ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders
Draft Submission in Response to Proposals and Questions

Augusta Ventures (Australia) Pty Ltd Response

August 2018

Augusta Ventures Limited (AVL) began as a litigation funder in the UK in 2010. To date we have funded 167 cases and committed £102.7m to commercial litigation claims. An Australian office Augusta Ventures (Australia) Pty Ltd (AVA) was established in Sydney in May 2017 and has been active in funding commercial litigation claims and various class actions. The aim is to commit around $30m to litigation claims in Australia in 2018. AVA became a member of ALFA at its inception and Neill Brennan is a director of ALFA. AVL is also a member of the Association of Litigation Funders (ALF) in the UK.

While AVA agrees with much of the submission by the Association of Litigation Funders of Australia (ALFA) we do diverge in some important areas. Where we do not agree with ALFA we have respectfully included our response.

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.***

Content with ALF view

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.

Content with ALF view

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 arrangements for managing conflicts of interest;***
- ***have sufficient resources (including financial, technological and human resources);***
- ***have adequate risk management systems;***
- ***have a compliant dispute resolution system; and***
- ***be audited annually.***

Content with ALF view

Question 3–1 What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

Content with ALF view

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.

Content with ALF view

Question 3–3 Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?

We accept the ALF view that funders can disclose if they joined the scheme.

However, we do not believe it should be required or encouraged. It is most likely that a complaint arising would relate to the terms of a litigation funding agreement or a

settlement decision. It is not clear to us how complaints made would operate with court proceedings and the possibility that it may possibly delay or interfere with a court process. In a class action regime we consider the courts have the authority and are in the best position to determine what is fair and reasonable

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 report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

Content with ALF view

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 a 'litigation scheme' in the Corporations Regulations 2001 (Cth).

Content with ALF view

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.

Content with ALF view

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.

Content with ALF view

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.

Content with ALF view

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.

Content with ALF view

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 any adverse costs order.***

Content with ALF view

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.

Content with ALF view

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?

The Association does not respond to this request.

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.

Content with ALF view

If Proposal 5–~~2~~ 3 is adopted ~~(assume this should be 5-3)~~, this power should also apply to contingency fee agreements.

Content with ALF view

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%?***

Content with ALF view

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?

Content with ALF view

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?

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 the class action is a securities class action it is appropriate for it to be commenced as an open class action due to the likely number of class members affected; to ensure parties cannot avoid a "beauty parade", which will ultimately result in the best return for class members; and ensure access to justice for all shareholders. We also agree with the commission that closed class proceedings are likely to encourage competing classes. We can see why some funders may prefer a closed class as a way of improving their competitive position by signing up a number of larger institutional investors and seeking to avoid a "beauty parade". This inevitably leads to costs being expended by a number of

potential law firms and funders which cannot be recovered. The outcome is an inefficient use of resources.

There a number of instances where closed class actions may be more appropriate than open class actions, including but not limited to:

(a) a smaller group of class members exists who are willing to enter into agreements with solicitors and/or a funder rendering the need for an open class redundant;
(b) the costs of a common fund application and contentious opt out process outweigh the costs of signing up class members to a funding regime; and
(c) the approach being taken in one claim, such as the proposed cause of action or claim period, differs to an approach taken in an open class action.

The breadth of the powers available to the Federal Court to case manage representative proceedings empowers the Federal Court to take steps regarding closing and opening classes where appropriate. Adopting a prescriptive approach is likely to cause more issues than it resolves.

- ***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;***
- Content with ALF view

- ***litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and***
- Content with ALF view

- ***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.***
- Content with ALF view

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.

If the answer to Proposal 6.1 is yes, then the answer to Proposal 6.2 is also yes.

Content with ALF view

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?

Yes. It is necessary for one court to have exclusive jurisdiction to avoid competing class actions being run in different courts and the relevant legislation is Federal. If the Supreme Courts were instead to have jurisdiction, it is foreseeable claims may be brought in different jurisdictions, which could result in a respondent defending claims in multiple courts unless anti-suit injunctions were able to be utilised. To ensure certainty and reduce forum shopping and the wasted legal costs associated with resolving such issues, legislative change is necessary.

We consider ideas such as those included in the VLRC of a cross vesting judicial panel is unworkable within the construct of the constitution.

An alternative would be to provide the power to the Federal Court to order shareholder class actions commenced in a State Supreme Court to be transferred to the Federal Court.

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.

Content with ALF view

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?***

Content with ALF view

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?

Content with ALF view

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.

Content with ALF view

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

Content with ALF view