The Rise and (Minor) Fall of Litigation Funding in Australia

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IN 1992, the *Federal Court of Australia Act 1976* (Cth)(the "Federal Court Act") was amended to introduce Part IVA which established a federal representative proceedings (class action) regime. Subsequently, similar class action regimes have been introduced in Victoria,[1] New South Wales,[2] and Queensland,[3]

[1] *Supreme Court Act 1986* (Vic) pt 4A (effective January 1, 2000).
[2] *Civil Procedure Act 2005* (NSW) pt 10 (effective March 4, 2011).
[3] *Civil Proceedings Act 2011* (Qld) pt 13A (effective March 1, 2017).

with Western Australia poised to follow in 2020.[4]

The stated objective of the class action regime when introduced to the Federal Court of Australia (the "Federal Court") was to provide access to justice, resolve disputes more efficiently, avoid respondents facing multiple suits and the risk of inconsistent findings across those suits, and reduce costs for both the parties and the courts.[5] Similar objectives were cited on the introduction of each of the state-based regimes. Nearly thirty years later, most institutions and individuals with experience in the conduct of litigation, class actions, and access to justice issues agree that Part IVA and its state counterparts, while not perfect, have largely met these objectives. It is undeniable that the class action regimes have provided practical access to justice for a large number of claimants with a wide-range of claims, many of whom who would have been unable to bring their claims before the court but for the existence of the regimes.[6]

However, one element of the class action regimes that has attracted an increasing amount of attention is the role of litigation funders in securing access to justice. Supporters claim that litigation funding is vital to the health of the Australian class actions regime, whereas critics argue that it represents the worst of entrepreneurial litigation. This article seeks to provide an overview of the current status of litigation funding in Australia. First, we explain the origins of the litigation funding market. Next, we consider the recommendations made by the Australian Law Reform Commission ("ALRC") in its report *Integrity, Fairness and Efficiency – an Inquiry into Class Action Proceedings and Third-Part Litigation Funders*.[7] Third, we explore the High Court of Australia's decision in *BMW Australia Ltd v Brewster* and its implications for the funding market.[8] Finally, we consider the Victorian Government's proposal to introduce contingency-fee based billing in the Supreme Court of Victoria.

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[4] *Civil Procedure (Representative Proceedings) Bill 2019* (WA).

[5] MICHAEL LEGG AND ROSS MCINNES, AUSTRALIAN ANNOTATED CLASS ACTIONS LEGISLATION 4 (LexisNexis Butterworths, 2nd ed, 2018).

[6] The Honorable Justice Bernard Murphy and Vince Morabito, *The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice*, in DAMIAN GRAVE AND HELEN MOULD (EDS.), 25 YEARS OF CLASS ACTIONS IN AUSTRALIA 43 (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

[7] Australian Law Reform Commission, *Inquiry into Class Action Proceedings Final Report* (Report 134, December 2018) (hereinafter, the "ALRC Report").

[8] [2019] HCA 45.

I. The Origins and Rise of Litigation Funding in Australia

Historically, the rules against maintenance and champerty prohibited third parties from financing litigation where they had no direct interest in the claim. Towards the end of the twentieth century, some Australian states began to gradually relax the prohibition by abolishing maintenance and champerty, either as a tort, or a crime, or both. Yet the approach was inconsistent and questions as to the relevance and impact of the rules were not always straightforward.

The situation was clarified somewhat by the Federal Court in 1996 in *Movitor Pty Ltd (receivers and managers appointed) (in liq) v Sims.*[9] The Federal Court held that an agreement in which an insurance company would fund a liquidator's cause of action against the directors of the liquidated company fell within an exception to the prohibition on champertous agreements. This exception was that a trustee in bankruptcy may lawfully assign the bankrupt's causes of action. The liquidator, having statutory powers to dispose of the property of the company, was allowed to dispose of a cause of action on terms that the insurance company was to share in part of the profits, so long as it was not making a grossly excessive profit. This decision legitimized third-party funding arrangements and created an opportunity for litigation funders to develop their business model in Australia. However, it was limited to raising capital to provide funding for insolvency practitioners.

Over the next ten years, the litigation funding industry in Australia grew and evolved, and litigation funders began to explore funding mass claims. Litigation funders' ability to provide funding more generally was considered by the High Court of Australia[10] in 2006 in *Campbells Cash and Carry v Fostif.*[11] The initial proceeding was commenced by tobacco retailers in an attempt to recover from tobacco wholesalers' amounts relating to a licensing fee. A litigation funder funded the proceedings in exchange for one third of any judgement sum or settlement sum if the action was successful. A majority of the High Court found that the litigation funding arrangements were not contrary to public policy and did not lead to any abuse of process. The High Court decided that neither the litigation funder's motive for profit, nor their attempts to seek

[9] (1996) 64 FCR 380.

[10] The High Court of Australia is Australia's ultimate appellate court, analogous to the United States Supreme Court.

[11] (2006) 229 CLR 386.

out plaintiffs to join the proceedings, were alone or in combination enough to warrant an overarching rule of public policy to bar litigation funding agreements.[12]

The decision in *Fostif* gave litigation funders a legitimate role in financing multi-party proceedings, including class actions, and allowed them to exercise influence over how that litigation is conducted. As a consequence, litigation funding was no longer restricted to raising capital to provide funding for insolvency practitioners. In the years that followed, the number of litigation funders (both domestic and international) operating in Australia steadily increased, as did the number of funded class actions filed in the federal and state courts.

The rise of litigation funding in Australia is, in part, a result of the prohibition on lawyers charging contingency fees, which is a fee calculated as a proportion of any verdict or settlement obtained by the client. Litigation funders have filled a market gap by introducing a third person into the relationship between a client and a lawyer who is not subject to such a prohibition. The typical structure of an Australian funding arrangement is:

(a) a contract between the funder and the claimant pursuant to which the claimant agrees to pay the funder a percentage of any amount they obtain by way of judgment or settlement in exchange for the funder agreeing to pay the costs of the litigation (usually including any cost order made against the claimant);
(b) a contract between the funder and the lawyer, pursuant to which the funder agrees to pay the lawyer's fees and the lawyer agrees that the funder may direct certain aspects of the litigation (subject always to the lawyer's overriding obligation to their client); and
(c) a contract between the claimant and the lawyer pursuant to which the lawyer agrees to represent the client and the client acknowledges role of the funder in directing the conduct of the litigation.

Notwithstanding the growth of the litigation funding industry in Australia, Australian governments have been reluctant to regulate the industry. Litigation funders are not required to hold a license to operate, and the only regulatory action taken by the Commonwealth government to date in relation to litigation funding was in response to a Federal Court decision which held that litigation funding arrangements were a managed

[12] *Id.* at [88].

investment scheme.[13] In 2013, the Commonwealth passed regulations which exempted litigation funders from the usual regulatory obligations applying to promoters of managed investment schemes, subject only to the condition that the funder must to implement adequate procedures to manage conflict of interest.[14]

II. ALRC Report 134: *Integrity, Fairness and Efficiency – an Inquiry into Class Action Proceedings and Third-Part Litigation Funders*

The increase in class actions, and the role of litigation funders, has been the topic of considerable attention since the introduction of Part IVA in 1992. Supporters argue that litigation funding plays a vital role in ensuring the viability and health of the class action regime, which in turn promotes access to justice. Critics maintain that litigation funding has influenced the types of class actions brought and have changed the way civil litigation system operates in Australia for the worse. Some are concerned that this influence and change means that the class actions regimes are less able to achieve the stated objectives. Others are concerned by the lack of a licensing regime.

The level of interest peaked in December 2017 when the Attorney-General of Australia asked the ALRC to consider whether and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation. The ALRC published its final report in December 2018 and made twenty-four recommendations aimed at promoting fairness and efficiency in class action proceedings; protecting litigants from disproportionate costs; and assuring the integrity of the civil justice system.[15]

In its report, the ALRC recognised the critical role that litigation funders play in providing access to justice, but identified risks associated with litigation funding. These included that funders may fail to meet their obligations under funding agreements, use the Federal Court for improper purposes, or exercise influence over the conduct of proceedings to the detriment of group members.[16] While the ALRC

[13] *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11. Managed investment schemes are a species of investment in which a promoter invites a range of individuals to invest in a venture over which they have limited control. Promoters of managed investment schemes are subject to a number of regulatory requirements, including the requirement to hold a financial services license.

[14] *Corporations Amendment Regulation 2012 (No. 6)* (Cth).

[15] ALRC Report, *supra* note 7, at 9 – 12.

[16] *Id.* at 153.

considered recommending that litigation funders be required to obtain a license in order to operate within Australia,[17] ultimately the ALRC recommended that claimants should be protected by improving court oversight of litigation funders on a case-by-case basis, rather than licensing, in part due to concerns regarding the effectiveness of the existing financial services licensing regime.[18]

The ALRC made several key recommendations in relation to litigation funding. First, the ALRC sought to reduce the financial risk to consumers of litigation funding services. To achieve this goal, the ALRC made two recommendations. First, solicitors acting for the representative plaintiff in a funded class action should be prohibited from seeking to recover any unpaid fees from the representative plaintiff or group members.[19] Second, the Federal Court Act should be amended to include a statutory presumption that litigation funders would provide security for costs in a form that is enforceable in Australia.[20]

The ALRC sought to enhance the court's power to supervise litigation funders during proceedings by amending the Federal Court Act to expressly empower the court to award costs against litigation funders and insurers who fail to facilitate the just resolution of disputes according to law as quickly, inexpensively, and efficiently as possible.[21]

With a view of ensuring that the risks associated with litigation funding agreements are disclosed to class members before they committed to the agreement, the ALRC recommended that such agreements for representative proceedings require court approval before they are enforceable.

The ALRC also recommended that the existing Australian Securities and Investment Commission (ASIC) *Regulatory Guide 248 – Litigation schemes and proof of debt schemes: Managing conflicts of interest*, which sets out ASIC's approach to how a person who provides a relevant service can satisfy the obligation to maintain adequate practices and follow certain procedures for managing potential and actual conflicts of interest, be amended to require litigation funders to report to ASIC annually on their compliance with the requirement to implement adequate procedures to manage conflict of interest.[22]

Finally, the ALRC recognised that litigation funding was an ever-evolving phenomenon. As a result, it was reasonable to assume that new funding models would emerge.

[17] *Id.* at 157 – 163.
[18] *Id.*
[19] *Id.* at 163.
[20] *Id.* at 163 – 165.
[21] *Id.* at 165 – 168.
[22] *Id.* at 181.

In order to limit additional conflict of interest issues arising, the ALRC recommended that the *Corporations Regulations 2001* (Cth) be amended so that "law firm financing" and "litigation fund scheme" be treated as a managed investment scheme for regulatory purposes.[23]

The ALRC also made a range of recommendations directed at the conduct of class actions more generally, including recommend-dations in relation to other participants in class actions. Perhaps the most radical was the recommendation that lawyers acting for plaintiffs in class actions ought to be permitted to charge contingency fees (see further below).[24] The ALRC's recommend-ations were collectively intended to "assist the Federal Court case manage class action proceedings effectively, efficiently and fairly"[25] including in relation to: the constitution of class actions; competing class actions; and settlement approval by the court. The Commonwealth has not yet taken any action in response to the recommendations.

III. Common Fund Orders

Part IVA and its state counterparts are "opt-out" class actions regimes. Any individual who meets the definition of a class member is automatically part of the class, regardless of whether they are aware of that fact. All class members, unless they opt-out of the class before a date fixed by the court, are bound by the decisions of the court.

The opt-out regime poses a problem for litigation funders because there may be group members who benefit from the litigation without entering into a funding agreement, meaning that the litigation funder has no entitlement to recover a funding commission from them. That is known as the free rider problem. The traditional way for funders to address the problem was to retain as many group members as necessary to make the action viable before the action was commenced. This process, known as "book building", involved the litigation funder and law firm advertising the class action, including via newspapers, the internet, and social media, and was often time consuming and expensive. However, with each additional class member, the litigation funder and law firm guaranteed a greater return on investment and reduced its risk exposure. When the litigation funder and law firm had retained sufficient group members, the law firm would commence the class action.

[23] *Id.* at 183.
[24] *Id.* at 18.
[25] *Id.* at 17.

The opt-out regime meant that if all individuals who met the class member definition were also included in the class, regardless of whether that individual had entered into an agreement with the litigation funder, some people were getting a free ride. In an attempt to circumvent the free rider problem, funded litigation would often be commenced as a closed class limited to those who had signed a funding agreement, an approach which, while approved by the Australian courts,[26] created a tension with the Australian opt-out regime.

A. *Money Max Int Pty Ltd (trustee)* v *QBE Insurance Group Pty Ltd*[27]

The free rider problem arose in the *Money Max* shareholder class action. The applicant brought the class action on its own behalf and on behalf of an "open class" comprising all persons who acquired an interest in QBE shares during the relevant period and who claimed to have suffered loss as a result of QBE's conduct.[28] The action was funded, but not all class members had entered into a funding agreement. Pursuant to the funding agreement, the applicant and the funded class members agreed that, in return for the funder covering the costs of the litigation, they would reimburse the funder the legal costs paid and would also pay the funder a percentage of either 32.5% or 35% from any settlement or judgment, depending on how many shares they owned.

The applicant brought an interlocutory application in the preliminary stages of the proceeding seeking orders pursuant to section 33ZF of the Federal Court Act which had the effect of applying the terms of the funding agreement to all class members (that is, not just those class members who had entered an agreement with the funder) (a "common fund order" (CFO)). Under the proposed CFO, the applicant and all class members would pay the funder a pro rata share of legal costs incurred and a funding commission at the reduced rate of 30% from the common fund of any settlement or judgment in their favour. QBE opposed the application on a number of grounds, including that the court would inevitably make a "funding equalisation order" (FEO)[29] at the appropriate time to ensure equivalent returns for funded and

[26] *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited* [2007] FCAFC 200 at [10], [31], [110]-[111] and [178].
[27] (2016) 245 FCR191.
[28] *Id*. at [1].
[29] The effect of a funding equalization factor is to redistribute an amount equivalent to the commissions that would have been payable by the non-funded group members between all group members.

unfunded group members, so there was no prejudice suffered by not making a CFO at the early stages of the proceeding.[30]

The Full Court of the Federal Court explained that, to a large extent QBE's opposition to the application was grounded on the premise that a FEO was to be preferred to the proposed CFO, and it was therefore likely that the court will make such an order at the appropriate stage.[31] Their Honors did not accept this contention and said that a FEO is not necessarily the most appropriate way to achieve equality of treatment between funded and unfunded group members.[32] Notwithstanding QBE's opposition, the court made the orders, although it did require that the rate of commission be set at a later time and approved by the court.

The decision marked the start of a new chapter in litigation funding and class actions in Australia. Litigation funders were now able to extract a commission from all class members, not just those with whom it had contracted. As a consequence, they no longer had the pressure or inconvenience of building a book of class members before commencing an action. Once they were satisfied that it was likely that there were a sufficient number of individuals who met the class member definition, they could commence proceedings with relative confidence that the court would make a CFO at an early stage of the proceeding. Business was booming.

B. *BMW Australia Ltd v Brewster*[33]

The High Court considered CFOs for the first time in 2019 when it jointly heard appeals in two class actions. One of the class actions, brought against BMW in the Supreme Court of New South Wales ("NSWSC"), a state court, was a claim in respect of faulty airbags. The other, in the Federal Court, was against Westpac Bank in relation to financial advice. The claimants in the *BMW* and *Westpac* class actions sought CFOs. At first instance, the NSWSC removed the question whether it has the power to make such an order in the *BMW* proceeding to the New South Wales Court of Appeal ("NSWCA") and the Federal Court made the order in the *Westpac* proceeding.

Both BMW and Westpac appealed the decision. The two appeals were heard at an historic concurrent sitting of the intermediate appellate courts, the NSWCA and the Full Court of the Federal Court. Each court, in separate decisions, held that it had power to make CFOs. BMW and

[30] *Money Max*, *supra* note 27, at [62].
[31] *Id*. at [126].
[32] *Id*. at [127].
[33] *Brewster*, *supra* note 8.

Westpac appealed the decision to the High Court of Australia.

The High Court held that neither the Federal Court nor the NSWSC had the power, pursuant to section 33ZF of the Federal Court Act and section 183 of the *Civil Procedure Act 2005* (NSW) (the "Civil Procedure Act") respectively, to make the CFOs sought.[34] Section 33ZF of the Federal Court Act is a reserve power of the Federal Court in respect of class actions and provides:

> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
> (2) Subsection (1) does not limit the operation of section 22.

Section 183 of the Civil Procedure Act is the analogue of section 33ZF(1) in NSW legislation.

The High Court upheld the appeals 5-2 and said that neither court had the power to make a CFO, at least at the early stage of proceedings. In considering the appeals, the plurality of the High Court of Kiefel CJ, Bell and Keane JJ said:

> While the power conferred by these sections is wide, it does not extend to the making of a CFO. These sections empower the making of orders as to how an action should proceed in order to do justice. They are not concerned with the radically different question as to whether an action can proceed at all. It is not appropriate or necessary to ensure that justice is done in a representative proceeding for a court to promote the prosecution of the proceeding in order to enable it to be heard and determined by that court. The making of an order at the outset of a representative proceeding, in order to assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding, is beyond the purpose of the legislation.[35]

Further, the plurality said:

> While it has rightly been acknowledged that the power conferred by each of s 33ZF and s 183 is broad, it is

[34] *Id*. at [1].

[35] *Id*. at [3].

> one thing for a court to make an order to ensure that the proceeding is brought fairly and effectively to a just outcome; it is another thing for a court to make an order in favour of a third party with a view to encouraging it to support the pursuit of the proceeding, especially where the merits of the claims in the proceeding are to be decided by that court. Whether an action can proceed at all is a radically different question from how it should proceed in order to achieve a just result. [36]

The plurality was of the view that an order distributing the proceeds of a class action should come at the conclusion of the proceeding. If class members happen to be indebted to a litigation funder for its support of their claims, the value of that support will have been rendered certain, and will be capable of assessment.[37]

C. The reaction to *Brewster*

The *Brewster* decision brings both the FCA and NSWSC back to the pre-2016 position. Litigation funders will have to come to court with economic viability already established, instead of using a CFO to make the action viable – which will probably slow, but not stop, Australia's lively class action industry. It is possible that new funding models may also emerge. However, it remains to be seen whether CFOs are dead or whether they can be restructured. Two days after the High Court's decision in *Brewster*, a Federal Court judge was reported as saying at a directions hearing:[38]

> …the High Court focused on CFOs at an interlocutory phase. The two cases did not concern section 33V(2). They didn't really say very much about that. There is still a possibility, if you wanted to do it. You could make submissions to have a CFO as part of a settlement distribution under section 33V(2)….

Section 33V of the Federal Court Act stipulates that a group proceeding cannot be settled or discontinued without the approval of the court. If the court gives such approval, it may make such orders

[36] *Id.* at [47].
[37] *Id.* at [68].
[38] Christine Caulfield, "Judge says High Court did not rule out common fund orders at settlement," LAWYERLY (December 6, 2019), available at https://www.lawyerly.com.au/judge-says-high-court-did-not-rule-out-common-fund-orders-at-settlement?sg=t .

at it thinks fit with regards to the distribution of any money.[39]

Next, on December 20, 2019, the Federal Court issued a revised Class Actions Practice Note (GPN-CA).[40] The revised paragraph 15.4, under the heading "Settlement – Procedure" states:

> …make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action…

Although practice notes are only intended to facilitate court processes only, the Federal Court appears to believe that achieving equality of treatment between funded and unfunded group members is a priority.

Then, on February 5, 2020, the Federal Court approved a settlement in *Clime Capital Ltd v UGL Pty Ltd.*[41] The hearing of the application to approve a settlement in the matter, which originally included a CFO, was being heard on the same morning that the High Court handed down its judgment in *Brewster* but was adjourned when news of *Brewster* reached the courtroom. The parties amended the settlement in light of *Brewster* to include a FEO instead of a CFO. The FEO required that funded group members pay a commission of 22.5% of the entire settlement sum to the litigation funder and then equalized this amount across all group members. The court acknowledged that the FEO was "devised to result in the same outcome" as a CFO.[42] The court said that FEOs are "well established by authorities in this Court" from 2010 onwards[43] and did not consider that the decision in *Brewster* presented an impediment to approving the FEO. The court relied on the plurality of the High Court's statement in *Brewster* that a FEO is clearly available where settlement is reached and could be ordered pursuant to section 33V of the Federal Court Act.

Accordingly, a similar effect to a CFO may be possible to achieve, albeit at the end rather than the beginning of proceedings. While the outcome is perhaps not as bad for funders as originally thought, considerable uncertainty exists as

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[39] The NSW analogue of this section is s 173 of the *Civil Procedure Act 2005* (NSW).

[40] CJ J L B Allsop, Class Actions Practice Note (GPN-CA), *Practice Documents* (December 20, 2019), available at https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca.

[41] [2020] FCA 66.

[42] *Id.* at [1] and [2].

[43] *Id.* at [12].

to precisely what funders can and cannot do to recover a commission from unfunded group members. It seems inevitable that the uncertainty will affect the decisions funders make about whether to fund litigation in Australia.

IV. The VLRC Report: *Access to Justice – Litigation Funding and Group Proceedings and Contingency Fees*

In December 2016, the Attorney-General for the state of Victoria asked the Victorian Law Reform Commission (the "VLRC") to report on ways to ensure that litigants in the Supreme Court of Victoria who use litigation funding services or participate in group proceedings are not exposed to unfair risk or disproportionate costs.[44] Although the VLRC inquiry was narrower than the ALRC inquiry, some issues were considered by both Commissions.

As is said above, Australian lawyers are prohibited by state and territory legislation from charging clients in litigation on a contingency basis.[45] As part of its inquiry, the VLRC was specifically asked to consider whether removing this prohibition would mitigate the issues presented by the practice of litigation funding. The issues presented included the selection of cases to fund; the amount charged; and the priority given to the funder's commercial interests over the plaintiff's or class members' interests.[46] In considering the issue, the VLRC identified that, to mitigate these issues, removing the prohibition on law firms charging contingency fees would need to:

(a) expand the availability of funding to cases that are uneconomic for litigation funders to support;

(b) reduce costs to plaintiffs;

(c) ensure that client interests are not trumped in favor of the funder's financial interests.[47]

The VLRC suggested that lifting the ban could increase competition in the litigation funding market, which might improve the chances of claims that are too small or risky being run, as well as potentially reducing costs in large class actions through increased competition. However, this would not be a cure-all for access to justice and costs issues.[48] The VLRC also concluded

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[44] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, v (March 2018) (hereinafter the "VLRC Report").

[45] *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3, cl 27(1); *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 183; *Legal Profession Act 2008* (WA) s 285.

[46] VLRC Report, *supra* note 44, at 3.

[47] *Id.* at 52-53.

[48] *Id.*

that the contingency fees would intensify the risk that a lawyer's financial interest in the outcome of litigation will prevail over their duty to their client. However, lawyers are experienced in managing conflicts of interest and, compared to litigation funders, are subject to more extensive rules and obligations and stronger accountability mechanisms.[49]

The VLRC was of the view that that the mitigation of issues presented by the practice of litigation funding alone is not a sufficient reason to remove the prohibition on lawyers being able to charge contingency fees. However, it could be part of a comprehensive policy response that could be implemented nationally.[50] The VLRC concluded that legal practitioners should be permitted to charge contingency fees, subject to certain exceptions and regulations. It proposed that the representative plaintiff be permitted to make an application to the court for a common fund for a "litigation service fee", whereby a court-approved fee is calculated as a percentage of any recovered amount and liability is shared among all class members if the litigation is successful.[51] Court approval would be subject to conditions that protect the representative plaintiff, and other class members, from excessive costs, such as the law firm indemnifying the representative party for adverse costs.[52] However, the suggestion was not warmly received by all members of the legal fraternity, some who remain unconvinced that the conflicts of interests can be adequately managed.

A. *Justice Legislation Miscellaneous Amendments Bill 2019*

The Victorian government has acted on this recommendation. In November 2019, the *Justice Legislation Miscellaneous Amendments Bill 2019* (the "Bill") was introduced to the Victorian Legislative Assembly. The Bill proposes amendments to the *Supreme Court of Victoria Act 1986* to give the court the power to make "Group Costs order" on application by a representative plaintiff.[53] In making a Group Costs order, the Court may order that:

(a) the legal costs payable to the plaintiff's lawyers be a percentage of the amount recovered in the proceedings; and

(b) liability for those legal costs be shared by the plaintiff and group members.[54]

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[49] *Id.*
[50] *Id.* at 62.
[51] *Id.* at 68.
[52] *Id.* at 65.
[53] *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic) s 5.
[54] *Id.*

Further, if a Group Costs order is made, the plaintiff's lawyers will be liable to pay any costs awarded to the defendant, and if ordered by the court, a plaintiff law firm may be required to give security for the defendant's costs.[55]

The move has caused consternation among some members of the legal community and prompted the Attorney-General for Australia to announce on March 5, 2020 that a Commonwealth Parliamentary Committee will examine the impact of litigation funding on justice outcomes and report to Parliament by November 9, 2020. The Attorney-General indicated that the Committee will also be asked to review the broader impact of the increase in class actions on the Australian economy, as well as the potential impact of a move by the Victorian Government to abolish the long-held prohibition on lawyers being paid on a contingency basis, where lawyers claim costs as a percentage of their clients' damages.[56]

Notwithstanding the Parliamentary Committee, the Bill is likely to be passed into law as soon as the current health crisis allows. Only time will tell whether the Bill will result in increased competition, and, in turn, broaden the range of claims that attract funding and increase competition at amongst players able to run larger claims. However, it is likely that the Bill will see the VSC become the arena of choice for plaintiffs looking to prosecute class actions.

V. Conclusion

While far from perfect, Part IVA and its state counterparts have improved access to justice, helped to resolve disputes more efficiently, and reduced the costs of litigation, both for the parties and the courts. It is also undeniable that, in one form or another, litigation funding is here to stay in Australia.

The *Money Max* decision gave confidence to litigation funders to expand the number and type of class actions funded in Australia. It would not be unreasonable if, in reassessing the class action landscape in light of recent developments, litigation funders concluded that market is riskier than it was only a few months ago and that this resulted in a correction to the recent growth in actions. However, it is unlikely that litigation funders will pull back significantly or withdraw from

[55] *Id.*

[56] Attorney-General for Australia and Minister for Industrial Relations, *Committee to examine impact of litigation funding on justice outcomes* (March 5, 2020) available at https://www.attorneygeneral.gov.au/media/media-releases/committee-examine-impact-litigation-funding-justice-outcomes-5-March-2020.

funding litigation in Australia. It is more likely that new approaches to funding develop, leading to a period of uncertainty and slower growth in class actions.

It would be surprising if the Commonwealth government did not act on at least some of the ALRC's recommendations, particularly in light of the Victorian government's contingency fee proposal. It will be equally interesting to see how this proposal impacts the class action landscape. At a minimum, we anticipate seeing a spike in the number of class actions filed in the Supreme Court of Victoria. This may mean an increase in activity from established firms, or we could see new players enter the market. There are obvious concerns about the distorting effects that can flow from one court adopting different rules in relation to lawyer remuneration.

Whatever way you look at it, class action practice in Australia in 2020 and the years beyond is going to be an interesting and exciting place to practice law.

CLAYTON UTZ

The Continued Fall of Litigation Funding in Australia

Greg Williams, Partner, Clayton Utz

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In an article published in the April 2020 Defense Counsel Journal, we reported on the growth of litigation funding in Australia driven by many years of "light touch" regulation. We also described how in 2020 the favourable conditions for the litigation funding industry began to change.

On page 15 of that article we noted that on 5 March 2020 the Attorney-General for Australia announced a Commonwealth Parliamentary Inquiry into litigation funding and the regulation of class actions.

The Inquiry Committee undertook extensive consultation, including receiving 101 written submissions and holding five days of public hearings in July and August 2020. On 21 December 2020, the Committee released its 450 page report.

The Inquiry was triggered by increasing concern on the part of the Australian government (likely reflecting concerns in the business community) about the increased prevalence of funded class actions, in particular shareholder class actions seeking damages for alleged breaches of Australia's continuous disclosure laws.

The Committee's view was that these concerns have substance. As it said in the Executive Summary to the report:

> *Courts and civil remedies were not established as novel investment vehicles to deliver handsome profits to innovative financiers or creative lawyers. Most Australians would be comfortable with the idea that profits may be made incidentally while delivering the core objective of access to justice. But they would be rightly horrified to learn that for some participants in our justice system, return on investment and profit from risk-taking has become their primary motivation.*
>
> *Australia's highly unique and favourably regulated litigation funding market has become a global hotspot for international investors, including many based in tax havens and with dubious corporate histories, to generate investment returns unheard of in any other jurisdiction – in some cases of more than 500 per cent.*
>
> *This is directly the result of a regulatory regime described by the Australian Securities and Investments Commission (ASIC) as 'light touch' and under which no successful action by a regulator has ever been taken against a funder.*
>
> *Participants in class actions are the biggest losers in this deal. When they finally get their day in court, it is the genuinely wronged class action members who are getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders.*

However, notwithstanding these concerns, the Committee has acknowledged that there is *"consistent support for class actions as a legitimate tool to overcome this barrier for many members of the community who wish to enforce their rights and obtain redress through the courts"*.

In order to balance the generally accepted benefits of funded class actions against the current concerns about the manner in which such class actions are being conducted, the Committee said:

> *Having considered the evidence put to it, the committee considers the concerns about the class action and litigation funding industries to be wellfounded. In the committee's view, the class action system needs to be reformed to reflect the underlying tenets of its original intent: that is, to deliver reasonable, proportionate and fair access to justice in the best interests of class members.*

> *Accordingly, the committee identifies those areas where it sees significant value in reforming the current regime. Nevertheless, the committee is aware of the adverse consequences that could arise from ill-judged regulation. Therefore, the reforms proposed by the committee, while comprehensive, are measured and targeted.*
>
> *The committee's approach to reform has been guided by the principle of reasonable, proportionate and fair access to justice in the best interests of class members. The rest of the executive summary provides an overview of the key issues and the committee's recommendations for reform.*

The Report 31 Recommendations for legislative and procedural reform which cover:

- addressing multiple class actions making the same allegations against the same defendants, the introduction of a 90 day "standstill" after the filing of the first class action to allow any other class actions to be filed and then a "selection hearing" where the Court selects the class action(s) that will continue. In addition to this, an express power for the Court to resolve competing or multiple class actions at an early stage of proceedings (**Recommendations 2 and 3**)

- improvement to transparency and management of potential conflicts of interest between group members, litigation funders and legal representatives - including the appointment of contradictors to act on behalf of group members in the settlement process and the imposition of a statutory requirement that funders act in accordance with the overarching purpose of the class action legislation (**Recommendations 17, 18, 19, 22 and 23 to 26**)

- proportionality of costs incurred in litigating a class action, considering factors such as potential return to group members, impacts on court resources, regulatory outcomes and the public interest (**Recommendations 1 and 20**)

- legislation to address the ongoing uncertainty in relation to common fund orders (**Recommendations 6 and 7**)

- increased regulation, direct Court supervision (and where warranted, Court intervention) of litigation funding and contingency fee arrangements, including a presumption that litigation funders provide security for costs and complete protection for lead plaintiffs against adverse costs orders (**Recommendations 8 to 16, 20, 21 and 28**)

- greater uniformity and clarity across jurisdictions, including in relation to express class closure powers in the Federal Court (**Recommendations 4, 5, 30 and 31**)

- continuation of the relaxed continuous disclosure laws introduced by the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* as a measure to curb commencement of unmeritorious shareholder class actions (**Recommendation 29**)

If the Report's recommendations are accepted, it will mean a fundamental change to the market conditions for litigation funders in Australia and more generally, for the way in which class actions are conducted in Australia.