

Contingency Fees in Victoria and Parliamentary Inquiry

Summary

- **The State of Victoria has passed legislation that permits lawyers to charge a contingency fee to all group members in a class action by way of a 'group costs order'.**
- **Omni Bridgeway considers that legalising contingency fees, in the form permitted under the Victorian legislation, enables lawyers to act concurrently as a funder and a legal adviser, which creates an insoluble conflict of interest between lawyers' financial interests and their professional duties to their clients.**
- **Omni Bridgeway has detailed its views both on contingency fees and the proposed regulatory changes to the conduct of class actions and litigation funding in its submission to the Parliamentary Joint Committee on Corporations and Financial Services.**

Omni Bridgeway Limited (**Omni Bridgeway**) notes that the Parliament of Victoria has yesterday passed into law reforming legislation that will entitle lawyers in that State to charge a fee for their legal services, which is calculated as a proportion of the damages received by their client in the litigation proceedings (**Victorian Contingency Fee Law**). Such fee arrangements are known as 'contingency fees' because the amount of the fee is contingent upon the outcome of the case (**Contingency Fees**).

In addition, the Victorian Contingency Fee Law provides that any lawyer charging a Contingency Fee must fully indemnify their client for any adverse costs payable to the defendant in the event the case is unsuccessful and also provide any security for costs required by the court during the proceedings.

The Victorian Contingency Fee Law specifically provides for a 'group cost order' in the context of class actions. This is equivalent in substance to a 'common fund order' (**CFO**) at the outset of the case. The High Court recently determined that such CFOs granted to litigation funders were outside the applicable authority granted to the Federal Court and New South Wales Supreme Court under the respective class action regimes. The Parliamentary Joint Committee on Corporations and Financial Services' inquiry into class actions and litigation funding (**PJC Inquiry**) has called for submissions on whether permitting Contingency Fees could lead to less financially viable outcomes for claimants.

Omni Bridgeway considers that there is an inherent danger in permitting Contingency Fees because of the insoluble conflict of interest it creates for the lawyers between their financial interest in the outcome of the case and their professional obligations to their clients and as

officers of the court. This caused the then attorney-general George Brandis QC to note that "*conflicts of interest and moral hazards should be addressed*".¹

Omni Bridgeway believes the use of Contingency Fees risks undermining the current class action system, under which lawyers and third-party funders act as a check on each other, with both subject to court supervision.

This is one of the matters highlighted in Omni Bridgeway's submission to the PJC Inquiry, which can be accessed at www.imf.com.au/class-action-centre. The company looks forward to contributing its views to support the formulation of public policy settings that further the interests of group members, access to justice and transparency. Outlined below is the summary of the recommendations detailed in the submission:

- Support the proposed licensing regime for litigation funders operating in Australia recently proposed by the Treasurer. A licensing regime should include minimum onshore capital adequacy requirements, disclosure obligations and reporting standards in addition to the current conflicts management requirements
- Support the application of the managed investment scheme (MIS) regime to future funded class actions in Australia (i.e. grandfathering existing class actions), conditional on appropriate modifications to the MIS framework to ensure it is fit for purpose in a litigation funding context
- Introduce legislation to require a minimum return to group members in a funded Australian class action of no less than 50 per cent of the gross proceeds from the action
- Introduce legislation to end the use of common fund orders and prevent the introduction of contingency fees for lawyers in Australia
- Introduce legislation to give the Federal Court exclusive jurisdiction over securities class actions and any other class actions involving Federal law
- Introduce from May 2020 a six-month moratorium on new Australian class actions that are associated with COVID-19-related disclosures²

Omni Bridgeway background

Omni Bridgeway is a global leader in dispute resolution finance, with expertise in civil and common law legal and recovery systems, and operations spanning Asia, Australia, Canada, Europe, the Middle East, the UK and the US. Omni Bridgeway has built its reputation as a trusted provider of funding solutions and offers end-to-end dispute finance from case inception through to post-judgment enforcement and recovery.

Authorised by the Disclosure Committee

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¹ Chris Merrit "*Regulation is on the cards*", The Australian, 7 November 2013.

² Omni Bridgeway first publicly supported a six-month moratorium on new Australian COVID-19 related class actions in its ASX Announcement of 14 May 2020.