

3 August 2020

Mr Patrick Hodder
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
By email: corporations.joint@aph.gov.au

Dear Mr Hodder

**Re: Inquiry into Litigation Funding and the Regulation of the Class Action Industry:
Questions on Notice**

Thank you for your letter dated 17 July 2020 providing questions on notice relating to the Committee's inquiry into litigation funding and the regulations of the class action industry.

Please find attached as separate PDF documents, Omni Bridgeway's answers to:

- QoN 05-01
- QoN 05-02
- QoN 05-03
- QoN 05-04
- QoN 05-05
- QoN 05-06
- QoN 05-07
- QoN 05-08
- QoN 05-09
- QoN 05-10
- QoN 05-11

In addition, we thought it would be helpful to the Committee to provide case studies on a number of matters funded by Omni Bridgeway (see **Annexure A**). We are proud of the fact that Omni Bridgeway has assisted over 300,000 people to seek redress and access to justice. The vast majority of these are individuals or small businesses. Indeed, given that investment and superannuation funds routinely participate as group members in funded shareholder actions, the number of ordinary Australians positively impacted is vastly higher.

Put simply, the actions made possible by litigation funding are truly life-changing and life-enhancing for those who have benefited. In so many instances, individuals, families and communities who have suffered financial and psychological damage as a result of wrongdoing have secured an outcome, they could not otherwise have attained, that goes a substantial way to redressing their circumstances.

These case studies seek to present the perspective and stories of claimants, initially through the wrong they have suffered, the resulting impact, and their subsequent decision to participate in a funded class action.

The case studies presented relate to:

- Case Study #1: Wivenhoe Dam – Access to justice for Queensland flood victims
- Case Study #2: PFAS Contamination Cases
- Case Study #3: Standard & Poors/Lehman Brothers – Justice for councils, churches and charities
- Case Study #4: Gunns Limited – Shareholder class action
- Case Study #5: Combustible Cladding Australia

I trust this information is of assistance.

Yours sincerely,



Andrew Saker

Managing Director & CEO



Annexure A

Looking at current and historic funded class actions, Omni Bridgeway has assisted over 300,000 people to seek redress and access to justice, the vast majority of whom are individuals or small businesses. Indeed, given that investment and superannuation funds routinely participate as group members in funded shareholder actions, the number of ordinary Australians positively impacted is vastly higher.

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Case Studies: Omni Bridgeway Funded Matters

Case Study #1: Wivenhoe Dam – Access to justice for Queensland flood victims

Case Study #2: PFAS Contamination Cases

Case Study #3: Standard & Poors/Lehman Brothers – Justice for councils, churches and charities

Case Study #4: Gunns Limited – Shareholder class action

Case Study #5: Combustible Cladding Australian

Case Study #1: Wivenhoe Dam – Access to justice for Queensland flood victims

Brief description of case

Through December 2010 and January 2011, Queensland experienced record levels of rainfall culminating in major flooding in mid-January 2011 throughout most of the Brisbane River catchment. The floods caused damage to dozens of suburbs and tens of thousands of homes and businesses, and 35 people lost their lives.

Omni Bridgeway is funding (with funding participation by another entity) a class action on behalf of claimants seeking compensation for financial loss or damage caused by the negligent operation of the Wivenhoe and Somerset dams in the lead up to and during the January 2011 floods. Omni Bridgeway initially financed an investigation by lawyers representing flood victims and ultimately funded a class action, filed in July 2014 in the Supreme Court of New South Wales, against dam operators Seqwater and Sunwater, and the Queensland Government.

Claimants/beneficiaries

Over 6,500 people who suffered financial loss or damage.

Outcome or current status

In late 2019, the Supreme Court handed down its judgment in favour of the claimants. The court found that the claim for negligence, brought by the class representative, was proven against each of the defendants. Two of the defendants are appealing the judgement.

Major cases like this class action play a critical role in providing access to justice and helping ensure better standards and behaviour to avoid future events. After the floods, the dam operating manual for managing Wivenhoe and Somerset Dams was changed.

Claimant perspective

Comments by Mr Vince Rodriguez, Lead Claimant:

"Without funding from Omni Bridgeway, I would not have been able to successfully pursue my claim and run an action against such powerful entities.

"They agreed to back the Brisbane flood class action for me and thousands of other people who suffered damage from the flooding in January 2011.

"I found the funding process fair and reasonable for the claimants, understood the terms of the Funding Agreement and Omni Bridgeway and the lawyers kept me fully informed during the claim and the litigation process. Funders take on a massive risk if they lose (not just the legal and other fees they have paid for, but also potential adverse costs).

"The case has been hard fought and still in May 2020 has not yet finally resolved. It is fair that funders recover their expenses and a commission for taking on the risk. Without them, claimants would recover nothing at all.

"I would support a requirement for a minimum of 50% of any of the recoveries going to claimants in class actions. That would be a fair arrangement for all concerned. I also support the requirement that funders have a financial services licence."

Claimant personal perspective

Comment from anonymous Wivenhoe group member:

"In early 2010, I was living in Brisbane and needed to go to Melbourne for an extended period due to family reasons. I decided to rent out my house while I was away and store my belongings in a good, reliable long-term storage facility.

The moving and storage company I chose was in Coopers Plains. The company salesman had advised when I was getting a quote that my belongings would be stored in a shipping container that would be stored outside. He said the container would be locked, safe and vermin-proof. At the time I asked what would happen if it rained and he assured me it would be fine.

In June 2010, my belongings were packed into the shipping container and a few days later I moved to Melbourne taking with me just a suitcase full of my clothes and personal effects.

Near the end of 2010, I returned to Brisbane. The first few weeks of January it had been raining non-stop with reports of flooding in various parts of Brisbane. I decided to contact the storage facility where my belongings were stored after my son-in-law had said he thought that the area was flooded. I called the facility and was told that the premises had been flooded and to come down there.

It took me a couple of days to get there due to flooding in the area and when I arrived, I could see that the place was in chaos. Shipping containers were upended and on top of each other like they had been tossed about in a washing machine. When I got to my container, I could see that boxes had moved around and were topsy-turvy. There was a brown watermark about three-quarters of the way up the container walls. The cartons at the front were sodden and falling apart and there was already a horrible smell of mould and mildew.

A few days later my container was moved to another site in Acacia Ridge which had been unaffected by floodwaters. Here I was able to go through my storage container with the help of my son and two sons-in-law. Almost everything was ruined - beautiful furniture broken and smashed beyond repair. My TV and stereo were broken and water damaged. Items were mouldy. Suitcases and boxes of clothes, antique white bedspreads and cushions were damp and full of mould. I had lovely art prints and a beautiful leadlight hallstand that were all destroyed. My son and sons-in-law were very supportive and helped me to get through the day. I couldn't have done it on my own.

In early February 2011, I made a claim with my insurance company and was later advised that I was not covered for water damage caused by flood and my claim was declined.

The aftermath of the flood took a personal toll on me. I had lost everything and did not end up fully re-furnishing my home. I couldn't afford to replace everything I had lost and relied on donations from friends and family.

In April 2012, I decided to join a class action for the victims of the 2011 Brisbane Floods against the operators of Wivenhoe Dam after I heard about it from a staff member at the storage company. The action was to be funded by Omni Bridgeway (then known as IMF Bentham) and legally represented by Maurice Blackburn. With Omni Bridgeway's funding and the legal support of Maurice Blackburn, the class action has been able to proceed all the years later and enabled me and thousands of others to make a claim for compensation that we would otherwise have been unable to do. Many flood victims, including myself, were left with nothing and how can you pursue legal action on your own with nothing?"

Case Study #2: PFAS Contamination Cases

Brief description of case

Since the 1970s, the Department of Defence has used firefighting foam containing PFAS chemicals in training facilities across Australia. Once discharged into the environment, PFAS create plumes which can be difficult or impossible to remediate. The chemicals have contaminated local environments, negatively impacting residents, their land and water supply, their fishing grounds and their livelihood. Many thousands of people within these communities have been affected. Around Australia, at least 90 sites are under investigation for PFAS contamination.

Omni Bridgeway funded and project managed three separate cases brought by the local communities at Williamstown NSW, Oakey QLD, and Katherine NT, which sought damages for economic losses (diminution in property and business value) in nuisance, negligence and breach of environmental statute.

The cases are believed to be the first environmental tort class actions ever to be brought against the Commonwealth of Australia and are an example of how funded class actions can help individuals access the justice system on an equal footing with a highly resourced defendant.

Claimants/beneficiaries

This claim involved over 2,800 people across the three impacted communities.

Outcome or current status

In February 2020, Omni Bridgeway announced a \$212.5m conditional settlement in the three long running Federal Court class actions we funded against the Commonwealth Department of Defence in Australia.

Omni Bridgeway's funding has enabled the communities to pursue such claims on an equal footing, and Omni Bridgeway has also supported their campaign for public health reforms and greater assistance to affected communities.

Claimant perspective

Comments by Mr Cain Gorfine, Williamstown Claimant:

"There is absolutely no doubt that without the class action system and litigation funding, that the community would not have been able to afford to have taken on the Department of Defence who have spent tens of millions of taxpayer dollars and five years in fighting us.

"The amount of time and effort put into this case and campaign by our legal team, the funder, the WSC [Williamstown Steering Committee] and others in Williamstown on behalf of the community has been extraordinary.

"There has certainly been no lack information on what's happening at either at a Steering Committee or wider community level. At every stage information has been set out plainly and questions addressed openly.

"As the group who have lived and worked on this matter for over 1000 days in our broader communities' interests, we are united in saying the settlement is the right outcome for Williamstown.

"We believe it has been fair, hard fought, in the communities' interests and the significant settlement agreed to in court ordered mediation is preferable to pursuing litigation over a number of years that will cause ongoing uncertainty and mental anguish for the people of Williamtown."

Case Study #3: Standard & Poors/Lehman Brothers – Justice for councils, churches and charities

Brief description of case

In mid-2007, investors in a Lehman Brothers financial product known as synthetic collateralised debt obligations (CDOs) saw the value of their investments plummet, despite the products receiving AAA and AA ratings by credit ratings agency Standard and Poor's (S&P). CDOs were widely considered to be one of the critical factors that led to the collapse of Lehman Brothers and the global financial crisis in 2008.

Omni Bridgeway funded several Federal Court actions on behalf of investors in the Lehman Brothers CDO products. We funded an application to overturn a deed of company arrangement and a subsequent action against Lehman Brothers on behalf of local councils who suffered major financial loss after investing in the CDO products.

In 2013 we funded an action against Standard & Poor's on behalf of local councils, churches and charities in Australia over allegations it engaged in misleading and deceptive conduct in awarding the Lehman Brothers products AA and AAA credit ratings.

Claimants/beneficiaries

90 Australian local councils, churches and charities.

Outcome or current status

The Deed of Company Arrangement was overturned and the case against Lehman Brothers was successful.

The S&P claim was successfully resolved in February 2016 and the settlement terms are confidential.

Claimant perspective

Comments by Cr Mick Wainwright, (then) Mayor, City of Swan:

Described the confidential settlement as "a welcome end to the monumental David and Goliath style action.

"As one of the few Australian local governments prepared to stand up to these international giants of the finance sector, we hope this settlement will finally see the conclusion of this eight year saga."¹

Comments by Mr Colin Cameron, (then) Executive Manager. City of Swan:

"Without litigation funding from Omni Bridgeway, the councils, churches and charities adversely affected would have likely ended up with less than 6c in the dollar. With Omni Bridgeway's backing, we achieved a great financial outcome recovering at least 92c in the dollar.

"There is no way we could have funded the litigation ourselves and Omni Bridgeway was prepared to back the case all the way to the High Court if needed. With their funding we were able to engage top lawyers and even the playing field.

¹ <https://www.abc.net.au/news/2016-02-20/councils-hail-david-and-goliath-legal-win-to-recoup-gfc-losses/7186012>

"I found them very easy to work with, reasonable, transparent and commercial. They added very significant value and come highly recommended."

Claimant personal perspective

By Mr Colin Cameron, (then) Executive Manager. City of Swan:

"In July 2007 I took on the role of heading the corporate services team at the City of Swan Council in Perth. The council's investment portfolio included Lehman Brothers-issued Collateralised Debt Obligations (CDOs) which at the time I thought were just banknotes but was reassured by the product's AAA rating by Standard & Poor's.

It wasn't long before I noticed the rapidly declining performance of one of the Lehman CDOs and decided to take a closer look at the investment. My concerns were already raised from closely monitoring the worsening financial situation [in] the US with reports of a subprime bubble about to burst. After requesting the full documentation from Lehman Brothers Australia (LBA), I discovered a flip clause in the fine print which promised that investors would get their money back if Lehman Brothers was to go bankrupt. In September 2008 Lehman Brothers collapsed.

With the financial backing of Omni Bridgeway, City of Swan Council teamed up with Parkes Shire Council and over 70 charities, councils and churches across Australia and enlisted the legal support of Piper Alderman to lead a class action against Lehman Brothers Australia

With the support of Omni Bridgeway and as the lead applicant, I convinced Swan City Council to reject a Deed of Company Arrangement (DOCA) from LBA's liquidator that would have amounted to just two to six cents in the dollar back to investors.

After several federal court actions against Lehman Brothers the DOCA was overturned and we successfully recovered several hundred million dollars for the class members. We then commenced a separate action against Standard & Poor's in 2012 over its AAA and AA ratings of the Lehman CDOs, which again resulted in a successful outcome for the class members."

Case Study #4: Gunns Limited – Shareholder class action

Brief description of case

Investors in Tasmanian woodchip company Gunns Limited, an ASX listed entity, saw their investments in the company collapse after it released its half year financial results in February 2010 with profit down almost 100% on the previous corresponding period. The decline in Gunns' trading performance was alleged to have resulted principally from a significant deterioration in woodchip export markets. It was alleged Gunns had been aware as early as August 2009 that its results would be significantly worse than the previous year but had failed to inform the market at the time.

In April 2011, Omni Bridgeway funded a class action on behalf of more than 300 investors against Gunns for breaching its continuous disclosure obligations and misleading conduct. The claim alleged Gunns had failed to disclose material information regarding the deterioration of its financial performance for the half year ending 31 December 2009, as required by the Corporations Act and ASX Listing Rules.

Claimants/beneficiaries

310 investors in Gunns Ltd.

Outcome or current status

In September 2012 an external administrator was appointed to Gunns and the proceeding was stayed as a result. Gunns subsequently went into liquidation.

A proceeding was filed in August 2015 against certain directors and officers of Gunns in the Federal Court of Australia which achieved a successful settlement for the group members in March 2016.

Claimant perspective

Comments by Sean Foley, lead Claimant:

"In the absence of such regulations [i.e. continuous disclosure], the incentives, and temptations, for directors become divorced from those of their shareholders. Take Gunns Ltd as an example – a shareholder class action in which I was the lead applicant. Director (and convicted insider trader) John Gay knew Gunns was in trouble in mid-2009.

"Rather than inform shareholders, he chose to raise \$128 million of new shares in September 2009 (at 90c), and sell 3.4 million shares for \$3 million in December 2009. When the news was released to the market, the share price rapidly slid to around 50c, and would ultimately be worth \$0 in 2012 when Gunns entered bankruptcy. The "loss" Mr Gay avoided of ~\$1.2 million was punished by ASIC with a non-custodial disgorgement of \$500,000 and a fine of \$50,000. Sounds like quite a good deal to me. And therein lies the problem.

"From my research, most shareholder class actions in Australia are settled by the firms themselves – effectively admitting the breach was real, and preferring not to risk a court order carrying a significantly higher cost.

"Opponents of shareholder class actions cite the profits made by litigation funders as evidence that the system is inefficient and hinders business. This is clearly not the case, with a June 2020 AICD survey reporting only 2.85 per cent of respondents identified complying with continuous disclosure obligations as the biggest regulatory challenge posed by the COVID-19 crisis.

"The question that needs to be asked is not who ultimately pays, nor how the spoils are divided between misled shareholders and litigation funders.

"Rather, the question is how much worse our market would be in the absence of private enforcement actions. ASIC has been quick to hand out "please explain" aware letters, but very reluctant to follow up with any meaningful enforcement actions. If company directors know that private enforcement actions were not possible, what would stop them from committing even more egregious acts of deception on an unsuspecting shareholder base?"²

Claimant personal perspective

"In 2009, as a PhD student in Finance, I undertook research on Gunns Ltd, and from their public disclosures was excited about their potential. I bought 12,000 shares at around \$1 each, and was quickly surprised at the scale of the drop in profits they experience only months later. I felt lied to, sold my shares, and accepted my almost \$5,000 loss as a learning experience.

"I eventually became the lead applicant in the successful shareholder class action against Gunns. When approached by Maurice Blackburn and IMF Bentham, I was heartened that there might be some recourse for the cavalier approach their management took to their continuous disclosure obligations.

"The class action was complex and expensive, running for many years, even after Gunns fell into administration. Without the expert guidance of Maurice Blackburn I doubt many class members would have been able to navigate the complex D&O insurance terms to access recourse for our class members.

"As an Associate Professor of Applied Finance at Macquarie University, I have continued to study the efficacy of SCA's in augmenting the public enforcement role of ASIC. My research coincides with my personal experience – that they are an effective mechanism to both censure poor company behaviour, and to provide redress to shareholders who have been misled (and financially damaged) by company disclosures."

² <https://www.investordaily.com.au/analysis/47403-why-do-we-need-shareholder-class-action>

Case Study #5: Combustible Cladding Australia

Brief description of case

London's Grenfell tower tragedy, in which the building's cladding caught fire and led to many fatalities, prompted governments across Australia to begin identifying affected buildings with certain polyethylene (PE) core cladding products and to restrict and prohibit the continued use of some of these products. In Australia, replacing existing cladding is, however, largely the responsibility of building owners and owners' corporations.

Faced with the prospect of having to arrange and pay for this replacement, building owners and owners corporations across Australia are now seeking compensation through 2 separate class actions against the manufacturers of Alucobond and Vitrabond PE core cladding products.

Claimants/beneficiaries

On behalf of owners of residential, commercial, mixed-use, public, and other non-residential buildings throughout Australia.

Outcome or current status

In June 2020, the Federal Court of Australia rejected submissions by the Alucobond manufacturer that the Alucobond proceeding no longer continue as a class action or in the alternative, the number of participants in the action should be limited. This is a significant win for the claimants who can continue to pursue compensation from the manufacturers. Both class actions are currently open for registration.

Claimant perspective

Comments by Michael and Gwen Shiels, lead Claimants:

"We are one of 17 apartment owners in a strata building at Dolls Point, NSW, affected by combustible cladding, which Council has ordered us to remove and replace at our cost. We have had to borrow almost half a million dollars to comply with Council's order. We have also incurred additional insurance premiums and other costs as a result of the presence of this cladding. The burden of these costs on us as retirees, and most of the other apartment owners, who are also retirees has been very significant."

"We agreed to be lead applicant in a class action funded by Omni Bridgeway against the manufacturers of the cladding that affected our building. The value of being able to procure litigation funding to pursue our compensation claim, which includes coverage for the risk in the event the litigation is unsuccessful, is great. The opportunity to recover some of the loss we have sustained through the funded class action is immensely important to us."

"Being mostly retirees, if it were not for the funded class action we would never have been in the position, financially, to seek redress from a well-funded multi-national company for the loss sustained by us."

Claimant personal perspective

By Mr Michael Sheils, lead Claimant:

"We, together with the other apartment owners, firstly became aware of combustible cladding following the tragic fire at the Grenfell Towers in London."

"A number of our apartment owners at a Strata Committee meeting expressed concern as to whether or not our building had combustible cladding. It was decided at that meeting that the Chairman and two other Committee members be authorised to make enquires of Bayside Council and the suppliers of the cladding on our apartments as to whether such cladding was Alucobond Pe (combustible) or Alucobond Plus (non-combustible).

"All of the owners present at that meeting expressed great concern for their safety, particularly those owners in the apartments on the upper levels of the complex.

"Initial enquires of Bayside Council disclosed that the Certifier for the building had informed the Council that the cladding was Alucobond Plus. However, this was subsequently proved to be incorrect.

"Extensive enquiries were made of the supplier of the cladding. The documentation obtained by our Strata representatives from the Supplier showed that all of the cladding on our complex was Alucobond PE. This information was supplied to Bayside Council who some months later issued the Strata with an enforceable order to replace the affected cladding within 90 days.

"Many meetings of the Strata Committee and all owners were held in relation to complying with Council's order.

"Cladding contractors were interviewed and finally one was chosen who has successfully removed the non-compliant cladding and replaced it with compliant cladding. The order from Bayside Council has now been discharged.

"During the many discussions that were held with the 17 owners great concern was expressed as to how individual owners were going to fund the cost of the replacement cladding. No help was forthcoming from the NSW Government or Bayside Council and each owner was required to obtain its own finances. Our share of the cost was \$26,000.00 which had to be taken from our Superannuation.

"The Strata initially contacted NSW Fair Trading as to whether or not action could be taken against the Builder but there was extreme doubt as to whether that was possible due to being statute barred, as the building had been occupied for in excess of 6 years.

"In or about December 2018 we became aware that William Roberts, Solicitors, were seeking expressions of interest, from those affected by combustible cladding, to join a class action against the manufacturer of the affected cladding. By a unanimous decision of the Owners it was agreed that our Strata would join the class action as the lead applicant. An arrangement was reached with Omni Bridgeway so that the class action would be funded by it, at no out of pocket cost to the owners in the complex, against the manufacturers of the cladding that was installed on our building. Having this arrangement in place with the funder provided a great deal of relief for all of the owners. In effect a great weight was lifted from our shoulders."