

17 August 2018

The Hon Justice Sarah Derrington
President
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

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

Our ref: (KB – LR)

Dear President

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Thank you for the opportunity to make a submission to the Inquiry into Class Action Proceedings and Third-Party Litigation Funders. The Queensland Law Society appreciates being consulted on this important review.

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

QLS also assists the public by advising government on improvements to laws affecting Queenslanders and works to improve their access to the law. We also assist legal practitioners to continually improve their services, while monitoring their practices to ensure they meet the high standards set for the profession in Queensland.

Executive Summary

Upon review of the discussion paper, it appears that a clear policy direction for the future of class actions, including those that are funded by litigation funders, has not yet been determined, or at least has not been presented in the paper. This is problematic and has hindered our ability to comment on the specific proposals presented.

For one thing, we note that the terms of reference do not limit this inquiry to class actions, but rather permit consideration of other types of actions which also attract litigation funders. If further regulation of this industry is being contemplated, then consideration should be given to all actions where litigation funding occurs.

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The paper also suggests that the Federal Government is seeking to regulate all class actions. If this is the policy intent, then in our view, further consideration is needed to achieve it. For example, solicitors' conduct and legal costs are regulated by the states. Actions currently being run in federal courts accommodate this at present, however, a new federal class actions regime would need to specifically deal with these issues including the referral of states' powers and the multiplicity of the regulation of the legal industry. As to the latter point, it would be ill-advised to require a lawyer to comply with state and federal regulations, which may not be consistent with each other.

Additionally, consideration needs to be given to whether it is preferable to afford parties the choice of jurisdictions. QLS considers that maintaining this choice will provide better access to justice, although, we also note that a multi-tiered system does present some hurdles.

Therefore, if it is the policy intent to move all class actions to the federal sphere, considerable work will need to be done to consider the regulation of lawyers and legal costs, the impacts of a single jurisdiction and how this will impact upon court resources.

Due to the lack of clarity around this policy area, the views expressed below may not provide specific or final answers to the questions and proposals.

Our initial views on the proposals and questions in the paper are summarised as follows:

- The policy question about whether the Federal Government should regulate class actions in Australia needs to be resolved.
- We support continuing review of this area.
- We support strong consideration being given to a certification process.
- We support a bespoke licensing scheme for litigation funders.
- We support the definition of "litigation scheme" in the *Corporations Regulations 2001* capturing all funding models so that these can be appropriately regulated.
- Any accreditation should not be mandatory and should be run by the states.
- The Australian Solicitors' Conduct Rules should be amended to:
 - prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting; and
 - require disclosure of third-party funding in any dispute resolution proceedings.
- The Federal Court Practice Note should be amended to:
 - require comprehensive First Notices to be provided that deal with conflicts of interest; and
 - provide a case management process for competing class actions.
- We consider that there is some merit in reviewing what is appropriate for a litigation funder to recover from a settlement or judgment.

1. Introduction to the Inquiry 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.

QLS is supportive of a review being undertaken however, we do not consider that any review will present an easy answer to the issues identified.

One option for consideration in a review is the introduction of a certification process for class actions. We are aware that this option has been raised previously and we are also aware that this process operates in other jurisdictions such as in the United States of America, Canada and other common law jurisdictions.

At present, all that is required for commencing a representative proceeding in Australian jurisdictions, is for seven or more people to sign up to the action. A certification process would allow for a review of commonality and of the key issues in the claims. It would permit the court to have better oversight over what actions can be commenced and by whom. The process could require consideration of the type of damages claimed and of direct versus indirect causation. A personal injuries matter, for example, could include review of potential loss and damage.

We also consider that a certification process can assist the court to deal with the issue of competing class actions. Such a process will raise the bar for class actions as the legal representatives will need to satisfy a court that they have met the requisite criteria before a claim is certified and able to proceed. It will also ensure that attention is given to these crucial issues at an early stage.

We submit that the benefits of a certification process may be greater than simply tweaking disclosure obligations.

Finally, QLS does not comment on the final point of this proposal concerning the availability and cost of directors' and officers' liability cover within the Australian market.

3. Regulation 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.

In addressing this proposal, we refer to one of the preliminary issues raised in our Executive Summary about the merits of giving exclusive jurisdiction over class actions to federal courts. This point needs to be considered when deciding to use the *Corporations Act 2001* to bring about reform in this area.

Putting that issue aside, our view is that a licensing scheme would be a positive step in resolving some of the issues outlined in the discussion paper and could assist in ensuring better access to justice.

A licensing scheme would need to consider an appropriate definition of "litigation funder" and the licensing of law firms who act as funders (subject to reforms based on the questions and proposals below). We note the proposals in this paper about contingency fees and suggest that such a structure may result in some firms being classed as "litigation funders" and thus obligated to hold a licence. Our preliminary view is that lawyers should be exempt from a licensing scheme of this type as they are not only carrying the WIP (work in progress) of a particular matter, in these instances, but are also already heavily regulated as to conduct and costs.

Another issue that should be considered is how a federal licensing scheme would interact with state class action jurisdictions, if they remain. It is possible that a litigation funder may look to fund an action in the jurisdiction that is the most advantageous to it. This may mean seeking to avoid a licensing scheme. Whilst we do not envisage this will concern large funders, who will obtain a licence, it may dissuade others and new entrants to the market.

If a scheme, or some other mechanism, is to be implemented, consideration will need to be given to how it is funded. We submit that it is appropriate for industry (the litigation funders) to bear the costs of the regulation and suggest that this could be achieved through a licensing fee. In addition, adequate resources will need to be devoted to the operation of the scheme and the enforcement of any licence conditions.

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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;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

We are generally content with the above requirements. We would welcome the opportunity to review the draft legislation which establishes a scheme to ensure the conditions are fair and reasonable and that there are no unintended consequences.

Question 3-1

What should be the minimum requirements for obtaining and litigation funding licence, in terms of the character and qualifications of responsible officers?

In addition to fulfilling the requirements in proposal 3-2, consideration should be given to:

- a) a minimum asset requirement and other financial standards; and
- b) a limit on the number of actions able to be funded at the one time. This will mitigate exposure and risk and may also help avoid conflicts of interest.

Question 3-2

What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

In addition to our responses to proposal 3-2 and question 3-1, we consider that capital adequacy and adequate buffers for cash flow should be considered. We also believe there should be audited annual reports provided to the scheme administrator.

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Question 3-3

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

QLS does not consider the Australian Financial Complaints Authority scheme would adequately accommodate the activities of litigation funders. We consider that a bespoke licensing regime is preferable in the circumstances.

4. Conflicts of Interest

Proposal 4-1

If the licensing regime proposed by Proposal 3-1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248 and should be required to implement adequate practices and procedures to manage conflicts of interest.

Our preference is for a bespoke licensing scheme to be introduced. If this recommendation is not adopted, then proposal 4-1 will assist in regulating funders. While the *Corporations Act 2001* and its *Regulations* contain provisions relating to the regulation of financial services, the discussion paper suggests that these provisions may not be adequate.

We are cognisant that no scheme we eliminate conflicts of interest, however, a tailored scheme will be able to assist class members, legal representatives and funders in navigating this area.

Proposal 4-2

If the licensing regime proposed by Proposal 3-1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of 'litigation scheme' in the *Corporations Regulations 2001 (Cth)*.

QLS is agreeable to this proposal, subject to our comments made in the Executive Summary about whether the Federal Government should regulate solicitors and fees. We submit that the definition of "litigation scheme" should adequately capture all funding models so that these can be appropriately regulated.

Proposal 4-3

The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.

This proposal requires further clarification. Is the intention to require a solicitor to be accredited before commencing a class action? If so, we see several problems with the proposal. First, requiring a legal representative to hold a specific accreditation before a proceeding can be commenced presents a clear access to justice issue. This concern is furthered if an accreditation course requires a prerequisite amount of experience or expertise, as is the case with many accreditation courses. Accreditation is a personal qualification. It does not attach to the firm and this raises the question as to whether just one person in the team would require this qualification to enable an action to proceed.

QLS would object to a regime which *required* accreditation to be able to commence a class action as this would create a barrier to bringing a claim, would unfairly disadvantage smaller or regional firms and reduce competition between firms, especially if experience in class actions was required before undertaking a course.

Any accreditation should be state-based as there are different costs regimes in the different states. Queensland solicitors are required to comply with the *Legal Profession Act 2007* and will need to know their obligations under this law as part of any specialist course.

We consider that a certification regime would deal with many of the issues that an accreditation requirement may seek to address

Proposal 4-4

The Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.

QLS agrees with this proposal. We note that the Australian Solicitors' Conduct Rules (ASCR) are currently under review. This change could be incorporated into that process.

We consider that generally, activities that require an Australian Financial Services Licence (AFSL) are likely outside of the scope of legal work and should not be undertaken by lawyers. In addition, while there remains a prohibition on contingency fees, permitting law firms to have interests in third-party funders which are funding their actions, may be construed as effectively avoiding this prohibition.

Proposal 4–5

The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.

QLS agrees with this proposal. We consider that such an amendment will bring Australia in line with other international arbitration regimes such as those in Singapore and Hong Kong. However, there may be matters where such disclosure might not be appropriate. In these cases, the parties should be able to seek directions from the court.

Proposal 4–6

The Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.

QLS is agreeable to this proposal. First Notices should not be pro forma documents. The notices should consider what conflicts may arise and how the legal representatives and funders will deal with these. For example, the notices should describe who will make the decision in the matter and what steps will be taken when there is a settlement proposal.

We consider that a licensing regime could assist in this regard; for example, by prescribing steps that a licence-holder should take when dealing with a conflict.

We are aware that solicitors and law firms already take steps to prevent and resolve conflicts. Some law firms create committees which comprise of representatives from the different interests¹, while other firms seek independent advice including advice from counsel. Such steps should be included in the First Notices.

We submit that while dealing with conflicts of interests and conflicting duties (e.g. to the court and the client) are not issues that are unique solicitors in funded class actions, a clear acknowledgement of these issues and an outline of proposed solutions should be disclosed to class members.

¹ Consideration could be given to the Court appointing a member to this committee.

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. This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:

- an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;
- a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and
- under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.

We refer to the preliminary issue raised in our Executive Summary about the regulation of solicitors' fees being state-based and urge the Federal Government to consider the role it wishes to play in this area before seeking to introduce any specific regulation. Given that lawyers are already heavily regulated, care should be taken to not over-burden the process and create barriers to legal representation.

As to the proposal itself, we are aware of the competing arguments about permitting contingency fees arrangements with respect to class actions and given these divergent views, QLS is not in a position to support the introduction of contingency fees at this time.

We note the report from the Victorian Law Reform Commission on this topic concluded that the majority of class actions in that state were not funded by litigation funders and so the Commission was able to consider contingency fees on that basis. This is not the case with federal class actions.

If the proposal was to be introduced, there should be restrictions on when a firm could charge contingency fees to avoid that firm being overly exposed and to reduce the risk of a conflict of interest. For example, there could be a minimum asset requirement and a limit on the number of matters each firm could run on this basis. Consideration should be given to whether the matters should be identified so that the exposure risk was fully understood and so that it could be determined whether a security for costs application was necessary.

Consideration would also need to be given to whether a contingency fee includes counsels' fees.

Proposal 5–2

Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

We reiterate our view that whilst there are some arguments in favour of the introduction of contingency fees for class actions, QLS is not in a position to support such a proposal at this time. Any amendments in this regard would need to consider whether the Federal Court should have oversight over the fee arrangements in each matter.

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?

QLS is not able to support any introduction of contingency fees at this time.

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. If Proposal 5–2 is adopted, this power should also apply to contingency fee agreements.

Aside from the issues already raised about the Federal Court's jurisdiction in respect of all class actions, we consider that it is proper for the court to have this oversight.

Question 5–2

In addition to Proposals 5–1 and 5–2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:

- Should contingency fee arrangements and commission rates also be subject to statutory caps that limit the proportion of income derived from settlement or judgment sums on a sliding scale, so that the larger the settlement or judgment sum the lower the fee or rate? or
- Should there be a statutory provision that provides, unless the Court otherwise orders, that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%?

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In Queensland, solicitors who charge professional fees on a speculative basis are required to comply with the “50/50” rule. This rule is found in section 347 the *Legal Profession Act 2007* (Qld) and prohibits a solicitor who has entered into a speculative costs agreement with a client from recovering more than 50% of the settlement or judgment in professional fees, after the refunds to third parties and disbursements have been deducted.

Whilst we are not presently in a position to support the introduction of contingency fees, we consider that there is some merit in reviewing what is appropriate for a litigation funder to recover given that lawyers, in Queensland:

- are subject to the 50/50 rule if they have entered into a speculative costs agreement;
- have their costs agreements and conduct overseen by the Court (in class action claims); and
- are regulated by the *Legal Professional Act 2007* and by the Legal Services Commission.

Question 5–3

Should any statutory cap for third-party litigation funders be set at the same proportional rate as for solicitors operating on a contingency fee basis, or would parity affect the viability of the third-party litigation funding model?

We refer to our comments made in answer to question 5-2.

Question 5–4

What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a ‘class action reinvestment fund’ be a viable option?

The Commission and the Government should explore alternative funding options including a class action reinvestment fund.

There is an overarching issue surrounding the lack of public funds to assist people without the means to pay solicitors. Legal Aid and other legal assistance funding was previously available for all manner of matters, including personal injuries matters. It is now severely limited. We call on these services to be properly funded.

Consideration should be given to establishing a stand-alone fund, outside of consolidated revenue, to fund legally assisted matters. Using a similar model to the Queensland Building and Construction Commission insurance scheme, adequate funds could be guaranteed and quarantined from re-absorption by Government.

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;
- where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;
- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and
- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.

Generally, we do not object to the points raised in this proposal. We consider that our recommendation for the consideration of a certification process and a bespoke licensing scheme would assist in resolving issues created by competing class actions. We are aware that determining whether multiple actions should proceed often delays proceedings and increases costs.

However, we maintain our view that implementing such a proposal is premature if the Government has not determined the broader policy issues outlined in our Executive Summary.

Proposal 6–2

In order to implement Proposal 6-1, the Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

We repeat our comments made in respect of proposal 6-1. We would welcome amendments to the practice note to give further direction to parties once the overall regime was clarified.

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?

We consider this question to be fundamental. Should it be determined that a class actions regime should be exclusively remitted to the Federal Court, then we have no specific objection to using the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments*

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Commission Act 2001 (Cth) to do this. However, the amendments may not capture all claims and we query whether consideration should be given to using the Australian Consumer Law to implement this policy.

If exclusive jurisdiction is to be given to the Federal Court, then we recommend that comprehensive reform, potentially in the form of a Code, will be needed to deal with issues such as disclosure and costs. It will also be necessary for the Federal Government to engage with the states about referral of their powers in this regard.

7. Settlement Approval and Distribution

Proposal 7–1

Part 15 of the Federal Court of Australia’s Class Action Practice Note (GPN-CA) 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 and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.

QLS does not consider it is unreasonable to appoint a referee in these circumstances. However, we believe a more pragmatic approach would be to engineer a better process at the commencement of the proceeding.

We also note that courts have, in the past, been reluctant to make orders on costs. We would welcome greater involvement from the courts on this issue as this may assist in resolving disputes in expeditiously.

In addition, some of our members have suggested that the Commission give consideration to developing a new scale of costs for class actions. Such a scale would need to accommodate the specific costs incurred in a class action, which are not commonly incurred in other types of litigation.

Question 7–1

Should settlement administration be the subject of a tender process? If so:

- How would a tender process be implemented?
- Who would decide the outcome of the tender process?

Our members have considered the issue of whether lawyers should be distributing the settlement. On the one hand, lawyers have the knowledge and expertise to undertake this work, whilst on the other, it may be more cost effective to outsource this task.

Any tender process should not absorb costs that could be saved if the funds were distributed by the lawyers with the conduct of the matter and, the lawyers would need to ensure that they fulfilled their obligations to the court and client if the process was outsourced.

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The decision about distribution needs to be made at the time a court sanctions the settlement, at which time the court can consider the option that is most appropriate in the circumstances.

The process of distributing a settlement is distinct from the issue of costs and a costs assessment. We refer to our comments made above about this process.

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?

Our experience is that settlements in class action claims are already largely public and are hard to contain in any event. If there are learnings from prior settlements which are invaluable for future claims and settlements, then we do not object to these being made public.

We note that the courts can intervene to direct that something be kept confidential and often do so with regard to the different settlement amounts received by individual class members.

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?

The idea of regulatory redress is commendable however, we question how such a scheme would be designed and operated including how money will be contributed and disbursed.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor.

Yours faithfully

Ken Taylor
President