

**SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE
ON CORPORATIONS AND FINANCIAL SERVICES**

1 June 2020

INTRODUCTION

1. My name is Mark Morris. I have been in the securities industry for forty years. I have been a director of businesses within major domestic and offshore institutions, Macquarie, ANZ, CBA banks. I started my own business which I sold to Commonwealth Bank of Australia in 2004. I have held Responsible Executive/Management positions in Australia, Hong Kong, Singapore, London and New York.
2. I have two questions for the Committee. Is the litigation funding industry the only business in all of Australia that is totally unregulated? Are litigation funders and their lawyers subject to the same continuous disclosure laws as the rest of the community or has ASIC exempted them?
3. In July 2018 I made a submission to the ALRC inquiry into class actions. My redacted submission can be found at www.alrc.gov.au/wp-content/uploads/2019/08/57._mark_morris.pdf. An unredacted copy is available. Inquiries into litigation funders have been held by the Australian Government Productivity Commission 2014, VLRC 2017 and ALRC 2018.
4. I would embrace the opportunity to give evidence under oath before your Committee. My focus is on the damage unregulated litigation funding does to the economy at a time when Australia desperately needs the economy to be strong.
5. My submission will report on three separate legal claims filed against me and a company I purchased from a big four bank. Everything in my submission is supported by the pleadings, transcripts, judgments and other documents of the three claims. The litigation funders conceded that I personally had done nothing wrong and their allegations related to a period when the bank owned the company.
6. The claims were filed in the Federal and Supreme Courts of Western Australia. I won all three cases. I would ask you as Committee members to reflect on the magnitude of these successes given that I am not a lawyer and had to face the litigation funders with their legions of lawyers on their home ground and ask if you personally, your families or any business should be subjected to this outrage. The stress, cost, damage to reputation, destruction of health, loss of a business, loss of capital and damage to lives is incalculable. The claims were based on false allegations and the litigation funders knew it. They represent the dark side of litigation funding that ASIC refused to acknowledge even existed. How many other businesses across this nation have been treated and continue to be treated with similar conduct and do not have a voice to protest and the general economy suffers?
7. With respect to the Committee, the fact that I have been able to expose the duplicity of the litigation funders in the courts gives authority to my submission.
8. The strategy of the litigation funders in my cases was publish allegations (which they always knew to be false and were never able to substantiate before the courts), make an announcement to ASX, never abide by the laws of continuous disclosure, make as much noise as possible and give interviews to the press to get as many plaintiffs signed up as possible to boost the funder's return.

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9. The number one priority on a litigation funder's check list is to identify an entity that could pay if they are successful with a claim. This could include Australian taxpayers, shareholders, insurers and businesses. The transcripts of my cases reveal the tactics of the litigation funder forcing my company into liquidation to have my insurance company added to the proceedings.
10. Litigation funders promote themselves as crusaders for the little man. Really, they are unregulated masters of manipulating the system for their own enrichment. A QC once described litigation funders as criminals in suits.
11. Litigation funders have no respect for the Rule of Law. Their business model is so entrenched and been unregulated for so long that your Committee has a major task to change their conduct. In my case the funders "identified crimes" that did not exist and spent ten years trying to con the courts that they did exist.
12. I will resist naming names here to avoid being redacted as I would like my submission to be accepted and published to give other businesses the courage to come forward. I am happy to make the names available when requested. I will hopefully cover many of your terms of reference and highlight the unjustified carnage unregulated litigation funders wreak on businesses and the general economy.
13. ASIC officers, responding to a question from MP Jason Falinski, in this Committee, late February, conceded they knew nothing about the activities of litigation funders. ASIC has turned a blind eye to and, in some cases, encouraged and enhanced the activities of litigation funders to the detriment of businesses and the economy.
14. It is my opinion that the Federal Government's attempts to reign in the excesses of litigation funders will come to naught until one of them is successfully prosecuted. Sanction one and the rest will only pursue legitimate actions. The laws to do this already exist. Inquiries are not substitutes for action.
15. After twenty years of unregulated practice, litigation funders have honed their models. They patronise subservient authorities, especially ASIC with their glossy presentations about "access to justice". For example, in mid-2013 ASIC issued REG 248 which related to "conflicts of interest". In August 2013 a leading litigation funder, to show themselves as good law-abiding citizens in lockstep with and to patronise ASIC issued a paper under the heading "The Regulation of Conflicts of Interest in Australian Litigation Funding". In part it reads "The Australian Government has a famously "hands off" approach to the regulation of litigation funders ... Australian funders face no mandatory licensing or prudential supervision ... There is however, one exception to this benevolence. Funders must now have "adequate practices for managing" any conflict of interest that may arise in litigation they fund. This requirement has been imposed by regulations. It is backed by criminal sanction for non-compliance. ASIC has, via a regulatory Guide on the regulations, promoted the development of an extensive compliance regime for funders". ASIC has never enforced REG 248, so litigation funders, including the authors of this paper, have ignored it.
16. I wrote to ASIC many times. In one of ASIC's few replies it said "conflict of interest" breaches are not enforced because they are only regulations in contrast to a litigation funder publishing a paper saying they are backed by criminal sanction for non-compliance. How does one explain this?
17. Forget about ASIC, it is useless and has had too many chances to prove its relevance; every Royal Commission has lambasted ASIC; former Treasurer Peter Costello called for ASIC to be cleaned out after the Haynes Royal Commission reported; the general public distrust ASIC; ASIC is oblivious to

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criticism and ignores its responsibilities to enforce the law and Australia suffers; Australia deserves better. If your Committee is serious about rectifying the excesses of litigation funders, it must be taken out of the hands of the incompetents who have failed Australia for twenty years.

18. The US Attorney-General Bill Barr offers a template. He has sidelined an intransigent FBI and Department of Justice and appointed a highly respected and non-political Special Investigator John Durham to assess criminal charges and expose the bias in those agencies and generally. Durham has an unimpeachable reputation for upholding the Rule of Law. Attorney-General Christian Porter could do the same here and clean up the destructive mess that has become litigation funding.
19. A Special Investigator could spotlight the dubious tactics and legal MANIPULATION of the twenty-five funders operating in Australia; funders say they conduct due diligence before making damaging allegations, but do they? Why are plaintiffs in class actions used as cannon fodder and receive very little and sometimes nothing; where are these funders domiciled; how many funders and their lawyers are registered in tax havens; profits are washed overseas – what is the quantum; what tax have they paid the ATO in the past; are some of them Ponzi schemes? The Special Investigator would have the power to subpoena witnesses and documents – it will be a bumper harvest for Australia. This investigation is beyond the expertise of ASIC or any other government agency.
20. I will give A-G Porter the case to prosecute. My submission will cover many of your terms of reference but most importantly for Australia highlight, in times of economic uncertainty, the necessity for honest businesses to be left alone to create jobs and pay taxes. Australia needs to create a business environment that encourages law abiding people to take risks. Business is hard enough without being subjected to fraudulent allegations.
21. I would suggest that my submission is unique in the sense that it details the endurance needed to successfully defeat litigation funders, once in the Federal Court (and on appeal) and twice in the Supreme Court. I have exposed the duplicity of funders' methods. All my records, the transcripts of four trials and judgments are available to your Committee to launch a prosecution for "conflict of interest" and much more. I have so much information to impart after ten years of torture from litigation funders. As mentioned above a litigation funder has gone into print to say breaching the law on conflicts of interest carries criminal sanctions!
22. It is hoped your Committee sidelines the usual political squabbles where each accuses the other of protecting their respective interests and donors and instead assesses the broader picture to make command decisions and bring sanity to how funders conduct their business? Or in two years does the government call another inquiry after the problems have metastasised? After all there will always be room for legitimate class actions but not the frauds that are currently being prosecuted.
23. Your Committee will be besieged with cries of "access to justice" by sycophants and so called "experts" on the payroll of litigation funders. Ignore them. The High Court of Australia in *Campbell's Cash and Carry Pty Ltd v Fostiff Pty Limited* entrusted litigation funders with the licence to conduct cases provided they gave clients "access to justice" and avoided "conflicts of interest". Litigation funders, with gluttonous financial appetites and rapacious conduct putting clients last have betrayed that trust. ASIC has done nothing to regulate them and Australia has suffered.
24. The carpetbaggers lobbying Canberra for litigation funders will preach the virtues of an Australian Financial Services Licence (AFSL) as though this will bestow sainthood on litigation funders. Ignore them. An AFSL is not worth the paper it is written on. Funders have held AFSLs in the past and their conduct remains reprehensible. Many an AFSL holder from the securities industry warms a jail cell.

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Litigation funders would think they had won Lotto if all that comes out of your inquiry was a legislated AFSL and then to be regulated by an incompetent and comatose ASIC.

MY BUSINESS

25. In 2007 I was approached by an international company employing 1,000 people to establish a joint venture and a business that if successful would be taken global. In 2007 that international company recorded a profit of \$400 million.
26. The joint venture purchased a small stockbroking business from one of the big four banks. I employed 100 people and restructured the business. In early 2008 I was informed of problems in relation to two clients. These problems occurred when the bank, and not I, owned the business. I held guarantees from the offending stockbrokers and they wrote cheques totalling \$2,600,000.00 to compensate the clients. The guarantees were unlimited, irrevocable and unconditional. I then wrote to every other of the brokers' clients to ascertain if there were other problems. No further complaints were advised.
27. ASX and ASIC was advised of the above. 27 November 2008 ASIC was again advised that the guarantees existed.
28. It was then that litigation funders entered my life not for anything that I had done but for events that had occurred when the bank owned the business.
29. The High Court decision in *Fostiff* mentioned above was a 5:2 decision. The criticism of litigation funding by the minority judges, Callinan and Heydon JJ was prescient...."the purpose of court proceedings is not to provide a means for third parties to make money by creating, multiplying and stirring up disputes in which those third parties are not involved and which would not otherwise have flared into active controversy but for the efforts of the third parties, by instituting proceedings purportedly to resolve those disputes, by assuming near total control of their conduct, and by MANIPULATING the procedures and orders of the court with the motive not of resolving the disputes justly, but by making very large profits".
30. I would ask the members of your Committee to read the above paragraph again. For ten years this is exactly the conduct I was subjected to by litigation funders. I wrote to ASIC many times seeking guidance or assistance. I was either ignored or met with gibberish. ASIC resented my disturbing their slumber as they have a quasi-outsourcing of law enforcement to litigation funders.
31. The first case filed against my company and I by litigation funders was FCA 1147 of 2011 for \$14 million in the WA Federal Court. Gilmore J threw the case out after considerable time and great expense. The litigation funders appealed. In FCAFC 107 of 2012 the three appeal judges agreed with Gilmore J. My insurance company QBE was supine and refused to help in the defence.
32. The second case filed by a different litigation funder was CIV 3124 of 2009 in the WA Supreme Court for \$10 million. In 2018 Allanson J found in my favour after a twelve-day trial. Incredibly, QBE offered no assistance. The litigation funder based this case on three secret agreements which the funder in 2008 knew to be illegal.
33. The third case filed against my company was for \$30 million CIV 1793 of 2012 again in the WA Supreme Court. There was no cause of action and the case was not taken to trial. This case was based on phantom "unauthorised trades" supposedly conducted when the above mentioned big four bank owned my company. Affidavits filed by the funder's lawyers reveal the funder knew in

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2012 that there were no “unauthorised trades”. The funder persisted with its fraudulent claims until 2018. You might ask where was ASIC when this was unfolding?

34. The very same litigation funder who wrote the paper on “Conflicts of Interest” mentioned in paragraph 15, addressed a creditor meeting of my company in May 2011 to announce his funders was launching action for \$30m. My administrator valued his claims at \$1.00. The courts were to reject his claims. ASIC showed no interest in this conflict of interest.
35. Some of the details of my defences are contained in my submission to the ALRC inquiry. Greater detail is available on request. Technology played a major and important role in the defences.
36. What is of significance for your Committee’s inquiry is the fact that all three cases were based on false allegations involving conflicts of interest on the part of litigation funders who were not seeking “access to justice” for plaintiffs but “access to other peoples’ money” for themselves based on fraud and attempted extortion. All the litigation funders were aware of my guarantees. The guarantees would have covered any legitimate claim – in fact, there were no legitimate claims. All the litigation funders ignored the guarantees because they would not have been paid their usual 40% fee if the claims were settled by the guarantees. This was a blatant conflict of interest.
37. I was not able to survive the cost and damage to my business of the constant attack of the litigation funders. I had to put my business into administration then liquidation. 100 people lost their jobs. I was bankrupted trying to save my business. And the litigation funders after causing all this damage got nothing and simply walked away.
38. On my past business record, I estimate that in the time from 2008 to now, I would have paid tax on profits of \$500 million and increased my workforce to 200. Australia desperately needs businesses like this right now. Why wouldn’t your Committee use my situation to prosecute the litigation funders who stifle business and make an example of them for the rest of the industry?
39. It would be my dream that the dissenting judges in Fostiff, Callinan and Heydon JJ be asked to write an opinion piece on my treatment at the hands of litigation funders while ASIC stayed silent – their worst fears have become a reality. Having studied the facts, the majority judges in Fostiff might regret unleashing unregulated litigation funders on Australian businesses, the economy and short-changing their own plaintiffs.

Mark Morris