CLAYTON UTZ

Submission to the

Australian Law Reform Commission

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Introduction

Clayton Utz welcomes the opportunity to respond to the proposals and questions set out in the Australian Law Reform Commission's Discussion Paper.

Clayton Utz has represented numerous defendants in class action proceedings in Australia since representative proceedings were introduced in the Federal Court of Australia in 1992. Prior to the introduction of a formal class action procedure the firm represented the defendants in a number of quasi-class actions, notably the long running Copper 7 litigation in the Supreme Court of New South Wales.

The firm has also assisted clients in the defence of class action proceedings (however described) in the United States of America, Canada and the United Kingdom.

A number of Clayton Utz partners have written extensively on the subject of class actions and litigation funding. They have also participated in debates relating to the introduction and reform of class action procedure in both Australia and internationally.

The responses to the Commission's Discussion Paper are based on the collective experiences of the firm's partners working in this area.

Response to the Commission's Proposals and Questions in Relation to Continuous Disclosure Obligations

Clayton Utz shares the concerns that have been expressed by the Australian business community, the insurance industry and others in relation to the way in which the continuous disclosure obligations of listed companies have been utilised by the class action industry.

While we support a robust market disclosure regime it must be framed and enforced in a way which reflects the realities of the environment in which companies, their directors and officers operate. The regime that is imposed on Australian companies should also be consistent with those that operate in countries that have a close relationship with the Australian market, notably Britain and the United States.

Compliance with Australian continuous disclosure obligations is by necessity a matter of judgement, notably in relation to timing. Premature disclosure, particularly in circumstances, where there is uncertainty as to the relevant facts or consequences, has the potential to damage a corporation and unnecessarily impact its share price.

The business judgement defence is not available to companies or directors in these circumstances. Thus, one class of shareholders can be found liable to pay significant sums to another as a consequence of an error of judgement, identified by a class action promoter with the benefit of hindsight.

The class action industry's approach to these actions is both driving an increase in the price, and adversely impacting the availability, of D&O insurance.[1]

Proposal 1-1 (Review impact of continuous disclosure regime)

Clayton Utz supports Proposal 1-1.

[1] See e.g. Show me the money! The impact of securities class actions on the Australian D&O Liability insurance market – XL Catlin/ Wotton + Kearney – September 2017.

Response to the Commission's Proposals and Questions in Relation to the Regulation of Litigation Funders

The protections currently provided to consumers of litigation funding services are inadequate.

Specifically:

(a) the level of disclosure provided by litigation funders is generally inadequate and often results in funders failing to disclose critical information. A regime to ensure the provision of adequate disclosure of relevant information should be imposed on all litigation funders;

(b) conflicts of interest are a serious issue in relation to litigation funding. The limited requirement that litigation funders put in place systems to 'manage' conflicts of interest is inadequate;

(c) the remuneration charged by some litigation funders in terms of success fees and other charges is excessive;

(d) the absence of any prudential oversight or capital adequacy requirements creates a substantial counterparty risk. Litigation funders should be subject to a similar degree of prudential supervision as other financial services providers are, including with respect to capital adequacy provisions; and

(e) there is little clarity as to the degree of control which may appropriately be exercised by litigation funders, as opposed to named plaintiffs, in the conduct of funded proceedings.

Comprehensive national reform is required

The Australian litigation funding industry has created a national market and given rise to a range of issues that require a national solution.

The Commission should advocate for a national solution to a national problem. This solution must address all aspects of the litigation funding industry. Specifically, the solution must apply to all entities which provide third party funding for dispute resolution proceedings, including class actions, single plaintiff litigation and arbitrations. It must also be sufficiently flexible to encompass the emerging new modes of litigation financing, for example portfolio financing.

This is the appropriate time to pursue such a proposal. The Federal Government is engaged in a detailed review of the regulatory models used to regulate the financial services sector. There is intense public interest in ensuring that consumers who utilise financial services are properly protected and that the conduct of the providers who participate in that market is appropriate and fair.

Regulation of the litigation funding industry has also recently been recommend by both the Productivity Commission and the Victorian Law Reform Commission.[2]

[2] Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72(2014) vol 2, 601–637; Recommendations 18.1–18.3 and Victorian Law Reform Commission *Access to Justice - Litigation Funding and Group Proceedings,* March 2018 Recommendation 2.

Proposals 3-1 and 3-2 (Introduction of a licencing regime)

Clayton Utz generally supports Proposals 3-1 and 3-2 as suggested by the Commission.

However, we are strongly of the view that any license should also:

(a) expressly impose a non-derogable duty on litigation funders to:

(i) act in the best interest of their clients, and to place the best interests of their clients ahead of their own; and

(ii) in circumstances where a conflict arises, prioritise the interests of their clients over their own.

(b) include a breach reporting requirement that is similar to those that apply to AFSL holders under the Corporations Act and ASIC Regulatory Guide 78. Specifically, a licenced litigation funder should be required to:

(i) notify the regulator in writing within 10 business days of any significant breach (or likely breach) of its obligations as a licence holder. This notification obligation should apply to all licence conditions, disclosure obligations and capital adequacy requirements; and

(ii) maintain appropriate breach registers and compliance reporting.

(c) require proper disclosure to clients and potential clients of the terms of the funding agreement;

(d) address foreign litigation funders, some of whom have little or no presence in Australia. The participation of foreign funders in the Australian market raises questions about the ability of a client to enforce the terms of any funding agreement or take action in the event of a breach of licence conditions. Therefore, foreign litigation funders operating in Australia should be required, as a licence condition, to expressly:

(i) agree that Australian law governs the funding contract; and

(ii) irrevocably submit to the jurisdiction of the relevant Australian court.

Who should regulate the industry?

Clayton Utz rejects any suggestion that a self-regulation model will deliver meaningful or effective regulation to the litigation funding industry and believes it would do little to address conflicts of interest issues. As a matter of public policy, Australian governments have rejected this concept in relation to the regulation of the legal profession and many other, indeed most industries. It is also clear that the self-regulation model adopted in the UK has not been effective; for example, the voluntary code of conduct applies to only a handful of litigation funders operating in the United Kingdom who have chosen to join the voluntary industry association there.

The critical issues in the choice of an oversight agency will be to ensure that the regulator is:

(a) proactive in terms of its oversight and enforcement function;

(b) adequately resourced; and

(c) has appropriately qualified and experienced staff who can provide that oversight.

Subject to its ability to satisfy these requirements, Clayton Utz would not oppose ASIC as the regulator.

Question 3-1 (Qualifications for licensees)

Litigation funders are involved in the promotion, conduct and control of complex, commercially significant litigation in Australia, requiring the imposition of both character and qualification standards.

Litigation funders exercise a substantial degree of control over very large litigation that can have a significant impact on markets and the fate of publicly listed corporations. There is potential for litigation, particularly class action litigation, to be misused. Litigation funders also deal with vulnerable members of the community who often become involved in class actions by way of a website 'click to sign up' approach with minimal assistance, let alone appropriate, independent legal advice.

For these reasons, Clayton Utz believes that a litigation funding licence should require:

(a) those who are involved in the management and control of the entity to satisfy a good character test based on the 'fit and proper' criteria imposed on those applying to join the legal profession;

(b) a financial knowledge and skills requirement of the type required of an AFS licensee running a registered scheme; and

(c) a responsible manager who is legally qualified and holds a current practicing certificate.

The requirement for licensees to have a responsible manager who is legally qualified and holds a current practicing certificate will ensure that the litigation funder can properly monitor and instruct the lawyers it effectively (and sometimes literally) retains on behalf of class members who are not otherwise allowed under the terms of some funding agreements, or are not in a position, to do so.

Question 3-2 (Minimum financial resources)

Clayton Utz agrees that security for costs orders do not negate the need for capital adequacy.

A security for cost order will not address the risk of the funder being unable to fully fund the expense of running an extensive, complex trial. The consequences for both plaintiffs/class members and defendants of a trial aborting due to a loss of funding mid trial can be substantial.

Litigation funders have, from time to time, asserted that there has not yet been a 'failure' of a funder in terms of it being unable to meet its obligations. Of course, the fact that there may not have been a failure as yet is hardly a reason to assume there will not be a failure in the future. At least one UK based funder has publicly acknowledged being called upon by smaller funders to take over the funding of ongoing matters where the original funder was unable to complete the matter.[3]

More recently the managing director of Burford Capital, a significant foreign litigation funder, was reported as saying that "many funders won't be able to survive the inherently risky business [of litigation funding]".[4] In the current environment, where litigation investments can be made by entities whose principal business is not litigation funding, and even by individuals, capital adequacy must be established.

[3] Observation made during panel discussion at *Increased Regulation of Litigation Funding Seminar* in Melbourne on 9 April 2018

[4] See comments in *Lawyerly* 10 July 2018 <https://lawyerly.com.au/burford-capital-managing-director-predicts-many-litigation-funders-will-fall/> (accessed 12 July 2018)

Licensed litigation funders should be subject to prudential supervision to ensure that the funding entity has sufficient capital in Australia to satisfy its financial obligations.

To that end, the applicable prudential requirements should include those that already exist under the AFSL regime in addition to the following further obligations:

(a) satisfy the '*Base Level Financial Requirements*' set out in ASIC Regulatory Guide 166;

(b) comply with the minimum financial requirements that apply to specific classes of AFSL holders. For example, a litigation funder could be subject to adjusted surplus liquid fund and liquid fund requirements in circumstances where the arrangement under which it conducts business means it is obliged as principal to claimants for an amount in excess of $1,000,000, or where the litigation funder otherwise holds property on trust for the claimants in the sum of $100,000 or more;

(c) satisfy ASIC that it has sufficient assets to cover the potential liabilities associated with an unsuccessful case; and

(d) maintain liquid capital reserves equal to at least twice the amount of its investments in litigation.

ASIC should conduct an annual audit of the funder to ensure its financial soundness. This would ensure that a litigation funder is capable of paying legal fees, disbursements and any adverse costs order.

The position of foreign litigation funders raises additional complications beyond simply capital adequacy requirements. These include the ability of a client, or indeed another party, to enforce any orders or judgement made against a foreign litigation funder.

Response To The Commission's Proposals And Questions In Relation To Conflicts Of Interest

Proposal 4-1 (Reporting on compliance with RG248)

RG248 in its current form is of limited value and effectiveness. There is no mechanism to ensure that litigation funders comply with the obligations imposed by the guide. There is no obligation to report on compliance, let alone a mandatory obligation to report a breach.

While imposing an obligation to report annually to the regulator in relation to a funder's compliance may be an improvement on the current situation, RG248 will continue to be of limited value until compliance with its terms is enforced by a proactive regulator.

In particular, its effectiveness will be limited until such time as it is enforced in terms that ensure proper and effective disclosure to clients by litigation funders of conflicts and the way in which they are managed to clients.

Proposal 4-2 (Definition of litigation funding)

The litigation funding industry continues to evolve in both its scope and structure. Accordingly, it is imperative that any regulatory regime or other solution is sufficiently flexible to accommodate future developments and new modes of funding.

In these circumstances, Clayton Utz supports the proposal to expand the definition of litigation funding so as to ensure that the existing regulation, such as it is, is extended to new modes of funding as this is preferable to leaving them completely unregulated.

Proposal 4-3 (Accreditation of solicitors)

Clayton Utz supports the concept of accreditation for solicitors in class action law and practice.

As lawyers acting for defendants in class actions we have observed that there is a wide variation in the experience and expertise of those acting for plaintiffs. In some instances it has been clear that the lawyers involved in class actions we have defended did not understand what was involved when acting in a matter where there was a large class of otherwise unrepresented class members.

This, coupled with a misunderstanding of some aspects of class action practice and procedure, has resulted in the parties incurring significant unnecessary costs, lengthy delays and the use of court time that could have otherwise been better employed.

Proposal 4-4 (Prohibiting interest in funders in certain circumstances)

Clayton Utz supports the amendment of the Australian Solicitors' Conduct Rules (**ASCR**) as proposed.

To date we are unaware of any instance of a barrister having an interest in a funder that was funding a matter in which they appeared for the class members. Nevertheless, while these circumstances have not arisen in the past, the Commission should consider the application of a similar rule to barristers.

Proposal 4-5 (Disclosure in matters other than class actions)

Clayton Utz strongly supports the amendment of the ASCR as proposed.

Proposal 4-6 (Amendment to GPN-CA in relation to conflicts)

Clayton Utz supports the concept recommended in Proposal 4-6, but notes that this would only apply to class actions in the Federal Court of Australia (**Federal Court**).

The same principal and obligation should apply to all funded proceedings coming before a federal court, or indeed in any other court or arbitral proceeding. This could be achieved by way of an amendment to the ASCR.

If the Commission is not minded to recommend such an amendment to the ASCR, the Commission should recommend that the Attorney-General propose to the Council of Attorneys-General that similar requirements be introduced in all states and territories.

Response To The Commission's Proposals And Questions In Relation To Contingency Fees And Commission Rates

Proposals 5-1 and 5-2 (Contingency fees)

Clayton Utz recognises that there are a number of arguments both for and against the removal of the prohibition on solicitors entering into contingency fee agreements. In saying this we acknowledge that removing the prohibition may increase competition both with and between litigation funders. It may also allow some claims that cannot otherwise be funded to run. This will arguably improve access to justice.

At the same time, we believe there is a very real risk that removing the prohibition will lead to an increase in the incidence of unmeritorious claims being commenced. This will add inevitable and unnecessary cost to business which is ultimately borne by the broader community.

If allowed, contingency fee arrangements with lawyers will create the potential to increase the lawyer's revenue at the expense of their clients. If such a dramatic change to lawyers'

charging arrangements is contemplated, it is important that the existing and well understood process of assessing risk in litigation should not be disturbed

Accordingly, should the prohibition be removed, it is critical that a number of protections be put in place.

First, it is imperative that the 'loser pays' rule should be maintained in its present form. Modifying the rule to provide a carve out for 'novel' or so called 'public interest' claims (as recently recommended by the Victorian Law Reform Commission) will inevitably undermine the protection against unmeritorious claims that is provided by the rule.

Second, solicitors who wish to enter into a contingency fee agreement with their client must only be allowed to do so if they agree to indemnify their client against any adverse costs order made in the proceedings.

Question 5-1 (Carve out of some matters from a contingency fee regime)

Clayton Utz believes it would be difficult, if not impossible, to effectively carve some matter types from a contingency fee regime, given the blending of claims and remedies that occur in many matters.

Consider for example a prohibition on 'personal injury' matters. It is not clear if this carve out would apply to a product liability class action that included both claims for damages for personal injuries and breach of contract in relation to the sale of an implantable medical device where part of the claim involved the cost of a replacement device.

Similarly, it is unclear if it would apply to the recent class actions involving detainees on Manus Island where the remedies pleaded included damages for both false imprisonment and physical and psychological injury.[5]

Proposal 5-3 (Power to vary or set commission rates)

Clayton Utz is concerned that there may be doubt as to the Court's power to make an order varying or otherwise setting a litigation funders commission or other remuneration as the legislation currently stands. We believe that any such doubt should be removed.

In this regard we note that a litigation funder denied the existence of the Federal Court's power to vary a funding agreement in the course of an application to approve a settlement in *Clarke v Sandhurst Trustees Limited (No. 2)*.[6] There have also been suggestions made to the effect that a common fund order is ultra vires.[7]

In these circumstances, Clayton Utz supports Proposal 5-3 as it would put the matter beyond doubt.

If the prohibition on solicitors entering into contingency fee agreements with their clients is removed in whole or in part, Clayton Utz believes the same power should be applied equally to contingency fees.

The ability of a court to make such an order should not be restricted to class actions in the Federal Court. Rather, the same power should be available to all courts in relation to all funded proceedings coming before a federal court or indeed in any other court or arbitral proceeding.

[5] See Fourth Amended Statement of Claim in *Kamasaee v The Commonwealth of Australia & Ors* SCI 2014 06770

[6] [2018] FCA 511, [18].

[7] A party in the Takata litigation is currently contemplating seeking referral to High Court of the question of whether the Federal Court has power to make a common fund order

Accordingly, Clayton Utz recommends that the Commission:

(a) amend the proposal such that the same power should be available to all courts in relation to all funded proceedings coming before a federal court; and

(b) recommend that the Attorney-General propose to the Council Of Attorneys-General that similar powers be introduced in all states and territories.

Question 5-2 (Limits on commission rates)

Clayton Utz opposes the introduction of a blanket statutory cap on contingency fees or a litigation funder's total remuneration (not just 'commission') as it is concerned that any cap will quickly become the accepted 'norm'. We note that the Victorian Law Reform Commission reached a similar conclusion in the course of its recent review.[8]

The preferable course would be to adopt a more flexible approach, which would involve:

(a) in the case of a pre-verdict settlement, the stage the proceedings have reached;

(b) the amount the litigation funder has invested in the proceedings – to be reflected in the litigation funder's return on its investment (**ROI**);

(c) the total amount awarded to the plaintiff by way of verdict or settlement before the deduction of legal costs and the litigation funder's remuneration;

(d) an assessment of the risk taken by the litigation funder in funding the proceedings, including consideration of any steps taken by the funder to off-set its risk, for example, obtaining after the event insurance, and the way that this was funded; and

(e) a mechanism for limiting the percentage of the damages that can be taken by the funder in personal injury matters, particularly those involving catastrophic injuries.

Given the emergence of the common fund order, even fewer cases will involve even a pretence of the class members being able to negotiate terms with the funder before the case is commenced. Accordingly, regulation is essential if consumers are to be adequately protected.

Question 5-3 (Imposition of statutory cap)

The more flexible approach should also be applied to contingency fee agreements if the prohibition on solicitors entering into contingency fee agreements with their clients is removed.

Question 5-4 (Class action reinvestment fund)

Clayton Utz does not support the introduction of a class action reinvestment fund or similar entity.

First, if a claim is in fact truly 'meritorious' it will be either funded by a funder or funded by a solicitor's firm on a 'no win, no pay' basis. The is no evidence to suggest that this is not the case. Indeed, we note that no class action claimants have made an application to the Victorian Law Aid fund for support.[9]

Second, absent a significant injection of government (tax payer) funding, it is unlikely that any fund relying on a tax or levy of one percent of fees recovered from contingency or litigation

[8] Victorian Law Reform Commission *Access to Justice - Litigation Funding and Group Proceedings,* March 2018 (**VLRC Report**) - see paras 3.86 - 3.88.

[9] VLRC Report - para 5.131

funding agreements will build a sufficient a capital base in the short to medium term capable of providing meaningful support.[10]

Third, while the source of funds may be portrayed as a tax or levy on the proceeds of fees recovered from contingency or litigation funding agreements it would, in truth, be a tax or levy on successful claimants who have already given up a very significant proportion of their damages to the funder or lawyer acting on a contingency fee agreement. The creation of a fund thwarts the concept that damages awards are intended to compensate the plaintiff in that case.

Response To The Commissions' Proposals And Questions In Relation To Competing Class Actions.

It is imperative that the issue of competing class actions be addressed as a matter of urgency. One need look no further than the six separate class actions presently on foot against AMP Limited to appreciate the importance of establishing a mechanism to deal with the issue quickly and efficiently.

Proposal 6-1 (Amendments to the *Federal Court of Australia Act 1976* (Cth))

Any proposal to deal with the issue of competing class actions must effectively address the problems across all competing class actions that have been commenced in more than one jurisdiction in Australia and not just the Federal Court. The concurrent, overlapping proceedings in the Federal Court and the Supreme Court of New South Wales against AMP Limited starkly demonstrate this aspect of the problem.

Proposal 6-2 (Amendments to GPN-CA)

As outlined above, any proposal to deal with the issue of competing class actions must effectively address the problems of competing class actions in more than one jurisdiction in Australia.

Question 6-1 (Exclusive jurisdiction for Federal Court in corporations matters)

Clayton Utz does not support the proposal that the Federal Court be given exclusive jurisdiction with respect to civil matters commenced as representative proceedings, arising under the *Corporations Act 2001* (Cth) and/or the *Australian Securities and Investments Commission Act 2001* (Cth) if this is only being proposed in an effort to address the issue of competing class actions.

First, while this may address the issue of competing shareholder class actions that are commenced in a state or territory jurisdiction, it leaves the very same problem unresolved for class actions involving any other subject matter or legislation.

Second, it is contrary to the policy objectives of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) which has delivered substantial benefits to litigants in Australia and has assisted in avoiding many of the difficulties encountered in other multi-jurisdictional countries.

Clayton Utz believes that the VLRC recommendation, that the Council of Attorneys General work to establish a cross-vesting judicial panel for class actions, is sound. The judicial panel would then make decisions regarding the cross-vesting of class actions, where multiple class actions relating to the same subject matter or cause of action are filed in different jurisdictions.[11]

[10] The Ontario Class Proceedings Fund charges a fee capped at 10% of the settlement amount. While Law Aid is entitled to charge a fee of 10% the common charge is said to be 5.5% - See VLRC Report paras 5.130 and 5.134

[11] VLRC Report paras 4.89 - 4.98 and Recommendation 12.

Response To The Commission's Proposals And Questions In Relation To Settlement Approval And Distribution

Proposal 7-1 (Oversight of legal costs)

Clayton Utz supports the proposal that an external referee be appointed to assess legal costs and the work undertaken by solicitors as proposed.

Any such assessment should include all costs and disbursements including fees charges by experts and counsel.

Question 7-1 (Administration of settlement distribution)

Clayton Utz believes that settlement distribution should be subject to a tender process.

Tenders should be called in a form agreed by the parties once the terms of the settlement have been resolved.

The outcome should be decided by the Court after an assessment of the tenders by a Registrar of the Court.

Question 7-2 (Confidentiality of Settlements)

Clayton Utz believes that the confidentiality of settlements should be respected.

First, maintaining confidentiality of settlements assists in the early resolution of claims. It is in the public interest for litigation to be settled as quickly as possible, as this assists in ensuring that unnecessary costs are avoided, and the burden on courts, a public cost, is reduced. This would not necessarily be the case if the terms of a settlement were made public given the potential to encourage further claims.

Second, defendants settle proceedings for a variety of reasons that extend well beyond questions of legal liability. For example, a claim may be settled, notwithstanding the absence of any liability, in order to avoid the cost and disruption associated with defending the proceedings. Similarly, the quantum of a settlement may not reflect the actual liability of the defendant. A premium may be paid to resolve a matter because of the impact that publicity of a claim, albeit without merit, may have on a corporation and its ongoing business operations. If confidentiality of settlements cannot be maintained these reasons fall away and corporations will be more willing to simply leave the determination of the claim to the court.

That said, we acknowledge that this will not always be possible where the Court is required to approve a settlement in the context of a class action.

In the context of the approval of class action settlements, Clayton Utz notes that the general lack of transparency in relation to the operation of litigation funders is exacerbated by the approach taken in many judgements in applications for the approval of settlements in funded matters. In many cases there is simply not enough information in the judgement in relation to the terms of the litigation funding agreement, the total remuneration (commission, so called 'management' or 'project' fees and the like) to determine the total cost to the funded client, or the percentage of the settlement that has been taken up in the funder's remuneration and legal fees.

Until such time as litigation funders are required to be more transparent it will continue to be very difficult for consumers to properly assess what they are offered in a funding arrangement, let alone effectively compare alternatives or negotiate a fair agreement.

This lack of transparency also makes it very difficult for courts to deliver consistent decisions with respect to the reasonableness of commission rates and other charges. If the Court is to take on a greater role in addressing these issues (as it must with the growth of common fund

orders) it is essential that adequate information in relation to commission rates, other charges and their overall impact on the amount received by class members is publicly available.

In order to address these concerns a court's decision in a settlement approval hearing should include sufficient information to allow the reader to ascertain:

(a) the fees and charges paid to the litigation funder; and

(b) the percentage of the compensation or damages received by the class that has been deducted to pay:

  (i) the litigation funder's commission, fees and charges however described; and

  (ii) the legal costs and disbursements.

Response To The Commission's Proposals And Questions Relating To A Possible Regulatory Redress Scheme

While there may be good reasons for seeking an alternative to the class action, any proposed alternatives deserve detailed consideration given the consequences and cost for business and the broader community, should any particular alternative be adopted.

Simply raising one alternative solution as an addendum to an inquiry into litigation funding and class actions is not the appropriate way to develop an alternative mechanism to the class action procedure. There is insufficient information let alone analysis of this complex issue to make a meaningful assessment.

For example, the Discussion Paper outlines the way in which a collective redress scheme operates in the United Kingdom under the terms of the *Consumer Rights Act, 2015* (UK) (**CRA**) but does not address the similar schemes that are operating in other parts of the European Union. The Discussion Paper offers no information or analysis on the operation of the CRA nor the impact it has had on either consumers or business.

In these circumstances, the better approach would be to adopt the course that the Commission has taken in relation to its concerns with the continuous disclosure regime and recommend to the Australian Government that it refer the question of alternatives separately to the Commission for proper consideration.

Clayton Utz is also concerned that a regulatory redress scheme as proposed would:

(a) impose yet another layer of regulation and cost on business - nothing would be removed;

(b) notwithstanding assertions to the contrary, not be truly voluntary having regard to the pressure that could and would be brought to bear on corporations by regulators and the media;

(c) lack certainty and finality. Unlike a class action judgement or settlement where claims are resolved or extinguished, a regulatory redress scheme would only resolve the claims of those who were willing to participate;

(d) create circumstances where class action litigation would be pursued against a corporation, despite a regulatory redress scheme being proposed and regardless of the generosity of such a scheme. This has already occurred in the context of implantable medical device disputes. Class actions have been commenced, notwithstanding the establishment of a scheme by the manufacturer to pay for revision surgery and compensate the patient for the additional pain and suffering, and then immediately settled on similar terms - plus a substantial payment to the class action's promotors; and

(e) regardless of the terms of any legislation establishing a redress mechanism, the implied admission of liability may have significant consequences in other jurisdictions and in relation to some insurance policies.

Proposal 8-1 (Federal collective redress scheme)

For the reasons set out above, Clayton Utz does not support a recommendation that the Australian Government consider establishing a regulatory redress scheme in the absence of a proper inquiry to consider such a scheme.

If the benefits of a regulatory redress scheme are to be considered, that should occur in the context of an appropriate review, rather than as an addendum to the current Reference.

Question 8-1 (Design of possible Federal collective redress scheme)

Clayton Utz does not believe that sufficient consideration or analysis has been undertaken to allow a proper response to this question at this time.

Clayton Utz
1 August 2018