



INSTITUTE OF
**PUBLIC
ACCOUNTANTS®**

**Response to ALRC
Discussion Paper
on Class Action
Proceedings and
Third Party
Litigation Funders**

Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the Discussion Paper issued by the Australian Law Reform Commission with respect to its Inquiry into Class Actions and Third Party Funding.

The IPA is one of the three professional accounting bodies in Australia, representing over 35,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants, but also small business and their advisors. The IPA was first established (under another name) in 1923.

The IPA's submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA Submission has benefited from consultation with Rachel Burgess, Researcher, IPA-Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou on +61 3 8665 3100.

Yours sincerely

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IPA Submission

Australian Law Reform Commission
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The IPA-Deakin SME Research Centre is grateful for the opportunity to make a submission in response to the Australian Law Reform Commission Discussion Paper issued in respect of its *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*.

The IPA-Deakin SME Research Centre will shortly be releasing its second Small Business White Paper (SBWP II) which addresses a range of issues of relevance to small business in Australia. In the chapter on Competition Law, the SBWP II raises the issue of access to justice. Although the issues addressed within the chapter focus on access to justice in the context of competition law, the suggestions made have wider application, and many are relevant to this ALRC Inquiry. Accordingly, the IPA has extracted relevant aspects of the forthcoming SBWP II for this submission.

The options for obtaining access to justice for small business in relation to competition law breaches include representative actions, private damages claims and requesting the ACCC to prosecute. However, as noted by the Harper Review¹, “access to remedies has been a roadblock for many small businesses” suggesting that these options are not working in their current form for small business. One of the solutions offered by the SBWP II is the establishment of a voluntary redress scheme, akin to the one recently established in the UK. The IPA is pleased to see this option also being raised by the ALRC in its Discussion Paper.

As private damages claims and prosecution by the ACCC are not relevant to the current ALRC Inquiry, we do not address these points in this submission. Instead, we focus on representative actions and the establishment of a voluntary redress scheme.

Improving representative actions

Under Part IVA of the *Federal Court of Australia Act 1976*, a representative action may be brought on behalf of a group provided there are at least 7 members of the group with a common issue (section 33C). The objectives of “introducing representative proceedings [into Part IVA] were to promote the efficient use of public and private resources in resolving disputes and enhance access to justice by providing a means by which similar claims which, by themselves, might be too small to be worth pursuing, could be considered together”².

The number of representative actions for breaches of competition law in Australia are low compared with other categories of claims, with only 5 claims (0.9%) by cartel victims in the 25 years between 1992 and 2017³. There are more actions for consumer protection claims (47 in

¹ The Competition Policy Review Final Report available at <http://competitionpolicyreview.gov.au/final-report/>, Accessed 23 July 2018

² Australian Government, Attorney-General's Department, Access to Justice Taskforce (2009). *A Strategic Framework for Access to Justice in the Federal Civil Justice System*. Canberra: Australian Government, p 124

³ Morabito, Vince (2017), *An Empirical Study of Australia's Class Action Regimes – Fifth Report, The First Twenty Five Years of Class Actions in Australia*. Available at SSRN: <https://ssrn.com/abstract=3005901> or <http://dx.doi.org/10.2139/ssrn.3005901>

25 years, amounting to 9.1% of all claims)⁴. The recently successful ACCC action against Reckitt Benckiser for misleading and deceptive conduct in relation to its Nurofen Specific Pain Relief⁵ products provides a good example. Reckitt Benckiser was fined \$6 million by the ACCC. In addition, the Federal Court approved a settlement deed under which Reckitt Benckiser will pay \$3.5 million into a fund to compensate consumers who purchased the products⁶.

More research needs to be undertaken to understand why there are so few competition law representative actions in Australia. Reasons may include:

(a) Difficulties in obtaining the evidence required to prove a competition law breach.

The investigatory powers of the ACCC are usually needed to uncover the relevant evidence. Facilitating ‘follow on’ actions (i.e. where an action is brought after a breach is proven by the ACCC) may be more successful than ‘stand-alone’ actions (where the claimant needs to prove the breach), provided the evidence of the ACCC can be utilised in the follow-on proceedings. It is understood that parties can seek discovery of ACCC information and documents, other than where the information or documents was provided in confidence and relates to a suspected cartel (section 157B, 157C Competition and Consumer Act (CCA)).

(b) The nature of the ‘representative’ that can bring proceedings.

Australia’s representative actions require the ‘representative’ to have standing to bring the claim (section 33D), although the Full Federal Court has accepted that this requirement is satisfied where the applicant has legislative standing to bring an action. This has enabled the ACCC to bring representative proceedings on behalf of consumers based on section 87(1A) and (1B) CCA⁷ (although the ACCC has not brought any representative actions since 2003⁸).

The requirement for the representative to have standing to bring the claim itself necessarily confines the list of those who could be applicants, as well as increases the risk of a conflict of interest arising⁹. Some of these issues may be able to be addressed by expanding the scope of permitted representatives, for example, to include an industry association body.

The other concern, which the ALRC is examining closely in this Inquiry, relates to funding, as an individual may be reluctant to act as a representative without some assurances regarding the payment of legal costs incurred¹⁰.

Recent amendments to the UK Competition Act 1998, permit a representative approved by the UK Competition Appeal Tribunal (CAT) to commence collective proceedings for damages for breach of competition law, even where the representative itself has not suffered loss (section 47B(8) Competition Act)¹¹. This reform was

⁴ Id.

⁵ *ACCC v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181

⁶ Settlement Deed available at http://www.fedcourt.gov.au/_data/assets/pdf_file/0013/45040/NSD273-2016-Deed-31Jul2017.pdf, Accessed 30th December 2017

⁷ Morabito, V and V. Wayne *Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions* (2017) 36 Civil Justice Quarterly 213 at 217

⁸ Ibid, n 4.

⁹ Emmerig, J and M. Legg, “Twenty-Five Years of Australian Class Actions – Time for Reform”, (2017) 36 Civil Justice Quarterly 164, pp 167-168

¹⁰ Ibid, n 9, p 217ff

¹¹ Amended by Schedule 8 of the *Consumer Rights Act 2015*

introduced as part of a suite of changes designed to offer greater access to justice for individuals and small businesses where there has been a breach of competition law:

“Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law”¹².

The representative must satisfy the CAT that it is ‘just and reasonable’ to be appointed as a representative and the CAT Rules set out criteria that will be applied to determine if this test is satisfied (Rule 78(2)). The first application for a collective proceeding order was brought before the CAT in *Dorothy Gibson v Pride Mobility Products Limited*¹³. The CAT authorised Gibson, as the General Secretary of the National Pensioners Convention and who had not suffered any loss, to act as the representative for the collective proceedings.

- (c) Claims of this nature are often made against very large firms with deep pockets, making this a potential deterrent for claimants in terms of weighing up cost/benefits.
- (d) The sheer complexities of a competition law case may deter applicants (and their legal representatives)¹⁴.

Further research in this area is needed.

Compensation schemes

As highlighted in the ALRC Discussion Paper, the UK government has introduced a voluntary redress scheme (compensation scheme) for breaches of competition law. This initiative was part of a package of reforms designed to assist consumers (and small business) to access justice for competition law breaches¹⁵. Interestingly, these changes coincided with an increase in support for private actions for damages following the passing of the EU Damages Directive¹⁶.

The UK’s voluntary redress scheme has been operative since 1 October 2015. Any party who has breached competition law may establish a redress scheme which must be approved by the Competition and Markets Authority (CMA) (the equivalent of the ACCC). The burden of establishing the scheme and proving that it is appropriate to compensate victims is on the offending business. Once approved by the CMA, a consumer or small business who has suffered loss as a result of the competition law breach can claim an agreed amount in damages from the offender. The CMA can offer a reduction in penalty for offenders that agree to a redress scheme.

¹² Department of Innovation Business and Skills, *Private Actions in Competition Law: A consultation on options for reform – government response*. London: DIBS, 2013. Available at <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> (accessed 23 July 2018)

¹³ [2017] CAT 9; see also *Walter Hugh Merricks CBE v Mastercard Inc* [2017] CAT 16 where the proposed representative (a solicitor and a member of the class that had suffered loss) would have been authorised to act as representative (subject to changes to the funding agreement) however the collective proceedings application was refused on other grounds.

¹⁴ Discussion between Rachel Burgess (IPA-Deakin SME Research Centre) and Vince Morabito, December 2017

¹⁵ *Ibid*, n 11

¹⁶ Further information on the private damages issue can be provided, if necessary.

Bearing in mind the difficulties of successful litigation, the benefits for small businesses of being able to claim compensation in this way are apparent. The voluntary redress scheme also offers benefits for businesses in breach of competition law as it:

- (a) provides certainty in terms of the potential liability for private damages (i.e. a claimant who has benefited from the scheme is unable to institute a separate action for private damages); and
- (b) may result in a reduced penalty.

The ACCC has the power to seek an order for compensatory damages under section 87(2)(d) CCA but the obvious difficulty with this approach is that it involves the court process. A compensation scheme similar to that introduced in the UK does not require the involvement of the court or tribunal and is therefore preferable from an access to justice perspective.

In the context of competition law only, a similar outcome could be achieved in Australia using the section 87B CCA *enforceable undertaking* procedure. A good recent example is the enforceable undertaking given to the ACCC by Coles Supermarkets Australia Pty Ltd following allegations of unconscionable conduct. Coles undertook to appoint an independent arbiter (former Premier of Victoria, Jeffery Kennett) to review its conduct vis-à-vis the suppliers in question and assess whether they were entitled to any refunds. This was recognised by the court as “an important part of the resolution of this proceeding”¹⁷. The section 87B undertaking can be enforced in the courts, if breached by the party giving the undertaking.

The IPA is supportive of the wider use of the section 87B procedure by the ACCC to encourage those in breach of competition law to offer undertakings of the kind given by Coles. It is believed that this would be one way to assist in achieving redress for small businesses suffering loss as a result of a competition law breach.

Proposal 8-1 Establishment of a Federal Collective Redress Scheme

The Discussion Paper proposes the establishment of a federal collective redress scheme and asks what principles should guide its design.

In principle, the IPA-Deakin SME Research Centre considers that a scheme of this nature would be beneficial to small businesses as it could provide a means of redress which is otherwise usually unattainable.

Issues that will need to be considered include:

- (1) Will the scheme be administered by the relevant statutory authority?

The IPA-Deakin SME Research Centre considers that the relevant statutory authority would be best placed to approve (or determine) the terms of a collective redress scheme. In the UK, it is the competition regulator that has the power to approve a redress scheme offered in relation to a competition law breach. The ACCC would be best placed to consider a redress scheme relating to competition or consumer law breaches, and ASIC in relation to corporations law breaches, and so on.

¹⁷ *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at para 123

- (2) Will the scheme be voluntary for businesses, as it is in the UK? If so, there will need to be incentives for a business to offer a redress scheme.

Like the ALRC Discussion Paper, the SBWP II acknowledges the potential incentives that a redress scheme could provide in the way of reduced fines and greater legal certainty. However, the experience in the UK suggests that the option of agreeing to voluntary redress may only be attractive if faced with a real prospect of a private claim for damages.

Although the UK scheme has been in operation since October 2015, as at November 2017 there had not been any approaches to the CMA for a voluntary redress scheme to be approved. Based on discussions with CMA staff¹⁸ at that time, this is believed to be due to the fact that businesses are 'waiting to see' whether they will face a large volume of private damages claims in relation to competition law breaches before 'volunteering' to provide redress. We also note that private damages actions have been further facilitated in the UK recently by the adoption of the EU Damages Directive.

In the SBWP II, it is noted that private damages claims for competition law breaches need to be encouraged in Australia, as the market could then be less reliant on the ACCC to bring action. Although small businesses are unlikely to be in a position to bring actions themselves, larger competitors could, and the risk of a private claim may itself, deter anti-competitive conduct. Significant reforms have taken place in Europe and the UK in the last 5 years to encourage private damages actions and Australia needs to consider similar reform. In this context, the threat of a private damages claim will also provide an added incentive to offer voluntary redress.

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¹⁸ Informal telephone discussions between Rachel Burgess and CMA on 23 November 2017