

## IMF BENTHAM LIMITED

### Australian Law Reform Commission's (ALRC's) Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Inquiry)

#### SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

## 1 Introduction

1.1 IMF Bentham Limited (**IMF Bentham**) is pleased to make these supplementary submissions in response to:

1.1.1 the ALRC's supplementary note for consultation: Leave to proceed dated 13 September 2018 (**ALRC's supplementary note**); and

1.1.2 the post-submissions presentation slides dated September 2018 (**ALRC's post-submissions slides**) which contain some additional proposals for reform, as well as areas that are still under deliberation.

1.2 IMF Bentham also refers to its original submission dated 6 August 2018, which should be read with these supplementary submissions.

1.3 IMF Bentham's primary position is that there should not be a "one size fits all" approach adopted. Each class action involves different circumstances, considerations and issues. IMF Bentham is concerned that some of the ALRC's current proposals for reform have the potential to reduce the flexibility of the Court to address issues on a case by case basis, will increase costs for class members and provide procedural barriers that will inhibit access to justice.

## 2 Leave to proceed proposal - ALRC's supplementary note for consultation

### Concern that the process ends up being a de facto class certification process

2.1 In the ALRC's supplementary note, the ALRC states it remains unpersuaded that a certification procedure should be introduced for class actions. However, it suggested a new procedural mechanism requiring applicants to make an application, at the first case management conference, for leave to proceed with a class action that has been commenced.

2.2 The ALRC stated that this mechanism is to enable the "*efficient disposition of preliminary issues, such as the approval of litigation funding agreements (and potentially contingency fee agreements), and to minimise the costs and delay imposed on both plaintiffs and defendants when multiple actions against the same defendant are filed seriatim in respect of the same circumstances*".

2.3 This proposal includes two alternative processes:

*"If no competing class actions are foreshadowed or anticipated, the Court may:*

1. *reject, vary or set the commission rate and/or the contingency fee;*

2. *approve the costs agreement and/or the litigation funding agreement; and*
3. *grant leave to proceed on such terms as the Court sees fit.*

*If a competing class action or actions is anticipated, the Court would then determine the timeframe by which such competing class actions must be commenced and the date on which the carriage motion is to be heard. Upon the conclusion of the hearing of a carriage motion, the Court may grant leave to proceed to one or more of the applicants on such terms as the Court sees fit.”*

- 2.4 It is expressly stated that “*Such a mechanism should not be interpreted as a de facto certification procedure*” and that “*No hurdles would be placed on applicants beyond those matters that are already required by the Class Action Practice Note (GPN-CA) to be addressed at the first case management hearing*”.
- 2.5 IMF Bentham agrees with the concerns expressed in relation to introducing a class certification process. The USA has a class certification process and it is widely regarded as resulting in considerable time and expense. The plaintiff bears the burden of proving that all the necessary requirements are met and consequently bears the costs of what can often amount to a mini-trial at the outset and which can take two or more years after filing the class complaint to be resolved<sup>1</sup>. Those Court decisions are often appealed, leading to further delay.
- 2.6 Given these concerns, and given that the ALRC has made it clear that no additional hurdles are to be placed on applicants by the potential leave process, beyond what is already required by GPN-CA, it is unclear why there is any need for the applicant to apply for leave.
- 2.7 If the requirements of GPN-CA are not met by the applicant, the Court could make orders for their compliance with consequences to flow for non compliance. In the same way, if for example, the respondents were not in position to address the matters required of them in [7.8] of GPN-CA, the Court could make appropriate orders.
- 2.8 Placing an onus on the applicant to seek leave if there really is no additional criteria for leave to be given other than compliance with an existing practice note, imposes an unnecessary hurdle on applicants.
- 2.9 The concern is that the process ends up being a de facto class certification process, which provides the respondents with additional opportunities to raise objections to class actions and adds cost and delay for claimants and makes it harder for class actions to commence.
- 2.10 Giving the Court power to grant leave to proceed on such terms as the Court sees fit, fuels these concerns as there is no indication as to what factors the Court will take into account, and there is significant risk of considerable argument by respondents as to why leave should be refused or on what terms leave should be permitted.

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<sup>1</sup> See the global publication, ‘Getting the Deal Through’ on Class Actions in the United States by Sidley Austin LLP published in December 2017 <https://gettingthedealthrough.com/area/82/jurisdiction/23/class-actions-united-states>.

Power to reject, vary or set funding commissions- a fundamental departure from freedom of contract

- 2.11 If the reference in [1.18] of the ALRC's supplementary note is to the Court setting the commission rate and/or the contingency fee in the context of a common fund order, at outset of the proceedings, then in IMF Bentham's submission that is appropriate. The Court has a protective role in respect of group members and if they are to be bound to pay a fee they have not separately negotiated (ie under a common fund) then it is reasonable for the Court to have the proposed power in respect of the fee.
- 2.12 Further, setting the fee at the outset is fair in most situations. Setting the commission or fee at the end of the proceedings, or after a settlement has been reached, risks hindsight bias. The funder should know the fee before the risks are incurred, not after an opportunity has been obtained to determine whether or not they have crystallised. The fee reflects a premium for the uncertainty inherent in the litigation.
- 2.13 If the reference is to the Court having power to reject, vary or set the commission in a funding agreement reached between the funder and a claimant, outside the context of a common fund order and absent any of the traditional bases for Court intervention in contracts (such as unconscionable conduct), then in IMF Bentham's submission such intervention is not appropriate. It represents a fundamental departure from traditional rules of freedom of contract (see page 18 of IMF's original submission). To demonstrate the difficulties with the proposition, we ask rhetorically whether the Court should also have power to reject, vary or set aside the interest rate at which the claimant had borrowed money to pay the legal fees of the case, without any misconduct by the lender being required.

Competing class actions- need for flexibility

- 2.14 The ALRC's supplementary note states at [1.17] that "*The parties should also be in a position to advise the Court as to whether any competing class actions have been foreshadowed or are anticipated*" and if so a timeframe is set for when any competing class actions should be commenced and a carriage motion heard.
- 2.15 The parties will not always know whether a "competing" action is anticipated, so how is the Court to be informed of whether this is the case and how is someone contemplating a "competing" action to be informed? Who is going to pay for any advertising? And what time period should be provided for a competing action to be filed?
- 2.16 The devil is likely to be in the detail. There is obvious merit in ensuring all related claims are brought at the same time, and before the same Judge. However, in IMF Bentham's submission, the ability of claimants, lawyers and funders to conduct a proper due diligence on the merits of the case in whatever time period is necessary should not be prejudiced. A race to the Court should not be encouraged and this proposal carries that risk.
- 2.17 Further, as discussed below in relation to the proposal that all class actions be commenced as open classes, flexibility should be preserved and "closed" classes should not be outlawed. In some cases it might be appropriate for a class action proceeding, which is related in some way

to another class action proceeding, to go ahead (for example in tandem), rather than to face a carriage motion.

### 3 ALRC's post-submissions slides

#### Recommendation 6.1 - All class actions should be commenced as open class actions

- 3.1 This recommendation would remove the current ability of a claimant to choose to represent some<sup>2</sup>, and not all, affected persons, for example, if some class members prefer different legal representation or funding solutions or if the claims alleged in different class actions have variations.
- 3.2 A closed class, for example where parties need to sign a funding agreement to be in the class and only some of the affected group may be in the class, is an "opt in" process. It is not a pure one as under the Federal Court Act there is still a right to opt out (but the funding agreement may still continue to apply). An open class action is an opt out process.
- 3.3 There is widespread debate internationally as to the merits of an opt out class action system versus an opt in class action system. For example, Spigelman CJ said in *Jameson v Professional Investment Services Pty Ltd* [2009] NSWCA 28 (25 February 2009) at [98] in the context of that case, that: "*In this respect [as described in [97] - taking into account the fact that what was proposed was an "opt in" action rather than an "opt out" action, as a matter that weighed in the balance against the proceedings continuing as a representative proceedings]*", in my opinion, his Honour erred. I do not agree with his Honour that common law jurisdictions generally prefer an "opt out" approach. There are arguments in favour of both approaches ....".
- 3.4 The beauty of the current Part IVA model is that it offers the flexibility for class actions to be opt in or opt out. As Professor Scott Dobson observed (albeit in the context of the US system)<sup>3</sup>: "*The first insight is that not all nonmandatory class actions have the same needs. The one - size-fits-all premise of the class action debate ignores the reality that some class actions might warrant an opt out mechanism, whilst others might warrant an opt-in mechanism*".
- 3.5 Enabling a closed class (for example restricted to those who sign a funding agreement) may have significant advantages, including providing the funder and lawyers an opportunity to ascertain the level of interest of group members in pursuing the claims and accordingly the utility of doing so, before significant costs are incurred. It provides an avenue to obtain an indication of the level of loss likely to be claimed or at least the base level, as those who take steps to positively join the class are less likely to opt out. It permits informed decisions to be taken as to whether there is proportionality between the budgeted costs and the loss likely to be ultimately claimed (or at least the likely base loss) and enables the funder to make informed decisions around risk and reward.

<sup>2</sup> See s 33C(1) of the Federal Court of Australia Act 1976 (Cth) (**Federal Court Act**).

<sup>3</sup> "*An Opt-In Option for Class Actions*", Michigan Law Review, volume 115, Issue 2, 2016 at pages 173 - 174

3.6 Accordingly, IMF Bentham opposes the above recommendation and considers that the flexibility of the current system should be retained, whereby a class action can be commenced on either an open or 'closed' basis.

Recommendation 6.1- any order to close the class must be final unless the court is satisfied it would be inefficient or otherwise antithetical to the interests of justice

3.7 It is not clear why there is a need to prescribe any rule in relation to the permanence of class closure orders, as opposed to leaving the matter for the Court to determine in the exercise of its case management powers, taking into account the specific circumstances of the case. Accordingly, IMF Bentham opposes this recommendation. Prescribing a rule simply leaves open scope for interlocutory disputes and costs in relation to what circumstances give rise to the exceptions to the rule.

Recommendation 6.2 – two or more competing class actions to be consolidated or all but one stayed unless the court is satisfied it would be inefficient or otherwise antithetical to the interests of justice.

3.8 This recommendation is linked with the proposal that all class actions commence as open classes, which IMF Bentham comments on above. IMF Bentham submits that it should be permissible for a closed class for some of those affected by the relevant alleged misconduct, to proceed with an open class for the balance of those affected, or with another closed class for some others affected. The Court has powers to case manage both proceedings and to address any unnecessary costs duplication in both proceedings. This is occurring in a number of class actions currently proceeding.

3.9 In IMF Bentham's submission, a degree of multiplicity, where the defendant faces say two or three cases, which are different in some respects, but which are being case managed together, preserves the appropriate balance between avoiding prejudice to defendants, and preserving choice and flexibility in the way claims are advanced. Compared to an alternative of hundreds or potentially thousands of separately commenced proceedings by individual group members, this outcome will still be superior.

A carriage motion, applying listed criteria, is to be conducted to determine the outcome (referred to above in recommendation 6.2)

3.10 IMF Bentham opposes the proposal for listed criteria to apply to a carriage motion.

3.11 In the *GetSwift* decision<sup>4</sup>, the Federal Court recognised that “one size does not fit all and how one manages competing class actions is essentially a case management decision rooted in the particular circumstances of the relevant matter”<sup>5</sup>.

3.12 In IMF Bentham's submission, the Courts should retain the flexibility of the current class action regime to address issues on a case by case basis over a 'one size fits all' approach, including

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<sup>4</sup> *Perera v GetSwift Limited* [2018] FCA 732, which has been appealed to the Full Federal Court and is awaiting judgment.

<sup>5</sup> *Ibid*, [376].

where there are multiple or competing claims. The relevant factors referred to (at first instance) in *GetSwift* should not be treated as fixed or finite. What may be important criteria or factors in one case may not be important or as important in another case.

- 3.13 IMF Bentham agrees that in the Court's consideration of factors, class member sign up to a funding agreement should be a relevant factor.

*Litigation funding agreements (LFA) enforceable only with leave and LFA and solicitor costs agreements only approved on the basis of a common fund*

- 3.14 IMF Bentham repeats its comments above, in relation to the proposal to grant the Court power to reject, vary or set funding commissions. It would introduce significant uncertainty for funders if, absent any misconduct that would ordinarily render the agreement liable to be set aside, they could not rely, with certainty, on being able to enforce the contract, until leave were given.

- 3.15 Unless it was proposed that the funded party could enforce the LFA without leave, which would be a very odd and one sided result, the proposal would also introduce uncertainty for funded parties, until leave was given or not given.

- 3.16 In relation to common fund, IMF Bentham agrees that a common fund should be a funding option available for class actions, but not the only option. Closed classes, with the benefit of litigation funding, should continue to be permitted.

*Limitations on licence for litigation funders – not required where funded party is not a “consumer” and regulation of capital adequacy of lawyers who act on a contingency basis (if permitted)*

- 3.17 IMF Bentham supports the licensing of all litigation funders operating in Australia, not limited to circumstances where the funded party is a consumer. IMF Bentham expects there would be a further detailed consultation with stakeholders on the form or regulation and would be happy to be part of such a process.
- 3.18 IMF Bentham has set out its position on contingency fees in its original submission<sup>6</sup>. If, contrary to IMF Bentham's view, the prohibition on lawyers charging contingency fees is to be lifted, and the traditional role of the lawyer changes to becoming a funder, they should be subject to the same or similar obligations as third party funders under a licensing regime.

*Funders and insurers to comply with s37M*

- 3.19 IMF Bentham supports this proposal, namely to “*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*” but recommends that the word “some” be inserted before “direct or indirect control”.

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<sup>6</sup> See pages 16-18 of IMF's original submission.

3.20 If this proposal is to be implemented, consistently with the obligation on litigation funders to disclose their involvement in proceedings (and their terms), to ensure fairness and a level playing field, insurers should be required to disclose their involvement.

*Conferral of exclusive jurisdiction on Federal Court re civil matters under part 9.6A Corporations Act and s12GJ of the ASIC Act 2001 (Cth)*

3.21 IMF Bentham considers the objective behind this proposal to be sound. It is not in the interests of claimants or funders for the same laws to be applied differently in different jurisdictions and it is in their interests for competing class actions to be dealt with efficiently.

3.22 However, given that several States have enacted legislation which largely mirrors Part IVA of the Federal Court Act, applicable in the relevant State Courts, there should be flexibility. Claimants should have the right to choose the most appropriate Court in the circumstances of the claim. The answer is not for the Federal Court to seize exclusive jurisdiction in shareholder class actions (assuming that were possible) but to ensure uniformity of practice notes and legislation at the Federal and State levels.

*Recommendations as to further inquiry on costs*

3.23 Instead of a further inquiry into the continuous disclosure laws, which IMF Bentham submits is not needed and should not proceed (in this respect ASIC's submissions to the ALRC contain powerful reasons in support of this position), an inquiry into how costs might be reduced in class actions should be conducted.

3.24 The ALRC's discussion paper refers to the effect of the continuous disclosure laws on the insurance industry, who pay considerable sums in the defence of such claims. Rather than change the laws which, as stated above, is not an appropriate response, it would be much more appropriate to address these concerns by making the enforcement of these laws more efficient and cost effective.

3.25 Such an inquiry could review the applicability of costs budgeting and cost management<sup>7</sup>, the introduction of depositions, greater flexibility around use of interrogatories, and procedures to accelerate finality in shareholder class actions at the conclusion of a finding for the applicant on common issues.

## **30 September 2018**

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<sup>7</sup> See *Controlling the costs of class actions* (<https://www.imf.com.au/newsroom/blog/blog-full-post/imf-bentham-blog/2018/09/27/the-imf-bentham-and-unsw-national-class-actions-conference-papers-are-available>), the keynote address by Sir Rupert Jackson, former Lord Justice of the Court of Appeal of England and Wales, given at a National Class Actions Conference on 25 September 2018, co-hosted by IMF Bentham and the University of New South Wales. Sir Rupert discussed the costs budgeting and cost management procedure introduced in England & Wales in 2013 following his review of civil litigation costs system.