



26 July 2018

Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: class-actions@alrc.gov.au

Submission to the Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Dear Sir/Madam,

Bennelong Funds Management represents eight investment management businesses in Australia who collectively manage over \$10 billion of assets on behalf of retail and institutional clients (as at 30 June 2018). As a business, we have participated in a number of class actions over the last 10 years on behalf of our investors.

We have read the discussion paper relating to class action proceedings and third-party litigation funders and wish to make the following comments.

Continuous Disclosure Obligations

Proposal 1-1:

The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) with regards to:

- *the propensity for corporate entities to be the target of funded shareholder class actions in Australia;*
- *the value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and*
- *the availability and cost of directors and officers liability cover within the Australian market.*

RESPONSE:

- Continuous disclosure obligations are essential for the integrity of the market and provide an important protection for investors around the country, whether they are large financial institutions investing our superannuation funds or smaller retail investors.
- We believe there is no basis for any conclusion that there are problems with the substantive law, and the Banking and Financial Services Royal Commission revelations have made it clear that any suggestion of watering down corporate accountability is undesirable.
- Increasing transparency and ensuring proper disclosures from large companies will increase access to justice and our ability in Australia to deal with corporate wrongdoing – class actions are the major vehicle for allowing those who have been wronged to seek recompense.

- If there is a problem with directors and officers insurance, the market should be re-priced and/or there should be an improvement in corporate wrongdoing.

Prohibition on Contingency Fees

Proposal 5-1:

Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements.

This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:

- *an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;*
- *a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and*
- *under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.*

Proposal 5-2:

Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

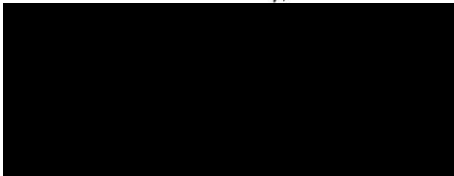
RESPONSE:

- The proposal to lift the ban on contingency fees should deliver benefits for class action claimants by increasing access to justice, improving enforceability and, importantly, assisting greater returns to victims.
- The proposal is consistent with the recommendations of the Productivity Commission in 2014 and the VLRC in its own review of the civil justice system in 2008, as well as its most recent inquiry into the class actions regime earlier this year.
- We believe that speculation that the availability of contingency fees would promote unmeritorious, frivolous litigation and lead to conflict between the lawyers' duty to their client and financial interest in the case is misguided:
 - o Merit – Cases are typically run on a 'no win no fee' basis, regardless of the billing arrangement, meaning that lawyers are already incentivised to proceed only with claims that have a reasonable chance of success. The introduction of contingency fees would likely align the interests of the lawyers and their clients to working towards to highest possible recovery. Unlike the US, whose regime ours is often compared to, adverse costs orders in Australia are an existing disincentive to pursuing high risk claims

with a low likelihood of success. It is apparent that not all types of class actions are attractive to third party litigation funders and there is a gap left by their investment policies, so many smaller meritorious potential class actions are falling through the cracks and the opportunity for justice is therefore denied to many victims of wrongdoing. Lifting the ban will allow those claims to be pursued that are not financially viable for funders.

- Transparency – If the prohibition is removed the clients' costs will be proportional to the recovery, which reduces uncertainty at the outset of a case regarding potential total fees.
 - Returns – With the current ban on this method of billing, many cases are backed by litigation funders who, in return, are allowed to take a percentage of the recovery that can be anywhere from 25% to 40%. The lawyers' legal fees then still need to be paid. Studies have been conducted on this and the evidence suggests that the combined cost of lawyers' fees and a litigation funder's commission is greater than an appropriately structured contingency fee arrangement. Lifting the ban will result in greater returns for clients.
- Proposal 5-2 is agreeable, as existing Court approval of settlements means that fee arrangements and actual fees already require the Court's blessing.

Yours Sincerely,



Jeff Phillips
Company Secretary
Bennelong Funds Management