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

Dear Commissioners,

**Inquiry into Class Action Proceedings and Third-Party Litigation Funders**

Thank you for the opportunity to make a submission to this inquiry.

I have researched corporate law, financial markets and the civil justice system for over 25 years. Since 2009 I have also been a presidential member of the ACT Civil and Administrative Tribunal (ACAT), one of the super tribunals. In 2009-2010, I served as a member of the National Legal Profession Reform Consultative Group for the (COAG) National Legal Profession Reform project.

Given the scope of the inquiry, I propose to address particular proposals and questions that are raised in the Discussion Paper 85 (DP 85) as follows.

## COMMENTS

### Review of the Legal and Economic Impact of the 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*

I welcome a review of the legal and economic impact of the continuous disclosure obligations under Chapter 6CA and misleading and deceptive conduct under Part 7.10 Div 2, of the Corporations Act. However, such an enquiry should not merely focus upon class actions and the continuous disclosure obligations. I understand the concern that class actions might excessively deter legitimate business activity under the auspices of compliance with continuous disclosure obligations. DP 85 describes the continuous disclosure regime "peculiar" and compares it to the regimes in UK and Canada.[1] Whether or not the regime is peculiar is not particularly important because the regimes that regulate corporate conduct and enforcement by group proceedings are unique to each jurisdiction. The UK's approach of embedding enforcement by class actions in substantive statutes is radically different to the general actions permitted in Australia under procedural statutes such as the Federal Court Act. Similarly, Australia's continuous disclosure regime is relatively strict but it can be argued that Australia's regime of periodic and special purpose disclosure is less demanding than other jurisdictions such as the US. For example, obligations regarding periodic disclosure and changes of control in the US are likely to be policed by class actions. That is not the case in Australia.

There should be a holistic analysis of regulatory responses to corporate wrongdoing. For example, DP 85 refers to the multiple class actions commenced against AMP after it admitted during the Royal Commission that it had charged fees for no service. There has been little discussion about the program instigated by ASIC to compensate customers who suffered losses as a consequence of paying fees for no service and poor financial advice. In its statement to the ASX, AMP disclosed that it was "Accelerating advice remediation … to ensure impacted advice customers are appropriately compensated" and referred to ASIC reports 499 and 515 which required an industry-wide 'look back' of advice provided from 1 July 2008 and 1 January 2009". ASIC commenced the investigations relating to reports 499 and 515 before 2015. On any analysis, AMP has been very slow to remediate their customers.

There is natural concern about compensation to less deserving shareholders when customers have been the primary target of corporate wrongdoing. However, the deterrent effect class actions is complex and relies to some extent on the public messaging that they convey which loops back to corporate governance practices. The messaging embraced by AMP was about trust. This is clearly important to all publicly listed companies who are subject to the continuous disclosure regime. Presently, we are lucky that the Royal Commission is providing the messaging about the conduct of financial services providers but its role is transient.

A further aspect that should be examined by any review is whether class actions have a higher propensity for settlement than other civil proceedings in Australia and

[1] Australian Law Reform Commission, *Class Action Proceedings and Third-Party Litigation Funding*, Discussion Paper No 85 (2018) (DP 85) at 1.73

if so, why. Certainly, the fact that no investor/shareholder class action has proceeded to a full hearing in Australia is a matter of notoriety. However, increasingly hearings are regarded as a failure of the civil justice system and general settlement rates have escalated considerably over the last few years. Although class actions get considerable public attention, their numbers are small.

Related to this was the anticipation of the LRC in 1990 that section 33N Federal Court Act would have a disciplining effect by allowing respondents to make de-classing applications. Section 33N has not lived up to its promise and it would be valuable to have more information about this. If fewer cases settled, there would be a corresponding opportunity to develop the interpretation of the relevant provisions of the Corporations Act (e.g. Chapter 6CA and Part 7.10 Div 2) through case law. Currently there is an insufficient supply of cases to achieve this. For example, the case law on market-based causation demonstrates an Australian approach to the question that is interesting and innovative;[2] however, one must be patient to await further judicial guidance.

### 3. Regulating Litigation Funders

***Proposal 3–1*** *The Corporations Act (2001) (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia*.

The current arrangements for the regulation of litigation funders are inadequate. I have previously submitted that litigation funders should be required to hold an Australian Financial Services Licence (AFSL) because the nature of the interest held by claimants is sufficiently close to a financial product under the Corporations Act to warrant the protection of the AFSL regime. There is considerable utility in requiring a special "litigation funding licence" (LFL) because there are elements of litigation funding arrangements that differ considerably to other financial products, for example the relationship of the funder to legal representatives of the claimants and to the court. I agree that ASIC is the most appropriate regulator and has considerable powers to adapt the conditions of licences under the AFSL regime to develop a framework for LF licences.

***Proposal 3–2*** *A litigation funding licence should require third-party litigation funders to:*

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

Most of the obligations imposed on AFS licensees under section 912A of the Corporations Act are appropriate for litigation funders. These obligations have been clarified over the last few years by judicial interpretation of the obligation to provide services efficiently, honestly and fairly: recent examples include Beach J in *ASIC v*

[2] *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322, [2015] FCAFC 94; *HIH Insurance Limited (in liq)* (2016) 113 ACSR 318; [2016] NSWSC 482

*Westpac Banking Corporation* (No 2)[3] and the Storm Financial litigation culminating in *ASIC v Cassimatis* (No 9). [4]

*… have a compliant dispute resolution system*; …

In my view this is a necessary requirement but the institutional architecture of the dispute resolution system needs to be considered carefully. See my comments below regarding the Australian Financial Complaints Authority Scheme.

***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 Australian Financial Complaints Authority scheme. However there is some concern that this scheme may not be adequate protection for claimants. The Financial Ombudsman Scheme (FOS) suffered from weaknesses in its enforcement framework. This is exemplified by a mounting number and quantum of unpaid determinations made by FOS in favour of consumers.[5] The proposed Australian Financial Complaints Authority scheme may suffer from a similar weakness because it is an EDR scheme. It may be preferable to consider linkages to tribunals who have formal arrangements for enforcement with courts. This will allow informal dispute resolution to occur but provide further incentives for litigation funders to comply with their legal obligations.

**5. Commission Rates and Legal 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 …*

***Question 5–1*** *Should the prohibition on contingency fees remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated?*

***Proposal 5–3*** *The Federal Court should be given an express statutory power in Part IVA of the Federal Court of Australia Act 1976 (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements*

As I submitted to the Productivity Commission in its Access to Justice Arrangements enquiry in 2013-2014, I consider that the prohibition on contingency fees should be lifted because contingency billing and damages-based agreements do facilitate access to justice by expanding the capacity of lawyers to fund claims. Further, the use of conditional or no-win no fee arrangements is widespread in the legal profession, therefore allowing lawyers to charge a contingency fee would only shift to

[3] [2018] FCA 751 (24 May 2018)

[4] [2018] FCA 385 (22 March 2018).

[5] See https://www.fos.org.au/fos-circular-33-home/fos-news/unpaid-determinations-update.jsp

some extent this "widespread practice of service based upon the prospect rather than the promise of payment.[6]

In the US, a substantial portion of the market for litigation funding is in tort claims because the market has grown from the contingent financing provided by lawyers, who cover legal expenses by drawing on their firm's general operating account or by a bank line of credit. Third-party litigation funding is therefore supplemental to attorney contingency fee funding in the US.

Litigation funders in Australia increasingly fund economic claims such as investor/shareholder claims.[7] As it is presently structured, litigation funding will have minimal impact upon the middle class (except for retail investors and some consumers) where the decline in access to justice has been most marked. Contingency billing and damages-based agreements allow lawyers to both complement and potentially compete with litigation funders to service high demand but lower value areas such as family, housing, credit/debt, and employment disputes.

I agree that the Federal Court should be given an express statutory power in Part IVA of the Federal Court Act to reject, vary or set aside the commission rate in third-party litigation funding agreements. The Federal Court's use of common fund applications is a creative response to the minimal regulation of litigation funders. However, the common fund arrangements are precarious and potentially confined by the proper ambit of judicial power. An express statutory power will clarify the Federal Court's power to make decisions about the third-party litigation funding agreements.

This issue is discussed more extensively in my article 'After Fostif: Lingering uncertainties and controversies about litigation funding' ('After Fostif') (2008) 18 *Journal of Judicial Administration* 101.

## 6. Competing Class Actions

***Proposal 6–1*** *Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended so that:*

*· all class actions are initiated as open class actions*

I agree with this proposal and in the past have firmly argued against closed classes as an impediment to access to justice.[8]

I also agree that the Federal Court should be considering further case management procedures for competing class actions. There has been some discussion in the

[6] New South Wales Bar Association, Submission to the Productivity Commission Access to Justice Arrangements 4 December 2013

[7] Vince Morabito, "An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia," 2016 pp 11-12

[8] See for example, 'After Fostif: Lingering uncertainties and controversies about litigation funding' (2008) 18 Journal of Judicial Administration 101 at 111-113.

literature and in DP 85 about adopting a US-style certification procedure. In my view, the requirements for certification in the US are not easily transposed to Australia and would burden the Australian regime with clumsy requirements and excessive transaction costs. By contrast, I agree that the Canadian carriage motion[9] may be an effective way to deal with competing classes because it aligns with the general culture of litigation in Australia and the class action regime in particular.

***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 of Australia with respect to civil matters, commenced as representative proceedings, arising under this legislation?*

I am not in favour of the conferral of exclusive jurisdiction upon the Federal Court in this area. There are two reasons for this. First, there is some value in competition between courts for group proceedings and the capacity of the state and territory Supreme Courts to exercise jurisdiction in cognate areas such as tort (notwithstanding the Federal Court's accrued jurisdiction) may make them more appropriate venues for broadly-based class actions such as the Black Saturday bushfire litigation in Victoria. Further, there is considerable expertise in state Supreme Courts in other related areas which facilitates the regulation of obligations under the Corporations Act, for example the expertise in the New South Wales Supreme Court in prosecutions for insider trading under part 7.10 of the Corporations Act. To facilitate redress for a broad range of victims of corporate misconduct (not just shareholders/investors) class actions should not be siloed into particular jurisdictions.

In order to deal with competing class actions the Victorian Law Reform Commission has proposed a cross-vesting judicial panel to manage class actions filed in different jurisdictions.[10] In my view, this proposal is a feasible and meritorious alternative to conferring exclusive jurisdiction on the Federal Court.

## 7. Settlement Approval and Distribution

***Question 7–2*** *In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?*

I strongly agree that the terms of class action settlements should be made public. Although the Federal Court has expanded its consideration of the terms of settlement in judgments giving approval under section 33V Federal Court Act, there is still an element of shadowboxing whenever one reads these judgments. The case law has expanded and the increasing use of contradictors is a welcome

[9] As discussed at DP 85 at pp 107-108

[10] Victorian Law Reform Commission, *Access to Justice - Litigation Funding and Group Proceedings: Report*, 2018 at xx

development[11] but there are important gaps in the information. In ARC funded research in the Federal Court, my fellow researchers and I encountered numerous obstacles presented by confidential material, which made it difficult to undertake research into the long-term efficacy of the class-action regime.

Given the principle of open justice, I think we need to reverse the onus of establishing confidentiality thereby open the settlements to full public scrutiny and then require the parties to justify confidentiality in order to protect their interests. I also consider that material such as pleadings filed in class actions should be more available to the public. Basic case details such as court events and orders can be found on the Commonwealth Courts Portal and sometimes documents filed in class actions are included in Public Interest Cases (Online Files) on the Federal Court web page. But given the small number of class actions and their significant public interest it would be invaluable for the Federal Court to follow the lead of the High Court by making all the accessible material available to the public on its web page.

## 8. Regulatory redress

***Proposal 8–1*** *The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.*

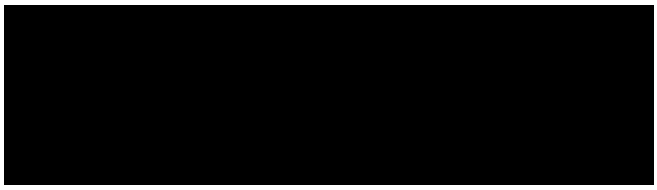
***Question 8–1*** *What principles should guide the design of a federal collective redress scheme?*

In my view, there is no justification for a collective redress scheme and implementation of this proposal so would be a major step backwards. Collective redress schemes are important where a large number of victims face barriers to obtaining redress, as exemplified by the Royal Commission into Institutional Responses to Child Sexual Abuse. This is not the case for the claimants in class actions. Collective redress schemes frequently result in the capping of compensation for victims and limited funds. This would undermine the deterrent effect of both the substantive provisions in the Corporations Act and the ripple effect of class actions to incentivise good corporate governance. The Royal Commission into Financial Services has starkly demonstrated this point. Now is not the time to drop our standards on corporate accountability.

[11] For example in *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323

I would be happy to expand upon any of the issues raised above in order to assist the Commission.

Yours sincerely,



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