

Dear Committee Secretary

Thank you again for the invitation to appear before the Committee last Friday. Please find **attached** transcript markups and apologies for the poor connection.

Based on my understanding of the transcript, the Committee asked two questions on notice:

1. *Whether we could identify any current cases that may not have proceeded if the proposed legislation had been in effect*

The case that would most clearly be impacted is our class action against Domino's Pizza. It has been brought on behalf of delivery drivers and in-store workers who allege that they have been systematically underpaid relative to award entitlements. This class action would not have proceeded under the proposed legislation.

Due to the large number of group members (who are widely dispersed) a 'bookbuild' would not have been viable, and the claim is only possible because of the opt out nature of our system and because of the likely availability of a common fund order.

2. *Assuming that the Court is only permitted to consult an exhaustive list of criteria when assessing a funding fee, what additions would we propose to that list*

We remain deeply concerned about the proposal to specify those matters that a Court must *only* consider. One of the primary benefits of Part IVA is that it provides the Court with broad case management powers; allowing it to make such orders as are needed to promote the best interests of group members. Some of the matters could be *argued* to fall within section 601LG(3) as drafted. However, if the legislature remains committed to an exhaustive list, then any ambiguity should be eliminated. This would not be necessary if the exhaustive requirement was removed.

We observe that the exhaustive list specified in the current draft would prevent the Court from considering any objections filed by group members in response to the Notice of Proposed Settlement. This underscores the dangers of the approach.

We propose the inclusion of the following:

- a. as new subparagraphs of s 601LG(3)(a), being additional characteristics of the proceeding that may be considered:
 - i. the likelihood of the proceeding succeeding, assessed at the commencement of the proceeding;
 - ii. if the proceeding has settled:
 - the stage of litigation at which settlement occurred;
 - whether approval of the scheme promotes the public interest in facilitating or encouraging settlement;
 - the likely outcome that group members would have obtained if the matter had gone to trial;
 - whether the settlement represents a compromise of group members' claims such as by reason of recoverability concerns or lack of (or limitations on) insurance;
 - iii. the defences raised by, and interlocutory steps taken or opposed by, the respondent, and whether those matters facilitated the just, quick and cheap disposition of the proceeding, including such further enquiries into those matters as the Court deems appropriate;

- iv. whether it was reasonable, at the commencement of the proceeding, to anticipate a materially different outcome to the proceeding than has occurred;
 - v. whether the commencement of the proceeding facilitated access to justice, and whether group members would have had recourse if no representative proceeding had been commenced; and
- b. the wishes of group members, including objections;
 - c. the extent that there are costs borne by parties to the scheme which are not sought to be recovered.

Please let me know if we can be of any further assistance.

Yours faithfully

BEN PHI
MANAGING DIRECTOR

PHI_x FINNEY_x MCDONALD

[Redacted signature block]

WWW.PHIFINNEYMCDONALD.COM