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Joint Parliamentary Committee
Corporations and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Committee

Please find attached a submission from the Federal Chamber of Automotive Industries (FCAI) to the current inquiry into litigation funding and the regulation of the class action industry.

The members of the FCAI are the importers and distributors of new passenger and light commercial motor vehicles and motorcycles in Australia. While FCAI is of the view that there is a role to litigation funders to play in providing access to justice, FCAI members are concerned by the recent trend by litigation funders and class action law firms to focus on the new motor vehicle sector, partly driven by opportunistic and speculative approaches to the conduct of recalls by the FCAI members.

As outlined in our attached submission this increased focus has largely been the result of the availability of Common Fund Orders (CFOs). As is explained in more detail in our submission, despite last year's High Court ruling in ***Brewster,*** the law on the availability of CFOs at the end of proceedings has not yet been settled. By ensuring that a funder receives a return on funds invested from the entirety of a settlement or judgment pool, CFOs all but eliminate the need for litigation funders and class action law firms to "bookbuild" with large numbers of group members with low value claims. The subsequent effect means that actions may be, and in our view have been, commenced without any evidence that there is a real or significant interest among group members in pursuing them or, indeed, that there is evidence that a significant number of group members have actually suffered a material or quantifiable loss. Instead the opportunity of commercial profits for the litigation funder, without the need to bookbuild, appears to be the primary driving motivation to commence.

Yours sincerely,

Tony Weber
Chief Executive

FCAI Submission to Joint Parliamentary Committee Inquiry into Litigation Funding and the Regulation of the Class Action Industry

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FCAI Submission to Litigation Funding Inquiry

1. Executive Summary

The Federal Chamber of Automotive Industries (**FCAI**) is the peak industry organisation representing the importers of passenger vehicles, light commercial vehicles and motorcycles in Australia. The FCAI welcomes the opportunity to make this submission to the **Parliamentary Joint Committee on Corporations and Financial Services (Committee**) **inquiry into litigation funding and the regulation of the class action industry**. [1]

FCAI members have been subject to a number of recent class actions supported by litigation funders, including one where at the point of approving settlement the Court held that the Funder in question had during the course of the proceeding engaged in "*entrepreneurial activity entered into solely for the financial benefit of [the Funder] and in complete disregard of the interests of group members*."[2]

FCAI accepts that litigation funding has a role to play in the Australian class action landscape, however as a result of this recent experience, and more generally for the reasons developed in this Submission, FCAI strongly supports appropriate regulation of the industry through legislation. FCAI therefore welcomes the recent announcement that litigation funders will be required to hold an Australian Financial Services Licence (**AFSL**), and will be subject to the Managed Investment Scheme regime. It also raises for consideration by the Committee some additional steps that might be taken.

Appropriate regulation of litigation funders should be coupled with changes to the class action regime with a view to ensuring that it is protected from commercial exploitation while maintaining its original intention of providing access to justice so as to enable the efficient regulation of multiple claims arising from the same, similar or related circumstances.

Further, to the extent that changes to the class action regime are contemplated which benefit the interests of plaintiffs, group members or litigation funders (though in FCAI's view the interests of funders are irrelevant in this context) the impact of these changes on the regime as a whole must be considered to ensure that defendants are not improperly disadvantaged.

FCAI's Submission is structured to:

- provide some background for the Committee on FCAI and the Australian automotive industry (**Industry**);
- highlight certain areas of concern for FCAI members which inform FCAI's response to the Terms or Reference; and
- provide a response in respect of the following areas of particular interest from within the Terms of Reference (**TOR**): 4, 6, 7, 8, 9 and 10.

FCAI would be happy to address the Committee further on any aspect of its submission, including at the public hearings scheduled in July 2020.

2. FCAI and the Australian Automotive Industry

2.1 Size, Shape and Importance to Australia

[1] Australian Parliament, Parliamentary Joint Committee on Corporations and Financial Services, Terms of Reference (13 May 2020).

[2] Cantor v Audi (No 5) [2020] FCA 637 (***Cantor***) at [472].

In the 2019 calendar year, there were 1.06 million new vehicles sold in Australia out of a total estimated 91 million sales worldwide.[3] There are currently over 18 million vehicles on Australia's roads, meaning that the Industry plays an essential role in the work and social lives of most Australians.

With the closure of the last major Australian vehicle manufacturing plants in late 2017, all vehicles sold by FCAI member organisations are now imported into Australia. However, while manufacturing no longer occurs in Australia, FCAI member organisations employ approximately 60,000 Australians across a number of roles, both directly and indirectly. Further, many automotive brands are major providers of specialist training for automotive technicians who may diversify into other industries.

2.2 Automobiles, Recalls and the ACL

Motor vehicles and motorcycles are extremely advanced consumer goods made from tens of thousands of component parts (which themselves are made by hundreds of separate manufacturers from around the globe). The mechanical, chemical and computer technology contained within vehicles, and the way that this technology interacts with the driver, other drivers and pedestrians, communication systems and the external environment, is evolving at a rapid rate as the benefits of these new technologies to society becomes more readily identifiable.

The advanced and complex nature of motor vehicles, coupled with the nature of their use, means that they require routine inspection, servicing, and repair or replacement of component parts. As a result:

(a) new motor vehicles are generally supplied with express warranties in addition to those contained in the Australian Consumer Law (**ACL**);

(b) regular servicing is required; and

(c) safety recalls are common - approximately one-third of all voluntary recall notifications in the 2018 and 2019 financial years related to motor vehicles (not including those relating to Takata airbags).[4]

FCAI has worked with the Industry and Government to develop a Code of Practice for automotive safety recalls which recognises not only the particular complexities associated with motor vehicles but also the ability to trace each individual unit of product in the market.[5] It is also important to note that the initiation of a recall, particularly in relation to a motor vehicle does not mean that the issue identified as the basis for the recall gives rise to a consumer remedy under the ACL. Rather it results from the identification of a risk higher than that entertained at the time of release of the vehicle to market. It may be that the recall is precautionary, so that the risk is later shown not to exist. It may be that the issue which gives rise to the recall only actually affects a small fraction of the vehicles recalled. It may also be that the appropriate ACL remedy is repair of the goods at no cost to their owner, which is achieved by the recall in any event.

In addition to the protection afforded by express warranties and voluntary safety recalls, the ACL creates a regime which supports the rights of Australian consumers. In the context of the automotive industry, this means that consumers are able to have their vehicles campaigned by dealers to ensure that the potential problem is eliminated. Further, in the case of complex products like motor vehicles, the ACL creates a delicate balance between recognising the inevitable need for service and repair over a lengthy operating life and providing additional remedies to consumers in rare cases of serious product failure. Whether the ACL strikes the right balance in the case of motor vehicles is a matter of ongoing dialogue between the FCAI and the government.

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[3] International Organization of Motor Vehicle Manufacturers, 2005-2019 Sales Statistics http://www.oica.net/category/sales-statistics/; FCAI, 'New vehicle sales down in challenging 2019 market' (6 January 2020) https://www.fcai.com.au/news/index/view/news/600.

[4] ACCC and AER, Annual Report 2017-18, 113: https://www.accc.gov.au/system/files/ACCC-%26-AER-Annual-Report-2017-18_0.pdf; ACCC and AER, Annual Report 2018-19, 106: https://www.accc.gov.au/system/files/ACCC-AER%20annual%20report_2018-19.pdf.

[5] The current edition, FCAI, Code of Practice for the Conduct of an Automotive Safety Recall (17 October 2019), may be found at:: https://www.fcai.com.au/news/codes-of-practice/view/publication/86.

2.3 Recent Class Actions Affecting the Industry

In recent years, several FCAI members have been the subject of significant class action proceedings - all but one of which have been commenced following a vehicle safety recall or customer service exercise by the member company. Broadly speaking, a customer service exercise involves the member company inviting consumers to obtain a non-safety related field fix or product improvement (such that it is not considered to be a safety recall).

In the cases following recall or customer exercise, the claim brought on behalf of group members includes a claim that the relevant recall or exercise (or the issue underlying the recall or exercise) has caused affected vehicles to lose value and that group members are entitled to be compensated for that loss in value.

Each of these proceedings has attracted significant media attention. They also demonstrate that class actions involving large classes and complex technical issues can take many years from commencement to hearing or settlement:

- **Volkswagen Diesel Emissions:** Five class actions were commenced in late-2015 on behalf of 100,000 Australian car owners against Volkswagen, Audi, and Skoda, in relation to breaches of the ACL as a result of dual-mode software in diesel vehicles which had the effect of reducing diesel emissions recorded during emissions tests.

  These class actions were brought by two law firms and ran for approximately four years before settlement. The class actions have now settled with the Volkswagen Group agreeing without admission of liability to pay group members up to $127.1 million. One of the law firms was funded by Grosvenor Litigation Services, the other was not funded.

- **Ford Transmission:** A class action against Ford in relation to certain models equipped with the Powershift transmission was commenced in May 2016 on behalf of 70,000 group members, alleging that the affected vehicles are subject to a number of issues including transmission slippage and sudden acceleration. The class action is funded by Martin Place Litigation Services.

  These proceedings are ongoing, with a six week hearing scheduled to commence in June 2020 - more than four years from the date the proceedings were filed.

- **Takata Airbags:** Seven car manufacturers are currently subject to class actions filed on a rolling basis commencing in November 2017 on behalf of an estimated 2.3 million group members. These proceedings seek damages for consumers who purchased vehicles fitted with certain Takata airbags sold by Toyota, Honda, Mazda, BMW, Subaru, Nissan and Volkswagen, from 2002 through to 2015. The proceedings have a common law firm and funder. While a common fund order has been sought in these proceedings, the application has not been pressed following the High Court of Australia decision in *Brewster* (discussed further below).

  These proceedings are ongoing, with a 12 week hearing scheduled to commence in March 2021.

- **Toyota Diesel Particulate Filter:** Class action proceedings were commenced by two law firms, supported by a litigation funder, in July 2019 against Toyota on behalf of 250,000 consumers who purchased various models fitted with diesel particulate filters which are alleged to be faulty and were subject to a customer service exercise.

  These proceedings are ongoing.

3. **Issues of concern for Industry**

3.1 There are 6 primary issues which inform the FCAI's Submission.

3.2 **First**, FCAI is concerned to ensure that the focus of reform is on access to justice and the vindication of rights, and not on profits for, or the economic viability of, litigation funders. The *Cantor* judgment is instructive as it demonstrates that:

(a) funders can prioritise their own commercial interests ahead of those of group members in a way which is inconsistent with the objectives of the Australian judicial system;

(b) the support of a funder was not necessary to protect or advance the interest of group members in that proceeding in circumstances where an unfunded class action was available; and

(c) had the common fund order sought by the funder in that proceeding been made, it would have significantly reduced the compensation received by class members as a result of the settlement by increasing the return on investment to the funder from approximately $985,000 to just over $7.5 million (**see TOR 2**).[6]

While it is clear and the FCAI accepts that litigation funding can improve access to justice (one recent example is the Stolen Wages litigation[7]), that potential should not be assumed or overstated.

3.3 **Second**, litigation funders have the potential to exert significant influence over the conduct of funded class action proceedings. Other active participants in litigation owe certain duties (for example, the duties owed by a solicitor to the Court and to their clients) and are subject to certain obligations in the conduct of proceedings.

3.4 Legislation in New South Wales extends an obligation on litigation funders not to cause a party to civil litigation to breach their duty to assist the Court in furthering the overriding purpose (see for example section 56(4) of the *Civil Procedure Act* 2002 (NSW)), but falls short of imposing duties directly on funders. Federal legislation imposes an obligation on a party's lawyer to take account of the duty on the party to conduct proceedings in a way that is consistent with the overarching purpose, and to assist the party to comply with that duty (*Federal Court of Australia Act 1976* (CTH) s 37N(2)), however that obligation does not extend to persons with a relevant interest in the proceeding (such as funders) in the same way as the NSW legislation.

3.5 In FCAI's view it is desirable to impose duties or obligations on funders through legislation given:

(a) the potential for funders to influence the commencement and conduct of proceedings;

(b) class actions require active case management and therefore require a significant allocation of resources from both the Courts and the defendants;

(c) the fact that funders have elected to invest their money in litigation with a view to deriving profit from a heavily regulated regime; and

(d) the significant profits that are in fact derived by funders from the Australian class action regime.

3.6 **Thirdly**, all parties' interests (including the Courts) will be assisted by certainty as to what is and is not permissible (or what is and is not required) when it comes to:

(a) funding arrangements (including but not limited to the commercial return a funder can achieve from their investment, and the circumstances in which a funder can withdraw funding from a proceeding they have caused to be commenced);

(b) the prudential requirements imposed on a funder in order that they are able to meet the ongoing costs of the class action, any security for costs ordered and any adverse costs order; and

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[6] *Cantor* at [445].

[7] *Pearson v State of Queensland (No 2)* [2020] FCA 619

(c) orders or steps that might assist in the just, quick and cheap resolution of funded class actions.

Considerable time and expense has been spent ventilating issues such as common fund orders and orders for registration and class closure in funded class actions involving FCAI members.[8] Each of these decisions were handed down after the publication of the Australian Law Reform Commission's (**ALRC**) inquiry in 2018 (**see TOR 13**). Notwithstanding these recent decisions, there remains mixed views within the judiciary on (for example) the availability of common fund orders and what is, and is not permissible, to include in registration notices. Until such uncertainty is resolved class action litigants will continue to spend time and resources on the litigation of procedural disputes.

Some of these outcomes are driven by differences in the different class action regimes. While each State and Territory class action regime is substantially modelled on the Federal Court regime, there are differences - and these differences are conducive of uncertainty and therefore highly undesirable.

3.7 **Fourthly**, in FCAI's view it is not in the interests of the general public that routine recalls should give rise to a threat of class actions based on speculative theories of loss of value. A common thread that connects the recent automotive class actions detailed at 2.3 above is an allegation of loss in value which is said to arise following the announcement of a recall or customer service exercise. This theory has not been tested by the Courts in this context, however:

(a) the High Court authority in *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 makes it difficult to understand how such cases can succeed for the majority of group members if recall or customer service exercise provides a complete remedy to the alleged loss. If some customers have suffered losses because of unusual circumstances, their claims are best dealt with on an individual basis, not as part of a class action;

(b) such claims also need to be considered in the context that most vehicles depreciate in value based not only on their age but also their use and are not purchased as investments, but rather as means of conveyance;

(c) any damages claims which do exist will be highly individualised; and

(d) the observations in *Cantor* at [228] - [231] are instructive of the challenges faced by Plaintiffs in seeking to establish such loss.

3.8 **Fifthly,** FCAI is concerned that increasing class action activity may have the effect of stifling innovation (or at least access to innovation for Australian consumers). There has been a strong focus in the Industry on innovative automotive technologies, such as automated driving technologies. However, with no manufacturing in Australia, FCAI submits that the threat of speculative class actions should not be allowed to inhibit the willingness of the Industry to bring innovative technology to Australia. Such technology is necessary to bring Australia's transport network into the 21st century.

FCAI have previously submitted that:[9]

> *FCAI member organisations are at the cutting edge of innovation, according to Boston Consulting Group 2019 Most Innovative Companies Report,[10] 6 x vehicle manufactures are in the Top 50 most innovative companies. Vehicle manufacturers*

[8] *BMW Australia Ltd v Brewster* (2019) 374 ALR 627 (***Brewster***); *Haselhurst v Toyota Motor Corporation Australia Ltd (t/as Toyota Australia)* [2020] NSWCA 66; and *Cantor*.

[9] FCAI, Submission in response to Joint Select Committee on Road Safety (4 February 2020): https://www.fcai.com.au/news/publication/view/publication/154.

[10] Boston Consulting Group, Innovation in 2019: The Most Innovative Companies 2019 (21 March 2019): https://www.bcg.com/en-au/publications/2019/most-innovative-companies-innovation.aspx.

are expending extraordinary amounts of money on research and development to commercialise and introduce the latest technologies with advances that will bring quantum changes to the way in which Australians access and operate motor vehicles form both propulsion and safety aspects.

Therefore, FCAI strongly supports regulations and legislation which has the effect of ensuring an appropriately balanced environment for the introduction of innovation by FCAI member organisations.

Conversely, a failure to properly regulate litigation funding and class actions runs the risk of acting as a disincentive to FCAI member organisations to bring automotive innovations to Australia, as a result of the potential to:

(a) stifle investment in existing footprint and technology;

(b) impact the speed of implementation of innovative technologies given the apparent risk of litigation arising from those technologies; and

(c) at its most extreme, lead to FCAI members withdrawing from the Australian market thereby lessening competition and consumer choice.

3.9 **Sixthly**, and finally, it is important that FCAI member organisations are able to promptly and transparently communicate to the market in respect of potential safety issues is critical for products such as motor vehicles. No FCAI member wants to see a user of their vehicles affected by a safety issue. However, the FCAI is concerned that its members are not subject speculative class actions claiming economic loss emerging from recall announcements, particularly if the recall offers a complete remedy for the issue for the vast majority of , if not all, vehicle owners.

4. Increasing Prevalence of Class Actions (TOR 8)

4.1 The Automotive industry is experiencing **an increasing prevalence of class actions.** FCAI considers that this increase is being driven by a number of factors, in particular:

(a) the ease of identifying potential targets for litigation;

(b) the deemed manufacturer provisions in the ACL;

(c) increased competition in the litigation funding industry, and the availability in recent times of common fund orders (**CFO**) and funding equalisation orders (**FEO**), causing funders to move away from traditional areas of shareholder claims into consumer class actions with large numbers of group members with low value claims; and

(d) the ascendance of novel loss of value theories of damage which are yet to be tested in the automotive recall context, but face considerable legal difficulties. The speculative nature of this theory of loss has not deterred funders, causing automotive companies to incur millions in legal fees and increased risk. Settlements may result in such cases not because the defendant concludes that their risk of actual liability is great, but because the impact of defending the litigation in terms of costs and effect on continuing business in the very competitive Australian market.

4.2 All product safety recalls are published on the Product Safety Australia website,[11] with the consequence that litigation funders and lawyers can **readily identify targets for litigation**. By way of example, within 11 days of an announcement of a recall by Mazda of various models of diesel vehicles there were reports of a possible class action in the press.

[11] https://www.productsafety.gov.au/

Further, FCAI members are obliged to use a standard template when conducting a product recall. This template cannot be changed by suppliers or manufacturers, and contains (inter alia) the headings "Defect" and "Hazard". The effect of this is that member organisations are effectively required to put into the market material that looks like an admission of defect.

As already observed, a consequence of the complex nature of motor vehicles is that recalls are inevitable. The issue underlying the recall is generally addressed efficiently by FCAI members pursuant to the FCAI Code of Practice, through the provision of repairs and replacement parts free of charge through their dealer networks.

4.3 As noted in 2.1 above, vehicles are no longer manufactured in Australia - rather, they are imported by FCAI member organisations. In circumstances where either a multiplicity of actions against individual retailers, or the commencement of actions against the original equipment manufacturer (**OEM**) may be unattractive to funders, funded litigation is being commenced against FCAI members pursuant to the "**deemed manufacturer**" provisions of the ACL. These provisions allow importers of consumer goods manufactured overseas to be sued as if they were the manufacturer, and thus subject to requirements to compensate consumers for loss and damage in the same way that the actual manufacturer would. This is particularly attractive for class actions. While such an outcome was clearly contemplated in the enactment of these provisions, it has real consequence in terms of the length and complexity of proceedings in automotive proceedings. Further, in circumstances where design and manufacture takes place offshore, the local entity will usually hold only some of the documents relevant to the matters in issue, and may have no legal right to obtain other relevant documents from the overseas entities who hold them. This makes it difficult to properly defend such claims without considerable engagement and cooperation from offshore related entities (or in the case of those member companies who are not factory-owned, arm's length third parties) who may have no obligation to provide them. A third factor increasing the prevalence of automotive class actions is **increased competition in the funding industry** and an **increase in the type of claims that are being funded**. By way of explanation:

(a) in 2018 the ALRC reported that the litigation funding market in Australia was "*forecast to grow at an annualised 7.8% over the five years through to 2022-23*".[12] It is now expected that the industry will grow at an annualised rate of 8.7 per cent through to 2024-25.[13] Likewise, it is expected that the number of enterprises within the litigation funding industry in Australia will grow by 75 per cent between now and 2025[14]; and

(b) the Australian litigation funding industry initially concentrated on shareholder class actions, where the process of book building was assisted by the availability of shareholder registries. In more recent times there has been an expansion in funded claims to include class actions involving consumer complaints, in particular, product liability claims.

Though the shift in industry focus has been partially the result of increased competition in the funding industry, FCAI's view is that it has largely been the result of the availability of Common Fund Orders (**CFO**). By ensuring that a funder receives a return on funds invested from the entirety of a settlement or judgment pool, CFOs all but eliminate the need to bookbuild. This makes class actions with large numbers of group members with low value claims more attractive to funders. The subsequent effect on FCAI member organisations subject to these class actions is that the lack of bookbuilding results in a lack of certainty for defendants and Courts, and means that actions may be commenced without any evidence that there is significant interest among group members in pursuing them or, indeed, that

[12] ALRC, Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Report 134, December 2018), [2.12].

[13] IBISWorld, Litigation Funding in Australia, Industry Report OD5446 (May 2020): https://my.ibisworld.com/au/en/industry-specialized/od5446/industry-outlook.

[14] IBISWorld, Litigation Funding in Australia, Industry Report OD5446 (May 2020): https://my.ibisworld.com/au/en/industry-specialized/od5446/key-statistics.

there is evidence that a significant number of group members have actually suffered a loss.

4.4 The final driver of automotive class actions is the recent **ascendance of novel loss of value theories of damage** which are yet to be tested by Courts in the automotive recall or service exercise context, but face considerable legal difficulties. In short:

(a) Plaintiffs allege that the fact of a recall or service exercise means that the 'true value' of the vehicle must have been less than the amount paid by the consumer at the point of purchase, and that consumers are entitled to compensation for the difference, measurable at the point of purchase (notwithstanding ongoing use of the vehicle and the subsequent provision and fitment of replacement parts free of charge);

(b) the High Court authority in *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 makes it difficult to understand how such cases could succeed for the majority of group members if recall action provides a complete remedy to the underlying issue at no cost to the consumer;

(c) such claims also need to be considered in the context that most vehicles depreciate in value over time (with many factors contributing to this depreciation) and are not purchased as investments, but rather as means of conveyance and, except in very rare instances can continue to be driven in the period between the recall being announced and the fix being obtained; and

(d) while the recent settlement in *Cantor* would appear to lend support to the novel loss of value theory, the comments from the Judge at [228] - [231] are instructive of the challenges faced by Plaintiffs in seeking to establish such loss. However, unless and until such a case is run to a final hearing at great expense and investment of time on the part of an FCAI member organisation, the application of the law to the Industry will remain unresolved and funders will take advantage of such uncertainty.

5. Appropriateness of Requirement to Hold Australian Financial Services Licence (AFSL) and Comply With Managed Investment Scheme Regime (TOR 5 and 6)

5.1 FCAI welcomes the recent announcement that litigation funders will be subject to greater oversight by requiring them to hold an AFSL and comply with the managed investment scheme regime.

5.2 If litigation funders can earn significant profits from litigation which brings to bear a considerable strain on the resources of defendants and the Courts, they ought to be under duties in relation to the conduct of their business. In particular, FCAI considers that:

(a) the duty on an AFSL holder to act honestly and fairly is important in ensuring that a class action is actually in the interests of group members (particularly where a 'beauty parade' has emerged where multiple class actions are commenced in respect of the same issue and each purports to represent the same/similar class of group members);

(b) prudential obligations in relation to the conduct of a litigation business are important to ensure that the recent Grosvenor Litigation Funding situation does not repeat. That is funders putting themselves in a financial position where their actions can no longer be in the interests of group members; and

(c) the importance of the funder having sufficient means is heightened in the context of litigation involving complex products and highly technical issues - such as automotive litigation - which means that the timeframe and costs of such litigation can be significantly more than shareholder class actions.

5.3 The proposed changes also properly reflect the fact that litigation funding arrangements constitute managed investment schemes.[15]

6. **Further proposals for change (TOR 6, 7)**

6.1 In addition to the changes discussed in 5 above, FCAI considers that the regulation and oversight of the litigation funding industry should go further because of:

(a) the unique nature of class action litigation;

(b) the need to ensure that the focus of reform is on access to justice and the vindication of rights, and not on profits for, or the economic viability of, litigation funders;

(c) the nature of the bargaining power, or lack thereof, of group members in consumer class actions in negotiating Funding Agreements; and

(d) the benefits of increased certainty to all participants in class action litigation as well as to the courts.

6.2 One obvious area for regulation is the availability of **common fund orders** and similar arrangements in class actions. While *Brewster* provides some clarity in respect of the availability of CFOs at an early stage of a proceeding, there remains an apparent divergence of judicial views as to whether CFOs are prohibited at a later stage of proceedings (including at settlement) or whether a different power to that traditionally relied upon in seeking such orders might support them[16]. Such diverging views in the face of High Court authority will continue to cause uncertainty.

6.3 In *Brewster*, the High Court noted that it is not the purpose of the legislation that a court make "*an order … to assure a potential funder of the litigation of a sufficient level of return* ".[17] FCAI agrees.

6.4 In FCAI's view, the law should be amended to make it clear that the Courts do not have powers to make CFOs (or other arrangements that have the same outcome as a CFO - however described) at any stage of proceedings.

6.5 Prohibiting CFOs will assist to ensure that litigation funders must look after their own commercial interests (rather than relying on the Courts to do so - something the High Court has indicated in not properly a concern of the Court or the class action regime) and bookbuild before commencing proceedings, satisfying themselves that there is a genuine public interest in bringing the claim forward, and lessening the likelihood of claims based on speculative theories of loss of value.

6.6 If, contrary to 6.4, CFOs are not prohibited by legislation (and therefore bookbuilding does not occur) then in order to address the issues identified in 6.5 and provide a degree of certainty for defendants, express powers should be established for courts to make registration and class closure orders in appropriate circumstances, with a view to increasing the prospect of settlement in circumstances where class actions are commenced with large groups in respect of which minimal information is known. Such powers are already available in Victoria under s 33ZG of the *Supreme Court Act 1986* (Vic).

6.7 Consistent with the FCAI's view that it is inappropriate for 'super profits' to be derived by litigation funders based on speculative loss of value claims, FCAI considers that some

[15] Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd *[2009] FCAFC 147*

[16] See the discussion of recent decisions in *Cantor* at [388] - [419].

[17] *Brewster* at [3], [83].

legislative controls should be imposed in order to **avoid the making of super profits**. Controls could include:

(a) legislating a maximum funding commission in much the same way that the maximum uplift fees that may be charged by lawyers pursuant to conditional fee arrangements are capped at 25%; or

(b) Courts could be given express powers to make orders to ensure that, whatever the terms of the funding agreement, the remuneration paid to litigation funders in the event of a settlement or successful outcome is commensurate with the investment and risk, and is not excessive. While not completely analogous, this exercise would be similar to the approval by the Court of legal fees in the context of settlement approval - or the role that had been played in certain cases where common fund orders had been made to set the final rate of commission upon settlement or judgment.

6.8 More generally, and for the reasons set out in 3.3 and 3.5 above, FCAI makes the following suggestions as to **increased duties and obligations on litigation funders**, for the consideration of the Committee:

(a) funders should have duties similar to those imposed on lawyers to ensure that an action has reasonable prospects of success (in the sense of providing a remedy for group members who wish to pursue claims) before being commenced. It is no answer to this suggestion that the lawyers representing the lead plaintiff and group members will be under such a duty, and indeed many sophisticated funders make such an assessment as part of their existing due diligence process;

(b) the federal regime class action regime should be amended to include an obligation on funders similar to that contained in 56(4) of the *Civil Procedure Act* 2002 (NSW);

(c) in circumstances where funders can bring a controversy to Court, funders should be subject to rules in respect of the termination of funding agreements that are similar to the rules in respect of completion or termination of engagement imposed on lawyers; and

(d) funders should be required to demonstrate a sufficient position and willingness to furnish security for costs early in proceeding (i.e. at or around the time that the Funding Agreement is disclosed). In circumstances where a funder has elected to support multiple class actions against multiple defendants, this should be given no or limited weight in considering the appropriate level of security to be furnished in respect of each proceeding.

7. Class Actions and COVID 19 (TOR 12)

7.1 As with many Australian industries, the COVID-19 pandemic has caused significant disruption to FCAI member organisations.

7.2 The total sales of new vehicles in April and May this year was recorded as 38,926, and 59,894, respectively, representing an average fall in sales of 41.9 per cent from the same periods last year, and a 52.3 per cent fall from February sales (before COVID-19 had any significant presence in Australia).[18] This decrease in sales is also the largest single decrease of any month since these figures were first recorded in 1991, and from a year to date perspective, the decline in sales represents a total decline of 20.9 per cent.

7.3 The May sales data represents the 26th consecutive month of declining sales in automotive vehicles, however COVID-19 is expected to continue to have detrimental effects on the Industry. Figures released by the Australian Bureau of Statistics indicate that 31 per cent of

[18] https://www.fcai.com.au/news/index/view/news/622; https://www.fcai.com.au/news/index/view/news/636.

Australian citizens are experiencing a decrease in income,[19] and 72 per cent of businesses are expecting reduced cash flow,[20] which will inevitably impact the purchasing decisions of consumers in the immediate to medium-term future.

7.4 In the context of such uncertainty, speculative, funded class action litigation is attractive to litigation funders seeking profits, however has the potential to place significant pressure on FCAI member organisations who are already dealing with unprecedented issues of business continuity. Further, the uncertainty has increased the need for additional certainty in respect of the role of litigation funding and aspects of the class actions regime, such as CFOs.

8. Conclusion

8.1 FCAI would like to thank the Committee for the opportunity to provide submissions in respect of this important inquiry.

8.2 FCAI would be happy to address the Committee further on any aspect of its submission, including at the public hearings scheduled in July 2020.

[19] ABS Household Impacts of COVID-19 Survey (1 May 2020).

[20] ABS Business Indicators, Business Impact of COVID-19 (4 May 2020)