



NATIONAL UNION OF WORKERS

Introduction

The National Union of Workers (NUW) writes this submission in response to the Victorian Law Reform Commission 'Access to Justice - Litigation Funding and Group Proceedings' Consultation paper dated July 2017. It does so within its Terms of Reference but only pertaining to those parts relevant to Litigation Funders.

The National Union of Workers is a broad-based blue collar trade union. It operates nationally but has approximately 26,000 members in Victoria. It is engaged in litigation on behalf of its members from time to time as you might expect any large trade union to be.

Until recently, the NUW had not experienced the justice system where its members also had a Litigation Funder 'as an investment partner' to the subject proceedings. The experience for our members - regional members from in and around Bendigo who had lost their jobs from the company that was subject to the litigation - was one of complete despair.

'The legal system is rigged against us'¹

The circumstances of *Laurence Andrew Fitzgerald and Michael James Humphris in their capacity as trustees for certain former employees of Huon Corporation Pty Ltd ('Huon') v CBL Insurance (formerly called Contractors Bonding Limited), Supreme Court of Victoria Proceeding No. c1-2011-5405* (hereinafter referred to as 'the subject proceedings') are well documented.²

The subject proceedings were part of an eleven year series of events. Our members who were only paid a part of their redundancy entitlements four years after their final payment were patiently waiting for the result of the litigation. The following summary is a useful guide:

¹ NUW member at Bendigo Town Hall meeting with NUW representatives, Trustees. 9 June 2016

² See Ben Butler, 'Victims Get Nothing as Litigation Funder, Lawyers Share the Spoils', *The Australian* newspaper 22 August 2016

Date	Action
Late 2005	NUW Negotiations for CBL Policy
December 2005	Policy signed with CBL
June 2006	Huon goes into Administration
December 2006	Trustees demand CBL payment
January 2007	Trustees make second demand to CBL for payment
March 2008	Trustees make third demand to CBL for payment
July 2010	Huon Liquidation - last dividend made to former Huon employees
September 2011	Trustees receive funding from LCM to pursue CBL through Piper Alderman Lawyers as a part of the funding arrangement
October 2011	Statement of Claim filed in Supreme Court of Victoria
September 2013	Trial starts
October 2014	Part judgement
May 2015	Final judgement - Compensation determined

July 2015	Appeal on judgement by CBL
February 2016	Appeal abandoned by CBL
16 May 2016 & 16 June 2016³	Trustees informed former Huon employees of litigation result and how monies were split between the plaintiff party's representatives

Cost Breakdown

\$5,107,259 were received from CBL as the ordered sum, interest and costs.

This amount was dispersed as follows:

LCM	\$1,848,259
Piper Alderman	\$1,792,000
Barristers	\$885,000
Holding Redlich	\$235,000
Grant Thornton	\$211,000
PPB - Liquidator	\$50,000
Other Lawyers	<u>\$86,000</u>
Total	\$5,107,259

The actual plaintiff - the beneficiaries to the Trust who were NUW members - received no entitlement. This is in spite of the large order that was made by the court. All monies were taken by the various representatives acting ostensibly on our members behalf, in the lead up to, during and subsequent to the trial. For its part, we note that our members have not paid one dollar in membership since their formal employment separation. Nor were we ever seeking backpay of membership dues in the event of a further distribution from the trial.

We believe that this is not a good public policy outcome. Those who were clearly wronged decided to prosecute their claim in spite of all of the various tactical legal barriers put before them and won an outcome that should have meant a disbursement to them after 11 years. Our Victorian system of justice however did not produce this outcome. It is clear to us that some form of market regulation needs to occur to prevent this result from occurring again.

³ Please see Letter dated 16 June 2016 from Trustees to the former Employees of Huon.

Recommendations

We believe that there are two measures that would have prevented this outcome from occurring.

The first measure is that we believe that there should be a mechanism that informs the Court that a Litigation Funder is a private partner to the proceedings. While we understand that these are in essence commercial arrangements entered into, it may assist the court in any determinations that it may make in the administrative proceedings of the trial and ultimately we believe the administration of justice.

Secondly, we are of the view that where a Litigation Funder is a private partner to proceedings, the court should have some form discretion through a formula that it can work to, once an order is made. In the current example, a percentage range of the final sum that was worked out for our members would have meant a dividend to them. It is our view that the market will adapt to any regulatory aspects that government may make in this regard.

We thank the Victorian Law Reform Commission for the opportunity to make this submission. We are available to make any further comment with respect to our submission.

NATIONAL UNION OF WORKERS

22 September 2017



Grant Thornton

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To The Employee as addressed

Correspondence to:
GPO Box 4736
Melbourne Victoria 3001

T +61 3 8320 2222
F +61 3 8320 2200
E info.vic@au.gt.com
W www.grantthornton.com.au

16 June 2016

Laurence Andrew Fitzgerald and Michael James Humphris in their capacity as trustees for certain former employees of Huon Corporation Pty Ltd (“Huon”) v CBL Insurance (Formerly called Contractors Bonding Limited) Supreme Court of Victoria Proceeding No. C1-2011-5405

We refer to our circular of 16 May 2016 in relation to the above and the disappointing statement there is no prospect of a return to employees from the policy the Trustees held with CBL Insurance Ltd. The Trustees were not involved in establishing the policy.

A number of people have requested a more comprehensive overview as to why there will be no return when ostensibly the Trustees, on half of Certain Employees, were “successful” in the litigation. We have set out more information and details of the application of the funds in this letter. As noted in the letter of 16 May 2016 there were three key reasons which we have expanded below:

1. The time to pursue and prosecute the matter:
 - The first demand for payment was made on CBL in December 2006, with further demands during 2007 and 2008.
 - Discussions commenced with CBL in 2007 to no avail. From the beginning CBL maintained an obtuse approach in dealing with the Trustees’ demands and subsequent litigation.
 - By 2008 it was apparent CBL had no intention of paying the Insurance Bond unless forced to do so in Court. CBL stated that the policy was void on the basis of misrepresentations made to it by Huon. The process to force payment took a further 7 years, as the payment of monies was not made until August 2015 and then the funds were required to be held in Trust pending an Appeal initiated by CBL.

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- The Trustees were without funds. In order to pursue Court action the Trustees had no option but to approach third parties for funding. Extensive discussions took place with Huon’s Liquidator but a funding arrangement couldn’t be consummated.
- The Trustees also approached the then Department of Education, Employment and Workplace Relations (“DEEWR”) which administered the Commonwealth Government’s GEERS, for funding. As you are aware it advanced funding to the Liquidators of Huon for distribution to employees in part payment of their entitlements. Unfortunately legislative impediments meant that DEEWR could not enter into a funding arrangement with the Trustees to pursue litigation.
- As a last resort, the Trustees approached a number of litigation funders. This process culminated in a funding agreement being entered into with LCM Litigation Investment Fund. The drawback of these arrangements is that in the event of a successful recovery the funder is entitled to a return of its advance (monies put up to pay for legal dispute) and a percentage of the sum recovered. At the inception of this arrangement the Trustees were confident a sufficient recovery would be made so as to enable a reasonable return to employees.
- The trial occurred in Sept/Oct 2013 and partial judgement was handed down in October 2014. The assessment of funds payable by CBL was not completed until 1 May 2015 when the court confirmed the sum. We expected this would be relatively straightforward, however, numerous arguments took place in relation to the calculation of the claim.
- CBL then sought an extension of time in which to Appeal the Judgement, then leave to Appeal which did not get resolved until February 2016.
- The Trustees were always confident the Insurance Policy would and could be paid, but the legal impediments and delays dragged this out for years.
- The Trustees then initiated a legal dispute with the Litigation Funders seeking to force a dividend to be made to employees, however on legal advice, we have abandoned that dispute.

2. The total funds recovered from CBL were:

Principal sum	\$4,132,232
Interest	\$500,027
Costs contributions from CBL	\$475,000
Total Proceeds	\$5,107,259

Total of all outgoings – payments of time and cost including GST to key advisors involved in the process:

Piper Alderman	Solicitors from Sept 2012, throughout Trial	\$1,792,000
Barristers (various)	Utilised through Court proceedings	\$885,000
Holding Redlich	Solicitors pre and early proceedings to Sept 2012	\$235,000
Grant Thornton	Accounting & administration assistance to Trustees	\$211,000
PPB – Liquidator	Access to Employee records	\$50,000
Other Lawyers	Non litigation advices including the Arbitration process	\$86,000
Total		\$3,259,000

The litigation funding agreement required LCM to meet the costs and then be reimbursed from proceeds.

- LCM as funder was bound to pay all legal and action costs, being the risk it took on. LCM as a consequence was entitled to a percentage of the gross recovery. LCM's entitlement under the funding agreement exceeded monies available after reimbursement of the costs. As a result there were no net funds available to distribute to employees.

We share the extreme frustrations of employees and note the following:

- CBL refused to make any payments until forced to do so by the Court.
- It took almost 9 years from the initial demand made on CBL before the funds were paid into trust where they were frozen for another 6 months.
- The Trustees exhausted numerous options before securing funding from LCM, in particular the process whereby the original Liquidator of Huon may have provided funding.
- The initial legal cost estimates were hopelessly inadequate as a result of the long trial time and legal process and disputes.
- In the absence of litigation funding we expected absolutely no recovery at all as CBL simply refused to pay on the Policy.

Yours faithfully



Laurence Fitzgerald
Trustee



Michael Humphris
Trustee