U.S. CHAMBER
Institute for Legal Reform

Improving the Environment for Business in Australia

A Proposal for Reforming Oversight of Third Party Litigation Financing

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Prepared by the U.S. Chamber Institute for Legal Reform

Introduction

In recent years, the use of third party litigation financing ("TPLF") in Australia has resulted in a notable proliferation of class actions and other funded lawsuits. The growth of the lawsuit investment industry has occurred largely without government oversight, giving rise to serious issues yet to be addressed. As a result, the increase in TPLF-financed litigation has in turn increased the cost of doing business in Australia, a trend which will continue if the current situation remains unchanged. The U.S. Chamber Institute for Legal Reform ("ILR") has grave concerns about this development, which has implications not only for the Australian civil justice system and economy but globally as well. ILR supports reform of the oversight regime governing TPLF in Australia in a way that will address the problems that the growth of TPLF poses.

The TPLF industry began as a financing instrument for the insolvency market. Its robust expansion, however, can be traced to the High Court of Australia's 2006 decision in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd.*[1] A majority of the High Court held that a third party investor in litigation may exercise significant control over the litigation and that this control is not an abuse of process and does not offend public policy where maintenance and champerty have been abolished as crimes and torts. The minority opinion harshly criticised third party investments in litigation, stating that the "purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy."[2] The majority, however, held that once the doctrines of champerty and maintenance were eliminated, there was no public policy against third party funding and a funder's control of litigation. The High Court's endorsement of a funder's control over the conduct of cases goes further than any other jurisdiction of which ILR is aware in opening litigation to the control of market forces.

Over the past seven years, the resulting acceleration of litigation instigated and financed by TPLF companies has gone largely unchecked, with new funders entering the market to share in lucrative returns from the forced-settlement model that has become standard in the industry.[3] In 2012, securities class action settlements alone exceeded $480 million, or nearly half of total settlements of that kind in Australia in the past twenty years. Over half of these 2012 settled proceedings were funded by TPLF.[4] This signals a global trend in which Australia is the leader.

Despite this dramatic change in the litigation landscape, the government has taken a largely hands-off approach to oversight of the TPLF industry. Indeed, the current state of affairs is an anomaly. Although Australian courts have characterized TPLF in different ways, TPLF investors fundamentally provide a financial service to claimants. Like other financial service providers, they conduct funding activity and manage financial risk (in this instance, litigation risk). Yet, unlike other financial service providers, TPLF companies operate with minimal oversight. Recent measures such as *Corporations Amendment Regulation 2012 (No. 6)* and the Australian Securities and Investments Commission's Regulatory Guide 248[5] are insufficient safeguards, allowing TPLF investors to mirror the role of lawyers by exerting significant control over litigation without the constraints applicable to the legal profession. This conspicuous gap in the regulatory regime encourages speculation on litigation in Australia from investors around the world, with a near total lack of accountability.[6]

The unchecked acceleration of litigation controlled by strangers to the underlying dispute has implications for Australia's civil justice system, the cost of doing business in Australia and its global reputation as an investment destination. Effective oversight should be the natural and necessary consequence of TPLF's prevalence in Australia. *Fostif* created the opportunity for pervasive third party investment in, and control over, lawsuits; the exercise of that opportunity requires appropriate oversight of how those investments are made and how that control is exercised in order to protect consumers, business and the courts.

The time has come to reform the oversight regime applicable to TPLF investors.[7] As this paper will describe in more detail, a combination of three policy actions will mitigate the risks posed and harms caused by TPLF:

A. COMMONWEALTH LEGISLATION

- Commonwealth legislation should be enacted that establishes a licensing regime for TPLF investors. They should be licensed to ensure their fitness, including their capital adequacy. This regime should be enforced by an experienced independent statutory body, which should have the authority to commence proceedings, obtain civil penalties for violations, make banning orders and vary the TPLF license conditions.

B. LEGISLATIVE SAFEGUARDS

- Oversight reforms should include legislative safeguards against the risks inherent in TPLF. These legislative changes would not require significant modifications to the current statutory scheme. Rather, they would represent a "light-touch" approach to regulation that would nonetheless provide significant improvements to the current situation.

C. COURT AND OTHER RULES

- Commonwealth and state legislation or court rule amendments should be passed:

  (a) specifying that TPLF investors are jointly and severally liable for adverse costs orders; and

  (b) clarifying that TPLF investors may not engage in actions that are tantamount to the practice of law or hold themselves out to the public as lawyers for hire without the appropriate professional licensing applicable to all lawyers.

What is TPLF?

A TPLF investor is a specialized investment firm that has no other connection to a case but provides financing to claimants or their lawyers for litigation costs, including lawyers' fees, court costs and expert-witness fees, in exchange for a portion of any recovery from the dispute. The claimant's law firm and the TPLF investor typically work closely together to identify claims to file and to solicit claimants in whose name to file them. In addition, TPLF investors monitor the litigation, frequently instruct lawyers (or at least consult with them) regarding litigation strategy, and often drive settlement negotiations.[8] While TPLF has been used to finance insolvency and other proceedings, the principal area of growth has been the prosecution of complex torts or business disputes and class actions in return for a share of any award.

The investor's return is usually a portion of any recovery that the claimant receives from the resolution of the dispute, whether through final judgment or settlement. The amount of recovery the TPLF investor will charge turns on several factors, including the amount of money advanced, the length of time until recovery, the potential value of the case and whether the case settles or goes to trial.

TPLF funding arrangements generally are non-recourse (in whole or in part); the recipient of the funds obtains money to pursue a proceeding and is only required to provide a return to the TPLF company if the recipient obtains a damages award at trial or settles on favorable terms. The non-recourse nature of TPLF, where the return to the investor is contingent upon the outcome of a specified dispute, is what differentiates TPLF from other forms of credit. On the other hand, funding arrangements may allow the TPLF investor to discontinue funding at any point without constraint or may allow the investor to decline to pay an adverse costs order, leaving the claimants to foot the bill.

> *"This is an area ripe for abuse and the government has let the grass grow under its feet in not identifying and anticipating the extent to which abuses and opportunistic claims are being brought."*
>
> *–Senator George Brandis*

Problems Posed by TPLF

TPLF has at least three negative consequences for the sound administration of civil justice. Several ILR publications, as well as publications by other authors, have explained these consequences in more detail, but briefly they are:

First, TPLF increases the number of claims filed, and in particular, can be expected to prompt an increase in the number of claims of questionable merit. That TPLF increases the number of claims filed is simply an extension of the fact that TPLF increases the number of dollars to fund claims. A 2010 NERA Economic Consulting study of securities class actions in Australia found that "[t]he availability of commercial litigation funding has improved the incentive and ability for investors to initiate class actions."[9] Indeed, the managing director of IMF (Australia), the country's largest TPLF company, stated on ABC TV's *Lateline* that the increased availability of TPLF in Australia is behind the growing number of class actions and large litigation cases.[10]

Moreover, TPLF can be expected to prompt an increase in questionable and meritless claims because TPLF companies are mere investors. They base their funding decisions on the present value of their expected return, of which the likelihood of success at trial is only one component. TPLF providers can accept weaker cases because they can spread the risk of any particular case over their entire portfolio of cases and among their investors.[11]

TPLF's defenders say that investors' willingness to file lawsuits increases "access to justice." What this really means, however, is that TPLF makes it easier for a claimant to file a lawsuit and force a defendant to incur costs to appear and defend against it—and on occasion, force a settlement on purely reputational or legal costs grounds. The United States has had its own experiment with increasing "access to justice": contingent lawyer fees. Contingency fees and TPLF are strikingly similar—in both cases, a claimant can pass off the risk of pursuing a lawsuit to a third party on a non-recourse basis, meaning that the claimant has every incentive to roll the dice and file a claim. But at least in the case of contingent lawyer fees, the ultimate decision of whether a claim is worth filing sits with a lawyer who is bound by professional rules of conduct. In the case of TPLF, the person deciding whether or not a claim is worth filing is a third party investor who may owe no duties to the potential claimant. Thus, while a contingency fee lawyer will decide whether or not to file a claim based at least in part on the strength of its legal merit, a TPLF investor looks at the present value of the expected return, of which the legal merit is only a part.

The most notorious example of TPLF supporting a meritless claim was the investment by a fund associated with Burford Capital Limited in a lawsuit against Chevron filed in an Ecuadorian court alleging environmental contamination in

Lago Agrio, Ecuador. Burford made a $4 million investment with the claimants' lawyers in the Lago Agrio suit in October/November 2010 in exchange for a percentage of any award to the claimants. In February 2011, the Ecuadorian trial court awarded the claimants an $18 billion judgment against Chevron.[12] A New York federal court subsequently issued an injunction against the claimants trying to collect on their judgment after finding "ample" evidence of fraud on the part of the claimants' lawyers.[13] Indeed, long before Burford had made its investment in the case, Chevron had conducted discovery into the conduct of the claimants' lawyers, and at least four courts in the United States had found that the Ecuadorian proceedings were tainted by fraud.[14] An international arbitration tribunal convened under the U.S.-Ecuador Bilateral Investment Treaty and administered by the Permanent Court of Arbitration at The Hague recently ordered the Republic of Ecuador "to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments [against Chevron]."[15]

While Burford has announced it ceased funding,[16] its initial decision to invest $4 million with the claimants' lawyers despite allegations of fraud in the proceedings powerfully demonstrates that TPLF investors have high risk appetites and are willing to back claims of questionable merit. Indeed, Burford sold an interest in its investment in this litigation to another investor.

Second, by inserting a third party into a decision-making role, TPLF diminishes the lawyer-client relationship and sets up conflicts among the investor, the lawyer and the claimant. TPLF investors seek to protect their investments in litigation and exert control over the strategic decisions that, absent TPLF, have traditionally been made by claimants and their counsel. And, unlike a claimant who is interested in vindicating legal rights, the investor is interested solely in its own profits. Moreover, when the claimant's lawyer accedes to the control asserted by the investor, no one remains to protect the claimant's interests—especially when the TPLF investor's interests diverge from the claimant's.[17] ASIC has recognized the conflicts of interest that TPLF creates, and *Corporations Amendment Regulation 2012 (No. 6)* attempts to address them by requiring TPLF investors to have procedures to manage conflicts. Given the TPLF investor's relentless focus on its own profits, and its sole power over the purse, however, ILR does not believe that detrimental conflicts of interest can be managed—they need to be avoided altogether.

The recent case *Kirby v. Centro Properties Limited* provides an example of the conflicts-of-interest problem.[18] *Kirby* involved three related class actions against common defendants—two funded by IMF (Australia) and represented by Maurice Blackburn, and a third funded by Commonwealth Legal Funding LLC and represented by Slater & Gordon. The defendants agreed with IMF (Australia) and Maurice Blackburn that they would move to stay the action funded by Commonwealth Legal Funding LLC if IMF (Australia) and Maurice Blackburn would cause the claimants in their actions to move to incorporate the Commonwealth Legal Funding LLC-funded action into their case. Although the court ultimately incorporated the Commonwealth Legal Funding LLC-funded action into the IMF (Australia)-funded actions, it noted its concern that IMF (Australia) and Maurice Blackburn were conflicted: they had a pecuniary interest in removing Commonwealth Legal Funding LLC as a recipient of settlement funds, but incorporating the Commonwealth Legal Funding LLC-funded action into their actions made a beneficial settlement for their own clients less likely because of the nature of the Commonwealth Legal Funding LLC action and the number of potential claimants in it.

Third, TPLF prolongs litigation by deterring settlement. A plaintiff who must pay a TPLF investor out of the proceeds of any recovery can be expected to reject what may be a fair settlement offer, hoping for a larger sum of money.[19] In addition, litigation funding agreements also contribute to this problem. In Australia, typically these agreements provide the investor a greater percentage of any recovery the longer the dispute is pending. This incentivises TPLF investors to instruct claimants' counsel to reject early settlement offers to attempt to drag out the litigation—which, under *Fostif*, TPLF investors are permitted to do.

Indeed, in the first empirical study of the effects of TPLF, researchers found that increased litigation funding in Australia was "associated with slower case processing, larger backlogs, and increased spending by the courts."[20] The same study unambiguously concluded that, in Australia, "an increase in activity of litigation funders leads to more sclerotic courthouses."[21]

The evidence shows that each of these consequences is already happening. The incidence of filed and threatened law suits with TPLF has steadily increased with new funders entering the market to share in lucrative returns from the forced-settlement model that has become standard in the industry. The class action industry in Australia has matured rapidly over the past 20 years, with the potential to become the jurisdiction of choice for plaintiffs, lawyers and funders promoting class actions.[22] Since 2000, IMF (Australia) has funded 142 completed cases generating revenue of US $1.237 billion, making a gross return on investment of 304 percent.[23] Some outside of Australia are already taking notice. In April 2013, a UK-based "class-action services provider" established offices in Australia after estimating that annual class action settlements in the region will reach US $3.4 billion by 2020, the largest regional total outside the United States.[24] This unchecked acceleration in litigation has implications for Australia's civil justice system, the cost of doing business in Australia and its global reputation as an investment destination.

TPLF funding agreements and actions show that TPLF investors are exerting significant control over litigation they agree to fund, invariably with the sole goal of profit maximisation. This degree of influence arises because the funding agreements generally provide for, among other things, TPLF investors to exercise their discretion to:

(a) investigate the evidentiary basis for the claims so as to assist in the preparation of the case and review whether to continue to provide funding;

(b) investigate the capacity of any defendant to pay any judgment sum;

(c) provide project management services including advising the claimant on strategy, considering the advice of the lawyers and providing day-to-day instructions to the lawyers and seeking compliance with project estimates and timelines; and

(d) pay the costs of litigation (such as the lawyers' fees and investigation costs).

In some TPLF agreements there is an obligation that the claimant must instruct the lawyers to comply with all instructions given by the TPLF investor. Unless the claimant has the prior written consent of the TPLF investor, the claimant is also prevented from commencing, discontinuing, abandoning or settling the case.[25] However, TPLF investors have wide latitude to terminate their obligations under the funding agreement and withdraw their funding from the litigation. The funding agreements often contain an exclusion clause by which the TPLF investor does not and is not intended to owe fiduciary obligations to the claimants to act for their benefit.

At the same time, the role of legal counsel and claimants' interests are diminished and relegated to secondary status behind those of the TPLF investors who are effectively calling the shots—and taking a large portion of any settlement amount. This also calls into question who the lawyer's "client" is—the claimant or the funder—and raises the ethical issue of whether the lawyer is appropriately discharging the duty to act in the actual client's best interests. Increasingly, the funders are "partnering" with lawyers to get a case up and running. Often, lawyers are using court processes such as subpoenas and discovery to obtain access to details of potential class members so that they and the TPLF investors can contact those members to determine whether they want to be involved in the class action. This is the "book build" process which is critical to any litigation funder in determining whether to fund the litigation.

Additionally, funders' standard arrangements often have the potential to prolong litigation, especially in collective actions where there is no individual claimant directing the litigation. The terms of funding agreements typically provide for a greater percentage for the funder the longer a case goes on. The funding agreements often structure the TPLF investor's percentage take based on certain milestone dates if the resolution of the case is reached on or after a specified date and/or before another specified date. While this ostensibly is compensation for a longer term of investment, in reality it provides an incentive for funders effectively controlling the litigation to hold out for more attractive settlement offers over time, regardless of whether claimants' interests would be better served by reasonable settlements earlier in the litigation.

> *"The class action industry in Australia has matured rapidly over the past 20 years, with the potential to become the jurisdiction of choice for plaintiffs, lawyers and funders promoting class actions."*
>
> *–Stuart Clark, Clayton Utz*

Proposed Reform of the Oversight Regime

Greater safeguards against the dangers inherent in TPLF should be implemented through reforms to the government oversight regime in Australia. The risks posed by TPLF are so serious, and the incentives for misconduct by TPLF providers are so great, that industry self-regulation is not a viable option. In addition, government oversight and regulation of TPLF are proper because TPLF investors use litigation proceedings—and compulsory court processes—as investment vehicles. In other words, TPLF investors make money by co-opting the coercive power of government to command defendants to appear in court or before arbitrators, turn over documents and defend themselves. In these circumstances, regulating TPLF investors' actions is an entirely proper function of government. A Commonwealth regime of "light touch" regulation is the most sensible and effective way to address TPLF. From a practical standpoint, implementing a regulatory regime to govern TPLF will be more effective and straightforward than attempting to achieve harmonised state systems. Adopting Commonwealth TPLF rules, laws and regulations would ensure that one oversight regime is in place that covers all of the states. Such an approach would avoid a checkerboard of disparate state laws, rules and regulations which likely would funnel funded cases to the state courts in the states with the weakest oversight regimes. Issues that would still need to be addressed at a state level, discussed below, could be handled by the appropriate court or government body.

In particular, oversight of TPLF should be strengthened in three ways: (a) an appropriate independent Commonwealth authority should be designated to oversee TPLF regulation; (b) a regime of statutory safeguards should be adopted that governs both the practice of TPLF and the entities that practise it, and which could be enforced by the designated agency; and (c) there should be Commonwealth and state legislation or court rule changes specifying that TPLF investors are jointly and severally liable for adverse costs orders, clarifying that TPLF investors may not engage in actions that are tantamount to the practice of law without the appropriate professional licensing applicable to all lawyers, and restricting law firms from acting in matters funded by a TPLF investor in which they have an economic interest. We address each of these efforts below.

A. Commonwealth Legislation

The first step in our proposed oversight regime is to appoint an agency to oversee TPLF regulation. The designated body would be given authority to licence TPLF investors and to enforce its rules and any laws and regulations governing TPLF investments. There may be various options as to the most appropriate oversight agency.[27]

1. LICENSING

Commonwealth legislation should be enacted that improves oversight of the TPLF industry and that would be administered and enforced by the designated government agency. The proposed legislative framework would impose a licensing regime on TPLF investors. Such a legislative regime could adopt and augment the existing regulatory framework in Chapter 7 of the Australian Corporations Act relating to financial products and the provision of financial services so that litigation funders are subject to obligations similar to those applicable to providers of financial services.[28]

At the least, an effective licensing regime would need the following components:

(a) As a condition of obtaining a licence to operate, a TPLF investor must disclose the identity and relevant interests of all members of the TPLF investor's board of directors and all senior executive officers.

(b) Any applicant for a licence to invest in lawsuits must undergo an audit by the oversight agency to ensure its financial soundness, and must maintain liquid capital reserves equal to at least twice the amount of its investments in lawsuits. This high capital-adequacy requirement would help to ensure that the investor could pay legal fees, disbursements and any adverse costs order in the event the litigation is unsuccessful. We anticipate that capital-adequacy requirements for TPLF investors would mirror AFSL capital requirements.

(c) Any applicant should be required to post a substantial bond. This money would remain in an account administered by the oversight agency, with any interest or dividends going to fund enforcement and oversight activities by the agency.

(d) Any applicant must demonstrate that it has policies and procedures in place to ensure compliance with the TPLF oversight regime proposed here, including training its employees regarding compliance.

In administering this licensing regime, the oversight body would issue regulatory guidelines on how it will interpret and apply the law. See Appendix B for a detailed description of various options for a licensing regime to regulate TPLF.

2. ENFORCEMENT

The oversight agency should also have meaningful authority to ensure compliance with the laws governing TPLF investments. As part of this authority, it should be able to commence enforcement proceedings, obtain civil penalties for violations, make suspension or banning orders and vary the TPLF licence conditions. It should also have the power to seek scaled monetary penalties against violators, based upon the seriousness of the offence, which could be enhanced for repeat violations.

B. Legislative Safeguards

In addition to appointing a regulatory authority to oversee TPLF investments, Parliament should implement further legislative safeguards to be enforced by that agency. These safeguards should be of two types: statutory provisions that would govern TPLF investers generally, and statutory provisions relevant to TPLF investments in particular disputes.

1. PROVISIONS GOVERNING TPLF INVESTORS GENERALLY

(a) Prohibition on Law Firms Representing a Party in Matters Funded by TPLF Investors in Which They Have a Financial Interest

Law firms that have an ownership interest in a TPLF investor funding a case should not be permitted to act for a party in the same matter. Permitting a law firm with an ownership interest in a TPLF investor to offer legal advice in a matter funded by that investor diminishes the quality of legal advice available to clients in at least two ways:

(i) First, lawyer investors may focus more on the TPLF investor's profit prospects than on their clients' interests. This is likely to be a particular problem in class actions where there is typically no claimant directing the suit to whom the lawyer would report.

(ii) Second, financial ties between the lawyer and the TPLF further dilutes the already diminishing role of the client in the legal system as lawyers are pulled by the interests of the influential investor more so than the interests of their clients.

The overriding duty of a lawyer is to act in the best interests of the client. As fiduciaries, lawyers have an obligation to prefer their clients' interests over their own. A legal practitioner should be acutely aware of the fiduciary nature of the relationship with their clients, and always deal with their clients fairly, free of the influence of anything which may conflict with a client's best interests.[29] A legal practitioner must not accept instructions to act for a person in any proceedings or continue to act for a person engaged in such proceedings when the practitioner is, or becomes, aware that the person's interest in the proceedings is, or would be, in conflict with the practitioner's own interest or the interest of an associate.[30]

The concern with law firms that own TPLF companies also acting in a funded matter is that this duty is compromised. For any given client, the same lawyer would have a duty to the TPLF investor to maximise profit, but at the same time owe a duty to the client to maximise the amount of the claim. Often these duties will clash. While a lawyer would defer to the interests of the client, a TPLF investor has no such incentive or obligation.

At present, there is no express legislative prohibition against a law firm having a financial interest in a TPLF investor also acting in a funded matter for one of the parties in the case. However, the problems with this practice have been recognised.[31]

(b) Breach Reporting

Legislation should require TPLF investors to report any breach of the laws, regulations or rules governing TPLF to the oversight agency.

Failure to report a breach should itself constitute a breach. This would bring TPLF regulation in line with requirements applicable to other financial services licensees.[32]

(c) Funding Agreements

As a condition of licensing, TPLF investors should be required by legislation to include in their funding agreements an indemnity in favour of the claimant to pay adverse costs.

There is currently no express legislative obligation imposed on TPLF investors to assume the risk of meeting an adverse costs order.[33] Court rules permit courts to exercise a discretion to make a costs order against a non-party (such as a litigation funder) in the interests of justice. However, absent a court order a TPLF funder may avoid adverse costs even if it organised, controlled and financed the unsuccessful lawsuit.

Funders should also be required to agree that control over significant strategic decisions in a lawsuit, such as when to settle and for how much, should be reserved for the claimants. A TPLF investor exerts a significant degree of control over a case because the TPLF funding agreement typically confers wide-ranging contractual discretion on the TPLF investor. A legislative requirement that a TPLF investor must give an undertaking not to exert control over decision-making in the litigation, and a legislative requirement to include such an undertaking in the funding agreement, would promote a greater regard for the claimants, who are the ultimate beneficiaries, to act appropriately and in their best interests.

2. PROVISIONS RELATING TO TPLF INVESTORS' CONDUCT IN CASES

(a) Requirement that a Representative Claimant Instruct Lawyers

After the High Court's decision in *Fostif*, TPLF investors have been able to instruct law firms directly. This is especially problematic in class actions, where individual claimants are not significantly involved in directing the litigation. Without challenging Australia's policy behind permitting TPLF investors to solicit claimants and select lawyers, ILR is concerned that permitting TPLF investors to instruct lawyers on an ongoing basis leads to higher costs and delayed case resolutions. As noted above, Australian TPLF agreements typically grant the investor a greater share of any award the longer the case remains pending. This incentivises TPLF investors to prefer drawn-out cases, even though such cases result in higher costs for defendants (and for losing claimants) and waste scarce judicial resources. For this reason, once a lawsuit is commenced, legislation should prohibit TPLF investors from further instructing the lawyers.

The legislation should further provide that in class actions, the court will appoint a claimant from the class to serve as a representative to the lawyers. This would prevent TPLF investors influencing the claimant they have chosen and thereby prevent the TPLF investors from indirectly controlling the instructions given to the lawyers about the conduct of the case, so that the claimants' interests do not become subservient to the TPLF investors' interests.

(b) Disclosure Requirements

Currently, *Corporations Amendment Regulation 2012 (No. 6)* exempts litigation funders from the disclosure obligations applicable to AFSL licensees. To protect consumers, legislation should provide that, in each case, the TPLF investor must disclose to the claimants:

(i) The fees payable to the investor;

(ii) The obligations and rights of the investor, especially the level of control over decision-making in the litigation and termination rights;

(iii) The obligations and rights of lawyers;

(iv) The obligations and rights of claimants; and

(v) An estimate of costs.

(c) Fiduciary Duties

Legislation should provide that TPLF investors have a non-waivable fiduciary duty to act in the best interests of claimants. Fiduciary obligations create a standard of undivided loyalty characterised by a number of duties, including the duty to:

(i) Avoid conflicts of interest;

(ii) Avoid unauthorised profit from the fiduciary relationship;

(iii) Act in good faith; and

(iv) Act in the client's interests and not one's own benefit.

The desirability of a fiduciary relationship between the TPLF investor and claimants that is imposed by legislation arises from the significant degree of control the funder exerts over the litigation, which also underpins the need for an express statutory undertaking not to exert undue control of the lawsuit as discussed above. The role of a TPLF funder mirrors that of a law firm, because the funder chooses which cases to fund, which claimants to support, which lawyers to engage and what litigation strategy to deploy. The claimant is effectively handing control over to the funder who holds economic power over the funding of the litigation. An overriding clause requiring the TPLF funder to act in the best interests of the claimants seeks to ensure that decisions about the litigation are made properly on a case-by-case basis (including whether a claim is worth filing or not, the ongoing conduct of the case and potential settlement of the dispute) to protect the claimants' interests, and not driven by the imperatives of the funder's funding model based on the present value of their expected return.[34]

(d) Prohibition on Conflicts of Interest

As discussed above, TPLF investments can lead to substantial conflicts of interest among TPLF investors, lawyers and claimants.[35] Senator George Brandis recently acknowledged the real potential for conflicts of interest in TPLF-funded litigation, saying, "I am not satisfied that the existing unregulated system sufficiently addresses the conflicts of interest and moral hazards of, in particular, the litigation solicitors who have a very significant interest in this litigation."[36] Given the risks that these conflicts pose for consumers—and for the sound and impartial administration of justice—ILR believes that legislation should provide that TPLF investors must avoid conflicts, not simply manage them. Currently, *Corporations Amendment Regulation 2012 (No. 6)* does not mandate conflict avoidance but instead provides that regulations may require a TPLF investor to "have arrangements, and follow certain procedures, for managing conflicts of interest in relation to the scheme."

In April 2013, the Australian Securities and Investments Commission ("ASIC") released its Regulatory Guide 248 "Litigation schemes and proof of debt schemes: Managing conflicts of interest" designed to supplement *Corporations Amendment Regulation 2012 (No. 6)* and articulate ASIC's expectations about maintaining adequate conflict management procedures. Conflicts of interest between the funder, lawyers and claimants may arise in a litigation funding scheme where there is a pre-existing legal or commercial relationship between the funder, lawyers and claimants. The Regulatory Guide states that "[w]hile you must take responsibility for determining your own approach to managing interests that conflict, in our view, if your arrangements are not consistent with the guidance and expectations in this guide, you are less likely to be complying with the obligation and will be exposed to a greater risk of regulatory action."[37]

If, as some have asserted,[38] the role of TPLF investors mirrors the role of lawyers by virtue of the significant degree of control they exert over, and their intimate involvement in, the litigation, it would be incongruous for TPLF investors simply to manage rather than avoid conflicts of interest. A prohibition on conflicts of interest in the TPLF context would also be a necessary consequence of a fiduciary relationship between the TPLF investor and claimants if such a relationship is imposed by legislation.

C. Court and Other Rules

1. TPLF PROVIDER JOINTLY AND SEVERALLY LIABLE FOR ALL COSTS AWARDED AGAINST THE CLAIMANT

In *Jeffery & Katauskas Pty Limited v. Rickard Constructions Pty Limited*,[39] the High Court held that a lower court "did not have the power to make a costs order against a company which was not a party to litigation merely because the company had, for commercial gain, funded litigation by an insolvent plaintiff without indemnifying the plaintiff against an adverse costs order."[40] As a result of the High Court's decision, the defendant was denied reimbursement of its legal fees, even though it had been successful in the underlying litigation, because the claimant was insolvent.

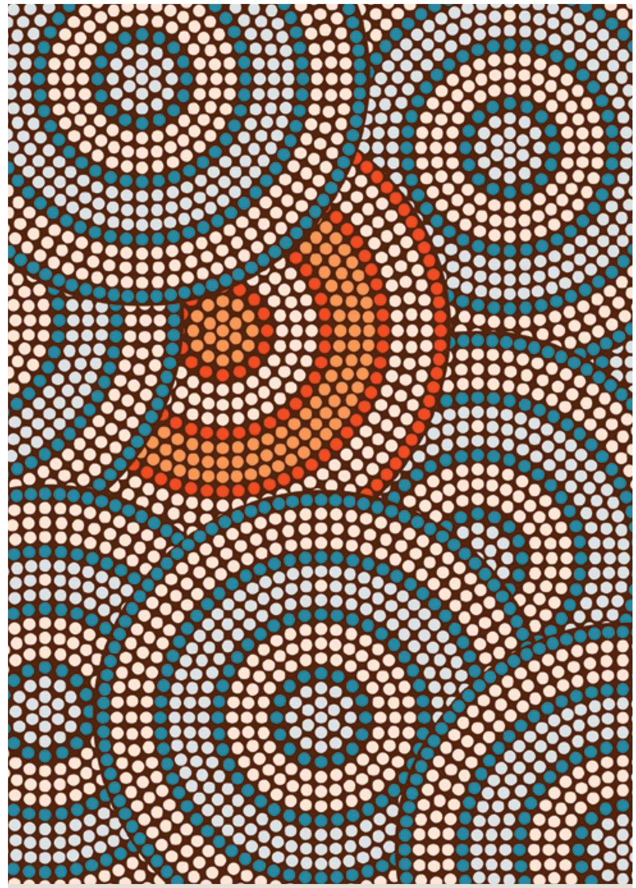
Jeffery's result is not fair—TPLF investors make litigation possible by investing in it, and they should be responsible for any adverse consequences of their investment decisions.

At present, there is no legislative obligation at the Commonwealth or state levels imposed on TPLF investors to assume the risk of meeting an adverse costs order jointly and severally. The court rules at the Commonwealth and state levels provide only limited relief because a costs order against a non-party (such as a litigation funder) will depend on the exercise of the court's discretion.[41]

Accordingly, the Commonwealth and state governments and/or courts should require that, in the event that a claimant whose case is funded by TPLF investors has an adverse costs order entered against it, the TPLF investors should be jointly and severally liable with the claimant for satisfying the cost award. Moreover, this obligation should not be limited to the amount of the investors' investment in the litigation.

2. PROHIBITION ON PRACTICE OF LAW

The significant control typically exercised by TPLF investors over the litigation they fund could also be viewed as tantamount to the practice of law.[42] Commonwealth and state legislation or court rule amendments are required to clarify that TPLF investors may not engage in actions that are tantamount to the practice of law without the appropriate professional licensing applicable to all lawyers.[43] The amendments should also clarify that persons who engage in TPLF may not be permitted to hold themselves out to the public as lawyers for hire.



> *"TPLF investors make litigation possible by investing in it, and they should be responsible for any adverse consequences of their investment decisions."*
>
> *–Lisa A. Rickard*
> *President, U.S. Chamber Institute for Legal Reform*

Conclusion

Australia's courts and legislatures have made the policy decisions to embrace pervasive third-party investments in litigation. But now, having done so, strict oversight of those investments is necessary to protect consumers, claimants, businesses and all stakeholders in the sound administration of civil justice in Australia. Prior to the High Court's decision in *Fostif*, the issue of whether and to what degree oversight of TPLF investors is necessary was closely considered by the Standing Committee of Attorneys General and others. Now, more than ever, this issue should be at the forefront of policy debate in Australia. For the reasons described above, a Commonwealth oversight regime that implements the safeguards described in this paper is necessary.

About the U.S. Chamber Institute for Legal Reform

ILR is a not-for-profit public-advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR's mission is to restore balance, ensure justice, and maintain integrity within the civil legal system. Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in courts around the world and has participated actively in legal reform efforts in the United States and abroad.

As part of its core mission, ILR has been studying the effects of TPLF for several years. It has sponsored several nonpartisan symposia and conferences, and has released articles on the effects of TPLF in the United States and in Europe. ILR also has engaged in public advocacy with several state legislatures in the United States, and has been consulted by the governments of European countries and the European Commission regarding TPLF. Recently, ILR submitted comments on the Australian Treasury's consultation draft of the Corporations Amendment Regulations 2012.

Because many of ILR's members have substantial business activities in Australia, ILR is deeply invested in the orderly administration of justice in Australia and in the evolution of Australian legal regimes. ILR submits this proposed oversight regime to protect its constituents, as well as all stakeholders in the civil justice system, from individual consumers to the largest multinationals.

Appendix A—Options for Oversight Agencies

OPTION 1

One option would be for Parliament to empower the Australian Securities and Investments Commission ("ASIC") to oversee the TPLF industry. This can be achieved through amendments to the existing *Corporations Act* 2001 (Cth) and the *Corporations Regulations* 2001 (Cth) under section 798G of the *Corporations Act* 2001 (Cth). ASIC is an appropriate enforcement body given its experience with financial services industries and understanding the problems arising within that setting. TPLF in Australia is, at its core, a financial service, making ASIC the proper regulator for TPLF. In connection with appointing ASIC as the agency to oversee TPLF investments, ASIC would be given the authority to licence TPLF investors and to enforce its rules and any laws and regulations governing TPLF investments.

OPTION 2

The Australian Competition and Consumer Com Commission ("ACCC") could also be authorised to oversee the TPLF industry. The ACCC is the government agency which administers the Australian Competition and Consumer Act. It exercises its statutory powers and functions to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The ACCC's obligations include:

- investigating possible breaches of the competition and consumer protection provisions and, where appropriate, bringing enforcement proceedings and obtaining compensation or redress;
- considering applications for immunity from the competition law on a range of public interest grounds; and
- arbitrating disputes over access to essential facilities and in the telecommunications industry.

The ACCC's focus on consumer protection arguably would qualify it to undertake the type of protection for users of the TPLF funding service (claimants to lawsuits) that is so conspicuously lacking at present.

However, the ACCC may not be a suitable agency to be allocated responsibility for oversight over TPLF, since the statutory regime for which the ACCC is responsible does not involve the administration and enforcement of a licensing regime like the AFSL regime under the Corporations Act. Additionally, given that TPLF falls broadly within the category of financial services, ASIC would appear to be the more suitable oversight agency because, unlike the ACCC, ASIC is responsible for the regulation of financial services and financial products.

OPTION 3

Another possibility could be to regulate TPLF investors under the various state regimes governing the legal profession. However, TPLF companies are first and foremost providers of financial services and should not be engaged in the provision of legal services. As such, oversight would more properly reside with an independent statutory body with expertise in financial service regulation. Moreover, in the absence of a uniform national scheme regulating the legal profession, leaving oversight to the state bodies would be unlikely to result in a uniform approach. The result instead could be to encourage forum shopping by TPLF investors.

Appendix B—Options for an Oversight Regime

OPTION 1 - NEW LICENCE

1. This option would involve the implementation of a new legislative regime specific to TPLF schemes. Where implemented the new regime could require TPLF scheme operators (and any persons involved in providing relevant services in respect of TPLF schemes) to be covered by a specific licence which could include appropriate conditions.

2. This approach would be similar to the relatively recent evolution of "credit", which is now regulated by the National Consumer Credit Protection Act 2009 (Cth) and corresponding regulations and where an entity that engages in providing "credit activities" must be covered by an Australian credit licence. It is worth noting here that the Australian credit licence regime is based very heavily upon the AFSL regime.

OPTION 2 - NEW "FINANCIAL PRODUCT"

3. This option involves specifically including TPLF schemes as a "financial product" under Division 3 of Chapter 7 of the Corporations Act. This would require persons who provide "financial services" in respect of TPLF schemes to be covered by an AFSL and to otherwise comply with the existing AFSL framework and obligations. There would of course also be an opportunity to seek appropriate additional obligations for TPLF scheme operators (which, for instance, would not otherwise apply to financial service providers).

4. A similar approach was taken recently with respect to "margin lending facilities" which were added as "financial products" together with a new "responsible lending regime" which imposed additional obligations upon margin loan providers.

OPTION 3 - NEW CLASS ORDER

5. This option involves the introduction of a regime for TPLF schemes through a new ASIC Class Order. The new Class Order could seek to regulate TPLF schemes in the same manner as contemplated by Option 2 (that is, treat TPLF schemes as “financial products” and so require TPLF scheme operators and related participants to be covered by an AFSL).

6. This approach is similar to the existing regulation by ASIC of both “managed discretionary accounts” and “platforms”. This approach is generally taken in respect of new or novel “financial products” where the application of the existing financial services regime would be inappropriate and allows for the existing regime to apply in part and new bespoke obligations also to apply.

OPTION 4 - EXPANDED REGULATIONS

7. This option involves amending the existing *Corporations Amendment Regulation 2012 (No. 6)* (which commences on 12 July 2013) so as to include, for instance, additional obligations and/or to reduce the breadth of the exemptions currently afforded to TPLF schemes.

END NOTES

1 (2006) 229 CLR 386.

2 *Id.* at 488.

3 See V Morabito, "An Empirical Study of Australia's Class Action Regimes", Second Report, September 2010, at pages 5 and 37-44; King & Wood Mallesons, Class Actions in Australia, The Year in Review 2012, at 10-11.

4 *See* King & Wood Mallesons, supra note 3 at 10-11.

5 Regulatory Guide 248, "Litigation schemes and proof of debt schemes: Managing conflicts of interest."

6 Senator George Brandis recently noted this trend, stating:

"In view of the decisions of the High Court in 2006 and last year, and most particularly the Chameleon Mining decision, where the court held that litigation funders did not require an Australian financial services licence, it is my view, and the Coalition's view, that this is an area which should be carefully examined with a view to determining whether there is sufficient protection of parties, potential defendants, who may be the subject of opportunist claims. That consideration, plus the broader social consideration of the undesirability of fostering a litigious climate resembling that of the US, persuades me that greater regulation of litigation funding of class actions should be examined.'' Chris Merritt, "Brandis Takes Aim at Litigation Funders," *The Australian*, 19 July 2013.

7 Senator George Brandis stated:

"This is an area ripe for abuse and the government has let the grass grow under its feet in not identifying and anticipating the extent to which abuses and opportunistic claims are being brought. … If elected … a Coalition government would review the regulation of litigation funders and examine whether they should continue to be exempted from mandatory licensing.'' Id.

8 *See supra note 5 at 390, 413, 424; IMF (Australia) Ltd, About Us, available at www.imf.com.au/about.asp.*

9 Greg Houston, Svetlana Starykh, Astrid Dahl, and Shane Anderson, *Trends in Australian Securities Class Actions: 1 January 1993 – 31 December 2009*, (NERA Economic Research Associates, Inc., 2010), at 2.

10 "Class action growth due to funding availability: IMF Australia," *Business Spectator* (June 29, 2010), *available at* www.businessspectator.com.au/bs.nsf/Article/Class-action-growth-due-to-funding-availability-IM-pd20100629-6VHNW?OpenDocument&src=mp.

11 *See generally* Paul H. Rubin, *On the Efficiency of Increasing Litigation*, paper presented to the Public Policy Roundtable on Third Party Financing of Litigation, Northwestern University Searle Center on Law, Regulation, and Economic Growth (Sept. 24, 2009).

12 The Ecuadorian trial court awarded $9 billion in damages to the claimants, which would be doubled if Chevron did not publicly apologise to them. Chevron did not apologise, and the damages were doubled to $18 billion. This judgment is on appeal.

13 *See Chevron Corp. v. Donziger*, Case No. 11-cv-0691 (S.D.N.Y. Mar. 7, 2011), Opinion at 82-83. The Second Circuit later vacated Judge Kaplan's injunction on jurisdictional and procedural grounds, but his factual findings stand. On the Lago Agrio suit, *see generally* Roger Parloff, *Have You Got a Piece of this Lawsuit? The Bitter Environmental Suit Against Chevron in Ecuador Opens a Window on a Troubling New Business: Speculating in Court Cases*, Vol. 163, Issue 8 (June 13, 2011), at 68.

14 *See In re Chevron Corp.*, No. 10-MC-21 (J/LFG) (D.N.M. Sept. 13, 2010) (finding "that . . . discussions trigger the crime-fraud exception, because they relate to corruption of the judicial process, the preparation of fraudulent reports, the fabrication of evidence, and the preparation of the purported expert reports by the attorneys and their consultants."); *In re Application of Chevron Corp.*, No. 10-cv-1146-IEG (Wmc) (S.D. Cal. Sept. 10, 2010) (crime-fraud exception applies because "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own."); *Chevron Corp. v. Champ*, No. 1:10-mc-0027 (GCM-DLH) (W.D.N.C. Aug. 30, 2010) ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."); *In re Application of Chevron Corp.*, Civil Action No, 10-2675 (SRC) (D.N.J. June 11, 2010) Hrg. Tr. at 44 ("In short, the provision of materials and information by consultants on the litigation team of the Lago Agrio plaintiffs in what appears to be a secret and an undisclosed aid of a supposedly neutral court-appointed expert in this Court's view constitutes a prima facie demonstration of a fraud on the tribunal.").

15 *See* Chevron v. Republic of Ecuador, PCA Case No. 2009-23, Second Interim Award on Interim Measures (Feb. 16, 2012), at 3.

16 According to a December 2011 press release, as a result of "[f]urther developments," Burford "conclude[d] that no further financing w[ould] be provided" in the Lago Agrio case. *See* Press Release, Burford Capital Limited, Burford Reports Continued Activity and Entry into UK Market (Dec. 12, 2011), *available at:* http://www.burfordfinance.com/pressroom/press-releases. In January 2013, Burford released a letter it had sent to the Lago Agrio claimants' counsel in September 2011 accusing counsel of defrauding Burford into investing in the litigation. *See* Burford Group to Purrington Moody Weil LLP, Sept. 29, 2011, *available at* http://lettersblogatory.com/wp-content/uploads/2013/01/Burford.pdf.

17 Anne Urda, *Legal Funding Gains Steam But Doubts Linger*, Law360 (Aug. 27, 2008) (quoting a Huron Consulting Group Vice President as saying, "clients may have to relinquish some decision-making authority to the funder" and "the client's interests may diverge from the funder").

18 (2008) 253 ALR 65.

19 *See* Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220-21 (Ohio 2003) (noting that the amount the plaintiff-appellant owed to litigation financiers was an "absolute disincentive" to settle at a lesser amount).

20 Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding* (January 2012), at 27, *available at* www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf.

21 *Id.*

22 Stuart Clark, *After 20 years, action industry finds a class of its own*, *The Australian* (19 July 2013).

23 *See* King & Wood Mallesons, supra note 3 at 5.

24 *See* Goal Group, Recovery Responsibility, a predictive study into securities class actions in legislatures outside the U.S.A., January 2013, at 8.

25 If a claimant wishes to settle the case for less than the TPLF investor considers appropriate or refuses to settle when the TPLF investor considers it appropriate, some TPLF agreements require the claimant and the TPLF investor to seek senior counsel's advice on whether the terms of the settlement are reasonable in all the circumstances.

26 *See also* Campbells Cash and Carry Pty Ltd *v.* Fostif Pty Ltd (2006) 229 CLR 386 at [87] and [93].

27 See Appendix A.

28 The Australian courts have taken different views on the characterisation of TPLF in Australia, including that TPLF may be a "managed investment scheme" (*Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147) or a "financial product" (*International Litigation Funding Partners Pte Ltd v. Chameleon Mining NL* [2011] NSWCA 50) (i.e. "a facility for managing a financial risk") under the Australian Corporations Act 2001 and a "credit facility" (*International Litigation Funding Partners Pte Ltd v. Chameleon Mining NL* [2012] HCA 45) under the Australian National Consumer Credit Protection Act 2009 but not a financial product under the Corporations Act 2001. In the wake of these differing views, recent regulatory and legislative changes have clarified that TPLF is exempt from being a "managed investment scheme", a "financial product" or a "credit facility" and that litigation funders are not required to hold an Australian financial services licence.

29 For example, *see* Revised Professional Conduct and Practice Rules 1995 (NSW), Statement of Principle.

30 Revised Professional Conduct and Practice Rules 1995 (NSW), rule 10.2. In describing the key elements of a fiduciary relationship, Justice Mason stated in *Hospital Products Ltd v. United States Surgical Corp* (1984) 156 CLR 41:

- o "The critical feature of these [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position." 156 CLR 41 at 96-97.
- o "The fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect" 156 CLR 41 at 103.

In the context of a solicitor's obligation, in *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65 at [16], Gleeson CJ said:

The principle that a solicitor "shall not be permitted to make a gain for himself at the expense of his client" was said by the Lord Chancellor, Lord Westbury, in Tyrrell v. Bank of London, to be one strictly requiring a faithful and honourable observance. In *Law Society of NSW v. Harvey the Court of Appeal of New South Wales* observed that an appreciation of a solicitor's duty not to prefer his or her interest to that of the client rests, not upon some technical instruction, but upon understanding and applying the ordinary concepts of fair dealing.

31 Chief Justice Allsop of the Federal Court of Australia recently queried whether an application by a new litigation funder to share in potential damages from a horse flu class action was a "money- spinner" for the lawyers behind the funder. Senior lawyers from the claimants' law firm reportedly set up the funder to partly finance the litigation the firm was running. *See* "Judge probes lawyers' horse flu damages case" Australian Financial Review July 2013, at 32. Currently, if a legal practitioner engages in TPLF, the legal practitioner must comply with the existing professional obligations under the Professional Conduct Rules in each State. These are designed to ensure that their interests or the interests of the law practice do not conflict with the interests of clients and that engaging in any other business not directly associated with the legal practice is not likely to impair their duties to their clients in the conduct of legal practice. These obligations also apply to legal practitioners who are officers or employees of an incorporated legal practice or a multi-disciplinary partnership that also provides services other than legal services. A legal practitioner must not, in any dealings with a client: (a) allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client; and (b) exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client. *See*, e.g., Revised Professional Conduct and Practice Rules 1995 (NSW) rules 10.1 and 37.1.

32 *See* Corporations Act *(2001)* § 912D. ILR does not believe, however, that failure to report a breach of the TPLF oversight regime should constitute a criminal offense.

33 The Practice Notes in some Australian courts also provide for an obligation to disclose at the early stages of the case (including at the initial case management conference) any agreement as part of the overall TPLF agreement by which a litigation funder is to pay or contribute to the costs of the litigation or any adverse costs order. This requirement provides greater transparency and certainty about the contents of the litigation funding arrangements, but does not ensure that TPLF agreements contain the necessary indemnity to protect the claimant against a successful defendant's costs.

34 Australian judges have recognised the potential for conflicts including in *Campbell Cash and Carry Pty Ltd v. Fostif Pty Ltd,* 229 CLR 386 (2006). While finding TPLF to be lawful, Gummow, Hayne and Crennan JJ considered a range of factors including the following: (i) the funder's act of seeking out of claimants was described as "officious intermeddling"; (ii) there was the degree of control which the funder would have over the proceedings where the litigants' interests were said to be "subservient" to those of the "intermeddler" and (iii) the funder's retainer of a solicitor to act for the plaintiffs and represented parties was said not to lessen the funder's control of the proceedings but to give rise to possible conflicts of duty for the solicitor. *See* 229 CLR 386 at [93] 433. Callinan J and Heydon J specifically pointed to some of the more compelling reasons for fiduciary obligations on litigation funders in their joint statement:

"Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court. The court is in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules. The appearance of solicitors is recorded on the court file. Institutions like [litigation funders] Firmstone & Feil, which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. 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. In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control." (*See* 229 CLR 386 at [266] 487)

35 Michael Legg has closely studied the problem of conflicts of interest for lawyers arising out of funding arrangements. Among his conclusions:

"The litigation funder is able to exert influence on the lawyer, even if they are not the lawyer's client. Equally the lawyer has incentives to ensure that the funder is satisfied with the lawyer's performance. This combination of influence and incentives may give rise to a conflict of interest for the lawyer." According to Professor Legg, the potential areas of conflict include: the terms of the funding agreement; litigation strategy; termination of the funding agreement; and acting in other litigation funded by the same litigation funder."

Michael Legg, *Litigation Funding in Australia Identifying and Addressing Conflicts of Interest for Lawyers* 29 (U.S. Chamber Institute for Legal Reform 2012).

36 *Brandis Takes Aim at Litigation Funders*, The Australian, July 2013.

37 ASIC RG [248.22].

38 *See* note 34 supra.

39 [2009] HCA 43.

40 High Court of Australia, Manager, Public Information, *Jeffery & Katauskas Pty Ltd v. SST Consulting Pty Ltd & Ors*, 13 Oct., 2009, *available at* www.hcourt.gov.au/assets/publications/judgment-summaries/2009/hca43-2009-10-13.pdf.

41 For example, see Civil Procedure Act (NSW) § 98 (2005) and Federal Court of Australia Act § 43 (1976).

42 *See also Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* 229 CLR 386 at § 87, 93, 266 (2006) in relation to the control exercised by TPLF funders; The Regulation of Third Party Litigation Funding in Australia - Discussion Paper, The Office of the NSW Legal Services Commissioner, 2012.

43 Currently, the legal profession and the practice of law are regulated by the Legal Profession Act and the Professional Conduct and Practice Rules in each State. There are strict rules and regulations about eligibility and certification to engage in the practice of law and the requirements pertaining to the conduct of a legal practice.

U.S. CHAMBER
Institute for Legal Reform

202.463.5724 main
202.463.5302 fax

1615 H Street, NW
Washington, DC 20062

instituteforlegalreform.com