11 June 2020

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email: corporations.joint@aph.gov.au

Dear Sir/Madam,

Parliamentary Inquiry into litigation funding and the regulation of the class action industry

We appreciate the opportunity to make a submission in response to the above Parliamentary Inquiry.

About AustralianSuper

AustralianSuper is one of Australia's largest superannuation funds with over A$168 billion in assets under management as at 31 March 2020. We are a profit for members superannuation fund with over 2.2 million members representing over one in ten working Australians. At AustralianSuper we are committed to delivering the best possible retirement outcome to members.

Our approach to participating in shareholder class actions

We participate in shareholder class actions where companies appear to have failed in their disclosure obligations and see class actions as a cost-effective way to recover members' losses caused by a company's genuine breach of law. Our approach involves considering the merits of each claim and we seek to only participate in class actions as a governance mechanism of last resort. From our viewpoint, where the interplay between the legal system, shareholders and companies is effective, class actions can be a meaningful means to hold companies accountable and enhance better corporate governance, resulting in long term value for our members.

Challenges faced

In recent times, we have observed certain developments in the Australian legal landscape which have resulted in challenges for us and other institutional shareholders in assessing and / or participating in class actions. Our concerns are broadly concentrated on the following issues:

1. being asked to sign-up to class actions commenced as opt-in / closed matters from the outset, at which time there is limited available information to assess the merits of a claim;
2. incidences of competing claims based on almost identical issues being run by various combinations of plaintiff firms and litigation funding groups;
3. increase in number of litigation funders in the market contributing to the higher(?) number of competing claims; and
4. high costs of participation due to litigation funding fee structures and the lack of alternatives available.

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Key points

With this background in mind and our experience in witnessing the life cycle of various class actions to date, we are supportive of changes in law as part of this Parliamentary Inquiry and recommendations proposed by the 2019 Final Report of the Australian Law Reform Commission (**ALRC**) – *Inquiry into Class Action Proceedings and Third Party Litigation Funders* which seek to:

- ensure that class actions be commenced on an open class (opt out) basis;
- provide a case management procedure and certainty in process for competing class actions; and
- reduce costs in participating, maximizing settlement distributions to shareholders.

We also support the regulation of litigation funders provided that if a licensing regime is introduced, it is appropriate for funders.

Overall, we are broadly supportive of changes in law which enable access to justice and facilitation of meritorious claims to ensure good corporate governance over the long term.

We do not support calls for reviewing the continuous disclosure and misleading and deceptive conduct laws as we believe these operate effectively in ensuring market integrity for the protection of shareholders. However, efforts to improve the class action system will better serve shareholders' ability to seek redress for corporate malfeasance.

Support for open class actions

We maintain our position from our 2018 submission as part of the ALRC Inquiry in favour of changes to *Part IVA of the Federal Court of Australia Act 197*6 (Cth) with respect to ensuring class actions are initiated as open class actions. We believe open class actions enable fair and equitable outcomes to all participants by allowing: (1) shareholders the opportunity to assess the merits of a claim as and when information becomes available; and (2) participation by shareholders who may not have the time or means to assess the claim. This system would deter the bringing of frivolous claims whilst resolving inefficient use of resources by our Fund in assessing claims and by companies in defending claims. Our concern stems from our experience of being required to sign-up to the claim as part of a closed class action at the time where limited information is available to fully assess the merits of the claim. This registration, whilst on a no-win-no-fee basis, can be used by litigation funders as demonstrating institutional investor support for the allegations raised against a company as part of their book building process.

The recent High Court decision in December 2019 in the Brewster case and subsequent decision of the Federal Court in the Vocus case has raised uncertainty around the power of the court to issue common funding orders. We believe that legislative reform is necessary to clarify the court's powers in making common fund orders. This would be an equitable means of distributing the cost of litigation across class members and preventing the fall back by litigation funders to book-build to establish financial viability of running a case, which in turn supports an open class proceedings based system.

Addressing competing class actions

We believe that incidences of multiple class actions based on overlapping claims and class members do not serve to promote the goals of the class action system. In our experience, examining multiple claims is a time-consuming process. It involves assessing the legal basis, potential success of each competing action and weighing these up against proposed fees by the lawyers and the funders. We therefore support the ALRC's recommendations for courts to be given express power to resolve competing representative proceedings and for the Federal Court of Australia's Class Actions Practice Note (GPN-CA) to be amended to provide a further case management procedure for competing class actions.

Reducing costs for participation

Our comments on enabling the reduction of costs for participation and ensuring a higher remaining amount to be distributed to shareholders from settlement proceeds are as follows:

- we recognize the need to allow class action lawyers and litigation funders to be remunerated fairly for work undertaken and the risk of non-payment. However, over the years we have seen a significant proportion of settlement distributions be consumed by the legal and litigation funder fees. The settlement distributions received range from 15%-30% as a proportion of the loss estimate provided at sign-up stage of the case;
- we support the introduction of contingency fee arrangement laws as this would introduce healthy competition in the industry and reduce costs for participation, provided that the system ensures that conflicts between the lawyer/client relationship and their commercial interests are appropriately managed;
- we reiterate our support of the ALRC's recommendation for the clarification of the court's power through statute:
    - to appoint a referee in assessing the legal fees and disbursements charged in representative proceedings prior to settlement approval; and
    - to reject, vary or set commission rates for third-party litigation funding agreements; and
- if the court is granted power to reject, vary or set commission rates for third-party litigation funding agreements, we believe this should also be applied to contingency fee arrangements.

Regulation of litigation funders

We recognise that litigation funding can play an important role in supporting class actions. We foresee that introduction of any contingency fee laws together with a licensing regime akin to the Australian Financial Services Licence may inhibit the number of litigation funders participating in class actions. We are keen to see the preservation of healthy competition in funding models to support the class action system, but believe that regulation of litigation funders whether through a licensing regime or court supervision should be on the basis of ensuring trust and transparency for shareholders. We require a base level comfort that funders have adequate risk management systems in place, and assurance of sufficient resources (including capital, technology and human resources) and that services provided and communications with class members are honest and accurate. Whilst the litigation funding agreements can provide a contractual mechanism to facilitate this, the rise in number of domestic and international funders makes it difficult to undertake due diligence on these factors. Each litigation funding agreement

varies in length and detail. As such, regulatory oversight and entailing consequences for non-compliance would provide the necessary safeguards for shareholders.

We emphasise that if a licencing regime were to be introduced, it should be appropriate in order to achieve the right balance in ensuring competition in funding class actions whilst not encouraging the funding of spurious actions.

Continuous disclosure provisions

We believe that the continuous disclosure obligations and misleading and deceptive conduct laws are critical to promoting market integrity, protecting shareholders, and maintaining the strong reputation of Australia's financial markets. We believe the current regime functions well. The class actions system and the consequences for companies and boards in not complying, operates as a reminder to avoid continuous disclosure breaches. As such, we do not support calls for commissioning a review of the continuous disclosure laws.

We note the often cited research of Professor Morabito[1] which shows that the comparative level of class action activity in Australia is either on par or behind that of other jurisdictions. This in our view, is evidence of the effective operation of the current continuous disclosure regime.

Summary

In summary, we call for the following changes to the operation of class actions as has been identified above, being:

1. class actions should be commenced on an open class (opt out) basis;
2. clarifying the powers of courts to manage competing actions;
3. appropriate regulation of litigation funders; and
4. reducing participation costs to maximise settlement distributions for shareholders.

We do not believe reviewing the continuous disclosure laws are necessary as they are currently operating well.

Please do not hesitate to contact the undersigned should you wish to discuss any aspects of our submission further.

Yours sincerely,

Andrew Gray
Director – ESG & Stewardship
AustralianSuper

[1] V Morabito, "An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia" (11 July 2018),