



Institute of Actuaries of Australia

# XIth Accident Compensation Seminar 2007

## **Litigation Funding**

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# Litigation Funding in Australia

- 1. The Insolvency Market until 2001**
- 2. IMF Public Profile from 2001:**
  - **Commercial Litigation**
  - **Group Actions**
  - **Insurable Risk Cases are excluded**
- 3. Fostif**

## **Types of Actions Funded**

- 1. Commercial Claims**
- 2. Not Insurable Risk Cases**
- 3. Higher Value Claims**
- 4. Multi Party Claims**

# The Demand for Litigation Funding

1. **Lord Woolf UK focus**
2. **Litigation Risks:**
  - **No budget**
  - **No timing**
  - **Hourly rate pricing policy**
  - **Well resourced defendants**
  - **Legal jargon regarding risks of failure and the consequences**
  - **No adverse cost order predictability**
3. **Resulting from the Litigation Risks:**
  - **Speculative actions are minimised**
  - **Demand for litigation funding is high**

## **The Supply of Litigation Funding**

- **Comparatively, capital investment is negligible**
- **IMF has raised about \$30 million**
- **This would be more than all the other funders combined:**
  - **Hillcrest**
  - **Australian Litigation Fund**
  - **Litigation Lending Services**
  - **Firmstone**

# The Cost/Benefit of Funding

- Benefits**
- Payment of claimants' legal costs and disbursements
  - Provision of security for respondent's costs
  - Payment of any adverse cost orders
  - Assistance with investigations and project management

- Cost**
- Nil if unsuccessful
  - Reimbursement of investment from settlement or judgment
  - Payment of between 20% and 35% of settlement or judgment

# Is the Price of Litigation Funding Fair?

**Over 4 years IMF has:**

- : invested about \$30 million**
- : generated EBIT of about \$8 million**
- : annual return on investment of about 7%**

**Insolvency Market**

- : Oldest Market**
- : Tendering is the norm**
- : Creditor and Court oversight**
- : Over 100 decisions (see list)**

**Group Actions**

- : Court oversight**



## List of Judicial Decisions on Cost of Funding

- In the matter of ACN 076673875 Ltd (2002) NSWSC 578 (26 June 2002) - 40%
- QPSX Ltd -v- Ericsson Australia Pty Ltd (2005) FSA933 (6 July 1995) - 24%
- Clairs Keeley (A Firm) -v- Treacy and others (2004) WASCA 277 (25 November 2004) - 30%
- Cornelius -v- Coplex Resources NL (2002) FCA 1378 (18 October 2002) - 40%
- Green Re Oz – US Film Productions Pty Ltd (2005) NSWSC 249 (31 March 2005) – 40%
- Buiscecx Ltd -v- Panfida Food Ltd (1998) 28ACSR357 – 75%
- Bandwill Pty Ltd -v- Spencer – Laitt (2000) WASC 210 (24 August 2000) – 55%
- Jarbin Pty Ltd -v- Clutha Ltd (2004) NSWSC 28 (25 February 2004) – 44%
- Elfic Ltd v Macks (2001) QCA 219 (6 June 2001) – 35%
- Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd (2005) NSWCA 83 (31 March 2005) – 33%
- Re Addstone Pty Ltd (1998) 83FSR 583 – 35%
- Claim direct test cases (2003) 4ALLER 528 – 30%
- The Bell Group Ltd v Westpac Banking Corporation (1993) 18 WAR 21 – 66%
- Hawke v Efrat Consulting Services (1999) MSA 412 (13 April 1999) – 30%
- Re Tosich Construction Pty Ltd (1997) FCA 115 – 50%
- Re William Felton and Co Pty Ltd (1998) 28ACSR 228 – 30%
- Stocznia Gdanska SA v Latreefers (2000) EWCA Civ 36 – 55%

## Investments

IMF Investment Portfolio Report as at 31 December 2006 (Budgeted IMF Fee >\$500,000)			
Matter	Latest Completion Date <sup>1</sup>	Maximum Claim Value \$000's	Insolvency/ Group/Commercial
Allstate Explorations NL	December 2007	<sup>2</sup>	Group
AM Corporation, Smith, Rich & Lifetrack	December 2007	20,000	Group
Ainsworth ats SilkEarl	April 2008	10,000	Commercial
Aristocrat Leisure Ltd	December 2007	230,000	Group
Centaur Mining v Gutnick	August 2008	30,000	Insolvency
Challenger ats Unit Holders	December 2009	5,000	Group
Concept Equity v Challenger	December 2007	2,000	Commercial
Coplex Resources NL	December 2007	20,000	Insolvency
Finance Brokers Case	June 2007	120,000	Group
Global Finance	October 2007	10,000	Insolvency
Interline v Transpacific	June 2007	5,000	Commercial
ION Limited <sup>3</sup>	December 2007	65,000	Group
Kingsheath Club of the Clubs v Stamoulis	August 2007	10,000	Insolvency
Lawyers Private Mortgages	June 2007	10,000	Insolvency
Marlor Domestic Appliances Pty Ltd v Directors of TVSN	December 2007	5,000	Commercial
Meadow Springs v Colliers	June 2007	10,000	Insolvency
Multiplex Limited	December 2008	12,000	Commercial
NEIB v Minara Resources	December 2007	20,000	Commercial
Nomad Telecommunications	March 2008	15,000	Insolvency
Pan Pharmaceuticals <sup>3</sup>	November 2007	30,000	Group
Performance Finance	December 2007	9,000	Insolvency
Preslands	<sup>5</sup>	<sup>5</sup>	Commercial
QPSX	June 2007	<sup>4</sup>	Commercial
Reynolds Wines (in liquidation)	June 2007	5,000	Insolvency
Shenton Park	December 2007	15,000	Insolvency
Sons of Gwalia (Administrators Appointed) <sup>3</sup>	June 2007	25,000	Group
Spatial v Telstra	June 2008	50,000	Commercial
Symonds	September 2007	14,000	Commercial
Totterdell v Pollock	December 2007	20,000	Insolvency
Truckies v Pilbara Manganese Pty Ltd	December 2007	6,000	Group
Village Life	December 2008	20,000	Commercial
Westpoint	August 2008	30,000	Commercial
Wright	December 2007	<sup>4</sup>	Commercial
<b>TOTAL</b>		<b>923,000</b>	

1 Note: The Latest Completion Date is IMF's current best assessment of when the case will be finalised. The case may finalise earlier than or later than this date. Equally, the Maximum Claim Value is IMF's current best estimate. **The actual recovery in each case may differ significantly from the estimates.**

2 Macquarie announced on 5 May 2006 that it will "give the intercompany debts of Allstate Explorations NL (which the Bank purchased in 2002) to a trust for the benefit of the mine employees".

3 The recoverable claim value is likely to be dependant upon percentage distributions to creditors by the respective external controller.

4 The claim value in respect of this matter is too uncertain to currently identify any recoverable amount, although the maximum claim value exceeds \$50 million.

5 IMF withdrew funding after investing \$90,000, without adverse cost order.

## Markets

	<b>Insolvency</b>	<b>Commercial</b>	<b>Group</b>
<b>Number</b>	<b>11</b>	<b>13</b>	<b>9</b>
<b>Claim Value %</b>	<b>17%</b>	<b>29%</b>	<b>54%</b>
<b>Claim Value \$</b>	<b>\$154m</b>	<b>\$268m</b>	<b>\$501m</b>

## **Investment Protocol Factors**

- **Quantum of the Claim**
- **Quantum of the Investment**
- **Claimant's Net Return**
- **Funder's Return on Investment**
- **Claims to be Rejected**
- **The Relative Value of the Investment**
- **The Funder's Decision Making Process**

## **Due Diligence – (a focus on the claim)**

- **The Claim**
- **The Defence/Cross Claim**
- **The Quantum**
- **The Proposed Defendant/s**
- **The Claimant**
- **The Project Overview**

## The UK Experience

- **Conditional Fee Agreements and Uplift**
- **After The Event Insurance (see list)**
- **Access to Justice Act:**
  - **Proportionality**
  - **Case Management**
  - **Uplift and Premium payable by unsuccessful defendant**
  - **Funder's ACO capped at quantum of investment**

## The USA Experience

- **Massive Class Action Industry**
- **Why isn't the Australian experience similar?**

# The USA vs The Australian Models

- **In the USA:**
  - Attorneys race to file
  - Attorneys charge % without contractual consent
  - No Adverse Costs Order
  - Punitive Damages
  - Jury Decisions
  - Depositions
  - Limited Institutional Support
- **In Australia:**
  - Funder conducts due diligence
  - Funders charge % with contractual consent
  - Adverse Costs Order
  - No Punitive Damages
  - No Jury Decisions
  - No Depositions
  - Total Institutional Support



# **Accountability of Funders and Insurers**

- 1. Just, quick and cheap resolution of the real issues**
- 2. Collation of relevant Court data**

## Likely Insured Causes of Action

### Shareholder Claims

- s710, 728
- s674(2)
- s1041(h), s769(c)

### Claims Against Directors

- s729
- s674 (2A)
- 1041I
- Section 82 of the Trade Practices Act
- s79 and 75B of the Trade Practices Act
- s1317H
- s180 to 184
- s588G

### Professionals Claims

- Contract
- Tort
- Fair Trading
- Trade Practices

## Class Actions as a Justification for Raising Premiums?

“Spurred on by increasing shareholder activism and a plaintiff-friendly legal regime, there are currently a number of shareholder class actions that have the potential to substantially impact the D&O market. Based on current reports, these factors could result in claims payouts in excess of an estimated \$850m. Some of these actions, even individually, have the potential to put a significant dent in the D&O premium pool.”

- Vanessa Maher, VP claims for Liberty International Underwriters, to Australian Insurance Law Association, June 2006.

# Implications for D&O Insurance Policies and Premiums

- Insurance premiums
  - no evidence of increase attributable to advent of funding;
  - competition: AFR reports on front page, 15 January 2007: ‘Insurance premiums set to fall’ citing “underwriters battle to increase market share”.
- Changes to D&O policies?
  - Is there an increased scope for gaps in coverage?
  - Look at exclusions. Typically ‘Dishonesty, fraud and wilful misconduct’ will be excluded, but what about excluding:
    - prospectus liability (Concept Sports – IMF funded action); and
    - securities claims?

## But Is Australia so Plaintiff Friendly?

- There have been no new developments in caselaw to make the class action regime any easier.
- Most of the class actions face interlocutory hearings on a range of procedural issues.
- Due to the spectre of adverse costs, funders act as a reality check and vet inappropriate cases.
- US system does not award adverse costs.
- An opt in process means a sufficient number of aggrieved shareholders must wish to take action.