1. Introduction

The Institute for Legal Reform (ILR)

The Institute for Legal Reform (ILR) welcomes the Committee’s inquiry into the issues of litigation funders and class actions, which are ripe for reform.

ILR is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, which is the world's largest business federation representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers, and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system.

Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in the U.S. courts and has been actively involved in legal reform efforts in the U.S. and abroad. Its members have a direct interest in how litigation is conducted in Australia as many carry on business in Australia or trade with Australians.

The total trade in goods between the United States and Australia in 2018 - 19 was approximately AUD $48.7 billion. Australia's total investment in the United States in 2018 amounted to around AUD $718.9 billion and the United States investment in Australia was approximately AUD $39.5 billion.¹ The United States is Australia's third largest trading partner.

The United States is Australia’s largest provider of foreign direct investment (FDI) into Australia. In 2019 the United States invested A $983.7 billion². Combined, the investment relationship between the US and Australia is worth more than A $1.47 trillion – almost as large as Australia’s gross domestic product.³ As a net capital importer, Australia is dependent on investment from U.S. businesses.

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Given this level of trade and investment, U.S. businesses have a direct interest in the Australian legal system. They and their subsidiary companies also have direct exposure to litigation in Australia, and, in particular, to class actions.

In these circumstances, it is hardly surprising that the ILR would be interested in developments in Australia.

*The Australian class action and litigation funding industry*

The Australian legal system, and in particular, the Australian class action and litigation funding industry has a number of unique features which have had a significant adverse impact on both the business and the broader Australian community.

Australia is also the birthplace of third party litigation funding. Since its emergence in Australia, the litigation funding industry has grown into a global industry worth billions of dollars. Notwithstanding this global growth, Australia continues to be both one of the most active jurisdictions for the industry in the world and a honeypot for foreign funders.

The attraction of the Australian market is easy to understand.

- Australia has a uniquely plaintiff friendly class action system and one of the most onerous continuous disclosure private enforcement regimes in the world.

- It is perhaps the most profitable litigation funding market in the world generating returns to investors that exceed those of even the US litigation scene.

- It is all most completely unregulated, something which foreign litigation funders are quick to emphasise.

2. **A plaintiff friendly class action system**

Australia’s class action regime is more plaintiff friendly than that of the United States.

Unlike the US class action system, Australian class action procedure:

- Does not require common issues to predominate over individual issues – as a consequence pretty well any claim can be framed as a class action.

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4 See section on Australia in *Litigation Funding 2020* published by Woodsford Litigation Funding
• Does not include a certification procedure to ensure the speedy removal of unmeritorious claims.

• Allows for the resolution of issues relating to individuals or sub-groups as part of the class action.

As a consequence, class actions can, and are, run in Australia in relation to issues which could not be the subject of class action proceedings in the United States. Indeed, in 2009 Prof Geoffrey Miller, a US Professor of Law, observed that:

"Australia has one of the most liberal class action rules in the world … an American class action lawyer from the plaintiff’s side might think that he or she had died and gone to heaven."

3. The most profitable litigation funding market in the world

The Australian litigation funding market generates extraordinary profits. As a consequence, most if not all of the global funders have entered the Australian market.

In March 2020 Herbert Smith Freehills identified at least 25 litigation funders operating in the Australian market. Of these, 11 are global businesses.

Earlier this month, Omni Bridgeway released an investor presentation that included a table of its principal competitors in Australia. A copy is attached as Annexure 1. The table provides a useful snapshot of the global industry as it operates in Australia and the funds those funders are seeking to invest.

Historically, it has been difficult to assess the level of profitability of the litigation funding industry. However, as more information has emerged from both approval hearings and corporate filings the extraordinary returns on investment have been revealed. That profitability can now be compared to both the profitability of litigation funders operating in the US market and competing asset classes.

In 2016 a US study identified what it described as “extraordinarily high” returns on investments in US litigation funding. That study reported that:

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5 A good example of this are the Australian class actions involving pacemakers manufactured by St Jude Medical in the United States and distributed throughout the world. A global Hazard Alert resulted in two class actions being commenced in Australia – see Courtney v Medtel Pty Ltd & Ors [2003] FCA 36. No class action was commenced in the United States or, indeed, anywhere else in the world.

“... litigation financing can return between 29.4% and 43.2% annually, with an average annual return of about 36%.”

The material released by Omni Bridgeway includes data on Return on Invested Capital for both US and non US investments which confirm the profitability of the industry. While returns on its US investments exceeded 100% for the period FY 2015 through 2017 it has subsequently returned 47 and 40% respectively in FY 2019 and FY2020. By comparison, ROIC for investments outside the US, which are predominately Australian, have been remarkably stable in the period FY 2015 to FY 2020 returning an average of 157%.

The returns in the Australian market are confirmed by the data relating to individual cases that have been disclosed in the media. The Murray Goulburn class action offers a useful case study. The case settled for a total of $42 m. IMF spent $2.4 m on legal fees. Its commission was $15.9 m (~38%). Its profit (after these costs) would be $13.5 m. This suggests a ROIC for that investment of 5.62 in a period of just over 12 months or around 562% per annum.

Expressed as an annualised equivalent figure, these ROIC amounts would be substantially higher for litigation fund investors than comparable benchmark returns. For example, Australian Private Equity & Venture Capital Index 10-year Average Return is just 12.4% per annum. The returns able to be achieved by litigation funders would appear to be orders of magnitude higher. In a low interest rate environment, it is easy to see why significant amounts of foreign capital are being raised by litigation funds for deployment into Australia.

4. The case for proper regulation and supervision of litigation funders

In ILR’s submission, the arguments for the regulation of the litigation funding industry are overwhelming.

In 2014, the Productivity Commission conducted an inquiry into Access to Justice Arrangements which recommended that litigation funders should be required to hold a licence which would ensure that they:

- can satisfy any liabilities they incur;

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7 Finance and Law: Returns To Litigation Finance Investments Michael McDonald above-the-law.com 19 July 2016

8 See annexure 2

9 See IMF Bentham release the ASX of 24 June 2019

10 Cambridge Associates Index and Selected Benchmark Statistics, 31 December 2018
• properly inform their clients of relevant obligations; and
• implement systems for managing conflicts of interest.  

In March 2018, the Victorian Law Reform Commission (VLRC) recommended the national regulation and supervision of litigation funders in its report *Access to Justice - Litigation Funding and Group Proceedings.*

In June 2018, the Australian Law Reform Commission (ALRC) published a discussion paper in which it agreed with the earlier recommendations of the Productivity Commission and set out the benefits that would flow to consumers if funders were regulated. The ALRC also expressed the view that ASIC should regulate the industry. The views set out in the Discussion Paper were the subject of extensive criticism by both elements of the litigation funding industry and ASIC. For reasons which have never adequately been explained the ALRC subsequently changed its position and dropped this recommendation from its final report.

Many of those involved in the administration of justice and funded litigation have also called for national regulation and oversight of litigation funders. These include the leading global litigation funder Omni Bridgeway and Litigation Capital Management.

The ILR supports these calls to regulate the Australian litigation funding industry and agrees with the reasoning set out in the reports.

*Lack of regulation fosters lack of transparency*

Despite all that has been written about the litigation funding industry, it is still not well understood by the government, academics, or the general public in Australia. In part this is because writings have not been particularly well balanced, but principally because the industry remains opaque by choice. The absence of meaningful regulation serves to ensure this opacity.

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12 See para 2.32 and Recommendation 2.

13 *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* DP 85, June 2018 at para 3.23. See also paras 3.2 to 3.6.

14 See para 3.7.

15 Omni Bridgeway ASX Announcement 22 May 2020 *Omni Bridgeway supports litigation funding licensing proposal.*

16 Funders respond to recent government actions to impose regulation, *Lawyers Weekly,* 27 May 2020
This is an important issue for two reasons. First, litigation funders play a significant role in Australia’s civil justice system. Their decisions in relation to whether to fund a case can determine whether or not the claim will be litigated. Litigation funders’ decisions are often crucial in determining whether a case, once commenced, will continue, and the terms on which cases are settled.

Second, the litigation funding industry's business model depends on its ability to access and utilise, at no cost to it, a vital public asset – the court system. For that reason alone, the public (and government) have a vital interest in its transparency.

Other than in the case of litigation funders listed on the ASX where there is some level of market disclosure, little or nothing is known about litigation funders, including:

- their source of funds;
- their profitability;
- the way in which they operate, in particular, their control or influence over the litigation;
- the way in which they deal with their clients; or
- their ability to satisfy their liabilities.

More information about the industry and the way it operates is required to ensure adequate transparency and to allow stakeholders to make a proper assessment of litigation funders' claims and what they offer clients.

The disclosures currently required of listed companies are not sufficient given the unique nature of the litigation funding industry and its relationship to the courts, and the simple fact that many litigation funders are not listed.

This lack of transparency is exacerbated by the approach taken in many judgements in applications for the approval of settlements in funded matters. In many cases, there is simply not enough information in the judgement in relation to the terms of the litigation funding agreement, the total remuneration (commission, so called 'management' or 'project' fees and the like) to determine the total cost to the funded client or the percentage of the settlement that has been taken up in the funder's remuneration and legal fees.

Until such time as litigation funders are required to be more transparent, it will continue to be very difficult for consumers to properly assess what they are offered.

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in a funding arrangement, let alone effectively compare alternatives or negotiate a fair agreement.

Litigation funders are essentially unregulated

In large part, the lack of transparency flows from the fact that the Australian litigation funding industry is not subject to any meaningful regulatory or prudential supervision. Unlike law firms, banks, insurers, superannuation funds, financiers, and other lenders, there is no mechanism for regulators to obtain information about the operations or viability of litigation funders. There is no scrutiny of their operations nor oversight of the arrangements they make with their clients.

Litigation funders have historically responded to the assertion that they are essentially unregulated by pointing to the limited requirements imposed by the Australian Securities and Investment Commission (ASIC) and the procedural and other obligations imposed in some jurisdictions. However, while these obligations exist, they are of little practical effect.

Corporations Act and Australian Securities and Investment Commission Act

All incorporated litigation funders are regulated by the Corporations Act 2001 (Cth) (Corporations Act) on the same basis as other corporations; there are no superadded regulations which apply to them because they are litigation funders. Those that are listed on the ASX are also contractually bound to comply with the ASX Listing Rules that are enforceable under the Corporations Act.

In October 2009, the Federal Court held that the funding arrangements in a shareholder class action constituted a managed investment scheme that was required to be registered under sections 9 and 601ED of the Corporations Act.19 This decision was followed by a decision of the New South Wales Court of Appeal in March 2011, which held that, because litigation funding could be used to manage financial risk, it was a 'financial product' which, in turn, obliged the litigation funder to hold an Australian Financial Services Licence (AFSL) under the Corporations Act.20

However, on appeal, the High Court of Australia held that litigation funders were 'credit facilities' rather than 'financial products'. As such, litigation funders were not

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18 In making this statement, ILR acknowledges the recent announcement by the Treasurer in relation to the revocation of the exemptions granted to the litigation funding industry but notes that order is limited both in time and in its scope.

19 Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (2009) 180 FCR 11, [82], [103], [104].

20 International Litigation Partners Pte Ltd v Chameleon Mining NL (2011) 276 ALR 138, [33]–[45], [122]–[128], [189]–[210].
required to hold an AFSL, but rather, could be regulated under the National Consumer Credit Protection Act 2009 (Cth).\(^{21}\)

To remove any ambiguity as to the nature and regulation required of litigation funders, the Federal Government moved to exempt litigation funders from all forms of regulation, save for a requirement that funders have adequate processes to manage (as distinct from avoid) conflicts of interest.\(^{22}\) This was purportedly done to improve access to justice.\(^{23}\) However, as has already been observed in this submission, there is still very little transparency as to what processes litigation funders have in place to manage any conflicts of interest between the funder and litigant (or class of litigants) or lawyers.

Exempt litigation funders are required to manage conflicts of interest in accordance with the obligations found in ASIC Regulatory Guide 248 (RG248). The Commission's Discussion Paper Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Discussion Paper) provides a useful summary of both the obligations imposed by RG248 and, perhaps more importantly, its deficiencies.\(^{24}\)

While RG248 purports to impose a robust set of obligations they are, in many respects, illusory.

First, as has been noted elsewhere, there is no mechanism to enforce compliance with the requirements of RG248.

Second, there is no requirement imposed on litigation funders to report on a regular basis in relation to their compliance with RG248.

Third, there is no meaningful or effective oversight of litigation funders in terms of their compliance with RG248 by ASIC or any other regulator. As the Discussion Paper notes there does not appear to be any instance of ASIC investigating a breach of its requirements, let alone taking any enforcement action.\(^{25}\) ILR is similarly unaware of any such action being taken.

In some respects, this is not surprising in the absence of a proactive approach by the regulator. Complaints will always be rare given the paucity of information provided to many funded clients and the fact that few, if any, are actually involved

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21 International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr appd) (2012) 246 CLR 455, [33], [44].

22 Corporations Amendment Regulation 2012 (No. 6) 2012 (Cth); See also, Patrick Windle, 'IBISWorld Industry Report 05446 Litigation Funding in Australia', IBIS World (February 2017).

23 Treasury, Parliament of Australia, Explanatory Commentary: Exclusion of Class Actions/Litigation Funding Schemes from Managed Investment Schemes (27 July 2011) 1.

24 See pages 68 - 72.

25 See para 4.36.
in the conduct of the proceedings. In circumstances where a funded class member or other litigant has effectively handed over control of the proceedings to the funder and the lawyers it instructs, most clients will never become aware of a conflict, let alone the failure of the funder to have appropriate management arrangements in place.

The reality is that, in the absence of an effective, proactive regulator, it really does not matter what rules, guidelines or other obligations are imposed as some regulated entities will simply fail to comply.

As with any other incorporated entity providing a service or product, litigation funders are also subject to the consumer protection provisions in the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). The ASIC Act provides protections for consumers against unfair contract terms, unconscionable conduct, and misleading or deceptive conduct, as well as an implied warranty that any services will be rendered with due care and skill and be fit for the purpose for which they are supplied.

However, while these provisions exist, it is arguable that many would rarely apply to a litigation funding agreement as some or all such contracts may not meet the definition of a "consumer contract". In any event, because there is very little oversight of litigation funders, and currently no requirement for funders to disclose all funding agreements, these protections do not hold much weight. ILR is unaware of any enforcement of these provisions against a litigation funder.

The Australian Government should move to regulate the litigation funding industry

The ILR recommends that the Australian Government implements the recommendations of the earlier inquiries and establishes a national regulatory regime for the Australian litigation funding industry.

In 2014 the ILR published a proposal for a regulatory regime. A link to that paper is provided at the end of this submission. While the issues have evolved since that time,

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26 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA (definition of ‘financial product’), s 12BAB (definition of ‘financial service’).

27 Ibid, ss 12BF–12BM.

28 Ibid, ss 12CA–12CC.

29 Ibid, ss 12DA, 12DB, 12DF.

30 Ibid, s 12ED(1).


32 *An Oversight Regime for Litigation Funding in Australia, August 2014.*
the ILR believes that its proposal provides a solid foundation for the development of an appropriate and effective licensing regime.

The ILR also recommends that the Australian Government ensure that an effective and pro-active regulator is tasked with the oversight and enforcement of the regulatory regime.

5. Contingency fee agreements

Lawyers in Australia are prohibited from charging contingency fees.\textsuperscript{33}

The prohibition arose from the common law crimes and torts of maintenance and champerty. Even though both common law offences were abolished in most states and territories many years ago, the ban on contingency fees has been, and remains, articulated in legislation.\textsuperscript{34} This is underpinned by a public policy concern that contingency fees would create perverse incentives for lawyers who have a direct financial interest in decisions affecting the litigation in which they are involved.\textsuperscript{35}

There has long been a general view in Australia that allowing lawyers to enter into contingency fee agreements is not in the public interest. Many, including ILR, are concerned that the introduction of contingency fee agreements would inevitably exacerbate a U.S. style litigation culture in Australia which will ultimately be paid for by consumers and the public at large. In this context it is significant that the ALRC, in its report into the introduction of class actions in Australia, noted that one of the key protections against the emergence of U.S. style litigation (including what it described as "legal entrepreneurs") was the fact that Australian lawyers were prohibited from entering into contingency fee agreements with their clients.\textsuperscript{36}

The Law Council of Australia (LCA), the profession's peak representative body, examined this issue in 2016. While a Working Party comprised almost entirely of plaintiffs' lawyers recommended the introduction of contingency fees, the proposal was overwhelmingly rejected when considered by the LCA. That view was confirmed again in 2020.

\textsuperscript{33} Discussion Paper para 5.5

\textsuperscript{34} Legal Profession Uniform Law, s 183(1); Legal Profession Act 2004 (Vic), s 3.4.20(1); Legal Practice Act 1996 (Vic), s 99(1).


In truth, virtually the only voices agitating for the introduction of contingency fee agreements are plaintiffs' lawyers. 37

*The risk that clients will be subjected to 'double dipping'*

An issue that must be taken into account when considering whether to allow lawyers to charge on a contingency basis is the prospect of the client being charged two contingency or success fees: one by their lawyer and the other by a litigation funder.

This is not a theoretical possibility – it is now being seen and promoted by litigation funders in the United States with the entry of litigation funders into that market. Put simply, the litigation funder agrees to finance the matter and the lawyer agrees to act on a contingency basis. Both charge a success fee which is paid by the client. From the law firm's perspective, this reduces the need to fund the proceedings out of its resources with a consequent benefit on cash flow. 38 From the litigation funder's perspective, it further reduces the actual risk it is facing. 39 This practice will inevitably further erode the return actually received by the plaintiff and group members from the proceedings.

In the event that any consideration was to be given to allowing lawyers to enter into contingency fee agreements, it must be accompanied by a prohibition on clients being subjected to multiple sets of success fees in relation to the same matter.

*Would allowing contingency fee agreements actually increase competition with litigation funders?*

It has been suggested that contingency fees would create a significant source of new funding over and above that provided by litigation funders. It has also been argued that the resultant increase in competition would place downward pressure on the remuneration charged by litigation funders. 40

However, this is far from certain. ILR is unaware of any empirical evidence that would support this proposition and notes that the best the Productivity

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Commission, a body far better qualified to opine on this issue than lawyers, could say is that:

"At the other end of the spectrum, [contingency fee agreements] may create some competition for litigation funders …." 41 (emphasis added)

First, there is a real question as to the extent to which lawyers would be able to access sufficient capital to fund litigation beyond that which is already conducted on a 'no win, no pay' basis, with the potential for an 'uplift' of those fees. Law firms operating as partnerships are not well placed to raise significant capital to invest in their businesses. Related to this issue is the inevitable reluctance of lawyers to risk their own capital in litigation funding. This is reflected in the limited number of class actions in Australia that are conducted by lawyers on a 'no win, no pay' basis.

Second, contingency fee options are more likely to be offered for smaller claims – particularly those which litigation funders are unwilling to consider based on the potential size of the return. 42 In part this will be due to the inability of law firms to raise sufficient external capital to fund major litigation. It will also reflect the desire of most law firms to limit their potential losses if a case fails. Law firms taking on cases that litigation funders are unwilling to consider, let alone fund, will not drive an increase in competition. However, with the introduction of contingency fees, it is likely that there will be a significant increase in the number of lower value cases being commenced, with a real risk that some firms will use this as an opportunity to pursue clients and cases that would not otherwise justify being commenced. For some defendants, particularly corporate defendants, it may well be cheaper to settle these matters than defend the proceedings, regardless of the merits of the claim.

Given most personal injury claims are already conducted by lawyers on a 'no win, no pay' or conditional fee basis, the real effect of the introduction of contingency fees may be that clients receive less while their lawyers take a percentage of the proceeds of the case that would have previously flowed to their client. It is hard to see how that is in the public interest.

Third, while it is implicitly assumed by those who favour the introduction of contingency fees, it does not follow that a lawyer acting on a contingency fee basis will charge less than a litigation funder. Indeed, given they may be taking on


smaller, riskier, claims, lawyers may well charge more as a proportion of the settlement/judgment.

The changes that have been implemented in the United Kingdom are instructive. In the United Kingdom, contingency fees that can be charged by a lawyer are capped at 25 percent for personal injury cases, 35 percent for employment cases, and 50 percent for all other cases. Presumably, these caps have been set after careful consideration of the premium that would be required to encourage sufficient numbers of lawyers to adopt a contingency fee model. Given litigation funders charge around 30 percent of the total amount recovered, this suggests that there will be limited competition on fees.

Fourth, absent a legislative requirement to do so, it is unlikely that lawyers offering to act on a contingency fee basis will be willing to indemnify their clients against an adverse costs order, as do litigation lenders. This is a significant disincentive for clients entering into contingency fee agreements with a lawyer as compared to a traditional litigation funding agreement. A plaintiff in these circumstances would have to risk the consequences of an adverse costs order or purchase an ATEI policy - something which, when offered on a 'one off' basis, is likely to be prohibitively expensive. If the plaintiff is a corporation, it may face the prospect of an application for security for costs. None of these alternatives will be attractive for potential plaintiffs.

Absent a real increase in competition driven by both a real choice for consumers between two similar products and the ready availability of the alternative, there will be no significant downward pressure on the fees charged by litigation funders.

Finally, as has already been noted, the United States experience suggests that, absent some express prohibition, litigation funders are likely to work with lawyers in developing a 'hybrid' approach. As a consequence, rather than driving down the cost to the funded client through increased competition, the cost to the client could well increase.

However, this is not the only issue that should be considered. The benefits to the community and access to justice flowing from any downward pressure on the fees charged by litigation funders.

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45 American Bar Association, *Emerging Issues in Healthcare Law, Litigation Finance - Practical and Ethical Dimensions* (8 - 11 March 2017) 6, 8, 9
charged by litigation funders must also be weighed against the other consequences such a change would bring.

*Would allowing contingency fees agreements actually increase 'access to justice'?*

Proponents for the introduction of contingency fee agreements argue that it would increase 'access to justice' by:

- allowing those who cannot otherwise afford a lawyer to obtain the services of one who is willing to act on a contingency basis; and

- enabling law firms to use the super profits earned by way of contingency fees in commercial litigation to cross-subsidise so called 'social justice' cases.

To state the obvious, "[l]aw firms … [acting on a contingency basis] … , like litigation funders, will likely only back cases they can win, limiting potential benefits to clients." That incentive is absent where the lawyer makes an assessment that the potential action is marginal, let alone more likely than not to be lost.

One of the more audacious arguments advanced in support of the introduction of contingency fees is the suggestion that this would allow plaintiffs' firms to run more 'social justice' litigation. Presumably, the super profits from the successful cases will support the funding of more marginal or speculative cases where there is a risk that the case will fail. There could, of course, be no assurance that this would in fact happen. There is also a real question as to the public interest in facilitating an increase in the incidence of marginal or speculative cases – particularly in circumstances where the plaintiff or representative class member is likely to be a person who would have no prospect of satisfying any adverse costs order.

This has certainly not been the case in the United States where contingency fees have been allowed for many years, with one American commentator suggesting that,

"[b]ecause of this large personal financial stake, the attorney can no longer look upon his practice of law as one devoted primarily to justice… the contingency fee system has bred a particular type of attorney and a particular type of client who now view the contingency system as a mechanism for high, relatively easy returns."

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It is also unclear why, as a matter of public policy, plaintiff law firms should determine which causes should be seen as a social justice issue and thus cross-subsidised by others chosen by those law firms.

Finally, while it is argued that allowing contingency fees to be charged by lawyers in class actions may increase competition, it is more likely the result will be the emergence of more competing class actions with the potential for overlapping classes of members. While this would give rise to a mirage of increased competition, in reality it would simply increase costs, the volume of litigation, and the pressure on Australia’s already overburdened court system.

**Contingency fees would drive an increase in litigation of dubious merit**

While the introduction of contingency fees is unlikely to drive a significant increase in competition in the litigation funding market, it is much more likely to drive an increase in the overall volume of litigation.

Many small firms will, for the first time, have the opportunity to ‘take a punt’ - not just for their normal fee plus an uplift but rather for what some will see as a significant windfall profit. However, as Associate Professor Michael Legg and his colleagues have observed in the context of the class action market, an increase in the overall number of claims is likely to see a reduction in the quality and merit of new claims.\(^49\) In other words, more marginal claims are likely to be accepted and commenced.

It might be said that such claims will fail and the plaintiffs will be obliged to pay the defendant's costs, thereby creating a significant disincentive to commence such a claim. However, experience suggests that this is not what will happen. Most cases settle. This is because defendants are often unwilling to run the risk of losing a long and expensive trial, regardless of the real merits. Management teams do not want the distraction of litigation and there is the ever present risk of reputational damage, regardless of the true merits of the claim.\(^50\)

In the case of a class action, the problem for a defendant is exacerbated. The class action procedure allows for the aggregation of many thousands of claims in a single proceeding, thereby exposing a defendant to an enormous amount of potential liability. This potential liability, in turn, places enormous pressure on the defendant to settle, regardless of the claim’s merit. This is because defendants are loath to risk even a remote possibility of a significant judgment and because such

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large potential liability frequently can depress the performance of the defendant’s share price.\textsuperscript{51}

Thus, even in Australia with the risk of an adverse costs order, there would likely be an increase in unmeritorious claims with the introduction of contingency fees, as there is in the United States, because most cases settle.\textsuperscript{52}

In any event, lawyers acting on a contingency fee basis are unlikely to offer to indemnify the funded client against any adverse costs order. Many potential plaintiffs will simply not have the ability to meet such an order. While the theoretical consequence of failing to meet an adverse costs order is bankruptcy, experience shows that most defendants are unwilling to take that course. It is often pointless as the failed plaintiff simply does not have the assets to justify the additional expense. There can also be the risk of significant reputational risk to a corporate defendant if it is seen to bankrupt an impecunious individual, even where it has prevailed in litigation. For these reasons, the so-called protection against unmeritorious litigation is, in many cases, illusory.

While some small law firms will suffer as a consequence of taking on unmeritorious claims on a contingency basis, many more will generate a return that will inevitably be paid by consumers and the community as a whole as those costs are passed on by defendants.

\textit{Conflicts of interest}

In the Australian legal system, the lawyer/client relationship has long been recognised as a fiduciary relationship. In a fiduciary relationship one person (the client) places his or her confidence, good faith, reliance, and trust in another (the lawyer), whose advice is sought in some matter.

The essence of fiduciary obligations is that the fiduciary is precluded from acting in any way other than in the interests of the person to whom the duty to so act is owed. In short, the fiduciary obligation is one of ‘undivided loyalty’.\textsuperscript{53} The duty of

\textsuperscript{51} See for example, CBA’s share price fall after the announcement of the heavily promoted proposed class action against the CBA in relation to its alleged failure to comply with AML/CTF legislation that is jointly promoted by IMF and Maurice Blackburn. See, Clancy Yeates, ‘CBA shares slump as bank vows to fight the Austrac claims’, \textit{Sydney Morning Herald} (online) 4 August 2017 <http://www.smh.com.au/business/banking-and-finance/cba-shares-slump-as-bank-vows-to-fight-the-austrac-claims-20170804-gxp9xp.html>.


\textsuperscript{53} \textit{Beach Petroleum NL v Kennedy} (1999) 48 NSWLR 46–47.
a fiduciary is "to avoid and not merely "manage" a conflict of interest or prioritise one interest over another."\textsuperscript{54}

Lord Cranworth LC formulated that rule in \textit{Aberdeen Railway Co v Blaikie Brothers}\textsuperscript{55} as that:

\begin{quote}
\textit{“… no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.”}
\end{quote}

In a recent paper, Justice Black of the Supreme Court of New South Wales, observed \"[t]he test for when a conflict arises has been expressed in various ways in the cases, but the shorthand \textit{“real [and] sensible possibility”} is often applied. He then referred to three decisions:\textsuperscript{56}

\begin{quote}
\textit{“In Boardman v Phipps [1967] 2 AC 46 at 124, Lord Upjohn formulated the test for whether a conflict exists as whether a:}

\begin{enumerate}
  \item \textit{“reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.”}
  \item \textit{In Chan v Zacharia (1984) 154 CLR 178 at 198, the test was expressed as \textit{“a conflict … or significant possibility of such conflict”}. In that case, Deane J (with whom Brennan and Dawson JJ agreed) also referred to an observation of Sir Frederick Jordan in Chapters in Equity in New South Wales (6th ed 1947, p 115) that:}
  \item \textit{“It has often been said that a person who occupies a fiduciary position ought to avoid placing himself in a position in which his duty and his interest, or two different fiduciary duties, conflict. This is rather a counsel of prudence than a rule of equity; the rule being that a fiduciary must not take advantage of such a conflict if it arises.”\textsuperscript{56}}
\end{enumerate}
\end{quote}


\textsuperscript{55} \textit{(1854)} 1 Macq 461, 471.

A moment's consideration will reveal that a lawyer who enters into a contingency fee agreement with a client will almost always, if not inevitably, find him or herself in a position of conflict with his or her client. Or, at the very least, a situation where a reasonable person would think that there was a real and sensible possibility of conflict.

These conflicts, or the appearance of a conflict, will arise throughout the life of the proceedings. Questions will arise as to whether a particular strategy should be pursued which may, if successful, result in a significant award of damages, albeit at some risk of the case failing. Lawyers may be deterred from accepting a case resolution that does not result in a monetary award. A settlement offer may be received which, while well short of what might be awarded in a final judgement, provides a faster, more certain return on the lawyer's investment and is more attractive to the lawyer than to the client.

The dilemma of the 'settle or run to verdict' question will be all the more acute when the plaintiff is impecunious and faces no real consequences from an adverse costs order. This has been the situation in the United States with commentators, such as Philip Havers, suggesting that with contingency fees:

"[a]s the lawyer invests more time and money, his personal stake in the outcome of the case increases and the more the lawyer's incentives begin to change. Rather than seeking a just settlement for the client which adequately compensates the client for his injuries, the attorney must also account for the increasing costs and effort expended as the suit goes forward."\(^{57}\)

Therefore, an American commentator suggests contingency fees "destroys the attorney-client relationship."\(^{58}\)

This concern is met by two arguments on the part of those who advocate the introduction of contingency fees. First, litigation funders face exactly the same conflicts. Second, lawyers who enter into conditional fee agreements face similar conflicts.

Neither of these propositions justify the introduction of contingency fees.

While litigation funders may place themselves in the same position of conflict, they are in a fundamentally different position to a lawyer. They are not fiduciaries – indeed, most go to great lengths to exclude that possibility by agreement with their clients. They are not subject to the other ethical and professional obligations imposed on lawyers. They are not part of a profession that stands for and is based


\(^{58}\) Ibid.
on something more than merely endeavouring to make a profit from their clients. There can be no meaningful analogy between the two positions.

The argument in relation to conditional fee agreements entered into by lawyers is more difficult in the sense that a conditional agreement does give rise to a conflict. However, just because a lawyer may already face a conflict, this does not justify the introduction of a further conflict. *A fortiori* a conflict which is sharpened or made more difficult by virtue of the enormous sums that might be at stake in the case of a contingency involving a multi-million dollar potential settlement.

Ultimately, one only has to consider the prospect of litigation that is "*lawyer funded, lawyer managed and lawyer settled*", in circumstances where the plaintiff’s only source of information and advice about the conduct of their litigation is coming from a person with a direct, and perhaps, very significant financial interest in the outcome of the proceedings, to understand why such a position is unacceptable.

*The prohibition on contingency fees should remain*

Having regard to the consequences that would flow from allowing law firms to enter into contingency fee agreements, the ILR recommends that the prohibition should remain.

However, in the event that lawyers were to be allowed to enter into contingency fee agreements with their clients, it should be on the condition that:

- there is a prohibition on both a litigation funder and the lawyer charging the client a success fee or contingency in the same matter; and
- the lawyer indemnifies the client against any adverse costs order.

**LINK**

**ILR Research Paper | An Oversight Regime for Litigating Funding in Australia (2014)**

Scévo de Cazotte | Senior Vice President, International Initiatives
U.S. Chamber Institute for Legal Reform (ILR)
1615 H Street, NW, Washington, DC 20062
direct: | cell:

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60 Ibid.
# Asia Competitive Landscape

## Principal Competitors

<table>
<thead>
<tr>
<th>Company</th>
<th>Fund size US$</th>
<th>Offices (Global/Asia)</th>
<th>Headquarters</th>
<th>Team (Global/Asia)</th>
<th>Founded</th>
<th>Public/Private</th>
</tr>
</thead>
<tbody>
<tr>
<td>Omni Bridgeway</td>
<td>$1500m</td>
<td>18/2</td>
<td>Sydney NSW</td>
<td>157+/8</td>
<td>2001/1986</td>
<td>ASX:OBL</td>
</tr>
<tr>
<td>Augusta Ventures</td>
<td>$298m</td>
<td>4/FIFO</td>
<td>London UK</td>
<td>85+/FIFO</td>
<td>2013</td>
<td>Private</td>
</tr>
<tr>
<td>Burford Capital</td>
<td>$2900m</td>
<td>6/1</td>
<td>New York NY</td>
<td>125+/1</td>
<td>2009</td>
<td>LON:BUR</td>
</tr>
<tr>
<td>Deminor Recovery Services</td>
<td>$1100m</td>
<td>6/1</td>
<td>Brussels, Belgium</td>
<td>25+/1</td>
<td>1990</td>
<td>Private</td>
</tr>
<tr>
<td>Harbour Litigation Funding</td>
<td>$1100m</td>
<td>1/FIFO</td>
<td>London UK</td>
<td>30+/FIFO</td>
<td>2007</td>
<td>Private</td>
</tr>
<tr>
<td>Lake Whillans Litigation Finance</td>
<td>$125m</td>
<td>2/FIFO</td>
<td>New York NY</td>
<td>6/FIFO</td>
<td>2013</td>
<td>Private</td>
</tr>
<tr>
<td>Litigation Capital Management (LCM)</td>
<td>$150m</td>
<td>5/1</td>
<td>Sydney NSW</td>
<td>18/1</td>
<td>1998</td>
<td>Was ASX until 2018 Now: AIM:LIT</td>
</tr>
<tr>
<td>Therium Capital Management</td>
<td>$1100m</td>
<td>6/FIFO</td>
<td>London UK</td>
<td>35+/FIFO</td>
<td>2009</td>
<td>Private</td>
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<tr>
<td>Vannin Capital</td>
<td>$100-300m</td>
<td>5/FIFO</td>
<td>St Helier Jersey</td>
<td>20+/FIFO</td>
<td>2010</td>
<td>Private</td>
</tr>
<tr>
<td>Woodsford Litigation Funding</td>
<td>$100-300m</td>
<td>4/0</td>
<td>London UK</td>
<td>20+/0</td>
<td>2010</td>
<td>Private</td>
</tr>
</tbody>
</table>
Omni Bridgeway’s (formerly IMF) ROIC Track Record (excluding data in respect to investments within the purchased Omni Bridgeway business)

- ROIC in non-US investments have remained relatively stable over the period.
- ROIC in US investments has been low during the period as a consequence of:
  - Large loss in FY19 in Fund 1; and
  - Accelerated completion of large matters in Funds 1 and 4 before higher ROIC periods were reached (Fund 4's remuneration and capital recycling arrangements are more favourably focussed on IRR returns than ROIC – Fund 4 current IRR is 93%).
- Anticipate that ROIC in the US will be lower than ROIC in non-US, and should increase above current levels.

The data contained in the Funding Track Record has been reviewed by Ernst & Young to 31 December 2019.