# Foes of litigation funding cannot deny self-interest

*Andrew Saker*

Andrew Saker, CEO and managing director of Omni Bridgeway

One consistent theme that has been marketed by those who oppose litigation funding and class actions is that litigation funders take too much of the recoveries and that their returns are avaricious and out of step with other types of investments.

It follows that the "mums and dads" who comprise group members in class actions are left to fight over the scraps.

Omni Bridgeway supports appropriate regulation of the Australian class action landscape and funding industry and welcomes a balanced debate on any reform. But this kind of misinformation and flawed statistical analysis — presented in a way that serves its authors' own commercial interests — has no place in that debate.

The first thing to note is that those making the loudest complaints are not the group members whose returns have been affected by the payment of commissions to funders. Instead, it is industry advocacy organisations such as the Australian Institute of Company Directors, Ai Group and the Menzies Research Centre.

They have shrouded their self-interest — protecting their own members from class actions for wrongdoing — in hand-wringing concern for mum-and-dad group members.

This line of attack was developed and disseminated by the US Chamber of Commerce and its "independent" think tank, the Institute for Legal Reform. The chamber's motivation seems to be to cut off litigation funding, thereby limiting or eliminating class actions to protect its constituents (the three million businesses it

represents) from being held to account when they have breached their obligations to their shareholders, clients or communities.

The ILR has not been content to confine its activities to its home market and has been running a long campaign to influence policy in Australia. Sadly, other parties are now singing from the same self-interested song sheet.

What is lacking in their critique of litigation funding and class actions is widespread outrage from the mum and dad group members they purport to protect. With few exceptions, group members are not lining up to complain about litigation funding, having funds to access justice or receiving a portion of a claim, when they would otherwise receive none.

This is the real issue: how many claimants in funded class actions would have received nothing because they were unable to take action as individuals without the support of litigation funding?

One example, funded by Omni Bridgeway, is the class action taken by the 6700 victims of the mismanagement of Queensland's Wivenhoe Dam during the 2011 floods. Lead claimant Vince Rodriguez says: "Without funding from Omni Bridgeway, I would not have been able to successfully pursue my claim and run an action against such powerful entities."

In approving the settlement in the class actions against the Department of Defence over contamination caused by the use of toxic firefighting chemicals on Defence facilities, Justice Michael Lee said the case would have been "impossible to bring without a funder" and delivered settlements that "can fairly be described as excellent".

The other myth perpetuated by critics of litigation funders is that the returns generated by funders are outrageous when compared to other investments.

In one part of its submission, the MRC compares returns derived from Australian bonds, the ASX 200, US private equity and other investments to the ROI reported by three funders. This is akin to comparing two completely different measures and holding it out as science.

What the ROI figures cited in the MRC report do not include are the operational overheads that are not capitalised into the investments. You can't fund a claim if you don't run a business. The appropriate comparison is that Omni Bridgeway has generated an all-in ROI of 21 per cent per annum during the period 2001-19 — still strong compared to other considerably lower-risk investments but far from the outrage critics have attempted to seed.

The other piece of information missing in the MRC paper is the nature of the investment. As anyone who knows investing will be aware, comparing investment classes requires consideration of multiple factors, including liquidity, loss-mitigation strategies and risk.

Investments in bonds or equities are highly liquid, while those in litigation are not. In fact, there is no active market for litigation, so when a funder makes an investment, it knows it will be committed to that investment until it completes, for better or for worse. Across the industry, that is an average commitment of 2.6 years for class actions. The Wivenhoe Dam matter is still going after more than eight years.

In terms of loss mitigation, if your bond or equity investment is not going well, you can sell out, maybe for a loss, but you don't lose the lot. For litigation, while there are termination rights in some circumstances, if you exit you lose the lot and will possibly be liable for 70 per cent of the other side's costs. As such, your

maximum downside from an investment is 170 per cent of every dollar you invest. For bonds and equity, the maximum you can lose is 100 per cent — and only if you have gone to sleep and don't take remedial steps before that occurs.

The MRC claims that the "high returns and low risk of litigation funding make this a tantalising investment class". Anyone who suggests this has never been involved in litigation.

Litigation funders must evaluate and assume risks — often running to tens of millions of dollars — before the first court hearing, when there are uncertainties in terms of the time it will take to resolve the matter, the legal and other costs of the case and, of course, the outcome.

Of course, if all goes to plan, there can be a generous return. But to describe this is a low-risk investment is absurd.

*Andrew Saker is CEO and managing director of Omni Bridgeway.*