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Ms Angela MacRae
Commissioner
Access to Justice
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Ms Macrae,

Submission on Productivity Commission Draft Report – Contingency Fees

This is a submission to the Productivity Commission respecting its April 2014 draft report on Access to Justice Arrangements and the recommendation that the prohibition on contingency fees or damages–based billing, as it is also known, be lifted subject to comprehensive disclosure requirements. In this letter, I argue that if Australian jurisdictions decide to lift the prohibition they should also require firms commencing matters on a contingency basis to provide some security for costs to protect defendants against a hollow victory.

The Productivity Commission's recommendation regarding contingency fees has sparked some comment from firms and the press with concerns expressed about the advent of United States style litigation on the one hand and responses that such prohibitions have recently been lifted in the United Kingdom and Canada without opening the flood gates on the other. In the United States, losing parties rarely bear the burden of the successful parties' legal fees. It is otherwise in Australia and the risk of adverse costs orders has long been a constraint on the sort of speculative, entrepreneurial litigation that it is feared could arise here should contingency fees be introduced. This risk would remain. Indeed, in England, a significant factor in lifting the prohibition on contingency fees was the belief that awarding fees to the prevailing party is likely to prevent speculative claims. But of course, the threat of adverse costs orders means little if unsuccessful parties are unable to pay.

In recognition of the risk that a defendant's victory may be pyrrhic, the law developed the concept of security for costs. So in cases where there is a risk that an unsuccessful plaintiff will not be able to meet an adverse costs order, defendants can apply for an order that the plaintiff post a bond or more usually provide a bank guarantee by way of security as a condition for being able to continue to prosecute their claim. Security for costs is not intended to give a complete indemnity to a successful defendant but rather to give them some costs protection and the law has recognised some discount factors to balance the importance of not stultifying worthy claims on the one hand while giving a defendant some comfort on the other.

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With the advent of litigation funding, the presence of a funder behind a plaintiff, a party whose involvement was purely for commercial profit rather than being interested in having their rights vindicated, has led to orders for security both being more likely and at a higher level.[1] This is because the courts see less need for a discount where the entity standing behind the plaintiff is there for a purely profit motive.

Further, it is clear since the decision of the Full Court of the Federal Court in the Willmott Forests class action[2] that security for costs can be ordered against an individual named applicant in a class action. This was despite the absence of a litigation funder in that case.

Security for costs is now a fact of life in large scale plaintiff litigation.

I believe that in the event jurisdictions decide to remove the prohibition on contingency fees or damages – based costing, they should also introduce a requirement which would be by way of rebuttable requirement that any firm commencing a plaintiff action on a contingency fee basis can do so only upon providing security for costs for the prospective defendants. It may be that certain types of claims are excluded, for example property and personal injury claims arising out of natural disasters such as bush fires, floods or landslides where the evidence suggests human involvement in their onset and individual personal injuries claims. However, large complex class action claims concerning pure economic loss such as shareholder/continuous disclosure actions or claims about managed investment schemes could be subject to the requirement.

If Australia followed the United Kingdom and Canadian models, it is likely that any contingency fee arrangement will be subject to close regulatory, if not judicial, scrutiny. Provision of security by such firms could be a part of that scrutiny.

As the cases recognise, the presence of a litigation funder substantially alters the balance between plaintiffs and defendants.[3] Requiring plaintiff firms intending to launch litigation on a contingency fee basis to provide security would do no more than ensure that the firm also bore the burden of adverse costs orders. This requirement should not be an undue burden on plaintiff firms as no doubt appropriate insurance products will become available and firms may also be able to set off risk by slicing and dicing both the liability to pay security and the potential upside in whatever manner their ingenuity may lead them. Further the requirement would ensure that in the market for large class actions, plaintiff law firms did not enjoy a structural advantage.

Finally, my personal view is that contingency fee arrangements carry with them a substantial risk of intractable conflicts of interest between clients and firm so any judicial or regulatory oversight of these arrangement must contain robust checks and balances to minimise and contain this risk. However, I also accept that complex commercial litigation has become incredibly expensive and where defendants have deeper pockets, increasingly hard to

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[1] *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 per Hodgson JA at [51] – [54].
[2] *Madgwick v Kelly* [2013] FCAFC 61.
[3] *Saunders & Ors v Houghton and Jones* [2009] NZCA 610 [35]-[36] cited with approval by Judd J *in Bufalo Corporation Pty Ltd (Rec & Man appointed) (in liq) v Lendlease Primelife Ltd & Ors* (No 3) [2010] VSC 263 at [68].

prosecute to victory. That said, there does appear to be an opportunistic element in much US securities and even some products liability litigation and one way of containing excess and maintaining balance in the litigation arena would be to ensure to that those who initiate such proceedings also bear the burden of losing it.

If you would like me to expand on any aspect of this letter, please do not hesitate to contact me.

Yours sincerely,

Penelope Pengilley
Director