Premier Litigation Funding Management

Premier Litigation Funding Management Pty Ltd
Level 1, 2 Barrack St,
Sydney, NSW, 2000

Attention: Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Submitted via online submission portal

Re: Inquiry into Litigation funding and the regulation of the class action industry – Public Submission

This letter is a submission in response to the 'Inquiry into Litigation funding and the regulation of the class action industry' ("the Inquiry") issued by the Parliamentary Committee on Corporations and Financial Services ("the Committee") as announced on 13 May 2020.

Premier Litigation Funding Management Pty Ltd ("PLFM") would like to take the opportunity to thank the Committee for allowing us to provide this response to the Inquiry.

Background

By way of background, PLFM is involved in funding claims with a value of less than $10 million with a focus on corporate insolvency recovery matters. In these claims the Federal and State Governments are often one of the main beneficiaries of any recoveries. That is the major creditor to the insolvency is the Australian Taxation Office or State Revenue Offices.

PLFM is not focussed on Class Actions but have been approached by many groups of individuals who have been adversely affected by the activities of a range of parties (from the outright criminal, to so called "blue-chip" corporations and Government). The only practical recourse against these parties is through the Courts by way of Class Actions. PLFM is generally only approached when all other avenues (e.g. Police, ASIC, FWC) for recourse have been exhausted. It is in this light that we provide our submission.

General Observations

Litigation funding of Class Actions has developed due to a failure of the legal and regulatory systems. That is the cost of access to justice is prohibitive to a private individual, particularly against a well-resourced defendant, or alternatively the time and effort to pursue a small claim is not a rational decision.

This proposition was succinctly summarised by Justice Lee, as reported in the Australian newspaper (on-line version) on 9 June 2020[1]:

> *Justice Lee concluded on Friday that while the settlement might have felt like a "hollow" victory for some class action members, it would have been "impossible" for them to have pursued such a big, complex case in court without the support of a litigation funder.*
>
> *Justice Lee said while he was not prepared to get into the "live controversy about litigation funding", without a funder in this case most of the group "would likely have been placed in a situation of being supplicants requesting compensation in circumstances where they would have been the subject of a significant inequality of arms".*
>
> *He said the case was "a testament to the practical benefits of litigation funding". The claims, he said, had been "litigated in an efficient and effective way" and had ultimately been resolved with an out-of-court settlement.*

If the Department of Defence had immediately acknowledged its wrongdoing and adequately compensated victims as soon as the issue was brought to their attention, then no litigation funder would have needed to be involved.

The one thing that can't be measured is that Department of Defence has no doubt changed its behaviour such that it will not, or at least perhaps pause for thought, use chemicals in a manner that has the potential to expose the community to harm. That is the Departments of Defence's governance and risk management frameworks will be improved by this case. An expensive lesson for taxpayers which will hopefully lead to better outcomes for all stakeholders (and the environment) going forward.

Similarly, in the Class Action of the Brett Cattle Company Pty Ltd v Minister for Agriculture [2020] FCA 732 the decision (handed down 2 June 2020 and not appealed at the date of this letter) was described on Sky News[2] by the former CEO of the Northern Territory Cattlemen's Association Tracey Hayes as follows:

> *"Today we stood up for good governance, good government, justice, fairness and a fair go," Ms Hayes said.*
>
> *"Principles no government should ever abandon for popularist politics and activist pressure."*

This Class Action was funded by the Australian Farmers Fighting Fund ("AFFF") which, according to the AFFF's website[3], is administered by the National Farmers Federation and whose Trustees include Mr Donald McGauchie AO, The Hon. Andrew Robb AO and Ms Fiona Simson (current president of the National Farmers Federation).

[1] (2020). ADF payout locked in, litigation funders defended. [online] Available at: https://www.theaustralian.com.au/nation/defence/adf-payout-locked-in-litigation-funders-defended/news-story/6b60db5bfe7d33fe72e5264e065b41cc.

[2] (2020). [online] Available at: https://www.msn.com/en-au/news/australia/nt-cattlemen-win-live-export-case/ar-BB14UaPo?ocid=spartanntp.

[3] Australian Farmers' Fighting Fund. About Us. [online] Available at: https://afff.com.au/about-us/

Unfortunately, the argument that all or most meritorious claims would go to Court without litigation funders in the market is, in PLFM's experience, factually incorrect due to the vast costs in relation to legal fees, Court disbursements, expert fees and security for costs. Regrettably, most litigants don't have a supporter like the AFFF.

Any changes to regulation which damages the competition in the litigation funding marketplace would inevitably make prospective plaintiffs suffer. Nevertheless, PLFM is supportive of any regulation which proves beneficial to plaintiffs' access to justice.

It is difficult to have sympathy for defendants who have treated plaintiffs poorly and know that they are unlikely to be held to account absent a litigation funder and the Class Action process.

Addressing Specific Questions posed by the Committee

Whether the present level of regulation applying to Australia's growing class action industry is impacting fair and equitable outcomes for plaintiffs, with particular reference to the following:

1. *what evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income;*

PLFM splits this question into two parts, as follows:

a) *'the fees earned by litigation funders'*

Firstly, as litigation is inherently risky due to the non-recourse nature of the product and potential for adverse costs orders, the returns earned by litigation funders need to be correspondingly high. These returns are normally based on either i) a percentage of the net proceeds of the claim or ii) a multiple of claim expenditure. A way in which PLFM safeguards plaintiff returns is by putting a funder profit 'cap' in our litigation funding agreements to ensure plaintiffs still receive a return even when the recovery is smaller than expected. This is in contrast to other funders whose funding agreements we believe may result in them taking the entire proceeds. We are also aware of situations where lawyers seek payment out of case proceeds before the plaintiff and the plaintiff(s) see nothing. An unfortunate and undesirable result but the Plaintiff has at least had an opportunity to seek redress in the legal system.

The present level of regulation of litigation funding has allowed many new litigation funders to enter the market place thereby both increasing the amount of litigation funding capital and decreasing funder returns, especially in the Class Action sphere (for example the AMP[4] and GetSwift[5] class actions). This is an example where the market operates effectively where "super" profits are eroded to "normal" profits as the market adjusts to an equilibrium where the returns match the cost of capital.

Any unreasonable or cumbersome regulations placed on the litigation funding industry which limits the market will therefore then counteract this and either i) reduce the amount of funders in the market, or ii) raise significant barriers of entry to new funders – this would prove detrimental to plaintiffs. Ensuring that proposed regulation doesn't impact the competitiveness of the market is

[4] Wigmans v AMP Ltd; Fernbrook (Aust) Investments Pty Ltd v AMP; Wileypark Pty Ltd v AMP Ltd; Georgiou v AMP Ltd; Komlotex Pty Ltd v AMP Ltd [2019] NSWSC 603 [2019] Available at: https://www.caselaw.nsw.gov.au/decision/5ce48de9e4b0196eea40715c.
[5] Perera v GetSwift Limited [2018] FCA 732 [2018] Available at: https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca0732.

therefore vital to maintaining '*just and equitable outcomes for plaintiffs'* while minimising the costs to the plaintiffs.

b) the treatment of the fees earned by litigation funders

While we are not certain what is meant by the treatment of the fees earned by litigation funders we assume "the treatment" is for tax purposes. On the basis of that assumption, fees are treated as assessable income for Australian tax purposes as PLFM is an Australian resident.

2. the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;

As noted above, PLFM targets smaller recovery claims and doesn't fund Class Actions.

Notwithstanding the above, PLFM's view is that without litigation funders funding Class Actions, many of the meritorious actions would not reach the Court. Therefore the 'impact of litigation funding on the damages and other compensation received by class members' is very favourable for the plaintiffs. The alternative is zero compensation. The frictional cost of the legal system, lawyers, Court costs and the cost of providing capital by the litigation funder must reduce the recovery of plaintiffs that would be achieved in a non-existent utopian world where everyone has free access to a legal system that provides immediate Judgements. Indeed, in the current system even where a self-funded plaintiff wins a case there will be a gap between the legal costs incurred and those the Court will award as part of the Judgement.

The continuing emergence of new funders has dropped litigation funders' returns considerably – especially in the competitive Class Action sphere, as mentioned in 1(a) above.

3. the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs;

PLFM's belief is that lawyer contingency fees would create more issues than currently presented by the practice of litigation funding. Contingency fees fundamentally change the relationship between the client and lawyer with the lawyer having a direct financial interest in the outcome. It is difficult to see how the fiduciary relationship between client and lawyer would operate. The anecdotal evidence we hear from the United States is that lawyer's contingency fees are higher than Australian litigation funders "share". If this experience were repeated in Australia the plaintiff would receive less for any given outcome.

Another question that seems to not be answered "is would the lawyer be liable for adverse costs in the event that they were awarded?" Given that the lawyer was sharing in the reward under a contingency arrangement it would seem reasonable that they share in the adverse costs. This is a key difference to the United States legal system where adverse costs are only rarely awarded against a plaintiff.

4. the financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;

PLFM splits this into two questions:

a) Relationship between litigation funders and lawyers

The important distinction for PLFM is that we fund claimants who then pay legal fees. Therefore, our funding deeds only involve the claimant, not the lawyer. Thus, the claimant always retains the exclusive right to direct their solicitors.

PLFM is aware that litigation funders who fund Class Actions have different relationships with the lawyers. We are unable to say whether these relationships impact on the lawyers' duties.

b) Plaintiff's lawyer duties to their clients

Lawyers are Officers of the Court and subsequently have well defined duties to the Court and their client(s). Litigation funders should be sub-ordinate to these other duties. If lawyers are breaching their duties to the Court or their clients, this behaviour should be dealt with under the existing rules that regulate lawyers – not with more regulation on other parties.

5. the Australian financial services regulatory regime and its application to litigation funding;

Due to the fact that the Australian Law Reform Commission, the Victorian Law Reform Commission, the Australian Securities and Investment Commission, and the Courts in general have reviewed the operation of litigation funders and concluded that the industry is operating effectively there does not seem to be any reason to subject litigation funding to Australian financial services regulation.

The requirement to hold an Australian Financial Services License ("AFSL") to undertake litigation funding will only add to compliance costs including obtaining insurance, reduce competition as it will make it more difficult for "off-shore" or new investors to fund claims thereby increasing pricing and provide the regulators with additional work.

All this "dead" regulatory cost will have to be borne by the plaintiff which will ultimately leave them worse off on a successful outcome - if they can get funding at all.[6]

6. the regulation and oversight of the litigation funding industry and litigation funding agreements;

The issue regarding oversight of litigation funding agreements is moot in Class Actions due to the fact that the Courts are already able to amend Class Action funding agreements when they feel it necessary. Therefore, PLFM sees no utility at all for further oversight. Judges are best placed to consider the returns of litigation funders balanced against the returns to class members as the Judge hears the legal and commercial realities of each case. As litigation funding occurs across multiple areas of law and a large range of quantum, any prescriptive regulation in relation to Class Action litigation funding agreements could prove highly restrictive to plaintiffs obtaining funding and therefore continued access to justice.

In bilateral funding agreements (ie non-Class Actions) the decision to enter into the funding agreement should not be subject to any oversight. The market has effectively established a price for capital for litigation funding and there is no need to interfere with the market as there has been no identified market failure.

[6] As explored in: The Treasury, 2015. *Post-Implementation Review - Litigation Funding*. Commonwealth of Australia - https://ris.pmc.gov.au/sites/default/files/posts/2016/03/Litigation-Funding-PIR.pdf

7. the application of common fund orders and similar arrangements in class actions;

PLFM is in support of the Australian Law Reform Commission recommendation that Courts be given the specific power to impose "common fund orders"[7].

The reason for this view is not due to PLFM's experience in running Class Actions, but the director of PLFM's past employment in a large organisation that was subject to Class Actions. Simply, by not having the capacity to have all potential plaintiffs dealt with in one action there is no finality for the defendant. For example, the total theoretical class is 100,000 people. 30,000 "sign-up" to a Class Action, the action is run, the plaintiffs win and the defendant pays damages. The defendant then has the potential to be subject to a new Class Action (or actions) or theoretically 70,000 more individual claims. The time to resolve this matter could take years. It is therefore recommended to allow the Court to order a common fund order with an ability for individual plaintiffs to opt-out.

8. factors driving the increasing prevalence of class action proceedings in Australia;

Professor Morabito, University of Monash – Department of Business Law and Taxation notes in his report: Shareholder Class Actions – Myths v Facts (November 2019)[8]:

> *'Does the filing of 634 class actions over a period of 27 years and 4 months support the claim that there has been an explosion of class actions? This represents an annual average of 23 class actions. No objective or balanced assessment of this figure could lead to the conclusion over the 27 years in question, the floodgates have opened*
>
> *What about the last five years? Similarly, an annual average of 46.8 class actions does not support the claim that there has been an explosion of class actions. It must not be forgotten that in the last three years, four class action regimes were in operation and three operated in the preceding two years.'*
>
> *In light of the above, no balanced or objective assessment of Australia's class action landscape could possibly lead to the conclusion that there has been an explosion of class actions in recent years.*

PLFM believes that the increased prevalence of Class Actions is due to natural growth since the early 1990s when the legislation was changed, along with state legislations allowing Class Actions and events such as the Royal Commission in to Misconduct in the Banking, Superannuation and Financial Services Industry shining light on poor corporate behaviour.

Less than one Class Action being filed a week in the whole of Australia does not seem to be excessive.

Anecdotally there does seem to be an increase in non-shareholder security Class Actions - particularly related to employment law. While some organisations, such as Woolworths Limited, have to their credit, acknowledged and attempted to resolve the systemic underpayment of

---

[7] *ALRC (2018). Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders. [online] p.335. Available at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf.*

[8] Morabito, V., 2019. *AN EVIDENCE-BASED APPROACH TO CLASS ACTION REFORM IN AUSTRALIA - Shareholder Class Actions In Australia - Myths V Facts*. - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660&download=yes

employees,[9] there can be little sympathy for organisations that have underpaid staff and make no attempt to resolve the issue.

Organisations that turnover hundreds of millions (if not billions) make correspondingly large profits and therefore can afford the best employment lawyers and consultants to ensure that their systems capture work performed by an employee and that the employee is paid at the correct rate. The argument that complying with the employment law is hard is not acceptable for these organisations. The fact that it may cost millions to rectify the underpayment is only because the employees were not paid the correct amount initially.

PLFM sees employee Class Actions as an enforcement of the law as it stands to ensure employees are paid what is rightfully owing to them. This function is not being undertaken by any party other than litigation funders and class action law firms who have stepped in to fill a void. The answer to employers' grievances is not to complain about Class Actions but to, firstly, pay the employees what they are legally entitled to, and secondly, if they are not satisfied with the way employment laws operate in Australia seek to have the employment laws changed. In the mean-time comply with the law of the land.

There is only one behaviour that drives Class Actions in Australia and that is tortuous behaviour of parties which impact on many parties – often individuals. If the number of Class Actions is increasing it is because more parties are not complying with the law and more parties are having their legal rights infringed.

9. what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy;

Class actions have the benefit of holding big entities to account where there is an imbalance between the parties (refer comments of Justice Lee in General Observations). The benefit of Class Actions is that organisations who are subject to a Class Action will definitely change their behaviour, culture and processes to ensure that they comply with their legal obligations. Other organisations with similar issues will often review their operations to ensure that they are not undertaking marginal activities. The overall impact on the economy will be positive as the governance systems of the organisations that have or may be impacted by Class Actions improve.

10. the effect of unilateral legislative and regulatory changes to class action procedure and litigation funding;

'*The effect of any unilateral legislative and regulatory changes in relation to Class Action procedure and litigation funding'* entirely depends on the changes specified. If the changes are 'unreasonable' then it could have the effect of decreasing access to justice for prospective plaintiffs, something which would obviously reduce 'just and equitable' outcomes for plaintiffs in the Australian legal system.

If the changes are reasonable and the method of approaching these changes to the industry are carefully planned and enacted, then PLFM believes that the changes could increase transparency without damaging funded plaintiffs' access to justice.

If litigation funding of Class Actions becomes practically impossible then the behaviour of large organisations will inevitably regress. As a consequence of not having the additional accountability mechanism Class Actions provide further pressure will be placed on Government to enforce the law.

[9] *(2019). ASX Announcement - WOW. https://www.asx.com.au/asxpdf/20191030/pdf/44b14995k48nsf.pdf.*

Indeed, it may be necessary to have many further Royal Commissions to shine light on "bad" behaviour.

11. the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement;

PLFM does not profess to know precisely how the introduction of contingency fee agreements would impact the legal system. However, it does seem self-evident that, as noted at question 5 above, there will potentially be a divergence of interests that will create a conflict between the lawyer's fiduciary duties to their client and management of any matter. PLFM believes that retaining the integrity of the lawyer-client relationship is of the utmost importance to the legal system and should not be changed absent compelling reason.

12. the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic;

Due to the Treasurer's announcement surrounding changes to section 674(2) of the Corporations Act 2001 (Cth) reducing the liability of ASX companies in relation to their continuous disclosure obligations[10], the impact of the *'current class action on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic'* is effectively moot.

Further, due to the fact that the recoverability of a claim is essential to any litigation funders review of any matter, if business is struggling due to the impact on COVID-19, these Class Actions would not be ordinarily funded anyway. Thus, PLFM does not see the 'current class action industry' as impacting Australian business negatively at all in the short term due to the above-mentioned protections. Any Class Action which will arise out of the '*six month shutdown'* would have to involve serious breaches of the Corporations Act other than the continuous disclosure breaches, something which should be prosecuted.

In addition, the proposition that just because an entity is "vulnerable and suffering" due to the Covid-19 pandemic impacts that there should be some type of protection provided to avoid the impacts of the Australian Class Action industry is incorrect. An organisation that has over charged clients or underpaid staff is less vulnerable to the impact that Covid-19 than "good" organisations that have correctly charged clients and fully paid staff. This is simply because the "bad" organisation has more financial capacity due to its past tortious behaviours. The "bad" organisation should not be rewarded for its past bad behaviour.

13. evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders;

PLFM's view is that as the Australian Law Reform Commission only reported to Parliament in December 2018 on Class Actions little has changed in the Class Action industry in the succeeding 18 months.

The trend in the increasing number of employment law related Class Actions referred to in question 8 above was clearly visible as early as 2016 and definitely by 2018.

[10] *(2020).* Temporary changes to continuous disclosure provisions for companies and officers. *[online]* Treasury. *Available at: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/temporary-changes-continuous-disclosure-provisions.*

14. any matters related to these terms of reference.

Class Actions are good for the rule of law and accountability of organisations which would otherwise not be held to account. Class Actions, or the treat thereof, improve governance and compliance with regulation. This benefit to society is practicably immeasurable – but significant. Further, absent Class Actions Government would be required to spend more resources on the enforcement of laws and regulations.

Conclusion

Given the depth and breadth and large number of reviews into the regulation of Class Actions which have universally concluded that existing regulation is largely adequate, it is submitted that no regulatory changes are necessary.

If any changes regulatory changes are considered necessary, then they should only apply to Class Actions and not other funded matters.

PLFM would be pleased to provide additional information to the Committee if required. In this regard, please do not hesitate to contact the author.

Yours faithfully,
Premier Litigation Funding Management Pty Ltd

Douglas Whelan
Director