

THE COST BARRIER OF CONSUMERS CLASS ACTION IN INDONESIA AND HOW TO LEARN FROM THERE THE PROCEDURE HAS BEEN ADOPTED¹²

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Abstract

Indonesia's consumer law protection has adopted class action procedure as a strategic response to consumers' access to justice in the 1990s. When it was applied in some consumer cases in Indonesia, most of them failed with the cost barrier to notify all class members as the main factor.

Based on Watson point of view of divergent element in the comparative law study, this article first, examines the difficulties facing those who commencing consumers' class action in Indonesia. Second, looks to Australian procedural law and practices to explore whether similar problems exist. Third, make use of it comparatively to overcome the cost barrier in Indonesia.

Looking at some Australian provisions and practices, and with respect to the Indonesian situation, it analyzed that the solution to the cost barrier in consumers' class actions for Indonesian litigants may be expressed in the terms of:

1. Optimizing the principles of having 'the judges involved' and 'the efficiency of justice' to arrange the most efficient way of notifying all group members;
2. Supporting the growth of commercial litigation funders based on rules;
3. Establishing a funding support body, like, the *class action funding support agency* by the Government,

The two main litigation funders, the commercial funder and the *class action funding support agency*, then may work in harmony. Where a class action lawsuit cannot be supported financially by the commercial funder, it may be supported by the *class action funding support agency*.

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Keywords: litigation cost of class action, Indonesia, Australia, litigation funding

Introduction

Indonesia has adopted class actions to consumer law protection,¹³ and eventually provided for it more generally by the Supreme Court through the *Supreme Court Rules No 1 of 2002* (Ind).

Although some consumer' class actions were commenced in Indonesia in the decade since adoption, most have failed. One of the reasons for this failure has been the cost associated with commencing class actions.¹⁴ For instances, in *Seven consumers v Guyub Raharjo Co*,¹⁵ and in the *12 Activists v Minister of Economic of Indonesia cs*,¹⁶

Looking at R2 of the *Supreme Court Rules, No 1 of 2002* (Ind), it can be said that Indonesia tends to follow the United States and Australian class proceeding regime.¹⁷ This article discusses the cost barrier faced in commencing class action in Indonesia and considers some legal argumentation and legal comparison (from the Australian provisions) to see if they help overcome that cost barrier.¹⁸ Watson argues that legal adoption

¹³ See, r46(1) of *The Consumer's Protection Act No 8 of 1999*

¹⁴ The cost aspect as an obstacle also faced by another Asian Country, Malaysia. See, Yeow Choi Choong & Sujata Balan, *Class Actions in Malaysia: Principles and Procedural Obstacles*, a paper in *The Globalization of Class Actions Conference* (Oxford, England, 12 – 14 December, 2007) 13, Available at http://www.law.stanford.edu/display/images/dynamic/events_media/Malaysia_National_Report.pdf, 10 October 2011.

¹⁵ See, cn 11/Pdt.G/2002/Sleman General Court, unreported. In this case, seven consumers of an investement product of Guyub Raharjo Co commenced lawsuit on behalf of their own and another 1300 potential consumers interest. They alleged Guyub Raharjo had absconded the consumers' investment funds in breache of the *Consumers' Protection Act No 8 of 1999* (Ind).

¹⁶ See, cn 335/Pdt.G/2005/Central Jakarta General Court, unreported. In this case, several activists brough class action lawsuit on behalf of them selves and all Indonesian citizens interest based on allegation that Minister of Economic Departement of Indonesia breached the civil right and the good governance by increasing the fuel expence on October 1th, 2005 unwisely without regard that it created more poor condition to Indonesian citizen.

¹⁷ Based on the comparison of r2 of the *Supreme Court Rules No 1of 2002*(Ind), r23(a) of the *Federal Court of Civil Procedure 1966* (US), and r33(C) Pt.IVA of the *Federal Court of Australia Act 1976*(Cth).

¹⁸ The result of study to the foreign law comparatively can be used as an input to make a law reform to the other country. See also, Sidhartha, *The Reflection of the Legal Jurisprudence' Structure (Refleksi Tentang Struktur Ilmu Hukum)*, (Mandar Maju, Bandung, 2000) 128.

can take place even though there are differences between legal systems, with one system serving as a model to be imitated by the other.¹⁹

In part one of this article, the ways in which cost is a barrier in consumer' class action practices, how they confronted the problem, the judge's role and the Government's responsibility, are discussed and analysed in detail, to examine who deals with the cost problem in class actions. In the second part, the article will describe the Australian approach to consumer' class action to describe how they have overcome the cost problem. The third and last part will consider some legal argumentation and the Australian provisions, to see if they might be adapted and adopted in light of Indonesian experiences, to help overcome the cost barrier faced when commencing consumer' class actions.

Part One: the Cost Problem of Consumer' Class Action in Indonesia

The right to commence consumer' class action in Indonesia can be seen in R46(1)b of the Consumer Protection Act No.8 of 1999, that states:

'The Civil lawsuit againsts Corporate can be commenced by a group of consumers that have the same interest.'

How class actions work in Indonesia can be seen in the *Supreme Court Rules No 1 of 2002* (Ind) that applies to all courts. R2(2) of *The Supreme Court Rules No 1 of 2002*(Ind), states:

'The lawsuit can be commenced in representative or class proceeding if:

- a. The class or group of members is so numerous, that it is not efficient to be commenced individually or by joinder;
- b. The representative party and all the group he/she represents have common facts or circumstances, legal issue substantially, and seek the same relief;
- c. The representative party represents and protects the interest of all group members adequately and fairly;
- d. The court may advise to replace the lawyer if he/she contravenes with his/her duty to protect the interest of the group members.'²⁰

Based on r5(4) of the *Supreme Court Rules No 1 of 2002* (Ind), once a lawsuit is certificated as class action, the representative plaintiff is immediately required to notify all potential members of the lawsuit, and give them an opportunity to opt out if they disagree with the filing of the class action.²¹ The *Supreme Court Rules No 1 of 2002* (Ind) does not provide for who should pay the cost of filing class action lawsuit at the beginning. Accordingly, the general principle of the cost of bringing civil litigation as constituted on r121(4) of *Het Herziene Indonesisch Reglement*,

¹⁹ See, Alan Watson, *Legal Transplants And European Private Law*, (Univerzitet u Beogradu, Pravni Fakultet, Belgrade, 2006) 6-7.

²⁰ Available at http://www.elsam.or.id/pdf/kursusham/PERMA_No_1_Tahun_2002.pdf.

²¹ See, r7(2)a, and r7(3) of the *Supreme Court Rules No 1 of 2002*(Ind).

Staatblad No 44 of 1941 (Ind), has been implemented: the cost for filing the lawsuit should be paid in the beginning by the plaintiff, as the initiator.

The representative plaintiff in consumer' class actions, has to retain approximately Rp510 000 to Rp615 000 in the beginning, coupled with the cost to notify all potential members immediately as the suit is certified as a class action by the court.

Looking into the advertisement fare, the cost to notify all potential members in consumer' class action through the national newspaper is approximately Rp17 550 000 (AUD1907.6) to Rp26 550 000 (AUD 2885.8) to do so for 150mmX200mm format advertisement.²² The cost to notify all potential members in consumer' class action is costly, almost a hundred per cent of the total legal cost in general. It seems burdening for consumers to initiate a class action, since she/he should bear the cost of notification to all members that is approximately 21.7 times of her/his wages a month, while her/his claim was small. In respect of a consumer representative plaintiff, it becomes cheaper to sue individually, because he/she only pays about Rp566 000 (AUD61.5) to Rp615 000 (AUD66.8) along with her/his solicitor cost.²³ Rowe Jr. noted that the implementation of the rule that 'the loser should pay' in class actions raises major problems for the representative plaintiff of the group, since he or she must pay the defendant's costs, including the cost of his/her lawyer.²⁴

One of the objectives of adopting consumer' class actions in Indonesia is to abandon the defficiency of the administration of justice for a group of consumers as parties in joinder. With this in mind, the simplicity and efficiency of class actions ought always to be borne in mind.

1. Learning from some cases in Indonesia

The representative plaintiffs in *Seven consumers v Guyub Raharjo Co* and in *12 activists v Minister of Economic of Indonesia cs*, had no money to pay the cost of notifying all potential members of the group of consumers so the action was stopped. In *Seven consumers v Guyub Raharjo Co*, the judges

²² Interpreted by the author, from *Kompas* Newspaper's advertisement fare at Display Klasika-BW-prize and Display-BW-prize, <http://www.pasangiklan.com/tarifiklan>, 20 September 2011.

²³ Based on provision of *Penetapan Ketua Pengadilan Negeri Wates Nomor: W13.U3/550/HK.02/V/2010* (Ind); *Penetapan Ketua Pengadilan Negeri Jakarta Utara Nomor: W10-U4/2767/HK.02/VI/2010* (Ind); Based on Rule 123 of the *Het Herziene Indonesisch Reglement, Staatblad No 44 of 194*, Indonesia has the principle that the applicant should not be represented by the lawyer in filing lawsuit. But recently, most of the lawsuits filed represently by lawyer.

²⁴ D Rowe, Jr, Jr, *Debate Over Group Litigation in Comparative Perspective: What Can We Learn from Each Other?*, dalam *Duke Journal of Comparative & International Law*, Vol 11, No 2 (Spring/Summer 2001) 158, available at <http://www.law.duke.edu/journal/djcl>.

order the representative plaintiffs to notify all 1300 potential members of the class through the local and national newspaper. It would cost Rp13 000 000 to do so. The consumer representative plaintiffs did not do this. Among the reasons were that the cost burdened them and were not proportionate with the damages they would receive if the case were settled successfully. Of the Rp13 000 000 for notification, each of the consumer representative plaintiffs should share Rp1 857 142 from the total cost of notification (plus the other proceeding cost), while apportioned damages being claimed were on average Rp2 000 000 to Rp8 000 000.²⁵

The lawyer asked the judges whether the way of notification could be changed to the local newspaper (Yogyakarta Province), and the national radio (Radio of Republic Indonesia), arguing they were more efficient. The judges did not agree to this request as many of the potential members lived outside Yogyakarta Province, and notification through the radio would not satisfy the notification provision.²⁶

The consumer representative plaintiffs asked their Lawyer from the Legal Aid Foundation, whether they could pay upfront for the cost that will later be repaid were the case to be settled successfully.²⁷ The Lawyers' Legal Aids Foundation did not agree to do so, since it was uncommon to make an agreement like that, and it would have greatly reduced the Foundation's budget²⁸ It seems that the Lawyer's Legal Aid Foundation did not want to face the risk of not being able to recover the cost of notification.

In *12 activists v Minister of Economic of Indonesia cs*, the representative plaintiff failed to fulfil the requirement to notify all potential class members through the local and national newspaper, as the judges ordered, which would have cost approximately Rp24 000 000. One of the reasons was that the representative plaintiffs had no funds to do so. They applied to change the way of notification to using the Internet, but the judges did not accept the application, as most of the potential members would not have been reached given they are yet to gain access to the Internet²⁹

Two points are to be made. First, did the plaintiffs truly lack the funds to notify potential members? Could they not account for that cost from the funds of their advocacy? In fact, of 12 activists two were members from

²⁵ Based on the pleading in *consumers v Guyub Raharjo Co*

²⁶ Based on interview with the Lawyer, on 8 January 2006.

²⁷ Legal Aid Foundation (LBH-Ind) is a non-profit foundation, held by non government organization or by the Faculty of Law, serving for pro bono legal assistance to the persons with disability socially or economically. See, The history or profile of YLBHI and LBH Jakarta, at <http://www.ylbhi.or.id/index.php?cx=1>; Also <http://www.bantuanhukum.or.id/index.php/id/profile/sejarah>.

²⁸ From the interview with the lawyer, on 8 January 2006.

²⁹ From the interview with the Lawyer, 6 August 2007.

non-government organizations that actually should provide sufficient funds for their action, but the others were personal activists, including two student activists, two women activists, two labour activists, youth leader activists, and two artists. They did not try to make such an agreement to bear the cost together. Second, the Internet as a way to notify is more efficient, but might be unjust for some members of the potential class and consequently be in breach of the provision. It also can be argued that even Indonesian activists are still burdened by the cost of notification.

Moreover, the Internet can be a more efficient means of notifying a very large number of potential members to a class action and therefore form an alternative solution to the cost barrier. On the other hand, not all of the regions of Indonesia can be reached by the Internet, so as a technology, it has limited usage. Generally it was a good idea for the representative plaintiffs in *12 activists v Minister of Economic of Indonesia, cs* to use the Internet as an alternative to overcome the cost barrier. However, it remains arguably unjust and ineffective.

Based on these two cases, there is a contradiction: generally speaking class action is more efficient than individual or joinder proceeding, but the representative plaintiff still faces the cost barrier of notifying all potential members. There is more to be learned regarding potential solutions from the cases below.

In *Harun Al Rasyid (KOMPARTA) v Thames PAM Jaya, Ltd*, there were 800 potential group members of consumers.³⁰ After being certificated as a class action, the judges ordered the consumer representative plaintiffs to notify all 800 potential members of the group through the local newspaper. The lawyer faced the burdensome cost of doing so. They refused to do so as it was expensive to notify all potential members that live in Jakarta through the local newspaper. Instead, they asked the judges that notification be through the notice boards at all five drinking-water agency offices. The judges recognized their application and changed the order. The judges considered that the way to notify 800 potential members of KOMPARTA through the notice board at all five drinking-water agency offices was still acceptable to the potential class members and pursuant to r1no 12 and r7(2) of *The Supreme Court Rules No 1 of 2002* (Ind). The representative plaintiffs then notified all 800 potential members using the notice boards free of

³⁰ See, cn 276/Pdt.G/2003/Central-Jakarta General Court, unreported. In this case, Harun al Rasyid as a member of KOMPARTA and other seven members, on behalf of them selves and other members of KOMPARTA (Association of Jakarta Drinking-Water Consumers) interest brough a lawsuit against Thames PAM Jaya Ltd, Palya Ltd. and Governor of Jakarta, on the allegation that the defendants did negligence by having bad service or doing nothing in facing bad quality of the drink water, so that in common circumstances were caused injury and damages to KOMPARTA as their consumers.

charge.³¹ With innovative lawyers and judges willing to entertain their suggestions, we can reach appropriate solutions to overcome the cost barrier. In this case indirect notification to 800 members that lived in the same and certain region through the notice board created efficiency in the proceeding, since it was served and announced at the five offices. This was done in a day and there was no expense to do so. The cost barrier can be overcome by choosing the most efficient way of notification, but only in a limited situation.

In *J Nurjaman v Sarana Jaya,Ltd*, the total number of the potential members was only 62 persons.³² The lawyer notified all members directly by inviting them, since they were living close by.³³ The cost was only Rp510 000 (AUD55.4).³⁴ Based on that case, direct notification can still be efficient and give the optimum result. However, it has limited use. It may be used in cases where there are small numbers of identified potential members that live in close proximity. Direct notification cannot be used in cases of large numbers of non identified potential members that live in a widespread area. Given the two cases described above, it can be argued that the cost barrier can be overcome by choosing the most efficient way of notification, but only in a limited situation: with a small number of potential members who live in close proximity and the same region.

Based on some cases above, it can be said that the cost to notify the potential members in class actions is costly, especially through the newspaper, with that cost being almost the same as the total legal costs in general. It is a burden on consumer representative plaintiffs and a discouragement. An alternative solution could be made by the consumer representative plaintiffs inviting other group members to lighten the burden of cost. Alternatives such as choosing a more efficient way of notification, for example through use of notice boards, direct notification or the Internet have some limitation might be unjust. A cost agreement between client and lawyer, as an alternative to assist with the cost of notification in class actions is still uncommon in Indonesia. Although Indonesian Legal Aid Institutes

³¹ As seen in the expenditure document they kept to notify in cn 276/Pdt.G/2003/Central-Jakarta General Court, unreported. They only incur for the transportation expense, and publish the notification for free of charge.

³² See, cn 580/Pdt.G/ 2006/South Jakarta General Court, unreported. In this case, J Nurjaman as an occupant of Tebet Flat on behalf of him self and all occupants of Tebet Flat brought a lawsuit against Sarana Jaya Ltd, in allegation that the defendants did negligence and breached the civil right of the occupants since the management transferred from Governor of Jakarta to Sarana Jaya Ltd and Karya Cipta Karsa Ltd, by raising the flat fare unilaterally, so that burdened the occupants as poor people and leak them to get the cheap housing, as the objective of developing that Flat.

³³ From interview on 7 September 2007.

³⁴ Based on the interviewed with the lawyer and the expenditure documents in the case.

fund legal action, it is not enough to finance the cost of class action regularly.

2. The Judges' role.

The judges have a role to 'play-the game' efficiently. Indonesia has the principle of 'the judge should become involved', that implicitly can be seen in r4(2) of the *Fundamental of the Judiciary Power Act, No 48 of 2009* (Ind), that states: 'The court should assist litigants and make every effort to overcome all obstacles to meet the aims of a simple, speedy and cheap resolution of proceedings'. R132 of The *Het Herziene Indonesisch Reglement, Staatblad 1941 No 4* or r156 of The *Rechts Reglement Buiten Gewijsten, Staatblad 1927, No 227*, also expresses that principle, which states that '[t]he judges should assist litigants who do not understand the procedures in filing a lawsuit'. These provisions express that the judges have a role to promote the 'efficiency of justice' principle.

One of the components pursuant to r2a of the *Supreme Court Rule No 1 of 2002*(Ind), is that class action may be chosen if it creates more efficient procedure than joinder action. It expresses the efficiency principle. That principle should be wisely and precisely assessed by the judge. Included in this assessment ought to be the efficiency of the means of notifying all group members pursuant to r7(1) of the *Supreme Court Rules No 1 of 2002*(Ind). Otherwise, the judges may order an inappropriate way to notify all members that may create inefficiency.³⁵

With reference to the experience of some cost barrier cases discussed before, the principles of 'the judge should be involved' and 'the efficiency of justice' can be optimized to overcome the cost barrier in consumer' class action: (1) by giving advice to the consumer representative plaintiff to invite other group members to join as representative plaintiffs, and (2) by having the ability to define the means of notification with regard the number and the region of the group members.

3. The Government' legal aid scheme

The Indonesian Government is concerned with assisting poor litigants' access to justice. Rule 56(2) of the *Fundamental of the Judiciary Power Act, No 48 of 2009* (Ind) provides that: 'The government bears the

³⁵ See, in *Harun Al Rasyid (KOMPARTA) v Thames PAM Jaya, Ltd*, the judges might order to the representative plaintiffs to notify 800 potential members of drinking-water consumers who lived in Jakarta through public boards that still meet with r7(1) of the *Supreme Court Rules No 1 of 2002*(Ind). Otherwise, the judges ordered to notify 800 potential members lived in Jakarta through the local newspaper that also meet with r7(1) of the *Supreme Court Rules No 1 of 2002*(Ind), but was not more efficient than through public boards.

court costs for poor litigants'. In r57 of the *Fundamental of the Judiciary Power Act, No 48 of 2009* (Ind) stated:

- (1) Legal aid office is set up in every original court for litigants who cannot afford legal assistance;
- (2) Legal assistance referred to in paragraph (1) provided at no charge at all levels of the judiciary until the decisions on the matter has obtained the permanent legal force;
- (3) Legal assistance and legal aid office referred to in paragraph (1) carried out in accordance with the related regulation.

These provisions are provided similarly at all levels, including general and limited jurisdiction.³⁶ R56(2) and r57 of the *Fundamental of the Judiciary Power Act, No 48 of 2009* (Ind) is implemented more generally by the *Supreme Court Newsletter (SEMA) No 10 of 2010* (Ind) that also applies to all courts. Based on r56(2) and r57 of the *Fundamental of the Judiciary Power Act No 48 of 2009* (Ind), the government has the legal aid scheme, including not only contributing to but also undertaking court costs for poor litigants and/or the giving of legal assistance for no charge.

The implementation of r56(2) and r57 of R1(1) of *Fundamental of the Judiciary Power Act, No 48 of 2009* (Ind) can be seen in Appendix-A of *SEMA No 10 of 2010*(Ind), that provides:

'The provision and the implementation of the legal aid budget in the general jurisdiction are included for the establishment of the legal aid office, the cost assistance for the duty-lawyer, the indemnity of the court costs both in civil and criminal proceeding, and the cost of inspection of real or personal property outside the court.'

'A no charge' proceeding can be applied for by everyone who cannot afford access to the court and who meets with the criteria as provided, after having a recommendation from the duty lawyer of Legal Aid Office.³⁷ After any such application is approved by the judge, the cost of proceedings is then undertaken by the government'.³⁸ Pursuant to r1(9) of Appendix-A of *SEMA No 10 of 2010* (Ind), the 'indemnity of court cost' scheme applies to all civil litigation and criminal litigation. Accordingly, consumer class action as civil litigation should be included in that criteria if the representative plaintiffs cannot afford access to the court.

³⁶ See, r68B & 69C of the *Second Amandement Act No 2 of 1986 on the General Court, Act No 49 of 2009* (Ind); r60B & 60C of the *Second Amandement Act No 7 of 1989 on the Religion Court, Act No 50 of 2009* (Ind); r144C & 144D of the *Second Amandement Act No 5 of 1986 on the Administrative Court, Act No 51 of 2009* (Ind).

³⁷ r8(c), r11 of Appendix-A of *SEMA No 10 of 2010* (Ind).

³⁸ r18 of Appendix-A of *SEMA No 10 of 2010*(Ind).

R20(3) of Appendix-A of *SEMA No 10 of 2010* (Ind), provides that the component of the civil lawsuit's court costs includes: orders to call to present for parties, witnesses and experts, orders to notice the judgement, order to detain property, orders to inspect real or personal property, office supplies expenses, documentary copies expenses, filing and binding of case documents expenses, and stamp expenses. Based on these components, it raises the question of whether it may embrace the court cost of consumer' class actions. These rules can be interpreted narrowly or widely, which may influence whether consumer' class proceeding can be embraced or not, since class action proceedings have the specific expense of notification to all members. If the cost of 'order to call to present parties' may be interpreted widely, the court then may order the Government to pay the cost of notification to all potential members in a class action. This may be a solution to the cost barrier in class actions.

Even though the cost to notify potential class members may be interpreted as being embraced by the legal aid scheme, in fact, the Government budget in legal aid scheme cannot be relied upon, since the total budget to be shared for all programmes is very limited. For example, in 2010 the total budget for legal aid in Indonesia was Rp3 250 000 000.³⁹ As provided, it should be shared across all jurisdictions (one general jurisdiction and three limited jurisdictions) for a three scheme programme: providing Legal Aid offices, paying the duty lawyers, and bearing the court costs in 'no-charge' proceeding for poor litigants. If it is shared in the same proportion, each scheme will receive Rp1 083 333 333. If the 'no-charge programme' receives Rp1 083 333 333, that should be shared amongst 678 original courts of general and limited jurisdictions, with each court only receiving Rp1 597 836 in a year.⁴⁰ What can be expected with such a limited budget to assist with the cost barrier in class actions? One court would receive Rp1 597 836, which is insufficient to pay the cost of notification in a class action.

The Indonesian Government ideally has good legislation which has in it the responsibility to bear the court cost in general cases for poor litigants. However, it still raises the question of whether it includes the cost to notify consumer' class action or not. It also creates an expectation that cannot be met, since the budget is very limited in implementation.

³⁹ Available at http://www.badilum.info/images/stories/ortala/LAPTAH_Ditjen_Badilum_2010_part_1.pdf, 10 October 2011.

⁴⁰ For the total number of the court, see <http://litbangdiklatkumdil.net/direktori-pengadilan/>, 14 November 2011.

Part Two: Learning from Australia

1. Class action in Australia: an introduction

The different terminology of ‘representative proceeding,’ and ‘group proceeding’ or ‘class action’ are often used for the same purpose, but procedurally and conceptually, they have differences. As Cashman overviews:

The distinguishing characteristics relate primarily to (a) the ambit of the relief able to be sought, (b) the specificity of the rules relating to the commencement, conduct and conclusion of such proceeding, (c) the status, right, and responsibilities of those on whose behalf the proceeding are maintained and (d) the extent of potential liability for the costs of conducting or losing the litigation.⁴¹

Although there are differences between representative proceeding and class action, they have the same purpose: to eliminate the deficiency of the proceeding in which numerous persons are involved. Even in the Federal Court of Australia, class action proceedings are called both ‘representative proceedings’ and ‘grouped proceedings’.⁴²

Australia has now modernized its class action or grouped proceeding laws after the Australian Law Reform Commission gave their recommendation by inserting Pt.IVA in 1991 in the *Federal Court of Australia Act 1976*. This new provision came into effect on 4 March of 1992.⁴³ Sec33C, Pt.IVA of the *Federal Court of Australia Act 1976* (Cth) provides:

(1) Subject to this Part, where: (a) 7 or more persons have claims against the same person; and (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and (c) the claims of all those persons give rise to a substantial common issue of law or fact; a proceeding may be commenced by one or more of those persons as representing some or all of them.

Pt.IVA of the *Federal Court of Australia Act 1976* is applied in commonwealth jurisdiction and supplements the existing representative action procedures provided by Federal and territorial court rules.⁴⁴

Bamford found that in Australia, the provision of Pt.IVA of *FCAA 1976* had not initially been used as expected or feared by some.⁴⁵ But more

⁴¹ Peter Cashman, *Class Action Law and Practice*, (The Federation Press, Sydney, 2007) 5.

⁴² See, Part IVA of the *Federal Court of Australia Act 1976* (as inserted in 1991). See also, Div 9.3 of the *Federal Court Rules of Australia 2011*.

⁴³ See, Australia Law Reform Commission, *Grouped Proceeding in the Federal Court*, ALRC 46, (1988), <http://www.austlii.edu.au/au/other/alrc/publications/reports/46/>; See also, the Commencement of *The Federal Court of Australian Amendment Act 1991*.

⁴⁴ Cashman, above n 49, 19.

recently, it has spread into broader areas of law. According to the Chief Justice of the Federal Court, at the end of 2005 there had been 166 class actions commenced in the Federal Court since Pt.IVA of *FCAA 1976* came into force in March 1992.⁴⁶ From a study carried out by Peter Cashman, the class actions commenced in the Federal Court of Australia fall into the areas of: claims for economic loss arising out of contracts, allegedly defective products, insolvent trading and claims by shareholders, human rights, discrimination and immigration cases, product liability claims, employment and industrial relation matters, proceedings by the Australian competition and Consumer Commission, native title claims, consumer claims, other tort and personal injuries, intellectual property, and taxation.⁴⁷

2. The cost provision in class action

Litigation proceedings through the court, including civil litigation, results in costs for many procedures and orders. Generally, there are two primary costs rules:

- a. The [*no cost*] rule where each party bears its own costs.
In this rule, the court does not award costs to the successful party, so that each party bears his or her own costs of the litigation, regardless of the outcome.
- b. The [*loser pays*] rule (also referred to as the *cost-shifting* rule)
In this rule, the unsuccessful party will pay the successful party's costs.⁴⁸

The usual rule applied in Anglo-Australian common law civil litigation is the loser pays costs rule, where the unsuccessful party pays the successful party's costs.⁴⁹

Based on procedural rules and practice, the ALRC viewed that cost is a critical element of access to justice, a fundamental barrier to those wishing to pursue litigation, and for people caught up in the legal system it can

⁴⁵ David Bamford, *Class Action A Survey at Recent Cases*: in summary (Legal Society of South Australia, October 2000) 2.

⁴⁶ Based on his speech to Class Action Conference in Melbourne, (December 2005), cited in Cashman, above n 49, 466.

⁴⁷ See, Ibid 467.

⁴⁸ See, Rachael Mulheron, *The Class action in Common law legal system: a comparative perspective*, (Hart Publishing, Oxford, Portland Oregon, 2004) 436-38; ALRC, *Costs Shifting-who pays for litigation?*, Rep No 75 (1995), *Overview: Access to justice and cost rules*.

⁴⁹ As can be interpreted from the costs provision in *Federal Court of Australia Act 1976* and *Federal Court of Rules 2011*(Cth).

become an intolerable burden.⁵⁰ As an illustration, the Federal minimum wage of worker per-month in Australia is AUD2357.2.⁵¹ The fee charged merely to commence lawsuit through the Federal court is AUD894, being 37% of the minimum monthly wage of the worker.⁵² The fee to commence and a couple of minimum schedule of proceeding is AUD4047, being 171% of the minimum monthly wage of the worker.⁵³ The cost to file a lawsuit may burden a person with a minimum income, and be more burdensome if they have to pay the solicitor cost. And what might be said of more complex matters like class proceedings? In *P Dawson Nominees Pty Ltd v Multiplex Limited*, Maurice Blackburn Cashman (MBC) the initial estimate of the cost of running the action was in excess of \$7.5 million! The actual estimate is confidential.⁵⁴

The *loser-pays* or *cost-shifting* rule is applied under the Australian Federal class action regime, as can be interpreted from s 33ZJ and s 43(1A) of the *Federal Court of Australia Act 1976*.⁵⁵ In proceedings brought under Pt IVA of the *FCAA 1976*, the Court can award costs against the representative party, a person appointed by the Court to represent a subgroup or an individual group member who has been given leave to appear. The Court cannot award costs against any other person on whose behalf the proceedings have been commenced, except: (a) where in determining the issues, not all issues are common; (b) where in determining an issue that relates to individual issues.⁵⁶

Where the class action achieves a successful outcome of damages relief, the representative party may apply to the court for an order that an amount equal to the whole or a part of the assessed cost reasonably incurred in relation to the representative proceeding, recoverable by the person from the respondent, or, make any other order it thinks just.⁵⁷ But where the action is unsuccessful, there is no provision in Australia for members of an unsuccessful class to be ordered by the court to contribute

⁵⁰ ALRC, *Costs Shifting-who pays for litigation?*, above n 56, [2.2]. Many of the oral and written submissions made to the Commission in the course of this review, to show how they felt that the costs of civil proceeding very burden them. [2.5].

⁵¹ See at <http://www.actu.org.au/HelpDesk/YourRightsfactsheets/MinimumWages.aspx#federal>, 224 November 2011.

⁵² See the fee charged by the court at Federal Court, available at http://www.fedcourt.gov.au/fff/fff_feesandcosts_fees.html#filing, 24 November 2011.

⁵³ Ibid from the total fees of schedule item No1, 15, 23, 24, 26.

⁵⁴ (2007) 1061 FCA 28.

⁵⁵ See also ALRC, *Costs Shifting-who pays for litigation?*, above 56, [16.25]-[16.26].

⁵⁶ s43(1A) of the *FCAA 1976*; See also s 33Q of the *FCAA 1976*; s 33R of the *FCAA 1976*.

⁵⁷ Ibid s 33ZJ.

to costs, even where the representative plaintiff is a poor person with insufficient finance to satisfy any costs order made in favour of the successful defendant.

Even though the *loser-pays* rule is applied in class actions, it has not precluded the Federal Court from making discretionary orders to overcome or minimize the costs problem in class proceedings. In *Cook v Pasmenco Ltd*, Lindgren J ordered that costs should be paid by the solicitors for the applicant on an indemnity basis, because the proceeding was not only untenable, but was brought irresponsibly without any, or any proper, consideration of the question whether it had any prospect of success.⁵⁸ That practice means the representative plaintiffs can avoid the *loser-pays* rule, but only in cases where the solicitors represent the case in inappropriate way.

Since the cost to file class action is still burdening and daunting to anyone who brings a class action, it should be sought how to overcome that 'single most important issue' while maintaining a cost structure which is fair to all parties.⁵⁹ As Grave and Adam warned, without this issue being adequately addressed, the viability of representative proceedings is threatened.⁶⁰ No one may ambit to be a representative plaintiff to commence class action, so that no advance of class action practices.

3. Some recommendations and case law

To overcome or minimize the burden of costs in class proceeding, some recommendation have been proposed. Among them, there are three main recommendations that are interesting to discuss.

a. Contingency and up-lift fee agreement

Contingency fee agreements and up-lift fee agreements are fee agreements made by the solicitor and the client where the lawyer's fees are to be taken out of the proceeds, perhaps at a higher than usual rate and generally on a 'no-win no-fee' basis. Conversely, a contingency fee agreement is where in the event of the successful outcome of the case, the lawyer will receive the payment of the lawyer's 'normal' fee, which is fixed or a sliding percentage of the compensation awarded to the client.⁶¹ The

⁵⁸ [2], (2000) 1819 FCA, 65, 66; See also, *Cohen v the State of Victoria & ors*, [2](2011)165 VSC, 52,54.

⁵⁹ See also, Mark J Rankin in David Bamford, *Principles of Civil Litigation*, (Thomson Reuther Australia Limited, Sydney, 2010) 252, that said the litigation cost is more significant issue than the other common criticism of civil litigation –delay.

⁶⁰ Damian Grave and Ken Adams, *Class Action in Australia* (Lawbook Co,Sydney, 2005) 437.

⁶¹ See, Morabito, *Contingency Fee Agreement with Represented Persons in Class Action- An Undesirable Australian Fenomen*, 34 Common Law World Review (2005) Issue3, 204, that cited his view from the Australian Senate Standing Committee on Legal and Constitutional Affairs.

amount of that fee depends on the amount of compensation awarded to the client. In an up-lift fee agreement, in the event of a successful outcome, the lawyer is paid on ‘top of the fee’ to cover the risk of the loss.⁶² The amount of that fee can be accounted for, since the fee has been fixed, and the ‘top of the fee’ to cover the risk is agreed in a certain percentage of that fixed fee, for example 25-40% of the fixed fee.

Contingency fee agreements for class proceeding are not recognized in the Australia Federal Court,⁶³ and some Professional Conduct Rules prohibit them.⁶⁴ Otherwise, the court has permitted the uplift fee agreement between client and legal practitioner. In a way, this provides an incentive for legal practitioners to represent class actions.⁶⁵

These two kinds of cost agreements may be used to lighten the cost barrier in class action, but do not relieve the litigant from the risk of an adverse party-party costs order that he/she still should pay to the successful defendant. The litigants still face the burden of party-party costs in class actions that is consequently more expensive than in non-class actions.

b. Public legal funding, legal aid, and pro bono

Public legal funding means a funding scheme provided by the Government to assist litigants in finance since they deal with matters of public importance.⁶⁶ Before it was created, public interest litigation funding had been recommended by the ALRC to be provided for in legislation, but such has not been accepted by the Government.⁶⁷ So, there is no legislative provision relating to public interest litigation funding.

Otherwise, the Federal Government through the Attorney-General’s Department has a kind of public legal funding scheme, namely a ‘Financial

⁶² Ibid. Morabito cited the definition from the Trade Practices Commission.

⁶³ But some states have practiced it, e.g South Australian Legal Assistance Fund; Western Australian Litigation Assistance Fund, ALRC, *Costs Shifting-who pays for litigation*, above 56, nn 61,62.

⁶⁴ See, *Legal Profession Act 2004* (NSW),Ch3, Pt 3.2, Div 5, s325; *Legal Professional Act 2004*, as amended by No 12 2007 (Vic), s 3.4.29; *Legal Practitioners Act 1981* (SA), s42(6c); *Australian Solicitors Conduct Rules 2011*(SA), r 16C.1dan 16C.3; *2007 Barrister Rule* (Qld), r120;

⁶⁵ See,Eg, *Cook v Pasmenco Ltd* [2], (2000), 107 FCR 44, 54, 476; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731, 736-37 (per Merkel J); *Courtney v Medtel Pty Limited*(No. 5) [2004] FCA 1406, 58 (per Sackville J), *Williams v FAI Home Security Pty Ltd* [3] (2000) FCA 1438, 13 (per Goldberg J), cited in Vince Morabito, above n 69, 34 Comm L. World Rev (2005) 203-05 nn 6, 11, 14, 16; Also in [2011] VSC 614, 29.

⁶⁶See, <http://www.ag.gov.au/www/agd/agd.nsf/AllDocs/B7A8300F7D9B7876CA2578770007293A?OpenDocument#commonwealthpublicinterest>, 13 October 2011.

⁶⁷ See, ALRC, *Costs Shifting-who pays for litigation*, above 56, [18.2]; Public interest litigation by means of a mechanism for clarifying legal issues to the benefit of the general community.

Assistance Scheme'. Based on sec.4.12 of the Guidelines For the Provision of Assistance By Commonwealth For Legal And Related Expenses Under Commonwealth Public Interest And Test Cases Scheme (August 1996), all civil proceedings in Australian courts and tribunals are covered since they deal with matters of public importance.⁶⁸ Consequently, it should include assisting class actions, in the instance where a class action deals with the matters of public importance.

The State governments also have a Legal Aid scheme that assists litigants cannot afford socially or economically to access justice, but have merit in a case, or to assist in public interest cases. In Legal Aid scheme the government mainly provides legal assistance, while in public legal funding, the Government assists financially. The Legal Aid can provide free services for legal information and minor assistance, and/ or a legal representation.⁶⁹ Some states have provided for legal aid schemes. For example, Victoria Legal Aid,⁷⁰ New South Wales Legal Aid Commission,⁷¹ New South Wales' Law and Justice Foundation (that provides a contingency legal assistance fund (CLAFs)).⁷² Legal Aid schemes mainly focus on assisting persons who cannot afford socially or economically to access justice, but have merit in a case, or to assist with public interest cases. So, Legal Aid does not address class action specifically, even though it may be interpreted as being embraced by that scheme. No data founded.

Some Legal Practitioner' Association in some states also run a pro bono services scheme, that assist in legal assistance for unwealthy people or for public interest cases. For example, the Public Interest Law Clearing House of Victoria,⁷³ of New South Wales,⁷⁴ and of Queensland,⁷⁵ the ACT Law Society Pro Bono Clearing House, New South Wales Bar Association Legal Assistance Referral Scheme (LARS),⁷⁶ the New South Wales Law Society Community Referral Service Pro Bono Scheme (PBS), Bar

⁶⁸See,

<http://www.ag.gov.au/www/agd/agd.nsf/AllDocs/B7A8300F7D9B7876CA2578770007293A?OpenDocument#commonwealthpublicinterest>, 13 October 2011.

⁶⁹ http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_LegalAidProgram, 13 October 2011.

⁷⁰<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Courts/Going+to+Court/Legal+Aid/>

⁷¹ <http://www.legalaid.nsw.gov.au/get-legal-help/help-at-court>.

⁷²<http://www.lawfoundation.net.au/ljf/app/&id=A18BD89AC5777376CA25716200154DFD>, 3 October 2011.

⁷³ <http://www.pilch.org.au/individuals/>.

⁷⁴ See, National Pro Bono Resource Centre, *History of Australian Pro Bono Schemes*, The White House University of NSW, May 2006, at <http://www.nationalprobono.org.au/documents/ReferralSchemeshistoryreportfinal.pdf>, 14 October 2011.

⁷⁵ Ibid.

⁷⁶ See, Ch.3, Pt3.1, Div 7 of *Legal Professional Act 2004* (NSW).

Association of Queensland, Law Institute of Victoria Legal Assistance Scheme (LIVLAS), the Victorian Bar Legal Assistance Scheme (VBLAS), the Law Society of Western Australia Law Access Public Interest Law Clearing House (WAPILCH),⁷⁷ and Litigation assistance fund run by the Legal Practitioner’s Association of South Australia.⁷⁸ It is unclear, whether class proceedings can be assisted by these schemes, since class proceedings are costly and lengthy forms of litigation. There are also some organisational funders, for instance: PIAC (Public Interest Advocacy Centre),⁷⁹ Australian Competition and Consumer Commission,⁸⁰ and the Green (in Justice Policy),⁸¹ that assist in public interest cases, including consumer cases.

The public legal funding, Legal Aid scheme and pro bono are mainly used for individual cases involving unwealthy persons or public interest cases. It still raises the question of whether these schemes may embrace assisting class action regularly, given the added expense and complexities involved.

c. Commercial litigation funder

The other solution to overcome the cost barrier in class actions is by using commercial litigation funders. Commercial litigation funders are a private funder, personal or corporate, based on a funding agreement that provides finance to litigants. The commercial funder works for profit. They take, in agreement, a certain amount as their funding fee from the litigants.

In Australia, to date, class proceedings have been funded primarily by lawyers acting for representative parties.⁸² Commercial litigation funders have funded several class action proceedings. In the event of a victory by the plaintiff class, funders seek reimbursement of their expenditures as well as the payment of between 20 per cent and 45 per cent of the compensation that the class members will be entitled to receive from the litigation.⁸³ This is a great amount and is one of the incentives for commercial litigation funders to fund class action. The limits on contingency fees do not apply to them.

There are some large law firms and some commercial litigation funders that have funded class actions.⁸⁴ Only large litigation funders can

⁷⁷ See, National Pro Bono Resource Centre, above n 82.

⁷⁸ See, Pt 2, s 14A of the *Legal Practitioners Act 1981* (SA).

⁷⁹ See, <http://www.piac.asn.au/legal/public-interest-cases>, 5 October 2011.

⁸⁰ See, <http://www.accc.gov.au/content/index.phtml/itemId/585905>.

⁸¹ See, <http://greens.org.au/policies/human-rights-democracy/justice>.

⁸² Damian Grave and Ken Adams, *Class Action in Australia* (Lawbook Co, Sydney, 2005), 466.

⁸³ Vince Morabito, *The Victorian Law Reform Commission's Class Action Reform Strategy*, VLRC Report (Vol 15 No 2) 114 nn 34.

⁸⁴ <http://www.slatergordon.com.au/areas-of-practice/victoria/general-legal-services/class-actions>; <http://www.mauriceblackburn.com.au/areas-of-practice/class-actions/past->

afford to fund class proceedings, since they are a costly form of litigation, and a cost agreement based on a *no-win no-fee* basis may mean being out of pocket by millions of dollars even if successful. In deciding whether to fund, commercial litigation funders will consider the prospective chance of success. Prof. Morabito has advised that a likely success rate of 80 per cent is required, by plaintiff law firms before a class action proceeding may be instituted.⁸⁵

The judges also welcome such funding agreements, as far as it will not interrupt the autonomy of litigation. In *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited*, the Court of Appeal concluded that:

‘...whether proceedings funded by a litigation funder are an abuse of process depends on whether the role of that funder "has corrupted or is likely to corrupt the processes of the court to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently for abuse of process." In the present matters... there was no abuse of process. First, the proceedings were under judicial supervision; second, Firmstones' control of the litigation was "not excessive"; third, Firmstones' fees were not excessive; fourth, there was a solicitor on the record; and fifth, the individual claims were small (making separate recovery processes unlikely)’⁸⁶

The court will be willing to accept commercial litigation funding where there is no unacceptable risk of abuse of the court process. The practices of funding litigation should not breach public policy as prohibited by s32 of *Wrong Act 1958* (Vic), s6 of *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), s3 of Sch 11 of *Criminal Law Consolidation Act* (SA).

It is shown that Australia even faces cost barriers to class actions. The cost barrier in class actions encompasses the whole of legal costs, and these become more costly in class actions, not only because of the cost of notification to all potential members but because of the added complexities involved. As described, the Australian civil justice system has some solutions to the cost barrier in class actions, and the most popular is commercial litigation funding.

class-actions.aspx; <http://www.imf.com.au/pdf/AnnualReport2011.pdf>; http://www.hillcrestlitigation.com.au/financial_reports/ASX%20Quarterly%20Report%2031%20December%202010.pdf;

⁸⁵ Morabito, *The Victorian Law Reform Commission's Class Action Reform Strategy*, above n 91, 117, nn 83

⁸⁶ (2006), 41FCR 63; See also *P Dawson Nominees Pty Ltd v Multiplex Limited*, (2007) 1061 FCA 28. That case has been funded by ILF.

Part Three: the Proposal of *Litigation Funding Model for Indonesia*

The cost barrier in class actions for Indonesian litigants, unlike Australian litigants, is the cost to notify all potential members of the group represented. Although Australia and Indonesia face different types of cost barriers, both nevertheless face a barrier to engaging in class actions.

As the ALRC indicated, none of these litigation funding schemes may offer a complete solution, but some are better than others.⁸⁷ Having third parties fund litigation is the main factor in influencing the success of litigation funding schemes. These third parties include the government, who wish to provide legal aid funding and public purpose funding, and lawfirms or large companies who can carry out litigation funding as a profitable business. Let to know more about their limitation works and how to advance them to Indonesia.

1. Legal aid and pro bono schemes

These two alternatives may not necessarily be implemented well in Indonesia. As explained in part one, the legal aid scheme by the Indonesian Government has a limited budget that is unlikely to undertake all applications for legal aid, let alone for class action applications. Indonesia also has pro bono legal representation that is generally provided by a non profit public legal service institution, like *Yayasan Lembaga Bantuan Hukum Indonesia* (YLBHI) that has many representative-offices at many regions in Indonesia,⁸⁸ In fact, they generally have a limited budget to fund to support their pro bono legal representation programme, including class actions.⁸⁹ As provided in r1(1) of Apendix_A of *The Supreme Court NewsLetter No 10 of 2010* (Ind), the Government assists with the cost for the duty-lawyer that is often carried out by the public legal service institution, and even by professional lawyers.

The legal aid and pro bono scheme, including ‘indemnity of court-cost’ scheme and ‘cost assistance for duty-lawyer’ scheme may become one of the solutions to the cost barrier in class actions in Indonesia: if the Government includes the cost of notification to all potential members as a component of the court-cost to be undertaken by the government; given this, the Government should reform its legal aid budget appropriately to support class action.

⁸⁷ See, ALRC, *Grouped Proceeding in the Federal Court*, above n 51, 106-107.

⁸⁸ See, <http://www.ylbhi.or.id/index.php?cx=1&cy=2>, 7 October 2011.

⁸⁹ See the failed to continue class action in *Seven consumers v Guyub Raharjo Co*; in *12 Activists v Minister of Economic of Indonesia, cs*; in *victims of G30S/PKI' labeling v President of Republic Indonesia*.

2. Public legal funding

Unlike the legal aid and pro bono schemes that have as their basic principle access to justice for the poor, public legal funding has a different basic principle. As pursuant to the terminology, public legal funding highlights the public interest. Can the public purposes funding scheme be applied in funding class actions?

Class actions have two functions: private interest and public interest.⁹⁰ On one hand, class action works for the private interest, since it seeks compensation for individuals. On the other hand, class action works in the public interest, since the commencement of class proceeding sometimes serves as an important regulatory function, for instance, it may have a positive influence on product design decisions in trade practices class actions. Australia does not mention that function and even if class actions as a whole are not regarded as being public interest, some class actions are and would be covered by the public purposes funding.

Class actions have a public interest function and help the government prosecute anyone or companies that breach public interest law area, including trade practices or environment law. Even if the government doesn't do the public interest law enforcement, for instance in the environment law breaches that embrace a public interest loss, the initiative of any one who want to be a representative plaintiff to bring class action should be supported.⁹¹ In case that the government doesn't do its duty, it is reasonable, that the budget to initiate the prosecution by the government replaced then, for supporting the class action for the same purpose, by any one. So, public purposes funding scheme is considerable to be implemented for funding class action that involves public interest.

The private interest class action may be funded by legal aid and pro bono schemes, where all the members are 'the persons in straw'. As 'providing access to justice for the poor' can be included in public policy, it makes it a public interest obligation. Accordingly, funding to private interest class action (where all members are 'the persons in straw') can be included in a public purposes funding scheme.

⁹⁰ Jamie Cassels and Craig Jones, *The Law of A Large Scale Claims, Product Liability, Mass Torts, and Complex Litigation in Canada*, (Irwin Law, Toronto, Ontario, Canada, 2005) 369.

⁹¹ For example, Indonesia Government didn't do so relating with "Lapindo Brantas-Sidoharjo" case, as entitled in r90(1) of the *Protection and the Management of Environment Act No 32 of 2009* (Ind), that provides: the Government agencies responsibly in environmental, entitled to file the damages or injunction relief civil lawsuit against those act or enterprise that caused the damages and pollution to the environment.

The resources of legal aid and public purposes funding are from the government budget. If funding to overcome the cost barrier is from the government budget, then the viability of the class action regime is dependent on the political will of the government. This is another problem in a developing country like Indonesia. Providing legal funding by the government solely (whether in legal aid funding or a public purposes funding scheme) may become burdensome. In spite of what the government provides, the amount will not be as much as expected, since the total budgets to be shared for all programmes will be limited. For example, in 2010 the total budget for legal aid services in Indonesia were Rp.3 250 000 000 (more and less AUD 361 111).⁹² It must be shared across all jurisdictions, and over three scheme programmes: Providing Legal Aid Posts, providing duty lawyers, and bearing the costs proceeding in free-costs programme for poor litigants. If it is shared equally across programmes, each will receive Rp.1 083 333 333 (approximately AU \$ 120 370). What can be expected with such a limited budget? Alternatively, it should be recommended that there be another legal funding scheme for those who fall into the middle economic status.

3. Commercial legal funders

A commercial legal funder has to manage the litigation funding as a prospective investment, where they will consider, before agreeing to litigation, the likely success rate of the case, so that they do not suffer an unacceptable risk of financial loss. IMF Ltd as a commercial claimant litigation funder has raised its investment to fund group action. It was raised from \$526 million in 2006 to \$ 926 million in 2008.⁹³

Indonesia has no model and experience with the commercial litigation funding. It believed that none of the commercial entities have knowledged those ‘profitable investment’. Learning from the success of the commercial litigation funder in Australia may encourage the growth of commercial litigation funders in Indonesia. The more prevalent and willing commercial funders become, the more cost barriers to class actions can be reduced, if not eliminated. Every applicant that fails to access legal aid funding or public purposes funding, may have a chance to get funding from a commercial funder.

⁹² http://www.badilum.info/images/stories/ortala/LAPTAH_Ditjen_Badilum_2010_part_1.pdf. 10 October 2011.

⁹³ Wayne Attrill, *Litigation Funding: Access to Justice in a Time of Economic Crisis*, presented at Globalaw Asia Pacific Regional Meeting, (Auckland, 20 February 2009) at <http://www.imf.com.au/pdf/Globalaw%20Conference%20-%20Feb%202009.pdf>, 10 October 2011.

The limitation of commercial litigation funding is that it only takes cases that are likely to be. Accordingly, the prospective applicant or his/her lawyer should have an appropriate civil matter, a real issue of fact relevant to determination of the matter, or the legal arguments in relation to the matter should be dealt with adequately by written submissions, so that it can be well considered and funded by the funder. Conversely, cases with unsuccessful prospects will be left alone. But, it is considerable that no one should file a lawsuit frivolously, vexatiously, or that has no legal argumentation in relation to the matter.

4. The combining model to be proposed: *Class Action Funding Support Agency*

Based on this comparative study, all three litigation funding models are likely to be adopted by Indonesia. These are legal aid scheme, public legal funding, and commercial legal funders. With regard to the limitation of each and in the context of the Indonesian situation, it may be recommended that a combining model, named *Class Action Funding Support Agency*, be adopted. This funding body model will work:

- a. independently to support in financing all kinds of class action.

The agency should work independently, so that it can serve all kinds of class action lawsuits fairly, even against government agencies.

- b. both profitably and non-profitably pursuant to the economic status of the applicants.

Such an agency may work profitably, in a certain class action lawsuit, so that it can support the viability and the advancement of the agency, in case the government cannot support its finances satisfactorily.

- c. with or without repayment and a certain percentage of any funds recovered by applicants if the settlement succeeds for the applicant who is to be funded.

The repayment and receiving a certain percentage of any funds recovered by applicants if the settlement succeeds, in a certain class action lawsuits, will also support the viability and the advancement of the agency.

- d. raise funding resources from the government (from the compulsory legal aid funding scheme), and from commercial entities (by agreement).

Since the Indonesian government has a compulsory commitment to the access to justice for the poor and public interest services based on Acts and Rules, that has its source from the moral principle in *Pancasila*, it is worth using the budget to implement these principles by way of a *class action funding support agency*, that should report the finance transparently. The placing of the legal aid funding arrangement into the *class action funding support agency* may be more effective the current bureaucracy, since the government bureaucracy often times results in

delays and complexities. Funding must also come from beyond the government. Getting the funding resources from commercial entities also supports the viability and the advancement of the agency, and as a media for the commercial entities to make profits by way litigation funding.

Conclusion

Looking at some Australian provisions and practices, and with respect to the Indonesian situation, the solution to the cost barrier in class actions for Indonesian litigants may be expressed in the terms of:

1. Optimizing the principles of having ‘the judges involved’ and ‘the efficiency of justice’ to arrange the most efficient way of notifying all group members.
2. Supporting the growth of commercial litigation funders based on rules.
3. Establishing a funding support body, like, the *class action funding support agency* by the Government, that:
 - a. works independently to support financially all kinds of class action.
 - b. both profitably and non-profitably pursuant to the economic status of the applicants.
 - c. with or without repayment and a certain percentage of any funds recovered by applicants if the settlement succeeds for the applicant who is to be funded.
 - d. raises the funding resources from the government from the compulsory legal aid funding scheme and from commercial entities (by agreement).

The two main litigation funders, the commercial funder and the *class action funding support agency*, then may work in harmony. Where a class action lawsuit cannot be supported financially by the commercial funder, it may be supported by the *class action funding support agency*. If the applicant is unsuccessful in securing a commercial funder, he/she may move then, to the “class action funding support agency” that may offer a favourable arrangement.

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