Litigation Funding – consumer protection and access to justice

Submission to Standing Committee of Attorneys General on Litigation Funding in Australia

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1. About the Australian Consumers Association

The Australian Consumer's Association (**ACA**) is an independent not-for-profit, non-party-political organisation established to provide consumers with information and advice on goods and services, health and personal finances, and to help maintain and enhance the quality of life for consumers. ACA provides consumer education, conducts surveys into consumer attitudes, lobbies for improved conditions for consumers and distributes unbiased consumer advice. ACA was established in 1959 and now has approximately 190,000 subscribers to its magazine, *Choice*, and web-based services in Australia.

ACA is well placed to comment on proposals to regulate litigation funding. It has extensive knowledge of consumers' experience and experience advocating for improvements to consumer protection. ACA, like PIAC, is expert in regulatory frameworks.

2. About PIAC

The Public Interest Advocacy Centre (**PIAC**) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC has extensive litigation experience in courts and tribunals. In particular, PIAC routinely advises clients on costs issues and regularly pursues innovative arguments in relation to costs in the matters in which it acts. For example, PIAC has assisted clients to obtain pre-emptive costs orders pursuant to Order 62A of the *Federal Court Rules* and avoid an adverse costs order on the grounds that the matter was in the public interest.

This experience has informed the submissions and representations that PIAC has made to government, courts and statutory agencies in relation to access to justice. In PIAC's view there are many barriers to justice, ranging from complex procedural rules to inaccessible court buildings. However the issue that most constantly faces our clients is the cost of their legal representation and the potential for an adverse costs order.

3. Key themes

In addition to our comments on the specific issues raised in the discussion paper *Litigation Funding in Australia,* distributed by the Standing Committee of Attorneys General in May 2006, our submission has two guiding themes: access to justice and consumer protection.

3.1 Access to justice

ACA and PIAC support the concept of litigation funding as it has the potential to provide increased access to justice by enabling individuals to pursue meritorious matters in circumstances where they would not otherwise be able to do so. We are opposed to outdated and unnecessary barriers to litigants receiving funding from a Litigation Funding Company (**LFC**). Common experience suggests that well-resourced defendants would be likely to raise a challenge based on such prohibitions at any opportunity. To this end we support moves to remove laws against maintenance and champerty and oppose moves to replace them with extensive or arbitrary prohibitions on litigation funding.

Litigation is expensive and plaintiffs are often faced with insurmountable economic barriers: the costs of their own representation and the risk of an adverse costs award. Relieved of these concerns, litigants are more likely to pursue their rights.

Significantly, a LFC not only agrees to pay for the costs of representation for the litigant, it agrees to indemnify the litigant in the event that the litigant is unsuccessful and the court orders them to pay the costs of their opponent. As is discussed below, this is in marked contrast to the not-for-profit litigation funding schemes that are currently in operation, which usually only provide funding for the litigant's own costs. In addition, we are aware that LFCs have on occasions also provided security for costs.

The point that must be emphasised is that LFCs have the capacity to provide litigants with complete financial security before embarking on litigation.

Of course the LFCs provide funding for a fee. In principle this does not concern ACA or PIAC. More significantly it did not concern Gummow, Hayne and Crennan JJ[1], who were the guiding majority in *Campbells Cash & Carry v Fostif Pty Limited* [2006] HCA 41 (***Campbells Cash & Carry***).

However the common method for calculation of the fee is an important matter to be taken into account in considering the need for and nature of regulation of LFCs. The LFC will typically tie its fee to the result in the matter in that the fee is expressed as a percentage of a potential damages payment. While the LFC faces a risk as a consequence of this type of fee, it imposes on the LFC a need to assess the merits of each matter and to approve funding only to litigants who it believes will be successful. As such the LFC does not burden the courts with unnecessary and unmeritorious litigation.

3.2 Consumer Protection

ACA and PIAC believe that it is important to have regulation that ensures that the agreements between LFCs and potential litigants are fair. Such regulation would necessarily focus primarily on disclosure of information to potential litigants who are considering entering into a litigation funding agreement. In our submission, litigation funding agreements must address two categories of information type. The agreements must ensure that the litigant has clear information about the manner and conduct of the litigation on the one hand and information about the financial product

[1] *Campbell's Cash & Carry* v *Fostif Pty Limited* [2006] HCA 41 at [89].

that they are using on the other. Both of these categories must be clearly set out for the funding agreement to be valid.

The key obligations in relation to financial products arise from an acknowledgement that LFCs are providing financial services and in doing so must comply with the regulatory framework that is in place for the provision of financial services to consumers. Essentially, LFCs are financial service providers and, as such, should be regulated by Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**). Section 760A of the *Corporations Act* states:

> The main object of this Chapter is to promote:
>
> (a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
> (b) fairness, honesty and professionalism by those who provide financial services; and
> (c) fair, orderly and transparent markets for financial products; and
> (d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

ACA and PIAC fully support these objects and the proscriptions that follow from it; these are discussed in more detail below under Issue 8.

Although not directly concerned with the litigation funding agreement, we believe that the retainer between the funded litigant and their lawyer is a necessary part of the consumer protection strategy.

4. *Campbells Cash & Carry v Fostif Pty Ltd*[2]

The recent decision of the High Court in *Campbells Cash & Carry* is a significant contribution to the debate over the regulation of LFCs and it is perhaps useful to summarise the decision before advancing to a consideration of the individual issues. In effect *Campbells Cash & Carry* said that there was not an overarching rule of public policy that would support the prohibition of litigation funding and emphatically dismissed concerns over the role of LFCs in litigation.

Campbells Cash & Carry related to a matter in which Firmstones, an LFC, provided funding for a representative action and had substantial control over the action. The issues to be determined in the matter were whether the provisions for representative proceedings were validly engaged and, if they were, whether the proceedings should be stayed as contrary to public policy and an abuse of process because of the involvement of an LFC.

PIAC acted for the ACA, which was granted leave to appear as *amicus curiae* in the appeal. ACA argued that the matter should not be stayed, as the involvement of an LFC in proceedings could not lead to a finding of abuse of process.

The Court determined by majority (Gummow, Hayne & Crennan JJ, Callinan & Heydon JJ) that the representative proceedings provisions were not validly engaged and the appeal was upheld. However a majority of the Court (Gleeson CJ, Gummow, Hayne & Crennan JJ, Kirby J) found, to quote Gleeson CJ, that '[t]he proceedings do not constitute an abuse of process, and there was no reason in public policy why they should have been stayed."

The appellant sought to argue that the matter was an abuse of process as:

- the modern law of champerty was infringed by the involvement of a LFC in the institution and conduct of proceedings;

[2] [2006] HCA 41.

- the proceedings were an abuse of process as the interests of the plaintiffs were subservient to the interests of the LFC; and

- the proceedings were an abuse of process as the LFC's involvement constituted trafficing in litigation.

At [83]-[95] Gummow, Hayne & Crennan JJ, Gleeson CJ[3] and Kirby J[4] concurring, considered arguments in relation to abuse of process. The joint justices concluded[5]:

> Shorn of the terms of disapprobation, the appellants' submissions can be seen to fasten upon Firmstone's seeking out those who may have claims and offering terms which not only gave Firmstones control of the litigation but also would yield, so Firmstones hoped and expected, a significant profit to Firmstones. But none of these elements, alone or in combination, warrant condemnation as being contrary to public policy or leading to any abuse of process.

Gummow, Hayne & Crennan JJ stated that fears about the possible conduct of LFCs could be 'addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's process'.[6] In relation to the potential for LFCs to be a corrupting influence on lawyers, the justices stated:

> And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.

The joint justices were also not concerned with 'the fairness of the bargain struck between funder and intended litigant'.[7]

ACA and PIAC are however concerned with the fairness of the bargain between the LFC and a potential litigant. We therefore suggest, in this submission, a number of minor regulatory changes that fine tune the impact of *Campbells Cash & Carry* on litigation funding to ensure that the bargain between an LFC and a litigant is fair, while upholding the majority of the Court's central reasoning.

We are also concerned that current rules as to lawyers' duties will not always be sufficient to provide adequate protection, particularly in the absence of a retainer between lawyer and client.

5. The Issues

Issue 1	Should laws against maintenance and champerty be repealed in those jurisdictions where the tort or crime continues to exist (Western Australia, Queensland, Tasmania and the Northern Territory)?

In ACA's submissions to the Court in *Campbells Cash & Carry*, it argued that the modern law of maintenance and champerty were not relevant to *Campbells Cash & Carry* as this law has no role in assisting defendants, either as a defence or as grounds for a stay, to challenge otherwise meritorious

3 Ibid [1].
4 Ibid [146].
5 Ibid [88].
6 Ibid [93].
7 Ibid [90]-[92].

proceedings. Gummow, Hayne & Crennan JJ came to the same conclusion.[8] They did so, however, in the context of proceedings in a State where maintenance and champerty no longer existed as torts and crimes. They did not comment on the position in States or Territories where the prohibition continues to exist.[9]

ACA and PIAC can identify a number of historical policy justifications for the need for laws against maintenance and champerty. These include protecting the processes of the courts from abuse, providing litigants who accrued unnecessary costs as a consequence of the involvement of an LFC and acting as a deterrent against third parties intent on stirring up unmeritorious litigation.

However, these policy justifications for the retention of maintenance and champerty are now redundant. The majority of the High Court dismissed the suggestion that accusations such as that LFCs meddle in litigation, stir up litigation, that they are traffickers in litigation or that the interests of litigants are subservient to those of the LFC. As a consequence they concluded that there was no reason to support a general rule that such contracts were contrary to the public policy.[10]

Courts now have extensive powers that enable them to regulate proceedings based on the individual circumstances of the matters before them. They have powers to dismiss claims, to make orders for costs against third parties, and to strike out claims. The touchstone for these powers is merit.

If the claim has merit and the claimant has a proper purpose then it should proceed. It is the role of courts to determine these issues. There should not, in PIAC and ACAs' view, be an arbitrary and special restriction placed on litigants such as a prohibition on actions by funded litigants, particularly in circumstances where there are no policy justifications. The greater public policy consideration today is the need to improve access to justice and address the barriers caused by the high and increasing cost of legal services and of legal action more generally.

As a consequence there is no need to continue to have laws against maintenance and champerty. In addition, there is a need to remove doubt over the applicability of *Campbells Cash & Carry* in States and Territories where laws against maintenance and champerty have not yet been repealed.

Issue 2 Should a direct contractual agreement between the solicitor and the plaintiff be required in all funded actions?

In *Campbells Cash & Carry*, the solicitor acting in the matter had minimal contact with the plaintiff and the prospective group members. While the majority in *Campbells Cash & Carry* were not concerned by the lack of involvement of the plaintiff in the matter, the absence of communication[11] and obvious lack of control by the plaintiff over the litigation[12] were significant reasons underlying the dissenting views of Callinan & Heydon JJ.

ACA and PIAC believe that the requirement of a retainer between litigant and solicitor is a sensible approach to balancing these different views. There are two strong public policy reasons for this: the protection of the litigant, and protection of the integrity of the litigation where there is a litigation funding agreement.

A solicitor's relationship with a client provides significant protections to a litigant. The relationship between a solicitor and their client is recognised as one of utmost importance. The foundation of the relationship is the trust that the client places in the solicitor. This trust places onerous duties on the

8 Ibid [81]-[82].
9 Ibid [85]
10 Ibid [86]-[88]
11 Ibid [282].
12 Ibid [277].

solicitor including duties of performance, loyalty, confidentiality as well as duties imposed by statute in relation to the disclosure of costs. The trust and confidence in the client-solicitor relationship has been recognised as giving rise to fiduciary relationship. Fiduciary duties are proscriptive and are based around the loyalty of the solicitor to their client. Accordingly, the solicitor is prohibited from assuming a position where there is or may be a conflict between the client's interest and his or her interests or those of a third party. Australian courts have applied this duty strictly.

It may be argued that as a LFC bears the financial risk of the litigation that there is no need for a retainer between solicitor and their client and that there should be no restriction of the right of the LFC to direct affairs. Indeed, as noted above, the majority in the High Court was not concerned by the level of control by the LCF in *Campbells Cash & Carry*.

With respect, ACA and PIAC believe that such a view places too great a significance on the financial role in litigation of the LFC and undervalues the bonds between solicitor and client. The solicitor-client relationship has a deeper significance than simply the disclosure of fee rates and payment of fees. The litigant may well have under contract an obligation to report on the progress of the litigation to the LFC or the litigant could give the LFC a dominant role in the litigation. However, the retainer between solicitor and litigant client activates a broad range of obligations and would help to ensure that the interests of the litigant are safeguarded through all eventualities.

Finally, we note that the solicitor-client retainer demonstrates that the central party to litigation is the litigant. As such it strengthens the integrity of litigation where an LFC has funded the litigant and ensures that the litigation retains a proper purpose of achieving an outcome for which the law is designed: *Williams v Spautz* (1992) 174 CLR 509. This principle may, however, no longer be significant at common law following the majority's emphatic appraisal in *Campbells Cash & Carry*.

Issue 3 **Should the criteria for legally acceptable funding agreements be formalised?**

Issue 4 **If so, should this be in the form of either or both:**

- **a list of relevant criteria?**
- **a set of required terms or disclosure requirements in the agreement?**

Or should this be in some other form?

Issue 5 **Should disclosure and other requirements be imposed on LFCs when they enter into non-insolvency funding agreements?**

Issue 6 **If so, what should the requirements be?**

ACA and PIAC address, at Issue 8 below, the need for litigation funding agreements to reflect current consumer protections in the *Corporations Act*. In this section, we discuss additional consumer protections that would be beneficial.

Campbells Cash & Carry has disposed of the claim that litigation where LFCs are involved is an abuse of process. There is therefore now no common law requirement for a legally valid agreement between an LFC and a funded litigant. The question arises though, in light of the High Court's decision, as to whether there are valid public policy reasons for imposing specific requirements. ACA and PIAC believe that there are.

Litigation is often time-consuming, complex and lengthy and can be unpredictable. Litigants are tied up in court proceedings for extended periods. Even apparently simple matters can become the subject of protracted and bitter dispute. Therefore, before embarking on litigation, a litigant must be clearly advised about the proposed conduct and likely prospects of success of the matter. They must also be clear about their rights and obligations *vis á vis* the LFC, in particular the requirements that the LFC may impose on the litigants to ensure that the litigation can be properly conducted.

In the view of ACA and PIAC, there is a need for there to be a small number of disclosure requirements to ensure consumer protection. We do not suggest that the terms of the agreement should be prescribed, rather that the categories of information that must be included in the agreement be prescribed. The matters that should be addressed in a valid litigation funding agreement are:

- Any obligations on the litigant to disclose to the LFC information regarding the progress of the matter.

- The basis on which the LFC will be paid, including the percentage of any money awards that are payable by the litigant to the LFC and whether that sum is reduced by any costs not paid by the losing party.

- The obligation of the LFC to indemnify the litigant for costs the litigant is ordered to pay as a consequence of costs orders.

- The basis on which the litigation could be settled.

- The circumstances in which the litigation funding agreement could be terminated.

There may also be some benefit in requiring that the court dealing with the proceedings sight the litigation funding agreement so that it can satisfy itself that a funded litigant has had the benefit of proper disclosure as to the effect of the funding contract and as a consequence that the litigant's acceptance and prosecution of the action reflect informed consent. In the event that there is not proper disclosure, the court could require steps to be taken to ensure that informed consent is obtained. This was the case in *Clairs Keeley v Treacy (No 3)* [2005] WASCA 86 at [59-60].

However, the particular arrangements between litigants and LFCs should not be allowed to be the subject of a contest between the parties to the litigation. This would require a detailed enquiry into the funding arrangement and its different permutations and possibly the manner of its performance. A court would then be required to gauge whether the balance of interest between the litigant and the LFC were commercially justified, and whether the nett result weighed in favour of the litigant or the LFC, all in a context where the litigant was not complaining. A majority of the High Court agrees.[13] The problem would be particularly acute in representative proceedings, especially where the benefit flowed from the aggregation of a large number of small claims. This would invariably lead to increased cost and delay. Courts should not be required to embark on this type of enquiry and so the litigation funding agreements should only be disclosed to the court, not to other parties.

[13] HCA 41 at [92]

The requirements that ACA and PIAC recommend for the litigation funding agreements are for the benefit of the funded litigant rather than for the integrity of the proceedings, which as the High Court has clearly decided, are not impugned by the involvement of an LFC. There may therefore be no reason for courts to see the litigation agreement before sanctioning litigation. The protection for the funded litigants arises from the lawful requirements rather than from a court's monitoring of the agreements.

ACA had argued before the High Court that the requirement of a valid litigation funding agreement would strengthen the legitimacy of proceedings but in light of the decision of the majority, questions regarding the integrity of the proceedings would appear to be mute.

Issue 7 Should LFCs be subject to prudential regulation?

It is the view of ACA and PIAC that LFCs provide financial services. As a consequence they are or should be subject to the *Corporations Act* and are or should be required to hold an Australian financial services license. Part 7.6 of the *Corporations Act* prescribes the licensing regime for financial service providers. The *Corporations Act* imposes extensive obligations on financial service providers, including prudential requirements, which are overseen by the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority. In the event that an LFC does not have a license or if it fails to comply with the prudential requirements of that license, then sanctions may be imposed on it.

Issue 8 Should LFCs be subject to mandatory disclosure requirements?

There should be a number of mandatory disclosure requirements applied to litigation funding agreements. Some of these have been discussed above at Issues 3-6. In addition, the *Corporations Act* sets out key consumer protection disclosure requirements for financial services. LFCs should be regulated in the same manner and, as such, there is not the need to establish a separate regime for LFCs.

Part 7.7 of the *Corporations Act* sets out the requirements for financial services disclosure. The key relevant requirement of this Part is the giving of a Financial Services Guide (**FSG**) to persons seeking financial services. Section 942B of the *Corporations Act* lists the main requirements for an FSG.

Part 7.9 of the *Corporations Act* sets out the requirements for financial product disclosure. In particular section 1013D of the *Corporations Act* lists a series of statements that must be included in the Product Disclosure Statement (**PDS**) that must be given to retail clients. The PDS must include:

- information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided;[14]
- information about any significant risks associated with holding the product;[15] and
- information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product.[16]

14 *Corporations Act 2001* (Cth) s 1013D(1)(b).
15 *Corporations Act 2001* (Cth) s 1013D(1)(c).
16 *Corporations Act 2001* (Cth) s 1013D(1)(f).

Issue 9 Should explicit measures to ensure independence of lawyers from LFCs be introduced?

Issue 10 Should these be in the form of:

- **prohibitions on certain dealings between LFCs and lawyers?**
- **standard terms in contracts between LFCs, lawyers and plaintiffs?**

Or some other form?

ACA and PIAC do not think that there is a demonstrated need for explicit measures to ensure the independence of lawyers from LFCs. Clearly nor did a majority of the High Court. We believe that litigants can be adequately protected through the disclosure requirements suggested above *together with* fiduciary and statutory obligations that will arise from the requirement of a direct contractual relationship, or retainer, between the solicitor and their client, as we recommended above under Issue 2.

Issue 11 What measures should be taken to encourage more organisations to provide not-for-profit litigation funding?

ACA and PIAC submit that statutory schemes should be established in each State and Territory to provide not-for-profit litigation funding to individuals for the cost of disbursements and to indemnify them if an adverse costs order is made against them. The costs of the scheme could be met by a payment of a percentage of the damages when the claims are successful. Indeed the fees charged by the schemes may help the schemes to expand. The schemes should be available for all individuals in non-commercial matters, with a focus on middle- and lower-income members of the community. The scheme would have a merit test to ensure that all matters are worthwhile.

It would, of course, be most useful if the scheme would meet the cost of litigants' representation as well. However, we consider this to be optional and should not be an initial focus of the schemes. This view is based on the fact that lawyers are, in our experience, prepared to act on a speculative basis in many meritorious actions in cost jurisdictions.

Such schemes would expand access to justice considerably, without significant initial or ongoing cost to government.

There are a number of schemes that have provided for the cost of representation and/or disbursements. The Law and Justice Foundation of NSW (**the Foundation**) operated the Litigation Support Fund (**LSF**) from 1994 until 1997, although it was only fully operational from August 1997. The Foundation evaluated the LSF and produced a report titled *Litigation Support Fund: a reflection on the New South Wales experience*. We attach a copy to this submission for your consideration.

The LSF was ultimately discontinued because, amongst other reasons, it was not expanding access to justice. Part of the reason for this was that funding was only available in a limited range of matter types and private lawyers would often be prepared to take on these matters on a contingency basis. Not only was it available only in a limited range of cases, but it did not cover the costs of counsel's fees [90] and nor did it cover the cost of an adverse costs order [92]. We believe that the latter was a

significant failing. The reason for the placing of these limitations on the scope of funding appears to have been commercial viability.

The Litigation Assistance Fund (**LAF**), a charitable trust established by the Law Society of South Australia, was set up 'to assist plaintiffs to proceed with litigation where they would be otherwise unable to afford to sue'.[17] The reference to 'unable to afford' is a reference to affordability of the cost of legal representation. The LAF pays for the costs of a litigant's own solicitor's fees and disbursements. We understand it does not meet the costs of an adverse costs award nor the costs of the plaintiff's counsel.

Where funds provide coverage for an individual's legal costs alone, they appear more designed to protect the interests of lawyers—ensuring that their fees are paid—and not the interests of the litigant, as they will still be exposed to the risk of an adverse costs order. There may be some utility for this type of funding in some areas. As the Law Foundation noted it may encourage smaller and country firms to take on matters [18]

However, it is the view of ACA and PIAC that, where a choice must be made between meeting the cost of representation and the cost of disbursements and an adverse costs award, the latter should be preferred. This is because lawyers are prepared to act on a contingency basis in many matters that are meritorious. The Law Foundation noted this and this partly explained the LSF's lack of impact on access to justice.

In addition to contingency arrangements the cost of a potential litigant's own legal representation can be in some cases be met by *pro bono* or publicly funded legal services. For example, PIAC is able to represent clients who are unable to meet their own legal costs as it receives some funding to pursue certain types of litigious matters and is willing to act in matters that it determines are in the public interest and have reasonable prospects of success. Generally, PIAC can also obtain counsel to act on a speculative or *pro bono* basis.

However, PIAC cannot agree to meet an adverse costs award for its client in the event that they lose. Consequently, many of PIAC's clients have abandoned meritorious claims that have significant public interest and strong prospects of success because they are not in a position to take the risk of an adverse costs award. Usually, the other party in such matters does not face such a limitation as they are, more often than not, government or corporate entities with far greater resources. In the case of corporations, they also have the benefit of recovering much of their legal costs through the taxation system.

Issue 12 Do not-for-profit litigation funding schemes operate other than the schemes described above?

Issue 13 If other not-for-profit schemes are operating, how do they work, and are any statistics available to demonstrate their effectiveness?

The NSW Law and Justice Foundation's paper, *Litigation Support Fund: a reflection on the New South Wales experience*, notes that there are a number of not-for-profit schemes. ACA and PIAC does not have access to any further information or statistics in relation to them.

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17 Legal Services Commission of South Australia, *Litigation Assistance Fund* (2006) <http://www.lawhandbook.sa.gov.au/index_article.asp?id=5162> at 12 September 2006.

18 Law and Justice Foundation of NSW, *Litigation Support Fund: a reflection on the New South Wales experience*, [162]

Issue 14 Are litigation insurance products desirable in Australia?

The NSW Law and Justice Foundation, in conjunction with GIO, operated Legal Expense Insurance Ltd (**LEI**) from 1987 to 1995. The report, *Legal Expense Insurance: an experiment in access to justice*, prepared by the Law and Justice Foundation on the operation of the LEI, is a valuable resource when considering litigation insurance products. A copy of the report is provided with this submission.

Issue 15 If so, what steps should be taken to ensure that the availability of litigation insurance in Australia is not discouraged or prevented?

We are not aware of any particular impediments to litigation insurance other then commercial viability and product design.

We therefore suggest that the main focus of the Attorneys – General should be upon the expansion of non profit litigation funding rather than an examination of the prospects of the expansion of the litigation insurance market. The current availability of litigation funding is limited and unlikely to expand to cover the majority of lower and middle income people.

In addition, the Attorneys General may wish to consider the position of litigants who are unlikely to obtain an award of damages, such as debtors or individuals seeking administrative law remedies. These individuals may well have strong merit to their defences or actions, but would be unlikely to obtain assistance from an LFC that requires a percentage of the damages in return for the provision of the assistance. Again, it is the threat of an adverse costs order that in many cases operates as an unfair barrier to a legal right being asserted or defended.

Once a not-for-profit LFC is established, the LFC could assess whether the LFC could provide assistance to individuals with claims where there is no prospect of an award for damages. It is ACA and PIACs' submission that assistance to these individuals should be seen as a higher priority than providing funding for lawyers.

Finally, the Attorneys General may also wish to consider expanding or introducing in-house civil law teams within statutory legal aid commissions, such as exists within NSW Legal Aid. This team provides able assistance to those individuals who are eligible for legal aid in such matters.