ALCG.

30 July 2018

The Honourable Justice Sarah Derrington
President
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
Per Email: class-actions@alrc.gov.au

Dear Justice Derrington,

INQUIRY INTO CLASS ACTION PROCEEDINGS AND THIRD-PARTY LITIGATION FUNDERS

I wish to make a submission to the discussion paper published in relation to the above inquiry.

MY BACKGROUND:
I have been a costs lawyer for over 30 years, practicing predominantly in Victoria. I have had a very wide practice in particular in the area of legal costs disputes acting mainly for clients aggrieved with their lawyers' legal fees. In recognition of this work, I received in 2014 the Law Institute of Victoria's Pro Bono/Access to Justice award.

In recent years, I have had been engaged as a costs expert in the following five Federal Court class actions, six Victoria and two NSW Supreme Court class actions by law firms Slater & Gordon, Gordon Legal and Maurice Blackburn:

a) **Provident class action** (*Innes Creighton v Australian Executor Trustee Limited* (NSW Supreme Court Proceeding 2015/306222) (expert report dated 22 May 2018 – for mediation purposes)
b) **QBE class action** (*Money Max Int Pty Ltd (as trustee for the Goldie Superannuation Fund v QBE Insurance Group Limited)* (Federal Court of Australia No. VID 513/2015) (expert report dated 26 March 2018))
c) **Manus Island Detention Centre class action** & on-going administration costs (*Majid Karamai Kamasaee v The Commonwealth of Australia & Ors* (Victorian Supreme Court Proceeding VSC 2014/06770)) (expert reports dated 25 August 2017, 1 & 6 February 2018 and 29 May 2018)
d) **Slater & Gordon class action** (*Matthew Hall v Slater & Gordon Limited*) (Federal Court of Australia No. VID 1213/2016) (expert report dated 9 November 2017)
e) **Allco class action** (*Blairgowrie Trading Ltd & Ors v Allco Finance Group Ltd (Receivers & Managers appointed*) (Federal Court of Australia No. NSD 1609/2013) (expert report dated 17 February 2017)
f) **NAB class action** (*Steven Farey & Ors v National Australia Bank Ltd* (Federal Court of Australia No. VID1459/2011) (expert report dated 5 April 2016)
g) **ACR class action** & on-going administration costs (*George Camilleri & Ann Camilleri v The Trust Company (Nominees) Ltd* (Federal Court of Australia No. VID410/2013)) (expert report dated 11 December 2015)
h) **Fairbridge farm class action** (*Giles & Anor v Commonwealth of Australia & Ors* (NSW Supreme Court No. 2009/329777)) (expert report dated 19 August 2015)

i) **Murrindindi bushfire class action** (*Rowe v Ausnet Electricity Services Pty Ltd & Ors* (Victorian Supreme Court No. S CI 2012 4538)) (expert report dated 6 May 2015)
j) **Bonsoy class action** (*Downie v Spiral Foods Pty Ltd & Ors* (Victorian Supreme Court Proceeding No. S CI 2010 05318)) (expert report dated 16 February 2015)
k) **Kilmore-East Kinglake bushfire class action** (*Matthews v SPI Electricity Pty Ltd & Ors* (Victorian Supreme Court No. S CI 4788 of 2009)) (expert report dated 7 November 2014)
l) **Croydon Day Surgery – Hepatitis C class action** (*A v Schulberg & Ors* (Victorian Supreme Court No. S CI 2012 02791)) (expert report dated 3 June 2014)
m) **Thalidomide class actions** (*Rowe v Grunenthal GLMSH & Ors* (S CI 2011 3527) & *Robbins & Ors v Grunenthal GLMSH* (Victorian Supreme Court No. S CI 2010 5845)) (expert report dated 6 February 2014)

DETERMINING THE REASONABLENESS OF PLAINTIFFS' LEGAL COSTS

The role of the Court in determining the reasonableness of the plaintiff's legal costs has developed not so much due to the governing legislation but the development of the caselaw.

In my opinion, the decisions by Federal Court Justice Gordon (now of the High Court) in the Modtech class action[1] provided the clearest indication in recent times of the central role of the Courts in determining the reasonableness of the legal costs and the obligations imposed on plaintiff's solicitors to properly prove their reasonable legal fees. Her Honour stressed that it was the Court that had to determine the issue of costs and an expert report on costs had to address a series of issues. Justice Gordon was responsive to the nature of modern practice and the use by lawyers of time recording systems.

I believe the Modtech cases had a major effect on plaintiff lawyers throughout Australia in class actions and other large litigation. It has led plaintiffs' lawyers to consider more carefully the process of how they quantify and prove their costs. This included investing in new and improving time recording systems, better communications with their client and improving compliance with requirements of the Legal Profession Act or the Uniform Law.

More costs lawyers have entered the field and developed specialist class action expertise since 2013 (including myself) where previously there were only a handful of costs experts who had been engaged by plaintiff's solicitors. There has been concerns that a very small pool of costs lawyers had been engaged by the same law firms. This ought not be a current concern as both the number of plaintiff law firms conducting class actions and costs lawyers specializing in class actions have grown in the last 4 years and continues.

The plaintiff and group members (whether clients or not of the law firm) have benefited from having a costs expert in effect "audit" the law firm's legal fees and prepare a detailed report for the Court's consideration and ultimate approval of legal fees.

The effort, skill and care demonstrated in the parties coming to a settlement/resolution requiring the Court's approval of involving millions of dollars is also needed in a Court approving millions of dollars of legal fees, particularly as the legal costs might not involve any "contradictory evidence".

In my experience, law firms spend great care in ensuring the materials provided to the costs expert has minimal non-recoverable claims. However, it is also my experience in class actions that notwithstanding the efforts of plaintiff lawyers, I invariably reduce their fees when assessing their reasonableness. I do so not only because of the ability to identify work that in a particular case may involve unreasonable fees (e.g. excessive claims for fees for training of staff due to staff overturn) but I have found some basic errors. Examples of errors I have identified have been incorrect costs rates claimed, incorrect application of updated rates, duplicate time entries and even large arithmetic errors. In one class action I identified with the law firm that a barrister had duplicated a claim for appearances during a particular month in a long trial resulting in that barrister reducing his fees by an amount in excess of $130,000.

[1] *Modtech Engineering Pty Limited* v *GPT Management Holdings Limited [No. 1]* [2013] FCA 626; *[No.2]* [2013] FCA 1163 & [2014] FCA 680

It is my strong view that contingency fees applied according to a % formula without the supervisory role by the Court as to the amount of the plaintiff's legal costs would have a strong negative impact on clients and group members. They would lose protection currently afforded to them. Today, the approval process in class actions result in a separate supervisory role that is a substitute in practice to the costs disputes regime under the various Legal Profession Acts or the Uniform Law.

The engagement of Costs Lawyers as experts (including as Referees) has to date provided the necessary information to the Court and to clients and other group members that the legal fees have been audited and that the plaintiff's solicitors are to be paid are reasonable legal costs and no more.

I therefore submit that the ALRC should ensure that clients and other group members retain the protection they currently have to pay the plaintiff lawyers reasonable fees and that some form of auditing still occur through use of Costs experts.

Finally, if contingency fees were to be introduced, the Courts should be empowered to approve the % of any contingency fees after the settlement has been determined. Only at the conclusion of the matter can the Court assess the issue of proportionality when it comes to any contingency fees payable by the plaintiff's solicitors.

I am happy to meet with any members of the working group to discuss further any matters raised in my submission and to the ALCR discussion paper generally. I wish the working group all the success in their important endevours.

Yours faithfully,

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Cate Dealehr