Chapter 16

The Future of Litigation Funding in Australia

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Introduction

Litigation funding involves a commercial entity, which is otherwise uninterested in a piece of litigation, agreeing to meet the costs (including any adverse costs) of the litigation in return for a share of any recoveries if that litigation is successful.

In Australia, litigation funding is only about 20 years old which, one might think, is an insufficient base from which to prophesy its development over the next 40 years. But in fact Australia is one of the world's most developed markets for litigation funding. Litigation funding (at least for non-insolvency matters) was pioneered in Australia and while it has not always been plain sailing for Australia's funders, they have made impressive strides. It is reasonable to conclude, given progress to date and reasonably foreseeable opportunities for growth, that litigation funding has a bright future in the Australian civil justice system.

This chapter will look at four factors which support a generally positive view of the Australian litigation funding industry:

1. the recognition that litigation funding promotes access to justice;
2. the rapid development of litigation funding markets in Australia and overseas;
3. emerging opportunities for funders; and
4. the potential that full regulation of the industry has to impact positively on its future.

Litigation Funding and Access to Justice

The Problem of Access to Justice

Improving access to justice has become a central concern of policy makers, the judiciary and the legal profession in Australia.[2] A major barrier to access to justice is cost. People

1. The views expressed in this chapter are the personal opinions of the writer and do not represent those of IMF. The writer would like to thank his colleagues at IMF, Susanna Khouri and Kate Hurford, for their assistance with, and valuable contributions to, this chapter.
2. See, for example, Law Council of Australia, *Submission to Senate Legal and Constitutional Affairs Committee*, Parliament of Australia, Canberra, 30 April 2008, p 7.

who seek to vindicate their rights through litigation in Australia not only need the means to pay their own lawyers, but must also have the capacity to pay the other side's costs as well if the litigation is lost. As the authors of one of Australia's leading texts on class actions state: 'the need to find solutions that overcome the costs barriers that have acted as an obstacle to the prosecution of representative proceedings is increasingly pressing.'[3]

Proponents of litigation funding argue that it promotes access to justice because funders provide finance for the prosecution of meritorious claims by parties who would otherwise lack the resources to do so. While this argument is by no means the only justification for litigation funding,[4] it is an important consideration. Its acceptance by a majority of the High Court in the seminal decision approving litigation funding in Australia, *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*),[5] and by the Commonwealth Government[6] has underwritten the acceptance of litigation funding in this country. Is this argument correct?

Funding as a Means of Improving Access to Justice

Critics of litigation funding as a means of improving access to justice commonly raise three objections. The first argument is that funders are selective. They reject meritorious cases that do not meet their investment criteria, such as small claims and claims for non-monetary relief. And they insist on 'closed classes' in funded class actions, thereby excluding potential group members who have not signed a funding agreement.[7] The second argument is that as the number of funded cases is low compared to the level of litigation in the courts, the impact of litigation funding on access to justice is, at best, 'modest'.[8] The third argument is that the courts are no place for 'suits that are brought only because a trader can make a profit from the exercise'.[9]

As to the first of these concerns, funders' case selection criteria are indeed strict and exclusionary.[10] No system of funding for litigation anywhere in the world, whether publicly or privately funded, accepts (or can accept) all cases brought to it. Funders prefer to fund closed classes in representative proceedings so as to prevent 'free riders' (people who will benefit from the proposed action but do not agree to contribute towards its cost) from eroding funders' returns to the point where the litigation is uneconomic to fund. Funders have long advocated reforms to address this issue.[11]

3. D Grave, K Adams and J Betts, *Class Actions in Australia*, 2nd ed, Thomson Reuters, Sydney, 2012, p 802.
4. Ibid, at 793–798.
5. (2006) 229 CLR 386 (per Gleeson CJ; Gummow, Hayne, Crennan and Kirby JJ).
6. See, for example, the *Explanatory Statement to the Corporations Amendment Regulation 2012 (No 6)*, p 1.
7. Grave et al, above n 3, at 836–839.
8. Ibid, at 802.
9. P A Keane, 'Access to Justice and Other Shibboleths', paper presented to the JCA Colloquium, Melbourne, 10 October 2009, p 3.
10. J Walker, S Khouri and W Attrill, 'Funding Criteria for Class Actions' (2009) 32 *The University of New South Wales Law Journal* 1036.
11. In 2007, IMF proposed reforms that would allow representative applicants in an 'open class' class action to seek an order from the court, at the outset of the proceedings, that the funder's returns from the proceedings (if successful) be paid by all group members pro rata to their share of any settlement or damages award: J Walker, 'The Changing Funding Environment in Class Actions', paper presented at the Maurice Blackburn International Class Actions Conference, Sydney, 2007.

As to the second argument, it is also true that the number of funded actions is relatively small. Australia's largest funder, IMF (Australia) Ltd (IMF), has only resolved 123 cases in 10 years (although some of these are very large class actions),[12] which hardly compares to the vastly greater level of litigation in the courts.[13] However, none of the funded cases would have been brought without IMF's support and the number of claimants who have been assisted by litigation funding is very large. Professor Morabito has estimated approximately 70,500 persons were group members of 18 funded class actions he studied, with about 5,500 persons entitled to share in the recoveries from settled funded cases.[14] IMF is funding litigation against major Australian banks for around 170,000 bank customers.[15] Each funded case is of importance to the claimants involved.

The third argument turns on the view one takes of the proper role of the civil justice system. The courts are undoubtedly an arm of government with a constitutional duty to quell controversies brought before them and are not commercial markets for trading in litigation. But to suggest that funders undermine the purity of justice mischaracterises their role and influence, discounts the power of courts to control their own process and ignores other important and practical issues that affect access to justice. Justice Kirby in *Fostif* put another view:

> The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a consideration that stimulates fresh thinking about representative or 'grouped' proceedings[16]… A litigation funder … does not invent the rights. It merely organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law.[17]

The Litigation Funding Markets

Litigation funders typically fund litigation involving corporate insolvencies, commercial and contractual disputes, intellectual property matters, estate and testamentary claims and claims alleging large-scale corporate misconduct in the securities, competition law and consumer protection areas. There has been strong growth in the Australian funding market and a massive expansion in litigation funding capacity worldwide, all of which augers well for the continued development of litigation funding.

12. IMF (Australia) Ltd, *2011 Annual Report*, 2011, Sydney, p 4.
13. For example, the Federal Court of Australia reported 4,303 new matters (excluding appeals) were commenced in the court in 2010–11 and 4,036 were resolved in that year: Federal Court of Australia, *Annual Report 2010–2011*, Canberra, 2011, p 129.
14. V Morabito, *An Empirical Study of Australia's Class Action Regimes — Second Report*, Monash University, Victoria, 2010, p 39.
15. IMF (Australia) Ltd and Maurice Blackburn, *Bankwest Customers Take Class Action on Unfair Fees*, media release, 18 April 2012.
16. (2006) 229 CLR 386 at 451.
17. Ibid, at 468.

The Australian Market[18]

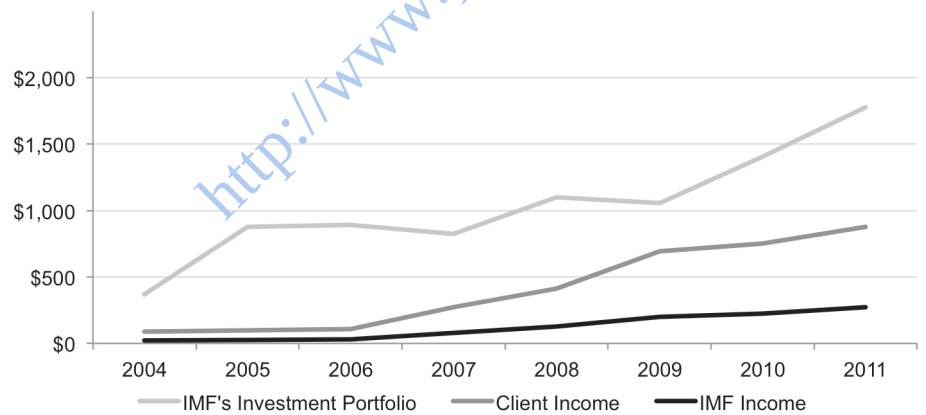
The Australian litigation funding market, which has historically been dominated by IMF, is becoming more competitive. In addition to IMF, the market includes:

- another ASX-listed funder (Hillcrest Litigation Services Limited);
- two funders that specialise in insolvency actions (LCM Litigation Fund Pty Ltd and Litigation Lending Services Limited);
- a funder that specialises in family law claims (Quantum Funding Pty Ltd); and
- overseas-based funders, including Comprehensive Legal Funding LLC (a US-based funder) and International Litigation Funding Partners Pte Ltd (a Singapore-based funder).

In March 2012, United Kingdom-based funder Argentum Investment Management Limited announced its entry into the Australian market.[19] In August 2011, it was reported that the large United Kingdom funder, Harbour Litigation Funding, had taken a stake in a New Zealand representative proceeding.[20] Australian funders have themselves invested in overseas or international litigation and arbitrations. IMF has funded litigation in South Africa, New Zealand, the United Kingdom and the United States and on 25 August 2011 announced it had established a New York-based subsidiary, Bentham Capital LLC, to facilitate its expansion in the United States.[21]

Funders have achieved strong growth in the Australian market. According to IMF's 2011 annual report, the value of IMF's funded claims reached nearly $1.8 billion at 30 June 2011, the majority of which are within Australia.

IMF PORTFOLIO TRENDS[22]



Source: IMF (Australia) Ltd

18. G Barker, *Third Party Litigation Funding in Australia and Europe*, Working Paper No 2, Centre for Law and Economics, ANU College of Law, December 2011, pp 23–35.
19. 'New Litigation Funder Comes to Town', *Lawyers Weekly,* 30 March 2012.
20. T Stewart, 'Feltex Litigation Funding Set to Rise', *Stuff.co.nz — Business Day*, 11 May 2012.
21. IMF (Australia) Ltd, 'United States Office', release to the Australian Securities Exchange, 25 August 2011.
22. IMF (Australia) Ltd, *2011 Annual Report*, 2011, p 5.

The composition of IMF's investment portfolio has also changed substantially over time, with the number (and especially value) of multi-party litigation (including class actions) increasing from nil in 2001 to 10 cases with an estimated claim value of $531 million at 30 June 2005 to 19 cases with an estimated claim value of $875 million by 30 June 2009.[23]

Funders' Performance in Australia

Litigation funding has accumulated sufficient experience in Australia to test some of the arguments that are ranged against it. In May 2011, IMF released audited statistics on the 118 funded cases it had completed in the period from 19 October 2001 (when IMF listed on the Australian Securities Exchange) to 31 December 2010[24] and reported it had:

- settled 79 (67%) of the cases it had agreed to fund in that period;
- taken a further 14 cases to judgment, of which 9 (8%) had been won and 5 (4%) lost;
- withdrawn from 25 (21%) of the cases it had agreed to fund prior to those cases being resolved;
- generated total income from completed cases of $825.7 million (which included cost recoveries of $81.5 million), of which $565 million (68%) was payable to the funded claimants;
- earned a net return from funding during this period, including costs on unsuccessful cases and overheads, of $171 million (or 21% of the total revenue generated by all completed cases); and
- taken on average 2.9 years to achieve a settlement in a funded case with cases resolved by judgment taking 2.5 years and cases from which IMF withdrew having a duration of about 14 months.

Another source of data on funded litigation is Professor Morabito's empirical study of class actions in Australia.[25] Neither data set supports the critics of litigation funding in two key respects.

First, it is said that funders run litigation predominantly to benefit themselves and the lawyers involved. Professor Morabito found that funders took about 30% of the settlement proceeds in the 11 resolved funded class actions he reviewed.[26] The IMF data indicates that IMF's net return on its portfolio of resolved claims was 21% of the total recoveries from those cases; of recoveries, 68% went to the clients and only about 10% was paid to the lawyers. Overall, given the costs, risks, time to resolve and the potential for adverse costs orders, these returns do not appear to be excessively high.[27] In addition, funders' returns and class action lawyers' costs have been explicitly approved by the Federal Court in a number of recent class action settlements.[28]

23. Walker et al, above n 10, at 1037.
24. IMF (Australia) Ltd, 'Case Investment History', release to Australian Securities Exchange, 6 May 2011.
25. Morabito, above n 14.
26. Ibid, at 41.
27. Grave et al, above n 3, at 857 refers to a Law Council assessment of IMF's return on capital over four years being about 7% per annum in comparison to major liability insurers earning 15% and 22% returns in that period.
28. For example, *Pharm-a-care Laboratories Pty Ltd v Commonwealth of Australia (No.6)* [2011] FCA 277; *Kirby v Centro Properties Limited (No 6)* [2012] FCA 650.

It is also said that funders unduly delay or prevent the settlement of funded litigation. Professor Morabito found that all the funded class actions he studied had settled — a settlement rate which was 'far higher' than that of non-funded class actions.[29] He also found 'no major differences' between the time taken to settle funded and non-funded class actions or that funded class actions were less vigorously pursued.[30] IMF took slightly longer to resolve its funded matters by settlement than by judgment (this might reflect relative differences in the complexity of the cases), but the difference was not material.

The International Litigation Funding Market

Massive expansion has occurred in overseas markets for litigation funding in recent years, particularly in the United Kingdom and United States. The total amount invested in litigation is now estimated by industry participants to exceed US$1 billion.[31] In the United Kingdom, the litigation funding industry is said to be backed by up to £500 million of investors' funds.[32] There appears to be no shortage of risk capital willing to invest in the major litigation funding markets.

An indication of the rapid expansion in funding outside of Australia can be gleaned from the following reports:

- In May 2012, Harbour Litigation Funding Ltd announced that it had successfully raised £120 million of additional capital for investment in commercial litigation and arbitration. Harbour's new portfolio is expected to comprise over 50 cases with a minimum claim value per case of £3 million.[33] This followed an earlier capital raising of £60 million in 2010. In 2011, Harbour reported it had 'last year alone' invested £40 million in litigation claims that have a value in excess of £1 billion.[34]
- Burford Capital Limited was launched in 2010 with an £80 million float on the London Stock Exchange's AIM market. Burford raised a further £110 million in 2010 and bills itself as 'the world's largest provider of investment capital and risk solutions for litigation'.[35] In April 2012, Burford announced it had committed US$282 million to 37 investments since its inception, approximately US$180 million of which was committed during 2011.[36] In February 2012, it acquired Firstassist, a United Kingdom litigation expenses insurer, to facilitate Burford's entry into the United Kingdom market.[37]

29. Morabito, above n 14, at 41.
30. Ibid, at 42.
31. B Appelbaum, 'Investors Put Money on Lawsuits to Get Payouts', *New York Times*, 14 November 2010.
32. O Bowcott, 'Litigation Funders Become Big Business, Enjoying Booming Market in UK', *The Guardian*, 25 May 2012.
33. J Croft, 'Litigation Provider Launches £120m Fund', *Financial Times*, 5 May 2012.
34. Harbour Litigation Funding Limited, *Harbour Litigation Funding Raises £120 Million – New Closed-ended Investment Fund Will Finance UK Legal Cases and Arbitrations*, media release, 9 May 2012.
35. Burford Capital Limited, 'Burford Capital Limited Announces Full Year Results', release to AIM, 4 April 2012, p 1.
36. Ibid, at 7.
37. Ibid, at 1.

- Juridica Investments Limited listed on the AIM market on 21 December 2007 and announced that, as at 31 December 2011, it had investments in 23 cases with a total funding commitment of US$155.1 million. Its portfolio had generated US$48.8 million in cash to 18 April 2012.[38]

Burford and Juridica principally invest in United States-based litigation.

Emerging Opportunities for Funders

Growth in funding depends on growth in the underlying demand for funding from litigants and an increasing supply of cases that meet funders' investment criteria. While there is no shortage of litigation in Australia or elsewhere,[39] funders expend considerable resources in the search for suitable cases. Case flow has, in the past, been impeded by a lack of awareness of funding in the legal and general community.

As awareness of funding improves and competition intensifies among funders, the search will be on for new types of case to fund. Three potential areas are: funding international arbitrations; funding claimants who may have the resources to fund their own litigation; and funding defendants.

International Arbitrations

In recent years there has been a noticeable increase in interest in the use of third-party funding for international arbitrations, including bilateral investment treaty (BIT) claims. While the private nature of arbitration and the lack of rules for the disclosure of funding agreements yield little hard data on the extent of litigation funding in arbitration, funding of arbitrations has come to light through public disclosures by the claimant or the funder[40] and through litigated disputes between a claimant and funder.[41]

Recent announcements by claimants and anecdotal evidence suggest that this area of funding is on the rise and this is expected to continue.[42] Examples include:

- In June 2012, Canadian mining company, Rusoro Mining Ltd, announced that it had entered into a funding agreement with a subsidiary of the United Kingdom-based Calunius Fund to assist in the funding of Rusoro's international treaty arbitration proceedings against Venezuela.[43]

38. Juridica Investments Ltd, *Annual Report and Accounts 2011*, 18 April 2012, pp 4–5.
39. Above n 13.
40. Rusoro Mining Ltd, *Rusoro Reports Closing of Arbitration Costs Financing*, release to Toronto Stock Exchange Venture Exchange, 15 June 2012; Oxus Gold plc, *Litigation Funding*, Release to London Stock Exchange, Alternative Investment Market, 1 March 2012.
41. See *S&T Oil Equipment & Machinery Ltd v Juridica Investments Ltd*, No. H-11-0542, Southern District of Texas.
42. See M Scherer and A Goldsmith, *Third Party Funding in International Arbitration in Europe Part 1: Funders' Perspectives*, Report of RDAI/IBLJ Roundtable 2012. See also E De Brabandere and J Lepeltak, *Third Party Funding in International Investment Arbitration*, Grotius Centre Working Paper No. 2012/1, June 5, 2012; S Seidel, 'Third Party Commercial Funding: Taking Stock Today, Looking at Tomorrow', paper presented at the Commercial Litigation and Investment Summit, New York City, 16 March 2012.
43. Rusoro Mining Ltd, above n 40.

- In March 2012, a London-listed mining company, Oxus Gold, announced that it had entered into a funding agreement with Calunius in relation to its international arbitration proceedings against Uzbekistan.[44]

There are a number of factors which may make international arbitrations and BIT claims suitable for funding, including:

- The dispute resolution process is controlled by expert and experienced arbitrators and the parties with the potential to achieve a quicker and more efficient resolution of the dispute than through a court process.
- The claimants often seek very substantial monetary awards that are based on documentary, rather than oral, evidence.
- Arbitral awards are generally final and binding with only limited rights of review so the risk of appeals and delay are reduced.
- The benefit of enforcement under the New York Convention and, for International Centre for Settlement of Investment Disputes (ICSID) claims, defendants have an incentive to comply with an award under the ICSID Convention or risk losing support from the World Bank.[45]
- Demand for third-party funding is likely to follow growth in the use of international arbitrations, which are emerging as a preferred means of resolving cross-border disputes.

However, other features of international arbitral regimes are presently not so conducive to funding and may limit its use:

- In some jurisdictions,[46] maintenance and champerty remain in full force. The ability to fund claims in these jurisdictions is limited and funders may need to wait for legislative reform or the development of a more flexible approach by local courts.
- While the funding of BIT claims is not constrained by maintenance and champerty, as these claims are not anchored to any particular legal system and the law of the funding agreement can specify a permissive jurisdiction, other developments may limit demand for funding. Some countries have decided to withdraw from the ICSID convention or to negotiate treaties with much reduced investor–state dispute settlement provisions to limit potential recoveries by claimants.[47] Funders are naturally reluctant to fund claims against states with a poor history of paying ICSID awards.
- There is no system of precedent which informs the development of substantive norms or universally accepted rules of arbitral procedure. Many practical issues affecting

44. Oxus Gold plc, above n 40.
45. Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).
46. For example, third party funding of arbitrations is problematic in Singapore (refer *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Anor* [2007] 1 SLR (R) 989); in the United States, only 28 states no longer prohibit champerty or provide extensive exceptions. See also 'Third-Party Funding: Snapshots From Around the Globe' (2012) 7(1) *Global Arbitration Review* 25.
47. See **Chapter 21**.

funding, such as privilege[48] and access to confidential information by funders, continue to be vigorously debated within the international arbitration community. Their resolution will impact the future development of litigation funding.

- Access by funders to confidential information on the dispute may be constrained by the terms of the arbitration agreement (which is often drafted without funding in mind), and a question remains over whether, if such information is provided by a claimant to a funder, that information will remain confidential if disclosure is later sought in the arbitral proceedings.
- There are concerns, in some jurisdictions, that privilege in documents prepared by the claimant's lawyer or for the purpose of the dispute may be waived if the documents are given to a funder and that communications between the funder and the claimant and/or the claimant's lawyers will not be protected in jurisdictions which do not recognise common interest privilege.[49]
- There is no consensus within the arbitration community as to the disclosure of third-party funding agreements, either to the arbitral panel or to a defendant.

While these uncertainties pose risks which may cause funders to be cautious in funding international arbitrations, funding for these claims is likely to be a significant activity in the future. As has happened in other areas of funding, the legal and doctrinal uncertainties will eventually be resolved while the volume of arbitrated disputes is likely to experience strong growth.

Funding for 'Solvent' Claimants and for Defendants

The global financial crisis that commenced in 2007 has created a corporate environment that is risk- averse and highly cost-conscious. This is likely to lead to increasing demand for litigation funding from claimants who may have the resources to fund their own litigation but who wish to obviate the risks and management distraction involved, and take advantage of funders' litigation management expertise and legal cost efficiencies.[50] While it may be argued that such funding does little for access to justice, litigation funders currently fund claims of 'solvent' litigants.[51] A further market segment which may develop, for similar

48. As there is no legal framework which informs how an arbitral tribunal will approach a claim for privilege or its waiver, the approach of the tribunal may be hard for a funder to predict. The International Bar Association Rules on the Taking of Evidence in International Arbitration, art 9.3 provide some assistance and refer to one relevant factor, being the expectations of the parties and their advisers at the time the legal impediment or privilege is said to arise. Questions of privilege and waiver may be of particular concern where the documents or information provided fall within the jurisdictional reach of the courts of the United States. Courts in the United States have allowed discovery in aid of international arbitration under 28 USC § 1782.
49. For a discussion of these issues, see A Goldsmith and L Melchionda, 'Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask) (Part 1)' (2012) 5 *International Business Law Journal* 53.
50. See A Katz and S Schoenfeld, 'Third-party Litigation Financing – Commercial Claims as an Asset Class' (March 2012) *Practical Law The Journal* 36; Seidel, above n 42; M Amey, 'Keep the Litigation Hedge in Shape', *Financial Director*, 3 July 2012.
51. Institutional investors are usually group members in funded shareholder class actions: see M Legg, 'Shareholder Class Actions in Australia – The Perfect Storm?' (2008) 31 *The University of New South Wales Law Journal* 669 at 675.

reasons, is funding portfolios of claims such as a group of subrogated claims held by an insurer arising out of a single loss event.

One facet of funding which is still in its infancy but is likely to grow is funding for defendants. Access to justice may well be engaged by such funding. The principal impediment to the development of this type of funding is identifying clear yardsticks with which to measure success and striking an appropriate balance between risk and reward.

The Regulation of Litigation Funders in Australia

The regulation of litigation funders is a perennial topic in the debate over funding's acceptability. In May 2006, the Standing Committee of Attorneys-General issued a discussion paper on litigation funding in Australia that raised many of the regulatory issues which continue to be debated today.[52] The best that can be said of the current regulatory regime is that it is a 'work in progress' that will inevitably need further reform in the future.

Why Regulate Funders?

Regulation is considered necessary to address some or all of the following issues:

- the management of conflicts of interest which could arise between a funder, its clients and the lawyers retained to act for the clients in the funded proceedings;
- the need to maintain the independence of the lawyers who act for funded litigants from the funder, so as to ensure the lawyers' professional and fiduciary obligations are not compromised;
- a perceived need to protect consumers of funding as they may be vulnerable to exploitation by funders;
- ensuring that funders maintain sufficient capital to enable them to reliably meet all of their financial obligations including, importantly, to pay any adverse costs in the event the litigation is lost;
- licensing of funders, including a 'proper person' test for determining eligibility to hold a licence; and
- the disclosure of funding agreements to the court and other parties to the funded litigation.[53]

Background to the Current Regulatory Regime

Until very recently there was no statutory regulation of litigation funders in Australia, even though on two occasions senior courts have found that licensing, conduct and disclosure provisions in the Corporations Act 2001 (Cth) (Corporations Act), which are designed to regulate financial services and products, applied to certain litigation funding arrangements:

52. Standing Committee of Attorneys-General, *Litigation Funding in Australia*, May 2006, pp 8–9.
53. Rules of court may require disclosure of funding arrangements; see, for example, the new Order 9A of the Rules of the Supreme Court of Western Australia 1971 (WA).

- In *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (Multiplex),[54] a majority of the Full Court of the Federal Court held that the arrangements for the funding of the class action in that case constituted an unregistered managed investment scheme (MIS) within the definition in s 9 of the Corporations Act.
- In *International Litigation Partners Pte Ltd v Chameleon Mining NL (Chameleon)*[55] a majority of the New South Wales Court of Appeal held that the litigation funding agreement in that case was a 'financial product' (within the meaning of s 763A of the Corporations Act) because it was a facility for managing financial risk. As the funder did not hold an Australian Financial Services Licence (AFSL) authorising it to deal in financial products, the client was entitled to rescind the funding agreement.[56]

The *Chameleon* decision had wider implications for funders than *Multiplex* for two reasons. First, it was not restricted to class actions. Second, it applied to all funders operating in Australia that did not hold an AFSL (or an exemption from the Australian Securities and Investments Commission (ASIC)) — that is, practically all of them. The funder in *Chameleon* was granted special leave to appeal to the High Court and the High Court's judgment is currently reserved.

Following the *Multiplex* decision, ASIC promptly announced that it would temporarily exempt funders and lawyers involved in funded class actions from the MIS requirements to enable the federal government to consider whether to make the exemption permanent. This was achieved by means of a Class Order,[57] which has been extended a number of times. Following *Chameleon,* ASIC amended the Class Order to cover funders and lawyers involved in single-party funded litigation.[58] ASIC's holding action reflected the Commonwealth Government's decision to foster litigation funding as a means of promoting access to justice.[59]

The Corporations Amendment Regulation 2012 (No 6)

The Corporations Amendment Regulation 2012 (No 6) (the Regulations) is the federal government's response to the call to regulate funders. Registered on 13 July 2012 and due to come into force on 14 January 2013,[60] the Regulations seek to exclude funded class actions from the definition of a MIS and exempt any person providing funding as part of a 'litigation scheme' as defined in the Regulations from holding an AFSL, on condition that they:

> maintain, for the duration of the scheme, adequate arrangements for managing any conflict of interest that may arise in relation to activities undertaken by the person, or an agent of the person, in relation to the scheme.[61]

54. (2009) 180 FCR 11 (per Dowsett and Sundberg JJ; Jacobson J dissenting).
55. (2011) 276 ALR 138 (per Giles and Young JJA; Hodgson JA dissenting).
56. Ibid, at [94] per Giles JA; [251] per Young JA.
57. ASIC Class Order CO 10/333.
58. ASIC Class Order CO 11/555.
59. See C Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, 'Address to Shareholder Class Action Conference', Quay Grand Suites, Sydney, 4 May 2010, p 3.
60. The Regulations commence six months after they are registered: reg 2.
61. Regulation 7.6.01AB(2)(b).

The Regulations are thus concerned with conflicts of interest in the context of a funded multi-party action that would otherwise be an MIS. They do nothing in relation to the licensing of funders, the prevention of 'rogues' entering the industry, the establishment of an acceptable code of conduct or the maintenance of adequate capital by funders. They also do not respond to the *Chameleon* decision which, unless reversed by the High Court or nullified by continued ASIC exemption or regulation, will require all funders (other than those that limit themselves to representative proceedings) to hold an AFSL.

Some commentators are disappointed the government did not take the opportunity to require licensing of funders.[62] IMF, the only Australian funder with an AFSL, and another local funder, Litigation Lending Services, have called for mandatory licensing.[63] AFSL licensees are required, as a term of their licence, to have effective conflicts management arrangements in place as well as having to comply with numerous other obligations protective of consumers of the licensed service.[64] Questions have also been raised over whether the Regulations are legally effective to achieve their modest aims.[65]

The Future of Regulation

The current regulatory regime for litigation funding in Australia is unsatisfactory. While this chapter has focused on the great potential that exists for the Australian litigation funding industry, one of the very real risks to the industry's health is an unregulated funder defaulting on its obligations or engaging in serious misconduct to the detriment of funded claimants, the defendants and the court.

Funding in Australia has been mercifully free from the scandals and excesses that have plagued some other markets (such as occurred with certain claim management companies in the United Kingdom). If this situation were to change for the worst, the implications for the credibility, acceptability and growth of funding could be serious, to say nothing of the harm that would be caused to the parties directly affected by a funder's misbehaviour. Hence it is not surprising that responsible funders have supported calls for fuller regulation of their industry.

The extent to which government decides to regulate funders in the future, the precise form those regulations take and the degree to which regulatory changes are made to other actual or potential sources of funding (such as insurers and lawyers),[66] will have a profound impact on the development of funding in Australia. Carried out prudently and in full consultation

62. C Merritt, 'Funding Rules "Leave Public at Risk"', *The Australian*, 20 July 2012, p 29 — quoting IMF Managing Director Hugh McLernon: 'There is nothing [in the Regulations] to prevent (US corporate criminal) Bernie Madoff from becoming a funder from his cell'. See also M Legg and N Mavrakis, 'Rules on Litigation Funders "Flawed"', *The Australian*, 3 August 2012, p 19.
63. S Bowers, 'Litigation Funders Say Licences Needed', *Australian Financial Review*, 19 August 2011, p 22.
64. Grave et al, above n 3, at 800, 871.
65. IMF (Australia) Ltd, *Corporations Amendment Regulations 2012*, submission to the Treasury, Canberra, 17 January 2012. IMF submits that the Regulations are flawed in that they only exempt, from the MIS provisions of the Corporations Act 2001, schemes in which neither the funder nor the lawyers are members: reg 5C.11.01 (1) (b) (vi). This is contrary to the majority's decision in *Multiplex* which held that the funded class action in that case was a MIS in part because the funder, the lawyers and the group members were all members of the scheme.
66. For example, lifting the current prohibition on lawyers charging contingent fees.

with stakeholders, it is likely that regulatory reform will prove beneficial to the industry. It will provide certainty for funders, their clients and lawyers; improve the responsible provision of litigation funding in Australia; and enhance its providers' prospects.

Conclusion

To the extent that one can forecast the development of an industry that is still relatively young, derives its income entirely from investments in (inherently risky) pieces of litigation and continues to face challenges in the courts (either to its own contractual arrangements with its clients or to its cherished investments, or both), the Australian litigation funding industry appears to have a bright future.

Litigation funding has established its legitimacy in the Australian legal system and while it is not a 'panacea' for access to justice, it is 'a positive step towards its attainment'.[67] Litigation funders have achieved commercial success in their domestic market and can increasingly look outside Australia for new opportunities with confidence. The future of litigation funding in this country will, perhaps, be most influenced by the evolution of its regulation by government. Provided regulation is developed competently and in full consultation with affected stakeholders and is applied sensibly, the interests of suppliers and consumers of litigation funding, as well as that of the civil justice system itself, should be well served.

67. B Murphy and C Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399 at 439.