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Ms Kerin Leonard
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Access to Justice Review
Department of Justice and Regulation
Level 24, 121 Exhibition Street
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By email: accesstojusticereview@justice.vic.gov.au

Dear Ms Leonard,

Access to Justice Review

IMF Bentham Ltd (**IMF**) welcomes the opportunity to present submissions to the Victorian Government Access to Justice Review (**Review**) and is grateful for the extension provided to include these submissions as part of the Review.

IMF notes that the Terms of Reference for the Review "...*should have regard to the Productivity Commission's Inquiry Report: Access to Justice Arrangements, No 72, 5 September 2014, submissions to that inquiry, and other relevant reports on access to justice issues*."

IMF made submissions to the Productivity Commission's inquiry and provided a response to the Commission's draft report. Accordingly, IMF encloses for the assistance of the Review, IMF's:

(a) Submissions to the Productivity Commission: Access to Justice Arrangements, 18 November 2013 (**Submissions**);

(b) Response to Draft Report of the Productivity Commission: Access to Justice Arrangements, 26 May 2014 (**Response**).

Executive Summary

The **enclosed** Submissions and Response are now submitted by IMF as part of its submissions to this Review, in addition to the matters outlined in this letter.

IMF's submissions to this Review can be summarised as follows:

(a) third party litigation funding meaningfully increases access to justice;

(b) in relevant circumstances, claimants should be made aware of the range of options available to assist them to fund litigation, including third party litigation funding and lawyers' conditional fee agreements;

(c) any consideration of introducing lawyer contingency fees should:

(i) require lawyers to be exposed to the same potential liability to pay adverse costs, as third party litigation funders face in claims they fund;

(ii) address the financial capacity issues law practices will be exposed to under a contingency fee arrangement;

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(iii) acknowledge the benefits of third party litigation funding in dealing with conflicts and agency costs, as compared to a contingency fee arrangement;

(iv) take care when comparing the services and fees of third party litigation funding to a potential contingency fee arrangement; and

(d) all litigation funding (whether provided by a third party or a lawyer) should be appropriately regulated to provide appropriate consumer protections.

Introduction

IMF is Australia's largest litigation funder. IMF's business began in Australia and listed on the Australian Securities Exchange in 2001. IMF has a market capitalisation of $205 million. IMF operates from offices in all major capital cities in Australia and in New York, Los Angeles, San Francisco and Toronto (through subsidiaries) and London (through a joint venture). IMF also offers its services in Europe, New Zealand, Hong Kong and Singapore.

IMF is in the business of facilitating access to justice for its clients. IMF provides funding for claimants' own legal fees and expenses (including counsels' fees, witness expenses and court costs), agrees to pay any adverse costs orders which might be made if the claimants are unsuccessful and will supply any security for costs which the court may order IMF's clients to provide. As IMF stands behind its clients' potential financial obligations to defendants, IMF ensures that successful defendants in litigation it funds will be paid their recoverable costs. IMF only receives payment if the claimants are successful.

IMF also has a pro bono program, making executive and employee time available and providing funds in appropriate circumstances. The pro bono cases IMF has supported are listed on IMF's website.

In its Submissions to the Productivity Commission, IMF provided details about its funding criteria and results.[1] IMF's results and funding criteria have since changed. IMF considers claims of lower value, but generally funds in Australia:

(a) insolvency claims with a claim value greater than $1m;

(b) single party claims (other than insolvency) with a claim value greater than $5m; and

(c) multi-party claims with a claim value greater than $20m.

As at 31 December 2015, IMF has funded and completed 180 cases, with an average case length of 2.4 years. Of those 180 cases, 119 were settled, 13 were won, 13 were lost and IMF withdrew from 35. From those results, total recoveries (settlements damages and costs) have been $1.67 billion, of which $1.055 billion (63%) has been paid to IMF's clients, $251 million (15%) to IMF as reimbursement of costs resulting in net revenue to IMF of $362 million (22%) (excluding overheads). Lost cases cost IMF $38 million and withdrawals have cost $5 million.

As at 31 December 2015 IMF had:

(a) net assets of $125.5 million of which $93.6 million was held in cash; and

(b) investments in 47 claims in Australia, Asia and North America with an estimated value of $3.15 billion.

Submissions to the Productivity Commission

IMF's Submissions note that the most significant barriers to access to justice at the court level are the high cost of litigation, the unpredictability of both the final cost and time involved in resolving the dispute, and the other significant financial risks inherent in using the courts, including the risk of adverse costs orders.[2]

Litigation funding is a private market response to the demand for increased access to justice in a time of rising legal costs.[3] The Productivity Commission, in its Access to Justice Arrangements Report,

[1] IMF (Australia) Ltd, *Submission to the Productivity Commission: Access to Justice Arrangements*, 18 November 2013, 1.14 – 1.20.
[2] Ibid, 2.9 - 2.14.
[3] Ibid, 4.1 - 4.1.1

acknowledged that litigation funding promotes access to justice.[4] However, the Commission also recommended that litigation funding be subject to greater regulation. IMF expressed its support for regulation in its Submissions.[5]

Since the Submissions to the Productivity Commission, competition in the litigation funding market in Australia has increased. In addition to the 8 litigation funders referred to in the Submissions[6], other litigation funders, now active in Australia, include:

(a) Vannin Capital Ltd;

(b) Harbour Litigation Funding Ltd;

(c) JustKapital Litigation Partners Limited (ASX-listed);

(d) Ironbark Funding;

(e) Litman Holdings;

(f) Grosvenor Litigation Services; and

(g) Mark Elliott – Melbourne City Investments.

There are also a number of other funders that principally fund insolvency claims.

Contingency Fees by Law Practices

There has been a good deal of media and discussion about introducing the ability for legal practices to charge on a contingency fee basis.[7]

The Law Institute of Victoria has made a submission to this Review entitled 'Percentage-Based Contingency Fees: Position Paper', dated 25 May 2015, which was not released until 17 February 2016 (**Position Paper**).

IMF addresses contingency fees by lawyers in both its Submissions[8] and its Response to the Productivity Commission. IMF summarised its submissions to the Productivity Commission as follows, which included submissions in respect of contingency fees (or damages-based agreements):

- "*There should be a general ethical obligation on a lawyer to inform his or her client of all options potentially available to the client to fund any litigation the client may wish to undertake.*

- *IMF accepts that allowing Australian lawyers to charge contingency fees would be likely to improve access to justice in this country and would also increase competition for litigation funding. However, IMF considers that the current model of third party litigation funding, in which the funder operates at arms' length to the lawyers, is superior to contingency fee charging by lawyers for the reasons set out at [4.68] – [4.72] of IMF's initial submission to the Productivity Commission.*

- *If the Commission's draft recommendation 18.1, that "Australian governments should remove restrictions on damages-based billing [i.e. contingent fees] subject to comprehensive disclosure requirements", is accepted, IMF submits that, in addition, lawyers who wish to act under a damages-based agreement ("**DBA**") should be subject to appropriate elements of the regulatory regime that applies to litigation funders.*

[4] Australian Government Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No.72, 5 September 2014, 624.
[5] Above n 1, 4.36 – 4.67.
[6] Ibid, 4.13.
[7] See for example: Marianna Papadakis, 'Legal profession divided on banning success fees', *Australian Financial Review* , 18 February 2016, Marianna Papadakis, 'Victoria, but not NSW, open to legal contingency fees', *Australian Financial Review*, 11 June 2015, Marianna Papadakis, 'Contingency fees allow more billing alternatives, law firms say',*Australian Financial Review* , 4 February 2016, Kerry O'Shea, '*LIV calls for introduction of contingency fees to increase Access to Justice*' 17 February 2016, and Mariana Padakis, 'Law Institute plan for success fees 'flawed and cynical'', *Australian Financial Review* ', 4 March 2016.
[8] Above n 1, 4.68-4.73.

- *In particular, lawyers who act under a DBA ("**contingency fee lawyers**") should have the same potential liability to pay adverse costs if the litigation they act in is lost, as litigation funders face in litigation contingently funded by them.*

- *While the courts may develop principles that reflect submission 3.4 to guide the exercise of their discretion to make a non-party costs order against a contingency fee lawyer, IMF submits that the courts' power to make such an order should be set out clearly in court rules or legislation.*

- *The disclosure requirements for DBAs should include, at a minimum, the matters set out in paragraph 47 of this submission.*

- *No limit should be imposed on the maximum percentage payable to a lawyer who wishes to act under a DBA. The percentage should be subject to negotiation between the lawyer and his or her (fully-informed) client. Sufficient protections exist under current law to prevent lawyers from entering into or enforcing an unjust, unconscionable or unethical DBA, but the law should mandate a cooling off period for DBAs and a requirement that clients be informed of their right to take independent legal advice on a DBA before signing it.*

- *IMF agrees with the Commission's draft recommendation 18.2, that "third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards" – a position that IMF has long advocated - and submits that lawyers who act under DBAs should be subject to the same requirements in relation to their funding activities under DBAs only.*

- *IMF is willing to work constructively and efficiently with Treasury and ASIC (and any other body the Government may establish for this purpose) to develop the appropriate licence and regulatory requirements applicable to litigation funders (including contingency fee lawyers).*

- *IMF does not favour the development of an industry code of conduct in Australia for litigation funders, as has occurred in the United Kingdom. IMF favours mandatory licensing and regulation of litigation funders, rather than a voluntary code.*

- *IMF notes that the Commission suggests that a Code "could serve as guidance for the Courts in overseeing the behaviour of litigation funders". IMF submits that it would preferable for the courts to develop practice notes, directions or rules, in consultation with litigation funders and other interested stakeholders, to deal with this area. This approach could be expected to provide an appropriate regime for judicial oversight of funders' conduct of litigation. IMF is willing to work with any body proposed by the judiciary to develop such practice notes, directions or rules*."[9]

The Productivity Commission made recommendations, being Recommendations 18.1 to 18.3 of its Report[10], in respect of litigation funding and contingency fees. IMF acknowledges those recommendations and makes the following additional points, below.

Consideration of an introduction of contingency fees ought to include the following questions:

(a) What benefits would contingency fees add to the current litigation funding market?

(b) What problems and issues are likely to arise from the introduction of contingency fees?

IMF acknowledges in its Submissions that contingency fees would increase competition.[11]

There is already an increasingly competitive third party litigation funding market. As indicated above, there are at least 15 active litigation funders in the Australian market. There are many more litigation funders in the United States and the United Kingdom that are likely to consider funding in Australia at some time in the near future.

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[9] Bentham IMF Limited, *Response to Draft Report of the Productivity Commission: Access to Justice Arrangements*, 26 May 2014, 3.1 – 3.11.
[10] Above n4, 629-637.
[11] Above n1, 4.73.

One of the benefits of the introduction of contingency fees, identified by the Law Institute of Victoria in its Position Paper, is that contingency fees would provide an incentive to law practices to resolve matters efficiently.[12] However, law practices already have ethical and professional obligations to resolve matters efficiently. IMF considers that one of its roles is to assist its clients in ensuring the legal practitioners work to resolve matters efficiently, as clients often have an information disadvantage when engaging legal practitioners, which IMF, as an experienced litigant, does not have.

Law practices can already offer costs agreements to clients on a conditional fee or 'no win-no fee' basis, and charge an uplift of 25% on the fees that the law practice risks. Such fee arrangements provide access to justice in a similar way that contingency fees would operate and currently provide a premium to the law practice for the risks it takes. Further, law practices are presently able to inform and, we submit, should advise their clients about third party litigation funding options if relevant to the clients' circumstances.

It is worth noting that Maurice Blackburn, through Claims Funding Australia, has shown that law firms can establish a litigation funding entity themselves and compete with litigation funders. The only restriction on such an entity is that it cannot fund matters which are conducted by the related legal practice. Despite testing the waters in the Equine Flu class action, Claims Funding Australia does not fund matters conducted by Maurice Blackburn. Nevertheless, Claims Funding Australia funds claims conducted by other law practices.

Comparing third party litigation funding to contingency fees

In its Submissions, IMF identifies the 'check and balance' between a litigation funder and a law practice as a principal benefit of third party litigation funding as compared with contingency fees.[13]

Where the lawyer is also the litigation funder, there is a greater threat that the client will suffer from an information disadvantage. The client will often be less able to evaluate whether the claim is being run efficiently and the value of a proposed settlement recommended by the lawyer. The cost of this information disadvantage is commonly referred to as an 'agency cost'.[14] Third party litigation funding mitigates this problem by introducing a repeat litigant that does not suffer the same information disadvantage, whose interests are aligned with the claimant's to resolve the claim efficiently for the greatest possible sum. Although third party litigation funding introduces another agent, the structure operates to counter-balance any self interest on the part of the agents, being the litigation funder and lawyer. The third party litigation funder assists the client in monitoring the lawyers and the lawyers assist the client in monitoring the litigation funder.

The client's information disadvantage would be heightened if a law practice is able to effectively choose which fee structure it is prepared to offer a client. For example, if a claim is substantial and would likely be able to be resolved with comparatively little work, it will be in the law practice's interest to offer to conduct the case on a contingency fee basis.

Insofar as third party litigation funders are less regulated than law practices, that difference can be met by the introduction of greater regulation of third party litigation funders.

The Law Institute of Victoria's Position Paper seeks to compare the offering and results of third party litigation funders and contingency fees by law practices. However, a comparison between those two funding models does not compare like with like.

Third party litigation funders frequently offer key additional benefits as compared with what a contingency fee funding arrangement provides. Although third party litigation funders differ in respect of what they offer clients, IMF offers a number of services and benefits that may not be available under a contingency fee arrangement, which include:

(a) adverse cost risk cover;

(b) funding for all disbursements;

(c) financial capacity to carry through to trial and cover any security for costs and adverse cost risk;

[12] Law Institute of Victoria, *Percentage-Based Contingency Fees: Position Paper*, 25 May 2015, p.4.
[13] Above n 1, 4.69 – 4.73.

[14] Ibid 26.

(d) no cost merits review and due diligence of claim for prospects and commercial viability;

(e) a 'check and balance' in respect of the role of funder and lawyer (referred to above);

(f) law practice generally not financially exposed, unless the law practice chooses to be engaged under a conditional fee agreement;

(g) review of legal costs;

(h) strategic input based on experience as a repeat litigator;

(i) aligned interest with client to achieve greatest possible resolution sum in most efficient way;

(j) financial strength to level the playing field against financially powerful defendants.

Not all litigation funders offer, or are able to offer, all these services and benefits. Further regulation would help ensure there were safeguards and benchmarks in respect of what litigation funders offered as part of their service.

A failure to cover adverse cost risk unfairly exposes successful defendants to cost risk.

If a law practice, acting on a contingency fee basis, does not pay for all disbursements and/or provide adverse cost cover to clients, they cannot be compared to third party litigation funders that do provide those services.

The Law Institute of Victoria's Position Paper sets out proposed 'safeguards'[15], however, the paper is silent on whether law practices should be obliged to provide cover for adverse costs.

If law practices, acting on a contingency fee basis, do pay for all disbursements and provide adverse cost cover to clients, regulators must consider the ability of law practices' to carry such financial risks. It is not clear how many law practices are currently structured to manage such financial risks.

Arguably, the greater the financial burden on a law practice becomes, arising from a contingency fee arrangement, the greater the risk of a conflict of interest between the law practice and the client.

Further, any comparison of distributions to clients under third party litigation funding and a possible contingency fee arrangement cannot assume:

(a) the resolution sum achieved will be the same – financial strength is one of a number of reasons a third party litigation funder might achieve a better recovery outcome than a law practice with lesser financial capacity;

(b) the percentage fee charged by a third party litigation funder on a given claim will always be greater than a contingency fee; and

(c) clients will not be subject to additional cost for disbursements or insurance cover for adverse cost risk on top of the lawyer's contingency fee.

Unmet Legal Needs

The LIV Position Paper highlights the existence of unmet needs in relation to potential litigant's capacity to pursue meritorious claims and the importance of ensuring there are available options for meeting those needs.[16] The Position Paper notes that a substantial number of respondents to the Legal Australia Wide Survey[17], indicated they did not obtain advice and proceed with litigation because it cost too much. Further, the number of respondents in that category was significantly larger in relation to 'substantial' civil matters.[18] Third party litigation funders are available to help meet some of the demand for assistance with funding those claims.

The Position Paper also provides examples of scenarios where unmet needs could be addressed by contingency fee arrangements.[19] Again, third party litigation funders are equally available to help meet those examples of legal need.

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[15] Above n 9, 13.
[16] Above n 9, 7.
[17] Ibid.
[18] Above n 9, 8.
[19] Ibid 16.

The LIV's Position Paper raises the question as to whether law practices are actively advising potential clients of the existence of, and option to use, existing third party litigation funders. Many of the benefits of contingency fees raised in the Law Institute of Victoria's Position Paper can also be provided by appropriately regulated litigation funders, with the additional advantages outlined above.

Yours sincerely

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Encl.

- Submissions to the Productivity Commission: Access to Justice Arrangements, 18 November 2013;
- Response to Draft Report of the Productivity Commission: Access to Justice Arrangements, 26 May 2014.