

LITIGATION FUNDING



“Litigation Funding is here to stay”...Over the last eight years **John Walker** has developed highly specialised skills in providing funding for and managing insolvency, commercial and multi-party litigation. He is managing director of IMF (Australia), which is the largest litigation funder in Australia.

Why is litigation funding perceived as controversial and do you really think it is?

Any perception that litigation funding is controversial has been dissipated in recent years. Majority of the participants in the Australian capital markets and legal market have heard of IMF and understand that litigation funding is here to stay. Those who might perceive it as controversial fail to appreciate that litigation funders play a similar role to insurers, who regularly fund and control legal proceedings on behalf of the insured. Litigation funders can balance the scales by providing similar funding and management services to plaintiffs.

Why is litigation funding more established in Australia?

IMF (Australia) Ltd listed on the Australian Stock Exchange in 2001. The decision to list the company was based on a premise that the courts would allow litigation funding to expand outside the insolvency arena (insolvency practitioners had been able to seek financing for litigation from third parties since 1996). The premise proved to be right. Since IMF's listing, a number of Australian courts have decided that third party funding does not amount to an abuse of the courts' process, citing the importance of facilitating access to justice. This view was recently confirmed by the High Court of Australia.

How investable is this space? What are the different litigations, investment horizons and investment vehicles available to an investor?

IMF funds three types of cases: group actions, commercial actions and insolvency-related actions. The maximum value of claims in IMF's portfolio as of 31 December 2006 (in matters where IMF expects to receive a fee of more than AUD500,000) amounted to AUD 923 mn. Based upon 200 completed cases, IMF has won at trial or settled 80% of its matters. IMF has received an average return on its investment of about 2.5 times.

Investors have the opportunity to invest in IMF through its publicly-listed securities which trade on the Australian Securities Exchange. In the future, there may be the opportunity to invest in particular portfolios of IMF-funded cases.

What are the risks and how can they be managed, monitored, controlled, mitigated and exploited?

In Australia, the losing side must pay the winning side's costs, so the biggest risk to funding litigation is an order to pay the costs of the other side if the case fails. This risk is managed via an extensive due diligence process, which IMF undertakes before it decides to provide funding. This process examines in detail the claim, the claimant, the quantum, any likely defences and the defendant's capacity to pay any judgment. Funding is only provided once these criteria are satisfied.

Once litigation is funded, the two main risks are: (a) delays to the resolution of a case; and (b) costs being more than anticipated. IMF addresses the later risk by seeking budgets from the lawyers and seeking to cap the amount payable by IMF to those budgets. A “hands-on” approach to management of the litigation, and the provision of instructions to the lawyers, reduces the potential for delay.

On average, do the rewards outweigh the risks?

This question is best answered by looking at IMF's recent performance. IMF has successfully resolved six matters since June 2006, resulting in cash receipts of AUD26.5 mn (on an amount invested of AUD9.77 mn – representing a return on investment of 170%, over a three year period).

What are the challenges going forward? Do you see it gaining ground in other jurisdictions (and which ones)?

One challenge facing litigation funders is government regulation. The Attorney-Generals of the Australian states are currently considering a model to regulate funders. But IMF is generally supportive of such efforts and is requesting that insurance companies also be considered in any measures to regulate litigation funders. Other challenges involve insuring that lawyers and the courts focus their attention on the just, quick and cheap resolution of the real issues in legal proceedings; that lawyers operate within budget and chart reasonable timetables.

We think litigation funding will become more common in other jurisdictions, especially the United Kingdom, where the Civil Justice Counsel recently published a draft report (February 2007) which said “properly regulated third party funding of litigation should be recognised as an acceptable option for mainstream litigation.”