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Australian Law Reform Commission
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INQUIRY INTO CLASS ACTION PROCEEDINGS AND THIRD-PARTY LITIGATION FUNDERS

HESTA welcomes the opportunity to make a submission to the above inquiry.

About HESTA

HESTA is an industry superannuation fund, established in 1987 to provide retirement benefits for workers in the Health and Community Services Sector, and we operate only to benefit members. We have over 840,000 members and manage over $46 billion of members' assets.

Key points

This submission highlights the following risks and emerging issues for institutional investors participating in class actions which we have identified via assessment of HESTA's potential participation in shareholder class actions over a number of years:

i. High costs to participate and the lack of alternative participation options.
ii. Insufficient information available to assess the action at sign-up date.
iii. Entrance of new third-party litigation funders into the Australian market and the difficulty of undertaking sufficient due diligence of these funders.
iv. Proliferation of multiple, near-identical competing actions.

As a result, we express support for Proposal 3-1, Proposal 5-3, Proposal 6-1 and Proposal 7-1, which we believe will go some way to addressing the issues outlined above.

We express our disagreement, however, with Proposal 1-1 to review Australia's continuous disclosure obligations and misleading and deceptive conduct laws as a response to issues which we believe have primarily emerged as a result of the way Australia's shareholder class action system itself has evolved.

High cost to participate

As highlighted in the discussion paper, shareholder class actions can often be expensive. Litigation funding fees in general appear too high but shareholders have little leverage to negotiate substantially lower fees as only a single participant in the market. We note that often when there is competition for an action, litigation funding fees which are typically set at 28 – 40% can often come down to 19 – 24%. This is taken by us as evidence that litigation funding fees can be lower but the structure of the market makes it difficult for participants to negotiate lower fees.

As a participant seeking to participate in genuine actions in order to recuperate losses bourn by our members, we support proposals which can genuinely lower costs. Therefore we support:

i. Proposal 5-3, that the Federal Court be given express statutory power to reject, vary or set the commission rate in third-party litigation funding agreements and;
ii. Proposal 7-1, that the Federal Court of Australia's Class Action Practice Note should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval.

We believe that these two proposals have the capacity to substantially decrease costs for participants. In the event that Proposal 5-3 is accepted, given that shareholders typically lack leverage to negotiate improved fee structures, we do not believe that institutional shareholder support for a litigation funding agreement should be used as a basis itself to determine appropriate fees. From our experience, signing up with a litigation funding agreement is typically a reflection of our belief in the merits of the claim and our lack of alternative options to pursue the claim than an endorsement of the agreement's fee structure.

Insufficient information at sign-up date

The traditional closed nature of shareholder class actions in Australia means than shareholders are required to sign-up by a specific deadline. At this point investors often have insufficient information regarding the merits of the claim or further information is likely to be revealed after the deadline. In order to remedy this issue, we support Proposal 6-1 that all class actions are initiated as open class actions. This will ensure that participants are not required to make a decision whether to participate and therefore implicitly endorse an action based on insufficient information.

Entrance of new third-party litigation funders into the Australian market

We have noticed a significant number of new third-party litigation funders approaching HESTA to participate in class actions. As potential participants in funded actions, we welcome a competitive litigation funding market and recognise that:

i. Third-party litigation funders play a valid role in Australia's class action system and;
ii. The introduction of new third-party litigation funders will naturally lead to more competitive pricing.

However, we also note that it is often difficult and onerous for investors to undertake adequate due diligence on these new third-party entrants regards to their resourcing, risk management systems, capital adequacy and the accuracy of their communications. We therefore support the concept of Proposal 3-1 that third-party litigation funders should obtain and maintain a litigation funding license to operate in Australia.

Notwithstanding, we encourage this reform to be negotiated in collaboration with litigation funders to ensure that licensing requirements are not so onerous as to discourage competition in the litigation-funding landscape.

Proliferation of multiple competing class actions

In recent years we have observed a proliferation in the number of competing actions. Comparing competing actions is often complex and time-consuming for potential participants. Further the existence of competing actions per se do not appear to be accompanied with significant benefits for participants.

Therefore we are supportive Proposal 6-1 and Proposal 6-2 which seek to provide greater clarity on the case management procedure for competing class actions. We also note that Proposal 6-1, which suggests that all class actions are initiated on an open basis, may discourage competing class actions.

Proposal to review continuous disclosure obligations and misleading and deceptive conduct laws

Australia's continuous disclosure obligations regime and misleading and deceptive conduct laws are a foundation of free and open markets. Indeed, we believe the current regime typically functions well and contributes to market efficiency.

As we have outlined above, we acknowledge that there are issues currently causing a suboptimal operation of Australia's shareholder class action system. However, we believe that these issues are a result of the structure of the class action system itself rather than as a result of the continuous disclosure regime. Further, we believe that through the Proposals advanced by the Inquiry regarding the requirement to run all actions on an open basis, the regulation of litigation funders, conflicts of interest, commission rates, claims consolidation and settlement approval, many of the distortions in the class action system can be addressed.

Therefore we disagree with Proposal 1-1 that the Australian Government should commission a review of continuous disclosure obligations and laws relating to misleading and deceptive conduct as a response to the Inquiry into class action proceedings and third-party litigation funders.

Further discussion

We welcome the opportunity to discuss the submission further, should you have any queries please contact Jorden Lam, General Counsel.