



Australian Government
Attorney-General's Department
Deputy Secretary
Legal Services and
Families Group

Mr Jason Lange
Executive Director
Office of Best Practice Regulation
Department of the Prime Minister and Cabinet
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BARTON ACT 2600

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Dear Mr Lange

Certification of independent review: *Litigation Funding and the Regulation of the Class Action Industry (Parliamentary Joint Committee on Corporations and Financial Services) and Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Australian Law Reform Commission)*

I am writing to certify that the attached independent reviews – the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) Report *Litigation Funding and the Regulation of the Class Action Industry*, and the Australian Law Reform Commission's (ALRC) Report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* – have undertaken a process and analysis equivalent to a Regulation Impact Statement (RIS) for a number of measures currently being considered by Government.

These documents are submitted to the Office of Best Practice Regulation for the purposes of satisfying the RIS requirements of the Government's proposed response to the ALRC and PJCCFS reports (the policy proposal).

I certify that the reports have adequately addressed six of the seven RIS. I provide supplementary analysis in **Attachment A** in relation to the seventh RIS question.

I am satisfied that the scope of the problem and recommendations identified in the certified review are, for the most part, substantially the same as the identified problems and responses in the policy proposal. I have provided supplementary analysis where this is not the case in **Attachment B**.

Where fewer than three policy options are examined, the department's assessment is that this was feasible in light of the well-established policy problem and the extensive review processes which have informed this policy proposal.

Parliamentary Joint Committee on Corporations and Financial Services, and Australian Law Reform Commission, reports

The Australian Government referred an inquiry into class action proceedings and third party litigation funders in December 2017. Its term of reference required the ALRC to consider whether, and to what extent, class action proceedings and third-party litigation funders should be subject to Commonwealth regulation. The ALRC received submissions from stakeholders, conducted consultations and workshops, and had regard to class action law and practice of cognate Commonwealth jurisdictions. It released a discussion paper in June 2018.

The ALRC's final report was tabled in Parliament in January 2019. The report highlighted the need for a range of changes to the class action framework to keep pace with evolutionary developments in the legal market, including litigation funding, and made a number of recommendations accordingly. These recommendations were directed towards the federal, and state and territory governments, as well as the Federal Court of Australia and the legal profession.

The Government subsequently moved to refer an inquiry to the PJCCFS to further scrutinise the class action regime and the litigation funding industry. The inquiry was moved in order to further test and refine the ALRC's recommendations, while providing an additional evidence base for legislative changes. In particular, the Government considered that greater scrutiny was needed of the impact that litigation funders' business models have on access to justice, as well as on the Australian economy in the context of the COVID-19 pandemic. The PJCCFS received submissions from stakeholders and conducted public hearings.

The PJCCFS report was tabled in December 2020. It made a number of recommendations guided by the principle of reasonable, proportionate and fair access to justice in the best interests of class members. The recommendations of the PJCCFS were directed towards the federal, and state and territory governments, as well as the Federal Court and the legal profession.

The Government's response

The Government's response highlights that it will consult, and comply in full with RIS requirements, prior to implementing measures in line with the Government response.

The regulatory burden to business, community organisations or individuals of the policy proposal is quantified using the Australian Government's *Regulatory Burden Measurement Framework* and is provided below. It is not anticipated that there will be a significant regulatory impact on business, community organisations or individuals, arising from the proposal. In saying that, I note the following.

First, in relation to PJCCFS recommendation 29, the Government has already complied with RIS requirements through its submission to the Office of Best Practice Regulation on

1 March 2021. Subsequently the Parliament passed legislation to make permanent changes to Australia’s continuous disclosure laws on 10 August 2021. Specifically, the *Corporations Act 2001* was amended so that companies and their officers would only be liable for civil penalty proceedings in respect of continuous disclosure obligations where they have acted with “knowledge, recklessness or negligence”.

Second, the Government’s response highlights that it is considering measures in response to recommendations made by the PJCCFS and ALRC report, and consulting on these through exposure legislation. The policy proposal does not involve the Government taking a decision at this stage. These recommendations are listed in **Attachment A**.

The Government’s broad intention is, consistent with the reports, to promote a fair and reasonable distribution of class action proceeds in proceedings involving a third party litigation funder. Prior to any final decision being made on these recommendations and as part of settling any legislative reform, the Government will have an opportunity to consider and address their regulatory impact with consideration given to matters raised in consultation and an assessment of any regulatory burden.

Third, the Government has committed to investigate or consider further issues in relation to a number of PJCCFS and ALRC recommendations (see **Attachment A**). To the extent that these recommendations relate to legislative reform, the Government will have an opportunity to consider and address any unforeseen regulatory impact at a later date as part of the detailed development of any legislative reforms.

Fourth, to the extent that the Government accepts recommendations for non-legislative reform, the primary focus of such reforms is regulating standards of conduct in the legal profession and improving clarity and efficiency of Court processes and procedures. The Government will encourage and consult with the Federal Court and the legal profession regarding the ALRC and PJCCFS recommendations, but ultimately the Government cannot mandate action or impose obligations in this space.

Finally, I note more generally that even if, in some circumstances, implementation of this proposal may increase the regulatory burden on some stakeholders, holistically, the ALRC and PJCCFS recommendations will increase the efficiency of the class actions regime. This will be beneficial to business, community organisations and individuals and as such will provide benefits to the economy. The department will remain alert to opportunities to reduce the regulatory burden for affected stakeholders.

Regulatory burden estimate table

Average annual regulatory costs (from business as usual)

Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	Nil	Nil	Nil	Nil

Accordingly, I am satisfied that the attached report is consistent with the *Australian Government Guide to Regulatory Impact Analysis*.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T. Harvey', enclosed within a hand-drawn oval shape.

Tamsyn Harvey
A/g Deputy Secretary
Legal Services and Family Group
29 September 2021

Attachment A: Supporting information for certification of PJCCFS and ALRC reports

Attachment B: Additional gap analysis for certification of PJCCFS and ALRC reports