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4 November 2013

Submission – Access to Justice Arrangements

Attached is a submission on the Productivity Commission's *Access to Justice Arrangements Issues Paper*. The submission has been written by David Caruso and Suzanne Le Mire from the Adelaide Law School, University of Adelaide. Our particular interest is the issue of funding for litigation, especially regulation of third party funding and contingency fee arrangements.

We trust this is of assistance to the Commission and would be happy to provide further information should that be helpful.

Yours sincerely

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Submission to the Productivity Commission:
Access to Justice Arrangements Issues Paper

Submission by David Caruso
and Dr Suzanne Le Mire

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4 November 2013

This submission considers the issue of litigation funding. Clearly the extent of funding available to an individual or organisation will have a profound effect on their ability to seek justice using a court process. The submission sets out some background to this issue, before providing three specific recommendations.

ISSUES PAPER POINT 13 – Funding for Litigation

Litigation funding is intimately connected to access to justice. For many litigants, third party funding or contingency fee arrangements provide access to justice which would otherwise be unavailable to those litigants. In 1995, the ALRC stated:

> *[c]ost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can become an intolerable burden.*[1]

Australia's current system has moved to a position where the rules against champerty and maintenance have been relaxed,[2] and a system of litigation funding has developed. This development has been closely monitored by the courts and legal profession but, generally, supported by both due to concerns about access to justice.[3]

We do not seek to question whether litigation funding should be permitted. We accept the balance of opinion and the move of the Australian legal system to permit of third party funding. Our submission is based on a key aspect of regulation of litigation funding which is yet to be properly addressed, namely, the extent to which third party funders should be bound by professional rules of practice and ethics governing the conduct of officers of the court and, together with that, the extent to which courts should monitor and supervise the conduct of third party funders in their dealings.

Our submission is directed at third party funding by commercial enterprise in contrast to special (contingent) funding arrangements clients may reach with lawyers. We note in this regard that contingent billing is currently unlawful in Australia.[4] This prohibition is based on concerns that such a practice would create a conflict of interest whereby a practitioner might have an interest in proposing litigation in situations where that interest is not shared by the client.[5] 'The greater the share of the spoils that the provider of legal services will receive, the greater the temptation to stray from the path of rectitude.'[6] Despite this, uplift fees, where a practitioner, if the matter is successfully concluded, is permitted to charge up to an extra 25% of their legal costs, are allowed, notwithstanding that they create a similar conflict.[7] The inherent inconsistency of this approach aside, there are several reasons why the prohibition on contingency fees should be reconsidered.

The prohibition only confines the activities of lawyers and effectively leaves the field open to litigations funders. One effect of this is that competition is reduced, leaving litigation funders with the ability to charge up to 75% of any award of compensation after the deduction of costs.[8] A

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1 ALRC, *Cost Shifting: Who Pays for Litigation*, 1995, ALRC 75, p 17.

2 *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* [2006] HCA 41; (2006) 229 ALR 58; (2006) 80 ALJR 1441 reduced the rule to impugning contracts only where they are contrary to public policy.

3 See, for example, ibid [120] (Kirby J). See also Law Council of Australia, *Regulation of Third-Party Litigations Funding in Australia*, Position Paper, June 2011, [31]-[36]

4 See, for example, *Legal Profession Act 2004* (NSW) s 325.

5 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007)192.

6 *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932; [2003] QB 381, 413 [85].

7 See, for example, *Legal Profession Act 2004* (NSW) s 324.

8 Standing Committee of Attorneys General, *Litigation Funding in Australia*, Discussion paper, May 2006, 4.

second, and slightly ironic, effect is that lawyers, whose actions are governed by extensive ethical guidelines backed by disciplinary sanctions, are prevented from acting while litigation funders, who operate without externally imposed ethical regulation, can essentially operate on contingency. This lack of proper regulation was noted by Senator George Brandis in July 2013, when he commented, '[t]his is an area ripe for abuse and the [former] 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'.[9] Most importantly, the prohibition on contingency fees limits the avenues by which potential litigants can seek financial support to access the justice system through the primary officers of the court – lawyers – whilst leaving effectively the same prohibited practices open to commercial parties who operate independently of the rules and codes governing lawyers.

Third party commercial litigation funders face, as the Commission has noted in its Issues Paper at page 37, little regulation or supervision. The consequence is that the following issues, for example, remain outstanding. One, there is no sufficient or transparent regime by which conflicts of interest are to be resolved for funders who may potentially fund opposing or related parties in proceedings. Two, there is no clear articulation of the legal relationship between the third party funder and the litigant. The relationship is clearly contractual but there is an argument to suggest it should be fiduciary in nature to protect the litigant and place requisite duties on the funder. Three, guarantee and fidelity funds can provide some protection for litigants from losses occasioned by the actions of solicitors or law firms. There is no equivalent protection against actions by third party funders. Four, the extent to which third party funders should be able to control and instruct on the decisions to be taken in litigation when those decisions may conflict with those of the funded. Five, the extent to which the court and opposing litigants should be made aware of the terms of third party funding arrangements for the sake of ensuring appropriate costs orders and securities are ordered by the court.

Our point is that there is merit in moderating the restrictions on contingency fee arrangements between lawyers and clients, whilst strengthening the regulation and supervision of third party funding arrangements by commercial enterprise with litigants. The merit primarily arises from the different professional duties and principles governing the respective persons seeking to fund litigation.

Recommendations

1. That the restrictions on contingency fees should be moderated to allow lawyers, in appropriate cases, to assist clients with the funding of litigation through contingency fee arrangements.
2. That such arrangements should be subject to the same ethical rules that govern other aspects of the lawyer/client relationship.
3. That a comprehensive system of regulation and supervision be developed for third party funders.

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9 Chris Merritt, 'Brandis Takes Aim at Litigation Funders' *The Australian*, 19 July, 2013.