other professions would be an increase in the costs of obtaining professional indemnity. This might well have to be passed on to clients, which, in turn, could have economic consequences, particularly for small and medium-sized enterprises.

With the application of joint and several liability still the norm in Hong Kong, a plaintiff can recover in full from any one defendant a loss caused by two or more parties who may have been negligent in performing their role in a transaction giving rise to the loss, without reference to the actual share of the fault of each defendant. It is believed that the introduction of a conditional fee regime could exacerbate the situation, taking into account the experience in other common law jurisdictions, and the potential for increases in claims following the implementation of such a regime. As a result, the likelihood of defendants incurring substantial costs in defending claims for damages, the full extent of which may not have been justly attributed to them, would increase.

In our view, it is neither economically efficient nor equitable for a financial marketplace such as Hong Kong to operate on the basis that financial losses may have to be paid for by a party, whose role in the events giving rise to the losses may have been limited. It would be unfortunate if the balance were to be tipped further in favour of potential plaintiffs by the proposals in the consultation paper, without steps also being taken to address the problem of liability.

We are aware that the government is giving consideration to the issue of liability reform. Under the circumstances, it is our position that the introduction of the proposed conditional fee regime should be put on hold, at least until substantial progress has been made towards implementing reform, including, in particular, a framework for proportionate liability, as outlined in a paper issued by the Institute in March 2005. (See “A Case for Professional Liability Reform in Hong Kong”, which is available at:

http://www.hkicpa.org.hk/professionaltechnical/liability/liability_reform.pdf).

Under a system of proportionate liability, a negligent professional, for example, would be liable only for that proportion of the loss that reflected his or her responsibility for damages suffered. This would be more equitable and would allow for a more effective management and control of business risks and liabilities.

As regards the detail of the proposals contained in the consultation paper, in our view, any conditional fee regime would need to incorporate adequate safeguards to minimise the risk of a proliferation of unwarranted and frivolous or vexatious claims. Examples of such safeguards mentioned in the paper would include putting a cap on the success fee, expressed as a percentage of normal legal costs (Recommendation 5); requiring a claimant utilising conditional fees, by law, to



notify the defendant of this fact, and granting the court discretionary power to require security for costs in appropriate cases (Recommendation 6).

We hope that you will find our comments to be constructive. If you have any questions in relation to this submission, please feel free to contact me on 2287 7084.

Yours faithfully,

A handwritten signature in black ink that reads 'Peter Tisman'. The signature is written in a cursive, flowing style.

Peter Tisman
Director, Specialist Practices

PMT/JT/ay