Slater Gordon Lawyers

Submission to the Parliamentary Inquiry Into Litigation Funding and the Regulation of the Class Action Industry

Submitted by
Slater and Gordon Lawyers
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1. Slater and Gordon appreciates the opportunity to produce a submission to the Parliamentary Inquiry into Litigation Funding and the Regulation of the Class Action Industry.

2. As a leading class action plaintiff law firm, Slater and Gordon has decades of relevant experience – from commencing many of Australia's earliest class actions to conducting landmark cases such as those brought on behalf of Manus Island detainees (*Kamasaee v Commonwealth*) or representing mum and dad investors in the largest shareholder class action result achieved to date (*Vlachos v Centro Properties Limited*). Over that time, we have delivered well-deserved compensation to over 100,000 class members, who would never have been able to pursue their claims individually against entities with vastly greater resources and power than their own.

3. We presently act for plaintiffs in 18 ongoing class actions, 11 of which are funded by a litigation funder and 7 of which are being run on a "No Win No Fee" basis.

4. In recent years, Slater and Gordon has made extensive submissions to inquiries relating to class actions and litigation funding, including the Australian Law Reform Commission's Litigation Funding Inquiry, the report of which was tabled in January 2019,[1] and the Victorian Law Reform Commission's Litigation Funding and Group Proceedings Inquiry, the report of which was tabled in June 2018.[2] In the interests of brevity, we have not sought to repeat those submissions here but have instead provided below short responses to the specific terms of reference for this Parliamentary Inquiry.

5. As will be apparent from our responses below, Slater and Gordon understands the concern that litigation funding should operate in a manner that is consistent with the public interest.

6. In examining this question, however, it is important to appreciate the important role that litigation funding plays in providing access to justice and equality of arms as between well-resourced defendants and ordinary Australians. The reality is that, in order to effectively prosecute a claim against a corporate respondent, a plaintiff will frequently require a litigation budget in the millions of dollars. This is obviously out of reach for most Australians. Accordingly, unless mechanisms remain available to level the playing field, the justice system will be accessible only to the wealthy. Litigation funding is one such mechanism.

7. As things presently stand, litigation funding is providing support to claimants in a wide range of diverse class actions, including:
   a. claims against superannuation entities for exorbitant fees, mishandling member contributions or charging for services never requested;[3]
   b. claims by the owners of apartments and other properties constructed with highly combustible aluminium cladding;[4]
   c. claims arising from the negligent operation of the Wivenhoe and Somerset dams during the 2011 Queensland floods;[5]
   d. various shareholder claims;

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[1] Australian Law Reform Commission, *Integrity, Fairness and Efficiency: An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) ('ALRC Report').
[2] Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018) ('VLRC Report').
[3] See for instance: *Keith Kayler-Thomson v Colonial First State Investments limited & Anor* (VID1313/2018); *Marcel Eugene Krieger & Anor v Colonial First State Investments Limited* (VID1141/2019); *Tracy Ghee v BT Funds Management Limited & Anor VID962/2019; Dale Robert Alford & Ors v AMP Superannuation Limited & Ors* (VID572/2019).
[4] *The Owners – Strata Plan 87231 v 3A Composites GMBH & Anor* (NSD215/2019); *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd* (NSD940/2019).
[5] *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority* (2014/200854); *Lynch v Queensland Bulk Water Authority trading as Seqwater* (2016/373183).

e. underpayment claims against a major pizza franchise;[6]
f. claims for the mis-selling of add-on insurance sold in motor vehicle dealerships;[7]
g. consumer protection and defective goods claims relating to the Takata airbags in various motor vehicles;[8] and
h. claims relating to the mis-selling of life insurance.[9]

8. These claims are not frivolous or speculative. They go to the heart of real issues that exist in Australian society, yet they could not be taken up without the existence of litigation funding.

9. In our view, much of the anxiety expressed in recent public commentary regarding litigation funding has either been unfounded or based upon misunderstandings of the relevant evidence. We have sought to correct some of these misunderstandings in our submissions.

10. We are also concerned that many of the regulatory 'fixes' that have been proposed in recent public debate would have the opposite effect to that intended – that is, they would *reduce* competition in the litigation funding market, thereby *increasing* the cost of litigation funding to people who have legitimate claims, and *increasing* the returns to those litigation funders that remain in the market. It would also increase the prospect that Australians with viable claims would not be able to access our courts.

11. Of course, the present regulatory regime can always be improved, and Slater and Gordon supports the introduction of sensible, evidence-based reforms, the terms of which should be developed in consultation with the legal industry. In particular, we support reforms intended to protect consumers and promote better outcomes for participants in the justice system. To this end, having regard to the comprehensive evidence based inquiry conducted by the ALRC, we largely endorse the recommendations made by that Commission.

1. What evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income;

1.1 As all class actions must be resolved by Court order (whether by way of final judgment or Court approval of an agreed settlement), information regarding the fees charged by litigation funders in each case is typically published by the Court and thereby made publicly available.

1.2 In its 2019 report, the ALRC examined this publicly available information and reported that the average fee charged by a litigation funder in concluded Federal Court of Australia proceedings commenced over 2014 and 2015 was 28.5% of the recoveries in those proceedings.[10] Similar analysis of the fees charged by litigation funders is also published from time to time by academics in the field, such as Professor Vince Morabito.[11]

[6] *Gall v Domino's Pizza Enterprises Limited* (VID685/2019).
[7] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd & Anor* (NSD544/2019).
[8] *Haselhurst v Toyota Motor Corporation Australia Ltd* (2017/340824); *Whisson v Subaru (Aust) Pty Ltd*; *Kularathne v Honda Australia Pty Ltd* (2017/378526); *Brewster v BMW Australia Ltd* (2018/9555); *Bond v Nissan Motor Company Australia Pty Ltd* (2018/9565); *Coates v Mazda Australia Pty Ltd* (2018/42244); *Dwyer v Volkswagen Group Australia Pty Ltd trading as Volkswagen Australia* (2018/322648).
[9] *Lenthall & Anor v Westpac Banking Corporation & Anor* (NSD1812/2017).
[10] ALRC Report, 66 [2.68].
[11] Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments* (Report, January 2019); and Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, July 2017).

1.3 Slater and Gordon's experience has been that, in recent years, the average cost of litigation funding has been materially decreasing. This reduction in funding charges has been driven by:

a. *Increased competition* – as new funders have entered the market, offering funding at a lower cost than was previously available;

b. *Increased scrutiny by Courts of the fees charged by litigation funders* – most commonly at the time that approval is sought for the settlement of class actions[12]; and

c. *The approach taken by Courts to resolving 'multiplicity' or 'overlapping' class actions* – this arises where more than one class action is commenced in respect of the same underlying issue. In November 2018, the Full Court of the Federal Court of Australia held[13] that an available option in circumstances of overlapping proceedings is for the Court to effectively select one class action to proceed, and permanently stay all overlapping proceedings. In selecting the class action to proceed, a significant consideration is which of the proceedings would have the lowest litigation funding fees.[14] This has created a powerful competitive incentive to litigation funders to agree to lower litigation funding fees.

1.4 This trend in the cost of litigation funding is apparent from a consideration of the litigation funding fees approved by Courts since the ALRC report.[15] We have attached, as Annexure A, a schedule and analysis of those class actions which have been finalised in the period subsequent to that considered by the ALRC.

1.5 This analysis shows that the average funding fee approved by the Court in claims subsequent to the ALRC report was **23.5%** of the recoveries from those proceedings. This already demonstrates a significant reduction in the average cost of funding from that calculated by the ALRC.

1.6 Further, given that class action litigation typically takes around 2-3 years to resolve there is an effective lag in the evidence that emerges from considering the funding rates approved at the conclusion of those proceedings – that is, the evidence that emerges from such an analysis may demonstrate the cost of litigation funding some years prior, rather than providing an accurate picture of the cost of litigation funding in the present market.

1.7 As such, we consider it important to also consider the funding fees proposed to be charged in class actions that have been issued more recently and that are yet to be resolved. This evidence is harder to gather as, unlike at the conclusion of a matter, the relevant rates are not to be found in Court judgments. However, Slater and Gordon's experience is that the funding fees on matters issued in recent years have continued to decline. For example, Slater and Gordon has issued matters in recent years where the funding fee is capped at 10% of recoveries – a rate which was not available in the market five years earlier.

1.8 In our view, the evidence clearly demonstrates that competition in the litigation funding market has been good for consumers. It remains the case that litigation funding is a necessity for many people who wish to pursue legitimate claims, and so price competition in the funding market ought to be encouraged.

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[12] *Endeavour River Pty Ltd v MG Responsible Entity & Anor (VID1010/2018).*
[13] *Perera v GetSwift Limited* [2018] FCA 732.
[14] Ibid [320] – [324].
[15] The ALRC relied on a dataset of claims finalised up until October 2018.

2. The impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;

2.1 In the absence of litigation funding, many important and meritorious class actions simply could not be pursued.

2.2 Bringing a complex or novel claim against a well-resourced defendant costs millions of dollars, in solicitors fees, barristers fees, expert witness fees, court fees and other expenses. While class actions reduce these costs by effectively spreading them across a large number of claimants, in almost all instances class members are still not able to pay for the costs of prolonged litigation upfront.

2.3 Plaintiff firms can sometimes address this problem by acting on a "No Win, No Fee" ('NWNF') basis, which usually involves the firm meeting the substantial out of pocket expenses of the litigation as it is ongoing and agreeing to charge its own fees on a deferred and conditional basis. Where they can offer to act on these terms, plaintiff firms already do so – for example, seven of the eighteen class actions currently being conducted by Slater and Gordon are being run on a conditional fee basis. The reality, however, is that at any given time plaintiff firms have a finite amount of capital that can be made available to fund expensive and uncertain class action litigation.

2.4 The risk-reward ratio for a law firm to conduct every class action on a NWNF basis limits the extent to which this funding mechanism can be deployed. To illustrate, in 2012 Slater and Gordon incurred a financial loss of $10m after running the unsuccessful Vioxx class action on a NWNF basis, on behalf of Australians who had suffered heart attacks or strokes said to be caused by the now-blacklisted anti-inflammatory drug, Vioxx. Around half of the $10m loss related to external costs (i.e. disbursements) paid by the firm on behalf of the applicant and the group members over the life of the matter.

2.5 Given that the 'return' from a successful class action is calculated by reference to i) the amount of time spent by our lawyers at their usual hourly rates, which in turn must be approved by an independent costs consultant and the court and ii) the potential award of an uplift or 'premium' calculated at 25% of the approved amount, the size of that return does not justify the risk the law firm faces in meeting the 'carrying costs' of the case, namely, the labour costs and overheads of the lawyers working on the case, funding the disbursements over a two or three year period and the risk of failure across a portfolio of cases. It is a risk that even large firms can only afford to take in respect of a small number of cases at any one time.

2.6 Accordingly, in the absence of litigation funding, many legitimate claims would simply not be able to be pursued due to the inequality of resources as between the claimants and the defendant. For people with such claims, litigation funding is indispensable. It has the effect of increasing the compensation they are able to obtain from zero to a meaningful amount.

2.7 Once a case has litigation funding and is therefore viable, the impact of that funding on the damages and compensation received by class members is as described in response to the previous question regarding funding fees.

3. The potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs;

3.1 Under a contingency fee model, class members will usually receive a greater percentage of any compensation obtained through a class action than they would under the traditional litigation funding model.

3.2 There are two reasons for this.

3.3 The first is that, under the existing litigation funding model there are typically multiple charges deducted from any compensation delivered by plaintiffs; one deduction for the cost of litigation funding, another for repayment of legal costs incurred and, oftentimes, a third deduction for the cost of 'after the event' insurance taken out by the representative plaintiff to protect them against exposure to a disproportionate adverse costs order. Under most contingency fees models on the other hand, these multiple charges are replaced by a single fee, being the contingency fee. With only one party entitled to seek recovery of a single fee from the compensation, the total returns to group members can be expected to be higher than they otherwise would be.

3.4 The second reason is that, under the types of contingency fee models proposed in Australia, the percentage at which the fee is to be charged will be set by the Court. It can be expected that Courts will seek to set the fee at a rate which represents a reasonable, but not windfall or excessive, return to the plaintiff firm conducting the litigation, having regard to the risks and significant expenses borne by that firm to permit the action to proceed.

3.5 By way of example, we have attached as Annexure B a schedule of ten cases successfully resolved by Slater and Gordon over the past ten years, and which were brought under a traditional litigation funding model. As shown in Attachment B, class members would have been materially better off if these claims had all been brought on a contingency fee basis, with that fee capped at 25% of total recoveries, than they were under the current scenario where multiple fees are deducted (funding fees, solicitors fees, disbursements and 'After The Event' ('ATE') insurance costs etc.) Indeed, some additional $29.7m would have been returned to group members under a contingency fee model as compared to current funding models.

4. The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;

4.1 Slater and Gordon considers that litigation funders should be independent of the lawyers acting for class members in funded litigation. To the extent that some claims have been brought by lawyers and litigation funders that are related parties, we consider that Courts have addressed this appropriately by staying the proceedings.[16]

[16] See for instance, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited; In the Matter of Treasury Wine Estates Limited* [2016] FCA 787.

5. The Australian financial services regulatory regime and its application to litigation funding; and

6. The regulation and oversight of the litigation funding industry and litigation funding agreements;

6.1 Slater and Gordon supports the regulation of litigation funding in a manner that is fit-for-purpose and appropriately adapted to the service being provided. Such a regime will introduce protections for consumers, by ensuring that funders are able to meet the financial obligations they assume in a class action, and by ensuring that appropriate practices and procedures are in place to manage any conflicts that may arise in funded litigation.

6.2 If, however, the regulatory regime is unduly onerous or is not well suited to the funding industry, we are concerned that this will have the effect of imposing disproportionate compliance costs that will create barriers to entry and stifle competition. We expect that this would cause the current trend of decreasing litigation funding fees to reverse, to the significant detriment of consumers.

6.3 An example of regulation that is clearly *not* fit-for-purpose is the application of the Managed Investment Scheme ('MIS') provisions of the *Corporations Act 2001* (Cth) to funded class actions, as announced last month by the Federal Treasurer.[17]

6.4 It is notable that the regulator, the Australian Securities and Investments Commission ('ASIC'), shares this concern, and has previously publicly opposed the application of Australian Financial Services licensing or MIS regulations to litigation funding entities in the context of funded class actions.[18]

6.5 It is obviously the case that the MIS provisions in the *Corporations Act 2001* (Cth) were not drafted with litigation funding in mind. Critically, the 'investments' that the MIS regime contemplates are wholly different from 'choses in action', which in practical terms, absent litigation funding, cannot be exercised.

6.6 By way of example, all registered managed investment schemes are subject to compliance requirements including the issuing of a product disclosure statement. This requirement is not only clearly unsuitable for the class actions regime, but will be liable to confuse class members.

6.7 Applying such a poorly suited regulatory regime to litigation would be merely regulation for regulation's sake. The compliance requirements are not directed towards the issues relevant to participants in funded litigation, yet those requirements will result in significant additional overhead costs. It may be expected that those overheads will be passed on as increased costs to consumers, or will reduce competition in the funding market, and will thereby reduce access to justice.[19]

6.8 In the context of litigation funding licencing requirements and MIS regulations being adopted, careful consideration will be required to ensure that the role of the Australian

[17] Media Release of the Commonwealth Treasurer, "Litigation Funders to be Regulated Under the Corporations Act", 22 May 2020: <*https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/litigation-funders-be-regulated-under-corporations*>.
[18] Australian Securities and Investments Commission Submission to the ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders, September 2018.
[19] VLRC Report 17 [2.22] citing Australian Government Treasury, *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)* (Review, October 2015).

Financial Complaints Authority ('AFCA') can *"complement and not overlap the primary role of the courts in supervising the class actions regime"*.[20]

6.9 Slater and Gordon restates its previously articulated concerns in respect of external AFCA determination processes being largely incompatible with the existing mechanisms and operation of class action proceedings. The AFCA forum is clearly intended for use by a wholly different type of consumer than claimants in unresolved class actions. These claimants will have progressed through the class action's court approval procedures before reaching AFCA, and any exercise of AFCA's jurisdiction is therefore likely to be sub-judicial. Any AFCA matter is also likely to operate on a very different schedule to extant court proceedings.

6.10 External dispute-resolution organisations such as AFCA will not owe obligations to other group members in a class action or be required to have regard to their interests or the interests of the proceeding overall–presumably, their remit will be confined to determining the dispute between the funder and the complainant. Such an arrangement presents a multitude of opportunities for the external dispute resolution process to disrupt or interfere with the orderly conduct of a class action or settlement distribution process, which we submit should be avoided.

6.11 As we have submitted in previous Inquiries, in the context of a class action settlement, the objection process provides the best and most appropriate means by which complaints from group members can be considered and resolved. It occurs at the point in a claim when a funding agreement or relationship will have a specific impact on group members' outcomes, and occurs following a notification process by which all group members are informed of the ability to raise a complaint or objection, as well as the precise effect of any funding arrangements on each group member's entitlements. It also can result in tangible results that can affect the entire class, in that the Court can reflect on group members' complaints when deciding whether or not to grant or reject a proposed settlement.

6.12 It also bears noting that the publication of a settlement approval decision will often detail the nature and quantity of complaints or objections from group members – often at some length – which provides for a greater level of transparency to both group members and the public than might be produced in a dispute resolution process managed by an external regulator. Considering the volume of open and confidential material made available to a court in the course of a settlement approval application, we expect that the determination of such objections by a court will also invariably be conducted on a better informed basis than would be the case through an external dispute-resolution process.

6.13 This is just one example of how the compliance regime prepared for an entirely separate class of investment will not be appropriate for application to class actions. Slater and Gordon's concern is that hasty regulation for regulation's sake will give rise to many unintended consequences that will increase the costs and delays in litigation, and ultimately cause detriment to group members. It is important that any regulation of litigation funding be fit-for-purpose and carefully designed to improve the existing system, rather than simply creating additional problems for Australians who have already suffered a significant harm for which they are seeking a remedy.

[20] Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Discussion Paper No 85, 2018) 61.

6.14 It is important to recognise the important role that the Courts currently play in overseeing and regulating litigation funding in class actions and any regulatory response needs to complement and support this role.

7. The application of common fund orders and similar arrangements in class actions;

7.1 The adoption of common fund orders by Australian courts was a positive development for consumers.

7.2 First, under a common fund order, the funding fee charged in any class action is unequivocally a matter within the Court's control. This power, which arguably does not exist in traditional funded class actions, allows the Court to set the funding fees at a level that is just. It is therefore less likely that a litigation funder will enjoy a windfall return in a matter that is subject to a common fund order.

7.3 Second, common fund orders have been highly beneficial for consumer class actions. Prior to common fund orders, the requirement to bookbuild represented a significant barrier to the commencement of claims involving large numbers of persons with individually relatively modest claims – say, in the thousands of dollars each. It is notable that the matters in respect of which the High Court of Australia considered the availability of common fund orders under s33ZF of the *Federal Court of Australia Act 1976* (Cth), *Brewster* and *Lenthall*, were both consumer class actions of this type.

7.4 Enabling consumer redress was one of the original objectives of the class action regime introduced in Australia.[21] However, an analysis of the first 25 years of class actions in Australia found that just 9% of proceedings commenced over that period may be characterised as consumer claims.[22] By way of contrast, once common fund orders were available, in 2018/19, consumer protection claims represented around 30% of all claims filed, a significant increase from the 9% over the first 25 years of the regime.

7.5 This increase in consumer claims, enabled by common fund orders, was positive evidence of the regime more consistently achieving the objectives for which it was put in place.

8. Factors driving the increasing prevalence of class action proceedings in Australia;

8.1 It is first worth determining the extent to which class actions have in fact increased in prevalence.

8.2 A recent report by Professor Morabito found that the average number of class actions issued in the Federal Court each year has increased from 13.9 per year over the period from 2000 to 2009, to 23.5 per year over the period 2010 to 2019. While this is an increase, it is hardly a tsunami of litigation and it represents a much lower rate of case issuance than many overseas jurisdictions.[23]

[21] ALRC Report 66 [2.68].
[22] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, July 2017), 27.
[23] In Israel, between 2007 and 2015, 5687 class actions were filed. This is almost nine times more than in Australia between 1992 and 2019. In Quebec, since 1993, 1306 class actions have been filed (an average of 50 cases per year) despite Quebec's population being little more than 8 million. Finally, in Ontario, between 1993 and 2017, 1459 class actions with an average of 54 cases per year were filed: Vince Morabito, *An Empirical*

8.3 Importantly, Professor Morabito also found that one third of the matters issued are in fact 'duplicates' – that is, they are instances of 'multiplicity' or 'overlapping' class actions.[24] As explained in our response to the first term of reference, these instances of multiplicity have been handled by the Courts in a manner that typifies the nature of competition, with the overall fees payable by class members reducing accordingly. As such, the issuing of overlapping claims by different law firms ought not to be seen as problematic. Class actions are complex pieces of litigation with public importance, and the fact that multiple law firms or funders are competing to run that litigation (and in the process seeking to put forward the most competitive proposal for doing so) should be seen as no more concerning than multiple commercial law firms competing in the tender for the legal services contract on a government-funded construction project.

8.4 Once it is understood that approximately one third of the class actions filed each year represent instances of multiplicity, the true number of new Federal claims issued each year may be significantly lower than 23.5 – perhaps around 16. This would represent a very modest increase from the rate of issuance between 2000 and 2009.

8.5 The next question is how any increase ought to be interpreted.

8.6 The class action regime in Australia was introduced for a reason. The ALRC in 1988 recognised that the high cost of litigation was effectively preventing individuals and businesses from making well-founded claims for compensation against larger businesses and government entities. This was undoubtedly true at the time, and unfortunately it remains true today.

8.7 In this context, it should be seen as a positive that the regime is being utilised and that meaningful compensation is being delivered each year to thousands or tens of thousands of class members. The fact that redress at such a scale can be achieved by the issuance of a relatively small number of proceedings each year is demonstration of the efficiency of the class action regime.

8.8 The increase in class actions that has been observed should only be a cause for concern if it were thought that unmeritorious or frivolous claims were being pursued. The evidence does not support this at all. Further, given the role of the 'adverse costs' rule in Australia, any plaintiff law firm or funder which regularly pursued unmeritorious claims would soon be out of business.

9. What evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy;

9.1 The available evidence does not support the claim that class actions are having an adverse impact on the Australian economy.

9.2 Much of the anxiety expressed over class actions has related to shareholder claims. However, over recent decades the Australian share market has been one of the best performing in the world. It has now reached a market capitalisation of around $2 trillion

Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia (Report No 5, July 2017) 13.

[24] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, July 2017) 13.

and is consistently ranked in the top five exchanges globally for raising capital.[25] The idea that the Australian share market is being significantly hampered by the existence of some shareholder litigation is fanciful.

9.3 To the contrary, the fact that the Australian corporate environment is well-regulated, both by public enforcement through bodies such as ASIC and by private enforcement through class actions, is considered a strength of Australian markets. This encourages investment, both from domestic sources and international, and has benefited the Australian economy.[26]

9.4 Indeed, it is noteworthy that the recent relaxation of continuous disclosure laws in Australia has caused concern amongst significant institutional investors on the ASX.[27]

9.5 While some corporate groups, such as the Australian Institute of Company Directors, oppose class actions, this should not come as a surprise since it is their members' conduct which may be the subject of class action litigation. However, the interests of this group and its attempt to shield its members from well-founded class action claims where misconduct is identified should not override the broader interest of the Australian community in having well-regulated capital markets and an accessible judicial system.

9.6 Further, as noted in our response to the previous Term of Reference, the level of class action litigation in Australia is far from exceptional. A total of 8 shareholder class actions were filed in Australian courts in 2019. Given that there are 2,134 companies listed on the ASX as at 13 May 2020, this means that just 0.37% of listed companies were subject to a shareholder claim. And, of course, ASX-listed companies can reduce their risk by ensuring strict compliance with their ongoing disclosure obligations – a step which strengthens Australia's corporate environment.

10. The effect of unilateral legislative and regulatory changes to class action procedure and litigation funding;

10.1 The development of the class action regime in Australia has always involved unilateral and incremental change, one jurisdiction at a time. From 1995 to 2000, representative proceedings could only be commenced in the Federal jurisdiction. Then, in 2000, Victoria introduced group proceedings through the introduction of Part 4A into its *Supreme Court Act 1986* (Vic). New South Wales followed suit in 2011[28], and Queensland in 2017.[29] A group proceedings bill was introduced into the Western Australian Parliament in 2019, however the bill is yet to be legislated.[30]

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[25] https://www.asx.com.au/about/corporate-overview.htm
[26] Australian Trade and Investment Commission's 2019 report found Australia's 'robust regulatory frameworks' creates a 'strong foundation' thus encouraging foreign investment in Australia. Reference: Australian Trade and Investment Commission, *Why Australia?* (Benchmark Report, 2019) 49 <https://www.austrade.gov.au/International/Invest/Resources/Benchmark-Report>;
Additionally, a 2017 Australian Investor Study commissioned by the ASX and completed by Deloitte found 'improving disclosure for consumers is a key goal for the industry and regulators' and 'could encourage individuals to invest, as well as changing the products they choose to hold'. Reference: Deloitte, *ASX Australian Investor Study* (Report, 2017) 16 <https://www.asx.com.au/documents/resources/2017-asx-investor-study.pdf>.
[27] Australian Financial Review, 'The Costs and Risks of Continuous Disclosure Changes', 26 May 2020; https://www.afr.com/chanticleer/the-costs-and-risks-of-continuous-disclosure-changes-20200526-p54wi0>.
[28] Upon the introduction of Part 10 into the *Civil Procedure Act 2005 (NSW)*.
[29] Through Part 13A of the Civil Procedure Act 2011 (Qld)
[30] Civil Procedure (Representative Proceedings) Bill 2019 (WA)

10.2 Even now, the existing class action laws in each state are not entirely harmonious, with some meaningful differences existing between the empowering legislation in different jurisdictions – for example the *Civil Procedure Act 2005 (NSW)* outlines a different test for standing to commence a class action against multiple defendants than that set out in the equivalent provisions of the *Federal Court of Australia Act 1976* (Cth).

10.3 In our experience, this method of legislative reform has allowed for the incremental development of the law and has never caused any significant difficulties.

10.4 Nor is such disconformity unique to class actions procedure. The different states of Australia have, for example, quite different procedural requirements relating to the important issues of proportionate liability and the joinder of concurrent wrongdoers to claims for compensation.

11. The consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement;

11.1 Slater and Gordon supports the ALRC's recommendation, produced on the basis of significant consultation and research, that solicitors acting for plaintiffs in representative proceedings be permitted to charge a percentage-based fee (subject to leave being granted to do so by the Court). This recommendation follows on from equivalent recommendations by the VLRC[31] and, earlier, the Productivity Commission[32].

11.2 As explained in section 3 above, by replacing multiple charges by different participants in a class action with a single contingency fee, such a regime would materially increase the returns to class members in such litigation.

11.3 Further, by essentially allowing plaintiff firms to directly compete with litigation funders, such a change is expected to produce further benefits and reductions in overall fee rates of the sort described in section 1 of this submission. This competitive impact was called out by a 2018 IBISWorld Industry report which noted that the litigation funding industry would be significantly opened up to competition if percentage-based billing were permitted.[33]

11.4 In particular, we anticipate that contingency fees will be beneficial for consumer claims, which have traditionally been difficult to run under the existing funding models (absent common fund orders, as explained in section 6 above).

11.5 Finally, as noted in the ALRC Report[34], percentage-based fees provide clarity and certainty for class members, as they are more readily understood than time-based billing and will also ensure that the majority of funds recovered are received by class members.

[31] VLRC Report, Recommendation 7, page xx.
[32] Australian Government Productivity Commission, "Access to Justice Arrangements", Inquiry Report No. 72, 5 September 2014, 61.
[33] Kim Do, 'IBISWorld Industry Report OD5446: Litigation Funding in Australia' (February 2018) 8; as referenced in ALRC Report, page 200.
[34] ALRC Report, page 200.

12. The potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic;

12.1 The concerns expressed around the impact of class actions on Australian businesses at the time of the COVID-19 pandemic have, in our view, been wildly overstated.

12.2 The amendments made to relax listed companies' continuous disclosure obligations, for example, were a solution in search of a problem. The change was said to be necessary to allow listed companies to navigate through the uncertainty caused by COVID-19.

12.3 However, over 100 ASX listed companies had already seen fit to withdraw their previous market guidance prior to this amendment coming into effect – an appropriate step for a company to take in circumstances such as the present. None of those companies had found themselves incapable of understanding their disclosure obligations in the context of the pandemic.

12.4 Moreover, as far as Slater and Gordon is aware, no plaintiff firm has announced that it is investigating the circumstances of any of those instances of withdrawn guidance. In this case, the concerns arounds the impact of disclosure obligations and class action risks on listed companies simply aren't supported by the evidence.

12.5 In our view, more concern ought to be directed toward the impact that any move to weaken Australia's class actions system would have on vulnerable Australians who benefit from those claims – whether they be injured plaintiffs, misled consumers, or ripped off retail investors. Much like Australian businesses, those vulnerable Australians are also being significantly impacted by the COVID-19 pandemic. This is not the appropriate time to undermine the ability of ordinary people to access the justice system.

13. Evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders; and

13.1 In the eighteen months since the ALRC's report was handed down, the jurisprudence of class actions in Australia has continued to be developed, with significant decisions handed down by the High Court of Australia and other superior courts.

13.2 Fundamentally, however, the operation of the regime has not changed.

13.3 Class actions continue to offer an accessible means by which ordinary people can seek collective redress for a significant. The types of claims on foot right now are diverse and address real issues in society. They include:

a. *Kayler-Thomson v Colonial First State Investments Limited* (VID 1313 of 2018) – a Part IVA Federal Court action alleging Colonial First State invested the retirement savings of its members with its parent bank, the Commonwealth Bank of Australia, where it received uncompetitive interest rates.

b. *Prygodicz & Ors v Commonwealth of Australia* (VID 1252 of 2019) – a Part IVA Federal Court proceeding brought on behalf of those who suffered losses due to the operation of Centrelink's "Robo-Debt" system.

c. *The Owners – Strata Plan 87231 v 3A Composites GMBH & Anor* (NSD 215 of 2019) – a Part IVA proceedings brought against the manufacturers and suppliers of 'Alucobond PE' cladding products.

d. *Turner v Bayer Australia Ltd & Ors* (S ECI 2019 02916) – a proceeding brought in the Supreme Court of Victoria on behalf of women who have suffered harm as a result of the implant of a contraceptive device known as the 'Essure' device.

e. *Stallard as trustee for the Stallard Superannuation Fund v Treasury Wine Estates Ltd* (S ECI 2020 01590) – a Supreme Court of Victoria proceeding brought against Treasury Wines Estate ('TWE') on behalf of shareholders who allege TWE contravened its continuous disclosure obligations and engaged in misleading or deceptive conduct.

f. *Kemp v Westpac Banking Corporation* (VID 134 of 2020) – a Part IVA Federal Court proceeding alleging Westpac mis-sold credit card and personal loan insurance to consumers.

13.4 There have also been a number of significant class actions resolved since the ALRC report, including:

a. *Court v Spotless Group Holdings Ltd* (VID 561 of 2017) – a Part IVA proceeding brought against Spotless Group Holdings on behalf of shareholders which settled just prior to trial for $95 million inclusive of interests and costs.

b. *Pearson v State of Queensland* (QUD 714 of 2016) – a Part IVA proceeding brought on behalf of an estimated 10,000 indigenous worked in Queensland who had wages stolen was settled for $190 million.

c. *Hudson & Ors v Commonwealth of Australia* (NSD 1155 of 2017); *Bartlett & Anor v Commonwealth of Australia* (NSD 1388 of 2018); *Smith & Ors v Commonwealth of Australia* (NSD 1908 of 2016) – a series of Part IVA proceedings brought on behalf of landholders around Australia whose land was subject to PFAS contamination. The proceedings settled for a total of $212.5m in 2020.

d. *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* (VID 163 of 2017) – a Part IVA Federal Court proceeding brought on behalf of shareholders in Bellamy's Australia Ltd in 2017 and settled in 2019 for $49.7 million inclusive of interest and costs.

e. C*lark v National Australia Bank Limited* (VID 1238 of 2018) – a Part IVA Federal Court proceeding issued in 2018 alleging individuals were mis-sold insurance on their credit card or personal loans was settled in 2019 for $49.5 million inclusive of costs.

f. *Alister Dalton & Anor v Volkswagen AG & Anor* (NSD 1459 of 2015); *Steven Roe v Skoda Auto A.S. & Ors* (NSD 1473 of 2015); *Richardson v Audi AG & Ors* (NSD 1472/2015); *Cantor v Audi Australia Pty Ltd* (NSD 1307 of 2015); *Tolentino v Volkswagen Group Australia Pty Ltd* (NSD 1308 of 2015) – A series of Part IVA Federal Court proceedings alleging that certain vehicles had been fitted with 'defeat devices' designed to detect test conditions and cut its emissions to pass emissions-testing in a laboratory environment. The proceedings settled for between $87 million and $127 million in 2019.

g. *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals* (NSD448 of 2017) – a Part IVA Federal Court proceeding alleging unfair contract terms, that consumers in every state except South Australia overpaid for rental products, and that the Company did not advise consumers of certain costs. The proceeding settled for $29 million in 2019.

h. *Lynch v Cash Converters Personal Finance Pty Limited* (NSD 900 of 2015); *Gray v Cash Converters International Limited and others* (NSD 2089 and 2090 of 2013) – a series of Part IVA Federal Court proceedings brought on behalf of consumers alleging that the Company engaged in misleading or deceptive conduct and that its contracts contained unfair contract terms. The Gray proceeding settled for $23 million in 2015, and the Lynch proceeding settled for $42.5 million in 2020.

13.5. These results, which have benefited tens of thousands of Australians, clearly would not have been possible without a well-functioning class action regime. These results demonstrate the value to society that class actions provide.

13.6 Should you require any further information or have any queries about this submission, please contact Phil Reed, Slater and Gordon's Head of Government and Stakeholder Relations.

Slater Gordon
Lawyers

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ANNEXURE A – FUNDING CHARGES IN CLASS ACTIONS CONCLUDED SINCE ALRC REPORT

Name of Proceeding	Year Proceeding Concluded	Total Recoveries in Proceeding	Litigation Funding Charges
David Scott Hopkins (as Trustee of the David Hopkins Super Fund) v Macmahon Holdings Ltd (NSD1346/2015)	2018	$6.7m	$1.295m
Peter Anthony Basil v Bellamy's Australia Limited (VID 213 of 2017); McKay Super Solutions Pty Limited (as Trustee for the McKay Super Solutions Fund) v Bellamy's Australia Limited (VID 163 of 2017)	2019	$49.7m	$15m
Pawel Kuterba & Anor v Sirtex Medical Limited (VID 1375 of 2017)	2019	$40m	$8.8m
Rushleigh Services Pty Ltd v Forge Group Limited (In Liquidation) (Receivers and Managers Appointed) & Ors (NSD 1382 of 2014)	2019	$16.5m	$3.95m
Clime Capital Limited v UGL Pty Limited (VID1390/2017)	2019	$18m	$4.05m
Smith v Australian Executor Trustees Limited (2015/171592)	2019	$15.75m	$4.25m
Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited (ACD93/2016)	2020	$32.4m	$8.6m
Noel Murray Uren v RMBL Investments Ltd & Anor (VID1093/2018)	2020	$3m	$0.75m
Michael and Tracey Fisher as trustees for the Tramik Super Fund Trust v Vocus Group Ltd (VID419/2019)	2020	$35m	$6.2m
Endeavour River Pty Ltd v MG Responsible Entity Limited & Anor (VID1010/2018)	2020	$42m	$10.7m
John William Cruse Webster as Trustee for the Elcar Pty Ltd Super Fund Trust v Murray Goulburn Cooperative Co. Ltd & Ors (VID508/2017)	2020	$37.5m	$8.625m
Hans Pearson v State of Queensland (QUD of 2016)	2020	$190m	$38m
Richard John Findlay Bradgate as Trustee of the Bradgate Superannuation Fund v Ashley Services Group Limited (NSD2074/2016)	2020	$14.6m	$4.8m
Hassan El-Banna El-Zein & Ors v Barton Nine Pty Limited ATF the Barton Nine Settlement (NSD1555/2018)	2020	$2.57m	$0.65m
Kirsty Jane Bartlett & Anor v Commonwealth of Australia (NSD1388/2018); Bradley James Hudson & Ors v Commonwealth of Australia (NSD1155/2017); Gavin Smith & Ors v Commonwealth of Australia (Department of Defence) (NSD1908/2016)	2020	$212.5m	$53.1m
	TOTAL	**$716.22m**	**$168.77m**

LITIGATION FUNDING CHARGES AS A PERCENTAGE OF RECOVERIES = 23.5%

ANNEXURE B – IMPACT OF CONTINGENCY FEES ON GROUP MEMBER RETURNS

Name of Proceeding	Total Recoveries	Total of Various Fees Deducted, incl.: - Litigation Funding Commission - Disbursements - Solicitors Fees - ATE Insurance Premium	Single Deduction Assuming a Contingency Fee at 25% (plus GST)
McKay Super Solutions Pty Ltd (as Trustee for the McKay Super Solutions Fund) v Bellamy's Australia Ltd (VID 163 of 2017)	$30,000,000	$12,795,000	$8,250,000
Michael and Tracey Fisher as Trustees for the Tramik Super Fund Trust v Vocus Group Limited (VID419/2019)	$35,000,000	$8,510,000	$9,625,000
Endeavour River Pty Ltd v MG Responsible Entity Limited & Anor (VID1010/2018)	$42,000,000	$12,685,770	$11,550,000
Earglow Pty Ltd v Newcrest Mining Limited (VID 406 of 2014)	$36,000,000	$16,969,401	$9,900,000
Newstart 123 Pty Ltd v Billabong International Ltd (VID143/2015)	$45,000,000	$17,223,804	$12,375,000
Modtech Engineering Pty Limited v GPT Management Holdings Limited and GPT RE Limited (VID1408 of 2011)	$75,000,000	$26,859,052	$20,625,000
Hadchiti v Nufarm Limited (NSD1847 of 2010).	$28,000,000	$8,596,281	$7,700,000
Earglow Pty Ltd v Sigma Pharmaceuticals Limited (VID 933 of 2010)	$57,500,000	$17,246,514	$15,812,500
Vlachos & Ors v Centro Properties Ltd & Ors (VID 366 of 2008)	$50,000,000	$18,423,232	$13,750,000
	TOTAL	**$139.3m**	**$109.6m**

ADDITIONAL RETURNS TO GROUP MEMBERS IF ALL MATTERS HAD BEEN RUN ON A CONTINGENCY FEES BASIS = $29.7 million