

# THE ALRC'S FINAL REPORT ON CLASS ACTION PROCEEDINGS AND THIRD-PARTY LITIGATION FUNDERS

25 February 2019 | Australia  
Legal Briefings

---

On 24 January 2019, the Commonwealth Attorney-General tabled in Parliament the Australian Law Reform Commission (**ALRC**)'s final report on class action reform: *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (**Report**).

Since the introduction of Australia's federal class action regime in 1992, there have been substantial changes in the class action landscape. The number of class action proceedings has increased substantially (in particular, shareholder class actions), and the class action regime has developed in parallel with the rise of third party litigation funding in this country. The funding market has grown rapidly since the High Court's 2006 decision in *Fostif*. These developments have raised complex challenges for the regime.

In preparing its Report, the ALRC engaged in extensive consultation with industry stakeholders, government agencies, academics, insurers, judges and members of the legal profession. The Report gives detailed consideration to the question of whether, and to what extent, class action proceedings and third party litigation funders should be subject to reform and increased regulation.

The ALRC has made **24 recommendations**, focusing on:

- a. providing the Federal Court with greater oversight over the management of class action proceedings;

- b. increasing regulation of litigation funders;
- c. the introduction of percentage-based fee arrangements (in limited circumstances); and
- d. improving management of conflicts of interest between lawyers, funders and clients.

## CASE MANAGEMENT

The ALRC proposes a number of changes to the Federal Court's case management powers and procedures. These include giving the Court increased powers and oversight with regard to the constitution of class actions, competing class actions and settlement approval.

The ALRC recommends that the federal class action regime be amended so that all class actions are required to be initiated as 'open' classes (as distinct from 'closed' classes, restricted to persons who have signed up with a particular firm of solicitors and/or a funder). The ALRC considers that this is preferable from the perspective of enhancing access to justice.

To tackle the challenges presented by competing class actions, the ALRC suggests that, where there are two or more class actions with respect to the same or related matters, the Federal Court should have express statutory power to "resolve" competing representative proceedings. The Commission considered whether to recommend the introduction of a US-style certification requirement, but concluded that it would not do so. Instead, it has made a recommendation that aims to "augment" the existing powers of the Court to make decisions about which claim or claims be permitted to go forward, and in what form. The Commission observed that the Canadian carriage motion process may provide a useful model for Australia, and suggested a process by which there might be a "selection hearing" at an early stage.

With regard to settlement approval, the ALRC proposes changes to the Federal Court Practice Note which would permit the Court to appoint a referee to assess the reasonableness of legal costs charged in the proceeding, and also that a tender process might be conducted for the work involved in administering a settlement.

The ALRC also recommends that the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) be amended to confer exclusive jurisdiction on the Federal Court to deal with representative proceedings arising under those acts.

## FUNDER REGULATION

There has been a great deal of interest in the potential reforms that the ALRC might recommend in the area of litigation funding. The Report observes that funders play an important role in providing access to justice. However, it also expresses concern as to risks associated with third party influence over the conduct of proceedings.

The ALRC stops short of recommending a licensing regime, which had been contended for in some submissions to the Commission. Instead it proposes to address these concerns by subjecting funders to additional regulation, including that:

- a. there be greater oversight of the litigation funding arrangement;
- b. funders be required to indemnify lead plaintiffs against costs orders;
- c. there be a statutory presumption that funders (and lawyers funding representative proceedings) will provide security for costs in a form that is enforceable in Australia; and
- d. the Federal Court have express power to reject, vary or amend the terms of any funding agreement and to award costs against funders and insurers who fail to comply with the overarching purposes of the *Federal Court of Australia Act 1976* (Cth) to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively and efficiently as possible.

## PERCENTAGE-BASED FEES

Presently, there is a ban on 'contingency fees' in Australia, which prohibits fee arrangements involving the provision of legal services in exchange for a percentage of the amount recovered from the litigation. The ALRC proposes to change this, by permitting percentage-based fees in limited circumstances, and subject to the leave and oversight of the Federal Court. The Report concludes that this may serve the objective of providing greater return to class members, and removing economic disincentives to medium-sized class actions.

## CONFLICTS

The ALRC also examined the potential for actual and perceived conflict of interests between funders, solicitors, the representative plaintiff and group members. To mitigate and protect against this, it makes several recommendations, in particular, that:

- a. solicitors and law firms be prohibited from having financial and other interests in a third party litigation funder that is funding the same matter in which the solicitor or law firm is acting;
- b. funders report annually to ASIC regarding their compliance with obligations to avoid or mitigate conflicts of interests; and

- c. the first notices provided to potential class members by legal representatives be required to clearly describe the obligation of legal representatives to avoid and manage conflicts of interest, and to outline any conflicts in that particular case.

## SUBSTANTIVE LAW

Finally, the ALRC has recommended that the Government commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading or deceptive conduct contained in the *Corporations Act* and the *ASIC Act*.

## WHERE TO FROM HERE?

The Federal Attorney-General has stated that the Government will carefully consider the Report's recommendations and further engage with key stakeholders to develop its response. It remains to be seen if any of the 24 recommendations will be implemented and when, particularly in view of the upcoming federal election.

[Follow this link to view a series of short videos by senior members of our class action team on the main themes from the ALRC Report.](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**RUTH OVERINGTON**  
PARTNER,  
MELBOURNE  
+61 3 9288 1946  
ruth.overington@hsf.com



**DAMIAN GRAVE**  
PARTNER,  
MELBOURNE  
+61 3 9288 1725  
Damian.Grave@hsf.com



**JASON BETTS**  
PARTNER, SYDNEY  
+61 2 9225 5323  
Jason.Betts@hsf.com



**GREGG ROWAN**  
PARTNER,  
MELBOURNE  
+61 3 9288 1568  
Gregg.Rowan@hsf.com



**ALAN MITCHELL**

PARTNER,  
MELBOURNE

+613 9288 1401  
Alan.Mitchell@hsf.com



**PETER HOLLOWAY**

PARTNER,  
MELBOURNE

+61 3 9288 1693  
Peter.Holloway@hsf.com



**ANTE GOLEM**

PARTNER, PERTH

+61 8 9211 7542  
Ante.Golem@hsf.com



**CAMERON HANSON**

PARTNER, SYDNEY

+61 2 9225 5224  
cameron.hanson@hsf.com

---

## LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2019

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2019