Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Inquiry into litigation funding and the regulation of the class action industry

Submission to the Parliamentary Joint Committee on Corporations and Financial Services

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA appreciates the opportunity to make a submission to the inquiry into litigation funding and the regulation of the class action industry that is being conducted by the Joint Parliamentary Committee on Corporations and Financial Services ('the Committee').

2. This submission will focus on the importance of non-investor class action proceedings as a vehicle for access to justice, enabling disadvantaged individuals – who have been subjected to similar injurious circumstances – to pursue legal remedies against a well-resourced defendant such as a government agency or large corporation. The ALA submits that any regulatory framework for class action proceedings and third-party litigation funders should not inhibit the use of the class action regimes to access legal remedies by those who are socially and economically disadvantaged.

Non-investor class actions — providing access to justice for disadvantaged persons

3. The ALA recognises that class actions allow groups of people who have suffered similar breaches of their rights to join with each other to sue a well-resourced and powerful defendant. For many of these people, pursuing their claims against a well-resourced defendant individually would be beyond their financial means. In this way class actions enable more people who are economically disadvantaged to enforce their common law and statutory rights. A number of ALA members are legal practitioners who have undertaken class action litigation on behalf of disadvantaged people who have suffered considerable personal harm as a result of wrongful conduct by a powerful defendant. In most cases, these actions have been undertaken on a 'no-win, no-fee' basis.

4. In 1988, the Australian Law Reform Commission (ALRC) recognised that the underlying purpose of class actions was 'to enhance access to legal remedies for those who are disadvantaged either socially, intellectually or psychologically'.[2] This recognises that many people with legitimate legal claims against powerful government or corporate actors would

[2] Australian Law Reform Commission (ALRC) (1988), *Grouped Proceedings in the Federal Court*, Report No. 46 (1988), paragraph 107.

face considerable financial and social barriers in accessing legal redress through the courts without the Part IVA class action regime.

5. The ALA refers the Committee to the research conducted by Professor Vince Morabito and Jarrah Ekstein, documented in their article *Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study*,[3] which includes several examples of how the Part IVA provision of the *Federal Court of Australia Act 1976* (Cth) ('the *FCA Act*') has been used by groups of financially and socially disadvantaged people, to pursue legitimate legal claims in circumstances where their health, well-being and financial circumstances have been materially affected by the actions of government or corporate agencies. Several of these case studies are provided in this submission.

6. The ALA refers the Committee to the ALRC Report No. 134, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, released in December 2018. In formulating its recommendations, the ALRC was guided by three overarching principles:

   I. It is essential to the rule of the law that citizens should be able to vindicate just claims through a process characterised by fairness and efficiency to all parties, and that gives primacy to the interests of the litigants, without undue expense or delay.

   II. There should be appropriate protections in place for litigants who wish to avail themselves of the class action system and the variety of funding models that facilitate the vindication of just claims.

   III. The integrity of the civil justice system is essential to the operation of the rule of law.[4]

7. In relation to the first principle (fairness and efficiency without undue expense or delay) the ALRC noted that the basis of the introduction of the federal class action regime in 1992 by Part IVA of the *FCA Ac*t was that it is essential that appropriate procedures exist to ensure that

[3] Morabito, Vince and Ekstein, Jarrah (2016), *Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study*, (2016) 35 C.J.Q, Issue 1, 61–88.

[4] Australian Law Reform Commission (ALRC) (2018), *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No. 134 (2018) paragraph 1.22.

groups of persons who have suffered loss or damage, whatever the type of claim, will be able to pursue redress and to do so more cheaply and efficiently than would be the case with individual actions. The ALRC concluded that the regime had operated as intended and that it had enabled claims to be brought by people with small claims whose number may be such as to make the total amount at issue significant, and to deal efficiently with similar individual claims that are large enough to justify individual actions.[5]

8. The ALRC also noted that litigation funding is an important element in facilitating access to the legal system, as it provides an avenue by which citizens can realise their rights to pursue legitimate legal claims which would otherwise be unaffordable for them to pursue.[6]

9. The ALA also refers the Committee to the 2018 Victorian Law Reform Commission (VLRC) report *Access to Justice – Litigation Funding and Group Proceedings*. The VLRC concluded that Victoria's class action regime has improved access to justice, with thousands of Victorians having benefited from the procedures introduced in 2000 by Part 4A of the *Supreme Court Act 1986* (Vic). The VLRC noted that these litigants combined had received more than one billion dollars in compensation that they would have been unable or unwilling to recover in separate claims. It found that 85 class actions have been filed on behalf of a wide variety of claimants, from vulnerable individuals to institutional investors and insurers. Two in every three class actions settled.[7]

10. The VLRC also concluded that litigation funders had little impact in enabling class actions to be brought in the Victorian Supreme Court, identifying that the most prevalent form of financial assistance to representative plaintiffs was in the provision of legal services by law firms on a 'no win, no fee' basis.[8]

[5] Ibid, paragraph 1.23.

[6] Ibid, paragraph 1.29.

[7] Victorian Law Reform Commission (VLRC) report *Access to Justice – Litigation Funding and Group Proceedings* (2018), March 2018, paragraph 7.1.

[8] Ibid, paragraph 7.10.

11. The ALA also refers the Committee to the further article by Jarrah Ekstein, co-authored with Ben Slade,[9] in which examples of socially beneficial class actions are again detailed.

Class actions involving personal injury claimants

12. Morabito and Ekstein identified over 50 class actions that were brought between March 1992 and March 2014 on behalf of persons who suffered health problems or personal injury alleged to have been caused by the negligence of defendants. They observed that the vulnerability of the claimants arose as a result of, or was compounded by, the injury that was the subject of the class action. In almost all cases the proceedings were undertaken by solicitors working on a 'no win, no-fee' basis. [10]

13. Some of the particular examples to which Morabito and Ekstein refer include:

    I. Class action initiated by over 100 people born between 1958 and 1970 who had suffered since birth from a congenital malformation, and whose mothers had consumed thalidomide drugs while pregnant (*Robbins v Grunenthal GmbH* and *Rowe v Grunenthal GmbH*).[11]

    II. Class action initiated on behalf of all persons who after 30 June 1999 obtained prescriptions from an Australian medical practitioner for the anti-inflammatory drug Vioxx, and who suffered one or more of specified cardiovascular conditions, thrombotic stroke and vascular disease (*Peterson v Merck Sharp & Dohme (Aust) Pty Ltd* [2006] FCA 875).

    III. Class action initiated by over 100 people who consumed Travacalm travel sickness tablets and who claimed to suffer personal injury as a result (*Reynolds v Key Pharmaceutical Pty Ltd*).[12]

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[9] Ben Slade and Jarrah Ekstein: *Class Actions and Social Justice: achievements and barriers* in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1992–2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017). See also Slade, Ben *The social value of class actions* [2015] Precedent AULA 45; (2015) 129 Precedent.

[10] Morabito and Ekstein, see n 3 above, 78.

[11] As noted at n 111 in Morabito and Ekstein, see n 3 above, 78.

[12] Ibid, 79.

IV. Class action initiated on behalf of victims of allegedly defective silicone breast implants (*Bates v Dow Corning (Australia) Pty Ltd* [2005] FCA 927).[13]

V. Class action on behalf of a large number of people who suffered loss or damage as a result of the Black Saturday bushfire in February 2009 in Kilmore East Kinglake. It was alleged that the fire was caused by a faulty electricity conductor. The claim involved approximately 1,700 personal injury claims, 4,000 claims for uninsured or underinsured property loss and more than 5,000 claims for insured property. Many of those who were involved in the class action were injured, grieving, unable to work or homeless (*Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663).[14]

VI. Class action on behalf of people who had contracted Legionnaires disease in 2000, after attending the Melbourne Aquarium (*Hilton v Melbourne Underwater World Pty Ltd* [2004] VSC 357; *Scicluna v Melbourne Underwater Pty Ltd* (unreported 26 November 2004)).[15]

VII. Class action on behalf of 26 people who suffered injuries and mental distress following the collapse of the Arthurs Seat Scenic Chairlift in Dromana, Victoria (*Mardini v Arthurs Seat Scenic Chairlift Pty Ltd*).[16]

Class actions involving people from particular socially and economically disadvantaged groups

14. In respect of the above-mentioned examples of class actions for personal injury claims, the ALA notes the observations of Morabito and Ekstein, and Ekstein and Slade, that in almost all examples, the members of the class action groups were people who would otherwise face considerable barriers to accessing their legal rights through the courts. Many were elderly, suffering significant personal injury or disability, dealing with grief or distress as a result of the circumstances that would be the subject of their claim, or were parents of young children.

[13] Ibid, 81.

[14] Ibid, 84.

[15] Ibid, 85.

[16] Ibid, 86.

15. In addition, Morabito and Ekstein refer to other examples of class actions involving particular groups that face hardship and social or economic disadvantage. These include:

    I. People with intellectual disability –

    A class action that settled for approximately $100m for 9,735 people with intellectual disability who were employed in Australian Disability Enterprises ('ADEs'), whose representative claimed that they were subject to unlawful discrimination by the application of the Business Services Wage Assessment Tool devised by the Federal Government to determine pro-rata wages for people working at ADEs (*Duval-Comrie v Commonwealth of Australia* [2106] FCA 1523). The class members were society's most vulnerable, with minimal incomes and receiving the disability support pension. None of the class members were able to bring a proceeding on their own.[17]

    II. Children and young people –

    A class action filed in the NSW Supreme Court on behalf of 56 young people who had been wrongfully arrested and detained by NSW Police for breach of bail, due to the police computer system containing out-of-date or incorrect bail information *(Konneh v State of NSW (No 3)* (2013) 235 A Crim R 191 (later *Amom v State of NSW*)). Each of the class members was aged between 11 and 18 at the time of their wrongful arrest, and all were from socially and economically disadvantaged backgrounds.[18]

    III. People on fixed or low incomes –

    Two class action proceedings were initiated against the pay day lenders Cash Converters for unconscionable conduct in the provision of financial services, including the imposition of a dubious fee for shortening the repayment period. The fee pushed the annual percentage rates from the allowed maximum of 48% to over 150% for loan terms of 24 months and as high as 633% for one month small cash loans. The class of those compensated were people on low incomes or receiving social security payments. 26,000 class members ultimately shared in $20m that was paid by Cash

[17] Ibid, 69.

[18] Ibid, 72.

Converters to settle the claims (*Gray v Cash Converters International Ltd* (2014) 100 ACSR 29).[19]

IV. Older people –

Class action proceedings filed on behalf of 100 elderly people who were lessees of a retirement village, in which it was claimed that prior to entering into the lease, misleading statements were made on behalf of the retirement village proprietor concerning the extent of their liability under the lease to contribute to the expenses of operating the lease (*Murphy v Overton Investments Pty Ltd* [1999] FCA 1123). Most of the members of this class of claimants were elderly, with many lacking capacity to provide instructions to commence proceedings on their own behalf.[20]

16. Some compelling examples of socially beneficial class actions that have been identified by Ekstein and Slade[21] are:

I. The settlement of the Grand Western Lodge class action that saw $4.05 million paid to 50 intellectually disabled and/or psychiatrically impaired residents of a licensed residential care facility. They variously claimed to have been assaulted, falsely imprisoned, drugged and/or financially exploited during their time at the lodge;[20]

II. Up to 200 former residents of Fairbridge Farm School at Molong in NSW who suffered child abuse shared in a $24 million fund after their class action was settled;[22] and

III. 2,000 people with allegedly defective hip implants shared in a $250 million settlement, Australia's largest product liability settlement.[27]

[19] Ibid, 74–75.

[20] Ibid, 77.

[21] Ben Slade and Jarrah Ekstein: *Class Actions and Social Justice: achievements and barriers* in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1992–2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

[20] *McAlister v State of NSW (No 2)* [2017] FCA 93.

[22] *Giles v Commonwealth of Australia* [2011] NSWSC 582.

[27] This figure includes costs: *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452.

17. In each of the examples provided, members of the respective class of claimants would have faced considerable barriers in bringing individual actions. In almost all cases the individuals concerned were economically disadvantaged, either receiving very low wages or fixed incomes such as a disability support pension. The legal costs involved in bringing an individual action, often in respect of a claim that was of low monetary value (as in the case of the class action against Cash Converters), in itself would have been prohibitive. In addition, several of the class claimants in the abovementioned examples had personal characteristics (including age, intellectual disability, significant physical illness or disability) that presented significant difficulties for them in bringing an individual claim.

Funding arrangements for class actions involving people from socially and economically disadvantaged groups

18. In most of the examples of class actions undertaken on behalf of people from socially or economically disadvantaged groups referred to by Morabito and Ekstein, and Slade and Ekstein, the solicitors who filed the actions on behalf of the class of claimants provided legal assistance on a 'no-win, no-fee' basis; that is, they had conditional fee agreements with at least the representative applicant. In these circumstances the solicitors only received fees if there was a favourable settlement or success through litigation. In some cases where the action was discontinued, the solicitors incurred significant costs and disbursements which they absorbed and for which they did not charge the litigants.[22]

19. According to Morabito and Ekstein, while none of the proceedings which were the subject of their research were funded by litigation funders, the fact that litigation funders provided funding for other types of class actions, such as investor or shareholder class actions, meant that law firms were able to devote resources to class actions that involved disadvantaged litigants pursuing their common law rights against powerful defendants.

20. The ALA notes that the availability of litigation funding for class actions of this nature is quite limited. Most commercial litigation funders only assist class action litigants where all class members agree to pay to the litigation funder a specified percentage of the amount that is recovered if the litigation is successful. This means that the defined class for any particular proceeding is limited to those people who have agreed to enter into the litigation finance

[22] Ibid 81, 87–88.

arrangement. As a result, the remedy arising from a class action undertaken under such an arrangement will only benefit those who have entered into such an arrangement. It will not provide a remedy for all people who may have been adversely affected by the conduct giving rise to the litigation.

21. This situation could be remedied by:

    I. Allowing law firms, and not just litigation funders, to claim a share of the total amount recovered by a class action litigation through a common fund order, without requiring each of the class members to enter into separate contractual agreements with a litigation funder or expecting the law firm to act on a conditional fee basis only.

    II. The creation of a state-operated 'Justice Fund' that provides financial assistance to parties with meritorious class action civil claims. This fund could provide an indemnity in respect of any adverse costs orders and meet any requirements by the courts for security for costs. Such a fund was recommended by the VLRC's 2008 report *Civil Justice Review*. The VLRC recommended that in return for providing this financial support, the fund would, subject to judicial approval, receive an agreed percentage of the amount recovered in successful cases.[23] Such a fund could be focused solely on providing financial assistance for commercially viable, meritorious litigation that is important to the public interest or involves a disadvantaged class of potential litigants.[24]

Conclusion

22. The ALA welcomes the opportunity to submit to the inquiry into litigation funding and the regulation of the class action industry that is being conducted by the Joint Parliamentary Committee on Corporations and Financial Services. The ALA strongly submits that class action proceedings represent an important vehicle for access to justice for disadvantaged individuals who have been subjected to similar injurious circumstances, enabling them to pursue legal

[23] Victorian Law Reform Commission (2008), 'Achieving Greater Access to Justice: A New Funding Mechanism' chapter 10 in *Civil Justice Review: Report*, Victorian Law Reform Commission, Report 14, May 2008, 622–623.

[24] Note the discussion of the Justice Fund concept in Ben Slade and Jarrah Ekstein: *Class Actions and Social Justice: achievements and barriers* in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1992–2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

remedies against a well-resourced defendant such as a government agency or large corporation.

23. The ALA further submits that the Committee should consider opportunities for third-party litigation funders to provide financial assistance for class actions involving disadvantaged litigants pursuing their common law rights against powerful defendants, and for claims that involve a significant public interest.

Andrew Christopoulos

President

Australian Lawyers Alliance