

FINANCING ACCESS TO JUSTICE: THIRD-PARTY LITIGATION FUNDING AND CLASS ACTIONS IN AUSTRALIA

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Like their counterparts in the United States and Canada, Australian class actions are complex, long and expensive proceedings. In the absence of contingency fees and limitations imposed by Conditional Costs Agreement, third-party litigation funding has emerged to fill the financing void. Third-party litigation funding has improved access to justice through the class action mechanism by supporting cases that may not have proceeded due to financial reasons and promoting an equality of arms between plaintiffs and defendants. Promoting greater competition in the third-party litigation funding market in Australia would see a reduction in funding commissions.

I. INTRODUCTION

Though there may be many points of disagreement between plaintiffs and defendants about class actions, there is close to a consensus on one point: class actions are expensive proceedings to prosecute and defend.

Proceedings can, and often do, last for a number of years from announcement and filing to final resolution. In that time, costs accrue to both sides for various reasons, including:

- the nature and complexity of issues often dealt with in class action proceedings;
- the time reasonably required of lawyers to advance the proceedings, including investigating events, drafting pleadings, attending interlocutory proceedings, making and reviewing discovery, taking evidence, and preparing for trial;
- briefing appropriately qualified experts to provide evidence on issues in dispute; multiple experts are often retained and briefed by each party in the proceedings;
- the quantum of damages claimed means that for both sides the stakes are high and, perhaps not surprisingly, this can lead to a war of attrition strategy, particularly on the part of defendants.

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Given the size, complexity, length and cost of class actions, it is clear that they must be well financed to proceed. In the United States and Canada this has primarily been achieved by providing appropriate economic incentives in the fees available to class counsel. By allowing fees calculated by reference to the size of damages ultimately agreed in settlement or awarded by judgment, counsel in those jurisdictions generally have the prospect of appropriate reward in return for undertaking the risk of financing class actions.

In Australia, legislation in all States precludes a legal practitioner from charging fees calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings.¹ It is then little wonder that commercial litigation funding (CLF) has stepped in to fill the void.

This paper examines the development of commercial litigation funding in Australia and argues that in providing a practical solution to the funding of class actions in that country, commercial litigation funding has provided a significant means of improving access to justice.

II. FINANCING CLASS ACTIONS IN AUSTRALIA

1. First Principles – the Law Reform Commission Report

In the modern world the mass production and distribution of goods and services has become an inescapable reality. While it brings benefits to many, it also increases the possibility that wrongful injury, loss or damage will be caused on a mass scale. It is time for the legal system to face these realities and to free itself from the individual approach to the granting of legal remedies in cases where mass wrongs occur.²

Australia first introduced a modern statute-based class action regime³ with the enactment of Part IVA of the Federal Court of

1. Legal Profession Act 2004 (Vic.), s. 3.4.29; Legal Profession Act 2006 (A.C.T.), s. 285, Legal Practitioners Act 1981 (S.A.), s. 42(6) and Australian Solicitors' Conduct Rules (adopted by South Australia on July 25, 2011), r. 16C; Legal Profession Act 2007 (Qld), s. 325; Legal Profession Act 2004 (N.S.W.), s. 325; Legal Profession Act 2008 (W.A.), s. 285; Legal Profession Act (N.T.), s. 320; and Legal Profession Act 2007 (Tas.), s. 309.
2. Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No. 46 (1988), para. 13.
3. Prior to this all Australian jurisdictions had rules permitting representative proceedings for persons having the "same interest." See *Carnie v. Esanda Finance Corporation Ltd.* (1995), 182 C.L.R. 398 for a discussion of the checkered development of the law in relation to the use of such rules and *O'Sullivan v.*

Australia Act 1976 (Cth) (FCA) in 1992. The purpose of this legislation was to promote access to justice and improve the efficient use of court resources by a process of aggregating legal claims. Subsequently, legislation substantially modeled on the Federal provisions has been enacted in Victoria⁴ and New South Wales.⁵ Recently, the Law Reform Commission of Western Australia has recommended introduction of legislation based on the Federal provisions.

The introduction of the federal class action provisions followed a 1988 Law Reform Commission (LRC) Report, *Grouped Proceedings in the Federal Court* (“the LRC Report”).⁶ In its report, the LRC was cognisant of the costs that would come with class actions and sought to make recommendations that would ameliorate these pressures.

The LRC Report examined many possible changes to costs rules and solicitors’ fees.⁷ Its significant recommendations were:

- the retention of the “loser pays” costs rule;⁸
- rejection of either lawyers or third parties entering into agreements for a share of the amount recovered;⁹
- that plaintiff lawyers should receive costs on “the basis of a lump sum increase on party-party costs recovered or a fraction or multiple increase of scale costs”;¹⁰
- the creation of a public class action fund;¹¹

The recommendation of a public class actions fund was not adopted by the government, and further attempts to establish similar funds have also failed.¹²

Challenger Managed Investments Ltd. (2007), 214 F.L.R. 1 (N.S.W. S.C.) for a demonstration of the ongoing uncertainty regarding their utility in cases involving claims for damages even after *Carnie*.

4. Supreme Court Act 1986 (Vic.), Part 4A.

5. Civil Procedure Act 2005 (N.S.W.), Part 10.

6. Prior to 1996, the Australian Law Reform Commission was called the “Law Reform Commission.” We use the title “Law Reform Commission” consistent with the point in time of its report.

7. Law Reform Commission, *supra*, footnote 2, paras. 252-319.

8. *Ibid.*, para. 271.

9. *Ibid.*, paras. 296-297 and 318.

10. *Ibid.*, para. 297.

11. *Ibid.*, paras 307-314.

12. In its Civil Justice Review, the Victorian Law Reform Commission recommended the creation of “the Justice Fund” to fund, *inter alia*, class action proceedings. See Victorian Law Reform Commission, *Civil Justice Review*, Report No. 14 (2008), paras. 605-622. This recommendation was not adopted.

Though the high costs of class actions and need for finance were correctly anticipated by the LRC, the measures recommended to resolve those problems were either not adopted or proved to be insufficient.

2. Who Would Be A Lead Plaintiff?

Class action regimes promote access to justice by making effective the enforcement of rights which might never be enforced without a mass remedy. They promote judicial economy by dealing more efficiently (at less time and expense) with a proceeding on behalf of many, thereby avoiding a multiplicity of such proceedings. Looked at from the perspective of the group members, the courts, the lawyers for the parties and, at least in relation to the promotion of judicial economy, from the perspective of the defendants, all these things make sense.

However, in the years immediately following 1992 the plaintiff¹³ in an Australian class action enjoyed a relatively unenviable position. The plaintiff was responsible for the costs of litigating the class action. These costs would most often dwarf the value of their individual claim and be substantially in excess of those which would inure if an individual claim had been litigated. The provisions of Part IVA provided for mechanisms whereby those costs could be shared with the group but only after resolution of the proceedings.¹⁴

An equally significant factor was that the plaintiff alone bore the responsibility for the payment of adverse costs, that is the costs of defendants in the event the proceeding should be unsuccessful. As Wilcox J. commented in *Woodlands v. Permanent Trustee Company Ltd.*:¹⁵

The problem that has arisen in this case occasions no surprise to me. It is a problem inherent in representative proceedings. In a nutshell, the problem is that a representative party is exposed to the risk of an order to pay the costs of a respondent or respondents (the amount of which will usually be increased by the very fact that the proceeding is a representative one), without gaining any personal benefit from the representative role. So there is little or no incentive for a person to act as a representative party. Unless the

13. In the Federal Court the appropriate term is applicant and the formal description of the proceedings is representative proceedings but in our discussion we use the more commonly used terms "plaintiff" and "class action".

14. Federal Court of Australia Act 1976 (Cth), s. 33V(2), as part of settlement approval, and s. 33ZJ, after an order for damages.

15. (1995), 58 F.C.R. 139 (F.C. Aus.), p. 145.

person's potential costs are covered by someone else, there is a positive disincentive to taking that course.

3. Conditional Costs Agreements

Though the federal government did not adopt the proposal recommended by the LRC for success-based fee agreements with some uplift component, most Australian state governments subsequently authorised similar costs agreements.¹⁶ Such agreements are often called “conditional costs agreements” (CCAs) (and are colloquially known and marketed as “No Win-No Fee” or “No Win-No Charge” agreements). They allow solicitors to charge legal costs contingent upon a successful outcome, with an additional uplift fee that is set by reference to those costs.¹⁷ The allowable uplift fee differs on a state-by-state basis.

A CCA does not provide that the solicitor or their firm will accept responsibility for adverse costs in the event that they are awarded. Responsibility for adverse costs remains with the lead plaintiff.

A CCA transfers litigation risk (in the form of solicitor-client costs and, often, all disbursements incurred) from litigants to solicitors, who may aggregate lawsuits in a portfolio approach to managing risk.¹⁸ The portfolio approach means that firms are more robust and capable of accepting litigation risk than individual litigants.¹⁹

Additionally, a CCA will effectively shift the source of financing for the proceedings from the lead plaintiff and/or members of the class, to the plaintiff firm. The firm will not receive payment of their professional fees for the duration of the case and will typically, though not always, pay all disbursements incurred in the proceeding. Accordingly, the strength of financing and resources available to support the proceeding and the degree of risk aversion

16. Legal Profession Act 2004 (Vic.), s. 3.4.28; Legal Profession Act 2006 (A.C.T.), s. 284; Legal Practitioners Act 1981 (S.A.), s. 42(6); Legal Profession Act 2007 (Qld), s. 324; Legal Profession Act 2004 (N.S.W.), s. 324; Legal Profession Act 2008 (W.A.), s. 284; Legal Profession Act (N.T.), s. 319; and Legal Profession Act 2007 (Tas.), s. 308.

17. Uplift fees are typically expressed in legislation as a percentage. For example: Victorian legislation allows a 25% uplift fee. If legal costs on a successful case were \$1,000, the solicitor would be entitled to charge an additional \$250 uplift fee.

18. This is similar to the approach and effect of contingent fee lawyers in the United States. See Jonathon Molot, “Litigation Finance: A Market Solution to a Procedural Problem” (2010), 99 *Georgetown L.J.* 65, p. 90.

19. *Ibid.*

in relation to its conduct will reflect the available finances, resources and risk appetite of the plaintiff firm.

Plaintiff firms are able to manage risk by diversifying their cases, between CCA-based cases and regular payment cases, as well as their broader practice groups, such as workers' compensation, road accidents, medical negligence, and employment. In areas of practice where there are hundreds or thousands of cases with relatively smaller costs at stake the firm can financially withstand the loss of a number of cases.

In this context, class actions pose a particular problem for plaintiff firms, as they are often long, complex and expensive to conduct, and important issues of substantive law remain the subject of judicial uncertainty.²⁰ Prosecuting these cases is attendant with a substantial amount of risk to the firm that accepts the case, and diversification across cases and practice groups may not present a sufficient risk management solution to proceedings of this magnitude.²¹ Set against the limited reward if the case is successful it is likely to be unsustainable for most firms to run more than a very small number of large class actions under a CCA. Accordingly, some meritorious cases could not be brought on a CCA-basis due to the risks posed to the plaintiff firm, resulting in under-compensation and under-deterrence.²²

The *Vioxx* class action²³ demonstrates that such risks are not merely theoretical. The *Vioxx* class action was launched in Australia in 2005 by a plaintiff firm acting on a CCA. Though the plaintiff prevailed at the initial trial, he lost on appeal and was denied special leave to appeal to the High Court of Australia in May 2012. The financial result for the plaintiff firm was a \$10.5 million write-down of work in progress and disbursements, and the firm's total net profit after tax fell by 10.5%.²⁴

Given these risks, it is perhaps unsurprising that there are few Australian firms engaged by plaintiffs to litigate class action proceedings. In his empirical analysis of class actions in Australia, Professor Morabito found that Maurice Blackburn and Slater and

20. For instance, key questions of causation and the appropriate measure of damages remain unanswered in securities class actions.

21. Paul H. Rubin, "Third-Party Financing of Litigation" (2011), 38 N. Ky. L. Rev. 673, p. 677.

22. Joanna M. Shepherd, "Ideal Versus Reality in Third-Party Litigation Financing" (2012), 8 J.L. Econ. & Pol'y 593, p. 599.

23. *Peterson v. Merck Sharp & Dohme (Australia) Pty Ltd.* (VID 451 of 2006).

24. Slater & Gordon Ltd., "SGH FY12 Financial Results Investor Presentation", Powerpoint presentation (August 24, 2012), slides 3 and 5.

Gordon were the only firms to represent applicants in 10 or more class actions filed in the Federal Court of Australia, and accounted for 33.9% of all class actions filed in that jurisdiction on or before March 3, 2009.²⁵

It is clear that CCAs promote access to justice for those plaintiffs unable to pay costs and disbursements without the proceeds gained from litigation. In the class action context, this allows cases to proceed on the basis that firms continue to act while not receiving payment from the lead plaintiff or group members. However, the financing, resources and risk appetite provided pursuant to a CCA is then dependent upon the characteristics of the plaintiff firm, and the financial incentives to the plaintiff firm are sufficiently circumscribed to ensure that reliance on CCAs alone will be a significant limitation on access to justice. This situation made it necessary to develop alternative forms of financing and risk allocation to ensure that plaintiffs would have practical access to justice under the class action mechanism.

III. COMMERCIAL LITIGATION FUNDING OF CLASS ACTIONS IN AUSTRALIA

1. The Development of CLF in Australia

Litigation funding is at its core a contractual arrangement whereby a third party pays the cost of litigation and in return, if the case succeeds, receives a percentage of the proceeds.²⁶

CLF in Australia first developed around insolvency litigation before expanding into other areas of litigation including general commercial litigation and class actions. It remains a relatively new industry, as is the industry's support of class actions. Until December, 2006, only one litigation funder had been financing class action proceedings.²⁷

The involvement of third parties in litigation funding has been heavily contested. We conclude below that one consequence of the availability of CLF has been an increase in the extent to which wrongdoers are held to account for their actions. Thus it is perhaps

25. Vince Morabito, *An Empirical Study of Australia's Class Action Regimes – First Report* (Australia Research Council; Victoria Law Foundation, 2009), p. 28.

26. Michael Legg, L. Travers, E. Park and N. Turner, "Litigation Funding in Australia", University of New South Wales Research Paper 2010-12, p. 2.

27. Vince Morabito and Vicki Waye, "Reining in Litigation Entrepreneurs: A New Zealand Proposal" (2011), *N.Z. L. Rev.* 323, at p. 340.

not surprising that, with one exception,²⁸ challenges to funding arrangements have not come from plaintiffs or group members aggrieved by their opportunity to pursue a claim. Rather, it is defendants who have sought to stop litigation funded by a third party. All the more galling for those who act for plaintiffs is that these challenges have often been accompanied by expressions of concern for the well-being of group members, even sometimes for access to justice.

Initial challenges focused on maintenance and champerty and abuse of process.²⁹ These were conclusively brought to an end by the High Court in *Campbell's Cash and Carry Pty Ltd. v. Fostif Pty Ltd.*³⁰ There were challenges regarding the permissibility of “closed classes”³¹ (which in effect preclude free riders in a funded case and thus provide an economic incentive for group members to sign CLF agreements). These were disposed of in *Multiplex Funds Management Ltd. v. P. Dawson Nominees Pty Ltd.*³² More recently activity has focussed on the applicability of various forms of financial regulation³³ to class actions, prompting regulatory responses aimed at reversing the effects of both major decisions in the area.³⁴

The result is that CLF in Australia is now regarded as a legitimate means of funding litigation generally and class actions in particular with a “light touch” regulatory approach (at least until the next defendant challenge).

28. *International Litigation Funding Partners Pte Ltd. v. Chameleon Mining NL* (2012), 246 C.L.R. 455 (H.C. Aus.).

29. See *Clairs Keeley (a firm) v. Treacy* (2003), 28 W.A.R. 139 (Aus. C.A.); *Clairs Keeley (a firm) v. Treacy* [2005] WASCA 86 (Aus. S.C.); *Dorajay v. Aristocrat Leisure Ltd.* (2005), 147 F.C.R. 394 (F.C. Aus.).

30. (2006), 229 C.L.R. 386 (Aus. H.C.).

31. See *Dorajay v. Aristocrat Leisure Ltd.*, *supra*, footnote 29; *Rod Investments (Vic) Pty Ltd. v. Clark*, [2005] vsc 449 (Vict. S.C.).

32. (2007), 164 F.C.R. 275 (F.C. Aus.).

33. *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd.* (2009), 180 F.C.R. 11 (F.C. Aus.) and *Chameleon*, *supra*, footnote 28.

34. Corporations Amendment Regulation 2012 (No. 6), July 12, 2012, and “Australian Securities and Investment Commission Regulatory Guide 248 – Litigation schemes and proof of debt schemes: Managing conflicts of interest” (April, 2013) in effect reverse court decisions finding that litigation funding arrangements were Managed Investments Schemes (see *Multiplex*, above footnote 33) but were not a financial product (see *Chameleon*, see *supra*, footnote 28) pursuant to provisions of the Corporations Act 2001 (Cth).

2. How CLF has Enhanced Access to Justice in Australian Class Actions

This section deals with the economic effects of CLF on class action financing in Australia and the consequences for access to justice.

(a) Economic effects of CLF on class action financing

CLF has alleviated the financing constraints facing class actions in Australia, as described in section 2 above.

Instead of the plaintiff firm providing and bearing the risk of finance for a class action proceeding, funds can be obtained from a broader network of firms with access to domestic and international debt and equity markets. Litigation funders who have funded class actions in Australia include a company listed on the Australian Securities Exchange,³⁵ and private firms based in the Netherlands,³⁶ United States³⁷ and Singapore.³⁸ This represents a dramatic expansion in the marketplace for class action finance, which was previously effectively limited to two Australian law firms.³⁹

Plaintiff firms are no longer constrained by their own financial situations and the composition of class actions in their portfolios when assessing whether to litigate a potential proceeding. Previously a decision to litigate was a decision to fund the proceeding. Now it need not be — in a very real way, the decision to finance a case has been separated from the decision to litigate a case.⁴⁰

Accordingly, cases assessed as meritorious are less likely to be rejected simply by reason of their financial implications. Now that different types of CLF may be obtained from a small market of funders, plaintiff firms can more effectively diversify their financial exposure to class actions by arranging total or partial funding for their professional fees and disbursements within a particular action.

Litigation funders can construct even more sophisticated portfolios of exposure across adverse costs, ongoing solicitor's

35. IMF (Australia) Ltd.

36. Omni Bridgeway.

37. Comprehensive Legal Funding LLC.

38. International Litigation Funding Partners Pte Ltd. and International Litigation Partners Pte Ltd.

39. See reference to Maurice Blackburn and Slater and Gordon in Part II(c), above.

40. Rubin, *supra*, footnote 21, at p. 677.

professional fees (total or partial), and ongoing disbursements — in commercial consideration for varying percentages of any award or settlement. They may also spread their risk across law firms, with other funders, in multiple jurisdictions, and by diversifying the nature and size of the claims they fund. In addition, many ameliorate their exposure to adverse costs by taking out “after the event” (ATE) insurance.

(b) Consequences for Access to Justice

The economic effect of opening up the financing of Australian class actions to the market has enhanced access to justice for those who have suffered legal wrongs.

CLF has improved access to justice because cases have been filed that otherwise would not have been pursued due to financial barriers. By allowing CLF of class actions, plaintiff firms are able to prosecute cases without all of the attendant financial risk that existed prior to CLF. As explained above, this previously necessitated the litigation of a proceeding on a CCA-basis and incurring the litigation risk of solicitor-client costs and disbursements, as well as the opportunity costs associated with the inability to deploy capital elsewhere.

Plaintiff firms may take on more cases as there are more options to finance them, each entailing different levels of risk. For example, if a firm is already conducting a large proceeding solely on a CCA, it may be able to conduct further proceedings that receive CLF, in which their costs and disbursements are paid. Whilst there is no evidence of any significant increase in the number of Part IVA proceedings filed since the advent of litigation funding,⁴¹ it is the authors’ experience that CLF has allowed plaintiff firms to conduct more proceedings involving greater damages claimed and, accordingly, greater costs than previously possible.

It follows that it is more likely that greater number of those who have suffered legal wrongs will see their case prosecuted through the class action mechanism because of the access to CLF. This is a positive development for members of the Australian community, and a negative one for possible wrongdoers and defendants. As recognised by Kalajdzic, Cashman and Longmoore:⁴²

What is of understandable concern to corporate and other defendants is that

41. Morabito, *supra*, footnote 25, at pp. 15-16, and Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes – Second Report* (Australia Research Council; Victoria Law Foundation, 2010), at p. 17.

42. Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, “Justice for Profit:

commercial funding has facilitated the pursuit of claims that would otherwise not have been filed and which resulted in substantial recoveries, particularly in shareholder class actions.

The comments of the Law Reform Commission in discussing the effect of the introduction of a class action regime are just as apposite regarding the impact of CLF:⁴³

Respondents will be called upon to a far greater extent to pay for the costs of loss or damage that the law says they should pay for, or the costs of preventing those losses. This will lead to greater enforcement of substantive rights and may have some deterrent effect on those persons and organisations who are potential respondents.

Another benefit of CLF is that it has enhanced the resources devoted to cases that are run and has made less likely the success of “war of attrition” defence strategies.

Where the only effective option for funding class actions is by plaintiff law firms under CCAs, not only do financial constraints impact on the choice of litigation which can be commenced but they also impact on the choices which can be made in litigation particularly in the engagement of barristers (most Australian jurisdictions maintain a profession which is practically separated) and experts. This affects not only the choice of those who can be engaged to assist the plaintiff but also the amount of time for which such persons can be engaged to prepare, research, advise and appear.

One highly respected Senior Counsel stated to one of the authors that in his view the capacity for plaintiffs to bring an equality of arms to large scale litigation through CLF was one of the most significant changes in the litigation landscape in a career spanning more than 30 years.

In providing a greater “equality of arms” CLF is likely to create better settlement outcomes for group members. Of the six settlements in class actions for over \$100m that have occurred in Australia, four have occurred in funded cases.

Molot identifies three major forces that drive settlement levels: the parties’ perceptions of the merits of the case and predictions for trial, litigation expenses, and risk tolerances.⁴⁴ He further posits that:⁴⁵

A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding” (2013), 61 Am. J. Comp. L. 93, p. 113.

43. Law Reform Commission, *supra*, footnote 2, para. 341.

44. Molot, *supra*, footnote 18, pp. 75-76.

45. *Ibid.*, p. 71.

If we want to advance substantive law goals, we must find a way to ensure that settlements are driven as much as possible by the merits [of the proceeding] and as little as possible by imbalances in [the parties'] risk preferences.

CLF achieves a reallocation of the litigation risk associated with class actions to parties who are better equipped to meet it. This assists in strengthening the risk tolerances of plaintiffs and “. . . to level the playing field between parties who are not otherwise equally well suited to cope with litigation risk.”⁴⁶

3. Arguments that CLF does not Promote Access to Justice

It is sometimes argued⁴⁷ that CLF does not actually promote access to justice because:

- closed classes run counter to the notion of providing access to justice to all those affected by a wrong and create the likelihood of multiple actions, thus diminishing judicial economy;
- funders choose only those cases which are “slam dunks”;
- funding is focused primarily on securities actions and thus does not provide access to justice in other cases;
- funders are only interested in funding cases where there are large corporate victims and are often uninterested in the fate of smaller victims of corporate wrongdoing.

The practice of utilising closed classes has raised access to justice considerations, and has been written about extensively.⁴⁸ We do not wish to rehearse all those debates but make three points:

- while in many instances a funder may perceive a closed class as necessary or desirable to provide an economic incentive to potential group members not to “free ride”, it would be a

46. *Ibid.*, p. 88.

47. For examples of these arguments, see Michael Legg, “Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest” (2009), 32 U.N.S.W. L.J. 909, comments of Justice Sackville at the Clayton Utz Class Actions Think Tank as reported in Stephanie Quine, “IMF Not About Access to Justice”, *Lawyers Weekly*, August 17, 2012, online: <<http://www.lawyersweekly.com.au/news/imf-not-about-access-to-justice>>, and Vince Morabito, “Class Actions Instituted only for the Benefit of the Clients of the Class Representative’s Solicitors” (2007), 29 Sydney L.R. 5.

48. See extended discussions of this issue in Peter Cashman, “Class Actions on Behalf of Clients: Is This Permissible?” (2006), 80 A.L.J. 738; and Jarrah Hoffmann-Ekstein, “Funding Open Classes Through Common Fund Applications” (2013), 87 A.L.J. 331, at pp. 335-340.

mistake to elide the distinction between funded cases and closed classes. In practice closed classes have not been confined to funded cases⁴⁹ and in fact a significant number of funded cases have either commenced as, or converted in running to, open classes.⁵⁰ There is some prospect that courts will order open funded classes.⁵¹

- some access to justice for some victims is better than none;
- there is no evidence that funding has created any increase in the phenomena of multiple actions about the same subject matter⁵² and no evidence that such multiple filings have compromised the efficiency advantages of a class action regime.⁵³

There is no evidence that CLF is limited to “slam dunks.” Morabito finds no difference in the average time taken to settle a funded as opposed to an unfunded class action.⁵⁴ A cursory examination of the many interlocutory judgments and appeals in funded litigation also sits at odds with the suggestion that funded cases are easy. Finally, it may be noted that a significant number of funded cases have proceeded to trial before settlement.⁵⁵

In *An Empirical Study of Australia’s Class Action Regimes – Second Report*,⁵⁶ Morabito reports that of the 18 commercially funded Australian cases identified in his sample, there were 11 securities class actions, two disputes concerning agent commissions, two employment disputes, one cartel action, and two other actions involving idiosyncratic claims.⁵⁷ Taken at face value, these numbers suggest a strong preference for the funding of securities class actions, but a closer analysis suggests this may have more to

49. See those cases where group members are defined by list, such as those referred to in Morabito, *supra*, footnote 47, at p. 16.

50. For example, see *Dorajay v. Aristocrat Leisure Limited* (NSD 362/2004), *Vlachos & Ors v. Centro Properties Pty Ltd. & Ors* (VID 366/2008), *Hadhiti v. Nufarm Ltd.* (NSD 1847/2010), *Pathway Investments Pty Ltd. v. NAB* (SCI 2010 06249), orders dated August 24, 2012.

51. Hoffmann-Ekstein, *supra*, footnote 48.

52. Morabito, *supra*, footnote 41, at pp. 22-23.

53. Multiple filings in the *Oz Minerals*, *Nufarm* and *Centro* cases did not preclude efficient case management.

54. Morabito, *supra*, footnote 41, at p. 42.

55. *Dorajay Pty Ltd. v. Aristocrat Leisure Limited*, [2009] FCA 19; *Watson v. AWB Limited* (NSD 2020/2007) orders of Foster J. dated April 27, 2010; *Kirby v. Centro Properties Limited (No. 6)*, [2012] FCA 650, and *Modtech Engineering Pty Ltd. v. GPT Management Holdings Limited and Others* (VID 1408/2011), orders of Gordon J. dated June 26, 2013, and *Modtech Engineering Pty Limited v. GPT Management Holdings Limited (No. 2)*, [2013] FCA 1163.

56. Morabito, *supra*, footnote 41.

57. *Ibid.* at p. 38.

do with the temporal proximity of the High Court decision in *Fostif* and the onset of the Global Financial Crisis.

In August, 2006, the High Court of Australia handed down its decision in *Campbells Cash and Carry Pty Ltd. v. Fostif*,⁵⁸ finding that litigation funding was not an abuse of process or contrary to public policy. Until December, 2006, IMF (Australia) Ltd. had been the only litigation funder providing CLF to Australian class action proceedings⁵⁹ and its focus in class actions had been on a small number of securities actions.

After “the profound events of 2007 and 2008”⁶⁰ which caused chaos in global financial markets, a significant number of funded class actions were commenced against Australian companies in response to alleged breaches of disclosure and misleading and deceptive conduct. This collection of actions include:

Proceeding	Filing Date
Centro (five class action proceedings)	2008
Imobilari Pty Ltd. v. Opes Prime and Others	2008
OZ Minerals (two class action proceedings)	2009
Pathway Investments Pty Ltd. & Anor v. NAB	2010
Modtech Engineering Pty Ltd v. GPT Management Holdings Limited and Others	2011
Nufarm (2 class action proceedings)	2011
Blairgowrie Trading Ltd. & Anor v. Allco Finance Group Ltd.	2013

It is thus unsurprising that Morabito found such a prevalence of securities class actions amongst funded actions. With those cases that arose from the GFC being resolved, litigation funders have demonstrated that they are looking beyond the Australian Securities Exchange for cases. Funded proceedings recently commenced or under investigation include class actions arising from the spread of an abalone virus in Victoria,⁶¹ the operation of

58. (2009), C.L.R. 386 (Aus. H.C.).

59. Morabito, *supra*, footnote 41, at p. 38.

60. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: National Commission on the Causes of the Financial and Economic Crisis in the United States*, (Washington, D.C., U.S. Government Printing Office, 2011), at p. xv.

61. *Regent Holdings Pty Ltd. v. State of Victoria and Southern Ocean Mariculture Pty Ltd.* (SCI 2010 6132), Vict. S.C.

two dams during the 2011 Queensland floods,⁶² and the spread of equine influenza from a quarantine facility in New South Wales.⁶³

From a funder's perspective, large institutional group members can make a case economic. Routinely in securities cases funders offer discounts on commission for those with greater losses, in practice usually large institutions. In its due diligence when deciding whether to fund a class action, a prominent Australian litigation funder, IMF (Australia) Ltd, considers that the fact that an action is composed of too many small claims may be a disqualifying factor to funding.⁶⁴ This may raise concerns that large institutional investors or insurers are essential for any class action to proceed with CLF-backing, with implications for access to justice for smaller claimants.

However, in the first instance it should be noted that it is because of the presence of large institutional group members that it is economic to run many cases. In the authors' experience in securities actions retail investors usually account for less than 20% of claimed damages, often less than 10%. Many cases would simply not be run if they were confined to retail investors alone.

Further, appropriate use of technology makes possible funded claims on behalf of large numbers of group members all with relatively small claims. IMF's recent funding of the bank fees class actions is an example. The first bank fees class action, against ANZ, was launched in September, 2010 on behalf of 27,199 group members for a \$50 million claim.⁶⁵ In total over 200,000 people have registered for class actions against 12 banks.⁶⁶ The electronic registration process used in the claimant registration process appears to have assisted in ensuring the economic viability of a series of class actions with quite low average claim values.

There is then little evidence of a systematic bias in the availability of funding for either particular kinds of claim or for

62. Maurice Blackburn Lawyers, "Queensland 2011 Floods Class Action", January, 2011, Potential Class Action, online: <<http://www.mauriceblackburn.com.au/areas-of-practice/class-actions/current-class-actions/queensland-floods-class-action.aspx>> .

63. *Clasul Pty Ltd. & Ors v. Commonwealth of Australia* (NSD 368/2013).

64. John Walker, Susanna Khouri and Wayne Attrill, "Funding Criteria for Class Actions" (2009), 32 U.N.S.W. L.J. 1036, at p. 1041.

65. Maurice Blackburn Lawyers, "Bank Fees Class Action", online: <<http://www.mauriceblackburn.com.au/news/press-releases-announcements/2010/anz-first-of-the-banks-to-face-penalty-fees-class-action.aspx>> .

66. Chris Zappone, "Groups Join Forces to Battle Banks", *Sydney Morning Herald*, September 22, 2010, online: <<http://www.smh.com.au/business/groups-join-forces-to-battle-banks-20100922-15m3b.html?autostart=1>> .

particular kinds of claimant. Even if there were a revealed preference on the part of funders for particular kinds of cases, CLF would indirectly improve access to justice in other kinds of cases by freeing up other financial resources for plaintiff firms to conduct those other cases under traditional CCA arrangements.

4. Future Developments

CLF has undergone significant developments in the last seven years, from uncertainty about its legality to a relatively well-established place in the litigation landscape, and in class actions from one funder to at least seven. In the next year, courts will be called upon to consider the efficacy of an open funded class, that is an arrangement where the court is requested to extend the terms of a litigation funding arrangement to all group members.

Whilst the above analysis demonstrates the benefits of CLF so far as access to justice is concerned, it must be acknowledged that that access can come at a significant price for group members. In many securities class actions a retail investor will pay a funder's commission of 40% of the total sum recovered inclusive of costs and a project management fee of 15% of the lawyer's costs. If the lawyer's costs amount to 10% or greater of the total settlement sum then less than half of the sum recovered on behalf of the retail investor is returned to them. On average commissions are lower and this is not the norm but nonetheless consumers would benefit from lower commissions.

Competition from new entrants in the funding market will and to some extent already has placed downward pressure on funders' commissions. In our view this will only be enhanced if economic interests associated with law firms are also permitted to fund. Further, if open funded classes are approved the capacity to obtain a return across a greater pool of damages and the potential reduction in the significant costs of class gathering should see an overall reduction in funder's commissions.

In the recent debate about the regulation of litigation funding in Australia, resulting in an amendment to the Corporations Act,⁶⁷ defendant solicitors⁶⁸ and business lobby groups⁶⁹ argued for measures that sought to strictly regulate the CLF industry: capital

67. Corporations Amendment Regulation 2012 (No. 6), July 12, 2012.

68. Nicholas Mavrakis, Ross McInnes and Michael Legg, "Litigation Funding now (lightly) regulated" (2012), 50 *J.L. Soc'y N.S.W.* 34.

69. Lisa Rickard, "Time to apply regulatory brakes to runaway litigation funding", *The Australian*, July 20, 2012.

adequacy requirements and prudential supervision, mandatory disclosure of the terms of the arrangement, and a requirement that funders be subject to adverse costs orders.

Many of those arguments ignored the measure that would be most in the interests of funders' clients: the lowering of TPLF commissions. It is competition which will more surely result in benefits to group members. Erecting unnecessary barriers to market entry will have the opposite effect. Sufficient safeguards for group members are best accommodated by a combination the light touch regulation recently adopted by the government and close court supervision of class action procedures.

IV. CONCLUSION

Australian class action regimes were designed and enacted with an explicit purpose of increasing access to justice and improving the efficient use of court resources. Though the class action mechanism proved itself to be adept at achieving these goals through the process of aggregation, it has also proven to be expensive and risky for those funding.

CLF has emerged to be a revolutionary force in the financing of class actions in Australia. By broadening the finance base and dispersing litigation risk, class actions are no longer restrained by the financial limitations associated with the previous methods of finance. As a result, a higher number of proceedings can be sustained and there is greater equality in the resources plaintiffs and defendants can deploy, making it more likely that settlements will be for amounts that more accurately reflect the merits of a case rather than simply a disparity of financial capacity. Potential legal developments offer the prospect of greater competition amongst funders, lower commission rates and concomitantly greater returns to group members.