Our ref: 1DXB:8LTP 21602652
Contact: David Burstyner
Direct Line: 03 9611 0137
Direct Email: dburstyner@adleyburstyner.com.au
Your ref:

Adley Burstyner

27 September 2017

Adley Burstyner
Level 5, 707 Collins Street
Melbourne 3008
Victoria Australia

DX 30970
Stock Exchange

PO Box 633
Collins Street West
Victoria 8007

T +61 3 9620 9399
F +61 3 9620 9288

adleyburstyner.com.au

ABN 98 076 868 034

Victorian Law Reform Commission
333 Queen Street
MELBOURNE VIC 3000

By email to law.reform@lawreform.vic.gov.au

Dear Sir/Madam

RE: SUBMISSION TO VICTORIAN LAW REFORM COMMISSION

ACCESS TO JUSTICE – LITIGATION FUNDING AND GROUP PROCEEDINGS

We refer to the Commission's review into Litigation Funding and Group Proceedings, and appreciate the opportunity to make submissions.

We have answered online the specific questions posed, and provide the following further submission to complement those answers.

Adley Burstyner's class action practice and experience is summarised at the conclusion of this submission.

Introductory remarks - complexity and cost of class actions

The consultation paper refers to the "*the real and perceived problems of class action regimes in Australia*".

Whether a perceived problem is an actual problem should be considered before any knee jerk reaction. Lawyers heading one of Australia's largest defence class action practice have noted:

> *"There is a lot of hysteria surrounding class actions in Australia and unfortunately for all parties involved it can lead to some serious misconceptions about what's happening in the local legal sector"*[1]

Thus, prior to making specific comments on potential improvements to the class action procedure, it is submitted that any consideration of changes keep in mind that:

- It seems likely that class actions will be criticised no matter how proper they are, owing amongst other things to sensationalist

[1] Damian Graves, Ken Adams and Jason Betts, *Class Actions in Australia* (Lawbook Co, 2nd ed, 2012), cited by His Honour Justice Bernard Murphy in *The Operation of the Australian Class Action Regime*, (FCA) [2013] FedJSchol 43.

media, biased protection of potential defendants or wrongdoers, and lack of genuine understanding of a very nuanced area of law; and

- Lawmakers must resist the temptation to implement changes if the impetus is criticism which cannot withstand fair and thorough scrutiny.

Indeed, the complicated legal and factual dynamics involved in class actions do not lend themselves to the shallow, soundbyte analysis of much of the public reporting of this area. Indeed, in a recent settlement approval judgment His Honour Wigney J said the following:

> "*Some aspects of the proposed settlement of this matter may give rise to the perception, at least at a superficial level, that the only real "winners" in this litigation were the lawyers and the litigation funders….Ultimately, however, the evidence led in support of the approval of the proposed settlement has demonstrated, on balance, that the settlement, including the Settlement Distribution Scheme, is fair and reasonable and in the interests of group members as a whole*"[2]

Public perception is of course important and confidence in the judicial system is vital. For class actions courts can perhaps continue, and develop further, the practice of summarising decisions which generate public interest. And there will likely be other strategies which can assist in the dissemination of balanced information about class actions, countering the sometimes incomplete information about salient aspects of cases. But leadership and courage is required in lawmaking, and the aim must be for just outcomes, and not outcomes to satisfy artificial analysis even if where that risks adverse public perceptions.

Next, any evaluation of class actions must start with their proper context, which typically means a situation where misconduct has generated injury (or at least that someone takes that view, and the proceeding tests the allegation). It is important to realise that the problem precedes the class action.

In fact a class action is nothing more than a case management procedure providing efficiency in court cases where many people wish to pursue a remedy for a legal wrong. It would not be a criticism of class actions to say that they wouldn't exist in a perfect world, because in such a world the root problems giving rise to claims also wouldn't exist. But, in real life, wrongdoing occurs, for many reasons, and is dealt with in an adversarial judicial system. Where there are more than seven claimants, the class action procedure is used for practicality.

But, the real life features of such claims means that they are never identical, as regards both the circumstances underpinning the claims as well as any variation between group members, and the way they cooperate. This means that it must be accepted that there is likely to continue to be a degree of pioneering in many class actions, including because the challenges of dealing with individuality are magnified when there is a group of disparate claimants. The maxim "*Each case on its own facts*" is particularly relevant for class actions and, again, the nuance of those facts requires understanding in order to critique an outcome of the system which delivered it. This is relevant for determining the best management for the class action procedure, whether that be the judiciary assessing each case's circumstances individually, or the introduction of rules trying to cater for anything and everything.

Also, poor outcomes aren't immediately a cause for change to law. Firstly, it remains incredibly important that novel or progressive cases can be brought to test rights as society develops, and if they fail it may be nothing more than clarifying law rather than indication of a systemic problem. Secondly, through no fault of the system, case prognosis can change, just like in conventional litigation. There are many moving parts in litigation, not least of which is the attitude of a defendant. Whilst it ought be anticipated that many defendants will vigorously oppose a claim, the level of such opposition sometimes exceeds

---

[2] *HFPS Pty Limited (Trustee) v Tamaya Resources Limited (in Liq) (No 3) [2017] FCA 650* at 126

prediction, perhaps due to particular dynamics of an action. For example, where insurance cover is in a fixed amount, covering both claim and legal costs, and is financing the defendant's position then the defendant camp may be motivated for various reasons to exhaust much or all of that insurance coverage in their defence rather than satisfaction of the claim. In such circumstance, the commercial imperatives otherwise motivating settlement can become skewed. From the defendant's perspective, regardless of whether it settles early or later it doesn't get to keep the money which is the insurance coverage, but if the claim is settled early with a payment then any chance of prevailing (no matter how unrealistic) is forsaken. There are also reasons why an insurer might prefer to protract the litigation by spending legal fees until the policy limit is reached, as explained later in these submissions. Those insurance dynamics are of course not unique to class actions.

Conventional litigation, by which it is meant claims which are not class actions, are in fact rarely straightforward. It may in fact be the case that class actions are not disproportionately more costly or protracted than conventional litigation in which the stakes are as high. The known difference is simply that conventional litigation is more private (especially as regards settlement information and dynamics), plus it is a less populist topic, and therefore less amenable to the public interest.

Perhaps one difference warrants mention, that class action defendants have made a habit of conducting interlocutory procedures challenging plaintiff and group members' representation and funding arrangements, sometimes relying on the grounds that group members' interests are in jeopardy. This is of course perverse, because class actions are generally about those same defendants having caused injury to the group members. The motive for defendants, far from protection of group members, is obvious – to stymie a case progressing towards trial. It is submitted that many times when a defendant issues such a challenge, it is not credible that its motive is principally its own legitimate interests in a fair fight. For example, in 2009 when the defendant in the Multiplex Shareholder Class Action invoked investor protection regulations to challenge the arrangements between group members and the litigation funder, His Honour Justice Finkelstein famously stated: "*What lies behind this allegation is Multiplex's desire to stop the action in its tracks*"[3].

Such defendant distraction should be stopped. It bears no relationship with the substance of a case and is, as His Honour pointed out, designed solely to obfuscate the substance of a claim being properly tested, and almost offensively calling on protections for group members.

Of course, defendants have a legitimate interest in ensuring that the case against them will be efficiently conducted and lead to finality, without questions of the authority of the plaintiff or its lawyers.

However a class action should not permit defendants to act as champions of group members' rights. Such conflict of interest is brazen. It single handedly adds vast costs and distraction to class actions.

Courts should not permit defendants to agitate issues in which they have no worthwhile interest in, as that leads to a motivation to use such issues to derail proceedings. Courts should move away from defendant control of such questions and, only if the court identifies a genuine issue, refer it to an independent lawfirm or barrister for carriage. Contradictors, an emerging trend in settlement approval process, could be utilised, or some other means devised. Defendants should not have a say in group members' rights, whether that be on claim structure, issues of competing class actions, settlement or otherwise. Where defendants' interests are secondary or non-existent concerns, there should be an independent contradictor and defendants permitted only to submit on points genuinely relevant to their interests.

But, whether or not the function of contradictor is developed, class action interlocutory wrangling will not be avoided by certification.

---

[3] *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 3)* [2009] FCA 450, paragraph 2

Certification

Certification has been mooted as a potential solution for a perceived vice of inefficiency and bloated cost, including from satellite interlocutory warfare on various issues.

Much warfare in class action litigation is prevalent in non-class action litigation, for example, pleading disputes, squabbling over evidence. In the past three months alone, class action disputation has been over video-link applications[4], expert changes of opinion[5], pleading attacks[6], and even an application for recusal on grounds of bias[7].

These themes can hardly be considered specific to class actions. They are endemic in any major litigation, where the stakes are high enough that parties' strategies deploy all manner of destabilising warfare to undermine their opponents' position.

Even where a skirmish commences as a wholesale attack on class action structure, it not can end up morphing into nothing more than a garden variety pleadings attack[8]. Obviously, pleading disputes are also not unique to class actions.

Thus, before considering solving a perceived warfare problem specific to the class action context, there should be a study and comparison with the magnitude of warfare in other large cases. Comparison could be made between easily identifiable metrics such as the number of hearings, motions/ applications filed, affidavits, cost orders (quantum of cost orders, to the extent known). Part of such analysis could include consideration of the duration of individual applications, with many applications in present times attracting repeated court hearings and significant work and costs. It is submitted that certification would be a particularly protracted example, which would simply add one more application with little or no amelioration of the warfare seen at present. Of course, the comparison should also acknowledge that the wider reach of a class action may be expected to generate some degree of extra intensity of a process.

Apparently, certification has been considered because of its use elsewhere, perhaps most notably the USA. Great caution should be exercised in comparing the Australian and US class action system because fundamental differences alter participants' motivations and conduct. But as certification is prominent in the US and Canada, any consideration in Australia of whether to implement certification should at least consider how the certification procedure functions in those jurisdictions.

While the consultation paper recites US certification rules, which are of course an important consideration, the efficiency of certification in practice must also be considered.

Discussion with US attorneys discloses a view that the certification process takes on a life of its own, effectively a mini-litigation, or a case within a case, which can last several years and traverse many substantive issues of a matter. US certification procedures now include discovery, leading of detailed expert evidence, cross-examination or scrutiny of that evidence, and challenges to admissibility of evidence. This can take years. That suggests a working theory, subject to any empirical study showing otherwise, that in practice certification is a protracted and long winded process, and one which facilitates defendant strategies of causing delay and litigation fatigue among claimants.

The air cargo cartel litigation may be a case in point. The claim arose from a cartel which regulators across the globe sanctioned, issuing fines to the wrongdoers to the tune of billions of dollars and euros, resulting in much information and witnesses becoming known to the class action lawyers. Nevertheless, while proceedings were filed in 2006 certification

---

[4] *Jones v Treasury Wine Estates Limited (No 3)* [2017] FCA 961 and *Kirby v Centro Properties Limited* [2012] FCA 60

[5] *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority trading as Seqwater (No 9)* [2017] NSWSC 1116

[6] *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited* **[2017] FCA 995**

[7] For a recent example see *Melbourne City Investments Pty Ltd v UGL Limited* [2017] VSCA 128

[8] *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited* **[2017] FCA 995**

was only ordered nine years later in 2015. Even if that is an extreme example, it is sufficient to demonstrate that the actual certification experience should be considered, with a study of the timeframes and costs of US class action certification (from case filing to certification decisions) and the procedure in practice generally, before importing it to Australia. The prevalence of duplicating procedures during certification and the primary proceeding, for example discovery, should also be considered.

Having regard to that landscape in the US, it seems difficult to see how introducing a certification regime to take place in all class actions will favourably affect costs and efficiency, when there is presently no required warfare. It shouldn't be overlooked that the class action cases which presently proceed without protracted litigation, would likely be slowed down by the introduction of a certification. Defendants who, unprovoked, might not have mounted the challenges referred to earlier in this submission may be unable to resist the temptation to agitate in a certification context, especially if the costs of a certification are in the cause and have a different risk profile to a self initiated challenge.

Unlike certification, which would presumably be required of all cases, in the current Australian system the warfare: (a) only happens when the defendant wishes to attack a structure; (b) comprises a largely confined attack, as to a specific aspect of the structure which the defendant attempts to impeach; and (c) is with the defendant on the hook for adverse costs, a discouragement from frivolous attacks.

Ultimately, it is the submission of this paper that as class actions are pioneering and of great significance financially, for social change, or otherwise, they inevitably raise novel and often complex issues. Therefore it is unrealistic to expect that they won't generate major warfare. Sure, that shouldn't run wild, but it should not be overlooked that judges are increasingly adept at supervising parties in major litigation, and there may be far better ways to solve the problems of defendant attempts to derail the process than certification.

If, contrary to these submissions, certification is to be introduced then the procedure should not permit defendants to agitate interests of group members, and the role of an independent person with limited incentive to derail a class action should be installed.

Funder's success fees and the return to plaintiff and group members

One of the driving concerns of the consultation, and debate around class actions generally, is the net financial return to group members, which of course is and ought properly be one of the most fundamental objectives of the procedure. Additionally, 25 years since the present class action procedure began, Courts accept both that litigation funding costs are a standard part of many class actions[9], and that such actions would not be able to occur without funding. If return to group members is really to be fairly protected, it behoves the system to require defendants to reimburse funder's success fees, as they are an unavoidable part of the costs which must be spent to vindicate rights. The cost is directly incurred as a necessary element of responding to the defendant's wrongdoing (because of course at the time of the success fee, the claim is vindicated). The fact that the victor in litigation recovers its costs, albeit usually a portion, is based on solid principles which protect the integrity and fairness of the adversarial litigation system.

Excluding a funding fee leaves claimants short changed, out of pocket for the entirety of the single largest cost, through no fault of their own. It defies logic that group members should be out of pocket that fee, when our system provides for the recovery of other critical and reasonable costs, and it's the defendant's conduct which necessitates that expense, firstly in the wrongdoing and secondly in failing to remedy the wrongdoing without the aggrieved persons having to invoke expensive court action.

Disclosure of funding agreements, control of litigation funders, and insurance cover

As already mentioned, defendant focus on arrangements between claimants and their lawyers or funders (whether class actions or otherwise) can have little to do with the

[9] Paragraph 144 of Murphy, J, in *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433

substantive issues in a matter, and are more motivated by self interest of stymying litigation, rather than letting it proceed to trial.

It is sometimes said that scrutiny of a funding agreement is to ensure that costs can be recovered. But present procedures include a well functioning procedure for security for costs which addresses that.

In any event, the judiciary is demonstrating, with multiple judgments over the past year, that it is incredibly well adept at using its array of tools to manage class actions and litigation funding arrangements[10]. They demonstrate that there is no need for regulatory supervision, and indeed the very individualistic nature of class actions are best moderated by skilled judges with the ability to hear and solve issues which inevitably vary from case to case.

Regulatory intervention:

A. Is incapable of constructively dealing with the very case specific nature of this area, as is patently obvious from the unhelpful and piecemeal window dressing efforts of some regulation since at least 2009;
B. Carries a high risk of creating barriers to entry for litigation funders, which will reduce the very competition necessary to generate downward pressure on funding fee rates.

The inherently dynamic nature of class actions means that they will be constantly evolving. Laying down a rigid one size fits all regime would lead to injustice due to its inability to foresee the future. At any rate such regulation is bound to impose burdens on litigation funders and lawyers, increasing costs and likely stymying competition.

It is far more preferable for judges to continue the supervisory role they currently exercise, well, developing principles on a case by case basis, adopting the principles which are increasingly well established and practice notes where considered necessary. This makes particular sense because after all the class action device is no more than a procedure for case management, which has and should remain the realm of judges.

What the judiciary has been unable to achieve, however, is access by prospective and actual plaintiffs to defendant insurance information. The interests of fairness and efficiency weigh far greater in favour of disclosure of such information, than of a litigation funding agreement. It should be trite to note that it is reasonable for a plaintiff to know in advance whether resources exist to meet their claim. A plaintiff having to speculate about the existence or not of insurance coverage materially hampers that. The justice and efficiency in furnishing plaintiffs with information vital to determining whether there are financial resources to pay a winning claim, so that they can decide to not pursue a claim (in the event no insurance coverage is to be available) or to pursue a claim, are obvious.

At the very least, knowing whether a policy limit includes or excludes costs can be very material. Consider the scenario where a strong claim by a plaintiff is to be covered by the defendant's insurance policy (whether or not the plaintiff knows) and that insurance policy has a $10m limit and provides that legal costs of defending a claim are included in that $10m limit. Consider also, that insurers typically do not wish to be seen as soft targets for litigation. As professional litigants, insurers may be assumed to act on the basis that the impact of their strategies in one case could affect them in future matters. In such a scenario, an insurer dealing with the claim may adopt the position that it rather spend as much as it can of the $10m on litigation than pay the plaintiff, so the plaintiff does not do well from a proceeding. This, the insurer might conclude, may dissuade future claims. However, it is grossly unfair for the source for satisfying a plaintiff's legitimate claim to be depleted in such fashion.

[10] For example, *Money Max Int Pty Ltd (as trustee for the Goldie Superannuation Fund) v QBE Insurance Group Ltd* (2016) (2016) 245 FCR 191, and *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433

In today's world, there are many instances where the existence of insurance policies are required and promoted for the benefit of potential claimants, not simply to give insureds protection and peace of mind. It cannot authentically be claimed that an insurance policy is an entirely private matter between defendant and insured. Yet, there is uncertainty and unjust restrictions on claimants' ability to actually rely on polices when a claim arises.

This exposes a disparity between the scrutiny and sanctions facing a litigation funder, compared with those faced by an insurer hiding behind a defendant. Where, by the manner of defending a claim, an insurer's conduct has contributed to injustice, courts and plaintiffs should be able to seek remedies directly from the insurer and be satisfied from the insurer's pocket, and not in a way which depletes the resources otherwise available to satisfy a valid claim (because otherwise it would be a pointless exercise, and not called upon).

Lest it be said that increasing access to insurance policy will result in more claims, that position cannot fairly be maintained, or at least misses the point, because a plaintiff being able to consider the policy will not in any way change the critical question being whether a claim has merit. It would be a brave plaintiff to effectively take on as sophisticated a litigant as an insurer (by claiming against an insured), expecting a payout for an unmeritorious claim. Present dynamics in any event already avoid a systemic problem of the pursuit of unmeritorious cases, not least of which is exposure to adverse cost. Rather, the justice system's focus should be to avoid justifiable claims being abandoned simply because the plaintiff doesn't know enough about the insurance position.

Injustice occurs where a worthwhile claim a plaintiff's uncertainty about the existence or not of an insurance policy leads to a decision that proceeding is too risky and the abandonment of a meritorious claim. Such injustice will persist unless there is a change in law.

Competing class actions

As to the emergence of competing class action, this submission expresses the strong view that:

A. There should be no departure from the long standing ability of litigants to select their own lawyer, because it is a right recognised for significant period, for good reason.
B. Historically there have been only a very small number of lawfims dominating the class action space, without genuine competition.
C. The emerging appetite of an increasing number of lawfirms in class actions will add to pressure on those historically dominating lawfirms, likely reducing fees and increasing innovation.
D. Compelling litigants to consolidate their claims with a lawyer other than the one they chose may have material adverse effects on that competition, likely creating undesirable monopolies by the historically dominant lawfirms (who for too long have already not faced enough competition). Such an outcome is the opposite of what appears to be the present objective (of reducing group member cost and control).

Closing remarks

Although this submission explains the protracted nature of class actions as being part and parcel of the judicial system, that should not be interpreted as expressing satisfaction with the present state of affairs.

Indeed, the cost of justice, barriers to it and the opportunities for distractions to getting to the substance of a matter, are lamentable. But that curse is not in any way specific to class actions and infects almost all litigation. In fact the class action procedure delivers efficiencies by resolving many claimants' disputes in one procedure. It can be improved by the following:

1. Plaintiff's access to defendant insurance policies, or at least key terms such as coverage inclusions and exclusions, policy financial caps, and provisions regarding legal costs;
2. Just as courts can order parties who maintain a plaintiff to pay for costs, they should be able to order an insurer maintaining a defendant to pay costs outside of a policy limit.
3. Recognition that litigation funding costs fall within the costs of an action which are recoverable, subject to a justifiability requirement.
4. Greater vigilance from the judiciary as to defendants championing protections of group members, and the attendant conflict of interests.
5. Development of the contradictor role in class action.
6. Judicial publication of very concise summaries of class action outcomes, which set out the salient facts which may often get lost in one sided secondary reporting of judgments.

But not certification.

About Adley Burstyner

Adley Burstyner is the dedicated class action department of the Lantern Legal Group. It is run by David Burstyner, who has been a class action practitioner since 2006, as lawyer and funder. David has worked on some of the largest group claims in Australia and Europe. David and the Lantern Legal Group founded the Victorian based Adley Burstyner in 2016 to facilitate claims which have so far been unachievable for small to medium businesses and entrepreneurs, amongst others. Lantern Legal Group comprises Victoria's largest rural and regional lawfirm, Harwood Andrews, as well as Sladen Legal. This year it celebrates a 175 year history.

Adley Burstyner remains willing to contribute further to the Victoria Law Reform Commission's work, in any way considered useful.

Please do not hesitate to contact us on dburstyner@adleyburstyner.com.au or 9611 0190.

Yours faithfully,

David Burstyner
ADLEY BURSTYNER