A Possible Approach to the Regulation of Litigation Funding - Supplementary Report

5 July 2021

pwc

Disclaimer

This report is not intended to be read or used by anyone other than Omni Bridgeway.

We prepared this report solely for Omni Bridgeway's use and benefit in accordance with and for the purpose set out in our engagement letter with Omni Bridgeway dated 3 June 2021. In doing so, we acted exclusively for Omni Bridgeway and considered no-one else's interests.

We accept no responsibility, duty or liability:

- to anyone other than Omni Bridgeway in connection with this report
- to Omni Bridgeway for the consequences of using or relying on it for a purpose other than that referred to above.

We make no representation concerning the appropriateness of this report for anyone other than Omni Bridgeway. If anyone other than Omni Bridgeway chooses to use or rely on it they do so at their own risk.

This disclaimer applies:

- to the maximum extent permitted by law and, without limitation, to liability arising in negligence or under statute
- even if we consent to anyone other than Omni Bridgeway receiving or using this report.

Liability limited by a scheme approved under Professional Standards legislation

Executive summary

In December 2020 the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) released its report into litigation funding and the regulation of the class action industry.[1] One of its areas of focus was the perception that third party litigation funders were earning an 'excessive' return from successful cases, at the cost of unacceptably lower returns to the plaintiffs.

While not being definitive in its conclusions, the PJCCFS pointed to a future reform agenda focusing on the regulation of returns to third party funders. Specifically, Recommendation 20 provides:

> *The committee recommends the Australian Government consult on:*
> - *the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);*
> - *whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor; and*
> - *whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.*[2]

Amongst other questions, the Commonwealth Treasury and the Attorney General's Department are now seeking industry views in response to the following questions arising from Recommendation 20 of the PJCCFS report:

3. *Is a minimum gross return of 70 per cent to class members the most appropriate floor for any statutory minimum return? If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?*
4. *Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?*
5. *How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.*

We have been asked by Omni Bridgeway to comment on regulatory best practice should the Government be minded to consider regulation of funded class action returns. This supplementary report should be read with our original report (March 2021) prepared for Omni Bridgeway.

With respect to Question 3, we note that:

- The mooted 70% return to class members does not appear to be based in any empirical analysis of actual case outcomes. The Commonwealth Treasury has an opportunity to take an empirical approach. To do so it will need to:
  - seek confidential commercial data from litigation funders to enable a whole of industry perspective on the actual level of returns for class members relative to the capital invested and risk borne by litigation funders
  - apply an analytic methodology consistent with regulatory best practice. We have provided additional insight as to what this might look like (see section 2.1).
- Evaluation of the Morabito dataset used in our original assessment, extended by the addition of case results obtained from the Law Council of Australia (LCA), reinforces our prior conclusion that a guaranteed 70% return to class members would mean substantially fewer class actions. Specifically, analysis of prior cases in the LCA dataset shows that, phrased in two alternative ways:
  - 30.8% of the class actions would not have occurred because there was no net return to the litigation funders (i.e. the legal costs alone exceeded 30% of the gross returns). In total, 24 out of the 26 cases in each database would be impacted (92.3% of cases covered by this industry-wide data)

---

[1] PJCCFS (2020)
[2] PJCCFS (2020, p.206)

- in general, class actions that provide a gross return of less than $25 million would be unviable and would not be funded. Such cases comprise 11 of the 26 cases used for each dataset (i.e. 42.3% of the cases from the new expanded data set).

With respect to Questions 4 and 5, we note that:

- There are some advantages in applying a graduated scale rather than a flat cap on returns. A graduated scale that incorporates a number of variables according to size of settlement can preserve the inherent risk sharing and incentive benefits of a single factor approach to pricing (e.g. relative to straightforward cost-based pricing), while also addressing potential limitations of a single factor approach (i.e. a potential windfall profits to a funder where the amount awarded or settled is a significant value; and a single, averaged value approach could make smaller cases unprofitable given that some case establishment and operating costs associated with a litigation will be fixed in nature).
- In designing a graduated approach we suggest that the scheme should seek to meet the following objectives

If a graduated approach were to be adopted then it should:

- be developed based on an analysis of a comprehensive assessment of previous class action outcomes
- not be too complex to understand and apply. In particular, we note that many of the factors that the PJCCFS noted (e.g. complexity, time, risk, etc) are likely to be correlated to some degree and so building a graduated approach with every possible variable is likely to be unnecessarily complex with little incremental benefit over a simpler graduated approach
- support the operation of existing portfolio business models of litigation funders
- achieve a more uniform recovery across cases by magnitude of settlement (while maintaining differentiation for larger cases with higher risk)
- support continued viability of the industry as a means supporting an important legal avenue for obtaining compensation, particularly for claimants with relatively small claims
- embody a minimum return to claimants in smaller cases, where costs are generally the highest in proportion to settlement values
- achieve a marginal allocation rate to claimants in the highest award value cases, in respect of the component of award value which exceeds a predetermined threshold value for such cases
- incorporate potential demand responses (to address the concern that the graduated approach is constructed off historic class action outcomes).

Contents

1 Introduction

1.1 The parliamentary review of litigation funding

In December 2020 the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) released its report into litigation funding and the regulation of the class action industry.[3] One of its areas of focus was the perception that third party litigation funders were earning an 'excessive' return from successful cases, at the cost of unacceptably lower returns to the plaintiffs.

On the basis that perceived 'excess returns' were being generated by litigation funders, and correspondingly lower returns were provided to the litigants, the PJCCFS considered broad options as to how to address this concern. The focus was on how to guarantee a minimum return to successful class action plaintiffs (i.e. how to cap returns to litigation funders).[4] For example, submissions to the PJCCFS provided a range of ideas as to:

- the basis on which to set a regulated cap (i.e. a guaranteed minimum percentage of the resolution for plaintiffs, or a maximum percentage of the resolution for litigation funders which includes reimbursement of investments made, etc)
- the structure of the cap (i.e. whether there should be a single 'cap' or some form of graduated (i.e. sliding) scale based on certain factors).

While not being definitive in its conclusions, the PJCCFS pointed to a future reform agenda focusing on the regulation of returns to third party funders. Specifically, Recommendation 20 provides:

> *The committee recommends the Australian Government consult on:*
> - *the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);*
> - *whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor; and*
> - *whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.*[5]

The matters directly raised by PJCCFS Recommendation 20 relate to the apportionment of litigation outcomes between class action industry participants and class members.

---

[3] PJCCFS (2020)

[4] This was despite particular reference by the PJCCFS to the Productivity Commission's view (see PC 2014, pp. 22, 61, 627) that a cap is not appropriate (particularly compared to caps on lawyers) as:

> *litigation funders provide a different service to lawyers — they provide funding and manage claims on behalf of clients rather than providing legal advice. As noted above, current commissions charged by funders appear commensurate to the services offered. … Therefore, the Commission considers that there is no need to place a limit on the fees of litigation funders.*

[5] PJCCFS (2020, p.206)

1.2 Additional consultation on the PJCCFS recommendations

On the back of Recommendation 20 of the PJCCFS, the Commonwealth Treasury and the Attorney General's Department recently published a consultation document entitled *Guaranteeing a Minimum Return of Class Action Proceeds to Class Members*. In it a series of questions were posed to stakeholders, seeking their views.

In this document we address the following questions posed in the consultation document:

3. *Is a minimum gross return of 70 per cent to class members the most appropriate floor for any statutory minimum return? If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?*
4. *Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?*
5. *How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.*

Question 3 was directly addressed in our original March 2021 report (PwC 2021). In this supplementary report we extend that original analysis in Chapter 2 through the application of a new dataset of case outcomes.

In Chapter 3 of this report we address Questions 4 and 5 by considering what a graduated approach could look like, but stress that additional research is required by Treasury to determine the appropriate returns on an industry-wide basis rather than supposition.

2 Is a 70% Minimum Gross Return to Class Members Appropriate?

A challenge here, largely due to confidentiality arrangements, is that there are few cases where there is complete public information about the relative return to the plaintiffs, lawyers and funders.

2.1 There is a need for a stronger evidence base to substantiate an appropriate minimum return

In the report we prepared following the release of the PJCCFS's inquiry report we stressed the need for any price regulation of litigation funders to be based on a strong evidence base using established regulatory tools and techniques.

Our comments in relation to these matters are from the perspective of established economic regulatory regimes in Australia.

Firstly, as we noted in our earlier report, there has been an acceptance since the mid-1990s, that government interventions in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures. This is built from the principle that, as a general rule, efficiency is maximised when markets are allowed to operate unhindered, but in certain circumstances, some markets fail, creating a legitimate reason for government to step in and correct the 'market failure'. The PJCCFS inquiry report does not establish the existence of a pervasive market failure in the case of litigation funding that would justify price regulation.

Secondly, the price regulation proposals mooted in Recommendation 20 are not based on a consideration of economic returns or economic efficiency in a conventional regulatory sense, but are instead directly based on considerations of proportionality and allocation. Indeed, this approach advanced by the PJCCFS is not consistent with regulatory theory and does not provide a balanced economic basis for the form of price regulation proposed in the report.

Specifically, in our original report we suggested that a balanced regulatory regime - consistent with regulatory best practice - could be developed from the principles and procedures of the models in:

- submission 100 by Professor RR Officer, which sets out a discounted cashflow (DCF) model, which sets the foundational approach, which would be complemented by
- submission 101 by Mr Sean McGing, which sets out an actuarial/insurance approach.

As such, if there is to be further consideration of a regulatory cap, we believe that the task should be undertaken by an existing and experienced regulatory body applying standard regulatory processes. Given that the Commonwealth Treasury is tasked with assisting in the preparation of a response, we suggest that it needs to act as though it is an impartial economic regulator in developing any specific model.

Specifically, we suggest that in suggesting any cap the Commonwealth Treasury should:

- undertake the analysis on an industry-wide basis (i.e. rather than on a case-by-case or funder-by-funder basis).
- be based on a DCF framework as an overarching approach, reflecting the often significant time-lag between the provision of funding and allocation of any returns
- include appropriate amounts/loadings for the full range of costs ('Indirect Funder Costs') including:
    - business development costs
    - capital costs
    - operating costs
    - overhead costs
- involve consideration of actual or notional costs in relation to capital at risk and insurance.

- the rate of return developed for a litigation funder regulatory model should be founded on accepted corporate finance principles, and include specific factors or adjustments to account for risks associated with litigation funding investments (such factors could be based on principles from the insurance industry and should be derived from the application of verified data).

The key challenges here are that:

- this may require the Treasury seeking from individual litigation funders, presumably under a non-disclosure agreement, information on all the class actions which they have supported.
- it does not appear that many of the Indirect Funder Costs noted above are collected in a manner allowing easy attribution to specific cases, and so allocation of common costs will become a more pointed issue.

In applying the overarching framework of the DCF model, because the model mechanism presuming a fixed relationship between costs incurred to settlement sum outcomes may not reflect costs incurred in individual cases, any percentage rate applied to settled sums to determine pricing could:

- represent a guiding value rather than an absolute control value
- allow for variations to deal with specific circumstances, or
- comprise a graduated (i.e. sliding) scale of percentage values according to the size of the settlement or award.

2.2 A broader dataset confirms the conclusion that a 70% minimum gross return will have considerable implications for access to justice

In our March 2021 analysis (PwC 2021) we analysed publicly available data compiled by Professor Morabito regarding class action outcomes,[6] concluding that:

> the PJCCFS's mooted approach (i.e. effectively a cap of 30% of gross returns for litigation funders), is projected to result in 36% fewer class actions (i.e. cases where the litigation costs alone would not have come within the proposed 30% cap, meaning the funder would have made a loss or been in a break even position and made no profit at all). This demonstrates the tradeoff inherent in any cap on litigation funder returns; it would provide higher returns to some class members, but some members would not receive returns they would have otherwise expected as fewer actions would be undertaken.

We have been requested to apply the same analytic approach to an alternative database of class action outcomes to test whether our original results are a function of the data used, or are more generally applicable.

Hence, we have used the Morabito dataset for the purposes of the analysis in this paper. In parallel with this dataset in respect of corresponding cases, we have also used a dataset derived from Attachment A of the Law Council of Australia (LCA) submission to the PJCCFS dated 16 June 2020. The process for aligning the datasets is described in Box 1 (next page).

In this way we have sought to establish, as close to as possible, an industry-wide perspective, using the information in Morabito as the base, and using the LCA database generally as a cross-check to calculations based on the Morabito data.

In relation to the industry-wide data of 26 cases simply assembled from the two separate databases:

- the Morabito data presents that the average percentage allocation of dollar settlement values to funders and lawyers combined is 42.9%; accordingly, on average, claimants would be allocated 57.1%
- the same cases assessed from the LCA database show a combined allocation to funders and lawyers of 42.8%, so that 57.2% would be available to claimants.

[6] See Morabito (2020)

Box 1 General synthesis of the Morabito and LCA data sets

The Morabito database covers a period from 2017 to 2020 and contains information on 35 cases. Of these, the cases immediately below do not in our view contain sufficient information for our basic analysis in relation to returns to funders (and the reciprocal values in relation to settlement sums, of returns to claimants):

- *Hardy v Reckitt Benckiser (Australia) Pty Ltd*
- *Cantor v Audi Australia Pty Limited* and the related class action
- *Andrews v ANZ Bank*. This case contains some relevant monetary information, but the data appears incomplete and inconsistent. We excluded this data from our analysis and note that this case would only have a small weight in relation to the total cases covered.

Based on removal of the above cases, the Morabito database yields 32 cases. Of these, six cases do not appear in the LCA database, leaving a base list of 26 cases. These Morabito cases that appear not to be included in the LCA data are:

- *Court v Spotless*
- *Webster v Murray Goulburn Co Operative Co Limited*
- *Smith v Sandhurst Trustees Ltd*
- *Kenquist Nominees Pty Ltd v Campbell*
- *Basil v Bellamy's Australia Limited*
- *El-Zein v Barton Nine Pty Limited*.

We then undertook selection of cases from the LCA database that correspond to the adjusted list from Morabito. The LCA database covers a period of 2001 to 2020 and contains information on 86 cases.

Of the 86 cases, 45 cases in the LCA database are excluded from our analysis given that the source data in Attachment A of the LCA submission presents in relation to these cases:

- that the case has no funder
- that funding information is not available, or
- the parties are to bear their own costs (with no dollar values shown for funding)

The same reason for excluding *Andrews v ANZ Bank* from our analysis of the Morabito data, also excludes it from the LCA data for assessment. These combined adjustments to the LCA base data result in a revised list of 40 cases.

Because the LCA data covers a broad time period, from 2001 to 2020, versus 2017 to 2020 for the Morabito data, aligning the LCA data with Morabito also provides in our view a current perspective from the LCA data.

In the LCA database, 10 cases appear to have concluded before the period covered by Morabito. Exclusion of these cases results in a revised list of 30 LCA cases.

A further four cases in the LCA database do not appear to be present in the Morabito database, so the adjusted total for the parallel cases in the LCA database is 26 cases.

It is important to note that such base data derived from these sources, by relating only to dollar settlement values and to the allocation of such values to specific parties, can only provide only a partial perspective of litigation funder activities, costs and financing. **Other actions that are funded, but are not successful; actions assessed, prepared for, but not progressed; and an entity's business development and operating costs, are relevant considerations for an assessment of the costs of litigation funding. These matters are not covered by our analysis.**

Allocation factors relating to the combined remuneration to the funder and legal costs,[7] as a percentage of gross settlement fund value, are expressly calculated and displayed in the Morabito base data. The LCA data shows only the specific allocations to the funder (as Litigation Funding Fees percentage of settlement) and to cover legal costs (Legal Fees as a percentage of settlement). Based on the Morabito procedure, such component fees or costs from the LCA database are simply added to form the combined remuneration factors for LCA within our analysis.

The two databases yield practically the same results: there are differences in treatment of individual cases between the Morabito and LCA tables[8] but it appears that any potential differences in accessibility to, or interpretation of, underlying source data do not have a meaningful effect, in terms of derived aggregate results. Importantly, subject to the comments in the preceding paragraph, both databases present consistent categorisation and application of underlying source information. Our parallel modelling of the two databases may provide a degree of confidence in the data and analysis encompassing a recent industry-wide perspective.

In the historical data, in very broad terms, the percentage of returns to funders reduces with increasing magnitudes of the settlement value. However, the costs that can be obtained from the data comprise only legal costs. The costs of funders will however include other direct costs, and indirect costs. Such costs will incorporate some elements that will be fixed in nature, so that the limited forms of return that can be inferred from the base data indicate that a material proportion of low dollar settlement value cases may present low rates of return.

The higher settlement value cases generally achieve higher returns, based on the direct costs only, of legal fees. It could be presented that such cases may provide support to litigation funding businesses overall, but also there is a correspondingly high business risk associated with individual large cases.

Although the application of a pricing regime involving a single allocation factor of 42.9% or 42.8% would in theory preserve recoveries based on the simple analysis of the historic data from the Morabito and LCA databases respectively, this would exacerbate differences between direct cost recoveries for cases below $25 million and above $50 million settlement values. If a perspective based on associated operating and other costs (in addition to the directly attributable costs of legal fees) is used, cases below $25 million could become unprofitable to funders. Cases generally above $50 million would achieve higher returns, but this may not be reflective of risks associated with such cases.

If the mooted 70% return to class members (a flat rate funder and legal costs allocation of 30%) is applied, this would reduce gross revenue to litigation funders by about 30% based on the historical data. Under this scenario, cases below $25 million would in general not recover the direct costs of legal fees and provide an appropriate margin for other funder costs incurred.

In the Morabito data set, under a 30% allocation to funder/legal costs scenario, nine of the 26 cases would not recover the legal fees expended (without any consideration of the Indirect Funder Costs).

One case is in the middle band of cases, *Inabu Pty Ltd v CIMIC Group Limited*. The remaining eight cases are in the band of 11 cases with settlement values below $25 million. Of the three cases that would cover the direct costs of legal fees, two would only cover them marginally. We note that the third case, *Santa Trade Concerns Pty Ltd v Robinson (No 2)*, is treated differently in the two databases. It would cover direct costs based on the Morabito data, but it would significantly under recover such costs based on the LCA data. Putting the *Santa Trade Concerns Pty Ltd v Robinson (No 2)* case to one side, with any even moderate allowance for cases making some contribution to other costs incurred, it is reasonable to present that, in general, cases below $25 million would be unprofitable, and would not be undertaken.

The LCA dataset presents a similar position. There are eight cases based on the LCA data that would not cover direct legal costs under this scenario. As in the calculations from the Morabito data, one case is in the middle band of cases, shown as *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd* and presenting almost identically to the middle band entry in the Morabito data set.

---

[7] Legal costs comprise complete lawyers' fees and disbursements (which are the other costs to bring the proceedings such as court fees and expert fees).

[8] We note that the LCA observes (footnote 5) that they included some 'approved costs' in their analysis of litigation funding fees. This may explain some of the differences in the treatment of specific legal cases by Morabito and the LCA

In the LCA dataset, seven of the 11 cases with settlement values below $25 million are shown not to recover the specific direct legal cost. Of the four cases that can be shown to recover their direct legal costs, three of those cases would only do so marginally. The fourth case, *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)*, presents a reasonable gross margin under this scenario in the LCA database, while in the Morabito database under the same scenario would not cover direct legal costs. Hence, based on our analysis and comparison of the data sets, and recognising that direct legal costs are a limited cost item, we consider it reasonable to present that, in general, cases with settlement values below $25 million would be unprofitable and accordingly would not be viable and would not be funded. Such cases comprise 42.3% of the cases in each dataset.

While cases with settlement values in the range $25 million to $50 million would in general cover the narrow range of direct legal costs used for our analysis, if full costs are considered (i.e. including Indirect Funder Costs), these cases may not yield a sustainable risk-adjusted commercial return over fully allocated costs. Cases with settlement values over $50 million would continue to present a return over direct legal costs and potentially also of other indirect funder costs, but cases of this general order of magnitude alone are comparatively infrequent and may not comprise a sustainable business.

3 Consideration of a Graduated Approach

The PJCCFS queried 'whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases'.[9]

The Commonwealth Treasury and the Attorney General's Department subsequently asked:

4 *Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?*

5 *How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.*

If constructed off a solid evidence base (see Chapter 2), a graduated model could possibly be developed to regulate the returns to litigation funders in a manner that provides higher returns to class members.

A graduated scale incorporating a number of variables according to size of settlement can go some way to preserving the inherent risk-sharing and incentive benefits of a single factor approach to pricing (e.g. relative to straightforward cost-based pricing), while also addressing potential limitations of a single factor approach.

Potential limitations of a single factor approach can include, for example:

- potential windfall profits to a funder where the amount awarded or settled is a significant value and the cost expended is low
- a single, averaged value, approach could make smaller cases unprofitable given that some case establishment and operating costs associated with a class action will be fixed in nature (i.e. the Funder Indirect Costs).

If smaller cases became unprofitable this would lead to a reduction in class actions as a means of obtaining compensation for such cases. This would be a negative outcome given that the Australian Competition and Consumer Commission (ACCC) considers the current *Competition and Consumer Act* framework for class actions to provide an efficient and appropriate means of obtaining compensation, particularly for smaller cases:

> *Class actions play a particularly important role in obtaining compensation in circumstances when individual action by plaintiffs is unlikely or uneconomical. In many competition and consumer enforcement matters the harm suffered by an individual consumer is too small to justify individual litigation but the collective loss to all affected consumers is substantial.*[10]

In its 2014 *Access to Justice* report the Productivity Commission (PC) considered that a single rate approach would not adequately protect consumers and that a sliding scale to setting lawyers' contingency fees should apply to ensure that fees for large claims are not excessive relative to costs, while also allowing a fair return to lawyers across cases.[11] While the PC specifically rejected a graduate/sliding scale approach for litigation funders,[12] we consider that the principles considered in the development of a sliding scale for setting lawyers' contingency fees is illustrative in considering the PJCCFS's mooted graduated scale.

---

[9] PJCCFS (2020, p.206)
[10] ACCC, Submission 15
[11] PC (2014, p.269)
[12] PC (2014, pp.633-635)

The mechanism presented in the PC report involves a reducing marginal percentage rate for allocating contingency fees to lawyers based on award values exceeding increasingly higher thresholds of award value. This mechanism is conceptually equivalent to the Australian Taxation Office income tax rate schedules for individuals, which apply increasing marginal taxation rates to income in excess of corresponding higher income threshold values.

Based on the economic merits of such a marginal rate sliding scale mechanism, the PC recommended in general that lawyers should be permitted to apply damages-based pricing (contingency fees) and that the percentage values for such pricing should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients.

In the PC's recommendation, the graduated scale approach is presented as being determinative of lawyers' pricing in each case for retail clients. That is, such pricing in these cases cannot be combined with or replaced by other bilaterally agreed pricing arrangements. In effect, the PC considered, therefore, that bilaterally agreed pricing would be appropriate for non-retail (i.e. sophisticated) clients

If a graduated approach were to be adopted then it should:

- be developed based on an analysis of a comprehensive assessment of previous class action outcomes
- not be too complex to understand and apply. In particular, we note that many of the factors that the PJCCFS noted (e.g. complexity, time, risk, etc) are likely to be correlated to some degree and so building a graduated approach with every possible variable is likely to be unnecessarily complex with little incremental benefit over a simpler graduated approach
- support the operation of existing portfolio business models of litigation funders
- achieve a more uniform recovery across cases by magnitude of settlement (while maintaining differentiation for larger cases with higher risk)
- support continued viability of the industry as a means supporting an important legal avenue for obtaining compensation, particularly for claimants with relatively small claims
- embody a minimum return to claimants in smaller cases, where costs are generally the highest in proportion to settlement values
- achieve a marginal allocation rate to claimants in the highest award value cases, in respect of the component of award value which exceeds a predetermined threshold value for such cases
- incorporate potential demand responses (to address the concern that the graduated approach is constructed off historic class action outcomes).

Appendix - Sources

Submissions:

- ACCC - No. 15
- Omni Bridgeway - No. 73
- Professor R.R. Officer AM - No. 100
- Mr Sean McGing - No. 101

Vince Morabito (2020), *POST-Money max Settlements in Funded Part IVA Proceedings*

PJCCFS (Parliamentary Joint Committee on Corporations and Financial Services) (2020), *Litigation Funding and the Regulation of the class Action Industry*, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding

PwC (2021), *Models for the regulation of returns to litigation funders*

PC (Productivity Commission) (2014), *Access to Justice*, available at https://www.pc.gov.au/inquiries/completed/access-justice/report

www.pwc.com.au