

11 June 2020

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

Dear Committee Members,

## **Litigation funding and the regulation of the class action industry inquiry**

Thank you for the opportunity to provide comment to the Parliamentary Joint Committee's inquiry, *Litigation funding and the regulation of the class action industry* (**Class Action Inquiry**).

Class actions provide Australians a valuable mechanism for accessing justice where systematic or repetitive conduct by the same party has caused similar harm to numerous individuals. Class actions also provide a substantive deterrent against wrongdoing where the likelihood of a single individual taking legal action may be low, and reduce the burden that running multiple cases separately would place upon the courts and legal system.

Our submission comments on the current class action process from a consumer perspective, and recommends reforms that would help protect the rights of consumers, particularly those who experience vulnerability.

### **About Consumer Action**

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

### **Previous submissions relevant to the inquiry**

Consumer Action has previously made submissions to inquiries into class action proceedings and third-party litigation funding that were undertaken by both the Australian (in 2018) and Victorian (in 2017) Law Reform Commissions. These submissions are still relevant to the current status of class actions and litigation funding in Australia today, and to speak to the terms of reference for the Class Action Inquiry.

We have accordingly **attached** copies of these submissions to inform the Committee's Class Action Inquiry.

## Ensuring settlement distribution schemes reach the most vulnerable

As noted in our 2017 submission to the Victorian Law Reform Commission, we are generally supportive of class action processes that are 'open', that is, they don't require each individual class member to have entered into a retainer agreement with solicitors and a funding agreement with a litigation funder. Open class actions can benefit consumers because they do not require engagement from a consumer to participate or benefit. They can also mean that it is more likely that consumer class actions proceed as these can commonly relate to losses that are small individually but large overall—where there are small individual losses, it is less likely that consumers will take the steps to 'sign up' with the lawyers and funders.

Where a settlement is reached in an open class action, or there is an award of compensation made, a settlement distribution scheme will be established. As part of the establishment of this scheme, class members are given an opportunity to opt-out. If a class member does not opt out, their relevant cause of action is bound by the outcome of the class action. Any independent legal rights will be extinguished.

As part of a class action settlement distribution scheme, class members will also then be required to proactively register to be eligible to receive compensation. If a group member fails to register by a certain date, they are not eligible to receive compensation. For class members that fall into this category, their legal rights have been extinguished but they have not received any compensation.

Our Centre has received contact from people in this situation, with Ruth's case study (below) being an example. Often, people have no idea that a class action is on foot. They may have not received or not understood any communication about the class action, or steps that they should take to opt-out or register. In particular, our experience is people experiencing vulnerability commonly fall into this category, including people:

- who have less stable living situations (which may be due to a range of vulnerabilities) are less likely to be contactable based on historical records from their interaction with the defendant;
- who do not speak English confidently or do not have access to the internet are unlikely to otherwise become aware of the existence of the class action; or
- who are dealing with issues like mental illness or family violence and may not be in a position to respond to a notification, even if they do become aware of it, in time.

### Case Study – Ruth's story

Ruth (name changed) has experienced significant ongoing financial difficulty, as well as periods of homelessness. Ruth entered agreements with Radio Rentals for electrical goods that rendered her a group member of the Rent Try \$1 Buy Radio Rentals class action.

The opt-out and registration dates for the class action were 31 January 2020. Ruth missed this date, as she only learned about the class action in February 2020. Ruth told us that she never received any notification of the class action, despite the fact that her mobile number had not changed in over 20 years. The lawyers acting for the applicant in the class action told us that they had sent her a text message notifying her of the class action, but had not sent her a letter (despite having a listed address for her).

After contacting the law firm acting for the applicant directly, Ruth was able to register to receive compensation for the class action, but it was too late for her to opt-out, meaning she could not pursue her claim separately. Allowing Ruth to register at this time was also contrary to notices on the law firm's website indicating to the public that registration had closed.

Ruth had also been owed repayments under a remediation scheme agreed to by Radio Rentals years ago. While Radio Rentals only reached her in February 2020 about this issue as well, there was no legal impediment stopping her from receiving this compensation.

We appreciate that there needs to be a way to properly identify recipients of settlement funds from a class action. However, in some circumstances there may be very good reasons that an individual fails to opt-out or register under a settlement distribution scheme.

As such, we recommend requiring settlement distribution schemes remain open for a longer period of time so that people who might benefit don't miss out inadvertently. Moreover, we recommend those responsible for contacting class members (particularly the wrongdoer who in many cases will have records which indicate how to contact class members) be required to take additional and proactive steps to identify and communicate effectively with class members. This should include liaising with consumer advocates, financial counsellors or appropriate community groups where appropriate to assist.

We also encourage consideration of whether, particularly where the wrongdoer is a regulated firm (e.g. a licensed credit provider or financial services provider), that class members, whose rights have been extinguished but have not received compensation, continue to nevertheless be able to raise disputes with external dispute resolutions schemes to seek compensation separately. This would help reduce the risk that vulnerable Australians may be left without compensation, and their other rights extinguished.

**RECOMMENDATION 1.** That settlement distribution schemes should be required to remain open for a sufficient period to reach vulnerable consumers.

**RECOMMENDATION 2.** That wrongdoers, and administrators of settlement distribution schemes, be obliged to take proactive steps to identify and communicate effectively with class members.

**RECOMMENDATION 3.** That class members who have not received compensation under a settlement distribution scheme for failure to opt-in are nevertheless able to make a complaint to an external dispute resolution scheme where one exists to seek compensation in relation to the same issues as that has been considered by the class action.

Please contact Policy Officer **Cat Newton** at **Consumer Action Law Centre** on 03 9670 5088 or at [Cat@consumeraction.org.au](mailto:Cat@consumeraction.org.au) if you have any questions about this submission.

Yours Sincerely,

**CONSUMER ACTION LAW CENTRE**

A handwritten signature in black ink that reads "Gerard Brody". The signature is written in a cursive, flowing style.

**Gerard Brody** | CEO