Litigation Funding Solutions

Level 26
259 George St
Sydney
New South Wales
2000

22 September 2017

Attention: Victorian Law Reform Commission

GPO Box 4637

Melbourne Vic 3001

By email: law.reform@lawreform.vic.gov.au

Regarding the Consultation Paper entitled, "Access to Justice – Litigation Funding and Group Proceedings" July 2017.

This letter is a submission in response to the consultation paper issued by the Victorian Law Reform Commission in July 2017.

Litigation Funding Solutions ("LFS") is a company which arranges litigation funding for many different types of claims with a large range of claim sizes from under $500k to over $500 million.

LFS has arranged funding for matters across Australia and reviewed cases for funding across many other jurisdictions including Papua New Guinea, Singapore, Hong Kong, UK, Germany and South Africa.

General Observations

To begin with, LFS would like to provide some general observations on litigation funding before addressing the specific questions raised in the paper. It is hoped these general observations will assist in providing context to the specific questions raised.

The decision to provide litigation funding is a rigorous process which includes many steps. This process is designed so that only meritorious claims are able to be funded and furthered in the Courts. The process also means that spurious claims should not receive funding. The general process is as follows:

- The Plaintiff's lawyer assesses the case and provides an opinion;
- The Litigation Funder assesses the case;
- The Litigation Funder's lawyer assesses and provides an opinion on the case; and
- The Investment Committee of the Litigation Funder (which normally includes lawyers, Barristers (often QCs), and retired Judges) assesses the case.

This creates a well-structured screening process for claims and ensures that it is not one which wastes the time and resources of the Court.

The concept of After the Event ("ATE") insurance also provides an additional level of screening for the decision process. ATE insurance is a policy which covers the adverse costs of an unexpected result in the litigation. ATE insurance is necessary for most litigation which is funded.

LFS has reviewed over 200 cases in the last 18 months and has rejected over 90% as being unsuitable for litigation funding. Notwithstanding the above, there does seem to be an unfortunate trend in class actions whereby "bad news" is announced one day and the next day there are lawyers and funders lodging "class action" claims in the Court. This seems to be driven by a 'fear of missing out' and is often not driven by the merits of the matter. LFS would be in favour of a more ordered filing process to take account of the merits of the case, funding package (if relevant) and different class members' circumstances.

The nature of litigation funding is that it is a commercially driven concept. This ensures that the litigation funding market is highly competitive whilst demanding commercial returns. Class actions, particularly "securities" actions, are highly competitive and returns to Funders have dropped over the last few years. Competition in the market allows for the best possible deal for the Plaintiff.

It is also of note that a number of funders who refuse to be involved in certain types of cases. In particular, some funders do not want to be involved in personal injury matters as they do not want to be seen as profiting from the unfortunate circumstances of others. The implication of funders taking such a principled approach is that potential claimants are denied their "day in Court" and therefore access to justice.

There have been a very small number of matters in Australia, most relevantly for Victoria in *Huon Corporation*, where a matter has been settled/decided and the funder and lawyer have received a large proportion, if not all, of the proceeds. This is a disappointing result for all involved. The funder has not made an adequate return on their capital invested for the risk taken. The lawyers have not got the outcome they are looking for and most disappointingly, the claimants have received nothing. Unfortunately, this is how the numbers have worked out in this circumstance. But, it should be noted that the claimants are no worse off than if the funder had never been involved. No funder, no action, no outcome. And indeed, the claimant had the chance of receiving a return.

Funding for a single plaintiff is very different to funding a class action. It should be noted that LFS' expertise does not sit with Court procedure so are unable to provide detailed recommendations to many of the questions provided.

LFS would also like to take the opportunity to thank the Victorian Law Reform Commission for their time and efforts regarding this pivotal subject in the modern legal world.

Addressing the Questions

Chapter Three: Current Regulation of Litigation Funders and lawyers

1. *What changes, if any, need to be made to the class actions regime in Victoria to ensure that litigants are not exposed to unfair risks or disproportionate costs?*

Class action funding gives the claimant a day in court, often with indemnity or other protection from adverse cost orders. In return, the Claimant gives up a share of their proceeds. This is effectively a risk transfer between the Plaintiff(s) and the Funder.

To reduce unfair risks and disproportionate costs, LFS highlights two methods could accomplish this:

(i) Abolishing cost orders for retail class actions; and

(ii) Regulation of charge out rates of plaintiff lawyers would potentially address the concerns raised. However, it may also have the perverse effect of meaning potential claimants cannot obtain representation. Hence LFS would not support this method.

2. *What changes, if any, need to be made to the regulation of proceedings in Victoria that are funded by litigation funders to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?*

Proceedings which are funded by litigation funders would generally not be heard in Court absent the Funder.

LFS has seen no evidence of Plaintiffs being exposed to unfair risks nor disproportionate cost burdens.

No change is necessary.

3. *Should different procedures apply to the supervision and management of class actions financed by litigation funders compared to those that are not?*

No. Whether or not a matter is funded out of a Plaintiff's own pocket or from a funder should not impact on how justice is administered.

4. *How can the Supreme Court be better supported in its role in supervising and managing class actions?*

LFS would be supportive of additional Court fees being levied on class actions to provide the Court system with additional resources to manage class actions. These additional costs should be allocated by way of cost order against the unsuccessful party.

5. *Is there a need for guidelines for lawyers on their responsibilities to multiple class members in class actions? If so, what form should they take?*

LFS is not in a position to comment.

Chapter 4: Disclosure to Plaintiffs

6. *In funded class actions, should lawyers be expressly required to inform class members, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?*

   Under Federal Court proceedings, lawyers are expressly required to disclose funding fees at the commencement of proceedings. This ensures the transparency of the process.

   LFS advocates that the Federal Court process to be adopted for proceedings in the Victorian class actions. The funding of the case would then be transparent. This would be most likely notified to the class at the commencement of the case. The lawyer would submit their expected cost structures and strive to stay within the range or figure submitted.

7. *In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?*

   It is important to note that every case involving litigation funding is different. In many cases the funder has no relationship with the lawyer at all.

   From LFS' experience however, when a litigation funder agrees to fund a case on a bi-lateral basis, they do so by entering into a litigation funding agreement with the plaintiff. This means that the plaintiff and the funder are, usually, the only two parties to the contract.

   Consequently, this means that the plaintiff is aware of the cost structure and is up to date with any changes to the funding agreement. Therefore, the lawyer is not in a position to withhold any funding charges, or some such, in the first place.

   Given the above, LFS is of the view that lawyers do not need to inform the plaintiff about litigation funding charges in addition to any other obligations.

8. *How could the form and content of notices and other communications with class members about progress, costs and possible outcomes be made clearer and more accessible?*

   LFS' view is that notices to class members, under section 33X, should put forth a clear picture on the progress of the case (including costs and cost structures).

   The most important part of this process is to make these notices easily read and understood for all members of the class. These notices should have the option for a phone call (or a meeting if the class size is somewhat smaller) to ensure that the class members understand what is occurring in their case. This will make sure that there is a transparency for all facets of the case.

To improve the accessibility of these notices, the class should have the option of internet and hard copy options. This would ensure that all members could read the notices provided regarding the proceedings.

LFS appreciates the difficulty in keeping all members of the class notified especially when the size of the class is considerable. All that can be done is that a process is in place to disseminate the notices as efficiently as possible. In some circumstances, members of a class may not be possible to reach effectively.

LFS also suggests the setup of examples of notices to class members, as in the consultation paper, by the Supreme Court. The Court could give out examples of notices for the "retail" class member which would be easy to understand. They could also give guidance to lawyers acting in class actions for both formal and informal notices.

9. *Is there a need for guidelines for lawyers on how and what they communicate with class members during a settlement distribution scheme? If so, what form should they take?*

LFS believes that the Supreme Court should contemplate written guidelines to ensure that the lawyers perform to the best of their ability and in the interest of their clients. Communication during the Settlement Distribution Scheme ("SDS").

During the SDS, the lawyer must communicate in a simple manner and explain the situation to the members of the class. This communication must be easy to understand for a non-legal professional.

In reference to the Kilmore East SDS, we can see that the language involved is legalistic and has the potential to confuse class members. As Vince Morabito believes (pg. 128 of the consultation paper) it can be seen from the confusion in the Kilmore East class action that the SDS is a problem. This can only be fixed by communication and transparency of all parties involved, including the Funder.

LFS also suggests the setup of examples of notices to class members, as suggested in the consultation paper, by the Supreme Court. The Court could give out examples of notices for the "retail" class member which should be easy to understand. They could also give guidance to lawyers acting in class actions.

Chapter 5: Disclosure to the Court

10. *In funded class actions, should the plaintiff be required to disclose the funding agreement to the Court and/or other parties? If so, how should this requirement be conveyed and enforced?*

As a general principle, LFS is of the view that the Plaintiff should provide the funding agreement to the Court and the Defendant.

In many cases, the funding agreement is a public document as class members have the right to review the document they are consenting to be bound by. Further, the disclosure of the

funding agreement may lead to the Defendant not seeking security for cost orders. However, the exception to the general principle would be where an agreement has been entered into and that agreement contains information that may be legally privileged most likely because it shows the legal strategy of the Plaintiff.

11. *In funded proceedings other than class actions, should the plaintiff disclose the funding agreement to the Court and/or other parties? If so, should this be at the Court's discretion or required in all proceedings?*

As a general principle, LFS is of the view that the Plaintiff should provide the funding agreement to the Court and the Defendant.

The exception to the general principle would be where an agreement has been entered into and that agreement contains information that may be legally privileged most likely because it shows the legal strategy of the Plaintiff.

12. *In the absence of Commonwealth regulation relating to capital adequacy, how could the Court ensure a litigation funder can meet its financial obligations under the funding agreement?*

LFS believes that a capital adequacy requirement or ratio would not be conducive to a competitive market place. The Funders who are based offshore have most of their assets overseas even though they are heavily involved in Australian matters. They hold little or no capital here in Australia. Imposing a minimum capital requirement for litigation funders to operate in Australia could remove a large quantity of funding from Australia. If this occurred, the access to justice would be adversely impacted for many people. This would not help improve access to justice for potential Plaintiffs.

Also, there is no requirement for lawyers to have required capital to run a case in Court. Indeed, the recent financial troubles of listed law firm Slater + Gordon demonstrates this point. Had Slater + Gordon gone into administration or receivership, they would have potentially caused greater issues for clients of that firm than a funder ceasing to fund mid-case.

LFS would also like to mention that, so far, there has been no evidence of a litigation funder not being able to pay anything agreed upon in a funding agreement. A capital adequacy requirement would therefore be a solution looking for a problem rather than a solution to one.

It is imperative that the marketplace stays competitive which improves the possibility for people to access justice. The increased competition will also improve the terms of the funding agreements placed into Court.

Furthermore, there is no capital adequacy requirement under the Federal Part IVA proceedings and there have been no financial issues with Funders in Australia. Therefore, Victorian Part 4A rules should not differ.

Chapter 6: Certification of Class Actions

13. *Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate?*
    (a) *introduction of a pre-commencement hearing to certify that certain preliminary criteria are met*
    (b) *legislative amendment of existing threshold requirements under section 33C of the Supreme Court Act 1986 (Vic)*
    (c) *placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met*
    (d) *other reforms.*

    The existing threshold of a class action in Victoria is intrinsically linked with the threshold for the Federal class actions. Absent compelling reasons specific to a particular jurisdiction, harmonisation of laws across Australia should be encouraged.

    Having said this, a pre-commencement hearing to certify a class could be beneficial. A certification hearing would be able to reduce the amount of class actions coming through the Victorian Supreme Court by removing the spurious claims. This would have to be well regulated to ensure that this does not become a defendant ruled system as access to justice should be encouraged at all times. If a Judge were to hear the basic facts surrounding the purported class in pre-commencement, they could deem whether or not the class is meritorious. This could potentially prove to reduce the defendant's arguments over class certification if the Court had certified it already (albeit on a preliminary basis), thereby reducing the length of proceedings.

14. *Should the onus be placed on the representative plaintiff to prove they can adequately represent class members? If so, how should this be implemented?*

    LFS is not in a position to comment.

15. *Should a specific legislative power be drafted to set out how the Court should proceed where competing class actions arise? If not, is some other reform necessary in the way competing class actions are addressed?*

    LFS makes no comment on specific legislative change.

    However, LFS is concerned by a suggestion that Judges should be choosing lawyers to run matters based on potentially subjective matters and cost. Low cost potentially equals low value or low-quality service. It also potentially creates a barrier to entry for lawyers who are 'inexperienced' (whatever this means) in class actions from taking on class actions. Hearing competing class actions jointly may be a better way to deal with competing interests.

    At the same time, the parties which should not be involved in the class, or the spurious members, should be culled. This would make the settlement or judgement (in the result of a positive result) more effectively and justly distributed to the parties.

If this option is not possible for the Victorian Court, then the current case-by-case system would be more beneficial as competing class actions still ensure that the defendant is sufficiently dealt with by the Courts (if found in the wrong). This system, albeit quite time consuming as there is no process in place, allows for the best option for the case at hand.

16. *Does the involvement of litigation funders in class actions require certain matters (and if so, which) to be addressed at the commencement of, or during, proceedings?*

    No. Whether or not a matter if funded out of a plaintiff's pocket or from a funder should not impact on how justice is administered.

Chapter 7: Settlement

17. *How could the interests of unrepresented class members be better protected during settlement approval?*

    LFS' view is that of the options listed, a third-party guardian to represent the unrepresented class members would be optimal. This would assist in ensuring the most fair and equitable outcome for all claimants.

18. *What improvements could be made to the way that legal costs are assessed in class actions?*

    LFS is not in a position to comment.

19. *Should the following matters be set out either in legislation or Court guidelines?*
    (a) criteria to guide the Court when assessing the reasonableness of a funding fee
    (b) criteria for the use of caps, limits, sliding scales or other methods when assessing funding fees
    (c) criteria or 'safeguards' for the use of common fund orders by the Court.

    All cases have different attributes (albeit they may have common factors). Accordingly, a funding fee which is reasonable in one case may be seen as being unreasonably in another. Consequently, any criteria must be able to take into account the different attributes of each case. Also, appreciation of the fact that many matters may be considered (at great cost to the funder) before a matter is selected for funding. A case, reviewed in isolation may give rise to a reasonable fee of (say) 10% on a standalone basis whereas the funder cannot profit on a portfolio basis from that return. The market is often best placed to determine an appropriate funding fee.

20. *Is there a need for an independent expert to assist the Court in assessing funding fees? If so, how should the expert undertake this assessment?*

If the Court felt its decision making would be enhanced then the use of an independent expert would be desirable. The independent expert should consider all relevant matters in coming to a view on the funding fee.

21. *At which stage of proceedings should the Court assess the funding fee? What, if any, conditions should apply to this?*

    If the Court feels that it should assess a funding fee, then this should be at the commencement of the case. This would ensure that the funder is commencing an investment in full knowledge of possible outcomes. This would allow the funder time to change its decision if necessary.

    This would also help with the transparency of the funding fee for the duration of the litigation.

22. *In class actions, should lawyers and litigation funders be able to request that the total amounts they receive in settlement be kept confidential?*

    Yes, but the Court must have discretion to decline such request if is not in the class' interest or otherwise in the interest of Justice to do so.

23. *How could the management of settlement distribution schemes be improved to:*
    (a) ensure that individual compensation reflects the merits of individual claims
    (b) ensure that it is completed in a manner that minimises costs and delays?

    LFS is not in a position to comment.

24. *How could Court-approved notice for opt out and settlement be made clearer and more comprehensible for class members?*

    The opt out notices should perhaps include a box checking exercise where the individual would be explained the possible ramifications of where they would stand. This would ensure that section 33X would be complete more efficiently.

    For example:

    (a) Contribute to the funding of the class – *this ensures that you will receive the full rate of settlement if a funding equalisation order is made, as well as making your case readier to be pursued with funding in place. You would be bound to the judgement/settlement.*
    (b) Stay in class but do not contribute to the funding – *this means that you could be in store for a funding equalisation order where you would not receive as much of the settlement, and not contribute to the class' ability to pursue judgement. You would be bound to the judgement/settlement. *keep in mind that the Court has the ability to pursue a common fund order which would demand funds from you to remain in the class.*

(c) Opt out of the class – *this means that whatever settlement or judgement is made, you will receive none of this. You are consequently not bound by the judgement/settlement.*

This is the type of "check the box" format which could be sent out to class members to ensure the most efficient information dissemination.

25. *Are there other ways the process for settlement approval and distribution could be improved?*

LFS is not in a position to comment.

Chapter 8: Contingency Fees

26. *Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?*

Contingency fees would create more issues than currently presented by the practice of litigation funding. Contingency fees fundamentally change the relationship between the client and lawyer with the lawyer having a direct financial interest in the outcome. It is different to see how the fiduciary relationship between client and lawyer would operate.

Further, would the lawyer be liable for adverse costs in the event that they were awarded? Given that the lawyer was sharing in the reward it would seem reasonable that they share in the adverse costs.

27. *If the ban on contingency fees were lifted, what measures should be put in place to ensure:*
    (a) a wide variety of cases are funded by contingency fee arrangements, not merely those that present the highest potential return
    (b) clients face lower risks and cost burdens than they do now in proceedings funded by litigation funders
    (c) clients' interests are not subordinated to commercial interests
    (d) other issues raised by the involvement of litigation funders in proceedings are mitigated?

As noted in Question 26, contingency fees would create more issues than currently presented by the practice of litigation funding. Contingency fees fundamentally change the relationship between the client and lawyer with the lawyer having a direct financial interest in the outcome. It is different to see how the fiduciary relationship between client and lawyer would operate.

Further, would the lawyer be liable for adverse costs in the event that they were awarded? Given that the lawyer was sharing in the reward it would seem reasonable that they share in the adverse costs.

28. *Are there any other ways to improve access to justice through funding arrangements?*

Two ideas spring to mind:

(i) Where a Plaintiff is unable to satisfy a security for cost orders then the Court could bring to the Plaintiffs attention that litigation funding exists (note: the Court may recommend that a plaintiff seek legal representation so such a change is not a big leap).
(ii) Abolishing adverse costs so the Plaintiffs can't be "deep pocketed" as easily.

These are two ideas that have great implications to the Victorian legal system so should not be adopted lightly.

Conclusion

LFS supports any proposal which helps the process of accessing justice for claimants, providing it does not create other concerns or conflicts (e.g. Contingency fees). Litigation funding has, and if allowed to flourish, will bring access to justice to many potential claimants whom otherwise would not have their day in Court.

LFS would like to thank the Victorian Law Reform Commission for being given the chance to convey our opinions on matters raised in the consultation paper.

If the Commission wishes LFS to provide further detail on or clarify the points which we have raised, we would be pleased to do so. This could be done by further written submissions or LFS could make an oral submission at your convenience.

Yours faithfully,

Douglas J. Whelan

Douglas Whelan

Director

Litigation Funding Solutions (Australia) Pty Ltd

Contact Details:

LFS Address:

Level 26,

259 George Street,

Sydney, NSW, Australia

Douglas Whelan, Executive Director: