SUBMISSION

To:

The Hon Justice Sarah Derrington

President

Australian Law Reform Commission

From:

Professor Julie-Anne Tarr

School of Business

Queensland University of Technology

Re: Discussion Paper 85 Inquiry into Class Action Proceedings and Third-Party Litigation Funders (June 2018)

Date: 19 July 2018

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1. Thank you for the opportunity to provide a submission in relation to the Australian Law Reform Commission's Discussion Paper 85 *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (June 2018).

2. This submission is primarily directed at third-party litigation funding matters and the particular question: More External Regulation and/or Enhanced Judicial Supervision?

3. It is respectfully submitted that, in the absence of hard evidence that litigation funding is fuelling an avalanche of frivolous or unmeritorious claims, caution should be exercised before adopting any new external regulatory regime without the actual, quantifiable costs and benefits of the proposed regulation, as well as the risks of unintended consequences (such as the creation of unnecessary barriers to market entry) being fully assessed. The ALRC and the Victorian Law Reform Commission[1] have acknowledged that the the impact of third-party litigation funding, especially in tandem with class or group actions, should not be overstated. While the quantum of certain claims and class sizes may sometimes appear daunting and loom very large in the litigation landscape, a consideration of the number of suits delivers a different perspective. The VLRC Consultation Report, in reviewing data about class actions dating back to the commencement of the Commonwealth regime in 1992, point out that class actions account for only about 0.1% of all

[1] *Access to Justice- Litigation Funding and Group Proceedings (Consultation Paper, July 2017)*

litigation in Australia[2] and there is little or no evidence of a proliferation of litigation being fuelled by class actions supported by third party litigation funding.

4. Caution and restraint before introducing a new regulatory or licensing regime is particularly pertinent if one considers the capacity and role of the courts in the context of third-party litigation funding. The High Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*[3] considered that the doctrine of abuse of process (if proceedings were in fact an abuse), the ability of the courts to otherwise protect their processes, and lawyers' ethical and professional duties were more than adequate to address circumstances in which a funder conducted itself in a manner 'inimical to the due administration of justice'."[4] The High Court's view of a court's capacity to protect its processes and the increasing willingness of the courts to bring flexibility and nuance to oversight and supervisory roles in relation to litigation funding provide a strong level of confidence that problems associated with third-party litigation can be addressed without the need to establish another regulatory regime.

5. Further, it is respectfully submitted that there is little basis upon which to challenge the High Court's view of a court's capacity to protect its processes. This is particularly the case where third-party litigation funding can take so many forms and when the factual context, the risks involved and commercial interests can be highly diverse and not susceptible to "broad brush" regulation. As Peta Spender[5] states "…pinpointing the difference between optimal litigation for socially beneficial outcomes and suboptimal trafficking in litigation is difficult". In the circumstances, it is preferable to let the court decide whether any piece of litigation is merited or not on a consideration of the facts of the individual case *and* what role the court can take in supervising the conduct and entitlements of the funder.

6. Recent decisions of the courts reinforce this view. For example, the decision of the Full Federal Court in *Money Max International Pty Ltd (Trustee) v QBE Insurance Group Ltd*[6] represents a further very significant step by the Courts in accepting a more active role in assessing and dealing with litigation funding and in providing judicial oversight. The fact that class members' interests would be protected by judicial oversight of the funding commission charged by the Funder was central to the court's decision and as Michael Duffy[7] observes, the decision in this case 'hints that the courts may be willing to get into the business of reviewing contractual arrangements between funders and litigants, in the interests of fairness'. Furthermore, Federal Court decisions in *Mitic v OZ Minerals Limited (No 2),*[8] *Blairgowrie Trading Ltd v Allco Finance Group*[9] and *Earglow Pty Ltd v*

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[2] Ibid., paragraphs 2.55 – 2.68. See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016) https://ssm.com.abstract=2815777 Accessed 25 August 2017..

[3] [2006] HCA 41; (2006) 229 CLR 386.

[4] (2006) 229 CLR 386, at 435.

[5] "After Fosif: Lingering uncertainties and controversies about litigation funding", (2008) 18 JJA 101, at 107.

[6] [2016] FCAFC 148.

[7] "Courts are regulating the class action funding industry where the government has failed to act", The Conversation 3 November 2016 https://theconversation.com/courts-are-regulating-the-class-actio-funding-industry-where-the-government-has-failed-to-act-68057 See also Michael Duffy, "Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory" (2016) 39 UNSW Law Journal 165.

[8] [2017] FCA 409.

Newcrest Mining Ltd[10]confirm that the Court has accepted a more active role in assessing and dealing with litigation funding. For example, in the *Allco* case Justice Beach pointed to the ability of courts to better regulate funding fees than other forms of regulation. He noted that the courts are 'able to bring flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with, say, idiosyncratic State legislation.'[11]

7. Dealing with evolving problems associated with third-party involvement in litigation – even in the context where numerous funding models have emerged ranging from the relatively straightforward third-party case-by-case funding through to portfolio funding or law firm financing[12] - is not new to the courts. Taking the specific example of dealing with litigation funders in the same manner as insurers, the New South Wales Court of Appeal in *Project 28 Pty Ltd (Formerly Narui Gold Coast Pty Ltd) v Barr*[13] said*:*

> The insurance context provides a useful example of how the law copes adequately with a situation where control over litigation is given to a person who is not party to the litigation itself".

8. This is not to suggest that the existing legal framework in which third-party litigation funding operates could not be enhanced. This submission respectfully concurs in, and supports, those proposals, legislative or otherwise, directed at strengthening the armoury of the courts and the capacity of persons or entities utilising third-party litigation funding to make informed choices and be protected in settlements. For example, this submission strongly supports the options canvassed in the Discussion Paper[14] in relation to settlement approval and distribution such as conferring upon the courts specific statutory power to appoint an independent referee to review solicitors' costs and setting out in legislation the criteria by which a court is to assess any proposed settlement or discontinuance of class action litigation.

9. The Discussion Paper[15] also outlines measures to assist in the management of conflicts; namely, accreditation of solicitors acting in class action proceedings through a continuing education program to assist class members to appoint appropriate legal representation and for prospective class members to receive information regarding actual and perceived conflicts of interest that may affect the conduct and management of their claim at the first available opportunity. The ALRC proposes further that Australian solicitor's conduct rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting[16]. These are, in this writer's submission, initiatives that would be extremely welcome.

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[9] [2017] FCA 330.
[10] [2016] FCA 1433.
[11] [2017] FCA 330, at paragraph 142.
[12] See, for example, International Council for Commercial Arbitration- Queen Mary Taskforce, *Report on Third-party litigation funding in International Arbitration,* April 2018, pp.38-39.
[13] [2005] NSWCA 240, at paragraph 70.
[14] Generally, chapter 7.
[15] Paragraph.4.3.
[16] Paragraph 4.58.

10. However, in my submission the Discussion Paper[17] proposal that a litigation funding licensing scheme be established at this time goes too far. As noted above, in the absence of evidence that litigation funding is fuelling an avalanche of frivolous or unmeritorious claims, it is respectfully submitted that there is little basis upon which to challenge the High Court's view of a court's capacity to protect its processes.[18] Nor is there any reason to doubt the proposition that the courts are 'able to bring flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with, say, idiosyncratic State legislation.'[19] This is not to say that the processes of the courts could not be assisted by specific statutory amendments; for example, the Australian Law Reform Commission's proposal that the Federal Court should be given an express statutory power to reject, vary or set the commission rate in third-party litigation funding agreements[20].

11. Furthermore if, as the Discussion Paper[21] advocates, it is resolved to develop a distinct licensing regime for litigation funders and for obligations comparable to those imposed upon Australian financial services licensees (AFSL) to be imposed, the design and supervisory resources to support that licensing scheme will need to be very carefully framed and costed. Very significant limitations of the AFSL scheme have been readily apparent for two decades and despite parliamentary enquiries and commissions, increased regulation and increased educational requirements, recent financial adviser scandals continue. In Australia, for example, HIH Insurance, Storm Financial, One.Tel, Westpoint Group, Fincorp, Opes Prime, Timbercorp Securities, Octaviar Limited, National Australia Bank and the Commonwealth Bank of Australia resulted in substantial losses to retail clients over the past two decades notwithstanding the AFSL regime. The Ripoll Report in 2009[22] and the current Banking Royal Commission[23] evidence the strong ongoing legislative concern with conduct and practices within the financial services sector but also give rise a legitimate concern that a licensing scheme analogous to the AFSL is not necessarily the panacea the Australian Law Reform Commission advocates.

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[17] Discussion Paper *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (June 2018), para. 3.2.

[18] *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, at 435.

[19] [2017] FCA 330, at paragraph 142.

[20] Discussion Paper *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (June 2018), para.5.46.

[21] Ibid., chapter 3.

[22] *Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into financial products and services in Australia* (November 2009) (the "Ripoll Report") at: http://www.aph.gov.au>

[23] *Royal Commission into Misconduct in the Superannuation, Banking and Financial Services Industry* (2018) (the "Banking Royal Commission") at: http://www.financialservices.royalcommission.gov.au>

12. Should the push to introduce an entire new regulatory regime upon litigation funders prevail, this submission concludes with a strong plea that any policy proposal designed to introduce such regulation be accompanied by an Australian Government Regulation Impact Statement or RIS. The updated Australian Guide to Regulation (AGGR)[24] sets out the approach to regulation which focuses upon reducing the regulatory burden by limiting the flow of new regulation that, inter alia, does not pass a cost-benefit analysis. The adoption of this methodology in the case of any proposed external regime for litigation funding will keep regulators focused on the critical questions such as the actual, quantifiable costs and benefits of the proposed regulation, and also minimize the risks of unintended consequences such as the creation of unnecessary barriers to market entry[25]. This is particularly important in the context of an issue that generates so much visibility and charged commentary and when more active Court oversight and supervision might address the vast preponderance of concerns.

13. Thank you for your consideration of this submission.

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Professor Julie-Anne Tarr

19 July 2018

[24] Australian Government, *Guide to Regulation* (Cutting Red Tape, March 2014). See<https://cuttingredtape.gov.au>

[25] Generally, see S. Taylor, J. Tarr and A. Asher, "Australia's flawed Regulatory Impact Statement (RIS) process" (2016) 44 *Australian Business Law Review* 361.