



SUBMISSION TO THE AUSTRALIAN CONSUMER LAW REVIEW

Slater + Gordon Lawyers

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Scope of Submissions

1. Slater + Gordon acknowledges the work of Consumer Affairs Australia and New Zealand in preparing the Australian Consumer Law Review Issues Paper and is grateful for the opportunity to make this submission.
2. This submission concentrates on the question of whether there are means to facilitate greater opportunities for consumers and businesses to use private action to enforce their rights under the Australian Consumer Law (**ACL**) (and where relevant, the *Australian Securities and Investment Commission Act 2001* (Cth) (**ASIC Act**)). The specific questions identified in the Issues Paper to be addressed are as follows:
 25. *Are there any barriers to consumers and businesses enforcing their rights and seeking access to remedies under the ACL? Are there barriers to private action that need to be addressed?*
 26. *What low-cost actions could consumers and businesses more readily use to enforce their rights?*
 27. *Are there any overseas initiatives that could be adopted in Australia?*
 28. *What are the experiences of consumers and business in dealing with ACL regulators? Could they play a greater role in promoting private action or take action in other areas that would help consumers enforce their rights under the ACL?*
3. Slater + Gordon is a leading provider of consumer legal services in Australia. We have built our reputation by providing specialist services in a range of practice areas including consumer law, commercial litigation, and class actions.
4. We believe some things set Slater + Gordon apart from other consumer law firms. This includes our multi-jurisdictional presence, our commitment to affordable legal services, our size, as well as our history of over 80 years of advocating for the socially and economically disadvantaged.
5. Thousands of everyday Australians and businesses contact Slater + Gordon each year seeking answers to a variety of legal problems, including consumer law issues. We are, in a real sense, on the front line when it comes to dealing with current trends in consumer law. This is because we provide advice and act for consumers and businesses as they navigate their way through the Australian Consumer Law (**ACL**) and the broader justice system every day.
6. The assistance that we provide to our clients that is of relevance to this submission falls into two broad categories: legal assistance through private individual actions and legal assistance through class actions. Both types of action are considered below.
7. Slater + Gordon has historically acted for a range of consumers who have brought claims under consumer protection laws for losses suffered – particularly as a result of the sale and use of unsafe goods. More specifically, prior to the introduction of the changes to the *Wrongs Act 1958* (Vic) (**Wrongs Act**) in Victoria limiting consumers' rights to compensation for injuries (and equivalent legislative amendments in other states), the firm represented consumers in a number of class action proceedings relating to the consumption of contaminated foods.
8. As is canvassed in further detail below, the introduction of restrictive personal injury thresholds has meant that losses of this nature caused by breaches of the ACL are frequently difficult if not impossible to recoup from responsible parties. Slater + Gordon continues to receive a large

volume of enquiries from members of the public in relation to injuries suffered as a result of defective or unsafe products. The lack of proper avenues of redress for such consumers forms the basis for the proposal set out at the end of this submission in relation to reforming thresholds for bringing personal injury claims in respect of breaches of the ACL.

9. As the Issues Paper notes, the ASIC Act contains a number of provisions which reflect those contained in the ACL, but which more specifically relate to financial services. Slater + Gordon has represented and continues to act for claimants against parties alleged to have breached ASIC Act provisions regulating misleading and deceptive conduct. Examples of such claims include:
 - (i) representative proceedings brought by shareholders against corporations listed on the Australian Securities Exchange for conduct including misleading and deceptive conduct in breach of the ASIC Act; and
 - (ii) claims against financial service providers or financial product issuers alleging misleading or deceptive conduct in the provision of financial planning advice or the promotion of financial products.
10. These provisions therefore play an important role in regulating the conduct both of listed entities and of financial product and service providers, thereby contributing to investor confidence that they have access to information to make informed decisions as investors and investment market participants. This submission includes proposals to remove barriers to claimants bringing litigation under the ASIC Act provisions, which we consider forms an important component of necessary reforms to the broader national consumer policy framework.

Executive summary

11. This submission considers the above questions through the lens of private actions, and in particular, the barriers which exist where consumers seek to bring actions under the ACL or ASIC Act on a representative basis. The focus of this paper is on identifying the need for a coordinated approach to improving access to justice for consumers.
12. Firstly, this submission identifies the complex array of barriers faced by consumers in seeking to defend their rights within the provisions of the national consumer legal framework. Specifically, these include prohibitive loss assessment thresholds and costs risks to consumers.
13. Secondly, this submission explores the role and value of private consumer actions (including class actions), including a discussion of the need for a cultural shift towards collaboration between public regulatory bodies and private entities, including legal representatives.
14. This submission then considers the role of litigation funding in reducing inequality of resources between consumers and 'deep-pocketed' opponents.
15. The final section of the submission presents proposals aimed at addressing the barriers faced by consumers seeking to resolve disputes through litigation, particularly in cases involving financial and resource imbalance between the relevant parties.

Barriers to private enforcement

16. The consumers and businesses that contact Slater + Gordon to discuss their potential consumer claims are frequently reluctant to bring claims under the ACL. This reluctance generally stems from:
- (i) A limited understating of how the legal system operates and concern at the costs, risks, and timeframes associated with commencing legal action;
 - (ii) Concerns at the heavy-handed tactics that corporations sometimes display in defending their conduct;
 - (iii) Concerns at the repercussions of initiating legal action, including retribution by more powerful and better-resourced corporations whom they rely upon for ongoing trade and commerce;
 - (iv) A perception that the justice system is costly and inefficient, and that the potential risks often outweigh the potential benefits, particularly in the commercial context where matters can be complex and require substantial legal and financial resources to pursue;
 - (v) The limited practical utility of consumers and businesses pursuing small value claims, even where those claims are viable, due to cost and risk uncertainties and the lengthy timeframes associated with litigation. Our experience of this perception amongst potential claimants has also been reinforced by independent empirical studies;¹
 - (vi) A significant imbalance in resources as between the parties, particularly when opponents are well-resourced 'deep-pocketed' corporations.

Loss/injury threshold requirements

17. Where compensation is sought for personal injuries caused by a breach or breaches of the ACL under the federal legislation, section 87S of the *Competition and Consumer Act 2010* (Cth) prescribes that the court must not award personal injury damages for non-economic loss where the loss the plaintiff suffers is less than 15% of a most extreme case.
18. At a state level, the thresholds prescribed in the relevant State-based civil procedure or tortious liability legislation are generally relevant to the assessment of compensation for personal injuries where cases are brought under the State-based consumer legislation. These thresholds can be restrictive – for example, in Victoria, the Wrongs Act injury threshold requirements stipulate that in personal injury cases (other than spinal injury or psychiatric), the impairment threshold for claiming general damages requires a degree of permanent impairment *exceeding* 5%.²[emphasis added]

¹ Howells G, Ramsay I, Wilhelmsson T, and Kraft D (eds), *Handbook of research on International Consumer Law* (Edward Elgar, 2010), 499–500.

² *Wrongs Act 1958* (Vic), s 28LB.

19. Recent amendments to the Victorian *Wrongs Act* in November 2015³ saw these thresholds slightly improved in respect to spinal injuries and psychiatric injuries. An injury to the spine now has a threshold of “greater than *or equal to* 5%” [emphasis added]. The psychiatric injury threshold was also increased to “greater than *or equal to* 10%”. [emphasis added]⁴ These amendments were made following an inquiry conducted by the Victorian Competition and Efficiency Commission.
20. The threshold requirements for claims for non-economic loss in class actions pose a challenge in cases involving severe but comparatively transient injuries or illnesses directly caused by the consumption of contaminated foods.
21. Cases such as those against Wallis Lake Oysters, World Hot Bread Bakery, and claims on behalf of hundreds of people who consumed contaminated peanut butter, would now be practically impossible to run in view of these restrictive injury threshold requirements. We believe that this result is inconsistent with the objectives and principles underlying the ACL. Further, we believe that the current *status quo* fails to strike the right balance between, on the one hand, promoting market innovation and managing compliance burdens, and on the other, ensuring consumers who have been injured are appropriately compensated.
22. The cases described above were brought on behalf of plaintiffs who had suffered loss or injury as a result of breaches of the relevant consumer law at the time. Whilst they would not have reached the permanent impairment threshold now imposed in respect of such claims, these individuals undoubtedly suffered loss as a result of consuming contaminated products which public policy would dictate ought to be compensated.
23. Insofar as the law seeks to appropriately allocate the financial burden of wrongdoing, placing the responsibility with consumers to the extent that they do not meet the permanent impairment threshold in our view is inconsistent with the purpose of the law.

Costs Barriers

Adverse Costs

24. Adverse costs orders constitute a major barrier to consumers enforcing their rights under relevant consumer laws. The threat of ‘deep-pocketed’ opponents deploying their immense financial resources in defending a claim has a direct and substantial effect on the plaintiff’s capacity to initiate or endure litigation, particularly in complex cases.
25. Our concern is that consumers with otherwise viable claims are likely to abandon the dispute for fear of adverse costs orders being ordered against them. This risk has very tangible consequences for consumer access to justice, especially where the gap between the compensable loss suffered and the potential exposure to an adverse costs order makes pursuing justice uneconomic.
26. The clear imbalance in resources as between individual consumers and well-resourced corporations often results in reluctance on the part of consumers to seek redress within the legal

³ *Wrongs Amendment Act 2015* (Vic).

⁴ *Wrongs Act 1958*(Vic) s 28LB.

system. The regular imbalance in costs risks for parties to claims able to be brought under the ACL also significantly obstructs the efficacy of private litigation as a regulatory tool, and effectively alters public perception of equality before the law.

Adverse costs cap

27. In response to this resourcing imbalance, Slater + Gordon believes that the introduction of an adverse costs 'cap' would allay, to a degree, this imbalance. We believe that an adverse costs cap of up to \$5,000 could be imposed for smaller-scale consumer actions. Such a cap would have the effect of shielding consumer plaintiffs from the not-insignificant risk of large costs orders being imposed against them, while still adequately fulfilling the general purpose of Australia's legal costs regime, being to discourage the bringing of frivolous or unmeritorious claims. This proposal supports the underlying policy justifications of the Australian Consumer Law itself, being the promotion, protection and enforcement of consumer rights, to compensate for past harm, and to deter future harm of consumers.
28. The overriding purpose of the ACL is to give consumers an avenue of redress in the event that they experience loss due to conduct including misleading or deceptive conduct, or unconscionable conduct, or breaches of the consumer guarantees. Capping costs orders is consistent with the purpose of the ACL, and ensures that consumers are not prevented from bringing viable and meritorious claims due to costs exposure risks.
29. By way of example, Slater + Gordon represented plaintiffs in the Australian Finance Direct (**AFD**) class action. This was a proceeding brought against a financier that had provided finance to students to attend investment seminars provided by the discredited property developer, Henry Kaye. The case involved relatively small consumer credit code claims in which the primary relief sought was debt extinguishment, not exceeding much more than \$10,000 in most cases.
30. Whilst the class action mechanism does provide an effective tool for large groups of consumers to pursue collective action, it remains the case that the named representative plaintiff must accept the risk of an adverse costs order should the case be unsuccessful. Such consumer-based claims or class actions rarely get off the ground as a result of this risk.
31. In the AFD case, Slater + Gordon worked with Neil Jenman, a consumer advocate, and the Homesellers and Homebuyers Protection Fund established by Jenman, to provide the representative plaintiff with an indemnity against an adverse costs order. This was an unusual arrangement, and from our experience, it is rare for a third party to step in to take on the risks of a potential adverse costs order for the benefit of a group of plaintiffs.
32. In circumstances where there is no effective means by which a representative plaintiff, or group of plaintiffs, may be indemnified against adverse costs liability exposure, important and meritorious claims such as the above example may be unable to be brought. As the AFD case makes clear, the consequence of consumers being unable to pursue such claims is not confined to an inability to recover compensation, but may extend to consumers being required to honour debts which a Court would find to be unenforceable.
33. This situation risks encouraging prospective defendants to consumer claims to selectively flout compliance with the ACL (and related legislation) on the basis that consumers will elect not to take on the adverse costs risk associated with enforcing their rights.

34. The imposition of a cap on adverse costs orders would strongly discourage such cynical behaviour, by ensuring that viable claims are not abandoned due to the threat of adverse costs risks.

Consumer law 'justice fund'

35. The Victorian Law Reform Commission has previously proposed a publically funded 'Justice Fund' with the purpose of funding civil claims.⁵ The Fund would support cases which would not be considered for funding from other entities such as Legal Aid, and would focus on civil cases including viable consumer matters arising under the ACL. This funding entity proposal echoes those established internationally.

36. The 'Consumer Legal Action Fund' (CLAF) in Hong Kong, for example, is a pertinent international example of an effective public 'justice fund'. This Fund provides financial support and legal assistance (often in the form of representation by counsel) for consumers who have exhausted all other dispute resolution avenues. This type of fund would serve to increase access to the courts for lesser-resourced consumers, and also moves to close to some degree the resourcing 'gap' between parties to consumer disputes.

37. The CLAF has previously assisted consumers in cases where all other means of dispute resolution have been exhausted. Examples include consumer actions against a Hong Kong dental service in which the Fund sourced and financed legal representation and initiated proceedings in the Small Claims Tribunal on behalf of consumers who had paid for dental services which were ultimately not provided. The solicitors appointed by the Fund were successful in obtaining a judgement against the dental clinic as a result of the support of the CLAF.⁶

38. The establishment of such a fund at the state or Federal level could increase the number of small consumer claims that would otherwise not be pursued. This development would endorse and support the policy aims of the ACL in facilitating the protection of consumer rights and encouraging viable claims to be pursued where they would otherwise likely be relinquished for resourcing reasons.

Improving existing avenues to justice

Litigation Funding

39. The provision of litigation services to individuals or groups through conditional fee arrangements and/or litigation funding agreements can facilitate access to justice where consumers would otherwise lack the financial resources to bring meritorious claims. Where there are opportunities to reaffirm the importance of these funding arrangements and introduce measures to facilitate them, those opportunities should be embraced.

⁵ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008), 616.

⁶ Hong Kong Consumer Legal Action Fund, *Annual Report: 1 April 2015 to 30 September 2015*, 26 January 2016:
<https://www.consumer.org.hk/ws_en/legal_protection/consumer_legal_actions_fund/claf-report-2015.html>.

40. Slater + Gordon lead the field in recognising the potential for litigation funding to enable access to justice to those who otherwise would be prevented from seeking redress due to financial constraints. This has become particularly evident in relation to class actions.
41. The introduction of litigation funding was met with considerable scrutiny in Australia. An initial concern was that litigation funding would interfere with the justice system by leading to the pursuit of speculative claims motivated by the profit interests of commercially interested third parties, and that claimants would be required to give up large proportions of their damages. Litigation funding has nonetheless flourished as an alternative funding model and has received endorsement by the High Court, which has recognised that litigation funding can increase access to the Courts.⁷
42. As the market for litigation funding matures and additional funders enter the space, we anticipate that funding options will increase in scope and will become more widely adopted. This will, in turn, increase the competitiveness of the market overall. Further, increased accessibility for consumers and businesses is likely to be cultivated over time.
43. In our experience, the concern that litigation funding would lead to the progression of speculative claims has not been borne out in the Australian litigation landscape. Litigation funding acts, in many cases, as an objective third opinion into the merits of a claim. Speculative claims are less likely to be pursued, as they are recognised by prospective funders as unlikely to be in the funder's or the client's economic interest.
44. The availability of adequate funding schemes increasingly has become a precondition to attaining effective consumer protection, through class actions or otherwise.⁸ Indeed, many successful securities or investor class actions would have been unlikely to proceed in the absence of financial support from a litigation funder.
45. This trend is not limited to Australia.⁹ In Europe, and particularly in the United Kingdom, the role of litigation funding in class actions has been increasing exponentially, and has recently experienced considerable growth. This has been sparked by new entrants into the market, along with significant capital raisings by existing funders to enable the funding of a greater volume and variety of cases.
46. While the growth of litigation funding implementation is encouraging, its adoption in actions involving small businesses with small value disputes remains rare.¹⁰ In this respect, litigation funders identify the same barriers to entry as are identified by potential private claimants. Certain types of cases are often not considered for litigation funding for a variety of reasons, including difficulties in identifying and quantifying recoverable losses, and reluctance on the part of funders to take on small claims where the risk of an adverse costs order is considered disproportionate to the possible returns.
47. Consequently, third party litigation funding is not a total and complete answer to the financial barriers facing consumers seeking to bring meritorious claims. There may be important issues requiring consumer redress that cannot be pursued through the vehicle of a class action, or

⁷ *Campbells Cash and Carry Pty Ltd v Fostif* (2006) CLR 386; recently considered in *Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd* [2016] FCA 306.

⁸ Iris Benöhr, *EU Consumer law and Human Rights*, (Oxford University Press, 2013), 202.

⁹ Iris Benöhr, *EU Consumer law and Human Rights*, (Oxford University Press, 2013), 186.

¹⁰ Hodges, Vogenauer, & Tulibacka, *The Funding and Costs of Civil Litigation* (n 148), 30-1.

situations in which litigation funding cannot be secured, and as such, consumers with potential claims are left without recourse.¹¹

Private Actions

48. Private action effectively complements and reinforces the multi-regulatory enforcement model upon which the ACL rests. Enforcement of the code is shared between Commonwealth and State entities, with the driving aim being deterrence of certain types of behaviour (such as unconscionable conduct, misleading or deceptive conduct etc.), as well as reinforcing the framework for consumers to seek redress.
49. Some consumers find alternate pathways to redress, for example, by making complaints to the ACCC that are investigated and then acted upon, or by complaining to an Ombudsman if their dispute falls within the applicable terms of reference. These alternate pathways, while useful to some individuals, cannot possibly cover the field. There is no certainty that a dispute, if brought to the ACCC or various consumer affairs regulatory bodies, will be acted upon, or if it is, within an appropriate timeframe. Further, as public regulatory bodies are largely constrained by the limited public resources allocated to them, they can be forced to turn away consumer claims that they do not have the capacity to address.

Cooperation between regulators and non-regulators

50. The ACCC and ASIC, along with the relevant State and Territory consumer regulators, have a critical role to play in enforcing national consumer laws. However, the existence of resourcing constraints means that regulators cannot possibly be expected to cover the field in terms of seeking redress for wronged consumers.
51. We note that the Issues Paper raises the question of whether regulators could play a greater role in promoting private action, or could take action in other areas that would help consumers enforce their rights under the ACL.
52. In our view, there should be a greater recognition of the role that law firms and community legal centres play in protecting the rights of consumers and small businesses. Where the subject matter of a consumer's claim concerns substantially the same subject matter as the activities of the regulator, the relevant regulatory bodies should be encouraged to share resources and information with lawyers advocating on behalf of their clients to facilitate the enforcement of their clients' rights.
53. Our experience is that those working in public enforcement roles tend to adopt the erroneous assumption that solicitors acting for private consumers are competitors rather than collaborators in the enforcement of consumer rights. In our view, it is important for regulatory organisations encourage and promote a cultural shift towards the promotion of co-operation between regulators and consumers' legal representatives to the greatest extent permitted by law. The primary objective of this cultural shift would be to facilitate the common interests of both enforcement

¹¹ Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45, (2008), 214.

bodies and private consumers (and their legal representatives), being the advocacy and promotion of consumer rights under the ACL.

54. At the highest levels of public enforcement, the rhetoric supports a culture of co-operation between regulators and private participants. Speaking specifically to the role of class actions in private litigation, the Australian Securities Investment Commission (ASIC) Chairman, Greg Medcraft, made the following comments:

“In terms of our own resources, personally being a free enterprise person, I’d rather people deal with the issues between themselves than actually involve ASIC...That’s where I see class actions as a good development, because if the market decides there’s something they want to take on rather than coming back to the public purse, to me it’s part of market efficiency....The strategy is that if the private sector is willing to take on, for example a compensatory action, then our job is to try and use the resources we have the most effectively we can....If in fact private litigation can achieve an outcome that we might have done previously then we should let the private litigation pursue that outcome, because we can use those resources to devote to another area.”

55. The following extract from a key paper focusing on private enforcement of *competition* laws is in our view equally applicable to a broader set of consumer claims:

“Private litigants do not have the coercive investigative powers of the ACCC; nor can they offer the incentives available under the ACCC’s immunity, leniency and settlement policies to encourage cooperation by respondents. Private litigants rely significantly on discovery. Discovery in large matters, particularly involving cartel conduct, is often complex, heavily contested, expensive and time-consuming. Given these difficulties, it would be of substantial assistance to private litigants to have access to information collected by the ACCC.”¹²

56. Slater + Gordon believes that the cooperation of the ACCC and other regulators in sharing information and documents arising from their investigations would not only facilitate consumer action in enforcing consumer rights and protections under the ACL, but would also reduce the overall cost-burden of litigation by increasing the efficiency of the discovery process. Considering the cost-inefficiency, complexity involved, and time-consuming nature of proceedings, it would be in the best interests of consumers to have access to materials uncovered by the ACCC during its investigations.
57. Our view is that where regulatory investigations lead to private litigants seeking compensation for breaches of the ACL or ASIC Act provisions, arguably all parties would benefit from greater cooperation between private litigants’ legal representatives and regulators, particularly through the provision of evidence.
58. Recent examples of ACCC-prosecuted cases that resulted in a fine for the offending party highlight the importance of private enforcement of consumer law in bringing about results which are consistent with the deterrence and compensatory principles of the law. In general, we consider that prosecutions resulting in penalties historically have provided insufficient deterrence to defendants and other corporate actors in respect of actual or contemplated breaches of the

¹² Caron Beaton-Wells, ‘Private Enforcement of Competition Law in Australia – Inching Forwards?’ (2016) 39(3) *Melbourne University Law Review* (advance), 28.

ACL and related legislation. This reflects that the size of such penalties typically is much less than either the aggregate economic harm to consumers occasioned by the relevant defendant's conduct *and/or* the profitability of that conduct for the defendant.

59. The Court's consideration of the appropriate penalty is necessarily constrained by relevant factors including the cooperation of the offending party with any investigation, and the extent to which its conduct was deliberate or reckless.
60. In addition to seeking the imposition of penalties pursuant to relevant consumer laws, the ACCC also has power under the ACL to seek compensation orders, including by undertaking representative proceedings. We believe that this is an important part of the ACCC's role, and offers a pathway to justice for some consumers on whose behalf the regulator has capacity to act. We note however that resourcing issues constrain the regulator's ability to take on work of this kind in all instances. Where this is the case, we believe that private litigation offers an alternative means to achieve compensation for wronged consumers.
61. Private litigation – whether brought by an individual or as a representative proceeding – offers an appropriate pathway to justice for those affected by a company's wrongdoing. Together with the threat of regulatory action and the imposition of a fine, the possibility that a company may be subject to a judgement ordering the payment of compensation commensurate with consumers' loss would act as a strong deterrent to engaging in such conduct.
62. This highlights that private action provides an additional layer of accountability for corporations that contravene provisions in the ACL, and is likely to result in more appropriate compensation for consumers harmed by that conduct.

Class Actions

63. At their simplest level, class actions are representative proceedings brought by one person on behalf of a group of people. Class actions are used to assist the Court to resolve common issues and factual disputes amongst that group. The main benefit of class actions is that they enable a dispute involving potentially large numbers of people to be resolved in a single case, thereby significantly reducing the cost, time and variability in outcomes that would otherwise if all eligible claimants were required to litigate their claims separately.
64. Our experience over the last two decades indicates that the class action mechanism has become a powerful means of advancing access to justice, with the vast majority of claimants that we have represented in class actions having claims that otherwise would not be viable to pursue individually. Cases such as the Hepatitis C, Brookland Greens, Fincorp and Fairbridge Farms class actions run by Slater + Gordon have proven the efficacy of the class action methodology, across a variety of the categories of claims, including personal injury, environmental harm and property damage, and pure economic loss.
65. Over the last decade we have conducted some of Australia's largest securities class actions including claims against Centro, Sigma, Nufarm, GPT and Newcrest. Many of these proceedings have involved alleged breaches of misleading and deceptive conduct provisions under the ASIC Act.
66. The recent emergence of litigation funding has, in our view, increased the viability of consumer-based class actions that previously may not have been considered viable. However, many obstacles remain for groups of consumers seeking to enforce their ACL rights.

67. Class actions perform an essential role, particularly in the consumer context where small value transactions dominate complaints,¹³ or where claims are generally small or ‘scattered’.¹⁴ Given the representative nature of class actions, they can also be used to prosecute substantive claims under the Australian Consumer Law, for example, misleading, deceptive or unconscionable conduct claims regarding products or business practices where there is a common respondent.
68. Class actions empower consumers. They ensure that in cases where the amount at stake for each individual would not otherwise justify legal action because of the risks and costs involved, a claim can be pursued by way of a joint proceeding, making the case significantly more viable.¹⁵ The fact that claimants are able to bring such claims means that defendants may be called into account in circumstances where they would otherwise not expect to be pursued. This serves as an important public policy objective,¹⁶ and is effective at ‘equalling up of the tables’ between consumers and big business.¹⁷
69. Class actions also result in reduced litigation costs, greater judicial efficiency, and increased uniformity of results between plaintiffs within the same class.
70. Class actions do not provide a mechanism for redress for all potential litigants. Some legal wrongs may not have impacted a sufficiently sized group of people to form a ‘class’ and justify the commencement of a class action. In other cases, claimants may be affected by similar legal issues, but lack a common respondent to pursue.
71. Alternatively, claimants may have claims against a common respondent, however the elements of their claims may be deemed insufficiently common at law to allow their claims to be determined within a single representative proceeding. This risk is particularly great where the contravening entity has engaged in an ongoing pattern of contravening conduct affecting a wide range of consumers in a variety of circumstances.

Pre-litigation claims resolution

72. In addition to representing claimants in group litigation, we have also been engaged by clients to act on their behalf in non-litigious claims assessment processes. An example of this is the claims process which was established by the Commonwealth Bank following the collapse of Storm Financial (the **CBA Storm Resolution Scheme**). This process provided an avenue for 2000 Storm Financial investors with claims against the Commonwealth Bank to access compensation, without incurring the costs or risks involved in issuing court proceedings.
73. One advantage of the CBA Storm Resolution Scheme was that it enabled an efficient and low-cost claims assessment process which nevertheless took into account the individual

¹³ Malbon J and Nottage L (eds), *Consumer Law and Policy in Australia and New Zealand*, (Federation press, 2013), 361.

¹⁴ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press, 2015), 125.

¹⁵ Malbon J and Nottage L (eds), *Consumer Law and Policy in Australia and New Zealand*, (Federation press, 2013), 361.

¹⁶ Malbon J and Nottage L (eds), *Consumer Law and Policy in Australia and New Zealand*, (Federation press, 2013), 353.

¹⁷ AFR, *Regulators praise private court actions* (5 April 2012)

<http://www.afr.com/p/national/legal_affairs/regulators_praise_private_court_CSb6eX9QQpx9RK1pBHdJTn>.

circumstances of the affected investors, and in particular those circumstances which might affect the strength or quantum of their individual claims against Commonwealth Bank. Such individual treatment of claims would be difficult to achieve in the context of a representative proceeding.

74. Slater + Gordon views such pre-litigation claims resolution processes as a potentially effective means to address the financial barriers preventing access to justice in the area of consumer law. We note however that the efficacy and fairness of these processes depends in large part on the cooperation and attitude of the relevant corporation, and therefore do not necessarily offer an appropriate alternative to litigation in all circumstances.
75. We also consider that such schemes will typically operate more effectively – and attract more support both from prospective claimants and the wider community – where scheme participants have access to independent legal advice and representation from practitioners accustomed to bringing similar claims by way of private action. The CBA Storm Resolution Scheme is but one example of where our involvement in such a process enabled us to advocate effectively for claimants, ensuring that our clients received fair and appropriate compensation without the need to commence litigation. Because the cost of our involvement was covered by the Scheme, we were able to ensure that those participants requiring the most assistance and/or with the least financial means of obtaining it were not disadvantaged.
76. Consequently, we also consider that in many instances compensation schemes, whether supervised by an appropriate regulator or not, will benefit from the explicit provision for claimants to access independent legal advice and representation the cost of which is covered by the scheme.

Conclusion

77. Consumer advocacy is an effective conduit for consumers to experience greater access to justice, and the success of private advocates such as Slater + Gordon in pursuing redress on behalf of those with consumer disputes has demonstrated the necessity of private advocates within the consumer law sphere.
78. The recurring issues concerning consumer law in our experience include the disparity in standing between parties in consumer disputes (e.g. financial resourcing, size, experience etc.), the current inability of the courts to implement capped adverse costs orders, and the lack of public financial support for individual consumer action where other forms of funding are unavailable. All of these elements constitute discrete and challenging facets of the consumer law space. We consider that the proposals we have presented would diminish, by some measure, the disadvantages faced by consumers in attaining access to justice.

PROPOSALS

Personal injury thresholds

1. We propose that the threshold requirements for seeking compensation for personal injuries caused as a result of a breach of consumer law provisions be lowered or adjusted, to allow consumers to recover compensation for less serious and/or transient injuries.

Cooperation between regulators and consumer advocate lawyers

2. We propose that legislative provisions are introduced to encourage (if not compel) ACL regulators to provide (within the confines of the law) private litigants with access to resources such as proofs of evidence.

Justice Fund

3. We propose that the creation of a publically funded litigation fund, such as that proposed by the Victorian Law Reform Commission, would greatly assist in closing the gap between well-resourced defendants and comparatively poorly-resourced consumers, as well as ensuring that viable claims are not abandoned at the 'court door' due to comparative resourcing deficits.

Capped Adverse Costs Orders

4. We support calls made by the Victorian Law Reform Commission¹⁸ for Australian courts to be empowered to issue capped adverse costs orders for the benefit of poorly-resourced consumers. Again, this measure would go some way to addressing the resource imbalance between consumers and large corporations, and would add to the fairness, efficacy and accessibility of the court system for consumers.

Non-litigious compensation schemes

5. We believe that the value of such schemes is great enhanced by ensuring that participants have access to independent legal advice and representation at no cost to the participant.

¹⁸ Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008), 616.