

2005 Policy document



Caps on Legal Costs

In some Australian jurisdictions there is an upper limit on the amount of legal fees that a successful plaintiff can be awarded. NSW provides a simple example: in any claim for damages for personal injury that results in an award of damages less than \$100,000, the maximum that a lawyer can be awarded in costs is \$10,000 or 20% of the damages awarded – whichever is the greater.

There are two key difficulties with this kind of restriction:

1. The amount of damages recovered is not related to the complexity of a claim. The fact that the compensation awarded in a case does not exceed \$100,000, does not mean that the case didn't raise serious legal complexities, involve many different people and companies in a complicated factual scenario, or involve questions on important matters of public interest that needed to be investigated.
2. Where an injured person pursues litigation but is awarded less than the \$100,000 limit, their legal fees – especially in a complex case – may well exceed \$10,000. The result is that the injured person will have to dip into their damages award to pay their lawyers. Even in claims under \$100,000, defendants can mount such vigorous defences that the legal costs involved exceed the ultimate judgment. This can happen whether the defence was meritorious and the legal costs stemmed from the inherent complexity of the case, but can also occur where defences are dilatory and merely delay the case, thereby adding to the costs.

Caps on legal costs prevent some claims from reaching the courts, as pursuing complex cases for amounts less than \$100,000 is a financially questionable proposition. Injured people who can afford lawyers will question the risk involved themselves. Lawyers who offer no-win no-fee services – thereby effectively supplying the civil legal aid no longer widely available through Legal Aid Commissions – will find it economically unviable to support complex claims under \$100,000.

The result is an effective barrier to accessing the justice system for those people whose injuries are assessed as being worth less than \$100,000. No equivalent barrier exists for economic losses sustained in business.

Proposals to limit the costs recoverable in relation to the amount awarded in a particular claim must be approached with caution. Contingency fees are illegal in Australia: lawyers cannot charge fees proportionate to the eventual damages award. However, the converse is legal: recoverable lawyers fees can be limited proportionate to the eventual damages award.

The Australian Lawyers Alliance is opposed to any system of caps that prevents injured people having full access to unfettered legal advice and being able to exercise their rights to pursue valid claims through the courts.