

5 November 2021

Submission to
PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

in respect of

Inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

1 Section of Bill addressed in this submission

This submission covers

- *Section 601LG(3) Fair and reasonable test*
- *Section 601LG(5) A rebuttable presumptionnot so fair and reasonable if more than 30% of the claim proceeds.....*

2 Previous Inquiry and Report by Committee

2.1 Prior submission

At the request of the Committee Secretariat I made a submission dated 2 October 2020 to the Committee's Inquiry into 'Litigation funding and the regulation of the class action industry'. The subject of my submission was *Principles for a Reasonable Return for Funding Litigation in Class Actions*.¹ In that report I set out the factors I see as relevant to 'A reasonable rate of return to a litigation funder out of the proceeds of a settlement of a class action', based on an Expert Witness Report prepared for the Court in *Bolitho v Banksia Securities Ltd (No 18) (remitter)*.²

A copy of that submission is attached for easy reference.

2.2 Committee's Report response

In the Committee's December 2020 Report entitled "Litigation funding and the regulation of the class action industry", several references were made to my submission, including noting of the principles I set out.³ In paragraphs 13.59 and 13.60 the Committee noted:

¹ Submission 101. Mr. Sean McGing available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Submissions

² [2021] VSC 666.

³ Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, December 2020.



13.59 The committee notes the investment and insurance risk-return principles proposed by Mr McGing and net present value methods offered by Professor Officer. These models intend for a litigation funder's return to be commensurate with the risk taken.

13.60 However, the committee has not received sufficient evidence to quantify what an appropriate risk-based premium should be in order to achieve outcomes for both class members and litigation funding returns that are reasonable, proportionate and fair. The committee notes that the implementation of such an approach would be complex and demanding for the Federal Court.

3 Use of McGing approach in *Banksia Securities* case in 2021

I suggest the use of the McGing approach is not as complex and demanding as it may have appeared to the Committee.

I draw to the attention of the Committee that since the tabling of the Committee's December 2020 report⁴ the McGing approach was applied in the Supreme Court of Victoria by Justice John Dixon in his determination of a fair and reasonable return for a litigation funder in the *Banksia Securities* case.⁵ Justice Dixon's judgment reflected that such a principled approach is both appropriate and practical.

Justice Dixon considered "*that the application of investment and insurance principles is a fundamentally sound approach to determine a fair and reasonable return for a litigation funder*".⁶

When it came to practical application, Justice Dixon found that the McGing approach could be applied with only minor adjustments.⁷ It stands testament to the practical applicability of the McGing approach that Justice Dixon was able to use the approach with apparent ease even after some relevant facts and figures had changed from when the expert report was initially prepared.⁸

4 Specific suggestions

4.1 Section 601LG(3) Fair and reasonable test

I suggest the Bill add an additional explicit requirement for consideration of the time value of money. This is a critical ingredient in the determination of a fair and reasonable return. This is of great importance given that s601LG(3) constitutes an exclusive list of factors.

4.2 Section 601LG(5) A rebuttable presumptionnot so fair and reasonable if more than 30% of the claim proceeds... ..

The introduction of an exact threshold parameter of 30% into the legislation could be interpreted by some as signifying a default target level which achieves fairness in distribution of

⁴ Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, December 2020.

⁵ See paragraphs [1939]-[1973] of the judgment in *Banksia Securities (No 18) (remitter)*: https://www.supremecourt.vic.gov.au/sites/default/files/2021-10/Bolitho%20v%20Banksia%20Securities%20Ltd%20%28No%2018%29%20%28remitter%29%20%5B2021%5D%20VSC%20666_1.pdf

⁶ *Banksia Securities (No 18) (remitter)* [1967].

⁷ *Banksia Securities (No 18) (remitter)* [1969]-[1970].

⁸ *Banksia Securities (No 18) (remitter)* [1973].



claims proceeds. This would be misleading and could lead to greater levels of payout to non scheme members than if a purely principled approach was taken. Every case will be different, and every case should consider the actual risk versus return elements from first principles, with no minimum or maximum.

5 Contact

Please contact Sean McGing if there are any aspects of this submission that you wish to discuss.

Yours sincerely

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