

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

RIS questions

RIS-like processes are required to address all seven questions that would be addressed through a RIS. The PJCCFS and ALRC do not do so, in full, in relation to question 7: how will you implement and evaluate your chosen option.

The PJCCFS and ALRC generally identify how a recommendation would be implemented. Where they do not, further investigation is recommended which the Government will undertake, except for instances where the Government does not agree to the recommendation.

The reports do not identify how recommendations would be evaluated. Where recommendations are for implementation by the Australian Government, the Government will conduct a review of the efficacy of the recommendations at an appropriate time (depending on the nature of the change) after their implementation to measure the success of the reforms after an initial adjustment period. Certain recommendations are directed towards the Federal Court of Australia, state and territory Governments or courts, or the legal profession. Evaluation would be a matter for those bodies, though the Government strongly encourages such evaluation processes.

Tranche 1 recommendations for further impact analysis

The Government has released for consultation exposure draft legislation to promote a fair and reasonable distribution of class action proceeds in proceedings involving a third party litigation funder.

If progressed, the legislation would implement the recommendations below. Further regulatory impact analysis would be undertaken prior to any introduction of legislation, taking into account submissions received during the exposure draft consultation stage.

Issue	PJCCFS Recommendation	ALRC Recommendation
Common fund orders	PJCCFS #7 – The committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in <i>BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall</i> [2019] HCA 45	ALRC #3 – Amend the Federal Court Act to provide the Federal Court with an express statutory power to make common fund orders on the application of the plaintiff or on the Court's own motion.
Approval and variation of funding agreements	PJCCFS #11 - The committee recommends Part IVA of the <i>Federal Court of Australia Act 1976</i> be amended to introduce: <ul style="list-style-type: none"> a requirement for a litigation funding agreement to obtain approval of the Federal Court 	ALRC #14 - Amend the Federal Court Act to provide that: <ul style="list-style-type: none"> third-party litigation funding agreements with respect to representative proceedings could only be enforceable with the approval of the Court

	<p>of Australia to be enforceable; and</p> <ul style="list-style-type: none"> • a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice. 	<ul style="list-style-type: none"> • the Court has an express statutory power to reject, vary or amend the terms of a funding agreement
Choice of law and forum for funding agreements	<p>PJCCFS #12 – Part IVA of the <i>Federal Court of Australia Act 1976</i> be amended to require that any litigation funding agreement in a class action in the Federal Court of Australia is governed by Australian law and the Federal Court of Australia approves a litigation funding agreement only if the agreement provides that the litigation funder submit irrevocably to the jurisdiction of the Federal Court of Australia.</p>	<p>ALRC# 14 (cont.) - Amend the Federal Court Act to provide that:</p> <ul style="list-style-type: none"> • Australian law governs litigation funding agreements and funders submit irrevocably to the jurisdiction of the Court.
Use of litigation funding fee assessors as a referee	<p>PJCCFS #13 - The Australian Government amend the Federal Court of Australia's Class Actions Practice Note to the effect that, pursuant to section 54A of the <i>Federal Court of Australia Act 1976</i>, at any point in a proceeding, the Federal Court of Australia may appoint a referee to act as a litigation funding fees assessor</p>	N/A
Use of litigation funding fee assessors as a referee	<p>PJCCFS #16 – the Federal Court of Australia's Class Actions Practice Note state the Federal Court of Australia may order the costs of the work undertaken by a referee appointed by the Federal Court of Australia as a litigation funding fees assessor be paid by a litigation funder, in circumstances where the conduct of a litigation funder justifies such an order being made.</p>	N/A
Use of contradictors	<p>PJCCFS #18 – the Federal Court of Australia's Class Actions Practice Note be amended to:</p> <ul style="list-style-type: none"> • introduce a presumption that the Federal Court of Australia is to appoint a contradictor in instances where there is the potential for significant conflicts of interest to arise, 	N/A

	<p>or complex issues are likely to arise at the settlement approval application;</p> <ul style="list-style-type: none">• include guidance on scenarios in which a conflict of interest is likely to arise, including:<ul style="list-style-type: none">○ where there is a material conflict between the interests of the representative plaintiff and those of some sub-groups of class members, including between those with different sorts of interests or claims, and between those who have signed up with the litigation funder and/or the representative plaintiff's solicitor and those who have not;○ where the proposed return to the class members does not appear to be in accordance with the possible prospects of success;○ where an issue arises as to whether some class members should be included or excluded from claiming settlement proceeds where they did not register in time pursuant to some registration process ordered by the Federal Court of Australia to identify the number, identity and claims of class members;○ where there is an application, or an order has been made, for a common fund	
--	--	--

	<p>order or a funding equalisation order, or an equivalent order; and</p> <ul style="list-style-type: none"> ○ where it is proposed that the solicitors for the representative plaintiff are to be appointed as the administrator of the settlement and where there may be other means available to administer the scheme more cheaply, efficiently or quickly; ● ensure the Federal Court of Australia retains discretion to appoint a contradictor and provide non-exhaustive guidance for the Federal Court of Australia as to the factors to which it should have regard when considering whether to exercise its discretion to appoint a contradictor; and ● ensure the Federal Court of Australia may order the costs arising from the work undertaken by a contradictor be paid by the plaintiff law firm, or the litigation funder, in circumstances where the conduct on the part of the lawyer or the litigation funder justifies such an order being made. 	
Minimum return to class members	<p>PJCCFS #20 – The committee recommends the Australian Government consult on:</p> <ul style="list-style-type: none"> ● the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements); ● whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms 	N/A

	<p>and litigation funders, is the most appropriate floor; and</p> <ul style="list-style-type: none"> • whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases. 	
--	--	--

Recommendations for further consideration

The Government has agreed to investigate or consider further issues in relation to the recommendations below. Therefore at this stage no decision to introduce regulation has been made. To the extent 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.

Issue	PJCCFS Recommendation	ALRC Recommendation
Procedural proportionality in class action proceedings	<p>PJCCFS #1 – the Australian Government investigate legislative change which promotes procedural proportionality in class actions, with the objective of facilitating the pursuit of class actions where the potential costs and drawbacks are balanced against the potential benefits for the parties to litigation, the class members, as well as the impacts on court resources, regulatory outcomes and the public interest.</p>	N/A
Information for approval of a class action settlement	<p>PJCCFS #17 – the Federal Court of Australia should require the provision of specified information to accompany an application for approval of a class action settlement.</p> <ul style="list-style-type: none"> • the date the proceeding commenced; • the estimated number of class members before opt out; • the number of people who have opted out; • the number of registered class members; • the number of funded and unfunded class members; 	N/A

	<ul style="list-style-type: none"> • the identity and location of the litigation funder; • the amount of security for costs paid; • the estimated value of the claims at the outset and at the time of settlement; • the settlement sum and any non-monetary relief; • the funding commissions payable under litigation funding agreements; • the total amount of the funding commission (and per cent of the gross settlement sum) that the litigation funder would be paid, as the case may be: <ul style="list-style-type: none"> – pursuant to its contractual entitlements under the litigation funding agreements; – following a funding equalisation order (if one is sought); – following a common fund order (if one is sought); and – following any other order to share costs across class members. • the total costs broken down into legal fees, counsel's fees, expert fees and their disbursements; • any costs orders paid in the proceedings; • payments to representative plaintiffs (their claims and recognition payments); • other reimbursements and payments, including pursuant to cy-près orders; • the average payment to all class members, funded class members and unfunded class members (and the per 	
--	---	--

	<p>cent of the gross settlement sum);</p> <ul style="list-style-type: none"> the number of class members who reached compromises, executed releases or covenanted not to sue during the class action, the estimated value of their claims and the value of such releases (aggregated and anonymised); and <p>the amount of corporate tax paid in Australia</p>	
Use of contradictors	<p>PJCCFS #19 – the Australian Government implement a procedure to facilitate communication of class members' concerns and objections to the settlement to a contradictor, when appointed. Class members should be informed of the contradictor's appointment in the class action and the questions to be determined by the contradictor. One option which should be considered is the introduction of such a power in the notice provisions in Division 3 of Part IVA of <i>Federal Court of Australia Act 1976</i> and supplemented by processes described in the Federal Court of Australia's Class Actions Practice Note.</p>	N/A
Legal fee arrangements	<p>PJCCFS #21 – the Australian Government review the feasibility of applying the Australian Financial Services Licence and the Managed Investment Scheme regimes to lawyers operating on a contingency fee arrangement in class actions.</p>	N/A
Legal fee arrangements	<p>PJCCFS #22 – the Australian Government consider options to establish rules that govern the ability of lawyers to charge an uplift fee on the total amount of legal costs in class action proceedings, with particular reference to:</p> <ul style="list-style-type: none"> uplift fees which are conditional on a successful outcome; and 	N/A

	<ul style="list-style-type: none"> the potential appropriateness of capped uplift fees of less than 25 per cent on the total costs 	
Disclosing conflicts of interests	<p>PJCCFS #25 – the representative plaintiff's lawyers and litigation funders be required to disclose the following to the Federal Court of Australia:</p> <ul style="list-style-type: none"> any potential conflicts of interest; any new conflicts or potential conflicts which arise after the first case management conference; and <p>the conflict management policy when applying to the Federal Court of Australia for approval of a litigation funding agreement.</p>	N/A
Tailored managed investment scheme regime	<p>PJCCFS #28 - The committee supports the regulations issued by the Treasurer which clarify that litigation funders require an Australian Financial Service License and that they be regulated as Managed Investment Schemes. Noting that ASIC has provided relief from a number of MIS requirements, the committee recommends the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders. However, the committee recommends that the Australian Government consult on the best way to exempt not-for-profit litigation funders who held charitable status at the time the regulations were issued, have run no more than three class actions in the last five years, and exist solely to support and protect the members of the associated charitable entity</p>	N/A
Jurisdiction for corporations laws class actions	<p>PJCCFS #30 – the Australian Government amend Part 9.6A of the Corporations Act 2001 and section 12GJ of the Australian Securities and Investments Commission Act 2001 so that exclusive jurisdiction is conferred on the Federal Court of</p>	<p>ALRC #7 – part 9.6A of the <i>Corporations Act 2001</i> (Cth) and s 12GJ of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth) should be amended to confer exclusive jurisdiction on the</p>

	Australia with respect to civil matters, commenced as class actions, arising under that legislation.	Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under that legislation.
Settlement administration report	N/A	ALRC #10 – Amend the Federal Court’s Class Actions Practice Note to require a settlement administrator to provide a report to group members and the Court on completion of the distribution of the settlement sum. This report would be published in a national representative proceedings database to be maintained by the Court.
Annual reporting to ASIC	N/A	ALRC #15 – The Australian Securities Investments Commission <i>Regulatory Guide 248</i> should be amended to require that third-party litigation funders that fund representative proceedings report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.
Definition of a ‘litigation funding scheme’	N/A	ALRC #16 – Regulation 5C.11.01 of the <i>Corporations Regulations 2001</i> (Cth) should be amended to include ‘law firm financing’ and ‘portfolio funding’ within the definition of a ‘ <i>litigation funding scheme</i> ’.
Consumer redress	N/A	ALRC #23 – Review the enforcement tools available to regulators of products and services used by consumers and small businesses (including financial and credit products and services), to provide for a consistent framework of regulatory redress.