



Law Council  
OF AUSTRALIA

Office of the President

19 August 2020

Senator James Paterson  
Chair  
Parliamentary Joint Committee on  
Corporations and Financial Services  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)

Dear Chair

### **Responses to Questions on Notice – Inquiry into litigation funding and the regulation of the class action industry**

Thank you for the opportunity to appear before the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) in relation to the inquiry into litigation funding and the regulation of the class action industry (**Inquiry**) at the hearing on 29 July 2020.

The Law Council looks forward to the Committee's final report and provides this supplementary submission to respond to three questions on notice that arose from the hearing.

#### **Question 1**

*Mr FALINSKI: I will just follow-up on that. In the Bank of Queensland case Justice Murphy was highly critical of Quinn Emanuel for reviewing 1.2 million documents. Was that referred to any of those oversight bodies that you just referred to? Was there any investigation of Quinn Emanuel in that matter?*

Law Council Response: Without commenting on the specific circumstances of the matter in question, the Law Council is not aware of a referral to, or investigation by, a regulatory body in relation to the *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* (No 3) [2018] FCA 184 case.

#### **Question 2**

*Senator O'NEILL: I'm sure that you have particular examples in mind about what this litigation funding mechanism has enabled to happen that has been of benefit to Australian small businesses and individuals. I would just ask you to maybe put a couple of those on the record.*

Law Council Response:

The members of the Class Actions Committee of the Law Council's Federal Litigation and Dispute Resolution Section (**Class Actions Committee**) advise that the following are examples of cases which may not have proceeded in the absence of third-party funding:

- *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq)* [2012] FCA 1028;
- *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)* [2018] FCA 1289;
- *Pearson v State of Queensland (No 2)* [2020] FCA 619;
- *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837; and
- *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119.

This list is by no means intended to cover the field. There are many other examples of class actions providing benefits to individuals and small business which may not have been run were it not for third-party funding, and the above list represents a small sample of these instances.

### Question 3

*Mr FALINSKI: You've talked about how the experience of people using common fund orders is that it drives down the cost of class action and increases returns to plaintiffs. Are you relying on Professor Morabito's research to make that claim or have you got other peer-reviewed research that you can point to that is publicly available?*

#### Law Council Response:

As noted by Mr Emmerig in the course of the hearing, the contention by the Law Council in its written submission that common fund orders, during the period in which they were permissible, led to increased competition, positive downward pressure on commissions charged and increased the transparency of litigation funding arrangements,<sup>1</sup> is based on the extensive expertise and experience of the members of the Class Actions Committee.

A particular example of common fund orders increasing returns to class members arises in the decision of Murphy J in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191 (**Money Max**).<sup>2</sup> Justice Murphy has stated that the decision to allow a common fund order in *Money Max* resulted in the funding rate being reduced from 32.5-35 per cent to 23.2 per cent and an increased return to class members of between \$12.3 million and \$15.6 million.<sup>3</sup>

It is further noted that common fund orders also remove much of the significant expense associated with 'book building' by litigation funders, therefore increasing the return to class members.

Finally, in the experience of the Law Council's Class Actions Committee, not only do common fund orders make class actions cheaper to fund, they also enable a broader range of matters to be funded, such as consumer class actions with a large group of class members who stand to receive relatively modest sums on success.

<sup>1</sup> Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation funding and the regulation of the class action industry* (16 June 2020) [6], [14(f)], [17].

<sup>2</sup> Murphy J's decision in *Money Max* was the first to permit common fund orders. The High Court in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 found that section s 33ZF of the *Federal Court of Australia Act 1976* (Cth) and s 183 of the *Civil Procedure Act 2005* (NSW) do not give the courts the power to make common fund orders.

<sup>3</sup> Justice Bernard Murphy, 'Civil Justice Reforms in Class Actions and Litigation Funding' (Speech, ALFA Class Action Litigation Funding Reform Conference, 26 October 2018) 5 <<https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/20181026>>.

The Law Council therefore repeats its position, in accordance with recommendation 3 of the Australian Law Reform Commission, that the Federal Court of Australia be provided with an express statutory power to make common fund orders.<sup>4</sup>

### Contact

Thank you again for the opportunity to participate in the Inquiry. Should you or the Committee have any further questions, please contact Mr John Farrell, Senior Policy Lawyer on (02) 6246 3714 or [john.farrell@lawcouncil.asn.au](mailto:john.farrell@lawcouncil.asn.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

**Pauline Wright**  
President

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<sup>4</sup> Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018).