levitt robinson
solicitors

SUBMISSION ON EXPOSURE DRAFT BILL AND REGULATIONS, LITIGATION FUNDING

Litigation Funding/Class Action Reform and Legal Costs generally

I write to you in opposition to an arbitrary limit being imposed on the combined share which class action funders and lawyers should be permitted to receive from a verdict or settlement, namely thirty percent (30%) of any payout.

OUR RECORD

Our firm has been very active in the Class Action space, including against banks, governments and most recently, against 7-Eleven. More often than not, we have not had or used litigation funding.

So far, we have achieved a fair measure of success for our clients in every class action in which we have been involved, either by trial, on appeal or mostly, from settlements.

In almost every such case in which we have involved, the Group Members have netted around seventy percent (70%) or more of the verdict or settlement monies; in some matters, where there was no litigation funder involved, almost ninety percent (90%). An exception will be what we expect to be the final outcome in the 7-Eleven class action.

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CONSULEGIS
A LEADING GLOBAL NETWORK

We do not take on cases unless there is some social wrong or injustice to be addressed. For example, we have never brought a shareholders' Class Action. We have never accepted instructions to act in a case where the Group Members did not care about the outcome, and it was mainly being fought for the benefit of the lawyers, a litigation funder or both.

WHY COSTS MAY BLOW-OUT

The most recent case – and current case - in which we have been involved, 7-Eleven, just settled for ninety-eight million dollars ($98,000,000.00) but the return to Group Members is only likely to be around fifty-five percent (55%). Why is this so?

1. First, 7-Eleven did not agree to settle for ($98,000,000.00) because 7-Eleven was in the right. They had very expensive and capable lawyers, Norton Rose Fulbright and top QC's and junior counsel representing them.

When they made security for costs applications, the costs that 7-Eleven asked for, for the Court to order the litigation funder to pay for each stage of the proceedings, were more than our costs for that stage and we were the Plaintiffs, who had to do most of the heavy lifting.

2. Well-oiled Defendants in Class Actions, like 7-Eleven, mostly try to run the Plaintiffs' lawyers into the ground. They are permitted under Court rules, to use the tools of litigation to impose a form of attrition and make it less and less profitable for the Funder to continue

to honour its contractual obligations and to "keep on keeping on" paying the Plaintiffs' lawyers to advance the Group Members' claims.

3. (a) In 7-Eleven, by the time of mediation and three and a half (3 ½) years into the case, the US Litigation Funder, Galactic, had already lodged more than $6,000,000.00 (six million dollars) in security for costs and would have needed to have lodged a similar sum going forward, if the trial proceeded beyond Mediation. Security for Costs is what a Defendant asks for, to secure its position in case the Defendant wins or the case does not run to a happy conclusion for the Group Members.

(b) We know that 7-Eleven must have been in the wrong because big corporations don't give away $98,000,000.00 for nothing. 7-Eleven is the second largest private company in Australia, turning over well over $3 billion dollars a year in sales revenue.

4. 7-Eleven's legal team took almost every point. There was one interlocutory hearing after the other. By taking legal point after legal point and making one application after another e.g., including for Security for Costs, (the Court never granted their applications in full), our opponents successfully caused legal costs to blow out. Almost every subpoena for production led to a big and expensive fight, too, either with 7-Eleven, with the witness to whom the subpoena was issued, or both.

5. Many franchisees believed, on strong grounds, that the renewal of their franchise term, an extension of their lease or their ability to sell their store for a reasonable price, all hinged on their lying low and being seen to be toeing the Franchisor's line. This meant not rocking the boat, by signing up to the Class Action. Additionally, 7-Eleven threatened franchisees

with wages claims, when the franchisees had been reeling under what we alleged to be an unfair system which caused and condoned the underpayments. 7-Eleven would release them only if they signed a release of their claims in the Class Action, very often an uneven bargain.

6. Under the law as currently applied, banks, franchisors and large corporations can effectively intimidate Group Members during a Class Action, scaring them out of joining in or signing up to a Funding Agreement with a litigation funder. 7-Eleven was also able to offer inducements to the Class Action organisers, to sign-out of Funding Agreements after they had signed-on, through a combination of pressure and inducements, including by buying back the Association Leaders' stores at a premium, on condition that they did not give evidence to the Senate Enquiry in mid-2018.

7. The Commonwealth Bank used similar but less impeachable methods to pick-off Group Members in the Storm Class Action when we were suing over the Commonwealth Bank's collusion with Storm Financial, facilitating high risk ill-advised financial commitments, leading to devastating losses by hard-working Australians, mostly Queenslanders.

CASES WILL BE HARDER TO SETTLE

8. The draft legislation which the Treasurer has proposed, will make negotiated settlements in Class Actions far more difficult to achieve because funders and lawyers will be driven to hold-out until a 7:3 ratio from any proposed settlement can be reached, if ever. It would increase resistance to reaching a compromise.

UNFAIRNESS AND DISTORTION

9. If more effort were put into streamlining the Federal Court Rules, restricting expenditure by Defendants or their legal representatives as well as Plaintiffs, limiting security for costs orders, subpoena compliance costs, and Court fees and charges, then a cap on Class Action funders and lawyers would be sustainable.

A communication protocol restricting Defendants from pressuring Group Members into giving up their rights without adequate compensation and legal protection, should also be made mandatory.

10. Putting a cap on Plaintiffs' lawyers and funders without doing the same to Defendants' lawyers (and sometimes, their backers), particularly large corporate or institutional Defendants, would effectively mean that any prospect of achieving justice for ordinary Australians against the big end of town, would be stymied or crushed. The Defendants' lawyers can simply take every point, out-spend the Plaintiffs and drag things out, to kill-off the Plaintiffs' claims.

11. For example, in the 7-Eleven case, Metcash sought from the Plaintiffs more than eight-hundred thousand dollars ($800,000.00) just to comply with a Subpoena. The Court taxed this sum down to less than seven hundred thousand dollars ($700,000.00). Many Subpoenas had to be issued and there were separate arguments about compliance, with

each subpoenaed party. Millions of dollars needed to be expended just on covering the costs of Subpoena disputes and Subpoena compliance.

12. The Court hearing fee for the long 7-Eleven trial, charged by the Federal Court, which would have proceeded if the case had not settled, was over $600,000.00, excluding the costs of daily transcript – another $2,500.00 per day!

COMPARE FAMILY LAW COSTS

13. There are many cases, brought under the Family Law Act, 1975, where individuals, particularly women, have had to part with millions of dollars to try to get to the bottom of their husband's complex financial arrangements, designed to frustrate spousal claims. The costs which ordinary Australians, mainly women, face in Family Law cases, are many times higher *per capita* than in Class Actions, in which the Plaintiffs' lawyers have to attend to the affairs of hundreds, sometimes thousand of people, to take on some of Australia's largest corporations and institutions.

WEAPONISING MONEY

14. With regard to Class Actions and litigation funding, there needs to be a good hard look taken at how the sector works from both sides: particularly regarding the massive amounts of money deployed by "*guilty*" Defendants, trying to frustrate Plaintiffs' claims and wear down litigation funders. Their aim is to drive litigation funders to the conclusion that they can get a far safer and higher return on the investment of their money elsewhere.

If the Government's proposed bill is passed, many thousands of working Australians, as well as hundreds of thousands engaged in small business, will be deprived of access to justice through the Courts. The many thousands of franchisees around Australia are just small business operators.

OPT-OUT v OPT-IN – BRINGING CLOSURE

15. Common Fund Orders are desirable because, when a case is settled or won, the many people who did not sign Funding Agreements invariably only then, come forward to claim their share of the pot. Often, they had been intimidated or induced not to sign a funding agreement, only to take some of the spoils at the end. Justice Sackville, formerly of the Federal Court, referred to them as "*free riders*".

16. If Common Fund Orders are not available, then litigation funders would be encouraged to turn away from the "*Opt -out*" Class Action towards the "*Opt-in*" Class Action.

What does that mean? In a Class Action, the Class being represented is defined by a description of Group Members and anybody who falls within that description is bound by what happens in the Class Action, unless they make a decision when invited to do so by the Court, to "*Opt-Out*".

In such cases, there will be a proportion who have signed litigation funding agreements and a large number who have not but who still elect not to Opt-Out.

If Common Fund Orders are abolished, then only those people who have signed Commercial Litigation Funding Agreements will be required to contribute towards the litigation funder's "risk fee" or commission.

Where a Common Fund Order is made, that "*risk fee*" is usually reduced by the Court below what had been agreed with Group Members who had signed up to a Funding Agreement, in exchange for giving the funder the benefit of a larger spread.

Generally, Defendants prefer to face Opt-Out Class Actions because it means that the issues being litigated, are the subject either of a judgment or a settlement which then disposes of the issues raised of for all persons affected by the matters in dispute (except for the people who Opt-Out) – which means the dispute can then finally be put to bed.

17. In an Opt-In Class Action, only those people who sign up to a Funding Agreement (or otherwise Opt-In) get the benefit or are bound by the outcome of the Class Action, so that if there is a judgment or settlement in their favour, or a ruling against them, only they receive that benefit or suffer that detriment.

People who did not sign up to the Class Action in an Opt-In scenario are not bound and this could mean that the Defendant might face multiple Class or individual Actions on the same issue, and that the case just won't go away for the Defendant for a long time.

18. While I certainly believe that there needs to be a root and branch review of how the legal system operates too expansively, the Treasurer's draft legislation will add fuel to Defendants' lawyers determination to drive up the costs of litigation to frustrate the average working man's access to the justice system. It will greatly discourage financial assistance becoming available to working and middle-class Australians to agitate their just claims against exploitation, abuse and just being generally ripped-off.

19. The lack of protection against Group Members in Class Actions from being intimidated by Defendants, particularly when they are still locked-in to a franchise network with a Defendant or where banks are involved on the one side, with the banks' customers on the other, needs to be addressed. The issue of putting a cap on payouts in Class Actions cannot be treated in a vacuum and must be dealt with wholistically, so that the little man can still reach out for legal remedies.

SHRINKING ACCESS TO FUNDING. WHY SINGLE-OUT CLASS ACTIONS?

20. While on one level, "*Putting a Cap on payouts for Class Action Funders and Lawyers*", might make for a good headline, there is a much better headline to be found in backing a review committed to lowering legal costs and streamlining systems so Aussie battlers get cheaper legal services and there is better access to Courtroom justice for all.

FREEDOM TO SELF-FUND

21. The ASIC Regulations introduced by the Federal Government which commenced to operate on 22 August, 2020, fudged the issue of whether self-funded litigants are also caught up in ASIC's "*Managed Investment Scheme*" régime. Self-funded litigants had previously had a specific exemption from the operation of the MIS provisions.

22. Any new legislation or regulations should make it abundantly clear that aggrieved Australians are free to band together to contribute their own funds towards paying their own lawyers to bring a representative action on their collective behalf, without being treated in the same way as commercial litigation funders or subjected to similar rules or restrictions.

I think all of us want to live in a free Australia without being mired in excessive red tape, rules and regulation and it is surprising that an LNP Government is seemingly so protectionist in this area. However, this legislation is aimed at protecting the wrong interests.

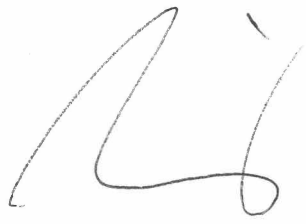
Not one large top tier law firm, servicing the interests of big business or the banks, will be adversely affected by what is being proposed because they, under the proposed "*reforms*", will be encouraged to jack-up their fees to make representative actions uneconomical propositions for lawyers and funders wanting to back working Australians, the very people who have no other avenue by which they can afford to fund cases to redress the wrongs and salvage compensation and their self-respect, from being screwed by the rich and powerful.

I want to reiterate, that we, at Levitt Robinson, favour a broadbased examination of how legal costs can be reduced, with more money going into the pockets of the victims of the wrongs of the miscreants against whom Class Actions are mostly directed.

The proposed Federal Governments "reforms" seem focused on protecting the wrongdoers and depriving the victims of access to justice; not at increasing compensation but at eroding the opportunity to claim compensation.

With kind regards,

Yours sincerely
LEVITT ROBINSON



Stewart A Levitt
Senior Partner

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Our ref: SAL:DR:120314_727

6 October 2021

The Manager
Market Conduct Division
Treasury
Langton Crescent
PARKS ACT 2600

By email: MCDLitigationFunding@treasury.gov.au

Dear Sir/Madam

Submission on Exposure Draft Bill and Regulations, Litigation Funding.

Herewith Submission on Proposed Changes to Class Action Legislation and Rules.

Yours sincerely
LEVITT ROBINSON

Stewart A Levitt
Senior Partner

Encl

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