LCM
EXPERIENCE COUNTS

PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES INQUIRY INTO THE CORPORATIONS AMENDMENT (IMPROVING OUTCOMES FOR LITIGATION FUNDING PARTICIPANTS) BILL 2021

SUPPLEMENTARY SUBMISSION OF LITIGATION CAPITAL MANAGEMENT LIMITED
TO CORRECT MISSTATEMENTS IN EVIDENCE BEFORE COMMITTEE
16 November 2021

1. Litigation Capital Management Limited and its subsidiaries ("LCM") have made a submission in response to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the *Corporations Amendment (Improving Outcomes For Litigation Funding Participants) Bill 2021*.

2. The purpose of this supplementary submission is to correct misstatements that have been made in the evidence provided to the Committee in relation to the case of *Laurence Andrew Fitzgerald and Michael James Humphris in their capacity as trustees for certain former employees of Huon Corporation Pty Ltd v CBL Insurance (formerly called Contractors Bonding Limited)*, Supreme Court of Victoria Proceeding No. c1-2011-5405 ("Huon Claim").

3. In particular, LCM refers to the following evidence provided to the Committee:

    3.1. Chris Merritt of the Rule of Law Institute of Australia provided the following evidence in the course of the Public Hearing:

    "… the worst example, which is outlined in several submissions to the current inquiry, was the 2015 settlement in a class action on behalf of 336 former employees of Huon Corporation. Once lawyers, funders and other service providers were paid, the former employees received nothing from the $5.1 million settlement." (Our emphasis)

    3.2. The Ai Group further referred to the Huon Claim (see page 6 of its written submission) in support of its submission that:

    "The regulatory system governing litigation funding arrangements should ensure that the class action regime is not misused as an avenue for litigation funders to make unreasonable profits at the expense of class members and businesses"

    3.3. Mr Stuart Clarke also referred to the Huon Claim (see page 2 of his written submission) to assert that it described:

    "…a class action outcome which saw the entirety of an award of over $5 million taken by the plaintiffs' lawyers, litigation funders, and others with absolutely nothing going to the class members despite a successful outcome!"

4. LCM was the provider of litigation funding in relation to the above proceedings and in that capacity submits that the above evidence and reliance on the Huon Claim is simply wrong. LCM wishes to assist the Committee by providing the following correction to these misstatements:

    4.1. The Huon Claim was not a class action.

    4.2. LCM's funding arrangements were with the named plaintiffs in the subject Supreme Court action. Those plaintiff parties were two very experienced professionals that were appointed as trustees of certain former Huon Corporation employees. In that role, the trustees were responsible for protecting the interests of the employees, and for progressing the legal proceedings on their behalf.

4.3. Further, LCM submits that it is sensationalist and ill-informed to refer to the distribution of this claim's ultimate proceeds without exploring the claim's history and background.

4.4. Although LCM treats its confidentiality obligations very seriously and will not comment on any confidential aspects of the progress or outcome of this litigation, by way of observation on publicly available information LCM notes that:

4.4.1. Proceedings were commenced in October 2011.

4.4.2. The defendant denied liability and actively defended the action. The path of the proceedings was circuitous and the matter was not set down for trial until September 2013.

4.4.3. Following the conclusion of trial in October 2013, judgment was handed down in October 2014.

4.4.4. Importantly, this judgment required further significant work to be undertaken before final orders could be entered and such orders were not able to be made until May 2015. The orders then provided for a judgment in favour of the plaintiffs in the sum of $4,132,232.70, together with a fixed interest sum. Detailed orders on costs were also made (not all in favour of the plaintiffs).

4.4.5. Public reports state that the legal costs incurred in the matter were in the order of $3.3million (although LCM does not comment on the accuracy of these reports for confidentiality reasons).

4.4.6. LCM pauses here to reiterate that that the claim did proceed to judgment and it did succeed. It was not an un-meritorious claim, nor was it speculative.

4.4.7. However, as is an unfortunate reality in litigation that even when liability is established, the Court may make findings on quantum that do not offer a satisfactory proportionality against the costs that are incurred in pursuing that actively-defended and long-running claim.

4.4.8. Further and importantly, the defendant then filed an appeal in respect of the above orders, further increasing the costs and delaying finalisation of the action.

4.4.9. The appeal (and the plaintiffs' cross-appeal) was listed for hearing, and the claims were only resolved and finally discontinued before hearing in February 2016, over four years after the claim was first commenced.

5. LCM submits that it is simply wrong to use the above proceeding as an example of a class action proceeding, let alone as the "the worst example".

6. What the proceeding is an example of is the unfortunate realities of litigation risk – risk on liability, risk on quantum, risk of aggressive defence tactics, risk of increasing costs and risk of delays. It is these risks, as well as the significant risks of adverse costs, that funders absorb and shield litigants against. Had the Huon Claim (and the same can be

said for most funded actions) resolved for less than its ultimate outcome, or had the defendant been successful at first instance or on appeal, it is LCM who would have been liable to make payment of the full sum of the plaintiffs' legal costs and, in addition, to meet the very considerable burden of adverse costs orders.

7. In the Huon Claim, two very experienced professional trustees valued the above risk and entered into express funding arrangements that remunerated the funder for accepting it.

8. The fact that the only risk that litigants do not pass to the funder – the risk of receiving no return – eventuated in this matter is not an indicator of a broken funding system. It is a reality of engaging in litigation.