Inquiry into Class Action Proceedings and Third-Party Litigation Funders

POST-SUBMISSIONS SEMINAR

Brisbane, 6 September 2018
Federal Court of Australia

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The process thus far

- over 40 pre-Discussion Paper consultations
- Discussion Paper released on 31 May 2018
- over 20 post-Discussion Papers consultations conducted in the UK
- over 70 formal submissions received to date
- face-to-face consultations continuing where necessary
- meetings with Judicial Expert Panel and Academic Expert Panel conducted or scheduled
- seminars were conducted in Sydney (22 August) and Melbourne (29 Aug)

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The overarching principles

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

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

3. The integrity of the civil justice system is essential to the operation of the rule of law.

Proposals where no substantive changes required

Majority support for proposals relating to:

- Conflicts of interest—except for disclosure of funding agreements in proceedings other than class actions, which has been removed.

- Settlement—with consideration being given to mandatory reporting to class members by settlement administrators, and publication of those (de-identified) reports.

- Regulatory Redress—review and design an appropriate scheme.

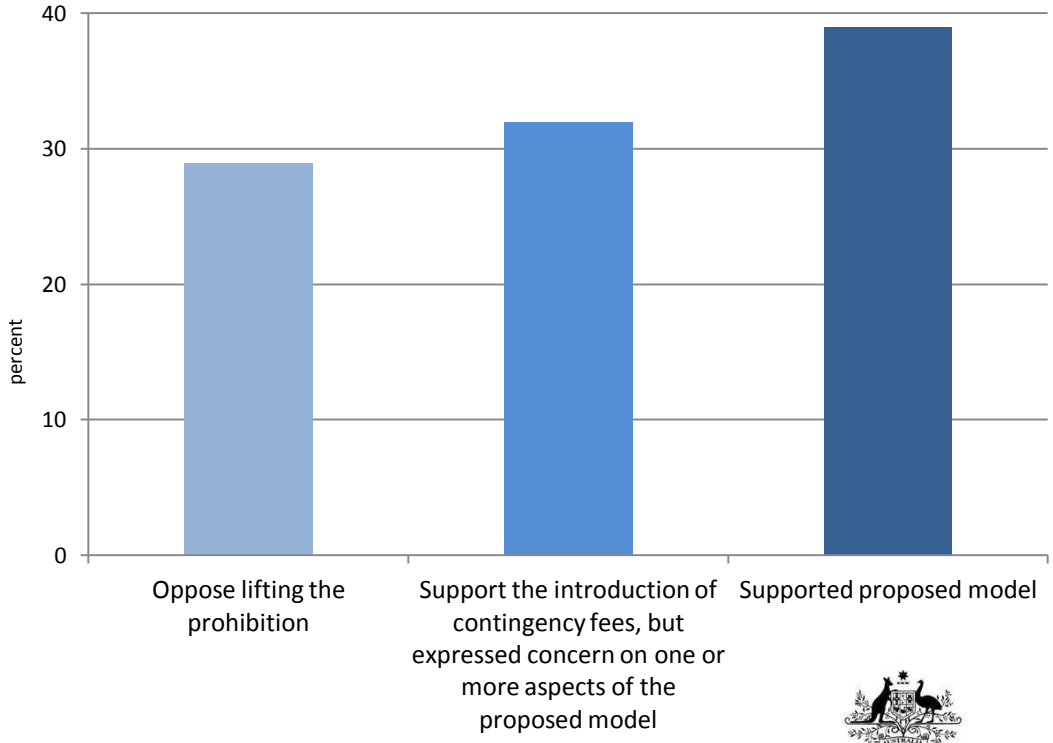
Responses were divided for lifting the prohibition on contingency fee agreements in class action proceedings—consideration being given to consequential recommendations.

Generally:

- 71% support lifting the prohibition on c/fees
- 29% oppose outright

Of those that support lifting the prohibition:

- 55% supported the proposed model proposed
- 45% disagreed with one or more elements or suggested variations to the model.



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Contingency fees

Those opposed to one or more elements of the proposed model found it to be too limiting, and suggested that:

- contingency fee agreements should have a broader application across all types of matters, not be confined to class action proceedings.
- the prohibition on hybrid billing (permitting contingency or commission, but not both) was uncompetitive , while prohibiting the combination of time-based billing with a contingency element would prevent some lawyers from entering the field.
- the requirement for firms to indemnify against adverse costs would provide a barrier to entry; produce an insurmountable conflict, especially in regards to advice to settle; and ensure only large firms could act under contingency fee agreements.
- lawyers that did indemnify clients should be subject to any capital adequacy regulation proposed for third-party funders.

Contingency fees

To these concerns, others noted that:

- As indirect funding arrangements were not prohibited under the model, this could go some way to addressing the obstacles posed by indemnity.
- The security for costs regime could be used on a case-by-base basis (see Productivity Commission).

Those in support of the proposed model considered it to provide a sensible mechanism by which to increase access to justice, while providing appropriate protections for litigants and the safeguards necessary to maintain integrity in the civil justice system.

Under deliberation

The call for a **review of the economic and legal impact of private causes of action in the context of the current law relating to continuous disclosure** obligations split stakeholders down the middle:

For those who prosecute these types of class actions, including lawyers, third-party litigation funders and other participants, review of the regulatory provisions was deemed an unwarranted examination of a necessary and protective legislative regime.

Those who defend securities class actions, including lawyers, insurers, and directors and officers of corporate entities, expressed an urgent need to reassess the workings of the regulatory and class action regimes and their outcomes.

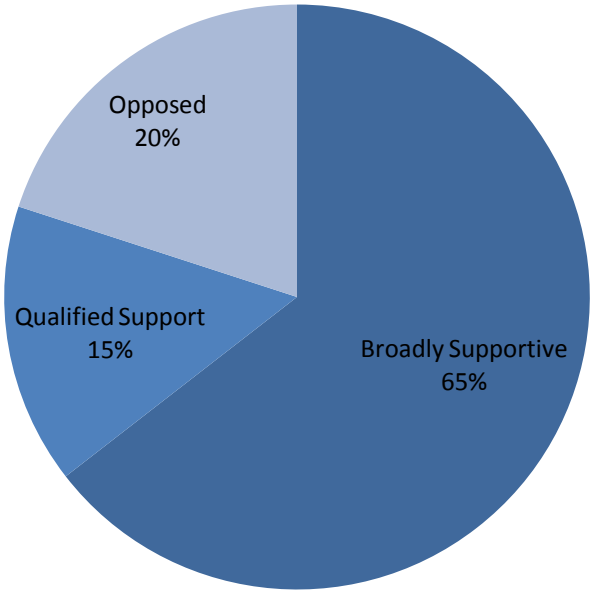
The ALRC is still deliberating

Licensing

Proposals 3-1 and 3-2 outlined a bespoke licensing regime for litigation funders.

Three questions were asked relating to qualifications and experience, capital adequacy and dispute resolution.

Submissions in response to licensing proposals



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Submissions in response to licensing proposals

Supportive: IMF Bentham, defendant law firms, insurers as well as clients of funders such as industry superannuation funds (i.e Australian super, Cbus and Hester).

For example: Hesta (Sub 61) ...*it is often difficult and onerous for investors to undertake adequate due diligence on these new third-party entrants regards to their resourcing, risk management systems, capital adequacy and the accuracy of their communications. We therefore support the concept of Proposal 3-1 that third-party litigation funders should obtain and maintain a litigation funding license to operate in Australia.*

Opposed: Funders such as Harbour and Burford. Many funders preferred industry regulation. The Victorian Bar Association and Australian Shareholders Association were also opposed.

Submissions in response to licensing proposals

A number of submitters, such as Norton Rose Fulbright, the Law Council Class Actions Committee, and Law Firms Australia, suggested removing the existing exemption from the Australian Financial Services Licence (AFSL) rather than establishing a bespoke litigation funding regime.

Norton Rose Fulbright submitted:

...there exists already a complex but comprehensive licensing, conduct and disclosure regime that applies to financial products, consumer credit and managed investments schemes ...which we consider could be appropriately modified ....to litigation funders.
... a new litigation funding licence has the potential to create administrative and legal inconsistencies with the existing regimes.

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?

Majority of submissions suggested that the AFSL standards for character and qualifications were appropriate.

Legg and Metzger: AFSL + one manger to be a practising lawyer.

Ashurst: AFSL + a requirement to understand civil litigation.

DLA Piper: AFSL + one manager to be a practising lawyer or failing that to have completed the specialisation (Proposal 4-3)

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.

Reasonable support for the AFSL approach set out in RG 166

Burford noted the difficulty of establishing a net asset position given the unique business model of litigation funders.

LCM noted that any capital adequacy framework needs to recognise the value of spreading risk. Those with more claims need less capital as a % of the exposure than those with very few claims. LCM also suggested listed entities with a market capitalisation of over $20M should be deemed to satisfy the requirements.

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.

A key point of contention was any exemption for foreign funders.

Arguments for mutual recognition focused on protecting competitive tension in the market.

Arguments against mutual recognition focused on ensuring a level playing field and the ease of enforceability of court orders.

Current thinking post submissions

Narrowing the current AFSL exemption rather than establishing a bespoke licence regime for litigation funders.

AFSL to be required for litigation funding of class actions. AFSL not required where funding individual clients that are not consumers.

Additional proposal – amendments to s 37N and s 43 of the FCA Act

The ALRC was urged to consider recommending amendments to s 37N to require third-party litigation funders to act in a way that is consistent with the overarching purpose of s 37M.

It was also suggested that ALRC consider recommending an amendment to s 43 of the FCA Act to give the Court express power to order costs against third-party litigation funders.

Such amendments would be consistent with the approach:

- in Victoria – s 10(d)(1), *Civil Procedure Act 2010*
- in NSW – s 56, *Civil Procedure Act 2015* and
- in WA – *Rules of Supreme Court 1971,* O9A r1

The ALRC considers that any such amendment should extend the obligation to act consistently with the requirements of s 37M to persons who provide financial or other assistance to a party in so far as those persons exercise direct or indirect control over the proceedings, and to do so expressly with respect to third-party litigation funders and insurers.

Whilst the common law of Australia is clear that 'an order for costs should be made against a non-party if the interests of justice require that it be made,' the ALRC considers that s 43 of the FCA Act should be amended to expressly so provide.

The protection from costs orders for class members should be preserved (except to the extent that they may be acting as funders).

Competing Class Actions

In 1988, the ALRC noted that the main objectives of the class action regime were to:

secure a single decision on issues common to all and to reduce the cost of determining all related issues arising from the wrongdoing. To achieve maximum economy in the use of resources and to reduce the cost of proceedings, everyone with related claims should be involved in the proceedings and should be bound by the result.

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 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;
- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and
- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund.

Competing Class Actions

Proposal 6-2 In order to implement Proposal 6-1, the Class Actions Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

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 arising under this legislation?

Competing Class Actions

Responses to the proposals split (as would be expected) between defendants, insurers and defendant law firms who supported the proposals and funders and plaintiff lawyers who opposed the proposals. Group members were also supportive of the proposal.

Australian Super: agrees that all class actions should be open class and supports Proposal 6-1.

Maurice Blackburn: the proposal is 'premature and overbroad.'

IMF Bentham suggested the 'ALRC needs to be careful to not over-react to the current media interest in a small number of proceedings'

Harbour sought clarity on how the court will choose the action/lawyer/funder and suggested it shouldn't just be about price.

Zurich supports the proposals but would like certification.

Current Thinking

Recommendation 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; and
- any order to close the class made during the course of the litigation must be final unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so.

Recommendation 6-2 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that where there are two or more competing class actions, the Court must either consolidate those proceedings or determine which proceeding will progress and 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.

Key issues under consideration:

Class Closure

Minter Ellison ... the process of re-opening, re-closing, registration, and opt out leads to increased costs and delay to the detriment of the applicant, group members, the respondent and the courts.

Allens ... there is no compelling policy reason why class closure at mediation should not be final.

Key issues under consideration:

Is the common fund the best approach?

Maurice Blackburn: Proposal 6-1 would seem a retrograde step to the extent it would act as a disincentive – or, potentially eliminate – the book build process.

The Victorian Bar: 'common fund orders have encouraged this spike in competing class actions'. The book build 'acted as a natural brake on competing actions. Funders had to 'go to the market' with their funding proposals. If there was insufficient interest for a given funder, that funder did not proceed. The **ABA** agreed.

Compromise? Retain common fund as an option with class member sign up a key criteria for carriage motion.

Discussion Paper

Proposal 6-2 In order to implement Proposal 6-1, the Class Actions Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

Current Thinking

Recommendation 6-3 In order to implement Recommendation 6-2, the Class Actions Practice Note (GPN-CA) should be amended to:

- provide a further case management procedure for competing class actions, and
- list the criteria the Court will apply when determining the lawyer and funder that will have carriage of the class action.

Potential Recommendation 6-1 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to require leave of the Court to proceed with a class action.

- Leave granted only after opportunity for competing class actions to be brought and carriage determined.
- The parties would address the matters currently specified in paras 7.6-7.8 of GPN-CA at the first hearing or following the determination of carriage.
- The criteria by which the Court is to decide whether to grant leave should be those set out in ss 33C and 33D of the Act.

Principle One

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

Proposals

Powers of the Court

- Express power to reject, vary or set commission rates
- Power to award costs against insurers and funders who fail to comply with s 37M
- Power to conduct a 'carriage motion' and associated PN amendments
- Power to appoint costs referee
- Power to tender settlement administration

Development of principles for alternative redress schemes

Broad base of funding options

- Limited contingency fees

Principle Two

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

Proposals

Regulation of litigation funders

- Only for funding of class actions
- Not required of charitable/pro bono funders
- AFSL or bespoke?
- Capital adequacy

Regulation of the legal profession

- Specialist accreditation and on-going CPD
- Prohibition on financial interests in funder who is also funding action in which solicitor acting
- [licensing/assurance of capital adequacy/statutory presumption re security for costs for firms charging contingency fees when required to indemnify against adverse costs]

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Principle Three

The integrity of the civil justice system is essential to the operation of the rule of law.

Proposals

Delay and costs should be minimised

- [Power to grant leave to continue with a class action upon approval of funding/costs agreement and after carriage motion]

Regulating procedural arbitrage

- confer exclusive jurisdiction on the FCA in shareholder/investor class actions

Informing group members

- Providing notices about potential conflicts of interest in class action proceedings
- Requiring administrators to report to the class on completion of the distribution

Ensuring the policy settings of the substantive law continue to be appropriate

- Call for a review of the economic and legal impact of private causes of action in the context of the current law relating to continuous disclosure obligations

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