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Submission

by

to the

Parliamentary Joint Committee

on

Corporations & Financial Services

Litigation Funding & Class Actions

Content

1. Introduction

1.1. I am the Chief Executive Officer and founder of Investor Claim Partner Pty Ltd (**ICP**), Managing Director of ICP Capital Pty Ltd (**ICP Capital**), ICP Funding Pty Ltd (**ICP Funding**) and the Chair and co-founder of the Association of Litigation Funders of Australia (**ALFA**).

1.2. After obtaining a Bachelor of Commerce from the University of Melbourne and a Bachelor of Laws from the University of Sydney, I practiced law predominantly in the area of commercial litigation for 10 years.

1.3. In 1996, I founded Insolvency Management Fund Pty Ltd (**IMF**) to fund insolvency claims around Australia.

1.4. In 2001, I co-founded and was an inaugural director of IMF (Australia) Ltd (now Omni Bridgeway Ltd) and remained a director until 2015 (being the Managing Director between 2004 and 2008).

1.5. In 2014, I was appointed Managing Director of Bentham Europe Limited, now called Innsworth Advisors Ltd, which manages the funding of, amongst other claims, shareholder claims in the United Kingdom and Germany for shareholders of Tesco and Volkswagen, respectively with the Volkswagen claim being for in excess of €2.3bn; an amount greater than the total compensation paid in Australian shareholder claims to date. I left the board of Innsworth in 2015 but was reappointed to that board in 2016; an appointment I continue to hold.

1.6. In 2016, I founded ICP to design, develop and manage shareholder claims. In 2017 and 2018, I founded ICP Capital and ICP Funding, respectively to fund shareholder claims.

1.7. I joined the board of Public Interest Advocacy Centre in 2015; an appointment I continue to hold.

2. Executive Summary

2.1. My principal concern with the Terms of Reference for this Inquiry is that we don't have a clear understanding of the objectives sought to be achieved other than to enable the development of "policies that will ensure the interests of Australians are better protected."

2.2. As a result, the Committee will receive submissions from the defendants' side of our adversarial civil justice system that they require "better protection" which, by definition, will be at the expense of plaintiffs. The plaintiff's side will primarily be seeking "no less protection" and hoping any benefits will exceed implementation costs.

2.3. It is ironic that the preponderance of stated concerns about the fees of funders comes from the defendants' camp. Despite the disingenuous nature of these concerns, and their likely motivation, we have Terms of Reference focused on funder's costs to better protect the interests of Australians.

2.4. That said, the cost of funding has been objectively assessed in the ALRC Report and ought to be continually reassessed.

2.5. There have been calls for a cap on funder's fees without much focus on other costs in our civil justice system, including lawyers' fees on both sides of the adversarial process and the cost of insurers funding defences causing delays and considerable cost.

2.6. Some are calling for a minimum percentage of claim proceeds being received by class members, irrespective of the size of the recovery or the cost of securing the proceeds. ICP for example contracts with its clients on the basis they will receive at least 50 percent of the claim proceeds after costs. However, any regulatory imposition of a cap, will cause only the larger claims to be funded, deny access to claimants with smaller collective claim size and permit illegal conduct to go unanswered.

2.7. Any regulatory intervention in the market has the risk of benefiting either plaintiffs or defendants at the cost of the other. Policy needs to focus on all Australians' interests; not just those who are well resourced and particularly not just those who are well resourced.

2.8. Secondly, contingency fees will place downward pressure on the cost of funding so it seems duplicitous for defendant interests to argue for cost of funding to come down and yet argue against contingency fees.

2.9. I do not oppose funders being subject to oversight by the Australian Securities and Investments Commission (**ASIC**) through the mechanism of requiring funders to have an Australian Financial Services Licence (**AFSL**). The further step of requiring each funded class action to be treated as a managed investment scheme (**MIS**) will, however, have consequences that are likely to not be in "the interests of Australians".

2.10. Class action members are not "investing" in the "scheme", but rather are pooling their causes of action. The primary policy consideration is whether ASIC can add any meaningful oversight of class actions over that of the Courts.

2.11. Open classes clearly enable greater access to justice than claims closed to funded members. Also, common fund orders, whilst recently called into question, enable better Court oversight of costs.

2.12. When recently addressing Court supervisory powers and whether the Court has power to grant common fund orders, Justice Beach said: *"In my respectful view, this is something that the legislature should address sooner rather than later, informed by Professor Vince Morabito's impressive empirical research. Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play".* (VID163/2017)

2.13. Motivating open classes and applications for common fund orders provide the Courts with the capacity to have more effective and cost efficient oversight of funders, and for that matter security for costs, than regulatory intervention passing these responsibilities to ASIC.

2.14. Finally, funding a piece of litigation in the expectation of earning a return from it is an expensive, risky and protracted undertaking. Typically the litigation will take years to resolve. The funder has outlaid very substantial sums in legal costs and disbursements during that time and, in a jurisdiction with costs shifting, has likely incurred a significant exposure to adverse costs. It is imperative, from the funder's point of view, that the litigation funding agreement is not liable to be

set aside on any ground, including misrepresentation, misleading and deceptive conduct, unconscionability, oppression or any other basis which the funder can reasonably avoid.

2.15. Litigation funding has, quite rightly, been subjected to intense judicial and regulatory scrutiny over the past 25 years or so since it emerged as an important option for claimants seeking to finance their litigation.

2.16. Viewed objectively, litigation funding is a positive development for the civil justice systems in which it operates. It unarguably enhances access to justice, not for all perhaps but certainly for many with genuine claims who are currently excluded from the system. And it improves the effective enforcement of the law, especially for consumers, workers and investors.

2.17. Directors of companies have seen these three major stakeholder groups make them accountable for their conduct; facilitated primarily by funded class actions.

2.18. Any regulatory intervention needs to be considered having regard to all Australians' interests.

3. The Ambit of The Inquiry

A. Which Litigation Funders are the subject of the Inquiry

3.1. I have sought unsuccessfully to determine whether the ambit of the Committee's inquiry extends outside the funding of Australian class actions to funding of individual claimants litigating for their sole benefit.

3.2. I will assume the ambit is limited to Australian class actions.

3.3. It is important to define "litigation funding" and to be careful not to define it too narrowly or broadly or unintended consequences may result. In particular, the Treasurer's announcement of the removal of the exemptions could be taken to include removal of all litigation funding exemptions in Corporations Regulation 5C.11.01(1).

3.4. First, in addition to third party litigation funders, insurers fund cross-claims, subrogated rights claims and have the same duties as third party litigation funders owed to the Supreme Court of Western Australia.

3.5. The Australian Law Reform Commission (**ALRC**) Report 134 dated December 2018 (the **ALRC Report**) in Recommendation 13 recommended that the Federal Court be expressly empowered to award costs against third party funders and insurers who fail to comply with the overarching purposes of the Federal Court.

3.6. Second, lawyers charging on no-win no-fee pricing policies and funding disbursements are funding litigation.

3.7. Third, creditors or members of a Chapter 5 body corporate fund investigations and recoveries by external controllers.

3.8. Fourth, the Federal Attorney General's Department through Fair Entitlements Guarantee seeks to recover debts arising from insolvency for reward through funding litigation.

3.9. Fifth, there are many not for profit organisations such as the Public Interest Advocacy Centre and the Environment Defenders Office that finance litigation conducted by their offices.

3.10. Finally, funding of individual claims either by litigation or prosecuting a proof of debt is litigation funding.

3.11. I will assume "litigation funding" is intended to be limited to funding by third party litigation funders, although I do not see any policy reason why the Committee would not also include lawyers charging on a no-win no-fee basis or insurers funding litigation.

B. The Unasked Questions

3.12. The Committee's first question centres around the costs (investments) of litigation funders, the returns on these investments and the treatment of any income.

3.13. The availability and cost of capital to be invested by litigation funders in class actions is a product of supply and demand as it is for all other industries.

3.14. Factors affecting litigation funders sourcing capital for funding Australian class actions include:

(a) the number of Australian class actions, despite emotional rhetoric that represents numbers are booming, may be counted in the tens per annum, disenabling economies of scale and spread to manage risk;

(b) profits, let alone return of capital, must be sourced solely from claim proceeds in respect of each individual claim without cross collateralisation, as funding is non-recourse to group members;

(c) case selection, whilst costly and risky like mining exploration, is essential given claim failure delivers total loss of capital and an obligation to pay the defendant's costs;

(d) in addition to the project, evidentiary, liability, quantum and enforcement risks, the costs and delays in Australia's class action adversarial process make returns inconsistent and unpredictable; and

(e) finally, the commitment of capital is open-ended so capital adequacy and liquidity risks must be managed (**Litigation Funder Return Factors**).

3.15. So, where is the evidence of "enormous profits being made by litigation funders … leading to poor justice outcomes for those who join class actions, expecting to get fair compensation for an injury or loss". (The Honourable Christian Porter MP's Media Release dated 13 May 2020)

3.16. Rather than the cost of funding being the primary focus for "justice outcomes", we need to focus on the fundamental causes of injustice, being when:

(a) the employer fails to pay wage entitlements;

(b) the investor is misled by misrepresentation or omission;

(c) the government illegally extracts payments from social security recipients;

(d) the bank breaches consumer protection laws;

(e) etc. (the **Primary Expectation Breaches**).

3.17. The Committee should first look to the cost to Australia of Primary Expectation Breaches to enable it to then address what would make the biggest difference to "justice outcomes".

3.18. Workers, investors, consumers, etc are best served by corporations and governments complying with Australian laws.

3.19. Our class action regime, created in 1992, was intended by Parliament to facilitate access to justice by enabling claims to be brought by aggregating people with small claims to justify the cost of the litigation. In other words, to make Australian laws enforceable.

3.20. It is also the role of litigation funding to make Australian laws enforceable by creating equality of arms; a necessary factor in achieving justice in our adversarial civil justice system.

3.21. Accordingly, litigation funding is necessary to achieve just outcomes either through:

(a) facilitating sufficient deterrence, with ASIC, the ACCC and other regulators, to cause Australian laws not to be broken; or

(b) funding class actions when the regulators do not seek compensation for victims of corporate or government breaches of our laws.

3.22. Having addressed the macroeconomic factors relevant to the Committee's Inquiry, we can now see in context material questions to be asked, including:

(a) what is the cost to Australians of corporations and governments breaching Australian laws?;

(b) what evidence is there that litigation funded class actions deter breaches?;

(c) what is the benefit to Australia of having Australian laws made enforceable by funded class actions over and above compensation for group members that have been received and distributed?;

(d) what is the cost to Australians of corporate and government breaches that are never made the subject of class action scrutiny?;

(e) is this cost driven by the Litigation Funder Return Factors?;

(f) etc. (the **Unasked Economic Questions**).

3.23. A good example of why these Unasked Economic Questions are likely to be far more material to just outcomes than the questions posed for the Committee to address can be found in the Australian Securities Exchange (**ASX**) shareholder claims example.
ASIC provided a submission to the ALRC in September 2018 and in this submission it said, among other things:

> *"The continuous disclosure obligations are critical to protecting shareholders, promoting market integrity and maintaining the good reputation of Australia's financial markets ($1.8 trillion market capitalisation with an average turnover of $5.9 billion a day). The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages.*
>
> *The regime has provided significant benefits including increased investor participation and investment, higher liquidity, and lower transaction costs. It is also the anchor point for other elements of Australia's regulatory regime (including low document capital raising through rights issues)".*

3.24. The importance of enforceable laws can be seen when one compares the ASX's $1.8 trillion market capitalisation and an average turnover of $5.9 billion a day with the part class actions play in investor protection; with total claim proceeds for all shareholder claims in Australia's history being less than $2bn.

3.25. This Parliamentary Inquiry is investigating the litigation funding costs of facilitating receipt of those claim proceeds which would be no more than about $500m (less than 10 percent of one day's turnover on the ASX).

3.26. In these cases alone, the companies shed about $36.5billion in market capitalisation when the correcting disclosures were made.

3.27. This provides a sense of the potential materiality of the Unasked Economic Questions and the relevant immateriality of the questions asked of the Committee.

3.28. Despite this concern, I respond below to the questions raised in the order that they have been raised.

4. The Questions Posed For the Committee

4.1. What evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income?

(a) I refer the Committee to publicly available information being:

(i) the ALRC Report;

(ii) disclosures by Omni Bridgeway, Burford and Litigation Capital Management as listed entities; and

(iii) the independent analysis of extensive data sourced by Professor Vince Morabito (the **Evidence**).

(b) Omni Bridgeway's losses in FY18 and FY19 are not evidence of "enormous profits", nor is its average annual cumulative increase in share price of about 18.48% percent since listing in 2001.

(c) It is true that on occasions because funding is non-recourse other than to claim proceeds, the percentage of proceeds pricing policy can lead to profits on a particular investment of three or more times the amount invested. Looked at in isolation, some would rightly question whether super profits are the norm.

(d) Looked at in the long term, however, including overheads and investments that fail or return little capital or profit, one can see why the litigation funding market has secured far less capital than demanded to enforce broken laws. The Litigation Funder Return Factors in the long term are the primary reason for the market's capital being insufficient to fulfil demand.

(e) If the Committee focuses on the Evidence, including Professor Vince Morabito's conclusion that class action numbers have increased about 69 percent over the last 10 years (about 7%

per annum), I suspect that an objective analysis will conclude that “enormous profits” are not being made and unfulfilled demand for limited capital remains.

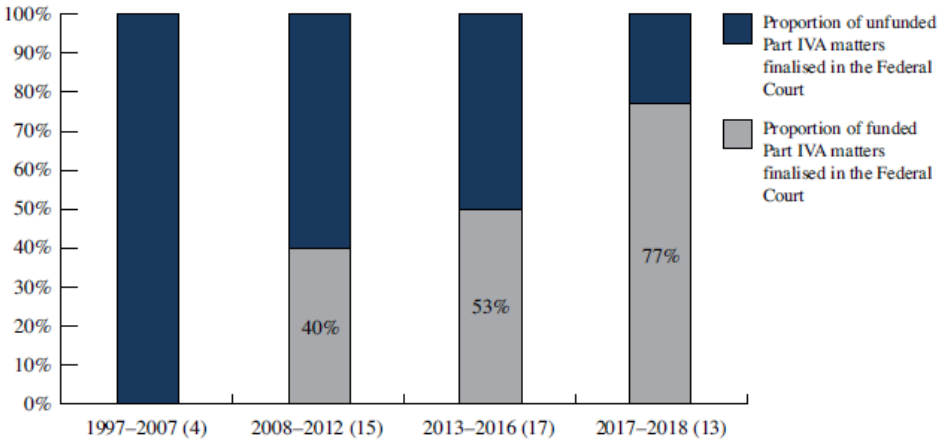
(f) Any regulatory intervention will not be justified if it further restricts group members to less capital than is currently available.

4.2. **What is the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders?**

(a) The principal impact is its existence. Without funding, money received by class members would be limited to claims conducted on a no-win no-fee basis.

(b) The ALRC Report illustrated the growing reliance upon litigation funding for class actions in the Federal Court in Figure 3.1 and Table 3.2:

Figure 3.1: Proportion of finalised Part IVA proceedings that received third-party litigation funding (1997–October 2018)



Source: ALRC Snapshot, Appendix F

Table 3.2: Total number of class action proceedings filed in the Federal Court of Australia and the percentage that were funded (1992–2018)

Time period	Total number of class action proceedings filed in the FC	Total number of filed class action proceedings that were funded	% of filed class action proceedings that were funded
March 1992—March 2013	311	46	15%
March 2013—March 2018	111	71	64%
March 2017—March 2018 (subset of above)	27	21	78%
TOTAL filed on/before March 2018	**422**	**117**	**28%**

Source: Professor Vince Morabito, Private correspondence (13 March 2018)

(c) Accordingly, it may be estimated that if litigation funding didn’t exist, then approximately 80 percent of class actions wouldn’t proceed, leaving victims of corporation and government legal contraventions with no access to justice.

(d) A secondary impact of litigation funding may be to increase the amount of compensation received. Professor Morabito, in an article "'Lessons from Australia on Class Action Reform in New Zealand", outlined the following:

> *"… the mean gross settlement fund and the median gross settlement fund in funded Part IVA proceedings – $48,218,333 and $38,500,000, respectively – were substantially greater than corresponding settlement funds for non-funded Part IVA proceedings: $16,987,659 and $3,100,000, respectively…"*

(e) Whilst this approximately 400 percent greater return in funded class actions than unfunded class actions is likely to be in part attributed to the benefits flowing from equality of arms, there would be a part of the difference being caused by claims being chosen by funders to fund being more valuable than the average.

(f) In any event, equality of arms in our adversarial civil justice system is, unfortunately, a prerequisite for justice.

(g) This latter point was highlighted recently by Justice Lee in the PFAS judgments where he noted the group members of the toxic foam class actions, without funding, would have been left to seek compensation from a position of "significant inequality".

> "*The reality of these cases … is that without funding, the claims of group members would not have been litigated in an adversarial way, but rather the group members 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*".
>
> "*It seems to be a testament to the practical benefits of litigation funding that these claims have been able to be litigated in an efficient and effective way and have produced a settlement*". (NSD1388/2018)

(h) A third and final potential impact, and in my submission the least impactful, is the deduction of the cost of funding from claim proceeds that would have been received had there not been funding.

(i) This imaginary universe assumes lawyers are able to conduct more claims than they are currently able given their available capital for no-win no-fee returns where they also have to pay for disbursements and cover adverse cost order risk.

(j) Third party funding comes at a cost dictated by market risk and reward imperatives.

4.3. What is the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs?

(a) This issue was extensively and most recently canvassed in the ALRC inquiry, submissions and ALRC Report (Chapter 7) where the ALRC Report recommended (at para 7.3) a limited

percentage-based fee model for class action proceedings aimed at providing a greater return to group members.

(b) The primary impact of the introduction of contingency fees would be to enable law firms to equate risk and reward in their pricing policy and therefore enable then to source and deploy greater amounts of capital in class actions. This would enhance access to justice and deepen competitive tensions causing the pricing for funding to further decrease.

(c) These upsides need to be weighed against secondary concerns, being:

(i) issues arising from lawyers owing fiduciary duties to their clients (although this issue hasn't seemed to be a major factor in the UK and the USA where contingency fees are permitted); and

(ii) the additional cost to group members paying contingency fees greater than they would have paid had the claims been charged on a no-win no-fee basis (although given the figures noted at paragraph 4.2(b) above this concern is becoming less material).

4.4. What are the financial and organisational relationships between litigation funders and plaintiff lawyers in funded litigation and do these relationships have the capacity to impact on plaintiff lawyers' duties to their clients?

(a) Funders usually pay some or all of the lawyer's fees and usually have the right to cease funding if the funder reasonably forms the opinion that the claim is no longer commercially viable.

(b) In addition to this financial relationship, funders usually provide instructions to the lawyers but with three important riders:

(i) if the lawyers consider the instructions are not in their client's interest, they may seek instructions directly from their client and those instructions will prevail;

(ii) if the client considers the instructions are not in its interest, it may instruct its lawyers directly and those instructions will prevail; and

(iii) in respect of settlement, any difference between clients and funders is usually arbitrated by the most senior counsel briefed in respect of the claim.

(c) As can be seen from paragraph 4.4(b), the plaintiff lawyers' fiduciary duties to their clients are paramount and funding terms do not impact; particularly in a practical sense. In my experience over about 25 years of funding claims, the lawyers who funders wish to fund understand their fiduciary duties and would not let funders in any way fetter their performance of those duties.

(d) Turning to the financial relationship, I consider it generally has a positive impact on plaintiff lawyers fulfilling their duties and, in particular in seeking to achieve the maximisation of the present value of the future net cash flows from the funded claims.

(e) This is achieved primarily by:

(i) funders requiring lawyers to be accountable to budgets;

(ii) funders seeking lawyers to focus on evidence and argument most conducive to maximising net returns; and

(iii) funders providing claimant lawyers with equality of arms.

4.5. Could the Australian financial services regulatory regime and its application to litigation funding have the capacity to impact fair and equitable outcomes for plaintiffs?

(a) The issue as to whether Australian financial services licensing ought to be introduced was extensively canvassed by the ALRC in Chapter 7 of the ALRC Report which did not recommend its introduction, principally because of the views expressed by ASIC and the fact that licensing may add less meaningful value in consumer protection than the cost of its introduction and management.

(b) The primary consumer protection risks which may theoretically be better managed by licensing are capital adequacy and misselling.

(c) I do not oppose the introduction of licensing provided:

(i) it is designed and introduced solely to enhance consumer protections and not as a mechanism to decrease capital invested in class actions;

(ii) it does not diminish competition that has emerged in the last five or so years;

(iii) it will not cost more than the likely benefits to consumers; and

(iv) it is the subject of adequate consultation once ASIC and Treasury have had sufficient time to consider all relevant circumstances and have published draft licensing terms for consultation.

(d) However, the Treasurer's announcement on 22 May 2020 that he will be requiring litigation funders to obtain AFSLs by 22 August 2020, also provides that class actions will be required to be registered as managed investment schemes.

(e) This component of the proposed regulation will require an immense amount of time and cost to fit the square peg of funded class actions into the round hole of MIS regulation in order to manage inevitable unintended consequences, including:

(i) the incapacity within the timeframe allotted to have adequate consultation to achieve appropriate regulation;

(ii) capital adequacy requirements being more onerous than the benefit they provide, given existing Court mechanisms to ensure security for costs;

(iii) a return to a more centralised market if levels of competition are diminished;

(iv) increasing barriers for capital entry to the market causing increased pricing and decreased capital availability; and

(v) most importantly, the costs to class members of regulation present and future outweighing the benefits of regulation.

(f) Whilst the Treasurer requires AFSLs within 3 months of the announcement, ASIC has confirmed it is only currently able to issue 70 percent of AFSLs applied for within 150 days of application.

(g) Policy, not politics, ought to drive government intervention in markets. Consumer protection is the only currently stated policy consideration. If other matters such as defendant interests are to be taken into account, then let them be identified, defined and legitimately addressed through public consulation.

(h) Any regulatory intervention ought to be judged by reference to its capacity to achieve the Treasurer's stated objectives, being to:

(i) ensure that only reputable and capable litigation funders enter the market;

(ii) reduce the risk of financial loss to the parties by reducing the risk that litigation funders will be unable to meet their liabilities;

(iii) encourage compliance by litigation funders with their obligations; and

(iv) potentially enhance the reputation of litigation funders.

(i) Regulation on the run could have many unintended negative consequences for consumers of litigation funding services.

4.6. Regulation and oversight of the litigation funding industry and litigation funding agreements

(a) I refer to the previous question and my response in respect of future regulation.

(b) Oversight by Superior Court Judges of litigation funders first started with their power to make cost orders against non parties who maintain or fund for reward civil suits such as litigation funders, including insurers.

(c) This oversight is in addition to the oversight of the claimant's lawyers who have professional and statutory duties to the Courts as court officers and secondarily to claimants who are owed fiduciary and contractual duties by their lawyers. Any funding agreement entered into with laywers' clients overseen by the lawyers needs to be assessed by the lawyers as in the best interests of their clients.

(d) Oversight of funders' capital adequacy is also provided by defendants who may and do regularly ensure Court oversight by applications for security for cost orders if considered necessary. This was seen by the ALRC in the ALRC Report as sufficient and perhaps more effective than ASIC having oversight of funders' capital adequacy.

(e) I wrote a paper headed "Policy and Regulatory Issues in Litigation Funding Revistsed in 2014" (Link) which lists all of the existing consumer protection laws, court protection laws and lawyer fiduciary and ethical duties that are relevant to the Committee's inquiry.

(f) Most importantly, particularly in respect of the issues being addressed by the Committee, the Courts have recently sought to have greater oversight over funders' returns since the Full Court decision in QBE in 2016 (VID513/2015).

(g) The decision introduced the concept of common fund orders which the Court considered was in the interests of group members, with the Court determining the return of funders rather than their return being determined by contractual entitlements.

(h) The QBE decision ushered in a period where:

(i) claims were filed on an open basis, thereby enabling access to justice to all potential claimants rather than being restricted to clients of the funders who have agreed contractually to pay the funders' contractual entitlements;

(ii) Courts had the capacity to oversee the remuneration of funders, as well as lawyers, in the interests of class members rather than being constrained by sanctity of contract issues; and

(iii) in particular, Funding Terms acceptable to all parties, including the Court were substituted for the previous contractual terms, requiring funding of the claim overseen by the Court rather than at the discretion of the funder.

(i) From a policy perspective, these three outcomes were clearly consistent with the legislative intent in enacting class action regimes in Australia and the States; namely access to justice.

(j) The High Court decision in Brewster in December 2019 and subsequent decisions question the power of the Court to grant common fund orders and therefore future funded class actions are now in broad terms restricted to claims where bookbuilding is likely to enable the claims to be commercially viable (i.e. closed classes) and where the Court is not certain it has power to ensure distribution of claim proceeds inconsistent with the funder's contractual entitlements.

(k) The ALRC made recommendations after extensive consultation and careful consideration which, I submit, are the pillars of appropriate oversight as follows:

> ***Recommendation 1****—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended so that all representative proceedings are initiated as open class.*
>
> ***Recommendation 3****—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion.*
>
> ***Recommendation 12****—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.*
>
> ***Recommendation 13****—Section 37N and s 43 of the Federal Court of Australia Act 1976 (Cth) should be amended to expressly empower the Court to award costs against third party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.*

Recommendation 14*—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that:*

- third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;

- the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;

- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and

- Australian law governs any such third-party litigation funding agreement the funder submits irrevocably to the jurisdiction of the Court.

(l) Justice Beach followed up on these recommendations in the Bellamy's decision where he stated:

"First, one advantage of early common fund orders was that it assisted to resolve the problem of competing class actions, whether each competing action had their own litigation funder or only one of the competing actions had a funder. For the Court, it did not matter how many group members each had signed up or at what contractual commission rates. If one action was to be the winner, the associated funder had to accept the rate to be ultimately struck by the Court under a common fund order. That was the price the Court, in essence, extracted. Control of the commission rate was ceded to the Court as the price of success. But that flexibility is now lost. Anyway, these are matters for another day.

Second, and flowing from BMW Australia Ltd v Brewster, I now have less flexibility to deal with commission rates. In my respectful view, this is something that the legislature should address sooner rather than later, informed by Professor Vince Morabito's impressive empirical research. Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play".

(VID163/2017; paragraphs 33 and 34)

4.7. Do common fund orders and similar arrangements in class actions impact on fair and equitable outcomes for plaintiffs?

(a) I refer to my response to question 4.6.

(b) Common fund orders and other methods utilised by the Courts have the greatest capacity to enable necessary court oversight to identify and have paid the legitimate costs of securing the claim proceeds.

(c) Empowering Courts to grant common fund orders is preferable to any regulatory intervention not focused on the individual circumstances in each class action.

4.8. What are the factors driving the increasing prevalence of class action proceedings in Australia?

(a) Professor Vince Morabito notes in his recent article "Will 2020 mark the beginning of the end for class actions in Australia" that in the ten years to December 2019 *"…. a total of 235 federal court actions were filed. This represents a 69 percent increase*". I am assuming a 7 percent per annum increase in filings over the last 10 years is what the question is referring to. This growth is likely to have been caused by factors including:

(i) Courts having greater experience in dealing with funded claims over time and developing procedures and determining outcomes that are more predictable;

(ii) consumer, worker and investor activism increasing; particularly when spotlights such as the Banking Inquiry focus on illegal conduct causing billions of dollars of damage;

(iii) floods and fires caused by negligence; and

(iv) the fact that the class action regimes are being seen to be able to deliver their intended outcome; access to justice.

(b) An average 7 percent per annum increase in filings over 10 years isn't reflective of a "booming litigation funding industry".

(c) Given the Litigation Funder Return Factors, I also do not expect there to be evidence of "enormous profits being made by litigation funders" unless one focuses on particular returns on particularly successful cases without having regard to litigation funder overheads and losses on unsuccessful or marginally successful cases.

4.9. What evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy?

(a) Class actions seem to be becoming more productive in fulfilling their intended purpose, being access to justice.

(b) This clearly is not in the interests of those who conduct their businesses illegally.

(c) To answer the question stipulated, I repeat context is important and the more important question is first to answer what is the cost to Australia of the Primary Expectation Breaches noted in paragraph 3.16 above and I repeat paragraphs 3.13 to 3.22, inclusive.

(d) The negative impact of class actions, present and future, relative to the cost to society of Primary Expectation Breaches is and will be immaterial.

(e) The positive impacts of deterrence and having laws made enforceable by funded class actions, coupled with compensation approved by Courts in all circumstances, seem objectively apparent.

(f) The alleged negative impacts seem to centre around accepting the truthfulness of defendants:
  (i) initial assertions that the claims will be strenuously defended; and
  (ii) settling the claims not because the claims have merit but because of the cost of litigation and management time.

(g) Therein lies the primary issue. The primary relevant impact on the Australian economy after illegality has occurred is the waste arising through adversarial process by defendants, often funded by insurers, filing defences and then only after material cost in time and money, settling without admission.

(h) We can focus on funders who facilitate justice, but we could more effectively focus on:
  (i) insurers who utilise our publicly funded courts and civil justice system to manage their claims; and
  (ii) the conduct of defendants and their lawyers to see what cost has been incurred on the Australian economy by insurers and defendants defending claims that should, in most circumstances, simply have been paid.

(i) The submissions by directors and insurers that insurance availability and premium costs are adversely affecting the Australian economy is a red herring.

(j) Any fall out in the insurance industry is caused by the illegal behaviour of insureds and mispricing by insurers; not litigation funding which is a symptom, not a cause.

(k) Directors can lay the blame for any diminution in cover or increases in costs clearly at the feet of the directors in their midst who acted illegally.

(l) As a matter of public policy, it seems extraordinary that Directors seeking to lay off the downside of illegal behaviour wish to have the legislature give prominence to their interest over the countervailing interests of the victims of the illegal behaviour.

(m) The cost of funding class actions and insuring against the downside of illegal behaviour is symptomatic of competition. It is interesting to see funding costs are coming down and insurance costs are going up.

(n) One has to question what role regulatory intervention can legitimately play to benefit groups insured against the cost to society of their illegal behaviour and their insurers.

4.10. What are the effects of unilateral legislative and regulatory changes to class action procedure and litigation funding?

The answer depends on the proposed changes. At present, I do not know what they are other than the proposed licensing changes that have been generally announced and will presumably be published for public comment. I have responded as best I can to the general announcement in response to Question 4.5.

4.11. What are 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 judgement or settlement?

(a) I refer to my answer to Question 4.3.

(b) The Bill currently before the Victorian Parliament raises both contingency fee and percentage cost orders issues.

(c) Both of these issues were the subject of favourable recommendations by the Victorian Law Reform Commission and Productivity Commissions' recent reports. Further, the ALRC Report recommended as follows:

> ***Recommendation 17****—Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.*
>
> ***Recommendation 18****—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to include a statutory presumption that solicitors who fund representative proceedings on the basis of percentage-based fee agreements will provide security for costs in any such proceedings in a form that is enforceable in Australia.*
>
> ***Recommendation 19****—Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that:*
>
> *- percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and*
>
> *- the Court has an express statutory power to reject, vary, or amend the terms of such percentage-based fee agreements.*

(d) My opinion, based on about 25 years of funding litigation is that there is materially less capital available to make our laws enforceable than is sought by victims of broken laws. Accordingly, in the balance, permitting lawyers to charge fees commensurate with the risks calculated as a percentage of recoveries will:

(i) increase available capital to facilitate access to justice; and

(ii) deepen competitive tensions causing downward pressure on pricing.

4.12. What are the potential impacts of Australia's current class action industry on vulnerable Australian business already suffering the impact of the Covid-19 pandemic?

(a) I must first raise the inherent bias in the question. All Australians are vulnerable to the Covid-19 pandemic; not just Australian businesses. These businesses are supported by their shareholders by way of capital, by their employees by way of labour and their consumers for their very existence. Why are we singling out businesses to be protected at the potential expense of business' principle stakeholders?

(b) Since this question has been asked, the Federal Coalition has exercised its powers to unilaterally water down our continuous disclosure laws to favour directors over investors despite each of these groups having to deal with the pandemic.

(c) The decision seems to have been made without regard to potential unintended consequences arising from a less informed market; consequences that may dwarf compensation payable to owners of the companies that benefit from the laws in question.

(d) I have sought to explain the immaterial relativity of shareholder class action settlement amounts and the cost of achieving these settlements to the cost to the market of being misinformed in paragraphs 3.23 to 3.26 above.

(e) It is hard to base the recent amendment to the continuous disclosure provisions on policy grounds.

(f) More generally, I don't see Covid-19 creating policy considerations that would form the basis for the Committee to recommend any further changes to Australian legislation or regulation.

4.13. Is there evidence of any other developments in Australia's rapidly evolving class action industry since the ALRC's Report into class actions and litigation funders?

(a) The material developments since the ALRC's Report have been:

(i) claims which would not have been possible without litigation funding:

a. the filing of many claims against corporations identified in the Banking Inquiry as having obtained illegitimate profits from ordinary Australians; and

b. the Supreme Court of NSW's judgment against State of Queensland and others that it and other State Instrumentalities caused material flooding below the Wivenhoe Dam in Brisbane and surrounds which would not have been possible without litigation funding;

c. the State of Queensland settling the stolen wages claim paying $190m to predominantly first nation Australian and the Federal Court granting the funder an order entitling it to 20 percent; a result which in my view was in the public interest and commensurate with the risk taken by the funder in question;

d. the Australian Government acknowledging it was not legally entitled to collect as debt over $700m from social security recipients which will be repaid as a direct result of the class action filed by Gordon Legal (the largest class action result in Australia's history);

e. the Federal Court decision in favour of thousands of women who have suffered from transvaginal mesh products sold by Johnson and Johnson; and

f. the recent Full Federal Court decision in Rossato placing into question whether about $11 billion not paid to casual workers ought now be recovered through class action with the Federal Attorney General not ruling out changes to the Fair Work Act to overcome the decision;

(ii) the High Court's decision in Brewster and cases following which place into question the Court's power to grant common fund orders; and

(iii) the NSW Court of Appeal's Hazelhurst decision which questions the Federal Court's capacity to order "soft" closure of classes to facilitate settlement; a decision not in the interests of defendants which seek finality from the class action process.

(b) These developments, other than the Brewster and Hazelhurst decisions that limit the Court's powers, are evidence of litigation funding and class actions delivering legitimate outcomes that ought not be restricted other than in favour of evidence-based policy considerations.

5. The Honourable Christian Porter MP's Media Release

(a) I note the release dated 13 May 2020 focuses on:

(i) "ensuring Australians get their fair share of legal entitlements";

(ii) "the enormous profits being made by litigation funders";

(iii) "the booming litigation funding industry is leading to poor justice outcomes for those who join class actions";

(iv) the FACT that "the Australian Law Reform Commission found that when litigation funders were involved in a class action, the median return to class members was just 51 percent, compared to 85 percent when a funder was not involved. That is CLEAR EVIDENCE that the system is not delivering fair and equitable outcomes for those mums and dads who join class actions, AND IT DEMONSTRATES WHY AN INQUIRY INTO ALL ASPECTS OF THE SYSTEM IS NEEDED" (Emphasis Added); and

(v) since "*Labour's decision in 2012 to exempt litigation funders from licensing requirements and prudential supervision …. There has been a three fold increase in the commencement of class action cases.*"

(b) There is no evidence of:

(i) enormous profits being made by litigation funders;

(ii) a booming litigation funding industry; and

(iii) poor justice outcomes for those who join class action; particularly where every settlement and its associated costs must be approved by a judge.

(c) I will leave it to others to dispute the existence of the stated FACT in paragraph 14.1(d) which lead to the CLEAR EVIDENCE this inquiry was needed.

(d) Clearly there has not been since 2012 a three fold increase in the commencement of class actions.

(e) The Courts, despite the assertions of the Government, have been ensuring Australians receive their fair share of their legal entitlements.

(f) The Honourable Attorney General also states:

"Justice is not a business and the primary focus of those who work in the legal system should always be on getting the best outcomes for their clients, not on maximising returns for hungry shareholders."

(g) The primary duty of lawyers is not to their clients but rather to the Court in enabling it to achieve its overarching objective. Justice is first and foremost served by Australian lawyers' commitment to that duty, evidenced by the recent outcomes identified in paragraph 14.13(a)(i).

(h) One has to ask why the highest appointed lawyer in our land has questioned the professionalism of other lawyers and more particularly the courts oversight of settlements and their cost? Is this political? Ought we be concerned about politics subsuming policy?

(i) This last question has to be asked due to the Honourable AG concluding his Media Release with his hope that:

"this inquiry will generate useful insights that will enable us to develop policies that will ensure the interests of Australians are better protected."

(j) Given what I have said above, I am concerned that when the Honourable AG references the interests of Australians, he does not include group members of class actions.

John Walker

Dated: 10 June 2020