Limitations in the ALRC Litigation Funding Inquiry

Investor Claim Partner welcomes the opportunity to provide input into the Inquiry being conducted by the Australian Law Reform Commission into Class Actions and Litigation Funding.

ICP will respond to the proposals and queries raised by the ALRC although, like all investigations, the value of the responses is dependent upon context; context within which the queries are raised and context within which the responses are given.

Unfortunately, four contextual issues will restrict the value of the ALRC Inquiry and its subsequent report:

1. There is limited focus on potential ways to decrease lawyers' fees and disbursements and the time claims take to resolve. Our adversarial civil justice system is the Rolls Royce of Justice Systems[1] that comes at a rolls royce price. Strong demand for funding obtained by parties in litigation is a symptom of the current cost of justice, not the root cause. A focus on how our courts could more efficiently resolve disputes, rather than by preparation for trials that are unlikely to occur, would have been fertile ground for identifying relevant productive reform measures.
2. Despite almost all of the defence costs arising from funded class actions being funded under pre-existing insurance policies, the ALRC has decided not to inquire into the impact of insurers in our civil justice system. This is remarkable given equality of arms in our adversarial processes is a pre-requisite in the attainment of justice. The quantum of funding defences dwarfs the funding of claims and accordingly has a far greater capacity to adversely affect our courts' capacity to achieve their objectives[2].
3. There is currently insufficient empirical data relevant to the policy considerations under examination to provide a reliable basis for change.
4. This leaves public debate focusing on the public spectre of actions, rather than evidence, driving policy debate. The productivity commission raised this concern in 2014[3]. The ALRC, whilst agreeing that public debate about the underlying laws is more appropriate than changing the mechanism by which class actions are prosecuted, acknowledges this evidence based inquiry is

[1] Chief Justice Wayne Martin – Swearing in speech as Chief Justice of the Supreme Court of Western Australia – 2006.
[2] The overarching purpose of the Federal Court's processes is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. (s37M – Federal Court of Australia Act).
[3] Productivity Commission, Access to Justice Arrangements (Inquiry Report No 72, Vol 2, 2014) 621.

beyond the scope of its current terms of reference[4]. Without an understanding, for example, of the cost to the ASX and market participants of breaches of the continuous disclosure provisions of the Corporations Act and the deterrent affect of class actions, the ALRC is not only unable to focus on the primary issues but could detrimentally affect the enforceability of our laws; a risk with potentially far greater unintended negative consequences than the potential intended gains that may flow from its current Inquiry.

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[4] Page 32 of the ALRC Discussion Paper.