Level 23, 150 Lonsdale St, Melbourne VIC 3000 | **T** +61 3 8677 3890 | **E** info@acsi.org.au | **W** www.acsi.org.au

11 June 2020

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600
Sent via email to: corporations.joint@aph.gov.au

Dear Committee Secretary

## INQUIRY INTO LITIGATION FUNDING AND THE REGULATION OF THE CLASS ACTION INDUSTRY

On behalf of the Australian Council of Superannuation Investors (ACSI), I am pleased to make this submission in relation to Litigation Funding and the Regulation of the Class Action Industry.

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) investment issues on behalf of our members. Our members include 39 Australian and international asset owners and institutional investors. Collectively, they manage over $2.2 trillion in assets and own, on average, 11 per cent of every ASX200 company, on behalf of millions of beneficiaries.

Our members recognise that ESG risks and opportunities have a material impact on investment outcomes. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them.

Our members are investors who may participate in class actions where they are a cost-effective way to recover member losses in cases of genuine unlawful conduct. Class actions can also improve governance standards over the long-term.

Accordingly, it is imperative that the regulatory provisions are effective, efficient and fair, and support the integrity of the market. We are concerned that the challenges associated with the structure and implementation of the class action framework are being misunderstood as issues with continuous disclosure obligations. Australia's continuous disclosure obligations and misleading and deceptive conduct laws are a foundation to an efficient market. We would also be concerned if any change operates to limit investors' ability to hold companies to account, given the importance of this to the integrity of the market.

Our detailed comments are set out in this submission. I trust they are of assistance.

Please contact me or Kate Griffiths, ACSI's Executive Manager - Public Policy and Advocacy, should you require any further information on ACSI's position.

Yours faithfully

Louise Davidson AM
Chief Executive Officer

## CLASS ACTIONS - CHALLENGES

We recognise that there are challenges with the structure and implementation of class actions in Australia. In particular, we recognise the following issues (as previously outlined by investors in submissions to the Australian Law Reform Commission):

- There can be high costs to participate and a lack of alternative participation options.
- Sufficient information is not always available to assess the action at sign up date.
- Conducting appropriate due diligence over new third-party litigation funders into the Australian market can be difficult.
- There can be multiple, near competing actions.
- Spurious actions may cause overly risk-averse governance standards in companies over time and cost for institutions to assess such claims.

Any changes to address the issues outlined should preserve investors' ability to hold companies accountable for their disclosures (or lack thereof), recognising that the ability to do so is an important mechanism in maintaining the integrity of Australian markets, bolstering ASIC's role.

Our view is that the above-mentioned challenges are a result of the way the class action system has evolved, rather than of the operation of the continuous disclosure provisions or the misleading or deceptive conduct laws.

## CONTINUOUS DISCLOSURE PROVISIONS

Australia's continuous disclosure obligations regime and misleading and deceptive conduct laws are a foundation of free and open markets. Indeed, we believe the current regime typically functions well and contributes significantly to market efficiency.

The existing provisions operate to underpin the integrity of the market, and we are concerned that any weakening of disclosure standards operates to undermine our market's integrity.

We are aware of calls to change disclosure laws, whether it be to permanently amend the test that applies to determining whether information requires disclosure, to limit the availability of action to investors to seek redress for breaches, or otherwise. Change is not necessary. There is significant guidance already available to companies (and their directors and officers) on how to manage disclosure obligations. In addition, the issues with the implementation of the class action framework are being misunderstood as issues with continuous disclosure obligations.

For example, when companies suggest that current obligations present challenges in disclosing forward-looking information, this is a perceived problem. It is important to take into account that the rules do not generally require companies to release forward looking statements to the market. Where a company chooses to do so, it should remain accountable for the quality of the information it chooses to release. In such circumstances, there is detailed guidance already available that outlines the action a company should take to ensure that the market is not misled. Accordingly, the perception of a problem is one that arises because of action a company is not compelled to take, but has chosen to take.

Companies with better governance are aware of the importance of the rules and guidance and have processes in place to manage their obligations. This is evidenced by the large number of companies that withdrew their forward-looking guidance as the economic disruption posed by the COVID-19 pandemic emerged. Investors understand why companies took this action, and did not expect the guidance to be replaced in such circumstances, as investors recognise the importance of accurate disclosure from companies.

Permanent changes to the continuous disclosure rules would adversely affect this trust between companies and investors, and work to undermine market integrity. Investors rely on the information that they are provided being correct. Without appropriate accountability for the quality of disclosures, it can be expected that the standard of information in the market will deteriorate.

While many directors and companies will seek to do the right thing, the inevitable reality is that if accountability for disclosures is diminished, the attention of officers and directors will quickly be focused elsewhere, resulting in a lower quality of information available to the market. Some will also seek to take advantage of the circumstances, which has the potential to adversely affect confidence across the market.

The current temporary changes to the rules have been the subject of much industry discussion and there is significant commentary confirming that the changes are unnecessary, and could act to undermine the integrity of the market a time when investment is crucial to underpin a recovery.

Accordingly, our view is that the Committee's resources are best directed at considering the recommendations of the Australian Law Reform Commission that go to the challenges in the class action framework set out above.