IMF Bentham CEO says funders must evolve with ever-changing class action regime

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As Victoria looks set to pass legislation allowing law firms to cut litigation funders out of class action work, and the High Court increases the risks of financing group proceedings, funders operating in Australia have been forced to think on their feet to adapt to the ever-changing regime. Australia's largest litigation funder IMF Bentham is no exception, CEO Andrew Saker told Lawyerly.

The ASX-listed funder, now known as Omni Bridgeway, said last week it was weighing various options in response to the dual threats of Victoria's contingency fee bill — which was scheduled for a second reading in the state's Legislative Council on

Thursday — and the High Court's common fund ruling, including setting up its own law firm to compete head to head with other class action firms, including Slater and Gordon and Maurice Blackburn.

"You want to make sure you have considered all the options on the table," Saker said.

IMF has not begun a recruitment drive but with a big in-house team of lawyers, the funder wouldn't need to hire anyone to launch a boutique to bring class actions in Victoria.

"Fortunately we're a firm that's made up of about 75 lawyers and there's about 15 of them that practice in Australia, all with 20 to 25 years' experience in class action management. We wouldn't need to specifically recruit people," Saker said.

While it would not be the first funder to be affiliated with a firm — Claims Funding Australia was established by Maurice Blackburn in 2009 — IMF would be the first funder in Australia to launch a law firm.

But before it would travel that path, Saker said, IMF would wait to feel the impact of the contingency fee legislation. He said it remained to be seen whether the bill would deliver the benefits to group members its proponents have predicted.

"There are a whole bunch of questions that need to be answered," Saker said.

The passage of the new law might not necessarily cause an upheaval for funders, with some predicting that unlike in the US, where the class action industry is fueled by law firms earning contingency fees, Australian law firms will take advantage of it only for some work.

Contingency fees are legal in the UK, but their use is highly regulated and law firms there have not embraced the option.

Speaking at the Association of Litigation Funders of Australia conference last month, Woodsford Litigation Funding consultant Clare Owen said a small number of law firms would be able to fund class actions off their own balance sheet and predicted funders will still have an active role.

"If you actually look at how [law firms] operate now they spread their portfolio – some cases on a no win, no fee, some with a funder and a mix. We expect that to continue so from a funder's perspective we don't expect there to be a huge change," Owen said.

But she said funders have to evolve, including through "backdoor" arrangements.

“We see there will be new opportunities to fund through the backdoor, a lawyers and funders agreement and we take our share from their contingency fee,” she said.

In the US, Woodsford has an arrangement with at least one plaintiffs law firm to provide a $20 million facility to fund cases on a contingency fee basis.

“We charge interest so it’s like a loan but they only pay the interest where there is a successful outcome,” Owen said.

Short of launching its own firm, IMF says another option on the table is to offer law firms portfolio funding, in which the funder finances a suite of cases. Much of IMF’s business in the US, where contingency fees are the norm, comes from this type of funding, which allows firms to manage the risk that comes from bankrolling a case. In Australia the risk is that much higher because of the threat of an adverse costs order against the losing party.

“The benefit for the law firms is that they see some cash early and mitigate some of the risk,” Saker said.

But depending on the impact of the legislation in Victoria, it could just be “business as usual” for IMF.

For some firms, running contingency fee cases could prove profitable in the short term, but the long term is another matter, he said.

“The major difficulty is that you’ve got to be pretty good at winning your cases. Not every case is a winner and you only need to lose one or two to blow up your capital. You can’t get it wrong too many times,” he said.

“It might be that plaintiffs firms compete away to the point where it’s uneconomical. It’s going to be an interesting period of time.”

The High Court’s ruling against common fund orders in December could also be an opportunity for IMF to take viable cases from funders that don’t have the same capital and are not willing to wait until the end of a class action for certainty of a recovery.

In Brewster, a majority of the High Court found courts were not empowered to order that all group members pay a portion of their class action proceeds to a third-party funder before a settlement or judgment is reached in the case.

Saker said the ruling could shrink the funding market, with some funders that entered what seemed to be an attractive environment in Australia in the past few years now deciding to retreat.

“There aren’t that many funders out there that have the availability of capital that we do,” Saker said. “I think it had the potential to make the market less attractive for funders, some that don’t have the business model or capital that we have and aren’t in a position to respond as nimbly as we can.”