27 July 2018

Australian Law Reform Commission
GPO Box 3708
Sydney, NSW, 2001

By email only: class-actions@alrc.gov.au

Dear Sir/Madam,

Inquiry into Class Action Proceedings and Third-party Litigation Funders

Thank you for the opportunity to provide input into this important inquiry.

Environmental Justice Australia (**EJA**) is a not-for-profit public interest legal practice. Our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect the environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with and on behalf of community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard won environmental protections from attack. We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

To this end, we focus our submission around two key themes:

1. Class Actions as a means of achieving access to justice; and

2. Class Actions as a means of achieving change.

We approach this via four of the terms of reference:

- the increased prevalence of class action proceedings in courts throughout Australia, and the important role they play in securing access to justice;

- the importance of ensuring that the costs of such proceedings are appropriate and proportionate;

- the importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards;

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- the role that third party funding entities play in enabling the commencement and maintenance of class action proceedings;

Our specific responses to each of these appears below.

ToR 1 - The increased prevalence of class action proceedings in courts throughout Australia, and the important role they play in securing access to justice.

The recent Victorian Law Reform Commission (**VLRC**) Report on its inquiry into Litigation Funding and Group Proceedings Report found that:

> *Class actions create economies of scale that make it financially viable to take legal action against a well-resourced defendant, such as a government agency or large corporation, to recover a small loss. By grouping individual claims from the same, similar or related circumstances, the cost of bringing proceedings can be spread across many claimants.*
>
> *In this way, class actions have provided access to justice to thousands of Australians who otherwise would not have pursued a legal remedy because of the cost. For claimants who could have taken separate legal action, class actions have offered cost savings. (p.70)*

EJA agrees with this finding.

Many of the cases in which EJA has been involved would not have transpired had the capacity for small claimants to group their concerns not existed in law.

Additionally, Class Actions are an important means for ensuring efficiency in the legal system – both from the perspective of the claimant, and the defendant. Compared to the prosecution of many small, individual claims, class actions also provide for better efficiency for the court system.

EJA encourages the ALRC to seek greater avenues for ensuring access to justice for individuals against well-resourced defendants.

ToR 2 - The importance of ensuring that the costs of such proceedings are appropriate and proportionate.

EJA notes that the Discussion Paper released by the ALRC contains the following specific proposal relating to ensuring costs are appropriate and proportionate:

> ***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.*

EJA supports this proposal.

The current prohibition on the use of contingency fee models in class actions is illogical and unsustainable. This has been reflected in the findings of a number of recent studies and inquiries. For example:

The VLRC inquiry found:

> *As a matter of principle, the Commission considers that lawyers should be able to charge contingency fees, as it provides another avenue of funding for clients who may be otherwise unable to pursue proceedings due to the cost. While their use should be subject to certain conditions, the need for regulatory controls is not sufficient reason to prevent the ban being lifted. The matter requires national consideration, and the Commission recommends that this be pursued.*

The Productivity Commission's (**PC**) inquiry into Access to Justice made the following recommendation:

> ***Recommendation 18.1***
> *The Australian, State and Territory Governments should remove restrictions on damages based billing (contingency fees). This recommendation should only be adopted subject to the following protections being in place for consumers:*
> - *the prohibition on damages based billing for criminal and family matters, in line with restrictions for conditional billing, should remain.*
> - *comprehensive disclosure requirements — including the percentage of damages, and where liability will fall for disbursements and adverse costs orders — being made explicit in the billing contract at the outset of the agreement.*
> - *percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients.*
> - *damages based fees should be used on their own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).*

EJA notes the commonality of findings expressed by both the VLRC and PC, and implicit in the ALRC's proposal:

- that the lifting of the prohibition on contingency funding would greatly increase access to justice;

- that strict regulations need to be imposed in relation to ensuring transparency in the disclosure of fees and costs, and

- that there must be clarity for clients around the potential impacts of an adverse costs order.

ToR 3 - The importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards

EJA notes that many of Australia's larger recent class actions have had an environmental overlay. For example, actions brought as a result of negligence which has contributed to or facilitated bushfire and flood have received significant media attention.

In many of our cases, however, the distribution of settlements and damages is not the primary goal of the action.

EJA argues that one of the primary benefits of a well-functioning legal system, including class actions, is the achievement of behavioural and cultural change, especially in the corporate and government sectors.

Quite often, our clients are not seeking financial settlements and/or damages. Rather, they are seeking the discontinuation of a particular corporate or government behaviour. Some examples of this are listed below:

- EJA filed the first case in the world by shareholders against a financial institution for failing to disclose to investors the risks of climate change in the directors' operating and financial review in an annual report. The investors sought a declaration from the Federal Court of Australia that disclosure laws were breached and an injunction preventing future breaches.

- EJA filed the first case in the world by a superannuation fund member seeking information about how the fund was future-proofing his investments from climate change. A declaration and injunction is being sought.

- EJA exposed serious flaws in plans for a government subsidy to support Adani's Carmichael project – a proposal for the world's largest new coal mine. The Northern Australia Infrastructure Facility (**NAIF**) considered lending $1 billion in taxpayers' money to a coal railway to service Adani's mine. EJA exposed NAIF board members' conflicts of interest, raised serious questions about NAIF's Risk Appetite Statement and its Anti-Money Laundering policy and advised that NAIF's officials would breach their duties if the loan proceeds.

- EJA's research revealed the legal framework governing the operation of Australia's Export Finance and Insurance Corporation contains Constitutional, political and legal roadblocks that could preclude loans and financial support for projects like Adani's Carmichael coal mine.

- EJA developed a report called *Fracking the Northern Territory*, which examines the NT Government's recent decision to lift its popular moratorium on hydraulic fracturing following a scientific inquiry into the impacts of fracking.

- EJA has been instrumental in the provision of advocacy in relation to air pollution laws. The national campaign aims to make sure polluters reduce and control their toxic air pollution as much as possible. The campaign is working to help community groups, experts and advocates to achieve national laws that reduce air pollution levels and safeguard clean air.

- EJA works with groups such as Friends of Leadbeater's Possum to ensure habitat protection. This work has involved the seeking of injunctions against logging by VicForests and enforcing codes of practice.

Class actions, as one of a number of methods for pursuing environmental justice, are a potent means for achieving change.

EJA encourages the ALRC to remain mindful, in the development of its recommendations from this inquiry, of the importance of protecting the interests of class members and plaintiffs in cases seeking cultural and behavioural change – not just damages and financial settlements.

A growing interaction between class actions and those seeking environmental justice has been foreshadowed by Noel Hutley SC and Sebastian Hartford-Davis in their memorandum of opinion entitled "Climate Change and Directors' Duties" prepared for the Centre for Policy Development and the Future Business School.

The memorandum states:

> *"It is likely to be only a matter of time before we see litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company (including, perhaps, reputational harm)." (para 51)*

Under the *Corporations Act 2001 (Cth)*, directors are required to take into account all foreseeable risks in the governance of their entity. Hutley SC and Hartford-Davis contend that, with the amount of scientific evidence pertaining to climate change, directors may no longer be able to deem their failure to account for such risks as unforeseeable.

The report says that "… many are failing in their most basic duty to consider and disclose the potential risks or to form a business case about whether action is needed to protect their company."

The report also makes reference to environmental risk disclosure cases already commencing in the United States of America, citing the examples of Peabody Coal and ExxonMobil.

EJA notes the important role that corporate regulators such as the Australian Securities & Investments Commission (**ASIC**) and the Australian Prudential Regulatory Authority (**APRA**) have in monitoring the corporate sector for breaches in shareholder expectations in relation to environmental risk disclosure. This is an exciting area of focus, which could lead to real change in how environmental risk is perceived.

EJA would be disappointed if the ALRC, in its consideration of responses to Proposal 1-1 in the Discussion Paper, fails to recognise that environmental risk management is, rightly, an important element of disclosure for companies listed on the stock exchange.

ToR 4 - The role that third party funding entities play in enabling the commencement and maintenance of class action proceedings

EJA submits that third party litigation funding is essential to enabling access to justice.

We agree with the principles expounded in Proposal 3-2 of the Discussion Paper, that third-party litigation funders should be required to:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;

- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interest;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

We have no opinion, however, on the mechanism through which the behaviours of third-party funders are held to account for these principles – be it through a licencing regime or some other method.

We merely seek to ensure that the ALRC understand the importance of litigation funders to organisations like ours, and the public interest work we do.

Just as not all cases primarily seek the distribution of settlements and damages, not all litigation funders primarily seek massive financial return on investment. Some litigation funders are equally or more concerned with investing in the public interest, and ensuring that access to justice is not predicated on financial capacity.

Please do not hesitate to contact me if I can further assist with the Commission's important work.

Yours sincerely

David Barnden
Principal lawyer
Environmental Justice Australia