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Access to Justice Arrangements
Productivity Commission

By email: access.justice@pc.gov.au

Dear Sir/Madam

Further comments in response to Access to Justice Arrangements

Maurice Blackburn refers its previous submissions, to the Law Council's submission to the Productivity Commission dated 5 June 2014 and, most specifically, the Business Law Section's submission that appears at attachment B to the Law Council's submission. Attachment B concerns the regulation of litigation funding and class actions.

Maurice Blackburn has considered the submission made by the Business Law Section and comments as follows:

1. Maurice Blackburn does not accept the suggestion made in the Business Law Section's submission that "unregulated litigation funding allows unmeritorious claims that would not otherwise be litigated . . ."

2. Maurice Blackburn notes that while there may be some examples of unmeritorious class action claims there is very little evidence of unmeritorious shareholder class actions that were supported by a third party litigation funder. Maurice Blackburn cannot identify one funded shareholder class action that was arguably lacking in merit from the outset.

3. Class actions that, in hindsight, appear to have been commenced without sufficient merit are generally struck out or otherwise dismissed. The dismissal of a claim with costs suggests that the system is working.

4. Maurice Blackburn submits that those few claims that can be identified that were without sufficient merit when commenced were conducted by those unfamiliar with the complexities of class actions and in circumstances in which the enormity of the plaintiff's task was underestimated.

5. There are very few unmeritorious class actions, if any, that one could sensibly argue have settled for significant sums purely because defendant is being

commercial.[1] There are no known examples of shareholder class actions that have settled, even though they were arguably lacking in merit, that were funded by litigation funders.

6. The Business Law Section makes the statement that:

> *"A large proportion of litigation funded actions are class action founded on allegations of a breach of a listed company's . . [obligations]".*

7. Professor Morabito's analysis of the number and type of class actions filed in Australia each year between 1992 and 2009 found that an average of 14.64 actions were commenced in the Federal Court each year with only 3 per year being securities class actions.[2] Allens Linklaters have determined that an average of 2.2 securities class actions have been filed each year since 1999.[3] At present, it appears that there are only 3 funded securities class actions on foot anywhere in Australia,[4] as compared to approximately 20 other class actions with a range of causes of action from product liability and other mass torts to consumer class actions.

8. Maurice Blackburn also takes issue with the Business Law Section's suggestion that *"in Australia, class actions and their settlements proceed on a basis which is contrary to current settled law"*.

9. Maurice Blackburn cannot find any examples of a settled class action in which the settlement was determined contrary to sensible legal principles and in consideration by both the plaintiffs and the defendants of the risks associated with proceeding to determination of the trial of common issues.

10. If the Business Law Section is referring solely to shareholder class actions, which as noted is a minor proportion of all class actions commenced and proceeded with, then to suggest that these claims were improperly settled by defendants is disrespectful of their lawyers and it ignores the fact that the causation test in the *Corporations Act* does not require proof of individual reliance.[5]

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[1] Once example may be *Taylor v Telstra Corporation Limited* [2007] FCA 2008

[2] Professor Vince Morabito, *An Empirical Study of Australia's Class Action Regimes (Second Report)*, September 2010

[3] Allens Linklaters, *Shareholder Class Actions*, February 2014, p. 2

[4] These are cases against: Leighton (in the Federal Court the settlement of which has recently been announced), OZ Minerals (in the Federal Court) and Allco (in the Federal Court against a company in liquidation and its directors). There are three other funded class actions relating to investment products, being against Aecom (in the Federal Court against a traffic projection company about the CLEM 7 tunnel in Brisbane), Australian Capital Reserve (a managed investment scheme) and against Standard and Poors (the appeal having just been handed down: *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65). Other identified class actions relating to investment products are either not funded by litigation funders; such the Willmott Forests cases (that has been stifled by a security for costs order), the Timbercorp cases (that are also likely to fail due to a lack of funding) or Mark Elliott's cases in the Victorian Supreme Court against Leighton, TWE and Worley Parsons (which are likely to be struck out).

[5] *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 at [1375] . . ."First, the legal principles. There is no bright-line principle that it is insufficient for a plaintiff to prove that some other person relied on the alleged misleading conduct and that that person's reliance led to the plaintiff suffering loss. *Ingot Capital Investments* does not stand for that proposition. *Ingot Capital Investments* is authority for the proposition that where misleading and deceptive conduct provides the opportunity for an investor to enter into a transaction, that investor will not be entitled to recover where the investor knows the truth of the underlying misrepresentation or was indifferent to its truth and proceeded nonetheless: *Ingot Capital Investments* at 661-662 [19]-[22] and 731-732 [612]-[619]; see also, *Digi-Tech (Australia) Pty Ltd v Brand* [2004] NSWCA 58; (2004) 62 IPR 184 at 212 [159]. [1376] Next, the entitlement to recover loss or damage in a case of misleading and deceptive conduct is not confined to persons who relied on the conduct: *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* [1992] FCA 437; (1992) 37

11. The suggestion that any public company, with its obligations to its current shareholders, has settled a shareholder claim for a substantial sum ignorant of applicable legal principles and to avoid being a "test case" is frankly unsustainable.

12. The contrary is more likely to be correct. That is, defendant companies settle shareholder class actions because they wish to avoid the risk of an adverse determination. They do so because the risk of losing is greater than the price of settlement. Such a motive is not either wrong or improper and is a motive that is equally applicable to both defendants and plaintiffs.

13. Maurice Blackburn also takes issue with the allegation that the existence of a litigation funder behind an action distorts the principle that damages are awarded to compensate loss. This is not the case. Litigation funders merely contract with those claiming compensation to carry the risk of litigation in return for payment that is set by reference to a proportion of the compensation. The payment and the amount thereof is a decision for the claimant. It is not a matter that distorts the compensatory principle.

14. Maurice Blackburn is most concerned that the Business Law Section's reference to the Storm Financial cases is used as an example to criticise litigation funding. In the particular case referred to, the victims of a financial planning scam sued Macquarie Bank and reached a settlement of approximately $85 million. A subset of the group funded the solicitors for the claimants along the way. In an attempt to convince his clients to accept the settlement, the solicitor attempted to strike a deal that would benefit those instructing him over class members who had not been paying for his services. This is fundamentally different to a shareholder class action that is funded by a third party litigation funder.

15. Maurice Blackburn respectfully agrees with the decision of the Full Federal Court in *Australian Securities & Investment Commission v Richards* [2013] FCAFC 89 that the regime proposed by the solicitor in the Macquarie Bank case was not made in the interests of all group members and should not have been approved. The decision had nothing to do with third party litigation funding. On the contrary, the decision endorsed the role of commercial third party litigation funders.[6]

16. The suggestion by the Business Law Section that litigation funders enlist the support of closely associated law firms and encourage reluctant group members to join a potential class is also challenged by Maurice Blackburn. It is hardly surprising that some litigation funders have their favourite firms. This is not unusual. There is no example in Australia of profit sharing between litigation funders and law firms.

FCR 526. Indeed, a plaintiff need not establish that the plaintiff directly received and relied upon the misrepresentation made by a defendant: see, by way of example, *Hampic Pty Ltd v Adams* [1999] NSWCA 455; (2000) ATPR 41-737. The causation inquiry required to be undertaken for the purposes of s 82(1) of the TPA (and for s 5D of the *Civil Liability Act*) entails a determination of whether the loss or damage is the "real or direct or effective cause of the applicant's loss"; "it must have been 'brought about by virtue of' the conduct which is in contravention of s 52": *Janssen-Cilag* at 530. The inquiry is whether the plaintiff suffered loss or damage by reason of, or as a result of, the contravention: *Janssen-Cilag* at 531.

[6] See, most particularly, paragraph 52 of the Full Court's decision.

17. The suggestion made by Maurice Blackburn that it intended to seek court approval to create a litigation funding company for the purpose of profit sharing with its principals was openly raised with the Commonwealth Attorney General who indicated his objection to that course. Accordingly, Maurice Blackburn withdrew the application and announced that it would not continue with the proposal.

18. It is simply not true to allege that group members who join funded class actions are reluctant to do so. Class action law firms and litigation funders have no ability to pressure a person to participate in an action and they do not attempt to do so.

19. The suggestion in the Business Law Section's submission that litigation funders are more likely to risk less meritorious claims than an individual plaintiff is also flawed. The history of litigation funding in Australia suggests that the allegedly wrongful conduct that is targeted by litigation funded class actions is more likely to be egregious than borderline as litigation funders are very concerned about the adverse costs risk. The skill of litigation funders, whose business depends on positive outcomes, means that even greater care is taken to identify strong claims than might be the case with included plaintiffs who may be emotionally involved.

20. To suggest, as the Business Law Section does, that litigation funding produces no benefit to the community at all is also challenged by Maurice Blackburn.

21. Parliaments in Australia have, for many years, seen the need to pass legislation that provides protection to the community from the wrongs of others and to give the victims of wrongful conduct the right to be compensated. Those injured by the negligence of others who owed them a duty of care, those who suffer loss by another's misleading or deceptive conduct and those who are injured by products manufactured and sold when they are not fit for purpose, have rights to be compensated and to sue if that compensation is not forthcoming.

22. These rights are facilitated by class actions as the cost of individual pursuit is often greatly outweighed by the value to the individual claimant yet the right to be compensated is no less important. The class action allows individual victims to pool the effort with other victims so that the claim for compensation is a cost effective step to take. The class actions regime and the pursuit of such claims, whether supported by litigation funders or not, can be a very good thing, not only for the victims of the wrongful conduct, but also for the wider community through improved accountability. Those who might consider that they can get away with wrongful conduct need to be aware not only of the risk that they will be taken to task by market regulators but by the victims themselves.

23. This principle extends to corporations that engage in misleading the market or failing to disclose material facts to the market in an attempt to distort the share price of the company. Shareholder class actions have a direct impact on corporate governance standards. These companies that have been subject to securities class actions have been shown to have weaker levels of corporate governance than other firms[7]. When corporate governance standards are improved, companies are less likely to face the wrath of shareholders.

[7] See, for example "Corporate governance and securities class actions" Chapple, Clout and Tan, Australian Journal of Management, November 2013.

24. Maurice Blackburn reiterates its previous submissions in support of the introduction of contingency fees.

25. It is noted that there has been much debate about whether a "certification process" should be introduced in Australia. Maurice Blackburn notes that the issue was carefully considered by the ALRC in its original report into "grouped proceedings" and rejected[8] and has been considered and rejected by each of the Victorian and NSW legislatures prior to the introduction, in these jurisdictions, if facilitated opt out class action regimes[9].

26. In Australia defendants can move to strike out class action proceedings and/or have them decertified under Sections 33C, 33M and/or 33N of the *Federal Court Act* and their equivalent in the States. This regime gives defendants greater protection than the US. This conclusion is supported by an empirical study conducted in Australia[10] that found there is:

> *"no evidence of claimants taking advantage of the absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly or efficiently through the class action device. On the contrary, we found that for every ten class actions that defendants sought to have decertified, eight proceeded as class actions, with the support of the court. We also discovered that, contrary to popular belief, defendants have not filed decertification applications in a majority of class actions as almost three out of every four cases were not the subject of decertification applications. Concerns have been expressed that the Australian decertification model may have an unfair impact on those defendants who choose not to challenge the class action format of the litigation. But again, the data we collected revealed a somewhat different story: defendants that did not seek decertification orders were able to secure more summary dismissals and fewer class-wide settlements than defendants who did seek (but without success) decertification. Another positive finding for defendants is that when they failed to secure a decertification order, contrary to their US counterparts, defendants were not invariably faced with the prospect of a class-wide settlement. The empirical data concerning the operation of the decertification regime, when it was activated by challenges launched by defendants, also revealed a different reality from that depicted in the legal literature. In fact, it showed that more often than not such challenges were dealt with more promptly than certification motions in the United States".*[11]

27. Maurice Blackburn also takes issue with the Business Law Section's allegation that litigation funders can deny indemnifying a representative plaintiff who is

[8] Australian Law Reform Commission, "*Grouped Proceedings in the Federal Court*" Report No. 46, 1988
[9] See Part 4A *Supreme Court Act 1986 (VIC)* and Part 10 *Civil Procedure Act 2005 (NSW)*
[10] *Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia* Vince Morabito & Jane Caruana in The American Journal of Comparative Law [Vol 61 2013 p580]
[11] *Supra* at p614

ordered to pay the defendant's costs. In class actions, the Federal Court practice note requires a representative plaintiff to reveal the existence of litigation funding (CM17) and recent decisions have reinforced the fact that defendants can demand that sizeable security for its costs be lodged at the outset[12]. If a funder is involved it will have no chance but to lodge the security of the action is to go forward.

Yours faithfully

Ben Slade
MAURICE BLACKBURN

[12] See for example *Kelly v Willmott Forests Ltd (in liquidation)* (No 3) [2014] FCA 78