Slater Gordon Lawyers

Submission to the Treasury Consultation:

Guaranteeing a minimum return of class action proceeds to class members

Submitted by
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Introduction

1. On 21 December 2020 the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) handed down its report, Litigation funding and the regulation of the class action industry (**Report**).

2. Recommendation 20 of the Report was that the Australian Government consult on:
   (a) the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);
   (b) whether a minimum gross return of 70% to class members, as endorsed by some class actions law firms and litigation funders, is the most appropriate floor; and
   (c) whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.

3. As a leading class action plaintiff law firm, Slater and Gordon has decades of relevant experience. We presently act for claimants in 17 ongoing class actions under a range of funding models that include third party litigation funding, operating on a "No Win No Fee" basis and under the Group Costs Order regime in the Victorian Supreme Court.

4. In recent years, Slater and Gordon has made extensive submissions to inquiries relating to class actions and litigation funding, including the Parliamentary Joint Committee inquiry referred to above (December 2020), the Australian Law Reform Commission's (**ALRC**) Litigation Funding inquiry (January 2019), the Victorian Law Reform Commission's Litigation Funding and Group Proceedings inquiry (June 2018). Those submissions provide background and context to our short-form responses to the specific terms of reference of Recommendation 20. We welcome the opportunity to make a submission to this consultation process.

5. Recommendation 20 is directed at a perception that currently the regulatory oversight of the financial outcomes for all class members is inadequate and that greater regulatory oversight is required to prevent litigation funders and law firms from taking what are perceived in some instances to be 'disproportionate' fees and to ensure fair and reasonable outcomes for all class members.[1]

6. Common between all stakeholders is the commitment to access to justice at the foundation of the class actions regime and the primacy of the duty of lawyers acting for class members to always act in the interests of those members. There is also a common objective that litigation funding structures must conform to this framework and operate in a manner that is consistent with the public interest.

7. However, the proposed mechanism of a guaranteed statutory minimum return would not achieve those objectives. Instead, it would have a significant number of perverse consequences, which are outlined in this paper, including consequences that would undermine the important principles of equality before

[1] Joint media release the Hon Josh Fydenberg MP Treasurer with Senator the Hon Michaelia Cash Attorney-General, Minister for Industrial Relations, *Consulting on the recommendations of the Parliamentary Joint Committee report on litigation funding and class actions* dated 28 May 2021 https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/consulting-recommendations-parliamentary-joint

the law and access to justice. Such a blunt mechanism does not strike an appropriate balance between seeking to protect class members' interests in obtaining a proportionate return, with protecting members' equal interest in having access to the justice system through the class action regime to pursue important issues at the heart of Australian society.

8. A better alternative to ensure fair, proportionate returns to members and balance broader access to justice considerations is to confer additional direct powers on the Federal Court to regulate litigation funding agreements.

9. Alternatively, if a statutory minimum is to be introduced, it is important that this metric be measured *exclusive* of legal costs, so as to avoid the various injustices outlined in this paper. That is, the rate might apply to other deductions from any settlement sum, including litigation funding costs. If this approach is to be adopted, however, it must be subject to a mechanism that preserves the discretion of the Federal Court to make alternative orders in the interests of justice in the circumstances of a particular case. This will avoid the injustices and perverse outcomes that can arise from applying an overly rigid framework to the entire Federal class action regime.

Impact of proposal on access to justice considerations

Increasing barriers to the commencement of legitimate cases

10. The introduction of a guaranteed statutory minimum return to protect group members' rights to receive a proportionate amount of proceeds in all cases has an adverse impact on broader interests in access to justice to pursue a range of important rights through the class actions regime.

11. A guaranteed minimum return will render some representative proceedings unviable at the outset. This is likely to disproportionately impact actions where the monetary remedy, either individually or in aggregate, is at the lower end or the remedy is non-monetary. However, there are nevertheless important rights at issue in these types of cases, no less important than when the monetary award in the case is likely to be at the higher end. Particular examples where this is likely to disproportionately impact are cases concerning privacy and data breaches and a range of administrative decisions impacting on environmental issues, social services and migration for example.

12. A recent example of a class action giving rise to important questions of infringement of rights where the primary remedy sought or delivered was non-monetary is the case *Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No 2) [2020] FCA 215.* This was a class action brought on behalf of all persons detained at the Don Dale Youth Detention Centre over a given period, in which the stated objective of the proceeding was the improvement of conditions in youth detention in the NT, and the remedies sought included: (a) declarations; (b) injunctive relief; (c) a writ of mandamus. Ultimately, the proceeding settled for a non-monetary outcome, being the announcement of a 'Statement of commitments' by the NT Government regarding improvements to youth detention in that territory.

13. It is likely that a guaranteed statutory minimum return would have the unintended effect of preventing claimants from enforcing important non-monetary rights, such as occurred in this case, thereby unfairly increasing the barriers to access to justice in many important cases.

14. We can also observe a trend toward consumer claims since 2018/2019 in relation to a range of consumer goods and services which accords with the original objectives of the class actions regime.[2] The introduction of a guaranteed statutory minimum return is likely to place pressure on this nascent trend, which has been a positive development for ordinary consumers. This is particularly the case in consumer class actions that raise legitimate and significant legal issues, but are more limited in the scale of impact. For example, in a case related to an allegedly misleading property investment or other financial product marketed to a particular demographic or geographic location. It would be an undesirable outcome if consumer access to seeking redress through class actions was constrained by the imposition of a blunt metric assessed on the basis of the scale of the aggregate loss.

15. While legal and funding costs are variable, there is a certain baseline expense to conducting a representative proceeding. It is obvious to say that legal costs do not move in relationship to the likely proceeds generated by the case, but instead to the novelty, complexity and extent of legal work required to effectively pursue the case to a successful resolution on behalf of group members. While class actions reduce these costs by effectively spreading them across a large number of claimants, in almost all instances class members are still not able to pay for the costs of prolonged litigation upfront. Accordingly, in the absence of litigation funding, many legitimate claims would simply not be able to be pursued due to the inequality of resources as between the claimants and the respondents. For people with such claims, litigation funding is indispensable. It is the difference between facing insurmountable economic barriers to taking any legal action, to achieving a meaningful remedy.

16. However, a guaranteed statutory minimum return will result in any representative proceeding where, the upfront assessment is that legal and funding costs might exceed 30% of the estimated proceeds on behalf of all group members, being very unlikely to proceed from the outset. The danger with over-reliance on data regarding the proportionality of the outcomes on a selection of resolved cases, is that this greatly under-states the difficulty of the upfront risk and cost assessment in an environment of high uncertainty. It is these difficult upfront assessments which determine whether a particular legitimate case secures a funding arrangement and proceeds or not.

Creating an unfair playing field

17. A second fundamental issue with the proposal to limit the costs that may be incurred by plaintiffs in class actions is that it is a restriction which applies only to one side of any piece of litigation. Accordingly, such a reform would imbed an entirely inappropriate degree of unfairness and inequality into the legal system.

18. Applicants seeking to enforce their legal rights would have a *de facto* limit placed on the legal and funding costs they can expend, while defendants would have no such limit. This sort of power imbalance and inequality of arms between ordinary

[2] Enabling consumer redress was one of the original objectives of the class action regime introduced in Australia, see the Australian Law Reform Commission Report 66 [2.68]. An analysis of the first 25 years of class actions in Australia found that just 9% of proceedings commenced over that period may be characterised as consumer claims (see Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: The First Twenty-Five Years of Class Actions in Australia* (Report No 5, July 2017). In 2018/2019, consumer protection claims represented around 30% of all claims filed.

claimants and well-resourced defendants is precisely what the class actions regime is intended to avoid.

19. Further, this one-sided limitation would create perverse incentives and opportunities for abuse by opposing litigants. As the Full Court of the Federal Court of Australia observed, in *Perera v GetSwift Limited* [2018] FCAFC 202, there are significant risks that arise when a respondent is able to ascertain *"a reasonable understanding of the approximate size of the "war chest" available for the case against it"*. In such cases:

    "… experience teaches that respondents sometimes engage in trial by attrition and endeavour to use up an applicant's resources to obtain an advantage. Respondents are also likely to understand that the applicant's solicitors may be less inclined to undertake the necessary work if they are approaching or have exceeded the amount allowed for costs, and/or to understand that the funder may put pressure on the applicant to settle in such circumstances. The Court should be careful to avoid the interests of the applicant and group members being damaged in this regard."

20. The proposal of a guaranteed statutory minimum return, presently under consideration by Treasury, would create these dynamics observed by the Full Federal Court in *every* class action. Introducing an effective "cap" that is not subject to the discretion of the Court, exacerbates the potential for tension between group members' and their legal teams in circumstances where the amount allowed for costs is approaching or has been exceeded. Such tensions disadvantage applicants in the context of making decisions about pursuing the most effective litigation strategy to obtain a successful outcome in the interests of group members. Further, it gives rise to perverse incentives for respondents to engage in wasteful strategies such as trial by attrition and damaging the interests of group members in precisely the manner warned against by the Full Court. Clearly, this would represent poor public policy.

21. The Court having broad discretion to supervise legal costs and funding fees is the best mechanism to manage these unhelpful dynamics in a flexible, responsive and appropriate manner in the interests of group members. For example, this is an important feature of the recently introduced Group Costs Order regime in Victoria, where such orders are subject to the discretion of the Court both as to whether to make such an order, and the appropriate rate. This allows the Court to consider the circumstances of a particular case and monitor and respond if those circumstances change over the course of the litigation.

Inappropriateness of assessing proportionality of costs based upon hindsight alone

22. Despite careful upfront assessment in relation to proportionality, it is common that litigation takes an unforeseen turn that results in legal costs becoming increasingly disproportionate to the expected proceeds on successful resolution. It is generally accepted that despite operating within various robust controls and professional obligations, litigation can be long, expensive, complex, adversarial and uncertain. We exclude from this discussion any scenario where the cost increase is due to some fault or lack of care on behalf of the lawyers conducting the case.

23. The importance of this principle has been repeatedly recognized by experienced Federal Court judges. For example, in *Blairgowrie Trading Ltd v Allco Finance*

Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330, Beach J noted (emphasis added):

*"… **what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit**. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending $0.50 to recover an expected $1.00 may be proportionate if it is necessary to spend the $0.50. In the former case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, **one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved.** Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, **circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed**. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question."*

24. Clearly, an undifferentiating statutory guarantee on returns to group members would offend against this principle, causing unjust outcomes in many instances.

Lack of clarity on application of proposal to judgments

25. A further important issue is that it is unclear how the concept of a guaranteed statutory minimum return from "gross proceeds" would apply if a class action is resolved by way of a Judgment of the Court, rather than a settlement on behalf of the class. In many cases, at judgment the Court will make orders for compensation and the payment of the legal costs of the lead applicant(s) *only* in the representative proceeding.

26. As a result, while the judgment delivered may result in binding findings that assist a very large class, the damages awarded may be very modest – often in the thousands or tens of thousands of dollars.

27. Clearly, it would not be practicable to limit the applicant's expenses to just 30% of that amount.

28. Moreover, there is real uncertainty as to how the imposition of a guaranteed statutory minimum return would interact with the 'indemnity principle' – that is, the principle that a successful litigant is not entitled to an adverse costs award of an amount that is greater than he or she would be liable to pay.[3] If the effect of a guaranteed minimum return to group members was to reduce the amount that successful claimants are able to recover for their legal costs at the time of judgment, this would represent a significant undermining of one of the bedrock principles of our legal system – the 'loser pays' rule.

[3] See *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 for a relatively recent articulation of this principle

Faulty premise underlying recommendation

29. Recommendation 20 of the Report is expressly based on the premise that *"some class actions law firms and litigation funders"* have endorsed the introduction of a 70% minimum gross return to group members. Statements to this effect appear at least eight times in the Report.

30. In fact however, no class actions law firms or funders have, to our knowledge, endorsed this reform. The only footnote in the Report which purports to provide a source for this proposal is not to a submission to the Parliamentary Joint Committee from a law firm or funder, but is to an article published in the Australian Financial Review on 11 November 2020 titled *'Litigation funding rules on the brink as dissent grows'*.

31. That article describes a proposal by One Nation Leader Pauline Hanson for funded class actions to be exempt from the then-proposed (now in-force) MIS regime if the funder guarantees a return of at least 70% to group members. Importantly therefore, the proposal by Senator Hanson was *not* to impose a one-size-fits-all restriction on the costs that may be incurred by plaintiffs in a class action, but to offer regulatory relief where such a minimum guarantee *can* be provided.

32. Thus, the proposal set out in Recommendation 20 is based on a fundamental error. Contrary to what is stated in the Report, it is <u>not</u> a proposal that has been recommended or endorsed by those with experience in the class action regime. As set out in the other sections of this document, there are good reasons why that is so.

Better alternative is to enhance the Court's powers to supervise funding costs

33. As all class actions must be resolved by Court order (whether by way of final judgment or Court approval of an agreed settlement), information regarding the fees charged by lawyers and litigation funders in each case is typically published by the Court and therefore made publicly available.

34. Settlement or discontinuance of a representative proceeding requires the approval of the Federal Court. If the Court gives approval, s 33V(2) of the Federal Court of Australia Act 1976 (FCAA) confers power on the court to make such orders as are just with respect to the distribution of money paid under a settlement or paid into Court. Typically deductions for legal and funding costs and the formula for the distribution of the balance of any settlement proceeds are set out in a detailed settlement distribution scheme. If the Court is satisfied that the proposed settlement and distribution is fair and reasonable and in the interests of group members it will make orders for the distribution of the settlement.

35. In respect of legal fees, the Court typically requires the assessment and independent opinion of a costs consultant that the fees are fair and reasonable. This provides adequate and robust oversight of the legal fees. However, the regulation of litigation funding fees is less structured and direct and we support reforms targeted to this issue as a means of promoting better outcomes for group members.

36. We note that the PJC Report includes a number of recommendations about enhancing the Court's powers to regulate litigation funding fees that we believe are of merit of further consideration. These recommendations address the objective of controlling funding costs and protection for group members but also preserve flexibility and are therefore less susceptible to consequences that may in fact decrease access to justice for ordinary Australians.

37. We note the following recommendations:

    (a) Recommendation 8: Funding agreements- introduce a requirement under the FCAA to require a litigation funder to provide a complete indemnity against adverse costs;
    (b) Recommendation 9: The Federal Court not approve a funding agreement unless the litigation funder provides a complete adverse costs indemnity;
    (c) Recommendation 10: Introduce into the FCAA a statutory presumption that a litigation funder in a class action provide security for costs;
    (d) Recommendation 11: Amend the FCAA to introduce a requirement that any funding agreement must be approved by Court to be enforceable and to extend powers to the Federal Court to reject, vary or amend the terms of any litigation funding agreement as the "interests of justice" require;
    (e) Recommendation 12: Introduce into the FCAA a stipulation that all funding agreements for class actions in the Federal Court are governed by Australian Law and subject to the jurisdiction of Federal Court; and
    (f) Recommendation 15: Amend the FCAA so that the Court can make costs orders against a litigation funder.

38. This collection of recommendations, or as a priority recommendation 11, would give the Federal Court direct power to control litigation funding fees.

39. Even in the current environment where there is a degree of uncertainty about the Court's powers to regulate litigation funding agreements, it is clear that the Courts have utilised existing powers to increase control over litigation funding fees in the context of settlement approvals. In Slater and Gordon's submissions to the PJC we provided an analysis of the the observable and steady decline in litigation funding fees since the data to October 2018 reviewed in the ALRC Report.[4]

40. One such mechanism has been the "Common Fund Order" ordered in a great many class actions since the decision of the Full Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 338 ALR 188; [2016] FCAFC 148 but brought into uncertainty in light of the decision of the Higher Court in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 (BMW). BMW concerned a challenge to the power of the Court to make a common fund order pursuant to s33ZF of the FCAA (and s183 of the Civil Procedure Act 2005 (NSW)). The High Court found that the Court did not have power to make common fund orders at an early stage under s33ZF. However, residual uncertainty exists as to whether the Court still has power to make a common fund order as part of a settlement approval under s33V, where such orders have played a useful role in allowing the Court to supervise funding fees.

41. Common Fund Orders grapple with the complexity that group members are not parties to the litigation and in an open class action where there has been no

[4] Slater and Gordon Lawyers, *Submission to the Parliamentary Inquiry into Litigation Funding and the Regulation of the Class Action Industry* [1.4]-[1.7].

bookbuild are commonly not parties and therefore not contractually bound to contribute to legal or funding costs. Yet, at the point of settlement approval, the Court is asked to arrive at some equitable means of distributing the costs of the litigation across all the group members who stand to benefit from a distribution from the proceeds. Absent an order under s33V(2), a group member will have no contractual obligation to pay any share of the costs or litigation funding charges in bringing the proceeding to completion by settlement or judgment. A line of authority has developed that the Court's settlement approval powers allow the Court to act in a supervisory capacity and are not bound to accept contractual rate in litigation funding agreement as part of s33V settlement approval.[5]

42. Common Fund Orders within the scope of settlement approval under s33V have provided a mechanism to bring the amount of the funding fee under the Court's control and have served a role in driving down litigation funding fees. The current uncertainty around Common Fund Orders at settlement approval stage could be resolved by legislative change as part of the package of powers at the Court's disposal to supervise litigation costs and ensure a fair mechanism for distribution of legal and funding costs across group members. This is particularly applicable to large open class consumer class actions where a "book-build" or a process to sign up very large numbers of group members with small individual monetary claims creates a wholly inappropriate barrier to access to justice for such consumers.

43. The developments within the Court system in connection with Common Fund Orders demonstrate that, where the Court is given powers to regulate funding terms, this significantly improves outcomes for group members, including in respect of proportionality of costs. With this in mind, we consider that recommendations 8 to 12 and 15 of the Report represent much more effective and appropriate reforms that would achieve the objective of delivering higher returns to group members, without introducing the significant issues and unworkability of recommendation 20.

Conclusion

44. Measures to protect group member interests in receiving a proportionate return from the proceeds of representative proceedings ought not come at the expense of members' interests in access to justice that Pt IVA is primarily designed to facilitate. Nor should those measures be introduced if they will introduce significant unfairness and uncertainty to the legal system, in a manner that disadvantages ordinary Australians.

45. The objective to protect group members against what are perceived to be 'disproportionate' litigation funding costs is better achieved through giving the Court direct powers to regulate litigation funding agreements.

46. Increased regulation of litigation funding agreements by the Court addresses where the where the current regulatory gap lies in relation to litigation funding

[5] Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) [2018] FCA 1842 (23 November 2018) (Murphy J); Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433 (28 November 2016) (Murphy J); Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330 (31 March 2017) (Beach J); Mitic v OZ Minerals Ltd (No 2) [2017] FCA 409 (21 April 2017) (Middleton J).

fees. Legal costs agreements are by contrast already subject to regulation and supervision by the Court.

47. Giving the Court additional powers addresses the objective that Recommendation 20 is targeting, without unintended adverse consequences on access to justice. A guaranteed statutory minimum return impacts adversely on access to justice considerations by:

(a) Imposing a barrier on the commencement of certain types of cases on behalf of ordinary Australians where important rights and redress are pursued but the monetary loss is moderate;
(b) Creating a risk to the equality of resources available as between group members and respondents by imposing a potential constraint on group members pursuing an effective litigation strategy to a successful conclusion, where respondents are not subject to an equivalent constraint; and
(c) Creating an incentive for respondents to engage in litigation by attrition to move costs towards the effective legislative 'cap' for strategic advantage and encouraging a litigation style that is wasteful of the Court's time and public resources.

48. Such adverse consequences are inconsistent with the fairness of the Australian legal system in general, and with the objectives of the class actions regime of the Federal Court in particular.

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