10 October 2017

The Hon. P. D. Cummins AM
Chair
Victorian Law Reform Commission
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Access to Justice – Litigation Funding and Group Proceedings

Thank you for the opportunity to provide a submission in response to the Victorian Law Reform Commission's (the VLRC) 'Access to Justice – Litigation Funding and Group Proceedings' Consultation Paper (the Consultation Paper).

The Insurance Council of Australia (ICA) is the representative body for the general insurance industry in Australia[1]. ICA members provide a range of general insurance products including public liability and professional indemnity insurance. Our members are commonly involved in class action litigation in Australia.

The ICA seeks to respond to a number of issues and specific questions raised in chapters 6 and 7 of the Consultation Paper. In particular, we wish to highlight how the introduction of an appropriately designed certification process will create a more efficient and cost effective class action regime.

The need to review the Class Action regime in Australia

The landscape in which the class action regime operates has changed considerably since it was first introduced in 1992. At that time, litigation funding was not present in Australia and class action entrepreneurialism was not prevalent.

A number of recent judicial decisions have identified that there are some shortcomings of the current framework regulating the laws in Victoria for class actions. These include the adequacy of the threshold requirements for commencing a class action under section 33C of the *Supreme Court Act* and the extent to which a lead plaintiff must represent the interests of the class. It is timely therefore that the Victorian Attorney-General has asked the VLRC to report on current aspects of the current class action regime.

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[1] Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

The need for a new certification process

Chapter 6 of the Consultation Paper addresses certification of class actions. It is noted in this section that certification is not required in Australia; however, it is used in every other international jurisdiction that has a contemporary class action regime with the exception of Sweden.

The ICA is of the view that a class action certification process is required in Australia to address a number of issues impacting both group proceeding class members and defendants to class action proceedings.

The growth of litigation funding and class action entrepreneurialism, including the use of closed classes, has seen more speculative claims and hastily prepared proceedings.

This has led to a number of problems that can have a detrimental impact on members of a class, defendants and the judicial system. These problems include:

- Lead plaintiffs, well into proceedings, being found not to be able to adequately represent the interests of the class leading to class actions being discontinued.
- Increasing incidents of claims being poorly pleaded, increasing the likelihood of delays and additional legal costs being incurred through interlocutory proceedings.
- Increased legal costs and uncertainty for defendants as a result of competing class actions, which results in defendants having to defend multiple actions arising from the same or similar circumstances. This adds additional expense for defendants and decreases the efficiency of the court system.
- The emergence of closed class actions – which are arguably repugnant to the original intentions of the current opt-out class actions regime.

We provide a list of cases that highlight some of these issues in **Attachment A.**

The introduction of a well-designed and robust certification process, as used in several overseas jurisdictions, would help address these issues.

A certification process may introduce some additional initial costs into class action proceedings. However, it is the experience of our members that these additional costs would be more than offset by the broader efficiency and public interest benefits that an appropriately designed certification process would bring.

Reform of the existing threshold criteria

We refer to question 13 of the Consultation Paper.

The ICA agrees that the existing threshold criteria for commencing a class action should be increased. The current class action regime is very liberal by international standards. Its design did not contemplate an environment of litigation funders and closed class actions that now take place.

A certification process should adopt a criteria that ideally allows a court, from the outset, through a pre-commencement hearing process to:

- Determine which class action is most appropriate for the benefit of the class so that only this one action can proceed. This would benefit class members by having only one set of fees and costs deducted from compensation payments. This would also benefit defendants by ensuring that unnecessary multiple actions were not brought against them for claims arising from the same circumstances.
- Ensure the class action is properly constituted and is a suitable vehicle for the resolution of the dispute. This would assist with reducing inefficiencies, delays and costs in the proceedings and would benefit members of the class, defendants and their insurers.
- Decide which lawyers or litigation funder are best placed to bring a class action.
- Whether the proposed lead plaintiff is a true representative of the class and are best placed to represent the class in proceedings.
- Determine whether the costs and fees to be charged by funders and lawyers are appropriate, thereby helping to protect the interests of the class.

Amendment of section 33C of the *Supreme Court Act (Victoria*) (as outlined at 6.65 of the Consultation Paper) could be another means to ensure an increased threshold criteria for commencing a class action. This should appropriately cater to the needs of the class while also ensuring proceedings are conducted efficiently and not duplicated.

The need for the representative plaintiff to prove they can adequately represent the class.

In response to the discussion in the Consultation Paper on adequacy of representation, the ICA would support reform to the class action regime that placed an onus on the representative plaintiff to show at, or prior to, the commencement of a class action that they can adequately represent the class. This is in line with our support for increasing the existing threshold criteria to bring a class action, as discussed in the previous section.

In relation to the method by which the representative plaintiff would demonstrate their adequacy to represent the class, this could be best achieved through incorporating adequacy of representative as a threshold requirement in certification, as occurs in the USA and Canada.

Alternatively, section 33 of the *Supreme Court Act* could be amended to require a representative plaintiff to establish they are a suitable and adequate representative for all members of the class.

The introduction of adequacy of representation requirements for lead plaintiffs at or prior to the commencement of a class action will ensure that the interests of all members of the class are represented and avoid difficulties that have arisen in a number of Australian class action proceedings that have proved detrimental to the class.

For example, in the *Pampered Paws* case[2], after 4.5 years of litigation, orders were made that the proceedings no longer continue as a class action after it was ascertained that only one of the representations sought by the lead plaintiff would assist the broader class members.
Similarly, in the Vioxx case, the Federal Court found that the representative plaintiff had causation difficulties that set him apart from the rest of the class. While the class action was allowed to continue and the matter ultimately settled, the court commented that the settlement offered little benefit to class members who, unlike the lead plaintiff, had stronger claims but were now prevented from pursuing them.[3]

Competing Class Actions

The ICA supports examining reforms to the class action regime that will address inefficiencies and other problems caused by competing class actions.

Competing class actions arguably work against the key policy objective of the current opt-out class action regime in Australia, namely to promote efficiency in the judicial system when dealing with a large number of claims arising out of the same or similar issue.

Competing class actions also create significant issues for defendants who must expend additional time and resources managing multiple claims that could be dealt with more expediently and efficiently in a single action. Furthermore, competing class actions curtail the ability of defendants and their insurers to obtain certainty and finality by addressing all potential claims through the one proceeding.

It has also been the experience of ICA members that competing class actions result in other procedural issues arising that cause further delays, inefficiencies and increased costs. For example, pleadings can be poorly drafted as law firms and funders rush to file proceedings. This can also result in more speculative and spurious claims being brought.

As noted earlier, the problems created by competing class actions could be addressed through a certification process at the start of a class action.

A possible reform could be for a court to be given the power (through legislation) to allow a single class action and to select a specific law firm and/or funder to run the class action. Legislation could outline a criteria for the court to consider in selecting a specific firm/funder team or could give the court a broader discretion over selection.

This certification process could occur over a period of 4-6 months after the first class action is filed, by which time any competing class actions could also be filed. This process would help avoid rushed and poorly drafted proceedings being filed which can be time consuming and expensive to rectify.

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[2] [2] *Pampered Paws Connection Pty Ltd (on its own behalf and in a Representative Capacity) v Pets Paradise Franchising (Qld) Pty Ltd* (No 11) (2013) FCA 241

[3] *Peter v Merck Sharp & Dohme (Aust) Pty Ltd* (No 7)(2015) FCA 123 (6-7).

Such a certification process would prevent defendants being faced with numerous claims by different law firms and would also provide a process to help ensure the law firm and funder selected to run the class action are best equipped to represent the interest of the class.

Litigation Funding – matters to be addressed at the commencement of proceedings

We refer to question 16 of the Consultation Paper.

The ICA is of the view that a number of issues that are specific to class actions involving litigation funding, in particular security for costs, should be considered as part of a certification process and the beginning of a class action.

From a defendant's perspective, the financial position of a litigation funder (particularly an overseas funder) is of significant importance.

There are currently no capital adequacy requirements imposed on litigation funders involved in Australian class actions. As a result, a successful defendant may be left with no recourse to recover a costs order in their favour in the event that, for example, a funder becomes insolvent or any After The Event insurance policy provided by way of security for costs does not respond.

The impact of a lack of security for costs is not limited to the defendant. The representative party will retain a liability for costs in respect for which they also have no recourse.

The need to manage the costs of class action litigation to ensure insurance availability

The ICA also wishes to highlight the need to have a more efficient and cost effective class action regime in Australia in order to maintain insurance availability and affordability, particularly in the current environment of the increasing number of class action proceedings being issued in Australia.

The market for some insurance products in Australia, in particular directors and officers (D&O) insurance, is now under significant stress. This stress appears to be largely the result of a continuing increase in securities class actions.

The average securities class action can cost between $50M-$70M.[4] By comparison the Australian D&O insurance market premium pool is comparatively small at approximately $280M.[5] There were four securities class actions issued in the first quarter of 2017, potentially draining the entire annual D&O premium pool.

[4] 'Securities Class Actions Causing Distress', *Insurance Business*, Issue 6.3 (2017), p. 38.

[5] ibid.

Not surprisingly the impact of securities class actions has seen insurers operating in Australia reduce their risk appetite in the D&O insurance market which is having a real impact on both the availability and affordability of this type of insurance product.

Within this context the need for a reform of the class action regime to ensure its efficiency and to ensure a greater degree of certainty for insurers becomes even more important.

We trust the VLRC will find this submission useful. The ICA would welcome the opportunity to discuss this submission further with the VLRC. If you have any questions, please contact Fiona Cameron, General Manager Policy, Consumer Outcomes via email fcameron@insurancecouncil.com.au, or phone (02) 9253 5100.

Yours sincerely

Robert Whelan
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Encl.

ATTACHMENT A

Case law examples of issues that have arisen in Australian class actions which could have been avoided through the use of an early certification process.

Adequacy of representation

Pampered Paws case (*Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11)* **(2013) FCA) – After 4.5 years of litigation and two trials the Federal Court ruled that only one of the declarations sought by the representative plaintiff was of assistance to class members. Accordingly, orders were made that the proceeding no longer continue as a class action.**

***Earglow Pty Ltd v Newcrest Mining Ltd (2015) FCA* - 88.34% of the class members were institutional investors yet the representative plaintiff was a retail investor.**

Increased requirement of commonality on questions of law and fact

2009 Black Saturday bushfires - The lawyers who issued the class action did not have instructions or authority from Leo Keane (the named representative plaintiff) to issue the writ. In addition, Mr Keane's property was destroyed by the Kilmore east fire, not the Beechworth fire. As a result, the representative plaintiff could not adequately represent the interests of class members who lost homes in the Beechworth fire.

***Meaden v Bell Potter Securities Ltd (No 2)* (2012) FCA - There was found to be a lack of common issues between the class members, such that any determination of the lead plaintiff's claim would offer no real guide as to how the balance of the claims by class members would be determined were they to proceed to be determined individually. In that regard, the Court noted that *it was impossible to see how the lead plaintiff's trial would determine any issue of sufficient significance to render it a process that had any real utility*. The application was heard nearly 18 months after the proceedings had been issued. It is arguable that, had there been certification prior to commencement, the class action would not have been permitted to continue.**

Consent of representative plaintiff

The 2003 Northern Victoria bushfires - The class action was dismissed as an abuse of process in May 2011, after no person in the class was prepared to act as the

representative plaintiff. The action had been commenced by lawyers without the consent of the nominated representative.

Narrowing issues in dispute / preliminary questions

Bank fees class actions - In a series of coordinated class actions, bank customers alleged that the exception fees charged by many of Australia's major retail banks were unlawful penalties. In the first of those class actions to go to trial, the Federal Court decided that only one of the challenged exception fees (late payment fees on credit cards) was a penalty (see *Paciocco v Australia and New Zealand Banking Group Limited* (2014) FCA 35). Then, in July 2016, the High Court of Australia held that none of the fees in question were penalties and, as a result, the class actions have been abandoned.

Public interest and timing of class action proceeding

2009 Black Saturday bushfires – A class action was issued within 10 days of the bushfires. Within such a short timeframe it would be challenging for a representative party to adequately form a view on recovery prospects, identify the issues in dispute, fully understand the scope of loss suffered and determine suitability to act as a representative plaintiff.