

6-1-2006

The fog has not lifted — section 198J of the NSW Legal Profession Act in light of acceptable negotiation theory and principles — Part I

Avnita Lakhani

Recommended Citation

Lakhani, Avnita (2006) "The fog has not lifted — section 198J of the NSW Legal Profession Act in light of acceptable negotiation theory and principles — Part I," *ADR Bulletin*: Vol. 8: No. 9, Article 2.
Available at: <http://epublications.bond.edu.au/adr/vol8/iss9/2>

This Article is brought to you by [ePublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [ePublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).



Regulating negotiation

The fog has not lifted — section 198J of the NSW Legal Profession Act in light of acceptable negotiation theory and principles — Part I

Avnita Lakhani*

Part 2 to this article will appear in the next issue of the ADR Bulletin.

Introduction

As part of the legal profession lawyers negotiate on a daily basis.¹ In some jurisdictions, negotiation on certain matters, such as family matters, is mandated by statute. It is also common ground that fewer than 5 per cent of filed claims ever reach the trial phase and, conversely, more than 95 per cent of cases settle² prior to conclusion by trial.³

As such, it is reasonable to conclude that negotiation is a primary day-to-day skill of the legal professional to engage in settlement discussions and to prevent cases from going to trial. Therefore, any legislative attempt to regulate the behaviour of the legal profession is, directly and indirectly, an attempt to regulate the negotiation behaviours of legal professionals.

The issue is whether such legislative attempts are unnecessary encroachments on a lawyer's duty to serve and advocate for his or her client. A related issue is whether such legislative constraints take into account acceptable negotiation theory and principles as opposed to being based on little more than anecdotal evidence, selectively obtained and subjectively assessed.

This article examines s 198J of the *Legal Profession Act 1987* (NSW) (LPA 1987), as a representative example⁴ of a legislative constraint on certain negotiation tactics used by the legal profession.⁵ For example, in negotiation literature, typical positional bargaining tactics include high-soft offers, low-soft offers, insult offers, theatrics, threats, lies,

and bluffing.⁶ Although 'lies' are clearly unacceptable for lawyers, why should the residue of the standard repertoire of negotiation behaviours be legislatively denied to lawyers, while permitted for their clients?

Background and purpose of section 198J

Part 11, Div 5C, s 198J(1) of the LPA

... negotiation is a primary day-to-day skill of the legal professional to engage in settlement discussions and to prevent cases from going to trial. Therefore, any legislative attempt to regulate the behaviour of the legal profession is, directly and indirectly, an attempt to regulate the negotiation behaviours of legal professionals.

1987⁷ effectively states that:

A solicitor or barrister [the LPA 2004 uses the phrase 'a law practice'] must not provide legal services⁸ on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

Subsequent subsections (and sections of the Act) attempt to define 'provable facts', and 'reasonable prospects of success'.

Section 198J was incorporated into the *Civil Liability Act 2002* (NSW). The *Civil Liability Act* was part one of the NSW Government's two-stage tort law reforms process. Stage one involves broad

reforms geared to 'reduce damage done by the public liability crisis'.⁹ Stage two will involve another set of broad reforms to the law of negligence.¹⁰

Stage one of the tort law reforms, which incorporates s 198J of the LPA 1987, was aimed at alleviating what government considered the detrimental impact of the 'public liability crisis'. Based on anecdotal information

and horror stories gained through conversations with local business and insurance companies, the Government concluded there was a national problem that needed to be remedied.¹¹

In short, the 'national problem' allegedly involves injured Australians making 'unjustified' claims for compensation and hiring 'greedy' lawyers to file unjustified claims that have little or no chance of partial or complete 'success'. This results in escalated insurance premiums that small businesses and clubs cannot afford, so they must close down or risk operating while uninsured. The alleged result is that Australian society is deprived of valuable (and sentimentally nostalgic) services of such small clubs and businesses.



The NSW Government decided that the remedy to this chain of mischief was to threaten the licenses of ‘greedy’ lawyers who are one of the causes of the alleged flood of unmeritorious claims. The expected benefits will include fewer unsuccessful claims filed so there will be fewer claims that need to be defended by insurers. This will mean that (not so greedy) insurance companies will have fewer and lower defense and administrative expenses, resulting in reduced increases in premiums. Such savings will be passed on to the customers who will then be able to afford insurance and stay in business longer. Furthermore, while this may mean that some injured individuals may not get compensation, on balance Australian society will be ‘better off’ than before. With this plan, the Government expected a 17.5 per cent reduction in the cost of personal injury claims, a 14 per cent reduction in the cost of personal liability claims, and an approximate 12 per cent reduction in public liability premiums.¹² However, the Government also stated they could not guarantee such results, nor guarantee that insurance premiums would actually fall.

This is a simplistic fairytale of social mischiefs and remedies. While it and its various offshoot versions are appealing, they are seriously naive and deceptive. An intelligent judge, for example, may reason that the literal remedy is based on flawed social analysis with unintended and detrimental side effects. The judge may conclude that the legislative remedy is not practical or justifiable. Such was the situation faced by the legal profession and the courts when s 198J was enacted. The next section of this article discusses the view of the courts and the legal profession in attempting to deal with alleged violations of s 198J.

Statutory interpretation of section 198J from case law

Since the enactment of s 198J, three significant cases have been decided. This section provides observations from the cases as well as a discussion of how the cases might affect future negotiation behaviours of legal professionals.

Concluding observations of case law decisions on section 198J

The following chart represents the

key observations regarding s 198J as interpreted by case law in New South Wales. The three primary cases include: *Momibo*; ¹³ *Degiorgio v Dunn (No 2)*; ¹⁴ and *Lemoto*.¹⁵ Following the

concluding observations is a discussion on some implications of the decisions in light of attempts to control the legal professional’s negotiation behaviour.

Observation	Source
<ul style="list-style-type: none"> The five key elements of the objective analysis are: <ol style="list-style-type: none"> (1) ‘reasonably believing’; (2) ‘material then available’; (3) ‘proper basis for alleging the fact’; (4) ‘a reasonably arguable view of the law’; and (5) ‘reasonable prospects of damages being recovered the action’. 	Momibo
<ul style="list-style-type: none"> Underpinning the objective test is deference to the lawyer’s subjective belief as to the reasonable prospects of success of the claim or defence. 	
<ul style="list-style-type: none"> ‘Reasonable belief’ — applies to all other elements; it means belief about the claim is that it is logically arguable; includes extent of belief as well as rationality of the belief; the belief may be subjective. 	Momibo
<ul style="list-style-type: none"> ‘Material then available’ — ‘then available’ means the time at which legal service is provided. ‘Material’ credible information/ evidence, not necessarily rising to the level of admissible evidence (that is, per rules of evidence). 	Momibo
<ul style="list-style-type: none"> ‘Proper basis for alleging the fact’ — this is a question of judgment in each case; first hand hearsay is there is no reason to doubt the provider, its inherent reliability, or its primary source. A sworn statement of client is material, that is proper basis. Similarly ‘hierarchy of material that is proper basis for alleging a fact is: <ol style="list-style-type: none"> (1) a client’s oral instructions (basic); (2) a client’s written statement; (3) a client’s sworn statement; (4) the latter plus admissible, corroborative evidence such as bank records.’ 	Momibo
<ul style="list-style-type: none"> ‘A reasonably arguable view of the law’ — not to be strictly or narrowly construed; does not require strict adherence to law as it currently might be, but extends to ‘any permissible development that might be foreseeably adopted by the court.’ 	Momibo
<ul style="list-style-type: none"> ‘Reasonable prospects of damages being recovered in the action’ — only requires recovery of ‘damages’, not the damages claimed or all damages; very broad construction; does not appear to affect exaggerated claims or provide a remedy against them; may also include equitable damages, token damages, nominal damages. 	Momibo; Degiorgio
<ul style="list-style-type: none"> ‘Reasonable prospects of success’ — <ol style="list-style-type: none"> (1) for a claim — ‘if there are reasonable prospects of damages being recovered on the claim’; 	s 198J(4) of the LPA 1987



Observation	Source
(2) for a defence — ‘if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim’.	
<ul style="list-style-type: none"> • ‘Without reasonable prospects of success’ — means ‘so lacking in merit or substance as to be not fairly arguable’; falls short of ‘likely to succeed’; does not require determination that success was likely or more likely than not — only requires determination on basis of facts and law that there is cogent basis for putting case forward that has merit and substance and is arguable (<i>Degiorgio</i>). • Not ‘fairly arguable’ if solicitor or barrister’s belief as to the material then available which justified proceeding with the claim or defence ‘unquestionably fell outside the range of views which could reasonably be entertained’ (<i>Lemoto</i> citing <i>Medcalf J</i> at [40]). 	Degiorgio; Lemoto
<ul style="list-style-type: none"> • Continuing duty under s 198J — on-going duty on legal practitioner to assess the case against reasonable prospects of success above and beyond when the case was filed. • Obligation arises whenever legal advice is provided (<i>Momibo</i>) and at all material times thereafter (<i>Degiorgio</i>). Legal professional obligated to review/inspect documents and make determinations at first <i>convenient</i> opportunity (not necessarily at first <i>available</i> opportunity) when taking into account practical realities of legal professional’s life and priorities (<i>Momibo</i>). 	Momibo; Degiorgio; Lemoto
<ul style="list-style-type: none"> • Section 198M costs orders may be: <ol style="list-style-type: none"> (1) repayment order; (2) indemnity order; (3) both repayment and indemnity order — must be exercised judiciously and only after determining that it is just in light of all circumstances. 	s 198M of the LPA 1987; Degiorgio; Lemoto
<ul style="list-style-type: none"> • Section 198M costs orders — considered discretionary¹⁶ and not mandatory, even if the result of a hearing is a judgment that the claim or defence was without reasonable prospects of success or plaintiff/defendant loses case. 	Lemoto
<ul style="list-style-type: none"> • Appeals and s 198J obligation — appeals from arbitration awards to judicial re-hearing that issues the same verdict as arbitrator is not a sufficient foundation to conclude that claim was without reasonable prospects of success; must be assessed independently with reasoned opinion. 	Lemoto
<ul style="list-style-type: none"> • Procedural fairness and natural justice — legal professional who might be subject to costs orders under s 198M must be given full and sufficient notice of complaint and full and sufficient opportunity to answer and present affidavits to rebut presumption. 	Lemoto

The myriad definitions and impressions only create further discrepancy in how the standard is applied on a case-by-case basis. The lack of a consistent, measurable definition is at the heart of an immeasurable yardstick for attorney conduct or misconduct.

Momibo in the NSW District Court

In 2004 the NSW District Court in *Momibo Pty Ltd v Adam*¹⁷ determined that the purpose of s 198J of the LPA 1987 was to cure the mischief of ‘unmeritorious’ claims and ‘spurious’ defences, but only if the mischief extends beyond the acts which the law currently regulates.¹⁸ The Court held that given the elements of the objective test in light of the solicitor’s subjective view of the reasonable prospects of success of the claim under contract law, the solicitor was not in violation of s 198J so as to impose s 198M costs orders against the solicitor.¹⁹ The Court dismissed the application and ordered each side to bear its own costs for the application.²⁰

This case points out several implications for the legal professional in light of negotiation theory and principle. First, from a case management standpoint, the legal professional is still in charge of the strategic direction and tactical methods used in managing a case. This responsibility, however, does not rise to the level of judging the merits of the case or assessing whether the plaintiff or defendant will be successful if the case goes to trial. Indeed, as long as the court registrar is persuaded, the claim or defence is likely to be rostered for a hearing. Who then is making the determination of ‘reasonable prospects of success’?

Second, the case addresses the use of exaggerated claims. The use of exaggerated claims (commonly termed ‘high-soft’) is generally an acceptable tactic in negotiation.²¹ In practice, a solicitor may start ‘high-soft’ with an insurer (who starts ‘low-soft’) as a normal part of the negotiation dance.²² Because the primary interest of the insurer is to minimise the amount paid against a given policy or injury, the solicitor may exaggerate the claim so as to settle eventually at an amount that is reasonable, given his or her client’s injury and to compensate for the

In addition to the five elements discussed in *Momibo*, the most highly debated phrase is the meaning of ‘reasonable prospects of success’ or ‘without reasonable prospects of success’

as stated in the LPA 1987. The table on p 178 reflects the definitions courts have come up with to reflect ‘reasonable’, ‘reasonable prospects of success’, or ‘without reasonable prospects of success’.



'Reasonable prospects of success'	'Without reasonable prospects of success'
<ul style="list-style-type: none"> Claim — 'if there are reasonable prospects of damages being recovered' (s 198J(4)). 	<ul style="list-style-type: none"> '[S]o lacking in merit or substance as to be not fairly arguable' and appreciably short of 'likely to succeed' (<i>Degiorgio</i>). No prospects of recovering damages on the claim.
<ul style="list-style-type: none"> Defence — 'if there are reasonable prospects of the defence defeating the claim or leading to a reduction in damages recovered on the claim' (s 198J(4)). 	<ul style="list-style-type: none"> No prospects of defeating the claim or no possibility of getting a reduction of damages recovered on the claim.
<ul style="list-style-type: none"> 'Reasonable' — 'reasonable under all circumstances of the case' (<i>Opera House v Devon</i> (1936) 55 CLR 110 per Latham CJ). Acid test is 'whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.' (<i>Ridehalgh</i> at 232). 	<ul style="list-style-type: none"> Not reasonable based on all circumstances of the case: 'Unreasonable' — conduct that is 'vexatious, designed to harass the other side rather than advance the resolution of the case' (<i>Ridehalgh v Horsefield</i> [1994] Ch 205 at 232). Not unreasonable 'simply because it leads ... to an unsuccessful result or because other more cautious legal representatives would have acted differently.' (<i>Ridehalgh</i> at 232).
<ul style="list-style-type: none"> 'Reasonable' = 'a relative term' (<i>Opera House v Devon</i> per Starke J). 	
<ul style="list-style-type: none"> 'Reasonable prospect' — 'a real chance, a prospect that is strong enough to be acted upon ... does not entail more likely than not ...' (<i>Cadogan v McCarthy & Stone (Developments) Ltd</i> [2002] L&TR 249 per Saville LJ). 	<ul style="list-style-type: none"> Does not have a real chance.
<ul style="list-style-type: none"> Nothing more than 'arguable' (<i>Westend Pallets Pty Ltd v Lally</i> (1996) 69 IR 1). 	<ul style="list-style-type: none"> Not arguable.
<ul style="list-style-type: none"> Something less than the likelihood of success (<i>Ahern v Deputy Commissioner of Taxation</i> (1983) 78 FLR 202). 	<ul style="list-style-type: none"> No likelihood of success.
<ul style="list-style-type: none"> 'Not hopeless or entirely without merit' (<i>Cadogan and Bushell v Repatriation Commission</i> (1992) 175 CLR 408). 	<ul style="list-style-type: none"> Hopeless and entirely without merit.
<ul style="list-style-type: none"> 'A theory that is rationally based' (<i>Cadogan and Repatriation Commission v Webb</i> (1987) 76 ALR 131), 	<ul style="list-style-type: none"> A theory that is 'irrational, absurd, or ridiculous'.

services of the legal professional. When negotiations begin, the insurer is likely to make an 'insult offer' by starting 'low-soft', an offer that is completely out of the reasonable range of acceptance as determined by the plaintiff's solicitor. Eventually, the parties negotiate and

attempt to arrive at a 'reasonable offer' that is within the acceptable range of settlement options for both parties. The *Momibo* Court concluded that s 198J does not affect 'exaggerated claims'.

Thus, in a literal interpretation, a plaintiff can claim \$6 million on any

claim as long as there is a prospect of recovering even \$1. In addition, as long as the defence can reasonably expect to argue that the claim is worth \$0, the defence's claim has merit. The legislature may not be pleased to know that so long as a plaintiff's lawyer believes that there is a prospect of recovering even \$6, he or she can claim \$6 million.

Degiorgio v Dunn (No 2)

On 1 February 2005 the Supreme Court of New South Wales decided *Degiorgio v Dunn (No 2)*.²³ Prior to this case the Supreme Court of New South Wales — Equity Division decided the issue of whether a partnership business existed in common between the parties.²⁴ That decision (*Degiorgio (No 1)*) was delivered on 26 August 2004 and established the basic facts of the proceedings for the costs orders sought under s 198M in *Degiorgio v Dunn (No 2)*. The Court looked at the legislative backdrop and statutory construction of s 198J, the solicitor's responsibility, and the *Momibo* test and concluded that the solicitor had discharged his responsibility properly in light of criteria set forth under s 198J.²⁵ The Court dismissed appellant Dunn's application for an order of costs under s 198M of the LPA 1987.²⁶

Several key observations are worth noting from this case. First, while the *Momibo* Court determined that the legal professional's on-going duty to ensure that the case has reasonable prospects of success applied at all times and was broadly construed, the *Degiorgio* Court seems to say that the on-going duty only applies 'at all material times thereafter'. This appears to be a less stringent standard yet the court does not define what is considered 'all material times thereafter'.

Second, the Court relies heavily on the solicitor's subjective view of the viability of the case. While the Court does not go into great length about a lawyer's preliminary assessment, the case does present a question as to the extent of due diligence required by the solicitor if he (or she) has to determine reasonable prospects of success before filing the claim and without benefit of discovery. Prior to discovery a lawyer does not even have the defendant's reply to see if his (or her) alleged 'facts' are



contradicted or accepted as against the alleged 'facts' of the opposing side.²⁷

Lemoto v Able Technical Pty Ltd

Just three months after *Degiorgio (No 2)* the Court was faced with another claim against a solicitor under s 198J, this time because the solicitor sought to appeal the decision of the arbitrator and the lower court in a personal injury case involving an at-work injury.

On 9 May 2005 the NSW Court of Appeal decided *Lemoto v Able* and considered the power of the courts to pursue costs orders against a solicitor who might have violated s 198J as well as whether are entitled to due process if subjected to costs orders under s 198M.²⁸ The original claim, filed in the District Court on 26 November 2001 (by the injured employee, Stoddart, the third respondent in the Court of Appeal proceedings), was referred to arbitration. The arbitrator ruled in favour of the co-defendants (the labour agency and employer, first and second respondents in the Court of Appeal). The plaintiff/employee filed for a re-hearing. The primary judge delivered his judgment on 26 September 2003, in which he also found in favour of the co-defendants and against plaintiff Stoddart.²⁹

Subsequently, at costs hearings, the first and second respondents (in the Court of Appeal) elected to file costs orders against the former plaintiff's solicitor, Lemoto. On 25 February 2004, Lemoto was advised by letter that the District Court judge had entered a costs order against him under s 198M since Lemoto had failed to provide affidavits to rebut the presumption of an invalid claim.³⁰ The letter allegedly did not provide a basis for the order or any terms of the costs order.³¹ On 19 May 2004 the District Court judge denied Lemoto's initial motion to set aside the costs orders.³² Lemoto then filed for leave to appeal on 18 June 2004, which was granted by the NSW Court of Appeal.³³

To interpret s 198J, the Court of Appeal looked to historical principles, policy concerns, and legislative purpose.³⁴ With respect to the issues before the Court, it found for the appellant/solicitor Lemoto and held:

- the primary judge erred in making the costs orders against Lemoto;

- the primary judge erred in concluding that the case met the test for a s 198N presumption;
- the primary judge failed to give reasons for the making of a costs order against the appellant; and
- the primary judge failed to consider 'whether the case was 'fairly arguable' on the basis of provable facts or a reasonably arguable view of the law.'³⁵ The Court allowed the appeal and discharged the costs order against the appellant Lemoto.³⁶

Viewed from the backdrop of historical principles, policy concerns and legislative purpose, the *Lemoto* Court, according to some, has 'expressed its preference for legal practitioners to be "bold spirits" rather than "timorous souls" in providing representation'.³⁷ In addition, costs orders against legal practitioners appear to remain within the courts' discretionary powers as the main deterrent to unmeritorious or weak claims and defences.³⁸ This is consistent with prior legal precedent and the court's summary power to ensure proper administration of justice.

If Pt 11 Div 5C is here to stay, albeit weakened in application, what is the impact on the legal profession? The next two sections of this article address the impact of s 198J as seen by various stakeholders, including courts, legal professionals and scholars.

Impact of section 198J — concerns and disadvantages

Has s 198J caused reverberations through the legal community? The 'reasonable prospects of success' legislation is anything but carefully crafted legislation designed to resolve a critical problem in society. Anecdotally, many argue that the legislation is everything from a carefully constructed campaign by the insurers to blame the legal system for the rise in insurance premiums to legislation that infringes on the rights of potential litigants. The major concerns and disadvantages of s 198J as expressed by the various stakeholders are identified in the following sections.

Courts

From the standpoint of the courts, the new power of s 198J is a remedial one, to be exercised very cautiously to

produce a beneficial effect, and only after utmost consideration of all circumstances of the case.³⁹ Judges appear to have five major concerns, as summarised below.

- Division 5C has a 'chilling effect' as it changes the traditional controls and attempts to prevent the legal professional from even accepting a case that may be hopeless for fear of being subject to personal costs orders and/or being struck from the roll of practitioners.
- Division 5C creates a potential conflict of interest between a lawyer's duty to the court and a duty to the client. It appears to place the legal professional in the precarious position of playing 'judge' and making value decisions by determining the potential success of the case even before the judge makes such a determination.
- Division 5C may well lead to an additional rise in unrepresented litigants.⁴⁰ The reasons for the increase include:⁴¹
 - (1) litigants choose to represent themselves;
 - (2) many cannot afford representation or do not qualify for legal aid;⁴²
 - (3) parties may believe they can do just as good a job as a lawyer;
 - (4) parties distrust lawyers; and
 - (5) parties continue the case unrepresented despite legal advice that they cannot win.
- Courts fear that too liberal a use of the powers of Div 5C will lead to a 'new and costly form of satellite litigation.'⁴³ 'Satellite litigation', as referred to in *Lemoto*, means a rise in cases between opposing lawyers or between lawyers and their former clients.
- Courts believe the legislation lacks a procedural basis for handling a Div 5C claim, leading to due process issues.⁴⁴ The *Lemoto* Court warned that Div 5C needs to be properly understood and applied in order to prevent the 'grave risk of [it] becoming an instrument of injustice.'⁴⁵ These major themes are consistent with concerns expressed by legal professionals and interdisciplinary scholars. Therefore, while the law may exist on the books, it will either gather dust or be so severely emasculated as to have no measurable consequences.



Legal professionals

Predictably, some lawyers as negotiators and litigators do not like the regulatory goals of s 198J or similar legislation. The primary concerns of legal professionals are highlighted below.

- Section 198J fails to control such 'inefficient' behaviours as 'exaggerated claims', 'wild claims' or 'insult offers' by such parties as insurance companies who usually start with a 'low soft'⁴⁶ offer for settlement.
- Section 109J adds to the existing ethical obligations when compared with Rule 36 of the Bar Rules and Rule A36 of the Solicitors' Rules.⁴⁷
- A solicitor who acts in good faith based on client instructions may still be subject to costs orders.⁴⁸ Division 5C provisions impose a greater personal liability and create greater professional conduct liability issues that generally fall outside of the professional indemnity insurance maintained by solicitors.⁴⁹
- Legal practitioners are now subject to simultaneous and/or incremental punishments including costs orders and penalties set out in s 198M, penalties set out in Pt 10 of the LPA 1987, professional misconduct or unsatisfactory professional conduct proceedings⁵⁰ and/or having his or her name removed from the roll of practitioners.⁵¹ For some, these would certainly serve as a major deterrent to taking on cases which merit representation but whose transaction costs outweigh the potential for adequate recovery in court.
- Division 5C may have an impact on the legal professional's duty with respect to a prospective client. Where are the bounds of confidentiality and legal professional privilege? If, after preliminary analysis, the practitioner declines the case, how does the practitioner protect himself or herself against claims by a potential client where another lawyer may decide to take the same case?

As evidenced by practitioners' remarks, s 198J has invoked much concern, equal to, if not more than, that of courts and judges who will be the recipients of potential Div 5C claims.

Legal community

Section 198J also produced ripples

across the legal community. Even before the *Momibo* decision, reports were already surfacing about s 198J being used as a negotiating chip between opposing solicitors. The major concerns of the legal community are summarised below.

- Section 198J may be used as a bargaining chip between opposing parties during settlement negotiations to obtain concessions.⁵²
- Section 198J may be used as a threat between opposing lawyers.⁵³
- Division 5C, if not properly managed, will potentially 'split the team' between the lawyer and client, with the lawyer now having to also worry about personal liability from his or her former client.
- Division 5C will potentially reduce co-operation and consideration between legal professionals as s 198J is now being used as a threat during negotiations.⁵⁴
- Division 5C will potentially affect the integrity and reputation of the legal profession because of the loss of client trust and opposing partner respect and co-operation.

As evidenced by the cases discussed above, the effects of the reforms have apparently resulted in another adversarial bargaining chip in an already adversarial system where unintended, but entirely foreseeable, consequences proliferated.

Scholars

A primary criticism by legal and social science scholars is that s 198J and similar provisions are based on faulty foundations. A summary of this and other related concerns are indicated below.

- There is a lack of empirical data to prove the social mischief of 'too many' litigious claims. Similarly, there is a lack of objective criteria to assess the legislation's potential for success.⁵⁵
- The lack of objective, substantiated evidence only perpetuates the myth of the so-called 'litigation explosion'. Similarly, competing interpretations of personal anecdotal evidence only increases the perception of lawyers and litigants as greedy and exploitive.⁵⁶
- A conflict of values and interests may ensue if the solicitor has to make value judgments regarding the potential of

success for a case. Section 198J brings to light a clash of values⁵⁷ — between providing access to legal representation versus defendant's goals to be free from unmeritorious claims and reducing insurance premiums — that may foster even more antagonism.

- The lack of an institutionalised remedy system that does not damage the integrity and reputation of the legal system leads to increased use of existing, institutionalised procedures. This increases the chances of 'satellite litigation' and completely frustrates the legislative aim to split the team!

Impact of section 198J — arguable advantages

Despite numerous concerns there are, however, several potentially positive outcomes of Div 5C (and s 198J (now s 345)). These potential advantages are summarised below.

- Section 198J and related provisions have put lawyers on notice with respect to proper, cost effective case preparation, another ALRC reform goal.
- The new legislation 'put a premium on realistic assessment of cases'.⁵⁸ By so doing, the legislation might protect the interests of litigants and the public by ensuring prompt and economic disposal of potential cases.
- The Government's reforms may restore some balance to a decade that was short on personal responsibility and long on directing blame towards others as the 'blaming culture' is one that has allegedly caused damage to business and society.⁵⁹
- A new industry of greater pro se (litigants in person) representation might emerge⁶⁰ because parties will be more educated⁶¹ and demand more control over the process.⁶² As a result, complementary services will emerge to aid the pro se litigant, such as pro se legal education providers that will aid the pro se litigant through the legal process.⁶³
- Clients may have to be more active in the process, fully assist the legal professional, and actively ensure that the services are in direct proportion to the expected benefit.
- The legal professional can now be more strategic as well as tactical, thus improving overall case management.⁶⁴



- Division 5C puts the power back into the hands of legal professionals to be objective and realistic counsellors at law instead of zealous advocates for their clients in the shadow of the law.

Avnita Lakhani is a PhD candidate at the Bond University Dispute Resolution Centre in Gold Coast, Queensland and holds an LLM in International Dispute Resolution.

Endnotes

*I am grateful to Professor John Wade, for his insightful comments on this article and to Professor Laurence Boulle for his helpful advice. Your comments and questions are welcome via email to alakhani@student.bond.edu.au.

1. Debra Lynn Zutter 'Negotiation' (March 2002) Family Law Quarterly 1 available at www.debzutter.com/sections_content/02_articles_pub/article0005.html on 9 April 2006.

2. Marc Galanter 'Reading the landscape of disputes: what we know and don't know (and think we know) about our allegedly contentious and litigious society' (2003) 31 UCLA L Rev 4 at 64-65.

3. Galanter, above note 2. See also Carrie Menkel-Meadow 'For and against settlement: uses and abuses of the mandatory settlement conference' (1985) 33 UCLA L Rev 485 at 502: 'Over 90 per cent of all cases (both civil and criminal) are currently settled and taken out of the system and, thus, are unavailable for common law rule making.'

4. Other examples include *Trade Practices Act* (Cth) s 52 (AUS), *Uniform Court Procedure Rules* s 360 (AUS), *Federal Rules of Civil Procedure* rule 11 (USA), and *ABA Model Code of Professional Responsibility* (USA).

5. The reference to 'fog' is taken from the term 'fog of war', which is used to describe how difficult it is to determine what is really happening in the heat of battle, resulting in countless, costly errors of judgment. Undoubtedly s 198J was proposed as a result of the fog of war known as the alleged 'tort crisis' in 1990s Australia.

6. John Wade (ed) 'Bond Dispute Resolution News' (May 2005) Volume 19. See also Lewicki, Saunders & Minton *Essentials of Negotiation* 2nd

ed, 2001 pp 168-170.

7. The LPA 1987 was repealed in 2004 and replaced by the *Legal Profession Act 2004* (NSW) (LPA 2004). Section 198J has been renamed s 345. This article uses s 198J for ease of reference when discussing case law and legislative history and purpose.

8. LPA 2004 defines 'legal services' as 'work done, or business transacted, in the ordinary course of legal practice'; 'legal practice' is not defined: see Pt 1.2, s 4.

9. Second Reading of the Civil Liability Bill 2002, *Legislative Council Extract*, 4 June 2002.

10. Above note 9.

11. Above note 9.

12. Above note 9.

13. *Momibo Pty Ltd & Barry Bryne v John Burnett Adam and John Robert trading as Marsdens Law Group* (unreported, NSW District Court, WL 2476453, 31 August 2004, Neilson DCJ).

14. *Degiorgio v Dunn (No 2)* [2005] NSWSC 3 (Barrett J).

15. *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 (Hodgson, Ipp and McColl JJA).

16. This is another area where some guidelines are needed. For example, how 'discretionary' is this? How many facts or how much evidence will/might trigger 'discretion' not to punish the lawyer?

17. *Momibo* (unreported, NSW District Court, WL 2476453, 31 August 2004, Neilson DCJ).

18. At [60].

19. At [105]-[106].

20. At [105]-[106].

21. Lewicki et al, above note 6.

22. Wade, above note 6, at 6-8.

23. *Degiorgio v Dunn (No 2)* [2005] NSWSC 3 (per Barrett J).

24. *Degiorgio v Dunn* [2004] NSWSC 767 [1].

25. *Degiorgio v Dunn (No 2)* [2005] NSWSC 3.

26. At [43].

27. The whole issue of accepted or contradicted 'facts' alone would make any claim a meritorious claim with an arguable basis of law and fact.

28. *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153.

29. At [23].

30. At [69]-[73].

31. At [75].

32. At [76].

33. At [79].

34. It appears that the Court bypassed the statutory method of interpretation and jumped directly to the 'golden rule' approach to argue against an interpretation that might result in an unjust or absurd result. By looking at historical principles, policy concerns, and legislative purpose, it appears the court hopes to provide a more historical rationale thus putting the ball back into the court's hands, so to speak.

35. [2005] NSWCA 153 at [174]-[179].

36. At [197].

37. At [126].

38. At [99]-[100].

39. *Momibo* (unreported, NSW District Court, WL 2476453, 31 August 2004, Neilson DCJ) at [105]; *Orchard v Southern Eastern Electricity Board* [1987] 1 QB 565 at 579G; *Degiorgio (No 2)* [2005] NSWSC 3 at [27]; *Lemoto* [2005] NSWCA 153 at [188]-[196].

40. *Degiorgio (No 2)* at [27]; *Lemoto* at [139]-[142] and [190]-[193].

41. Legal and Constitutional Reference Committee of the Senate of the Parliament of Australia, 'Legal Aid and Access to Justice — Chapter 10: Self-Represented Litigants' 183-185 available at <www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf> on 9 April 2005.

42. Above note 41.

43. *Lemoto* [2005] NSWCA 153 at [195].

44. At [150].

45. At [190]-[191].

46. Wade, above note 6.

47. Nicholas Beaumont, 'What are reasonable prospects?' (2004) *Law Society Journal* 42.

48. See generally Greg Couston & Shayne Thompson, 'Some guidelines at last on "without reasonable prospects" and personal costs orders' (2005) *Law Society Journal* 35.

49. Above note 48.

50. *Lemoto* [2005] NSWCA 153 at [122]; LPA 1987, s 198L(1).

51. Above note 50.

52. New South Wales Bar Association, *Bar Brief* No 112 (2004) 2.

53. Gordon Salier, 'Solicitors making threats to seek personal costs against



other solicitors pursuant to Part 11 Div 5C of the LPA, 1987' (email sent Friday, 6 August 2004).

54. See also *Lemoto* [2005] NSWCA 153 at [194].

55. The Law Council of Australia Newsletter (December 2005) 'Changes To Compensation Laws Are Not Working: Report'.

56. Galanter, above note 3 at 66.

57. Vilhelm Aubert, 'Competition and dissensus: two types of conflict and

conflict resolution' (1963) 7 *Journal of Conflict Resolution* 25 at 29-39. See also Robert H Mnookin, 'Why negotiations fail: an exploration of barriers to the resolution of conflict' (1993) 8 *Ohio State Journal of Dispute Resolution* 2 at 239 241.

58. *Maitland Hospital v Fisher* (No 2) (1992) 27 NSWLR 721 (CA).

59. Above note 58. See also Second Reading Speech, above note 9.

60. John Wade (October 1993)

'Pressures on 'legal' services and the dispute management industry: general characteristics of emerging DR industries' 5 — article on file with the author.

61. Above note 60.

62. Above note 60.

63. Wade, above note 6 at 5-7.

64. See generally John Wade (July 1999) 'Which conflicts need judges? Which conflicts need filing?' — article on file with the author.