

13 August 2018

Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: class-actions@alrc.com.au

Dear Sir/Madam,

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Thank you for the extension of time to make a submission to the ALRC inquiry into class actions and litigation funding.

It is our experience that class actions give vulnerable Australians access to justice that might otherwise be unavailable to them. As such they play an important role in achieving accountability and justice. The ability to join a class, particularly for people who do not have the means to commence litigation on their own behalf and where there is a systemic injustice or illegality, should not be diminished. The purpose of this submission is to ensure that the value of class actions as an effective access to justice measure is recognised and that there is no regulation to reduce the opportunity to join an action.

Legal Aid NSW has occasionally run class actions where we are seeking a systemic outcome for our priority clients or in a priority area of law and we have the capacity to do so. We also take the opportunity to refer our clients to class actions being run by private firms, which have the capacity to run matters of that scale, and in a manner that is more effective both in terms of cost and outcome.

CIDnAP

In 2004, Legal Aid NSW criminal lawyers identified that large numbers of young people were being arrested for breach of bail when in fact their bail conditions had been varied at their last court appearance, had had bail dispensed with, or had their matter finalised. The issue seemed to stem from discrepancies between court and police computer systems, with the police computer system appearing to contain out-of-date or incorrect bail information. On top of these wrongful arrests, the young people concerned were reporting being arrested for minor offences where less restrictive sanctions were available, the use of excessive use of force during arrest and inappropriate strip searches.

Other organisations were also aware of these systemic issues, including the Public Interest Advocacy Centre (PIAC) and the Public Interest Law Clearing House (PILCH). Together we established a joint project named the Children in Detention

Page 1 of 3

Tel: 9219 5000 • Fax: 9219 5923 • NRS: 133 677 LawAccess NSW: 1300 888 529

Address: 323 Castlereagh Street, Sydney 2000 • PO Box K847, Haymarket NSW 1238 • DX 5 Sydney

Website: www.legalaid.nsw.gov.au • ABN 81 173 463 438

We have accredited specialists in children's law, family law and criminal law



Advocacy Project (CIDnAP) to address both individual cases and systemic issues. Initially the group was involved in making complaints to the NSW Ombudsman and seeking meetings with representatives of the Department of Justice. Legal Aid NSW and private solicitors were also pursuing civil actions on behalf of individual young people. Despite these efforts, we were unable to resolve the systemic issues and young people continued to be detained, arguably without lawful authority.

Through the project, Maurice Blackburn was contacted to consider, and then commence, a class action (known as the Konneh class action).¹ Once the class action had been commenced, Legal Aid NSW no longer had to represent each young person separately. We were able to refer clients directly to the class action by setting up appropriate referral pathways to Maurice Blackburn and PIAC.

The Konneh class action achieved some systemic outcomes that meetings with justice partners and individual litigation had not be able to achieve. Further, the State of New South Wales established a fund to provide compensation to any young person who had been wrongfully arrested before 20 May 2014.

Cash AFX

In 2016, Legal Aid NSW commenced proceedings in the Supreme Court against five Cash AFX stores claiming that they were breaching the National Credit Code and other laws by charging a 'cheque-cashing fee' on their 'payday' loans. Over 8,000 customers from the Illawarra region were group members in the class, led by a 33-year-old pensioner who had borrowed \$400 for seven weeks to pay for repairs to his car and had a \$102 fee immediately taken from the loan proceeds.

We argued this fee was a breach of the credit code as it was in excess of the 48 per cent interest cap which applies to regulated loans. The defendants – ICM Group Finance, ICM Group Pty Limited, and the sole director of the companies Michael O'Shea – initially rejected the claims but eventually agreed to settle. Further, Mr O'Shea agreed that his companies would not engage in any further payday lending and would not collect more than \$40,000 in payments on outstanding loans.

Not only would individual action not have been cost effective, this outcome would not have been achieved without the avenue of a class action. Once proceedings commenced, the lender settled all claims brought against it by Legal Aid NSW, preventing a determination by a court of the legality of the lending. This case was able to raise the issue of unlawful behaviour of 'payday' lenders. Since this case, other lenders (including Cash Converters) have been subject to successful class actions and ASIC probes across Australia.

Radio Rentals

Casey Simpson, represented by Maurice Blackburn, has commenced a class action against Thorn Australia Pty Ltd, trading as Radio Rentals (Radio Rentals). Ms Simpson claims that Radio Rentals engaged in misleading or deceptive conduct and/or unconscionable conduct, and that Radio Rentals contracts contain unfair terms. She is claiming compensation for herself and others on the basis that Radio Rentals customers paid excessive amounts on their "Rent Try \$1 Buy" leases and that contrary to Radio Rentals' advertising, customers were not entitled to buy the rented goods for \$1.

¹ *Konneh v State of NSW (No 3)* (2013) 235 A Crim R 191 (later *Amom v State of NSW*)

The casework experience of Legal Aid NSW suggests that many consumers of these types of products are on low incomes. They also often have other vulnerabilities, such as low level literacy and may live in regional and remote areas where there are limited options for purchasing household necessities such as whitegoods.

Maurice Blackburn estimates there are over 200,000 people who may benefit from this class action. Community legal services and legal aid commissions do not have the resources to run individual matters for this many consumers. Legal Aid NSW considers that the issues raised by the class action are systemic and disproportionately impact on vulnerable consumers. The success of this class action could therefore lead to not only compensation for individuals, but also systemic changes to the ways these products are offered to consumers.

Conclusion

Class actions have achieved otherwise unattainable outcomes for at least three large groups of claimants within our client base. Given our large and diverse client base, Legal Aid NSW is in a unique position to identify systemic issues, and work with our justice partners (including community legal centres and the private profession) to develop an effective solution. Sometimes the best solution for our clients will be achieved only through a class action.

In our view the inquiry should not recommend any measures that would reduce opportunities for ordinary citizens to take part in class actions or that would reduce Legal Aid NSW's ability to conduct these proceedings where we have the capacity to do so.

We thank you for the opportunity to provide comments to this inquiry. If you have any questions about our comments, please contact Pip Martin, A/Director, Civil Law [REDACTED]

We look forward to reviewing the Commission's final report.

Yours sincerely

[REDACTED]
Brendan Thomas
Chief Executive Officer