AUGUSTA VENTURES (AUSTRALIA) PTY LTD

SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

AUGUSTA VENTURES (AUSTRALIA) PTY LTD

Date: 11 June 2020 Neill Brennan

Introduction

1. Augusta seeks to make submissions to the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**).

2. I am the co-founder and Managing Director of Augusta Ventures (Australia) Pty Ltd (**Augusta**) and a director of the Association of Litigation Funders Australia (**ALFA**). I am also a co-founder and director of Augusta Ventures Limited (**AVL**) a UK based litigation funder.

3. I obtained a Bachelor of Economics from the University of Western Australia and a Bachelor of Commerce from the University of New South Wales.

4. I was engaged in financial markets for over 22 years before becoming involved in litigation funding. I have been a Derivative Manager with Royal and Sun Alliance, Managing Director of Quantitative Research with Citigroup and co-founded the hedge fund Armajaro Asset management. I have been engaged in litigation funding for 10 years having co-founded AVL in 2010.

5. Augusta was established in May 2017 and has a substantial presence in the funding of litigation in Australia. It has common ownership with AVL, a UK based litigation funder and Augusta Canada, based in Toronto. AVL is the largest funder in the UK by number of cases. AVL is a founder member of the self-regulatory body the Association of Litigation Funding (**ALF**) and is regulated by the Finance Conduct Authority (**FCA**).

6. Since its establishment in Australia, Augusta has funded a number of cases including commercial litigation cases, insolvency cases and class actions. Augusta has funded many different types of class actions including:

    a) employment (casual hire contracts and sham contracting) claims;

    b) franchisee claims;

    c) securities claims;

    d) breach of contract claims; and

    e) financial services claims.

    Securities class actions only account for a very small number of class actions funded by Augusta.

7. Augusta wishes to engage with the Parliamentary Inquiry and is troubled by the recent Federal Government announcements that:

    a. it will require regulation of litigation funders who will be obliged to hold an Australian Financial Services Licence (**AFSL**) and that class actions will need to be operated as managed investment scheme (**MIS**); and

    b. the temporary amendment to continuous disclosure provisions under section 674(2) of the *Corporations Act 2001* such that listed entities will not be liable for breach of section 674(2) unless they knew, or were reckless or negligent, with respect to whether information would, if generally available, have a material effect on the price or value of its securities

8. Proposed regulation is at odds with the recommendations of the recent Australian Law Reform Commission (**ALRC**) Report 134 and the submission to the ALRC provided by Australian Securities and Investments Commission (**ASIC**). Those bodies have expressed views the courts are best placed to regulate funders and to oversee and manage specific claims and the costs of those claims.

9. The temporary amendment to continuous disclosure rules is of concern. There is voluminous academic research confirming an efficient market requires the availability of timely accurate and readily accessible information. This is even more critical where the market includes a large number of "retail" investors which is the case in Australia with around 35% of ordinary Australians holding listed shares. Many developed economies also have continuous disclosure regimes to enhance market integrity and transparency. While a response to COVID-19 has been explained as a rationale for this change, it is critical that COVID-19 is not used as a cloak for other changes that may be considered by the Committee as the area being examined deserve full consideration as evidence by the ALRC inquiry and be based on long term policy impacts and whether they deliver tangible benefits to the community.

10. The ALRC in its December 2018 Report 134, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders[1] provided 24 recommendations designed to improve the class action regime. Augusta agrees with many of these recommendations and would hope the Committee is able to consider those and take them into account when making its recommendations.

Summary

11. Augusta agrees with and supports the submissions presented by ALFA - 11 June 2020. Augusta does not intend to go over all of the points in that submission and will limit comments to its own experience and observations. For ease, it has adopted the numbering in the ALFA submission.

12. *Submission 1 - Many misconceptions appear to have influenced discussion of Class Actions and Litigation Funding in recent times.* There appears to be considerable coverage of class action litigation in the press that contains misrepresentations and hyperbole. Augusta is very disturbed that this may influence the members of the Committee in formulating their view and distract from prior empirical analysis.

    a) The press coverage routinely ignores the considerable risks involved in litigation funding. While there is substantial due diligence undertaken by a funder to invest in cases with good legal merits, there remain significant risks including:

        i. The decision to invest is generally taken with only limited information on the strength of the claim and usually the defendant's position is unknown;

        ii. new information may arise during the case that has an adverse impact on the prospects of success;

        iii. if the case proceeds to trial, it is very difficult to predict the outcome and any outcome may be the subject of an appeal;;

        iv. in some cases, even if the case wins, it may not be possible to recover from the defendant; and

[1] Honourable Justice Derrington, Australian Government, Australian Law Reform Commission, "Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (Report 134, 2018). 24.01.2019 https://www.alrc.gov.au/news/inquiry-into-class-action-proceedings-final-report/

v. court procedures may change (for example, the change to common fund orders arising from BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45) making the case unfeasible.

b) There have been references to "windfall gains". While that may have previously been the case when there were few funders in the market, there are now more funders providing funding for Australian cases (reported to be at least 25[2]) and the CFO regime has promoted competition which has materially reduced pricing. For instance, in Perera v GetSwift Limited [2018] FCA 732 the funder commission was the lesser of 20% of net damages (after legal costs) or a multiple rising from 2.2x to 2.8x the funding.

c) Claims, such as those made in The Australian newspaper in the quote below, are disingenuous. "*In truth, contingency fees for class action law firms and litigation funding make the alchemists' dream come true — they turn dross into gold. They take often tiny investments and produce outlandish returns, using a trick so simple it has escaped critical commentary. The trick is not to let your returns be measured by, or related to, the amount you have invested"*[3].

d) As litigation funding is highly uncertain and non-recourse, gains on successful cases offset the large losses on unsuccessful cases. Therefore, while a fee paid on a winning case appears large, the overall profits of a portfolio of cases are commensurate with the risk. There is no "free lunch" in litigation funding.

e) Many class action claims can proceed for 3 to 4 years or more. Therefore, after taking into account case losses, the Internal Rate of Return (IRR) is closer to a private equity return. The difference is private equity has step in control rights when things are not going well, whereas Augusta would not seek to control the litigation.

f) It appears the motivation for this type of hyperbole is for big business interest groups to focus the inquiry on litigation funding returns and distract from the economic and social benefits provided by litigation funders to assist ordinary Australians seek recompense at the expense of business enterprises when they have broken the law.

g) One of the vocal interest groups is insurers and groups representing company directors. Class actions are being blamed for the increase insurance premiums. It seems inconceivable that:

i. insurers who sought to profit and may have mispriced risk are now complaining when an insurance policy is forced to respond;

ii. insurers seek to use the court system to reduce their risk and put the claimants to the substantial cost of pursuing their case rather than resolving cases by early reasonable settlement; and

iii. company directors that have sought to hedge their risk against unlawful behaviour are complaining at the cost, after acting unlawfully.

13. *Submission 2 - Litigation funding provides and promotes access to justice which would not otherwise be available*. Litigation funding is now a mainstream source of finance in many global jurisdictions. There is inevitably an imbalance between ordinary Australians seeking redress and a well-funded corporation. This "David and Goliath" imbalance is addressed by the availability of funding. Some examples of this include:

[2] The Honourable Justice Derrington, "Litigation Funding: Access and Ethics", Australian Academy of Law Lecture, Brisbane, 4 October 2018.

[3] Janet Albrechtsen (2020)'Contingency Fees are a gross miscarriage of justice, The Australian May 20,2020

a) Justice Lee's comments in relation to the recent settlement of the PFAS class action. *Justice Lee said while he was not prepared to get into the "live controversy about litigation funding", without a funder in this case most of the group "would likely have been placed in a situation of being supplicants requesting compensation in circumstances where they would have been the subject of a significant inequality of arms". He said the case was "a testament to the practical benefits of litigation funding". The claims, he said, had been "litigated in an efficient and effective way" and had ultimately been resolved with an out-of-court settlement*[4].

b) The State of Queensland settling the "Stolen wages claim" It was claimed the Queensland Government breached its duties as trustee, or its duties as a fiduciary, by failing to repay wages owed to Aboriginal workers.

c) The Wivenhoe Dam claim where the Supreme Court of NSW found that conduct by the State of Queensland in relation to the operation of the Wivenhoe Dam caused substantial flooding.

d) The recent acknowledgment by the Commonwealth Government that over $700m in debts collected under the Centrelink "Robodebt" scheme were unlawful.

e) Settlement of class actions against Volkswagen, Audi and Skoda over diesel emissions with an average payout of around $2,800 per claimant.

14. *Submission 3 – The perceived increases in the volume of class action proceedings is being overstated.* Augusta agrees with the points raised by ALFA. Independent academic research undertaken by Professor Vince Morabito of Monash University, supports ALFA's submission and does not need repeating.

15. *Submission 4 - There is no evidence that Litigation Funding leads to the filing of opportunistic or unmeritorious suits*. This is simply evident from economic rationality. Augusta will generally invest more than $5m in a class action., As the funding is non-recourse, when a case loses the capital is lost. A funder would not remain in business where it invested in cases it did not consider had reasonable prospects.

16. *Submission 5 - ALFA supports the views of ASIC and the ALRC that the existing AFSL and MIS regulatory structures are unsuitable for a Litigation Funder*. It is evident that the MIS structure is designed for activities such as managed investments, unit trusts etc... In those circumstances' investors are contributing money in a pooled investment to generate a financial benefit. Applying this to class actions is trying to place a square peg in a round hole. Claimants do not contribute funds that require protection as they are engaging in a common cause of action. Protections do exist as lawyers representing the claimant and the group members have a fiduciary duty to act in their clients' best interest. Augusta is in principle not opposed to regulation. However, it is important that whatever the form of regulation adopted, it is efficient and workable, and the social cost does not exceed the benefits.

17. *Submission 6 - ALFA does not support wholesale changes to Part IVA of the Federal Court of Australia Act, such as converting the current "opt-out" structure (with open classes) to that of an "opt-in" model.* Augusta agrees with the ALFA submission.

18. *Submission 7 - ALFA considers that Common Fund Orders should be encouraged, and that Courts should be expressly empowered by legislation to make such orders.* Augusta agrees with the ALFA view entirely. With the substantial benefits of a Common Fund Order (**CFO**) the inquiry should consider a legislative solution that allows for CFO at an interlocutory stage in the proceedings. As the Victorian Law Reform Commission suggests, CFO's are a useful way to

[4] Deborah Cornwall (2020), 'ADF Payout Locked in, litigation funders defended', The Australian, June 8, 2020

ensure the court can control litigation funder fees. It states: *Common fund orders remove the need for a contractual arrangement between the litigation funder and class members who pay the fee. All registered class members are required to pay, whether or not they have signed a funding agreement. The size of the funding fee is determined by the court, most likely at settlement approval.*[5]

Common Fund Orders (**CFO**):

(a) Have played an important part in encouraging competition in funding and materially reducing funding fees.

(b) .

(c) Reduces the costs of building a book of claimants which means claimants receive a greater proportion of damages;

(d) Allow claims to be run where the individual amount of damages is small (say $1,000) but the aggregate damages are large and where book building may not be feasible; and

(e) Assis the court in dealing with similar claims being brought by different law firms with different litigation funders.

In addition, the courts also have far greater oversight over a funder's commission where a CFO is applied.

19. Submission A – The terms of the inquiry, while broad, do not appear to determine which funders the inquiry is aimed at or whether it relates only to class actions. It seems reasonable to expect all types of funding should be included. There are many funders of litigation including:

(a) third party litigation funders;

(b) law firms acting on a contingency fee or no win/no fee arrangement;

(c) insurers;

(d) creditors funding a claim for recovery;

(e) the Federal Government through the Fair Entitlement Scheme (**FEG**) that funds litigation

CONCLUSION

20. Augusta is grateful for the opportunity to provide this submission and welcomes as opportunity to present to the Committee, to answer any questions, or to provide any further assistance to the Committee.

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[5] Victorian Law Reform Commission, "Access to Justice: Litigation Funding and Group Proceedings: Report (html), tabled in Victorian Parliament 19 June 2019 (Paragraph 5.91) https://lawreform.vic.gov.au/content/5-risks-and-cost-burdens-class-actions