HARBOUR
LITIGATION FUNDING

Litigation Funding and the Regulation of the Class Action Industry - Australia

Harbour's response – June 2020

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Australian Parliamentary Joint Committee on Corporations and Financial Services:

Inquiry into Litigation Funding and the Regulation of the Class Action Industry

June 2020 - Submission from Harbour Litigation Funding Limited (Harbour)

Our responses draw upon our long-standing experience as:

- a funder of disputes in 15 different jurisdictions;
- a funder of class actions in 5 different jurisdictions; and
- a funder of Australian disputes since 2013.

1. Introduction to the Inquiry	Harbour's response
Does the present level of regulation applying to Australia's growing class action industry impact fair and equitable outcomes for plaintiffs?	The present level of regulation of the class action industry in Australia has, as far as we are aware, had no negative impact on plaintiffs/class members securing fair and equitable outcomes in relation to their claims. There is a confected narrative in Australia currently, with sections of the Australian media and defence bar making repeat references to unregulated "cowboy" litigation funders making "extraordinary profits" at the expense of ordinary "mum and dad" plaintiffs. A key driver of this narrative is the largest (by budget) lobbying organisation in the US, the US Chamber of Commerce, which mostly represents legacy industries like tobacco and fossil fuels. The truth, supported by facts and careful (and quite recent) consideration by the ALRC, is different. Our response to this latest inquiry is set against the following background:

	- Australia has a robust class action regime that is able to provide effective redress to multiple victims of wrongdoing. This is an enviable position to be in, compared with the challenges faced by plaintiffs who seek mass redress in other jurisdictions. - Victims of corporate wrongdoing have a right to seek compensation, but many are prevented from doing so because the costs of suing large, well-resourced defendants are often prohibitive. In order to level the playing field, plaintiffs – especially "mum and dad" plaintiffs - require a legal system that enables them to bring their claims as part of a group/class, and access to litigation funding. - It is not difficult for ordinary members of the Australian public to identify recent examples of corporate wrongdoing that have impacted victims on a mass scale. See for example the results of the Hayne Royal Commission (HRC) in 2019, which revealed numerous examples of egregious corporate behaviour. Defendants of claims arising out of the HRC should have little cause for complaint. - It is difficult to understand the basis for and timing of this inquiry, given the fact that the Federal Government is yet to respond to the recommendations made by the ALRC about class actions and litigation funding after a detailed 12-month study. - It is also difficult to understand the basis for bringing litigation funding within the AFS licensing regime, especially with such urgency. The ALRC's clear conclusion, informed by ASIC, was that it was not satisfied that the benefits of a licensing regime would outweigh the costs of imposing it, and that it was unlikely to improve regulatory compliance in the funding industry in the short or medium term. - Indeed, the licensing issue has already had a troubling effect, with two Australian-based funders having made public statements to the effect that the regime will provide them with a competitive advantage. It should go without saying that a competitive class action industry is in the best interests of plaintiffs. - Finally, we would highlight another issue addressed in the ALRC's report, being the quasi-regulatory role performed by the Australian courts in relation to class action outcomes. There are numerous recent examples of courts intervening at the conclusion of cases in order to lower commissions paid to funders and increase compensation paid to plaintiffs.

2. Terms of Reference	Harbour's response
1 – What evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income.	- We understand that Professor Vince Morabito, who has conducted impartial empirical work on the class actions industry for over a decade, will soon publish a comprehensive analysis of the proceeds of Australian class actions, and the compensation received by class members. We do not know the period this analysis will cover, but we would expect to see data spanning the last 10 years or more. We urge the Federal Government to refrain from making any decision until this analysis has been published and carefully considered. - In the meantime, we have access only to our own data, a summary of which can be found below: • Since 2013, Harbour has funded 28 disputes in Australia. Of these, 25 are/were class actions (12 remain ongoing). • We have spent a total of £58.3m ($108m) on legal/professional fees, of which £11.6m ($21.5m) has been written off due to unsuccessful outcomes. • We have recovered/been paid commissions totalling £13.9m ($25.8m). Our highest commission (and return) was £12.5m ($23m) on a case lasting almost 3 years. The commission represented 2.1 times what we had spent on the dispute. - Not that the above expenditure ($108m) does not include monies spent outside of cases, e.g. tax and regulatory advice.
2 – The impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders.	- See our response above concerning the awaited study/analysis from Professor Morabito. - Otherwise, we would simply note that: • While true that plaintiffs recover less than 100% of their damages when their claims are funded, many would receive nothing at all without the support of litigation funding, and this is a concern when such claims are meritorious. • A good example of this is the Montara class action, which is funded by Harbour and run by Maurice Blackburn. The action involves a class of 15,000 Indonesian seaweed farmers who are suing a major oil company for negligence. The class members claim that the Montara oil spill, which occurred in Australian waters and was one of the worst/largest in history, decimated their crops and ruined their livelihoods. Without Harbour's funding, these class members would have zero prospects of securing

	compensation – a fact clearly demonstrated by our spend on the action to date (£15.3m/$28.4m), which we have little doubt has been matched by the defendant.
3 – The potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs.	- Contingency fees, like litigation funding, can help to level the playing field for plaintiffs who seek redress against large and well-resourced defendants. Without options such as these, many plaintiffs would be unable to bring their claims at all. - Given the close supervisory role played by the Australian courts in relation to class actions, we cannot see room for many (if any) instances of law firms earning contingency fees that are disproportionate to the compensation paid to plaintiffs when their claims are successful. Further, the prospect of significant adverse costs orders for funders or lawyers, where a claim is unsuccessful, acts as a significant deterrent against the pursuit of anything other than a meritorious claim. Such deterrent does not exist in the US, where there are no adverse costs and juries, not judges, determine claim outcomes. - Some further points we would note in relation to contingency fees: • They have been available in other jurisdictions in which Harbour funds cases for some time, including the UK where Harbour is based. • Many law firms lack the necessary capital and risk-management skills to run multiple cases on contingency, especially large (and expensive) class actions. They often require financial support from litigation funders in order to do so. If that support is restricted, it will reduce the options available to plaintiffs to access the justice system.
4 – The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients.	- Harbour's business model, and the Code of Conduct by which we abide, ensures that there is no impact on a plaintiff lawyer's duty to his/her client. - Harbour is a founding member of the UK Association of Litigation Funders (ALF). One of Harbour's founders, Susan Dunn, is the ALF's current Chair. - The ALF was established in 2011 under the auspices of the Civil Justice Council and Lord Justice Jackson. It is charged with administering self-regulation of the UK's litigation funding industry in line with a published Code of Conduct. The Code was settled after months of research by a high-level Working Party that included senior lawyers, academics and business managers.

	- The Code has 3 key requirements by which Harbour abides, all of which relate to concerns we have heard voiced in relation to the class action industry in Australia: • **Capital Adequacy**, where funders must maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. Capital Adequacy is assessed, annually, by an independent auditor. • **Termination and Settlement**, where funders must behave reasonably and only withdraw from funding in specific circumstances. Independent counsel must be satisfied that the funding agreement clearly sets out such protections for claimants, and includes a suitable ADR mechanism (i.e. that any dispute about termination or settlement is resolved via a binding opinion from an independent QC/SC, who has been either instructed jointly or appointed by the Bar Council). • **Control**, where funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. Independent counsel must be satisfied that the funding agreement clearly sets out protections against control for claimants. - This system has been effective because reputation is the cornerstone of a professional funder's existence, and we also believe that non-ALF members operate at a disadvantage in the UK market. - We are an advocate for Australia adopting the same approach as the above.
5 – the Australian financial services regulatory regime and its application to litigation funding.	- We again refer to ASIC's submission in relation to the ALRC report. ASIC made it clear that an AFS licence would not necessarily mean that a litigation funder would be adequately capitalised to ensure it could meet adverse costs orders and continue to fund cases. In fact, ASIC favoured the existing mechanism for the courts to order that funders pay/meet security for costs. - Ultimately, the ALRC concluded that it was not satisfied that the benefits of a licensing regime would outweigh the costs of imposing it, and that such a regime was unlikely to improve regulatory compliance in the funding industry in the short or medium term. - The "funders require regulation" narrative has been pushed by anti-funding lobbyists such as the US Chamber of Commerce for several years. Their most recent attempt to force change in

	the UK was dismissed – on 25 January 2017 the Ministry of Justice (MoJ) rejected their calls for statutory regulations to be placed on funders, concluding that "*the government does not believe that the case has been made out for moving away from voluntary regulation... and we are not aware of specific concerns about the activities of litigation funders*". We believe that this rejection is a testament to the fact that self-regulation works (see point 4. above), and that Australia should adopt the same approach. - We note all of the above in the knowledge that Harbour, as one of the largest and most experienced funders globally, has the capacity to comply with regulation in whatever form. We employ a General Counsel who has his own Legal & Compliance team, and amongst other things our investment business and a number of Harbour's employees are regulated by the UK's Financial Conduct Authority. Our key concern, as regards calls for regulation, is to identify (a) what evidence, as oppose to post-truth analysis, is there that there are issues in our industry requiring regulation, and (b) is the proposed regulatory regime best-placed to resolve those issues in the best interests of our customers. In our view, funding arrangements do not naturally fit within the Managed Investment Scheme regime and therefore to the extent a decision is made to regulate the industry it should be by way of bespoke regulation that reflects the nuances of litigation funding.
6 – The regulation and oversight of the litigation funding industry and litigation funding agreements.	- See our response to point 5. above.
7 – The application of common fund orders and similar arrangements in class actions.	- Our response to this issue is simple. If Australia wants to facilitate consumer class actions, which typically involve large numbers of "mum and dad" plaintiffs with individually small claims, then early Common Fund orders or a suitable equivalent are required. Otherwise – because such actions will require third-party funding in some form - it is necessary to bookbuild. That is, to sign up individual plaintiffs to funding agreements. - A bookbuild approach will not facilitate the majority of consumer actions. Many will fail to reach a sufficient size/value in order for the claim to make economic sense to pursue.
8 – Factors driving the increasing prevalence of class action proceedings in Australia.	- This is part of the confected narrative we refer to above, which often cites the destruction of the "floodgates" in relation to class actions in Australia without any supporting evidence of note. - In truth, and as is demonstrated in Professor Morabito's study, the floodgates remain both intact and firmly under control. Over the last 10 years, and taking into account filings of the

	same action by competing law firms/funders, the number of class actions has remained remarkably consistent (ranging from c.15-40 per year). This contrasts with nearly 3,000 claims filed in Australia's Federal Court in 2019 concerning companies. - It is also interesting that the so-called upwards trend for class actions came to an end in 2019, as is shown in Professor Morabito's report and this in spite of the extraordinary findings of the Hayne Royal Commission. Also, Professor Morabito identifies a sharp decline in funded class actions in 2020.
9 – What evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy.	- We believe that a legal system which facilitates private redress engenders greater corporate responsibility. It is no surprise to us that, by enabling access to justice to those for whom it was previously out of reach, the litigation funding industry has attracted anti-funding lobbyists such as the US Chamber of Commerce. - We would also repeat our summary above of the $108m investment Harbour has made in the Australian professional services industry since 2013, which is considerable.
10 – The effect of unilateral legislative and regulatory changes to class actions procedure and litigation funding.	- See our response to point 5. above.
11 – 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 judgment or settlement.	- See our response to point 3. above.
12 – The potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impact of the COVID-19 pandemic.	- It should be noted that recoverability is a key concern for litigation funders. Harbour only receives a commission if (a) the case it has funded is successful and, (b) damages are recovered from the defendant. - Harbour, and we would suggest all reputable funders, will have no interest in backing claims against "vulnerable" businesses that are unable, or are likely to become unable, to pay damages.
13 – Evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders.	- The main developments we have seen are (a) an increase in competition in the class actions industry, (b) the High Court's determination that late Common Fund orders are not permissible, and (c) increasing anti-funding lobbying at a time when, as we have stated, the number of funded actions in Australia is already in decline.

14 – Any matters related to these terms of reference.	- We are grateful for the opportunity to respond to this inquiry.

We would be happy to discuss any further questions you may have.

Please contact Stephen O'Dowd on or

Submitted by

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