16 November 2021

Maurice Blackburn Pty Limited
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[redacted]

Dr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

By email: Corporations.Joint@aph.gov.au

Dear Dr Hodder,

Thank you for your email dated Monday 15 November 2021, providing the proof Hansard in relation to testimony provided by Andrew Watson on Friday 12 November 2021.

We have perused the transcript and located several questions which we agreed to take on notice. Our responses to those questions appear below.

Question:

On page 60 of the transcript, Mr Hill asked:

> *Can you provide us with any other illustrations of actual cases that would not have proceeded, in your view, had this regime been in place?*

Response:

Please find below a list of Maurice Blackburn cases which would not have proceeded without the support of a litigation funder.

- Cimic Group
- Bellamy's
- RMBL Investments
- Sirtex Medical Limited
- Bank Fees (ANZ)
- QBE
- Slater & Gordon
- Treasury Wine Estates (I)
- Allco Finance Group
- Tamaya Resources Ltd
- RiverCity Motorway

- Bank Fees (NAB)
- Gunns Limited
- Leighton Holdings Ltd
- Air Cargo
- NAB
- Centro Properties Ltd
- OZ Minerals
- Multiplex
- AWB
- Challenger Managed Investments Ltd
- Concept Sports
- TPI (Transpacific Industries Group)

The total returned to group members through these actions amounted to $609,816,954 ($610 million).

Question:

On page 61 of the transcript, Senator O'Neill asked:

> *Could I ask you to put on the record your views about what's going on with the **managed investment scheme structure**, which was previously rejected wholesale by ASIC. It had been seemingly forced on them by the government and now is, in some shape or form, being proposed to proceed. Also, there is the issue of **common fund orders**. What are your thoughts on those two critical issues?*

Response:

In relation to the managed investment scheme structure:

The managed investment scheme (MIS) structure is ill-suited as a method of regulating the litigation funding market.

ASIC[1] and Treasury[2] have both noted in the past that MIS requirements are not appropriate for litigation funding schemes, pointing out that the MIS scheme was not conceived with class actions in mind. Increased regulation and red tape will provide further barriers to entry for funders in the Australian market, reduce competition, and drive commission rates up as a result.

Dr Michael Duffy, a leading academic in the area of class actions, has also noted that the requirements of a constitution, compliance plan and a responsible entity do not align with the arrangements between lawyers, funders and litigants.[3]

In class actions, the litigation funder is not actually responsible for distribution of the proceeds upon settlement. The lawyers, instructed by the lead plaintiff, make the application to court for settlement approval, and put forward the proposed scheme for the distribution of settlement funds. The litigation funders do not have direct or unilateral control over the

[1] Australian Securities and Investments Commission, Submission No 72 to Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-Party Litigation Funders, September 2018, [54].
[2] Treasury, Post-Implementation Review: Litigation funding, Corporations Amendment Regulation 2012 (No. 6), October 2015, pp. 12 and 15. 81.
[3] Michael Duffy 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39(1) University of NSW Law Journal, 165.

distribution of settlement funds, nor do they have the legal authority to determine how settlement funds are to be distributed among class members. This does not align with the operation of a managed investment scheme.

There is no basis for the suggestion that the requirement for litigation funders to register class actions as managed investment schemes has produced better outcomes for class members - its only consequence has been increased costs, disruption and delay.

In relation to common fund orders:

Common fund orders encourage funding of worthy and meritorious cases where traditional 'book-building' would not have necessarily produced an economically viable class size.

Common fund orders encourage the availability of litigation funding for cases involving, for example, consumers injured by faulty products, bank customers ripped off by unlawful practices, First Nations Australians seeking to recover stolen wages, and land owners whose land has been poisoned.

Prior to common fund orders litigation, funding had been predominantly available for shareholder class actions. The current Bill is likely to return Australia's funding market to that position. This is a retrograde step that will inevitably reduce access to justice leaving the victims of serious corporate wrongdoing effectively unable to obtain a remedy.

Common fund orders have also proven to be an effective way to drive down transactions costs for group members. In the intervening period between the Full Federal Court decision in Money Max Int Pty Ltd v QBE Insurance Group Ltd[4] in 2016 and the High Court's decision in BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall[5] in 2019, common fund orders put downward pressure on litigation funding charges as a result of increased competition in the funding market.

The Australian Law Reform Commission (ALRC) published a report in December 2018 which noted that the litigation funding market included 33 funders[6], in contrast to the period before 2016 in which we observed that the market was limited to around half a dozen funders who were active in class actions. The increased competition between funders has resulted in lower fees and commissions, as was noted by Mr Phi in his evidence to the inquiry.

In cases involving litigation funders, Professor Vince Morabito[7] has observed that common fund orders have had a significant impact on funding commissions. Prior to common fund orders being available, the median funding commission sat around 27%, and in the period since it has dropped to 22%. The ALRC report in 2018 recommended that the Federal Court be empowered to make common fund orders.

The ALRC recommended that the Court's powers to make common fund orders be made certain. The Bill does the opposite, creating additional confusion and uncertainty regarding their availability. Insofar as the Bills' intent seems to be to mandate closed classes for litigation funded matters, it appears to preclude the opportunity for common fund orders in funded matters, though the provisions of s.601LF seem to have 'a bob each way'. This is entirely unsatisfactory. Consistent with the ALRC's recommendations Parliament should give the Federal Court express power to make a common fund order.

[4] (2016) 245 FCR 191.
[5] [2019] HCA 45; (2019) 374 ALR 627
[6] ALRC, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Final Report (ALRC Report 134, December 2018), Appendix G.
[7] Morabito, Submission to Parliamentary Joint Committee (2020), page 2

Correction:

Having reviewed the evidence provided, Maurice Blackburn wishes to clarify that the statement at transcript page 56 line 6 refers to cases which had started in the last 12 months and so should be read as follows:

"We've had one case, I think, start in the last 12 months where there was a funder involved."

If the Committee identifies any way that Maurice Blackburn might further assist, please do not hesitate in making contact.

Yours faithfully,

Andrew Watson
Principal Lawyer
Maurice Blackburn