
After Fostif: Lingering uncertainties and controversies about litigation funding

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*This article will examine uncertainties and controversies that remain unresolved after the High Court recognised litigation funding in *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386. The uncertainties are doctrinal, eg whether the assignment of a right to litigate is valid, and systemic, eg whether the existing suite of approaches is sufficiently robust to manage the challenges presented by litigation funding. Controversies persist as to whether litigation funders promote trafficking and meddling in litigation. Recent case law demonstrates that the policy underpinning the doctrines of maintenance and champerty still has salience. However, it will be argued that effective regulation of this area requires a coordinated approach and must move across different instruments and contexts. The article will sketch out some elements of effective regulation and make suggestions for reform of the current regime.*

INTRODUCTION

Litigation funding is now with us. Entrepreneurial activity in this respect raises issues that have come before the courts. It is not in all respects attractive, but subject to certain controls it may be a necessity. ... Yet, a basic problem of access to civil justice is the remorseless mercantileisation of legal practice. This reflects the dominance of the culture of the market, with its tendency to reduce society to the single dimension of producers and consumers.¹

A paradigmatic shift in the institutional framework of litigation funding has occurred in Australia during the last 10 years. With the decline of public funding for legal services, third parties increasingly finance litigation. Changes in substantive and procedural law, demographic shifts in the client base and increasing entrepreneurialism amongst plaintiff lawyers have converged to promote the creation of litigation funding companies (LFCs). The removal of legal constraints upon litigation funding by the High Court in *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 (*Fostif*) and a *laissez-faire* approach to regulation² have further accelerated activity.

Calls for regulation prompted the Standing Committee of Attorneys-General (SCAG) to agree to regulate litigation funders in November 2005³ and a discussion paper was issued in May 2006.⁴ At the March 2008 meeting, SCAG resolved to draft a regulation impact statement outlining strategies for regulation and to recommend a preferred form of regulation for consideration by Ministers.⁵

This article will argue that a multifaceted approach to the regulation of litigation funding is needed and discuss some uncertainties and controversies that have not been laid to rest by the *Fostif*

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¹ Gleeson CJ *Some Legal Scenery* (presented at Judicial Conference of Australia, 5 October 2007), p 8, available at http://www.hcourt.gov.au/publications_05.html, viewed 23 May 2008.

² Legg M, "Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation" (2007) 81 ALJ 478 at 489.

³ Cain J, "From the CEO: Aiding Access to Justice" (2005) 79(12) Law Inst J 6.

⁴ Standing Committee of Attorneys-General, *Litigation Funding in Australia* (Discussion Paper, May 2006) available at [http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/vwFiles/Litigation_Funding_Discussion_paper_May_06.doc/\\$file/Litigation_Funding_Discussion_paper_May_06.doc](http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/vwFiles/Litigation_Funding_Discussion_paper_May_06.doc/$file/Litigation_Funding_Discussion_paper_May_06.doc) viewed 23 May 2008.

⁵ Attorney-General of Australia, *Communiqué – Standing Committee of Attorneys-General* (28 March 2008) available at <http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/RWPA7434F9ED00CDACBCA25741A003910D7> viewed 21 April 2008.

case. The article will proceed by describing the current context of litigation funding in Australia and sketching the rise of the LFCs. It will briefly canvass the historical restraints that the doctrines of maintenance and champerty placed upon litigation funding and discuss the *Fostif* litigation. Thereafter the article will explore the uncertainties and controversies that remain unresolved by *Fostif*. The uncertainties include whether the purported assignment of a bare right to litigate is valid and whether the existing suite of approaches, such as the court's powers to control abuse of process and lawyers' duties, is sufficiently robust to manage the challenges presented by LFCs. Certain controversies persist after *Fostif*, in particular controversies as to whether the LFCs promote trafficking and meddling in litigation. Finally, questions will be posed about access to justice and the protection of clients under the new regime.

The primary focus of this article is on the case law as these developments have been accompanied by expressions of disquiet by members of the judiciary. In this respect the case law demonstrates the continuing salience of the policies underpinning maintenance and champerty despite the High Court's sanctioning of litigation funding in *Fostif*. However, it will be argued that this area requires a systemic approach to regulation involving, for example: the investigation of litigation funding products which facilitate smaller individual claims, such as legal expenses insurance and after-the-event insurance; the development of court rules on litigation funding; the reinstatement of a direct lawyer and funded client relationship; the monitoring of litigation funding products by a body such as the Australian Investments and Securities Commission (ASIC) as an incident of general financial or credit product regulation; and scrutiny of claims management services by a specialist regulator as an incident of legal services regulation.

THE RISE OF THE LFCs

Although virtually unheard of in the early 2000s, by 2006 there were five "for profit" LFCs in Australia⁶ and the market is expanding rapidly.⁷ Low barriers to entry⁸ have attracted new firms and the diversification of existing firms into the litigation funding market.⁹ Most of the cases concern IMF (Australia) Ltd (IMF), which is a publicly-listed company providing funding of legal claims where the claim size is over \$2 million.¹⁰

Several factors have combined to promote the rise of the LFCs. A flush of regulatory zeal in the 1990s conferred new statutory causes of action upon individuals who had suffered loss,¹¹ court procedures have been adapted to promote aggregation of plaintiffs,¹² and plaintiff lawyers have embraced entrepreneurialism.¹³ There have also been significant changes in the client base of plaintiff lawyers. Legal consumers are more aware of their rights, more likely to be financially independent and have higher expectations of the legal system.¹⁴ This increased awareness, together with marketing strategies which focus upon consciousness-raising, has promoted entry by plaintiff lawyers and LFCs

⁶ Standing Committee of Attorneys-General, n 4, p 4.

⁷ For example, two privately-owned companies have been set up or diversified into litigation funding within the last two years – Quantum Litigation Funding and LCM Litigation Fund. See "Funding the Third-party Way" (2007) 81(8) Law Inst J 39.

⁸ Legg, n 2 at 489.

⁹ In 2005 Yung noted the entry of Hillcrest Litigation Services Ltd, a listed company which was formerly engaged in mineral resources exploration, into litigation funding, see Yung C, "Litigation Funding: Official Intermeddling or Access to Justice" (2005) 15 JJA 61 at 63.

¹⁰ Other LFCs will fund claims over \$500,000: Standing Committee of Attorneys-General, n 4, p 4.

¹¹ Particularly *Corporations Act 2001* (Cth), Chs 6CA, 6D, 7.

¹² For example, *Federal Court of Australia Act 1976* (Cth), Pt IVA and *Supreme Court Act 1986* (Vic), Pt 4. Note that the New South Wales rule on representative proceedings – *Uniform Civil Procedure Rules 2005* (NSW), r 7.4 – has been amended to allow aggregation of plaintiffs whose claims arise out of the "same, similar or related circumstances". This replaces the more restrictive "same interest" test.

¹³ Exemplified by the world's first float of a law firm, Slater and Gordon Ltd, in May 2007, see Spender P, "Ethical Perils in Listing the Lawyers" *The Canberra Times*, 25 May 2007.

¹⁴ Law Council of Australia, 2010: *A Discussion Paper, Challenges for the Legal Profession* (Law Council of Australia, 2001), p 34.

into a so-called “latent legal market”.¹⁵ Commentators suggest that the primary market targeted by litigation funders and law firms specialising in class actions is the “disgruntled investor”.¹⁶ This market is potentially lucrative as Australia has the highest rate of share ownership in the world.¹⁷

The LFCs first achieved prominence by funding insolvency cases.¹⁸ They now tend to fund economic claims such as investor group proceedings, commercial claims and insolvencies.¹⁹ This should be contrasted with the United States where a substantial portion of the market for litigation funding is in tort claims. There, the market has grown from the contingent financing provided by lawyers, who cover legal expenses by drawing on their firm’s general operating account or by a bank line of credit.²⁰ Litigation funding company funding is therefore supplemental to attorney contingency fee funding, as Swan explains:

[T]he [LFCs] purchase a stake in a lawsuit’s result, instead of lending money at interest to the attorney. ... Upon a final judgment ... the payout for the [LFC] derives, generally, from the lawyer’s share if the funds were utilized for legal expenses, and from the client’s share if the money was utilized for personal expenses.²¹

As a consequence of this background, litigation funding in the United States is accessible to a wider range of causes of action and on average supports smaller claims than in Australia.²²

As stated above, the litigation funding industry in Australia is still relatively young and the doctrines of maintenance and champerty stood as a major barrier to its development until the High Court decision in *Fostif*.

MAINTENANCE AND CHAMPERTY

Maintenance and champerty are long established in English law, having their origins in medieval jurisprudence.²³ “Maintenance” is defined as “the giving of assistance or encouragement, by a person who has neither an interest in the litigation nor any other motive recognised as justifying the interference, to a party to litigation”.²⁴ Champerty was a species of maintenance, on terms that the maintainer and the plaintiff would share in the outcome of the action. It was particularly loathsome because “the champertor’s financial stake in the litigation provided a strong temptation to suborn witnesses and pursue worthless claims”.²⁵ Champerty is said to have arisen in response to meddling in litigation by officials and nobles who used the courts’ processes to harass vulnerable individuals.²⁶ It

¹⁵ Law Council of Australia, n 14, p 34.

¹⁶ Pelly M, “Revenge of the Shareholders”, *Sydney Morning Herald* (10 February 2006), quoted by Bowles J, *Class Actions and Litigation Funding: Improving Access to Justice?* (ANU Law School, 22 April 2006).

¹⁷ Australian Securities Exchange (ASX), *2006 Australian Shareownership Study* (May 2007), available at http://www.asx.com.au/products/shares/news/share_ownership_study_2006.htm, viewed 23 May 2008.

¹⁸ For the background, see Yung, n 9.

¹⁹ For example, IMF’s Investment Portfolio Report as at 31 March 2008 indicates that 44% of its portfolio is investor group claims, whereas commercial and insolvency claims are 37% and 18% respectively. See <http://www.imf.com.au/announcements/pdf/Case%20Investment%20Portfolio%20-%2030%20Apr%2008.pdf> viewed 16 May 2008.

²⁰ Swan G, “Economics and The Litigation Funding Industry: How Much Justice Can You Afford?” (2001) 35 *New Eng L Rev* 805 at 822-823.

²¹ Swan, n 20 at 822-823. Rodak explains that the Model Rules of Professional Conduct (r 1.8(e)) forbid attorneys from providing financial assistance beyond litigation costs to clients. See Rodak M, “It’s About Time: A Systems Thinking Analysis of the Litigation Finance Industry and its Effect on Settlement” (2006) 155 *U Pa L Rev* 503 at fn 5.

²² Swan stated in 2001 that the “majority of the litigation funding companies are small. They typically advance a maximum of \$20,000 to individual plaintiffs. One example is Capital Transaction Group. It provides up to \$20,000 for not yet-appealed personal injury lawsuits”: Swan, n 20 at 824.

²³ Yung, n 9 at 63, referring to Winfield PH, “The History of Maintenance and Champerty” (1919) 35 *LQR* 50.

²⁴ *Halsbury’s Laws of Australia* (Butterworths, subscription service), Vol 6 at [110-7135].

²⁵ New South Wales Law Reform Commission, *Barratry, Maintenance and Champerty* (Discussion Paper 36, New South Wales Law Reform Commission, 1994).

²⁶ Fleming J, *The Law of Torts* (9th ed, LBC Information Services, 1998), p 689 cited by Yung, n 9 at 68.

is said that:

[t]he mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power.²⁷

The concepts have undergone considerable change since the medieval period, including legislative change, as many Australian States and Territories have abolished the tort of maintenance, including champerty.²⁸ In the jurisdictions where it has been abolished, it was argued in *Fostif* that the concepts exist by way of public policy which can support an application for abuse of process.

There are two elements of the prohibition against maintenance and champerty which have continuing salience. The first is the portrayal of the champertor as an officious intermeddler, an image which featured prominently in the judgment of Callinan and Heydon JJ in *Fostif*, discussed below. The second is the aversion to promoting or trafficking in litigation, even if the claims being brought are well-founded. The doctrines of maintenance and champerty sought to discourage profit-making in all litigation, even where the merits were sound. Dobner argues that norms arising in the 11th and 12th centuries infused the law with the attitude that forgiving transgressions was a virtue, and unnecessary recourse to law courts was discountenanced.²⁹ Although some commentators argue that lawsuits are now regarded as “one of the marks of a civilized society”,³⁰ yet other commentators consider that the condemnation of litigiousness is a common element in modern attitudes.³¹

These themes were explored in the *Fostif* litigation, in particular by the contrasting views of the majority and minority judges in the High Court.

THE FOSTIF LITIGATION

In *Fostif* the plaintiffs were retailers and the defendants were wholesalers of tobacco. They were required to hold, respectively, a retailer's and a wholesaler's licence³² until, on 5 August 1997, the High Court struck down the licence provisions in *Ha v New South Wales* (1997) 189 CLR 465 (*Ha*). While the licensing scheme was in force, the defendants paid to the State of New South Wales licence fees referable to the value of tobacco sold by them from month to month. The plaintiffs passed that fee on to consumers, as part of the purchase price of tobacco products. The plaintiffs paid the licence fees for August 1997 but the decision in *Ha* meant that the defendants were not liable to pay, and did not pay, licence fees for that month. The plaintiffs sued in restitution to recover that part of the price paid by it to the defendants for tobacco that was referable to the unpaid licence fees.³³ The plaintiffs brought a representative action in the New South Wales Supreme Court funded by an LFC. The funding agreement authorised the LFC to act on behalf of the retailers in the proceedings, enter into a settlement agreement and receive 33% of the amount recovered. The LFC retained the solicitors on the record who were not permitted to liaise directly with the retailers.

²⁷ *Giles v Thompson* [1994] 1 AC 142 per Lord Mustill at 153.

²⁸ In Victoria, the common law offence and tort of maintenance, including champerty, were abolished in 1969. Equivalent legislation was enacted in South Australia in 1992, in New South Wales in 1993 and in the Australian Capital Territory by the *Civil Law (Wrongs) Act 2002* (ACT). Queensland, Western Australia, Tasmania and the Northern Territory have not passed legislation. See discussion in Yung, n 9 at 70.

²⁹ Dobner A, “Litigation For Sale” (1996) 144 U Pa L Rev 1529 at 1545.

³⁰ Simon R Jr, “Lawsuit Syndication: Buying Stock in Justice” (1989) 69 Bus & Soc’y Rev 10 at 11 quoted by Dobner, n 29 at 1545.

³¹ Radin M, “Maintenance By Champerty” (1935) 24 Cal L Rev 48, 49 at 52-54, quoted by Dobner, n 29 at 1545.

³² Pursuant to the *Business Franchise Licences (Tobacco) Act 1987* (NSW)

³³ The High Court in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 held that retailers, who had bought tobacco products from a licensed wholesaler on terms that the “invoiced cost” comprised the wholesale price of the products and a further amount representing the licence fee, could recover from the wholesaler, as money had and received, the amount paid for the licence fee and which the wholesaler had not remitted to the taxing authority by the date of the decision in *Ha v New South Wales* (1997) 189 CLR 465. The court further held, in *Roxborough*, that the action for money had and received is not defeated simply because the plaintiff had recouped the outgoing from others (as the appellants in *Roxborough* had when they sold the goods to customers at a price which covered the amount they sought to recover from the wholesaler). See discussion in *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [24].

The defendants argued, inter alia, that the arrangement constituted trafficking in litigation and therefore amounted to an abuse of process, and that the proceedings should not continue as representative proceedings.

The High Court held by a majority³⁴ that the rules of the New South Wales Supreme Court for representative proceedings had not been validly engaged. In relation to litigation funding, Gleeson CJ and Kirby J agreed with the view of the majority judgment of Gummow, Hayne and Crennan JJ that the appellants had failed to demonstrate an abuse of process to warrant a permanent stay of the proceedings on that basis.³⁵ Callinan and Heydon JJ dissented on this point.

The majority considered that the public policy fears about litigation funding were twofold – first, there were fears about adverse effects on the processes of litigation and, second, there were fears about the fairness of the bargain struck between funder and intended litigant.³⁶ They regarded that neither of these fears warranted an overarching rule of public policy that would bar the prosecution of an action where an agreement has been made to share the proceeds of litigation.³⁷ Such a response to the fears would take “too broad an axe to the problems that may be seen to lie behind the fears”.³⁸ Moreover, it is not possible to measure the fairness of the funding contract by some ascertainable standard.³⁹

Consequently, the majority view was that it is not contrary to public policy for LFCs to seek out those who may have claims and finance the conduct of the ensuing litigation on terms that give the LFC control of the litigation and allow it to make a profit.⁴⁰

The judgment of Callinan and Heydon JJ is an interesting counterpoint to the majority’s position on the question of litigation funding. Their Honours considered that abuse of process is established when the court’s process is employed for some purpose other than that which it is intended by the law to effect.⁴¹ The proceedings as structured by the LFC depended on a harnessing of the alleged wrongs and of the curial processes for the primary purpose of generating profits and this was an abuse of process.⁴² The justifications for the court’s intervention against this type of abuse include the need to ensure that court process is not employed beyond legitimate necessity and is invoked to quell real and active controversies.⁴³ They stated:

The purpose of court proceedings is not to provide a means for third parties to make money by creating 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.⁴⁴

Their Honours commented adversely about the LFC’s control of the litigation and posited a test for an acceptable level of control as follows:

It is a factor pointing against an abuse of process that the funder of litigation “does not meddle at all” or by its contract is left “very little room to intermeddle”. Conversely, the more room to intermeddle, the more likely is it that the litigation is an abuse of process.⁴⁵

³⁴ Gummow, Hayne, Callinan, Heydon and Crennan JJ (Gleeson CJ and Kirby J dissenting on this point).

³⁵ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 per Gleeson CJ at [1] and Kirby J at [145].

³⁶ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [90].

³⁷ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [91].

³⁸ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [91].

³⁹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [92].

⁴⁰ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [88].

⁴¹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [266], citing *Walton v Gardiner* (1993) 177 CLR 378 at 393.

⁴² *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [287].

⁴³ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [266].

⁴⁴ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [266].

⁴⁵ Callinan and Heydon JJ in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 at [277].

The decision in *Fostif* provided much needed guidance about some of the dilemmas presented by litigation funding. However, there are lingering uncertainties and controversies which will be discussed below.

LINGERING UNCERTAINTIES AND CONTROVERSIES

Assignment of a bare right to litigate

There is uncertainty about the validity of litigation funding agreements which purport to assign a right-holder's cause of action. Like the LFC in *Fostif*, most LFCs operate on the basis that they provide services in return for a percentage of the right-holder's judgment or settlement sum.⁴⁶ If the agreement confers considerable control of the litigation upon the LFC, it can be argued that the funding agreement constructively assigns the right to litigate, which renders the agreement vulnerable to invalidity as a bare right to litigate is incapable of assignment in law or equity.

There is considerable diversity in the drafting of litigation funding agreements. However, IMF's generic funding agreements are publicly available⁴⁷ and it is convenient to use these agreements to illustrate the issues.

Under IMF's generic funding agreement it receives a percentage of the judgment or settlement sum ("the resolution sum") in consideration for project management and investigation services.⁴⁸ The project management services include advising the claimant on strategy, retention of service providers (including the lawyers for the project), providing instructions to the lawyers and considering their advice. The project investigation involves IMF, inter alia, investigating the evidentiary basis of the claims, collating material documents and obtaining statements. IMF promises to pay the project costs, which include sums payable under a costs order and the retained lawyers' costs and disbursements. The client acknowledges that IMF has "an interest" in the claims and the proceedings and agrees that the lawyers will hold IMF's portion of the resolution sum upon trust for IMF.⁴⁹

The IMF agreement does not purport to effect an assignment of the claimant's right to litigate.⁵⁰ However, other litigation funding agreements do.⁵¹ Generally speaking, a bare right to litigate is incapable of assignment at law or in equity.⁵² Exceptions apply if the cause of action is incidental to a right of property which is also assigned⁵³ or if the assignee has a "genuine commercial interest in the enforcement of the claim of another".⁵⁴ The latter exception is drawn from the House of Lords decision in *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 (*Trendtex*) and the English courts have incrementally applied this extension to permit various forms of litigation funding.⁵⁵ However, in Australia, in relation to tort, the High Court held in *Poulton v Commonwealth* (1953) 89 CLR 540 (*Poulton*) that "according to well-established principle" a claim in conversion was "incapable of

⁴⁶ This mode of operation should be contrasted with litigation lenders which charge interest on funds lent to clients to cover disbursements, legal fees and living expenses but defer repayment until settlement of the case. See, eg Impact Capital Ltd, at <http://www.impactcapital.com.au> viewed 4 January 2008.

⁴⁷ At <http://www.imf.com.au/funding.asp?content=fundingforms> viewed 23 May 2008.

⁴⁸ See http://www.imf.com.au/forms/IMF_FundingAgreement_NonInsolvency071121b.pdf viewed 23 May 2008.

⁴⁹ See http://www.imf.com.au/forms/IMF_FundingAgreement_NonInsolvency071121b.pdf viewed 23 May 2008.

⁵⁰ It was held by French J in *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1 at [51] that "the arrangements between IMF and the applicants do not constitute an assignment of the applicants' cause of action. The contractual obligation to pay a percentage of the sum (if any) recovered in the proceedings does not, without more, amount to such an assignment".

⁵¹ For example, the Hillcrest Litigation Services webpage provides the following paraphrase of its litigation funding agreement: "in consideration of the Company providing such funding to the client, the client assigns to the Company an agreed percentage of the balance of the Settlement Sum", see <http://www.hillcrestlitigation.com.au> viewed 14 May 2008.

⁵² Meagher R, Heydon D and Leeming M, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, LexisNexis, 2002), p 280.

⁵³ Meagher et al, n 52, p 280; *Poulton v Commonwealth* (1953) 89 CLR 540 at 602.

⁵⁴ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 at 703D per Lord Roskill.

⁵⁵ See discussion in Walters A and Peysner J, "Event-triggered Financing of Civil Claims: Lawyers, Insurers and the Common Law" (1999) 8 Nottingham LJ 1 at 13ff.

assignment either at law or in equity”.⁵⁶ Statutory claims have also been held not to be assignable.⁵⁷ Although the issue was discussed by the High Court in *Fostif*, it did not overrule *Poulton* and various opinions have been expressed by Australian judges as to whether *Trendtex* can be applied in Australia without the High Court overruling *Poulton*.⁵⁸ Moreover, *Trendtex* has been interpreted in Australia to require that the assignee have an interest in the claim prior to or regardless of the assignment.⁵⁹ Litigation funding companies are unlikely to have an interest in the claim prior to the execution of a funding agreement. Accordingly, assignments of claims in tort have recently been held to be invalid⁶⁰ and litigation funding agreements are vulnerable to judges interpreting them to be de facto assignments of a bare right of action and thereby invalid.⁶¹

Trafficking in litigation

What does it mean, socially and professionally, for litigators to spur into action those whose claims were neither pressing nor large, but who belong to a formidably large group of similarly unenthusiastic pseudo-litigants? Apparently, it produces major litigation, enthused ... by the money it promises for funders and lawyers. But who is to say, and on what grounds, that this kind of money ... does not, in reality, provide justice where formerly access to it was too expensive?⁶²

In this quote Walker clearly addresses the question about trafficking in litigation, an issue which divided the majority and the minority in *Fostif*. One of the allegations regarding litigation funders is that they foment litigation by cultivating claims which otherwise would not have been brought. The LFCs respond that they provide access to justice and that their commercial requirement that risk is assessed by a rigorous assessment of the merits of the case allows for the screening of frivolous claims. But, as discussed above, the concern about fomenting litigation is wider than frivolous claims. This is clear from the history of maintenance and champerty, also discussed above. However, pinpointing the difference between optimal litigation for socially beneficial outcomes and suboptimal trafficking in litigation is difficult.

It is important to note that the early cases which explored litigation funding centred on insolvency. In the insolvency context, claims that were unviable were readily assigned by the trustee

⁵⁶ *Poulton v Commonwealth* (1953) 89 CLR 540 at 602.

⁵⁷ For example, a claim in damages under s 82 of the *Trade Practices Act 1974* (Cth), see *Park v Allied Mortgages Corp Ltd* (1993) ATPR (Digest) 46-105, *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* (2006) 236 ALR 720; 70 IPR 146 at [50]-[58].

⁵⁸ See the discussion of Gyles J in *Tosich v Tasman Investment Management Ltd* [2008] FCA 377 at [32]. His Honour noted that the most negative opinions have been expressed by judges of the Federal Court, eg *National Mutual Property Services (Aust) Pty Ltd v Citibank Savings Ltd (No 4)* (1995) 132 ALR 514; *Chapman v Luminis Pty Ltd (No 4)* (2001) 123 FCR 62; *Deloitte Touche Tohmatsu v Cridlands Pty Ltd* (2003) 134 FCR 474; and *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd* (2006) 236 ALR 720; 70 IPR 146. However, McDougall and Finkelstein JJ have taken the wider view in *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* (2004) 220 ALR 267 and *TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd (No)* (2007) 158 FCR 444 respectively.

⁵⁹ *Tosich v Tasman Investment Management Ltd* [2008] FCA 377 at [34].

⁶⁰ *Tosich v Tasman Investment Management Ltd* [2008] FCA 377 at [38].

⁶¹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [261]; *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139 at 163; [2003] WASCA 299 at [134] per Templeman J (Parker, Wheeler and Pullin JJ concurring). Note, however, that Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 made the following comments in response to a submission that the LFC in that case had acquired a degree of control over the litigation that was tantamount to it having taken an assignment of the cause of action: “In my view, a statement that there has been, in effect, an assignment of a cause of action, is a statement of a conclusion that the degree of control obtained by the putative ‘assignee’ is such as to raise a reasonable apprehension of abuse of process. Such a finding requires the same examination of the details of the agreements as would be necessary to find abuse of process without reference to assignment.”

⁶² Walker SC B, *Lawyers and Money* (2005 Lawyers’ Lecture, St James Ethics Centre, 18 October 2005) available at <http://www.ethics.org.au/about-ethics/ethics-centre-articles/ethics-subjects/law-and-justice/article-0465.html> viewed 23 May 2008.

in bankruptcy or the liquidator, since the insolvency of the claimant itself presented additional barriers to enforcement of claims. The unsecured creditors were often unwilling to take the risk of litigation to aid recovery.⁶³

The focus shifts when the plaintiff is solvent but there are significant incentives for the plaintiff to decline to bring proceedings or, in Galanter's words, to rationally "lump it".⁶⁴ In a comprehensive study published in 1981, Miller and Sarat found that over one-quarter of those with reported "middle range" grievances (ie involving the equivalent of \$1,000 or more) did not pursue the matter by making a claim, even though they had perceived an injury.⁶⁵ Viewed from the financial side, it is clear that litigation is expensive and, even if a potential claimant is advised that her case is meritorious, considerable expenditure may occur before an award of damages can be used to fund it.⁶⁶ Therefore, "individuals who are risk averse or liquidity constrained may be prevented from bringing a case".⁶⁷

In concluding that trafficking in litigation exists as a residual category of abuse of process,⁶⁸ Callinan and Heydon JJ posited a test for trafficking that is based on the intention of the right-bearer:

It is one thing to fund plaintiffs who wish to sue independently of the persuasion of the funder. It is another thing to fund plaintiffs who, but for the funding, would not have sued at all.⁶⁹

There are many reasons why a right-holder would not sue.⁷⁰ In the scenario discussed above, the potential claimant has perceived an injury and recognised the right to sue but has made a rational choice not to pursue the claim due to resources. In a second scenario she has perceived an injury but has not recognised the right to sue. However, through the provision of information by lawyers and funders a conscious decision is made to proceed. These two categories were described by Kirby J in *Fostif*:

By "organising" persons into a legal action for the vindication of their legal rights, [these] proceedings are not creating controversies that did not exist. Controversies pre-existed the proceedings, even if all those involved in them were unaware of, or unwilling earlier to pursue, their rights.⁷¹

In these two categories the activities of the LFCs may facilitate access to justice, particularly for those with small claims.

A third scenario is more problematic because the right-holder has no perception of injury and no knowledge of a right to sue; however, through the provision of information by lawyers and funders a conscious decision is made to proceed. The right-holder is ambivalent or uninterested in vindicating a pre-existing right other than to secure the proceeds of judgment or a settlement. The claim is therefore

⁶³ Aitken L, "'Litigation Lending' After *Fostif*: An Advance in Consumer Protection, or a Licence to 'Bottomfeeders'?" (2006) 28(1) Syd L R 171 at 173.

⁶⁴ Galanter M, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 UCLA L Rev 4 at 15.

⁶⁵ Miller RE and Sarat A, "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1980-1981) 15 Law & Soc'y Rev 525 at 527.

⁶⁶ Kirstein R and Rickman N, "Third Party Contingency Contracts in Settlement and Litigation" (2004) 160 *Journal of Institutional and Theoretical Economics* 1 at 2.

⁶⁷ Kirstein and Rickman, n 66 at 2.

⁶⁸ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [259].

⁶⁹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [274].

⁷⁰ See generally, Felstiner W, Abel R and Sarat A, "Emergence and Transformation of Disputes: Naming, Blaming, Claiming" (1980-1981) 15 Law & Soc'y Rev 631 and Miller and Sarat, n 65.

⁷¹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [202].

a windfall.⁷² The *Fostif* case falls into the windfall category due to the poor design of the substantive law.⁷³ More commonly windfall claims lack merit but rely on defendants choosing to settle rather than incur the costs of defending them.⁷⁴

The “undeserving” nature of windfall claims has led to several expressions of moral hazard by judges, particularly where there is an allegation of “claims harvesting” in proceedings.⁷⁵ Moreover, in *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* (2007) 158 FCR 417 the absence of a desire on the part of a right-holder to quell a controversy led Rares J to conclude that the proceedings were an abuse of process. He considered that the proceedings represented “the form, but not the substance, of a basis to invoke the exercise of the judicial power”.⁷⁶

However, proving that an individual proceeding is a windfall claim is difficult.⁷⁷ More importantly, attempts to establish systemic abuse and claims harvesting have been unsuccessful⁷⁸ and satellite litigation by defendants contributes to the overall concern about excessive litigation.

The United Kingdom has tackled this issue by regulating claims management services. Companies providing such services are required to be authorised by a specialist regulator,⁷⁹ currently situated in the Ministry of Justice. The Claims Management Services Regulator must promote competence and professional standards amongst the service providers as well as protecting users of these services, eg by handling complaints about the conduct of service providers.⁸⁰ A tribunal has been established to hear appeals from certain decisions of the regulator.⁸¹

It is axiomatic that procedures must be rationed within the civil justice system,⁸² and it could be argued that the additional resources allocated to funded litigation would be justified if positive distributional effects of that litigation could be demonstrated. In other words, if litigation funding

⁷² For a discussion of windfall claims see Spender P, “Securities Class Actions: A View from the Land of the Great White Shareholder” (2002) 31 *Common Law World Review* 123 at 146-149.

⁷³ Because the retailers were not required to prove loss in order to claim the licence fees the claim was meritorious even though the fees had been passed on to consumers.

⁷⁴ Telstra alleges that even though a securities class action involving 28,000 shareholders was “hopeless” it agreed to the payout because it was cheaper to settle than contest the case. See *Taylor v Telstra Corp Ltd* [2007] FCA 2008 and Priest M, “Crackdown on Class Actions” *Australian Financial Review* (7 December 2007), pp 1, 61.

⁷⁵ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [272]-[273], *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 per Gleeson CJ, Gaudron and Hayne JJ at [5], per Kirby J at [114] - [116] per Callinan J at [204]. Note the comments by Bryan and Ellinghaus regarding the Full Federal Court decision in the *Roxborough* litigation ((1999) 167 ALR 326) – “The moral force of the ‘windfall’ aspect of the case pervades the majority judgment”: Bryan M and Ellinghaus M, “Fault Lines in the Law of Obligations: *Roxborough v Rothmans of Pall Mall Australia Ltd*” (2000) 22 Syd LR 636 at 667.

⁷⁶ *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* (2007) 158 FCR 417 per Rares J in dissent at [116].

⁷⁷ The RAND Institute for Civil Justice studied 10 class actions, six of which were consumer class actions. After undertaking extensive inquiries, they stated, “[t]o us, it seems unclear which, if any, of the ten class actions ‘just weren’t worth it’ and which were. Viewed from one perspective, the claims appear meritorious and the behaviour of the defendant blameworthy; viewed from another the claims appear trivial and trumped up, and the defendant’s behaviour seems proper”: Hensler D, Dombey-Moore B, Giddens E, Gross J, Moller E and Pace N, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Executive Summary (RAND Institute for Civil Justice, 1 January 1999), p 25, <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> viewed 13 May 2008.

⁷⁸ A United States congressional inquiry into strike suits and extortionate litigation in 1995 was unable to “definitively assert” that warrantless class action suits were on the rise: Shorter G, *Securities Litigation Reform: Have Frivolous Shareholder Suits Exploded?* (CRS-34, 16 May 1995) quoted by Avery J, “Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995” (1996) 51 *The Business Lawyer* 335 at fn 21.

⁷⁹ The Claims Management Services Regulator, established by the *Compensation Act 2006* (UK), s 11.

⁸⁰ *Compensation Act 2006* (UK), s 5.

⁸¹ *Compensation Act 2006* (UK), s 12.

⁸² Gravelle H, “Regulating the Market for Access to Civil Justice” in Zuckerman A and Cranston R (eds), *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, 1995), p 289. See also Zuckerman A, “A Reform of Civil Procedure: Rationing Procedure Rather Than Access to Justice” (1995) 22 *Journal of Law and Society* 155.

increased access to courts for a wide group of plaintiffs the additional resources allocated to them would be justified. This issue will now be examined.

The distribution of “access to justice”

Claims that litigation funding improves access to justice were pivotal to the respondent’s arguments in the High Court in *Fostif* and they were highly influential in the New South Wales Court of Appeal.⁸³ However, the conception of access to justice championed in *Fostif* is not broadly based. Rather, it demonstrates the commoditisation of the concept and the decline in its recognition as a public good.⁸⁴ Parker’s analysis of access to justice movements from the 1960s confirms this decline and shows an increasingly pragmatic acceptance of market models as the public money for legal aid diminishes.⁸⁵

This conception of access to justice will facilitate certain claims, but mainly economic claims, and more particularly large claims or small claims that can be conveniently aggregated, such as consumer and securities class actions. Tort, either mass torts or individual claims, may be unviable and therefore not financed.⁸⁶ Importantly, the areas where the demand for legal services is greatest – family, housing, credit/debt, and employment⁸⁷ – will be unserved. Moreover, the LFCs will have minimal impact upon the middle class (except for retail investors and some consumers) where the decline in access to justice has been most marked, leading one commentator to quip that litigation is only available for “the rich, very poor, large corporates or governments”.⁸⁸

Comprehensive regulation of this area would examine supplemental funding products to those offered by the LFCs, eg conditional fee arrangements, contingent legal assistance funds (CLAFs)⁸⁹ or legal expenses insurance (LEI).⁹⁰ Although the Australian experience of LEI is patchy,⁹¹ it has thrived

⁸³ In the New South Wales Court of Appeal decision in *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* (2005) 63 NSWLR 203 at [105], Mason P stated that that litigation should be regarded as falling within the principle that “[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation”, quoting *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA 92.

⁸⁴ Sommerlad has argued that the New Labour access to justice model in the United Kingdom fails to clarify whether legal services are a public good or a commodity and, if so, what kind of good or commodity they are: Sommerlad H, “Some Reflections on the Relationship Between Citizenship, Access to Justice and the Reform of Legal Aid” (2004) 31 *Journal of Law and Society* 345 at 364

⁸⁵ Parker C, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999), p 32. For a discussion of the political aspects of funding for law reform, see Lavarch M, “Fighting the Fiends from Finance” in Stacy H and Lavarch M (eds) *Beyond the Adversarial System* (Federation Press, 1999), pp 10-20; legal aid funding, see Richardson M and Reynolds S, “The Shrinking Public Purse for Legal Aid in New South Wales, Australia” (1994) *Maryland Journal of Contemporary Legal Issues* 349; the corporatisation of legal aid, see Noone M, “State of Australian Legal Aid” (2001) 29 FL Rev 37.

⁸⁶ Litigation funding companies are generally not involved in personal injury matters or other smaller claims, as the associated costs and risks make them unviable: Standing Committee of Attorneys-General, n 4, p 4.

⁸⁷ Scott S, Eyland A, Gray A, Zhou A and Coumarelos C, *Data Digest, A Compendium of Services Usage Data from NSW Legal Assistance and Dispute Resolution Services 1999-2002* (Law and Justice Foundation of NSW, 2004) available at <http://www.lawfoundation.net.au> viewed 4 May 2008.

⁸⁸ Dale C, “From the President: An End of Year Challenge” (2004) 78 (12) *Law Society Journal* 4. This shift has been accompanied by a decline in work in areas where plaintiff lawyers assisted middle-class clients by acting on a speculative basis, eg personal injury claims. See Gleeson, n 1, p 8.

⁸⁹ Access to Justice Advisory Committee, *Access to Justice – An Action Plan* (1994), p 268, [10.39]. For a recent example, the Victorian Law Reform Commission (VLRC) Civil Justice Enquiry has raised the option of a cy-pres fund which can be used to create a justice fund to finance access to justice initiatives. See Victorian Law Reform Commission Civil Justice Enquiry, *Summary of Draft Civil Justice Reform Proposals as at 28 June 2007* available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Civil+Justice> viewed 6 May 2008.

⁹⁰ For an overview, see Kritzer H, “Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?” (2002) 80 Tex L Rev 1,943.

⁹¹ Regan F, “Whatever Happened to Legal Expense Insurance?” (2001) 26 Alt LJ 293 and Withers B, *Funding Litigation and Legal Services* (Australian Legal Convention, October 1999).

in other jurisdictions.⁹² The United Kingdom has seen a significant uptake of LEI products, particularly “after the event” insurance, and its experience demonstrates that it is a viable option for middle class clients, particularly where there is sufficient volume in the market to reduce the cost of premiums.⁹³ Importantly, LEI products have been carefully regulated in the United Kingdom, as an incident of both general financial and legal services regulation. This gives clients access to mechanisms such as the financial ombudsman⁹⁴ but provisions also control conflicts of interest and allow clients freedom in their choice of lawyers.⁹⁵ These issues will be explored further below.

Intermeddling

As discussed above, the doctrine of champerty arose to combat intermeddling in the courts’ processes by “men of power”. Although litigation funding agreements will vary as to the control conferred upon an LFC, the case law reveals that LFCs are often integrally involved in funded litigation and may seek further control, eg by seeking access to discovered documents⁹⁶ or conveying clients’ instructions to solicitors acting for other parties.⁹⁷ This type of involvement may amount to intermeddling. However, impermissible meddling by third parties in litigation is not confined to the LFCs,⁹⁸ and in individual cases the court can use its powers under the rules of court or the inherent power to refuse requests by LFCs, or to find that an abuse of process has occurred, or to find that the funding agreement is unenforceable.⁹⁹

Systemic intermeddling is more complex and in the view of the author has occurred by LFCs imposing limiting conditions upon members of classes in opt-out class actions. In several recent decisions¹⁰⁰ there has been disputation about class actions formed by a limiting condition, ie people who have entered into a funding agreement with a particular LFC.

A limiting condition is designed “to capture the class so as to limit the group to those who agree to a funder’s terms”.¹⁰¹ Litigation funding companies require a defined pool of participants in the proceedings in order to calculate the potential proceeds of a judgment or settlement with greater certainty.¹⁰² Limiting conditions provide commercial certainty to LFCs but they undermine

⁹² Particularly Germany with an uptake of 44% of households and Sweden where the uptake is 97%: Flood J and Whyte A, “What’s Wrong with Legal Aid? Lessons from Outside the UK” (2006) 25 *Civil Justice Quarterly* 80 at 92, 93, citing Kilian M and Regan F, “Legal Aid and Legal Expenses Insurance – Two Sides of the Same Coin? The Experience from Germany and Sweden” (2004) 11 *International Journal of the Legal Profession* 233. Commentators, however, warn of the differences between these jurisdictions and United Kingdom/Australia, particularly the existence of scale fees and a large risk pool that has built up over time: Flood and Whyte.

⁹³ FWD, *The Market for “BTE” Legal Expenses Insurance, July 2007*, pp 14-15, <http://www.justice.gov.uk/docs/market-bte-legal-expenses-insurance.pdf> viewed 6 May 2008.

⁹⁴ *Financial Services and Markets Act 2000* (UK), Pt XVI.

⁹⁵ *The Insurance Companies (Legal Expenses Insurance) Regulations 1990* (UK), rr 5, 6.

⁹⁶ This application was permitted by Finkelstein J in *Cadence Asset Management Pty Ltd v Concept Sports Ltd* [2006] FCA 711 and refused by French J in *QPSX Ltd v Ericsson Australia Ltd (No 5)* [2007] FCA 244.

⁹⁷ *Gurtler v Finance Now Pty Ltd* [2007] FCA 477 at [52] per Finn J.

⁹⁸ For example, *Hill v Smithfield Service Centre Pty Ltd (in liq)* (2002) 171 FLR 154; 43 ACSR 470 where the applicant’s purpose in an examination summons was to intermeddle in matters not directly of concern to him and thereby gain a forensic advantage not otherwise available to him. The examination summons was discharged for abuse of process (at [51]).

⁹⁹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [92].

¹⁰⁰ See discussion supra and *O’Sullivan v Challenger Managed Investments Ltd* (2007) 214 FLR 1; [2007] NSWSC 383, *Jameson v Professional Investment Services Pty Ltd* (2007) 215 FLR 377; [2007] NSWSC 1437.

¹⁰¹ Law Council of Australia, *Litigation Funding* (submission to the Standing Committee of Attorneys-General, 14 September 2006) at [57].

¹⁰² Slade B, *Australian Shareholders and Extraterritorial Class Actions* (paper presented at the International Class Actions Conference, Melbourne, December 2005) at [7.5].

participation by right-holders in class actions. For example, IMF has announced plans to fund claims by “up to 30 clients” who suffered loss in the collapse of Opes Prime¹⁰³ out of a total number of 1,200 potential members.¹⁰⁴

In opt-out class action proceedings, exemplified by Pt IVA of the *Federal Court of Australia Act 1976* (Cth), the description of the class includes all right-holders other than those who have opted out. This procedure is to be contrasted with an opt-in regime where the members of the group must take positive steps to be part of the proceedings, eg by being a named party or giving their consent.¹⁰⁵ It is well documented that participation rates by class members are lower in opt-in than opt-out schemes.¹⁰⁶ Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 (*Dorajay*)¹⁰⁷ considered that an opt-out definition that required the members of a class to enter into a limiting condition established an illegitimate opt-in procedure which was “inconsistent with the terms and policy of Pt IVA”.¹⁰⁸ Similarly, Morabito stated that such restrictions are:

a far cry from the class action landscape ... envisaged by the ALRC and by the Federal Parliament when they selected the opt out mechanism.¹⁰⁹

If an opt-out class is broadly described, eg “shareholders of X company on Y dates”, the regime can provide wider access to justice than a narrow description, eg “shareholders of X company on Y dates who have signed a funding agreement with LFC by Z date (Z date being a date before the commencement of proceedings)”. In the first example, members of the class who have a cause of action may participate at various stages as they find out about the action. However, in the second example the class will be closed to later shareholders after the proceedings are commenced. Narrow descriptions potentially lead to fragmentation of opt-out proceedings by the creation of a series of smaller groups but at worst they exclude the hesitant, the tardy or the less well-informed from prosecution of their causes of action.

The Full Federal Court in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 (*Multiplex*) upheld the validity of the narrow description. Their Honours distinguished Stone J’s decision in *Dorajay* upon narrow grounds.¹¹⁰ The question for the Full Court in *Multiplex* was whether the respondent had made out a case under s 33N of the *Federal Court of Australia Act* for discontinuance of the action under the class action procedures.¹¹¹ While their Honours were confident that s 33N was not engaged, the judgment is replete with

¹⁰³ Kruger C, “Catch 22 for Opes Prime clients”, *Sydney Morning Herald* (21 April 2008), p 23.

¹⁰⁴ Kohler A, “Opes: The Full Story”, *Business Spectator* (4 April 2008) at <http://www.businessspectator.com.au> viewed 16 May 2008.

¹⁰⁵ The opt-out regimes under the *Federal Court of Australia Act 1976* (Cth), Pt IVA and the *Supreme Court Act 1986* (Vic), Pt 4A, state that the members of the group must have the *same, similar or related* interest, and therefore provide much greater flexibility in the formation of the group. The court rules dealing with opt-in proceedings, eg *Court Procedures Rules 2006* (ACT), r 266, generally state that the members of the group must have the “same interest”.

¹⁰⁶ See generally Mulheron R, “Justice Enhanced: Framing an Opt-Out Class Action for England” (2007) 70 *Modern Law Review* 550.

¹⁰⁷ Followed in *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449.

¹⁰⁸ *Federal Court of Australia Act 1976* (Cth), Pt IVA; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394 at [117], [125].

¹⁰⁹ Morabito V, “Class Actions Instituted Only for the Benefit of the Clients of the Class Representative’s Solicitors” (2007) 29 *Syd LR* 5 at 33.

¹¹⁰ The Full Court held that *Dorajay* was distinguishable because in that case later shareholders could join the class action after the commencement of proceedings, thus leading to her Honour’s conclusion that they would need to opt-in to do so: *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [31].

¹¹¹ The *Federal Court of Australia Act 1976* (Cth), s 33N, states:

- (1) The Court may, on application by the respondent or of its own motion, order that a proceeding no longer continue under this Part where it is satisfied that it is in the interests of justice to do so because:
 - (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
 - (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or

reservations about the limited class action. For example:

There is force in the submission that the narrowness of the group and its self-interest may provide legitimate concerns for the administration of justice.¹¹²

and

It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.¹¹³

In a short concurring judgment French J stated that there “may be policy questions, for consideration by the legislature, relating to the role of litigation funders in representative proceedings”.¹¹⁴

The efficacy of existing regulation

The majority in *Fostif* considered that fears about the adverse effects of litigation funding upon the processes of litigation could be dealt with by the existing doctrines of abuse of process, and “other procedural and substantive elements of the courts process”, as well as the rules regulating lawyers’ duties to the court.¹¹⁵ Their Honours also considered that there is no ascertainable objective standard against which the fairness of the funding contract can be measured,¹¹⁶ nor did the courts have the power to relieve clients of the bargain struck with LFCs.¹¹⁷

Taking each of these comments in turn, it will be demonstrated that there are gaps in the existing regime which need a broader regulatory approach.

Oversight by the courts

The courts have a range of powers under the rules and the inherent powers to control litigation. Under the inherent jurisdiction a court may grant interlocutory relief against third parties in order to facilitate the administration of justice.¹¹⁸ Therefore, a court may make orders binding an LFC which, if breached, would amount to a contempt of court. But, as observed by Callinan and Heydon JJ in *Fostif*:

No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners.¹¹⁹

Further there are territorial and temporal limitations on the inherent jurisdiction. For example, an order under the inherent jurisdiction may not bind a foreign LFC,¹²⁰ nor would it necessarily extend to acts undertaken prior to the commencement of proceedings.¹²¹

Importantly LFCs are not officers of the court and are not necessarily bound by the rules of court as they are not generally a party in litigation. Therefore, they are not bound by obligations of proportionality under the rules.¹²² In *Hall v Poolman* (2007) 215 FLR 243; [2007] NSWSC 1330

- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

¹¹² *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [198].

¹¹³ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [117].

¹¹⁴ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200 at [1].

¹¹⁵ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [93].

¹¹⁶ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [92].

¹¹⁷ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [92].

¹¹⁸ *Cardile v LED Builders* (1999) 198 CLR 380; 162 ALR 294.

¹¹⁹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [266].

¹²⁰ *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 44 per Nicholls LJ.

¹²¹ *British American Tobacco Australia Services Ltd v Cowell (No 2)* (2003) 8 VR 571. See generally Spender P, “McCabe: Unresolved Questions About Truth and Justice” (2004) 12 TLJ 155 in text at fn 170-183.

¹²² For example, *Court Procedure Rules 1937* (ACT), r 21; *Civil Procedure Act 2005* (NSW), s 56; *Supreme Court Rules 1987* (NT), r 1.10; *Uniform Civil Procedure Rules 1999* (Qld), r 5; *Supreme Court Civil Rules 2005* (SA), r 3; *Supreme Court (General Civil Procedure) Rules 1996* (Vic), r 1.14; *Rules of the Supreme Court 1971* (WA), O 1, r 4B.

Palmer J invoked the court's supervisory powers over liquidators¹²³ to order an inquiry after a liquidator had incurred costs of approximately \$2 million in funded proceedings when aware that the creditors would receive no or very little dividend from the proceedings.¹²⁴ After the deduction of costs, the liquidator's fee and the LFC's success fee, the creditors of the company stood to gain about 1.3 cents in the dollar.¹²⁵

A proposal for harmonised rules on litigation funding has been made by the Council of Chief Justices.¹²⁶ This would form part of broader regulatory action which is advocated by this paper.

Protection of clients

Although the lawyers acting for funded clients owe duties to their client and to the court, under the funding agreement described above it is arguable that the retainer is with the LFC not with the right-holder.¹²⁷ The LFC appoints¹²⁸ and instructs the lawyers, therefore acting as an intermediary between the lawyer and "client". In the funding agreement in *Fostif* the solicitors on the record were barred from liaising with the plaintiff.¹²⁹ Clearly such arrangements have been put in place by LFCs to mitigate risk but the control that is thereby conferred upon the LFC has been viewed negatively by some judges,¹³⁰ while others are resigned to the so-called commercial reality of the arrangement.¹³¹

In the view of the author a direct retainer between the right-holder and his or her lawyer is critical to give funded clients access to the fiduciary and legal duties owed by the lawyer. Under current arrangements there is significant danger that conflicts of interest will arise, particularly between the interests of the LFC and those of the client. In the absence of a direct retainer, regulation similar to the United Kingdom model (which controls conflicts of interest and allows clients their choice of lawyers) may be necessary.¹³²

It is appropriate to amend the court rules to require the filing of funding agreements with requisite confidentiality safeguards. This will allow courts to monitor oppressive terms and to detect ad hoc incidents of abuse of process. Confidentiality would discourage opportunistic satellite litigation by defendants about the funding agreement.

However, effective regulation of the funding agreements would need to go much further than court supervision. Assuming that the market for litigation funding will grow, it may be necessary to consider how LFCs and funding agreements should be regulated by a body such as ASIC as incidents of uniform credit or financial services regulation. It is noteworthy that the March 2008 meeting of the Council of Australian Governments gave in-principle agreement to transferring the power to regulate credit to the Federal Government.¹³³ Therefore, Commonwealth credit regulation is a likely outcome which in turn may achieve a coordinated approach to these types of products. Regulation may pick

¹²³ Pursuant to *Corporations Act 2001* (Cth), s 536(1)(a).

¹²⁴ *Hall v Poolman* (2007) 215 FLR 243; [2007] NSWSC 1330 at [560].

¹²⁵ *Hall v Poolman* (2007) 215 FLR 243; [2007] NSWSC 1330 at [366].

¹²⁶ Lindgren K, *Class Action and Access to Justice* (International Class Actions Conference, 25 October 2007), p 11.

¹²⁷ Note, for example, IMF (Australia) Ltd Standard Lawyers Terms (Non Insolvency), cl 8.2, which gives the power to IMF to terminate the appointment of the lawyers to provide the legal work, see http://www.imf.com.au/forms/IMF_SolicitorFeeTerms_NonInsolvency071121b.pdf viewed 23 May 2008.

¹²⁸ IMF – Investigation, Management and Funding Agreement (Non Insolvency), cl 11.1, see http://www.imf.com.au/forms/IMF_FundingAgreement_NonInsolvency071121b.pdf viewed 23 May 2008.

¹²⁹ *Campbells Cash and Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at [245].

¹³⁰ For example, Einstein J at first instance in *Keelhall Pty Ltd (t/as Foodtown Dalmeny) v IGA Distribution Pty Ltd* (2003) 54 ATR 75.

¹³¹ For example, Ipp J in *Project 28 Pty Ltd v Barr* [2005] NSWCA 240.

¹³² *The Insurance Companies (Legal Expenses Insurance) Regulations 1990* (UK), rr 5, 6.

¹³³ Communique, Council Of Australian Governments' Meeting Adelaide 26 March 2008, http://www.coag.gov.au/coag_meeting_outcomes/archive.cfm viewed 23 May 2008; Productivity Commission, *Review of Australia's Consumer Policy Framework, Final Report*, Recommendation 5.2, available at <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport> viewed 23 May 2008; Senator The Hon Nick Sherry, *The Future of Regulation in Your Industry* (speech to the Mortgage and

and choose between, for example, control of usury under the consumer credit laws and differential protection of retail and wholesale clients under financial services regulation.

CONCLUSION

This article has highlighted uncertainties and controversies that remain unresolved after the *Fostif* case and asserts that a nationally coordinated approach is needed to deal with the challenges presented by litigation funding. Such regulation would consider monitoring by ASIC of litigation funding products as an incident of that body's general financial or credit product regulation. It would also investigate litigation funding products which facilitate smaller individual claims such as legal expenses insurance and after-the-event insurance. Consideration should also be given to the development of a claims management services regulator as an incident of legal services regulation.

Court rules should be amended to require the filing of funding agreements with requisite confidentiality safeguards to discourage satellite litigation by defendants. It is submitted that the court's existing procedures would suffice to control intermeddling in individual cases. However, managing systemic intermeddling, exemplified by the rise of the limited class action, is more complex and may in the first instance require empirical work to ascertain whether limited class actions diminish class members' access to courts.

The discussion above indicates that the doctrines of maintenance and champerty still have salience. However, effective regulation must move outside case law to embrace different instruments and contexts of regulation. This capacity to respond will hopefully diminish the "remorseless mercantisation of legal practice"¹³⁴ and reassert the intrinsic value of access to justice.

Finance Association of Australia National Convention, Sydney, 16 May 2008) available at <http://www.minscl.treasurer.gov.au> viewed 23 May 2008.

¹³⁴ Gleeson, n 1.