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30 July 2018

Australian Law Reform Commission
GPO Box 3708
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Attention:
the Honourable Justice Sarah Derrington, President, Australian Law Reform Commission

Dear Madam President

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

I am grateful for the opportunity to provide submissions to the Australian Law Reform Commission (**ALRC**) in response to the discussion paper entitled "Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (**discussion paper**). I am a partner of Mills Oakley but make these submissions in my personal capacity and confirm that the views expressed are my own. They do not represent the views of the partnership as a whole.

The submissions do not address all issues but are limited to the matters identified below.

Chapter 1. Shareholder Class Actions

The figures contained in Section 2 of the discussion paper in relation to shareholder class actions are concerning, noting in particular:

1. 100% of claims by shareholders were funded by litigation funders since 2013. This is not consistent with the funding provided to other class action types, which were funded in 43% of cases on average.[1]
2. Shareholder class actions have grown in the last 5 years from 23.4% to 34.2% of all filed class actions, and this growth trend is continuing.[2]
3. There has been a growth in the number of litigation funders, with approximately 25 funders currently active in the Australian market.[3]
4. At least some litigation funders appear to have developed a business model which focuses on identifying a significant drop in the value of securities to see whether this can be linked to late revelation of material information so as to constitute potential breaches of continuous disclosure obligations and/or misleading and deceptive conduct as contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth).

[1] Discussion Paper: Table 2.4; para 2.15
[2] Discussion Paper: para 2.16
[3] Discussion Paper: para 1.12

From my experience, the above factors can give rise to the potential for "reverse engineering" of a claim for the funder's benefit which may not necessarily have the applicants' interests as a central consideration, and may inappropriately prefer the interests of past shareholders to the interests of the current shareholders whose shareholdings can be affected by the commencement and then the settlement of a class action.

This may not be a universal issue, but it is of sufficient concern to have attracted comment in recent court decisions.[4] Further, the funding model that is prevalent in Australia has not gained the same kind of prevalence in other similar jurisdictions, such as Canada. This suggests that it may be appropriate to review the legislative provisions in Australia to ensure the correct balance has been struck between a corporate's ability to run a business and shareholders' rights to be informed.

For this reason we fully support **Proposal 1-1.**

Chapter 3. Regulating Litigation Funders

In its Access to Justice Arrangements 2014 report, the Productivity Commission found that litigation funding played an important role in facilitating access to justice in Australia. However, there are some concerns in relation to the regulation of litigation funding in Australia.

For example, while Courts have discretion to make adverse costs orders against third parties (see, for example, *Gore v Justice Corporation*[5]), litigation funding agreements are not required to provide an indemnity for adverse costs orders.[6] This can leave a representative party burdened with adverse costs orders, as non-representative class members have a statutory immunity from such costs.[7]

As such, in situations where litigation funders have not agreed to underwrite adverse costs, the representative party may become responsible for such costs. Further, court regulation may not assist in circumstances where the applicants' solicitor's costs have not been paid by the litigation funder.

While ASIC has produced guidelines, litigation funders are generally free from mandatory licencing, disclosure and reporting requirements, or other supervision.[8] Because of the lack of financial supervision, there is no means to ensure that litigation funders hold adequate capital within Australia.[9]

While recognising that litigation funding can be beneficial to the community in ensuring access to justice, there needs to be a means of ensuring that the community is protected (both persons relying on litigation funding to commence a claim, and respondents to such action when a claim is successfully defended) where there is no security for costs and/or a potential default on a financial undertaking.

The Productivity Commission has previously recommended that there be:

> *a licence for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations… [and] the licence should require litigation funders to be members of the Financial Ombudsman Scheme…*[10]

Such recommendation is appropriate and provides protection to the community as a whole.

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[4] See, for example, *Perara v Getswift* [2018]FCA 732
[5] (2002) 119 FCR 429.
[6] *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) HCA
[7] *Federal Court of Australia Act 1976* (Cth) s.43(1A).
[8] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, pg. 17
[9] Productivity Commission, *Access to Justice Arrangements, Productivity Commission Inquiry Report* (25 September 2014) pg 630.
[10] Productivity Commission, Recommendation 18.2

Question 3–2 What ongoing financial standards should apply to third-party litigation funders?

Litigation funding should be subject to a bespoke licencing arrangement which includes an obligation to maintain appropriate capital adequacy to ensure that litigation funders have capacity to meet financial undertakings and any adverse costs events. The arrangement should also require reporting to and supervision by an appropriate authority such as ASIC. This will give some comfort Courts, consumers/representative class members, respondents and the community generally.

Question 3–3 Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?

Third-party litigation funders should be required to join the AFCA scheme. This will ensure that there is an easy and accessible complaints mechanism for issues to be raised and resolved for the protection of consumers in a way that more evenly balances the power between consumers and third party litigation funders.

Chapter 6. Competing Class Actions

The prevalence of competing class actions in the Australian legal space undermines the prime objective of the class action regime to achieve efficient and cost effective use of resources by enabling a single decision on common issues. In particular, competing class actions:

a) Increase significantly the time and cost involved in defending and attempting to resolve the proceedings;

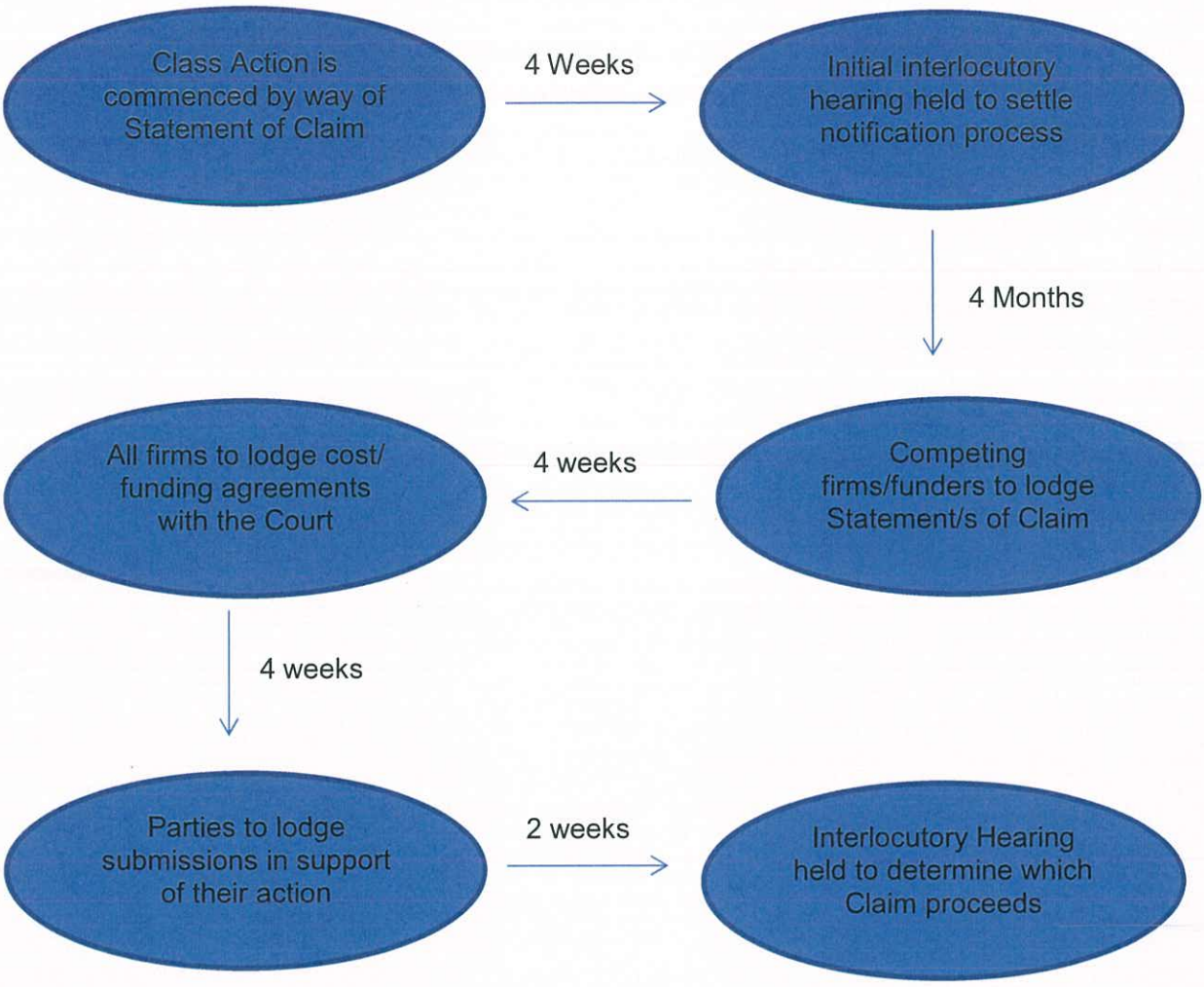
b) Increase court resources required to manage the competing claims; and

c) Erode funds available to the applicants as compensation.

Having considered various different legal models, **Proposal 6-1** and **Proposal 6-2** are appropriate. However, the following suggestions are offered for consideration.

Firstly, the proposal appears to be that, after the initial stages allowing competing submissions, an interlocutory hearing would be held whereby different applicant firms would be given the opportunity to present their respective cases to the Court, who would then determine which proceeding should go ahead, whilst the others would be stayed.

An appropriate timeframe for such a process would be as follows:



Such a timeline would bring the proceedings appropriately into line with other Court timetables and would ensure that the aims of representative proceedings are sufficiently addressed so as to ensure costs and resource usage is kept as low as possible.

The ALRC also seeks submissions as to which criteria should apply when determining which firm/funder should have 'carriage' of the class action. The criteria outlined by both Canadian precedent[11] and by Justice Lee[12] are prudent guideposts which all have probative value. However, the critical criteria which should be given the most weight are:

- If one proposed funding model is better than another, having regard to the correlation between the amount ventured and the likely returns for the applicants and avoiding the potential for a windfall return;
- The prospects of success against the defendant/s; and
- The quality and experience of the proposed representative applicants and their counsel (if there is a significant discrepancy).

[11] *David v Loblaw; Breckon v Loblaw; 2-18 ONSC 1298.*
[12] *Perera v GetSwift Limited* [2018] FCA 732 at [306]-[324].

In making the above suggestion, it is noted that litigation funders are profit-driven and this has the potential to give rise to inconsistencies with achieving justice and fair outcomes for the applicants. Support for this as a relevant concern can also be drawn from the findings of Justice Lee in *Getswift Limited.*[13] His Honour's reasoning for allowing one proposed action to move forward based on the amount ventured and the likely returns are compelling.

Another approach for the ALRC to consider is such as that taken by Burford Capital, a new player in the Australian class action market, whose pricing model encourages a common fund but works on a sliding scale, increasing costs taken by a set percentage over time.[14] This encourages both sets of legal practitioners to work expeditiously to resolve matters, which can assist in maximising benefits to the applicants.

The Discussion Paper states that the ALRC considers that respondents should not be involved in the selection hearing to determine which action should continue. Whilst appreciating the reasoning behind this statement, I respectfully disagree. The interests of the respondent/s should be taken into account at all stages of the proceedings. In particular, the Ontario Model allows for consideration of the respondent's interests when determining which firm should take carriage.

At the very least, the respondent should be allowed to put forward submissions as to which action it says should proceed on the basis of the proposed pleadings. Additionally, the respondent should be given the opportunity to put forward a case that none of the actions should be allowed to proceed if that is appropriate, for example, on the basis that the claim should not progress as representative proceedings. This is a critical step in most representative proceedings and accordingly, it will be important for the Court to understand the respondent's perspective in relation to same and hear its viewpoints.

Question 6–1 Should Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) be amended to confer exclusive jurisdiction on the Federal Court with respect to civil matters, commenced as representative proceedings, arising under this legislation?

I agree that this should be the case. Most shareholder class actions affect applicants from across the Commonwealth, so it is appropriate that the Federal Court should deal with such actions. It would also reduce the ability for applicant firms to forum shop. At a minimum, exclusive jurisdiction should be conferred where there are competing class actions.

A further suggestion is that, if such jurisdiction is conferred, the Federal Court should create a separate National Practice Area to deal with representative claims. This would allow a rotation of judges with specialised knowledge in relation to both class action procedure and the relevant legislation to manage the case load.

Yours faithfully

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LOUISE CANTRILL
PARTNER[15]

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[13] Ibid.
[14] Merritt, C, "Hands off strategy could grab some action", The Australian, 21 June 2018, p26.
[15] I would like to specifically acknowledge and thank Alesha Burke, Senior Associate, and Alex Donley, Lawyer, of Mills Oakley for their assistance in the preparation of this Submission