



## ACCESS TO JUSTICE CONFERENCE

### Litigation Funding

14 November 2008

**John Walker**

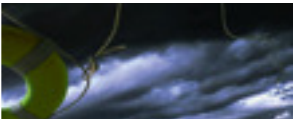
Managing Director, IMF (Australia) Ltd

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## Overview

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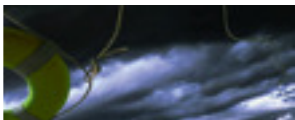
1. Introduction
2. The Cost / Benefit of Funding
3. History of Litigation Funding in Australia
4. Types of Actions Funded
5. Due Diligence (a focus on the claim)
6. The Demand for Litigation Funding
7. The Supply of Litigation Funding
8. The Lawyer's Fiduciary Duty and Funders Control
9. **(a).** The Relevant Similarities Between Funders & Insurers
  - (b).** Proposed Duties of Funders & Insurers
  - (c).** Disclosure of Funding Agreement and Insurance Policies



## 1. Introduction

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- Access to Justice
- Just, quick and cheap resolution
- Fundamental human right
- Rolls Royce Justice System
- Need lighter, more contemporary and fuel efficient vehicle
- Demand for litigation funding grows

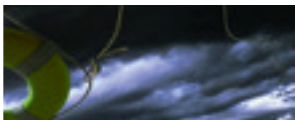


## 2. The Cost / Benefit of Funding

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- Benefits
- Payment of claimants' legal costs and disbursement
  - Provisions of security for respondent's costs
  - Payment of any adverse cost orders
  - Assistance with investigations and project management

- Cost
- Nil if unsuccessful
  - Reimbursement of investment from settlement or judgment
  - Payment of between 20% and 40% of settlement or judgment



## 3. History of Litigation Funding in Australia

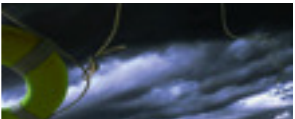
1. The Insolvency Market until 2001
2. IMF Public Profile from 2001:
  - Commercial Litigation
  - Group Actions
  - Insurable Risk Cases are excluded
3. Fostif
4. Insurers are funders



## 4. Types of Actions Funded

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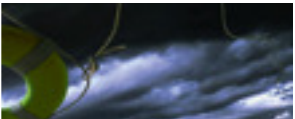
1. Commercial Claims
2. Not Insurable Risk Cases
3. Higher Value Claims
4. Multi Party Claims
5. It takes 2 to Tango (Insurers like to dance, but not be seen)



## 5. Due Diligence

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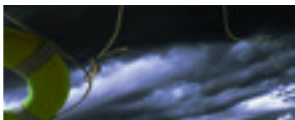
- The Claim
- The Defence/Cross Claim
- The Quantum
- The Proposed Defendant/s
- The Claimant
- The Project Overview



## 6. The Demand for Litigation Funding

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1. Lord Woolf's report entitled "Access to Justice"
2. Litigation Risks:
  - No certainty about budgets or timing
  - Hourly rate pricing policies
  - Well resourced defendants
  - Legal jargon regarding risks of failure
  - No adverse cost order predictability
3. Resulting from the Litigation Risks:
  - Speculative actions are minimised
  - Demand for litigation funding is high
4. Demand for insurance is higher to find defences
5. But there is no relevant data available publicly.

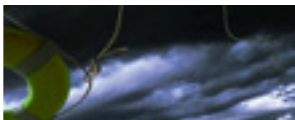




## 7. The Supply of Litigation Funding

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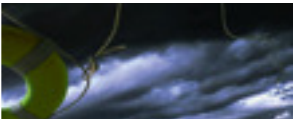
- Comparatively, capital investment is negligible
- IMF has raised about \$40 million
- This would be more than all the other funders combined:
  - Hillcrest
  - Australian Litigation Fund
  - Litigation Lending Services
  - Quantum



## 8. The Lawyer's Fiduciary Duty & Funder's Control

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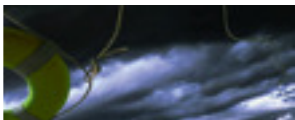
- The lawyer / client fiduciary relationship
- The front line are officers of the Court
- Funders and insurers don't owe fiduciary duties
- Control in Fostif



## 8. Control of the Litigation (cont'd)

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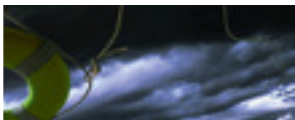
- Funders and Insurers don't owe fiduciary duties
- Control in Fostif
- Inquiry into unnecessary adversarial practices
- Use of interest rates to demotivate delay and diversion
- Disclosure of funders and insurers involvement facilitating accountability



## 9(a). The Relevant Similarities Between Funders and Insurers

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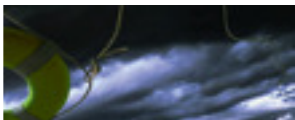
1. The client, solicitor, funder/insurer tripartite relationships
2. The common law rules for insurance contracts are adaptable to funding agreements
3. The inequality of arms between claimants and insurers ought not be increased



## 9(b). Proposed Duties of Funders and Insurers

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1. A paramount duty to the Court to facilitate the just, efficient, timely and cost effective resolution of the real issues
2. Honesty
3. No claims or defences that do not have merit
4. No unnecessary steps in the proceedings
5. Cooperation between the parties and the Court
6. No misleading conduct
7. Use reasonable endeavours to resolve the dispute, resolve issues that can be resolved and narrow the real issues
8. Costs to be minimised and proportionate
9. Act promptly and minimise delays
10. Disclose, at the earliest practicable time, relevant documents.



## 9(c). Disclosure of Funding Agreements and Insurance Policies

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1. Disclosure is necessary
  - If duties are owed
  - To determine whether security is needed or whether further litigation may be fruitless
  - Where the funder or insurer is the real litigant
2. The LRC Report recommends disclosure of the identity of insurers and funders and the Court should have discretion to order disclosure of policies/funding agreements
3. Disclosure of funding / insurance data should be routine to facilitate informed civil justice reform.

