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Senate Economics Legislation Committee

Submission by Omni Bridgeway Limited

Inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

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Omni Bridgeway provides this submission to the Senate Economics Legislation Committee's (**Committee**) inquiry into the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (**Bill**).

Omni Bridgeway notes the Committee's advice that submissions made to the Parliamentary Joint Committee on Corporations and Financial Services' (**PJCCFS**) inquiry into the Bill will be considered as evidence to this inquiry. The submission made by Omni Bridgeway to the PJCCFS inquiry identifies fundamental shortcomings in the Bill and recommends how these issues, at a minimum, should be rectified if parliament is to proceed in its consideration of the legislation.

In brief summary, the flaws in the Bill include:

- The proposed 70 per cent minimum return to group members[1]. This figure is arbitrary and is not based on any proper analysis of risks undertaken by funders and appropriate returns in that context. There has been no answer to the analysis undertaken by PWC[2] which shows that a 70 per cent minimum return will reduce the availability of litigation funding for meritorious actions and will therefore reduce the ability for claimants to access justice.[3] The title of the bill is a misnomer as it achieves the opposite effect – it worsens outcomes for litigation funding participants.

[1] This is the effect of proposed s601LG(5).

[2] See Models for the regulation of returns to litigation funders, PWC, 16 March 2021 (**PWC report**) (https://tinyurl.com/2whfe3d2).

[3] The PWC report showed that with 70 per cent as a minimum return to group members, historically, in 36 per cent of class actions the funder would not have generated any return on its investment at all as the legal costs comprised the entire 30 per cent.

- The inclusion of legal costs in the definition of claim proceeds. This means that 70 per cent of the representative plaintiff's recovered costs must be paid to the group members. There is no rationale justifying group members receiving a return out of costs that they did not pay and did not risk on the litigation being successful. The result is that a funder may not recover the amount of its investment (the costs the funder has paid).
- The exhaustive list of factors in the 'fair and reasonable test' in proposed s601LG(3) and that this list can be changed by regulation. The court's discretion should not be fettered and it should be able to consider any relevant factor. In addition, the responsible Minister should not have the ability to change what the court can and cannot consider.
- The lack of clarity about whether group costs order litigation funding is included in the definition of a class action litigation funding scheme under the Bill. Third party litigation funding and law-firm group costs order litigation funding are sufficiently similar and should be subject to one consistent set of rules and regulations.

The purpose of this short submission is to raise additional matters in relation to the Bill, including some issues that arose in the context of the PJCCFS inquiry hearings.

Conflating the case for price regulation of litigation funder returns in class actions with the Banksia and Huon Corporation cases

In the Banksia case[4], the court found the lawyers and the funder involved were engaged in fraud against class action members. Unfortunately, fraudulent conduct occurs in a wide variety of corporate, legal and other contexts and is rightly the subject of formal investigation and judicial sanction. To conflate the egregious conduct in the Banksia case, which has been rightfully called out and punished by the courts, with potential regulation of litigation funder returns is wholly inappropriate and mischievous.

The public policy debate regarding funded class actions, including the provisions of the Bill, centres on the issue of whether the existing system of court-administered checks and balances on group member returns should be altered. This is a legitimate debate but it in no way relates to the finding in the Banksia case. The Bill has nothing to do with the conduct in Banksia.

The Huon Corporation case[5] was also referred to in submissions and oral evidence to the PJCCFS in support of the Bill. This case was not a class action and, accordingly, the outcome in that case should not be relied upon to support changes to the class action regime. It was an action brought by trustees on behalf of former employees of Huon Corporation and demonstrates the high cost and risk associated with litigation of all types and not just class actions.[6] Cherry picking cases including those that are not even class actions to support class action reform is not, in Omni Bridgeway's submission, the basis for good policy.

[4] Bolitho v Banksia Securities Ltd (No 18) (remitter) [2021] VSC 666.

[5] Fitzgerald v CBL Insurance Ltd [2014] VSC 493.

[6] Omni Bridgeway was not involved in the Huon Corporation case but, based on the judgment and news articles, it appears that a key issue in the result was not the fact the case was funded but proportionality of the claim size relative to the legal costs. (See Ben Butler, *Spotlight on legal fees as Huon workers miss out on $5m payout*, The Australian, 26 August 2016.) It appears that the claim (not including interest and costs) was for approximately $4.8 million. The recovery on resolution was approximately $5.1 million (including costs). However, the total costs of the proceedings (that is, lawyers, barristers, the trustees who brought the action and liquidators – not including the litigation funder's fee) were approximately $3.25 million.

Perception of inflated returns to litigation funders

The continuing references to 'windfall' or 'unreasonable' returns to litigation funders from class actions, including in the course of the PJCCFS hearings into the Bill, conveniently ignore or misunderstand the financial risks assumed by litigation funders. These run to tens of millions of dollars in many cases and cannot validly be examined with the benefit of hindsight once the outcome of a case is known.

Litigation funders are required to evaluate and then assume these risks upfront, before the first court hearing, when there are material uncertainties in terms of the time it will take to resolve the matter, the legal and other costs of the case and, of course, the outcome.

Support for the 70 per cent minimum return to group members embodied in the Bill is based on superficial or no examination of the risks assumed by funders in the cases they fund, or the profits and losses they have in fact made (or incurred).

In essence, Omni Bridgeway's funding for class actions is provided on a limited-recourse, open cheque basis – that is, the claimant's costs are paid as the case proceeds (i.e. legal fees and other costs to bring the case), Omni Bridgeway assumes an exposure to uncapped adverse costs if the case is lost and is only reimbursed if the case is successful.

The risks assumed by a funder can be summarised as follows:

- The risk of the case failing at trial. The funder has no real control over 'success'. The funder can lose up to 170 per cent or more of its investment – the legal costs that it has paid (that is, the lawyers' fees and disbursements to bring the case) as well as adverse costs in the event that the case is lost[7].
- The funder is not the lawyer and has no control of the defence litigation strategy, including whether the defendant joins more parties pushing up litigation expenses and adding to the adverse cost risk.
- The funder has no control over changes to the law that may affect the success of the case.
- At the time of the decision to commit to fund litigation, the investment by the funder is an open-ended amount – reflecting the uncertainties and complexity of litigation.
- The litigation process itself throws up a multitude of risks including the possibility of witnesses not being willing to give evidence or not performing as expected, bad recollection by witnesses, documents not being discovered, ulterior motivations of parties, appeals, satellite litigation and/or multiple class actions for the same claim against the same defendant, and appeals.
- The likely amount of damages is uncertain. Normally only a wide range can be estimated at the outset.
- If the class action settles, there is still uncertainly over whether the court will intervene to lower the funding commission.

[7] In the class actions Omni Bridgeway has funded since 2001, the potential adverse cost order exposure has been estimated at substantially more than $172 million – or approximately 70 per cent of the project costs provided by Omni Bridgeway. The average length of a case funded by Omni Bridgeway is 2.6 years (and the average length of a class action is longer and approximately 3.7 years). This is effectively the period of investment required by the company before its first return – and only then if the funded client is successful in the matter. In the PFAS class actions for chemical contamination at Williamtown, Oakey and Katherine, the matters ran for 4.5 years and Omni Bridgeway faced potential costs of more than $50 million in the event they were unsuccessful.

- The funder has no control over the investment period – even in a successful case, it may take many years for the funder to receive a return on its investment.
- Whether the defendant will have the capacity to pay (a successful judgment or settlement) 3 to 4 years after the class action commences.

The risks also need to be judged in light of the fact that sometimes those risks crystalise. Omni Bridgeway seeks to fund class actions in which the likely costs and risks are proportionate to the likely damages award, so that group members are likely to achieve a substantial recovery. However, it is simply not possible to guarantee any particular return or outcome. Even the best of cases, as assessed following detailed due diligence by the funder, can ultimately yield a disappointing outcome or even be lost. For example, approximately $30 million was lost by Omni Bridgeway (then IMF Bentham) in the actions that it funded on behalf of bank customers over various bank fees. In recent years, there have been losses on other significant funded class actions[8].

In class actions, the courts oversee the returns to funders. In Omni Bridgeway's submission, the courts are best placed to assess the risks undertaken in a particular action and an appropriate return for that risk. That assessment must be made on a case by case basis and without a blanket rule over the appropriate level of return.

PJCCFS inquiry recommendation

The PJCCFS majority report on the Bill recognised that the exhaustive list of factors the court would be required to consider when determining the reasonableness of a claims process distribution method unduly fettered the court's discretion. It recommended that subsection 601LG(3) be amended to remove the word 'only' to enable greater flexibility on the part of the court.

As presented to the Senate, this recommended change does not appear to have been incorporated in the Bill. While Omni Bridgeway believes there are other fundamental problems with the Bill that mean it should not be passed, this recommendation would at least represent a minor improvement to a flawed piece of legislation.

[8] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Ltd* [2019] FCA 1747; *Crowley v Worley Limited* [2020] FCA 1522; *Dwyer v Volkswagen Group Australia Pty Ltd t/as Volkswagen Australia* [2021] NSWSC 715 (a Takata air bags class action). None of these cases were funded by Omni Bridgeway.