

Parliamentary Inquiry into litigation funding and the regulation of the class action industry Final Report and the Government's Response

On 21 December 2020, the Australian Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) released its Final Report following its inquiry into class actions and litigation funding (**Report**). The PJC Report can be accessed via this link:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Report

Stakeholders expected the Report, which runs over 450 pages and contains 31 recommendations, to be comprehensively responded to by the Government within three (3) months of its release. Instead, we have seen an initial response prioritising permanent legislative changes to continuous disclosure laws, changes that do not facilitate access to justice, discourage wrongdoing or promote the efficient and effective use of court resources, topics which the PJC had identified as needing an increased focus.

ALFA supports access to justice but does not support the Government's attempts to water down Australia's securities law via the Treasury Laws Amendment (2021 Measures No.1) Bill 2021 ([the bill](#)). The Bill seeks to permanently amend the continuous disclosure and misleading and deceptive conduct provisions in the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* so that civil penalty proceedings commenced under those provisions must prove that an entity or officer acted with 'knowledge, recklessness or negligence' in respect of an alleged contravention. These changes, if made permanent, will make it more difficult for group members to secure quick and efficient access to justice.

ALFA wonders which of the remaining 30 recommendations will be addressed next. Will the Government look to implement the recommendations that support access to justice or those seeking to suppress class actions as a means of access to justice? Given the Government is yet to respond to the comprehensive Australian Law Reform Commission (**ALRC**) report into Class Action Proceedings and Third-Party Litigation Funders, which was tabled in Parliament on 24 January 2019, it is not difficult to guess the answer.

The 31 recommendations in the Report can be divided into a number of categories including:

- Additional powers for the Federal Court (and its State counterparts) to supervise and manage class actions, including resolving competing actions, class closure and appointment of costs referees and contradictors for settlement approvals;
- Enhanced oversight by the Courts of the role of third-party litigation funders in class actions and their returns;
- Support for the amendments to the Corporations Regulations, which came into effect on 22 August 2020, requiring third party funders of class actions to hold an Australian Financial Services Licence (AFSL) and comply with the Managed Investment Scheme (MIS) regulations, and an extension of these requirements to class actions run under the Victorian contingency fee regime;
- Consideration of a guaranteed minimum return to class action members; specifically, whether a minimum 70% gross return to class members is an appropriate minimum return;

- Increased obligations in relation to litigation funders and lawyers disclosing and managing conflicts of interest; and
- Permanent legislative modification of the continuous disclosure regime.

Whilst ALFA supports the recommendations directed at increasing the efficient and fair operation of the class actions regime (and notes that a number of these are already in operation via the Federal Court's oversight of the Part IVA regime), it does not support recommendations that fail to reflect a principled approach to reform.

Recommendations ALFA supports

ALFA supports the Federal Court's continued oversight of class actions and litigation funders and notes that the Federal Court currently takes a proactive approach to ensuring that group members' interests are protected and class actions are conducted efficiently.

ALFA supports the recommendations aimed at resolving uncertainty currently existing regarding the resolution of competing class actions and class closure orders. In relation to common fund order (CFOs), ALFA supports the open class regime, which was the original intention of Part IVA to ensure that all eligible class members are included in the action. CFOs are fair in that they do not discriminate between group members as all bear an equal burden to pay the costs of the claim and if individual group members do not wish to be bound to the claim and the obligation to pay the costs and the funder's commission they can opt-out of the action and maintain their right to bring a separate claim (subject to any limitations period). The ALRC, in its Final Report 134 issued in Dec 2018, recommended the amendment of Part IVA to provide the Court with an express statutory power to make CFOs on application of the plaintiff or the Court's own motion.

Recommendations ALFA does not support

ALFA notes that the imposition of the MIS requirements which came into effect on 22 August 2020, is not fit for purpose and has led to confusion and uncertainty and is likely to ultimately lead to a diminished class actions regime, burdened by unnecessary red tape and cost, to the detriment of the users of this regime. ALFA notes PJC recommendation 28: "*Noting that ASIC has provided relief from a number of MIS requirements, the committee recommends the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders*".

ALFA also questions the PJC's recommendation to consider a guaranteed minimum return to group members of 70% of the gross proceeds of a class action. Whilst this may be an appropriate return to group members in some actions, it will not allow actions at the smaller end of the scale to proceed given the significant costs involved in bringing a class action of any size and the significant risks borne by litigation funders. If consideration is to be given to any capping proposal, the consultation process should be comprehensive and involve broad debate, facilitated by empirical evidence.

Regrettably, the regulatory requirements introduced by the Government in August 2020 has also led to serious unintended consequences in relation to the funding of other actions, particularly in the area of



Association of Litigation Funders of Australia

insolvency and multi-plaintiff claims. Given the ambiguity of some of the language employed in the regulations which came into effect, a number of grey areas exist which require rectification before these claims can proceed unfettered by the potential to be caught up in the current regulatory uncertainty. ALFA has been consulting with Treasury and ASIC since the regulations were introduced in August 2020, seeking to assist Treasury to devise and implement a solution to these problems, particularly as they impact the funding of insolvency claims.

ALFA notes that the PJC Report and recommendations is currently under consideration by the Government and awaits its response in due course. It would be an opportune time for the Government to consider the PJC recommendations by reference to the recommendations made by the ALRC, given the extensive consultation undertaken by the ALRC of a number of overlapping issues.