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2 March 2010

The Secretary
The Class Actions Sub-Committee
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai Hong Kong

Dear Sir

**The Law Reform Commission of Hong Kong – Consultation Paper issued in November 2009 ("Consultation Paper")**

1. This letter responds to question 12 in Chapter 10 of the Consultation Paper, namely:

   *"should the funding of class actions by private litigation funding companies be recognised and regulated?"*

2. Although IMF (Australia) Ltd ("IMF") makes no substantive comments on other questions in the Consultation Paper, as a funder of class action litigation IMF's experience is that the dedicated Australian rules for class actions[1] provide a means for the resolution of issues common to multiple parties in a manner that is vastly more efficient and cost effective than if individual causes of action were required to be pursued. Accordingly, IMF supports the introduction of a class action regime in Hong Kong.

**About IMF**

3. IMF acknowledges, that as a litigation funder, it has a commercial interest in Hong Kong embracing litigation funding as a means to enhance access to justice.

4. IMF is a public listed company with a market capitalisation of over AUD$200 million, which provides funding of legal claims and other related services. IMF is the largest litigation funder in Australia and the first to be listed on the Australian Securities Exchange. IMF's website may be found at www.imf.com.au.

1 Predominately Part IVA of the Federal Court of Australia Act 1976.



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5. IMF has funded access to the Supreme and Federal Courts of Australia for about 20,000 claimants since listing in 2001, and consequently has a 9 year track history of funding litigation.

6. IMF is a systemic funder of litigation (outlaying about $2 million per month in legal fees) with objectives closely aligned to claimants, being just, quick and cheap resolution of claims.

7. IMF funds 3 categories of cases:

   (a) insolvency (being cases where the plaintiff is a company subject to an insolvency regime or is the insolvency practitioner);

   (b) non insolvency commercial litigation; and

   (c) multi-party commercial claims (class actions)

8. IMF does not fund individual cases where the claim size is below AUD$2 million. The cost of litigation and the associated risks makes funding claims below this level commercially unviable.

9. IMF has no minimum claim size with respect to the claims of individuals which collectively comprise the members of a class action, although the total aggregate claim size must be such that the class action is commercially viable to fund.

10. A significant proportion of cases IMF has funded, and is funding, are multi-party claims. The types of such claims include:

    (a) claims by current and former shareholders arising out of breaches of continuous disclosure obligations by listed companies and misleading and deceptive conduct;

    (b) contraventions of financial services market protection legislation in the context of managed investment schemes; and

    (c) disparate matters, including a price fixing cartel, misfeasance in public office, airline death claims in USA and failure to remit tobacco taxes after the legislation was declared unconstitutional.

11. IMF does not confine its funding activities to Australia. IMF has funded, or is funding litigation in South Africa, New Zealand, Singapore and the United States. IMF has not yet funded any litigation in Hong Kong, but it is willing to do so.[2]

2 On 29 September 2009 Clive Bowman of IMF gave a presentation in Hong Kong to the Restructuring and Insolvency Faculty on litigation funding, focussing on litigation funding for insolvency practitioners

**Summary of IMF's submission**

12. IMF submits that litigation funding of class actions should be recognised in Hong Kong for these reasons:

    (a) concerns around the world about maintenance and champerty are receding. The worldwide trend is in favour of permitting third party litigation funding;

    (b) the cost of litigation and difficulties in obtaining access to justice are increasing; and

    (c) any concerns about potential abuse can be effectively dealt with under existing laws or by specific regulation.

13. Each of these matters is addressed below.

**Reason 1: The Worldwide trend is in favour of permitting third party litigation funding**

14. In the common law countries around the world there is an increasing tendency to embrace litigation funding. This is in part due to receding concerns about ancient rules of maintenance and champerty and the rising costs and delays associated with adversarial processes.

15. In the United States, historically lawyers have been able to act on a contingency basis. Although different States have differing views on maintenance and champerty, the prevalence of third party litigation funders in the United States is increasing.

16. Maintenance and champerty have ancient origins. The doctrines emerged in medieval times when corruption was common place. As Lord Mustill in *Giles v Thompson*[3] said:

> "The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and exploitation of worthless claims which the defendant lacked the resources and influence to withstand.
> ….
> As the centuries passed the Courts became stronger, their mechanisms more consistent and their participants more self-reliant. Abuses could be more easily detected and forestalled, and litigation more easily determined in accordance with the demands of justice, without recourse to separate proceedings against those who trafficked in litigation."

3 [1994] 1 AC 142

17. Lord Mustill recognised (as many others have also done) that the origins of maintenance and champerty lay on considerations of public policy designed to protect the purity of justice and the interests of vulnerable litigants.

18. Public policy is not static. Accordingly, whether conduct amounts to a contravention of the common law offence and tort of maintenance and champerty has changed over time in accordance with changes in public policy.

19. As the Hong Kong Court of Final Appeal recognised in *Siegfried Adalbert Unruh v Hans – Joerg Seeberger*[4]:

> "The early policy imperatives have long gone and by the 19th century it was widely recognised that maintenance and champerty had acquired a wholly different complexion. Thus in 1883 Lord Coleridge CJ stated that the old authorities "hold a multitude of things to be maintenance which would not be held so now…." and in 1982, Lord Rostill commented that in the 20th century, "the Courts have adopted an infinitely more liberal attitude towards the supporting of litigation by a third party than had previously been the case".

20. Importantly, in recent times, increasing concerns about access to justice have driven an increasing acceptance of litigation funding. As an example, the Court in *Gulf Azov Shipping Co Limited v Idisi*[5] said:

> "Public policy now recognises that it is desirable in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation."

21. The analysis below represents a snapshot of the worldwide trend.

***(A) The Australian Position***

22. In Australia, maintenance and champerty is no longer a crime, but is a tort in states other than New South Wales, Victoria and South Australia. The rules of maintenance and champerty remain part of the law in so far as they impact on contracts to be treated as contrary to public policy or otherwise illegal.

23. The Australian High Court in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* ("Fostif"),[6] confirmed by a 5:2 majority that it is not contrary to public policy under Australian Law for a

4 [2007] HKEC 268 at [89]

5 [2004] EWCA CW 292 at [54]

6 [2006] 229 ALR 58

funder to finance and control litigation in the expectation of profit and that litigation funded on this basis does not amount to an abuse of the Courts' process.

24. The claim in that case was a representative proceeding on behalf of numerous small tobacco retailers seeking a refund of licence fees paid to the defendant tobacco wholesalers.

25. The funding agreement conferred significant powers on the funder. In particular, the funder:

    (a) sought out the claimants through an extensive advertising and direct marketing campaign and organised the claimants into the proceedings;

    (b) retained the solicitor to act for the claimants and forbade the solicitor from directly liaising with the claimants;

    (c) gave all instructions to the solicitor in relation to the conduct of the proceedings;

    (d) had the power to settle the claims with the defendants (provided the amount of the settlement was not less than 75% of the amount claimed);

    (e) would receive up to 33.3% of any amounts recovered by the claimants; and

    (f) would retain any amounts awarded to the claimants for costs.

26. The Majority of the High Court held that neither the funder's conduct in seeking out persons who might have claims or the terms of the funding arrangement which gave the funder control of the litigation in the expectation of a significant profit were contrary to public policy or led to any abuse of process. In relation to control the New South Wales Court of Appeal (whose decision was confirmed by the High Court) said:[7]

    "….a measure of control is essential if the funder is to manage group litigation and also protect its own legitimate interests. The funder's control in the present case is not excessive, especially since there is a solicitor on the record and since these are representative proceedings under judicial supervision".

27. Their Honours went on to consider two fears associated with litigation funding: fears about possible adverse effects on the litigation process and fears about the fairness of the bargain struck between the funder and the client. They concluded that: "To meet these fears by adopting a rule in either form would take too broad an axe to the problems that may be seen to lie behind the fears."[8]

7 Ibid at [137]

8 Ibid at [91]

28. They rejected a role for the Courts in assessing whether a funding agreement was "fair" as this assumed, wrongly, that "there is some ascertainable objective standard against which fairness is to be measured and that the Courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity"[9]. And in response to Lord Denning MR's oft-repeated warning in *In re Trepca Mines Ltd (No 2)* that the "common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame damages, to suppress evidence, or even to suborn witnesses", the majority replied:[10]

> "Why is that fear not sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the Court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding the present rules regulating lawyers' duties to the Court and to clients are insufficient to meet the difficulties that are suggested might arise."

29. The majority recognised the practical reality of multi-party litigation and the positive role that funding can play in promoting access to justice. Underpinning their judgment was a determination to ensure that the defendants were not able to take advantage of "some general rule of public policy that a defendant may invoke to prevent determination of the claims that are made against the defendant". [11]

***(B) The UK position***

30. In the United Kingdom, maintenance and champerty were abolished as crimes and torts in 1967, but still remain a part of English Law in so far as the circumstances in which contracts can be treated as contrary to public policy or otherwise illegal are concerned.

31. A modern summary of the position of the law in the UK is found in *London & Regional (St George's Court) Ltd v Ministry of Defence*:[12]

> "Many of the relevant authorities in this area of the law have been helpfully summarised by Underhill J in *Mansell v Robinson* [2007] EWHC 101 (QB). He concluded that:
>
> (a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable: see *R Factortame Ltd v Secretary of State for Transport (No. 8)* [2003] QB 381;

9 Ibid at [92]
10 Ibid at [93]
11 Ibid at [95]
12 [2008] EWHC 265 at [103]

(b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement: see *Giles v Thompson;*

(c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable: see, for example, *Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No.2)* [2002] 2 Lloyd's Rep 692; and

(d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction: see *Papera*".

32. In *Arkin v Borchard Lines Ltd & Ors*[13] ("*Arkin*")the trial judge held that:

> "It is indeed highly desirable that impecunious claimants who have reasonable sustainable claims should be enabled to bring them to trial by means of non-party funding. It is further highly desirable in the interests of providing access for such claimants to the courts that non-party funders, such as MPC should be encouraged to provide funding, subject always to their being unable to interfere in the due administration of justice, particularly in order to forward their own interest in their stake in the amount recovered".

33. On appeal, the Court of Appeal endorsed the trial judge's sentiments concerning the desirability of litigation funding.

34. On the question of the funder's liability for costs, the Court of Appeal held that the rules concerning costs following the event and the reasons for those rules "render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action"[14].

35. The Court of Appeal considered that the professional litigation funder should not be liable for all of the costs of the case (which had been lost by the funded plaintiff), based on concerns that this might discourage funding and so be contrary to aims of promoting access to justice.

36. The Court of Appeal limited the liability of the funder to the costs of the opposing party to the extent of the funding provided. It recognised that a likely consequence was that professional

13 [2003] EWHC 2844 at [71]

14 [2005] EWCA CIV 655 at [38]

funders would be likely to cap the funds they provide so as to limit their exposure to adverse costs to a reasonable amount.

***(C) The position in South Africa***

37. In South Africa, the Supreme Court of Appeal of South Africa in *Price Waterhouse Coopers Inc & Ors v National Potato Co-operative Ltd*, in a judgment delivered on 1 June 2004, attributed the historical condemnation of champerty to concerns for the integrity of the judicial system and found that "as the civil justice system had developed its own inner strength the need for the rules for maintenance and champerty has diminished – if not entirely disappeared."[15]

38. The Court concluded that the civil justice system was strong enough to deal with any abuses that might arise if litigation is made possible by third party funding in return for a share of the recoveries. Accordingly, such arrangements were not contrary to public policy.

***(D) The position in New Zealand***

39. The High Court of New Zealand (New Zealand's court of first instance for major claims) in *Houghton v Saunders & Ors*[16] relied heavily on the Australian decision in *Fostif* in finding that the funding agreement in that case, which gave day to day control of the litigation to the funder of representative proceedings, did not amount to an abuse of process and as such would not warrant a stay.

40. Justice French noted that in recent times there had been a "dramatic change in attitude" to maintenance and champerty with the Courts generally adopting a more liberal and relaxed approach.[17]

41. Justice French identified the relevant concerns as being with the fairness of the bargain struck between funder and funded party and the adverse effects on the processes of litigation.

42. The funding agreement provided for the funder to receive 33% of any damages or settlement (rising to 38% in the case of an appeal) and a project management fee of 25% of the total costs of the project. The profit the funder stood to make, if the claim succeeded, was very substantial (possibly $80 to $90m).

43. The Court was referred to Australian decisions where the Court has approved funding agreements where the percentages were higher (75% in *Buiscex Ltd v Panfida Foods Ltd (in liq)*[18] 66.6% in *Bell Group v Westpac*[19] and 55% in *Bandwill Pty Ltd v Spencer Lauff*[20].

15 at [32] of the judgement
16 [2008] NZHC 1569
17 Ibid at [182]
18 [1998] NSWSC 516

44. Notwithstanding that the Australian High Court decision in *Fostif* was made in the context of a jurisdiction (New South Wales) where maintenance and champerty had been aborted as a crime and a tort (and in New Zealand the tort of champerty remains), the Court felt that the principles in *Fostif* were of sufficiently general application so as to be relied on.

***(E) The position in Ontario, Canada***

45. The Ontario Superior Court of Justice in *Metzler Investment GmbH v Gildan Activewear Inc & Ors*,[21] in a decision handed down on 6 August 2009, took a more conservative approach than that taken in Australia and New Zealand in considering whether to approve a third party litigation funding agreement in the context of a class action.

46. Under consideration was an Indemnification Agreement whereby the funder agreed to indemnify the lead plaintiff in the class action for any adverse costs order. The lawyers for the lead plaintiff were conducting the case on a contingency fee arrangement.

47. Although the Court was referred to the cases of *Fostif* and *Arkin*, the defendants argued that these cases were not particularly relevant because contingency fee agreements are not permitted in Australia (in contrast to Ontario) and are only permitted for non-contentious litigation in England. Further, they argued that in *Arkin* the plaintiff was impecunious (which was not the case here).

48. After a review of Canadian cases including those concerning fee arrangements, the Court concluded that there are 2 critical elements that constitute a champertous agreement with respect to third party funding agreements:[22]

> "First, the involvement must be spurred by some improper motive. Second, the result of that involvement must enable the third – party to possibly acquire some gain following the disposition of the litigation".

49. As the funder would clearly gain from a positive outcome, the motivation of the funder was seen as critical.

50. Even though the Indemnification Agreement gave the funder no control over the litigation, the Court objected to the terms that enabled the representative of the funder to attend settlement discussions and permitted the funder to terminate its obligations on 7 days notice.

19 (1993) 18 WAR 21

20 [2000] WASC 210

21 (2009) CanLII 41540 (Ont SC)

22 Ibid at [44]

51. In respect of the termination provisions, the Court found that the termination right "could amount to officious intermeddling and could create the potential for this litigation to be influenced by extraneous interests and agendas. The ability to terminate the Agreement without cause should therefore be deleted…."[23]

52. This position is contrary to that taken in Australia, as exemplified by the case of *Spatialinfo Pty Ltd v Telstra Corporation Ltd*[24]. In that case, Sundberg J found that the right of IMF to terminate the funding agreement was an almost unavoidable feature of a litigation funding agreement and was not an indirect mechanism to control the litigation.

53. With the provisions referred to above deleted, the Court held that the Indemnification Agreement did not contravene public policy, but that there was still an issue as to whether the agreement was champertous which required an examination of the funder's motive.

54. The Court followed the approach of the Ontario Court of Appeal in *McIntyre Estate v Ontario (Attorney General)*[25], adopting what the Court said at [76] as follows:

> "When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a Court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose – *i.e.*, taking advantage of the client".

55. This reasoning was applied to the Indemnification Agreement.

56. Although the Court accepted that it would not be appropriate to inquire into the amount of the fee payable were only the plaintiff liable to pay it, here all class members would be liable to pay it, and this required the Court to assess the fairness and reasonableness of the compensation payable to the funder.

57. The Court concluded that as the amount of compensation related completely to the amount of money recovered (7% of the recoveries) it was impossible to conclude, at this stage of the proceedings, what that amount was and consequently whether there was "over compensation". Thus, the Court held that it could not now declare that the agreement did not involve maintenance and champerty.

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23 Ibid At [60].

24 [2005] FCA 455 (22 April 2005)

25 (2002) 61 OR (3d) 257 (C.A.)

58. It appears that the Alberta Court of Queen's Bench[26] has also approved an indemnity agreement in conjunction with a contingency fee arrangement in a class action, in June 2009. The application was ex parte (and so did not involve a contradictor) and the finance arrangement was sealed and so not public

59. The decision in the Metzler case must be viewed in context. Essentially, the funder was seeking court approval to an arrangement that would bind all class members, even though they had not individually agreed to be bound. In Australia, group members only become part of a funded class if they enter a funding agreement.[27] If they do not want to do so they are free to pursue their litigation through other means.

***(F) The position in Hong Kong***

60. In Hong Kong, the leading authority on maintenance and champerty is the Court of Final Appeal's decision in *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* ("*Unruh*")[28] of 9 February 2007.

61. The Court reinforced that common law rules making maintenance and champerty criminal offences, torts and a ground of public policy for invalidating tainted contracts, were part of Hong Kong Law prior to 1997 and remain applicable by virtue of Article 8 and the Basic Law.

62. The Court recognised 3 non static categories of cases excluded from the ambit of liability for maintenance and champerty, as follows:

    (a) the "common interest" category which justified certain persons with a legitimate common interest in the outcome of litigation in funding it;

    (b) cases involving access to justice considerations; and

    (c) a miscellaneous category of practices accepted as lawful which include sale and assignment by a trustee in bankruptcy and the doctrine of subrogation as applied to contracts of insurance.

63. In examining the public policy considerations that result in a contract being vitiated on the grounds of maintenance and champerty, the Court identified 4 points:[29]

    (a) "In the first place, the traditional legal policies underlying maintenance and champerty continue to apply although they must substantially be qualified by other considerations.

26 See Don Hobsbawn v ATCO Gas and Pipelines Ltd

27 Although in some circumstances the class may subsequently be opened up, in which case there will be funded and non funded group members in the class. See also note 32 below.

28 See note 4 above

29 Ibid at [100] to [104]

Thus the mischief to be discouraged by the law of maintenance is still "officious intermeddling in litigation" in particular where this results in oppression of the person against whom the action is brought and possibly if it may result in the general encouragement of litigiousness".

(b) "Secondly the fact that an arrangement may be caught by the broad definition of maintenance or champerty is not in itself sufficient to found liability. The totality of the facts must be examined asking whether they pose a genuine risk to the integrity of the Court's processes".

(c) "Thirdly, countervailing public policies must be taken into account, especially policies in favour of ensuring access to justice and of recognising, where appropriate, legitimate common interests of a social or commercial character in a piece of litigation".

(d) "Fourthly, it is important not to confuse related but separate policies with those which properly underlie the operation of maintenance and champerty. For example, an agreement to take a share of litigation proceeds may be primarily objectionable because it involves the unconscionable exploitation of a vulnerable litigant. Or it may be considered objectionable for solicitors to enter into such an arrangement because it is thought likely to give rise to conflicts between the solicitor's interest in financial gain and his duties to the Court and to the client. It may be right to strike down the arrangement in some cases. But in others, doing so (and characterising the conduct as criminal) in reliance on the law of maintenance and champerty may be to use too blunt an instrument. It may, for instance, result in the litigant being left with no means to pursue a good claim. Resort might more appropriately be had in such cases to other doctrines and remedies more suited to granting relief to the exploited party or to confronting professional misconduct".

64. The Court emphasised that public policy is apt to change and in this context commented that "The continued retention by Hong Kong of criminal and tortious liability for maintenance and champerty may not be justified and this question merits serious legislative attention".[30]

65. The Court held that the funding agreement which provided for the plaintiff to receive 10% of any compensation in excess of $10m in arbitration proceedings was not champertous because:

(a) the plaintiff had a genuine pre-existing commercial interest in the outcome of the arbitration; and

30 Ibid at [119]

(b) Hong Kong Courts should not find an agreement void on maintenance and champerty grounds where it would not be so affected in the jurisdiction where it was to be performed (in this case, the Netherlands).

66. It is clear that Courts in Hong Kong have been prepared to approve litigation funding arrangements with insolvent entities (the third category of cases excluded from the ambit of maintenance and champerty referred to by the Court of Final Appeal). The case of *Akai Holdings Limited (in compulsory liquidation) and others v Ho Wing On and others* is an example both of an instance where Court approval was given to a litigation funding agreement and of the benefits third party litigation funding can bestow.[31] Without funding it is doubtful that the case would ever have been brought.

67. Many class actions would fall within the second category of excluded cases as involving access to justice considerations. This is because class actions typically involve situations where:

(a) an alleged wrong has been committed that adversely effects a number of people;

(b) the costs of funding the proceedings are very significant (in IMF's experience in funding securities class actions the legal costs are typically in the range of AUS$6 to $10 million on each side);

(c) the loss of each individual is less than the total costs of funding the proceedings; and

(d) many members of the class lack the financial capacity to pursue the proceedings on their own.

68. The difficulty likely to be confronted by funders of litigation and lawyers in Hong Kong, while maintenance and champerty remains a crime and a tort in Hong Kong is:

(a) the lack of certainty arising from the lack of any clear capacity before the litigation proceeds to obtain the Court's approval to the funding[32]; and

(b) the significant potential consequence for funders and lawyers, if the litigation proceeds and ultimately it is found that no exclusion from the ambit of liability for maintenance and champerty operates.

69. Consequently, unless the law in relation to maintenance and champerty in Hong Kong is changed, the public policy objectives underlying the recognition of an exception based on

31 It is public knowledge that the case was settled in late 2009 for a substantial sum.

32 Other than in the context of insolvency where the Court has power to give directors to a liquidator including with respect to entering into a litigation funding agreement

access to justice considerations are likely to be thwarted. No one is likely to be prepared to fund a case that appears to involve access to justice considerations without knowing whether the exception definitely applies. Furthermore, there is a real risk that people with international disputes who wish to obtain funding, will choose to litigate elsewhere.

**Reason 2: Increasing costs of litigation – the need for litigation funding:**

70. People determining whether to commence class actions are usually confronted with the same risks Lord Woolf identified in 1996 when he examined the English and Wales civil justice system and remarked:

> *"The defects I identified in our present system were that it is too expensive and that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal; there is a lack of equity between the powerful, wealthy litigant and the under-resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of the court, all too often, are ignored by the parties and not enforced by the court."* [33]

71. The Full Court of the Federal Court of Australia in *Gore v Justice Corporation Pty Ltd*[34] has observed:

> *"There are ongoing concerns about the high costs of litigation; there are risks that citizens with justifiable causes of action may be kept out of Courts because of their inability to pay the costs of litigation or because they fear the financial risks of litigation. If, in such circumstances, a business house, openly and reasonably, wishes to engage in the business of funding litigation and is prepared to meet the costs of the opposing party should that party be successful, we see no cause for instant alarm."*

72. Litigation funding is part of the solution, but not a total solution, to concerns about access to justice.

73. Litigation funders will usually only fund class action cases where:

33 (Law Commission of the United Kingdom, Civil Justice (July 1996): see www.dca.gov.uk/civil/final.)

34 [2002] FCA 354

(a) there is a total quantum claimed that makes the litigation viable by reference to anticipated costs;

(b) the prospects of success are strong; and

(c) the group members sign up to funding agreements[35].

74. There are government authorities vested with power to initiate litigation to redress social or public wrongs, where commercial considerations such as the cost of funding the proceedings, are not, or are not a significant, consideration in determining whether to proceed.

75. Furthermore, such government bodies do not have unlimited resources.

76. Litigation funding companies can and do operate side by side with government authorities and legal aid funds.

77. Commercial limitations ensure a rationale use of resources. The non pursuit of litigation which is not commercially viable, in the sense that its anticipated cost is greater than any anticipated damages award, results in an effective and efficient use of public resources, being the court system, and avoids the pursuit of litigation that serves no purpose other than to generate fees for service providers.

78. Limiting participation in a class action to members who meet certain criteria, such as signing a litigation funding agreement, is also economically rational.

79. Mr Vince Morabito notes it is *"troubling"* that the drafters of the (Australian) Federal Court Act failed *"to provide aspiring class representatives with the financial tools required to meet the significant costs entailed in instituting and running a class proceeding that is governed by an opt out device"*.[36] He says prohibiting the proceedings from being brought on behalf of some persons (those that wish to have the claims pursued on their behalf) would "*constitute a myopic approach as it would entail dealing with the symptom rather than the cause of the problem*". He concludes that the rejection of a mechanism that restricts the class to persons who wish to have claims pursued on their behalf *"on the basis that it prevents a significant proportion of claimants from gaining access to justice, represents a self-defeating exercise if it results in access to justice becoming an unattainable goal for all claimants".*

80. There is considerable merit in enabling the statutory class action procedure to be utilised by a group or groups of individuals who are aggregated together, including where such individuals or

35 Although in a number of class actions funded by IMF, the class has been opened to non funded persons, for example, the class actions funded by IMF against Aristocrat Leisure Ltd and AWB Ltd were opened.

36 Morabito V, "Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors", 29 Sydney Law Review 5 (2007) at 13.

entities consent to the pursuit of proceedings on their behalf.

81. This approach has been endorsed by the Full Federal Court in *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd*[37]. At first instance, Finkelstein J said[38]:

> *"… the only persons excluded from the group are free riders, that is persons who make no direct or indirect contribution towards the costs of the action. In my opinion this is not inconsistent with Part IVA… a group that excludes free riders cannot be criticised. On the contrary, there are economically rational reasons to establish such a group. The most obvious is that it provides each potential group member with an incentive to agree to contribute. It also keeps the cost or the burden of purchasing the costs down for each individual. There are other advantages in keeping group members down. For one thing, it is probably easier to settle a smaller claim. For another, there is a greater prospect of obtaining a higher percentage of the amount claimed by way of compromise. Even respondents may benefit from the prospect of a smaller payout. Indeed, it is odd to hear a complaint from a defendant that there are too few plaintiffs."*

82. It should also be acknowledged that access to justice is illusory if those who have suffered loss receive only a derisory portion of total loss recovered (the balance being consumed by funders fees and legal fees).

83. In class actions funded by IMF over its 9 year history, it has not been the case that IMF has taken the lion's share of any damages awarded.[39]

84. IMF's typical percentages in class actions range from 20% to 35% of the damages awarded or the settlement amount received.

85. It would be unlikely that any commercial funder would attempt to garner all or even most of the proceeds of the litigation for itself. To do so, would destroy any incentive the litigant had to pursue the claim. The litigant will, at the very least, be required to produce documents and other evidence in support of the claim and may be required to give oral evidence in court. It is essential that the litigant remains committed to seeing the litigation through. The funder needs the litigant's full co-operation. This can only be assured if the litigant wants to pursue the claim and perceives that it has a very real stake in its successful outcome.

**Reason 3: The potential for abuse is often overstated or misunderstood and is nevertheless able to be addressed either through existing laws or through regulation.**

37 [2007] FCAFC 200 (21 December 2007)

38 [2007] FCA 1061 (19 July 2007) at [48]

39 With respect, this experience is contrary to the suggestion in paragraph 8.83 of the Consultation Paper

86. At the outset, a general observation may be made that it is clearly illogical to disallow something simply because there is potential for abuse. If that were the approach very limited commercial activity would be permitted in society.

87. The overriding position of Australian Courts in response to concerns expressed, almost exclusively by defendants being sued in funded litigation or by defendant lawyers about the potential for abuse arising from litigation funding, is as follows:

    (a) to address fears about litigation funding by preventing it is not the solution and preventing it "*would take too broad an axe to the problems that may be seen to lie behind the fears*"[40];

    (b) the Court has no role in determining whether a funding agreement is 'fair' outside existing doctrines; and

    (c) existing doctrines of abuse of process, other elements of the Court's processes and rules governing lawyer's duties to the Court and to clients are sufficient to address any issues that arise with litigation funding.

88. It is instructive that in no case that IMF has ever funded:

    (a) has the litigation ultimately been stayed due to any issue concerning litigation funding (or for that matter due to any other issue); and

    (b) has an IMF funding agreement been set aside by the court.

89. Overwhelmingly, the persons who are the recipients of IMF funding are content with the arrangement and the outcome and it is the defendants, who are sued with the benefit of funding, who are not.

90. It is IMF's contention that a number of expressed concerns with litigation funding arise from misconceptions or misunderstandings and these are examined below.

***Concern No 1: Conduct of funders may be unscrupulous***

91. There may be a concern that funders may take advantage of vulnerable litigants by imposing unfair or extortionate terms on them in funding agreements, misled them about the risks or the disadvantages of the litigation or fail to fully disclose to them all relevant aspects of the funding agreements.

40 See Fostif referred to in note 6 at [93]

92. Funding a piece of litigation in the expectation of earning a return from it is an expensive, risky and protracted undertaking. Typically the litigation will take years to resolve. The funder typically outlays very substantial sums in legal costs and disbursements during that time and has likely incurred a significant exposure to adverse costs. It is imperative, from the funder's point of view, that the litigation funding agreement is not liable to be set aside on any ground, including maintenance and champerty, misrepresentation, misleading and deceptive conduct, unconscionability, oppression or any other basis which the funder can reasonably avoid.

93. If the agreement was to be struck down, particularly after the proceedings have been brought to a successful conclusion, then the funder will have wasted a very considerable investment and will have forgone any hope of earning a return on that investment. It behoves funders to act with scrupulous professionalism towards the litigants they fund and to enter into funding agreements which are likely to be seen as fair and reasonable having regard to all the circumstances of the funding and the risks attendant in the litigation.

94. Furthermore the claimant will have a lawyer acting for them. That lawyer's role is to act in the claimants' best interests. This provides valuable protection to any vulnerable litigant.

95. In Australia, a litigation funding agreement is a "financial product" within the ambit of the Corporations Act. IMF has an Australian Financial Services Licence pursuant to Chapter 7 of the Corporations Act, which enables it to offer to issue and to issue litigation funding agreements. At the time IMF offers to fund legal proceedings, prospective clients are provided with a Financial Services Guide and Product Disclosure Statement which sets out how IMF is paid for its services and how consumers who are dissatisfied with IMF's service can pursue a complaint. Customers are advised to seek independent legal advice before entering into a funding agreement.

96. All prospective clients of IMF are referred to Chapter 5 of IMF's Corporate Governance Manual which outlines IMF's dispute resolution process. This process provides for internal review of any complaint, at no charge to the complainant, and, if necessary, referral to an external body, the Financial Ombudsman. [41]

97. Obligations are imposed on IMF by virtue of the conditions which attach to IMF's Financial Services Licence and by virtue of the provisions of the *Corporations Act*. These obligations ultimately offer protection to parties seeking and obtaining funding from IMF. The conditions attaching to IMF's licence are largely financially related and include prudential requirements. The obligations imposed by the *Corporations Act* are broader and encompass matters including an obligation to:

41 IMF has served over 20,000 clients and has received only one compliant, which was dealt with by the Ombudsman in IMF's favour.

(a) do all things necessary to ensure that the financial services are provided efficiently, honestly and fairly;

(b) have in place adequate arrangements for the management of conflicts of interest;

(c) have available adequate resources to provide the financial services; and

(d) have adequate risk management systems.

98. Other provisions in the *Corporations Act* provide protection to consumers dealing with litigation funders in that they:

(a) provide for a cooling off period;

(b) provide that the licensee must not (in relation to the provision of a financial service) engage in unconscionable conduct;

(c) prohibit hawking of financial products; and

(d) prohibit false or misleading statements, misleading or deceptive conduct and dishonest conduct.

99. ASIC has a supervisory role in relation to the conduct of IMF's business pursuant to IMF's licence, with powers which include the power to suspend or cancel IMF's licence and to make a banning order prohibiting IMF from providing a financial service, permanently or for a specified period.

***Concern No. 2: conflicts of interest may arise***

100. There may be a concern that conflicts of interest may arise between the funder and the funded litigant which may lead to the litigant's legitimate interests being subordinated to those of the funder or being ignored altogether (for example the funder forces an early and cheap settlement on the litigant in order to improve the funder's cash flow or the litigant refuses to accept a reasonable settlement offer when the funder believes it would be prudent to do so).

101. The same potential conflicts of interest arise between insurer and insured and have existed for hundreds of years. The law prescribes the duties of the various parties including the solicitors involved, as follows:[42]

42 See generally C Leigh-Jones, MacGillivray On Insurance Law, 10th Ed, (2005) at para 28-35.

> Generally, the law assumes that a lawyer-client relationship exists between the solicitor appointed by the insurer and the insured, but not necessarily to the exclusion of a similar relationship with the insurer. Both the insurers and the solicitors they appoint owe a duty to the insured to conduct the proceedings with due regard to the latter's interests, and an action in damages will lie for breach of that duty . . .[43]

102. Additionally, insurers have the right to decide upon the proper tactics to pursue in the conduct of the litigation, provided that they do so in what they *bona fide* consider to be in the interests of themselves and the insured.[44] When the insurer takes over the conduct of the insured's defence, each party comes under an obligation, as a matter of contractual implication, to act in good faith with due regard to the interests of the other.[45]

103. The common law rules that have been formulated to deal with insurance contracts are readily adaptable to the regulation of litigation funders presently under consideration. Indeed, the New South Wales Court of Appeal said: *'The insurance context provides a useful example of how the law copes adequately with a situation where control over litigation is given to a person who is not a party to the litigation itself."*[46]

104. Indeed, there seems no reason in principle or policy for a funder's involvement in litigation to be treated differently to insurers. At the extreme, if regulators and courts are discriminatory, there will be a tendency to worsen the inequality of arms between claimants and insurers presently so clearly in existence.

105. Conflicts of interest can and are addressed:

    (a) in practical terms, by the involvement of the lawyer for the claimant, who serves the claimants' interests;

    (b) contractually; and

    (c) by the involvement of the Court, which in the context of class actions must approve any settlement before it binds group members.

106. The interposition of lawyers into the funding equation is central to ensuring that the interests of the funded litigant are not subordinated to those of the funder and reduces considerably the risk that

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43 Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr [2005] NSWCA 240 at [70]. The Court further noted at [83], as a factor against the argument that the litigation should be stayed because the funder had absolute control over it, that the funder had nominated "a reputable firm of solicitors to act in the name of the [funded litigant] and the solicitors, in turn, have retained counsel of eminence. There is no foundation for suggesting that the solicitors and counsel would allow the case to be conducted otherwise than with entire propriety." See also Fostif [2005] NSWCA 83 at [87] and Groom v Crocker [1939] 1KB 194 at 202-203.

44 Groom v Crocker [1939] 1 KB 194 at 203

45 K/S Merc-Scandia XXXXII v Lloyd's Underwriters [2001] 2 Lloyd's Rep 563 at 572-574.

46 Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr [2005] NSWCA 240 at [70]

the funded proceedings may tend to corrupt the civil justice system.[47]

107. It is in the interests of the funder that experienced and competent legal advisers act in the proceedings – the funder will have little chance of earning a return if corrupt or incompetent advisers are retained. The funder can also be expected to improve the efficiency and cost effectiveness of the lawyers through the funder's imposition of budgets on the lawyers and general experience in managing litigation[48] and lawyers can foster the development of the funding industry and its competitiveness by advising their clients of the options available for funding litigation.[49]

108. IMF deals with potential conflicts of interest contractually by providing in its class action funding agreements that:

(a) IMF will give day to day instructions; however the Claimant may override the instructions given by IMF by itself giving instructions to the lawyers;

(b) Except in relation to settlement, if the lawyers notify IMF and the Claimant that the lawyers believe they may be in a position of conflict with respect to any obligations they owe to IMF and those they owe to the Claimant, the Claimant and IMF agree that, in order to resolve that conflict, the lawyers may:

(i) seek instructions from the Claimant, which instructions will override those that may be given by IMF;

(ii) give advice to the Claimant and take instructions from the Claimant, even though such advice and instructions may be contrary to IMF's interest; and

(iii) refrain from giving IMF advice and from acting on IMF's instructions, where that advice or those instructions may be contrary to the Claimant's instructions.

(c) In relation to settlement, if the Representative:

(iv) wants to settle the Claims or the Proceedings for less than IMF considers appropriate; or

47 Lawyers, as officers of the court, are subject to the full disciplinary power of the court over any misconduct by them in the course of the proceedings. Lawyers provide safeguards for the system of justice outside of the courtroom as well. For example, the lawyers may be required to positively certify to the court, before filing any initiating process or defence, that the lawyers consider "there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence (as appropriate) has reasonable prospects of success": Legal Profession Act 2004 (NSW), s 347.

48 In QPSX Limited v Ericsson Australia Pty Ltd FCA 933 French J as he then was said at paragraph 54: "There is no doubt that the cost of litigation…can be very high. Even when conducted as efficiently as it can be with the aid of skilled advisers and technical experts, it is time consuming and expensive. The development of arrangements under which the cost risk of complex commercial litigation can be spread is at least arguably an economic benefit if it supports the enforcement of legitimate claims. Where such arrangements involve the creation of budgets by funders knowledgeable in the costs of litigation it may inject a welcome element of commercial objectivity into the way in which such budgets are framed and the efficiency with which the litigation is conducted."

49 The Solicitors' Code of Conduct (2007), Rule 2.03(d) requires solicitors in England and Wales to "discuss with the client how the client will pay [for the legal services to be provided], in particular . . . whether the client's own costs are covered by insurance or may be paid by someone else such as an employer or trade union."

(v) does not want to settle the Claims or the Proceedings when IMF considers it appropriate for the Claimant to do so;

then IMF and the Representative must seek to resolve their difference of opinion by referring the matter to counsel for advice on whether, in counsel's opinion, settlement of the class action on the terms and in all the circumstances identified either by IMF or the Representative or both, is reasonable in all of the circumstances.

(d) If counsel's opinion is that the settlement is reasonable then the lawyers will be instructed to do what is necessary to settle the Class Action, provided the approval of the court to the settlement is sought and obtained.

109. The role of the Court in approving any settlement provides an important safeguard to group members. [50]

***Concern No. 3: The Funder may lack the financial capacity to meet its obligations***

110. There may be a concern that the funder's promise to meet all adverse cost orders which may be made in favour of the defendant may turn out to be illusory if the funder lacks adequate capital or insurance, leaving the litigant, unexpectedly, with a very substantial liability to meet, or the hapless defendant with a significant loss.

111. As discussed above, licensing requirements impose on IMF prudential regulation and certification by audit opinion. This ensures a level of capital adequacy.

112. Any risk can be further ameliorated by the Court making security for costs orders, if concerns exist about the funder's financial position.

113. Civil Justice Reform, which came into effect in Hong Kong on 2 April 2009, enables Hong Kong courts to make costs orders against a non party if it is in the interests of justice to do so. It is IMF's understanding that such non parties would include litigation funders.

**Concern 4: Funders are simply stirring up strife and their involvement results in more litigation**

114. The minority in *Fostif* [51] reasoned that funders ferment disputes by encouraging people to litigate who would not otherwise have done so, either because they were unaware of their injury or right to sue or because they simply chose not to sue. Three responses, with respect, come

50 see section 33V of the Federal Court Act of Australia

51 Ibid note 6

to mind:

(a) If laws, particularly laws created by the legislature to protect markets, are to be enforced and victims compensated, then victims have to be informed of their rights and given an opportunity to band together to bring proceedings to recover their losses. Funders can play a crucial role in each aspect of this process;

(b) People will not litigate if their valid claims are paid without dispute; and

(c) Who (outside of a Court) is to say that any particular piece of otherwise perfectly valid litigation ought not to be brought? As Professor Spender observes: "pinpointing the difference between optimal litigation for socially beneficial outcomes and suboptimal trafficking in litigation is difficult."[52] It is preferable to let the Court decide whether any piece of litigation is merited or not on a consideration of the facts of the individual case rather than to shut people with legitimate claims out of Court altogether simply because they were organised and supported by a funder.

115. In December 2009 Professor Vince Morabito from Monash University published his first report of an empirical study of Australia's class action regime.[53]

116. Professor Morabito's study looks at actions described as "Part IVA proceedings". These are actions commenced in the Federal Court of Australia pursuant to Part IVA of the Federal Court of Australia Act. Part IVA was introduced in 1992 and outlines the practice and procedure relevant to the conduct of class actions in that Court.

117. Some of Professor Morabito's findings are surprising. His findings include:

(a) since 1992 on average Part IVA proceedings comprised 0.39% of all Federal Court proceedings;

(b) many class actions failed[54];

(c) while the incidence of shareholder class actions is increasing, in the past 5 years these actions represent only 25% of all class actions;

(d) following the *Fostif* decision and the decision of the Full Court in *Multiplex* relating to class composition[55], there has been no significant increase in the number of Part IVA

52 P Spender, After Fostif: Lingering uncertainties and controversies about litigation funding (2008) 18JJA 101 at 107. Recall also Kirby J's comments in relation to this issue in Fostif at [202].

53 Professor Vince Morabito, 'An empirical study of Australia's class action regimes, First Report – Class Action Facts and Figures', December 2009.

54 See also K. Adams and D. Grave, 'Litigation Funders or Bounty Hunters' appearing in Business Spectator, 5 February 2010.

55 Multiplex Funds Management Limited v P. Dawson Nominees Pty Limited [2007] FCAFC 200 which decided that the class could be defined by a criterion that group

proceedings; and

(e) over the 17 years since the introduction of Part IVA, product liability claims have substantially reduced while claims relating to investors and shareholders have increased[56]. In this regard, it should be recognised that ASIC commences Part IVA actions and in fact has filed more Part IVA actions than any other entity[57].

118. While Professor Morabito's work is only the first phase of a much more detailed study[58], the report does debunk some common misconceptions about an "explosion" in class action claims and any clear link between growth in the availability of litigation funding and a change overall in the incidence of class actions. Nevertheless, it is the case that the existence of litigation funding has enabled some class actions to proceed which otherwise would not. Of itself, that is laudable, as it demonstrates a role for litigation funding in enabling access to justice.

119. With respect to any concern that funders' involvement will result in unmeritorious litigation, a funder, acting rationally, will not fund proceedings which have poor prospects of success, given the likely loss of its investment and its exposure to uncapped adverse cost orders. As Justice Austin said: *"…there is the commercial reality that IMF would not, acting rationally, prosecute litigation at its expense unless there were a reasonable prospect of a verdict or settlement…"*[59]

***Concern No. 5: The Court have will not have sufficient power to control any abuses by funders who are neither parties to the litigation nor officers of the Court***

120. Litigation funders are usually not a party to the litigation they fund and they are not subject to the disciplinary powers of the Court as they are not officers of the Court. However, the majority in *Fostif* had no difficulty in concluding that the Courts have sufficient powers to control any abuse of process or tendency to corrupt justice that might arise from the involvement of a litigation funder in proceedings. The role played by the lawyer for the claimants is also an important component of this check.

121. The Western Australian Court of Appeal in *Clairs Keeley* stated that: [60]

*"…in terms of risk of abuse, there may be no difference between a litigation funder with an eye to maximizing profits and an insurance company with an eye to minimizing losses. Indeed, it may be said that the litigation funder has a greater incentive to ensure that he conducts himself*

members must have entered into a funding agreement.

56 Morabito Study at p.25.

57 Morabito study at p.28.

58 Professor Morabito's study ends at 30 June 2009 and may not reflect cases arising from the global financial crisis

59 ACN 076 673 857 Ltd [2002] NSWSC 578; (2000) 42 ACSR 296

60 Clairs Keeley (A Firm) v Treacy (No 1) (2003) 28 WAR 139 at [72].

*properly. Not only are the funder's activities likely to be the subject of the close scrutiny, but any transgression is likely to have a markedly deleterious effect on the funder's ability to conduct business in the future. By contrast, only a small portion of an insurer's business is likely to lead to litigation."*

122. The Victorian Law Reform Commission in 2008 in its Civil Justice Review Report 14 (the "VLRC Report") outlined the following key recommendations:

(a) "an overriding provision to the effect that relevant legislation and procedural rules ought to be enacted to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute;

(b) new provisions should be enacted to prescribe standards of conduct in civil proceedings, to facilitate cooperation between the participants in a civil proceeding, candour and early disclosure of relevant information and early resolution of the dispute, together with sanctions and penalties for non-compliance with these overriding obligations; and

(c) the overriding obligations should be owed by the parties, lawyers and their legal practices and "any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in a civil proceeding"."

123. This later recommendation (whilst not yet given effect to) reflects the fact that litigation funders, including insurers, have a greater capacity than most to systematically assist or retard the Court in achieving its overriding purpose. IMF supports funders being subject to these overriding obligations.

***Concern No. 6: Is the Court properly informed about the existence and terms of any funding and are defendants aware that the proceedings against them are being funded?***

124. The VLRC Report recommended:

(a) that the parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or funded party in the course of the proceeding; and

(b) the court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.

125. In IMF's view, disclosure by funders and insurers of their respective agreements ought to be routine rather than discretionary. Open and transparent funding arrangements (subject to non disclosure of any information that might provide the other party with an advantage in the litigation) permit the litigation to be focused on the real issues, rather than become bogged down with interlocutory disputes over funding.

**Regulation of litigation funding**

126. IMF is in favour of regulation of litigation funding in Hong Kong.

127. IMF submits that the following would be appropriate:

(a) abolition of maintenance and champerty as a crime and a tort;

(b) a requirement that any party to proceedings (plaintiff or defendant) who is funded in respect of the proceedings, including by way of insurance, disclose their funding and/or insurance arrangements to the Court;

(c) a requirement that the parties and any person paying any part of the legal costs of a party to civil proceedings be under a duty to assist the Court to achieve just, quick and cheap resolution of the real issues in the proceedings; and

(d) a requirement for litigation funders to be licensed with similar obligations imposed to those already imposed on IMF under Chapter 7 of the Corporations Act (as discussed above) which includes provisions in relation to capital adequacy and a requirement to provide certain information to consumers.[61]

128. IMF is opposed to any attempt to formalise criteria for legally acceptable funding agreements, as IMF is concerned that doing so may increase the likelihood of legal challenges to funding agreements, result in unnecessary collateral litigation and not achieve any benefit for consumers.

129. A clear and unequivocal warning may be found in the creation and revocation of the United Kingdom *Conditional Fee Regulations*, the purpose of which was to create a regulatory standard for solicitors' conditional fee agreements and thereby enhance consumer protection.[62] Rather than consumers relying upon these statutory protections, defendants and their insurers grasped the opportunity in large numbers to rely upon the regulations in their attempts not to pay the plaintiffs solicitors' success fees and after the event insurance premiums that they were liable to pay under the *Access to Justice Act* if the conditional fee agreements met the regulatory standard.

61 The regulations should also ensure that litigation funding arrangements are not unintentionally caught by any other financial regulation. In Australia the Full Federal Court in Brookfield Multiplex Ltd v International Litigation Lending Partners Pte Ltd [2009] FCAFC 147, overturning the first instance decision, decided that the class action funding arrangements in that case were a managed investment scheme requiring registration. Special leave is to be sought to appeal from the decision to the High Court.

62 Conditional Fee Agreements Order 1995 (SI 1995/1674); Conditional Fee Agreements Regulations 1995 (SI 1995/1675).

130. After a deluge of this satellite litigation,[63] the conditional fee regime was reviewed,[64] having regard to the Principles of Good Regulation enunciated by the Better Regulation Taskforce[65] which emphasised the need:

    (a) to target regulation effectively;

    (b) to carefully examine the costs and benefits of regulation;

    (c) to consider the desirability of allowing citizens to make their own decisions about the risks associated with their transactions; and

    (d) to avoid unintended consequences[66] (including satellite litigation).

131. The review:

    (a) concluded that the conditional fee regulations unnecessarily replicate professional conduct rules and provided limited consumer protection; and

    (b) resulted in the revocation of the regulations.[67]

132. In general terms, IMF cautions against regulation that will render litigation funding unviable for litigation funders and so run counter to an objective of promoting access to justice.

**Conclusion**

133. Litigation funding has been subjected to intense judicial and regulatory scrutiny over the past 10 years or so in Australia since it emerged as an important option for claimants seeking to finance their litigation. There may be lessons available from this experience to be learnt in other jurisdictions. Importantly, over the last decade there has been no demonstrated increase in unmeritorious litigation due to any activities of funders and, overwhelmingly, the consumer of the funding product, being litigants, have been happy with the outcome. Namely, they have been able to have their causes of action pursued, when they otherwise would not have been able to do so.

134. Litigation funding has gained and continues to gain acceptance by the courts, the legal profession, policymakers and the public around the world.

135. Viewed objectively, litigation funding is a positive development for the civil justice systems in which it operates. It unarguably enhances access to justice; not for all perhaps but certainly for many with genuine claims who are currently excluded from the system. And it improves the

63 Refer to Hollins v Russell [2003] 1WLR 2487 at [46].

64 United Kingdom, Department of Constitutional Affairs, Simplifying CFA's, Consultation Paper June 2003; United Kingdom, Department of Constitutional Affairs, Making Simple CFA's a Reality, Consultation Paper June 2004; United Kingdom, Department of Constitutional Affairs, New Regulation for Conditional Fee Agreements Responses to Consultation, 10 August 2005.

65 Refer to http:///www.brc.gov.uk/publications/principlesentry.asp.

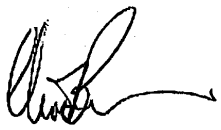
66 Such as the costly and time consuming satellite litigation utilised by the defendants and their insurers

67 Conditional Fee Agreements Regulations 2005.

effective enforcement of the law, especially in competition and securities areas.[68] This is materially assisted by the presence of a workable class action procedure.

136. There is always the risk, as exists in any industry, of rogue and unprincipled players seeking to exploit unwary litigants or undermine court process for commercial gain. But having regard to the safeguards which currently exist in the law to protect consumers and the potential for appropriate regulation in certain key areas (including capital adequacy of funders and mandatory disclosure of their terms of trade), litigation funding poses little risk to the integrity of the justice system and the interests of consumers.

137. It is IMF's submission that litigation funding should be an option open to potential users of any class action regime implemented in Hong Kong.



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68 M J Legg, The Transformation of a Share Price Fall into Litigation – Shareholder Class Actions in Australia, paper presented at the Corporate Law Teachers Association Conference, 3-5 February 2008, Sydney, Australia.