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# The drive for litigation innovation

Legal affairs editor Chris Merritt speaks to key players in litigation funding and online dispute resolution.

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16 MINUTE READ • 🗣️ 1

This is the first in a three-part series marking the publication next Friday of *The Australian Legal Review*, a magazine devoted to legal affairs.

This week, legal affairs editor Chris Merritt speaks to top managers from leading litigation funders IMF Bentham, Burford Capital and LCM, as well as the founder of Immediation, an online dispute-resolution company that plans to disrupt a market worth \$1.5 billion.

Part 2, which appears next Friday, focuses on the way technology and innovation are transforming private law firms.

The final part of the series examines law schools and their embrace of change that is producing tech-savvy graduates.

The series will be accompanied by 10 video reports, starting today, that will appear during the next three weeks.

## IMF Bentham

### Stringent picks for private enforcement

**IMF Bentham global managing director and chief executive Andrew Saker, above left, and the company's chief executive for Asia and Australia, Clive Bowman, say the litigation funder is growing internationally.**

**Chris Merritt:** Do you win most cases?

**Clive Bowman:** We have a success rate of 90 per cent.

**Merritt:** How do you manage that?

**Bowman:** We have investment managers who review the cases. There's a very stringent process, and if they decide to fund the case, it goes to an investment committee that has a number of permanent members, including former judges.

**Merritt:** So is it majority rule?

**Bowman:** No. It's unanimous and we think it imposes a particular discipline.

**Merritt:** So what proportion of applicants get through that selection process?

**Bowman:** Probably about 5 per cent?

**Merritt:** How much of the settlements are returned to clients?

**Bowman:** About 60 per cent goes to clients and 40 per cent goes to the funders and legal fees.

**Merritt:** Why do cases settle?

**Bowman:** Because they are good cases, primarily. IMF has, as I said, a very stringent selection process so when a funder comes on board defendants realise they cannot play the game of seeking to run the plaintiff out of money.

**Merritt:** Is this private enforcement of corporate law and is that a good thing?

**Andrew Saker:** It is in part. It's in part a response to the limited resources available to the government to enforce all types of legal outcomes and, as a consequence, the niche has grown for private enforcement opportunities.

**Merritt:** Do you see private enforcement and public enforcement as complementary?

**Saker:** We do. We see that there is a niche for both public enforcement and private enforcement.

**Merritt:** The company has been around for a while now, where is it going to grow?

**Saker:** We have expanded internationally and now have 14 offices in six countries. We do see some additional geographic expansion, primarily into continental Europe, but also within jurisdictions as there is a greater acceptance of litigation funding.

**Merritt:** Will future work be predominantly Australian?

**Saker:** Our present mix of our portfolio is approximately 60 per cent in the US and 40 per cent in the rest of the world. We do expect that to balance out in the near term as the rest of the world expands its investments, particularly in Asia and in Canada.

But we are expecting to see an overall growth in the total portfolio, so we expect expansion across all jurisdictions.

**Merritt:** Where in Asia?

**Bowman:** We are based in Singapore and Hong Kong, and we have been there for about a year and a half and seen very significant growth, particularly in the area of arbitration and insolvency.

**Merritt:** Why is arbitration so popular?

**Bowman:** The advantage is it's private, and also where companies are operating in jurisdictions where the court systems aren't as robust, they choose, by agreement, to nominate a particular place.

**Merritt:** Is it a competitive market?

**Saker:** The market is competitive. It's growing in its degree of competitiveness. In the US, in particular, we have seen a significant expansion of the number of funds that are offering third-party litigation funding or dispute finance. In Australia, less so, but there have been some recent entries of international funders into this market.

**Merritt:** What sort of regulation should there be?

**Saker:** IMF Bentham has a constant and consistent view about regulation of the industry and we support the Australian Law Reform Commission's recommendations.

At the moment that looks like they are going to be requiring litigation funders to get registered with the Australian Prudential Regulation Authority, which we think is a positive development.

**Merritt:** Why?

**Saker:** It provides the users of litigation finance, both as clients as well as defendants and the court, some degree of certainty as to the financial capacity of litigation funders to meet not only the cost of the prosecution of their claims but also any adverse costs in the instance that there is a loss.

**Merritt:** What would you oppose in terms of the regulation agenda?

**Saker:** The only matter that came out of the ALRC's recommendations that cause us a degree of concern was the implications about the relaxation or dilution of the rules and regulations about disclosure and misleading and deceptive conduct. We thought that was a step backwards in terms of the efficacy of the market and the confidence that consumer and users of the capital markets can have, so we weren't particularly supportive of that.

## **BURFORD CAPITAL**

### **Funders shift to defence**

## **Litigation funder Burford Capital wants to work for corporate legal departments, says managing director Craig Arnott.**

**Chris Merritt:** What is your view on the idea from the Australian Law Reform Commission that litigation funders should meet a capital adequacy and fit and proper person test?

**Craig Arnott:** We already have to do that in the UK, and in the US we have to do that and a lot more.

Our only point is that we should be given recognition for already satisfying those tests. What has happened in Australia is that a number of small players have jumped into the litigation funding market and if they are going to be backing class actions you don't want consumers to be burned. I completely understand that. So, to that extent, yes, have a capitalisation requirement, have some sort of financial sufficiency requirement, and if you do that you must have independent auditing.

**Merritt:** Would the regulatory scheme suggested by the ALRC interfere with the potential for you to grow the side of the business you are interested in?

**Arnott:** No, I don't think so.

On the suggestion that there should be a 50 per cent cap on returns, our approach is that we won't fund anything that even suggests we would take that much. We won't touch it. It's bad for business — it's a terrible look.

But what that means is we will only fund very big dollar matters.

So, in percentage terms, our fee will always be modest. We want it that way because you want the plaintiff to walk away feeling a winner. You have to have that. It is a disaster for business if you do not have that.

We want there to be enough headroom for everybody. We model all sorts of outcomes and we will always take the most conservative view possible of the outcome and then, on that basis, make sure that the very substantial part of any award goes to the plaintiff.

We won't touch it otherwise.

**Merritt:** Does that approach flow through and impose a degree of discipline on the law firms you do business with?

**Arnott:** Absolutely it does.

**Merritt:** Have they all been happy with that?

**Arnott:** They are because in the end it is better for their business as well. And, to be honest, they are really disciplined by the market.

**Merritt:** The ALRC has backed contingency fees for class actions — do you think they will come?

**Arnott:** I think they will come in. We say, why restrict it to class actions? If they work in one area of the law, they should work in another area of the law. Why would you make that distinction?

They will at least be brought in for class actions and we say we can see that demand in the market. To be honest, why should you artificially restrict demand in the market? Bring it in if people want it.

**Merritt:** I recall that you have made the point that class actions are not the main game for Burford.

**Arnott:** That's right. They are not. And we will only dip our toe into that if an AMP comes along. That's something that is absolutely bang to rights. We are not interested in playing in that space just for the sake of playing in it.

Our main target focus group is actually big corporates and the law firms who represent them.

That is where we see that there is very significant room for growth.

**Merritt:** Is it time for corporate law firms to stop viewing litigation funders as the enemy and start looking at them as part of the team working for corporate Australia?

**Arnott:** That is exactly our mantra. We say to law firms: You have to recognise the budget strain that your clients are under. That is not to say that funding always makes sense, but what we can tell you from what we see in the market is that they want it as an option.

**Merritt:** So have I got this right? Capital is being supplied to the plaintiff side at the moment but a shift is going to happen and it is going to be supplied to corporate defendants as well?

**Arnott:** That's right. The way it works is that you roll the defence side matters into a portfolio if corporates also have a claim that will anchor the portfolio.

It is definitely true that you need to have a claim, but most corporates have some sort of claim, especially if they have significant books of business.

**Merritt:** So you could be the best pal of in-house legal departments?

**Arnott:** That is the pitch, and the pitch is that instead of the in-house legal department being a cost drain, it actually turns it into a profit centre.

**Merritt:** That is the trend that is unfolding in Britain?

**Arnott:** Precisely right.

## IMMEDIATION

### Disrupter mediates disputes

**Barrister Laura Keily explains the foundation of her business.**

**Chris Merritt:** What got you thinking about this?

**Laura Keily:** I had a steady stream of clients in the commercial space where I work who could not get access to justice. It cost too much, took too long and they just gave up before they got a remedy that they deserved, and so I found that I was compelled to seek an alternative solution for them.

We've built a platform where people can bring their disputes. They can answer some simple questions, engage the person on the other side of the dispute and then work with a qualified expert lawyer to resolve it, either by way of negotiation or by the subject matter expert telling them a decision by which they can abide.

**Merritt:** Why would they use this online service as opposed to a traditional face-to-face mediation or even a court case?

**Keily:** There are myriad reasons. The first one is time. We're going to get people an outcome in 30 to 60 days, as opposed to months or years to use the court process. The cost will be fixed and relative to the value of the claim, so not a contingency fee based on an outcome. So if you have a \$100,000 claim it will cost you \$10,000 to use our platform, and that cost is very conservative compared to the uncertain amount of legal fees that people spend.

I found that people sometimes each spend two, three or four times the value of what they are arguing over on legal fees and that's why cases can't settle. The other is, it preserves relationships.

**Merritt:** You have the clients on one end, who's on the other end? Who are the lawyers?

**Keily:** We are establishing a panel of leading expert lawyers, so there will be qualified mediators and arbitrators, and we will also be looking for subject matter lawyers. We have had good reaction from the top-tier telling us, some of them, that they're interested in joining the panel.

**Merritt:** When you look forward a year or so, where do you want to be?

**Keily:** We think we can make considerable inroads into the Australian alternative dispute resolution market, which is currently \$1.5 billion, and hopefully add to that market.

There's an under-serviced part of the market where people know it's too expensive to bring cases, whether by alternative dispute resolution or in court and so they just simply don't do it and corporate Australia has been telling us that too.

There are about half a million commercial cases filed each year and we think we can probably attract about 1 per cent to 5 per cent of those, at least.

**Merritt:** You are starting in commercial law, right?

**Keily:** Yes. We really wanted to make sure that this was tested with corporate Australia first, and we are dealing with the general counsel of Australia's leading companies, and they are telling us that they want this solution and they are prepared to invest their time and energy with us as pilot clients.

Companies and businesses that are not listed and who don't have infinite resources and who have a dispute between, say, \$50,000 and \$5 million, they are really struggling to get an outcome, and so we thought we would help those businesses first and then we will be moving straight into family law.

**Merritt:** Family law. There is an enormous backlog of cases waiting to be heard.

**Keily:** There is, and every investor I've spoken with, every lawyer I've spoken with says: "You've got to do this for divorce."

**Merritt:** It would be more cost effective?

**Keily:** Cost effective and they will get an outcome in a couple of months.

**Merritt:** When is the launch date?

**Keily:** November. So in November we are calling for panel members in the commercial space. We will be going out to the market and asking barristers, retired judges, arbitrators and mediators to apply.

**Merritt:** Which leads to the next question, where next? This is going to launch in Australia, where are you going to take it?

**Keily:** We think we will go straight to London. I worked in the London market for a number years at Slaughter & May and I'm very familiar and comfortable with the UK market.

**Merritt:** Do you see yourself as a tech disrupter?

**Keily:** I didn't to begin with but it's becoming more evident as I go forward that I'm loving the entrepreneurial side of life and being a founder of a new business is opening up opportunities.

## LCM

### **Documentary evidence and a clear line of sight attenuate risk**

**Managing director Patrick Moloney outlines the litigation funder's strategy.**

**Patrick Moloney:** Predominantly, our experience has been in Australia, but we are in the process of opening an office in Singapore. We will have an office open there by November.

You know, the markets of Hong Kong and Singapore have opened up to litigation finance, at least so far as the international arbitration space is concerned, since last year and many of the larger and more established funders are moving into that market.

There has been competition now for some years between Singapore and Hong Kong as to who is going to provide the most favourable and sought-after seat for international arbitrations. Different parties will tell you which one is succeeding, but Singapore provides an incredibly good infrastructure for dispute resolution.

**Chris Merritt:** How do you select the cases you are going to back?

**Moloney:** We will only fund cases in areas where the law is reasonably well settled. We are not interested in moving in and creating new law, that creates too much risk and too much uncertainty. We are looking for cases that are predominantly reliant upon documentary evidence, as opposed to oral testimony.

We need to have a clear line of sight in terms of recovery. The economics of a case have got to work for us and it has got to work so that everyone benefits out of it, and we also need a strong legal team. Typically, we will get an application in for funding and that will be allocated to one of my investment managers, who will do a

first due diligence exercise. It will then be peer reviewed within our team and, ultimately, it will go to our investment panel, on which we would have independents who have expertise in the particular area of law from which the application comes.

**Merritt:** What proportion, roughly, get a tick?

**Moloney:** It is a very low proportion of applications that we offer commercial terms to, so it is in the order of about 4 per cent. If I compare LCM to the other listed entities on the market, there are very similar stats when it comes to that. We are trying to reduce risk as much as we can and take as much risk out of that investment as we possibly can but, inevitably, investing in litigation is still attended with lots of risk.

**Merritt:** So what is the strike rate? When these cases get filed, how many succeed?

**Moloney:** Overwhelmingly, cases that are backed by a litigation funder or financier ultimately settle and there are a number of dynamics that drive that, but one of them, in particular, is having a clear line of sight to recovery.

That often means the cases that we invest in or provide funding to are backed by some sort of an insurance product, whether it be, D&O or professional indemnity insurance.

**Merritt:** How significant is the funding of class actions compared to all of the work that you do?

**Moloney:** We like to maintain a balanced portfolio of investments across all types of disputes, from insolvency to commercial claims to class actions to international - arbitrations.

So we try to manage a portfolio so that it does not be attended with a concentration of risk.

So class actions are part of the overall mix but certainly not something that we would like to see dominate our portfolio of investments.

**Merritt:** What areas of law do you think are likely to be growing in future?

**Moloney:** You have things such as opportunities that arise out of insolvency and that is consequent on a downturn in the economy. The economy, at some stage, will have a downturn.

The class action space has grown immeasurably in the past five years in this country but if you again go back to the principles that we give consideration to — an area where the law is reasonably well settled — you cannot say that about class actions at the moment.

So, from LCM's perspective, to a certain degree we have stepped back and we are slightly more cautious about that area of law until it settles down.

**Merritt:** You're talking about competing class actions?

**Moloney:** Competing open classes particularly. We still don't have any certainty around that, so we have got a lot of judgments giving us all sorts of different principles associated with that, some of them are easy to reconcile, some of them are not, so there is a degree of uncertainty associated with how that particular problem may be resolved by the courts.

**Merritt:** We have the courts looking at this and we have the Australian Law Reform Commission looking at this, the Victorian Law Reform Commission has had a look at it, who do you think is going to get to the end point first? Will it be the courts or the commissions?

**Moloney:** The courts. The courts will create a framework for this to work in, I think, before the legislators do.