

# Attachment B: Gap analysis on PJCCFS and ALRC reports

ALRC Recommendation	PJC Recommendation	Proposed Government Response/s	Gap Analysis
<p><b>Recommendation 1</b> – Amend the <i>Federal Court of Australia Act 1976</i> to provide that all representative proceedings are initiated as open class actions.</p>	N/A	The Government <b>does not agree</b> to this recommendation.	<p>Currently representative plaintiffs can determine whether to commence their class action as an open or closed action. This preserves the ability of a group to control the size and scope of the class actions. Additionally, class members, or a subset of them, are able to choose whether to participate in a matter, and which lawyer (and funder) would represent (and fund) them.</p> <p>Further, the Government is committed to a class action regime founded on ‘book-building’ which requires a funder to individually identify members of a class to sign a litigation funding agreement. Submissions made to the PJCCFS highlighted that book building helps ensure that there is genuine interest among class members, and that the merits and viability of a claim are thoroughly assessed.</p> <p>The Government has indicated that it will investigate further reforms relating to certain types of class actions (eg employment claims) that may be conducted with a closed class by default, with the ability to opt for an open class action upon a decision of the Court. Further regulatory analysis will be undertaken before a Government decision is taken on this matter.</p>
<p><b>Recommendation 17</b> – statutes regulating the legal profession should permit solicitors to enter into ‘percentage-based’ fee agreements (only when acting for the representative plaintiff in representative proceedings). The following limitations would apply:</p> <ul style="list-style-type: none"> <li>• an action funded through a percentage-based fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis</li> <li>• a percentage-based fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis, and</li> <li>• solicitors who enter into a percentage-based fee agreement must advance the costs of disbursements, and account for such costs within the percentage-based fee</li> </ul>	N/A	The Government <b>does not agree</b> to this recommendation.	<p>This recommendation is directed towards states and territories. The Government’s response indicates its disagreement with the recommendation due to its concerns about contingency fee arrangements.</p> <p>As noted by submitters to the PJCCFS and ALRC inquiries, allowing contingency fees creates a risk of conflicts of interest. These include the fundamental duty that solicitors owe to the courts, as well as to their clients. Such conflicts may, or may be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters.</p> <p>In particular, the majority report of the PJCCFS concluded that it was not persuaded that allowing contingency fee arrangements in class actions would lead to reasonable, proportionate and fair outcomes. In addition to concerns about conflicts of interest, the majority report also found that the alleged potential of contingency fees to positively impact access to justice outcomes may be overstated.</p>
<p><b>Recommendation 18</b> – amend the Federal Court Act to establish that solicitors funding representative proceedings on the basis of percentage-based fee agreements will be required to provide security for costs.</p>	N/A	The Government <b>does not agree</b> to this recommendation.	<p>The Government will not pursue legislative change to permit the use of contingency fee arrangements because of the potential unmanageable conflicts of interest that such arrangements can create. Lawyers owe a fundamental duty to the courts, as well as to their clients. Introducing a direct financial interest in the outcome creates a conflict of interest and such conflicts may, or be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters.</p> <p>In particular, the majority report of the PJCCFS concluded that it was not persuaded that allowing contingency fee arrangements in class actions would lead to reasonable, proportionate and fair outcomes. In addition to concerns about conflicts of interest, the majority report also found that the alleged potential of contingency fees to positively impact access to justice outcomes may be overstated.</p>

<p><b>Recommendation 19</b> – amend the Federal Court Act to provide that: percentage-based fee agreements are permitted only with the leave of the Federal Court, and, the Federal Court would have the express statutory power to reject, vary or amend the terms of percentage-based fee agreements.</p>	<p>N/A</p>	<p>The Government <b>does not agree</b> to this recommendation.</p>	<p>The Government will not pursue legislative change to permit the use of contingency fee arrangements because of the potential unmanageable conflicts of interest that such arrangements can create. Lawyers owe a fundamental duty to the courts, as well as to their clients. Introducing a direct financial interest in the outcome creates a conflict of interest and such conflicts may, or be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters.</p> <p>In particular, the majority report PJCCFS concluded that it was not persuaded that allowing contingency fee arrangements in class actions would lead to reasonable, proportionate and fair outcomes. In addition to concerns about conflicts of interest, the majority report also found that the potential of contingency fees to positively impact access to justice outcomes may be overstated.</p>
<p><b>Recommendation 24</b> – the Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations, and those related to misleading and deceptive conduct, contained in the <i>Corporations Act 2001</i> and the <i>Australian Securities and Investments Commission Act 2001</i> (Cth).</p>	<p>N/A</p>	<p>The Government <b>does not agree</b> to this recommendation.</p>	<p>The Government does not agree with this recommendation as since the release of the ALRC report, further examination of Australia’s continuous disclosure regime has already taken place, including the issuance of two legislative instruments in response to the COVID-19 crisis that temporarily amended the continuous disclosure law as well as consideration by the Senate Economics Legislation Committee and the Senate Economics References Committee.</p> <p>The Government has reviewed the effect of the temporary instruments and the continuous disclosure law was further examined by the PJCCFS Report. These instruments and the PJCCFS report’s analysis informed the decision to permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.</p>