Guaranteeing a minimum return of class action proceeds to class members

Submission to the Treasury in respect of Recommendation 20 of the Parliamentary Joint Committee report on litigation funding and class actions: 28 June 2021.

Dr Peter Cashman.[1]

'Like a forest fire in this era of climate change, costs in class proceedings have gotten out of control.'[2]

Personal interest and background.

The author has had an active interest and professional involvement in class actions in Australia for 40 years, in a number of capacities.[3]

Summary of submission.

- The current transaction costs in class actions are excessive and, in many cases, disproportionate
- There is a pressing need for a non-profit Justice Fund
- Legal practitioners should be permitted to conduct class actions on the basis of percentage fees, subject to judicial review and approval
- A statutorily fixed percentage guaranteed return to class members is not appropriate

---

[1] Barrister; Adjunct Professor, Faculty of Law & Justice, University of New South Wales.

[2] Perell J, *Heller v Uber Technologies Inc*., 2018 ONSC 1690 [1]. Although made with reference to Canadian class action litigation, the same may be said of Australian class actions.

[3] These include:

- public interest lawyer (Director of the Public Interest Advocacy Centre and subsequently member and Chair of the Board of PIAC)
- *solicitor in private practice* (head of the Sydney practice of Slater & Gordon; founder of Cashman & Partners which merged with the firm Maurice Blackburn to form the national practice of Maurice Blackburn Cashman)
- *law reform commissioner* (Commissioner jointly in charge of the reference on class actions with the Australian Law Reform Commission; Commissioner in charge of the Civil Justice Inquiry, Victorian Law Reform Commission)
- *barrister* (counsel in numerous Federal Court class actions and a number of class actions and mass tort MDL proceedings before federal courts in the United States)
- *member of professional bodies* (former President of the Australian Lawyers Alliance; former member of the Board of Governors of the Association of Trial Lawyers of America; former Commissioner, Legal Aid Commission of NSW; former member of the Board of PILCH (now Justice Connect); current member of the Class Actions sub-committee of the Law Council of Australia; current member of the Federal Court Class Actions Users' Group)
- *academic* (Kim Santow Chair in Social Justice, University of Sydney, until February 2020; currently Adjunct Professor of Law, University of New South Wales)
- *author* (numerous publications, including *Class Action Law & Practice*, the Federation Press, 2007; co-author of 'Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' 61 *The American Journal of Comparative Law* 93 and, most recently, co-author of *The Globalization of Mass Civil Litigation: Lessons from the Volkswagen "Clean Diesel" Case*, RAND Corporation, June 2021
- *empirical researcher* on class actions and litigation funding (see the Research Reports cited below)
- *public interest litigation funder* (member of the Board of the Grata Fund, a philanthropic body providing financial support for public interest cases).

- the *Federal Court of Australia Act 1976* (Cth) should be amended to introduce
  (a) a requirement for Federal Court approval of litigation funding agreements as a precondition to enforceability and
  (b) a power to reject, vary or amend the terms of any litigation funding agreement in the interests of justice
- Additional specific statutory standards governing the conduct of all those involved in the conduct of class actions are required
- The present unlimited tax deductibility of legal costs and expenses incurred by respondents and insurers requires further research, review and reform.

Submissions.

Submission #1: The current transaction costs in class actions are excessive and, in many cases, disproportionate.

In a series of recent research reports,[4] the author and Amelia Simpson have examined various aspects of class actions and litigation funding in Australia. This includes the findings of empirical research in relation to litigation funding commissions and legal costs incurred in class action litigation.[5] As noted in that report (and as endorsed by the PJC Report) such costs are excessive in most cases and disproportionate in many. The empirical data are discussed further below.

However, as the authors have noted in detail in that report[6], the reasons for this are complex and multifactorial. Percentage based litigation funding commissions, or commissions based on a multiple of expenditure, are only one of the relevant factors. Substantial legal fees and out of pocket expenses incurred in conducting class actions are a major component of the transaction costs incurred. The forensic conduct of all parties and participants in class action litigation is such that most cases are protracted and extremely expensive.

It is necessary to consider, in a holistic manner, the many complex factors which contribute to the substantial transaction costs incurred in class action litigation in Australia if the policy goal is to reduce transaction costs and increase the return for class members. In the following submission, a number of means of achieving this are identified and advocated.

Submission #2: There is a pressing need for a non-profit Justice Fund.

Numerous independent inquiries by law reform bodies in Australia, at both federal and state level, have repeatedly recommended that a not-for-profit fund should be established in Australia to provide financial assistance and adverse costs protection in class action litigation.[7] Such funds have been successfully established in Canada, in the provinces of Ontario and Quebec.[8] The Canadian funds obtain a commission of ten percent out of the proceeds of successful cases that are funded.

---

[4] *Class actions and litigation funding reform: the rhetoric and the reality* [2020] UNSWLRS 85; *Class actions and litigation funding reform: the views of class action practitioners* [2020] UNSWLRS 73; *The problem of delay in class actions* [2020] UNSWLRS 86; *Costs and funding commissions in class actions* [2020] UNSWLRS 87; *Class action remedies: cy pres; 'an imperfect solution to an impossible problem'* [2020] UNSWLRS 67; *Class actions: commercial funding, regulation and conflicts of interest* [2020] UNSWLRS 74.These are available on austlii.
[5] Peter Cashman & Amelia Simpson, *Costs and funding commissions in class actions* [2020] UNSWLRS 87.
[6] Ibid, pp 3-9.
[7] In addition to the PJC report, there have been nine concluded inquiries encompassing class actions in Australia. These are summarised in *Class actions and litigation funding reform: the rhetoric and the reality*, ibid, pp 3-12.
[8] Ibid, pp 14-16.

Those commissions are used for the purpose of funding other cases. By way of contrast, commercial funders in the Australian market charge significantly higher commissions (historically in the range of 30-35%) and profits accrue to the funders, or their shareholders. Although funders play an important role in facilitating access to justice, this comes at a substantial transaction cost.

Various proposals for the establishment of non-profit funding mechanisms were documented by the author in submissions to the PJC.

In its original report, which led to the introduction of class actions in the Federal Court, the ALRC recommended that special fund should be established to provide financial support for class actions. [9]

With a view to achieving greater access to justice the VLRC recommended a new funding mechanism. It was proposed that a new funding body (the '*Justice Fund*') should be established to (a) provide financial assistance to parties with meritorious civil claims, (b) provide indemnify for any adverse costs order or order for security for costs made against the party assisted by the fund.

It was proposed that such body should seek to become self-funding through (a) funding agreements with assisted parties whereby the fund would be entitled to a share of the amount recovered by the successful assisted party; (b) having statutory authority in class action proceedings under Part 4A of the *Supreme Court Act 1986* (Vic) to either (i) enter into agreement with an assisted representative party whereby the fund would be entitled to a share of the total amount recovered by the class under any settlement or judgment, subject to approval of the court, or (ii) to make application to the court for approval to receive a share of the total amount recovered by the class under any settlement or judgment; (c) recovering, from other parties to the proceedings, costs incurred in providing assistance to the assisted party where the assisted party is successful and obtains an order for costs; (d) receiving funds by order of the court in cases where *cy–près* type remedies are available (see the discussion below) and (e) entering into joint venture litigation funding arrangements with commercial litigation funding bodies. [10]

The establishment of such a fund at a federal level would facilitate greater access to justice in class actions, increase competition with commercial litigation funders, reduce the transaction costs otherwise incurred in commercially funded class actions, not be a drain on public funds given the likelihood that it would become self-funding, provide assistance in 'public interest' cases, provide security for costs for the benefit of defendants and meet adverse costs orders in favour of defendants in unsuccessful funded cases. [11]

The writer and others, including the Law Council, the Grata Fund and the law firm Allens, submitted to the Commonwealth Joint Parliamentary Committee inquiry into litigation funding and regulation of the class action industry that such a fund should be established at a national level. [12] Curiously,

---

[9] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, October 1988).
[10] Victorian Law Reform Commission, *Civil Justice Review Report*, 2008, chapter 10 'Achieving Greater Access to Justice: A New Funding Mechanism', [136]. See also [137]-[140].
[11] See however the VLRC proposals in respect of limited liability of the fund during its first five years of operation or such lesser period as the trustees of the fund may determine in light of the financial position of the fund [138].
[12] Dr Peter Cashman, *Submission 55*, p. 1; Law Council of Australia, *Submission 67*, p. 7; Grata Fund, *Submission 76*, p. 9; Allens, *Submission 69*, p. 23 referred to in Report of the Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry', December 2020, p 141.

although the Committee's majority report refers to these submissions[13] there is no further comment or view expressed.

As noted above, successive governments have failed to implement recommendations from numerous law reform bodies that a *statutory fund* is required in connection with class actions. This is presumably on the grounds that they don't wish to commit scarce public funds. However, this overlooks the important societal benefits and savings to class members that such a fund could provide. Moreover, there are other sources of revenue which could be accessed in aid of the establishment of such a fund: as discussed below, the public purse is at present substantially depleted by the loss of tax revenue from the unrestricted deductibility of legal expenses available to defendant corporations who defend and lose class actions. Importantly, a statutory fund which operates in a competent and cost-effective manner would, in time, be self-funding from commissions derived from funding successful cases. As noted above, in its *Civil Justice Review Report*, the Victorian Law Reform Commission identified various ways in which the proposed Justice Fund would operate so as to minimise expenditure and maximise profitability.[14]

Commercial litigation funders entered into the market in Australia to fill the void left by the failure of successive governments to establish a statutory class action fund. Without such funding many class actions could simply not be pursued. However, the previously unregulated litigation funding market, and the profit motivation of commercial funders, led to the substantial transaction costs which are now proposed to be capped by imposing a statutory percentage of settlements payable to class members. This problem would be substantially ameliorated by the establishment of a statutory class action fund which seeks to maximise access to justice rather than commercial gain.

Submission #3: Legal practitioners should be permitted to conduct class actions on the basis of percentage fees subject to judicial review and approval

It is abundantly clear that one of the reasons why transactions costs in class actions are very high is because where cases are funded by a commercial funder the commission payable to the funder, coupled with the substantial legal costs and disbursements (and in many instances the premium payable to an adverse costs insurer for ATE insurance) result in an excessive and in many cases disproportionate amount of the settlement or judgment amount being absorbed by such transaction costs.

Australian courts, at both trial and appellate level, have reiterated in a number of recent decisions that where there are competing class actions, class members are more likely to be better off where the case is conducted by a law firm on a no win no fee basis compared with to a commercial funding arrangement.

Moreover, percentage fees payable to law firms in the event of success are now permissible in class actions conducted in the Supreme Court of Victoria, subject to judicial oversight and approval.

Various law reform bodies in Australia have recommended that percentage fees should be permissible, including in class actions, subject to appropriate judicial approval and safeguards.

[13] Report of the Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, December 2020, [10.46]-[10.47].
[14] Victorian Law Reform Commission (VLRC), *Civil Justice Review Report* (2008) chapter 10.

Permitting law firms to act on the basis of percentage fees may provide sufficient commercial incentive to obviate the need for a commercial litigation funder in many cases and result in an increased return to class members compared with cases financed by commercial funders.

At present, Maurice Blackburn is seeking the judicial imprimatur of Justice Nichols in the Victorian Supreme Court for a percentage fee of 25% under the recently introduced Victorian reforms. A decision is presently reserved. If allowed, this would represent an increase on the average amount normally recovered by way of legal costs and out of pocket expenses in class actions generally (15%) and is approximately the same as the average commission recovered by commercial litigation funders (26%).[15]

Analysis of empirical data on legal costs incurred in class action litigation in the United States and Canada is of interest. In the United States costs are not recoverable from the unsuccessful defendant but lawyers are permitted to charge a percentage of the recovery. In class actions, fees may be claimed based on a percentage of the recovery or using the 'lodestar' method.[16] This is subject to judicial scrutiny as to the reasonableness of the fee sought. In the period 1993 to 2008 the average fee awarded in federal class actions was 23% of the amount of the class action settlement.[17] In the period 2009 to 2013 this increased to 27%.[18] The legal fees as a percentage of the settlement amount approved by the courts declined as the settlement amount increased.[19]

Similar to the position in Australia and the United States, in Canada legal fees and costs in class actions must be approved by the court. There is a legislative requirement in most jurisdictions that fees approved must be 'reasonable'.[20]

Although the legislation in Ontario makes express provision for judges to apply a 'lodestar' methodology,[21] as Kalajdzic notes, courts have affirmed that other methods of calculation, including a percentage of the settlement, are permissible.[22] Two empirical studies have been conducted to examine the range of fees in class actions in Ontario. A 2007 survey of 29 settled cases found that there was a wide range of fee awards, calculated on the basis of both lodestar and percentage methodologies. The average approved fee was around $CA 3 million; the average multiplier was 2.48 and the average percentage of settlement amount was 14.85%.[23] An updated study in 2013 found

---

[15] See the empirical data discussed below.

[16] Applying a multiplier to the amount calculated based on hourly rates.

[17] Theodore Eisenberg and Geoffrey P. Miller, 'Attorney Fees and Expenses in Class Action Settlements: 1993–2008,' *Journal of Empirical Legal Studies*, Vol. 7, June 2010, pp. 248–281.See also, Theodore Eisenberg & Geoffrey P Miller, 'Attorneys Fees in Class Action Settlements: An Empirical Study', (2004) 1 *Journal of Empirical Legal Studies* 27; Brian T Fitzpatrick, 'An Empirical Study of Class Action Settlements and Their Fee Awards' (2010) 7 *Journal of Empirical Legal Studies* 811.

[18] Theodore Eisenberg, Geoffrey Miller, and Roy Germano, 'Attorney Fees in Class Actions, 2009–2013' *NYU Law Review*, Vol. 92, No. 4, October 2017, pp. 937–970.

[19] See generally, Peter Cashman and Amelia Simpson, *Costs and funding commissions in class actions*, [2020] UNSWLRS 87 pp 47-49. Laws and procedures in respect of class actions in the United States and Canada are referred to in Deborah Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel Gomez, Axel Halfmeier and Ianika Tzankova, *The Gobalization of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case*, RAND Corporation, June 2021.

[20] See e.g., *Class Proceedings Act, 1992*, SO 1992, c. 6, s. 33(8) CPA.

[21] That is, the application of a multiplier to the amount of the base fee (usually calculated on the basis of hourly rates): s 33 *Class Proceedings Act 1992*, SO 1992.

[22] Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) 129-130.

[23] Benjamin Alarie, 'Rethinking the Approval of Class Counsel's fees in Ontario Class Actions' (2007) 4 *Can Class Action Rev* 15 at 29, cited by Kalajdzic p 131 n 20.

that the average multiplier in the 109 decisions examined had decreased to 1.95 but that the average percentage of settlement had increased to 22.05%.[24] Thus, based on these data, in Canada fees approved by the Ontario courts in class actions are approximately the same percentage of the settlement amount (15%) as in Australia. However, in Ontario the fees recovered were twice or more of the amount[25] that would be recoverable based on hourly rates whereas in Australia the recovered fees are calculated on the basis of hourly rates (with an uplift of up to 25% in cases conducted on a no win no fee basis). The Canadian data are also of particular interest because, unlike in the United States, class actions costs in half of the Canadian provinces may be awarded in favour of the successful litigant. Where a Canadian class action is supported by the class action fund in either Ontario or Quebec the fund pays disbursements and assumes liability for adverse costs.

In many instances, permitting Australian law firms to conduct class actions on a percentage fee basis may result in a recovery by lawyers of a higher percentage of the settlement or judgment amount than would be recoverable under the existing hourly billing regime. However, in most cases the transaction costs in terms of legal costs would undoubtedly be less than the current average of over 40% paid to lawyers and funders in funded class actions. Moreover, as is the case in class actions in both the United States and Canada, in considering the reasonableness of any claimed percentage fee Australian courts would no doubt have regard to, inter alia, the amount of work done and the amount that would have been chargeable for such work based on customary hourly rates.

Permitting law firms to charge fees on a percentage basis might lead to higher transaction costs if both funders and law firms are able to obtain (unregulated) percentage payments in the same class action. Judicial scrutiny, and the proposal outlined in submission #5 below, would preclude this.

Submission #4: A fixed percentage *guaranteed* return to class members is not appropriate.

A statutory 'fixed' or guaranteed return to class members appears, prima facie, to be a plausible and reasonable mechanism for dealing with otherwise excessive or disproportionate transaction costs.

There is some national and international support for a mechanism to ensure that a minimum percentage of any gross settlement or damages is paid to claimants. For example, in the current draft report of the Committee on Legal Affairs of the European Parliament it is proposed that 'only under exceptional circumstances arrangements between litigation funders and claimants should vary from the rule that a minimum of 60% of the gross settlement or damages is paid to claimants.'[26]

The European Parliamentary Research Service has recently published a comprehensive global study of third-party funding of litigation, which encompassed Australia. In the European context, the study examined the need for additional effective safeguards and a number of policy options regarding the contractual, ethical and procedural aspects of third-party litigation funding (TPLF).

As the study noted:

---

[24] Benjamin Alarie and Peter Anthony Flynn, 'Accumulating Wisdom: An Updated Empirical Examination of Class Counsel's Fees in Ontario Class Actions' (2014) 9 (2) *Can Class Action Rev* 355 at 371, cited by Kalajdzic p 131 n 21.

[25] As Kalajdzic notes, in one case the court approved of a fee which was 5.5 times the base hourly fee and represented 20% of the gross recovery: Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) 131.

[26] Committee on Legal Affairs, European Parliament (2019-2024*) Draft Report with Recommendations to the Commission on Responsible private funding of litigation*', 17 June 2021, page 6. See also Article 12, clause 4 of the draft Directive attached to the draft report.

> 'From an economic and competitiveness point of view, there is a need to allow institutions, businesses and citizens to have access to affordable, high quality and efficient judicial pathways. In such a perspective, a **responsible TPLF regulatory framework** should aim at lowering costs, simplifying unnecessary procedures, increasing the predictability of costs, and delivering efficient services at costs that are proportionate to the amounts in dispute.' [27]

The study examined the likely impact of two different regulatory approaches, 'moderate' and 'strong', using a standard benefits-costs analytical conceptual framework.

The study examined limiting excessive return rates which was said to require attention because European Directive 2020/18 does not provide for a cap on the funder's return whereas this was recommended in 2013. According to the authors of the study:

> The study… emphasises that the funder and the claimant enjoy freedom to contract according to the selected applicable law, although their freedom is generally limited by public policy and mandatory provisions of the applicable law. This private autonomy of the parties in determining the remuneration may, however, undermine the effectiveness of the result obtained by the claimant through successful access to justice. A litigation funder typically takes a 20-50 % share of the amount awarded in the case, or a multiple of the funding provided, and may charge excessive fees to the claimant, thus depriving him or her of a substantial part of the litigation's outcome. In this way, the success of the result obtained by the claimant through successful access to justice may be compromised, as the claimant eventually receives a considerably lower compensation than that awarded by the court. Ultimately, the claimant has to pay a substantial part of what is recovered to the funder. In light of the above, the need arises for a balance between private autonomy and the public interest of protecting the effectiveness of access to justice.
>
> A possible remedy to the problem caused by excessively high remuneration fees would be the introduction of a cap on funders' return rates, thereby balancing private autonomy with the public interest of protecting the effectiveness of access to justice.
>
> A stronger policy option would be to fix a cap on funders' return rates at 30 % for all litigation funders across the EU. It may be necessary to ensure that a cap is expressed as a percentage of the amounts actually delivered to claimants. Such a cap should also take account of all the amounts funders will receive, including return of the invested amount, the fee, and any other charges or costs. Finally the cap could take account of the fact that funders often insist on being paid before anyone else, sometimes leaving little or nothing in the pot for disbursement. In addition, the Court could be given the ability, at any point in a proceeding, to appoint a professional referee to act as a litigation funding fees assessor.[28]

It is not clear whether the suggested cap on the return to funders encompasses both the commission payable to the funder and the legal costs and disbursements incurred.

Although a guaranteed statutory percentage return for class members has some intuitive appeal, for the following reasons it is contended that this is an unduly simplistic and, in many instances, inappropriate solution.

---

[27] European Parliamentary Research Service, *Responsible private funding of litigation: European added value assessment*, March 2021, p 1.
[28] Ibid, p 22.

In considering the desirability of a fixed percentage guaranteed return to shareholders, an important consideration is whether such a cap would have an impact of the propensity of commercial litigation funders to finance class actions. According to a recent article in the *Australian Financial Review,*[29] research by Price Waterhouse Coopers (PwC) indicates 'this would cut down class actions by a third.' The research paper in question '*Models for the regulation of returns to litigation funders*' is dated 16 March 2021 and is published on the website of litigation funder, Omni Bridgeway,[30] which commissioned the study.

Purportedly based on an analysis of publicly available litigation outcomes, a cap of 30% of gross returns (encompassing the commission payable to the funder *and* the legal and disbursement costs incurred)

> 'is projected to result in 36% fewer class actions (i.e. cases where the litigation costs alone would not have come within the proposed 30% cap, meaning the funder would have made a loss or been in a break even position and made no profit at all). This demonstrates the trade off inherent in any cap on litigation funder returns; it would provide higher returns to some class members, but some members would not receive returns they would have otherwise expected as fewer actions would be undertaken.'

With respect, this analysis and conclusion is problematic. First, a projection as to what funders would do in the future, based on transaction costs recovered in the past, is open to question. Second, recovery of a reduced proportion of the settlement proceeds, compared with historical percentage recoveries, does not mean that the funder would necessarily make a loss or only break even. There may be a reduction in profitability but not a loss. Moreover, as noted below, funders may elect only to support higher value claims.

Without further detailed information on the historical data on 'litigation outcomes' used for the analysis, it is not clear whether the marked decline in litigation funding commissions in recent years has been factored into the data and analysis. The report is based on a 2020 study by Professor Vince Morabito.[31] This encompasses 33 settlements where 'complete' data were available and one where partial data were available.[32] It was contended in the report that the foreshadowed cap of 30% would have implications for 91% of the settlements and that 9% of cases 'would unambiguously proceed as the gross returns (i.e. legal fees and funder returns) would fall below the 30% cap.'[33] As illustrated by Figure 1 in the report, in only 3 of the 33 cases was the percentage amount payable in respect of 'remuneration to the funder plus legal costs and disbursements' at or below 30% of the gross settlement. As Figure 2 indicates, in 11 of the 33 cases the legal costs and disbursements alone exceeded the 30% cap. The report concludes that there is little scope for the reduction in legal costs in class actions.[34] This conclusion is questionable. The report argues that if the cap had been implemented historically, there would have been 36%[35] fewer class actions as such cases would not have been commercially viable for the funders.

---

[29] Michael Roddan and Liam Walsh, 'Class action pressure sends liability insurance soaring', *Australian Financial Review* 26-27 June 201, p 22.
[30] https://omnibridgeway.com/insights/regulation-and-case-law/class-action-centre
[31] Vince Morabito, 'POST-Money max Settlements in Funded Part IVA Proceedings', 2020.
[32] PwC report, supra n 30, p 14.
[33] Ibid.
[34] Page 15.
[35] The correct figure would appear to be 33 and one third percent.

An empirical analysis of legal fees and funding commissions in Australian class actions over the period 2001-2020 was carried out by the writer in 2020.[36] This encompassed 108 class actions (some of which encompass multiple proceedings). Of those, data on the amount of settlement or judgment was analysed for 97 matters. In many cases, the total legal costs were substantially greater than the reported legal costs because, in most instances, the costs figures were those considered by the court on the application for approval of settlements, before the substantial additional costs of claims administration had been incurred. It was found that of the 97 matters where data on legal costs was available, such costs averaged approximately $8 million per case and comprised 15% of the total settlement amount. Litigation funding commissions were known in 54 of the cases. This was an average of $13.4 million per case or approximately 26% of the total settlement amount. The cumulative total of legal costs and funding commissions in funded cases was over $1 billion and comprised approximately 43.7% of the settlement amount.[37]

- Of the 94 class actions analysed where data on fees was available,[38] the fees exceeded 30% of the settlement amount in 26 cases (27.6%).
- Of the 54 cases where data were available on fees and funding commissions, the payment to the funder alone was 30% or more of the settlement amount in 13 cases (24%).
- The cumulative payments to the funder and the legal costs were 30% or more of the settlement amount in 49 cases (91%).

Thus, based on this historical empirical data, if a statutory cap on transaction costs of 30% had been imposed this would have reduced the recoverable costs and/or funding commissions in over 90% of cases (assuming that funders and lawyers would have taken on such cases subject to a statutory cap).

The prospect that a (say) 30% cap on transaction costs may render many cases commercially unviable and thus preclude funding is an important consideration in considering the desirability and policy consequences of introducing a fixed cap. However, what may be considered to be commercially viable is a vexed question. The recent study of litigation funders carried out by the European Parliamentary Research Service referred to data on the global financial returns to litigation funders. Litigation funding was said to be providing substantial returns to investors higher than those observed in private equity, real estate, traditional credit and hedge funds.[39]

In addition to the problems adverted to in the PwC report, there is a risk that the introduction of a fixed percentage cap on transaction costs may lead to funders agreeing to only fund much higher value cases that they have funded historically. Moreover, within a given class that may have suffered loss, funders may limit their financial support to those with the higher value claims. This would have an adverse impact on access to justice for others who have suffered compensable loss but who may not be encompassed by funded class actions.

Additional considerations that weigh against the introduction of a fixed statutory percentage payable to class members include the following:

---

[36] Peter Cashman and Amelia Simpson, *Costs and funding commissions in class actions*, [2020] UNSWLRS 87. This was based largely on data compiled by the author and Professor Michael Legg for the Law Council Class Actions sub-committee.

[37] Ibid, pp 45-46

[38] Excluding a number of cases where all costs were agreed to be paid on top of the settlement amount

[39] European Parliamentary Research Service, *Responsible private funding of litigation: European added value assessment*, March 2021, pp6-7 and Figure 4, citing Bloomberg, *For the World's Super Rich, Litigation Funding is the New Black*, August 2018.

- Placing a cap on the recovery of funding commissions and legal costs in class actions in the Federal Court would be of limited impact if corresponding caps were not imposed in other Australian jurisdictions where class actions are available. It may give rise to the funding of class actions in such jurisdictions to avoid the cap at a federal level.
- The complex reasons why transaction costs in class actions are so high should be examined and, where appropriate, mechanisms for reducing such transaction costs should be identified and implemented. This submission identifies a number of areas where reform is warranted.
- A 'one size fits all' statutory minimum statutory percentage return to class members does not take account of the diverse nature of class action litigation and the complex idiosyncratic factors that result in agreement to settle (or judgment) for a specified amount.
- There is the potential for any prescribed statutory 'minimum' return to class members to become the de facto 'maximum' likely to be recovered in many instances.
- Judicial officers already play an important role in the approval process in calibrating settlements and curtailing amounts payable to both funders and lawyers in accordance with their judicial experience and expertise in determining what is 'reasonable'.
- In a number of instances, settlement amounts are agreed to in circumstances where the class members are likely not to receive anything at all if the case had proceeded to judgment and failed. In such instances, a guaranteed percentage return to class members would result in a windfall. Moreover, where this results in either the funder or the lawyers not receiving a 'reasonable' return for financing and conducting the case (assuming that the case, on reasonable grounds, appeared to have merit at the outset) then this would result in unfairness. There are also cases where discounted settlements are agreed to because of a concern about the solvency of the respondent(s).
- The introduction of a guaranteed percentage return to class members may in some cases precipitate withdrawal of the funder and/or law firm during the conduct of the case when the transaction costs become substantial and may not be recoverable. This may also provide a forensic commercial advantage to respondents who may seek to protract the case or maximise transaction costs in the hope or expectation that the case will not be pursued to a conclusion.
- Where class members have a guaranteed percentage amount payable out of any settlement sum this may result in a tendency on the part of funders and/or lawyers acting for applicants to seek to negotiate settlements providing for the payment of legal costs *in addition* to the amount of any sum payable to the class. This could lead to a willingness to accept a reduced amount payable to the class members. Thus, a guaranteed statutory percentage of any such reduced settlement amount would not be a desirable outcome.
- There are a number of other ways in which 'excessive' litigation funding commissions can and should be addressed which would facilitate increased returns to class members. As the Treasury Consultation Paper notes, in its Report the PJC recommended that the *Federal Court of Australia Act 1976* should be amended to introduce (a) a requirement for Federal Court approval of litigation funding agreements as a precondition to enforceability and (b) a power to reject, vary or amend the terms of any litigation funding agreement in the interests of justice. These recommendations should be implemented.

The PwC report proposes that if there is to be further consideration of a regulatory cap, the task should be undertaken by an existing and experienced regulatory body applying standard regulatory processes. It is also suggested that in considering the return to funders the analysis should also

'reflect the costs associated with researching potential matters, and unsuccessful and successful matters pursued'. These suggestions are sensible.

Submission #5: the *Federal Court of Australia Act 1976* should be amended to introduce (a) a requirement for Federal Court approval of litigation funding agreements as a precondition to enforceability and (b) a power to reject, vary or amend the terms of any litigation funding agreement in the interests of justice.

Apart from domestic support for such legislative powers, the proposed Directive attached to the recent draft report of the Committee on Legal Affairs of the European Parliament proposes that Member States should provide for courts to have authority to control the impact of litigation funding agreements, by exercising powers, *inter alia,* 'to assess whether a third party funding agreement entitles a litigation funder to an unfair, disproportionate or unreasonable share of any award, and to annul or adjust such agreements accordingly.'[40]

In Canada following recent amendments to the Ontario *Class Proceedings Act,*[41] the procedure for judicial approval of third-party funding agreements is set out in statute. The representative plaintiff must apply for court approval as soon as practicable after entering into the agreement.[42] Without court approval, the agreement is of no force or effect.[43] The defendant is expressly allowed to make submissions concerning the approval of the agreement pursuant to s 31.1(8).

The provision sets out matters of which the court must be satisfied before approving an agreement. The court must be satisfied that:[44]

i *(i) the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable,*

ii *(ii) the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship*

iii *(iii) the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement, and*

iv *(iv) any prescribed requirements and other relevant requirements are met.*

The application of deemed undertaking rules and provision in the agreement for confidentiality obligations also require judicial approval.[45] The legislation provides that the court 'may give any necessary directions respecting a dispute or question that arises in relation to a third-party funding agreement.'[46]

---

[40] Article 16(d) of the draft Directive attached to the *Draft Report with Recommendations to the Commission on Responsible private funding of litigation*', Committee on Legal Affairs, European Parliament (2019-2024*)* 17 June 2021.

[41] *Class Proceedings Act,* 1992, S.O. 1992, s 33.1.

[42] Ibid s 33.1(2). Notice must be provided to the defendant and the plaintiff must serve or otherwise provide to the defendant a copy of the agreement. Subject to regulations, the plaintiff is able to redact information which 'may reasonably be considered to confer a tactical advantage on the defendant' although the court can order disclosure of redacted information. An unredacted copy must be provided to the court: s 33.1(4), (5), (6), (7).

[43] Ibid s 33.1(3).

[44] Ibid s 33.1(9)(a). In making this determination, the court must consider whether the representative plaintiff had the benefit of independent legal advice: s 33.1(10).

[45] Ibid s 33.1(9)(b).

[46] Ibid s 33.1(13).

In its report, the PJC supported legislative amendments to introduce a requirement that a litigation funding agreement obtain the approval of the Federal Court of Australia to be enforceable, as well as a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require (Recommendation 11).

Submission #5: Additional specific statutory standards and sanctions governing the conduct of all those involved in the conduct of class actions, including funders and insurers, are required.

In its *Civil Justice Review Report*, the VLRC somewhat radically and innovatively departed from the customary approach of incorporating an overarching purpose provision in civil procedural rules by going much further and proposing that an additional range of specific statutory obligations should be imposed not only on parties, lawyers and legal practices but also on insurers and *litigation funders* (insofar as they are involved in influencing the conduct of proceedings) and (in limited respects) on expert witnesses. Such provisions were incorporated in the *Civil Procedure Act 2010* (Vic) in the form of 'overarching obligations'. They take the form of 10 commandments. Importantly, wide ranging sanctions for non-compliance, beyond traditional orders for costs, were proposed and incorporated in the Act. Where any of the overarching obligations are contravened, the court is empowered to make certain orders, including orders for costs or any other orders in the proceeding, of its own motion or on the application of any party to the proceeding.

Similar provisions should be enacted at a federal level, through amendments to the *Federal Court of Australia Act 1976* (Cth). This was supported by the PJC (Recommendation 27).

Submission #6: The present unlimited tax deductibility of legal costs and expenses incurred by respondents and insurers requires further research, review and reform.

In view of the fact that little if any Commonwealth funded legal or financial assistance is available for persons with meritorious claims seeking to pursue class actions, it is arguably anomalous that commercial respondents and insurers may deduct from assessable income the entirety of the legal and other expenses incurred by them in defending claims.

This unlimited tax deductibility is availed of in all cases, irrespective of the merit of the defence or the outcome of the case. Thus, in effect, through the tax system, the Commonwealth subsidises unsuccessful defendants in class actions and other civil litigation.

It is the writer's understanding that the Commonwealth generally, and the Treasury in particular, does not have available statistical data on the economic impact of such deductions.

This is relevant for present purposes because it would appear clear that one of the (many) reasons why transaction costs in class actions are so high is because commercial defendants and their insurers do not personally bear the total amount of the costs incurred in defending claims against them.

It is respectfully submitted that this requires further research, review and reform.

Dr Peter Cashman, Barrister
Adjunct Professor of Law, University of New South Wales
T: +61 (0)418 417 061 | F: +612 9223 3941 | E: petcash@gmail.com
180 Phillip Street, Sydney NSW 2000 | DX 392 SYDNEY