Fw: Submission: litigation funding commentary

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This office is located on the land of the Traditional Custodians, the people of the Kulin Nations. We acknowledge their history, culture and Elders both past and present.

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Date: 28/08/2017 05:31 PM
Subject: Submission: litigation funding commentary

SUBMISSION

Re: Victorian Law Reform Commission 'Access to Justice – Litigation Funding and Group Proceedings Consultation Paper 'July 2017

Thank you for the opportunity to comment on the well thought out and structured draft discussion paper. This is an area of growing significance across a range of industries, carrying consequences for a wide range of stakeholders - including not only potential plaintiffs, legal advocates and companies but also the judiciary and public tax payers.

I wish you the best in your current journey to find a fair and fitting balance for all.

Yours sincerely -

(**Professor) Julie-Anne Tarr**, Business School, Queensland University of Technology
Date: 28 August 2017
Email: law.reform@lawreform.vic.gov.au

LITIGATION FUNDING SUBMISSION VLRC. August 2017.docx

SUBMISSION

Re: Victorian Law Reform Commission 'Access to Justice – Litigation Funding and Group Proceedings Consultation Paper 'July 2017

By:

Professor Julie-Anne Tarr

School of Business

Queensland University of Technology

Date: 28 August 2017

Email: law.reform@lawreform.vic.gov.au

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1. Summary

This submission focuses upon third party litigation funding (hereafter simply 'litigation funding'.) As a bottom line it advocates adoption of the range of disclosure requirements and procedures canvassed by the VLRC to better support the Supreme Court in its supervision and management of litigation funding and associated class actions.

Litigation funding continues to generate debate in relation to its merits and demerits, but there is no doubt that litigation funding is, and will continue to be, an important part of the foreseeable Australian legal landscape. While litigation funding is not restricted to group or class action proceedings, whereby a single representative can bring or conduct a claim on behalf of others[1], it is the emergence of litigation funding in conjunction with class actions that has had a disproportional impact upon traditional litigation within Australia.[2]

In the absence of hard evidence that litigation funding is fuelling an avalanche of frivolous or unmeritorious claims, however, this submission cautions against the adoption of any new external regulatory regime without full assessment of the actual, quantifiable costs and benefits of the proposed regulation, and also the risks of unintended consequences (such as the creation of unnecessary barriers to market entry).

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[1] Representative proceedings regimes are available under Federal and State legislation; see, for example, Federal Court of Australia Act 1976(Cth), Part IVA; Supreme Court Act 1986 (Vic), Part 4A; Courts and Tribunals Legislation (Miscellaneous Amendments Act 2000 (Vic); Civil Procedure Act 2005 (NSW), Part 10; Civil Proceedings Act 2011 (Qld), Part 13A.

[2] See for example, the comments of The Hon Justice MJ Beazley AO, President, New South Wales Court of Appeal, "The Rise of Litigation Funding and Class Actions and the Duties Owed by Legal Practitioners", University of New South Wales Seminar Paper Rule 6.1, 23 February 2017, at paragraph 2.

This is particularly the case given the High Court's view in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*[3] of a Court's capacity to protect its processes and the increasing willingness of the courts to bring flexibility and nuance to oversight and supervisory roles in relation to litigation funding.[4]

2. More External Regulation or Enhanced Judicial Supervision?

2.1 The current regulatory framework

The VLRC Consultation Paper[5] notes there are approximately 19 Australian and international litigation funders active in Australia, with the top four companies expected to account for almost 70% of industry revenue in 2016 – 2017. These funders as incorporated entities are regulated by the Corporations Act 2001 (Cth) on the same basis as other corporations with those listed on the Australian Securities Exchange (ASX) also being contractually bound to the ASX to comply with the Listing Rules enforceable under this Act.[6] Furthermore, as providers of financial services and products, litigation funders are directly subject to the consumer protection provisions of the *Australian and Securities Commission Act 2001 (Cth*) ('ASIC Act').[7] The VLRC Consultation Paper[8] further notes that the protections in the ASIC Act address the risks of an unscrupulous litigation funder imposing unfair or extortionate terms in funding agreements, misleading clients about the advantages and disadvantages of litigation or failing to disclose all relevant aspects of the agreement against unfair contract terms[9], unconscionable conduct[10], and misleading and deceptive conduct[11] along with the implied warranty in financial services contracts that services will be rendered with due care.[12]

The Commonwealth Government pursuant to the *Corporations Amendment Regulation (No 6) 2012 (Cth)*, excluded persons providing financial services for litigation schemes and proof of debt schemes (such as class actions or insolvency actions) from managed investment regulation and that this exemption was extended by ASIC to financial product regulation and also to relieve litigation funding from the requirements of the National Credit Code. In exchange for the relief from having to comply with the not inconsiderable regulatory burden these regimes would impose[13], litigation funders are required to maintain adequate conflict of interest procedures. In an endeavour to 'put some meat on

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[3] [2006] HCA 41; (2006) 229 CLR 386.
[4] See, for example, *Blairgowrie Trading Ltd v Allco Finance Group* [2017] FCA 330 *and Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433.
[5] At paragraphs 2.71 – 2.73.
[6] Corporations Act 2001 (Cth), ss 793C, 1101B.
[7] Section 12.
[8] At paragraphs 3.19 – 3.21.
[9] ASIC Act, ss.12BF-12BM. John Walker, "Policy and Regulatory Issues in Litigation Funding Revisited" (2014) 55 Canadian Business Law Journal 85, at 95 notes that these provisions apply to a 'consumer contract' which, as defined, would be unlikely to apply to a litigation funding agreement.
[10] ASIC Act, ss12CA-12CC.
[11] ASIC Act, ss12DA, 12DB, 12DF.
[12] ASIC Act, ss12ED.
[13] For example, characterization of litigation funding as a 'financial product' would require a litigation funder to hold an AFSL importing requirements, amongst others, as to capital adequacy, training of staff, risk management systems, conflict management procedures etc.

the regulatory bones'[14] to the conflict of interest provisions, ASIC issued their Regulatory Guide 248.[15] The Guide sets out ASIC's expectations for compliance with the obligation to maintain adequate practices to manage conflicts of interest. The Guide warns that the onus and responsibility is upon the person conducting a litigation scheme or proof of debt scheme to ensure that (s)he has robust arrangements in place to address potential, actual or perceived conflicts of interest and that (s)he follows those arrangements. The Guide[16] sets out ASIC's overarching expectation of what adequate compliance measures are likely to entail including the maintenance of adequate practices to manage conflicts of interest in relation to documenting, implementing, monitoring and reviewing the arrangements between funder, lawyer and members. Specific, non-exhaustive, guidance is given in relation to matters such as procedures for the recruitment of members, disclosure of conflicts of interest and oversight of settlement offers.[17]

Accordingly, a litigation funder operating in Australia is free from the mandatory licensing, financial disclosure requirements, reporting obligations and prudential supervision, unless the choice is made to list on the ASX or to hold an Australian Financial Services Licence[18]. The Productivity Commission[19] in 2014 proposed that all litigation funders should be subject to a licensing regime which focuses on capital adequacy and disclosure requirements. The Commission was concerned that litigation funders should hold adequate capital to manage their financial obligations under any litigation funding agreement and thereby protect plaintiffs and defendants from an impecunious litigation funder. The imposition of any licensing regime would inevitably impose a barrier to entry (or to continued operation) for current and would-be funders and Allens Linklaters[20] observe that '*(t)he extent to which such a barrier if enacted may impact the availability of class action funding is likely to depend on how the offshore funders (which currently comprise just over one-third of the funding market) respond'.* The Productivity Commission[21] considered that the barriers to entry created through licensing requirements were justified in order to ensure that only 'reputable and capable funders enter the market'. To date the Commission's recommendation has not been actioned.

2.2 The rhetoric and the reality

Calls for the increased external regulation of litigation funding are not infrequently fuelled by claims that litigation funding amounts to trafficking in litigation. As Lisa A Rickard, President of the U.S. Chamber Institute for Legal Reform[22], and Executive Vice President of the US Chamber of Commerce, states:

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[14] See Clayton Utz, "ASIC issues litigation funding guidance" https://www.claytonutz.com/knowledge/2013/june/asic-issues-litigation-funding-guidance Accessed 25 August 2017.

[15] *Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* RG 248; Issued 27 March 2013.

[16] RG 248.25.

[17] RG 248. 26 – 98.

[18] .VLRC Consultation Paper, paragraph 3.22.

[19] *Access to Justice Arrangements*, Inquiry Report No 72 (2014), vol 2, 631.

[20] Class Actions in Australia' February 2017 www.allens.com.au Accessed 24 August 2017

[21] *Access to Justice Arrangements*, Inquiry Report No 72 (2014), vol 2, 631-632.

[22] See www.instituteforlegalreform.com Accessed 25 August 2017.

> "Litigation financing is a sophisticated scheme for gambling on litigation, and its impact on American companies is unambiguous: more lawsuits, more litigation uncertainty, higher settlement payoffs to satisfy cash-hungry funders, and in some instances, even corruption".

The minority in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*[23], Callinan and Heydon JJ echoed these sentiments but in more moderate terms. The learned judges stated:

> "… The purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by manipulating the procedures and orders of the court with the motive, not of resolving the disputes justly, but of making very large profits"[24].

However, the impact of litigation funding, especially in tandem with class or group actions, should not be overstated. While the quantum of certain claims and class sizes may sometimes appear daunting and loom very large in the litigation landscape[25], a consideration of the number of suits delivers a different perspective. The VLRC Consultation Report, in reviewing data about class actions dating back to the commencement of the Commonwealth regime in 1992, point out that class actions account for only about 0.1% of all litigation in Australia[26] and there is little or no evidence of a proliferation of litigation being fuelled by class actions supported by third party litigation funding. Over the 24 years to 3 March 2016, only 370 class actions were filed in the Federal Court, which amounts to an average of 15.4 representative proceedings per year. Use of class action regimes pursuant to Victorian and New South Wales legislative regimes are even more modest with an annual average of 4.8 class actions filed in Victoria (since 1 January 2000) and 3.8 in New South Wales (since 4 March 2011).[27] Litigation funders fund approximately 50% of proceedings filed under the Commonwealth regime.

Litigation funders are not surprised by the relatively modest statistical impact of class actions and litigation funding in the overall litigation context as they assert that a funder, acting rationally, will not fund proceedings which have poor prospects of success, given the likely loss of its investment and its potential exposure to an uncapped adverse costs order[28]. For example, Bentham IMF[29] maintain that 'funders, like good business contingency firms, typically reject upwards of 90 percent of the investment opportunities presented to them, seeking only cases with a strong chance of success.

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[23] [2006] HCA 41; (2006) 229 CLR 386.
[24] (2006) 229 CLR 386, at 486.
[25] For example, the IMF Maurice Blackburn proposed class action referenced in the Introduction to this article.
[26] VLRC Consultation Report, paragraphs 2.55 – 2.68. See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016) https://ssm.com.abstract=2815777 Accessed 25 August 2017
[27] Vince Morabito, "Empirical Perspectives on 25 Years of Class Actions" in Damian Grave and Helen Mould (eds)*, Twenty-Five Years of Class Actions in Australia 1992-2017 (*Ross Parsons Centre of Commercial, Corporate and Taxation Law), 2017, at 43,45.

[28] See, for example, Wayne Attrill, IMF (Australia) Ltd, "Ethical Issues in Litigation Funding" 16 February 2009, at page 12. See www.imf.com.au.
[29] See Bentham IMF Litigation Funding Roundtable: Key Issues and Best Practices, January 2014 Report, at page6.

Further, as the Hon. Justice M J Beazley AO points out[30], litigation funders are unlikely to finance litigation that clients may wish to pursue for non-economic reasons which of itself may serve to rationalise the litigation process. The President of the New South Wales Court of Appeal does make the additional point that this is not to say that the Australian landscape is 'unsullied'[31]. The learned judge points to *Treasury Wine Estates Ltd v Melbourne City Investments Ltd*[32] where the Victorian Court of Appeal stayed an action as an abuse of process in circumstances where it was found that the class action was brought for the predominant purpose of enabling the sole director of the representative party to earn legal fees by acting as the representative party's solicitor. The Hon Justice P A Keane[33] makes reference to two other litigation funding examples that he identifies as 'the elephants in the room that are studiously ignored'; namely, *Emanuel Management Pty Ltd (In liq) v Foster's Brewing Group Ltd* [34] and *Idoport Pty Ltd v National Australia Bank*[35]. These cases were, in Justice Keane's view, funded by third parties as commercial ventures for profit.[36]

2.3 Judicial oversight

The High Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*[37] considered that the doctrine of abuse of process (if proceedings were in fact an abuse), the ability of the courts to otherwise protect their processes and lawyers' ethical and professional duties were more than adequate to address circumstances in which a funder conducted themselves in a manner 'inimical to the due administration of justice'."[38] In the absence of evidence that litigation funding is fuelling an avalanche of frivolous or unmeritorious claims, it is respectfully submitted that there is little basis upon which to challenge the High Court's view of a Court's capacity to protect its processes. Further as Peta Spender[39] states "…pinpointing the difference between optimal litigation for socially beneficial outcomes and suboptimal trafficking in litigation is difficult". In the circumstances, 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.

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[30] "The Rise of Litigation Funding and Class Actions and the Duties Owed by Legal Practitioners", University of New South Wales Seminar Paper Rule 6.1, 23 February 2017, at paragraph 89. Judicial observations to this effect are frequent; for example, the English Court of Appeal recently approved the view of a High Court judge that funders did not aim 'to finance hopeless causes but those with strong merits'; see *Excalibur v Texas Keystone Inc and Others* [2016] EWCA Civ. 1144, 27 (November 18, 2016).

[31] "The Rise of Litigation Funding and Class Actions and the Duties Owed by Legal Practitioner 1144, 27 (November 16, 2016).s", University of New South Wales Seminar Paper Rule 6.1, 23 February 2017, at paragraph 22.

[32] [2014] VSCA 351.

[33] "Access to Justice and Other Shibboleths," Paper presented at the JCA Colloquium in Melbourne, 10 October 2009.

[34] (2003)178 FLR 1. Ssee also *Emanuel Management Pty Ltd (In liq) v Foster's Brewing Group Ltd & Coopers & Lybrand & Ors [2003] QSC 299.*

[35] [2000] NSWSC 1141. Keane J observes that there were 75 separate judgments delivered during the course of this litigation, better known as the Maconachie Case.

[36] "Access to Justice and Other Shibboleths," Paper presented at the JCA Colloquium in Melbourne, 10 October 2009; at page 8.

[37] [2006] HCA 41; (2006) 229 CLR 386.

[38] (2006) 229 CLR 386, at 435.

[39] "After Fosif: Lingering uncertainties and controversies about litigation funding", (2008) 18 JJA 101, at 107.

The decision of the Full Federal Court in *Money Max International Pty Ltd (Trustee) v QBE Insurance Group Ltd*[40] represents a further very significant step by the Courts in accepting a more active role in assessing and dealing with litigation funding. The Court accepted that claimants who choose to be part of a class action ought to be compelled to contribute to the litigation funder a percentage of any monies they receive as a result of the proceeding and that a contribution will be required regardless of whether or not the claimant has entered into a funding agreement with the litigation funder.[41] However, this extension of entitlement to receive a funding commission from all class members who participate in a settlement or judgment was not without qualification, as the Court held that the funding commission payable is to be determined by the Court at the end of the proceedings. This qualification is very significant. The scope and factors inherent in this judicial oversight were explained by Murphy, Gleeson and Beech JJ[42] and considerations relevant to any approval could include litigation risk and exposure to adverse costs orders, comparable rates set in other proceedings or in the market generally, the sophistication of the class and the information provided to class members, the quantum of legal costs and settlement, and any objections by class members. As Michael Duffy[43] observes, the decision in the *Money Max* case 'hints that the courts may be willing to get into the business of reviewing contractual arrangements between funders and litigants, in the interests of fairness'.

More recent decisions of the Federal Court in *Blairgowrie Trading Ltd v Allco Finance Group*[44] and *Earglow Pty Ltd v Newcrest Mining Ltd* [45]confirm that the Court has accepted a more active role in assessing and dealing with litigation funding. For example, in the *Allco* case Justice Beach pointed to the ability of courts to better regulate funding fees than other forms of regulation. He noted that the courts are 'able to bring flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with, say, idiosyncratic State legislation.'[46]

3. Conclusions

There is no doubt that there will be ongoing debate and submissions in relation to the adequacy or otherwise of the legal framework in which litigation funding operates. Furthermore, it can be

[40] [2016] FCAFC 148.
[41] See Ruth Overington, "'Common Funds' in Australia – the Court has its say on Litigation Funding" 27 October 2016 https://www.herbertsmithfreehills.com Accessed 24 August 2017.
[42] At paragraph 11.
[43] "Courts are regulating the class action funding industry where the government has failed to act", The Conversation 3 November 2016 https://theconversation.com/courts-are-regulating-the-class-actio-funding-industry-where-the-government-has-failed-to-act-68057 See also Michael Duffy, "Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory" (2016) 39 UNSW Law Journal 165.

[44] [2017] FCA 330. Of
[45] [2016] FCA 1433.
[46] [2017] FCA 330, at paragraph 142.

reasonably asserted that there is little doubt that the existing framework could be enhanced and that prior legislative consideration has strongly focussed upon the imperative of access to justice[47].

However, in the absence of evidence that litigation funding is fuelling an avalanche of frivolous or unmeritorious claims, it is respectfully submitted that there is little basis upon which to challenge the High Court's view of a Court's capacity to protect its processes.[48] Nor is there any reason to doubt the proposition that the courts are 'able to bring flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with, say, idiosyncratic State legislation.'[49]

In the event that there is a push to introduce new external regulatory measures or an entire regime upon litigation funders, this submission makes a strong plea that any policy proposal designed to introduce such regulation be accompanied by an Australian Government Regulation Impact Statement or RIS. The updated Australian Guide to Regulation (AGGR)[50] sets out the approach to regulation which focuses upon reducing the regulatory burden by limiting the flow of new regulation that, inter alia, does not pass a cost-benefit analysis. The adoption of this methodology in the case of any proposed external regime for litigation funding will keep regulators focused on the critical questions such as the actual, quantifiable costs and benefits of the proposed regulation, and also minimize the risks of unintended consequences such as the creation of unnecessary barriers to market entry[51]. This is particularly important in the context of an issue that generates so much visibility and charged commentary and when more active Court oversight and supervision will, it is respectfully suggested, address the vast preponderance of concerns.

At a Victorian level the VLRC identifies for commentary reform options being the Supreme Court or the legal profession drafting draft guidelines addressing the responsibility of lawyers in class actions and/or the Supreme Court introducing practice requirements for litigation funders involved in class actions in relation to conflicts of interest. This submission supports very strongly this way forward.

Accordingly, this submission advocates that the Supreme Court Practice Note and Federal Court Practice Note should require all funding agreements to be disclosed at, or before, the first case management hearing or directions hearing in all funded class actions and other funded proceedings. The capacity of the courts to bring flexibility and nuance to their supervisory or oversight role in an individual case (including supervising funding terms generally and confirming capital adequacy) is contingent upon full information provided as early as possible

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[47] See, for example, the discussion of ASIC's *Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* RG 248; Issued 27 March 2013. See Clayton Utz, "ASIC issues litigation funding guidance" commented at the time this Guide was issued that it was ' light touch regulation' https://www.claytonutz.com/knowledge/2013/june/asic-issues-litigation-funding-guidance Accessed 25 August 2017.

[48] *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, at 435.

[49] [2017] FCA 330, at paragraph 142.

[50] Australian Government, *Guide to Regulation* (Cutting Red Tape, March 2014). See<https://cuttingredtape.gov.au>

[51] Generally, see S. Taylor, J. Tarr and A. Asher, "Australia's flawed Regulatory Impact Statement (RIS) process" (2016) 44 *Australian Business Law Review* 361.

As a practical matter, it is contended by litigation funders that potential conflicts of interest between funders and funded litigants 'are best dealt with by ensuring that in every piece of funded litigation the lawyers who have conduct of the proceedings owe their full professional and fiduciary duties to the litigants and that in the event of a conflict of interest between the litigants and the funder, the funding agreement expressly recognises that the lawyers may continue to act solely for the litigants even if the funder's interests are adversely affected by them doing so'.[52] Reaffirmation or restatement of this responsibility of lawyers in funded litigation has merit.

In relation to another major potential area of conflict – whether to settle or not – this submission supports the option suggested by the VLRC that the interests of unrepresented class members be protected through the appointment of a third-party guardian or contradictor.

Thank you for your time and efforts in this matter.

[52]Wayne Attrill, IMF (Australia) Ltd, "Ethical Issues in Litigation Funding" 16 February 2009, at page 11. See www.imf.com.au. See also V. Waye, "Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs" (2008) 19 Bond Law Review 225, at235.