From: [redacted]
To: [redacted]
Cc: [redacted]
Subject: [redacted]
Date: [redacted]
Attachments: [redacted]

Dear Civil Justice Council,

We attach Litigation Capital Management's submission in response to certain consultation questions.

The covering information you have requested is below:

Your response is (public/anonymous/confidential):	Public
First name:	Patrick
Last name:	Moloney
Location:	London
Role:	Chief Executive Officer
Job title:	Chief Executive Officer
Organisation:	Litigation Capital Management (**LCM**)
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Regards,

[redacted]

LCM

EXPERIENCE COUNTS

Bridge House 181 Queen Victoria Street
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Sydney | London | Singapore

LCM's Response to the CJC's Review of Litigation Funding Consultation

28 February 2025

Introduction

1. Litigation Capital Management (**LCM**) welcomes the opportunity to respond to the Civil Justice Council's (**CJC**) Review of Litigation Funding. Established in 1998, LCM is a pioneer in litigation funding, holds an Australian Financial Services License and is publicly listed on the London Stock Exchange's AIM. Operating from offices in London, Sydney, Brisbane and Singapore, LCM has facilitated access to justice by funding commercial, insolvency, arbitration, and group actions globally.

2. LCM has actively contributed to litigation funding reforms, including providing evidence to Australia's Parliamentary Joint Committee and the Australian Law Reform Commission's inquiries. This submission addresses certain questions from the CJC's consultation.

(3) Are there other benefits of third party funding? If so, what are they?

3. <u>Economic benefits</u> – Litigation funding significantly contributes to the UK economy. Since 2018, LCM's London office alone has invested approximately £120 million in legal services in the form of legal fees, expert fees and other disbursements. Across the industry, litigation funding channels billions of pounds into the legal sector, strengthening the UK's position in one of the few industries where it remains a global leader and force for good.

4. <u>Enabling business investment</u> – Third party funding permits corporates to pursue their meritorious claims without sacrificing investment in their core business. The capital that would otherwise have been spent on legal costs can instead be spent on growing their businesses and driving economic growth.

5. <u>Corporate governance</u> – Litigation funding facilitates accountability by enabling claims that might not proceed otherwise. This promotes corporate responsibility and deters unlawful conduct through public accountability.

(4) Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding? If not, what improvements could be made to it?

6. LCM supports fit-for-purpose, light-touch regulation of third party funding in the UK. Singapore successfully adopted this approach to regulation through the introduction of the *Civil Law (Third-Party Funding) Regulations 2017*, which establish criteria for 'qualifying third party funders'. These include requirements that the funder:
    a. carries on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which it is not a party; and
    b. has a paid-up share capital of not less than S$5 million or the equivalent amount in foreign currency; or not less than S$5 million or the equivalent amount in foreign currency in managed assets.

7. Similarly in Hong Kong, Part 10A of the *Arbitration Ordinance* (Cap. 609 of the laws of Hong Kong) introduced in 2019 made third party funding for arbitration permissible in Hong Kong. There is a Code of Practice that was introduced at the same time which is substantially similar to the English Association of Litigation Funders' Code of Conduct and requires a funder to maintain access to at least HK$20m of capital. There is no body in Hong Kong specifically empowered to regulate non-compliance with the Code of Practice however evidence of any failure to comply with the Code of Practice is admissible in evidence before a Hong Kong court or arbitral tribunal, if it is relevant to a question the court or tribunal is deciding.

8. So in both Hong Kong and Singapore, funders are not required to apply for recognition, or for a license to operate, as a 'qualifying third party funder'. However, third party funders that do not

satisfy these requirements may not be able to enforce their rights under the relevant litigation funding agreement. This does not prejudice the rights of any other party against the funder in respect of that funding agreement. Adopting a similar regime in the UK may meet concerns regarding capital adequacy and fitness to fund, without requiring the establishment of a regulatory authority to authorise or license third party funders to provide disputes funding in the UK.

6(c) Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?

9. In the view of LCM there is a fundamental difference between funding provided to firstly, a sophisticated commercial party such as a corporate or an insolvency practitioner and secondly, a consumer such as a group member in a collective action.

10. The vast majority of funded claims are advanced by claimants who are sophisticated and commercially astute corporations or investors. In respect of these claimants, LCM submits that freedom of contract, a fundamental tenant of English law, must prevail. The right of these parties to freely negotiate and enter into a commercial arrangement to finance the pursuit of their legal claim should not be restricted.

11. Practically speaking, regulation to restrict the ability of these parties to negotiate and agree commercial terms may also produce the unintended and counterproductive consequence of encouraging parties to "forum shop" for jurisdictions with less interventionist requirements.

12. The only interface that most litigation funders have with individual consumers is as group members to collective actions. It is highly unlikely that a consumer with a single claim would be able to secure litigation funding due to the likely lack of proportionality between the size of that claim and the amount of legal costs incurred to prosecute it. In relation to the funding of consumers as group members to a collective action there is a sound basis for taking the view that a different regulatory approach is required to any approach which may affect sophisticated corporate users of litigation finance.

8(b) What impact, if any, does third party funding have on the level of litigation costs?

13. LCM is aware of, and does not agree with, a misconception that third party funders actively encourage or promote the inflation of fees charged by solicitors, Counsel and experts involved in litigation ("**Legal Costs**").

14. <u>Very few cases receive third party funding</u>. As Professor Rachael Mulheron observed, on average, litigation funders agree to fund between 3% and 5% of funding applications.[1] The applications they receive in turn represent a very small percentage of the overall number of claims brought in the UK. We estimate this figure to be in the low single digit percentages.

15. <u>The main driver of rising Legal Costs is the rising hourly rates charged by solicitors</u> in the UK, which (unlike third party funding) affect all claims pursued and defended. As the Financial Times reported in October 2024, "*[t]he top 10 UK law firms are charging clients almost 40 per cent more per hour than they were five years ago*".[2] This means that lawyers' fees have increased by more than double the rate of consumer price inflation, in a period in which broader inflation has been running at levels deemed far too high by central banks around the world.

16. <u>Funder commissions do not necessarily 'increase litigation costs'</u>. Where funding is obtained, it is too simplistic to view the funder's commission as an additional cost of bringing the litigation.

[1] Rachael Mulheron, *A Review of Litigation Funding in England & Wales: A Legal Literature Review and Empirical Study* (A Report for the Legal Services Board, 28 March 2024) Executive Summary <https://legalservicesboard.org .uk/wp-content/uploads/2024/05/A-review-of-litigation-funding.pdf>.
[2] Suzi Ring, 'Top UK law firms raise hourly rates by 40% in five years', *Financial Times* (21 October 2024) <https://www.ft.com/content/541f8b38-d657-4542-a7de-8c92a113db28>.

A more accurate view is that the funding commission arises from a separate economic arrangement between the funded party and the funder, that represents a trade-off agreed to by the claimant. Where the funding is provided on a non-recourse basis, the claimant has determined that they are content to pay the funder's commission (should proceeds be recovered from the claim) in return for eliminating their costs and reducing their downside exposure. The funder's commission, which is negotiated and agreed at the outset of the funding relationship, is only paid out of any successful outcome and only to the extent of that successful outcome. Otherwise, the funding commission is not recoverable and the Legal Costs borne by the funder become sunk costs that must be written off as a complete loss. In wholly unsuccessful cases, nothing is paid to the funder, and their funding has therefore been provided at no cost to the claimant.

17. LCM supports costs management by the courts. LCM supports court-driven cost management. While LCM doesn't control Legal Costs, its goals align with funded parties to achieve efficient, cost-effective outcomes with reasonable and proportionate expenses.

18. Throughout a funded case, LCM finances Legal Costs, bearing full downside risk. As LCM is not the plaintiff and does not instruct legal representatives, it does not drive the quantum of incurred Legal Costs. However, LCM ensures payment of these costs and assumes the full risk of the action.

19. If a case resolves for less than expected or the defendant prevails, LCM bears the Legal Costs and, in cost-shifting jurisdictions like the UK, the significant burden of adverse costs orders.

20. Following the PACCAR decision, funding commissions are often tied to invested capital. While some argue this incentivizes funders to promote higher Legal Costs, LCM's approach prioritizes diversified investments and proportionality between costs and anticipated damages. Excessive legal spending reduces the pool of investable claims, lowers returns for funded parties, and prolongs proceedings, ultimately harming funder returns.

21. LCM's interest is to secure just, positive outcomes efficiently. It supports active supervision of Legal Costs by courts and tribunals in cases brought by consumers or groups or consumers (such as group actions and claims brought in the Competition Appeal Tribunal (**CAT**)), as permitted under discretionary frameworks like CPR 3.13.

22. However, such scrutiny must bear upon claimants and defendants equally. Limiting claimant costs alone will place claimants at a colossal tactical disadvantage when facing well-resourced defendants.

11) How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?

23. In certain fora, the English Court has considerable control over the price of funding. For example:

    a. In collective proceedings before the Competition Appeals Tribunal, the Tribunal has extensive discretion over whether the funder can collect its success fee from damages and if so in what amount and at what stage (before or after distribution of damages to the class). In *Mark McLaren Class Representative Limited v (1) MOL (Europe) Africa Ltd and Others* (Case No. 1339/7/7/20), the Tribunal noted at [100]:

       > "…*In relation to funders the Tribunal would want to be informed of how its claims for payments from the CR [(class representative)] under the funding arrangements have been incurred and calculated. It may be necessary to determine what is a reasonable rate of return for funders on the facts of this particular case and for that the Tribunal may need details of its funding model and rates of return. These matters will be for determination at a later stage but stakeholders should expect that these aspects will require careful consideration and scrutiny by the Tribunal in the light of the overall success of the proceedings."*

b. Although funding terms are considered as part of the CPO application, this is only for the purposes of calling out terms that are "out of the norm"; the final decision as to the funder's return is not considered until the conclusion of the proceedings, meaning that a funder has very little control over its pricing and takes the risk that the Tribunal will reduce its entitlement significantly. The funder bears this uncertainty until the end of the proceedings, which typically take several years to conclude. This is different to the position in respect of class actions in Ontario, for example, where once an LFA is approved (which happens towards the beginning of the case) that approval cannot be disturbed and the court's discretion is largely limited to varying the lawyers' contingency fees.

c. <u>In the insolvency context</u>, it is common market practice for insolvency practitioners to require a competitive tender prior to entering into a litigation funding agreement on behalf of the insolvent or bankrupt estate. This market practice exists because were it not to happen, a creditor would apply to the court to challenge the insolvency practitioner's conduct whereupon the court would examine the pricing and whether it was competitive.

d. <u>In the trusts litigation context</u>, a trustee will have to make a Beddoe application (*Re Beddoe, Downes v Cottam* [1893] 1 Ch 547) seeking directions authorising him or her to do so. That application engages a duty of full and frank disclosure so that the court has all the information necessary to make an informed decision. If that litigation is to be funded by a third party, a trustee would therefore have to disclose that fact and the pricing of the funding agreement and why it is in the best interests of the beneficiaries of the trust for the trustee to incur those litigation funding costs on its behalf. This leads to the court having control over the pricing since if it is not satisfied that the Trustee has discharged its duty to obtain competitive pricing and terms which are in the best interests of the beneficiaries of the trust, it will decline the application.

e. <u>In opt-out representative proceedings brought under CPR 19.8</u>, although the modern jurisprudence has not yet developed on this point, the litigation funding industry anticipates that a process similar to that outlined above in respect of a trustee having to make a Beddoe application for sanction will be expected by the courts prior to sanctioning the payment of any damages awarded to the represented class, to the funder.

24. The litigation funding market is subject to healthy competition, supported by an active brokerage industry. Brokers, such as Exton Advisers and Aon, ensure competitive pricing by running tender processes on behalf of clients. Approximately 67% of LCM's London-funded matters in 2024 were broker-referred, demonstrating the market's efficiency and price transparency.

12) Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?

If so, why?
If not, why not?

<u>Summary of LCM's Position</u>

25. As noted in response to question 6(c), where funding is provided to sophisticated parties, such as corporations or institutional investors, parties should be able to negotiate and agree on terms without interference.

26. LCM observes that funding may be provided to corporate or institutional clients on a single case basis or on a portfolio basis and this additional layer of complexity means the application of a uniform cap on funder returns is unsuitable. Where a funder has agreed to fund the costs of advancing multiple claims of varying risk profiles (and, in some circumstances, defending claims with no prospect of recovering damages), it will not be appropriate to apply a cap to the funder's return on any one action and will rarely be appropriate to apply a single arbitrary cap

on the funder's return across any and all portfolios. The bespoke nature of the funding arrangement requires bespoke pricing and to impose a statutory cap on returns to funders interferes with the rights of sophisticated commercial parties to make their own bargain, which is fundamental to the of ethos of freedom of contract.

27. In collective proceedings (e.g., those before the CAT), where funding is provided for the benefit of group members who may be unsophisticated individual consumers with no active role in the proceedings, it is appropriate that the tribunal play a discretionary and supervisory role over the terms of any settlement or award, including the funder's return. This was demonstrated by the recent approval by the CAT of the settlement reached in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* (Case No. 1266/7/7/16). As at the time of this submission the CAT has not yet exercised its power so as to alter the return to be paid to the funder, but as the amount of the settlement approved is less than the funder's entitlement it is likely that we will see this outcome from the CAT shortly.

28. This flexible regime which allows the tribunal to alter a return to a funder upon approving a settlement is preferable to the introduction of a hard cap on funder returns. Caps are blunt instruments that are rarely fit for purpose and likely to result in claimants being placed at an unfair disadvantage to well-resourced defendants. Further, the imposition of a statutory cap will have the effect of reducing the number and types of cases that will attract litigation funding, with the result being that only very large claims will be able to be funded. This outcome is inimical to the worthy pursuit of access to justice.

29. In addition to many claims becoming uneconomical to fund from the outset, another effect of the imposition of a statutory cap on funder returns is that claims may become uneconomic during their pursuit. This could occur where legal costs exceed their original budget, which may be as a result of either or both of unanticipated events or the conduct of a defendant in running up costs. Once costs on the claimant side exceed a particular level when compared with the available (capped) return, some claims will become uneconomic for a funder to fund and they may cease to provide funding. It will be open to defendants (with no cap on the amount of costs they can spend and often with deep pockets) to arbitrage this dynamic and take deliberate steps designed to exhaust (and which will be successful in exhausting) the funder's appetite to continue to fund.

30. In LCM's view, any statutory cap on funder's returns should be eschewed and any consideration of the reasonableness of a funder's return must occur on a case-by-case basis and take account of a wide range of circumstances relevant to the particular claim, including (but not limited to) the identity of the claimant, the risk profile of the claim, the costs of advancing the claim and the nature of any outcome obtained.

31. Imposing maximum funder returns (or inversely, minimum claimant returns) assumes that funded litigation can have only two outcomes: total success or total loss, and that if total success is achieved, a guaranteed minimum share of that success should be reserved for the claimant. However, this does not reflect the reality of litigation. A claim which, at the outset, appears to have good prospects of success may see those prospects deteriorate once disclosure is made or evidence is exchanged. A defendant that initially appeared to be a large corporate with significant funds may, after several years, have little capacity to pay the amount sought. In these circumstances, it is in the interests of the claimant to avoid total loss by reaching a compromised outcome that reflects the change in the risk profile of the action. These compromised outcomes are a regular feature of the litigation process and must be appropriately accounted for when considering the imposition of any cap on funder returns.

32. Given the various factors that determine the reasonableness of a funder's return, LCM submits that it would not be appropriate for any cap on funder returns to be enshrined in an instrument as blunt and inflexible as legislation. LCM notes that capping of funder's returns has been considered by the legislatures of both the EU and Australia and has not been implemented. Further the regulatory frameworks for the regulation of litigation funding in Singapore and Hong Kong do not include any legislative cap on funding. Any review or limitation of funder returns should be undertaken on a case-by-case basis and limited to situations in which the funded party is unsophisticated or otherwise vulnerable. A more appropriate mechanism to review

funder returns in these circumstances would be through the exercise of the relevant court or tribunal's discretion.

Dispelling the Myth of Disproportionate Funder Returns

33. LCM is not aware of caps to returns to other service providers in the ecosystem surrounding legal disputes, including insurers, solicitors, barristers and experts. The suggestion that funder returns should be capped implies that funders routinely achieve disproportionate profits relative to their costs and risks. However, LCM is unaware of any comprehensive, evidence-based analysis supporting this assumption. Proposals for capping returns are rarely accompanied by mechanisms to mitigate funder risks. LCM welcomes the CJC's call for evidence and transparency in this area.

Commercial incentives for fair pricing

34. When considering a claim, one of the key matters that funders carefully review is the proportionality between the budgeted investment sum and the likely recovery. Reputable funders do not fund matters if it is not clear that the size of the claim is sufficient to allow for: (a) the legal spend anticipated; (b) the funding commission; (c) the bulk of the recovery being paid to the claimants; and (d) a "buffer" to allow for settlement discounts, increases in costs and potential reductions in claim value as the claim develops.

35. From the outset, reputable funders do aim for the bulk of any recovery to be paid to the claimant(s). Indeed, funders are incentivised to select cases where this is the likely outcome. In jurisdictions where funders cannot be assigned a bare right to litigate, funders benefit from the claimant remaining actively involved in, and invested in the outcome of, the proceedings. This alignment of interest is important in jurisdictions such as the United Kingdom where funders are prohibited from taking control of the proceedings and have agreed to fund the costs of the litigation on a non-recourse basis. If the claimant no longer has an interest in pursuing the claim because the prospects of achieving an outcome high enough for the claimant to make a return diminish, then the claimant will lose the motivation to prosecute the claim which will ultimately reduce the prospect of any recovery for a funder. Further, like most commercial entities, reputable funders want to maintain positive and productive commercial relationships with their counterparts (including their funded parties) and many, like LCM, genuinely believe that third party funding plays a crucial role in facilitating access to justice, and seek to facilitate that access. However, all claims are costly to pursue and not all claims successfully recover those costs.

36. When assessing funder returns, it is crucial to recognise:
    a. the commissions funders charge are gross figures and do not account for significant operating costs in this labour-intensive industry; and
    b. litigation is unpredictable and a high-risk asset class.

Costs of Funding Litigation

37. Critics often overlook the extensive and resource-intensive process funders undertake to evaluate and manage claims. LCM funds approximately 3% of applications received in the UK, meaning 97% of applications incur costs without producing any profit. The costs which LCM incurs in assessing 97% of these applications are costs to the business which are never recovered.

38. Reputable funders conduct extensive due diligence before committing, often incurring significant sunk costs. For instance, LCM spent £100,000 over four months assessing a complex arbitration claim but ultimately declined to fund it.

39. Once a case is funded, achieving a recovery involves years of diligent preparation, persistent prosecution, and overcoming significant challenges from well-funded defendants. In large-scale collective proceedings before the CAT, costs often exceed £15 million and can surpass £30 million. To invest amounts of this magnitude over a period anticipated to be 4-5 years at a minimum is a high risk and capital intensive venture.

Profitability of the Litigation Finance Industry

40. Detailed investigations into funders' financial performance reveal that the litigation finance industry in the UK is not excessively profitable. Publicly available financial statements indicate poor profitability among UK-registered funders. Similarly, funders operating in jurisdictions like the Channel Islands show no evidence of materially different results.

41. The industry's low profitability is reflected in:
    a. numerous funders ceasing operations or transitioning into run-off due to unsustainable returns (e.g., Augusta Ventures, Vannin Capital, Affiniti Finance, LionFish Litigation Finance, among others); and
    b. challenges faced by current members of the Association of Litigation Funders in securing new capital.

42. Remuneration levels within the litigation finance industry provide further evidence that it is not excessively profitable. Compensation for professionals in the industry is significantly lower than that of their counterparts in leading commercial law firms. Recent significant pay rises for solicitors in this jurisdiction have been well documented. It was for instance, reported in June 2024 that newly qualified solicitors in Magic Circle firms stand to earn a salary of £150,000, and those in certain US firms earn £176,000. As the Financial Times reported, "*remuneration for some firms' most junior ranks has increased as much as 50% per cent in the past five years*".[3] This coincides with drastic increases in hourly fees. As a result, a typical Investment Manager in litigation finance earns less than a Senior Associate at a Magic Circle law firm, and a fraction of what a Partner would receive.

43. This disparity in financial outcomes – both at the corporate and individual levels – underscores the fact that the litigation finance industry does not generate excessive returns. On the contrary, the sector faces significant challenges in delivering adequate returns to investors. The financial struggles of the industry reinforce the adage that "the only winners from litigation are the lawyers". The average profit per equity partner at the UK's 100 largest law firms is approximately £844,000,[4] whereas for some London offices of US firms, they are suspected to be as high as £6 million. The evidence does not support the assertion that the litigation finance industry in the UK is excessively profitable or warrants price regulation. Rather, the current financial performance of the sector reflects the inherent costs and risks associated with funding litigation and suggests that additional regulatory burdens could further hinder its viability and thereby limit access to justice.

Risks of Funding Litigation

44. Litigation funding involves high costs, risks and uncertainties. Actions progress through adversarial processes and are often prolonged by defendants deploying tactical challenges, including jurisdictional disputes, interlocutory applications, and appeals. Even after a favourable judgment, claimants face enforcement risks, including deteriorated financial positions or outright resistance from defendants. The unfortunate reality of the legal system is that the claimant, no matter how meritorious their claim, is certain to incur significant Legal Costs over a long period of time while the prospect and size of any recovery remains uncertain.

45. Third-party funding mitigates these risks for claimants. Funders bear all costs and risks, including adverse costs, over the life of the action.

46. LCM agrees with the following observation made by the European Law Institute in its report published in 2024 on *Principles Governing the Third Party Funding of Litigation*:

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[3] Suzi Ring, 'Insane' pay rises for junior London lawyers raise concerns over culture, *The Financial Times* (16 June 2024) <https://www.ft.com/content/281e00d0-c716-4120-b6a6-9105d7bbc53f>.
[4] Alex Ryan, 'The LB100 ranked by PEP: firms push partner profits to new heights as associate pay debate rumbles on', *Legal Business* (18 December 2024) <https://www.legalbusiness.co.uk/analysis/the-lb100-ranked-by-pep-firms-push-partner-profits-to-new-high-as-associate-pay-debate-rumbles-on/>.

"There is, however, a very powerful suite of arguments that a rules-based approach – and still more the blunt instrument of a percentage cap – will be inappropriate because in any case, a funder's fee is likely to be a reflection of the level of risk undertaken (which will vary). Pricing is a sophisticated exercise that involves various factors (not just the application of a mere percentage on proceeds), including a healthy ratio between budget (funding sought) and expected realistic proceeds. It follows from this that there are very real difficulties with the approach of setting a percentage limit as the accuracy of the percentage will be known only at the end of the litigation when the statement of account is made depending on various factors (duration, multiple on commitment, cost reimbursement, amount of proceeds). Those on the funder side say, with some force, that capping returns will disincentivise investment in novel or high-risk disputes."

Impact of Regulation on Access to Justice

47. Capping funder returns would directly affect the types and sizes of claims funders can support. Regulation may shift the risk-reward balance, discouraging funders from operating in the UK. This was evident in Australia between 2020 and 2022, when regulatory changes led to a significant decline in funded class actions. For instance:
    a. the number of funded class actions fell from 23 in 2021 to 14 in 2022;[5] and
    b. King & Wood Mallesons reported the lowest total new class actions filed since 2017/2018.[6]

48. If regulation in the UK imposes caps on funder returns, third party funders may redirect investments to other jurisdictions like Australia, Canada and the United States, reducing access to justice for UK claimants.

[5] Professor Vicki Waye, Nikki Chamberlain and Professor Vince Morabito, 'How to Address the Regulation of Third-Party Litigation Funding of Class Actions?' (2025) *Law Quarterly Review* 141, 147.
[6] King & Wood Mallesons, *The Review: Class Actions in Australia 2021/2022*, page 6.