

Inquiry into Class Action and Third-Party Litigation Funders

Submission to the Australian Law Reform Commission
Discussion Paper

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA appreciates the opportunity to make a submission in response to the Australian Law Reform Commission (ALRC) Discussion Paper for the Inquiry into Class Action Proceedings and Third-Party Litigation Funders.
2. The ALA notes that the ALRC Discussion Paper places considerable emphasis on the use of the Part IVA provision of the *Federal Court of Australia Act 1976* (Cth) ('the *FCA Act*') for shareholder or securities class actions, and the use of third-party litigation funders to finance these class actions. It is within this context that the ALRC is being asked to inquire into whether and to what extent Commonwealth regulation of class actions proceedings and third-party litigation funders is necessary, to assure the social utility of the class action regime.
3. This submission will focus on the importance of non-investor class action proceedings as a vehicle for access to justice for disadvantaged individuals – who have been subjected to similar injurious circumstances – to pursue legal remedies against a well-resourced defendant such as a government agency or large corporation. The ALA submits that any regulatory framework for class action proceedings and third-party litigation funders should not in any way inhibit the use of the class action regime provided for by Part IVA of the *FCA Act* to access legal remedies by those who are socially and economically disadvantaged.

Non-investor class actions — providing access to justice for disadvantaged persons

4. The ALA recognises that class actions allow groups of people who have suffered similar breaches of their rights to join with each other to sue a well-resourced and powerful defendant. For many of these people, pursuing their claims against a well-resourced defendant would be beyond their individual financial means. In this way class actions enable more people who are economically disadvantaged to enforce their common law and statutory rights. A number of ALA members are legal practitioners who have undertaken class action litigation on behalf of disadvantaged people who have suffered considerable personal harm as a result of wrongful conduct by a powerful defendant. In most cases these actions have been undertaken on a 'no-win, no-fee' basis.

5. In 1988 the ALRC recognised that the underlying purpose of class actions was 'to enhance access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically'.² This recognises that many people with legitimate legal claims against powerful government or corporate actors would face considerable financial and social barriers in accessing legal redress through the courts without the Part IVA class action regime.
6. The ALA refers the ALRC to the research conducted by Professor Vince Morabito and Jarrah Ekstein, documented in their article *Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study*,³ which includes several examples of how the Part IVA class action regime has been used by groups of financially and socially disadvantaged people, to pursue legitimate legal claims in circumstances where their health, well-being and financial circumstances have been materially affected by the actions of government or corporate agencies. Several of these case studies are provided in this submission.
7. The ALA also notes the further article by Jarrah Ekstein that she co-authored with Ben Slade⁴ in which examples of socially beneficial class actions are again detailed.

Class actions involving personal injury claimants

8. Morabito and Ekstein identified over 50 class actions that were brought during the period March 1992 – March 2014 on behalf of persons who suffered health problems or personal injury alleged to have been caused by the negligence of defendants. They observed that the vulnerability of the claimants arose as a result of, or was compounded by the injury that was the subject of the class action. In almost all cases the proceedings were undertaken by solicitors working on a 'no win, no-fee' basis.⁵
9. Some of the particular examples to which Morabito and Ekstein refer include:

² Australian Law Reform Commission (ALRC) (1988), *Grouped Proceedings in the Federal Court*, Report No. 46 (1988), paragraph 107.

³ Morabito, Vince and Ekstein, Jarrah (2016), *Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study*, (2016) 35 C.J.Q, Issue 1, 61-88.

⁴ Ben Slade and Jarrah Ekstein: *Class Actions and Social Justice: achievements and barriers* in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017). See also Slade, Ben "The social value of class actions" [2015] Precedent AULA 45; (2015) 129 Precedent

⁵ Ibid 78.

- a) Class action initiated by over 100 people born between 1958 and 1970 who had suffered since birth from a congenital malformation, and whose mothers while pregnant had consumed thalidomide drugs (*Robbins v Grunenthal GmbH* and *Rowe v Grunenthal GmbH*).⁶
- b) Class action initiated on behalf of all persons who after 30 June 1999 obtained prescriptions from an Australian medical practitioner for the anti-inflammatory drug Vioxx, and who suffered one or more of specified cardiovascular conditions, thrombotic stroke and vascular disease (*Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* [2006] FCA 875).
- c) Class action initiated by over 100 people who consumed Travacalm travel sickness tablets and who claimed to suffer personal injury as a result (*Reynolds v Key Pharmaceutical Pty Ltd*).⁷
- d) Class action initiated on behalf of victims of allegedly defective silicone breast implants (*Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927).⁸
- e) Class action on behalf of a large number of people who suffered loss or damage as a result of the Black Saturday bushfire in February 2009 in Kilmore East Kinglake. It was alleged that the fire was caused by a faulty electricity conductor. The claim involved approximately 1,700 personal injury claims, 4,000 claims for uninsured or underinsured property loss and more than 5,000 claims for insured property. Many people involved in the class action were injured, grieving, unable to work or homeless (*Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663).⁹
- f) Class action on behalf of people who had contracted Legionnaires disease in 2000, after attending the Melbourne Aquarium (*Hilton v Melbourne Underwater World Pty*

⁶ Ibid 79.

⁷ Ibid 80.

⁸ Ibid 81.

⁹ Ibid 84.

Ltd [2004] VSC 357; *Scicluna v Melbourne Underwater Pty Ltd* (unreported 26 November 2004).¹⁰

- g) Class action on behalf of 26 people who suffered injuries and mental distress following the collapse of the Arthurs Seat Scenic Chairlift in Dromana, Victoria (*Mardini v Arthurs Seat Scenic Chairlift Pty Ltd*).¹¹

Class actions involving people from particular socially and economically disadvantaged groups

10. In respect of the above-mentioned examples of class actions for personal injury claims, the ALA notes the observations of Morabito and Ekstein, and again with Slade, that in almost all examples, the members of the class action groups were people who would otherwise face considerable barriers to accessing their legal rights through the courts. Many were elderly people, suffering significant personal injury or disability, dealing with grief or distress as a result of the circumstances that would be the subject of their claim, or were parents of young children.

11. In addition, Morabito and Ekstein refer to other examples of class actions involving particular groups that face hardship and social or economic disadvantage. These include:

- a) People with intellectual disability –

A class action that settled for approximately \$100m for 9,735 people with intellectual disability who were employed in Australian Disability Enterprises ('ADEs'), whose representative claimed that they were subject to unlawful discrimination by the application of the Business Services Wage Assessment Tool devised by the Federal Government to determine pro-rata wages for people working at ADEs discriminated against people with intellectual disabilities (*Duval-Comrie v Commonwealth of Australia* [2106] FCA 1523). The class members were society's most vulnerable, with minimal incomes and the disability support pension. None of the class members were able to bring a proceeding on their own.¹²

¹⁰ Ibid 85.

¹¹ Ibid 86.

¹² Ibid 69.

b) Children and young people –

A class action filed in the NSW Supreme Court on behalf of 56 young people who had been wrongfully arrested and detained by NSW Police for breach of bail, due to the police computer system containing out-of-date or incorrect bail information (*Konneh v State of NSW (No 3)* (2013) 235 A Crim R 191 (later *Amom v State of NSW*)). Each of the class members was aged between 11 and 18 at the time of their wrongful arrest, and all were from socially and economically disadvantaged backgrounds.¹³

c) People on fixed or low incomes –

Two class action proceedings were initiated against the pay day lenders Cash Converters, for unconscionable conduct in the provision of financial services, including the imposition of a dubious fee for shortening the repayment period. The fee pushed the annual percentage rates from the allowed maximum of 48% to over 150% for loan terms of 24 months and as high as 633% for one month small cash loans. The class of those compensated were people on low incomes or social security. 26,000 class members ultimately shared in \$20m that was paid by Cash Converters to settle the claims (*Gray v Cash Converters International Ltd* (2014) 100 ACSR 29).¹⁴

d) Older people –

Class action proceedings filed on behalf of 100 elderly people who were lessees of a retirement village, in which it was claimed that prior to entering into the lease, misleading statements were made on behalf of the retirement village proprietor concerning the extent of their liability under the lease to contribute to the expenses of operating the lease (*Murphy v Overton Investments Pty Ltd* [1999] FCA 1123). Most of the members of this class of claimants were elderly, with many lacking capacity to provide instructions to commence proceedings on their own behalf.¹⁵

¹³ Ibid 72.

¹⁴ Ibid 74-75.

¹⁵ Ibid 77.

12. Some compelling examples of socially beneficial class actions that have been identified in Ms Ekstein's second article¹⁶ are:

- a) The settlement of the Grand Western Lodge class action that saw \$4.05 million paid to 50 intellectually disabled and/or psychiatrically impaired residents of a licensed residential care facility. They variously claimed to have been assaulted, falsely imprisoned, drugged and/or financially exploited during their time at the lodge;²⁰
- b) Up to 200 former residents of Fairbridge Farm School at Molong in NSW who suffered child abuse shared in a \$24 million fund after their class action was settled;²² and
- c) 2,000 people with allegedly defective hip implants shared in a \$250 million settlement, Australia's largest product liability settlement.²⁷

13. In each of the examples provided, members of the respective class of claimants would have faced considerable barriers in bringing individual actions. In almost all cases the individuals concerned were economically disadvantaged, either receiving very low wages or fixed incomes such as a disability support pension. The legal costs involved in bringing an individual action, often in respect of a claim that was of low monetary value (as in the case of the class action against Cash Converters), in itself would have been prohibitive. In addition, several of the class claimants in the abovementioned examples had personal characteristics (including age, intellectual disability, significant physical illness or disability) that presented significant difficulties for them in bringing an individual claim.

Funding arrangements for class actions involving people from socially and economically disadvantaged groups

14. In most of the examples of class actions undertaken on behalf of people from socially or economically disadvantaged groups referred to by Morabito and Ekstein, and Slade and

¹⁶ Ben Slade and Jarrah Ekstein: *Class Actions and Social Justice: achievements and barriers* in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017)

²⁰ *McAlister v State of NSW* (No 2) [2017] FCA 93

²² *Giles v Commonwealth of Australia* [2011] NSWSC 582.

²⁷ This figure includes costs: *Stanford v DePuy International Ltd* (No 6) [2016] FCA 1452.

Ekstein, the solicitors that filed the actions on behalf of the class of claimants provided legal assistance on a 'no-win, no-fee' basis, that is, they had conditional fee agreements with at least the representative applicant. In these circumstances the solicitors only received fees if there was a favourable settlement or success through litigation. In some cases where the action was discontinued, the solicitors incurred significant costs and disbursements which they absorbed and for which they did not charge the litigants.¹⁷

15. According to Morabito and Ekstein, while none of the proceedings which were the subject of their research were funded by litigation funders, the fact that litigation funders provided funding for other types of class actions, such as investor or shareholder class actions, meant that law firms were able to devote resources to class actions that involved disadvantaged litigants pursuing their common law rights against powerful defendants.
16. The ALA notes that the availability of litigation funding for class actions of this nature is quite limited. Most commercial litigation funders only assist class action litigants where all class members agree to pay to the litigation funder a specified percentage of the amount recovered, if the litigation is successful. This means that the defined class for any particular proceeding is limited to those people who have agreed to enter into the litigation finance arrangement. As a result, the remedy arising for a class action undertaken under such an arrangement will only be for the benefit of those who have entered into such an arrangement. It will not provide a remedy for all people who may have been adversely affected by the conduct giving rise to the litigation.
17. This situation could be remedied by:
 - a) Allowing law firms, and not just litigation funders, to claim a share of the total amount recovered by a class action litigation through a common fund order, without requiring each of the class members to enter into separate contractual agreements with a litigation funder or expecting the law firm to act on a conditional fee basis only;
 - b) The creation of a state-operated 'Justice Fund' that provides financial assistance to parties with meritorious class action civil claims. This fund could provide an indemnity in respect of any adverse costs orders and meet any requirements by the courts for security for costs. Such a fund was recommended by the Victorian Law Reform

¹⁷ Ibid 81, 87-88.

Commission's 2008 report *Civil Justice Review*. The Commission recommended that in return for providing this financial support, the fund would, subject to judicial approval, receive an agreed percentage of the amount recovered in successful cases.¹⁸ Such a fund could be focused solely on providing financial assistance for commercially viable meritorious litigation that involves an important public interest or disadvantaged class of potential litigants.¹⁹

Conclusion

18. The ALA welcomes the opportunity to have input into the ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders. The ALRC considers that the Part IVA class action provision of the *FCA Act* provides an important vehicle by which groups of people experiencing significant social and/or economic disadvantage who have experienced personal injuries or financial loss as a result of the wrongful actions of powerful government or corporate entities, can access legal remedies. Without this provision these groups of potential litigants would face considerable financial and social barriers in accessing legal redress through the courts.
19. The ALA submits that any changes to the Part IVA framework should ensure that the opportunity for people to pursue class actions for personal injury or financial loss arising out of the wrongful act of powerful government or corporate entities should be preserved.
20. The ALA further submits that the ALRC consider opportunities for third-party litigation funders to become more available for providing financial assistance for class actions involving disadvantaged litigants pursuing their common law rights against powerful defendants, and for claims that involve a significant public interest.

¹⁸ Victorian Law Reform Commission (2008), 'Achieving Greater Access to Justice: A New Funding Mechanism' chapter 10 in *Civil Justice Review: Report*, Victorian Law Reform Commission, Report 14, May 2008, 622-623.

¹⁹ Note the discussion of the Justice Fund concept in Ben Slade and Jarrah Ekstein: *Class Actions and Social Justice: achievements and barriers* in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017)