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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
Canberra ACT 2600

By email:

Dear Secretary

ACCC Submission to the Inquiry into Litigation Funding

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services' *Inquiry into Litigation Funding*.

The ACCC is Australia's national competition and consumer protection enforcement agency. Our role is to enforce compliance with the Competition and Consumer Act 2010 (CCA) to ensure that Australia's market economy works for the benefit of all Australians. The CCA is a key piece of legislation regulating economic activity within Australia and provides a private right of action to consumers and small businesses harmed by anti-competitive conduct or conduct in breach of the Australian Consumer Law (ACL).

The ACCC recognises the importance of class actions in providing redress for consumers and businesses that are otherwise unable to obtain compensation for harm caused by breaches of the competition or consumer laws. Further, the threat of private litigation, including class actions, plays an important role in deterring conduct that may breach the CCA.

Conversely, class actions can impact the ACCC's enforcement work in two ways. First, by providing a disincentive to applicants seeking immunity from prosecution for cartel conduct under the ACCC's cartel immunity policy. Second, by acting as a disincentive to respondents seeking to resolve ACCC litigation by way of agreed facts and admissions. In both circumstances the prospect of class actions has the potential to detrimentally impact the ACCC's enforcement work.

However, the ACCC considers that the current class action regulatory settings appropriately balance these positives and potential negatives. As such, the ACCC recommends the inquiry carefully consider any changes that may make class actions less available as doing so risks preventing access to redress for a wide range of consumers.

ACCC enforcement action and class actions

The CCA provides for compensation via both ACCC enforcement action and private litigation such as class actions.

The ACCC considers obtaining consumer redress to be an important part of its enforcement work and will always seek it when it is feasible and appropriate. However, obtaining that redress can present significant legal, logistical and financial challenges and the focus of the ACCC's enforcement action must be on detecting, stopping, deterring or punishing contravening conduct and affecting behavioural change in the market. Using more ACCC resources to seek individual redress would be likely to result in a reduced number of enforcement actions and therefore, less incentive to comply with the CCA. When the ACCC does seek compensation orders, the cost of doing so is borne by the ACCC's legal budget and may only be partially recovered by a later costs order.

Some of the challenges the ACCC faces when seeking compensation orders include:

- satisfying legislative and evidentiary requirements, for example quantifying the loss from the unlawful conduct to the required evidentiary standard;
- establishing each individual's entitlement to compensation;
- managing the logistics of communicating with all class members; and
- the distribution and management of a compensation fund.

The ACCC has experienced these challenges across a wide range of matters, including both competition and consumer law matters¹.

Recent legislative changes to the CCA allow private litigants to use ACCC findings of fact as prima facie evidence in their own follow-on proceedings.² The ACCC strongly supported, and continues to support, these legislative amendments because the ACCC considers that class actions are sometimes the only economically efficient way for consumers and small businesses to obtain compensation is through a class action. The amendments were designed to make class actions under the CCA easier and cheaper to take.

The ACCC considers that private firms that specialise in class actions are generally far better equipped to overcome these challenges effectively and efficiently. Furthermore, the ACCC considers that where compensation is obtained, it is appropriate for the associated costs to be borne by those being compensated and, ultimately, the party who breached the law, and not the Commonwealth.

For these reasons, the ACCC considers that class actions are an efficient and appropriate mechanism for obtaining compensation that generally and appropriately supplements public enforcement.

Class actions as an efficient tool for compensation

Class actions play a particularly important role in obtaining compensation in circumstances when individual action by plaintiffs is unlikely or uneconomical. In many competition and consumer enforcement matters the harm suffered by an individual consumer is too small to justify individual litigation but the collective loss to all affected consumers is substantial. For the reasons stated above, it may not be feasible or appropriate for the ACCC to seek such compensation. A class action is likely to be the only viable compensation mechanism.

¹ For example, in *ACCC v Golden Sphere International Inc* (1998) 83 FCR 424, the cost of establishing the fund to deal with claimants was significant and resulted in reduced resources for the ACCC's other work.

² *Competition and Consumer Act 2010* (Cth) s 83.

Vulnerable and disadvantaged consumers are often disproportionately impacted by conduct in breach of the CCA, and many such consumers do not have the requisite resources to bring a private action themselves. In these cases, if the ACCC does not seek a compensation order, a private class action is their only remaining path to access justice.

As already stated, the ACCC recommends the inquiry carefully consider any changes to the relevant regulations that may further restrict the availability of class actions.

Class actions and deterrence

The ACCC considers that the threat of private litigation, including class actions, plays an important role in deterring conduct that may breach the CCA. Effective deterrence occurs where sanctions, having regard to the likelihood of detection and consequences, outweigh the gains from infringing conduct.

Pecuniary penalties play a critical role in deterrence. However, despite significant increases in recent years to the maximum available pecuniary penalties for breaches of the CCA, the penalties awarded are sometimes lower than the gains made from the infringing conduct.³ Where this is the case, civil pecuniary penalties alone are an inadequate deterrent. Therefore, the threat of further costs from damages payouts resulting from private litigation can be the difference between a party profiting from, or being deterred from, unlawful conduct. The ACCC supports retaining current laws around class actions and litigation funding to ensure businesses are effectively deterred from conduct that harms consumers and small businesses.

Impact of class actions on ACCC enforcement

As noted, the ACCC supports the continued availability of and measures to improve access to class actions under the CCA, but note that increasing the likelihood of private class action does also create challenges for ACCC enforcement action. In particular, that an increased likelihood of class actions may change the risk assessment for parties who either wish to approach the ACCC for immunity under the cartel policy or wish to cooperate with the ACCC and resolve enforcement cases via admissions.⁴

In our experience, cartel participants who are considering seeking immunity or parties that are considering settlement of ACCC proceedings will carefully consider the pros and cons of doing so. This analysis includes, among other factors, a careful consideration of the likely reduction in penalty for cooperation against the risk of and quantum of follow on private class actions. As such, if the risk of facing class actions in Australia increases to the point that parties are unwilling to approach the ACCC or proceed to court on the basis of a statement to agreed facts, the ACCC could face more enforcement challenges. As already stated, the ACCC does not consider that the incidence and risk of class actions is currently high enough that any changes in the regulatory environment are warranted. Nonetheless, the ACCC is carefully monitoring the development of class actions and litigation funding to identify these risks if they arise in the future.

Application of the ACL to litigation funding and class actions

The inquiry's terms of reference include a consideration of the regulation and oversight of the litigation funding industry and litigation funding agreements. The ACCC notes that the ACL regulates misleading, deceptive, unfair or unconscionable conduct by firms seeking to

³ <http://www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>

⁴ See [ACCC immunity & cooperation policy for cartel conduct](#). The immunity policy is limited to conferring protection from ACCC legal action or a criminal prosecution by the Commonwealth Director of Public Prosecutions. It only applies to persons engaged in the contravention and requires admissions of involvement in cartel conduct.

undertake or support the taking of a class action. These provisions cover both litigation funders and lawyers.

While not common, the ACCC has received allegations that litigation funders or law firms have breached the ACL by engaging in misleading or deceptive conduct, or unconscionable conduct, when promoting class actions to potential clients, or in relation to the operation of the class action agreements clients are required to sign. Concerns have also been raised that the win fee structures of class actions are often not clearly or adequately explained to the consumers or small businesses joining class actions, and can sometimes be unreasonably high, leaving the class potentially out of pocket compared to alternative settlement arrangements. Litigation funding agreements are often presented to potential clients at the same time as the class action suit agreement, and clients may not fully understand the ramifications of the funding agreements.

While the ACCC has not taken any action in response to such allegations raised with us to date, we note there is the potential for harm to consumers and small businesses and the ACCC is able to take action where conduct of this kind is likely to breach of the CCA or ACL.

Conclusion

Developments over recent years in class actions supported by litigation funding in Australia reflect past reforms, including those in the CCA, which sought to make redress possible for those who otherwise may not have the resources or capacity to seek it. The ACCC's view is that in the context of the CCA, developments should be allowed to continue without further substantial regulatory intervention at this stage.

The ACCC thanks the Committee for the opportunity to make a submission, and would be happy to provide further detail on any of the issues raised in this submission, and to respond to issues of interest to the Committee. If you have any questions, please contact Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, on (02) 9290 9130.

Rod Sims
Chair