President Arthur Moses SC with the president of the New York City Bar Association, Roger Maldonado.

It is estimated that 25 litigation funders currently operate in Australia.[9] Litigation funders do not require a licence to operate here,[10] which means there are effectively no minimum standards to be met before a person may represent themselves as being a litigation funder.[11] By regulation litigation funders are exempt from the requirements of the Consumer Credit Code and the definition of a managed investment scheme under the *Corporations Act 2001* (Cth), and may be exempt from the requirement to hold an Australian Financial Services Licence.[12]

The ALRC argues that a licensing regime would ensure continuous scrutiny of funders, better protect consumers and other parties to the litigation, and incentivise compliance.[13]

The Bar Association questions the need for a licensing regime. We believe that the issues this regime would purportedly address can be adequately regulated under current law.

Introducing a licensing regime raises three further issues: who would police the regime; is it clear that the licensing regime could guarantee that only reputable funders enter the market; and how to define who is a 'third-party litigation funder'. If an individual borrows from a bank to fund their litigation, for example, would that make the bank a 'third-party litigation funder'?

The association has said that if a licensing regime is ultimately introduced, there must be adequate funding to set this scheme up for success.

The approach to litigation funding in the USA is more haphazard, with regulation left to each state rather than the federal government. Many states do not have formal regulation, and assessment of litigation funding agreements has fallen to the courts.[14] In May, bills were introduced into the New York State Assembly to regulate litigation funders, such as by capping interest rates or requiring companies to educate their customers about fee structures.[15]

Contingency fees

Australian solicitors are currently prohibited from billing clients on a 'contingency fee basis' where the solicitors' services are provided in exchange for a percentage of the amount recovered by the litigation.[16] Such arrangements must be distinguished from lawful 'conditional fee agreements' where a lawyer appears on a 'no win/no fee' basis and may charge a percentage of uplift of fees.[17]

Lawyers are usually remunerated on a fee-for-professional-service basis. The Bar Association maintains that this model should not be abandoned without a compelling case justified by public benefit.

The ALRC has proposed that solicitors acting for the representative plaintiff in class action proceedings should in limited circumstances be permitted to enter into contingency fee agreements to 'allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk'.[18] Additionally, the ALRC has suggested that contingency fee agreements in class action proceedings should only be permitted with leave of the Federal Court.[19]

Arguments in favour of contingency fees rely on the potential to promote increased access to justice, particularly for members

of mid-sized class actions which are rarely funded by litigation funders; to promote competition and reduce commission rates; and to mitigate conflicts of interest, compared with time-based billing which has been said by some to reward 'the dull and the slow'.[20]

The Bar Association has to date opposed contingency fees. A significant issue that has underpinned that opposition is the concern that allowing legal practitioners to hold a direct and potentially substantial financial interest in the outcome of a given case creates a serious risk of compromising the practitioner's fundamental duty to the court, the overriding duty of candour and possibly the duty to their client.

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There is also the equally important concern that contingency fees may create risk for vulnerable plaintiffs, exarcerbate rather than ameliorate conflicts of interest and contribute to the bringing of unmeritorious claims.

The key issue in the current debate is whether contingency fees can be implemented in NSW in a manner that does not adversely impact upon the interests of litigants or the duties of lawyers as officers of the court. In contrast to our experiences in NSW, contingency fees have been allowed in the USA for more than 230 years.[21] If there is an appetite to introduce contingency fees here, the US experiences will need to be carefully considered. For more than 60 years, contingent fee lawyers have been required by New York courts to file confidential 'closing statements' with the court when a case is resolved, disclosing their fees, settlement amounts, expenses and related information.[22] This requirement was implemented in response to concerns raised in the 1920s by the New York City bench and bar about contingent fee lawyers' conduct and 'ambulance chasing'.[23] Today, retainer and closing statement requirements apply to all attorneys practising in Manhattan or the Bronx, regardless of which court the case is filed in.[24]

The cost of justice

In an increasingly noisy world, where anyone with an internet connection can be a commentator, and the rule of law is often tossed around like confetti without thought to its meaning, there are many competing voices that may overshadow barristers' voices in the public domain.

That does not mean that the message of the NSW Bar is any less important or urgent.

It is as critical now as ever for the Bar to speak up for the administration of justice and the independence of the legal profession – even and especially when it is unpopular to do so.

The cost of accessing justice remains a significant concern. But the economic and social cost of losing a robust and independent legal services profession is greater. For the New South Wales Bar, outweighing all considerations in the current debate on contingency fees, litigation funding and class actions, is the fact that we are a profession that has an overriding duty to the court as officers of the court and not just a business.

END NOTES

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3 See, eg, Spigelman CJ, *Swearing In Ceremony of The Honourable J J Spigelman QC as Chief Justice of the Supreme Court of New South Wales* (25 May 1998) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_1998.pdf>.
4 ALRC, *Class Action Proceedings and Third-Party Litigation Funding*, Discussion Paper No 85 (2018) 3.
5 Ibid, Proposal 3-1.
6 Ibid, 14 [1.3], quoting Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019 (Senator Durack).
7 Ibid, 14 [1.4]-[1.5].
8 Ibid, 14 [1.5], 37 [2.9]-[2.11]
9 Ibid, 16 [3.30].
10 Ibid, 43 [3.1].
11 Ibid, 49 [3.24].
12 Ibid, 43 [3.1] citing *Corporations Amendment Regulation 2012* (No. 6) (Cth) Items 6, 1B and 1.
13 Ibid, [3.2].
14 Incerto, Rodgers & Cummings, 'The Third Party Litigation Funding Law Review – United States', *The Law Reviews* (online) (2018) <https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-1/1152267/united-states>.
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16 ALRC, above n 3, 82 [5.5]; see, eg, Legal Profession Uniform Law (NSW) s 183.
17 Ibid, 82 [5.6].
18 Ibid, 88 – Proposal 5-1.
19 Ibid, Proposal 5-2.
20 Ibid, [5.11], [5.13], citing Michael Legg, 'Contingency Fees—Antidote or Poison for Australian Civil Justice?' (2015) 39 *Australian Bar Review* 244, 250-1; Michael Duffy, 'Submission 22 to the Victorian Law Reform Commission, Litigation Funding and Group Proceedings' (5 October 2017) 23.
21 ALRC, above n 3, [5.21], citing Contingency Fee Working Group, Law Council of Australia, '*Percentage Based Contingency Fee Agreements*' (May 2014), 4.
22 Helland, Klerman, Dowling, & Kappner, 'Contingent Fee Litigation in New York City' (2017) 70(6) *Vanderbilt Law Review* 1971, 1971-2.
23 Ibid, 1972-3, citing Isidor Wasservogel, *Report To Appellate Division*, First Judicial Department, 4 (1928).
24 Ibid, 1976.

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