



THE LAW SOCIETY
OF NEW SOUTH WALES

9 October 2018

The Hon Justice SC Derrington
President
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
By email: class-actions@alrc.gov.au

Dear Justice Derrington,

Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders – Supplementary submission

Thank you for the opportunity to comment on the Australian Law Reform Commission (ALRC) *Supplementary note for consultation: Leave to proceed*. The Law Society's Litigation Law and Practice Committee contributed to this submission.

We refer to our submission made in response to the ALRC *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, dated 17 August 2018, and note that it should be read together with this submission. Specifically, we refer to our response to Part 6 of the ALRC Discussion Paper regarding competing class actions.

The Law Society supports the ALRC's proposal to introduce a 'Leave to Proceed' mechanism. As noted in our earlier submission to the ALRC, complex issues arise both within Courts and between Courts when multiple actions are commenced in respect of the same, or substantially the same, circumstances. These issues cause confusion, delay, and waste in costs and time for the parties to the proceedings and the Court.

In that regard, the Law Society considers that, to the extent that it is possible, the control and consolidation of multiple actions into one proceeding is attractive for all participants. The control and consolidation of multiple actions, from an early stage in the proceeding, can reduce costs and time, as well as address preliminary matters in the proceeding, such as funding and costs arrangements. However, the Law Society also recognises the difficulty in controlling multiple and competing actions, which can be seen through the recent issues in the AMP case. The prevalence of multiple class actions would appear to be on the rise.

The ALRC's proposal of a 'Leave to Proceed' mechanism could address some of these issues by requiring an applicant to include an application for leave in the originating application and by placing the parties in a position to advise the Court as to whether any competing class actions have arisen or are expected. A requirement to publish notices of the existing action might be an appropriate order in some cases. The Law Society agrees that such a mechanism could assist in the reduction of wasted costs and delay by providing a process for the Court to better control the class action and/or consolidate multiple actions into one proceeding at a very early stage.

It could also allow the Court to deal with funding arrangements, as well as legal and costs agreements, to the extent that it was appropriate to do so, at the beginning of the proceeding. Importantly, the mechanism would be consistent with the overarching purpose of the Federal Court's civil practice and procedure of delivering justice as quickly, inexpensively and efficiently as possible (see Part VB of the *Federal Court of Australia Act 1976* (Cth)).

In relation to a certification procedure being introduced to address the problem of competing class actions, the Law Society agrees with the observations made by the ALRC in its Supplementary Note.

Please do not hesitate to contact Ida Nursoo, Policy Lawyer on 02 9926 0275 or at ida.nursoo@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Doug Humphreys OAM
President

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