Australian Government

Australian Law Reform Commission

Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders

FINAL REPORT

ALRC Report 134

December 2018

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This Final Report reflects the law as at 30 November 2018.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government

Australian Law Reform Commission

The Hon Christian Porter MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

21 December 2018

Dear Attorney-General

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

On 11 December 2017, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into Class Action Proceedings and Third-Party Litigation Funders. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act 1996*, I am pleased to present you with the Final Report on this reference, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (ALRC Report 134, 2018).

Yours sincerely,

The Hon. Justice SC Derrington

President

The Honourable Murray Wilcox AO QC

1937—2018

Murray Wilcox's personal contribution to Australia's class action regime, like his contribution to the intellectual rigour of the law and to life in general, was multi-faceted. He was a Commissioner of the Australian Law Reform Commission when Report No 46, 1988 "Grouped Proceedings in the Federal Court", was released. As a judge of the Federal Court of Australia, he presided over some of the very first class actions commenced in that Court following the introduction of Part IVA into the *Federal Court of Australia Act 1976* (Cth).

Some of Murray's own philosophies and passions, and his practical style of humanity, are echoed in the recommendations made by Report No 46. The introduction of an "opt out" rather than "opt in" model was considered preferable both to enhance access to justice, but also to eliminate the need for extra work and expense.[1] To both encourage persons to assume the responsibilities of a principal applicant and to protect that person from an adverse costs order, the report proposed that the government establish a public fund. Indeed, the report itself was titled "Grouped Proceedings…" to try and navigate the politics of the day, which included some wariness of the introduction of a US style system of class actions.[2]

Murray's continuing legacy is a now well established representative procedure, which includes machinery designed to deliver justice to those in need, within the protections offered by the Australian legal framework. Report No 46 described a stated objective of a class actions regime as being both to enhance access to justice and to save costs and judicial resources by facilitating one common, binding decision. The best way in which to implement this objective has continued to be a focus of the judiciary, including as they grapple with the increasing emergence of litigation funders, and more recently vigorous competition between service providers to conduct class actions. Murray would have embraced the current reference and the ALRC's rigorous examination of the adequacy of existing class action machinery in light of contemporary conditions.

Elizabeth Collins SC

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1 Murray Wilcox, 'Class Actions in Australia: Recollections of the early days', in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

2 Ibid at [2.2].

Contents

Terms of Reference

Inquiry into Class Action Proceedings and Third Party Litigation Funders

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to:

- the increased prevalence of class action proceedings in courts throughout Australia, and the important role they play in securing access to justice;
- the importance of ensuring that the costs of such proceedings are appropriate and proportionate;
- the importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards;
- the role that third party funding entities play in enabling the commencement and maintenance of class action proceedings;
- the role of third party funding entities in enabling the commencement of other classes of legal proceedings, including but not limited to arbitral proceedings;
- the potential for conflicts of interest between the professional obligations of lawyers and the commercial imperatives of third party funding entities;
- the fact that third party funding entities are not bound by professional ethical obligations, such as a lawyer's duties to the court and the client;
- the absence of a requirement that third party funding entities (or, where the entity is a corporate entity, its officers) satisfy character requirements or meet other antecedent criteria before being permitted to act as third party litigation funders; and
- the absence of comprehensive Commonwealth or State and Territory regulation to address the structure, operation and terms on which third party funding entities participate in the Australian legal system.

REFER to the Australian Law Reform Commission (ALRC), pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), consideration of whether and to what extent class action proceedings and third party litigation funders should be subject to Commonwealth regulation, and in particular whether there is adequate regulation of the following matters:

- conflicts of interest between lawyer and litigation funder;
- conflicts of interest between litigation funder and plaintiffs;
- prudential requirements, including minimum levels of capital;
- distribution of proceeds of litigation including the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;
- character requirements and fitness to be a litigation funder;
- the relationship between a litigation funder and a legal practice;
- the costs charged by solicitors in funded litigation, including but not limited to class action proceedings; and
- any other matters related to these Terms of Reference

I further ask the ALRC to consider what changes, if any, should be made to Commonwealth legislation to implement its recommendations.

Consultation

The ALRC should consult widely with institutions and individuals with experience of the conduct of litigation, class action proceedings and access to justice issues including the legal profession, courts and tribunals, litigation funding entities and the academic community.

Timeframe

The ALRC should provide its report to the Attorney-General by 21 December 2018.

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The Hon Justice John Middleton, Federal Court of Australia

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Recommendations

Case Management—Chapter 4

Recommendation 1—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that all representative proceedings are initiated as open class.

Recommendation 2—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide criteria for when it is appropriate to order class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.

Recommendation 3—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion.

Recommendation 4—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to give the Court an express statutory power to resolve competing representative proceedings.

Recommendation 5—In order to implement Recommendation 4, Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

Recommendation 6—The Supreme Courts of states and territories with representative action procedures, should consider becoming parties to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings*.

Recommendation 7—Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under that legislation.

Settlement Approval—Chapter 5

Recommendation 8—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval.

Recommendation 9—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may tender settlement administration, and include processes that the Court may adopt when tendering settlement administration.

Recommendation 10—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to require settlement administrators to provide a report to the class on completion of the distribution of the settlement sum. The report should be published on a national representative proceedings data base to be maintained by the Court.

Regulation of Litigation Funders—Chapter 6

Recommendation 11—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to prohibit a solicitor acting for the representative plaintiff, whose action is funded in accordance with a Court approved third-party litigation funding agreement, from seeking to recover any unpaid legal fees from the representative plaintiff or group members.

Recommendation 12—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.

Recommendation 13—Section 37N and s 43 of the *Federal Court of Australia Act 1976* (Cth) should be amended to expressly empower the Court to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.

Recommendation 14—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;
- the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
- Australian law governs any such third-party litigation funding agreement the funder submits irrevocably to the jurisdiction of the Court.

Recommendation 15—The Australian Securities Investments Commission *Regulatory Guide 248* 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.

Recommendation 16—Regulation 5C.11.01 of the *Corporations Regulations 2001* (Cth) should be amended to include 'law firm financing' and 'portfolio funding' within the definition of a '*litigation funding scheme*'.

Solicitors' Fees and Conflicts of Interest—Chapter 7

Recommendation 17—Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.

The following limitations should apply:

- an action that is 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;
- a percentage-based fee cannot be recovered in addition to professional fees for legal services charges on a time-cost basis; and
- 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.

Recommendation 18—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to include a statutory presumption that solicitors who fund representative proceedings on the basis of percentage-based fee agreements will provide security for costs in any such proceedings in a form that is enforceable in Australia.

Recommendation 19—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and
- the Court has an express statutory power to reject, vary, or amend the terms of such percentage-based fee agreements.

Recommendation 20—The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.

Recommendation 21—The *Australian Solicitors' Conduct Rules* should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matter in which the solicitor or law firm is acting.

Recommendation 22—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives to avoid and manage conflicts of interest, and to outline the detail of any conflicts in that particular case.

Regulatory Redress—Chapter 8

Recommendation 23—The Australian Government should 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.

Review of Substantive Law?—Chapter 9

Recommendation 24—The Australian Government should commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

Figures and Tables

Executive Summary

Contents

The Inquiry

On 11 December 2017, the then Attorney-General of Australia, Senator the Honourable George Brandis QC, asked the Australian Law Reform Commission (ALRC) to consider whether and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation. The Inquiry is set against the background of the increased prevalence of class action proceedings in courts throughout Australia, and the important role that litigation funders of class actions and other legal proceedings play in securing access to justice.

The Terms of Reference required the ALRC to consider:

- whether there is **adequate regulation of conflicts of interest** between litigation funder and plaintiffs and between lawyer and litigation funder, including in the relationship between a litigation funder and a legal practice;
- the desirability of imposing **prudential requirements**, including relating to capital adequacy, and also requirements relating to the character and suitability of litigation funders; and
- the adequacy of regulation around the **costs charged by solicitors in funded litigation** and, in particular, whether there is adequate regulation of the distribution of proceeds of litigation.

In short, the terms of reference required the ALRC to consider two overarching issues of the class action regime: the integrity of third-party funded class actions, and the efficacy of the class action system.

Class action proceedings in the Federal Court

Chapter 2 of this Report provides an in-depth review of the evolution of class action proceedings and third-party funding in Australia, with reference to cognate jurisdictions and recent jurisprudence. It highlights how shareholder claims have come to dominate the class action landscape in the Federal Court, and the role that third-party litigation funders have had in formulating that landscape and in providing access to justice for litigants.

The characteristics of class action proceedings in Australia are presented further in **Chapter 3,** which reviews the available statistics on the operation and outcomes of class action proceedings filed in the Federal Court. This chapter supports the view that shareholder claims are in the majority. It also shows that shareholder claims have never resolved by trial and are always funded by third-party litigation funders.

The statistics presented in **Chapter 3** indicate that third-party litigation funders are an entrenched element of class action proceedings, and that the class action sector is growing and diversifying.

Guiding principles

In formulating the recommendations of this Report, the ALRC has been guided by three overarching principles:

- **Principle One**: It is essential to the rule of the law that citizens should be able to vindicate just claims through a process characterised by fairness and efficiency to all parties, that gives primacy to the interests of the litigants, without undue expense or delay.
- **Principle Two**: There should be appropriate protections in place for litigants who wish to avail themselves of the class action system and the variety of funding models that facilitate the vindication of just claims.
- **Principle Three**: The integrity of the civil justice system is essential to the operation of the rule of law.

The recommendations of this Report are aligned with one or more of these principles. That is, the recommendations aim to: promote fairness and efficiency; protect litigants; and assure the integrity of the civil justice system. The relationship between the key principles and the recommendations of this Report are considered in **Chapter 1.**

Clarifying the powers of the Federal Court

The ALRC makes recommendations to assist the Federal Court case manage class action proceedings effectively, efficiently and fairly. This includes recommendations relating to: the constitution of class actions; competing class actions; and settlement approval by the Court.

Constitution of class actions

In **Chapter 4**, the ALRC recommends amendments to the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) to provide that class actions must be initiated as open class—this improves access to justice by enabling all victims of a civil wrong to participate in the class action and not just those who take active steps to join it. This amendment to the FCA Act would be supported by amendments to the Federal Court of Australia's Class Actions Practice Note (GPN-CA) (Practice Note) to:

- set out the circumstances in which it may be necessary to close the class to facilitate early settlement, and
- the criteria for the limited circumstances in which a class action that has been closed may be reopened.

In order to support an open class regime, the ALRC recommends the FCA Act be amended to provide an express statutory power for the Court to order a common fund.

Competing class actions

In **Chapter 4**, the ALRC recommends amendments to the FCA Act to address the rising incidence of competing class actions. Those amendments seek to ensure that, wherever possible, there is a single class action in order to litigate a claim. Multiple class actions increase uncertainty, costs and delays, and therefore there is a sound public policy basis to permit only one class action with respect to a dispute to proceed, subject to the overriding discretion of the Court. Statutory amendments to reduce the risk of forum shopping are also recommended.

Settlement approval

In **Chapter 5**, the ALRC makes recommendations to assist the Federal Court in its settlement approval decision-making—including in its determination of fairness and of reasonable costs.

The ALRC also examines the use of confidentiality orders in class action settlements, and how these orders affect group members and policy-makers reliant on an evidence-base. It is recommended in **Chapter 5** that settlement administrators be required to provide a report to group members and the Federal Court outlining the distribution of settlement funds. The requirement to report would increase the accountability of administrators, support the principle of 'open justice', and enable the Federal Court to design and

maintain a database that captures the outcomes of Part IVA proceedings that resolve in its jurisdiction.

Regulation of third-party litigation funders

In **Chapter 6,** the ALRC acknowledges the critical role that third-party litigation funders have in providing access to justice for group members, while also recognising the inherent risks associated with litigation funders. This includes the risk that third-party litigation funders may fail to meet their obligations under funding agreements, use the Federal Court of Australia for improper purposes, or exercise influence over the conduct of proceedings to the detriment of group members.

A suite of recommendations to improve the regulation of litigation funders and to support the unique role of the Federal Court in protecting the interests of all group members is recommended in lieu of a licensing regime for litigation funders. The recommendations: provide for greater Court oversight of the litigation funding agreement, require that the funder indemnifies the lead plaintiff against an adverse costs order, and create a presumption in favour of security for costs.

Legal costs

As shown by the data presented in **Chapter 3**, class action proceedings are often run with the support of third-party litigation funders. Litigation funders cover and then recoup legal costs and receive a commission from an award of damages. Most matters receive third-party funding, meaning that the types of matters that proceed are skewed towards ones with the highest financial returns and that group members usually pay two sets of fees: legal costs and third-party litigation funding commissions.

In **Chapter 7**, the ALRC recommends the limited introduction of percentage-based fees (commonly called 'contingency fees')—a method of billing for legal services through a percentage of the amount recovered by the litigation rather than through time-based or cost scale billing. The recommended percentage-based billing model aims to provide a greater return to group members, further enable medium-sized class action matters to proceed, and, as class actions are strictly supervised by the Court, provide protection for representative plaintiffs and group members against paying a single yet disproportionate or unreasonable fee.

Conflicts of interest

Actual or perceived conflicts of interest that arise in class action proceedings—with particular emphasis on the tripartite arrangement of funder, solicitor and representative plaintiff/group members—are dealt with in **Chapters 6 and 7**. The ALRC recommends strengthening existing ways to mitigate and protect against conflicts of interest in class action proceedings. Particularly, in **Chapter 6,** the ALRC recommends that the existing ASIC Regulatory Guide 248 be amended to require third-party litigation funders to

report to ASIC to show compliance with the requirements to meet certain obligations to avoid or mitigate conflicts of interest.

In **Chapter 7**, the ALRC recommends the development of a voluntary accreditation program for solicitors who act in class action proceedings. It also recommends prohibiting arrangements whereby a solicitor may have an interest in the third-party funder with whom the solicitor is working, and recommends clear and concise communication with group members regarding conflicts of interest.

Areas for further inquiry

The ALRC identifies two areas for further inquiry. First, in **Chapter 8,** the ALRC suggests principles that may guide and support the design of regulatory collective redress powers—aimed at enhancing access to justice, through reduced costs and greater efficiencies. A review by Government of the statutory enforcement regimes for regulators is recommended so to facilitate effective, efficient and consistent statutory redress schemes.

Secondly, in **Chapter 9**, the ALRC recognises that the class action regime may benefit from a broader review of the substantive law which supports shareholder class actions, and recommends such a review.

1. Framing the Inquiry

Contents

The Inquiry

1.1 On 11 December 2017, the then Attorney-General of Australia, Senator the Honourable George Brandis QC, asked the Australian Law Reform Commission (ALRC) to consider whether and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation. The Inquiry is set against the background of the increased prevalence of class action proceedings in courts throughout Australia, and the important role that litigation funders of class actions and other legal proceedings play in securing access to justice.

1.2 The Terms of Reference require the ALRC to consider whether there is **adequate regulation of conflicts of interest** between litigation funder and plaintiffs and between lawyer and litigation funder, including in the relationship between a litigation funder and a legal practice.

1.3 The ALRC was also asked to consider the desirability of imposing **prudential requirements**, including relating to capital adequacy, and also requirements relating to the character and suitability of litigation funders.

1.4 Further, the ALRC was asked to consider the adequacy of regulation around the **costs charged by solicitors in funded litigation** and, in particular, whether there is adequate regulation of the distribution of proceeds of litigation, including a consideration of the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders.

1.5 In short, the terms of reference require the ALRC to consider two overarching issues of the class action regime: the integrity of third-party funded class actions, and the efficacy of the class action system.

1.6 The Terms of Reference direct the ALRC to advise the Government on necessary and appropriate Commonwealth regulation of class action proceedings and litigation funding. The ALRC has therefore excluded the class action regimes in the states and territories from its current considerations. Nonetheless, issues that might complicate the class action regime and thereby hinder access to justice, through for example, forum shopping, are considered where appropriate.

The impetus for reform

1.7 More than a quarter of a century has elapsed since, in March 1992, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) introduced a federal class action regime within Australia. In the Second Reading Speech, then Attorney-General, the Honourable Michael Duffy said:

> The new procedure will enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources ... Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the Bill is to deal with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and so more cheaply and efficiently than would be the case with individual actions.[1]

1.8 Part IVA, in large measure, implemented the Report of the ALRC, *Grouped Proceedings in the Federal Court*.[2]

1.9 Despite representing a very small proportion of actions commenced annually in the Federal Court, class actions are among the most high-profile and far-reaching procedures within the federal legal system. As stated by the Chief Justice of the Federal Court of Australia, the social utility of the class action regime is said to be demonstrated through 'the vindication of just claims through a process characterised by fairness and efficiency to both parties that gives primacy to the interests of litigants, including class members (but not funders or lawyers)'.[3] The legitimacy of the consequences of the operation of such a regime is assessed by the vindication of just claims, the encouragement of proper behaviour by putative wrongdoers, and the elimination, without undue expense or delay, of unworthy claims.[4]

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1 Commonwealth, *Parliamentary Debates,* House of Representatives, 14 November 1991, 3174-3175 (Duffy).

2 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988).

3 Chief Justice JLB Allsop AO, 'Class Actions' (Speech, Law Council of Australia, 13 October 2016).

4 Ibid.

1.10 In assessing the social utility and legitimacy of the regime, attention has been drawn to the role of the Federal Court to safeguard its processes and to ensure that the practices and procedures of the Court are informed by considerations, which include:

- the statutory mandate in s 37M(3) of the FCA Act to facilitate the just resolution of disputes (including representative proceedings) according to law, and as quickly, inexpensively, and efficiently as possible; and
- the furtherance of the Court's supervisory and protective role in relation to group members.[5]

1.11 More recently, the focus of this attention has been directed primarily, although not exclusively, at shareholder (or securities) class actions. Shareholder claims are the most commonly filed class actions in the Federal Court, representing 34% (37) of all class actions filed in the last five years.[6] Such claims are usually based on breach of the continuous disclosure and misleading and deceptive conduct provisions of the *Corporations Act 2001 (Cth)* (the Corporations Act),[7] which were introduced in 2002. Since the introduction of these provisions, 82 shareholder class actions have been filed in the Federal Court.[8] None has proceeded to judgment and there has been relatively little judicial consideration of the provisions, including the validity of the 'market-based causation' theory[9] in the context of those provisions, beyond the class action context.[10] The features particular to shareholder class actions are discussed further in Chapter 2—The Evolution of Class Action Proceedings and Third-Party Litigation Funding.

1.12 It is unlikely that, in 1988, the ALRC could have foreseen the developments in the law relating to class actions that have occurred since then. It certainly would not have foreseen the growth in the involvement of litigation funders. It is therefore timely to revisit whether, and if so to what extent, the second purpose of the initiating Bill (the ability to obtain redress more cheaply and efficiently) continues to be achieved, particularly in respect of investor and shareholder claims, and having regard to the expressed aim of reducing the costs of proceedings and promoting efficiency in the use of court resources. These are matters that need to be considered both in terms of the integrity of third-party funded class actions, and the efficacy of the regime through which they are prosecuted.

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5 *Perera v GetSwift Limited* [2018] FCA 732 [3].

6 Vince Morabito, Private correspondence, 13 March 2018.

7 See, eg, *Corporations Act* 2001 (Cth), ss 674, 728, 1041E, 1041H.

8 Vince Morabito, Private correspondence, 13 March 2018. Professor Morabito advised that 66 shareholder class actions had been filed during this time period. 16 shareholder class actions have been filed since March 2018.

9 Market-based causation theory refers to proof of loss that does not rely on any direct reliance on the unlawful conduct: *HIH Insurance Limited (in liq)* [2016] NSWSC 482.

10 But see *Forrest v ASIC* (2012) 247 CLR 486; *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) FCR 402; *ASIC v Southcorp Ltd (No 2)* (2003) 130 FCR 406; *ASIC v Narain* (2008) 169 FCR 211; *ASIC v Chemeq Ltd* [2006] FCA 936; *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2014] VSC 357; *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322; *Melbourne City Investments Pty Ltd v UGL Ltd* [2015] VSC 540; *Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482.

1.13 This Inquiry has examined whether and to what extent Commonwealth regulation of class action proceedings and third-party litigation funders is necessary to assure the social utility of the class action regime.

Process of reform

1.14 The ALRC was asked to consult widely with institutions and individuals with experience of the conduct of litigation, class action proceedings and access to justice issues, including the legal profession, courts and tribunals, litigation funding entities and the academic community.

1.15 In the early part of the Inquiry, consultations were held with a number of government agencies, academics, judges, members of the legal profession, insurers and industry stakeholders both within Australia and, where relevant, internationally. Many individuals and organisations contacted the ALRC to discuss the issues of concern to them. A list of those early consultations is included at Appendix A.

1.16 On 31 May 2018, the ALRC released a Discussion Paper in which it proposed a number of reform measures and also asked a number of questions. Those Proposals and Questions are included at Appendix C.

1.17 Subsequent to the release of the Discussion Paper, formal submissions were invited. The ALRC also conducted a series of consultations with relevant stakeholders in England and Wales.

1.18 The ALRC received 107 submissions. A list of those submissions is included at Appendix D and those that are not confidential are available on the ALRC website.

1.19 A further series of consultations and workshops took place after the receipt of the submissions to ensure that interested persons had the opportunity to expand on matters that had been raised in their submission, where necessary, and to comment on any new matters that had not been previously canvassed in the Discussion Paper.

1.20 The ALRC has also been informed by the class action law and practice of cognate Commonwealth jurisdictions, particularly that of Canada and the United Kingdom. Despite the long history of class actions in the United States, meaningful comparison with much of that country's class action jurisprudence is difficult, not least because of the fundamental difference between the costs regimes (the absence of the loser-pays principle in most litigation in the United States) and the tradition of charging on a contingency fee basis.[11] Nevertheless, where appropriate, the position in the United States has also been considered.

11 Samuel Issacharoff, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' (2014) 63 *DePaul Law Review* 561.

1.21 In preparing this Report and in reaching its Recommendations, the ALRC has been assisted greatly by the numerous individuals and institutional representatives who have shared their experience of the class action regime and their considerable insights. The ALRC has also derived significant assistance from the two expert panels that were established at the outset of this Inquiry: the Academic Expert Panel and the Judicial Expert Panel.

Overarching Principles

1.22 In formulating its Recommendations, the ALRC has been guided by the following overarching principles:

Principle One:	It is essential to the rule of the law that citizens should be able to vindicate just claims through a process characterised by fairness and efficiency to all parties, that gives primacy to the interests of the litigants, without undue expense or delay.
Principle Two:	There should be appropriate protections in place for litigants who wish to avail themselves of the class action system and the variety of funding models that facilitate the vindication of just claims.
Principle Three:	The integrity of the civil justice system is essential to the operation of the rule of law.

Principle One: Fairness and efficiency without undue expense or delay

1.23 The basis of the introduction of the federal class action regime by Part IVA of the FCA Act in March of 1992 was that it is essential that appropriate procedures exist to ensure that groups of persons who have suffered loss or damage, whatever the type of claim, will be able to pursue redress and to do so more cheaply and efficiently than would be the case with individual actions. Twenty-six years later, it is beyond doubt that, as was intended, the regime has enabled claims to be brought by people with small claims whose number may be such as to make the total amount at issue significant, and to deal efficiently with similar individual claims that are large enough to justify individual actions.

1.24 Nevertheless, the costs of such actions remain very high and it is essential that court processes maximise efficiency and control expense and delay, without compromising fairness to any party.

1.25 Costs and delay are also necessarily increased where multiple class actions are commenced with respect to the same or related matters. In 2015–2016, 25% of class action proceedings were related actions.[12]

12 King & Wood Mallesons, 'The Review – Class Actions in Australia 2015/2016'.

1.26 The following Recommendations respond to these issues:

Powers of the Court

Recommendation 13—Section 37N and s 43 of the *Federal Court of Australia Act 1976* (Cth) should be amended to expressly empower the Court to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.

Recommendation 1—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that all representative proceedings are initiated as open class.

Recommendation 2—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide criteria for when it is appropriate to order class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.

Recommendation 4—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to give the Court an express statutory power to resolve competing representative proceedings.

Recommendation 5—In order to implement Recommendation 4, Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

Recommendation 8—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval.

Recommendation 9—Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may tender settlement administration, and include processes that the Court may adopt when tendering settlement administration.

1.27 Appropriate procedures to ensure that groups of persons who have suffered loss or damage will be able to pursue redress and to do so more cheaply and efficiently than would be the case with individual actions should not only facilitate access to the courts but should also provide for methods, where appropriate, of pursuing collective redress without resorting to litigation.

1.28 The following Recommendation addresses the need to provide a broad range of options for those who seek to vindicate just claims:

Alternative collective redress model

> **Recommendation 23**—The Australian Government should 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.

1.29 Regardless of the quality of procedures that give citizens the right to pursue claims, such rights are of little value if those citizens are unable to afford to pursue those claims. Litigation funding is an important element in facilitating access to the legal system, particularly in jurisdictions like Australia, Canada and the United Kingdom where the losing party, in addition to having to fund its own legal fees, is responsible for the costs of the successful party (adverse costs). As Jackson LJ said in his *Review of Civil Litigation Costs*:[13]

> It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice.

1.30 Third-party litigation funding is now well established in Australia but, over the past five years, has predominantly facilitated access to the courts in a narrow range of claims, namely securities and investor class actions.[14] However, litigation funding is but one element in facilitating access to the courts to enable groups of persons to seek redress.

1.31 It is also common for solicitors representing plaintiffs in a class action to bill the representative plaintiff pursuant to a conditional fee agreement, otherwise known as a 'no win/no fee' agreement. Under such arrangements, the representative plaintiff usually remains liable for the disbursements, any order for security for costs, and any potential adverse costs order. Payment for the solicitor's time is, however, dependent on a successful outcome and, in the case of a successful outcome, a solicitor is entitled to an uplift fee of not more than 25% of the billed amount to compensate the solicitor for the risk and to represent interest on the deferred payment of fees. Such agreements are regulated pursuant to the statutes governing legal professional conduct in each State and Territory.

1.32 More recently, After-the-Event (ATE) Insurance has provided another source of funding for plaintiffs in class actions. ATE insurance refers to a policy of insurance taken out after a dispute has arisen that generally covers the litigating party against its potential liability to pay adverse costs, as well as the party's own disbursements, in the event that the claim is unsuccessful. Typically, such policies are entered into in conjunction with

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13 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs Preliminary Report* (May 2009) 160.

14 Of the 71 funded claims filed in the Federal Court from 2013 to 2018, 52.1% (37) were claims by shareholders, and 23.9% (17) were claims by investors. This compares with 5.6% (4) four consumer protection and product liability class actions that were funded, and 4.2% (3) mass tort claims.

a conditional fee agreement between the representative plaintiff and his or her solicitor. They are also used increasingly by litigation funders to offset a portion of the funder's risk.

1.33 Broadening the base of permissible funding models and creating different funding options may facilitate greater access to redress procedures, particularly in lower value claims or public interest matters, thereby assuring citizens are able to vindicate just claims consistent with the rule of law.

1.34 The following Recommendations respond to these issues:

A broad base of funding options

> **Recommendation 17**—Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.
>
> The following limitations should apply:
>
> – an action that is 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;
> – a percentage-based fee cannot be recovered in addition to professional fees for legal services charges on a time-cost basis; and
> – 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.

Principle Two: Protection of litigants

1.35 The structural features of the class action regime implemented by Part IVA of the FCA Act have the consequence that class members are usually passive participants in the litigation who lack the ability or the incentive (because of those very structural features of the regime) to monitor the litigation activities of those who act on their behalf, the representative plaintiff and the solicitors retained by that plaintiff. These peculiar circumstances are reflected in the Court's role in agreements to settle class actions. Again, unlike other forms of commercial litigation, an agreement to settle class action litigation has no legal effect unless and until it is approved by the Court. It has been observed by the Full Federal Court that, 'it assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises'.[15]

1.36 Over the course of the two and a half decades since the introduction of the class action regime in Australia, the number of class actions has grown steadily, but not exponentially. In the first 12 months of its operation, eight class actions were filed; seven

15 *ASIC v Richards* [2013] FCAFC 89 [8].

were filed in the following 12 months; and a further 14 in the subsequent 12 months. Thirty-two class actions were filed in the Federal Court in 2017–2018. This represents 0.68% of the total number of causes of action filed in the Federal Court over the same period.[16] As of March 2018, approximately 15.4 class actions have, on average, been filed annually in the Federal Court of Australia since the regime commenced in 1992.[17]

1.37 The most significant trend in the preceding five years is the rise in funded shareholder or securities class actions. In the period from September 2013–September 2016, every shareholder class actions filed in the Federal Court was funded by a third-party litigation funder.[18]

1.38 Class action proceedings have traditionally been conducted in Australia by a small pool of law firms and funded by a small number of litigation funders. That landscape is changing. In the period from 2005-2008, there were 11 different law firms in filed class actions. In the period from 2014-2017, that number grew to 43.[19]

1.39 The number of litigation funding entities active in the Australian market has also increased with around 25 currently active in Australian litigation, including class actions.[20] These entities, both domestic and foreign, include publicly listed corporations, private companies, private equity firms, and hedge funds. Some retain significant capital on their balance sheets; others access capital in a variety of ways.

1.40 In addition to the relatively straight forward model, where a third-party (a litigation funder) with no direct interest in the proceeding agrees to fund litigation in return for a share of any amount recovered if the case is successful, a much wider range of funding models has emerged and they continue to evolve. Portfolio funding or law firm financing is being promoted as an alternative to case-by-case funding. Broadly, there are two types of arrangements: the first involves finance structured around a law firm, or department within a law firm, where the claimants are various clients of the firm; and secondly, finance structured around a corporate claim holder or other entity which is likely to be

16 See Chapter 3, Table 3.1.

17 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [4.2]. In the state courts, the average number of class action filings, since the introduction of a class action regime in Victoria, Part 4A *Supreme Court Act 1986* (followed by NSW in 2011, Part 10 *Civil Procedure Act 2005* and Queensland in 2017, Part 13A *Civil Proceeding Act 2011*) is 6; ibid.

18 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [4.3.2].

19 King & Wood Mallesons, "The Review: Class Actions in Australia 2016/2017'.

20 Augusta Ventures (Australia) Pty Ltd, Australian Funding Partners Ltd, Balance Legal Capital LLP, Burford Capital LLC, Calunius Capital LLP, Chancery Capital, Claims Funding Australia Pty Ltd, Comprehensive Legal Funding LLC, Grata Fund, Harbour Litigation Funding Ltd, IMF Bentham Ltd, International Justice Fund Ltd, International Litigation Funding Partners, Investor Claim Partner, Ironbark Funding, Litigation Capital Management, Litigation Funding Solutions, Litigations Lending Management Pty Ltd, Litman Holdings Pty Ltd (Agora Capital Corporation), Macquarie Specialised Investment Solutions, Omni-Bridgeway, Therium Group Holdings Ltd, Vannin Capital Ltd, Woodsford Litigation Funding Ltd.

involved in multiple disputes over a defined period of time.[21] Some types of financing are increasingly a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain control over its investment (in the litigation) through traditional corporate governance.[22] Additionally, some funders now establish Special Purpose Vehicles (SPVs) to receive investment funds from a variety of sources including pension funds and educational trusts.

1.41 Despite offering a financial service, litigation funders are not required to hold a licence to operate in Australia. Tension exists between the perceived need for a licensing regime to ensure that litigation funders have the ability to meet their financial obligations (to indemnify the plaintiff in the event of an adverse costs order and to meet their commitment to fund the plaintiff's lawyer) and manage the conflicts that are inherent in any funding agreement, and the risk that a licensing regime may unnecessarily stifle competition amongst funders and thus artificially inflate the cost of funding.

1.42 The following Recommendations respond to these issues:

Court approval of third-party litigation funding or percentage-based fee agreements

Recommendation 14—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;
- the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
- Australian law governs any such third-party litigation funding agreement the funder submits irrevocably to the jurisdiction of the Court.

Recommendation 19—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and
- the Court has an express statutory power to reject, vary, or amend the terms of such percentage-based fee agreements.

21 ICCA-Queen Mary Task Force, *Report on Third-Party Litigation Funding in International Arbitration*, April 2018, 38–39.

22 Ibid 35.

Recommendation 3—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion.

Reducing the financial risks to consumers

Recommendation 12—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.

Recommendation 11—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to prohibit a solicitor acting for the representative plaintiff, whose action is funded in accordance with a Court approved third-party litigation funding agreement, from seeking to recover any unpaid legal fees from the representative plaintiff or group members.

Recommendation 18—Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to include a statutory presumption that solicitors who fund representative proceedings on the basis of percentage-based fee agreements will provide security for costs in any such proceedings in a form that is enforceable in Australia.

1.43 The very nature of class action proceedings, particularly those that are funded by third-party litigation funders, gives rise to circumstances that are likely to result in actual or perceived conflicts of interests and duties as between all concerned in the complex tripartite relationship. Third-party litigation funders operating in Australia, who meet the current definition for exemption from the requirement to hold an Australian Financial Services Licence, are nevertheless required to comply with Regulatory Guide 248 in relation to managing conflicts of interest.[23] That definition no longer captures the increasingly wide variety of funding models that is emerging in the Australian litigation funding market and concerns have been expressed that it may no longer be obvious in all circumstances that a third-party funder is required to comply with Regulatory Guide 248.

1.44 Concerns have also been expressed about the depth of understanding within the legal profession as to the complexity of the conflicts of interest that may arise in the context of third-party funded class actions, particularly given the rapid increase of new entrants, both funders and solicitors, to the class action landscape.

1.45 It is important that there are appropriate protections in place for litigants involved in class actions, including passive class members who are nevertheless reliant on the representative plaintiff, and the solicitor acting for the representative plaintiff, to act in their interests.

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23 Australian Securities and Investments Commission, *Litigation schemes and proof of debt schemes: Managing conflicts of interest:* Regulatory Guide 248 (April 2013) [248.13].

1.46 The following Recommendations respond to these issues:

Broadening the reach and scope of Regulatory Guide 248

> **Recommendation 16—**Regulation 5C.11.01 of the *Corporations Regulations 2001* (Cth) should be amended to include 'law firm financing' and 'portfolio funding' within the definition of a '*litigation funding scheme*'.
>
> **Recommendation 15**—The Australian Securities Investments Commission *Regulatory Guide 248* 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.

Regulation within the legal profession

> **Recommendation 20—**The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.
>
> **Recommendation 21—**The Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matter in which the solicitor or law firm is acting.

Principle Three: Assuring the integrity of the civil justice system

1.47 The class action regime that was created by Part IVA of the FCA Act is different in character from other forms of civil litigation. Class actions are not simply disputes between private parties about private rights. They frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels, or fostering safe pharmaceuticals.[24]

1.48 In addition to the issues of costs and delay caused by multiple class actions being commenced with respect to the same or related matters, referred to earlier, such issues are exacerbated when parties seek to commence multiple class actions across different jurisdictions.[25] Such procedural arbitrage poses a risk to the integrity of the civil justice system in circumstances where it is

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24 Michael Legg, 'Class Actions, Litigation Funding and Access to Justice', Public Lecture addressing the *Victorian Law Reform Commission Consultation Paper, Access to Justice – Litigation Funding and Group Proceedings* (2017) 18.

25 See *Wigmans v AMP Ltd* [2018] NSWSC 1045; *Wileypark Pty Ltd v AMP Limited* [2018] FCA 1052; *Wigmans v AMP Ltd* [2018] NSWSC 1118; *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143.

> based on the view by those in control of the litigation as to the likely approach of the different judges in different courts not only about the law and facts, but about funding agreements and lawyers' fees; and the risk of the possible placement of self-interest above the interest of those whom the Court is bound to protect: the group members.[26]

1.49 In circumstances where the Court is placed in the position of serving in a role akin to a fiduciary for the class, and in circumstances where the legitimacy of the complex tripartite relationship between representative plaintiff, solicitor and funder has been endorsed by the High Court of Australia,[27] the integrity of the system through which class claims are pursued must be assured. The legitimate use of the Court's processes in a common enterprise of a commercial character to obtain mutual benefits for each of the group members, the funder and the solicitors should not be undermined by proceedings that disproportionately benefit the funder and solicitors, rather than the litigants. Both the public function of class actions and the private interests of the litigants must take priority over the interests of those whose role it is to provide the services necessary to participate in the system.

1.50 The following Recommendations respond to these issues:

Resolution of cross-jurisdictional arbitrage

> **Recommendation 6—**The Supreme Courts of states and territories with representative action procedures, should consider becoming parties to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings.*
>
> **Recommendation 7**—Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under that legislation.

Communications with class members

> **Recommendation 22—**Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives to avoid and manage conflicts of interest, and to outline the detail of any conflicts in that particular case.
>
> **Recommendation 10—**Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to require settlement administrators to provide a report to the class on completion of the distribution of the settlement sum. The report should be published on a national representative proceedings data

26 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [15].
27 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

base to be maintained by the Court.

Review of the substantive law

Recommendation 24—The Australian Government should commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

Related inquiries

1.51 Over the past two decades, there have been several inquiries into class actions and litigation funding, both within Australia and internationally. This Inquiry did not revisit all of the matters canvassed in those previous inquiries, and publicly available submissions to the previous inquiries mentioned below have been considered in the course of preparing this Report. In this Inquiry, the ALRC has focussed on developments in the law and practice relating to class actions that were unlikely to have been foreseen by its predecessors in 1988, and has re-examined questions which, with the benefit of 20 years of litigation funding in Australia, might yield a different answer from that originally given.

Australian Law Reform Commission

1.52 Three decades have elapsed since the ALRC first considered the desirability of a class action procedure in *Grouped Proceedings in the Federal Court* (ALRC No 46, 1988). The result of that Inquiry was the introduction of Part IVA to the FCA Act. Part IVA built on and reformed existing representative proceeding rules dating back to 19th century procedures. The new Part was articulated as part of the Government's equity and access policies in its social justice program.

1.53 The ALRC acknowledged in that report that there was an increasing trend for litigation to be financed by a variety of groups, including trade unions and special interest groups.[28] It did not, however, consider it appropriate for such agreements to be predicated on receipt of a share in the proceeds of the subject matter of the action, unless the agreement was between solicitors and clients[29] (evincing early support, albeit limited, for the introduction of contingency fee arrangements in Australia).[30]

1.54 The design of the regime encompassed by Part IVA was a matter of careful consideration by the ALRC. Having considered the ALRC's recommendations, the

28 Australian Law Reform Commission, above n 2, [315].

29 Ibid [318]. The ALRC's view was contradicted by the High Court of Australia in *Campbells Cash and carry v Fostif Pty Ltd* (2006) 229 CLR 386. The Chief Justice of New Zealand has recently expressed a potentially contrary view, albeit in obiter, *Pricewaterhousecoopers v Walker* [2017] NZSC 151.

30 Australian Law Reform Commission, above n 2, [295]-[297].

Government determined that an open class system with an opt-out procedure was preferable on grounds both of equity and efficiency. The then Attorney-General said:

> It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.[31]

1.55 The ALRC had drawn attention to the implications that would arise should the consent of all persons affected be required before proceedings could be commenced, thereby in effect creating a closed class. It noted that any finding as to the liability of the respondent would only be binding on those people whose consent had been obtained and that others might never be informed of the situation. If an affected person later sought a remedy individually, the respondent would not be obliged to accept liability but could recontest it.

1.56 Further, if there was a limited fund from which monetary relief could be obtained, for example an insurance policy, a procedure covering all members of the group would make it more likely that they would all obtain a share of the limited fund. By contrast, if group members were left to pursue individual proceedings, those who obtained judgment first would deplete any fund available, leaving other group members without recourse to the fund. The ALRC also pointed to the reduction in the proportion of costs incurred in pursuing a claim where all persons are involved in the proceeding. It recommended that, subject to appropriate protection of a person's rights where consent is not given, it should be possible to commence a group members' proceeding without first obtaining the consent of that group member.[32]

1.57 At the heart of considerations of both the integrity of third-party funded class actions and the efficacy of the regime through which they are prosecuted, is the vexed issue of costs—hence the focus on costs in this Inquiry. The ALRC made a number of recommendations in its original report in relation to costs in representative proceedings.

1.58 So far as adverse costs orders were concerned, the ALRC recommended that the principal applicant should be liable for any costs ordered to be paid in group members' proceedings of which he or she has had the conduct, and that group members should not be liable to pay the costs of another party except to the extent that they have assumed conduct of their own proceedings.[33]

1.59 In the absence of a third-party funding agreement, the above approach would provide a significant costs disincentive for a person to be the principal applicant in a

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31 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174-3175 (Duffy).

32 Australian Law Reform Commission, above n 2, [127].

33 Ibid [261].

representative proceeding. The ALRC therefore explored other approaches to costs such as:

- a one-way costs rule, where an applicant may recover its costs if successful but is not liable for costs if unsuccessful;
- a no costs rule, where each party bears its own costs; and
- variations of each of these rules.

1.60 The difficulty of finding the correct balance to strike in respect of costs in representative proceedings was reflected in the ALRC's recommendation that the existing discretion in relation to the awarding of costs be retained given that there are no entirely satisfactory alternatives to the rule that costs follow the event. In relation to security for costs, the ALRC recommended that no order for security should be made against principal applicants on the ground that they are not suing for their own benefit but for the benefit of a group member.[34]

1.61 In order to address the economic disincentive that would confront the representative party, the ALRC considered that conditional fee agreements should be permitted, noting however that the Court would have to be satisfied, before approving an agreement, that the method of calculating any amount in excess of scale to compensate the solicitor for the risk of losing the case is fair and reasonable.[35]

1.62 Conditional fee agreements are no longer novel and indeed are regulated under the various state and territory statutes that regulate the legal profession.[36] However, as foreshadowed by the ALRC, typically they still do not extinguish the representative party's liability for party-party costs in the event that the representative proceeding is unsuccessful. These costs can be significant.

1.63 The ALRC considered alternative methods of calculating a fee agreement including:

- as a lump sum;
- as a percentage of recovery, either at a flat rate or on a decreasing sliding scale according to the amount of recovery or on a scale varying according to the time when the proceedings are resolved;
- as a fraction or multiple increase on scale costs; and
- as a top-up on party-party costs if awarded.

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34 Ibid [271].

35 Ibid [293].

36 *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3, cl 27(1); *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 183; *Legal Profession Act 2008* (WA) s 285.

1.64 The ALRC recommended that solicitors' fees calculated as a percentage of the amount recovered (contingency fees) should not be permitted. It noted, however, that this recommendation could be reviewed if the law changed to permit contingent fees in civil litigation generally.[37]

1.65 The ALRC also foreshadowed the development of the 'common fund order' in Australia (albeit not with respect to funders' commissions)[38] and considered that, even if a group member had not contracted with the solicitor acting for the representative party, the group member should have to contribute to the solicitor-client costs when monetary relief is awarded.

1.66 The ALRC considered that the ability to recover costs from group members through a deduction from damages payable to group members adequately addressed those representative proceedings which were successful and resulted in recovery of money. However, significant financial disincentives remained for a person to be a representative party where:

- the proceedings in question were not for monetary relief;
- the amount recovered might not be sufficient to satisfy the difference between the party-party costs recovered from the respondent and the representative party's liability to his or her solicitors; and
- the representative party was unsuccessful in the conduct of the representative proceeding. In this situation, a conditional fee agreement may negate the representative party's liability to its lawyers but would not address the liability of the representative party to a respondent by reason of an adverse costs order.

1.67 Principally to accommodate that exposure, the ALRC recommended the establishment of a special fund to provide for the costs of parties involved in group proceedings.[39] It was envisaged that the fund would apply a merit test to any application for financial assistance and would 'provide support for the applicants' proceedings and … meet the costs of the respondent if the action was unsuccessful.'

1.68 The ALRC observed that the suggestion of a special fund was not (even at that time) a novel one—Quebec had established a Class Action's Assistance Fund in 1978. Subsequent to the establishment of that Fund, in 1992, Ontario established the Class Proceedings Fund (CPF) following a recommendation of the Law Reform Commission of Ontario in its 1982 Report on Class Actions.[40]

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37 Australian Law Reform Commission, above n 2, [297].

38 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

39 Australian Law Reform Commission, above n 2, [309].

40 Class Proceedings Committee, *Submission 15* to the Law Commission of Ontario's Inquiry, *Class Actions: Objectives, Experiences and Reforms,* Consultation Paper (March 2018). The CPF was established under s 59.1 of the *Law Society Act*. It received a $500 000 endowment on establishment and has been subsequently funded by a 10% levy on settlements or awards in favour of class members.

1.69 The ALRC recognised that such a fund would be of particular assistance where the amount of the representative party's and group members' claims was small. Enhancing access to justice for this type of claim was one of the key purposes for the establishment of the representative mechanism. The existence of a fund to provide support for the representative party's proceeding and to meet the costs of the respondent if the action was unsuccessful would plainly enhance access to justice. It would also assist in circumstances where the individual claim was economically recoverable but the applicant had to bear the additional costs of being the representative party. In these circumstances, it was said, the fund would assist with the attainment of judicial economy by encouraging the grouping of proceedings. As noted above, this recommendation has never been adopted.

1.70 The ALRC had an opportunity to consider the issue of costs in its 1995 Report, *Costs shifting—who pays for litigation.*[41] The ALRC had been asked to review the impact on the litigation system of the costs allocation rules, in particular the 'loser pays' rule. The ALRC found that the costs allocation rules sometimes operate unfairly and can deny access to justice. In particular, the 'loser pays' rule can deter people from pursuing meritorious claims or defences because of the risk of having to pay a portion of the other party's costs if unsuccessful. It acknowledged that litigation in the public interest may be a relevant exception to the usual costs rule. It also recommended that courts and tribunals should continue to be able to order costs, in appropriate cases, against people who are not formally a party to proceedings. Specifically, the ALRC did not propose any changes to the specific costs allocation rules that apply to representative proceedings conducted pursuant to Part IVA of the FCA Act.[42]

1.71 Representative proceedings were again reviewed by the ALRC in 2000 as part of the Report, *Managing Justice—a review of the federal civil justice system.*[43] As at the date of that Report, only eight years had elapsed since the introduction of Part IVA of the FCA Act and 124 class actions had been filed in the Federal Court.[44] Difficulties had already begun to emerge with competing actions and the ALRC recommended that the Court promulgate rules in relation to criteria for selecting the appropriate representative action.[45] Further, it made recommendations that professional conduct rules should include rules governing lawyers' responsibilities to multiple claimants in representative proceedings,[46] and that Part IVA should be amended to require class closure at a specified time before judgment and enabling the Court to approve fee agreements between the

41 Australian Law Reform Commission, *Costs shifting—who pays for litigation* (ALRC No 75, 1995).
42 Ibid [16.26].
43 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).
44 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017) 23.
45 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) rec 79.
46 Ibid rec 82.

representative party and/or group members and the representative party's lawyer.[47] The ALRC's recommendations were not implemented.

1.72 In that same Report, the ALRC considered briefly the introduction of a system of depositions within representative proceedings. At that time, the ALRC was not minded to make any recommendation in relation to the introduction of depositions, noting that there was sufficient power in the FCA Act and the Rules of Court for a judge to order the taking of depositions in any event.[48]

1.73 Although it is clear that the size and costs of discovery processes in representative proceedings contribute to the significant expense of such proceedings, it is not proposed to revisit the issues around managing discovery in this Inquiry. In its 2011 Report, *Managing Discovery: Discovery of Documents in Federal Courts,* the ALRC made recommendations that the FCA Act should be amended to provide expressly for pre-trial oral examination about discovery.[49] Those recommendations have not been adopted and it appears to the ALRC that no additional powers are presently required to enable the Court to manage the discovery processes in representative proceedings.

Productivity Commission

1.74 In 2014, the Productivity Commission provided a report on access to justice arrangements in civil matters—focusing on constraining costs and promoting access to justice and equality before the law.[50] The terms of reference for that Inquiry required the Productivity Commission to analyse, among other things:

- whether the costs charged for accessing justice services and for legal representation were generally proportionate to the issue in dispute; and
- alternative mechanisms to improve equity and access to justice, including litigation funding.

1.75 Volume 2, Chapter 18 of the report dealt with third-party litigation funding. The Productivity Commission differentiated between 'conditional agreements' between lawyers and clients, which permit lawyers to charge clients for some or all of the services if legal action is successful,[51] and 'damage-based/contingent' fee agreements, where the client is billed in relation to the amount recovered, noting that, in Australia, only conditional agreements are permitted in lawyer/client relationships when the client cannot pay for the legal services.[52] By contrast, the Productivity Commission observed that third-party litigation funding companies are able to charge contingent fees—filling

47 Ibid rec 80.
48 Ibid [7.102].
49 Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Report No 115 (2011) [10.129].
50 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2).
51 Ibid 603–605.
52 Ibid 605–606.

the 'gap that lawyers were not permitted to enter'.[53] It also recognised that litigation funders can increase access to justice for the prosecution of 'genuine claims by plaintiffs who would otherwise lack the resources to proceed'.[54] It noted, however, that the matters that are funded are self-selecting: high costs, large payouts and low risk, which was unlikely to improve access to justice in relation to rights-based, non-monetary claims.[55]

1.76 The Productivity Commission addressed three concerns regarding conditional agreements and contingent third-party litigation funders. These included that these types of fee arrangements:

- promote unmeritorious claims—it found that there are sufficient incentives to avoid bringing frivolous claims;[56]
- create conflict of interests between lawyers and clients—it was unconvinced there was any real conflict;[57] and
- lead to excessive profits for lawyers—it found that contingency arrangements could provide for a fee structure that is easier for clients to understand and consent to, and that excessive profits can be avoided by implementing a cap on damages-based (contingency) fees on a 'sliding scale', where the cap reduces as the claim amount increases.[58]

1.77 The Productivity Commission recommended that governments remove restrictions on damage-based billing, except in criminal and family law matters. The recommendation was contingent on comprehensive disclosure requirements; the percentage recoverable being capped on a sliding scale; and contingency fees being used on their own with no additional fees, such as hourly rates.[59]

1.78 The Productivity Commission observed that permitting lawyers to enter contingency fee arrangements would put them in competition with litigation funders, noting that it would likely be those lawyers who currently offer 'no win/no fee agreements who would operate in the same space (workers' compensation, for example). The Commission recommended an amendment to court rules so that lawyers are required to disclose contingent funding agreements to the Court, as is currently required of litigation funders.[60]

1.79 In relation to the question of the regulation of litigation funders, with which this Inquiry is also concerned, the Productivity Commission observed that, while the courts

53 Ibid 608.
54 Ibid 607.
55 Ibid.
56 Ibid 613.
57 Ibid 614.
58 Ibid 616–617.
59 Ibid rec 18.1.
60 Ibid rec 18.3.

had regulated them to some extent,[61] the Government should establish a licence for third-party litigation funders. Such a licence should be designed to ensure the funder holds adequate capital relative to its financial obligations and properly informs clients of relevant obligations and systems in place for managing risks and conflicts of interests. [62]

1.80 The ALRC has had regard to the submissions that were received by the Productivity Commission and to the recommendations made by that Commission.

Victorian Law Reform Commission

1.81 In January 2017, the Victorian Law Reform Commission (VLRC) was asked to inquire into litigation funding and group proceedings. The VLRC delivered its Report in March 2018 and made 31 recommendations, several of which overlap with the terms of reference for this Inquiry, including those relating to whether:

- courts or regulatory bodies should require clearer disclosure requirements from funders and lawyers, and whether there should be fee limits;
- removing the existing prohibition on law firms charging contingency fees (excluding personal injury, criminal and family law matters) would assist to mitigate the issues; and
- there should be further regulation of group proceedings, including certification requirements and court approval of settlements (and any impact on the workload of the Supreme Court).

1.82 In addition to making a number of recommendations to align the class action practice and procedure of the Supreme Court of Victoria more closely with the existing practices of the Federal Court of Australia,[63] most relevantly to this Inquiry, the VLRC recommended that:

a. the Victorian Government should advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry;[64]

b. the Attorney-General should propose to the Council of Attorneys-General that the Council:

    (a) agree, in principle, that legal practitioners should be permitted to charge contingency fees subject to exceptions and regulation

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61 Ibid 609, citing *Campbells Cash and Carry v Fostif* (2006) 229 CLR 386; *Jeffrey & Katausakas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11; *International Litigation Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455.

62 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1) rec 18.2.

63 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2018). See, eg, recs 3, 4, 5, 10, 16, 21, 25, 26, 28.

64 Ibid, rec 2.

(b) agree to a strategy to introduce the reform, including the preparation of draft model legislation that regulates the conditions on which contingency fees may be charged and maintains the current ban in areas where contingency fees would be inappropriate;[65]

c. Part 4A of the *Supreme Court Act 1986 (Vic)* should be amended to provide the Court with the power to order a common fund for a litigation services fee [subject to conditions], on application by a representative plaintiff, whereby the fee is calculated as a percentage of any recovered amount and liability for payment is shared by all class members if the litigation is successful;[66]

d. a certification requirement should not be introduced in Victorian class actions;[67]

e. the Supreme Court should consider amending its practice note on class actions to include guidance for the Court and parties on managing competing class actions. The guidance should reflect current practice, as it has developed over time, and allow for the Court to respond flexibly in the circumstances of each case;[68]

f. the Attorney-General of Victoria should propose to the Council of Attorneys-General that a cross-vesting judicial panel for class actions be established. The judicial panel would make decisions regarding the cross-vesting of class actions, where multiple class actions relating to the same subject matter or cause of action are filed in different jurisdictions;[69]

g. the Attorney-General of Victoria should seek the agreement of the Attorney-General of New South Wales that:

(a) guidelines should be issued to legal practitioners on their duties and responsibilities to all class members in class actions, providing specific direction on the recognition, avoidance and management of conflicts of interest

(b) the Standing Committee under the Legal Profession Uniform Law should ask the Legal Services Council to ensure that such guidelines are produced and promulgated;[70]

h. the Supreme Court should consider specifying in its practice note on class actions that scheme administrators report to the Court [on certain matters during the settlement and at its completion];[71]

i. Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to provide the Court with specific power to review and vary all legal costs, litigation funding

65 Ibid rec 7.
66 Ibid rec 8.
67 Ibid rec 9.
68 Ibid rec 11.
69 Ibid rec 12.
70 Ibid rec 13.
71 Ibid rec 18.

fees and charges, and settlement distribution costs to be deducted from settlement to ensure that they are fair and reasonable;[72]

j. Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court has the power to approve a common fund order, on application by a representative plaintiff, whereby all costs of proceedings are shared by all class members if the litigation is successful.[73]

1.83 The ALRC has had regard to the 36 submissions that were received by the VLRC in response to its consultation paper and to its Report, *Access to Justice—Litigation Funding and Group Proceedings*.

The Civil Justice Council, United Kingdom

1.84 Some of the issues with which this Inquiry is concerned have also been considered by the Civil Justice Council (CJC) in the United Kingdom (UK). Its 2005 report, *Improved Access to Justice–Funding Options and Proportionate Costs,* followed the English Court of Appeal's decision in *Arkin v Borchard Lines* (*Arkin*),[74] which established that properly structured litigation funding does not infringe the rules against maintenance and champerty. The Court said:

> Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable.[75]

1.85 The report proposed that 'building on the judgment of the Court of Appeal in *Arkin* further consideration should be given to the use of third-party funding as a last resort means of providing access to justice'.

1.86 In its subsequent report in 2007, *Improved Access to Justice—Funding Options and Proportionate Costs*, the CJC recommended that:

> Properly regulated third-party funding should be recognised as an acceptable option for mainstream litigation. Rules of Court should also be developed to ensure effective controls over the conduct of litigation where third parties provide the funding.[76]

1.87 The question of third-party funding was one of the discrete issues considered by Lord Justice Jackson in his final report on *Review of Civil Litigation Costs* (the Jackson Report).[77] In this report, Jackson LJ concluded:

> I do not consider that full regulation of third-party funding is presently required. I do, however, make the following recommendations:

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72 Ibid rec 24.
73 Ibid rec 27.
74 [2005] EWCA Civ 655, [2005] 1 WLR 3055.
75 Ibid [40].
76 Civil Justice Council, *Improved Access to Justice—Funding Options and Proportionate Costs* (2007), rec 3.
77 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs—Final Report* (December 2009)

(i) A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.

(ii) The question whether there should be statutory regulation of third-party funders by the FSA ought to be re-visited if and when the third-party funding market expands.

(iii) Third-party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.[78]

1.88 Subsequent to this report, in 2011, a Code of Conduct for Litigation Funders (the Code) was promulgated along with Rules of the Association for the Association of Litigation Funders of England & Wales (the Rules). Rule 6.1 requires every member of the Association to abide by the Code to the extent that it applies to them. The Code was subsequently updated in 2014 and again in 2017. Relevantly, the Code makes provision for proper capital adequacy, provides that the funder is not entitled to terminate the funding agreement mid-litigation without good reason, and proscribes the extent of a funder's ability to influence the litigation and any settlement negotiations.

1.89 The ALRC has had regard to the Jackson Report and the development of the self-regulatory model for litigation funders in England and Wales.

Other concurrent inquiries

1.90 It is noteworthy that comparable jurisdictions are currently involved in similar reviews, driven not least by the global reach of many litigation funders.

1.91 In March 2018, the Law Commission of Ontario (LCO) initiated a class actions project to consider Ontario's experience with class action since the *Class Proceedings Act* (CPA) came into force in 1993.[79] Like Australia, Canada has 25 years' experience with a statutory class action regime. The third-party litigation funding industry has not yet developed alongside the class action regime in Canada to the same extent as in Australia.

1.92 The LCO's mandate is 'to conduct an independent, evidence-based, and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and deterrence.'[80] Four reasons for the class action project are cited as the catalyst for reform. The first is that several important and far-reaching choices underpinned the CPA and there is 25 years of jurisprudence. These choices have not been reviewed systematically since a 1990 report of the Ontario government's Advisory Committee on Class Action Reform. Secondly, class action legislation and proceedings are generally acknowledged to have significant policy and financial implications for both class members and class action defendants. They also have systemic implications for

78 Ibid 124.

79 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms,* Consultation Paper (March 2018).

80 Ibid 1.

access to justice, court procedures and efficiency, and government and corporate liability. Thirdly, class action discussions are controversial and often influenced by stakeholder interests and perspectives. Finally, there is a need for a firmer empirical foundation for the issues that are raised in the context of class actions.

1.93 The ALRC has considered the 25 submissions that have been made to the LCO.

1.94 On 15 March 2018, the President of the New Zealand Law Commission (NZLC), the Honourable Sir Douglas White QC, announced that the NZLC had received a reference to review class actions and litigation funding. As at the date of this Report, the terms of reference had not been finalised but some indication of what those terms might be, and an indication of the scope of the NZLC inquiry, can be gleaned from the paper delivered by Sir Douglas on 15 March 2018, 'Setting the Scene: The Law Reform Project and the current review of Class Actions and Litigation Funding' at 'The Future of Class Actions Symposium' at the University of Auckland Business School.

2. Evolution of Class Action Proceedings and Third-party Litigation Funding

Contents

Class action proceedings in Australia

2.1 In March 1992, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) introduced a federal representative proceedings (class action) regime within Australia. Subsequently, similar class action statutory frameworks have been introduced in Victoria,[1] New South Wales,[2] and Queensland.[3]

2.2 At its simplest, Part IVA enables representative proceedings to be issued as of right and continue, provided that the conditions in ss 33C and 33H are satisfied. There is no certification regime, as exists in the US, Canada, and England and Wales (albeit within the context a very constrained class action regime). In Australia, a certification regime was rejected on policy grounds because it was thought that protections within the then proposed Bill which,[4] with modification, became Part IVA, gave the Federal Court of Australia extensive case management powers to prevent such problems arising or to resolve problems if they arose. Part IVA sets out a prescriptive regime containing detailed provisions for the commencement (s 33C) and the conduct of class actions, including a discretionary 'control' mechanism (s 33N).[5]

2.3 Consequently, a class action may be commenced in Australia where the following three thresholds are satisfied:

- seven or more persons have claims against the same person;

1 *Supreme Court Act 1986* (Vic) pt 4A (with effect from 1 January 2000).
2 *Civil Procedure Act 2005* (NSW) pt 10 (with effect from 4 March 2011).
3 *Civil Proceedings Act 2011* (Qld) pt 13A (with effect from 1 March 2017).
4 *Federal Court of Australia Act 1976* (Cth) s 33C.
5 Ibid s 33N.

- the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- the claims of all of those persons give rise to a substantial common issue of law or fact,[6]

and compliant originating process is filed.[7]

2.4 It was not expected that the new regime would have a significant financial impact nor was there expected to be a significant increase in the number of cases brought.[8]

2.5 As has been observed elsewhere,[9] the legislation did not have bipartisan support. There were four principal concerns about the regime: first, it was said to be an attack on the traditional method of exercising legal rights, secondly, there were fears it would foster a litigious culture in Australia, thirdly, it was thought it would change the nature of legal practice by the creation of an entrepreneurial class of lawyer promoting proceedings, fourthly, it was seen to be a misdirected overreaction to the problem of the cost of litigation. Former Attorney-General Senator Durack remarked,

> [a] number of people would even go so far as to say that [this Bill] is a monstrosity … It really is one of those rather loopy proposals that come up from time to time from commissions like the Law Reform Commission.[10]

2.6 These fears have, in large measure, not materialised. As was intended, the regime has provided a remedy where, although many people are affected and the total amount at issue is significant, each person's claim is small, and to deal efficiently with similar individual claims that would nevertheless be large enough to justify individual actions.[11] To date, the cases that have been brought under the regime reflect a broad range of both commercial and non-commercial causes of action, including shareholder and investor claims, anti-cartel claims, mass tort claims, consumer claims for contravention of consumer protection law, environmental claims, trade union actions, claims under the *Migration Act 1958* (Cth),[12] and human rights claims. One of the more recent examples of the Part IVA regime promoting access to justice is the formal apology and settlement award of $30 million to 447 residents of Palm Island in their action against the Queensland Government following claims of racism and police misconduct in 2004.[13]

2.7 A development that was unlikely to have been with the contemplation of the proponents of the original Bill is that insurers are now class members in matters. There

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6 Ibid s 33C.
7 Ibid s 33H.
8 Explanatory Memorandum, Federal Court of Australia Amendment Bill 1991 (Cth) [5].
9 Chief Justice JLB Allsop, 'Class Actions' (Speech, Law Council of Australia, 13 October 2016).
10 Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019 (Durack).
11 Ibid.
12 Amendments to the *Migration Act 1958* (Cth) in 2001(s 486B(4)) prohibited the use of the Part IVA regime in any proceedings relating to visas, deportations or removals of non-citizens.
13 *Wotton v Queensland (No 8)* [2017] FCA 639.

have been instances of insurers relying on rights of subrogation, and opting insureds out of class actions—even without their authority to do so.[14]

2.8 If a criticism could be levelled at Part IVA regime, as it was introduced, it was that neither the Part IVA, nor any other relevant legislation, dealt with the issue of an appropriate costs regime—leaving unanswered the difficult question of how to relieve a principal applicant from the brunt of an adverse costs order should the proceeding fail. A recommendation to establish a public fund to protect principal applicants in the face of such an eventuality was not adopted by the government of the day.[15]

2.9 Inevitably, innovation deals with gaps in the law and, as the class action regime has matured, commercial third-party litigation funding has become a particular feature of the Australian class action landscape. Litigation funding has largely filled the lacuna created by the absence of a satisfactory mechanism to protect principal applicants from adverse costs orders.

2.10 Such funding involves a third-party (a litigation funder) with no direct interest in the proceeding agreeing to finance some or all of a party's legal costs (which can include solicitors' fees, counsels' fees and other disbursements) in return for a share of any proceeds of the litigation. Calculation of the funder's share of the proceeds is typically based on a percentage of the sum recovered or a multiple of the funding provided. For the purposes of this Inquiry, a litigation funder does not include an insurer funding the litigation costs under a pre-existing policy, or a solicitor acting on a 'no win/no fee' basis (or under a contingency fee agreement, in jurisdictions where this is permitted).

Overview of the litigation funding market

2.11 The relatively straightforward form of litigation funding described above is, however, no longer the only funding model being used in the litigation funding market. A much wider range of funding models has emerged and different funding methods continue to evolve. In addition to portfolio funding or law firm financing, some types of financing are increasingly a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain control over its investment (in the litigation) through traditional corporate governance.[16] Additionally, some funders now establish Special Purpose Vehicles (SPVs) to receive investment funds from a variety of sources including pension funds and educational trusts. Funders are also securitising their investments.

2.12 The litigation funding market in Australia has been growing and industry revenue is forecast to grow at an annualised 7.8% over the five years through to 2022–2023.

14 See, *Johnston v Endeavour Energy* [2015] NSWSC 1117; *Lenehan v Powercor Australia Ltd* [2018] VSC 579; *Hawker v Powercor Australia Ltd* [2018] VSC 661.

15 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) rec 3.09.

16 Ibid 35.

Revenue for the 2017–18 financial year is predicted to be $105.4 million with a profit of $44.8 million.[17]

2.13 As noted above, the calculation of the funder's share of the proceeds is typically based on a percentage of the sum recovered or a multiple of the funding provided in return for a share of any amount recovered if the case is successful. Funders are therefore necessarily very selective about the cases they agree to fund, given that their business model depends on the success of any piece of funded litigation. IMF Bentham reports a success rate of 90% with an average return on investment (ROI) of 1.5x.[18] The Chief Executive for Asia and Australia, Clive Bowman explains that:

> We have investment managers who review the cases. There is a very stringent process, and if they decide to fund the case, it goes to an investment committee that has a number of permanent members, including former judges.[19]

2.14 Clive Bowman, notes further that only about 5% of applications for funding are approved. IMF Bentham received 866 applications for funding worldwide in the 2017–2018 financial year, 302 of which were to fund Australian litigation.[20] Other funders require different rates of ROI before agreeing to fund a matter. Augusta Ventures has agreed to fund a class action against mining labour hire firms in which it specifies a ROI of 2.5x if the matter runs over 12 months. As explained by Managing Director of Burford Capital, Craig Arnott, such funding models mean, that for Burford, 'we will only fund very big dollar matters' so that in percentage terms, the fee will be modest 'because you want the plaintiff to walk away feeling a winner.'[21]

2.15 Appendix G provides an overview of the funders currently operating either in the United Kingdom or Australia, or in both jurisdictions.[22] Many of them are now also active in the Canadian market. It highlights the lack of homogeneity in the funding market and the consequent difficulties with a single regulatory response to third-party litigation funders operating within Australia.

2.16 In addition, a number of entities have registered with ASIC, apparently in anticipation of entering the market, but do not yet appear to be actively involved in the Australian funding market.[23]

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17 IBISWorld, Litigation Funding in Australia, Industry Report OD5446, (2018).

18 IMF Bentham, *FY2018 Full Year Results Investor Presentation* (February 2018).

19 Chris Merritt, 'The drive for litigation innovation', *The Australian* (online), 18 October 2018.

20 IMF Bentham, above n 18. The Australian applications were surpassed only by US applications (356) but Canada (127), Asia (55) and Europe (26) lagged significantly behind.

21 Merritt, above n 19.

22 As at June 2018.

23 Ausspirit Litigation Funding Pty Ltd, Award Litigation Funding Pty Ltd, Bronte Corporate Litigation Funding Pty Ltd, Campio Litigation Funding Pty Ltd, CVC Litigation Funding Pty Ltd, Epsilon Litigation Funding, IDS Litigation Funding Pty Ltd, Jones Heard King Lawyers Pty Ltd (King Litigation Funding Pty Ltd), KB Litigation Funding Pty Ltd, Litigation Funding Australia Pty Ltd, Litigation Funding Pty Ltd, Litigation Funding Services Pty Ltd, Lloyds Litigation Funding Pty Ltd, Quantum Litigation Funding Group Ltd, Res Ipsa Litigation Funding Pty Ltd.

The historical constraints on third-party funding

England and Wales

2.17 Historically, arrangements whereby an unconnected third-party funded litigation in return for a share of the proceeds were unenforceable as a result of rules against barretry (or barratry), maintenance and champerty. The law of maintenance, and the subsets of champerty and barretry, has been traced back to the *Statute of Westminster the First* (3 Edw I c 25) of 1275. Maintenance was the unlawful 'intermeddling with litigation in which the intermeddler has no concern'.[24] Champerty was 'maintenance aggravated by an agreement to have a part of the thing in dispute'[25] and barretry, relevantly for present purposes, was perpetrated by someone who was 'a common mover or stirrer up or maintainer of suits'—a serial maintainer.[26]

2.18 By the nineteenth century, it was already clear that the foundations on which the prohibitions against maintenance and champerty were laid had been crumbling for some time. In 1843, *The Works of Jeremy Bentham* were published. In his twelfth letter, written in 1787, he expressed the view that restrictions against litigation funding were a 'barbarous precaution' borne out of a 'barbarous age'.[27] Lord Abinger CB, also in 1843, described the law of maintenance as:

> Confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or make defences which they have no right to make … [By contrast], if a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance.[28]

2.19 The future significance of third-party litigation funding as a means of enhancing access to justice was beginning to emerge. In *Alabaster v Harness*, Lord Esher MR questioned the rationale that lay behind the prohibitions:

> The doctrine of maintenance, which … was discussed briefly by Lord Loughborough in *Wallis v Portland,*[29] and more recently elaborated by Lord Coleridge CJ in *Bradlaugh v Newdegate,*[30] does not appear to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong is assisting another man in his litigation. But it seems to have been though that

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24 *Neville v London Express Newspaper Ltd* [1919] AC 368, 382.

25 *Wild v Simpson* [1919] 2 KB 544, 562.

26 *The Case of Barretry* (1588) (30 Eliz) 8 Rep 36; 77 ER 5. See also Lord Neuberger, 'From Barretry, Maintenance and Champerty to Litigation Funding' (Speech delivered at the Harbour Litigation Funding First Annual Lecture, Gray's Inn, 8 May 2013) [11]–[13].

27 Jeremy Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (William Tait, 1843) Vol 3, Part 1, *A Defence of Usury*, Letter XII, *Maintenance and Champerty*, 19.

28 *Findon v Parker* (1843) 11 M & W 675, 682-683; 152 ER 976, 979.

29 (1797) 3 Ves June 494; 30 ER 1123.

30 (1883) 11 QBD 1.

> litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful. Lord Loughborough, in *Wallis v Duke of Portland*, says that the rule is, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense'.[31]

2.20 As Lord Neuberger observed, '[t]he rationale for the prohibitions of maintenance thus rested on public policy, which is of course never static.'[32] He identified that the original public policy concerns were to protect property and contractual rights and to weaken the hold of gangster barons. By the late 18th century, the policy had become the desire to ensure that individuals did not stir up litigation at no risk to themselves.[33] The difficulty of aligning the rules with more modern notions of public policy was again raised in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Company Ltd*, in which Fletcher Moulton LJ said:

> The present legal doctrine of maintenance is due to an attempt on the part of the Courts to carve out of the old law such remnant as is in consonance with our modern notions of public policy … Speaking for myself, I doubt whether any of the attempts at giving definitions of what constitutes maintenance in the present day are either successful or useful …in my opinion it is far easier to say what is not maintenance than to say what is maintenance.[34]

2.21 The development of the jurisprudence of England and Wales, Australia, and Canada has followed similar paths towards broad acceptance of the legitimacy of third-party litigation funding, although Australia has released the shackles rather more definitively than has occurred in the other two jurisdictions.

2.22 The first English decision in which the practice of third-party litigation funding was approved, albeit limited to the insolvency context, was *Seear v Lawson* in 1880.[35]

2.23 Lord Neuberger has observed that, following the Second World War, legislators and lawyers began to accept that the accelerating and fundamental changes in society meant that the basic policy which had been used to justify the prohibition of maintenance could now be more sensibly invoked to justify the abolition of those prohibitions.[36] By the mid-1950s, the Court of Appeal had disapproved Lord Loughborough's rationale for the prohibitions on maintenance and litigation funding generally, namely, 'that parties shall not by their countenance aid the prosecution of suits of any kind, which every person must bring upon his own bottom, and at his own expense',[37] and further exceptions to the

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31 [1895] 1 QB 399, 342.
32 Lord Neuberger, above n 26, [30].
33 Ibid.
34 [1908] 1 KB 1006, 1013-1014.
35 (1880) 15 Ch D 426.
36 Lord Neuberger, above n 26, [36].
37 *Wallis v Duke of Portland* (1797) 3 Ves Jun 494; 30 ER 1123.

prohibitions developed through the courts.[38] The introduction of legal aid[39] had, in any event, by then created a state-funded exception.

2.24 It was not, however, until 1967 that the *Criminal Law Act 1967* (UK) abolished criminal and tortious liability for maintenance and champerty. Nevertheless, s 14(2) preserved any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal:

> The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.[40]

2.25 The relaxation of attitudes towards third-party funding can be observed in the series of cases commencing with *Giles v Thompson*, in which the House of Lords considered a type of litigation funding. Lord Mustill was concerned with the question of whether it 'corrupted public justice'.[41] In the decision of the Court of Appeal in *R (Factortame) v Secretary of State for Transport (No 8),* it was held that only those funding arrangements that tended to 'undermine the ends of justice' should fall foul of the prohibition on maintenance and champerty.[42] When the Court of Appeal next had occasion to consider the consequences of opening the doors to maintenance, in *Arkin v Borchard Lines*, it held that a professional litigation funder could be liable for adverse costs, but, and controversially, only up to the extent of its own investment in the action.[43]

2.26 Section 14(2) of the *Criminal Law Act 1967* (UK), was considered by Jackson LJ in his 2009 *Review of Civil Litigation Costs: Final Report* (the Jackson Report). He concluded that there was no need to repeal the section, thereby abolishing the common law doctrines for all purposes. Rather, he expressed the view that it should be made clear (either by statute or judicial decision) that if third-party funders complied with any applicable system of regulation, then their funding agreements would not be overturned on the grounds of maintenance or champerty.[44] The *Code of Conduct for Litigation Funders*,[45] promulgated by the Civil Justice Council after the Jackson Report, seeks to ensure that the conduct of litigation funders does not result in a litigation funding agreement (LFA) being set aside as champertous:

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38 *Martell v Consent Iron Co Ltd* [1955] Ch 363, 399-400.

39 *Legal Aid and Legal Advice Act 1949* (UK).

40 *Criminal Law Act 1967* (UK) s 14(2).

41 [1994] 1 AC 142.

42 [2003] QB 381, 400.

43 [2005] 1 WLR 3055 [41]–[42]. The decision has been described as 'wrong in principle' by Sir Rupert Jackson and there have been calls for the '*Arkin* cap' to be legislatively overturned (which has not happened): see, Rachael Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments' (2014) 73 *Cambridge Law Journal* 570, 586-88; Rachael Mulheron, 'Third Party Funding and Class Actions Reform' (2015) 131 *Law Quarterly Review* 291, 315-19.

44 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs – Final Report* (2009) 124.

45 Ministry of Justice (UK), Civil Justice Council, *Code of Conduct for Litigation Funders* (January 2018).

> 9. A Funder will:
>
> 9.1 take reasonable steps to ensure that the Funded Party shall have received independent advice on the terms of the LFA prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Funder that the Funded Party has taken advice from the solicitor or barrister instructed in the dispute;
>
> 9.2 not take any steps that cause or are likely to cause the Funded Party's solicitor or barrister to act in breach of their professional duties;
>
> 9.3 not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder;
>
> 9.4 Maintain at all times access to adequate financial resources to meet the obligations of the Funder, its Funder Subsidiaries and Associated Entities to fund all the disputes that they have agreed to fund
>
> …
>
> 9.5 Comply with the Rules of the Association as to capital adequacy as amended from time to time.

2.27 The current state of the law in England and Wales on maintenance and champerty was summarised by Coulson J in *London & Regional (St George's Court) Ltd v Ministry of Defence*:

> a. The mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable …;
>
> b. In considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstances of a particular agreement …;
>
> c. The modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable …;
>
> d. The rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction …'[46]

46 [2008] EWHC 526 (TCC) [103] (Coulson J).

2.28 Thus, it is the position in England and Wales that litigation funding agreements will be upheld so long as they contain no additional features which could be characterised as tending to 'undermine the ends of justice'.[47]

Canada

2.29 In Canada, champerty is prohibited at common law, and has been codified in Ontario by the *Act Respecting Champerty* RSO (1897) (the Champerty Act), which states that:

> (1) Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
>
> (2) All champertous agreements are forbidden, and invalid.

2.30 Notwithstanding the prohibitions against maintenance and champerty, the concept left open the possibility of 'proper' forms of litigation support. In *Newswander v Giegerich,*[48] the Supreme Court of Canada emphasised the concern over a maintainer who is 'stirring up strife'. In other words, the motive of an alleged maintainer was particularly important to determine if the act was, in fact, maintenance.[49]

2.31 Champerty in Canada is a 'subspecies' of maintenance, as there cannot be champerty without maintenance.[50] Accordingly, the concept of champerty in Canadian law, similarly to that in England and Wales, invokes the concept of proper and improper motives underpinning litigation funding.[51] Canadian courts began to identify occasions when financial support from sources not connected to the litigation could be provided legitimately. One of the first cases to do so was *Goodman v R.*[52] Goodman was charged with champerty after agreeing to assist an improvident claimant injured by a streetcar in exchange for a share of any proceeds. Among the key facts in that case were that Goodman's assistance consisted of locating witnesses to the event and the plaintiff had consulted a lawyer before Goodman became involved. In this regard, the facts of the case reflected those of *Newswander*: the plaintiff had already considered litigation and the contribution by Goodman was required to enable the litigation to proceed given the plaintiff's financial circumstances. The Supreme Court of Canada quashed Goodman's conviction and held that his conduct did not amount to 'officious intermeddling' as he had not 'stirred up strife'.[53] This approach was extended to the doctrine of champerty by

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47 Damian Grave, Maura McIntosh and Gregg Rowan (eds), *Class Actions in England and Wales* (Sweet & Maxwell, 2018) [8-052].

48 [1907] 39 SCR 354 (*'Newswander'*).

49 Hugh Meighan, 'Canada' in Leslie Perrin (ed), *The Third Party Litigation Funding Law Review* (Law Business Research Ltd, 2017) 31.

50 *McIntyre Estate v Ontario (Attorney General)* [2002] 218 DLR (4th) 193, [34] (Ontario Court of Appeal) (*'McIntyre Estate'*).

51 Meighan, above n 49, 31.

52 [1939] SCR 446.

53 Bentham IMF, *Maintenance and Champerty*, (12 September 2017).

the British Columbia Court of Appeal in *Monteith v Calladine*.[54] The relevance of motive in an assessment of maintenance and champerty was reaffirmed in the 1993 decision of *Buday v Locator of Missing Heirs Inc*.[55]

2.32 Following *Newswander* and *Goodman*, maintenance and champerty were removed from the *Criminal Code* in 1953. However, under the Champerty Act, champerty remained a tort in common law jurisdictions and has typically had the effect of acting as a shield against the enforcement of champertous agreements (rather than serving as the basis of an action for damages, as in *Newswander*).[56]

2.33 Don Hobsbawn v ATCO Gas and Pipelines Ltd,[57] a decision of the Alberta Court of Queen's Bench, was the first class action proceeding in Canada in which a third-party funding agreement was approved.[58] At the time, concern was expressed that third-party funding fails to address the 'very valid policy reasons behind making unsuccessful plaintiffs liable' to pay directly the costs of a successful defendant. It was said that, '[i] f the representative plaintiff is not exposed to cost consequences directly, then more marginal claims may be commenced and prosecuted'.[59]

2.34 The legitimacy of third-party funding agreements in Canada was secured by a decision of the Ontario Court of Appeal which found that the interests of justice can be served by allowing third parties to fund litigation.[60] In *McIntyre Estate*,[61] a plaintiff who intended to commence an action against Imperial Tobacco and Venturi Inc for wrongful death of her husband first sought a declaration from the court that the contingency fee arrangement with her lawyers was not prohibited by the Champerty Act. The Ontario Court of Appeal held that a determination of the proposed agreement as champertous depended on the outcome of the litigation. In making this finding, the Court of Appeal made the following observations:[62]

(a) a person's motive is a proper consideration, and indeed, determinative of the question of whether conduct or an arrangement constitutes maintenance or champerty;

(b) the courts have shaped the rules relating to champerty and maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice;

(c) whether a particular agreement is champertous is a fact-dependent determination, requiring the court to inquire into the circumstances

54 *Monteith v Calladine* (1964) 47 DLR (2d) 332.
55 (1993) 108 DLR (4th) 424, 268 (Ontario Coart of Appeal); Meighan, above n 49, 31.
56 Meighan, above n 49, 31.
57 Calgary 0101-04999 (ABQB) (unreported, 14 May 2009).
58 British Columbia Law Institute, *Study Paper on Financing Litigation*, BCLI Study paper No. 9 (2017) 115.
59 Dalton W McGrath QC and Gavin Matthews, 'Court approves third-party financing for putative class action', *Mondaq* (online), 11 June 2009.
60 Ibid.
61 [2002] 218 DLR (4th) 193.
62 Ibid [27], [32], [79], [80].

and the terms of the agreement; and

(d) this fact-based inquiring depends in part on the 'reasonableness and fairness' of the agreement.

2.35 In making these findings, it was clear that the court was aware of increasing concerns over access to justice and the potentially beneficial role of contingency fee agreements in this regard. This evolution in the priorities of the Canadian justice system necessitated a more flexible understanding of champerty and applicability of the Champerty Act.[63]

2.36 In 2009, the legality of third-party funding agreements was considered in *Metzler Investments GMBH v Gildan Activewear Inc*.[64] In *Metzler*, a representative plaintiff sought to certify a class proceeding under a costs indemnification agreement entered into with an Irish company whose main business is litigation funding in Europe. The terms stated that the third-party funder would cover any potential adverse costs award in return for 7% of the settlement award, with no upper limit, less expenses for legal fees, disbursements and administrative charges.[65] Relying upon the analysis of *McIntyre Estate*, the court applied the existing law on contingency fee arrangements to third party involvement in litigation. It found that case law pointed to 'two crucial elements' that constitute a champertous agreement:

(a) the involvement must be spurred by some improper motive; and

(b) the result of that involvement must enable the third party to possibly acquire some gain following the disposition of the litigation.[66]

2.37 The court confirmed that the principles of fairness and reasonableness, the importance of the motive underpinning the funding arrangement, and the increasingly relaxed application of the Champerty Act – all of which had been developed in the context of the *McIntyre Estate* analysis – could apply equally in the context of third-party funding agreements.[67] Nevertheless, the court refused to approve the agreement on the basis that an uncapped term in the agreement could result in over-compensation to the funder.[68]

2.38 A further class proceeding provided the first instance of court approval of a third-party funding agreements. In *Dugal v Manulife Financial Corp*,[69] Strathy J approved a funding agreement, under which a third party agreed, *inter alia*, to indemnify the plaintiffs against their exposure to the defendants' costs, in return for a 7% share of the proceeds of any recovery in the litigation. The court built upon the principles articulated in *McIntyre Esta*te and *Metzler*, and recognised that funding agreements had been approved in other

63 Meighan, above n 49, 33.
64 Ibid; 2009 CanLII 41540 (Ontario Superior Court of Justice).
65 Ibid [12].
66 *Metzler Investments GMBH v Gildan Activewear Inc* 2009 CanLII 41540, [70].
67 Meighan, above n 49, 34.
68 2009 CanLII 41540.
69 2011 ONSC 1785 [16], [37] (Ontario Superior Court of Justice); see also, *Dugal v Manulife Financial Corp*, 2011 ONSC 3147, [5] (Ontario Superior Court of Justice).

provinces of Canada, albeit without reasons, as well as in other common law jurisdictions around the world. In accepting the role that third-party funding agreements can play in promoting access to justice, the court approved the funding agreement in *Dugal*.[70] Strathy J observed:[71]

> The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.

2.39 The Canadian courts have also had occasion to explore the limits of the common law of maintenance and champerty in the context of single-party commercial litigation.[72] In *Schenk v Valeant,*[73] the court drew upon the jurisprudence in the class proceedings context and extended similar principles to the commercial litigation setting. McEwen J commented that '[t]ypically, such agreements have arisen in class proceedings. Counsel could not locate any cases in which third party funding has been extended to the context of commercial litigation. This being said, I see no reason why such funding would be inappropriate in the field of commercial litigation.'[74] However, as with jurisprudence arising in the class proceedings context, McEwen J also commented that 'the statutory and common law prohibition on champerty and maintenance in the Province of Ontario must be considered'.[75]

2.40 Nevertheless, the court declined to approve the particular funding agreement on the basis that it constituted maintenance and champerty. In the absence of a cap, the agreement could result in the funder recovering over 50% of the proceeds and could be construed to allow 'open-ended exposure to Schenk that could result in Redress retaining the lion's share of any proceeds'.[76] The court held that 'such an agreement ... does not provide access to justice to Schenk in a true sense, but rather provides an attractive business opportunity to Redress who suffered no alleged wrong'.[77]

2.41 Specifically in the context of class actions, in *Houle v St Jude Medical Inc,*[78] the Ontario Superior Court of Justice confirmed that 'deciding whether to approve a [third-party funding agreement] will depend upon the particular circumstances of each case'.[79] It held, however, that the court must be satisfied of at least four criteria to approve a third-party funding agreement:[80]

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70 Meighan, above n 49, 34.
71 *Dugal v Manulife Financial Corp* 2011 ONSC 1785, [28] (Ontario Superior Court of Justice).
72 Ibid.
73 Ibid; 2015 ONSC 3215 (Ontario Superior Court of Justice).
74 Ibid [8].
75 Ibid.
76 Ibid [17].
77 Ibid.
78 2017 ONSC 5129 (Ontario Superior Court of Justice) (an appeal from the decision was quashed, 2018 ONCA 88 (Court of Appeal for Ontario)).
79 Ibid [72].
80 Ibid [63]-[64].

(1) the agreement must be necessary in order to provide access to justice;

(2) the access to justice facilitated by the TPF agreement must be substantively meaningful;

(3) the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants; and

(4) the third party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching and champertous.

Australia

2.42 In Australia, the legitimacy of third-party funding arrangements was established in the 1996 decision of the Federal Court of Australia in *Movitor Pty Ltd (receivers and manager appointed) (in liq) v Sims* (*Re Movitor*).[81] In *Re Movitor*, the liquidator sought approval of a contract of insurance with Lumley General Insurance (Lumley) pursuant to which Lumley would provide a standing facility to the liquidator's firm. This would enable the partners of the firm to request funding from Lumley so that it could pursue actions on behalf of insolvent companies and individuals. If Lumley agreed to provide funding for a claim then, upon a successful recovery, it would be repaid the funds it had advanced plus a 'risk premium' of 12% of the net proceeds.

2.43 The Court held that the arrangement involved both maintenance and champerty—champerty being where a person with no prior interest in a proceeding agrees to fund it in return for a share of the proceeds. The public policy concern underlying the crime and tort was that an unscrupulous funder might encourage the plaintiff to bring an unmeritorious claim or attempt to influence the proceeding for their own end. At the same time, the funder would assume no liability for costs if the claim failed, leaving the defendant with no recourse if the plaintiff is impecunious. Consequently, the arrangement would have been void as contrary to public policy unless it fell within one of the recognised exceptions. One of those exceptions was that a trustee in bankruptcy may lawfully assign any of the bankrupt's bare rights of action. As the liquidator of a company has conferred on him or her by statute the same powers in relation to the company's property, the Court found that there was no reason to deny this exception to Movitor's liquidators.[82]

2.44 This decision created the opportunity for commercial litigation funders to develop their business model in Australia as it allowed them to raise capital to provide funding to insolvency practitioners.[83]

2.45 Meanwhile, as had happened in the United Kingdom, there was legislative intervention in some states to expressly abolish maintenance and champerty as a crime

81 (1996) 64 FCR 380.

82 Susanna Khouri, Wayne Attrill and Clive Bowman, 'Litigation Funding and Class Actions – Idealism, Pragmatism and a New Paradigm' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [11.5].

83 Ibid.

and as a tort. Victoria was the first state to do so.[84] New South Wales followed in 1993,[85] as did other jurisdictions, although some appear to have abolished only one of either the crime or the tort.[86] Again, similarly to the legislation in the United Kingdom, the statutory provisions were expressed

> not [to] affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act.[87]

2.46 Consequently, questions of maintenance and champerty are not to be regarded as always legally irrelevant, even in those states where both the crime and the tort have been abolished.[88] The section assumes that considerations of public policy and illegality can still arise in connection with contracts providing for or dealing with maintenance and champerty. The scope that might be given to public policy and illegality in this context was explored by the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*).[89] The Court held that third-party litigation funding arrangements, which involved a funder seeking out those who may have claims, and offering terms which not only gave the funder control of the litigation but also would yield significant profit for the funder, did not, either alone or in combination, constitute an abuse of process, or warrant condemnation as being contrary to public policy.[90] The majority said:

> As Mason P rightly pointed out in the Court of Appeal, many people seek profit from assisting the processes of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising. That someone seeks out those who may have a claim and excites litigation where otherwise there would be none can be condemned as contrary to public policy only if a general rule against the maintenance of actions were to be adopted. But that approach has long since been abandoned and the qualification of that rule (by reference to criteria of common interest) proved unsuccessful. And if the conduct is neither criminal nor tortious, what would be the ultimate foundation for a conclusion not only that maintaining as action (or maintaining an action in return for a share of the proceeds) should be considered as contrary to public policy, but also that the claim that is maintained should not be determined by the court whose jurisdiction is otherwise regularly invoked?[91]

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84 *Crimes Act* 1958 (Vic) s 322A; *Wrongs Act* 1958 (Vic) s 32(2).

85 *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), subsequently repealed by the S*tatute Law (Miscellaneous Provisions) Act 2011* (NSW). The abolition of the tort is preserved by Sch 2 of the *Civil Liability Act 2002* (NSW) and of the crime by Sch 3 to the *Crimes Act 1900* (NSW).

86 *Civil Wrongs Act 2002* (ACT) s 221; *Criminal Law Consolidation Act 1935* (SA) sch 11; *Civil Liability Act 2002* (Tas) s 28E. The torts have not been abolished in Queensland, Western Australia, Tasmania or the Northern Territory.

87 *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 6. This saving provisions survives in s 2, sch 2 of the *Civil Liability Act 2002* (NSW).

88 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*) (2006) 229 CLR 386, [85]. Gummow, Hayne and Crennan JJ observing that, 'It is neither necessary nor appropriate to decide what would be the position in those jurisdictions where maintenance and champerty remain as torts, perhaps even crimes'.

89 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*) (2006) 229 CLR 386, [65]–[95] (Gummow, Hayne and Crennan JJ).

90 Ibid [88].

91 Ibid [89].

2.47 The majority said there was no basis for the formulation of an overarching rule of public policy that would, in effect, bar the prosecution of an action where any agreement had been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement.[92]

2.48 This is very different from the position in the United Kingdom where the two factors that are likely to lead to a finding of champerty within the limits of the preservation contained in s 14(2) of the *Criminal Law Act 1967* (UK) are:

(1) where the funder takes control of the litigation out of the hands of the claimant; and

(2) if the funder is entitled to an excessive share of any recovery.

It is also different from the position in Canada where the agreement must demonstrably enhance access to justice and the funder must not be overcompensated for assuming the risk of the adverse costs order.

2.49 It is important to note, in the context of considering the legitimacy of third-party funding agreements, that maintenance and champerty have never been held to be a defence to an action on the claim that was maintained, or a ground for staying such an action.[93] Rather, decisions about maintenance and champerty were principally directed to whether the maintenance agreement was enforceable. Similarly, questions of illegality and public policy may arise when considering whether a funding agreement is enforceable. In *Fostif*, the majority dismissed any inherent feature of a third-party funding agreement, even in class actions, as giving rise to circumstances that could not be sufficiently addressed by existing doctrines of abuse of process and other procedural and substantive elements of the court's processes.[94]

2.50 The decision in *Fostif* is unequivocal in its conclusion that, in Australia, funding arrangements of the type regularly entered into between funding entities and plaintiffs in class actions are enforceable and not contrary to public policy.

2.51 What has not been settled unequivocally is the limit of the considerations of public policy and illegality in the context of the development of new models of funding and the creation of markets in already funded litigation through, for example, securitisation. In circumstances where a funder is trading in derivatives comprised of the potential proceeds of the class action, it is conceivable that such agreements might be held to fall within the description given by the Privy Council in *Ram Coondoo v Chunder Canto Mookerjee* as:

92 Ibid [91].
93 Ibid [82].
94 Ibid [93]-[95].

> … extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for inappropriate objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy...[95]

2.52 The securitisation of already funded litigation could meet the description of 'trafficking in litigation', which, although a difficult concept to define, connotes the 'unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation'.[96] This type of arrangement, being a step removed from the arrangement between the funder and the party funded, cannot transfer any property interest to which the causes of action are ancillary nor can any genuine commercial interest arise, in the sense explored in *Trendtex Trading Corporation v Credit Suisse*.[97] If these arrangements are indeed found to fall into a residual category of 'trafficking in litigation', they will not render the proceedings liable to dismissal or a stay but, at the very least, the securitisation agreements are likely to be unenforceable.

Regulation of litigation funders

2.53 It is noteworthy that against this background, and in the context of the burgeoning market in litigation funding in Australia, third-party litigation funders are not required to hold a licence to operate in Australia. In July 2013, litigation funders were specifically exempted by regulation from the requirement to hold an Australian Financial Services Licence (AFSL), provided that the litigation funder has appropriate processes for managing conflicts of interest.[98] The regulations also exempted litigation funding from the requirements of the Consumer Credit Code,[99] and the definition of managed investment scheme (MIS) under the *Corporations Act 2001* (Cth) (the Corporations Act).[100] Litigation funders are subject to regulatory requirements under the Corporations Act, the consumer protection provisions of the *Australian Securities and Investment Commission Act 2001* (Cth) (the ASIC Act), and the general law including equity.

2.54 Consistent with all other corporations in Australia, incorporated litigation funders must comply with the Corporations Act, which provides minimum standards for corporate governance, constitutions and shareholding. Special purpose vehicles established to manage litigation funding businesses may be subject to particular investment regulations under the Corporations Act.[101] Those litigation funders operating under a trust structure must comply with state and territory laws on trusts as well as the common law generally.[102] Those funders that are listed on the Australian Securities

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95 *Ram Coondoo v Chunder Canto Mookerjee* (1876) LR 2 App Cas 186, 210.
96 *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 [61].
97 *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 703.
98 *Corporations Amendment Regulation 2012* (No 6).
99 Ibid.
100 Ibid.
101 See, eg *Corporations Act 2001* (Cth) ch 2L, ch 5C, ch 5D.
102 See, eg, *Trusts Act 1973* (Qld).

Exchange (ASX) are contractually bound to comply with the ASX Listing Rules and these are also enforceable under the Corporations Act.[103] There may also be specific obligations that apply as a matter of equity including fiduciary duties.[104]

2.55 All entities, including litigation funders, providing financial services with respect to a financial product must comply with requirements under the ASIC Act, which seek to provide protections for consumers of financial services. These protections include requirements that entities must not:

- engage in unconscionable conduct;[105]
- engage in conduct that is misleading or deceptive, or is likely to mislead or deceive; and [106]
- make false or misleading representations.[107]

2.56 In addition, where the financial services are provided to an individual for personal or domestic purposes, there is an implied warranty in contracts for the supply of financial services that:

- the services will be rendered with due care and skill;[108] and
- the contract for services will be without any unfair terms.[109]

2.57 Further, the Corporations Act creates the Australian financial services licence (AFSL), a single licensing regime for financial sales, advice and dealings in relation to financial products, which includes securities, derivatives, general and life insurance, superannuation, margin lending, carbon units, deposit accounts and means of payment facilities. [110] Unless specifically exempted (as is the case with litigation funders), entities providing financial services in relation to financial products must hold a licence in order to lawfully operate.[111]

2.58 AFS licensees have a statutory obligation to do all things necessary to ensure that they provide financial services efficiently, honestly and fairly.[112]

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103 *Corporations Act 2001* (Cth) ss 793C, 1101B.
104 Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244, 250.
105 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA–12CC.
106 Ibid s 12DA.
107 Ibid s 12DF.
108 Ibid s 12ED.
109 Ibid ss 12BF–12BM. A contract term is defined to be unfair when it would cause a significant imbalance in rights and obligations and is not reasonably necessary to protect legitimate interests – see s12BG.
110 *Corporations Act 2001* (Cth) s 911A.
111 Alongside this regime, credit facilities provided to consumers are subject to the *National Consumer Credit Protection Act 2009* (Cth) and the *National Credit Code*.
112 *Corporations Act 2001* (Cth) s 912A.

Regulatory Guide 248

2.59 These statutory obligations are supported by detailed Regulatory Guides published by ASIC, which explain how financial service providers can comply with their statutory obligations.[113] These compliance obligations are a mixture of general requirements, and requirements related to the provision of particular types of financial product. In relation to licensing (and more broadly), ASIC has power under the Corporations Act to exempt a person or a class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons.[114]

Court oversight

2.60 For litigation funders, additional regulatory oversight is provided by the courts on a case by case basis. The Federal Court requires litigation funding arrangements in class actions to be disclosed to the court, together with the solicitors' costs agreement, at the commencement of litigation.[115] The Court does scrutinise the funding agreement in detail. It is routine in class actions for the Federal Court to require the litigation funder to provide security for costs. It is at that point the capital adequacy of the litigation funder becomes important, not only to the class members and their solicitors, but also to the defendant.

Self-regulation

2.61 In April 2018, the Association of Litigation Funders of Australia (ALFA) was established with six founding members.[116] The purpose of ALFA is 'to actively engage with the government, legislators, regulators and other policy makers to shape the regulatory environment for litigation funding in Australia.'[117]

2.62 ALFA follows in the footsteps of the Association of Litigation Funders (ALF) in the United Kingdom, which established a system of self-regulation in November 2011.[118]

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113 See, eg, Australian Securities and Investments Commission, *Licensing: Administrative Action against Financial Service Providers* Regulatory Guide 98 (July 2013); Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* Regulatory Guide 165 (February 2018); Australian Securities and Investments Commission, *Licensing: Discretionary Powers* Regulatory Guide 167 (December 2016); Australian Securities and Investments Commission, *Licensing: Financial Requirements* Regulatory Guide 166 (September 2017); Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* Regulatory Guide 165 (February 2018); Australian Securities and Investments Commission, *Licensing: Managing Conflicts of Interest* Regulatory Guide 181 (August 2004); Australian Securities and Investments Commission, *Licensing: Meeting the General Obligations* Regulatory Guide 104 (July 2015); Australian Securities and Investments Commission, *Licensing: Organisational Competence* Regulatory Guide 105 (December 2016).

114 See, eg, *ASIC Corporations (Foreign Financial Service Providers—Limited Connection) Instrument 2017* (Cth).

115 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 5.

116 Litigation Lending Services, Augusta Ventures Ltd, Balance Legal Capital LLP, Grosvenor Litigation Services Pty Ltd, Investor Claim Partner Pty Ltd and Vannin Capital PCC. See The Association of Litigation Funders of Australia, News <https://www.associationoflitigationfunders.com.au/news.html>.

117 Ibid.

118 See further, Chapter 6—Regulating Litigation Funders.

In his 2009 Report, Jackson LJ concluded that full regulation of third-party litigation funders was 'not presently required' and recommended that: [119]

> - a satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation;
>
> - the question whether there should be statutory regulation of third-party funders by the Financial Services Authority ought to be revisited if and when the funding market expands.

2.63 The table at Appendix G demonstrates the extent of third-party funders who are presently active in both the UK and Australian markets. Despite its relative longevity as compared with the newly established ALFA, ALF currently has only nine members.[120]

2.64 Likewise, there is no statutory regulation of third-party litigation funders in Canada. In 2004, Ontario passed Regulation 195/04 – Contingency Fee Agreements, setting out requirements of valid contingency fee arrangements between lawyers and their clients. While contingency fee agreements received specific attention in the early 2000s, no similar regulation or guideline was developed in respect of third-party funding agreements.[121]

2.65 Nevertheless, the Ontario Trial Lawyers' Association (OTLA) has attempted to develop a regulatory mechanism for third-party funding through a policy to outline standards for the interactions between lawyers and funders.[122] The OTLA policy mirrors some of the objectives of self-regulatory code adopted by ALF in the United Kingdom. Any funding company that intends to appear at OTLA conferences, or advertise in OTLA publications, is required to comply with the policy.[123]

The impact of funding on modern class actions

2.66 Since *Fostif*, the number of domestic and international funders operating in the Australian market has grown steadily to approximately 25 active funders. In the period from September 2013–September 2016, approximately 49% of all class actions filed in the Federal Court were funded by third-party litigation funders.[124] From 2013 to 2018, the percentage of funded class actions proceedings grew to 64%, with funded class

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119 The Rt Hon Lord Justice Jackson, above n 44, 124.

120 Augusta Ventures Ltd, Balance Legal Capital LLP, Burford Capital, Calunius Capital LLP, Harbour Litigation Funding Ltd, Redress Solutions PLC, Therium Capital Management Ltd, Vannin Capital PCC and Woodsford Litigation Funding Ltd. See Association of Litigation Funders, *Membership Directory* <http://associationoflitigationfunders.com/membership/membership-directory>.

121 Meighan, above n 49, 33.

122 OTLA Policy Regarding Litigation Loan Companies, 27 October 2015.

123 British Columbia Law Institute, above n 58, 142.

124 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [4.3.2].

action proceedings filed in the final year of that period constituting 78% of all filed class actions.[125]

2.67 Whilst the types of matters that are the subject of class actions have changed over the period since the inception of Part IVA,[126] so too have those that attract litigation funding. All shareholder actions filed in the period between 2013–2018 were funded whilst only an average of 34% of consumer protection claims and mass torts claims attracted third-party litigation funding.

2.68 Consequently, attention has been focussed on whether the class action regime, and the ancillary third-party funding model that has grown alongside it, still meets the objectives of the initiating Bill (the ability to obtain redress more cheaply and efficiently and reducing the costs of proceedings and promoting efficiency in the use of court resources). Third-party litigation funders necessarily are drawn to those class actions that have the greatest degree of certainty of outcome in order to secure their requisite return on investment. Consistent with the funding decisions described by funders,[127] of the 13 matters commenced in the Federal Court of Australia in 2014 and 2015, and that have already been finalised by a judicially approved settlement, eight were shareholder claims and the remainder were investor claims. All shareholder claims were funded and all but one investor claim was funded. The average settlement amount was $52 million (the range being $6.75m - $215m). The average funding fee was 28.5%.[128] In the past five years, the class actions that have proved to be attractive to third-party funders have, overwhelmingly, been securities class actions founded on the right to bring a private cause of action in respect of breach of the continuous obligations contained in the Corporations Act and the ASIC Act. Such a cause of action was not available when Part IVA was enacted.

2.69 One of the first Australian securities class actions, which exemplifies the characteristics of the modern Australian securities class action, was *Dorajay Pty Ltd v Aristocrat Leisure Limited* (*Aristocrat*).[129] In that case, a senior executive of Aristocrat had brought an action for wrongful dismissal. In its defence, the listed company advanced a case that it was entitled to dismiss the executive for a number of reasons, including for failing to disclose material information to the market of investors in Aristocrat shares—thereby foreshadowing the possibility of civil liability to investors for a breach of a continuous disclosure obligation.[130]

2.70 Subsequent to *Aristocrat*, a standard approach to the development of securities class actions, including a common form of proceedings, emerged. Litigation funders and/or plaintiff law firms (or their hired experts) identify a significant drop in the value

125 Vince Morabito, Private correspondence, 13 March 2018.
126 See Chapter 3—Incidence.
127 See [2.13]–[2.14] above.
128 See ALRC Dataset, Appendix E.
129 (2005) 147 FCR 394.
130 See discussion of the development of the securities class action per Lee J, *Perera v GetSwift Limited* [2018] FCA 732 [10]–[29].

of securities. This is analysed to determine whether it is likely that the relevant drop had been occasioned by the late revelation of material information. Typically, the analysis determines whether or not it is likely that there is a sufficient basis for assuming the existence of contravening conduct during a period prior to the eventual announcement of the material information. The litigation funders and/or plaintiff law firms then determine the size of the potential loss that may have been occasioned by the suspected period of contravening conduct.[131] The duration of that period may extend back for a considerable period, as in the recently announced class actions against AMP Limited where a period of five years has been identified.

2.71 Once the funders and/or lawyers are satisfied that there is a sufficient basis for assuming the existence of contravening conduct, funding terms are discussed and (at least prior to the advent of the common fund order) there is an effort to sign up institutional and other group members (complex questions relating to issues of privacy and data sets are likely to arise in this context). [132] During this developmental stage, an announcement might be made of a potential class action, attracting media attention which may augment the number of affected shareholders who wish to participate in the proposed class action, but which may also precipitate a further decline in the price of the securities.[133]

2.72 Coupled with the development of the 'common form' of securities class action was the development of the understanding of how a class could be defined. Initially, it was considered that closed class actions, where the class action is limited to those who have signed up with the funder or law firm, were impermissible.[134] It was not until the decision of the Full Court in *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited*[135] that a class defined by reference to a funding agreement, or similar criteria, was accepted.

2.73 As a consequence of this decision, classes could be made up of persons who had signed funding agreements with an individual funder, thus eliminating the difficulty of so-called 'free riders'; that is, persons who had not signed funding agreements but who would be part of an open class. A further problem then emerged. If closed classes were allowed, how did a respondent obtain certainty from additional claims by settling only a closed class? A further procedural expedient resulted, allowing the 'opening up' and then 'closing down' of a class.[136] This allowed certainty to be delivered to a respondent (at least at the stage of a mediation) in settling what had originally been commenced as a closed class proceeding. The threat of 're-opening' the class if the matter does not settle at mediation looms large with respondents.

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131 Ibid [11].

132 See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

133 *Perera v GetSwift Limited* [2018] FCA 732 [12].

134 *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394. See also *Rod Investments (Vic) Pty Limited v Clark* [2005] VSC 449 and *Jameson v Professional Investment Services Pty Limited* [2007] NSWSC 1437.

135 (2007) 164 FCR 275. It was accepted because the text of s 33C of the FCA Act expressly provides that a proceeding can be commenced by only some of the persons who had claimed against a respondent.

136 *Perera v GetSwift Limited* [2018] FCA 732 [16].

2.74 The funding 'schemes' constituted by the funding agreements which allow class actions to be funded and maintained were characterised by the Full Federal Court in *Brookfield Multiplex Limited v International Litigation Funding Pte Ltd,*[137] in essence, as representing a common enterprise of a commercial character which uses the Court's processes to obtain mutual benefits for each of the group members, the funder and the solicitors. The use of the Court's processes in this way, although clearly legitimate, explains to some extent, why attention has been focused on securities class actions in calls for reform of the class action regime.

2.75 Specifically, it is a matter of some note that Chapter III[138] judicial power is being invoked regularly without the controversy, in respect of which jurisdiction is invoked, ever being resolved by final determination of contested common issues between the parties.[139] There might be many reasons for this, including the cost of running a matter to final determination, the risk of litigating unsettled legal principles (such as the market-based causation theory), and the difficulty of disproving contravening conduct in the face of the low statutory threshold.

2.76 The conditions in Australia that are said to have allowed litigation funding to flourish include: the opt-out model; the very high costs involved in conducting large-scale class actions; the cost shifting rule; the lack of a public fund or other mechanism to finance class actions,[140] and the prohibition on lawyers charging contingency fees.[141]

137 (2009) 180 FCR 11.
138 *Australian Constitution*, Chapter III.
139 *Perera v GetSwift Limited* [2018] FCA 732 [18].
140 Khouri, Attrill and Bowman, above n 82, [11.6].
141 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [10.2.2].

3. Incidence

Contents

Introduction

3.1 In this chapter, the ALRC summarises the available data regarding the number, operation, characteristics, key participants and outcomes of Part IVA proceedings in the Federal Court of Australia. The key findings indicate:

- **shareholder claims are the dominant type of action**: Shareholder claims constituted over one-third of all Part IVA proceedings.[1]
- **shareholder claims are always funded**: From 2013, all shareholder claims in the Federal Court were funded by third-party litigation funders.[2]

1 See Table 3.3–3.4.
2 Ibid.

- **funded matters rarely go to trial**: The majority of Part IVA proceedings were finalised through judicial approval of settlement,[3] with funded matters more likely than unfunded proceedings to resolve by settlement.
- **third-party litigation funding is an entrenched element of Part IVA proceedings**: From 2013 to 2018, 64% of filed Part IVA proceedings received third-party funding. Between March 2017 and 2018, 78% of filed proceedings were funded,[4] with the median commission rate for third-party litigation funding constituting 30% of the settlement award.[5]
- **the settlement amounts related to Part IVA proceedings are varied:** From 2013 to 2018 class actions have settled for a median of $29 million,[6] with settlements ranging from $3 million to $250 million.
- **group members receive a greater proportion of the settlement award in unfunded matters:** The median return to group members in funded matters was 51%, whereas in unfunded proceedings the median return was 85% of the settlement award.[7]
- **the class action market is growing and diversifying**: In the first ten months of 2018, the constitution of law firms and third-party litigation funders who participated in finalised Part IVA proceedings was more diverse than the preceding years.[8]

About the data

3.2 This chapter uses two distinct datasets. The first dataset comprises the research and findings of Professor Vince Morabito on filed Part IVA proceedings. These secondary findings were drawn from 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report'[9] (Fifth Report) and from figures provided by Professor Morabito to the ALRC.

3.3 The second dataset was compiled by the ALRC to form a primary dataset of finalised Part IVA proceedings (the ALRC Dataset).[10] The ALRC viewed and collected Part IVA judgments from the:

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3 See Table 3.6.
4 See Table 3.2.
5 See Table 3.7.
6 Ibid.
7 Ibid.
8 See below [2.39]–[2.42].
9 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017).
10 The ALRC is grateful for a list of Part IVA cases provided by law firm Allens, with which the ALRC was able to cross-refer its compilation of data, and for the assistance of Professor Vince Morabito. Any errors are the ALRC's.

- Digital Law Library on the website of the Federal Court of Australia;
- Commonwealth Courts Portal; and
- online legal archives such as Lexis Advance and Westlaw.[11]

3.4 The data include only proceedings that have been 'finalised'—generally considered those proceedings that have received judicial approval of settlement pursuant to an order under s 33V of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) or proceeded to final judgment. The **ALRC Dataset** is reproduced at Appendix E.

Omissions

3.5 The ALRC Dataset includes 91 finalised proceedings. This does not include every Part IVA proceeding finalised from 1997. For example, Professor Morabito reports that 452 Part IVA matters were filed in the Federal Court between 1992 and September 2018.[12]

3.6 There are three key reasons for omissions in the ALRC data. First, a 'finalised proceeding' may constitute more than one matter that was *filed* in the Federal Court—single filed matters relating to the same defendant can be finalised in one judgment.[13] Secondly, the ALRC Dataset does not include all of the proceedings that may have been dismissed or discontinued by the Federal Court. The vast majority of proceedings captured on the ALRC database were finalised by an order of the Federal Court approving a settlement agreement.[14] As noted in Table 3.6 below, 60% of Part IVA proceedings were generally settled, with most others discontinued or dismissed at some point in the proceedings. Accordingly, the ALRC Dataset omits approximately 40% of filed proceedings that were finalised in ways other than settlement.

3.7 Thirdly, the ALRC Dataset intentionally excluded matters that have been filed but not yet finalised. As at 12 December 2018, there were approximately 87 Part IVA proceedings on foot in the Federal Court. The ALRC Dataset also excludes six class action proceedings related to the Westpoint collapse that were prosecuted by the Australian Securities and Investment Commission (ASIC) on behalf of the applicants.[15]

3.8 Nonetheless, the ALRC considers that the ALRC Dataset is representative of publicly available Part IVA matters that have resolved through settlement agreements.

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11 Some information was collected from secondary sources, as indicated in the ALRC Dataset.

12 Vince Morabito, 'Closed Class Actions, Open Class Actions and Access to Justice' (October 2018) 9.

13 See, eg, *Kelly v Willmott Forests Ltd (In liq) (No 5)* [2017] FCA 689.

14 *Federal Court of Australia Act 1976* (Cth) s 33V.

15 *Stoyef v Masu Financial Management Pty Ltd* (No 2) [2008] FCA 1849; *Adamson v Professional Investment Services Pty Ltd* [2009] FCA 1235; *Rikys v Bongiorno Financial Advisers (Aust) Pty Ltd* [2009] FCA 1603; *Casey v State Trustees Limited* [2010] FCA 163; *Markov v Dukes* [2010] FCA 1419; *Goodman, in the matter of Glenhurst Corporation Pty Ltd (in liq)* [2010] FCA 667.

Limitations of the data—confidentiality orders and undisclosed information

3.9 The ALRC Dataset sought to capture in each proceeding the:

- case name and number;
- date filed and the date finalised;
- settlement amount;
- law firm acting for the applicant;
- legal fees of the law firm acting for the applicant, and the proportion of the settlement used to pay the legal fees;
- cost of settlement administration, and the proportion of the settlement used for those costs;
- third-party litigation funder (where involved);
- proportion of the settlement used to pay the funding commission;
- size of the class (where available or known); and
- the proportion of the settlement amount returned to the class.

3.10 Of the 91 finalised matters, 23% (21) had confidentiality orders in place pursuant to ss 37AF and 37AG(1)(a) of the FCA Act. These orders prevented the settlement amount, the cost of legal fees, or the funding commission rate from being published. In a further 22% (20) of matters, the settlement approval judgment did not disclose one or more of those elements, rendering it difficult to determine the proportion of settlement that was returned to the class. Confidentiality orders and access to information regarding settlement amounts, legal fees and commissions are discussed in Chapter 5—Powers of the Federal Court: Settlement Approval.

Subset data—the ALRC Snapshot

3.11 Confidentiality orders and incomplete data resulted in only 49 of the available judgments providing the key information sought by the ALRC. These 49 proceedings constituted a subset of data, referred to as the **ALRC Snapshot**, which is set out in Appendix F.

3.12 The ALRC Snapshot comprises a sample size of just over half that of the ALRC Dataset, including 25 funded and 24 unfunded finalised Part IVA proceedings. The ALRC is aware of the limitations of small sample sizes, and makes a recommendation to

enhance data collection in Chapter 5.[16] Nonetheless, the ALRC Snapshot is a complete dataset.[17] Although it is not definitive, the ALRC Snapshot is helpful to show variations between funded and unfunded matters, and to ascertain the range of costs in Part IVA proceedings.

Part IVA proceedings in the Federal Court

3.13 Class action proceedings constitute only a small number of the proceedings filed in the Federal Court annually. For example, up to 4,659 proceedings were filed in the Federal Court in the 2017–18 financial year,[18] with 32 of these being class action proceedings. This amounted to 0.68% of the Court's filings—a percentage that has only slightly increased since 2013–14. These figures are presented in Table 3.1 below.

Table 3.1: Annual number of causes of actions filed in the Federal Court of Australia, annual number of corporation matters and annual number of class action proceedings filed (2012/13–2017/18)

Filings	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	TOTAL
Number of causes of actions filed in the Federal Court (FC)	5169	4281	3445	5008	4670	4659	27,232
Number of causes of actions filed in the FC in 'Corporations' category	3849	2876	2185	3652	3202	2989	18,753
Number of class actions filed in the FC	17	15	20	24	28	32	136
% of causes of actions filed in the FC that were class actions	0.33%	0.35%	0.58%	0.47%	0.59%	0.68%	0.49%

Source: Federal Court Annual Report (2016–17) Table A5.2; Federal Court Annual Report (2017–18) Table A5.2; Professor Vince Morabito, Private correspondence (16 April 2018; 01 November 2018)

3.14 The number of class action proceedings in the Federal Court may not accurately represent the effect that class action proceedings have on justice outcomes and the workload of the Court. Class action proceedings involve multiple parties engaged in complex litigation, and require detailed case management and oversight by the Court. Class action proceedings take around two and a half years to resolve,[19] with many lasting significantly longer, meaning the accumulated number of class actions before the Court at any one time would be higher than the annual number filed.

16 See rec 10.
17 Excluding proportions used to reimburse the representative plaintiff and settlement administration costs, which are often not finalised until administration of the settlement is complete.
18 Federal Court of Australia, *Annual Report 2017–2018* (2018) table A5.2.
19 Morabito, above n 9, 31–32.

3.15 The number of group members in a class action proceeding may range from seven group members to thousands of group members.[20] This means that, although few are filed, class action proceedings may have a vast impact on the operation and workload of the Court and on civil justice outcomes.

3.16 Class action proceedings also have the potential to result in orders for the payment of significant sums by way of damages or the approval of very large settlement sums. For example, from 2013 to October 2018, the median settlement sum recorded in the ALRC Dataset was $29 million.[21]

Characteristics of Part IVA proceedings

3.17 This section presents data related to Part IVA proceedings, including causes of action that may be brought as class actions and those claims that receive third-party litigation funding.

The proportion of proceedings that received funding

3.18 From 2017 to 2018, the majority of Part IVA proceedings received funding from third-party litigation funders:

- 78% (21) of filed proceedings were funded;[22] and
- 77% (10) of finalised proceedings were funded.[23]

The growth of third-party litigation funding of Part IVA proceedings

3.19 The proportion of Part IVA proceedings that received third-party litigation funding has grown overtime. In the period from March 1992 to March 2013, 15% of class action proceedings filed in the Federal Court were funded. From 2013 to 2018, the percentage of funded class actions proceedings grew to 64%, with funded class action proceedings filed in the final year of that period constituting 78% of all filed class actions.[24] These figures are presented in Table 3.2 below.

20 The number of group members in any action in the ALRC Dataset ranges from 21 to 40,000.
21 See Table 3.7.
22 From March 2017 to March 2018: Vince Morabito, Private correspondence (13 March 2018).
23 From 2017 to October 2018: ALRC Snapshot database, Appendix F.
24 Vince Morabito, Private correspondence (13 March 2018).

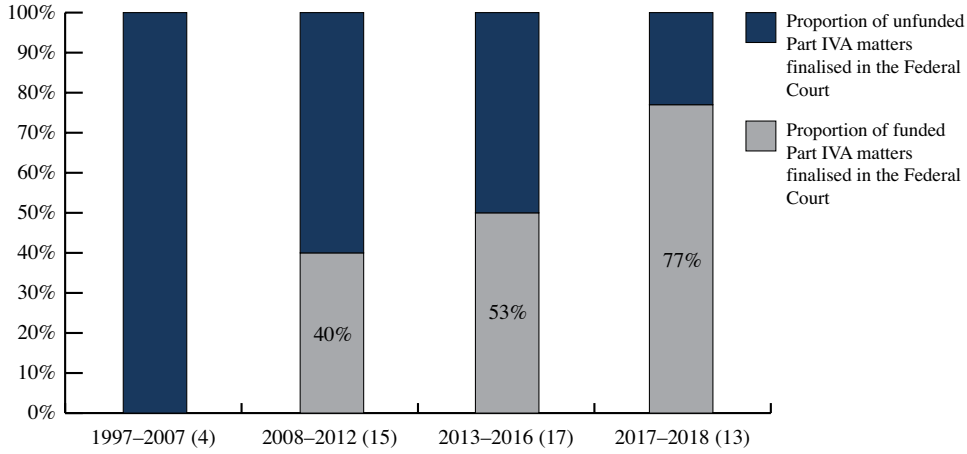
Table 3.2: Total number of class action proceedings filed in the Federal Court of Australia and the percentage that were funded (1992–2018)

Time period	Total number of class action proceedings filed in the FC	Total number of filed class action proceedings that were funded	% of filed class action proceedings that were funded
March 1992—March 2013	311	46	15%
March 2013—March 2018	111	71	64%
March 2017—March 2018 (subset of above)	27	21	78%
TOTAL filed on/before March 2018	**422**	**117**	**28%**

Source: Professor Vince Morabito, Private correspondence (13 March 2018)

3.20 The ALRC Snapshot of finalised Part IVA proceedings (49) charts the growth of third-party litigation funding from 1997, as presented in Figure 3.1 below.

Figure 3.1: Proportion of finalised Part IVA proceedings that received third-party litigation funding (1997–October 2018)



Source: ALRC Snapshot, Appendix F

3.21 During the time period of 2008–2012, 40% (6) of finalised proceedings received third-party funding. In 2013–2016 this increased to 53% (9), and from 2017 to October 2018, 83% (10) of class action proceedings finalised in the Federal Court in that time period received third-party funding.

Types of claims—funded and unfunded

Table 3.3 below illustrates the type of class actions claims that were filed and, of those, the types that were funded by third-party litigation funders from March 2013 to March 2018.

Table 3.3: Types of class action claims filed in the Federal Court that were funded by litigation funders (March 2013–March 2018)

Type of claim	Number of proceedings	Number that were funded	% that received funding	% of all funded class actions
Claims by shareholders	37	37	100%	52%
Claims by investors	26	17	65%	24%
Consumer protection claims	13	4	31%	6%
Product liability claims	8	4	50%	6%
Mass tort claims	8	3	38%	4%
Claims by employees/workers	5	2	40%	3%
Claims by franchisees, agents &/or distributors	3	2	67%	3%
Claims by real estate owners	5	1	20%	1%
Claims by alleged victims of racial discrimination in non-migration proceedings	3	1	33%	1%
Total	**108**	**71**	**66%**	

Source: Professor Vince Morabito, Private correspondence (15 March 2018).

3.22 Finalised matters comprised a slightly higher proportion of claims by shareholders, but otherwise reflected the same constitution as class action claims that were filed in the same time-period, as illustrated by Table 3.4 below. A similar proportion of filed and finalised matters received funding.

Table 3.4: Types of claims finalised in the Federal Court of Australia that received funding from litigation funders (2013–October 2018)

Type of claim	Number of proceedings	Number that were funded	% that received funding	% of all funded class actions
Claims by shareholders	11	11	100%	58%
Claims by investors	12	6	50%	32%
Consumer protection claims	2	1	50%	5%
Product liability claims	2	0	14%	0%
Other	3	1	33%	5%
Total	**30**	**19**	**63%**	

Source: ALRC Snapshot, Appendix F.

Shareholder proceedings

3.23 Tables 3.3 and 3.4 taken together indicate that shareholder claims were the predominant type of Part IVA claims filed and finalised in the Federal Court. Shareholder claims constituted:

- 34% of filed proceedings and 52% of filed funded matters; and
- 37% of finalised proceedings and 58% of finalised funded matters.

3.24 From 2013 to 2018, all shareholder claims received third-party litigation funding.

3.25 Shareholder and investor class action filings have been steadily increasing.[25] From the time periods 1992–2004 to 2005–2017, shareholder class actions went from representing 5% (15) to 23% (70) of all filed class action proceedings.[26] In the last five years, shareholder actions have grown even more to represent 34% (37) of all filed class actions.[27]

3.26 Similarly, investor class action proceedings increased from representing 7% (15) of all class actions filed from 1992–2004 to representing 28% (84) in 2005–2017.[28] In March 2018, they represented 24% (26) of all filed class actions, having been superseded by shareholder class actions in the last five years.[29]

3.27 Most other categories of filed class action claims decreased during the above time periods. For example, in the 2005–2017 time period:

- product liability claims decreased from 22% (48) of all filed class actions to 7% (22) of all class actions;
- claims by employees decreased from 21% (45) to 4% (11) of all filed class action proceedings; and
- mass tort claims and consumer protection claims increased from 7% (15) to 13% (39) and from 7% (14) to 11% (33) of claims respectively.[30]

3.28 The drivers of shareholder class actions are discussed in Chapter 9—A Review of the Substantive Law that Underpins Shareholder Class Actions?

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25 Morabito, above n 9, 28, 29; Jenny Campbell and Jerome Entwisle, 'The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?' (2017) 36(2) *Civil Justice Quarterly* 177, 182.

26 Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report', above n 9, table 7.

27 Table 3.2.

28 Morabito, above n 9, table 7.

29 Ibid 29. See also table 3.3.

30 Ibid table 7.

Competing proceedings

3.29 The ALRC defines competing Part IVA proceedings as 'multiple proceedings that otherwise relate to the same dispute'.[31] These may be actions that have been filed concurrently or consecutively against the same defendant/s.

3.30 The ALRC Dataset indicates that, from 2012, six sets of competing class actions have been finalised in the Federal Court—comprising 24 individual filed matters.[32]

Table 3.5: Competing Part IVA proceedings last settlement approval finalised in the Federal Court of Australia (2012–October 2018)

Sets	Individual matters filed in the Federal Court
Merck Sharpe	*Peterson v Mercke Sharp & Dohme (Australia) Pty Ltd* [2015] FCA 123
	(2008) *Reeves v Merck Sharp & Dohme (Aust) Pty Ltd & Anor:* VID 859/2008
Centro	*Kirby v Centro Properties Ltd (No 6)* [2012] FCA 650
	Richard Kirby v Centro Retail Ltd : VID327/2008
	(2010) *Nicholas Stott v PWC:* VID1028/2010
	Vlachos v Centro Properties Ltd: VID366/2008
	(2010) *Vlachos v PWC:* VID1041/2010
Oz Minerals	*Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801
	Anthony Scott & Anor v Oz Minerals Limited: [2013] FCA 182
	Mitic v Oz Minerals (No 2) [2017] FCA 409

31 See Chapter 4—Powers of the Court: Case Management.

32 Professor Morabito has suggested five other sets of claims that fit within the definition of competing or related class actions. Three of these involve actions against different respondents in relation to the same dispute: *Gray v Cash Converters International (No 2)* [2015] FCA 1109; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527; *Sherwood v Commonwealth Bank of Australia (No 5)* [2015] FCA 688 and *Lee v Westpac Banking Corporation* [2017] FCA 1553. One involves two class actions against Treasury Wines Estates Ltd, *(Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296 and *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2016] FCA 787) in which the latter case was permanently stayed as an abuse of process. The last involves eight class actions in relation to bank fees, see *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28. Vince Morabito, Private correspondence (12 November, 2018).

Sets	Individual matters filed in the Federal Court
Willmott Forests	*Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689
	David Kelly & Margaret Kelly v Mis Funding: VID1483/2011
	Aaron Grant v Commonwealth Bank of Australia: VID1484/2011
	Braeden Stephen Lord v Willmott Forests Ltd (In Liquidation) in its Personal Capacity and in its Capacity as Responsible Entity of the Willmott Forests Premium Forestry Blend – 2010 Project: VID187/2013
Sandhurst	*Hodges v Sandhurst Trustees Ltd* [2018] FCA 1346
	(2017) *Smith v Sandhurst Trustees Ltd:* NSD 1488/2017
Standard & Poor's	*Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289
	Lifeplan Australia Friendly Society Ltd v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York) [2018] FCA 379
	Clurname Pty Ltd & Anor v McGraw-Hill Financial Inc (Formerly McGraw-Hill Companies, Inc) (A Company Incorporated in New York) & Anor – NSD957/2015
	Coffs Harbour City Council v McGraw-Hill Financial, Inc (Now Known as S&P Global Inc.) & Anor – NSD1020/2014
	Coffs Harbour City Council v Australia and New Zealand Banking Group Ltd (Trading as ANZ Investment Bank)– NSD1021/2014
	Ceramic Fuel Cells Limited (In Liquidation)v McGraw-Hill Financial Inc (Formerly McGraw-Hill Companies Inc) & Anor NSD 1126/2015
	MDA National Insurance Pty Ltd v McGraw-Hill Financial Inc (Formerly McGraw-Hill Companies Inc) & Anor – NSD414/2016
	Mitsub Pty Limited, As Trustee for the Chris Carroll Superannuation Fund v McGraw-Hill Financial, Inc. (Formerly McGraw-Hill Companies, Inc) & Anor – NSD1344/2015

Source: ALRC Dataset, Appendix E; Professor Morabito, Private correspondence (12 November, 2018).

3.31 The ALRC Dataset does not record competing class actions that have been filed in other jurisdictions, such as the Supreme Court of Victoria or the Supreme Court of New South Wales.

3.32 Of the six sets of competing class actions where all matters were finalised in the Federal Court:

- four were funded by third-party litigation funders;[33]

33 Sets of class actions: Sandhurst, Oz Minerals, Centro, Standard & Poor's.

- three were investment matters,[34] two were shareholder matters,[35] and one comprised product liability claims;[36] and
- in four of the sets,[37] the same law firm represented the applicants in two or more competing matters—'related' proceedings.

3.33 In 2018, there was an increase in the number of competing class actions filed. The following competing securities class actions were commenced:

- five competing class actions against *AMP*
- three competing class actions against *Getswift*
- three competing class actions against *BHP*
- two competing class actions against *Brambles*
- two competing class actions against *Commonwealth Bank.*

3.34 Professor Morabito has complied a statistical review of filed competing class actions in Australia, *Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia.*[38]

3.35 Competing class actions are discussed in Chapter 4—Powers of the Court: Case Management.

Time from filing to finalisation

3.36 Professor Morabito reports that class action proceedings filed in the Federal Court take around two and a half years (848 days) to resolve.[39]

3.37 The ALRC Dataset records the year that a Part IVA proceeding was filed, and the year it was finalised. From 2013 to October 2018, the median number of years from filing to finalisation of Part IVA matters in the Federal Court was two years.

3.38 The shortest time from filing to finalisation was one year (five matters), of which three were shareholder matters,[40] two investment matters,[41] and one was a product

34 Sets of class actions: Willmott, Sandhurst, Standard & Poor's.
35 Sets of class actions: Centro, Oz Minerals.
36 Sets of class actions: Mercke Sharp.
37 Sets of class actions: Sandhurst, Willmott, Mercke Sharp, Standard & Poor's.
38 Vince Morabito, 'Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia' (11 July 2018).
39 Morabito, above n 9, 32.
40 *Inabu Pty Ltd v Leighton Holdings (No 2)* [2014] FCA 911; *Newstart 123 Pty Ltd v Billagong International Ltd* [2016] FCA 1194; *Foley v Gay* [2016] FCA 273.
41 *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Ltd* [2014] FCA 982; *Sydney Forex Pty Ltd v Westpac Banking Corporation* (Unreported, 5 January 2015).

liability matter.[42] The longest time from filing to finalisation was five years (two matters), of which one was a consumer matter,[43] and one was a public interest matter.[44] Both were filed in 2013.

Participants—law firms and third-party litigation funders

3.39 Historically, class action proceedings were generally run by a limited number of firms and funded by a small number of litigation funders. The Fifth Report identified five plaintiff law firms with the greatest number of filings, including Maurice Blackburn and Slater & Gordon,[45] and IMF Bentham was named as the leading litigation funder.[46]

3.40 The ALRC Snapshot indicates that from 1997 to October 2018, Maurice Blackburn acted for the class in the majority of finalised Part IVA proceedings (50%). There are, however, more law firms entering the field: of the eleven finalised proceedings in the first ten months of 2018, Maurice Blackburn represented 27% of applicants (either singularly or together with another firm). Seven other law firms represented one or more applicants in the other matters.

3.41 A similar pattern can be seen for third-party litigation funders. During the time period of the ALRC Snapshot, IMF Bentham funded the majority of matters (36%). However, in the first ten months of 2018, IMF Bentham funded only one (12.5%) of the eight funded finalised Part IVA matters. Four other funders were active, with International Litigation Funding Partners constituting the majority (50%). See Appendix G for a list of third-party litigation funders that operate in Australia.

3.42 Since 2005, between 51% and 70% of legal representatives acting for class representatives had not previously acted on a class action. The highest number, but lowest proportion, of inexperienced plaintiff lawyers was shown to be from 2014 to 2017, when 51% (22) of legal representatives in class action proceedings had no prior experience in running class actions.[47]

Outcomes of Part IVA Proceedings

3.43 This section presents data on the way that class action proceedings resolve; the median settlement amount; and the proportion of settlement redistributed to cover legal costs, funding commissions and the proportion returned to group members.

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42 *Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3)* [2017] FCA 1165.
43 *McAlister v New South Wales (No 2)* [2017] FCA 93.
44 *Wotton v State of Queensland (No 10)* [2018] FCA 915.
45 Morabito, above n 9, 35.
46 Ibid 34.
47 Ibid.

Proportion that resolve in settlement

3.44 The majority of class action proceedings filed in the Federal Court resolved by a judicially approved settlement.[48] A trial is rare. The Fifth Report states that 60% of all class action proceedings filed in the Federal Court from 1 December 2004 to 31 May 2017 settled pursuant to a judicially approved settlement agreement. Only 4.2% of class action proceedings resolved in a ruling (for or against the plaintiff) following trial.[49]

3.45 The top five methods of finalisation for class action proceedings in the Federal Court are presented in Table 3.6 below.

Table 3.6: Top five methods of finalisation of class action proceedings in the Federal Court of Australia (2004–2017)

% of class action matters resolved	Method of finalisation
60%	Judicially approved settlement agreement
10.6%	Proceedings dismissed (excluding for want of prosecution or lack of jurisdiction)
9.2%	Proceedings discontinued by the class representative
7%	Proceedings discontinued as a class action by the class representative
4.8%	Proceedings discontinued as a class action by the Court

Source: Professor Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017), table 10.

3.46 Despite their prevalence, no shareholder class action has been finalised with a judgment of the Federal Court,[50] although this does not mean that every shareholder class action resolved with a judicially approved settlement agreement. Of matters filed before June 2017, 64% of all shareholder matters settled (with 73% of investor class actions and 70% of mass tort actions settling).[51]

48 Ibid 37.
49 Ibid table 10.
50 Campbell and Entwisle, above n 25, 183.
51 Morabito, above n 9, 30.

Settlement rate of funded and unfunded matters

3.47 The Fifth Report notes that the settlement rate of funded actions filed in the Federal Court was higher (79%) than unfunded class actions (43%)[52] and that this gap decreased due to the funded unsuccessful finance class actions against the banks. Prior to those actions, 92% of funded class actions settled.[53]

Settlement amounts and distribution of funds

3.48 In class action proceedings that resolve by settlement, payments for services related to conducting the class action are often taken from the settlement amount. This includes payments to the representative plaintiff, legal fees, costs of settlement administration and any commission rate to a third-party litigation funder. The proportion of the settlement amount returned to the class constitutes the remaining funds after fees for services are withdrawn.

Median settlement and proportional distribution

3.49 Data from the ALRC Snapshot indicates that between 2013 and 2018, the median settlement amount and the median proportional return from the settlement to the law firm, third-party funder and group members was as per Table 3.7 below.

Table 3.7: Median settlement and return for Part IVA matters finalised in the Federal Court (2013–October 2018)

	Median settlement amount	Median % of settlement used to pay legal fees	Median % of settlement used to pay funding commission	Median % of settlement returned to the class*
All finalised matters, 2013–2018 (30)	$29 million	17%	22%	57%
All finalised matters (funded), 2013–2018 (19)	$32.5 million	17%	30%	51%
All finalised matters (unfunded), 2013–2018 (11)	$20 million	15%	n/a	85%

*Source: ALRC Snapshot, Appendix F. *Excludes proportion of settlement allocated to costs for settlement administration and to representative plaintiffs.*

52 Ibid 34.

53 Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia' (29 July 2016).

Range of settlement and proportional distribution

3.50 There was a broad range of settlement amounts in the time period. There was also a broad range in the proportion of settlement used to pay legal fees and commission rates. For example, in finalised funded matters:

- The settlement amount ranged from $3 million[54] to $250 million;[55]
- legal fees ranged from **2%** of a $250 million settlement[56] to **50%** of a $6.75 and a $3 million settlement;[57] and
- funding commissions ranged from **17%** of a $6.75 and a $3 million settlement;[58] to **62%** of a $6.6 million settlement;[59]
- the return to the class ranged from **29%** of a $6.6 million settlement[60] (mentioned above) to **69%** of a $75 million settlement.[61]

3.51 The lowest proportional funding commissions aligned with the highest proportional legal fees,[62] while the highest proportional funding commission aligned with the lowest return to the class.[63]

3.52 There are many variables that affect proportional returns, making any findings difficult to draw. This includes the nature and complexity of a matter, the length of proceedings, the size of the settlement, and the size of the class.

Median settlement and proportional distribution—shareholder claims

3.53 There was an increase in the median settlement amount when shareholder claims from the time-period were isolated. There was an increase in the proportion of settlement used to pay legal fees, and a slight decrease in the proportional funding fee.

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54 *HFPS Pty Ltd (Trustee) (in liq) (No 3)* [2017] FCA 650; *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491.
55 *City of Swan v McGraw-Hill Companies Inc* [2016] FCA 343.
56 Ibid.
57 *HFPS Pty Ltd (Trustee) (in liq) (No 3)* [2017] FCA 650; *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491.
58 *HFPS Pty Ltd (Trustee) (in liq) (No 3)* [2017] FCA 650; *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491.
59 *Farey v National Australia Bank Ltd* [2016] FCA 340.
60 Ibid.
61 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 3)* [2014] FCA 680.
62 *HFPS Pty Ltd (Trustee) (in liq) (No 3)* [2017] FCA 650; *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491.
63 *Farey v National Australia Bank Ltd* [2016] FCA 340.

Table 3.8: Median settlement and return for shareholder Part IVA claims finalised in the Federal Court (2013–October 2018)

	Median settlement amount	Median % of settlement used to pay legal fees	Median % of settlement used to pay funding commission	Median % of settlement returned to the class*
All finalised shareholder claims, 2013–2018 (11)	$36 million	26%	23%	51%

*Source: ALRC Snapshot, Appendix F. *Excludes proportion of settlement allocated to costs for settlement administration and to representative plaintiffs.*

Range of settlement and proportional distribution

3.54 Consistent with the range of settlement and proportional distribution in all matters, the ALRC Snapshot contained a broad range of returns for shareholder claims in the 2013–2018 time period:

- settlement amounts ranged from **$3 million**[64] to **$132.5 million;**[65]
- the lowest proportion spent on legal fees was **11%,**[66] and the highest proportion spent on legal fees was **50%** of the lowest settlement amount of $3 million: [67] typically the lower the settlement amount the greater the proportion taken in legal fees;
- the lowest proportional commission rate was **17%**[68] on a $3 million settlement, the highest was **33%.**[69]
- the lowest return to group members of **29%** occurred on a $6.75 million settlement;[70] the highest return was **69%** on a $75 million settlement.[71]

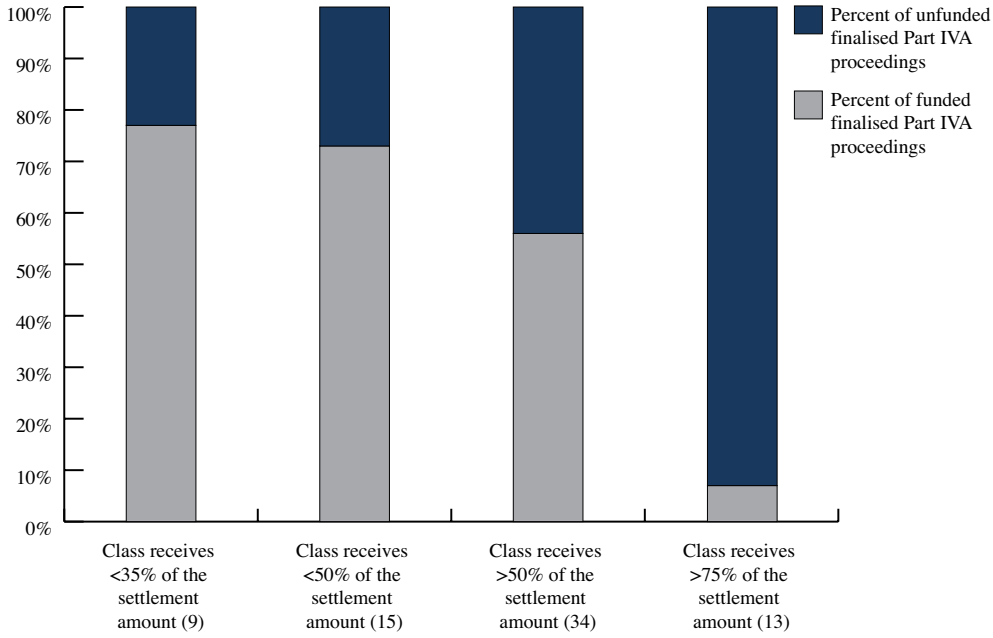
Return to the class in funded and unfunded proceedings

3.55 While it is difficult to draw any findings from the variations in returns, it is clear that the more services that are to be paid out of the settlement amount, the smaller the amount returned to the class. This is especially so when a funding commission is taken from the settlement amount.

64 *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491.
65 *Money Max Into Pty Limited as Trustee for the Goldie Superannuation Fund v QBE Insurance Group Limited* [2018] FCA 1030.
66 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (GPT Management)* [2014] FCA 680.
67 *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491.
68 Ibid.
69 *Hopkins v AECOM Australia Pty Ltd* [2016] FCA 1096.
70 *HFPS PTY LTD (as Trustee for the Hunter Facility Project Services Pty Ltd Superannuation Fund & Anor v Tamaya Resources Ltd (In Liquidation) & Ors* [2017] FCA 650.
71 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (GPT Management)* [2014] FCA 680.

3.56 The ALRC Snapshot further shows that the lower the proportional return to the class, the more likely the proceedings were to be funded.

Figure 3.2: The proportion of return to the class in finalised Part IVA matters and the percent of those that received third-party litigation funding (1997–October 2018)



Source: ALRC Snapshot, Appendix F

3.57 Most matters where the class received less than 50% of the settlement amount were funded by third-party litigation funders. 31% (15) of finalised proceedings captured by the ALRC Snapshot had a return to the class of 50% or less of the settlement amount. Of these matters, 73% (11) had been funded by third-party litigation funders.

3.58 Nine matters resulted in a return to the class of 35% or less of the settlement amount, of which 77% (seven out of nine) were funded.

Over 50% of settlement amount

3.59 The greater the return to the class, the less likely that the matter received third-party litigation funding. Of those where the return to the class was over 50% of the settlement amount (34), 56% (19) were funded by third-party litigation funders.

3.60 Where the return to the class was 75% of the settlement amount or over (13), just one matter had received funding (resulting in a return to the class of 84%).[72]

72 *Scott v Oz Minerals Ltd* [2013] FCA 182.

Qualitative data

3.61 The ALRC conducted over 67 confidential consultations with stakeholders to the Part IVA regime. A list of consultations are presented at Appendix A and B. The composition of consultees is outlined below.

Table 3.9: Composition of consultees to the Inquiry into Class Action Proceedings and Third-Party Litigation Funders (February 2018–November 2018)

%	Stakeholder
19%	Lawyers who generally represent the respondent in class action proceedings
16%	Industry bodies and institutes, such as law societies
15%	Third-party litigation funders
10%	Group members or representative plaintiffs of previous and current class action proceedings
9%	Lawyers who generally represent the applicant in class action proceedings
9%	Government agencies or independent statutory bodies
9%	Superannuation funds
7%	Academics
3%	Insurance agencies
1%	Federal Court of Australia

Source: Appendix A and Appendix B

3.62 The composition of consultees generally reflects the proportion of stakeholders active in the class action sector. For example, there are few established law firms that represent applicants (although the number of new entrants is growing), while various corporate law firms represent respondents.

3.63 Academics and the Federal Court of Australia have provided further input to the Inquiry through the academic and judicial expert panels described in Chapter 1—Framing the Inquiry.

Methodology and key themes

3.64 The purpose of holding confidential consultation is to inform the ALRC on the topic area and the need for reform. Confidential consultation is a key part of the ALRC process, which, combined with stakeholder submissions, legal research, and quantitative data, forms the ALRC evidence-base for each inquiry.

3.65 For this Inquiry, consultations with stakeholders were unscripted. The ALRC did not develop a standard set of questions, and each session was ‘free flowing’. The ALRC has not quantified the data from consultations, although it has made a record of the consultations from which competing themes have been identified, including:

- for those who prosecute class action proceedings, the system was working—no further regulation was required.
- for those who defend class action proceedings, the system was broken, and worked almost exclusively for the benefit of those who prosecute class actions.
- for those who participated as group members or representative plaintiff, the system was confusing, distant and uncertain. Some participants felt pushed into participating in an action—whether the participant was an individual or an institution.

4. Powers of the Federal Court: Case Management

Contents

Introduction

4.1 In order to improve access to justice and support the Court's management of class actions, the ALRC recommends amendments to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) and the Federal Court of Australia's Class Actions Practice Note (GPN-CA) (Practice Note). In order to return the class action regime to its original design, the ALRC recommends amending the FCA Act to provide that class actions must be initiated as open class – this improves access to justice by enabling all victims of a civil wrong to participate in the class action and not just those who take active steps to join. This amendment to the Act would be supported by amendments to the Practice Note to:

- set out the circumstances in which it may be necessary to close the class to facilitate early settlement, and

- the criteria for the limited circumstances in which a class action that has been closed may be reopened.

4.2 In order to support an open class regime, the ALRC recommends the FCA Act be amended to provide an express statutory power for the Court to order a common fund.

4.3 The ALRC also recommends amendments to the FCA Act to address the rising incidence of competing class actions. Those amendments seek to ensure that, wherever possible, there is a single class action in order to litigate a claim. In this chapter, the rationale for a single class action policy is explained and a procedure for implementing that policy is identified. Statutory amendments to reduce the risk of forum shopping are also recommended.

Open class actions

Recommendation 1 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that all representative proceedings are initiated as open class actions.

4.4 In its original report on *Grouped Proceedings in the Federal Court* (No 46, 1988), the ALRC noted that the main objectives of the class action regime were to:

> secure a single decision on issues common to all and to reduce the cost of determining all related issues arising from the wrongdoing. To achieve maximum economy in the use of resources and to reduce the cost of proceedings, everyone with related claims should be involved in the proceedings and should be bound by the result.[1]

4.5 A single binding decision would be achieved by including all related claims within the class action and not just the claims of individuals who had taken steps to join the class action. The ALRC carefully considered whether a class action scheme should be designed on the basis of the active consent by each group member (that is, an opt-in regime) or alternatively whether the scheme should be open class and opt out. The latter enables a class action to be commenced on behalf of all group members irrespective of whether they had been identified or consented to the initiation of the action. The ALRC considered this to be the preferable option from an access to justice perspective as it meant that all people, not just those who took active steps to join, would be able to enjoy the benefit of the class action if it were successful. This was seen as protecting particularly vulnerable groups who may be less likely to take active steps to join a class action because they were unaware of the class action or faced barriers to providing active consent. [2]

1 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) [92].
2 Ibid [107].

4.6 Closed classes became a feature of the Australian class action landscape following the decision in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd (Multiplex)*.[3] In that decision, the Court found that closed classes were permissible as s 33C of the FCA Act expressly provides that a proceeding could be commenced by only *some* of the persons who had claims against a respondent.

4.7 The Victorian Law Reform Commission (VLRC) has observed that closed classes may reduce the inequality introduced by 'free riders', as all class members who wish to benefit from the recovery must register with the litigation funder and agree to contribute to the costs.[4] Similarly, in reducing the different categories of class members (those who have signed the funding agreement and those who have not), the potential conflicts of interest faced by lawyers and funders may be reduced.[5] Third-party litigation funders also have greater certainty in relation to the funding fee that might ultimately be recoverable and respondents have greater certainty as to the size of the class and thus their potential financial exposure.

4.8 Nevertheless, while *Multiplex*[6] was correct as a matter of statutory interpretation, Jacobson J said:

> It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.[7]

4.9 Submitters to this Inquiry, such as Professor Legg and Dr Metzger agreed that there should be a return to a purely open class regime:

> We agree that the class action legislation should be structured so that all class actions operate on an opt out or open basis and not on a closed basis. The opt out class action was chosen because it promotes access to justice as group members who cannot be identified at the outset or who are unable to affirmatively participate due to social or economic barriers are not excluded from the legal system and a potential remedy. Open class/opt out 'results in efficient use of judicial resources as one proceedings instead of many are processed by the Court system and all group members are bound by the outcome unless they affirmatively opt out.[8]

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3 (2007) 164 FCR 275

4 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2017) [DP 7.94-98]. See also Lee J in *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 [2]: 'The reason for closed classes from the perspective of litigation funders was 'simple: to commence as an open class would mean that there was no incentive for group members to sign funding agreements delivering commercial benefits to the funder.'

5 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *UNSW Law Journal* 914; Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244.

6 (2007) 164 FCR 275

7 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 [117].

8 M Legg, J Metzger, *Submission 12*.

4.10 Similarly, Shine Lawyers noted that:

> Open class representative actions allow those who are poor, less educated, located in remote locations or who may be unable to take positive steps to have themselves included in proceedings to obtain access to justice.[9]

4.11 However, a number of stakeholders suggested that closed classes, classes where a criterion for membership of the class is the signing of a solicitor's cost agreement or legal funding agreement, should be permitted to enable group members control over the size and scope of the class action and to preserve individual choice.[10] For example, law firm Phi Finney McDonald submitted that:

> In our view, a requirement to initiate *all* class actions on behalf on an open class of group members would unjustifiably limit claimants' right to prosecute their claims as they see fit. In some circumstances, a group of claimants may wish to issue a closed class action for the specific purpose of maintaining control of the conduct of their claims on terms they have agreed. That may involve negotiating better funding terms than those offered or proposed to be offered in any open class proceeding, or choosing alternate legal counsel who they consider better suited to prosecute their claims. Where this occurs, and subject to the requirements that those group members opt out of any duplicative open proceedings and otherwise satisfy the Court that their proceeding does not constitute an abuse of process, they should be permitted to do so.[11]

4.12 While recognising that there may be particular advantages to those in the closed class, the ALRC considers that those benefits need to be balanced against the broader utilitarian objectives of the class action regime. In this regard, Shine Lawyers noted:

> Closed class proceedings prima facie appear to provide benefit to the legal representatives and litigation funders and ignores the public benefit of open class proceedings.[12]

4.13 However, IMF Bentham explained that:

> Representative parties should not be compelled to represent all affected persons if they wish to only represent a subset and group members should be free to expressly choose which lawyer/funder combination they wish to fund or represent them.[13]

4.14 In this regard, Part IVA is not the only procedural mechanism available to parties and the Courts to group claims that are is some way related. Other mechanisms include representative procedures, joinder, and consolidation.[14] A key difference between these mechanisms and class action proceedings under Part IVA is that a class action does not require the consent of the parties to the action or approval of the Court. All of the situations set out in submissions as being suitable for a closed class action involve parties who have actively consented to the action and have signed costs agreements or

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9 Shine Lawyers, *Submission 43*.
10 Therium Australia Limited, *Submission 19*; International Litigation Partners, *Submission 31*; Maurice Blackburn, *Submission 37*; Association of Litigation Funders of Australia, *Submission 58*.
11 Phi Finney McDonald, *Submission 34*.
12 Shine Lawyers, *Submission 43*.
13 IMF Bentham Limited, *Submission 50*.
14 *Federal Court Rules 2011* (Cth) r 8.21, r 30.11 and Div 9.1.

funding agreements. These other procedural mechanisms may provide a suitable means of grouping actions in a more limited way than through the use of Part IVA.

Industry superannuation funds support open class proceedings

4.15 Industry superannuation funds, including AustralianSuper, CBUS and Hesta, provided another rationale for a return to purely open class a regime. They suggested that closed class actions can create a false impression that a particular shareholder action has institutional shareholder support.[15] This occurs because the closed nature of the class action requires an early sign on by shareholders so as not to miss out. That early sign on may nevertheless be in circumstances where these superannuation funds do not have sufficient information to determine whether or not the class action is meritorious. AustralianSuper explained:

> Often, investors lack the resources or there is insufficient information to be able to carefully consider the claim and therefore they may sign up on the basis that there is nothing to lose. This can create the illusion that a significant proportion of the shareholder register believes there is merit to the allegation. Company boards in this position face a decision to spend potentially significant board and company resources to contest the claim or to settle the claim quickly, and at a lower cost, despite its potentially spurious nature.[16]

4.16 An open class action does not require early sign on and would allow superannuation funds to act with more circumspection when considering joining a particular shareholder action.

How should the restriction on closed classes be defined?

4.17 In a 2018 article on open and closed classes, Professor Morabito noted that his data suggests 'that determining whether all alleged victims of the impugned conduct have been included in the class action litigation is not as easy as one may think.'[17] There have been two principal ways in which individuals who may have suffered loss have been excluded from participating in a class action:

- through opt in devices such as a requirement to sign a funding agreement with a litigation funder or sign a solicitor's costs agreement with the lead plaintiff's solicitors, and
- through drafting the statement of claim in a manner that defines the class narrowly (examples include: listing all the claimants individually, bringing an action on behalf of members of a particular association or trade union, or limiting the actions to claimants with a minimum threshold loss or minimum purchase volume of a product).[18]

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15 AustralianSuper, *Submission 33*; Cbus Super, *Submission 46*; HESTA, *Submission 61*.
16 AustralianSuper, *Submission 33*.
17 Vince Morabito, 'Closed Class Actions, Open Class Actions and Access to Justice' *Research Report* (October 2018) 9.
18 Ibid 11.

3.18 The recommendation that all class actions be open class and opt out is primarily directed at ensuring that the class action regime does not require potential group members to sign up with a lawyer or funder in order to participate. To the extent that a third-party litigation funder or law firm sought that outcome by defining the group narrowly, the ALRC considers that the Court has the necessary discretion to distinguish between a statement of claim that reasonably defines the class and one where the description of the class is crafted to require, as a practical matter, the signing up with a lawyer or funder to participate.

Closure and reopening of the class

Recommendation 2 Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide criteria for when it is appropriate to order class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.

Closing the class

4.19 The Court has the necessary powers to order class closure immediately prior to mediation so as to facilitate a settlement and provide finality.[19] In fact, it has become a particular practice in shareholder class actions for the parties to apply routinely for class closure prior to mediation so as to provide clarity as to the size of the class, and therefore the size of the alleged loss sought to be compromised at the settlement. Specifically, the way that shares are traded on the ASX, for example through custodians and nominees, makes it difficult, in the absence of class closure and registration to assess how many individuals fall within the definition of the class and their estimated loss. Class closure is not always used in other types of class actions. For example, in medical device negligence cases the respondent may agree to settle on an aggregate basis.[20]

4.20 When the ALRC originally recommended a class action regime, it proceeded on the expectation that settlements would be reached on an 'aggregate assessment of monetary relief' with rules as to how that aggregate may be divided between class members.[21] Such an approach avoided the need for class closure prior to mediation.

4.21 The need for class closure to settle securities class actions was put forward by International Litigation Partners as a reason to continue with closed class actions. International Litigation Partners also noted that class actions, regardless of whether they are commenced as open or closed classes:

19 *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296.
20 *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452.
21 Australian Law Reform Commission, above n 1, [227].

> do not settle successfully except following a registration process which in effect closes the class and prevents claims being brought by any potential claimant who has not registered. Unregistered claimants remain group members bound by a settlement but disentitled to participate in it.[22]

4.22 The ALRC considers that the concerns that arise with respect to class actions that are initiated as closed classes also apply to open classes that are subsequently closed to enable mediation. That is, it disadvantages vulnerable groups who may be less likely to take active steps to register or face barriers to completing registration. Moreover, the fact that unregistered class members remain bound by a settlement but not eligible to participate[23] should weigh against class closure.[24] Advice provided to the ALRC during confidential consultations suggests that it is not unusual for fewer than 50% of group members to register and therefore be eligible to participate in any settlement agreed at mediation.

4.23 Accordingly, there is a careful balance that needs to be struck between facilitating the resolution of disputes through mediation and the development of a de-facto closed class regime at the point that the proceedings are prepared for mediation. The Court is in the best place to strike that balance and the Practice Note should be amended to provide guidance on the criteria the Court will apply in determining whether class closure is appropriate. The ALRC considers that it should not always be assumed that facilitating a successful mediation will outweigh the need to protect vulnerable groups who may be more likely to be excluded from a settlement due to a failure to register.

Reopening the class

4.24 A related issue is whether the class action, having been closed for mediation, should be reopened in the event that mediation is unsuccessful. MinterEllison noted that there does not appear to have been 'consistency in the approaches taken by the court in determining whether the class closure prior to mediation will be final or not.'[25]

4.25 In the Discussion Paper, the ALRC noted that there is merit in providing for class closure at mediation to be final so that the potential for the class to re-open is not used for tactical advantage. Allens agreed and explained that 'there is no compelling policy reason why class closure at mediation should not be final.'[26] Similarly, MinterEllison explained:

> Class Closure Class closure should be final:
>
> (a) In our experience, where the orders leave open the potential for the class to be re-

22 International Litigation Partners, *Submission 31*.
23 The Court has found that it has the power to bind unregistered class members. See *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433.
24 Requiring class members to register prior to settlement or judgment has been criticised. See Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347, 353-357.
25 MinterEllison, *Submission 45*.
26 Allens, *Submission 52*.

opened in the event of an unsuccessful mediation this has been raised during settlement negotiations in an attempt to apply pressure on the respondent to agree to a higher settlement figure. That is, as the Commission infers, it is deployed to the tactical advantage of the applicant.

(b) Irrespective of any tactical advantage, the process of re-opening, re-closing, registration, and opt out leads to increased costs and delay, to the detriment of the applicant, group members, the respondent and the court.

(c) All parties would benefit from a consistent approach that avoids uncertainty and reduces the potential for argument about the terms of the orders. To ensure the court retains the discretion to alter the usual approach in appropriate circumstances, we suggest that the vehicle to implement this proposal be amendments to the Practice Note: it should provide that the class closure will be final, but on subsequent application ... the court may in its discretion permit the class to be re-opened if satisfied that it is in the interest of justice to do so.

4.26 The ALRC agrees that the process of re-opening, re-closing, registration and opt out leads to increased costs and delay. It also uses finite judicial resources on iterative interlocutory procedural processes. The ALRC considers that, if the class is closed at a point during proceedings, it ordinarily should be final. That finality should be a consideration when making orders to close the class to facilitate a resolution of the dispute. The ALRC considers it appropriate that the Court retain discretion to re-open where it is in the interests of justice and that the Practice Note should be amended to explain the criteria that the Court will ordinary apply to determine the limited circumstances where a Court will order a class to be reopened.

Common fund orders

Recommendation 3 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion.

4.27 Common fund orders typically require all members of a class to contribute equally to the legal and litigation funding costs of the proceedings regardless of whether the class member signed a funding agreement.[27] In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited (Money Max),* the Court made orders on an interlocutory application allowing the third-party litigation funder to charge a (reduced) funding

27 Prior to the advent of common fund order the courts sought to address the perceived unfairness which exists between funded and unfunded members by making 'equalisation orders' following settlement or judgment. As an example of how equalisation orders work: if a funder has signed up 50% of the class who have agreed to pay a 30% commission, that commission is payable on a pro-rata basis across the entire class and the total the funder receives is no more than that to which they are entitled under the signed funding agreements. See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

commission to the whole class, not just to those class members who had signed the funding agreement.[28] The Court observed that:

> the proposed orders have the additional benefit that they will enhance access to justice by encouraging open class representative proceedings. If litigation funders are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class it is less likely that funders will seek to bring class actions limited to those persons who have signed a funding agreement.[29]

4.28 In a recent judgment, Lee J summarised the power of the Court to make a common fund order in the following terms:

> The decision of the Full Court in *Money Max* and the decisions of Murphy J in *Pearson v State of Queensland* [2017] FCA 1096 and *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, recognised that the power to grant a common fund order was grounded in s 33ZF ... and that "the Court has power to make a common fund order in an appropriate case": *Pearson* at [21].
>
> ...
>
> Consistently with the terms of s 33ZF, an applicant must establish the orders are "appropriate or necessary to ensure that justice is done in the extant proceedings, rather than by reference to broad policy considerations" (*Money Max* at 207 [66]).[30]

4.29 In the Discussion Paper, the ALRC proposed that the power of the Court to make common fund orders should be given an express statutory basis and that common fund orders should be mandatory in all class action proceedings.[31] This proposal received mixed support in submissions. Shine Lawyers supported the proposal:

> By initiating proceedings as an open class and ensuring a common fund is available, the risk to the funder is reduced, which may serve to encourage funding of those matters that would otherwise not attract funding, such as medical product liability and small claims worth $30 million or less.[32]

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28 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191.

29 Ibid [205].

30 *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 [25]-[26]. A small number of submitters noted that there is potentially doubt as to whether a common fund order was constitutional. For example, Ashurst, *Submission 25*, highlighted two potential constitutional issues: First, whether a common fund order is an exercise of judicial power for the purpose of Chapter III of the Constitution. Secondly, a common fund order may constitute an acquisition of property other than on just terms. These arguments have so far been rejected but have not been tested in the High Court of Australia. The courts' power to make a common fund order is the subject of two appeals: *Lenthall v Westpac Banking Corporation* (Federal Court proceedings) and *Brewster v BMW Australia* (NSW Supreme Court proceedings). These appeals will be heard in a joint sitting of the Full Federal Court and the New South Wales Court of Appeal on 4 and 5 February 2019.

31 Proposal 6–1.

32 Shine Lawyers, *Submission 43*.

4.30 US Chamber Institute for Legal Reform, however, suggested that to allow a litigation funder to 'unilaterally impose a premium [litigation funding commission] on non-funded class members at current rates would be unconscionable.'[33]

4.31 International Litigation Partners took a middle view arguing that common fund orders should not be compulsory and suggested that it was up to the funder to obtain the imprimatur of the Court if it wants to collect commission from people who have not entered into contracts. 'Outside that situation, litigation funders should be able to insist upon its contracts'.[34]

4.32 A number of submitters also suggested that common fund orders were contributing to the increase in competing class actions and a race to the courts.[35] For example, the Law Council's submission noted:

> The Victorian Bar considers that common fund orders have encouraged this spike in competing class actions for two reasons:
>
> (a) first common fund orders remove the necessity for funders, or the claimants' lawyers, to take the time and incur the costs of book building extensively prior to issue; and
>
> (b) secondly and consequently, common fund orders remove the necessity to ensure that sufficient 'book' of loss has been 'built' to ensure that the likely commission to the funders will justify the expense and risk of the litigation even absent a common fund order....[36]

4.33 Maurice Blackburn outlined the value of the book building process from their perspective including that it 'produced a culture of group member engagement in which many class members are likely to be aware that proceedings affecting their legal rights are on foot before a settlement is reached and they receive a notice to that effect' and that '[i]n shareholder cases the book build process is also a critical element of any proper analysis and investigation of materiality and quantum of loss.'[37] Similarly, the Law Council submission noted that:

> The pre-*Money Max* need for a funder to build a book acted as a natural brake on competing actions. Funders had to 'go to the market' with their funding proposals. If there was insufficient interest for a given funder, that funder did not proceed. There was 'natural selection' before any action was commenced.[38]

4.34 Justice Lee in *Lenthall v Westpac Life Insurance Services Limited,* however, described book building by a third-party litigation funder, as 'an endeavour conducive of wasted costs that the Court has sought to discourage since the advent of common

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33 US Chamber Institute for Legal Reform, *Submission 44*.
34 International Litigation Partners, *Submission 31*.
35 Maurice Blackburn, *Submission 37*; IMF Bentham Limited, *Submission 50*; Law Council of Australia, *Submission 43*; Australian Bar Association, *Submission 69*.
36 Law Council of Australia, *Submission 43*.
37 Maurice Blackburn, *Submission 37*.
38 Law Council of Australia, *Submission 43*.

fund orders.'[39] The Victorian Bar Association suggested that this could be addressed by providing that book build costs should be 'unrecoverable by the funder separately to any funding commission.'[40] The ALRC considers that a funder, with its vigilant focus on the internal rate of return, will nevertheless factor in all costs when setting its commission rate.

4.35 The ALRC agrees that the concerns expressed in submissions militate against making common fund orders compulsory as proposed in the Discussion Paper. Nevertheless, the ALRC considers that common fund orders should be supported by an express statutory power, as the availability of such orders is consistent with, and supportive of, a number of the other recommendations in this report, including; that class actions be initiated as open class,[41] that the court have an express statutory power to reject, vary, or amend the terms of a third-party litigation funding agreement,[42] and that the Court have the power to deal with competing class actions.[43] Concerns about the impact of common fund orders on book building and a race to the Court can be addressed by the Court in the criteria for assessing competing class actions (see Recommendation 5 below).

Certification

4.36 In its original report on *Grouped Proceedings in the Federal Court*, the ALRC considered and rejected the additional requirement of a preliminary hearing (a certification or authorisation hearing) to authorise the commencement of representative proceedings.

4.37 The policy objectives of such a hearing were said to be to ensure that:

- the requirements for commencing the proceeding have been complied with;
- the interests of the group members (who may not yet have been identified) are adequately protected; and
- the interests of the respondent are protected. [44]

4.38 The ALRC concluded, based on the experience of certification procedures in the United States[45] and Quebec,[46] that there was no need to go to the expense of a special hearing to determine that the requirements for group proceedings have been complied with, as long as the respondent has a right to challenge the validity of the proceedings at any time. It pointed to the existing Federal Court Rules that permitted a party to apply

39 *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422 [34].
40 Law Council of Australia, *Submission 43*.
41 See rec 1.
42 See rec 14.
43 See rec 4.
44 Australian Law Reform Commission, above n 1, [145].
45 *Federal Rules of Civil Procedure*, r 23.
46 See, eg, *Class Proceedings Act*, SO 1992, s 2.

to strike out a pleading and to apply to stay or dismiss proceedings generally, and to the provisions dealing with vexatious litigants.[47]

4.39 The ALRC also expressed the view that protection against blackmail suits would be enhanced by its recommendations on costs by which the principal applicant would be left with the full burden of costs, which would be higher than if individual proceedings were brought.[48]

4.40 The ALRC observed that a certification does not always achieve its goal of protecting individual class members. Class members' interests are better served by adequate notices informing them of their rights to opt-out if their interests would be better served by bringing individual actions.[49]

4.41 Accordingly, while no certification procedure is included in Part IVA, there are a number of protections and safeguards, including the specific protection for group members to opt-out,[50] seek substitution,[51] to be notified,[52] and the overriding power of the Court, either on application or of its own motion, to order that a proceeding no longer continue as a representative proceeding.[53] The precise operation of these provisions, particularly the latter, is still being developed through the jurisprudence.[54]

Developments since the original ALRC Report

4.42 Since 1988, a number of factors which were influential to the ALRC's original recommendations have changed. Significantly, the protection that was said to be provided against blackmail suits by visiting the full burden of costs on the principal applicant is not of the same character—that burden is now being borne in over 50% of class actions by third-party litigation funders. This is not to suggest that funders are supporting unmeritorious actions, rather it is to highlight that the circumstances of the party who is assuming the full burden of costs are fundamentally different from those that were envisaged by the ALRC in 1988.

4.43 Secondly, the procedural measures then in place in the US and Canada, and which were examined by the ALRC have, in some relevant respects, evolved. In particular all Canadian provinces have enacted an additional leave requirement as a 'screening mechanism' in respect of securities class actions based on breach of the continuous disclosure obligations.[55]

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47 Australian Law Reform Commission, above n 1, [149].
48 Ibid [148].
49 Ibid [147].
50 *Federal Court of Australia Act 1976* (Cth) s 33J.
51 Ibid s 33T.
52 Ibid s 33Y.
53 Ibid s 33N.
54 See, eg, *Johnson Tiles Pty Ltd v Esso Australia Limited* [1999] FCA 56; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers appointed) (in liq)* [2015] FCA 811; *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947.
55 *Securities Act*, RSO 1990, s 138.8(1).

4.44 In the UK, class actions for competition law grievances have recently been introduced with a certification requirement.[56] Certification is intended to be 'strict' so that 'only meritorious cases are taken forward.'[57] Interestingly, the first two cases before the tribunal failed certification.[58]

The VLRC Report

4.45 Several submissions to the VLRC Inquiry into Access to Justice: Litigation Funding and Grouped Proceedings (2018) supported the introduction of a certification procedure in Victorian class actions, although overwhelming the submissions to that Inquiry did not favour such a proposal. Ultimately, the VLRC recommended against the introduction of a certification process in Victoria on the basis that it would not improve access to justice; rather, it would inhibit it by exacerbating pre-trial complexities and increasing costs and delays.[59]

Support for certification in response to the ALRC Discussion Paper

4.46 Several submissions in response to the Discussion Paper urged the ALRC to reconsider whether a statutorily required certification procedure should be introduced.[60] These submissions were, in the main, directed at a means of dealing with competing class actions, although the Australian Bar Association (ABA) noted that the issues that have arisen in recent competing class actions may not be confined to such actions.[61] Similar issues may also arise in circumstances where there is a class action against a particular defendant and a parallel proceeding commenced against that defendant for related loss and damage by receivers, liquidators and special purpose receivers on behalf of the company and its creditors/shareholders (being broadly the same constituency as the members of the class). The potential benefits of a certification process can also be distilled at settlement approval where the legal costs are found to be disproportionate. For example, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*, Murphy J noted:

> [T]here is an increasing problem in class action litigation in that the quantum of legal costs and funding charges are disproportionate to the recoveries by class members. This usually seems to occur where one or more of the following factors are present: (a) damages are less than $30 million; (b) settlement is not achieved until late in the case; (c) the liability case is not strong and the case is strenuously defended; (d) there are multiple respondents; and (e) the applicant's lawyers are insufficiently experienced

56 *Consumer Rights Act 2015* (UK) s 81, sch 8.
57 Dept of Business, Innovation and Skills, *Private Actions in Competition Law: Government Response* (Jan 2013), 6.
58 *Gibson v Pride Mobility Products Limited* [2017] CAT 9, and *Merricks v Mastercard Inc* [2017] CAT 16. The latter is subject to appeal.
59 Victorian Law Reform Commission, '*Access to Justice—Litigation Funding and Group Proceedings*' (March 2018) [4.57]-[4.59].
60 Zurich Australia Insurance Limited, *Submission 49*; M Legg, J Metzger, *Submission 12*; Queensland Law Society, *Submission 66*.
61 Australian Bar Association, *Submission 69*.

> or cautious (or perhaps competent) for such large, complex and strenuously contested litigation. This occurs in a minority of cases but it is a problem which requires attention.[62]

4.47 The ALRC was also told by representative plaintiffs and group members of the deleterious effect on group members when informed that their class action might be delayed for another 12 months whilst subsequently filed class actions 'catch-up' to the level of preparation of their existing matter and of the consequent desire to settle quickly (and adversely) simply to bring the proceedings to an end.

No certification procedure is required

4.48 The value of a certification mechanism is contested across jurisdictions with a class action procedure. Nevertheless, the ALRC remains unpersuaded that the introduction of a certification procedure would enhance the practice and procedure of the class action regime in Australia. In particular, the ALRC notes that Canada is currently considering whether its certification procedure should be abandoned given the additional costs and delay that it imposes on parties and that in Australia class action litigation is subject to rigours pre-trial case management by the Courts.[63]

Competing class actions

4.49 Competing class actions, where there is more than one class action with respect to the same matter or related matters, undermines the objective of the class action regime to provide:

- a remedy for all those who have suffered loss, and
- the respondent with the benefit of finality with respect to the dispute.

4.50 The Chief Justice of the Federal Court has described competing class actions in the following terms:

> the running of multiple actions by different lawyers, with different funders was, in principle, potentially inimical to the administration of justice and, in particular, potentially inimical to the interests of group members, and potentially oppressive to [the respondent].[64]

4.51 As set out in Chapter 3 – Incidence, competing class actions are a feature of the Australian class action regime. When designing the class actions regime, it is clear that the ALRC did not envisage that competing class actions may arise, and yet, since 1992 there have been 513 class actions commenced in relation to 335 legal disputes.[65]

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62 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [129].

63 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms*, Consultation Paper, (March 2018) 24-25.

64 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [2], per Allsop CJ (Middleton and Beach JJ agreed).

65 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017).

According to information published by law firm King & Wood Mallesons, 25% of class action proceedings running in 2015–16 were related actions.[66] In 2018, 14 competing class actions with respect to five disputes have commenced. The majority of competing class actions over the last five years have been shareholder matters. Nearly all competing class actions in the Federal Court involve shareholder and investor disputes or product liability.[67]

4.52 A key concern with competing class actions is the increased cost and delay for both plaintiffs and respondents. As Professors Waye and Morabito have argued:

> economies of scale are clearly one of the major benefits of class actions. On the face of it, these scale efficiencies are undercut where multiple class actions proliferate.[68]

4.53 In *Perera v GetSwift Limited (GetSwift),* the Full Court of the Federal Court explained that competing class actions are likely to:

> (a) involve increased use of judicial and Court resources; (b) move more slowly and less efficiently through the interlocutory stages; (c) incur increased legal costs on the applicants' side which (if the cases are successful) will ultimately be paid by group members out of the same pool of available settlement or judgment monies; and (d) incur increased legal costs on the respondent's side through the requirement to defend three proceedings rather than one, including by addressing different case theories, different expert evidence and different tactical approaches. Such increased costs may mean costs become disproportionate to the importance and complexity of the matters in dispute.[69]

Canadian approach

4.54 Canadian provinces typically have a process to deal with competing class actions and ensure only one action with respect to a dispute continues. The class action procedures are contained in the provincial statutes. In Ontario, the carriage motion is the mechanism for determining which lawyer will have 'carriage' of the class action. The result of a successful carriage motion is to stay all other class proceedings with respect to the same legal claim. The power to decide the carriage motion comes from ss 12 and 13 of the Ontario *Class Proceedings Act*, SO 1992. Section 12 provides that:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

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66 King &Wood Mallesons, 'The Review: Class Actions In Australia 2015/2016'. See also, Allens, 'Class Action Risk 2016'.

67 Jenny Campbell (Allens), Private correspondence, 17 May 2018.

68 Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Inquiries in Law* 303, 309.

69 *Perera v GetSwift Limited* [2018] FCAFC 202 [122]. See also *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (Money Max), (2016) 245 FCR 191 [196].

4.55 Section 13 provides that:

> The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

4.56 Perell J, in *Smith v Sino-Forest Corporation*, explained that:

> Practically speaking, carriage motions involve two steps. First, the rival law firms that are seeking carriage of a class action extoll their own merits as class counsel and the merits of their client as the representative plaintiff. During this step, the law firms explain their tactical and strategic plans for the class action, and, thus, a carriage motion has aspects of being a casting call or rehearsal for the certification motion.
>
> Second, the rival law firms submit that with their talent and their litigation plan, their class action is the better way to serve the best interests of the class members, and, thus, the court should choose their action as the one to go forward. No doubt to the delight of the defendants and the defendants' lawyers, which have a watching brief, the second step also involves the rivals hardheartedly and toughly reviewing and criticizing each other's work and pointing out flaws, disadvantages, and weaknesses in their rivals' plans for suing the defendants.[70]

4.57 In *Mancinelli v Barrick Gold Corporation*, Strathy CJ confirmed the three criteria for determination of a carriage motion were (a) access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and (c) fairness to defendants.[71] Unsurprisingly, the best interests of the class is the dominant criterion.[72] In order to apply these criteria the courts have developed an expanding list of factors that should be considered:

(1) The quality of the proposed representative plaintiffs

(2) Funding

(3) Fee and consortium agreements

(4) The quality of proposed class counsel

(5) Disqualifying conflicts of interest

(6) Preparation and readiness of the action

(7) Relative priority of commencement of the action

(8) Case theory

(9) Scope of causes of action

(10) Selection of defendants

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70 *Smith v Sino-Forest Corporation* (2012) ONSC 24 [2]-[3].
71 *Mancinelli v Barrick Gold Corporation* (2016) ONCA 571 [13].
72 *Mignacca v Merck Frosst Canada Ltd* (2009) 95 OR (3d) 269 (Div Ct) [8], [26].

(11) Correlation of plaintiffs and defendants

(12) Class definition

(13) Class period

(14) Prospect of success: (leave and) certification

(15) Prospect of success against the defendants

(16) Interrelationship of class actions in more than one jurisdiction.[73]

The ALRC considers that the Canadian carriage motion may provide a useful model for Australia, provided the mechanism is appropriately tailored to the Australian judicial process and Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and not withstanding that the carriage motion is currently being reviewed by the Law Reform Commission of Ontario.

Burgeoning Australian practice of staying competing class actions

4.58 Commentators have expressed a view that it is unfortunate that Part IVA does not provide a mechanism to deal with competing class actions.[74] Notwithstanding, the absence of a statutory mechanism to deal with competing class actions, the Federal Court has used its case management powers to address the phenomenon of competing class actions. The Full Court of the Federal Court explained in the recent decision of *GetSwift* that when faced with competing class actions:

> The following realistic options are available to deal with the potential overlap between competing class proceedings:
>
> (a) first, the relevant proceedings could be consolidated;
>
> (b) second, an order could be made under s 33N(1) in respect of one or more of the proceedings, colloquially known as a declassing order;
>
> (c) third, there could be a joint trial of all proceedings with each left as they are presently constituted as open class proceedings i.e. the 'wait and see' approach;
>
> (d) fourth, there could be a permanent stay of one or more of the proceedings, the option adopted by the primary judge in the present case; and

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73 *David v Loblaw; Breckon v Loblaw* (2018) ONSC 1298 [6]; *Kowalyshyn v Valeant Pharmaceuticals International Inc* (2016) ONSC 3819 [143].

74 The Hon Justice Bernard Murphy and Professor Vince Morabito, 'The First 25 Years: Has the class action regime hit the mark on access to justice?', in Damian Grave and Helen Mould (Eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 41; Vince Morabito, 'Lessons from Australia on Class Action Reform in New Zealand', (Paper, *Future of Class Actions Symposium*, University of Auckland, March 2018) 30; Michael Legg, 'Class Actions, Litigation Funding and Access to Justice', (Public lecture addressing the Victorian Law Reform Commission Consultation Paper, '*Access to Justice – Litigation Funding and Group Proceedings*' [2017] *University of New South Wales Law Research Series* 57, 3-6; Ben Slade and Jarrah Ekstein, 'Class Actions and Social Justice: Achievements and Barriers', in Damian Grave and Helen Mould (Eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 297-301.

> (e) fifth, an order could be made closing the classes in one or more of the proceedings but leaving one of the proceedings as open class proceedings, with a joint trial of them all.[75]

4.59 The Full Court found that not all of those options will be available in each set of competing class proceedings. For example, 'consolidation orders are unlikely to be made in the absence of agreement between the different applicants, funders and solicitors.'[76] In addition, a declassing order is not apt in situations where the court is considering a choice between one or more competing class actions as the statutory test relies on assessing the efficiency of the representative procedure in resolving the claims and common issues compared to hypothetical non-representative proceedings.[77]

4.60 In the case of *GetSwift*, at first instance, faced with three open class actions by individuals who had purchased shares in Getswift Ltd, Lee J stayed two of the proceedings and allowed one to continue. Justice Lee explained the decision was focused on:

> how the Court deals with competing commercial enterprises which seek to use the processes of the Court to make money and the role of the Court in ensuring the use of those processes for their proper purpose and informed by considerations including: (a) the statutory mandate (s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) (Act)) to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively and efficiently as possible; and (b) the furtherance of the Court's supervisory and protective role in relation to group members.[78]

4.61 The Full Court of the Federal Court held that:

> In the present case the primary judge reached the view that allowing the continuance of three competing class actions was likely to be more expensive for the parties and group members and less efficient than staying two of the cases and allowing only one to proceed. We would respectfully agree.[79]

4.62 The Full Court observed that that approach of Lee J would not be suitable in every instance where the Court is faced with competing class actions. It noted particularly that these were three open securities class actions seeking a common fund order and none of the three applicant parties was willing to run their action as a closed class.[80]

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75 *Perera v GetSwift Limited* [2018] FCAFC 202 [44].
76 Ibid [51].
77 Ibid [60] and see *Federal Court of Australia Act 1976* (Cth) s 33N(1)(c).
78 *Perera v GetSwift Limited* [2018] FCA 732 [3].
79 *Perera v GetSwift Limited* [2018] FCAFC 202 [122].
80 Ibid.

Express statutory power to resolve competing class actions

Recommendation 4 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to give the Court an express statutory power to resolve competing representative proceedings.

4.63 The ALRC recommends that as a matter of public policy only one class action with respect to a dispute should proceed, subject to the overriding discretion of the Court where it would be inefficient or otherwise antithetical to the interest of justice to allow only one class action to proceed. This statutory power would augment the existing case management powers of the Federal Court and, as set out below at Recommendation 5, the process to give effect to this statutory power would be set out in the Practice Note.

4.64 Recommendation 4 is intended to be evolutionary rather than revolutionary. Clearly, the Federal Court has been developing practices, through the jurisprudence, to address the adverse consequences arising from competing class actions. In *GetSwift,* the Full Court of the Federal Court explained that:

> Part IVA does not enshrine the notion that a respondent may only face one class action. The provisions of Part IVA expressly recognise that a respondent might face multiple actions and necessarily incur duplicated costs, and even two class actions against a respondent may be constitute a costs saving compared with the costs in multiple individual proceedings in different jurisdictions.[81]

4.65 Recommendation 4 would shift the approach in Part IVA so that the presumption is that there will be only one class action with respect to a dispute, subject to judicial discretion. It reflects a different approach to that taken by the VLRC. The VLRC did not recommend the addition of a statutory power to address competing class actions but instead recommended greater case management through amendments to the Victorian Supreme Court Practice Note. The Victorian approach can be distinguished from the ALRC approach because to 'date, competing class actions have not been a problem in Victoria.'[82]

Should competing class actions be dealt with by statute?

4.66 In the Discussion Paper, the ALRC proposed that:

> Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that: where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so.[83]

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81 *Perera v GetSwift Limited* [2018] FCAFC 202 [186].
82 Victorian Law Reform Commission, above n 59, [4.78].
83 Proposal 6–1 (extract relating to competing class actions only).

4.67 Submissions from, and consultations with, respondents, insurers and solicitors for respondents provided strong support for the proposal.[84] These stakeholders raised concerns about the costs and delays caused by multiplicity of proceedings and encouraged the ALRC to recommend statutory reforms to empower the court to allow only one class action with respect to a dispute to proceed.

4.68 In addition, all industry superannuation funds that made submissions supported this approach and raised concerns that competing class actions were not in the interests of group members.[85] Group members in private consultations also raised concerns about the delays, costs and complexity caused by competing class actions.

4.69 Plaintiff solicitors and many third-party litigation funders took the opposite view.[86] Key objections included:

- the current system was working well;[87]
- the proposal would create 'a winner-takes-all contest at the very threshold of a case, when only limited substantive information may be available...';[88]
- the current jurisprudence was evolving and it was premature for statutory intervention;[89] and
- judicial selection amongst competing class actions would focus on costs to the exclusion of class members' preferences with respect to funder, lawyer and case theory.[90]

4.70 Continuing the theme that a statutory power to resolve competing class actions was unwarranted, IMF Bentham argued that multiplicity of class actions was in respondents' best interests as:

> In the end, a degree of multiplicity, where the defendant faces say two or three cases, will be superior to an alternative of hundreds or potentially thousands of separately commenced proceedings by individual group members.[91]

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84 See, eg, Zurich Australia Insurance Limited, *Submission 49*; Insurance Council of Australia Limited, *Submission 47*; Law Firms Australia, *Submission 51*; Allens, *Submission 52*; MinterEllison, *Submission 45*; Ashurst, *Submission 25*; L Cantrill, Submission 26; Chartered Accountants Australia and New Zealand, *Submission 28*; King and Woods Mallesons, *Submission 65*.

85 AustralianSuper, *Submission 33*; HESTA, *Submission 61*; Cbus Super, *Submission 46*.

86 Slater and Gordon, *Submission 54*; Maurice Blackburn, *Submission 37*; Association of Litigation Funders of Australia, *Submission 58*; IMF Bentham Limited, *Submission 50*; International Litigation Partners, *Submission 31*; Litigation Capital Management Limited, *Submission 30*; Therium Australia Limited, *Submission 19*. Not all funders were opposed and some instead stressed the need for certainty as to how the procedure would work in practice. See, eg, Woodsford Litigation Funding, *Submission 48*; Harbour Litigation Funding Limited, *Submission 17*.

87 Slater and Gordon, *Submission 54*; IMF Bentham Limited, *Submission 50*.

88 Maurice Blackburn, *Submission 37*.

89 Ibid; Association of Litigation Funders of Australia, *Submission 58*; Law Council of Australia, *Submission 43*.

90 Maurice Blackburn, *Submission 37*.

91 IMF Bentham Limited, *Submission 50*.

4.71 Given the costs of litigation in Australia and the risk of adverse costs orders, the ALRC is not persuaded that the recommendations in this chapter will lead to a flood of individual claims.

4.72 In relation to arguments about choice of lawyer, the class action regime necessarily involves compromises. Each class member is not identified at the time a claim is initiated, let alone involved in the choice of lawyer and funder. Group members who consulted with the ALRC confirmed that they were often encouraged to join the class action by the law firm or funder, rather than the class member proactively seeking out the lawyer and funder. Often the choice to join a class action was in the absence of alternatives and not without misgivings as to the cost and length of proceedings.

4.73 As a practical matter, often a funder will choose a lawyer. For example, the IMF Product Disclosure Statement explains:

> We will appoint the solicitors to provide the relevant legal work to you on the terms of an agreement, referred to as the Standard Lawyers Terms. This is an agreement between us and the solicitors. The solicitors will also wish to have a retainer agreement directly with you.[92]

4.74 Justice Lee, writing extra judicially, explained that Part IVA has inbuilt protections that reflect the absence of consent from class members:

> Given no consent is required to be obtained from a group member and little might be known of the details of individual group member claims, it is unsurprising that specific protections were afforded to group members. These protections are threefold: a right to opt out, a right that must be provided by the Court (s 33J); the group member's right to make an application seeking substitution or related orders in the event of inadequate representation (s 33T); and the right to be notified in certain circumstances, for example, proposed settlement, want of prosecution or the proposed withdrawal of an applicant (s 33Y). Importantly, no provision requires group members to make any application or do anything with their claim against their will or oblige them to take any active step prior to an initial trial.[93]

4.75 This recommendation retains these three protections.[94] In addition, having law firms and funders compete to run a class action may reduce costs as firms compete to convince the Court that theirs is the better offer. Early indications are that competition to run a class action against AMP, following adverse evidence at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, has reduced commission rates significantly.[95] This competition may, in part, be a response

92 IMF (Australia) Ltd, *Combined Financial Services Guide and Product Disclosure Statement*, (18 January 2010).

93 Justice Lee, 'Certification of Class Actions: A "Solution" in Search of a Problem?' (Paper presented to the Commercial Law Association Seminar *Class Actions—Different Perspectives*, 20 October 2017).

94 However, individual actions would be stayed until the conclusion of the class action as per rec 4.

95 See, eg, Emma Ryan 'No win-no fee: Maurice Blackburn slashes AMP class action commission', *Lawyers Weekly*, 16 May 2018.

to recent indications of a greater judicial willingness to require competing class actions to be stayed.[96]

4.76 The ALRC agrees that the quality of legal representation is critically important to group members and the fairness of the class action regime for all parties. The ALRC considers that Recommendation 4 will not undermine this, provided that the selection process for carriage in a competing class actions context takes group members' preferences and the quality of the proposed legal representation into account. This is discussed below under Recommendation 5.

How should competing class actions be defined?

4.77 In the Discussion Paper, the ALRC defined competing class actions as 'two or more class actions where there is a non-theoretical possibility that a person may be a class member of more than one class action and, as a result, would be seeking relief from the respondents for the same claim in multiple proceedings'.[97] This definition was designed to give the Court the broadest remit to manage competing class actions that overlap. It was also designed to eliminate, to the fullest extent possible, the tactical drafting of statements of claim and pleadings to avoid the proposed statutory power for the Court to manage competing class actions.

4.78 Law firm Ashurst and Professor Morabito argued that the definition in the Discussion Paper was too narrow.[98] For example, Professor Morabito argued:

> ... can we regard class actions filed by different solicitors with respect to essentially the same legal dispute as competing class actions if none of the class members in class action A are also class members in class action B and vice versa? In my view, the answer should be in the affirmative. The fact that class actions with respect to the same dispute are filed on behalf of different claimants does not mean that they are not competing with, influencing, or having a significant effect on each other or that they do not pose problems such as "increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents".[99]

4.79 According to Professor Morabito, using the definition in the ALRC Discussion Paper, there have been 28 sets of overlapping competing class actions. Extending the definition, as Professor Morabito suggests, would add a further eight sets of class actions. Given that the ALRC sought to give the statutory power to manage competing class actions the broadest scope, the ALRC agrees that the definition of competing class actions should be:

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96 *Perera v GetSwift Limited* [2018] FCA 732.

97 'It is well established that, prima facie, it is vexatious and oppressive for a second or subsequent action to be commenced in a court in Australia if an action between the same parties is already pending with respect to the same subject matter in an Australian court.' See *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 [11].

98 Ashurst, *Submission 25*.

99 Vince Morabito, 'Competing class actions and comparative perspectives on the volume of class action litigation in Australia' *Research Report* (11 July 2018) 12.

- two or more class actions where there is a non-theoretical possibility that a person may be a class member of more than one class action, or
- two or more class actions with respect to the same dispute filed on behalf of different claimants.

Powers of the Court –stay or broader?

4.80 In the Discussion Paper it was proposed that

> where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s). [100]

4.81 Professor Legg and Dr Metzger submitted that only giving the Court the power to stay competing class actions was too limiting:

> While the stay may be the appropriate procedure in many cases, it may also be that the court should use its powers to effectively combine class actions, or add parts of one class action to another, where they are not completely overlapping. Consolidation or joinder or amendment may permit the court to create a class action which includes common issues derived from various clams that were previously in different class actions. The court and group members should not be placed in a position where class actions can only proceed as originally filed.[101]

4.82 The ALRC agrees with Professor Legg and Dr Metzger.[102]

4.83 *GetSwift*[103] involved three identical overlapping class actions. It was raised in consultations that it would be challenging for the Court to choose between class actions that were framed differently, particularly as carriage is proposed to be determined at an early stage and prior to discovery.

4.84 Take a typical shareholder claim. A critical issue is determining the time period in which it is alleged shares traded without the benefit of information that should have been disclosed (delayed disclosure period). As group membership is determined by when shares were traded, framing the delayed disclosure period is critical to determining whether a person is a group member or not. How is a court to choose between overlapping shareholder claims with different delayed disclosure periods? Choosing the longer period may expand group membership but may also include individuals who on the available evidence have a weak (or no) claim at best and may expand the scope and cost of discovery to both parties. Alternatively, choosing the action with the shorter time frame will mean individuals who were included in the action that had a longer time

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100 Proposal 6–1 (extract relating to competing class actions only).

101 M Legg, J Metzger, *Submission 12* (citations omitted).

102 Professor Morabito raised concerns that Proposal 6–1 would require judges to grant carriage to one law firm regardless of any agreements that may be reached between some or all of the competing lawyers. Provided that the lawyers and funders are complying with competition laws, the ALRC does not interpret this recommendation as requiring such an approach.

103 *Perera v GetSwift Limited* [2018] FCA 732.

frame are excluded from the class action and therefore may not receive a remedy for their alleged loss.

4.85 Given judicial reluctance to deprive individuals of their right to litigate their claim at a preliminary stage,[104] it was suggested to the ALRC that this would mean that where there are competing claims it was more likely that the claim drawn most broadly would be selected, which may increase costs and delays. As set out above, the broadest claim may not be based on a rigorous analysis of the available evidence. Moreover, it is not unusual for the delayed disclosure period to change following discovery and there is no reason why this statutory power to resolve competing class actions would prevent subsequent amendments to the pleadings as expressly provided for by s 33K.[105] It would be an unfortunate development if it became routine for the broadest claim to proceed.

4.86 There are very good reasons why in ordinary civil litigation there is judicial reluctance to make decisions that affect the substantive rights of the parties in the absence of all the evidence being presented and tested during a trial. Faced with competing class actions the Court will be required to compare the actions and will have the broadest remit to fashion a single action that is in the best interests of the class as a whole. Importantly, if an individual is excluded from a class action as a result of the carriage motion they retain the important right to litigate individually if they so choose.

Exceptions to one class action going forward?

4.87 In the Discussion Paper, the ALRC proposed that the Court should retain the discretion to not stay the competing class actions:

> That power should be exercised rarely where:
>
> - the overlap is small;
> - there are multiple issues in dispute in relation to one or more defendants which cannot be dealt with by sub classes; or
> - other complexities arise so that it would not be efficient or desirable from the point of view of justice to consolidate.[106]

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104 For a contrary view, in the context of class actions, see *Perera v GetSwift Limited* [2018] FCAFC 202 [79]: 'In ordinary litigation, leaving aside *forum non conveniens* stays, the consequence of a permanent stay is that the party whose claim is stayed is shut out from being able to vindicate its rights, and preventing a litigant from vindicating their claim is a serious step. However, his Honour said that this consideration does not apply in the same way in the context of class actions. If a permanent stay of one competing class action is granted, this will not prevent the claim of the stayed applicants, which have an existence separate from, and anterior to, the proceedings they commenced, from being able to be advanced. Those claims can be litigated in the class action that remains, and will be resolved either by settlement approved by the Court or by curial determination. Moreover, each applicant as a group member in any unstayed class action has a statutory right under s 33J of the Act to opt out, and to then maintain their own individual claim if they so wish.'

105 See, also: *Ethicon Sàrl v Gill* [2018] FCAFC 137

106 Proposal 6–1.

4.88 In such cases, the Court would rely on its existing case management tools to manage the multiple class actions together in the most efficient manner.

4.89 Professor Morabito suggested that retaining the discretion would mean that the statutory requirement to allow only one class action to proceed would be meaningless:

> what is the point in "imposing" on our federal class action judges a requirement that they choose between competing class actions but, at the same time, allowing them to disregard this directive if such a step is in the interests of justice? Such compromise will most likely result in no significant change in this area.[107]

4.90 MinterEllison took the opposite view:

> In our view, the proposal, combined with the case management Proposal 6–2 signals that the expectation is that the court will take steps to eliminate the duplication and inefficiency inherent in multiple proceedings being run together. Further, we do not see that the proposal will lead to any greater uncertainty than already exists.[108]

4.91 Maurice Blackburn agreed with MinterEllison's assessment:

> as a practical matter, the default position is likely to remain undisturbed in all but very unusual cases:
>
> (a) default positions generally have the benefit of inertia;
>
> (b) the proposed statutory standard for the invoking the exception is, on its face, stringent;
>
> (c) the burden of establishing that the exception should be exercised is likely to be considerable, particularly given that at the outset of proceedings there would be little evidence to support an application that the default position would be antithetical to the interests of justice;
>
> (d) given the limited prospects of invoking the exception, there would be little incentive for law firms and litigation funders to pursue the exception; and
>
> (e) as the non-stayed case proceeds, for reasons of efficiency it would become increasingly difficult to justify displacing it with a case that had been stayed throughout.[109]

4.92 Recommendation 4 would give the Court a statutory power to deal with competing class actions. It retains the Court's discretion to allow more than one class action with respect to the same dispute and the ALRC expects this would occur infrequently.

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107 Morabito, above n 99, 20.
108 MinterEllison, *Submission 45*.
109 Maurice Blackburn, *Submission 37*.

Single class action—implementation

Recommendation 5 In order to implement Recommendation 4, the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

4.93 A process is required to implement Recommendation 4, including to:

- identify any potential competing class actions as soon as practicable; and
- efficiently resolve which action, representative applicant, lawyer and funder will lead the class action going forward.

4.94 Given the 'Whack-A-Mole' problem identified by Lee J,[110] the procedure for dealing with competing class actions should be set out in the Practice Note as it has the greatest flexibility to deal with developments in class action litigation.

4.95 The underlying premise of Recommendation 5 is that front-loaded case management of class action proceedings to resolve any competing class actions would generate efficiencies. The recommendation is designed to resolve competing class actions as early as possible so that the substantive merits can then be litigated in the ordinary course as part of a single class action proceeding.

4.96 The Court should have the discretion to omit these steps where, at the initial interlocutory hearing, the Court is satisfied that the likelihood of a competing class action being initiated is remote. For example, the ALRC expects that public interest litigation and litigation for a remedy other than for damages would be unlikely to be subject to a competing class action.

Key interlocutory steps

4.97 Under this recommendation, the initiation of a class action under s 33 of the FCA Act would lead to a sequence of interlocutory steps, which would:

- notify potential claimants and their lawyers and funders that a class action had commenced. The notification process and procedures would be settled at an initial interlocutory hearing;
- require potential claimants (and their lawyers/funders) to consider and lodge a competing class action within a defined period of time. No class actions with respect to the issues in dispute would be able to be initiated after this time.[111]

110 *Perera v GetSwift Limited* [2018] FCA 732 [16].

111 In response to the Discussion Paper, concern was raised as to what the effect of a permanent stay on competing class actions would mean in the event that the chosen class action was discontinued. See:

Individuals would still be able to opt out, with any individual actions stayed until the class action is resolved;

- require representative applicants to disclose on a confidential basis to the Court the terms of any costs agreement and funding agreement entered into by the representative applicant and the number of group members who have signed up to those agreements.

4.98 At the end of this defined period of time for lodging a competing class action there would be two eventualities: either no competing claims are lodged, or one or more competing claims are lodged:

- if there are no competing class actions, the Court will need to approve any funding agreement and legal fees (see Recommendations 14 and 19) and this should be done at the 'early case management hearing' prior to the first case management conference set out in the existing Practice Note.

- if there are competing class actions, there would be a 'selection hearing', at the conclusion of which the Court would determine the shape of the action going forward, the representative applicant, the lawyer/funder, and approve any funding agreement and costs agreement on a common fund basis. Following this, there would be the first case management conference as set out in the existing Practice Note.

Timeline

4.99 In order to implement this procedure effectively, timelines need to be carefully considered. If the time allowed for competing class actions is too short, there is a risk of haste leading to errors that disadvantage class members and potential class members. If the time allowed is too long, this will delay the resolution of the matters in dispute.

4.100 In consultations and submissions, it was put to the ALRC that a period of between 6 weeks and 4 months would be an appropriate timeline.[112] The Full Court of the Federal Court in *GetSwift* subsequently noted that:

> It may be time for the Court to consider a procedure, in relation to securities class actions at least, such that upon the filing of the first proceeding the Court orders a standstill in that proceeding for, say, 90 days to allow a reasonable time for other solicitors or funders to undertake a proper due diligence. In order to reduce the incentive to rush to the Court, and to reduce any incentive to speedily follow another party that does so, any book building that occurs during the standstill period should be given no weight by the Court. We note that a 90 day standstill period is imposed under s 77z-1 of the *Private Securities Litigation Reform Act 1995* in the USA.[113]

Morabito, above n 99 and MinterEllison, *Submission 45*. The ALRC considers in such a circumstance it would be within the Court's power to lift the stay on the application of a representative plaintiff.

112 See, eg, L Cantrill, *Submission 26*.

113 *Perera v GetSwift Limited* [2018] FCAFC 202 [280].

4.101 Given the Court's expertise in this area, the ALRC endorses an approach where there would be 90 days for potential claimants (and their lawyers/funders) to consider and lodge a competing class action. The advantage of including this process in the Practice Note is that if 90 days proves too long or short it can easily be amended by the Court.

Race to the court

4.102 The second issue raised in the above quote from the *GetsSwift* judgment is judicial concern regarding a 'race to the court' with claims initiated before being thoroughly investigated. To address this, there must be no 'first mover advantage' given to the law firm and funder that initiates the first class action. This was endorsed by the Full Federal Court in *Wileypark:*

> [T]here are specific dangers involved in giving weight to first filing. It involves an encouragement for hasty preparation and lack of mature reflection. In some cases, mature reflection enables it to be appreciated that there is a need for preliminary discovery to assess the strength of a possible case. Further, commercial decisions about funding made in haste to get in first may interfere with decisions about the interests of group members. Haste may also lead to less focused pleading and preliminary analysis which may undermine, not reinforce, the policy objectives of modern dispute resolution and court statutes. Using such a first-is-best approach may deny the Court the ability to make a considered and balanced case management decision as to which action or actions proceed conformably with the interests of all group members and any properly considered prejudice of the respondent. This is not to countenance delay; it is to deprecate any approach where any real weight is given to the first-in-best-dressed approach for those promoting and managing this kind of litigation.[114]

4.103 The possibility of a race to the court raises a number of related issues. In the context of competing class actions in multiple jurisdictions, there has been judicial concern about the use of 'anti-suit injunctions seeking to protect the first suit filed.'[115] This is discussed in more detail below in the section regarding forum shopping.

4.104 The second issue relates to the Common Fund (see Recommendation 3 above), in relation to which a number of submitters and commentators have suggested that the Court's dissuasion from book building in favour of common fund orders is said to be encouraging a race to the court.[116] In order to address this, the approach suggested by the Full Court is preferable (see para 4.100 above). That is, the applicant filing first will not have the advantage of being credited with book building during the standstill period. Later applicants will be able to present to the Court evidence that their proceeding has greater support within the class and will have 90 days longer to gather this support than the applicant who files first. Obviously, this relies on the support of the class being a criterion as part of the carriage motion process. This is discussed below.

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114 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [18].
115 Ibid [23].
116 See, eg, Law Council of Australia, *Submission 43*; Maurice Blackburn, *Submission 37*.

Criteria for obtaining carriage

4.105 In the Discussion Paper, the ALRC did not propose a list of criteria for obtaining carriage but instead highlighted both the criteria applied in Canada and those that Lee J considered in *GetSwift.*[117] Lee J suggest a broad range of considerations including whether:

- there are any significant differences in the scope, causes of action or the case theories proposed to be advanced such that the claims of group members cannot be vindicated in one open class proceeding;
- allowing group members claims to be advanced in more than one open class proceeding would be conducive to increasing costs and inefficiencies, contrary to the case management objectives of Part VB of the FCA Act;
- allowing more than one open class proceeding to proceed would involve an element of vexation to be occasioned to the respondent when there is no justifiable reason why it should face more than one open class proceeding;
- to allow more than one open class proceeding to proceed is likely to mean additional costs will need to be recovered in any settlement and potentially increased amounts by way of funding commissions will need to be paid;
- each of the proceedings are at a comparable state of preparation and there is no reason to suggest that anything about any one of the proceedings which will mean that one is likely to proceed to a mediation or trial any earlier than another;
- there has been any operative delay or dilatoriness of any applicant;
- there is any difference in experience or competence of the legal practitioners;
- there is anything about any individual claim made by an applicant that would render any of the proceedings unsuitable to be the vehicle pursuant to which common issues and issues of commonality could be determined at an initial trial;
- there is anything about the existence of funding agreements or the number of group members who have signed funding agreements that should weigh significantly in the balance, particularly as no incentive should be given to encourage pre-action book building;
- there is anything about the terms, or lack thereof, within a funding agreement which should be a source for concern when any funding agreement must be approved by Court order, which will make clear the terms on which funding of the proceedings is to take place;

117 *Perera v GetSwift Limited* [2018] FCA 732.

- proposals have been made by any party in relation to the appointment of experts that are likely to reduce costs;
- one proposed funding model is better than another having regard to whether it produces a more direct correlation between the amount ventured and the likely return and avoiding the potential for a windfall return;
- proposals have been made by any party for processes to control costs during the course of proceedings;
- by conducting a comparative analysis of the most likely returns to group members in a range of different scenarios, one proceeding is likely to produce a better return for group members in most scenarios and at all stages of the proceedings; and
- funders would nonetheless enforce obligations to pay amounts recovered irrespective of a funded group member's claim being recovered in other proceedings.

4.106 Funders and plaintiff solicitors suggested that the preference of group members with respect to who funds and litigates their claim should be an important criterion.[118] Concern was also expressed that any selection process would look at price to the exclusion of value or total claimant return which is harder to ascertain at an early stage.[119]

4.107 Allens submitted that:

> From a defendant's perspective, key factors include:
>
> (a) (**funding**) if the class actions are funded:
>
> (i) the security for costs arrangements offered by each funder; and
>
> (ii) the resources available to fund the group members' costs and meet adverse costs orders;
>
> (b) (**moral hazard**) whether the filing of any of class actions raises a 'moral hazard' through the absence of provisions in the funding agreement which guard 'against a funder having an inappropriate role in providing instructions as to settlement';
>
> (c) (**representative plaintiff**) the suitability of the proposed representative plaintiff(s) to represent the common claims of group members, including whether:
>
> (i) there are likely to be potential sources of conflict between the representative plaintiff and group members; and
>
> (ii) determination of the representative plaintiff's claim will adequately address the interests of the group members and resolve the common issues;

118 Slater and Gordon, *Submission 54*; Phi Finney McDonald, *Submission 34*; Maurice Blackburn *Submission 37*; Litigation Capital Management Limited, *Submission 30*; IMF Bentham Limited, *Submission 50*.

119 Harbour Litigation Funding Limited, *Submission 17*; Maurice Blackburn, *Submission 37*.

> (d) (**finality**) the extent to which the selection and determination of that claim will achieve finality for all parties in relation to the underlying conduct at issue. [120]

4.108 Consistent with Lee J's approach in *GetSwift,* Professor Legg and Dr Metzger suggested 'that the court is to choose the proceeding that best advances the claims and interest of group members in an efficient and cost-effective manner.'[121] The ALRC supports this approach. It considers that long multi-factorial lists can be unwieldy and that a principles-based approach is preferable.[122] In addition, the ALRC would add 'having regard to the stated preferences of group members.'

Role of the respondent in selection hearing

4.109 A key issue for consideration is the role that the respondent plays in these interlocutory steps. Currently, the respondent is able to receive copies of any litigation funding agreement on the basis that any material that would give the respondent a tactical advantage is redacted. The respondent is also central in any application for security of costs and makes submissions as to both the quantum and the suitability or otherwise of the form of security proposed. In Ontario, the respondent is involved in the carriage motion hearing and its interest is a consideration for the court in deciding which firm will have carriage of the class action on behalf of the plaintiff class members.

4.110 If the respondent is precluded from participating in the proposed selection hearing, there will still be an adversarial process. The representatives of each competing class actions would put their case as to why their class action should be selected to proceed and the other class actions stayed. Existing statutory provisions protect the respondent adequately, including the ability to seek summary dismissal (s 31A) and to seek a declassing of the action (s 33N). Moreover, some of the information revealed in the selection hearing might provide a tactical advantage to the respondent if it were disclosed publicly.

4.111 Accordingly, in the Discussion Paper, the ALRC suggested that the respondent should not be involved in any selection hearing, and that technology should be used to provide class members with access to the selection hearing that does not permit the respondent access. Responses to the Discussion Paper were divided between those representing plaintiffs (for excluding respondents) and those representing respondents (against). The Full Court of the Federal Court in *Getswift* noted that:

> a selection process such as that used in the present case is conducted in full view of the respondent and it is likely the respondent will obtain a reasonable understanding of the approximate size of the "war chest" available for the case against it. As the primary judge recognised, experience teaches that respondents sometimes engage in trial by attrition and endeavour to use up an applicant's resources to obtain an advantage.

120 Allens, *Submission 52*.
121 M Legg, J Metzger, *Submission 12*.
122 As exhorted by Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Speech, Law Council of Australia Joint Competition Law Dinner, Sydney, 30 August 2018).

> Respondents are also likely to understand that the applicant's solicitors may be less inclined to undertake the necessary work if they are approaching or have exceeded the amount allowed for costs, and/or to understand that the funder may put pressure on the applicant to settle in such circumstances. The Court should be careful to avoid the interests of the applicant and group members being damaged in this regard.[123]

4.112 The Chief Justice of the Federal Court has also observed that the sensitive and difficult issues that might need to be addressed when considering how to manage class actions 'is compounded, not alleviated, when the respondent "is more content" to be sued in one court rather that another'.[124]

4.113 Accordingly, the Court is alive to the issues at hand and if Parliament were to implement Recommendation 4, appropriate provisions would need to be included in the Practice Note. The ALRC remains of the view that, other than in respect of the form of security of costs proposed to be put forward by the competing class actions, the respondent ought not to be involved in the carriage process.

Supplementary Note –Leave to proceed

4.114 On 13 September 2018, the ALRC released a supplementary consultation paper. In that paper, the ALRC explained that it may be desirable to introduce a leave mechanism to implement what is now Recommendation 4 and minimise the costs and delay imposed on both plaintiffs and defendants when multiple actions are filed in respect of the same circumstances. Such as mechanism would also to facilitate the efficient disposition of preliminary issues. These preliminary issues include the approval of litigation funding agreements (and potentially contingency fee agreements).

4.115 Under the proposed mechanism, at the first case management hearing, an applicant who wished to proceed with the class action that has been commenced would make an application for leave to do so. The application for leave would be included in the originating application.

4.116 Upon that application, the parties should be in a position to address the matters currently specified in cl 7.6-7.8 of the Practice Note.[125] The parties should also be in a position to advise the Court as to whether any competing class actions have been foreshadowed or are anticipated.

4.117 If no competing class actions are foreshadowed or anticipated, the Court may:

1. reject, vary or set the commission rate and/or the contingency fee;
2. approve the costs agreement and/or the litigation funding agreement;
3. grant leave to proceed on such terms as the Court sees fit.

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123 *Perera v GetSwift Limited* [2018] FCAFC 202 [281].

124 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143, [19].

125 If the proposal to permit contingency fees is adopted, cl 6.1-6.5 of GPN-CA will be amended appropriately to encompass similar disclosure obligations in relation to the contingency fee agreement.

4.118 If a competing class action or actions is anticipated, the Court would then determine the timeframe by which such competing class actions must be commenced and the date on which the carriage motion is to be heard. Upon the conclusion of the hearing of a carriage motion, the Court may grant leave to proceed to one or more of the applicants on such terms as the Court sees fit.

4.119 The ALRC did not call for formal submissions in response to this supplementary note, although comments were encouraged. Four supplementary submissions relevant to this note were received, as well as several informal pieces of correspondence.

4.120 The Law Society of NSW thought such a mechanism

> could assist in the reduction of wasted costs and delay by providing a process for the Court to better control the class action and/or consolidate multiple class actions into one proceeding at a very early stage.[126]

4.121 However, both Law Firms Australia[127] and IMF Bentham[128] thought such a mechanism was not required. Maurice Blackburn considered the leave procedure 'redundant' and of 'no practical benefit or utility to the Court or to applicants, class members or respondents in a vast majority of cases.'[129]

4.122 Having settled on Recommendations 4 and 5, the ALRC is of the view that a leave mechanism is not required. The ALRC considers that a broad statutory power to deal with competing class actions coupled with a Practice Note direction as to the procedure to be followed is sufficient.

Forum shopping

4.123 In order to effectively address competing class actions, there needs to be a mechanism to resolve competing class actions initiated in different courts. It would be undesirable if some form of procedural 'arbitrage' were to emerge whereby parties sought to commence competing class actions in the same matter in different courts. As Beech-Jones J explained when discussing both the NSW representative proceeding and the class action regime under Part IVA:

> In its idealised form the Australian legal system should ensure that, within jurisdictional limits, there should be the same outcome for the same matter irrespective of which forum determines it.[130]

126 Law Society of New South Wales, *Supplementary Submission 75*.
127 Law Firms Australia, *Supplementary Submission 73*.
128 IMF Bentham, *Supplementary Submission 77*.
129 Maurice Blackburn, *Supplementary Submission 74*.
130 Beech-Jones J, 'Representative Actions in NSW Courts' (Speech, *Class Actions—Current issues after 25 years of Part IVA Seminar*, University of New South Wales, 23 March 2017).

4.124 In fact, a number of submissions noted that there was little utility in the ALRC recommending reforms to address competing class actions unless the recommendations adequately dealt with competing class actions across jurisdictions.[131]

4.125 Currently, under s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (and under corresponding state legislation), the state Supreme Courts have the power to transfer a class action to the Federal Court where there is a related action already in the Federal Court and it is the interests of just to make the transfer. Professor Morabito has previously argued that the existing cross-vesting provisions are not adequate.[132] The decision to cross-vest a case is made by the court. Judges are able to 'push' cases to another court, but are unable to 'pull' cases to their own court.[133]

The AMP Class Actions

4.126 The need to resolve multi-jurisdictional competing class actions was highlighted following the release of the ALRC's Discussion Paper at the end of May 2018 in the case of AMP Limited (AMP). AMP was subject to 5 separate competing open class actions arising out of matters raised at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

4.127 On 9 May 2018, Ms Wigmans initiated a representative proceeding[134] against AMP in the Supreme Court of New South Wales. Subsequently, four representative proceedings under Part IVA of the FCA Act were initiated against AMP. These four actions were filed on 9 May 2018, 25 May 2018, 6 June 2018 and 7 June 2018 respectively. On 6, 7 and 8 June 2018, AMP filed applications in the Federal Court to have the proceedings transferred to the Supreme Court of New South Wales.

4.128 On 9 July 2018, Stevenson J of the NSW Supreme Court declined to transfer the representative proceedings filed in Supreme Court of NSW to the Federal Court and said:

> I invite the Federal Court applicants to indicate, by 5.00pm on 16 July 2018 whether they will now consent to the transfer of the Federal Court proceedings to this Court.
>
> If they do not, I will decide whether to make an anti-suit injunction.[135]

4.129 An anti-suit injunction is made against a party restraining it from instituting a legal action or from continuing with proceedings that have already been instituted. Such an injunction can be granted in respect of proceedings in both local and foreign courts, though is most commonly used in private international law.

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131 See, eg, Clayton Utz, *Submission 42*.

132 Vince Morabito, 'Clashing Classes Down Under—Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 245, 307-313.

133 However, the use of anti-suit injunctions as discussed below, may achieve that pull factor but only where the relevant proceeding was filed first.

134 Pursuant to the *Civil Procedure Act 2005* (NSW) pt 10.

135 *Wigmans v AMP Ltd* [2018] NSWSC 1045 [54].

4.130 Thus, an anti-suit injunction could have been ordered by Stevenson J to effectively prevent the four representative plaintiffs from continuing with their action in the Federal Court. The Full Federal Court of Australia in the related judgement noted that:

> One of the difficulties with this course of action is that it presupposed that the only way two courts in an integrated federal judicature could and should resolve competing actions in their respective courts was by issuing anti-suit injunctions in protecting proceedings begun marginally earlier than others.[136]

4.131 While the Full Court of the Federal Court ultimately agreed to transfer the four class actions to the Supreme Court of NSW, the Court expressed concerns regarding procedural arbitrage or forum shopping:

> Those bringing the action have their own self-interests: any funders for their percentage take, lawyers for their professional fees, and, sometimes, lead plaintiffs for any special position they can negotiate in the overall arrangement. There is the risk of procedural arbitrage based on a view by those in control of the litigation as to the likely approach of different judges in different courts not only about the law and facts, but about funding agreements and lawyers' fees; and the risk of the possible placement of that self-interest above the interest of those whom the Court is bound to protect: the group members.[137]

4.132 The Full Federal Court also noted that:

> As yet, there are no standing arrangements between the two courts (or between other Supreme Courts and the Federal Court) for a procedural protocol for the approach to this problem of "competing" proceedings (really, competing self-interests of those promoting and hoping to manage these proceedings).[138]

Protocol to deal with competing class actions

4.133 On 1 November 2018, the Chief Justices of the Federal Court and Supreme Court of NSW entered into such a protocol.[139] That protocol directly refers to the AMP class actions as the genesis for the approach taken. The purpose of the Protocol is to

> ensure access to justice and to facilitate, in the interests of all stakeholders, the efficiency and effectiveness of class action proceedings in circumstance where multiple proceedings are brought in competing courts and across more than one jurisdiction.[140]

4.134 The Protocol sets out how the Courts envisage they would work together to address competing class actions that are filed in both their jurisdictions at the same or similar time:

> At the earliest practicable opportunity after the existence of competing class action proceedings is disclosed to the Court or otherwise ascertained, the Class Action

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136 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [8].
137 Ibid [15].
138 Ibid [5].
139 Bathurst CJ and Allsop CJ, *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings* (November 2018).
140 Ibid.

> Representative Judges [appointed by the respective Chief Justices] may convene a joint case management hearing for the purposes of ascertaining matters such as:
>
> (a) whether there is any dispute that either of the competing proceedings is a representative proceeding for the purpose of the applicable legislation in each of the jurisdictions;
>
> (b) any issue concerning the description of group members in the competing proceedings;
>
> (c) any issue concerning the identification of the common questions of fact or law in the originating process filed in the competing proceedings;
>
> (d) any other issues concerning the adequacy of the originating process;
>
> (e) the suitability of the matters for joint or concurrent hearing of a selection hearing and procedures for the approval of fee and cost proposals from lawyers/litigation funders; the parties' submissions as to the appropriate jurisdiction; and any other matters relevant to the settling of a timetable for the efficient conduct of the competing proceedings (including whether any security for costs will be sought and if so the amount, manner and timing of the provision of such security; and any protocol for communication with represented group members).

4.135 After this hearing, the Protocol explains that the Class Action Representative Judges from each Court will jointly determine the approach to managing the competing class actions, including selecting which action may proceed.

4.136 The ALRC acknowledges that the Protocol has yet to be tested in practice. However, it demonstrates the most effective response to competing class actions filed in multiple jurisdictions to date and it adopts the proactive case management approach of the Federal Court to manage representative proceedings to ensure access to justice and fairness to all parties. The Protocol expressly envisages the selection of one action to proceed, consistent with the recommendations earlier in this chapter.

Recommendation 6 The Supreme Courts of states and territories with representative action procedures, should consider becoming parties to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings.*

4.137 An effective response to competing class actions filed in multiple jurisdictions, requires that all jurisdictions that permit representative proceedings adopt the Protocol. The ALRC, accordingly, encourages the Supreme Courts of Victoria and Queensland, in particular, to consider signing up to the protocol. While outside the scope of this Inquiry, the ALRC also considers that such a Protocol may be useful where competing class actions are filed in two States. The ALRC considers that the Protocol, as an agreement between two courts, enables the respective Chief Justices to assess the effectiveness of the Protocol and make amendments as and when required. Once the Protocol has been demonstrated to be effective, it may be appropriate to consider amendments to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (and under corresponding state

legislation) to provide an express statutory basis for the entering into case management Protocols.

The VLRC approach

4.138 Subsequent to the release of the ALRC Discussion Paper, but prior to the development of the Protocol, the VLRC recommended that:

> The Attorney-General of Victoria should propose to the Council of Attorneys-General that a cross-vesting judicial panel for class actions be established. The judicial panel would make decisions regarding the cross-vesting of class actions, where multiple class actions relating to the same subject matter or cause of action are filed in different jurisdictions.[141]

4.139 The recommendation arose out of a stakeholder roundtable conduct by the VLRC as part of its consultation process. During that roundtable, the VLRC reports that there

> was agreement among stakeholders, however, that existing cross-vesting powers, both in Victoria and nationally, are not adequate to ensure efficient cooperation between state and federal jurisdictions where multiple class actions arise.[142]

4.140 The VLRC's recommendation was endorsed in a number of submissions to the ALRC as the preferable approach to dealing with class actions initiated in multiple jurisdictions.[143]

4.141 The VLRC's approach is based on that adopted in the United States where a Judicial Panel on Multidistrict Litigation (MDL Panel), transfers cases between federal districts in the United States:

> The MDL Panel is a statutory body that considers motions for coordinated or consolidated pre-trial proceedings in federal cases. While the MDL Panel has no power over cases pending in state courts, it facilitates coordination by transferring federal cases to a district where related cases are pending in the state courts.[144]

4.142 A key limitation of the MDL Panel in the US is that it does not cover cases pending in state courts.

4.143 The VLRC recommendation leaves the detail of how a cross-vesting judicial panel would work in practice to COAG. The ALRC has concerns about the constitutionality of any cross-vesting judicial panel established in Australia. As explained by Griffith CJ in

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141 Victorian Law Reform Commission, above n 59, rec 12.

142 Ibid [4.90].

143 See, eg, M Legg, J Metzger, *Submission 12*; Ashurst, *Submission 25*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Norton Rose Fulbright, *Submission 40*; MinterEllison, *Submission 45*; IMF Bentham Limited, *Submission 50*; Supreme Court of Victoria, *Submission 41*; P Spender, *Submission 53*; Slater and Gordon, *Submission 54*; Association of Litigation Funders of Australia, *Submission 58*.

144 Victorian Law Reform Commission, above n 59, [4.95]; and see Andrew D Bradt, 'The Long Arm of Multidistrict Litigation' (2017) 59 *William & Mary Law Review* 1165.

1909, the exercise of any judicial power is limited to the circumstances where a judge is seized of a matter:

> I am of opinion that the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[145]

4.144 In the Federal Court, a judge is not 'seized of a matter' until it is allocated by the Court's registry to that particular judge's individual docket.[146] Accordingly, how a panel of judges, other than those with a particular case before them, is to decide on the transfer of cases between the state (and territory) courts and the Federal Court is unclear.

4.145 Accordingly, the ALRC considers the protocol approach adopted by the NSW Supreme Court and Federal Court preferable to the cross-vesting judicial panel approach.

Exclusive federal jurisdiction for securities class actions

Recommendation 7 Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under that legislation.

4.146 In the Discussion Paper, the ALRC asked:

> Should Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters arising under this legislation?

4.147 Part 9.6A of the *Corporations Act 2001* (Cth) sets out the jurisdiction and the procedures of various courts in relation to the provisions of the *Corporations Act 2001* (Cth). Section 1337B confers on the Federal Court non-exclusive jurisdiction 'with respect to civil matters arising under the Corporations legislation.' Section 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) currently confers non-exclusive jurisdiction on the Federal Court with respect to civil liability arising from the consumer protection obligations imposed on financial services entities. Accordingly, this recommendation is designed to give the Federal Court exclusive jurisdiction over

145 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

146 Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management* (CPN-1) (2016) [4.1].

securities class actions as well as exclusive jurisdiction with respect to class actions involving financial services and products.

4.148 As set out above, most submissions were opposed to the conferral of exclusive jurisdiction, instead suggesting the VLRC's approach was preferable.[147] Maurice Blackburn supported the amendments contemplated but noted that it did

> not perceive any compelling substantive need for the amendment, however in practice most shareholder class actions have been conducted in the Federal Court of Australia, and we recognise the exclusive jurisdiction would prevent law firms from seeking strategic advantages by commencing proceedings in state courts.[148]

4.149 Other submitters in favour included Shine Lawyers, litigation funder Woodsford and the Insurance Council of Australia.[149] The Law Society of South Australia thought the jurisdiction was not broad enough: 'Consideration might be given to conferring on the Federal Court exclusive jurisdiction in all federal matters commenced by way of representative proceedings.'[150]

4.150 Those opposed to the idea of conferring exclusive jurisdiction were concerned that it undermined the cooperative approach underpinning the cross-vesting regime[151] and that it unnecessarily restricted litigant choice as to their dispute resolution forum.[152]

4.151 The class action regime in Australia began with amendments to the *Federal Court of Australia Act 1976* (Cth) which saw Part IVA added to that Act in 1992. Subsequently, States such as Victoria and NSW, have introduced complementary class action regimes which, notwithstanding some minor variations, mirror the Commonwealth regime. Coupled with the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (and under corresponding state legislation), there should be no or very limited difference in the outcome regardless of the choice of forum. Moreover, the addition of the Court Protocol should assist to manage competing class actions that occur across jurisdictions.

4.152 However, with respect to securities class actions in particular, it is also true that the vast majority of those cases have been initiated in the Federal Court. As has been noted by Lee J these are typically complex cases and, as a result, case management jurisprudence has developed in the Federal Court to manage those cases efficiently and effectively.[153] Those practices have not yet developed in the state courts and, as has been

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147 See, eg, M Legg, J Metzger, *Submission 12*; Ashurst, *Submission 25*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Norton Rose Fulbright, *Submission 40*; MinterEllison, *Submission 45*; IMF Bentham Limited, *Submission 50*; Supreme Court of Victoria, *Submission 41*; P Spender, *Submission 53*; Slater and Gordon, *Submission 54*; Association of Litigation Funders of Australia, *Submission 58*.

148 Maurice Blackburn, *Submission 37*. The submission may have been written prior to the full ramifications of the AMP class actions becoming apparent.

149 Shine Lawyers, *Submission 43*; Woodsford Litigation Funding, *Submission 48*; Insurance Council of Australia Limited, *Submission 47*.

150 Law Society of South Australia, *Submission 8*8.

151 Ashurst, *Submission 25*.

152 Slater and Gordon, *Submission 54*; Allens, *Submission 52*.

153 *Perera v GetSwift Limited* [2018] FCA 732 [3], [6].

highlighted by Chief Justice Allsop, this raises the spectre of litigants (and their funders) choosing their forum with an eye to obtaining a procedural advantage.[154] Accordingly, the ALRC is of the view that such proceedings should be litigated exclusively in the Federal Court.

154 *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [15].

5. Powers of the Federal Court: Settlement Approval

Contents

Introduction

5.1 In this Chapter, the ALRC examines issues related to the approval and distribution of settlements in class action proceedings. It makes recommendations to assist the Federal Court of Australia in its determination of 'fairness' and to decrease costs where needed.[1]

5.2 The ALRC also examines the use of confidentiality orders in class action settlements, and how these orders and other omissions affect group members and policy-makers reliant on an evidence-base. It is recommended that settlement administrators be required to provide a report to group members and the Federal Court outlining the distribution of settlement funds. The requirement to report would increase the accountability of administrators, support the principle of 'open justice', and enable the Federal Court to design and maintain a database that captures the outcomes of Part IVA proceedings that resolve in its jurisdiction.

No need to legislate the application of s 33V

5.3 Pursuant to s33V of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act), unlike other forms of commercial litigation, an agreement to settle class action litigation

1 See also the discussion on the power to vary litigation funding agreements in Chapter 6—Regulating Litigation Funders.

has no legal effect unless and until it is approved by the Court.[2] This aims to protect group members. The Full Federal Court has explained:

> ...the role of the court [in a settlement approval application] is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises.[3]

5.4 Section 33V does not provide the Federal Court with criteria by which to determine whether a settlement or discontinuance should be approved.[4] Nevertheless, the Court has developed the principles by which a settlement assessment should be conducted by the courts. Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* explained (references omitted):

(a) the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole;

(b) there will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the defendants (inter partes aspects) or in relation to sharing the compensation among claimants (the inter se aspects)—reasonableness is a range, and the question is whether the proposed settlement falls within that range;

(c) it is not the task of the Court to 'second-guess' or go behind the tactical or other decisions made by the plaintiff's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to: the circumstances which are 'knowable' to the plaintiffs and their representatives; and a reasonable assessment of risks, based on those circumstances;

(d) the list of factors typically relevant to an assessment of the reasonableness of a proposed settlement…is a useful guide but is neither mandatory nor necessarily exhaustive—it is just a guide (and additional consideration needs to be given to factors relevant to the fairness of the settlement inter se;

(e) in relation to the inter se fairness, a particular concern of the Court is to confirm that the interests of the lead plaintiff, or signed-up clients of a given firm of solicitors, are not being preferred over the interests of other group members. The arrangement should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible;

(f) an important consideration will be whether group members were given timely notice of the critical elements, so that they had an opportunity to take steps to protect their own position if they wished. Once appropriate notice is given, the absence of objections or other response action from group members is a highly relevant consideration in support of a settlement, and all its elements;

(g) where a group member does object to the settlement, an important further question is whether the objector is prepared to assume the role—and risks—of being lead plaintiff;

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2 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004) 309; Vince Morabito, 'Lessons from Australia in Class Action Reform in New Zealand' in *Future of Class Actions Symposium* (2018).

3 *ASIC v Richards* [2013] FCAFC 89 [8].

4 Morabito, above n 2, 3.

(h) in relation to provisions for costs-sharing among the successful group members, again an important consideration is where the group members were alerted at an early stage to the potential costs-sharing consequences of subsequent participation in the action. It is not, thereafter, the role of the Court to go behind the costs agreements, but rather to satisfy itself that the agreements have been applied reasonably according to their terms;

(i) further, the level of detail which the Court will require in order to be satisfied that costs have been calculated in accordance with the applicable agreements will vary, depending on factors such as whether the group members are all clients, or include non-client claimants, and the proportion of the settlement funds to be applied to costs.[5]

5.5 The Federal Court of Australia's Class Actions Practice Note (GPN-CA) (Practice Note) provides direction on what material may be needed to persuade the Court that the proposed settlement is fair and reasonable and in the interests of class members—not just in the 'interests of the applicant and the respondent(s)'.[6] Material provided in support of an application for Court approval of settlement will usually be required to address, at least:

(a) the complexity and likely duration of the litigation;

(b) the reaction of the class to the settlement;

(c) the stage of the proceedings;

(d) the risks of establishing liability;

(e) the risks of establishing loss or damage;

(f) the risks of maintaining a class action;

(g) the ability of the respondent to withstand a greater judgment;

(h) the range of reasonableness of the settlement in light of the best recovery;the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

(i) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[7]

5.6 Despite the well-established body of precedent that has applied to these principles in numerous cases, it has been suggested that legislation is needed, not just to guide the judges, but to ensure that the factors are given due consideration.[8] If the 'legislation requires that certain criteria be considered, and one or some are not considered, then the judge's discretion will have miscarried.'[9] The contrary view is that multi-factorial

5 [2015] FCA 1468 [5].

6 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 14.3.

7 Ibid [14.4].

8 Victoria has consolidated the criteria that have developed through the case law into the Supreme Court Practice Note: Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)* (2017). The UK legislature considered that a non-exhaustive list of 'relevant circumstances' should be set out in the Competition Appeal Tribunal Rules 2015: See Rachael Mulheron, 'A Spotlight on the Settlement Criteria under the United Kingdom's New Competition Class Action' (2016) 35 *Civil Justice Quarterly* 14.

9 Michael Legg, 'Class Actions, Litigation Funding and Access to Justice' in *Public Lecture addressing the Victorian Law Reform Commission Consultation Paper, Access to Justice – Litigation Funding and Group Proceedings* (2017) 7.

lists of legislative criteria fetter judicial discretion and stifle the evolution of principles as factual contexts change over time. Chief Justice Allsop has criticised 'the tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence'. He observes that the desire to do so is '[o]ften, if not always, this is in the name of certainty and completeness, but it is false certainty'.[10]

5.7 In two earlier ALRC reports, *Grouped Proceedings in the Federal Court* in 1988 and *Managing Justice: A review of the Federal Civil Justice System* in 2000,[11] the ALRC supported a statutory basis for the criteria judges were to take into account in approving settlement agreements. Examples can be seen in sentencing regimes and in the family law system. At the time of those reports, the jurisprudence in this area was entirely undeveloped. The ALRC now considers that legislative reform is unnecessary as extensive jurisprudence exists which provides guidance as to the criteria judges are to take into account in approving class action settlements, which criteria are likely to continue to evolve.

Application of settlement principles

5.8 Nevertheless, while the principles are well settled, their application to individual cases is less straightforward. An example is *Clarke v Sandhurst Trustees Ltd (No 2)*[12] (*Sandhurst Trustees*) in which the Federal Court was asked to approve a settlement sum of $16.85 million, against the starting point for the 'best case' recovery for the plaintiffs and group members of $29.8 million, and with legal costs of approximately $4.9 million and the funder's commission amounting to $5.055 million. Although he considered it 'a very borderline' case, and 'not without some misgivings',[13] Lee J approved the settlement in light of his conclusions that the 'headline' settlement sum (of $16.85 million) was fair. In reaching that conclusion, Lee J had regard to the reasons for settlement deposed to by the plaintiffs' solicitor; the amount of legal fees being charged was fair, having regard to the complexity of the litigation; and the funding fee was within the 'prevailing market parameters'.[14]

5.9 Justice Lee observed, however, that, although the amounts proposed to be charged by the funder could have been within the range of comparable amounts charged in similar proceedings, expressed as a pure percentage, that did not address what he regarded as the structural difficulty occasioned by litigation of this complexity and cost when the damages sought to be recovered, on a best-case scenario, were 'relatively modest'.[15] He went on to observe that:

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10 Chief Justice JLB Allsop AO, 'The Judicialisation of Values' (Speech, Law Council of Australia Joint Competition Law Dinner, Sydney, 30 August, 2018).

11 Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 163; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.108].

12 *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511.

13 Ibid [34].

14 Ibid [26].

15 Ibid [27].

> This proceeding brings into focus a problem which bedevils representative proceedings of a certain type. The type to which I refer are those class actions which are commenced to recover what, in absolute terms, might be thought to be a considerable sum, but, when judged against the relative costs of litigation and the amount required to be paid to a funder in order to allow the proceedings, is not large … [i]n these types of cases, it is necessary to be alive to the prospect that the settlement may be in the interests of the funders and sometimes the solicitors, but not in the interests of group members. [16]

5.10 The reasoning outlined in the above case raises the problem of 'anchoring', as described by Professor Legg: 'a cognitive psychology term that refers to a particular heuristic or rule of thumb used by humans to consciously or subconsciously simplify complex decisions'.[17] He observes that:

> In determining the fee that a litigation funder should receive there is a danger that a judge may place too greater weight on either the fee that the funder has used in a particular case, or the fees that have been charged in other class actions. Instead of engaging in the complex exercise of seeking to determine what is the return that compensates for the risk actually undertaken in the particular case, it may be tempting to use the source of the fees referred to above as a guide.[18]

5.11 Professor Legg has also criticised the decision in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* (*Allco*), in which the Court approved a funding commission of 30% of the settlement sum after the judge had reviewed the financial accounts of the funder, and other funders, and determined that standard commission rates were not producing rates of return so outside a reasonable range as to cast doubt on whether standard commission rates should be used as a benchmark for at least a contextual check.[19] Professor Legg has suggested that, despite those findings, the state of the current litigation funding market is not clear and is continuing to change with further funders entering the market. He observes that 'the continued entry of new funders may suggest that above normal returns are being earned' and that, consequently, 'the current approach to determining a litigation funder's fee may create concern'.[20]

5.12 So far as the problem of anchoring is concerned, it is difficult to legislate in relation to a cognitive process. In any event, it is apparent that as class action litigation has increased, courts are becoming more attuned to the problem. Indeed, in *Clarke*,[21] Lee J was concerned to assess the risk the funder had agreed to take (having paid only a proportion of the legal costs incurred by the plaintiffs and having defrayed the risk of an adverse costs order through an After the Event insurance policy) and did not rely merely on comparable amounts charged in similar proceedings. Similarly, in *Allco*, Beach J

16 Ibid [6]–[7].
17 Legg, above n 9, 15.
18 Ibid.
19 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330 [122].
20 Michael Legg, 'A Critical Assessment of the Shareholder Class Action Settlements—The Allco Class Action' (2018) 46 *Australian Business Law Review* 46, 54–64.
21 *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511.

said expressly that a 'judge might put to one side standard or putative market rates as a benchmark and set a rate based only on evidence in the case before him'.[22]

5.13 Further indication of the Federal Court's increasing awareness of the problem identified by Professor Legg can be observed in the decision of Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) (Petersen)*.[23] The applicant sought approval of a settlement sum of $12 million, from which it was proposed that legal fees and funding charges would comprise 98% of the settlement sum. Similar to the observations made by Lee J in *Sandhurst Trustees,*[24] Murphy J noted what he sees as an increasing problem in class action litigation in that

> the quantum of legal costs and funding charges are disproportionate to the recoveries by class members. This usually seems to occur where one or more of the following factors are present: (a) damages are less than $30 million; (b) settlement is not achieved until late in the case; (c) the liability case is not strong and the case is strenuously defended; (d) there are multiple respondents; and (e) the applicant's lawyers are insufficiently experienced or cautious (or perhaps competent) for such a large, complex and strenuously contested litigation.[25]

5.14 Justice Murphy addressed the reasonableness of the settlement by reference to the factors in the Practice Note and approved the settlement amount but only on the basis that approved legal fees were reduced by 40% and that the funding commission payable in accordance with the common fund order was reduced to a rate of 13.7% of the net settlement amount (or 8.3% of the gross sum). After that adjustment, there would be $4 million, or approximately 33% of the settlement sum available to be distributed to group members.[26]

Settlements should be fair for all groups of class members

5.15 Allco is also illustrative of the challenges that can arise for the Court in ensuring that any proposed settlement is fair and reasonable and in the interests of group members *inter se*. The settlement approved by the Court provided $30 million for group members who had signed up with the litigation funder and lawyer, and $10 million for the unknown group members who had not signed up. Professor Legg has criticised the approval in this case on the ground that, by discriminating between group members, it was not consistent with the requirements for the approval of a class action settlement.[27] Such criticism does not, however, lead inevitably to the conclusion that legislative intervention is required.

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22 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330 [122].
23 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842.
24 *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511 [6]-[7].
25 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [129].
26 Ibid [5]-[16].
27 Legg, above n 20, 66.

5.16 The factors to be taken into account by a court in assessing whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole are also well established, and include whether:

- the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;
- the assessment methodology, to the extent that it reflects 'judgment calls', is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;
- the assessment methodology is likely to deliver a broadly fair assessment (where settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);
- the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution; and
- to the extent that the scheme involves any special treatment of the applicants or some group members, for instance via 'reimbursement' payments—whether the special treatment is justifiable and, whether as a matter of fairness, a group member ought to be entitled to complain.[28]

5.17 In *Allco*, it is clear that Beach J had regard to the factors relevant to his assessment of the fairness of the settlement to the group members *inter se*. Having set out those factors he said:

> in relation to the fairness of the settlement as between the group members, it must be ensured that the interests of the representative party, the signed-up clients of the solicitors, and any litigation funder are not being preferred over the interests of other group members, absent strong and compelling reason(s) for any such preferential treatment.[29]

5.18 In this case, a discretion has been legitimately exercised by the Federal Court, albeit in a manner with which some would disagree. Accordingly, there appears little to be gained by amending the statute to spell out those criteria, which the courts are already applying as a matter of common law. Stakeholders to this Inquiry agreed that, as it is hard to discern what difference it would make to existing practice, further legislative intervention was not warranted.[30]

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28 *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 [43].

29 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330 [85].

30 See, eg, Slater and Gordon, *Submission 54*; Law Council of Australia, *Submission 62*.

The Court may refer legal costs to a referee

Recommendation 8 Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval.

5.19 Court approval of legal fees and disbursements to be paid to plaintiff law firms (or third-party funders as a reimbursement) from settlement sums comprises part of the settlement approval process. The Court does so in its protective role, on behalf of group members. As noted by Gordon J, the situation for solicitors seeking approval of their costs in class actions is 'unique'. The solicitor is 'acting for itself—it seeks an order that its costs be approved by the Court and paid to it. There is no contradictor'.[31]

5.20 The Federal Court is asked to approve the plaintiff's legal costs to be paid out of the settlement sum prior to any distribution on the basis that such costs are 'fair and reasonable'. By way of assessing the reasonableness of fees and disbursements, the Court has regard to, among other things, 'the nature of the work performed, the time taken to perform the work, the seniority of the persons undertaking that work and the appropriateness of the charge out rates for those individuals'.[32]

Costs consultants employed by plaintiff legal representative

5.21 Part 15 of the Practice Note provides directives and guidance in relation to Court supervision of deductions for legal costs or litigation funding charges. Clause 15.2 directs that it will 'usually be sufficient that an independent expert has examined the relevant files or records of the applicant's lawyers ...'. The legal costs expert needs to examine a 'sufficient sample of the legal work recorded to clarify whether the work was properly costed ...' and express an expert opinion as to whether the total legal costs claimed are fair and reasonable.[33]

5.22 It is common practice for the plaintiff's solicitors to rely on an expert report affidavit prepared by a costs consultant that sets out a commercial and reasonable methodology consistent with the terms of any retainer. The Federal Court may then refer to this expert report when making an assessment of the reasonableness of the fees, although the Court may also question or reject the findings of the report.[34] Rejection may

31 *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 636 [27].
32 Ibid [32]; see also Slater and Gordon, *Submission 54*.
33 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) pt 15.
34 See, eg, *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 636 [52].

lead to the Federal Court appointing a registrar of the Court to make an assessment of costs,[35] or to referring the matter to a referee (discussed below).[36]

5.23 An expert report by a costs consultant employed by a plaintiff law firm can affirm the legal fees or result in a reduction of the total cost of the legal fees. Reduced fees can include those that were unreasonable or made in error. Errors picked up by consultants have included duplicate time entries and errors of arithmetic. For example, a costs assessor advised the ALRC that they had identified fees for counsel in a class action matter that had been duplicated. As a consequence, the final invoice for legal fees and disbursements was decreased by $130,000.[37]

5.24 Although not all judges hold the same views on the most appropriate way of ensuring costs are contained, two concerns have been raised relating to the use of costs consultants employed by plaintiff law firms. First, it is said that such costs consultants appointed by the litigants' solicitors may not be truly independent or may suffer from bias.[38] Justice Murphy has noted:

> There is however a question as to whether costs experts routinely engaged by solicitors that act for applicants in class actions are truly independent, and whether they are likely to suffer from bias such as to be "tame" experts. Such concerns are not new, nor unique to costs experts or class actions. More than 140 years ago the Master of the Rolls, Sir George Jessel, commented on the tendency of expert witnesses to take on the views of those that regularly instruct them: see *Abinger v Ashton* (1873) 17 LR Eq 358 at 374 ...
>
> The possibility of expert witness bias is amplified when an independent costs expert provides an opinion in a settlement approval application because: (a) the expert is engaged by a firm of solicitors which is, in reality, acting for itself in seeking that its costs be approved; (b) there is no opposing expert's report; and (c) there is usually no contradictor in the application.[39]

5.25 In *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Co Inc in New York)*[40] *(Lifeplan*), Lee J put it in stronger terms:

> I pause to remark that on this application, I indicated at the outset that I did not require the applicants to adduce evidence from an independent cost assessor in order for them to justify the amount of legal costs. Without, I hope, slipping into overstatement, I regard such evidence as next to useless. I have seen many examples, but I am yet to see

35 Ibid. See also in Victoria: *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 [199]-[201]; *Williams v Ausnet Electricity Services Pty Ltd (Ruling No 3)* [2017] VSC 528.

36 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [119]–[122].

37 C Dealehr, *Submission 21*.

38 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [113]–[116]; The Hon Justice GL Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (Speech, 20th AIJA Annual Conference, 12 July 2002); NSW Law Reform Commission, *Expert Witnesses*, Report 109 (2005) [5.14]; Ashurst, *Submission 25*.

39 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [113], [116].

40 [2018] FCA 379.

> a cost assessor retained by a solicitor who has formed the robustly independent view that the fees charged by his retaining solicitor were unreasonable.[41]

5.26 Secondly, and as noted by Murphy J above, the expert report affidavit is rarely interrogated. The affidavit prepared by the cost consultant can be provided on the day of the hearing, without affording representatives for the defendant or the court an opportunity to test the affidavit evidence.[42] In any event, it is unlikely that the representatives for the defendant would seek to challenge such evidence given that, by this stage of the proceedings

> the interests of the applicant and respondent have merged in the settlement and neither side seeks to critique the settlement from the perspective of class members. Both sides have become "friends of the deal".[43]

5.27 When a Court is concerned about the level of legal costs claimed for the work undertaken, it can appoint a registrar of the Court to review; direct that a further affidavit be provided by a different costs assessor; or direct that a contradictor be appointed.[44] Additional costs are incurred with either course, and it is not apparent from the adoption of these practices that there is a significant reduction in original amounts claimed.[45] Competing expert reports increase the overall costs, which in turn reduces the ultimate return to the class members.

Court appointed referee

5.28 There are benefits to plaintiff appointed costs consultants. For example, Slater and Gordon submitted that having the same firm routinely brief the same costs consultant can result in the consultant developing a familiarity with the firms processes, which can reduce the time taken (and costs) to assess the fees.[46] Nonetheless, there are also clear benefits to using an independent referee to determine reasonableness of costs who is not tied in any way to the law firm that it is assessing. The Federal Court has power to do this. Section 54A of the FCA Act contains a power to appoint a referee.[47] Referral of legal costs to a referee is also consistent with the requirement that the Federal Court apply any civil practice and procedure provision in a way that promotes the quick, inexpensive and efficient resolution of proceedings.[48]

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41 *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 [40].

42 *Lee v Westpac Banking Corporation* [2017] FCA 1553 [32].

43 *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323 [63].

44 *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 [108].

45 In *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689, following the appointment of the contradictor, costs of $8.562m were found to be $156,000 less than the estimated reasonable costs

46 Slater and Gordon, *Submission 54*.

47 See *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 [35]–[62] for the principles relevant to the exercise of the power to appoint a referee. See also *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [64]; *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527.

48 *Federal Court of Australia Act 1976* (Cth) s 37M; *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 636 [53].

5.29 In view of the Federal Court's existing power to refer, some stakeholders to this Inquiry considered an express clause to this effect in the Practice Note to be unnecessary.[49] The use of a Federal Court appointed referee to review legal costs and disbursements in class action proceedings is, however, yet to become regular practice, although there have been calls for greater use. For example, in its 2018 report into litigation funding and group proceedings, the VLRC recommended that costs experts be appointed by the Supreme Court of Victoria rather than by the representative plaintiff's lawyer.[50] In *Lifeplan* Lee J declared: 'It may be that the time has come for the Court to establish a regular practice of appointing a referee to inquire and provide a report to the Court.'[51] This approach was adopted in *Petersen* with Murphy J observing, in the context of a case in which the fees and disbursements incurred amounted to more than half of the settlement, that 'it would have been wrong to rely on the report of a costs assessor appointed by [the plaintiffs' solicitors]'.[52]

5.30 The majority of stakeholders to this Inquiry supported formalising Court referral in the Practice Note.[53] There was also unprompted support for the suggestion canvassed in *Perera v GetSwift Limited*[54] (*GetSwift*), that the Federal Court should, in appropriate cases, appoint a referee to conduct periodic reviews of the reasonableness of legal costs.[55] Ongoing cost assessment was opposed by IMF Bentham as an approach that would likely entail additional cost and provide a 'greater burden for the lawyers while the litigation is proceeding' while 'its overall impact on costs may not be great'.[56] It was deemed unnecessary in matters that were funded by a third-party litigation funder with an Australian presence—as these funders generally supervise solicitors acting in the matter.[57] Conversely, in *GetSwift* Lee J noted that the

> criticism levelled at the Webb proposal that interim control by a referee would create an additional cost during the course of the proceeding is one that is misconceived. The ongoing involvement of a referee as proposed would serve to obviate the necessity for a referee or independent cost consultant to go back at a s 33V stage and check all the costs incurred during the course of the proceeding. Indeed the proposal has a very

49 See, eg, Slater and Gordon, *Submission 54*; NSW Young Lawyers, *Submission 68*.

50 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2018) [5.68], rec 25.

51 *Lifeplan Australia Friendly Society Limited v S & P Global Inc (Formerly McGraw Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 [40]–[41]; See also Legg, above n 9, 17; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [122].

52 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [91].

53 M Legg, J Metzger, *Submission 12*; Therium Australia Limited, *Submission 19*; Ashurst, *Submission 25*; International Litigation Partners, *Submission 31*; Australian Institute of Company Directors, *Submission 35*; Maurice Blackburn, *Submission 37*; Clayton Utz, *Submission 42*; Allens, *Submission 52*; NSW Society of Labor Lawyers, *Submission 55*; Risks and Insurance Management Society Australasia, *Submission 59*; HESTA, *Submission 61*; Law Society of New South Wales, *Submission 64*; King and Woods Mallesons, *Submission 65*; Australian Bar Association, *Submission 69*.

54 *Perera v GetSwift Limited* [2018] FCA 732 [226]-[228].

55 Ibid [226]-[229]; see, eg, Ashurst, *Submission 25*; Allens, *Submission 52*; King and Woods Mallesons, *Submission 65*; Australian Bar Association, *Submission 69*.

56 IMF Bentham Limited, *Submission 50*.

57 Ibid.

> considerable advantage in that it would allow for an iterative process with a referee making interim reports and where, on adoption, some guidance could be provided to the solicitors to ensure that any practice which was resulting in unnecessary costs would be addressed at an early stage.[58]

5.31 Both IMF Bentham and Therium suggested that court practice of referring costs to a referee need not be limited to the costs of the plaintiff law firm. IMF Bentham suggested that consideration be given to the approach in the United Kingdom, where the Court supervises the legal budgeting of both sides.[59] Whereas Therium suggested that 'costs management rigour' ought to also apply to the respondent, to prevent the 'adverse costs risk escalating excessively to the tactical advantage of the defendant and the disadvantage of the claimant class'.[60] The ALRC does not recommend legal budgeting at this time, although submitting a budget to the Court may become a concomitant requirement of the Court to the appointment of an ongoing cost referee.

5.32 Appointment of a referee will not always be appropriate.[61] The Court will need to ensure that the cost of the appointment of a referee in any given case is proportionate to the costs claimed and the amount that might potentially be saved.[62] Additional costs, which ultimately come out of the settlement fund, may be incurred unnecessarily if the Court routinely appoints a referee without appropriate regard to the circumstances of the case. Accordingly, the appointment of a referee should remain a discretionary power—the Court should be able to appoint a referee at the beginning of proceedings, at settlement approval, or not at all, as the case and Court determines.

5.33 The recommendation to embed the practice by prescribing it in the Federal Court of Australia's Class Action Practice Note also seeks to reduce:

- any conscious or unconscious bias in the preparation of reports as to the reasonableness of the costs charged;[63]
- the costs incurred in relation to applications for Court approval of settlement by obviating the need for competing expert reports and/or the appointment of a contradictor; and
- costs overall through enhanced scrutiny of costs incurred in class actions.

5.34 It would also provide the groundwork to establish a panel of competent and reputable independent costs consultants from which the Federal Court can select a referee.

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58 *Perera v GetSwift Limited* [2018] FCA 732 [228].
59 IMF Bentham Limited, *Submission 50*.
60 Therium Australia Limited, *Submission 19*.
61 See, eg, *Clarke v Sandhurst Trustees Limited (No 2)* (2018) FCA 511 [24]; see also Ashurst, *Submission 25*; Supreme Court of Victoria, *Submission 41*.
62 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [124]; *Clarke v Sandhurst Trustees Limited (No 2)* (2018) FCA 511 [24].
63 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [123].

The Court may tender settlement administration

Recommendation 9 Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may tender settlement administration, and include processes that the Court may adopt when tendering settlement administration.

5.35 Following settlement approval, the award to the class needs to be administered, which is usually conducted by the plaintiff law firm. The cost to administer the payments to group members is taken out of the settlement fund, so the process of settlement distribution needs to be both accurate in terms of the payment to individual group members and the lowest (and quickest) cost method of distributing those proceeds.[64] Judicial scrutiny of proposed settlement agreements is concerned to balance these two competing objectives.

5.36 While costs to administer settlements have generally sat under 3% of the total settlement sum, it has been higher. For example, in *Gray v Cash Converters International Limited*,[65] the fee to administer the settlement constituted 7% of the $20 million final award,[66] and in *Wotton v State of Queensland*[67] (*Palm Island*), the settlement administration fee was 5% of the final award of $30 million,[68] which equated to 38% of the total legal fees paid from the settlement fund.

5.37 The cost of settlement administration generally reflects the complexity involved in evaluating and distributing funds across group members. Shareholder distribution tends to use a formula. A recent survey of the costs to administer settlements funds from shareholder class actions conducted by Murphy J in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* showed a fee range from $250,000 for a small class to over $600,000.[69] In their submission to this Inquiry, Professor Legg and Dr Metzger contrasted these costs with the settlement distribution fees attached to personal injury matters, most of which exceeded $3 million.[70]

5.38 There are additional complexities in cases involving personal injury, discrimination, property damage, and economic loss claims. Personal injury matters may require

64 Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89.
65 *Gray v Cash Converters International Limited (No 2) (No 2)* [2015] FCA 1109.
66 Ibid.
67 *Wotton v State of Queensland (No 10)* [2018] FCA 915.
68 $1,550,750: *Wotton v State of Queensland (No 10)* [2018] FCA 915 [5].
69 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030 [149].
70 M Legg, J Metzger, *Submission 12*. *Citing Downie v Spiral Foods Pty Ltd* [2017] VSC 7 [8] and *Stanford v DePuy International Limited (No 7)* [2017] FCA 748, and noting that the Kilmore-East Kinglake bushfire class action settlement administration costs in Victoria amounted to $30 million.

independent assessment of group members. In these matters, it is often appropriate for the plaintiff law firm to administer the settlement fund. For example, in relation to the plaintiff law firm administering the settlement for *Palm Island*, Murphy J stated:

> It is appropriate to appoint Mr Levitt as scheme administrator. Mr Levitt is experienced in class action litigation and in relation to settlement administration. In the circumstances of the present case it is preferable that the scheme administrator have a close familiarity with the subject matter of the proceeding and class members' claims so that the claims can be assessed and finalised as quickly as possible. It is relevant too that the materials indicate that Mr Levitt enjoys the trust of a large number of class members. That will facilitate the efficiency in the administration. The assessments of compensation in some categories involve evaluative judgements upon which reasonable minds may differ, but they are not to be made by Mr Levitt. Those assessments will be made by independent junior counsel and are open to review by independent senior counsel ...
>
> In the circumstances it is not appropriate that the settlement administration be put to tender. It is plain from the materials that the applicants' solicitors have a detailed and nuanced understanding of class members' claims and I accept that they have earned the trust of a great number of class members. The fairness and the efficiency of the settlement administration will be enhanced by their understanding of the claims and it seems likely that there will be fewer review applications as a result of class members' trust.[71]

5.39 It may be that, particularly in shareholder class actions, an accounting firm, share registry service or a claims administration company could undertake such work as competently and with greater cost efficiency than the plaintiff's solicitors. Such was considered appropriate in *Petersen* where an accounting firm was appointed the scheme administrator.[72] Nevertheless, it is clearly a matter for the exercise of discretion. As observed by Lee J in *Lifeplan*:

> As to the *first* of these matters, for reasons I have already explained, I have some misgivings about JWS becoming the administrator of the [settlement distribution scheme] SDS. After considering the SDS, it seems to me that the task necessary to determine the amount to be paid to most group members is essentially an arithmetic exercise. The only exception relates to those group members whose claims will be subject to final and binding determination by the umpire to be chosen between the parties.
>
> In these circumstances it might be thought to be somewhat excessive for legal professionals to be charging for the administration of the SDS at prevailing market rates for the provision of legal services, rather than the administration task being undertaken by a service provider willing to undertake this work at a lower rate of remuneration. Despite these misgivings, given the relatively small size of the group and the efficiency which has hitherto characterised the conduct of the applicants' case, I am inclined, not without some hesitation, to accede to the request that JWS be appointed as the administrator without exploring further the possibility of another entity undertaking the task at lesser cost.

71 *Wotton v State of Queensland (No 10)* [2018] FCA 915 [42], [50].
72 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842.

> I stress, however, that for the reasons I have already explained, it seems to me that in a number of cases this would not be the appropriate course to take. If a notion exists among those conducting Part IVA work that solicitors for applicants will somehow automatically become scheme administrators, the time has come for that notion to be exploded.[73]

5.40 Some stakeholders to this Inquiry suggested alternative ways to control settlement administration costs. The NSW Society of Labor Lawyers suggested that the Practice Note should be amended to direct the Court to address whether solicitors for the lead plaintiffs have considered alternative means of distributing the settlement, taking into account the likely costs of the distribution, and whether, in the Court's view, there is a less expensive means of distribution.[74]

5.41 The collective submission received from a group of Australian healthcare companies and businesses suggested that lawyers should be prohibited from administering settlement. This submission identified that some solicitors who have conducted settlement administrations have based their fees on the same, or higher, rates as that charged for conducting the litigation. In particular, the submission drew attention to the case of *Stanford v DePuy International Limited*[75] to suggest that the hourly rate was around one third *more* for administration than for litigation, and urged that any oversight of solicitors' costs at settlement be applied equally to the costs of administration.[76] King and Woods Malleson suggested developing a scale of costs for lawyers conducting administrations and prohibiting lawyers from charging their usual commercial rates to administer the scheme.

5.42 The work involved in the distribution of a shareholder or investor claim may not always be entirely straightforward, at least until the final payment stage, and law firms tend to have invested significant intellectual property in developing their process. The process typically involves:

- the development of a 'loss assessment formula', based on the evidence, which is approved on settlement;
- a 'data integrity exercise', which involves verifying trade data, including by running quality assurance processes to pick up incorrect dates and opening balances, for example, and interrogating overlapping claims (such as those between beneficial owner vs custodian, custodian vs fund manager, claims aggregator vs fund manager);
- ensuring that beneficial owners' claims are properly valued and paid;

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73 *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 [52]–[54].

74 NSW Society of Labor Lawyers, *Submission 55*.

75 *Stanford v DePuy International Limited (No 7)* [2017] FCA 748.

76 Healthcare Companies and Businesses, Group Submission, *Submission 63*.

- applying the loss assessment formula to exceptional claims (such as options and warrants, contracts for difference, short sales);
- explaining the application of the loss assessment formula to class members; and
- the mechanical distribution of final payments.[77]

Introduce a tender process

5.43 A best-practice approach to tendering has yet to be prescribed by statute or the Federal Court. A formalised tender process may assist in reducing the costs charged in the settlement administration process and may improve the overall efficiency of administration processes into the future, as firms interested in tendering for such work refine their practices in response to a competitive tendering system. There is, however, a risk that any gains achieved through a competitive tender may be offset by increased costs should the Court be required to involve itself in the assessment of the tenders.

5.44 Stakeholders to this Inquiry who supported prescribing a tender process in the Practice Note also suggested that the use of such a process should remain at the discretion of the Court.[78] For example, Professor Legg and Dr Metzger agreed that a tender process 'holds out the prospect of reduced costs', but observed that it would not always be required.[79] The Federal Court has used its discretion in this way, as illustrated by Murphy J in *Palm Island*[80] and Lee J in *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* (*Liverpool City Council):*

> At an early case management hearing I raised the prospect of tenders being sought from third parties to administer the settlement scheme, but given the relatively complex nature of the proceedings, and the fact that the vast bulk of participating group members are clients of Squire Patton Boggs, this does seem to me to be a situation where it is appropriate that the applicants' solicitors be appointed the scheme administrator. The orders that I will make, however, will ensure that the costs incurred in relation to the administration of the settlement are also the subject of scrutiny by the referee before payment.[81]

5.45 Other stakeholders suggested that the Practice Note should identify sets of circumstances that would trigger a tender process. For example, the Association of Litigation Funders of Australia considered that settlements funds of greater than $10 million ought to be subject to tender processes, which should be overseen by the Court.[82]

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77 Rebecca Gilsenan, Private correspondence, June 2018.

78 See, eg, M Legg, J Metzger, *Submission 12*; International Litigation Partners, *Submission 31*; Maurice Blackburn, *Submission 37*; Risks and Insurance Management Society Australasia, *Submission 59*; Law Society of New South Wales, *Submission 64*.

79 M Legg, J Metzger, *Submission 12*.

80 See above [5.38].

81 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [77].

82 Association of Litigation Funders of Australia, *Submission 58*.

5.46 As to how a tender process should be run, Professor Legg and Dr Metzger proposed a staged approach:

> 1. The solicitor on the record as part of seeking settlement approval could still be required to put forward a settlement distribution scheme (SDS) for court approval, which would be what the tenderers offered to administer.
>
> 2. The tenderers could be asked to put forward their own SDS, including costs and timeline, for distributing the funds from the class action.
>
> 3. The tenderers could have the option of submitting a tender for the existing SDS and/or putting forward their own SDS for distributing the funds from the class action.[83]

5.47 Professor Legg and Dr Metzger also suggested that different ways of billing SDS should be encouraged, for example, billing by output (distribution) instead of input (hours taken to administer).[84]

5.48 MinterEllison put forward an option whereby the Court would open a confidential tender process, deciding an appointment using the principles set by Lee J in *GetSwift*.[85] Other considerations for determining an appointment could include the relevant expertise; the shortest proposed settlement time; the lowest cost option; and proposals for regular updates.[86] Maurice Blackburn stressed that any tender process should keep expertise in mind and would need to 'guard against the superficial allure of a cheap quote at the expense of genuine capability to perform the work'.[87] Slater and Gordon cautioned against a tender process, suggesting that the lawyers conducting the case are in most instances the best qualified to distribute the settlement.[88]

5.49 There was some concern that conducting tender processes for business opportunities was not the role of the court. The Supreme Court of Victoria submitted that the court's role is a judicial one, inferring that this type of process may be outside of its expertise.[89] King and Wood Mallesons suggested that there was 'little attraction' for courts in administering a tender role, and questioned what would happen if a challenge was made.[90]

5.50 Direct judicial oversight of the tender process was deemed to not always be necessary. The Law Council of Australia suggested that a tender process may be run by the judge who is conducting the settlement approval hearing; a registrar; or a court-appointed expert who provides the judge with a recommendation.[91] The ALRC agrees,

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83 M Legg, J Metzger, *Submission 12*.
84 Ibid.
85 *Perera v GetSwift Limited* [2018] FCA 732.
86 MinterEllison, *Submission 45*.
87 Maurice Blackburn, *Submission 37*; See, also, NSW Young Lawyers, *Submission 68*.
88 Slater and Gordon, *Submission 54*; See also *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191 [149].
89 Supreme Court of Victoria, *Submission 41*.
90 King and Woods Mallesons, *Submission 65*.
91 Law Council of Australia, *Submission 62*.

and suggests that the Federal Court should outline a process by which to delegate the tender process to a registrar of the Court in the Practice Note. Whether the tender is delegated should remain at the discretion of the Federal Court.

5.51 The ALRC acknowledges that the Federal Court already has power to tender settlement administration. There may be proceedings where tendering is not appropriate, but there may also be times when the 'default position'[92] of law firm administration does not serve the bests interests of the group members. The Practice Note deals with settlement administration sparingly. Clause 14.5(d) provides for an affidavit in support of the application for Court approval to state 'the means of distributing settlement funds' but makes no reference to disclosure of the additional costs that may be incurred in that process, nor does it require any statement that the means of distributing the funds is the most efficient or otherwise in the best interests of the class members. Clause 14.6 of the Practice Note provides for the Court to be advised at regular intervals of the progress and costs incurred in administering the settlement.

5.52 It would benefit all participants in class action proceedings to know when and how a tender process may be engaged. For the purposes of certainty and clarity, the Court should consider formalising a tender process within the Practice Note.

Settlement confidentiality

5.53 Some class action settlement agreements are confidential—that is, the final settlement amount granted to group members, the legal fees, or any commission rates are subject to a confidentiality order and are not disclosed in the judgment on settlement approval. This can make any assessment regarding the efficacy of Part IVA proceedings difficult and imprecise.[93]

5.54 A party to proceedings may apply to the Court for a confidentiality order under s 37AF of the FCA Act:

> **Power to make orders**
>
> (1) The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:
>
> (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
>
> (b) information that relates to a proceeding before the Court and is:
>
> (i) information that comprises evidence or information about evidence; or

92 Healthcare Companies and Businesses, Group Submission, *Submission 63*.
93 See Chapter 3—Incidence.

(ii) information obtained by the process of discovery; or

(iii) information produced under a subpoena; or

(iv) information lodged with or filed in the Court.

(2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).

5.55 Section 37AF is usually read together with s 37AE:

Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

5.56 Confidentiality applications in class action proceedings have increasingly been the subject of some judicial consideration.[94] In response to requests for blanket confidentiality orders in *Caason Investments Pty Ltd v Cao (No 2) (Caason),* Murphy J observed:

> It is wrong to assume that confidentiality or non-publication orders will be routinely or automatically made. Part VAA of the Act provides that the starting point for consideration of such orders, and it is mandatory under s 37AE for the Court to take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The Court must be satisfied that the order is necessary "to prevent prejudice to the proper administration of justice" (s 37AG(1)(a)), and "necessary" is a "strong word": *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at [30].
>
> There is a basis for treating some of the applicants' material as confidential (at least until settlement approval orders made) but the application for confidentiality orders was far too broad and wasted the time of the parties and the Court. There is a public interest in not making overly broad confidentiality orders in approving settlements in class actions, particularly the interests of class members in having a proper understanding of a settlement which affects their interests.[95]

5.57 Justice Lee had cause to consider the observations in *Caason* in *Liverpool City Council,* in which His Honour provided a comprehensive overview of the role of the Court in approving applications for confidentiality orders. Justice Lee 'observed a trend in Part IVA approval hearings for wide-ranging confidentiality orders to be sought' and noted that the 'mere fact that the parties to the proceeding have agreed between themselves that certain documents are to be kept confidential is not determinative', further noting that the 'trend should be discouraged'.[96]

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94 *Foley v Gay* [2016] FCA 273; *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468; *De Brett Seafood Pty Ltd v Qantas Airways Limited (No 7)* [2015] FCA 979. See, also M Legg, J Metzger, *Submission 12*.

95 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 [8]–[9].

96 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [102].

5.58 ALRC data reveal that 25% of settlement approval judgments are constrained by confidentiality orders that prevent the judgment from itemising the settlement amount, legal fees, funder or commission rate.[97]

5.59 In civil litigation, protecting the terms of settlement under the veil of confidentiality can be prudent for one or more of the parties and can incentivise settlement of a dispute. There are practical challenges in allowing greater transparency in these matters, including whether there are certain matters that:

- may disadvantage a party in the event of an appeal arising out of the settlement; and
- would disadvantage the respondent in defending any subsequent proceeding by those who opted out (or who were not in the closed class).[98]

5.60 For example, in *Lifeplan* confidentiality (or non-publication) orders were made due to related procedures being heard by another judge of the Federal Court. A situation described by Lee J as a

> paradigm example where the primary objective of the administration of justice (of safeguarding the public interest in open justice: see s 37AE of the Act) is outweighed by the necessity to prevent prejudice to the proper administration of justice by me revealing details of the settlement in this proceeding, except to the extent necessary for me to explain my reasons.[99]

5.61 In addition, in matters where confidentially is a condition precedent to the settlement taking place, the Federal Court may be required to either approve the confidential settlement or refuse settlement and allow the matter to run to trial.[100]

5.62 Nevertheless, class action settlements are different from other settlements, principally because the law requires the Federal Court to approve any settlement.[101] That approval is designed to protect the interests of class members who have not been active participants in the litigation, or provide an opportunity to make a submission to the Federal Court. Court orders and judgments are ordinarily public—supporting transparency and open judgment. As Professor Legg has previously noted:

> Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals. Class actions are not simply disputes between private parties about private rights. A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings.[102]

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97 See ALRC Dataset, Appendix E.

98 See, eg, Australian Institute of Company Directors, *Submission 35*.

99 *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 [20].

100 M Legg, J Metzger, *Submission 12*. See, also *Hodges v Waters (No 7)* [2015] FCA 264 [63]–[67].

101 *Federal Court of Australia Act 1976* (Cth) s 33V.

102 Legg, above n 9, 18. See, also M Legg, J Metzger, *Submission 12*.

5.63 Confidentiality orders are commonly sought with regards to written opinions written by counsel as to the reasonableness of costs and settlement, and cost reports. A successful confidentiality order application related to written opinions has been found by the Victorian Supreme Court of Appeal to impede the ability of the parties and group members to make submissions on the reasonableness of the claimed commissions and legal costs.[103]

5.64 A reasoned judgment can only be delivered if the terms of the settlement are entirely or at least in large part, public. This produces a conflict between the principles of openness and protection, and commercial reasons for the parties to conclude a settlement on a confidential basis. There may be a middle ground. Professor Legg and Dr Metzger suggested to disclosed in a settlement approval judgment:

- aggregate settlement sum;
- legal fees;
- funder's fee;
- settlement distribution scheme costs; and
- ideally, what the claim was thought to be worth and why.[104]

5.65 Other stakeholders to this Inquiry suggested alternative ways to release only necessary and limited information. International Litigation Partners suggested that data regarding class action settlements be made available, but that individual matters be held confidential.[105] MinterEllison argued that certain material should remain confidential, including the settlement deed, affidavits in support of settlement approval, and senior counsels' opinion regarding the merits of a case and any recommendation that settlement be approved.[106] Similarly, Risks and Insurance Management Society Australasia (RIMS) supported disclosure of legal and funding fees charged but did not consider it 'necessary, or indeed desirable, to disclose the full terms of settlement.'[107]

5.66 Dr Duffy was in favour of broad disclosure:

> [A]mounts and some detail of plaintiff legal costs and of funding commissions should be disclosed in all court approvals of settlements unless the court finds a compelling reason not to do so. There should be a general presumption that these amounts will be published in reasons for settlement approval. Given the large number of funded class actions which justifiably complain of the evils of nondisclosure to securities markets it would be inconsistent to generally allow nondisclosure of fees to legal and litigation

103 See, eg, *Botsman v Bolitho* [2018] VSCA 278 [5], [155], [237]–[266].
104 Legg, above n 9, 18. See, also M Legg, J Metzger, *Submission 12*; Clayton Utz, *Submission 42*; Law Firms Australia, *Submission 51*.
105 International Litigation Partners, *Submission 31*.
106 MinterEllison, *Submission 45*; see also Maurice Blackburn, *Submission 37*.
107 Risks and Insurance Management Society Australasia, *Submission 59*.

> funding markets. Better disclosure will tend to allow for more efficiency in markets for legal services and litigation funding.[108]

5.67 The majority of stakeholders suggested that the current discretion of the Federal Court to make confidentiality orders under s 37AF of the FCA Act was sufficient and provided the right balance between commercial imperatives and open justice.[109] Allens advised that a 'blanket prohibition' on confidentiality was likely to be an obstacle to settlement, and suggested that the best way forward was for the Court to retain its discretion. DLA Piper suggested that the terms of any class action settlement should be made public, excluding personal details of class members, with the parties still able to apply to the Court to keep some terms of the agreement confidential.[110] The Law Society of NSW put it simply, noting that

> generally settlements are made public. In circumstances where the terms are not made public, there is usually a good reason, and the parties tend to be in agreement about that.[111]

5.68 The Supreme Court of Victoria expanded on the issues:

> Open justice principles, the need to allow for a process of objection by group members, and the requirement to provide reasons, each militate in favour of public disclosure in settlement approval proceedings. However, there are necessarily limits that apply in the interests of justice. These can be diverse in nature, which means they do not lend themselves to precise definition.
>
> In the experience of the Court, these are judgments best made by individual judges based on the particular circumstances of the case.[112]

5.69 The ALRC agrees that the discretion of the Federal Court should not be fettered, and notes that the Court is building jurisprudence in this area. *Petersen* is a recent example where the Court was not persuaded that a confidentiality order was necessary to prevent prejudice to the proper administration of justice but was nevertheless prepared to preserve the confidentiality of some part of the affidavit material tendered in support of the settlement application.[113] Nonetheless, gaps left by confidentiality orders render proper analysis of class actions difficult and can impede group members' ability to access information regarding their own case. There may, however, be other ways by which the data can be captured, and group members and the public can be informed. Principally, the settlement administrator could be required to provide a report on the distribution of settlement, discussed below.

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108 M Duffy, *Submission 36*.

109 See, eg, Ashurst, *Submission 25*; DLA Piper Australia, *Submission 27*; Clayton Utz, *Submission 42*; IMF Bentham Limited, *Submission 50*; Allens, *Submission 52*; Slater and Gordon, *Submission 54*; Law Society of New South Wales, *Submission 64*; NSW Young Lawyers, *Submission 68*; Australian Bar Association, *Submission 69*.

110 DLA Piper Australia, *Submission 27*.

111 Law Society of New South Wales, *Submission 64*.

112 Supreme Court of Victoria, *Submission 41*.

113 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [17]-[21].

Report of the settlement administrator

Recommendation 10 Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to require a settlement administrator to provide a report to group members and the Court on completion of the distribution of the settlement sum. The report should be published on a national representative proceedings data base to be maintained by the Court.

5.70 Clause 14.6 of the Practice Note provides that:

> The Court will require to be advised at regular intervals of the performance of the settlement (including any steps in the settlement distribution scheme) and the costs incurred in administering the settlement in order that it may be satisfied that the distribution of settlement monies to the applicant and class members occurs as efficiently and expeditiously as practicable.[114]

5.71 The Federal Court must be kept abreast of progress and costs of settlement administration. There is, however, no requirement for settlement administrators to provide a formal report to the Federal Court on finalising the settlement administration. Nor is there any requirement for the settlement administrator to provide the information on the settlement administration to group members.[115] The information may not enter the public domain at all.

5.72 Without this information, it is difficult for the Court, group members, participants, policy makers and the general public to gain an in-depth understanding of how class action proceedings resolve. In particular, the lacuna in publicly available information means that group members may not know or be able to access information related to the distribution of funds.[116] The legal profession, legal researchers and academics, policy makers, and community members do not have access to a clear and accurate evidence-base. The last publicly available document in a Part IVA proceeding is likely to be the judgment relating an application for settlement approval. It may be the order pursuant to s 33ZF of the FCA Act approving the final cost of settlement administration—although these orders rarely provide detailed information. Without a report that outlines how the funds were distributed, and when, it is difficult to hold settlement administrators to account.

5.73 A report by the settlement administrator thus serves multiple purposes. In order to meet those objectives, such a report should be submitted to group members and to

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114 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 14.6.

115 Maurice Blackburn has developed a report related to the administration of funds in the Black Saturday Bushfire class actions. See Maurice Blackburn, 'Kilmore East—Kinglake & Murrindindi—Marysville Black Saturday Class Action Settlement Administrations: Final Report' (2018).

116 See, eg, *Botsman v Bolitho* [2018] VSCA 278.

the Federal Court to review, publish and capture critical information for a 'class action database'. Accordingly, the report should include:

- the dollar settlement amount;
- the dollar and proportion of the settlement amount used to pay legal fees, including disbursements;
- the dollar and proportion of the settlement amount used to pay a funding commission (when funded by a third-party litigation funder);
- the dollar and proportion of the settlement amount used to reimburse representative plaintiffs;
- the dollar and proportion of the settlement amount used to pay the settlement administrator; and
- the dollar and proportion of the settlement amount returned to the class, including a list of (de-identified) returns to individual group members, whether institutional bodies or individual persons.[117]

5.74 Where some or all of these data cannot be published due to a confidentiality order, this too should be clearly recorded in the report.

5.75 Reports need not be overly detailed and should be produced at the lowest available cost. It may be beneficial for the Federal Court to provide a template or Form to prescribe and contain the information to be provided.

5.76 The cost to produce the report should be considered in the settlement administration fee.

117 These requirements mirror those suggested by Legg and Metzger that should be included in an order pursuant to s 33V of the FCA Act. See: M Legg, J Metzger, *Submission 12*. A similar requirement for 'Post-Distribution Accounting' has recently been introduced in California. See: https://www.cand.uscourts.gov/ClassActionSettlementGuidance.

6. Regulating Litigation Funders

Contents

Introduction

6.1 Litigation funding can be said to improve access to justice. There is empirical evidence that a number of successful class actions would not have run absent the funding provided by litigation funders.[1] Notwithstanding this contribution to justice, there are inherent risks associated with litigation funders: failure to meet their obligations under funding agreements; using the Federal Court of Australia for improper purposes; and exercising influence over the conduct of proceedings to the detriment of plaintiffs.[2]

6.2 In this chapter, the ALRC sets out a suite of recommendations to improve the regulation of litigation funders who are funding class actions in the Federal Court. These recommendations support the unique role the Federal Court has under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) to protect the interests of

1 Professor Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

2 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2018) [2.91].

all class members. These amendments are recommended in lieu of a licensing regime overseen by a statutory regulator for litigation funders, which the ALRC proposed in the Discussion Paper.

6.3 The first set of recommendations are designed to reduce the risk to consumers of litigation funding services if a funder is unable to meet its debts as and when they fall due. Amendments to the FCA Act would:

a. clarify that the representative plaintiff and group members, who have entered into a funding agreement with a third-party litigation funder which has been approved by the Federal Court, are not liable for any unpaid costs and disbursements of the representative plaintiff's solicitor; and

b. improve the security for costs regime for respondents by including a statutory presumption that funders will provide security and requiring that any security provided must be capable of being released to the respondent without taking action outside Australia.

6.4 In order to strengthen the Federal Court's oversight of the conduct of funders during proceedings, the ALRC recommends amendments to the FCA Act that would require funders and insurers to act in accordance with the overarching purpose of civil litigation. The overarching purpose is to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively, and efficiently as possible. Failure to so act would see funders and insurers personally responsible for costs.

6.5 The next set of recommendations seek to ensure that litigation funding in the context of class action litigation only occurs with the approval of the Federal Court and that binding contractual entitlements in relation to funding are only created following Court approval. Court approval would require the litigation funding agreement to include an indemnity for adverse costs in favour of the representative plaintiff and would involve the Court reviewing, amending or setting the commission rates and terms.

6.6 The final set of recommendations relate to the management of conflicts of interest. Currently, litigation funders must comply with ASIC Regulatory Guide 248 in managing potential conflicts of interest. The ALRC recommends that Regulatory Guide 248 be strengthened to require annual reporting showing demonstrable compliance with the guide.

Existing regulatory requirements

6.7 The most appropriate framework by which to regulate litigation funders has been a point of contention. In the case of *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd*,[3] the Full Federal Court of Australia found that the litigation funding arrangements under consideration in that matter constituted a 'managed

3 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

investment scheme' (MIS). A consequence of this decision was that, unless otherwise exempted, litigation funders would need to comply with the obligations pertaining to a MIS under the *Corporations Act 2001* (Cth) (the Corporations Act)—which included requirements to have a responsible entity for the scheme licensed under an Australian Financial Services Licence (AFSL).

6.8 In 2011, the NSW Court of Appeal held that a litigation funding agreement was a 'financial product' under s 763A of the Corporations Act because it was a facility through which financial risk was managed.[4] On appeal, the High Court determined that the funding in this case was a 'credit facility'.[5]

6.9 In response to these findings, the Government decided to exempt litigation funders from the definition of an MIS,[6] and exempted litigation funders from financial services regulation on the condition that funders had necessary processes in place to manage conflicts of interest.[7] The Explanatory Statement to the relevant regulation said:

> The Federal Court's decision would have imposed a wide range of requirements that apply to MIS, such as registration, licensing, conduct and disclosure requirements on litigation funders and their arrangements with their clients. The Government considers that these requirements are not appropriate for litigation funding schemes. The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. The Government's main objective is therefore to ensure that consumers do not lose this important means of obtaining access to the justice system.[8]

6.10 Currently, exempt litigation funders are required to manage conflicts of interest and are subject to the ASIC Regulatory Guide 248. Obligations set out in Regulatory Guide 248 are further discussed below.

General legal requirements

6.11 Notwithstanding these developments, consistent with all other corporations in Australia, incorporated litigation funders must comply with the Corporations Act, which provides minimum standards for corporate governance, constitutions and shareholding. Special purpose vehicles established to manage litigation funding businesses may be subject to particular investment regulations under the Corporations Act.[9] Those litigation funders operating under a trust structure must comply with state and territory laws on trusts as well as the common law generally.[10] Those funders that are listed on the Australian Securities Exchange (ASX) are contractually bound to comply with the ASX

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4 *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50.
5 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (Receivers and Managers Appointed) (2012) 246 CLR 455.
6 *Corporations Regulation 2001* (Cth) as amended by *Corporations Amendment Regulation 2012* (No. 6).
7 *Corporations Regulations 2001* (Cth) reg 7.6.01AB.
8 Explanatory Statement, Select Legislative Instrument 2012 No 172 1.
9 See, eg, *Corporations Act 2001* (Cth) ch 2L, 5C, 5D.
10 See, eg, *Trust Act 1973* (Qld).

Listing Rules and these are also enforceable under the Corporations Act.[11] There may also be specific obligations that apply as a matter of equity including fiduciary duties.[12]

6.12 All entities, including litigation funders, providing financial services with respect to a financial product must comply with requirements under the *Australian Securities and Investments Commission Act 2001* (Cth), which seek to provide protections for consumers of financial services. These protections include requirements that entities must not:

- engage in unconscionable conduct;[13]
- engage in conduct that is misleading or deceptive, or is likely to mislead or deceive; and [14]
- make false or misleading representations.[15]

6.13 In addition, where the financial services are provided to an individual for personal or domestic purposes, there is an implied warranty in contracts for the supply of financial services that:

- the services will be rendered with due care and skill;[16] and
- the contract for services will be without any unfair terms.[17]

6.14 As noted by the VLRC, these provisions:

> address the risks of an unscrupulous litigation funder imposing unfair or extortionate terms in funding agreements, misleading clients about the advantages and disadvantages of litigation or failing to disclose all relevant aspects of the agreement.[18]

6.15 For third-party litigation funders, additional regulatory oversight is provided by the courts on a case by case basis. The Federal Court requires litigation funding arrangements in class actions to be disclosed to the Court, together with the solicitors' costs agreement, at the commencement of litigation.[19] The courts do scrutinise the funding agreement in detail. It is routine in class actions for the Federal Court to require the litigation funder to provide security of costs, on application or on its own motion. It

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11 *Corporations Act 2001* (Cth) ss 793C, 1101B.
12 Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244, 250.
13 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA-12CC.
14 Ibid s 12DA.
15 Ibid s 12DF.
16 Ibid s 12ED.
17 Ibid ss 12BF-12BM. A contract term is defined to be unfair when it would cause a significant imbalance in rights and obligations and is not reasonably necessary to protect legitimate interests – see s12BG.
18 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2017) [3.21].
19 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 5.

is at that point the capital adequacy of the litigation funder becomes important, not only to the class members and their solicitors, but also to the respondent.

6.16 Conflicts are also managed by the Court. The Federal Court Class Actions Practice Note (GPN-CA) (Practice Note) states that any litigation funding agreement should include provisions for managing conflicts of interest between funded class members, the solicitor and litigation funder.[20]

Should litigation funders be licensed?

6.17 In addition to the existing regulatory requirements on litigation funders in Australia, there have been growing calls for litigation funders to be subject to a licensing regime, principally to improve the regulation of capital adequacy of litigation funders and improve disclosure to consumers. Consistent with such views, the ALRC proposed in the Discussion Paper that litigation funders should be subject to a bespoke licensing regime that sat outside the Australian Financial Services Licensing regime (AFSL) but imposed comparable obligations.[21]

6.18 In the Discussion Paper, the ALRC suggested that a licence regime for litigation funders:

- has the potential to reduce the risk of financial loss to plaintiffs and respondents by reducing the risk that funders will be unable to meet their liabilities when due;
- can encourage compliance by litigation funders with their obligations given the risk of losing the right to participate in the market as litigation funders in the event of a breach of those obligations;
- can potentially enhance the reputation of litigation funders and protect the integrity of the class action system by reducing any disreputable conduct.[22]

Productivity Commission and VLRC supports licensing

6.19 The ALRC's proposal was not new. In 2014, the Productivity Commission recommended that litigation funders should be licensed to ensure that they 'hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest.'[23] The Commission explained that:

> [w]hile the Commission supports litigation funding, it recognises that consumers need to be adequately protected—in particular to provide some assurance that funders will follow through on financial promises.[24]

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20 Ibid cl 5.9. See, also Chapter 7—Solicitors' Fees and Conflicts of Interest.
21 Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Discussion Paper No 85 (2018), proposals 3–1 and 3–2.
22 Ibid 49 [3.23].
23 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) rec 18.2.
24 Ibid 601.

6.20 The Productivity Commission also explained that 'the Commission remains in favour of a licence regime to verify the capital adequacy of litigation funders in addition to court oversight.'[25]

6.21 Similarly, the Victorian Law Reform Commission (VLRC) recommended:

> The Victorian Government should advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry.[26]

Submissions support licensing

6.22 The majority of submissions received in response to the Discussion Paper were in favour of licensing third-party litigation funders.[27] Professor Legg and Dr Metzger explained:

> We agree that the *Corporations Act 2001 (Cth) (*the "Act") should be amended to require that litigation funders be required to obtain and maintain a statutorily mandated litigation funding license. A mandatory licensing regime is long overdue in Australia and it is unfortunate that licensing was not required at the time of the 2012 amendments to the Act or following the 2014 recommendations of the Productivity Commission. It is time to act to impose meaningful, statutory regulation on the third-party funding sector.[28]

6.23 Industry superannuation funds, who often use the services of third-party litigation funders, supported licensing and noted that

> it is often difficult and onerous for investors to undertake adequate due diligence on these new third-party entrants regards to their resourcing, risk management systems, capital adequacy and the accuracy of their communications. We therefore support the concept of Proposal 3–1 that third-party litigation funders should obtain and maintain a litigation funding license to operate in Australia.[29]

6.24 The Australian Bar Association similarly noted that licensing could enforce a minimum standard: 'the time has now come for the introduction of a formal licensing regime to ensure and supervise appropriate standards.'[30]

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25 Ibid 632.

26 Victorian Law Reform Commission, above n 2, rec 2.

27 W Mundy, *Submission 4*; M Legg, J Metzger, *Submission 12*; Ashurst, *Submission 25*; L Cantrill, *Submission 26*; DLA Piper Australia, *Submission 27*; Chartered Accountants Australia and New Zealand, *Submission 28*; AustralianSuper, *Submission 33*; Maurice Blackburn, *Submission 37*; Clayton Utz, *Submission 42*; MinterEllison, *Submission 45*; Cbus Super, *Submission 46*; Insurance Council of Australia Limited, *Submission 47*; Zurich Australia Insurance Limited, *Submission 49*; IMF Bentham Limited, *Submission 50*; Allens, *Submission 52*; P Spender, *Submission 53*; NSW Society of Labor Lawyers, *Submission 55*; HESTA, *Submission 61*; Law Firms Australia, *Submission 51*; King and Woods Mallesons, *Submission 65*; Queensland Law Society, *Submission 66*; Law Society of NSW, *Submission 15*4.

28 M Legg, J Metzger, *Submission 12*.

29 HESTA, *Submission 61*. See also AustralianSuper, *Submission 33*; Cbus Super, *Submission 46*.

30 Australian Bar Association, *Submission 69*.

Differing views on disclosure

6.25 One of the Productivity Commission's rationales for licensing litigation funders was to ensure proper disclosure of the financial risks of entering into a litigation funding agreement. Proper disclosure is designed to alleviate the information asymmetry that exists between the funder as repeat litigants and consumers who may only use the services of a litigation funder once in their lifetime. In terms of proper disclosure to consumers, the US Chamber Institute for Legal Reform noted that:

> Until such time as litigation funders are required to be more transparent, it will continue to be very difficult for consumers to properly assess what they are offered in a funding arrangement, let alone effectively compare alternatives or negotiate a fair agreement.[31]

6.26 In contrast, Norton Rose Fulbright noted that:

> There are already a range of safeguards for class members in this regard, including that the class members have access to the lawyer on the record for the class and that lawyer owes fiduciary duties to the class members, and that any settlement must be approved by the Court.[32]

Capital adequacy concerns

6.27 Submissions strongly favoured licensing as a means to ensure the capital adequacy of overseas third-party litigation funders operating in Australia. Law firm Allens explained: 'We are ... seeing an increasing number of new local and offshore funders with undisclosed financial backing or skills entering the Australian funding market.'[33]

6.28 A similar view was expressed by IMF Bentham:

> The need to licence funders has become pressing with the increased activity of foreign-based funders in this market, a lack of transparency of the financial capacity of unlisted funders, and the increasing attractiveness of litigation funding to one-off, smaller or opportunistic players.[34]

Is security for costs sufficient?

6.29 Security for costs is designed to ensure that there are funds available to the respondent in the event that it is successful in litigation and is awarded costs. Security for costs supports the principle in civil litigation that costs follow the event (the loser pays principle). Security for costs is not granted as of right and must be sought by the respondent.[35] The power of the Court to order security for costs is discretionary and the exercise of the power will depend on the facts in each case. For an application for security for costs to be successful, the respondent must satisfy the Court that there is

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31 US Chamber Institute for Legal Reform, *Submission 44*.
32 Norton Rose Fulbright, *Submission 40*.
33 Allens, *Submission 52*.
34 IMF Bentham Limited, *Submission 50*.
35 *Federal Court of Australia Act 1976* (Cth) s 56(1) and *Federal Court Rules 2011* (Cth) r 19.01. Where the plaintiff is a corporation, see also *Corporations Act 2001* (Cth) s 1335(1)

reason to believe that the plaintiff would be unable to pay the costs of the respondent if ordered to do so. The respondent must set out the reasons why the Court ought exercise its direction in favour of ordering security for costs.[36]

6.30 In exercising its power, the Court will give consideration to the particular facts of a case and will give varying weight to the relevant factors.[37] If the respondent persuades the Court that an order for security for costs should be made, the respondent will need to provide an estimate of its likely recoverable costs in defending the proceeding. The Court may order that security may take such form as will provide adequate and fair protection to the respondent. The form of security may include the payment of money into Court, bank bonds or guarantees. If a plaintiff fails to comply with an order for security for costs, the Court may order that the plaintiff's proceedings be stayed or dismissed.[38]

6.31 Many submissions supported a licensing regime for litigation funders as a means to address the limitations of security for costs from the perspective of a respondent:

> In our experience:
>
> (a) A security for costs order is generally made in the early stages of proceedings (when the likely costs are not clear);
>
> (b) The amount of security required is generally significantly less than the costs incurred by the respondent (and likely to be recoverable on a successful defence); and
>
> (c) The court's power to order security of costs is discretionary. Therefore, there is a risk that a respondent may be unsuccessful in obtaining security for costs.[39]

6.32 However, ASIC submitted that the security for costs regime provides better insurance against financial loss than could be provided by licensing regime:

> the existing mechanism for the court to order security for costs is a more targeted and effective way to address the risk that a litigation funder will not have adequate resources to meet an adverse cost order. Security for costs is intended to directly address the credit risks imposed on the defendant and the representative party. Security is paid by the funder in a manner acceptable by the courts (e.g. a bank guarantee).
>
> By contrast, ... the AFS licensing financial requirements are not designed to act as security to meet a particular liability, nor are they intended to protect against credit risk more generally.[40]

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36 Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters (Professional) Australia, 11th ed, 2016) 634. Importantly, in the context of unfunded matters, the protection in s43(1A) of the *Federal Court of Australia Act 1976* (Cth) against group members being ordered to pay costs does not apply to security for costs, such that in unfunded matters if security for costs is ordered the representative plaintiff may seek contributions from group members. See Peter Cashman, 'The Use and Abuse of Security for Costs in Class Actions' (2018) 7 (1), *Journal of Civil Litigation and Practice* 22.

37 See *Federal Court Rules 2011* (Cth) r 19.02.

38 *Federal Court Rules 2011* (Cth) r 19.01(b) and *Federal Court of Australia Act 1976* (Cth) s 56(4).

39 MinterEllison, *Submission 45*. See also Allens, *Submission 52*; Clayton Utz, *Submission 42*.

40 ASIC, *Submission 72*.

6.33 In relation to security for costs, the Law Council noted that it was not intended to be an absolute indemnity for adverse costs:

> It is the Law Council's view that defendants are adequately protected by obtaining security for their costs, albeit that security for costs may not be a complete protection. This is adequate because security for costs is just that, security. It is not meant to be a guarantee of absolute indemnity in the same way that neither party-party costs nor solicitor and own client costs are an absolute indemnity. [41]

6.34 As set out below, the ALRC believes the security for costs regime can be improved. Notwithstanding this, the ALRC is not satisfied that the benefits of a licensing regime, from the perspective of providing greater certainty that adverse costs orders will be met by litigation funders, outweighs the regulatory costs of imposing a licensing regime with minimum capital adequacy requirements on litigation funders.

Can a financial service licence ensure capital adequacy?

6.35 More broadly, in relation to ensuring the financial stability of litigation funders ASIC, cautioned that:

> A requirement that a litigation funder obtain an AFS licence will not, without significant changes to other aspects of the Corporations Act, necessarily mean that the litigation funder will be adequately capitalised to ensure it can meet adverse costs orders, continue to fund litigation or distribute funds to shareholders.[42]

> These AFS licensee requirements are not focused on ensuring that licensees meet their financial obligations to clients. They also do not seek to manage the credit risk of licensees, prevent businesses from failing due to poor business models or cash flow problems, or aim to provide compensation to consumers who suffer a loss, for whatever reason. They are not intended to address the risk of an adverse costs order in legal proceedings.[43]

6.36 Similarly, Professor Tarr noted:

> Very significant limitations of the AFSL scheme have been readily apparent for two decades and despite parliamentary enquiries and commissions, increased regulation and increased educational requirements, recent financial adviser scandals continue. In Australia, for example, HIH Insurance, Storm Financial, One.Tel, Westpoint Group, Fincorp, Opes Prime, Timbercorp Securities, Octaviar Limited, National Australia Bank and the Commonwealth Bank of Australia resulted in substantial losses to retail clients over the past two decades notwithstanding the AFSL regime. [44]

Alternatives to licensing

6.37 The ALRC initially supported a licence regime (as set out in Discussion Paper 85), and licensing of litigation funders was strongly supported by submissions. The

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41 Law Council of Australia, *Submission 62*.
42 ASIC, *Submission 72*.
43 Ibid.
44 JA Tarr, *Submission 5*.

ALRC now considers that the recommendations in this Chapter, if implemented, would achieve at least the same level of consumer protection without the regulatory burden of a licensing regime. Principally, the recommendations in this Chapter support improved court oversight of litigation funders. This approach was supported by ASIC, who considered the court to be 'better placed to regulate litigation funders, through court rules and procedure, oversight and security for costs'. [45]

6.38 Consistent with Professor Tarr's submissions regarding the limitations of the current financial services licensing regime, the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Banking Royal Commission), has set out in great detail the failures of, has set out in great detail the failures of the Australia financial services licensing regime to protect consumers of financial services in a meaningful way.[46] In particular, the Royal Commission expressed concern that:

> Too often, entities have been treated in ways that would allow them to think that they, not ASIC, not the Parliament, not the courts, will decide when and how the law will be obeyed or the consequences of breach remedied.[47]

6.39 The Interim Report suggests that the Royal Commission is likely to recommend significant reform to the licensing regime that will take considerable time to implement and it will be many years before the effectiveness of those reforms can be determined.

6.40 In this context, if the ALRC were to recommend financial services licensing it would be doing so in circumstances where the existing licensing regime has been revealed to have manifest limitations and is likely to be subject to a protracted process of reform. The ALRC would also be doing so in the context of significant criticism of not just the regulator, but the regulator's enforcement framework.[48] Accordingly, such a licence is unlikely to improve regulatory compliance in the third-party litigation funding industry in the short to medium term.

6.41 Moreover, given the small size of the litigation funding industry it is unlikely to ever receive significant attention from the regulator. ASIC explained that 'given ASIC's risk-based approach to regulation, it seems unlikely such an area would be a main focus of our work even if we had jurisdiction for it.'[49]

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45 ASIC, *Submission 72*.

46 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report*, (September 2018).

47 Ibid vol 1 281.

48 Ibid 267–300. The Commission was particularly concerned about ASIC's preference for negotiated outcomes: 'When contravening conduct comes to its attention, the regulator must always ask whether it can make a case that there has been a breach and, if it can, then ask why it would not be in the public interest to bring proceedings to penalise the breach....Contraventions of law are not to be treated as no more than bargaining chips to procure agreement to remediate customers'

49 ASIC, *Submission 72*.

6.42 Accordingly, instead of licensing funders, the ALRC has sought to ensure appropriate and effective consumer protection through improving court oversight of third-party litigation funders on a case-by-case basis.

Reducing the financial risks to consumers of litigation funding services

Recommendation 11 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to prohibit a solicitor acting for the representative plaintiff, whose action is funded in accordance with a Court approved third-party litigation funding agreement, from seeking to recover any unpaid legal fees from the representative plaintiff or group members.

Recommendation 12 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.

Solicitor to bear risk of unpaid costs

6.43 Recommendation 11 places the onus on the solicitor for the representative plaintiff to assess a funder's bona fides and assure themselves that the funder is reputable and has sufficient resources to meet the solicitor's costs and disbursements throughout the conduct of the litigation. The solicitor's only recourse for the payment of their bills would be to the funder, protecting the representative plaintiff and group members from any liability to pay costs if the funder fails.

6.44 The Law Council noted that

> security for costs provides an inadequate (indeed no) protection for a representative applicant from the unpaid legal fees of its own solicitor where the funder withdraws funding.[50]

6.45 The Law Council's submission also noted that their Class Actions Committee 'questions how commonly, in funded litigation, representative applicants are made directly liable for their own solicitors' costs under their retainer agreements.'[51] Similarly, Maurice Blackburn noted that:

50 Law Council of Australia, *Submission 62*.
51 Ibid.

> we are not aware of any instances where a litigation funder suffered financial failure and the representative plaintiff's solicitors subsequently sought to enforce an obligation by the plaintiff personally to pay legal fees.[52]

6.46 Nevertheless, the ALRC considers it appropriate, particularly in the absence of a licensing regime, to put beyond doubt that it is the solicitor that assumes the risk of unpaid fees when entering into an agreement with a litigation funder. That risk should not be borne by the representative plaintiff (or group members). This is also supported by Recommendation 14 below that the litigation funder ought to indemnify the representative plaintiff against adverse costs in order for the funding agreement to be valid.

6.47 Recommendation 11 is premised on the basis that solicitors are in a better position than consumers to assess the financial viability of a funder as plaintiff firms are repeat users of litigation funding services and such firms understand the intricacies of class action litigation and its costs. The ALRC considers that this is a sound public policy position given the information asymmetry that exists between funders and the solicitor on the record on the one hand, and the representative plaintiff.

Statutory presumption that funder provides security for costs

6.48 Recommendation 12 imposes a statutory presumption that a litigation funder will provide security for costs and requires that the security be of a type that may be called upon in Australia. As set out above at paragraph 6.29, currently, a respondent can apply for security for costs.[53] Class members including the representative plaintiff would be protected by a prohibition on the third-party litigation funder seeking contributions to the security from class members.

6.49 While as a matter of practice the Court typically requires third-party litigation funders to provide security for costs, a statutory presumption would shift the onus from the respondent who ordinarily is required to satisfy the Court that the security should be provided, to the representative plaintiff (in reality, the funder) if they wish to rebut the presumption. This recommendation, in part, responds to submissions that raised concerns that security for costs will be given only when sought by respondents and is at the discretion of the courts.[54] The ALRC considers that a presumption is more appropriate than a mandatory requirement as it retains the Court's discretion and ensures that the presumption can be rebutted in suitable cases, such as where the matter is in the public interest.

6.50 The second part of Recommendation 12 is designed to respond to concerns in submissions that the types of security being provided by funders are less secure than a bank guarantee and would put the respondent to considerable costs if they were to seek

52 Maurice Blackburn, *Submission 37*.
53 *Corporations Act 2001* (Cth), s 1335(1) or FCA Act, s 56(1).
54 US Chamber Institute for Legal Reform, *Submission 44*.

to call on the security.[55] As one example, in *Capic v Ford Motor Company of Australia Ltd*[56] the Court approved security for costs being provided by way of a deed of indemnity from an after-the-event insurer in the United Kingdom, together with the payment of $20,000 into Court for the purpose of covering the enforcement costs of the deed in the United Kingdom.

6.51 Provision of indemnities from after-the-event insurers to satisfy security for costs orders is a recent development in Australia. Without imposing restrictions on the form of security, the ALRC does not consider it reasonable, as a matter of public policy, that a respondent may be required to litigate in a foreign jurisdiction in order to recover against the security for costs provided. Recommendation 12 should give respondents greater comfort that capital will be available to cover their costs in the event that they are successful than could be provided by licensing litigation funders. The license could only impose a generic capital adequacy obligation on the funder that may not take into account the likely costs in individual matters.

6.52 Through these recommendations, consumers (being the representative plaintiff and group members) are protected from the principal financial risk that they will incur financial losses in the event that a third-party litigation funder was to become insolvent during the course of the litigation.

6.53 The consumer's remaining risk in this situation is that they are unable to continue with the litigation unless they can find an alternative funder to step in. In such a situation, the consumer is unlikely to be a worse position than if the funder had been unavailable to fund the matter in the first place.

Overarching purpose of civil practice & procedure provisions

Recommendation 13 Section 37N and s 43 of the *Federal Court of Australia Act 1976* (Cth) should be amended to expressly empower the Court to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.

6.54 This Recommendation seeks to enhance the Court's ability to supervise third party-litigation funders during proceedings. The Court would be given an express statutory power to impose costs on the litigation funder (and potentially insurers if they are directing the litigation) personally if they act in a manner that frustrates the

55 Clayton Utz, *Submission 42*; Allens, *Submission 52*.

56 *Capic v Ford Motor Company of Australia Ltd* NSD724/2016. Compare this approach with *DIF III Global Co-Investment Fund LP v BBLP LLC* [2016] VSC 401.

overarching purpose of s 37M of the FCA Act to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively, and efficiently as possible. This supervision by the Court covers the conduct of the funder during the course of litigation and arguably provides for more targeted regulatory intervention than a licensing regime administered by ASIC.

6.55 As observed by Lee J in *Perera v GetSwift Ltd*,[57] the Court is concerned with how to deal with commercial enterprises that seek to make use of the processes of the Court to make money and the role of the Court in ensuring the use of those processes for their proper purpose and informed by considerations including: (a) the Court's statutory mandate to facilitate the just resolution of disputed claims according to law and (b) the Court's supervisory and protective role in relation to group members.

6.56 Subsection 2 of s 37M of the FCA Act provides that without limiting the generality of the description of the overarching purpose in sub-s 1, it includes the following objectives:

a. the just determination of all proceedings before the Court;

b. the efficient use of the judicial and administrative resources available for the purpose of the Court;

c. the efficient disposal of the Court's overall caseload;

d. the disposal of all proceedings in a timely manner;

e. the resolution of disputes at a cost that it is proportionate to the importance and complexity of the matters in dispute.

6.57 Section 37N requires parties to act consistently with the overarching purpose.

(1) The parties to a civil proceeding before the Court must conduct the proceedings (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:

a. take account of the duty imposed on the party by subsection (1); and

b. assist the party to comply with the duty.

(3) The Court or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give an estimate of:

a. the likely duration of the proceeding or part of the proceeding; and

57 [2018] FCA 732 [3].

b. the likely amount of the costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:

i. the costs that the lawyer will charge to the party; and

ii. any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) If the Court or Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.

The role of third-party litigation funders in civil proceedings

6.58 In *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*[58] (*Fostif*), the High Court of Australia held that third-party litigation funding arrangements, which involved a funder seeking out those who may have claims, and offering terms which not only gave the funder control of the litigation but also would yield significant profit for the funder, did not, either alone or in combination, constitute an abuse of process, or warrant condemnation as being contrary to public policy.[59] Subsequent to that decision, it has become a common, practice for funders of class actions in Australian to exercise varying degrees of control over the litigation. In many funding agreements, control of the proceedings is ceded by participating group members to the funder, who provides day-to-day instructions to the representative plaintiff's lawyer.[60]

6.59 The integral role that many third-party litigation funders play in the conduct of class action proceedings in Australia places them in a position that is different from that in other jurisdictions. A particular comparison can be drawn with the United Kingdom and Canada where the degree of control exercised by a litigation funder over a class action proceedings remains a factor in considering whether or not the conduct of the funder amounts to maintenance or champerty.[61] It is not only litigation funders who exercise control over litigation and who also have an interest in the subject of the litigation. Insurers are often in a similar position.[62]

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58 (2006) 229 CLR 386.

59 Ibid [88].

60 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [10.4.4]; Confidential consultations by the ALRC with litigation funders and plaintiff lawyers.

61 See Chapter 2— The Evolution of Class Action Proceedings and Third-party Litigation Funding.

62 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 193; *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661[43] – [46].

6.60 Law firms Allens and Norton Rose Fulbright urged the ALRC to consider recommending amendments to s 37N to require third-party litigation funders to act in a way that is consistent with the overarching purpose of s 37M.[63] Allens also suggested that the ALRC consider amendment to s 43 of the FCA Act so to give the Court express power to order costs against third-party litigation funders. [64] In a supplementary submission, IMF Bentham indicated their support for this recommendation and suggested that insurers ought be required to disclose to the Court their involvement with the defence of proceedings.[65]

6.61 The recommended amendments to s 37N are consistent with the approach that has been taken in Victoria where the *Civil Procedure Act 2010* (Vic) provides that the overarching obligations to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute apply to any person who provides financial or other assistance to any party in so far as that person exercises any direct control or any influence over the conduct of the civil proceeding.[66] This expressly includes insurers and third-party litigation funders.

6.62 A similar obligation is included in the *Civil Procedure Act 2005* (NSW) which applies to individuals with a 'relevant interest' in civil proceedings, being a person who provides financial, or other, assistance to a party, and exercises any direct or indirect control, or any influence over the conduct of the proceedings or the conduct of a party in respect of the proceedings.[67]

6.63 The ALRC considers that there is merit in imposing an obligation to act consistently with the overarching purpose of the FCA Act prescribed in s 37M on persons who provide financial or other assistance to a party in so far as those persons exercise direct or indirect control over the proceedings, and to do so expressly with respect to third-party litigation funders and insurers. Whilst the common law of Australia is clear that 'an order for costs should be made against a non-party if the interests of justice require that it be made,'[68] the ALRC considers that s 43 of the FCA Act should be amended to expressly cover litigation funders and insurers as a statement of public policy.

63 Norton Rose Fulbright, *Submission 40*; Allens, *Submission 52*.
64 Allens, *Submission 52*.
65 IMF Bentham, Supplementary Submission 77.
66 *Civil Procedure Act 2010* (Vic) s 10(1)(d).
67 *Civil Procedure Act 2005* (NSW) s 56. See also Rules of Supreme Court 1971 (WA) O9A r1 to similar effect.
68 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 193 (Mason CJ and Deane J); *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 [43].

Court approval of the litigation funding agreement

Recommendation 14 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

a. third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;

b. the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;

c. third-party litigation funding agreements of representative proceedings must expressly provide for a complete indemnity in favour of the representative plaintiff against any adverse costs order awarded against the representative plaintiff; and

d. Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Court.

6.64 It is well-understood and accepted that the Court has a supervisory and a protective role in class action proceedings. In service of that supervisory role, plaintiff solicitors and third-party litigation funders must disclose their costs and funding agreements to the Court prior to the first case management hearing of any representative proceeding.[69] Solicitors are further required to notify group members of costs and funding agreements as soon as practicable—which is an ongoing obligation.[70] The Court does not, however, deal with the terms of those agreements until an application for settlement approval pursuant to s 33V of the FCA Act has been filed.[71] Whether the Federal Court has the power to vary or set agreements at that time (such as through the use of a common fund order), or whether the power of the Court under s 33V is limited to either approving or rejecting the settlement agreement, remains unsettled.

6.65 In Chapter 4, the ALRC recommends that the Court be given an express statutory power to deal with competing class actions. It is envisaged that the exercise of such a power would require the Court to assess legal costs agreements (especially any contingency fee agreements) and third-party litigation funding agreements to ensure that they are reasonable and accessible to group members. The proposed reform would require the Court to take an active role in the construction of legal costs agreements and third-party litigation funding agreements, expanding the role of Court from approving the distribution of settlements to ensuring the proceeding is advanced upon fair and

69 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 6.1, 6.4.

70 Ibid [5.3].

71 *Federal Court of Australia Act 1976* (Cth) ss 33V, 33ZF; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 13. But see *Perera v GetSwift Ltd*, [2018] FCA 732.

reasonable terms. This both recognises the current practice of the Court and expands its supervisory role in class action proceedings.

6.66 To enable this reform, the ALRC recommends that third-party litigation funding agreements for representative proceedings require Court approval in order to be enforceable. Such approval would not cut across the Court's power to assess the proportionality and reasonableness of funding commissions at the time settlement approval is sought. Rather, the Court will have an opportunity to consider the terms of the agreement as a whole including, for example, the scope and extent of the indemnity offered to the representative plaintiff, the degree of control sought by the funder, the funder's ability to unilaterally instruct a different plaintiff law firm, and the appropriateness of any dispute resolution mechanism.

6.67 The approval process also enables a critical evaluation of how class members were approached to enter into an agreement with the litigation funder. Mr Kirk SC has expressed concern regarding the adequacy of disclosure by litigation funders, explaining that group members sign up

> quite likely by clicking on a button on their screen which encourages them to do so whilst saying that terms and conditions apply. One wonders how, say, the banks might fare if they engaged in the practice of signing consumers up to a contract which took a substantial part of an asset in circumstances where the benefit of doing so was open to doubt and in the absence of full, frank and upfront disclosure of the costs and benefits of doing so. [72]

6.68 When approving a litigation funding agreement, the Court would be required to consider the information provided to class members and the nature of the interactions between class members, the representative plaintiff's solicitors and the litigation funder to assess whether free and informed consent was given by class members.

6.69 This recommendation is limited to class actions and reflects the unique role the Court has under Part IVA of the FCA Act to protect the interests of all class members. This recommendation responds to submissions that raised concerns that any court supervision of litigation funders currently occurs after the 'bargain is struck' between the class and the litigation funder and that at this time the class members are particularly vulnerable as they may not understand the risks attached to the litigation funding agreement or its terms.[73]

6.70 The recommendation also responds to concerns expressed by group members and representative plaintiffs in consultations with the ALRC. Group members expressed uncertainty as to the nature of the litigation funding agreement and uncertainty as to whether the funding commission was reasonable or competitive. Many only agreed to

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72 Jeremy Kirk SC, *The Case for Contradictors in Approving Class Actions Settlements*, (Seminar, NSW Bar Association, 14 June 2018).

73 Ashurst, *Submission 25*; Clayton Utz, *Submission 42*; US Chamber Institute for Legal Reform, *Submission 44*.

join a class action as they had explored all other options for redress and been unsuccessful. Some also were unaware that any settlement sum would be reduced not just by the funder's commission but also by the legal fees incurred by the plaintiff law firm. The ALRC considers greater Court oversight of the terms of a litigation funding agreement may assist in addressing class member vulnerability.

6.71 This recommendation would also address judicial concern about altering contractual rights. In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*, Beach J explained:

> I am loathe to permanently stay one of the proceedings, as to do so would substantially affect the contractual funding and retainer arrangements of over 1000 group members in whichever proceedings I stayed.[74]

6.72 A broad statutory power to intervene in these agreements should be prescribed by Part IVA of the FCA Act. A clear statutory power to reject, vary or set the terms of funding agreements would also:

- reinforce the Court's power to do so at settlement approval;
- give a statutory basis to common fund orders; and
- minimise any satellite litigation regarding the power of the Court to make orders varying funding agreements early in proceedings.

6.73 In addition, the ALRC recommends that two particular aspects of any litigation funding agreement be prescribed as a matter of statute; namely, that the funding agreement must include an indemnity in favour of the representative plaintiff for adverse costs, and that the funding agreement is governed by the law of Australia and subject to the jurisdiction of Australian courts. The former requirement clarifies that an essential rationale for litigation funders' receiving a commission from any settlement or judgment is that they assume the risk of adverse costs. The latter requirement, with respect to choice of law and jurisdiction, reflects that the terms of litigation funding with respect to an Australian class action should be governed by Australian law and any that disputes under that agreement must be capable of being adjudicated in Australia. Notwithstanding the increasing variety of sources of litigation funding, it is the fact that the funding is used to support litigation in Australia that provides the policy basis for restricting the choice of law and jurisdiction.

6.74 These recommendations involve interventions in what may be considered in other contexts as the private contractual rights of individuals.[75] Statutory intervention in litigation funding agreements is, however, consistent with the unique protective jurisdiction that the courts have with respect to class actions, the historic limitations on

74 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 [56].

75 See, eg, *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191 [7]–[14]; the Hon Justice M Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (Speech, 1 June 2017).

third-party litigation funding, and the residual limits of funding arrangements that could be considered contrary to public policy or otherwise illegal within the meaning of s 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) and its equivalent provisions in other states and territories.

Existing Court oversight of agreements

6.75 The Practice Note and the FCA Act provide for some overview and supervision of funding and legal costs agreements. Funding agreements between litigation funders and class members must be disclosed to the Court following the filing of a class action under Part IVA of the FCA Act.[76] Such agreements receive further scrutiny by the Court on an application for settlement approval pursuant to s 33V of the FCA Act, which provides the legislative basis for the settlement and discontinuance of class action litigation. This provision, together with s 33ZF of the FCA Act, has: grounded the decisions of the Court concerning commissions payable out of the settlement sum; prescribed its power to refuse to approve funding agreements at settlement (and to supervise costs agreements with solicitors);[77] and been referred to in support of the Court setting a commission rate at the time of settlement under a common fund order.[78]

6.76 Section 33V provides:

> Settlement and discontinuance—representative proceeding
>
> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

6.77 Section 33ZF provides:

> General power of Court to make orders
>
> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
>
> (2) Subsection (1) does not limit the operation of section 22.

6.78 These provisions enable the Court to refuse to approve a settlement agreement when legal costs are disproportionate or the funding commission is excessive[79]—the

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76 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 6.1, 6.2.

77 See, eg, *Pharm-a-care Laboratories Pty Ltd v Commonwealth* [No 6] [2011] FCA 277.

78 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330 [119]; See also *Federal Court of Australia Act 1976* (Cth) s 23.

79 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [22].

consequence of which may well be forcing the parties to trial.[80] It is, however, less clear whether ss 33V and 33ZF provide a statutory basis for the Court to depart from an agreed funding commission if the Court concludes that the commission (or another element of the agreement) stands in the way of approving settlement.[81]

6.79 A further question arises as to whether the Federal Court can make orders which 'upset the bargain struck between the funder and group members'.[82] As mentioned above, the ability of the Court to do so has been grounded on ss 33V and 33ZF, and was said to be drawn from its protective and supervisory role.[83] Although it has generally been agreed that any power lies in s 33V(2),[84] there has not been unanimity as to its true source nor as to the circumstances in which the power should be exercised. In *Blairgowrie Trading Ltd v Allco Finance Group Ltd*, Beach J noted:

> I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargains dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF. I am empowered to make 'such orders as are just with respect to the distribution of any money paid under a settlement'.[85]

6.80 It is not, however, universally accepted that s 33V(2) or any other statutory provision provides the Court with power to modify contractual terms of a funding agreement. For example, in *Clarke v Sandhurst Trustees Limited (No 2)*,[86] the third-party litigation funder argued, albeit unsuccessfully, that the Court did not have the power to vary the funding agreement, suggesting that the previous commentary of the Court was dicta that 'ought not to be followed'.[87] There is division as to the extent of the power of the Court among the judiciary.[88]

6.81 In *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) (Petersen)*,[89] Murphy J agreed that s 33V and s 33ZF conveyed power to the Court to vary a funding commission under an agreement. His Honour acknowledged that the power to vary had 'recently been doubted', and suggested that the power to vary other

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80 See, eg, *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527.

81 See *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [22]–[36].

82 Lee, above n 75; *Clarke v Sandhurst Trustees Limited (No 2)* (2018) FCA 511 [12]. Also see the defence arguments regarding the scope of the Court's power in, eg, *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330 [101]; (2017) 343 ALR 476; *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409.

83 See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 [7]–[14].

84 See, eg, *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409 [28], [29]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 [110].

85 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 [110].

86 [2018] FCA 511.

87 *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511 [18].

88 See, eg, *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [52].

89 [2018] FCA 1842.

terms of the funding agreement may be a 'further step'.[90] In Peterson, the combination of funding commission and legal fees would have left group members with only two percent of the settlement.[91] The legal costs were decreased by the Court by 40%, and the common fund order was reduced by 11.3%—a reduction of $2 million. This left group members with 33% of the settlement sum.[92] Justice Murphy did not agree, however, to amend the terms of the funding agreement regarding the reimbursement of the funder's legal costs, disbursements and ATE insurance premium.

Provide a statutory power to reject, vary or set terms

6.82 The lack of a specific statutory power to vary or set agreements as between funders and class members has been described by the Honourable Ray Finkelstein QC as an 'immediate problem'.[93] The need for an express statutory power was considered by the VLRC in its 2018 report on litigation funders and group proceedings. In that report, the VLRC observed that the 'source of the court's power to set a funding fee at a rate other than that stipulated in the funding agreement, and the circumstances in which it would be appropriate to exercise this power, are unresolved'.[94] It recommended that the Part 4A of the *Supreme Court Act 1986* (Vic)—which mirrors Part IVA of the FCA Act—should be amended to provide the Court with specific powers to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to ensure that they are fair and reasonable.[95]

6.83 In *Liverpool City Council v McGraw-Hill Financial, Inc*, Lee J—who does not consider the Court to have power under s 33V or s 33ZF to vary or set funding agreements[96]—asserted that:

> if the legislature, cognisant of the developments in Part IVA proceedings following the rise of a sophisticated market for litigation funding, wishes the Court to have an express power to vary funding agreements to prevent excessive returns and abuses, then express statutory power should be provided and detailed criteria should be set out which identifies the basis or bases upon which that power should be exercised.[97]

6.84 The ALRC considers that a statutory power to vary the terms of a litigation funding agreement should be coupled with a requirement that funding agreements with respect to a class action require court approval to be enforceable.

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90 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [202].
91 Ibid [5].
92 Ibid [14], [15].
93 Ray Finkelstein, 'Class Actions: The Good, the Bad and the Ugly' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 432.
94 Victorian Law Reform Commission, above n 2, [5.40].
95 Ibid rec 24.
96 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [47].
97 Ibid [51].

6.85 The majority of third-party litigation funders who made a submission to this Inquiry were opposed to requiring court approval for litigation funding agreements to be enforceable and the introduction of a statutory power to vary the funding agreement.[98] Harbour Litigation Funders (HLF) suggested that the Court should only intervene in contract in exceptional circumstances. HLF further argued against a specific statutory power to vary funding agreements, citing that:

- to operate effectively and commercially funders require certainty of contract;
- courts are poorly placed to make a commercial decision regarding an agreed commission rate;[99]
- courts do not intervene in other matters in this way; and
- if a statutory power to intervene in contracts between funders and plaintiffs was introduced in Australia, funders may withdraw from the market.[100]

6.86 Law firm Maurice Blackburn acknowledged that a discrete statutory power to vary, amend or reject litigation funding agreements may introduce a degree of 'uncertainty and timidity in the litigation funding market, at least for a period of time as the practical application of this type of provision evolves and principles become settled'. Although ultimately Maurice Blackburn supported the introduction of such a provision.[101]

6.87 The Association of Litigation Funders Australia (ALFA) considered such a provision to be unnecessary. For ALFA, competition acts as the 'best mechanism' to set fees and commission rates, and 'the Courts' current powers in respect of approval of settlements are sufficient to protect class members'.[102]

6.88 International Litigation Partners stated:

> Presently, the Court can already 'regulate' pricing in open class actions where the litigation funder wishes to obtain the Court's imprimatur to collecting commission from people who have not entered into contracts (by seeking a common fund order). Outside that situation, litigation funders should be able to insist upon its contracts in other contexts given that all the claimants will have signed those contracts (and made a determination to do so, often with third party legal advice, that the return offered by the litigation funder was fair and reasonable in the circumstances, compared to alternative funding offers, if there were any).[103]

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98 Harbour Litigation Funding Limited, *Submission 17*; Litigation Capital Management Limited, *Submission 30*; International Litigation Partners, *Submission 31*; IMF Bentham Limited, *Submission 50*; Association of Litigation Funders of Australia, *Submission 58*; cf Therium Australia Limited, *Submission 19*.

99 See also NSW Young Lawyers, *Submission 68*. NSW Young Lawyers suggested defining the power so that the Court may approve or disallow a particular rate, rather than the setting of a rate.

100 Harbour Litigation Funding Limited, *Submission 17*.

101 Maurice Blackburn, *Submission 37*.

102 Association of Litigation Funders of Australia, *Submission 58*.

103 International Litigation Partners, *Submission 31*.

6.89 This view was supported by the Victorian Bar Association, who suggested that outside of a common fund order, there is little justification for an express power to intervene to upset or otherwise scrutinise private agreements between funders and group members.[104] While agreeing that the power should have a legislative basis, plaintiff law firm Slater and Gordon stressed that the Court should use it sparingly and only in open class actions.[105]

6.90 Nonetheless, the majority of stakeholders to this Inquiry were in favour of providing a statutory basis for the Court's power to reject, vary or set the commission rate in litigation funding agreements.[106] Primarily, a statutory power was seen as a way to remove doubt about the Court's capacity to intervene regarding the terms and commissions set in funding agreements.[107] While there was some confusion over when in proceedings the Court may exercise this power, there was general consensus that it should occur early in the proceedings,[108] and that any approval or amendment made early in proceedings should stand 'in the absence of the Court making any further order',[109] such as at the stage of settlement approval. The ALRC agrees with this approach.

6.91 The Australian Bar Association observed that the commission rate was not the only 'contractual integer' that determined the funder's contractual entitlement. It suggested that any statutory power should extend beyond the power to reject, vary or set the 'commission rate' to encompass other terms of the agreement relevant to the calculation of the funder's entitlement to payments.[110] In *Liverpool City Council*, Lee J suggested that any statutory power should prevent both 'excessive returns and abuses'.[111] The ALRC agrees, and suggests that the discretion of the Court to vary, set or amend funding agreements should extend to reviewing other terms when justice requires it, such as: the funder's right of exit; the funder's capacity to instruct an acting solicitor; and proposed project management fees.

6.92 Accordingly, the ALRC posits the power as one to 'reject, vary or set the terms of third-party litigation funding agreements when the interests of justice require', to be used by the Court in its supervisory role when necessary to protect group members, and

104 Law Council of Australia, *Submission 62*.

105 Slater and Gordon, *Submission 54*.

106 Proposal 5–3 of the *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Discussion Paper 85 suggested that the Federal Court should be given an express statutory power to reject, vary or set the commission rate in third-party litigation funding agreements and contingency fee agreements if adopted. The following submissions supported that proposal: M Legg, J Metzger, *Submission 12*; AustralianSuper, *Submission 33*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Clayton Utz, *Submission 42*; Allens, *Submission 52*; Slater and Gordon, *Submission 54*; Levitt Robinson, *Submission 56*; Risks and Insurance Management Society Australasia, *Submission 59*; HESTA, *Submission 61*; Law Council of Australia, *Submission 62*; King and Woods Mallesons, *Submission 65*; Australian Bar Association, *Submission 69*.

107 See, eg, Clayton Utz, *Submission 42*.

108 See, eg, Therium Australia Limited, *Submission 19*.

109 M Duffy, *Submission 36*.

110 Australian Bar Association, *Submission 69*.

111 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [51].

agrees with Maurice Blackburn that the business of litigation funding is unlikely to be affected by the introduction of this statutory power, at least in the long term.

6.93 While the ALRC does not propose the development of statutory criteria in order to define the 'interests of justice', relying instead on the existing and developing jurisprudence of the Court, Recommendation 14 also requires that certain provisions be included in the funding agreement if it is to be approved by the Court—specifically an indemnity for adverse courts and Australian choice of law and jurisdiction.

Managing conflicts of interest

6.94 Litigation funders are in a unique position. They fund litigation and can give directions to the plaintiff's solicitors, but they are not the client. This can create numerous situations of conflicts not addressed by the regulatory mechanisms that aim to manage conflicts mentioned above. These are instead included in Regulatory Guide 248, a comprehensive document requiring funders to have in place, and follow, continual 'robust arrangements for addressing potential, actual or perceived conflicts of interest'.[112] Failure to maintain adequate practices and follow certain procedures for managing these conflicts is an offence.[113]

Identified conflicts affecting litigation funders

6.95 Regulatory Guide 248 identifies that conflicts can arise for litigation funders when: a solicitor acts for both funder and class members; there is a pre-existing legal or commercial relationship between a funder, solicitors and/or members; and a funder has control of, or has the ability to control, the conduct of proceedings.[114] It notes further:

> The nature of the arrangements between the parties involved in a litigation scheme ... has the potential to lead to a divergence between the interests of the members and the interests of the funder and lawyers because:
>
> - the funder has an interest in minimising the legal and administrative costs associated with the scheme, and maximising their return;
> - lawyers have an interest in receiving fees and costs associated with the provision of legal services; and
> - the members have an interest in minimising the legal and administrative costs associated with the scheme, minimising the remuneration paid to the funder and maximising the amounts recovered from the defendant.[115]

112 ASIC, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (2013) [248.18].
113 *Corporations Regulations 2001* (Cth) reg 7.6.01AB(3).
114 ASIC, above n 112, [248.13].
115 Ibid [248.11].

6.96 These identified conflicts could affect the recruitment of prospective members, the terms of any funding agreement, and any decision to settle or discontinue the action.

Adequate protection of members

6.97 Regulatory Guide 248 aims to give practical guidance to litigation funders on how they may decide to meet their obligations concerning conflicts of interest.[116] It prescribes that the commercial interests of funders need to be 'pursued in a manner that ensures adequate protection of members' interests'.[117]

6.98 Protecting the interests of members is expected to be done through effective disclosure, which is considered to be a 'key mechanism' to manage potential and actual conflicts of interest.[118] Disclosure should include, for example, clearly disclosing when certain members of the scheme are likely to receive a greater proportion of any settlement because they have helped fund the claim.[119]

6.99 The funding agreement must also protect the interests of members. As Regulatory Guide 248 notes:

> Members do not always have legal knowledge, and may not be well placed to negotiate a funding agreement or have the ability to assess the terms they agree to. This can create an asymmetry of bargaining power between the funder and the members.[120]

6.100 Certain terms must be included in the funding agreement,[121] including a cooling-off period so that members may seek legal advice, and an obligation for solicitors to give priority to the instructions given by a member over those of a funder.[122]

6.101 Regulatory Guide 248 requires further that, when a matter has settled prior to the claim being filed with the court, the terms of the settlement must be approved by counsel, who must be mindful of procedures and policies to protect the interests of class members.[123] Counsel must be satisfied that the settlement is 'fair and reasonable', taking into account, among other things: the amount offered to each member; the prospects of success in the proceeding; the likelihood of members obtaining judgment for an amount significantly in excess of the settlement sum; the cost of proceedings if continued to judgment; whether the funder may refuse to fund further proceedings if the settlement is not approved; and whether settlement involved any unfairness to any members for the benefit of others.[124]

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116 Ibid 2.
117 Ibid [248.49].
118 Ibid [248.51].
119 Ibid [248.54].
120 Ibid [248.69].
121 In addition to providing that the funding agreement must be consistent with the unconscionable conduct and consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (Cth).
122 ASIC, above n 112, [248.71].
123 Ibid [248.88].
124 Ibid [248.94]–[248.95]. This approach aligns with the test applied by the Federal Court in approving the settlement of a representative proceeding under the *Federal Court of Australia Act 1976* (Cth): See Chapter

Adequate practices

6.102 To demonstrate the implementation of and adherence to adequate practices, litigation funders must have documentation to show that: a review has been conducted to identify and assess potential conflicting interests; procedures have been written to identify and manage conflicts of interest; and these procedures have been implemented. The written procedures are required to be reviewed regularly, 'at least every 12 months', and must include procedures that are monitored and managed by senior management or partners about protecting the interests of members and prospective members.[125]

6.103 Regulatory Guide 248 also includes procedures dealing specifically with situations where:

- **The solicitor acts for both the funder and member, or there is a pre-existing relationship between any of the parties:** If there is a relationship between funder, solicitors and members, the relationship needs to be 'prominently' disclosed to members,[126] with enough detail to allow members to make informed decisions about how the relationship may affect the service being provided to them.[127]

- **There is no direct contractual relationship between the solicitor and the members:** If there is no direct contractual relationship between the solicitor and the members, any funder is to engage the solicitor on terms that make clear that if there is a divergence of interests between the funder and members, the solicitor ensures that the interests of the members are adequately protected.[128]

- **The solicitor acts solely for members yet receives instructions from the funder:** Regulatory Guide 248 does not consider that the solicitor-client relationship (when the solicitor acts solely for the members) impedes the solicitor from receiving instructions from the funder, or the ability of the solicitor to 'consider these instructions in light of their obligation to the members'.[129]

6.104 The obligations set by Regulatory Guide 248 are scalable—what is required to meet them will vary depending on the nature, scale and complexity of the litigation scheme.[130] 'Nature, scale and complexity' include factors such as: the number of members of the litigation scheme; the potential for conflicts of interest to arise; identity of the group members; legal representation of the group members; and the structure of the litigation scheme. It is noted that, for small and simple scheme arrangements, management of conflicts could include meetings with affected members and periodic reviews of files and records. Large, complex schemes may require detailed policy manuals, dedicated staff,

5—Powers of the Federal Court: Settlement Approval.

125 Ibid table 1, p 11.
126 Ibid [248.81].
127 Ibid [248.85].
128 Ibid [248.77].
129 Ibid [248.79].
130 Ibid 12.

internal structures and reporting lines, and comprehensive disclosure of potential and actual conflicts of interest.[131]

Reviews of Regulatory Guide 248

6.105 A post-implementation review of Corporations Amendment Regulation 2012 (No 6) was published by the Department of the Treasury (Cth) in October 2015.[132] This review suggested that the approach taken by the Commonwealth Government and ASIC had been successful in maintaining access to justice—evidenced by an increase in filings of class actions and the number of litigation funders active in the market. It also reported that the cost of compliance with Regulatory Guide 248 was low.[133]

6.106 Stakeholders who made submissions to that inquiry were divided in their support for Regulatory Guide 248. Some suggested that the conflicts of interest regulation and guidelines had not provided any additional benefit to consumers. They had instead duplicated pre-existing constraints on solicitors and had unnecessarily increased the cost of litigation funding. Other stakeholders suggested that Regulatory Guide 248 did not provide a mechanism to enforce the requirement to have procedures in place to address conflicts of interest, and that the existing regulations remained insufficient to deal with all potential conflicts of interests arising out of the complex relationships entered into in funded class actions.[134]

6.107 This concern was mirrored by the VLRC in its consultation paper on litigation funding and group proceedings, which questioned whether the 'light touch' regulation was enough to protect the interests of class members.[135]

131 Ibid [248.32].

132 Australian Government, Treasury, 'Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)' (October 2015).

133 Ibid [85]. Treasury reviewed the 'compliance impact for litigation funders' by assessing the savings in compliance costs for litigation funders from not having to comply with the licensing and disclosure requirements applicable to MIS and financial product providers under the Corporations Act with the increase in compliance costs due to the requirement of having conflict of interest management arrangements in place. It found the regulatory cost saving of not having to hold an AFSL was around $581,000 on an average annual basis and not having to develop a product disclosure statement as required for a MIS was $1.4 million on an average annual basis. The conflict of interest management arrangement costs was estimated at $181,500 on an average annual basis, amounting to a net regulatory cost saving for litigation funders of $1.8 million: [68], [77].

134 Ibid 18.

135 Victorian Law Reform Commission, above n 18, [3.77].

Introduce annual reporting to the regulator

Recommendation 15 The Australian Securities Investments Commission *Regulatory Guide 248* 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.

6.108 Regulatory Guide 248 provides extensive guidance and imposes appropriately designed obligations on litigation funders, yet there is no way to determine if funders are following it or to what extent. Regulatory Guide 248 requires litigation funders to review their written procedures every 12 months.[136] This is an internal obligation, currently undertaken without review by the regulator. The ALRC recommends that those subject to Regulatory Guide 248 should also be required to report on their compliance to the regulator.

6.109 It is possible that some litigation funders may not be meeting their obligations under Regulatory Guide 248. There is little oversight or action from ASIC. There is no record of ASIC, either proactively or in response to a complaint, investigating or initiating an action against a litigation funder for breach of the obligations in Regulatory Guide 248. As noted by the VLRC, the 'level of compliance monitoring to date has contributed to concern that there is no effective oversight of industry practices or prevention of unethical conduct'.[137]

6.110 Regulator inaction may indicate that there are few, if any, issues that have arisen involving conflicts of interest between litigation funders, solicitors, and/or class members. It may also be the consequence of the structural features of funded class actions where the most likely complainants (class members) remain unaware of any breach because they are not directly involved in the day-to-day management of the matter, nor typically party to the funding agreement or retainer.

6.111 It has been suggested that Regulatory Guide 248 is inherently ineffective as a regulatory tool. Professor Morabito and Professor Waye observe that:

> [g]iven that disclosing conflicts of interest rarely enhances rational consumer decision making and that disclosure may in fact lull consumers into a false sense of security, questions must therefore be raised about the value of these ASIC safeguards.[138]

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136 ASIC, above n 112, [248.43].

137 Victorian Law Reform Commission, above n 2, [2.113].

138 Vince Morabito and Vicki Waye, 'Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions' (2017) 36(2) *Civil Justice Quarterly* 213, 235 Nonetheless, the authors note that there have been no reports of consumer dissatisfaction with litigation funding arrangements and determine that 'Australian consumers seem quite happy' with the access to justice provided by litigation funders.

6.112 Stakeholders to this Inquiry also noted the limited efficacy of Regulatory Guide 248 in its current form.[139] Some suggested that the introduction of a reporting requirement would do little to improve the situation, with the US Chamber Institute for Legal Reform suggesting that, while 'imposing an obligation to report annually to the regulator in relation to a funder's compliance may be an improvement on the current situation, Regulatory Guide 248 will continue to be of limited value until compliance with its terms is enforced by a proactive regulator.'[140]

6.113 Others suggested ways to enhance the regulator's role.[141] For example, the NSW Society of Labor Lawyers suggested that the guide would be stronger if ASIC was empowered to perform ad hoc audits, subject to a one month notice period.[142] Norton Rose Fulbright suggested that the proposed annual reports to the regulator be made publicly available and that the regulator reserve the right to remove the existing exemption to licensing requirements in circumstances of non-compliance.[143] Nonetheless, the majority of stakeholders to this Inquiry expressed support for an annual reporting requirement to be integrated into Regulatory Guide 248.[144]

6.114 The ALRC recognises that, in isolation, the requirement to report may not be an effective tool against misconduct, particularly where that misconduct might consist of almost undetectable behaviours, such as subtle (but inappropriate) pressure to settle. It may however prevent more overt breaches of the rules outlined in Regulatory Guide 248, and may further:

- **Promote investigation by the regulator when required:** Inadequate reporting, or failure to report, may bring any wayward litigation funders to the attention of the regulator.
- **Create a compliance-focused culture:** A proposal for litigation funders to report to the regulator on compliance with the requirements of Regulatory Guide 248 may assist funders to position themselves within a compliance-based profession.

6.115 The ALRC also recognises that the imposition of a reporting requirement will require extra resources for the regulator and may increase costs for litigation funders that may be passed on to class members in terms of larger commission rates. However,

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139 See, eg, Norton Rose Fulbright, *Submission 40*; Clayton Utz, *Submission 42*; NSW Society of Labor Lawyers, *Submission 55*; Australian Bar Association, *Submission 69*.

140 US Chamber Institute for Legal Reform, *Submission 44*.

141 Norton Rose Fulbright, *Submission 40*; NSW Society of Labor Lawyers, *Submission 55*.

142 NSW Society of Labor Lawyers, *Submission 55*.

143 Norton Rose Fulbright, *Submission 40*.

144 Professor M Legg, J Metzger, *Submission 12*; Harbour Litigation Funding Limited, *Submission 17*; Ashurst, *Submission 25*; Litigation Capital Management Limited, *Submission 30*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Maurice Blackburn, *Submission 37*; MinterEllison, *Submission 45*; IMF Bentham Limited, *Submission 50*; Slater and Gordon, *Submission 54*; Law Council of Australia, *Submission 62*; NSW Young Lawyers, *Submission 68*; Queensland Law Society, *Submission 66*; Law Society of New South Wales, *Submission 64*.

assuming funders are already compliant, reporting should impose only a small additional burden.

New methods of litigation funding

Recommendation 16 Regulation 5C.11.01 of the *Corporations Regulations 2001* (Cth) should be amended to include 'law firm financing' and 'portfolio funding' within the definition of a '*litigation funding scheme*'.

6.116 Since the amendments to the *Corporations Regulations 2001* (Cth) (the Corporations Regulations) exempting litigation funders from existing schemes in 2013, a much wider range of funding models has emerged, and they continue to evolve.

6.117 Portfolio funding or law firm financing is increasing as an alternative to case-by-case funding. Broadly, there are two types of arrangements: the first involves finance structured around a law firm, or department within a law firm, where the claimants are various clients of the firm; or, secondly, finance structured around a corporate claim holder or other entity which is likely to be involved in multiple legal disputes over a defined period of time. Structuring finance around multiple claims under either model usually involves some form of cross-collateralisation.

6.118 It is also possible that funding may manifest as a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain control over its investment (in the litigation) through traditional corporate governance,[145] although the ALRC has not heard of this occurring in Australia.

6.119 Accordingly, litigation funding may also occur through the funder:

- taking control of a potential claimant in order to control the litigation;
- investing in a law firm to support multiple actions (portfolio approach); or
- investing in a law firm to support one client with multiple actions.

6.120 The ALRC has also heard of funders securitising their interest in a particular piece of litigation; in effect, the selling of shares in the prospective proceeds of a class action.

6.121 These arrangements have the potential to create additional conflicts of interest issues.[146] They are not the types of funding arrangements that were contemplated by the amendments to the Corporations Regulations.

145 ICCA-Queen Mary Task Force, *Report on Third-Party Litigation Funding in International Arbitration*, Report No 4 (2018), 35.

146 Ibid 38-39.

6.122 There is concern that some litigation funding schemes may not fall within the ambit of reg 5C.11.01 of the Corporations Regulations, which defines litigation funding schemes for the purpose of excluding them from MIS. There is a lack of clarity as to whether evolving forms of litigation funding, including portfolio funding and law firm funding, are exempt from the definition of MIS and the consequences that flow from such a conclusion.

6.123 For reasons of certainty, the ALRC considers it necessary that the scope of reg 5C.11.01 be clarified. Otherwise, it is possible that a lacuna in the scope of schemes to which reg 5C.11.01 applies, and in the scope of the correlative obligation imposed by reg 7.6.01AB (obligations to manage conflicts), exists. There may be schemes which are not captured by reg 5C.11.01 and which may be entirely unregulated.

6.124 The recommendation to expand the definition of third-party litigation funders so to capture organisations that fund in this manner received general support by stakeholders to this Inquiry.[147] Professor Legg and Dr Metzger agreed that any 'entity that engages in third-party derived method of litigation financing should be subject to the conflicts management requirements and attendant reporting requirements'.[148] Others were more cautious, with Phi Finney McDonald agreeing on the condition that the definition of law firm financing did not extend to 'regular financing arrangements for law firms where the financier has no interest in resolution proceeds other than indirectly by reference to the law firm's recovery of its own legal costs'.[149] The Australian Bar Association also cautioned against casting the net too widely:

> In principle, the ABA agrees that the definition of "litigation scheme" in the *Corporations Regulations 2001* (Cth) should be reasonably adapted so as to capture every possible permutation of a third-party litigation funding agreement, whilst ensuring that the definition is not so broad that it has unintended consequences.[150]

147 M Legg, J Metzger, *Submission 12*; Harbour Litigation Funding Limited, *Submission 17*; Maurice Blackburn, *Submission 37*; Norton Rose Fulbright, *Submission 40*; Clayton Utz, *Submission 42*; US Chamber Institute for Legal Reform, *Submission 44*; IMF Bentham Limited, *Submission 50*; Slater and Gordon, *Submission 54*; NSW Society of Labor Lawyers, *Submission 55*; Law Council of Australia, *Submission 62*; Law Society of New South Wales, *Submission 64*; Queensland Law Society, *Submission 66*; Australian Bar Association, *Submission 69*.

148 M Legg, J Metzger, *Submission 12*.

149 Phi Finney McDonald, *Submission 34*.

150 Australian Bar Association, *Submission 69*.

7. Solicitors' Fees and Conflicts of Interest

Contents

Introduction

7.1 Class action proceedings are often run with the support of third-party litigation funders who cover and then recoup legal costs and receive a commission from an award of damages, or by solicitors on a 'no win/no fee' arrangement. Most matters receive third-party funding, meaning that the types of matters that proceed are skewed towards ones with the highest financial returns and that group members usually pay two sets of fees: legal costs and third-party litigation funding commissions.

7.2 The first part of this chapter discusses percentage-based fees (commonly called 'contingency fees')—a method of billing for legal services through a percentage of the amount recovered by the litigation rather than through time-based or cost scale billing. Percentage-based fee billing is currently prohibited in Australia, although it has been introduced in cognate jurisdictions such as Canada and England and Wales.

7.3 The ALRC recommends a limited percentage-based fee model for class action proceedings, which aims to provide for a greater return to group members. Percentage-based fee arrangements in class action proceedings may further enable medium-sized class action matters to proceed and, as class actions are strictly supervised by the Federal Court, representative plaintiffs and group members remain protected from paying a single yet disproportionate or unreasonable fee.

7.4 The second part of this chapter deals with actual or perceived conflicts of interest that arise for solicitors who act in class action proceedings—with particular emphasis on dealing with the tripartite arrangement of funder, solicitor and representative plaintiff/group members. The arrangement whereby a solicitor may have an interest in a third-party funder that is directly involved in their proceedings is distinguished from a percentage-based fee arrangement, and is identified as one where conflicts cannot be managed.

7.5 Solicitors and law firms that represent group members in class action proceedings have expanded from a few expert class action firms to an array of mid-range and boutique offerings.[1] There is an imperative for these solicitors, especially if the prohibition against percentage-based fees is relaxed, to be appropriately educated to deal with class action proceedings. The ALRC recommends that a voluntary class action accreditation scheme should be introduced to the suite of accreditation programs available to practising solicitors.

Methods for billing legal costs in class action proceedings

Existing billing methods

7.6 Australian solicitors are not permitted to bill clients on a percentage-fee basis—that is, to provide their services in exchange for a percentage of the amount recovered by the litigation.[2] This is a blanket prohibition covering all types of legal services for all legal actions.

7.7 Solicitors may structure their fee arrangements in numerous other ways, as summarised by law firm Levitt Robinson:

> There are generally three types of fee arrangements between lawyers and their clients:
>
> (a) first, *input based* fee arrangements, in which the lawyer is paid in accordance with the amount of work performed. This encompasses time-based billing, which is currently the most common form of fee arrangement;
>
> (b) second, *output based* fee arrangements, in which the lawyer is paid based on results that are achieved, which is not generally acceptable in Australia; and
>
> (c) third, *fixed* fee arrangements, in which the lawyer and client agree on a fee prior to the work being performed and that fee is paid regardless of all other variables (note that *pro bono* arrangements are essentially fixed fee arrangements where the fee is fixed at zero).
>
> In addition to the manner of charging fees, there are generally three arrangements by which the fees are billed to clients:

1 See Chapter 3—Incidence.

2 *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3, cl 27(1); *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 183; *Legal Profession Act 2008* (WA) s 285.

> (a) first, *upfront billing*, where the lawyer will not perform work without having been paid in advance;
>
> (b) second, *ongoing billing*, where the lawyer periodically bills the client for work performed and the client then pays the bill; and
>
> (c) third, *speculative billing*, where the lawyer is not paid unless and until a successful outcome is achieved.
>
> Each retainer agreement between a lawyer and a client must have a particular fee arrangement and a particular billing arrangement. For example, the most common form of retainer is an *input based* fee arrangement (lawyers charge by the hour, divided into 10 x 6 minute units) and an *ongoing billing* arrangement (lawyers bill periodically for work performed).[3]

Conditional fee agreements (speculative billing)

7.8 It is common for solicitors acting for the representative plaintiff in unfunded class action proceedings to bill the representative plaintiff using a conditional fee agreement, otherwise known as a 'no win/no fee' arrangement.[4] Under these arrangements, payment for the solicitors' time and output is dependent on a successful outcome, although the representative plaintiff is usually liable for: disbursements (payments for services or to third-parties connected to the proceedings, such as photocopying expenses, expert reports, court fees and barrister's fees);[5] security for costs; and any adverse costs order.[6]

7.9 Conditional fee agreements usually include an uplift fee of not more than 25% of the billed amount on a successful outcome. A 'successful outcome', requiring a plaintiff to pay their solicitor may include:

- an out-of-court or pre-litigation settlement that results in compensation;
- a court or tribunal decision awarding compensation to the plaintiff;
- accepting advice to agree to a settlement offer made by the defence; or
- rejecting a settlement offer that the solicitor recommends should be accepted.[7]

7.10 Solicitors are also permitted to charge legal fees under a conditional fee agreement in other circumstances where the matter is not 'won' at trial, such as when the matter does not proceed or the plaintiff changes lawyers.

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3 Levitt Robinson, *Submission 56*.

4 *Legal Profession Act 2006* (ACT) s 284; *Legal Profession Uniform Law* (NSW) s 182; *Legal Profession Act* (NT) s 319; *Legal Profession Act 2007* (Qld) s 324; *Legal Practitioners Act 1981* (SA) sch 3, cl 26; *Legal Profession Act 2007* (Tas) s 308; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 182; *Legal Profession Act 2008* (WA) s 284.

5 Victorian Legal Services Board and Commissioner, '"No Win - No Fee" Costs Agreements' (October 2015) 1.

6 Vince Morabito and Vicki Waye, 'Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions' (2017) 36(2) *Civil Justice Quarterly* 213, 229.

7 Victorian Legal Services Board and Commissioner, above n 5, 2.

7.11 The uplift fee is intended to compensate solicitors for carrying some risk and is considered a form of interest for the deferred payment of fees over the course of the proceedings. Conditional fee agreements that include an uplift fee must outline how the uplift fee is to be calculated.[8] In all states and territories, disbursements are not to be included in the calculation of the fee.[9]

7.12 Conditional fee agreements must set out the circumstances that would form a 'successful outcome' in the proceedings. They must also be in writing; include a cooling off period; and inform the plaintiff of the right to seek independent advice. Conditional fee agreements are not available in all types of matters. For example, they are excluded from family law or criminal law matters[10] (none of which are relevant to Part IVA proceedings).

7.13 There may be other restrictions on conditional fee agreements. For example, in Queensland a personal injury matter undertaken on a conditional fee agreement is subject to the '50/50' rule.[11] This statutory rule places an upper limit on the professional fees that a law firm can charge, with the maximum amounting to no more than one half of the total settlement amount (after refunds and disbursements have been deducted).[12]

7.14 Contravention of provisions relating to conditional costs agreements by solicitors or law firms is an offence.[13] Solicitors that contravene the statutory requirements may be unable to recover the whole or any part of the uplift fee, and the fee may need to be repaid.[14]

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8 *Legal Profession Act 2006* (ACT) s 284(2); *Legal Profession Uniform Law* (NSW) s 182(3)(a); *Legal Profession Act* (NT) s 319(2); *Legal Profession Act 2007* (Qld) s 324(2); *Legal Practitioners Act 1981* (SA) sch 3, cl 26(2); *Legal Profession Act 2007* (Tas) s 308(2); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 182(3)(a); *Legal Profession Act 2008* (WA) s 284(2).

9 *Legal Profession Act 2006* (ACT) s 284(4)(b); *Legal Profession Uniform Law* (NSW) s 182(2)(b); *Legal Profession Act* (NT) s 319(4); *Legal Profession Act 2007* (Qld) s 324(4); *Legal Practitioners Act 1981* (SA) sch 3, cl 26(4)(b); *Legal Profession Act 2007* (Tas) s 308(4)(b); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 182(2)(b); *Legal Profession Act 2008* (WA) s 284(4)(b).

10 *Legal Profession Act 2006* (ACT) s 283(2); *Legal Profession Uniform Law* (NSW) s 181(7); *Legal Profession Act* (NT) s 318(2); *Legal Profession Act 2007* (Qld) s 323(2); *Legal Practitioners Act 1981* (SA) sch 3, cl 25(2); *Legal Profession Act 2007* (Tas) s 307(2); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 181(7); *Legal Profession Act 2008* (WA) s 283(2).

11 *Legal Profession Act 2007* (Qld) s 347.

12 Legal Services Commission (Qld), '"No Win-No Fee" Costs Agreements: Information for Consumers' (Fact Sheet, Vol 2, 6 December 2012) 6.

13 *Legal Profession Act 2006* (ACT) ss 284(6), 284(7); *Legal Profession Uniform Law* (NSW) s 182(4); *Legal Profession Act* (NT) ss 319(6), 319(7); *Legal Profession Act 2007* (Qld) s 324(6); *Legal Practitioners Act 1981* (SA) sch 3, cl 26(5); *Legal Profession Act 2007* (Tas) s 308(5); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 182(4); *Legal Profession Act 2008* (WA) s 284(5).

14 *Legal Profession Act 2006* (ACT) s 288; *Legal Profession Uniform Law* (NSW) s 185; *Legal Profession Act* (NT) s 323; *Legal Profession Act 2007* (Qld) s 328; *Legal Practitioners Act 1981* (SA) sch 3, cl 29; *Legal Profession Act 2007* (Tas) s 311; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 185; *Legal Profession Act 2008* (WA) s 287.

7.15 Uplift fees are generally not recoverable from the other side in a costs order—that is, they are not considered to be within reasonable party/party costs.[15] Party/party costs are the portion of legal costs that the court orders the unsuccessful party to pay or the costs negotiated in a settlement that the other party has agreed to pay. Costs orders are usually made with reference to reasonable time-base billings and successful plaintiffs may end up with 'out of pocket' legal expenses, including the uplift fee.

Blended billing arrangements

7.16 In class action proceedings, solicitors may bill the representative plaintiff or a third-party litigation funder in funded matters. Solicitors can access a matrix of options regarding fee arrangements and the manner in which they are charged. For example, representative plaintiffs may—concurrently with a conditional fee agreement or when they are funding the proceedings—receive funding from a third-party funder for disbursements and/or security for costs/adverse costs order, so that the matter is partially funded by their solicitor or themselves and a third-party funder. Blended billing arrangements may also include After-the-Event insurance or deferred partial billing.

After-the-Event insurance

7.17 Solicitors, third-party litigation funders, and representative plaintiffs may take out After-the-Event (ATE) insurance to cover any adverse costs order (this type of insurance may also be referred to as 'adverse costs order insurance'). ATE insurance is usually taken out by plaintiffs or their representatives.[16] ATE insurance may be taken out in matters where a conditional fee agreement is in place, or where the matter is self-funded or partially funded by a third-party litigation funder. ATE insurance can also be proffered by law firms acting on a conditional fee basis.[17] In these arrangements, the insurer recoups the premium from any award or settlement. The premium charged for ATE insurance is usually between 20%—40% of the policy indemnity limit.

7.18 Notwithstanding that the Federal Court of Australia has found that an appropriately worded ATE policy could constitute sufficient security for a defendant's costs,[18] ATE insurance does not have a large market in Australia. ATE insurance premiums are not recoverable in cost orders in Australia. Commonly, third-party litigation funders may take up ATE insurance policies and absorb the cost of the premium in their commission rates.

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15 Turnbull Hill Lawyers, 'The Legal Costs' (2017) 2.

16 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 80.

17 Morabito and Waye, above n 6, 29. See also *Creighton v Australian Executor Trustees Ltd* (Order by Middleton J; 26 June 2015) Annexure A, 3.

18 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699.

Deferred partial billing

7.19 Solicitors who are paid by third-party litigation funders may choose to 'share the risk' with the funder and invoice the funder for a percentage of the amount due for legal services—recouping the remainder on a successful outcome.

7.20 In all of these arrangements, solicitors bill pursuant to a scale of costs or time-based services (except any uplift fee or disbursements).

Rules of legal costs agreements

7.21 However constituted, rules govern the issuing and execution of legal costs agreements in Part IVA proceedings. For example, legal costs agreements between solicitors and representative plaintiffs in class action matters are required to be: in writing; provided to group members who are clients; and disclosed to the Federal Court at the start of proceedings.[19]

Percentage-based fee agreements in cognate jurisdictions

7.22 Percentage-based fee agreements have been introduced in some Commonwealth jurisdictions. For example, contingency fee agreements were first introduced for class actions only in Ontario Canada in 1992,[20] and more broadly in 2004.[21] In 2013, percentage-based fee agreements, termed 'damages-based fees', were permitted generally in England and Wales, having previously been restricted to employment matters.[22]

England and Wales

7.23 Damages-based fees (outside of employment tribunals) where introduced in England and Wales following the recommendations of Jackson LJ in his 2009 *Review of Civil Litigation Costs: Final Report* (the Jackson Report).[23] This report recommended permitting damages-based fee agreements for both solicitors and counsel, with recoverable costs measured on the conventional hourly basis (any difference was to be borne by the successful party).[24] This system was termed the 'Ontario Model' based on the operations of contingency fees in that jurisdiction (see below).

7.24 The Jackson Report also recommended that damages-based fee agreements be 'properly regulated', including that: solicitors be required to provide 'clear and transparent' advice and information on costs; a maximum percentage be set by statute;

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19 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 5.2, 5.3, 6.1–6.

20 *Class Proceedings Act*, 1992 (Ontario) § 33.

21 Bill 178, An Act to amend the *Solicitors Act* to permit and to regulate contingency fee agreements (2002); *Solicitors Act* R.S.O 1990 c.S.15; *Rules of Professional Conduct*, rule 2.08(3).

22 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 45; *Courts and Legal Services Act 1990* (UK) s 58AA.

23 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009).

24 Ibid rec 5.1(i), 131.

unfair terms and conditions be controlled;[25] and agreements should only be valid when a client has received independent legal advice.[26] Personal injury matters should be capped at 25% of the claimant's damages (excluding future costs and losses).[27]

7.25 The Jackson Report also suggested that an agreement on liability for an adverse costs order must be reached at the outset. If it is agreed that the solicitor will meet any costs order, then the 'additional risk should be reflected in the percentage recovery to which the solicitors will be entitled in the event of success'. It determined that disbursements could be met by the solicitor and then recouped on the success fee, or met by the client, depending on the agreement.[28]

7.26 Damages-based fee agreements were consequently introduced by the *Courts and Legal Services 1990* (UK):

> **58AA Damages-based agreements**
>
> (1) A damages-based agreement which... and satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But (subject to subsection (9)) a damages-based agreement which... does not satisfy those conditions is unenforceable.
>
> (3) For the purposes of this section—
>
> (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—
>
> (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
>
> (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained; ...
>
> (4) The agreement—
>
> (a) must be in writing;
>
> (aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;
>
> (b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

25 Ibid 132.
26 Ibid rec 5.1(ii).
27 Ibid 133.
28 Ibid 132.

(c) must comply with such other requirements as to its terms and conditions as are prescribed; and

(d) must be made only after the person providing services under the agreement has complied with such requirements (if any) as may be prescribed as to the provision of information.

(5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.

(6) Before making regulations under subsection (4) the Lord Chancellor must consult—

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

(d) such other bodies as the Lord Chancellor considers appropriate.

(6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.

(7) In this section—

"payment" includes a transfer of assets and any other transfer of money's worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);

"claims management services" has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act).

(7A) In this section (and in the definitions of "advocacy services" and "litigation services" as they apply for the purposes of this section) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).

(9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.

(10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.

(11) Subsection (1) is subject to section 47C(8) of the Competition Act 1998.

7.27 Accordingly, damages-based fee agreements are permitted in employment, personal injury and commercial litigation, but are not permitted in criminal and family law matters.[29] The rules and regulations regarding damages-based fee agreements apply only to legal representatives (they do not cover litigation funding agreements between funders and clients).[30]

7.28 Section 58AA(11) operates so to prohibit damages-based fee agreements in opt-out collective actions for infringements of competition law heard by the Civil and Administrative Tribunal (CAT).[31] This collective action regime was introduced in 2015, and there was concern that the availability of an opt-out action would move the English system closer to that of the United States.[32] Excluding the use of damages-based fee agreements in England and Wales was part of a safeguarding package aimed at preventing the incursion of US-style litigation and the bringing of unmeritorious claims.[33] Damages-based fees are not prohibited for class actions that run as 'representative proceedings' or under Group Litigation Orders, which are both strictly opt-in actions filed in the High Court of England and Wales.[34]

7.29 In permitted matters, the proportion of settlement that can comprise the damages-based fee is capped by the regulations as permitted by s 58AA(4)(b)—with the proportion varying depending on the type of matter. The *Damages-Based Agreements Regulations 2013* (UK) prescribe that, when acting in an employment matter, the maximum percentage of damages or settlement monies recovered available on contingency is 35%.[35] At first instance,[36] damages-based fees in personal injury matters are capped at 25%,[37] and all other civil litigation matters are capped at 50%.[38] A sliding scale, which depends on the point at which the case concludes or the level of recovery, can be included in a damages-

29 *Courts and Legal Services Act 1990* (UK) s 58AA; s 58AA(4)(aa).

30 Civil Justice Council (UK), 'The Damages-Based Agreements Reform Project: Drafting and Policy Issues' (August 2015) 33.

31 *Consumer Rights Act 2015* (UK) sch 8; *Competition Act 1998* (UK) s 47C(8); *Courts and Legal Services Act 1990* (UK) s 58AA(11).

32 Morabito and Waye, above n 6, 213.

33 Department for Business, Innovations and Skills (UK), 'Private Actions in Competition Law: A Consultation on Options for Reform—Government Response' (January 2013) 26; Morabito and Waye, above n 6, 230. See also Quinn Emanuel Trial Lawyers, 'Opt-out Collective Actions for Competition Damages Actions—A New Dawn for Litigation in the UK' (online) 2015.

34 *Civil Procedure Rules* (UK) rr 19.6, 19.10; Rachael Mulheron, 'Class Actions and Law Reform: Insights from Australia and England, a Quarter of a Century Apart' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 305.

35 *Damages-Based Agreements Regulations 2013* (UK) No 609, reg 7.

36 Caps do not apply to appeal proceedings, where parties are free to negotiate, reflecting the additional risk: Explanatory Memorandum to the *Damages-based Agreements Regulations 2013*, No 609 (UK) [7.14].

37 Excluding damages for future care and loss: *Damages-Based Agreements Regulations 2013* (UK) reg 4(2)(a)(ii).

38 *Courts and Legal Services Act 1990* (UK) ss 58AA(4)(b); *Damages-Based Agreements Regulations 2013* (UK) regs 4(2)(b), 4(3), 4(4). All caps include VAT: *Damages-Based Agreements Regulations 2013* (UK) regs 4(2)(b), 4(3), 7.

based fee agreement, so long as the maximum percentage does not exceed the statutory cap.[39]

7.30 The damages-based fee amount includes recoverable costs and counsels' fees, but excludes other expenses incurred by legal representatives.[40] Otherwise, solicitors acting under contingency fee agreements in England and Wales are not able to recover more than the contingency amount.[41]

7.31 Court-ordered costs cannot exceed the damages-based fee amount,[42] and are recoverable on a conventional hourly rate basis rather than by reference to the damages-based fee.[43] The inclusion of recoverable costs in the cap means that the legal representative for a successful plaintiff can only ever receive the agreed damages-based fee, which can be made up of the recoverable costs, with any shortfall coming from the client's damages.[44] For example, if damages are awarded at £10,000, and the damages-based fee is set at 50%, the solicitor will receive £5,000. If costs are awarded to the applicant at £2,500, the solicitor receives those costs plus £2,500 of the award, leaving the client with £7,500.

7.32 The regulations are silent as to whether solicitors are to be liable for adverse costs when acting under damages-based fee agreements.[45]

7.33 Damages-based fee agreements are rarely used in England and Wales. In 2015, the Civil Justice Council provided advice to the Government of the United Kingdom, proposing amendments to the regulations to reduce obstacles to use. The advice included excising counsel's fees from the capped contingency fee amount and providing for recoverable costs to be paid to the solicitor on top of the contingency fee amount.[46]

7.34 Lord Justice Jackson has cited three reasons for the low use of damages-based fee agreements in England and Wales. First, the recommendation elsewhere in his report that the indemnity principle be abolished by statute was not adopted.[47] In essence, the indemnity principle prevents a party recovering more by way of costs from an opponent than it is obliged to pay to its own lawyers. It was reported that this principle had enabled insurers to challenge the terms of the solicitors' retainer.[48]

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39 Civil Justice Council (UK), above n 30.

40 *Damages-Based Agreements Regulations 2013* (UK) reg 4(1)(a). This excludes personal injury matters: *Damages-Based Agreements Regulations 2013* (UK) reg 4(2).

41 Explanatory Memorandum to the *Damages-Based Agreements Regulations 2013*, No 609 (UK) [4.5].

42 Ibid [7.11].

43 Michael Legg, 'Contingency Fees—Antidote or Poison for Australian Civil Justice?' (2015) 39 *Australian Bar Review* 244, 267.

44 Explanatory Memorandum to the *Damages-Based Agreements Regulations 2013*, No 609 (UK) [7.10]–[7.14].

45 Herbert Smith Freehills, 'Litigation Notes: Contingency Fees or Damages-based Agreements' (online).

46 Civil Justice Council (UK), above n 30.

47 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) rec 4.1; Rachel Rothwell, 'Judged by Results' *Litigation Funding*, April 2018 7.

48 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 54.

7.35 Secondly, the rules and regulations were considered 'poorly drafted' and in need of reform. The third reason given for the low take-up was the refusal to permit 'hybrid' damages-based agreements,[49] which refers to the prohibition on billing legal services hourly with a damages-based fee[50] (although, this can be done with a success fee in conditional arrangements).

7.36 Stakeholders from England and Wales told the ALRC that low take-up has been affected by the complexity of the regulations, the unenforceability of any agreement that does not comply with s 58AA and the regulations, as well as the rigidity of permitted arrangements. Further, third-party litigation funder Therium advised that, in the United Kingdom most law firm are not economically structured to fund matters on a contingency basis.[51]

The development of ATE insurance and recoverability in England and Wales

7.37 ATE insurance developed in England and Wales following the Woolf Report in 1996.[52] Initially premiums for ATE insurance were not recoverable costs in litigation, which limited its use. This was amended in 1999,[53] so that premiums became recoverable (payable in a costs order from the unsuccessful party). Recoverability was based on the premise that 'certain claimants need to be protected against the risk of having to pay adverse costs. In other words, for policy reasons those claimants should be allowed to benefit from the costs shifting rule when they win, but be protected against its adverse effects when they lose'.[54] This change increased both the popularity of ATE insurance, and the premiums that were recoverable on success.[55]

7.38 The Jackson Report observed that high ATE insurance premiums, together with conditional fee agreements in England and Wales had been used as a tactical device to force settlement and avoid payment by the other party of these significant costs. Albeit, the use of ATE insurance had also filtered unmeritorious claims, as the insurers 'rigorously vet the risks which they are taking on'. [56]

7.39 Lord Justice Jackson viewed the operation of recoverable ATE insurance premiums as an 'extremely expensive' form of one-way costs shifting, under which defendants were the only party liable to pay costs and that plaintiffs, regardless of their means, were always protected.[57] The report introduced an option to replace the recoverability of ATE insurance with an actual one-way cost shifting rule. This would mean that, when the

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49 Rothwell, above n 47, 7.
50 Ibid 8.
51 Therium Australia Limited, *Submission 19*.
52 Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London, 1996).
53 *Access to Justice Act 1999* (UK) s 29.
54 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 87.
55 King & Wood Mallesons, 'ATE Insurance and Implications for Class Actions in Australia' (30 September 2014).
56 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 81.
57 Ibid 87.

plaintiff was successful, the defendant would be ordered to pay party/party legal costs. When the plaintiff (in a meritorious case) was unsuccessful, the defendant could not recoup costs. Premiums for ATE had risen so high, that, as noted by Jackson LJ:

> It would be substantially cheaper for defendants to bear their own costs in every case, whether won or lost, than to pay out ATE insurance premiums in those cases which they lose.[58]

7.40 This approach was ultimately adopted in personal injury matters[59]—where Jackson LJ had suggested 'costs protection can be targeted upon those who need it, rather than offered as a gift to the world at large'.[60]

7.41 In 2012 the recoverability of the policy premium costs was repealed.[61] The repeal was prospective, applying to premiums purchased after April 2013. The recoverability of the success fee in conditional agreements was also repealed.

7.42 While not dealt with in statute, Canadian courts have also held ATE insurance to be unrecoverable.[62]

Canada

7.43 All Canadian jurisdictions with class action legislative frameworks permit the use of contingency fee agreements.[63] In Ontario, contingency fee agreements in class action proceedings are governed by the *Class Proceedings Act* R.S.O 1992, which introduced contingency fee agreements for class actions in 1992.[64] Contingency fee agreements are also regulated by the *Solicitors Act* R.S.O 1990,[65] which permitted the use of contingency fee agreements for other claims in 2004.

7.44 Contingency fees are calculated on a 'lodestar' (hourly rate, increased by multiples ranging from one to five) or percentage of settlement basis.[66] Due to its potential to reward slow, 'duplicative and unjustified' work, an outright lodestar method of calculation is less likely to be used in most Canadian jurisdictions than the percentage of settlement value method—although it has been recognised by the courts that the percentage awarded will be somewhat informed by the value of services rendered by the lawyer.[67]

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58 Ibid.
59 *Civil Procedure Rules* (UK) 44.13 to 44.17.
60 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 88, rec 7.1.
61 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 46(2) repealed the *Access to Justice Act 1999* (UK).
62 See, eg, *Markovic v Richards*, 2015 ONSC 6983; *Foster v Durkin*, 2016 ONSC 684; *Valentine v Rodriguez-Elizalde*, 2016 ONSC 6395; *Wynia v Soviskov*, 2017 BCSC 195 (Supreme Court of British Columbia).
63 Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) 127.
64 *Class Proceedings Act* R.S.O 1992, ss 32, 33.
65 *Solicitors Act* R.S.O 1990, c.S.15, s. 28.1.
66 Kalajdzic, above n 63, 129.
67 Ibid 131–134.

7.45 Where in the range the fee falls will depend on: the difficulty of the matter; the risks; the costs of bringing the action; and the likelihood of success.[68] A 2013 study suggested that the average multiplier awarded in class actions in Ontario was 1.95, and the average percent of settlement value was 22%.[69] The same study found that the size of approved fee decreased on a sliding scale the higher the award.[70] Courts may review contingency fee agreements and endorse fees above the standard when it is fair to do so.

7.46 For class action proceedings, the percentage payable is subject to approval from the Court,[71] and the Court must only approve a 'reasonable' fee.[72] The courts consider: the time taken and the skill and responsibility of the solicitor; the legal complexity and monetary value of the matter; the results achieved; the client's expectation of costs and their ability to pay the fee.[73] The courts also consider whether the contingency fee sought is 'sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well'.[74]

7.47 Solicitors acting on a contingency fee basis are not permitted to collect both the pre-arranged contingency fee as well as legal costs paid by the other party, unless approved by a judge.[75]

7.48 Contingency fees are commonly used in Ontario, and were recently described by lawyer and class action academic Professor Jasminka Kalajdzic as the 'engine that drives class actions'.[76] In a jurisdiction where third-party litigation funders have only recently emerged, Professor Kalajdzic further noted that the Canadian class action regime can function 'only if there are risk-tolerant lawyers willing to take on a complex piece of litigation on a contingency fee basis'.[77]

7.49 The contingency fee regime has not been without controversy, with Professor Kalajdzic also observing that the '$8 million-a-year class action lawyer is not necessarily a policy victory'.[78] This observation was mirrored by the Law Commission of Ontario which, in its 2018 consultation paper on class actions in that jurisdiction, reported the view that 'class action legislation creates a good procedure, but is also used by plaintiff counsel as a "centre for profit"', which can 'negatively impact the public perception of whether class actions are useful in facilitating justice'.[79]

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68 *Rules of Professional Conduct*, rule 2.08(3).

69 Benjamin Alarie and Peter Flynn, 'Accumulating Wisdom: An Updated Empirical Examination of Class Counsel's Fees in Ontario Class Actions' (2014) 9(2) *Canadian Class Action Review* 355, 371; Kalajdzic, above n 63, 131.

70 Alarie and Flynn, above n 69, 371; Kalajdzic, above n 63, 133.

71 *Class Proceedings Act* SO 1992, c 6, s. 32(2).

72 *Class Proceedings Act* SO 1992, c 6, s. 33(8). For a discussion on 'reasonableness' see Kalajdzic, above n 63, ch 6.

73 Ibid 130.

74 Ibid citations omitted.

75 *Solicitors Act* R.S.O 1990 c.S.15, s. 28.1(8).

76 Kalajdzic, above n 63, ch 6.

77 Ibid 6, 10.

78 Ibid 6.

79 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms* (Consultation Paper,

7.50 Concerns about legal costs were raised by the Superior Court of Justice in *Brown v Canada (Attorney General) (Brown)*.[80] This case concerned proposed settlement agreements in this and another matter for the 'sixties scoop' proceedings—where Indigenous children were taken from their homes and communities by Government and placed into foster care or adoption. A contingency fee across four law firms that amounted to $75 million dollars (10% of the award) was not approved by the Court at that time—although the contingency had been approved by the Federal Court in an earlier, related judgment.[81]

7.51 In *Brown*, Belobaba J was not satisfied that $75 million for legal fees was 'anywhere close to reasonable'.[82] The Court acknowledged that the claim involved a high degree of risk of non-payment and had produced 'extraordinary' results for the class, yet, when using established methodology, suggested that a reasonable fee for the Brown case alone would likely be around 33% less than the stated amount.[83] Ultimately, the Court asked counsel to 'de-link' the legal fees from the rest of the settlement.[84]

7.52 Professor Kalajdzic outlined three other key issues with the operation of contingency fees in the Canadian context. First, the author identified an over-emphasis on the terms of the fee agreement by the court in its determination of reasonableness, noting that it is not possible to know how involved the representative plaintiff was in negotiating the fee agreement.[85] That the fee agreement binds the entire class also determines that fee agreements in class action proceedings should not attract the same 'degree of deference' as other contracts.[86] Secondly, the move away from the lodestar method of calculation may

> discourage a significant investment of time and resources in a file ... when the actual work performed and risks borne are no longer considerations in determining a reasonable contingency fee, lawyers do not have an obvious incentive to commit substantial time to a potentially risky cause.[87]

7.53 Conversely, 'over lawyering' can also be a problem, which can be countered by cross-checking the percentage method with the lodestar.[88]

7.54 Thirdly, making low risk/low resource work the most attractive to lawyers has the potential to decrease access to justice.

2018) 10, 23.

80 2018 ONSC 3429.

81 *Riddle, White and Charlie v. Her Majesty the Queen* 2018 FC 641.

82 *Brown v Canada (Attorney-General)* 2018 ONSC 3429 [15].

83 At $25 million: Ibid [41], [70], [71].

84 Ibid [91]. Counsel did amend the agreement to delink and obtained Court approval of the settlement. In terms of the fee, however, it was successfully argued that the Federal Court (in *Riddle*) had already approved $37.5 million to go to three of the four firms handling the Federal Court file and that *res judicata* prevented a judge from revisiting the number: *Brown v Canada* 2018 ONSC 5456.

85 Kalajdzic, above n 63, 135.

86 Ibid.

87 Ibid 134.

88 Jasminka Kalajdzic, Private correspondence, 5 December 2018.

Percentage-based fees in Australia

7.55 The discussion regarding the introduction of percentage-based fees to Australia is not new. Whether percentage-based fee arrangements should be permitted in Australia was considered by the Productivity Commission in 2014, which recommended lifting the prohibition on percentage-based fees with limitations—including that they be capped and be the only applicable legal fee charged.[89] In 2018, the Victorian Law Reform Commission (VLRC) recommended that a national strategy to implement percentage-based fees be considered and adopted by the Council of Attorneys General.[90]

Arguments in favour

7.56 Four key arguments in favour of percentage-based fee agreements have been advanced. First, it is suggested that introducing contingency fees will increase access to justice for prospective group members of medium-sized actions.[91] These may be conducted by solicitors through conditional fee arrangements, but neither solicitors nor representative plaintiffs are likely to be able to fund disbursement costs or run the risk of adverse costs orders.[92] This creates a gap in services and is a key limitation of the current class action system. Lifting the prohibition on percentage-based fee agreements may enable solicitors (at least in the larger firms) to be compensated for costs and for carrying the risk of adverse costs orders, enabling these smaller matters to proceed.

7.57 The VLRC considered that introducing contingency fees to class action proceedings could see both large law firms competing with litigation funders to fund high value claims and smaller law firms pursuing a greater number of lower value claims.[93]

7.58 Maurice Blackburn advised this Inquiry that litigation funders may require up to three times the amount invested as a return, and that some overseas funders require ten times. These multipliers are often impossible to reclaim from smaller or midsized actions, accordingly the introduction of percentage-based fees may enable different categories of cases.[94] Similarly, the Australian Shareholder Association supported lifting the ban so to 'encourage more plaintiffs to mount a more financially marginal but otherwise worthy case'.[95] Bennelong Funds Management Group agreed that 'smaller meritorious potential

89 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) rec 18.1; See also Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) [7.8]. See below for a discussion on statutory caps.

90 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2018) rec 7.

91 Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 20, 21; Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 625–626; Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2017) [8.15]; Vince Morabito, '*Submission 35* to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (29 November 2017) 25.

92 Victorian Law Reform Commission, above n 91, [8.33].

93 Victorian Law Reform Commission, above n 90, [3.18].

94 Maurice Blackburn, *Submission 37*. See, also, Norton Rose Fulbright, *Submission 40*; Shine Lawyers, *Submission 43*; Slater and Gordon, *Submission 54*.

95 Australian Shareholders' Association Limited, *Submission 9*.

class actions are falling through the cracks' and that lifting the ban on percentage-based fee agreements would 'allow those claims to be pursued that are not financially viable for funders'.[96]

7.59 Secondly, it is argued that such an expansion of the funding market would promote competition and eventually lower commission rates charged by litigation funders, creating a more level playing field.[97] This has been put in strong terms, with an industry report on litigation funding in Australia suggesting that the introduction of percentage-based billing arrangements would have 'dramatic effects on the industry', opening up existing third-party litigation funders to 'immense competition', which would put 'pressure on profitability'.[98] The same report described third-party litigation funding in Australia as 'characterised by low competition'.[99] Unsurprisingly, the absence of percentage-based billing has been a selling point for litigation funding in Australia: that is, there is limited competition.[100]

7.60 Thirdly, percentage-based fee agreements may be particularly useful in class action proceedings, providing a level of clarity and certainty for class members. Time-based billing invoices can be 'lengthy and too complex' for some clients,[101] and may not receive the same scrutiny in class actions as other matters, as most class members are not actively involved in the matter. Percentage-based fee arrangements are likely to be comparatively more straightforward.[102]

7.61 Fourthly, it is contended that the introduction of percentage-based fee agreements would increase returns for group members. Fees and costs deducted from sums recovered in a funded class action currently include legal fees, calculated on time-based billing models, *and* the funder's commission. Most matters receive third-party litigation funding.[103] In funded matters, the median return to group members is 51% of the award. Unfunded matters return a median of 85% of proceeds to group members.[104] It is argued that, as only one 'success fee' would be deducted from the recovered amount, the introduction of percentage-based fee agreements would also 'drive down the cost of

96 Bennelong Funds Management Group Pty Ltd, *Submission 10*. See, also, S Foley, *Submission 8*; Australian Shareholders' Association Limited, *Submission 9*; Maurice Blackburn, *Submission 37*.

97 Contingency Fee Working Group, Law Council of Australia, above n 91, 20; Also see Morabito, above n 91, 25; Vicki Waye, 'Submission 2 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (18 July 2017) 6.

98 Kim Do, 'IBISWorld Industry Report OD5446: Litigation Funding in Australia' (February 2018) 8.

99 Ibid 19.

100 See, eg, JustKapital Litigation Partners Limited, 'An Emerging Leader in Litigation Financing: Annual Report Update' (Presentation, September 2015) 7: the organisation notes that the Australian market has been facilitated by the prohibition on contingency-based legal fees.

101 Contingency Fee Working Group, Law Council of Australia, above n 91, 10.

102 W Mundy, *Submission 4*; S Foley, *Submission 8*; Bennelong Funds Management Group Pty Ltd, *Submission 10*; Shine Lawyers, *Submission 43*; Slater and Gordon, *Submission 54*.

103 See Chapter 3—Incidence.

104 See Chapter 3, Table 3.7.

claim funding' by reducing the number of entities paid by reference to a percentage of the recovered amount.[105]

7.62 A consequential increase to returns was seen as a key benefit of percentage-based fee agreements by stakeholders to this Inquiry.[106] Maurice Blackburn submitted that, under a percentage-based fee claimants would receive 75% of an award, as opposed to an average of 60% that is currently returned in funded proceedings.[107] Bennelong Funds Management suggested that

> the combined costs of lawyers' fees and a litigation funder's commission is greater than an appropriately structured contingency fee arrangement. Lifting the ban will result in greater returns for clients.[108]

7.63 Even stakeholders that did not necessarily support the introduction of percentage-based fees saw benefit in eliminating one source of commission. For example, Ashurst noted that

> [i]f class actions currently funded by litigation funders could be funded less expensively by lawyers charging contingency fees calculated as a percentage rate of a settlement or judgment instead of involving a litigation, the proposal [to introduce contingency fees] is worth considering.[109]

7.64 In its 2018 report on group proceedings, the VLRC agreed that when a claim is unfunded, a greater proportion would be returned to the class under percentage-based billing. However, it further identified the possibility that percentage-based fees could end up being greater than time-based billings, and that clients could be worse off than they currently are under tripartite agreements.[110] Whether lifting the ban on percentage-based fees would reduce the costs would depend on the 'size of the law firm and the size of the claim'.[111]

Arguments against

7.65 The opposing view suggests that, not only is this type of billing arrangement inappropriate for the legal profession, but that the use of percentage-based fee agreements could foster an environment of greed that could result in the bringing of unmeritorious claims. For example, solicitors may encourage vulnerable plaintiffs to agree to contingency fees that do not reflect the amount of work actually required to resolve

105 Waye, above n 97, 6.
106 See, eg, W Mundy, *Submission 4*; Australian Shareholders' Association Limited, *Submission 9*; Bennelong Funds Management Group Pty Ltd, *Submission 10*; M Legg, J Metzger, *Submission 12*; R Bungey, *Submission 13*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Maurice Blackburn, *Submission 37*.
107 Maurice Blackburn, *Submission 37*.
108 Bennelong Funds Management Group Pty Ltd, *Submission 10*.
109 Ashurst, *Submission 25*. See also Law Council of Australia, *Submission 62* referring to the Victorian Bar Association and the Law Society of South Australia.
110 Victorian Law Reform Commission, above n 90, [3.27].
111 Ibid [3.35].

the claim nor the risk that it is unsuccessful.[112] Strong concern about the bringing of unmeritorious class action proceedings in England and Wales resulted in the prohibition of contingency fee arrangements in collective actions for breaches of consumer law conducted in the CAT.[113]

7.66 Concerns regarding the deleterious effect on the reputation of the legal profession were articulated by the NSW Bar Association, which made the following observations:

> (a) ... [the introduction of percentage-based fees may] seriously undermine the identity of the legal profession as a profession, with resultant diminution in respect for legal practitioners and their status as members of a profession;
>
> (b) the practice of law should be a profession and not a business;
>
> (c) this distinction is profound and important and is not one that should be undermined or eroded, even inadvertently;
>
> (d) the proposal, in giving legal practitioners a direct and potentially substantial financial interest in the outcome of any given case, runs a serious risk of compromising the legal practitioner's fundamental duty to the court, the overriding duty of candour and potentially also the duty to a client;
>
> (e) to extend entrepreneurial litigation to the persons responsible for (and in some cases arguing) the case is inconsistent with important notions of professional detachment and impartial indifference to the outcome of a case;
>
> (f) access to justice is already enhanced by existing no win, no fee arrangements as well as litigation funding; and
>
> (g) the proposal is likely to expose the entire legal profession to serious and sustained criticism as being driven by venal motivation, which in turn might be used for undesirable law reforms which restrict access to justice and are detrimental to the profession generally.[114]

7.67 It is argued that the possibility of a large payout will only augment existing conflicts of interest,[115] magnifying the likelihood of solicitors recommending that representative plaintiffs accept offers to settle for the commercial purposes of the solicitor/firm, rather than for the benefit of the client/s. Third-party litigation funder Litigation Capital Management Limited (LCM) submitted to this Inquiry that solicitors

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112 Contingency Fee Working Group, Law Council of Australia, above n 91, 20, 21; Legg, above n 43, 253; Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 613.

113 Department for Business, 'Innovation and Skills (UK) Private Actions in Competition Law: A consultation on Options for Reform—Government response' (January 2013) 26; *Consumer Rights Act 2015* (UK) sch 8; *Competition Act 1998* (UK) s 47C(8); *Courts and Legal Services Act 1990* (UK) s 58AA(11).

114 Law Council of Australia, *Submission 62*. Other stakeholders to this Inquiry opposed to the introduction of percentage-based fees included Litigation Capital Management Limited, *Submission 30*; Clayton Utz, *Submission 42*; US Chamber Institute for Legal Reform, *Submission 44*; IMF Bentham Limited, *Submission 50*; Association of Litigation Funders of Australia, *Submission 58*; Risks and Insurance Management Society Australasia, *Submission 59*; Healthcare Companies and Businesses, Group Submission, *Submission 63*; Law Society of New South Wales, *Submission 64*; Queensland Law Society, *Submission 66*.

115 Victorian Law Reform Commission, above n 91, [8.38]–[8.48].

acting on a percentage-fee basis may act to minimise time and disbursement outlay, as well as any adverse costs risk, while maximising returns. Solicitors may also 'manipulate the timing of a resolution' so to align with the firm's commercial imperatives. Removing the 'protective role' of the litigation funder increases the likelihood of conflicts, so that solicitors face a 'daily tension' between their duties to the Court and duties to the litigant.[116]

7.68 The US Chamber Institute for Legal Reform articulated the issues regarding conflicts and percentage-based fee billings:

> Ultimately, one only has to consider the prospect of litigation that is "lawyer funded, lawyer managed and lawyer settled" in circumstances where the plaintiff's only source of information and advice about the conduct of their litigation is coming from a person with a direct and perhaps, very significant financial interest in the outcome of the proceedings to understand why such a position is unacceptable.[117]

7.69 Proponents of percentage-based fee arrangements do not perceive that such arrangements will increase conflicts of interest. It has been suggested that the existing regulation of solicitors is adequate to prevent misconduct in percentage-based fee arrangements.[118] As they align the interests of the solicitor with that of the client/class, the introduction of percentage-based fees could even mitigate conflicts of interest and promote best-practice conduct,[119] due to the greater incentive to maximise the return to the class at the earliest possible time. As noted by Dr Warren Mundy, a previous Commissioner to the Productivity Commission:

> Potential conflicts of interest between lawyers and their clients are not unique to a contingency fee regime. Lawyers clearly have a financial interest in the outcome of their cases and clients are at risk of being charged excessive fees irrespective of the billing structure. Contrary to the speculation that contingency fees could generate conflicts of interest between lawyers and their clients, it can be argued that contingency fee arrangements would have the opposite effect and in fact align their interests in respect of achieving the highest value recovery.[120]

7.70 The same self-interest would prevent solicitors from supporting and acting in unmeritorious claims, as their remuneration relies on a successful outcome. A percentage-based fee arrangement, without a coexisting third-party funding agreement, might also remove the tension that currently exists in the tri-partite arrangement between funder, solicitors and representative plaintiff because of the commercial imperatives for the funder.

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116 Litigation Capital Management Limited, *Submission 30*. See also Therium Australia Limited, *Submission 19*; Chartered Accountants Australia and New Zealand, *Submission 28*; International Litigation Partners, *Submission 31*.

117 US Chamber Institute for Legal Reform, *Submission 44*. See, also, Association of Litigation Funders of Australia, *Submission 58*.

118 Contingency Fee Working Group, Law Council of Australia, above n 91, 21. See, also M Legg, J Metzger, *Submission 12*.

119 Legg, above n 43, 250.

120 W Mundy, *Submission 4*.

7.71 Those opposed to the introduction of contingency fees suggest that the key inter-related rationales in support of contingency fees—increasing access to justice and competition—are erroneous. Three related reasons are advanced as to why the introduction of percentage-based fee agreements would be unlikely to have any practical effect on access to justice and competition.[121]

7.72 First, solicitors charging on a percentage-based fee basis would not take on difficult or risky cases. As solicitors will only be paid on successful outcomes, high risk matters would not be funded through a contingency fee arrangement. As noted by the US Chamber Institute for Legal Reform, law firms will only back cases they can win.[122] There are few law firms that could take on the risk of an adverse costs order, provide security for costs, and finance these types of actions. Accordingly, percentage-based fee agreements would only benefit large law firms that are already billing via conditional fee arrangements[123]—generating a higher premium with no commensurate increase in risk.[124]

7.73 Secondly, solicitors are unlikely to take on matters that will not generate a significant monetary return, meaning 'public interest' cases would not benefit from the introduction of percentage-based fee agreements, and neither would low income matters. As noted by Risks and Insurance Management Society (RIMS), the 'financial imperatives which operate upon funders are the same financial pressures that would operate on law firms considering offering contingency fee arrangements'.[125]

7.74 Thirdly, solicitors and funders are unlikely to compete for the same type of matters. Litigation funders generally fund matters with high minimum returns in which the exposure to adverse costs, should the defendant succeed, is also significant. Exposure to the risk of adverse costs may price out law firms funding solely on a contingency basis. Accordingly, there would be little need for, or pressure on, litigation funders to lower their commission rates. It has further been argued that the notion of increasing competition fails to take into account the commercial risks, pressures and imperatives that inform a funder's commission. LCM suggested that if

> lawyers effectively assume the same risks and costs as those faced by funders (including the very real risk that some matters will not succeed and will result in considerable losses), it is rather optimistic to expect that lawyers' financial modelling would not ultimately drive their contingency fee rates into a similar range to the rates developed over the life of the litigation funding industry.[126]

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121 See also Victorian Law Reform Commission, above n 91, ch 8.

122 US Chamber Institute for Legal Reform, *Submission 44*.

123 Morabito and Waye, above n 6, 225. See also Levitt Robinson, *Submission 56*.

124 Legg, above n 43, 253; See also Simone Degeling, Michael Legg and James Metzger, 'Submission 9 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017) 19; US Chamber Institute for Legal Reform, 'Submission 19 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (29 July 2017) 43; Victorian Law Reform Commission, above n 90, [3.16], [3.17].

125 Risks and Insurance Management Society Australasia, *Submission 59*.

126 Litigation Capital Management Limited, *Submission 30*.

Lift the ban on contingency fee arrangements, with limitations

Recommendation 17 Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.

The following limitations should apply:

- an action that is 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;
- a percentage-based fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and
- a solicitor who enters into a percentage-based fee agreement must advance the cost of disbursements, and account for such costs within the percentage-based fee.

Recommendation 18 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that solicitors who fund representative proceedings on the basis of percentage-based fee agreements should be subject to a statutory presumption that they will be required to provide security for costs in any such representative proceeding.

Recommendation 19 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and
- the Court has an express statutory power to reject, vary, or amend the terms of such percentage-based fee agreements.

7.75 The ALRC recommends that percentage-based fee agreements should be permitted in class action proceedings that are filed in Australian courts.[127] On balance, the ALRC supports the notion that, in relevant matters, percentage-based fee agreements may expand access to justice and decrease the amount taken from the class. To address concerns raised by stakeholders regarding proper use, and to prevent 'windfalls' for solicitors and the related possibility that group members may be disadvantaged, the ALRC makes the concomitant recommendation that percentage-based fee agreements should

127 This includes the Federal Court of Australia and the Supreme Courts of any state or territory. See rec 17.

only be valid with leave from the Federal Court.[128] To receive Federal Court approval, the agreement cannot stand alongside a third-party litigation funding agreement that is directly funding the representative plaintiff/s, and the solicitor must have agreed to fund the cost of disbursements from their percentage-based fee. Unchanged is the requirement for legal fees to be 'fair and reasonable'.

7.76 To better protect group members and the respondent, the ALRC also recommends that there should be a statutory presumption that solicitors acting pursuant to percentage-based fee agreements will be required to provide security for costs. This aligns with the similar recommendation made in respect of third-party litigation funders.[129]

Leave from the Court

7.77 The majority of stakeholders to this Inquiry supported the requirement that solicitors acting pursuant to percentage-based fee agreements receive leave from the Federal Court in order for the agreement to be valid.[130] Professor Legg and Dr Metzger suggested that Court approval would provide 'critical consumer protection', further agreeing that it would be Court oversight that would make a 'contingency fee in a class action acceptable, but not in legal practice more generally'.[131] For Ashurst, court oversight was critical to prevent any increase in legal costs by disproportionate fees; to correct power balance between plaintiff and lawyer; and to minimise conflicts.[132]

7.78 Dr Mundy suggested that the Court should develop 'clear guidelines' by which the Court may grant its permission—noting that 'a check list' should suffice.[133] Dr Duffy suggested that statutory guidelines should be created, including 'fairness and reasonableness, some proportionately with work (reasonably) performed and a sliding scale of permissible amounts/caps to prevent unreasonable profiteering'.[134]

7.79 Others suggested that newly prescribed intervention by the Federal Court was unnecessary.[135] The NSW Society of Labor Lawyers considered that existing statutory power pursuant to s 33ZF of the FCA Act to vary costs rendered this requirement redundant. NSW Young Lawyers suggested that the Court was already 'sufficiently equipped to protect the interests of group members in relation to contingent fee arrangements, and requiring leave would only have the effect of imposing unnecessary costs on the parties as a result of approval applications having to be brought and determined'.[136] The ALRC

128 See rec 19.
129 See Chapter 6, rec 12.
130 See, eg, M Legg, J Metzger, *Submission 12*; Ashurst, *Submission 25*; Maurice Blackburn, *Submission 37*; Supreme Court of Victoria, *Submission 41*; Allens, *Submission 52*; Slater and Gordon, *Submission 54*; Association of Litigation Funders of Australia, *Submission 58*; King and Woods Mallesons, *Submission 65*; Australian Bar Association, *Submission 69*. This was the case even with stakeholders who did not necessarily support the introduction of percentage-based fees, see, eg, Johnson Winter & Slattery, *Submission 14*.
131 M Legg, J Metzger, *Submission 12*.
132 Ashurst, *Submission 25*.
133 W Mundy, *Submission 4*.
134 M Duffy, *Submission 36*.
135 NSW Society of Labor Lawyers, *Submission 55*; NSW Young Lawyers, *Submission 68*.
136 NSW Young Lawyers, *Submission 68*.

recommends a case management approach in Chapter 4 that uses existing processes, including the first case management hearing to accommodate a leave hearing.

7.80 Currently, when determining the reasonableness of time-cost based legal fees and disbursements at settlement, the Federal Court has regard to, among other things, 'the nature of the work performed, the time taken to perform the work, the seniority of the persons undertaking that work and the appropriateness of the charge out rates for those individuals'.[137] This mirrors the approach taken by the Court in Ontario Canada when assessing contingency fees, with the only addition in Ontario being considerations of any risk of non-payment and whether the contingency fee sought is 'sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well'.[138] In this context, the concept of proportionality plays an important role with Canadian courts concerned to ensure that contingency fees are not 'clearly excessive' or 'unduly high' with 'little relation to the work undertaken or the result achieved'.[139]

7.81 There were differences of opinion as to when the Court should approve the fee agreement.[140] Some stakeholders suggested that approval should be given at an early stage in proceedings,[141] and should not be overturned. For example, Johnson Winter & Slattery supported percentage-based billing so long as there was certainty of outcome — the Court should not be permitted to vary or reject a percentage-based fee proportion that it had approved at the start of proceedings at the close of proceedings in relation to the actual award or other considerations.[142] The Supreme Court of Victoria was concerned that the Court could not have all the information needed early in proceedings to make a final determination and that 'as a protective measure, the effectiveness of court approval at commencement may be overestimated'—courts are unable to properly assess risk and at that 'point in time are working from a lower evidence base than settlement approvals'.[143]

7.82 The ALRC recommends a requirement to receive leave from the Federal Court at the beginning of proceedings, preferably at the first case management hearing. This does not detract from the power of the Court to determine the fairness and reasonableness of settlement agreements pursuant to s 33V and s 33ZF of the FCA Act, and the Court may very well reassess legal costs at that time.

Power of the Court to vary, set or amend percentage-based fee agreements

7.83 The power of the Federal Court to review legal costs agreements prior to an application for settlement approval is uncontroversial. Nonetheless, if the recommendation

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137 *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 636 [32]; see also Slater and Gordon, *Submission 54*.

138 Kalajdzic, above n 63, 130 citations omitted.

139 *Lavier v MyTravel Canada Holidays Inc* 2013 ONCA 92 [32] (Ontario Court of Appeal).

140 See, eg, M Duffy, *Submission 36*; Norton Rose Fulbright, *Submission 40*.

141 See, eg, Maurice Blackburn, *Submission 37*.

142 Johnson Winter & Slattery, *Submission 14*.

143 Supreme Court of Victoria, *Submission 41*. See also C Dealehr, Submission 21.

to adopt percentage-based fees is implemented, for reasons of consistency and certainty, the proposed specific power regarding the ability to set, vary or reject terms of third-party litigation funding agreements should also include the power to set, reject or vary the terms of percentage-based fee agreements, before it is binding on the group members.[144]

7.84 There was some opposition to extending this proposed power in this way, with Johnson Winter and Slattery suggesting that the capacity of the Federal Court to make late changes to a contingency fee percentage could pose a 'significant commercial risk for mid-tier law firms'.[145] Other law firms supported intervention by the Federal Court, noting that it would be consistent with the supervisory role of the Court[146]—although Slater and Gordon suggested that the power should go both ways, enabling the Court to expand the percentage fee in appropriate cases.[147]

7.85 The recommendation to extend the power to percentage-based fee agreements aligns with the VLRC's recommendation that the Supreme Court of Victoria be given a specific statutory power to ensure that all costs taken from the settlement amount are fair and reasonable, extending to a power to review and vary litigation funding fees and charges, all legal costs, and settlement distribution costs.[148]

No direct hybrid billing

7.86 This recommended safeguard aims to limit the possibility of confusion and misuse by solicitors (through such things as blending third-party funding and percentage-based fees or legal service fees and percentage-based fees). Under the recommendations of this Report, a representative plaintiff may be charged either a percentage-based fee by its solicitors, or may enter into a funding agreement with a third-party litigation funder, pursuant to which the funder will take a commission calculated as a percentage of the sum recovered—but not both.[149]

7.87 Current tripartite arrangements leave class members with a median of 51% of the recovered amount; with the lowest return sitting at 29%. The median return for unfunded matters is 85%.[150] While it is recognised that the proportionate legal cost may increase to cover the risk, the prohibition on hybrid billing proposes to protect class members from having to pay a percentage of the recovered amount both to the litigation funder and to the solicitor[151]—there can be no double 'clipping of the ticket'.

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144 *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 636 [27].
145 Johnson Winter & Slattery, *Submission 14*.
146 Maurice Blackburn, *Submission 37*; Clayton Utz, *Submission 42*; Slater and Gordon, *Submission 54*.
147 Slater and Gordon, *Submission 54*.
148 Victorian Law Reform Commission, above n 90, [5.36], rec 24.
149 This concern has been raised in previous reviews. See, eg, US Chamber Institute for Legal Reform, above n 124, 42.
150 See Chapter 3, table 3.7, [3.49].
151 Victorian Law Reform Commission, above n 91, [8.26], citing Maurice Blackburn.

7.88 This safeguard also prevents solicitors from billing on an hourly basis and then charging an additional percentage-based fee if the matter is successful. This approach was not supported in all quarters, with law firm Levitt Robinson stating that:

> The Commission's proposal is no doubt rooted in the sound policy basis that solicitors should not "double-charge" for the same service; however, the role contemplated for solicitors by the Commission's proposal is one where they provide not only their usual service—that is, charging professional fees "for undertaking the professional responsibilities of running the case, as officers of the Court"—but also the services provided by litigation funders of advancing all costs and disbursements and providing an indemnity for costs. However, the Commission proposes that, whilst solicitors will be compelled to provide both services, they will only be permitted to charge for the latter.
>
> We submit that this is not a desirable approach. Contingency fees represent an alternative means by which solicitors charge for their ordinary services, taking into account the fact that the day-to-day costs of funding the action are shifted to the solicitor, and the solicitor is risking those costs not being recovered.[152]

7.89 The Law Council of Australia was of the view that billing options should provide 'maximum flexibility' to aid class members, meaning that representative plaintiffs should be able to enter into the most 'efficient and economical funding terms which they can negotiate, whether they be by contingency fee alone, or by arrangements involving a mixture of contingency fees, outside funding sources (including insurance) and/or time-cost charges'.[153]

7.90 The Association of Litigation Funders Australia (ALFA) strongly disagreed with a prohibition on hybrids, stating that this restriction limited access to justice and was:

> simply anti-competitive. If the addition of the two success fees are greater than market rates, then other than in respect of small claims that have limited competitive tensions, the market rather than regulation ought to produce the outcome, with the market providing alternate cheaper options.[154]

7.91 The ALRC does not propose that percentage-based fee billing be the only option available to solicitors that act in class action proceedings. It will still be open for solicitors to bill directly, to use time-based billing alone, or to provide services on a conditional basis with uplift. Law firms may still work with third-party litigation funders through existing tripartite arrangements. Percentage-based fees simply provide another option—albeit with certain limitations—and it is envisaged that law firms can then choose the billing approach and method that is most suited to the circumstances of the particular case.

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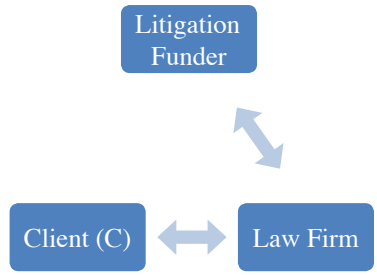
152 Levitt Robinson, *Submission 56*.

153 Law Council of Australia, *Submission 62*.

154 Association of Litigation Funders of Australia, *Submission 58*. See also NSW Young Lawyers, *Submission 68*.

7.92 The prohibition on hybrid billing as described should not prevent the law firm from raising capital as they see fit. This could include taking out an ATE insurance policy (with any premium accounted for in the contingency fee) or an arrangement whereby the third-party litigation funder sits behind the law firm. This type of arrangement may, for example, constitute a law firm having in place an agreement with a third-party funder whereby the funder supports the litigation/s in return for the funder's costs with interest on a successful outcome, with these costs borne by the law firm as a business expense—so long as there is no funding agreement between the third-party funder and the representative plaintiff.[155]

7.93 An example, described by third-party litigation funders Burford Capital and Harbour Litigation Funding to the Damages-Based Reform Project Working Party in the United Kingdom, can be represented in this way:



7.94 Pursuant to this arrangement, assume:

> - that there is a percentage-based agreement between C and the Law Firm pursuant to which the Law Firm will recover 30% upon a successful outcome. This percentage has been approved by the Court. When paid upon the successful outcome, that sum will be held on trust by the Law Firm for payment to the Litigation Funder;
>
> - that there is a litigation funding agreement between the Law Firm and the Litigation Funder under which the Funder provides non-recourse funding for work-in-progress (WIP), usually paid at a reduced hourly rate to fund the Law Firm's activities during the course of the litigation, plus the Funder will typically pay the disbursements incurred in the preparation of the case (experts' feed, counsels' fees, ATE premium etc);
>
> - that if C's action is successful, the Funder is entitled to a success fee under that litigation funding agreement which is payable by the Law Firm. The Law Firm may also contract to pay back the money advanced by the Funder if C wins the case;
>
> - the success fee that is due to the Funder is paid out of the approved percentage sum recovered. The Funder cannot recover more than that amount such that the Funder obtains 'a proportion of a proportion'.
>
> - importantly, as between C and the Funder, there is no funding contract ... [156]

155 Civil Justice Council (UK), above n 30, 31.

156 Civil Justice Council (UK), 'The Damages-Based Agreements Reform Project: Drafting and Policy Issues'

7.95 The safeguard aims to protect class members from the possibility of paying out a percentage of settlement to both solicitors and funders. It does not prohibit moneys being returned to litigation funders from solicitors when funding the solicitor to act in a matter or on a portfolio basis—that is where the funding sits behind the solicitor, as opposed to alongside the solicitor.[157] The ALRC recommends that this construction of a 'hybrid' model of litigation funding be included in the statutory definition of third-party litigation funding.[158] Permitting the type of arrangement where a funder sits behind the firm may enable law firms without sufficient capital to fund large and/or complicated class action proceedings on a percentage-based fee basis with support of a litigation funder, without cutting into the award in the way that tripartite arrangements can. This approach was supported by stakeholders,[159] although some considered that it may in fact result in the cost to the client increasing to cover both income streams.[160]

The percentage-based fee should cover all costs

7.96 The ALRC recommends that percentage-based fees should absorb all legal costs and disbursements (including any premium from an ATE policy). The Federal Court would consider this requirement when assessing the fairness and reasonableness of the percentage-based fee.

7.97 This limitation did not meet with approval from all stakeholders from the legal profession. On behalf of the Corporations Committee of the Business Law Section, the Law Council of Australia suggested that there was 'no reason of principle why lawyers operating on contingency fee arrangements should always be required to advance the cost of all disbursements'.[161] Slater and Gordon took a different view, and suggested that the defence may use this inclusion to their advantage and 'use up' the percentage-based fee with disbursement costs. Slater and Gordon suggested that an alternative approach should be to permit the Court to determine whether disbursements are to be included in the percentage-based fee on a case-by-case basis, taking account of proceedings that may be 'unusually costly or cheap to run'.[162]

7.98 The VLRC recommended that lawyers who charge contingency fees should be required to indemnify the representative plaintiff for adverse costs;[163] that the contingency fee cover the costs of disbursements;[164] and that no other fees, excluding settlement distribution costs but including the cost of ATE insurance, be passed onto class members.[165]

(August 2015) 30-31.

157 For an example of this approach see Civil Justice Council (UK), above n 30, 31.

158 See Chapter 6, rec 16.

159 See, eg, Phi Finney McDonald, *Submission 34*; Slater and Gordon, *Submission 54*.

160 US Chamber Institute for Legal Reform, *Submission 44*; IMF Bentham Limited, *Submission 50*; Allens, *Submission 52*.

161 Law Council of Australia, *Submission 62*.

162 Slater and Gordon, *Submission 54*.

163 Victorian Law Reform Commission, above n 90, [3.78]–[3.81].

164 Ibid [3.82].

165 Ibid [3.93], rec 8.

7.99 The ALRC agrees that percentage-based fees should cover the costs of disbursements (excluding settlement distribution costs, which under recommendations regarding tender of the administration[166] may not always be costs from the same law firm). Excluding disbursements from the percentage-based fee would run counter to one of the key objectives of percentage-based billing in class action proceedings—providing a level of certainty to the representative plaintiff and group members regarding their proportion of an award, and opening up the possibility that a greater share of awards will be returned to group members than under current arrangements.

Presumption in favour of security for costs

7.100 The Australian Shareholder Association held the firm view that representative plaintiffs should not pay costs: '[c]lass actions provide an affordable service to ensure that access to justice is not contingent on personal wealth'.[167]

7.101 The ALRC initially proposed in DP85 that solicitors acting on a percentage-based fee be required to indemnify representative plaintiffs from an adverse costs order.[168] Stakeholders were concerned that such a proposal would produce unassailable conflicts of interest. Law firm Phi Finney McDonald suggested that the requirement to indemnify against adverse costs would increase the likelihood of conflicts as the lawyer would need to 'balance the objective of conducting the proceeding in the best interests of group members with a desire to avoid an adverse costs order for which the firm (and potentially its individual partners, jointly and severally) would be liable'.[169] The Law Society of South Australia, through the Law Council of Australia, further submitted that such an indemnity may 'conflict with the Australian Solicitor Conduct Rules, in that a conflict of interest may arise in encouraging matters to settle'.[170]

7.102 Johnson Winter & Slattery submitted that a statutory requirement to indemnify would be a step too far and be entirely cost-prohibitive to the majority of law firms.

> Unlike third party litigation funders, the core business of Australian law firms is the provision of legal services, not litigation funding. Most law firms would simply not be in a financial position to fund long and hard-fought class actions and assume the risk of adverse costs. The cashflow impact and potential risks of not recovering a substantial portion of their professional fees at settlement or from a judgment may be prohibitive for most law firms. Law firms operating as partnership may need to use profits to build up the necessary capital to fund class actions on a contingency fee basis. This may expose the partnership to further risk if they are required to pay (high personal) tax on the profits before achieving any return on the investment in the class action.[171]

166 See Chapter 5, rec 9.
167 Australian Shareholders' Association Limited, *Submission 9*.
168 Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third-Party Litigation Funders: Discussion Paper' (DP85, June 2018) Proposal 5–1.
169 Phi Finney McDonald, *Submission 34*.
170 Law Council of Australia, *Submission 62*. Concerns about conflicts were also raised by M Duffy, *Submission 36*; NSW Young Lawyers, *Submission 68*.
171 Johnson Winter & Slattery, *Submission 14*.

7.103 Third-party litigation funders routinely indemnify representative plaintiffs against an adverse costs order. In this report, the ALRC recommends that this existing practice be mandatory in order for the third-party funding agreement to be valid.[172] In 2014, the Productivity Commission, specifically did not recommend a statutory requirement for solicitors to indemnify for adverse costs. The Productivity Commission instead recommended that the court rules be amended so that the court is able to treat the solicitor acting on a contingency fee basis as a funder for the purposes of ordering security for costs.[173] The Productivity Commission distinguished the role of solicitors acting on contingency fee to that of third-party litigation funders:

> Such simplification ignores the relative risks presented by their business models. Litigation funders focus their portfolios on higher value claims, while law firms will have a combination of income sources, encompassing both normal and damages-based billing, across a range of matters including complex litigation and simple transactions. As such, the Commission considers that case-by-case security for costs should be sufficient for law firms.[174]

7.104 On balance, the ALRC has been persuaded that the introduction of a presumption in favour of security for costs for solicitors acting on a percentage-based fee basis negates the requirement for solicitors to indemnify against adverse costs orders. A presumption in favour of security addresses concerns regarding the capital adequacy of law firms—the requirement to submit adequate security to the Federal Court protects the representative plaintiff and the respondent, without unduly restricting solicitors without large 'war chests' from participating in percentage-based fee agreements.

7.105 Types of appropriate security are discussed in Chapter 6—Regulating Litigation Funders, with the ALRC recommending that security must be in a form enforceable within Australia.

Limitations address concerns regarding potential 'windfalls'

7.106 Some stakeholders to this Inquiry were concerned about the possibility that percentage-based fees may provide for disproportionate payments to law firms, to the detriment of group members. 'Windfalls' can be apparent even when the percentage-based fee only represented 10% of the award, as in the Canadian matter of *Brown*.[175] This may be especially so in matters which do not traditionally receive third-party funding. For example, a conglomerate of health groups submitted the following table, showing actual legal fees billed in a product liability class action that settled in 2016,[176] compared with what these may have been in a percentage-based fee arrangement.[177]

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172 See Chapter 6, rec 14.
173 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 636, rec 18.3.
174 Ibid 636.
175 *Brown v Canada* (Attorney-General) 2018 ONSC 3429: See above [7.50]–[7.51].
176 *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452.
177 Healthcare Companies and Businesses, Group Submission, *Submission 63*.

Table 7.1: Comparison of time-based billing versus percentage-based fee billing in *Stanford v DePuy International*

Actual		**30% contingency fee**		**25% contingency fee**	
Settlement sum	$250m	Settlement sum	$250m	Settlement sum	$250m
Plaintiff law firm costs	$36m	Contingency fee	$75m	Contingency fee	$62.5m
Plaintiff law firm administration costs	$26m	Plaintiff law firm administration costs	$26m	Plaintiff law firm administration costs	$26m
Available to claimants	**$188m**	**Available to claimants**	**$149m**	**Available to claimants**	**$161.5m**

Source: Healthcare Companies and Businesses, Group Submission, Submission 63 [1.13].

7.107 This table shows that, under a 'standard' contingency fee of 30%, lawyers would have received an increase in payment of 52%—$39 million dollars—from that which reflected the amount of work needed to finalise the matter. The return to the class decreased accordingly.

7.108 The hypothetical percentage-based fee provided by this group can be contrasted with data provided by Maurice Blackburn, representing sixteen funded class action cases settled by Maurice Blackburn since 2006. This compared the combined funded/legal costs amount to a contingency fee of 25%, showing clear benefits to the class.

Table 7.2: Comparison of fees in funded class action proceedings versus percentage-based fees

Actual		**25% contingency fee**	
Settlement sums	$1,108m	Settlement sums	$1,108m
Funding Charges and Legal Costs	$446m	Contingency fee	$241m
Paid to Claimants	$662m	Paid to Claimants	$831m
% to Claimants	60%	% to Claimants	75%
Funder Profit	$283m	**Benefit to Claimants**	**$169m**

Source: Maurice Blackburn, Submission 37 [5.7]

7.109 The ALRC accepts that percentage-based fee billings are likely to provide the greatest benefit to group members in claims that would otherwise have attracted third-party litigation funding. There is genuine concern that in these matters, and particularly in matters that would not previously have garnered funding such as personal injury and product liability matters, percentage-based fees will provide a method by which law firms can increase their billings disproportionately.

Statutory caps on percentage-based fees?

7.110 Statutory caps for percentage-based fee billing (set on a sliding scale) formed part of the recommendation in support of contingency fees made by the Productivity Commission in 2014.[178] The Commission suggested that statutory caps were necessary to protect 'retail' consumers only, so they were not recommended for 'sophisticated' clients.[179]

7.111 Statutory caps in England and Wales treat the type of litigation (rather than the type of class members) differently. Personal injury matters are capped at 25% of recovery and non-personal injury matters are capped at 50%.[180] A sliding scale, which depends on the point at which the case concludes or the level of recovery, can be included in the agreement so long as the maximum percentage does not exceed the statutory cap.

7.112 Some stakeholders to this Inquiry supported the introduction of statutory caps concomitant with percentage-based fees.[181] Statutory caps would provide clear guidelines regarding appropriate payments under percentage-based fees and would help to provide for greater confidence in the system. Others supported a more flexible approach. For example, law firm Slater and Gordon suggested that a maximum cap should be prescribed in the first instance, but that an application to the Court for a higher rate should be allowed—a rebuttable presumption:[182]

> Such an approach, which effectively establishes norms of conduct while still affording clients and lawyers wishing to pursue differing arrangements an opportunity to seek permission to do so, seems to us to strike an appropriate balance between ensuring public confidence in the fee arrangements and the need to enable consenting clients and lawyers to explore differing kinds of funding arrangements (which may be of particular value in certain kinds of public interest litigation, for instance, where anticipated damages may be relatively low but where a client is determined to seek vindication of an important right or a determination of a question of public importance).[183]

7.113 The Law Society of New South Wales proffered a cautious approach, suggesting that, if caps were introduced that they should be subject to automatic review five years after implementation to assess their operation.[184]

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178 See also Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) [7.8.3].
179 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 627. It was recommended that the caps be reviewed after a three-year period.
180 *Damages-Based Agreements Regulations 2013* (UK) reg 4.
181 See, eg, Shine Lawyers, *Submission 43*; Norton Rose Fulbright, *Submission 40*.
182 Slater and Gordon, *Submission 54*.
183 Ibid. See also Phi Finney McDonald, *Submission 34*; Maurice Blackburn, *Submission 37*.
184 Law Society of New South Wales, *Submission 64*.

7.114 Three key arguments were advanced in opposition to statutory caps applying to an Australian percentage-based fee regime:

- **Sliding scale statutory caps may result in payments disproportionate to work or risk**. This risk could run both ways—limitations on income may not accurately reflect the true extent of the work or risk, leading to solicitors being under or overpaid. In this way, caps may be too blunt an approach that does not allow for differences of risk in individual cases.[185]

- **The maximum cap may become the default amount awarded to solicitors or funders**.[186] This has been the experience with uplift fees for solicitors.

- **The introduction of statutory caps may dissuade solicitors from taking on the very cases that the introduction of percentage-based fees might be thought to promote:** namely, smaller matters with higher risk, such that there will be no demonstrable improvement in access to justice.[187]

7.115 The primary reason advanced against statutory caps, however, was that the Federal Court—especially in relation to the model proposed by the ALRC—has sufficient power and oversight to contain percentage-based fees to proportional and appropriate amounts.[188] This reflects the recommendations of the VLRC which found that court determination of the percentage fee meant that statutory caps were unnecessary.[189]

7.116 The ALRC recommends that percentage-based fee agreements in class action proceedings are enforceable only with leave of the Federal Court. The ALRC also recommends that the Federal Court have the power to vary, set or reject the percentage-based fee.[190] These are not standalone recommendations—together with the recommendation to introduce percentage-based fee agreements for class action proceedings, they aim to ensure that percentage-based fees are proportionate and reasonable. The safeguards built into the recommendation are necessary to prevent a 'windfall' for lawyers acting in class actions. If these extra safeguards are not adopted, only then does the ALRC support the introduction of statutory caps.

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185 Legg, above n 43; M Legg, J Metzger, *Submission 12*.

186 M Legg, J Metzger, *Submission 12*. See also Victorian Law Reform Commission, above n 90, [5.80]–[5.85].

187 Victorian Law Reform Commission, above n 90, [5.80]–[5.85].

188 See, eg, M Legg, J Metzger, *Submission 12*; Johnson Winter & Slattery, *Submission 14*; Litigation Capital Management Limited, *Submission 30*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Maurice Blackburn, *Submission 37*; IMF Bentham Limited, *Submission 50*; Allens, *Submission 52*; NSW Society of Labor Lawyers, *Submission 55*; Law Council of Australia, *Submission 62*; King and Woods Mallesons, *Submission 65*; NSW Young Lawyers, *Submission 68*; Australian Bar Association, *Submission 69*.

189 Victorian Law Reform Commission, above n 90, [3.88], [5.80]–[5.85].

190 See rec 19.

Building an appropriate model

7.117 There are issues related to percentage-based agreements that are not dealt with by recs 17–19. If accepted, there will be detail that needs to be dealt with. The ALRC does not prescribe the minutiae of how percentage-based agreements may be formed, but suggests that the existing regulation of the formation of valid conditional fee agreements may be adapted for percentage-based fee billing, particularly the requirements that:

- the calculation of the fee be outlined in the agreement;
- a 'successful outcome' be clearly defined;
- a cooling off period be established;
- the client be informed of the right to seek independent legal advice; and
- contravention of the obligations constitutes an offence and renders the agreement invalid.[191]

7.118 For those areas specific to percentage-based fee agreements that are not considered by existing regulation, models in cognate jurisdictions may provide guidance, such as:

- **party/party costs**: England and Wales have generally provided for a time-based calculation.
- **ATE insurance premiums**: these are no longer recoverable in England and Wales (with some exceptions, in which the ATE premium could still be recovered).
- **percentage-based or multiplier**: In Canada a percentage-based fee can comprise a proportion of the award or a multiplier of time-based billings.

7.119 The ALRC supports a percentage-based fee model where the fee is based on a percent of the award. It suggests that ATE insurance premiums remain non-recoverable (and are absorbed within the contingency fee), and that party/party costs be determined in accordance with the approach taken in England and Wales.

Managing conflicts of interest

7.120 Class action proceedings, especially those that are funded by third-party litigation funders, give rise to particular circumstances likely to result in actual or perceived conflicts of interests and duties for funders and for solicitors who represent class members.[192] While funding agreements generally make clear that solicitors act for the class members, funders, at least in the Australian context, are often intimately involved in proceedings. Solicitors may be influenced by the commercial needs of funders with

191 See [7.8]–[7.15] above.
192 Conflicts of interests for third-party funders are dealt with in Chapter 6—Regulation of Litigation Funders.

whom they have established a relationship, and may face additional conflicts when there are multiple classes within the one action.

7.121 Conflicts are inherent in some aspects of the Australian class action regime. Nonetheless, if not adequately addressed, conflicts can result in outcomes that are detrimental to some or all class members. Not all conflicts can be managed, and unmanageable conflicts should, where possible, be prohibited. In short, unmanaged conflicts can undermine the integrity of class actions and the civil justice system.

Conflicts of interests and duties in class action proceedings

7.122 Even though the objective of class members, solicitors and third-party litigation funders is often aligned—to resolve the matter favourably for the class—class action proceedings can produce situations of actual or perceived conflict for solicitors.[193] Lawyers for the applicant have more at stake in class actions than other matters. As observed by the Honourable Ray Finkelstein QC:

> Because of the way class actions are put together the plaintiff law firm has much more to gain than the representative plaintiff or any individual class member and therefore has a greater stake in the action itself.[194]

7.123 In its consultation paper on litigation funding and group proceedings, the Victorian Law Reform Commission (VLRC) identified other scenarios in which conflicts of interests and duties may occur in the tripartite relationship formed in funded class action matters, including:

> **The recruitment of prospective class members.** As the litigation funder has an incentive to maximise the number of class members signing up, advertisements may give 'undue prominence' to the prospects of success of proceedings. Maximising the number of class members also increases the likely divergence in claims between class members, the expected length and complexity of proceedings, and the potential for lawyers to face conflicts of interest when acting for all class members.
>
> **The terms of any funding agreement.** The litigation funder has an incentive to maximise the amount recoverable in the event of a successful outcome, and may wish to participate in decisions affecting the outcome of proceedings. The lawyers will have an incentive to receive legal fees, and the class members will wish to minimise all costs and maximise their return.
>
> **Determination of strategies employed to pursue the claim.** The lawyers may consider aspects of the case to have legal merit, yet the litigation funder may not wish to finance these aspects of proceedings. Alternatively, where a representative plaintiff has a weak claim, a defendant may make an offer for discontinuance which, if accepted, would be against the interests of class members with stronger claims.

193 Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in Tripartite Contract, and the Lens of Theory' (2016) 39(1) *UNSW Law Journal* 165.

194 Ray Finkelstein, 'Class Actions: The Good, the Bad and the Ugly' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 418.

> **Determination of confidential information**. The lawyers acting for a class may feel that the best chance of settlement is achieved through disclosure of due diligence carried out by the litigation funder as to the likely success of the claim. For commercial reasons, the funder may not wish such disclosures to be made.
>
> **Settlement.** The litigation funder may want to settle, yet class members or lawyers may wish to pursue the legal claim. The types of settlement, including offers of settlement in kind rather than cash, may also cause a conflict between the wishes of the class members and the litigation funder.
>
> **Settlement distribution schemes.** While class members have an incentive to receive any amounts from proceedings as soon as possible, the lawyers administering the settlement distribution scheme must assess the merits of individual claims and distribute amounts accordingly. The lawyers continue to incur legal costs during settlement distribution schemes, which will diminish the amounts received by class members.[195]

7.124 The recent case of *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3),*[196] highlighted issues that can occur between solicitors and funders, especially when the relationship between the two breaks down. In that matter, group members objected to the proposed settlement due to, among other things, the effect of conflicts between the law firm and third-party litigation funder and the consequential withdrawal from the matter by the law firm on the final settlement amount.[197] For example, the third-party litigation funder had sought independent legal advice (and to then recoup the costs from the settlement) on the advice given by the solicitors who had carriage of the matter.[198] While the Court did not agree that the breakdown of the relationship had impacted negatively on the settlement,[199] the circumstances of this case reflect the experience of some participants to class action litigation told to the ALRC in confidential consultations. Disharmony between solicitor and funder can create conflicts of interest for both solicitors and funders.

7.125 Other actual or perceived conflicts of interests and duties that may arise for solicitors acting for plaintiffs in class action proceedings include particular conflicts of duty-duty. For example, solicitors acting for the representative plaintiff owe a fiduciary duty to the representative plaintiff, while owing the same duty to the entire class.[200] This is the case even in open class actions, where the group members can number in the thousands and many may remain unidentified.[201] Class members may not have suffered the same damage and may not be seeking the same remedy. This can give rise to a conflict between the duties owed by a solicitor to the representative plaintiff and those owed to the rest of the group, or between different categories of members within the

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195 Victorian Law Reform Commission, above n 91, 44.
196 [2018] FCA 1842.
197 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [70].
198 Ibid [12].
199 Ibid [77], [78].
200 Allens, 'Submission 12 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017) 8.
201 See, eg, *Kelly v Willmott Forests Ltd (in liq)* (No 4) (2016) 112 ACSR 584 [220], [308].

group.[202] As previously observed by law firm Allens, it may be difficult for plaintiff solicitors to 'act in the best interests of all group members when these interests may not necessarily align, and may in fact compete with each other'.[203]

7.126 It has been suggested that, to discharge the fiduciary obligation owed to the class by solicitors, the class must be narrowly defined so that all class members are asserting the same damage and loss. This would, however, undermine the 'very object' of the statutory class action regime to 'promote access to justice by allowing for groups with varying degrees of difference in the claims to band together so as to achieve economies of scale and share costs'—an object that is 'arguably fundamentally at odds with the requirements of fiduciary law'.[204]

7.127 Duty-duty conflicts may also arise when a solicitor acts for both a funder and the members. There may be an actual or perceived conflict for solicitors when funders retain solicitors to represent class members. This may be a frequent occurrence: as observed by the Australian Securities and Investment Commission (ASIC), members in funded matters do not usually engage their own solicitors.[205]

7.128 If not adequately identified and managed, conflicts of interest may benefit some class action participants rather than (or in advance of) all or some of the class members.[206] This provides for poor civil justice outcomes and runs counter to the objectives of the class action regime.[207]

Existing obligations to avoid conflicts of interest

7.129 Solicitors have existing obligations to their client/s to avoid conflicts of interest. For example, solicitors are subject to fiduciary duties to their client, ethical duties to the court, statutory duties under the state or territory's legal profession statute and professional codes of conduct and practice rules.[208]

7.130 The *Australian Solicitors' Conduct Rules* provide a framework for ethical and professional conduct and specifically include rules that establish the fundamental duties of legal practitioners, including their paramount duty to the court and the administration of justice, as well as duties to act in the best interests of their client and avoid any

202 Finkelstein, above n 194, 421.
203 Allens, above n 200, 8.
204 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *UNSW Law Journal* 914, 917.
205 ASIC, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (2013) [248.13].
206 Victorian Legal Services Board and Commissioner (Vic), 'Submission 10 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2016) 3.
207 See Chapter 2—The Evolution of Class Action Proceedings and Third-Party Funding.
208 ASIC, above n 205, [248.10].

compromise to their integrity and professional independence.[209] Solicitors in class action proceedings are also subject to oversight by the Federal Court.[210]

7.131 The existing framework prescribing solicitors' obligations may not adequately address certain circumstances that solicitors acting in class action proceedings are likely to face. For example, as mentioned above, solicitors for the representative plaintiff also owe duties to the entire class. There is little guidance for, and oversight of, solicitors who act in class actions regarding their duties to class members: this can affect a solicitor's ability to assess, disclose, and receive informed consent regarding conflicts—something that, in proceedings with a large or undefined class, can be an 'almost impossible task'.[211]

7.132 The existing framework prescribing solicitors' obligations may also be inadequate to assist solicitors to manage the range of potential conflicts of interests and duties that arise when a third-party litigation funder is involved in the proceedings. The majority of class action proceedings also involve a litigation funder who remunerates the solicitor—and may even give instructions—but who is not the solicitor's client. Different conflicts arise when the funder is also a client.

7.133 According to Maurice Blackburn, tactical behaviour already in evidence included:

> (a) the race to the courthouse, with the consequent problems of inadequate investigation, poor pre-commencement analysis, and few if any genuine steps towards early resolution;
>
> (b) extravagant and overbroad pleadings designed to exaggerate case value or to manufacture a putative competitive advantage by appearing to represent the biggest possible group over the longest possible claim period;
>
> (c) unsubstantiated public commentary by lawyers or litigation funders about the value of the claims they intend to pursue;
>
> (d) unrealistic litigation budgets (without any guarantee that they will not be revised); and
>
> (e) tactical delay (lying in wait) until other proceedings have been commenced and funding and other terms announced, and then filing (or even announcing an intention to file) copy-cat proceedings based on statements of claim in proceedings on foot, but doing so with the advantage of being able to make the last bid on price.[212]

7.134 In its final report on litigation funding and group proceedings, the VLRC recognised the particular conflicts that solicitors acting for the applicant in class actions may face. Nonetheless, it ultimately found that court oversight was a 'significant safeguard' against detrimental outcomes of inherent conflicts,[213] and that existing regulation of lawyers was sufficient to 'prevent, detect or sanction unprofessional conduct', deeming further

209 Law Council of Australia, *Australian Solicitors Conduct Rules* (2015) rr 3–5, 11.
210 See, eg, Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) cl 5.8, 5.9.
211 Finkelstein, above n 194, 421.
212 Maurice Blackburn, *Submission 37*.
213 Victorian Law Reform Commission, above n 90, [4.129].

regulation of the legal profession unnecessary.[214] The VLRC instead recommended that professional guidelines be produced for lawyers on the duties and responsibilities that solicitors have to all class members in class actions.[215] This recommendation mirrors those made by the ALRC in its 2000 report on *Managing Justice: A Review of the Federal Civil Justice System*, in which the ALRC recommended professional practice rules should be developed for lawyers dealing with multiple claimants and class actions.[216]

7.135 In this Inquiry, the ALRC goes further to suggest that guidelines could be a part of a broader accreditation process for solicitors acting in class action proceedings.[217]

More solicitors are entering into class action proceedings

7.136 Some solicitors may commence class actions (whether funded or not) without a complete understanding of their legal and ethical obligations. The Victorian Legal Services Board and Commissioner (VLSBC) submitted to the VLRC that, while the 'vast majority of lawyers comply with their ethical obligations and act with honesty, competence and diligence' in class action proceedings, this is not always the case. The VLSBC provided an example of a practitioner in a small firm who filed class action proceedings in the Victorian Supreme Court with 'undue haste' without 'sufficient research' or 'appropriate assistance from counsel'. Further, the solicitor in question had not obtained proper instructions, did not properly supervise junior staff and did not properly advise the representative plaintiffs of the risks, namely of the potential for costs orders to be made against them.[218] The VLSBC recommended to that inquiry that a specialist accreditation course in class actions be developed.[219]

7.137 The number of known legal representatives who act predominantly for the applicant in class action proceedings has grown over time.[220] For example, in the period from 2005 to 2008 there were 11 firms representing plaintiffs in filed class actions. In the period from 2014 to 2017, this number had grown to 43.[221] This growth has been described as the 'defining feature of the class actions landscape in recent years'.[222]

7.138 There is a risk that new entrants may file or defend class actions without any experience or knowledge regarding the complexities of class action proceedings. From 2014 to 2017, 51% (22) of legal representatives in class action proceedings had no prior experience in running class actions. Of this inexperienced group, Professor Morabito

214 Ibid [26].
215 Ibid rec 13; See, also, Norton Rose Fulbright, *Submission 40*.
216 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) rec 82.
217 See rec 20.
218 Victorian Legal Services Board and Commissioner (Vic), above n 206, 3.
219 Ibid 4, 5.
220 King &Wood Mallesons, 'The Review: Class Actions In Australia 2015/2016' 19.
221 See Chapter 3—Incidence.
222 Allens, 'Class Action Risk 2016' 5.

noted that 27% (6) 'were able to make their debut in Australia's class actions space thanks to the support of litigation funders'.[223]

Voluntary accreditation for class action proceedings

Recommendation 20 The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.

7.139 Accreditation is common in a variety of legal fields. A solicitor can become an accredited specialist in, among others, family law, immigration law, personal injury and dispute resolution.[224] Accreditation can be recognised across states and territories.[225] While solicitors without accreditation are not precluded from acting in these areas, specialist accreditation aims to provide the profession and the public with a reliable means of identifying practitioners with proven expertise in a particular area of law and practice. This may become of increasing significance in light of the growth in the number of competing class actions and the consequent need for the Court to determine whether it is appropriate for one or more of the proceedings to be stayed.[226]

7.140 Accredited class action solicitors would be better trained in all aspects of procedural law relevant to class actions, including in the identification and management of conflicts of interests and duties. This would be particularly valuable for new entrants.

7.141 Accreditation could provide solicitors with best-practice ways to communicate with group members.[227] This would be valuable to new entrants and existing practitioners. The ALRC held confidential consultations with various group members (both current and previous) in which communication from lawyers was a key theme: communications to individual group members were considered to be too infrequent or confusing.

7.142 Not all stakeholders to this Inquiry supported the implementation of a voluntary accreditation scheme. Some suggested that accreditation was unnecessary,[228] or that it would not have any practical impact on the conduct of solicitors.[229] Others suggested that

223 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017) 36.
224 See, eg, https://www.lawsociety.com.au/learning-and-events/specialist-accreditation/program-areas.
225 Law Society of NSW, Policy on Mutual Recognition of Accredited Specialists—Framework for National Policy (2009).
226 *Perera v GetSwift Limited* [2018] FCA 732 [122]; *Wileypark Pty Ltd v AMP Limited* [2018] FCA 143 [119]; and see Chapter 4—Powers of the Federal Court: Case Management.
227 See rec 22.
228 King and Woods Mallesons, *Submission 65*.
229 Allens, *Submission 52*.

it did not go far enough—and that certification of class action proceedings was needed if the aim truly was to mitigate the risks of funders 'exerting pressure on solicitors to settle matters prematurely, or on terms that are not in the best interests of the group members, and shopping for solicitors who are amendable to early settlement'.[230] Certification is discussed in Chapter 4—Powers of the Federal Court: Case Management.

7.143 Law firm Maurice Blackburn suggested that voluntary accreditation would be of limited use, noting that an accreditation program would not address the inexperience of some lawyers (especially if they were not accredited), but conceded that accreditation could assist prospective claimants to identify reputable practitioners with demonstrated knowledge of class actions.[231]

7.144 The Law Society of New South Wales recommended that limits be set on those who could undertake accreditation, noting that it would be in accordance with other specialist accreditation schemes that it only be available to those for whom class actions are a significant part of their practice. This is usually 25%.[232]

7.145 Most stakeholders who provided submissions on accreditation for class action practitioners supported the introduction of such a scheme.[233] It was generally held to be a sensible way to assist practising solicitors to gain a comprehensive understanding of the issues relating to conflicts, and to keep them apprised of developments in the sector.[234] There will be particular need for further training should percentage-based fees be adopted.

Uniformity and application

7.146 For accreditation to be most useful, it should be consistent across jurisdictions. As most class action proceedings are filed in the Federal Court,[235] uniformity across jurisdictions is especially important. The Federal Court has registries in all states and territories. Class action proceedings can also be filed in the Supreme Court of New South Wales, Victoria and Queensland. As observed by law firm Slater and Gordon:

> As there are some differences between the representative proceeding legislation between states and the Federal regime, it seems most appropriate that the accreditation should require expertise both in relation to federal class action proceedings, and the class action regime in the State in which the lawyer principally practices.[236]

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230 M Legg, J Metzger, *Submission 12*.

231 Maurice Blackburn, *Submission 37*.

232 Law Society of New South Wales, *Submission 64*.

233 See, eg, M Legg, J Metzger, *Submission 12*; Therium Australia Limited, *Submission 19*; Ashurst, *Submission 25*; International Litigation Partners, *Submission 31*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; Norton Rose Fulbright, *Submission 40*; Clayton Utz, *Submission 42*; Shine Lawyers, *Submission 43*; US Chamber Institute for Legal Reform, *Submission 44*; Insurance Council of Australia Limited, *Submission 47*; Woodsford Litigation Funding, *Submission 48*; Zurich Australia Insurance Limited, *Submission 49*; Slater and Gordon, *Submission 54*; NSW Young Lawyers, *Submission 68*.

234 See, eg, M Legg, J Metzger, *Submission 12*.

235 Morabito, above n 223.

236 Slater and Gordon, *Submission 54*.

7.147 The Law Council of Australia has agreed to take a leadership role in this regard:

> As a matter of policy, the Law Council does not operate or administer accreditation programs for any area of law. Rather, the operation and administration of accreditation programs is a matter that is generally handled by state and territory law societies, who are better placed to deal with such matters. That said, the Law Council would be pleased to play a leadership role in facilitating ongoing education for legal practitioners in class action law and practice—including by assisting its constituent bodies to develop specialist accreditation courses and training programs for practitioners practising in class action litigation.[237]

7.148 There is support among the states. The Law Society of New South Wales advised this Inquiry that it would consider whether there is sufficient demand for a class action accreditation unit within the existing Specialist Accreditation program. Class action practice may also fit as a sub category in the Commercial Litigation Program—or be a newly designed program.[238]

Amendments to the Australian Solicitors' Conduct Rules

Recommendation 21 The *Australian Solicitors' Conduct Rules* should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.

7.149 As mentioned above, the *Australian Solicitors' Conduct Rules 2011* (the Conduct Rules) provide a common set of professional obligations and ethical principles for Australian solicitors. The rules have been adopted in the majority of states and territories.[239] In NSW and Victoria they have been adopted under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.*

Prohibit financial interests in litigation funders who are funding proceedings

7.150 The relationship between solicitor and client is a fiduciary relationship, meaning that a solicitor must not 'engage in situations where his or her interests do or may conflict with the duty owed to the client' or 'profit from the position of solicitor', except with fully informed consent.[240]

7.151 Rule 12.1 of the Australian Solicitors' Conduct Rules provides that a solicitor must not act for client where there is a 'conflict between the duty to serve the best

237 Law Council of Australia, *Submission 62*.
238 Law Society of New South Wales, *Submission 64*. See, also, M Legg, J Metzger, *Submission 12* who see no reason why voluntary accreditation should not be part of CPD.
239 ACT, NSW, Queensland, SA and Victoria.
240 Law Council of Australia, 'Australian Solicitors' Conduct Rules 2011 and Commentary—August 2013' 21.

interests of a client and the interests of the solicitor'. Rule 12.4 notes that a solicitor will not have breached this rule merely by:

> 12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided the solicitor advises the client:
>
> (i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
>
> (ii) that the client may refuse any referral, and
>
> the client has given informed consent to the commission or benefit received or which may be received.
>
> 12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided the solicitor has first disclosed the payment or financial benefit to the client.

7.152 The commentary to the Conduct Rules directs solicitors who operate other concurrent businesses to 'be mindful of the possibility of conflicts arising because of the different business activities'. It notes that solicitors should ensure that a person can 'distinguish between the non-legal services provided in respect of which the protections of the solicitor-client relationship do not apply'.[241]

7.153 These duties and rules may mean that, in the situation where a solicitor is representing class members in a class action and is also invested in the entity that is funding that matter, the solicitor must disclose this to the class and receive informed consent to proceed. This may be complicated by several factors. First, due to the constitution of the class, it may not be possible to receive the fully informed consent of each member of the class, although informed consent may be given by the representative plaintiff. Secondly, for so long as contingency fees remain prohibited, permitting solicitors to fund a matter may facilitate an informal contingency fee arrangement.[242] Thirdly, the potential for unmanageable conflicts of interest issues to arise is heightened if a solicitor or law firm has a financial interest in a litigation funder.

7.154 This issue is not theoretical: there have been attempts by lawyers to fund actions in which they are representing the plaintiff. For example, in 2014, law firm Maurice Blackburn withdrew its application for court approval to have a related entity (Claims Funding Australia) fund a class action.[243] Following this, the Victorian Supreme Court found that it was improper for the legal representatives of a lead plaintiff to have an indirect financial interest in the outcome of a class action by way of a litigation funding

241 Ibid.

242 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 219.

243 *Clasul Pty Ltd v Commonwealth of Australia* [2014] FCA 1133; Ibid 218.

company.[244] The Court concluded that informed consent was not enough to prevent this arrangement from affecting the 'proper administration of justice, including the appearance of justice', and the legal representatives were prohibited from acting in the matter.[245]

7.155 The ALRC considers that the Conduct Rules should expressly prohibit solicitors from being invested in the outcome of a funded matter in which they are acting through having an interest in that litigation funder.[246] Accordingly, rule 12 should be expanded to provide that a solicitor (or law firm) must not directly or indirectly hold any share or ownership interest in a litigation funder which has a funding agreement with a client of the solicitor or the law firm in respect of a matter in which the solicitor or the law firm is currently acting.

Distinguish from percentage-based fee billing

7.156 Some stakeholders considered this prohibition contrary to the proposal to lift the prohibition on percentage-based fee billing in class action proceedings.[247] The NSW Young Lawyers suggested there to be no 'effective difference between a solicitor having an interest in a third party that is funding the proceeding in exchange for a commission and the solicitor being entitled to charge a commission—disclosure of the arrangement should be enough'.[248] Professor Legg and Dr Metzger considered that the proposal to prohibit an interest in the funder should only stand until percentage-based fees are introduced.[249]

7.157 The recommendation to prohibit ownership by solicitors in a litigation funder that is funding a matter in which the solicitor or law firm is acting can, however, be distinguished from the recommendation above that solicitors in class actions be permitted to bill on a percentage-based fee basis.[250] Primarily, solicitors are officers of the court. This imposes extra obligations to the court and the administration of justice on solicitors that are absent from the obligations of third-party litigation funders. Further, under our recommendations contingency fees would be:

- **Transparent:** solicitors acting on a percentage-based fee basis would be required to receive leave from the Federal Court to proceed—the share of any award to be received by the solicitor would be on the record. This provides for transparency in dealings that may not be present when solicitors, in their personal capacity, have an interest in the relevant litigation funder.

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244 *Bolitho v Banksia Securities Limited* [2014] VSC 582.
245 Ibid [67].
246 Singapore has recently enacted such a prohibition: *Legal Profession (Professional Conduct) Rules* 2015, s 49B.
247 See, eg, Litigation Capital Management Limited, *Submission 30*; NSW Young Lawyers, *Submission 68*.
248 Maurice Blackburn, *Submission 37* Maurice Blackburn also considered disclosure of the arrangement to be sufficient.
249 M Legg, J Metzger, *Submission 12*.
250 See rec 17.

- **Subject to supervision:** as the Court and participants would be fully aware of the solicitor's or law firm's financial interest in the matter, the Court could manage the proceedings appropriately.

7.158 As noted by law firm Slater and Gordon, funders are not subject to the same level of scrutiny, and they do not have a duty to the Court. The 'lower visibility of litigation funders' commercial activities and decision making could result in the materialisation of a conflict going undetected'.[251]

7.159 Other stakeholders considered a prohibition of this type to be unnecessary—existing obligations are sufficient to ensure that potential conflicts of interest are disclosed and managed, and actual conflicts are avoided.[252] Law firm Phi Finney McDonald suggested that a blanket prohibition may have unintended consequences:

> Our concern about a prohibition of such interests arises from the potential for inadvertent consequences and in particular the risk of unavoidable non-compliances. As the litigation funding market in Australia deepens and matures, the likelihood of solicitors inadvertently obtaining indirect interests in litigation funders' operations (for instance, by investing in an industry or retail superannuation fund which in turn invests in an investment fund involved in litigation funding) increases. Certainly, solicitors and law firms should be obliged to make prominent disclosure of all such interests of which they are aware, but a restrictive prohibition may cause an array of unintended consequences in future.[253]

7.160 Generally, however, the proposal to insert this prohibition into the *Conduct Rules* received support.[254] Stakeholders considered that, without the ban, the 'potential for collusion'[255] was too great and provided for a situation that constituted an 'intractable position of conflict'.[256] The Law Society of New South Wales stated:

> The Law Society supports consideration of this proposal because it believes that it is in the interests of the administration of justice that lawyers should not be put in a position where they would have, potentially, a clear and inherent conflict between commercial interests, through a funding vehicle, and exercising their fiduciary duties in favour of parties to the litigation that is being funded by that vehicle. While it is true that lawyers manage conflicts of interest on a regular basis, it is the view of the Law Society that it would not be in the public interest for lawyers to be able to place themselves in such a position of potential and perceived conflict.[257]

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251 Slater and Gordon, *Submission 54*.
252 International Litigation Partners, *Submission 31*; Phi Finney McDonald, *Submission 34*.
253 Phi Finney McDonald, *Submission 34*.
254 M Legg, J Metzger, *Submission 12*; Therium Australia Limited, *Submission 19*; Clayton Utz, *Submission 42*; US Chamber Institute for Legal Reform, *Submission 44*; MinterEllison, *Submission 45*; Woodsford Litigation Funding, *Submission 48*; IMF Bentham Limited, *Submission 50*; Allens, *Submission 52*; NSW Society of Labor Lawyers, *Submission 55*; Law Council of Australia, *Submission 62*; Law Society of New South Wales, *Submission 64*; King and Woods Mallesons, *Submission 65*; Australian Bar Association, *Submission 69*.
255 M Legg, J Metzger, *Submission 12*.
256 Law Council of Australia, *Submission 62*.
257 Law Society of New South Wales, *Submission 64*.

7.161 The US Chamber Institute for Legal Reform suggested that the ban should be extended to barristers, and the Australian Bar Association confirmed that, following the decision in *Bolitho v Banksia Securities Limited*,[258] it would indeed be considering amendments to the *National Barristers' Conduct Rules*.[259]

Early communication of conflicts of interest to group members

> **Recommendation 22** The Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.

7.162 The ALRC has discussed above ways for legal professionals to manage conflicts of interest when appearing in Part IVA proceedings. Litigation funders' obligations are canvassed in Chapter 6. This section of the report is concerned with how those conflicts are communicated to group members to ensure that group members have opportunities to assess whether any conflict may affect their decision either to join or to stay in class action proceedings.

7.163 Disclosure of conflicts of interest to class members is required by existing legal frameworks. For example:

- ASIC's Regulatory Guide 248 requires litigation funders to have written procedures dealing with how to disclose conflicts of interest effectively to prospective members, including procedures that provide prospective members with information to assist them to understand the different interests of the funder, solicitors and members, and the specific situations where conflicts may arise in that matter.[260] It is expected that disclosure would happen at the recruitment of prospective members, in the terms of any funding agreement, and be ongoing.[261]
- Solicitors are required to disclose conflicts of interest and receive informed consent to continue to act for those whose interests are might be affected by such conflicts (in class action proceedings, informed consent is given by the representative plaintiff).

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258 *Bolitho v Banksia Securities Limited* [2014] VSC 582.
259 US Chamber Institute for Legal Reform, *Submission 44*; Australian Bar Association, *Submission 69*.
260 ASIC, above n 205, [248.52].
261 Ibid 20–23.

7.164 There are pre-existing processes that provide an opportunity to advance information regarding conflicts of interest to group members. For example, legal representatives are required to provide class members in open class proceedings with notices, including opt-out notices.[262] Opt-out notices are sent to the entire class (where possible) and may be the first communication class members receive. These opt-out notices are in a prescribed form (Form 21) and are to be filled out and returned to the Federal Court should a member wish to opt-out.

7.165 Form 21 notices are provided to group members with a covering letter that outlines the details of the action. The Federal Court provides a sample best-practice opt-out notice cover letter for use by legal representatives. The sample letter includes an explanation of what a class action is; who the action involves (applicant/respondent); what an opt-out is; an explanation of costs in class actions; what to do to stay or leave the class; and how to obtain further documentation. It does not provide for information regarding conflicts of interest.[263]

7.166 Disclosing potential or actual conflicts and how they are to be managed at the earliest possible opportunity would promote transparency and may inform a class member's decision to opt-out. The ALRC recommends that the very first notice, be it an opt-out or general notice, should be required to include information (or a link to information) regarding any actual or potential conflicts of interest, and the proposed management of those conflicts. This recommendation received support from a broad range of stakeholders,[264] but was not supported by law firm Maurice Blackburn.[265]

7.167 Maurice Blackburn suggested that making disclosures regarding conflicts of interest in the first notice to class members may not be necessary or desirable in all cases and might give rise to practical difficulties. Maurice Blackburn further noted that third-party litigation funders already have obligations under Regulatory Guide 248, so that the recommendation would only be triggered in unfunded actions—which are less likely to involve conflicts of the type by which the recommendation is concerned. Law Firm Slater and Gordon advocated for a less prescriptive approach and suggested that the precise formulation of such conflict management disclosure should be determined by the court on a case-by-case basis.[266]

7.168 New South Wales Society of Labor Lawyers asked what conflicts should be included in the first communications to group members. To be clear, it suggested that the Federal Court should develop a comprehensive list of 'Conflict Disclosures', which would provide a template for the matrix of billing relationships possible in tripartite agreements. This could include: standard costs agreements; conditional costs

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262 *Federal Court of Australia Act* (1976) s 33J; *Federal Court Rules 2011* (Cth) r 9.34.

263 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (2016) Sch A.

264 Harbour Litigation Funding Limited, *Submission 17*; Ashurst, *Submission 25*; Phi Finney McDonald, *Submission 34*; M Duffy, *Submission 36*; MinterEllison, *Submission 45*; Queensland Law Society, *Submission 66*; Law Society of New South Wales, *Submission 64*.

265 Maurice Blackburn, *Submission 37*.

266 Slater and Gordon, *Submission 54*.

agreements; part-conditional costs agreement; costs agreements operating under a third-party litigation funding agreement; and contingency fee agreements (if adopted).[267]

7.169 In the course of this Inquiry, the ALRC's confidential consultations with group members suggested that further and clearer communication regarding proceedings is required.[268] While there are obligations already in place, the ALRC sees value in providing group members with a very clear outline of proceedings and participants, and any conflicts therein, as early as possible. There is value in having these notices approved by the Federal Court (unlike those issued by third-party litigation funders). There is, however, a balance to be struck between providing clear and consistent information and overwhelming group members with legal documents and correspondence.

Clear and accessible communication

7.170 Some stakeholders to this Inquiry were concerned that the inclusion of such detailed information concerning conflicts of interest may create confusion among some group members.[269] Class action proceedings are already complex, and the first notices to group members should be clear and concise.[270]

7.171 There have been movements towards providing information to group members in class action proceedings in plain English, and through various mediums—principally in the United States.[271] This has included the introduction of communication through email and providing notices on websites. Courts in both the United States and Canada have permitted class action communications through social media.[272]

7.172 The layout of notices has also received attention, with the use of prominent headlines and the adoption of advertising techniques to ensure that the key messages are read and understood.[273]

7.173 Progress has also been made with regards to class action proceedings in Australia. Law firm Levitt Robinson provided this Inquiry with an example of communications

267 NSW Society of Labor Lawyers, *Submission 55*.

268 For example: some class members appeared to be unaware that legal fees would be deducted from any settlement, in addition to the funder's commission; lead plaintiffs were confused about the nature of their role; some group members became aware of conflicts between differing classes within the group only after settlement.

269 See, eg, Maurice Blackburn, *Submission 37*; Norton Rose Fulbright, *Submission 40*.

270 M Duffy, *Submission 36*; Norton Rose Fulbright, *Submission 40*; Maurice Blackburn, *Submission 37*; Levitt Robinson, *Submission 56*; Law Society of New South Wales, *Submission 64*; NSW Young Lawyers, *Submission 68*.

271 See, eg, Federal Judicial Centre, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (1 January 2010).

272 See, eg, Catherine Piché, 'The Coming Revolution in Class Action Notice: Reaching the Universe of Claimants Through Technologies' (Paper, Third Workshop on Civil Procedure, Arizona, 23 March 2018) 45.

273 See, eg, Federal Judicial Centre, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* (1 January 2010).

to group members used in the Palm Island class action.[274] In this matter, Levitt Robinson employed a socio-linguist with particular expertise in communication with Aboriginal and Torres Strait Islander peoples. The notice, which was approved by the Court, comprised a 'brightly coloured booklet with the forms that could be filled out on detachable perforated sheets'.[275] Levitt Robinson advised that:

> The changes that Dr Eades made to the notice were instructive. To take one example, an original paragraph read as follows:
>
> *The applicants, the group members, and the respondents are all "bound" by the findings in the judgment. The claims of the applicants have been finally determined, and the Court has ordered that the first respondent (the State of Queensland) pay compensation to them for the acts of unlawful racial discrimination by the police. Some group members now have the opportunity to bring their own claims against the first respondent (the State of Queensland) for compensation or other redress.*
>
> After Dr Eades's suggestions, the paragraph read as follows:
>
> *The applicants, the group members, and the respondents are all "bound" by the findings in the judgment. This means that all of these people have to follow what the judgment has set down about who can make a claim and what they can claim for. The Court has ordered that the first respondent (the State of Queensland) pay compensation to the applicants (Lex, Agnes and Cecilia Wotton) for the acts of unlawful racial discrimination by the police. Some group members now have the opportunity to bring their own claims against the first respondent (the State of Queensland) for compensation or other redress (which means things like an apology from the government, or being given medical assistance or counselling).*
>
> In our submission, Plain English explanations of legal concepts such as those introduced by Dr Eades are lacking in most notices that are distributed in class actions ... [276]

7.174 In Levitt Robinson's submission, any further information provided by the notices needs to be included 'carefully and in a way that is designed to be as accessible as possible to an unsophisticated audience'.[277]

7.175 Professor Legg and Dr Metzger suggested that funds should be made available to support research into the drafting and presentation of effective class action notices. To this, the authors noted that in the United States, class action notices must 'concisely and clearly state in plain, easily understood language' specific information about the nature and terms of the proceedings and how it may affect potential class members' rights.[278] This approach was developed following extensive research, and produced a check list, which includes:

- Are the notices designed to come to the attention of the class?

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274 Levitt Robinson, *Submission 56*. See also Wotton v State of Queensland (No 7) [2017] FCA 406.
275 Ibid.
276 Ibid.
277 Ibid. See also M Legg, J Metzger, *Submission 12*; Law Council of Australia, *Submission 62*; Australian Bar Association, *Submission 69*.
278 M Legg, J Metzger, *Submission 12*.

- Does the outside of the mailing avoid a "junk mail" appearance?
- Do the notices stand out as important, relevant and reader-friendly?
- Are the notices written in clear, concise, easily understood language?
- Do the notices contain sufficient information for a class member to make an informed decision?
- Have the parties used or considered using graphics in the notices?
- Does the notice avoid redundancy and avoid details that only lawyers care about?
- Is the notice in "Q&A" format? Are key topics included in logical order?
- Are there no burdensome hurdles in the way of responding and exercising rights?[279]

7.176 The Law Council of Australia suggested that—to avoid the notices becoming overwhelmed with information—the requisite information could be hosted on a website.[280]

7.177 The ALRC encourages advances towards the development of best-practice models for communicating with group members in Australian class action proceedings.

279 Ibid.
280 Law Council of Australia, *Submission 62*.

8. Regulatory Collective Redress

Contents

Introduction

8.1 In this Chapter, the ALRC recommends that Commonwealth regulators of consumer products and services (including financial and credit products and services) are equipped with regulatory redress powers.

8.2 Empirical research internationally suggests regulatory redress powers are a critical element of effective enforcement regimes. In addition, a regulatory redress power would address, in part, the challenges for many people and businesses in accessing a remedy when they have suffered loss due to the unlawful conduct of another.

8.3 As has been observed in earlier chapters, it was an express objective of Part IVA to 'enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources'.[1] The class action regime has enabled many individuals to pursue claims as a group member that they would otherwise have been unable to pursue, and recoveries have been achieved in a wide variety of types of claims. Nevertheless, class action litigation is expensive, and the transaction costs involved in securing relatively modest returns to individual group members remain a concern.[2] In addition, given the

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–3175 (Duffy).

2 See, eg, *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511. In this case, transaction costs (excluding any consideration of the indirect costs incurred by the Federal Court) were $10 million to secure

expense of class action litigation, actions will only be launched when economically viable, denying access to a remedy in many circumstances.

Is there a need for enhanced redress powers?

8.4 There have been a plethora of studies and analyses commissioned by Government in recent years that have highlighted that access to justice for many individuals remains elusive.[3] The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Banking Royal Commission) has examined a range of practices in the banking and financial services industries that should have resulted in a remedy being provided where it was not provided, or provided only many years later.[4]

Existing forums for redress

8.5 Currently, there are range of forums through which an individual or business may seek a remedy. These include the courts, industry based external dispute resolution (EDR) schemes (also known as industry Ombudsman), and compensation schemes established as a result of enforcement action taken by a regulator. A consideration of each of these forum's benefits and limitations, suggests that enhanced regulatory powers, and a standing mechanism (or scheme) through which such powers can be exercised quickly, would broaden the scope of remedial options available to Australian consumers and small businesses. Each of these forums is discussed briefly below.

The Courts

8.6 As has been highlighted throughout this report, the civil justice system is expensive and cases typically take years to reach resolution. West Australian Supreme Court Chief Justice Martin has described the Australian justice system as a 'Rolls Royce that the average Australian could only admire rather than utilise.'[5] Few individuals and even corporations have the resources to initiate litigation in the courts, particularly given the paucity of legal aid and limitations on the types of matters law firms are willing to run on a no-win-no fee basis.[6]

8.7 For consumer disputes, there are also tribunals at the state and territory level which provide a more informal forum for redress for small claims and fair trading disputes.

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a return to class members of $6.85 million.

3 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72); Productivity Commission 2017, *Consumer Law Enforcement and Administration* (Research Report); Government of Victoria, *Access to Justice Review* (2016); The Australian Government Treasury, Review of the financial system external dispute resolution and complaints framework (Final Report 2017) (the Ramsay Review).

4 Commonwealth of Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report*, (September 2018).

5 The Hon W Martin, Chief Justice of Western Australia, 'Improving Access to Justice through the Procedures, Structures and Administration of the Courts' (Speech, Australian Lawyers Alliance Western Australian State Conference, 21 August 2009).

6 Australian Government, Attorney-General's Department, *Legal Services Expenditure Report*, 2016-2017.

The jurisdiction and powers of these tribunals vary across the states and territories.[7] Typically, these tribunals have strict jurisdictional limits and have monetary limits as to the value of disputes that may be adjudicated.[8]

8.8 The class action regime can provide access to a remedy when an individual action would not be economic to pursue. Notwithstanding this, the class action regime is not a panacea. As most class actions settle, costs are typically taken from the global settlement amount. Accordingly, there is a sizable gap between the total amount paid by a respondent to defend and then settle a class action, and the amount actually received by class members.[9] As a result, there are advantages for both plaintiffs and respondents in resolving mass damages claims outside of litigation.

8.9 In addition, the preponderance of class actions that are filed in the Federal Court are heavily skewed towards shareholder and investor disputes, which are low risk and profitable to run. The ALRC has heard in consultations that there are many cases with reasonable prospects of success that are not run because they are deemed by funders and lawyers not to be economic. There is also statistical evidence that the class action regime has not provided access to a remedy for certain types of actions.[10] Breaches of competition law have been the subject of very few class actions since Part IVA was introduced and none in recent years.[11] Similarly, in discrimination law there have been very few class actions.[12]

8.10 By comparison, between 2013 and 2016, the English courts delivered 58 judgments arising out of 30 cases where anti-competitive or cartel conduct was alleged.[13] There is no evidence to suggest that there is less anti-competitive or cartel conduct in Australia when compared with the United Kingdom, particularly given the levels of market concentration in a large number of sectors of the Australian economy. Instead, there are impediments to bringing competition law actions in Australia.[14] For example, the enforcement powers of a regulator may be much more successful in uncovering evidence of illegal behaviour than a discovery process.[15] Consequently, there may be

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7 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), *Civil and Administrative Tribunal Act 2013* (NSW), *State Administrative Tribunal Act 2004* (WA)

8 See, eg, *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 12.

9 Chapter 3—Incidence.

10 Chapter 3—Incidence, Tables 3 and 4.

11 Rachel Burgess, 'SMEs and Private Enforcement of Competition Law: Achieving Redress' [2016] (3) *Global Competition Litigation Review* 77, 80. Private enforcement of competition laws is generally very low in Australia.

12 For example, the Business Services Wage Assessment Tool (BSWAT) case was run as an individual case rather than class action, *Nojin v Commonwealth of Australia* [2012] FCAFC 192. The claim by the residents of Palm Island was a rare exception *Wotton v Queensland (No 8)* [2017] FCA 639.

13 Barry Rodgers, 'Competition Law Private Enforcement in the UK Courts: Case-Law Developments 2013–2016' [2017] (3) *Global Competition Litigation Review* 129.

14 Rachel Burgess, 'SMEs and Private Enforcement of Competition Law: Achieving Redress' (Presentation, National Small Business Conference, 1-12 August 2016).

15 Ibid.

particular advantages in the competition law space for greater regulatory redress powers that build on and follow enforcement action.

Industry External Dispute Resolution

8.11 A number of industries have external dispute resolution (EDR) services, such as an industry Ombudsman, as part of their regulatory framework or as a condition of their licence.[16] On 1 November 2018, the Australian Financial Complaints Authority (AFCA) became the new EDR for the financial services industry. AFCA replaced the Superannuation Complaints Tribunal, the Financial Ombudsman Service (FSO) and the Credit and Investment Ombudsman.

8.12 EDR schemes have been effective in resolving thousands of complaints at little or no cost to the complainant.[17] These schemes are typically self-funded by those regulated or licensed.[18] The Australian Securities and Investments Commission (ASIC) noted that, together with financial services licensees' internal complaint handing processes:

> EDR provide an accessible alternative to the courts for most consumers and small business to resolve individual financial services complaints, subject to scheme jurisdiction including applicable monetary limits.[19]

8.13 Notwithstanding this success, EDR schemes are typically focused on individual dispute resolution and the extent that the scheme may investigate and seek to resolve systemic issues varies.[20] This has been recognised as a limitation in the past. One of the AFCA's predecessors, the FSO, recommended that consideration be given to putting in place a consumer redress scheme.[21] The FSO considered that such a scheme would respond to the current situation, where there are large numbers of disputes arising from failings in a financial services provider or financial product (or service) which requires a substantial number of customers' claims of loss to be assessed.

8.14 Another limitation of industry-based EDR schemes is that not all sectors are covered and, as was suggested by the Consumer Action Law Centre, '[t]his means products and services fall between the gaps of existing industry EDR schemes for financial services, energy and water utilities, and telecommunications.'[22] EDR schemes also rely on the victim making a complaint. In many instances, a company may become aware of a problem with a particular financial advisor, or problems with a particular vehicle transmission (as examples), before the individual has suffered loss and made a

16 Primarily, financial services, energy and water utilities, and telecommunications.
17 Australian Energy Regulator, *Annual Report* (2016-17), Telecommunications Industry Ombudsman Annual Report (2017-18); Financial Ombudsman Service Australia, *Annual Review* 2017-18).
18 Australian Financial Complaints Authority (AFCA) *Operational Guidelines to the Rules* (November 2018) 4.
19 ASIC, *Submission 72*.
20 Limitations include rules of the scheme, priorities and resources. See, AFCA, above n 18, 99.
21 Financial Ombudsman Service, 'Submission to Financial System Inquiry' (April 2014) [8.1].
22 Consumer Action Law Centre, *Submission 67*.

complaint. Other limitations of EDR include jurisdictional limits, (including monetary caps), exclusions for particular claimants as well as particular products and services.

Redress as part of enforcement action

8.15 Regulators in Australia are primarily focused on enforcing compliance (or as has been highlighted by the Banking Royal Commission, negotiating resolution of alleged breaches of the law) as opposed to seeking compensation for victims. Nevertheless, as part of enforcement action, a regulator may seek agreement for a corporation to provide customers with compensation, typically a refund. For example, the Australian Competition and Consumer Commission (ACCC) can accept enforceable undertakings from companies that the ACCC alleges have breached the law. Those enforceable undertakings can include providing refunds to affected customers.[23]

8.16 The Consumer Action Law Centre noted that 'in the 2015-16 financial year, ASIC secured over $200 million in compensation and remediation for consumers and investors across the areas it regulates.'[24] The benefit to the individual victims in these cases of ASIC's efforts to secure that compensation cannot be underestimated.

8.17 There are, however, differences between industry regulators in the extent and in what circumstances the regulator can secure compensation.[25] There are also differences in the extent to which regulators prioritise compensation as opposed to preventing future breaches. Moreover, where compensation is secured by a regulator as part of enforcement actions it is typically a refund as opposed to full compensation which includes consequential loss.[26]

8.18 All regulators have limited financial resources and must prioritise how those resources are applied. In 2016-17, the ACCC entered into 23 s 87B enforceable undertakings and has entered into 29 in the year to date.[27] This clearly represents a small fraction of the complaints received. This is in no way a criticism of the ACCC; rather, it reflects the current enforcement framework in which the ACCC operates.

8.19 The ACCC's prioritisation of cases is influenced by an enforcement framework that focuses on general deterrence and denunciation rather than compensating victims for loss. For example, in its submission to this Inquiry, CHOICE referred to *Australian Competition and Consumer Commission v Thermomix in Australia Pty Limited* (the Thermomix case).[28] In this case, the ACCC was successful in obtaining a pecuniary penalty of $4,608,500 against Thermomix in respect of breaches of the ACL.[29] The orders also required Thermomix to establish a consumer compliance program, maintain

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23 *Competition and Consumer Act 2010* (Cth) s 87B.
24 Consumer Action Law Centre, *Submission 67*.
25 See, eg, *Telecommunications Act 1997* (Cth) s 572B, *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA, *Competition and Consumer Act 2010* (Cth) s 87B.
26 *Australian Competition and Consumer Commission v Thermomix in Australia Pty Limited* [2018] FCA 556.
27 ACCC, s 87B undertakings register (online – as at 9 December 2018).
28 CHOICE, *Submission 22*.
29 *Australian Competition and Consumer Commission v Thermomix in Australia Pty Limited* [2018] FCA 556.

that program for three years, and publish certain notices on its website and Facebook page. Murphy J held:

> In summary the ACCC alleges, and Thermomix Australia now admits, that between 7 July 2014 and 23 September 2014 ... it was aware that the mixing bowl in some TM31 appliances might move and lift during use and following the processing of hot food or liquid. By reason of this knowledge, Thermomix Australia knew that during this period there was a potential risk of serious injury to users caused by the lid lifting and hot food and/or liquid escaping from the mixing bowl before that food and/or liquid had settled, thereby causing burning or scalding...[30]

8.20 The negotiated outcome between the regulator and the company endorsed by the Court did not include compensation for the injuries suffered. CHOICE noted that for the victims 'pursuing individual legal action can be too expensive, particularly when the cost of the product and any associated medical bills are comparatively low.'[31] Accordingly, the ALRC considers that proceedings similar to the Thermomix Case would be the type of cases where a regulatory redress scheme could make a useful addition to the existing forums for obtaining a remedy.

Other regulators

8.21 In addition to industry specific regulation, corporations generally have specific obligations to comply with specific thematic regulations. For example, the Office of the Australian Information Commissioner (OAIC), regulates the compliance with privacy law of Australian business with an annual turnover more than $3 million per annum.[32] The OAIC hears complaints from individuals and seeks to resolve them through conciliation. In addition, the OAIC can accept an enforceable undertaking from an entity under s 33E of the *Privacy Act 1988* (Cth), or a person under s 94 of the *My Health Records Act 2012* (Cth), where the OAIC considers there is reasonable evidence of a breach of that legislation. This power may be used to provide redress comparable to that of the general regulators discussed above.[33]

8.22 By way of further example, the Australian Human Rights Commission (AHRC) can investigate and conciliate anti-discrimination law[34] complaints in many areas of public life, including employment, education, the provision of goods, services and facilities, accommodation and sport. The AHRC has no enforcement powers or ability to look at complaints from a more systematic perspective.

8.23 Under the *Privacy Act 1988* (Cth), the OIAC may permit EDR schemes to handle privacy-related complaints.[35] Most recently, the OAIC has approved the AFCA, and

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30 Ibid [10].
31 CHOICE, *Submission 22*.
32 *Privacy Act 1988* (Cth) s 6.
33 See, AFCA, above n 18, 97-100.
34 *Australian Human Rights Commission Act 1986* (Cth), *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth).
35 *Privacy Act 1988* (Cth) s35A, see also OAIC, *Guidelines for recognising external dispute resolution schemes under s 35A of the Privacy Act 1988*, (2013).

consequently AFCA is authorised to resolve complaints against financial services licensees that involve breaches of the *Corporations Act 2001* (Cth) and the *Privacy Act 1988* (Cth). Accordingly, there may be merit in including privacy breaches in the design of any regulatory redress scheme. This would ensure that there is no difference between the scope of any systemic redress scheme compared with individual complaint handling. There may also be merit to including anti-discrimination claims, particularly in relation to the supply of goods and services.

Storm Financial collapse

8.24 A comparison of regulatory responses, class actions, and alternative dispute resolution (ADR) was undertaken in 2016 by Professor Legg using the collapse of financial services company, Storm Financial Limited, as a case study.[36] The case study enables a comparison, albeit in the context of a single case of mass loss, of the effectiveness of those three mechanisms in compensating financial services consumers who have suffered significant financial loss. As Professor Legg explained:

> Storm Financial was an Australian financial planning organisation that advised its clients to use debt to invest in the share market with the result that when the global financial crisis occurred those clients suffered significant losses.[37]

8.25 Storm Financial was wound up in 2009, having collapsed due to insolvency. Storm Financial's collapse meant that the primary protagonist responsible for the loss was not able to be sued. This led to complex ancillary liability questions for the banks that had provided loans to Storm Financial's customers. Within that complexity, a number of different schemes were established to provide redress for Storm Financial's clients:

- ADR through the FOS,
- ADR through 'ad hoc voluntary dispute resolution schemes that were established by the banks that had made loans to Storm Financial clients.'
- class actions, under Part IVA of the *Federal Court of Australia Act 1976* (Cth), against a number of banks.
- regulatory action by ASIC, 'which commenced legal proceedings against the banks, secured an oversight role for itself in a voluntary dispute resolution scheme and involved itself in the settlement of the class actions.'[38]

8.26 On assessing the returns that were achieved through the various mechanisms, Professor Legg concluded that:

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36 Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311.
37 Ibid, 312.
38 Ibid.

> The Storm Financial case study... demonstrates that the government regulator can play an important role in seeking redress through a combination of direct action through test cases, but also through indirect action such as providing oversight and information. The indirect steps can result in more effective redress outcomes being delivered through ADR and class actions. The choice for regulators is not one of whether to vacate the field in relation to compensation because other mechanisms may be employed. Rather, the regulator needs to adopt a strategy that facilitates the effective use of the other mechanisms through oversight and engagement, but also by being prepared to employ litigation when needed.[39]

8.27 The case study provides evidence that regulatory intervention to support redress can achieve outcomes for victims that are superior to class actions or individual ADR. The case study also demonstrates that regulatory redress schemes and class actions can be mutually reinforcing in supporting appropriate outcomes for victims. The Law Council of Australia submitted to this Inquiry that the voluntary redress schemes used in the Storm Financial case could form a useful model for the design of a federal collective redress scheme.[40]

How regulatory redress works in England and Wales

8.28 In England and Wales, there has been a shift in the role that regulators and law enforcement bodies take in respect of compensation and redress. Professor Hodges and Associate Professor Voet explain that:

> the role of regulators and public enforcers has broadened to move away from merely achieving safety or well-structured and priced markets, to encompass an aspiration to ensure, first, that consumers and vulnerable businesses receive redress as an integral part of a relevelled playing field and, second, that behaviour is effectively changed.[41]

8.29 As a result, regulators now have the ability to used 'enhanced consumer measures' including achieving redress in various ways, ensuring compliance, and expanding consumer choice.[42] These broad powers give flexibility to enforcers to select the right orders to fit the particular situation.[43]

8.30 According to Professor Hodges and Associate Professor Voet, empirical research demonstrates that effective regulatory systems have a sequence of objectives as follows:

1. Establishment of clear rules and their interpretation
2. Identification of individual and systemic problems
3. Decision on whether behaviour is illegal, unfair or acceptable

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39 Ibid, 338.
40 Law Council of Australia, *Submission 62*.
41 Christopher Hodges and Stefaan Voet, *Delivering Collective Redress, New Technologies* (Hart Publishing, 2018) 9.
42 Ibid 180. The key regulators include the Competition and Markets Authority, Civil Aviation Authority, Financial Conduct Authority, the Information Commissioner, and various utility regulators.
43 *Consumer Rights Act 2015* (UK) s 79 and sch 7.

4 Cessation of illegality

5 Identification of the root cause of the problem and why it occurs

6 Identification of which actions are needed to prevent the reoccurrence of the problematic behaviour, or reduction of the risk

7 Application of the actions (a) by identified actors (b) by other actions

8 Dissemination of information to all (a) firms, (b) consumers, (c) other measures

9 Redress

10 Sanctions

11 Ongoing monitoring, oversight, amendment. [44]

8.31 Professor Hodges and Associate Professor Voet highlight that private litigation can only address objective 9 – redress. Accordingly, effective regulatory systems are those that effectively combine public regulation with redress systems–both collective redress and ADR through industry EDR and ombudsmen.[45]

Redress powers

8.32 As part of this shift in the role of regulators in England and Wales, the *Consumer Rights Act 2015* (UK) introduced statutory powers for regulators to 'order redress to consumers who have suffered loss as a result of conduct which has given rises to the enforcement order or undertaking.'[46] As an example of how this may work in practice, in simple cases, such as overcharging on bills by energy or communications companies, an order can be made that the supplier will re-credit the consumers' bills with the relevant amount.

8.33 In practice, the existence of a regulator with a full set of enforcement powers and some discretion as to how they may be used, leads to the majority of cases being dealt with by agreement.[47] The consequent public and private savings are clear. In all cases, it is axiomatic that those are owed money receive 100% of the amount outstanding. The regulators do not 'settle' for lower sums as happens in contested litigation. What may be reduced is the civil penalty (or fine) and, of course, the transaction costs (lawyers fees and court costs) are reduced significantly.[48]

Redress schemes

8.34 In more complex cases, where individuals' entitlements and quantum may need to be established and assessed, a bespoke mechanism (or scheme) may be required. There are a number of such schemes in England and Wales. For example, under s 404 of the *Financial Services and Markets Act 2000* (UK), the Financial Services Authority may

44 Hodges and Voet, above n 41, 9.
45 Ibid.
46 *Consumer Rights Act 2015* (UK) s 79 and sch 7.
47 Hodges and Voet, above n 41, 300.
48 Ibid.

make rules requiring financial services entities to establish and operate consumer redress schemes. A consumer redress scheme is a set of rules under which a firm is required to take one or more of the following steps:

- investigate whether, on or after a specific date, it has failed to comply with particular requirements that are applicable to an activity it has been carrying on;
- determine whether the failure has caused (or may cause) loss or damage to consumers;
- determine what the redress should be in respect of the failure; and
- make the redress to the consumers.[49]

8.35 Another scheme exists under the auspices of the Competition and Markets Authority (CMA), which has authority to approve a voluntary redress scheme to compensate consumers.[50] An approved voluntary redress scheme is a form of ADR and is intended to provide business with an additional option for offering compensation to those who have suffered loss as a result of the business' breach of competition law. According to the CMA the advantages of an approved voluntary redress scheme is that it provides a statutory process through which:

> consumers and businesses can gain access to compensation more quickly, easily and without the costs of litigation; and
>
> businesses that have infringed the competition rules may voluntarily offer and administer redress to those affected by the breach, thereby avoiding lengthy and costly court proceedings.[51]

8.36 The *Competition Act 1988 (Redress Scheme) Regulations 2015* (CRAF) describe how the CMA will consider applications for the approval of redress schemes.

8.37 Section 49C of the CRAF allows a person to apply to the CMA for approval of a redress scheme. Such an application can be made before a decision has been made by the CMA that there has indeed been an infringement, but can only be approved and made public at the same time as (or after) the decision.[52]

8.38 An application can be made by a single entity or on a group basis. An outline scheme can be submitted to the CMA at any time during the investigation, although in practice it would be challenging to do so before the CMA issues the statement of objection, in which it sets out its case against the parties under investigation.[53] The CMA has made clear that it does not view an application for a compensation scheme as an

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49 FSA, *Consumer Redress Scheme, Guidance Note 10* (2010).
50 FCA, *The Enforcement Guide* (2014), ch 11.
51 Ibid.
52 Norton Rose Fulbright, 'UK Voluntary Redress Scheme—An Alternative to Litigation' (October 2015).
53 Ibid.

admission of liability or in any way inconsistent with the applicant continuing to exercise its rights of defence.

8.39 The first stage of the process involves the presentation of an outline scheme to the CMA. The CMA then considers the scheme and decides whether it will prioritise assessment of the application. If the scheme is prioritised, the applicant is required to provide details of:

- the start date, term and duration of the redress scheme (which must be at least nine months);
- persons entitled to claim compensation under the scheme;
- the scope and level of compensation to be offered under the scheme;
- the process of applying for compensation under the scheme (including the estimated time it will take to determine applications for compensation) together with: (i) the evidence applicants will be asked to submit in connection with their application for compensation; (ii) how the scheme is to be advertised; (iii) the complaints procedure; and (iv) the consequences of accepting compensation under the scheme.[54]

8.40 An applicant will be required to appoint a chairperson (who must be a senior lawyer or judge) who will assist in devising the terms of the scheme and deciding whether to recommend the scheme to the CMA. The chairperson is then responsible for appointing board members who must include: (i) an economist; (ii) an industry expert; and (iii) a person to represent the victims of the infringement who will be entitled to claim compensation under the scheme. The chairperson and the board must determine the methodology for assessing the levels of compensation payable to each applicant. In addition to the compensation payable under the scheme, the parties seeking to set up the redress scheme are responsible for the fees of the chairperson, the board members and the costs of the CMA.[55]

8.41 Once the scheme is formally approved by the CMA, the infringing party has a statutory duty to comply with it. The CMA has the power to offer a reduction in the level of fine of up to 20% to reflect the infringing party's voluntary provision of redress.[56]

8.42 Under these models, individuals (or businesses) are not obliged to accept redress under the relevant scheme and are free to pursue private enforcement action through the courts if they do not believe the scheme to be satisfactory. Claimants must actively opt-in to the settlement. Nevertheless, the speed, cost effectiveness and relative certainty of receiving some compensation can make litigation less attractive.

54 Ibid.
55 Ibid.
56 Ibid.

8.43 Appropriately adapted to Australia, the ALRC considers that the 'enhanced consumer measures' introduced in the UK in 2015 may improve both access to remedy but also improve the efficacy of regulatory enforcement in Australia.

Regulatory redress

Recommendation 23 The Australian Government should 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.

8.44 The implementation of a public restorative power, or powers, affords an opportunity to deliver compensation and other forms of redress without the need to litigate. Regulatory redress provides an efficient and effective way for consumers and businesses to obtain compensation and reduce the burden on the civil justice system. A standing regulatory redress scheme would provide an additional avenue for access to a remedy. Such a scheme would nevertheless permit an individual person or business to choose not to participate in the scheme and to pursue litigation should they so choose.

8.45 Recommendation 23 builds on research internationally that demonstrates the benefit of collective redress.[57] The value of regulatory redress is that it involves less time and cost when compared with pursuing adversarial litigation for both applicants and respondents. In addition, private actions often unnecessarily duplicate public enforcement in follow-on compensation claims.[58] Regulatory redress also supports access to justice and is consistent with holding corporate wrongdoers to account.

8.46 An examination of the relatively new collective redress mechanisms in England and Wales suggests that:

- such schemes are a quicker and more cost-effective alternative to litigation;
- the duplication of effort and costs in separate, sequential public and private enforcement actions may be avoided;

57 See, eg, C Hodges and S Voet, 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles' in B Hess and X Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos and Hart 2017); C Hodges, 'Consumer Redress: Implementing the Vision' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2017).

58 Christopher Hodges, 'Delivering Competition Damages in the UK' (Oxford Legal Studies Research Paper No 66/2012, 17 September 2012) 42. See, eg, the Nurofen litigation: *GlaxoSmithKlein Australia Pty Ltd v Reckitt Benckiser (Australia) Pty Ltd (No 2)* [2018] FCA 1.

- suitably empowered regulators are likely to be able to deliver compensation swiftly through the ability to resolve the *combination* of public and private consequences;[59]
- defendants may avoid the perception of reputational loss and the high costs involved in defending a class action; and
- defendants may incur lower statutory penalties if compensation is paid early and before any fine is imposed.[60]

8.47 In the Discussion Paper to this Inquiry, the ALRC proposed a regulatory redress scheme based on the schemes existing in England and Wales. The proposal received a mixed response in submissions. A small number of submissions considered that the ALRC had not provided sufficient information to enable a considered response.[61] In this regard, the Law Council of Australia suggested that a regulator redress model should be considered 'through a comprehensive review process.'[62]

8.48 Litigation funder, Harbour suggested that regulatory redress schemes had worked poorly in the United Kingdom as they were overly bureaucratic and expensive.[63] Law firm Phi Finney McDonald was also opposed and suggested such schemes provide a way for 'wrongdoers to pay less'.[64] The firm was also concerned that a regulatory redress scheme would unnecessarily duplicate redress provided by class actions. IMF Bentham highlighted the benefits that can only be achieved by litigation:

> The proposed collective redress scheme is intended to avoid the high costs associated with litigation. However, litigation ensures that the wrongdoing is subject to public process, claimants are alerted to their rights and receive legal advice in respect of them, discovery is given, liability and causally-connected loss are fully investigated and assessed, procedural fairness accorded the parties under judicial supervision and, if necessary, the Court will provide a binding determination according to law.[65]

8.49 Slater and Gordon's submission,[66] identified research by Professor Hensler that found that a number of regulatory redress schemes established in different countries have been blighted by problems:

> a consistent pattern of complaints across administrative programs established to assist different sorts of victims in different countries suggests that in practice such programs

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59 Ibid 25.

60 See, eg, C Hodges and S Voet, 'Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles' in B Hess and X Kramer (eds), *From Common Rules to Best Practices in European Civil Procedure* (Nomos and Hart 2017); C Hodges, 'Consumer Redress: Implementing the Vision' in P Cortés (ed), *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2017).

61 See, eg, Clayton Utz, *Submission 42*.

62 Law Council of Australia, *Submission 62*.

63 Harbour Litigation Funding Limited, *Submission 17*.

64 Phi Finney McDonald, *Submission 34*.

65 IMF Bentham Limited, *Submission 50*.

66 Slater and Gordon, *Submission 54*.

> often struggle to serve the purposes for which they are intended. Often the number of eligible recipients who come forward as well as their needs exceed estimates (frequently developed in the absence of comprehensive data on how many people were injured and to what degree).
>
> Programs subsidized by government are frequently underfunded and funding problems can increase as programs drag on beyond the expected date of termination. Programs initially funded by private entities may appeal for government assistance when the initial appropriation to support the fund runs out.[67]

8.50 Maurice Blackburn suggested, however, that recent 'experience with voluntary redress schemes indicates that, in appropriate circumstances, they can operate as effective and low cost methods of dealing with mass harm.'[68] A key concern for a number of submitters was preserving the right of individuals to choose whether to avail themselves of redress under a regulatory redress scheme or seek redress through conventional litigation.[69]

8.51 The Institute of Public Accountants suggested that a regulatory redress scheme would be particularly beneficial for small business in the context of competition law breaches given the challenges of private enforcement through class actions.[70]

8.52 From a respondent perspective, it was suggested that any regulatory redress scheme needed to 'provide certainty and finality for the potential defendant by addressing all potential claims on a 'once and for all' basis.'[71] Submissions also suggested that regulatory redress schemes need to permit respondents to establish such schemes without any admissions of liability.[72] The ALRC agrees that corporations should be able to submit a regulatory redress scheme on a 'no admission' basis. Whether the regulator approves the scheme on that basis would need to be considered as part of the broader enforcement action in respect of that wrongdoing. As discussed below, a possible outcome of the Banking Royal Commission will be that regulators become less willing to negotiate settlements on a 'no admissions' basis.

8.53 Professor Legg and Dr Metzger submitted that the problems with collective redress schemes that have been identified in research include:

- the administrator lacks independence and is too closely aligned with the corporation's view of the conduct or approach to quantification of loss;
- compensation claims are subject to unduly high levels of proof;

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67 Deborah Hensler, 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally' (2017) 65 *Kansas Law Review* 981.

68 Maurice Blackburn, *Submission 37*. Submissions in support of regulatory redress include: Shine Lawyers, *Submission 43*; Cbus Super, *Submission 46*. A thorough submission outlining the benefits and challenges of introducing regulatory redress was also provided by Slater and Gordon, *Submission 54*.

69 See, eg, Burford Capital, *Submission 38*; Slater and Gordon, *Submission 54*; Law Council of Australia, *Submission 62*; Maurice Blackburn, *Submission 37*.

70 Institute of Public Accountants, *Submission 18*.

71 Law Firms Australia, *Submission 51*; King and Woods Mallesons, *Submission 65*.

72 Law Firms Australia, *Submission 51*.

- information to make and assess claims is held by the corporation and cannot be accessed or is not provided in a timely fashion to claimants;
- criteria for valid compensation claims and harm suffered is based on the corporation's view of the law;
- no, or insufficient, legal advice for claimants.[73]

8.54 Professor Legg and Dr Metzger also suggest that these issues are not fatal and can be addressed in scheme design, 'including appointing an independent administrator, providing for independent sign-off or oversight of the scheme and ensuring representation for participants.'[74] They also warn against being overly bureaucratic lest you lose the important value of a redress scheme which includes 'informality, cost and speed.'[75]

Principles

8.55 In the context of a review of class actions and third-party litigation funders, it is not possible to fully design a regulatory redress mechanism (or scheme) to complement the broad regulatory redress power that should be included in the statutory armoury of all regulators. Instead, the ALRC has sought to suggest that a standing scheme that can be adapted quickly for the particular circumstances of the case, and which is overseen by a pre-existing host organisation, would improve access to a remedy. In suggesting this approach, the ALRC is not suggesting there can be a 'one size fits all' model, but nor does it suggest that it is efficient to seek to establish a bespoke redress scheme on every occasion. In this section, the ALRC sets out a number of principles that should guide design of a regulatory redress scheme (Scheme):

- **Voluntary:** Corporations may choose to establish a Scheme where they have identified a breach, or potential breach, of the law causing loss and regardless of whether a regulator has instigated a formal investigation. Victims may choose to participate in the Scheme or take alternative action to seek redress.
- **No-liability:** Corporations may establish a Scheme with or without an admission of liability.
- **Independence**: The Scheme must be implemented by a Panel appointed by the Corporation and approved by the Regulator. The Panel must include a consumer representative or small business representative as appropriate. The Corporation must provide any information reasonably requested by the Panel to enable the Panel to make that assessment.
- **Panel's decision enforceable**: The Panel will assess individual claims and whether they fit within the terms of the Scheme and the amount of compensation awarded. The Corporation is bound by the Panel's assessment.

73 M Legg, J Metzger, *Submission 12*.
74 Ibid.
75 Ibid.

- **No cost to victims**: Participation in the scheme must be free.
- **Cost neutral to the regulator:** The Corporation must fund the costs of the Scheme as well as the regulator's costs in assessing and approving the Scheme.
- **Consumer support:** The Scheme should include the provision of support to victims to access independent advice when deciding whether to join the Scheme.
- **Compensation uncapped:** The Regulator's statutory authority to approve Schemes should not be subject to a monetary cap.
- **Consumer outreach:** The Panel should raise awareness of the Scheme amongst victims (in particular vulnerable consumers) to ensure the Scheme is known and people are able to assess whether to join.
- **Cy pres powers:** Where affected consumers cannot be located, the damages that otherwise would have been paid should be donated to charity, particularly those organisations that support consumers to access regulatory redress schemes.
- **Penalty Reduction:** A Corporation that establishes a regulatory redress scheme should be eligible for a reduction of up to 50% of the applicable penalty. Criteria should be established to determine in what circumstances a reduction is appropriate and the amount of the reduction. For example, a company that identifies a problem independent of a regulatory investigation and seeks regulator approval for a scheme should see a significant reduction in the applicable penalty compared with a company that only does so following a trial but prior to judgment.

Implementation

8.56 The ALRC considers that a regulatory redress scheme should be the subject of a pilot ahead of broader implementation. The design of a standing regulatory redress scheme is a large reform and a staged approach, beginning with a pilot, enables an assessment of what is working and what have been the impediments to success. This provides an evidence base for the final design of the redress scheme.

8.57 In light of the potential for significant reforms following Banking Royal Commission (discussed below), the ALRC considers that the financial services industry would be a suitable sector for a pilot run by the regulator responsible for consumer protection in the financial services sector. The success of the scheme should be reviewed three years after its establishment and, if found to be successful, should be extended more broadly.

8.58 Ultimately, within the limits of the Australian Government's constitutional powers, a single regulatory redress scheme should be established covering all sectors of the economy, rather than there being a number of industry specific schemes, to ensure that jurisdictional boundaries do not create gaps in coverage.

Redress in the context of the Banking Royal Commission

8.59 It was put to the ALRC in consultations and submissions that the ALRC's focus on redress ran counter to the likely direction of the Banking Royal Commission which, in its interim report, made a number of criticisms of the regulator and the regulatory enforcement model.[76] In particular, there were a number of criticisms by the Banking Royal Commission of ASIC in relation to its preference for negotiated outcomes rather than prosecuting breaches of the *Corporations Act 2001* (Cth) and *Australian Securities and Investment Commission Act 2001* (Cth) through the courts. In particular, the Commission noted:

> Contraventions of law are not to be treated as no more than bargaining chips to procure agreement to remediate customers. If a contravener wants to face a penalty hearing without offering effective compensation to those harmed by its conduct, the absence of compensation will be reflected in the penalty. It will go directly to whether the entity remains a fit and proper person to retain the licence that it has to operate in the industry. Of course ASIC can, and should, offer its views about remediation and the adequacy of any proposal for remediation. But if ASIC has a reasonable prospect of proving contravention, the starting point must be that the consequences of contravention should be determined by a court.[77]

8.60 The recommendation for enhanced regulatory redress should not be seen as a substitute for appropriate and effective enforcement of the law. For regulatory redress to be effective, there needs to be rigorous enforcement of the law with significant penalties attached to breach of the law to incentivise the early and full compensation of those who have suffered loss as a result of corporate misconduct.[78]

8.61 Slater and Gordon raised concerns that:

> the availability of a collective redress scheme may have the unintended consequence of softening the regime for corporate accountability – such that defendants may be more prepared to engage (or at least less cautious about engaging) in conduct that would ordinarily have attracted regulatory enforcement or a possible class action, with the knowledge that they can participate in an administrative scheme for redress to claimants that would contain their liability, at a significantly lower cost.[79]

8.62 As has been demonstrated in England and Wales, any reduction of a civil penalty as a result of instituting a regulatory redress scheme will only operate as an effective incentive to provide voluntary redress if there are strong and empowered regulators in all sectors that are willing to actively challenge corporate wrongdoing. While penalties for breach of the Australian Consumer Law have just this year been significantly increased,[80] the appropriateness of penalties may be revisited following the conclusion of the Banking

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76 See, eg, Slater and Gordon, *Submission 54*; P Spender, *Submission 53*.

77 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report*, (September 2018) 78.

78 Hodges, above n 58.

79 Slater and Gordon, *Submission 54*.

80 Treasury Laws Amendment (2018 Measures No. 3) Bill 2018.

Royal Commission and this should be considered as part of the design of a regulatory redress scheme in Australia.

8.63 One of the potential outcomes of the Banking Royal Commission is a significant change in the institutional arrangements for the enforcement of consumer protection provisions in the context of financial products and services. This is likely to have an impact on the regulatory arrangements for enforcement of the Australian Consumer Law at the Commonwealth level more broadly.

8.64 The ALRC considers that any change to the role of public agencies in this space provides an opportunity to reset the focus of enforcement agencies in relation to civil redress. Making civil redress a fundamental part of any enforcement proceedings provides the opportunity to improve access to a remedy for those who have suffered loss, recognising the significant gaps that presently exist—particularly for vulnerable groups.

Cost

8.65 The potential reshaping of regulatory arrangements for consumer protection is relevant to the question of how a regulatory redress scheme should be funded. As pointed out by Professor Legg in the Storm Financial case study, one of the reasons that regulator interventions can achieve a greater return to victims is that key costs, including legal fees, are borne by the regulator rather than the victims.[81] That is, such schemes do not necessarily cost less but they shift the responsibility for costs on to the regulator. Similarly, EDR schemes are typically free to the consumer because those schemes are fully self funded by those who are members of the scheme— often through their licence fees.

8.66 There are concerns about resourcing such an initiative. Slater and Gordon submitted that a 'properly administered redress scheme requires resources and funding presently beyond the reach of Australia's corporate regulators.'[82] Slater and Gordon also noted that there was a risk that, in the absence of additional resources, a redress scheme could divert the regulators' attention away from its core responsibility of enforcement. This view was shared by ASIC who noted that '[w]ithout appropriate resourcing, there is the risk that further adding to ASIC's responsibilities has the potential to affect ASIC's ability to target the greatest threats of harm in the financial system.'[83]

8.67 The cost of a regulatory redress scheme needs to be carefully considered if such a scheme is to be effective. The ALRC is of the view that the CMA scheme in England and Wales may be a useful model. Under that scheme, the costs of establishing the regulatory redress scheme are borne by the company which wishes to compensate those who have suffered loss.[84] In addition, the company must pay the costs of the regulator in reviewing

81 Legg, above n 36, 180.
82 Slater and Gordon, *Submission 54*.
83 ASIC, *Submission 72*.
84 For examples of self-funded schemes see, Hensler, above n 67.

and approving the scheme. In this way, the full costs of remediation are paid by the wrongdoer.

ASIC Regulatory Guide 256

8.68 A number of submissions[85] suggested consideration of the model adopted by ASIC in Regulatory Guide 256.[86] The Guide provides guidance to Australian financial services (AFS) licensees who provide advice to retail clients and who wish to provide compensation to clients who have suffered loss 'as a result of misconduct or other compliance failure by an advice licensee (or its representatives) in giving personal advice.'[87] Regulatory Guide 256 focuses on systemic issues and proactive review by licensees. In terms of scheme design:

> ASIC requires that all review and remediation processes should:
>
> (a) adopt a consumer-focused approach;
>
> (b) be free of charge to clients;
>
> (c) have commitment from senior management; and
>
> (d) be operated efficiently, honestly and fairly.

8.69 Under the Guide, licensees are expected to 'take reasonable steps to determine the group of clients that may have suffered loss or detriment as a result of the potential misconduct or other compliance failure.'[88] In addition ASIC explains that licensees 'cannot merely rely on inviting clients to express an interest in having their advice reviewed—that is, clients should generally not be expected to 'opt in' to review and remediation.'[89]

8.70 ASIC envisages, particularly where a small number of individuals have suffered loss, that the review and remediation may be conducted by the licensee that is in breach. This is in contrast to the approach in England and Wales where the regulatory redress scheme is run independently of the business which has breached the law. Another distinction with the approach taken by the CMA in England and Wales where the redress scheme usually includes a board of three to oversee the scheme, ASIC considers a single independent expert is required where:

> (a) complex issues are involved;
>
> (b) the review forms part of an enforceable undertaking or ASIC-imposed licence condition(s);

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85 M Legg, J Metzger, *Submission 12*; CHOICE Supplementary, *Submission 71*; Consumer Action Law Centre, *Submission 67*; ASIC, *Submission 72*.

86 Australian Securities and Investments Commission, *Client review and remediation conducted by advice licensees* Regulatory Guide 256 (15 September 2016).

87 Ibid 4.

88 Ibid, 31.

89 Ibid, 22.

(c) reporting to the public would be appropriate;

(d) there is nobody sufficiently independent or competent within the advice licensee to provide oversight; or

(e) the advice licensee has little or no experience in designing or implementing a review and remediation process, or similar activities.[90]

8.71 ASIC recommends that licensees give affected clients access to the EDR process and licensees are encouraged to 'waiving any monetary or time limits.' Licensees are encouraged to offer assistance to clients 'who wish to seek their own independent professional advice to assist their response to review and remediation.'[91]

8.72 The ALRC considers that there are many aspects of the RG 256 that may provide a useful template for the design of a regulatory redress scheme including:

- a requirement on the company to proactive identify all those who have potentially been affected by the breach;
- the adoption of a consumer-focused approach;
- that access to the scheme be free of charge to clients;
- that the scheme be operated efficiently, honestly and fairly; and
- that clients have access to EDR and independent advice.

Ramsay Review

8.73 The ALRC was also encouraged to consider the *Review of the financial, system external dispute resolution and complaints framework* (Ramsay Review) of EDR in the Financial Services Industry.[92] In 2016, the Government issued terms of reference for a review of the financial system's external dispute resolution (EDR) framework and established a Panel led by Professor Ian Ramsay and including Julie Abramson and Alan Kirkland. The Panel completed its review in April 2017.[93] It was on the basis of recommendations in that report, that there be a single EDR scheme for the financial services sector, that the Government established AFCA (which is discussed earlier in this chapter). The Panel recommended that the single EDR body should be governed by an independent board and be fully funded by industry. All financial services licensees would be required to be a member of the EDR scheme as a condition of their licence. The Review outlined the key features of the EDR scheme:

- Accessibility: it will be free to consumers when they lodge a complaint.

90 Ibid, 37.
91 Ibid, 47.
92 CHOICE Supplementary, *Submission 71*.
93 Ian Ramsay, Julie Abramson and Alan Kirkland, *Review of the financial, system external dispute resolution and complaints framework* (April 2017).

- Accountability: it will be subject to strengthened accountability mechanisms, including regular independent reviews ... and will have an 'independent assessor' to review how disputes are handled ....
- Enforceability: firms will be required to comply with its determinations as a condition of membership and it will report firms that fail to comply to the appropriate regulator. The body will have the power to expel firms that fail to comply.
- Improving industry practice: it will monitor, address and report systemic issues to the appropriate regulator.
- Expertise: it will use panels to resolve disputes in specific circumstances, such as complex disputes, and will provide clear guidance and transparency to users on when a panel will be used.
- Community engagement: it will engage in outreach activities to raise awareness amongst consumers (in particular vulnerable consumers) and financial firms.[94]

8.74 While mindful that the Ramsay Review was a comprehensive review of EDR in the financial services sector and not focused specifically on regulatory redress, the ALRC has considered the principles behind that approach in considering the appropriate design of a regulatory redress model in Australia, particularly in relation to governance, accessibility and community engagement.

Conclusion

8.75 International research has demonstrated that private enforcement through civil litigation is not as effective a regulatory tool as a combination of public regulation with redress systems—both collective redress and ADR through industry EDR and ombudsmen.[95] From a consumer and small business perspective, there are significant advantages in collective redress both in terms of availability, costs and speed of obtaining a remedy when compared to private litigation. Moreover, the current enforcement settings in Australia have been shown to be deficient. The Banking Royal Commission has highlighted the need for systemic reform of law enforcement in the financial sector. There is no doubt that business as usual is not an option.

8.76 Accordingly, the ALRC suggests a fundamental change in the way in which regulators engage with the harm suffered by individuals and small businesses as a result of the conduct of entities which they regulate. Seeking redress to compensate for the harm suffered should become a key part of the regulatory enforcement model in the future.

94 Ibid, 11.
95 Hodges and Voet, above n 41, 9.

9. A Review of the Substantive Law that Underpins Shareholder Class Action Proceedings?

Contents

Introduction

9.1 Class action proceedings brought on behalf shareholders against corporations who are alleged to have breached their continuous disclosure obligations under the *Corporations Act 2001* (Cth) (the Corporations Act) or to have engaged in misleading and deceptive conduct, or both, are the most common category of proceedings commenced pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) (shareholder claims). Although the overall proportion of such proceedings filed in the Federal Court over the last five years is significant (34%), the raw number (37) is small.[1] Since the introduction of these provisions, 82 shareholder class actions have been filed in the Federal Court.[2]

1 Vince Morabito, Private correspondence, 13 March 2018. Between March and November 2018, another 16 shareholder class actions were filed in the Federal Court, resulting in 53 shareholder class actions filed since 2013.

2 Ibid. Professor Morabito advised that 66 shareholder class actions had been filed during this time period. An additional 16 shareholder class actions have been filed since March 2018.

9.2 In the Discussion Paper, the ALRC proposed that the Australian Government commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct. The proposal was framed by consideration of the fundamental purpose of such obligations and consideration of whether the use of the civil justice system, and in particular the class action regime, for the private enforcement of those obligations leads to adverse economic and legal consequences that are not yet fully understood.

9.3 The proposal divided stakeholders to this Inquiry.[3] For those who prosecute shareholder claims, including lawyers, third-party litigation funders and other participants, review of the regulatory provisions was deemed an unwarranted examination of a necessary and protective legislative regime:

> we question the social or legal utility of any review of continuous disclosure obligations that was not explicitly framed to strengthen measures by which those companies can be held to account for their misconduct by investors and consumers.[4]

9.4 Those who defend securities class actions, including lawyers, insurers, and directors and officers of corporate entities, expressed an urgent need to reassess the workings of the regulatory and class action regimes and their outcomes:

> it is difficult to see how, after almost twenty years of shareholder class action experience, it could be suggested that these issues are not of sufficient importance to the conduct of business in this country to warrant an informed and balanced review of whether the continuous disclosure regime, and the private right of action arising from a possible breach, are serving the interests of shareholders and the broader business community.[5]

Somewhat counter-intuitively, a group of institutional investors (who are often group members) expressed concern that some less than meritorious class actions were being promoted by funders and lawyers but were nevertheless adamant that there should be no watering down of the continuous disclosure obligations.[6]

9.5 This chapter outlines the history of Australia's legislative provisions relating to the continuous disclosure obligations, compares those legislative provisions with similar provisions in the cognate jurisdictions of England and Wales and Canada (noting where particular attention has been given to the interaction between continuous disclosure obligations and class action procedures), and explores some of the issues that were raised with the ALRC to suggest that a review of those obligations may be warranted.

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3 Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-Party Litigation Funders, Discussion Paper, No 85 (2018) Proposal 1–1.

4 Slater and Gordon Lawyers, *Submission 54*.

5 Allens, *Submission 52*.

6 Confidential consultations with several institutional investors.

Continuous disclosure obligations

Recommendation 24 The Australian Government should commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

Object of continuous disclosure obligations

9.6 Continuous disclosure obligations are based on the efficient market hypothesis that current share prices should reflect all available information.[7] The disclosure of information by companies is a crucial initial step in the process of price formation,[8] whereby market participants rely on available information to evaluate securities and make investment decisions.[9] Continuous disclosure regimes regulate how and what information is to be disclosed to the market and impose sanctions for non-compliance. The objectives of such regimes may be expressed as market integrity and investor protection. They assist in preventing market manipulation and insider trading. As the Australian Securities and Investment Commission (ASIC) submitted:

> The continuous disclosure obligations are critical to protecting shareholders, promoting market integrity and maintaining the good reputation of Australia's financial markets ($1.84 trillion market capitalisation with an average turnover of $5.9 billion a day). The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages.
>
> The regime has provided significant benefits including increased investor participation and investment, higher liquidity, and lower transaction costs. It is also the anchor point for other elements of Australia's regulatory regime (including low document capital raising through rights issues).[10]

9.7 In 1970, a study of the relationship between information asymmetry and market participant behaviour concluded that participants would withdraw from a market if they faced severe information disadvantages – leading to lower asset valuation, liquidity, and, in the most extreme cases, market failure.[11]

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7 Michael Legg, 'Shareholder class actions in Australia – the perfect storm?' (2008) 31(3) *University of New South Wales Law Journal* 669, 684.

8 Paul Davies, 'Liability for misstatements to the market: A discussion paper by Professor Paul Davies QC' (Discussion Paper, Treasury, March 2007).

9 Ibid.

10 ASIC, *Submission 72*.

11 George A Akerlof, 'The market for "lemons": Quality uncertainty and the market mechanism' (1970) 84 *The Quarterly Journal of Economics* 488.

9.8 The Australian continuous disclosure regime was developed in response to the stock market crash of 1987, which saw market capitalization of companies listed on the Australian Stock Exchange (ASX) fall by 50%.[12] There was growing consensus that the collapse could have been avoided by 'timely and adequate disclosure of relevant information to investors',[13] so a statutory continuous disclosure regime was seen as a necessary part of the 'major task of redressing the damage done to [Australia's] business reputation and the confidence of investors...'.[14]

9.9 The continuous disclosure regime has since played an important role in Australian corporate and securities regulation. The New South Wales Court of Appeal noted that the 'timely disclosure of market sensitive information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management'.[15] As ASIC noted in its *Review of Australian equity market cleanliness,*

> [i]n markets where investors perceive they are at unfair informational disadvantage they tend to protect themselves by reducing their exposure to the market or demanding a higher return, to compensate for the adverse selection risk they experience as a result of information asymmetry.[16]

9.10 Market cleanliness measures are used by regulators to measure the extent to which information leakage is impacting on the prices and traders' behaviour for securities on listed markets. A recent study, referred to by ASIC in its *Review of Australian equity market cleanliness*,[17] undertaken by UK-based Intralinks Holdings, measured the degree of information leakage ahead of mergers and acquisitions to determine the degree of market cleanliness across a range of jurisdictions. It concluded that Australia had one of the lowest indicators of information leakage compared with other international jurisdictions.[18]

9.11 The UK Financial Conduct Authority, which has conducted similar market cleanliness studies over the past 15 years, has however cautioned against directly comparing the established market cleanliness measure between jurisdictions because each jurisdiction has different continuous disclosure regimes.[19]

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12 Meraav Bloch, James Weatherhead and Jon Webster, 'The development and enforcement of Australia's continuous disclosure regime' (2011) 29 *Company and Securities Law Journal* 253, 253.

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1993, 4083-4087 (Michael Lavarch).

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1991, 4213-4218 (Michael Duffy).

15 *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 [355].

16 Australian Securities and Investments Commission, *Review of Australian equity market cleanliness*, Report 487 (2016) [4].

17 Ibid [10].

18 Ibid Appendix 3, Table 18.

19 Financial Conduct Authority, *Why has the FCA's market cleanliness statistic for takeover announcements decreased since 2009*, Occasional Paper No 4 (2014) 21-23. Similar observations were made in the report of a study undertaken on behalf of the New Zealand Financial Market Authority by Anna Hensen, 'New

The continuous disclosure regime

9.12 The primary continuous disclosure obligation is found in the ASX's Listing Rules (Listing Rules). Under rule 3.1 companies are required to 'immediately' notify the ASX of any information concerning the company, that 'a reasonable person would expect to have a material effect on the price or value' of the company's securities.[20]

9.13 The statutory requirements for continuous disclosure are contained in chapter 6CA of the Corporations Act, which gives the ASX Listing Rules legislative backing. Chapter 6CA requires 'disclosing entities' to notify the ASX of information required to be disclosed by the Listing Rules where that information is not generally available and is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of enhanced disclosure (ED) securities of the entity.[21] The entity and any person involved in the entity's contravention may be held liable.[22] There is a due diligence defence available to individuals (but not to entities).[23] An entity that does not disclose accurately, and when required, may be subject to enforcement action by ASIC. Significantly, however, the legislature has also provided for a private cause of action where the contravention causes loss or damage.[24] The disclosure requirement is strict in that liability will attach to the failure to disclose without the need to establish a requisite fault element. A leading US class action expert has observed that this is a particularly plaintiff-friendly aspect of Australia's continuous disclosure laws.[25]

9.14 In addition to the continuous disclosure obligations, there are various statutory provisions that prohibit a person from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive, and which also provide defences.[26] A failure to disclose, or inaccurate disclosures, may provide key evidence of misleading and deceptive conduct for the purposes of some of the statutory provisions. The provisions were modelled on s 52 of the *Trade Practices Act* 1974 (Cth), now s 18 of the *Australian Consumer Law* (*ACL*).[27]

9.15 Prior to enactment of the *Financial Services Reform Act 2001* (Cth) (*FSRA*), statutory backing of the listing rules was provided for under former s 1001A of the Corporations Act. The section imposed a prohibition on 'intentionally, recklessly or

Zealand Equity Market Cleanliness for the years 2010-2016'.

20 Australian Securities Exchange, *Listing Rules* (at 26 November 2018) r 3.1.

21 *Corporations Act 2001* (Cth) ss 674-677.

22 Ibid ss 674(2A), 675(2A).

23 Ibid ss 674(2B), 675(2B).

24 Ibid ss 1317HA(1).

25 Samuel Issacharoff and Thad Eagles, 'The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions' (2014) 38(1) *University of New South Wales Law Journal* 179, 185.

26 See, eg, *Corporations Act* ss 670A, 670B, 670D, 728(1), 729, 731, 732, 733, 1041H, 1041I; *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12GF(1) (ASIC Act).

27 *Competition and Consumer Act 2010* (Cth) sch 2.

negligently' failing to comply with the Listing Rules.[28] No civil penalties were available under the section, but intentional or reckless contraventions constituted a criminal offence.[29] The amendments enacted by the *FSRA* removed any requirement to prove intent or fault. Nevertheless, there remains a requirement to establish causation. In the Explanatory Memorandum to the bill,[30] Minister Joe Hockey explained that the 'change in terminology' was made so that the new default fault elements under the Criminal Code would apply to future offences against the provision.[31]

9.16 When the continuous disclosure provisions were first proposed, neither the Lavarch Committee,[32] nor the Corporations and Securities Advisory Committee (CASAC)[33] recommended giving shareholders the right to sue the company for contraventions of them. The CASAC Report recognised the potential problem:

> In principle, the reporting obligations and liabilities for continuous disclosure should rest on the directors of the disclosing entity and not on the entity itself. This policy would encourage directors to ensure compliance with the reporting obligations and avoid possible detriment to innocent investors or creditors of a disclosing entity against which damages might otherwise be awarded.[34]

9.17 Miller notes that these comments appear to have been ignored without explanation when legislation was introduced in 1992 and eventually enacted in 1994.[35] Similarly, it appears that no concerns were raised when the *FSRA* was enacted, which included amendments removing any requirement for shareholders to prove that a corporation's contravention was intentional, reckless or negligent. Miller observes that:

> By moving the fault element from the *Corporations Act* to the *Criminal Code*, the [*Financial Services Reform Act*] also had the effect of removing entirely any fault element in respect of civil contraventions, including in respect of actions brought by shareholders for compensation. For what would prove to be such a significant change, it is remarkable that it was not mentioned by the Joint Parliamentary Committee on Corporations and Securities (*Report on the Financial Services Reform Bill 2001*, August 2001), the Department of the Parliamentary Library (*Financial Services Reform Bill 2001*, Bills Digest No 26 2001-02), or by any of the Members who spoke during parliamentary debate on the Bill. Nor was it referred to in the Explanatory Memorandum to the Bill…It may be that the legislators did not at the time of the FSR Bill consciously consider the impact that these "housekeeping" amendments concerning the criminal law would have on the corresponding civil action.[36]

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28 *Corporations Act* s 1001A, as amended by *Financial Services Reform Act 2001* (Cth) sch 2 item 21.
29 Ibid.
30 Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [18.11].
31 *Criminal Code Act 1995* (Cth) sch 1.
32 House Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Corporate Practices and Rights of Shareholders* (1991).
33 Corporate and Securities Advisory Committee, Parliament of Australia, *Report on Enhanced Statutory Disclosure System*, (1991).
34 Ibid 24.
35 Paul Miller, 'Shareholder class actions: Are they good for shareholders?' (2012) 86 *Australian Law Journal* 633, 648.
36 Ibid 648 fn 92.

9.18 The effect of moving the continuous disclosure provisions within the civil penalties' regime allowed for the private enforcement of the obligation.[37] This opportunity for private enforcement, coupled with the introduction of the strict liability standard laid the foundation for what Lee J described in *Perera v GetSwift Ltd* as the 'common form' of shareholder class action.[38]

9.19 In 2008, Professor Michael Legg argued that there has been a convergence of factors that has led, and will continue to lead, to greater class action litigation in Australia in relation to shareholder claims.[39] He described this convergence as 'a perfect storm'.[40] The factors identified by Professor Legg included; the [then relatively] new causes of action based on misleading and deceptive conduct and the continuous disclosure regime, access to evidence collected by ASIC, the availability of the class action as a procedural vehicle, and litigation funding.[41] He opined:

> Consequently the transformation of a share price fall or corporate collapse into shareholder litigation has been made more likely. Put simply, the combination of the above factors makes claiming viable.[42]

The call for a review

9.20 Early in the consultation phase of this Inquiry, individuals and organisations raised with the ALRC a number of issues relating to the way in which the Part IVA regime was operating but, which when interrogated, were confined largely to issues relating to shareholder claims. Such issues included: the perception of the growth of an 'entrepreneurial' approach to the commencement of shareholder claims, an increase in the number of 'competing' shareholder claims, the proportion of settlement sums returned to shareholders, the debate between the policy objectives of 'open' and 'closed' classes, and the absence of any judicial determination of the law on which these claims were based. More broadly, the ALRC's attention was drawn to other trends that were said to be emerging, perhaps as a result of unintended and unanticipated consequences of the inter-relationship between the class action regime and the amendments to the substantive law that post-date the introduction of Part IVA. Those trends were said to include: a greater propensity for Australian corporate entities, as compared with those in cognate jurisdictions, to be the target of funded shareholder class actions,[43] a diminution in the value of the investments of those shareholders (including the investments of the class members themselves) of the company at the time the company is the subject of the class action, and the impact on the availability of directors and officers insurance (D&O insurance) within the Australian market.

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37 *Corporations Act* s 1317E.
38 *Perera v GetSwift Limited* [2018] FCA 732 [11].
39 The terms 'shareholder class actions' and 'securities class actions' are used interchangeably throughout.
40 Legg, above n 7, 669.
41 Ibid 670.
42 Ibid.
43 XL Catlin and Wotton + Kearney, 'How did we get here? The history and development of securities class actions in Australia' (2017), 9.

9.21 Whilst acknowledging that several issues relating to the way in which the Part IVA regime is operating were appropriate for attention in this Inquiry, the ALRC was also conscious of the need to avoid recommendations that are focussed narrowly on perceived issues relevant to only one category of class action proceedings. Part IVA is, in essence, a procedural law and must be fit for its purpose; namely, to enable 'groups of persons, *whether they be shareholders or investors, or people pursuing consumer claims*, … to obtain redress and so more cheaply and efficiently that would be the case with individual actions'(emphasis added).[44] Further, the emerging issues that were said to arise out of the inter-relationship between the class action regime and aspects of the corporate law appeared to the ALRC to require consideration of the underlying substantive law on which shareholder claims are typically based and, more importantly, required a thorough economic analysis of the assertions that had been put to it by particular stakeholders.

9.22 The ALRC does not consider that it is appropriate to assess many of these matters solely through the lens of what is, in essence, a procedural law; nor are they likely to be resolved (if that were ultimately found to be warranted) by the procedural law. In any event, the investigation of such issues is beyond the Terms of Reference of this Inquiry and beyond a law reform body without economic expertise. The ALRC concurs with the view that was expressed by the Productivity Commission in 2014 when it noted that, 'public debate about the underlying law is clearly more appropriate than attempting to stifle a mechanism...' by which class actions were prosecuted.[45]

9.23 Any such review should undertake wide consultation;[46] collect and draw from an evidence-base; and should be conducted by agencies with sophisticated understandings of the regulatory provisions, class action law and procedure, and the securities market. The question, put simply, is 'whether the current laws achieve their goals in an optimal manner'?[47]

Matters within the ambit of a review

9.24 The purpose of the continuous disclosure obligations is well understood – no submission suggested that the fundamental obligations should in any way be lessened; quite the contrary.[48] It was forcefully submitted that a review would:

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44 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3175 (Duffy).

45 Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 621. The then Presiding Commissioner has not resiled from that view: W Mundy, *Submission 4*.

46 See, eg, IMF Bentham Limited, *Submission 50*.

47 M Legg, J Metzger, *Submission 12*; and to similar effect see Australian Bar Association, *Submission 69*; Law Society of NSW, *Submission 64*.

48 ASIC, *Submission 72*; HESTA, *Submission 61*; NSW Society of Labor Lawyers, *Submission 55*; IMF Bentham, *Submission 50*; Slater and Gordon, *Submission 54*; Zurich Australian Insurance Ltd, *Submission 49*; Woodsford Litigation Funding, *Submission 48*; Cbus Superannuation, *Submission 46*; Norton Rose Fulbright *Submission 40*; Maurice Blackburn, *Submission 37*; AustralianSuper, *Submission 33*; Litigation Capital Management Ltd, *Submission 30*; Therium Australia Ltd, *Submission 19*; Financial Recovery Technologies, *Submission 15*; R Bungey, *Submission 13*; Bennelong Funds Management Group, *Submission 10*; S Foley, *Submission 8*.

> threaten the integrity of the market and counteract the significant progress the regime has made over the course of the past 26 years. It is essential to protect and maintain the laws currently in place surrounding proper disclosures from large companies in order to continue to effectively deal with corporate misconduct in Australia, minimise the potential for insiders to profit and hold wrongdoers to account.[49]

9.25 Nevertheless, there was broad support for a balanced, unbiased legal and economic review of the Australian provisions and an analysis of whether there is any substance to the unforeseen and potentially adverse consequences that were raised by stakeholders with the ALRC.[50]

9.26 The Class Actions Committee of the Law Council's Federal Litigation Section identified the following matters as worthy of further consideration:

- whether the recoveries that are made by class members and litigation funders are reasonable in the context of the risks associated with this kind of litigation;
- the effective recovery achieved by investors, net of litigation funding costs and legal fees;
- the impact of litigation of this sort on corporations and classes of investors (for example, former shareholder class members versus current shareholders who are not class members);
- the practical impact of securities class actions on corporate conduct;
- the recent proliferation of multiple class actions based on the same facts and the impact on resolution mechanisms;
- the uncertainty around loss causation and its impact on settlements and legal certainty;
- the appropriateness of liability for innocent misrepresentation in this area;
- the appropriateness of open and closed classes and the free rider issue;
- the impact of securities class actions on the Directors and Officers (D&O) insurance market; and
- the possible use of other venues or procedures outside the judicial system to resolve

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49 S Foley, *Submission 8*.

50 Australian Bar Association, *Submission 69*; Queensland Law Society, *Submission 66*; King & Wood Mallesons, *Submission 65*; Law Council of Australia, *Submission 62*; Risks and Insurance Management Society Australasia, *Submission 59*; P Spender, *Submission 53*; Allens, *Submission 52*; Law Firms Australia, *Submission 51*; Zurich Australian Insurance Ltd, *Submission 49*; Woodsford Litigation Funding, *Submission 48*; Insurance Council of Australia Ltd, *Submission 47*; MinterEllison, *Submission 45*; US Chamber Institute for Legal Reform, *Submission 44*; Clayton Utz, *Submission 42*; M Duffy, *Submission 36*; Australian Institute of Company Directors, *Submission 35*; Litigation Capital Management Ltd, *Submission 30*; Chartered Accountants Australia and New Zealand, *Submission 28*; DLA Piper Australia, *Submission 27*; L Cantrill, *Submission 26*; Ashurst, *Submission 25*; M Legg, J Metzger, *Submission 12*; K Davis, *Submission 6*; W Mundy, *Submission 4*.

> claims of this nature – especially the benefit of building a body of precedent that market participants can use to inform their decision making. [51]

9.27 Some of the issues identified above belong properly within the scope of the current Inquiry and have been addressed in earlier chapters – 'open' versus 'closed' classes, competing class actions, and the proportion of a settlement sum that is returned to class members. Other issues that might properly fall within the ambit of a broader legal and economic review are addressed below.

The proper scope for private vs public enforcement

9.28 It is generally accepted that there are two goals that shareholder class actions are expected to deliver: compensation for shareholders harmed by breaches of the rules, and deterrence against future breaches.[52] There is, however, disagreement as to the relative utility of private versus public enforcement in achieving these goals. In its Class Action Consultation Paper, the Law Commission of Ontario noted mixed responses to questions about whether class actions result in behaviour modification, with some noting that the risk of criminal or regulatory consequences has a bigger influence on modifying behaviour. In particular, one person suggested that behaviour modification does not happen where insurers simply fund settlements and nobody admits liability.[53] This view accords with that of Miller, who has observed:

> To be effective, deterrence must impact upon the culpable actors – those who committed the wrongdoing or who at least had the means to prevent the wrongdoing but failed to do so. In the case of continuous disclosure obligations, this means the executives of the company rather than its shareholders.[54]

He observes further that, whilst it is possible to bring an action against individual officers, there is often little incentive to do so given the additional hurdle of proving that the officer was knowingly involved and the availability to the officer (but not the corporation) of a due diligence defence.[55]

9.29 ASIC submitted:

> The Corporations Act provides clear avenues for shareholders and consumers to take legal action to enforce their rights. It was clearly not intended that the regulator should have a monopoly on legal action. Where private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its regulatory resources to other priorities. ASIC encourages investors to consider private legal action

51 Law Council of Australia, *Submission 62*.

52 Miller, above n 35, 634; Deborah R Hensler et al, Class Action Dilemmas: Pursuing Public Goals for Private Gain, RAND Institute for Civil Justice, (1999); Elizabeth Boros, 'Public and private enforcement of disclosure breaches in Australia' (2009) *Journal of Corporate Law Studies* 409.

53 Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms*, Consultation Paper (2018).

54 Miller, above n 35, 646; Boros, above n 52, 436-437.

55 Ibid.

> where appropriate to obtain compensation for losses investors may have suffered: see Information Sheet 151 ASIC's approach to enforcement (INFO 151) at p. 6.
>
> Shareholder class actions help to democratise access to justice by addressing the power imbalance that exists between shareholders and defendants. Often, the only practical means for shareholders to enforce their rights is through a funded shareholder class action, as individual losses are too small to justify pursuing individually.56

9.30 The submission highlights the tension between the role of public versus private enforcement of regulatory obligations. There are clear differences in policy approaches as to how best to enforce secondary market disclosure obligations.

9.31 ASIC observes that, '[w]here private action can achieve a similar outcome to that which action by ASIC could achieve, it allows ASIC to allocate its regulatory resources to other priorities'. The ALRC was told that damages resulting from shareholder class actions usually dwarf any penalties or fines that are applied by ASIC for infringement of s 674 of the Corporations Act (continuous disclosure) in particular.[57] It is not apparent that there is presently any alignment between public and private enforcement outcomes. Professor Kevin Davis, Professor of Finance at the University of Melbourne, urged greater empowerment and resourcing of regulators, rather than there being a reliance on private action.[58]

9.32 In England and Wales, the view was taken that private enforcement was not appropriate, in the absence of fraud, on the basis that:

> it is not the purpose of such documents to sell the securities to the investor; rather it is the compliance with their disclosure obligations to the market, or the statutory requirement to publish reports and accounts, which is the purpose of such publications.[59]

This approach has led leading commentators to observe that, by comparison with Australia:

> We have not (yet)…reached the stage where every revised statement, correction or profit warning by a UK-based issuer leads to consideration of the possibility of a class action to recover the losses said to have flowed from the share price movements triggered by such events.[60]

England and Wales

9.33 Unlike Australia, where there is a private statutory cause of action in respect of a breach of the continuous disclosure obligation, regardless of intention or fault, in England and Wales, not only is mere negligence insufficient to ground liability, the claimant must

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56 ASIC, *Submission 72*.
57 MinterEllison, *Submission 45*.
58 K Davis, *Submission 6*.
59 Harry Edwards and Simon Clarke, "Securities class actions in England and Wales: A gathering storm?" in Damian Grave and Helen Mould (Eds), *25 Years of Class Actions in Australia*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2017), 329.
60 Ibid 327.

establish that the conduct of the directing mind of the issuer was reckless or dishonest. Section 90A of the *Financial Services and Markets Act 2000* (UK) (*FSMA*), which was introduced as part of the UK's implementation of the Transparency Directive,[61] establishes a statutory civil liability regime for fraudulent statements (including omissions or a delay in publishing information) in periodic disclosures made to the market by issuers of securities admitted to trading on the European Economic Area regulated markets. The rationale for the higher fault standard is said to be:

> the almost indeterminate class of potential claimants explains why negligence is deemed to be an inappropriate fault standard to apply, in much the same way that the common law uses the purpose of the document and size of the class of potential claimants to govern the category of relationships which give risk [sic] to a duty of care. Accordingly, if directors do their incompetent but honest best to determine the content of such published information, the s 90A claim will fail.[62]

9.34 Section 90A was inserted by s 1270 of the *Companies Act 2006* (UK),[63] replacing common law liability in deceit and negligent misrepresentation, which at the time carried significant uncertainty in whether it left room for the potential development of negligence based liability.[64] In constructing the new statutory regime the Government of the United Kingdom sought to address this issue by providing certainty to companies and ensuring that the potential scope of liability was reasonable.[65]

9.35 Section 90B was enacted together with s 90A and enables Treasury to extend the regime by regulation. Accordingly, in 2006 Treasury invited Professor Paul Davies to conduct an independent review concerning the liability of issuers in respect of damage or loss suffered as a consequence of misstatements or omissions to the market (Davies Review).[66] As a result of the Davies Review, the *Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010* were introduced. The regulations extended the original regime by amending s 90A and inserting schedule 10A, which among other reforms, broadened the scope of information covered by the regime and introduced liability for dishonest delay of information.[67]

9.36 Section 90A distinguishes between three sources of liability: misleading statements, dishonest omissions and dishonest delays, directing the reader to schedule

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61 *Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC* – which required Member States to implement a statutory civil liability for fraudulent statements in periodic disclosures.

62 Edwards and Clarke, above n 59, 329.

63 *Companies Act 2006* (UK) c 6, s 1270.

64 Eilís Ferran, 'Are US-style investor suits coming to the UK?' (2009) 9 *Journal of Corporate Law Studies* 315, 343.

65 Explanatory Notes, *Companies Act 2006* (UK) [1643].

66 Paul Davies, 'Liability for misstatements to the market: A discussion paper by Professor Paul Davies QC' (Discussion Paper, HM Treasury, March 2007) 5.

67 James Palmer and Carol Shutkever, I*ssuer liability – Regulations Amending Section 90A Financial Services and Markets Act 2000 (FSMA)* (Herbert Smith Freehills, 29 April 2010).

10A for the content of these liabilities. The dishonest omission and delay provisions are the most analogous to Australia's continuous disclosure obligations.

9.37 A person who 'acquires, continues to hold or disposes of the securities in reliance on published information' will have a claim against the company if they suffered loss from an omission in that published information,[68] or suffered loss from the company delaying the publication of that information.[69] Published information is defined in the schedule as information published by the issuer by a recognised information system.[70] Liability arises if a person discharging managerial responsibility (normally a director),[71] 'knew the omission to be a dishonest concealment of a material fact',[72] or 'acted dishonestly in delaying the publication of the information'.[73] Dishonesty is defined in the schedule and adopts the criminal standard from *Ryan v Ghosh*,[74] where the court held that dishonesty as referred to in the *Theft Act 1968* (UK) was not intended to characterise a course of conduct but to describe a state of mind. As such, the court held that a finding of dishonesty first requires an objective determination if the conduct is 'regarded as dishonest by persons who regularly trade on the securities market in question' and then a subjective determination if the person was 'aware (or must be taken to have been aware) that it was so regarded'.[75]

9.38 The approach taken by the Government of the United Kingdom reflected a deliberate policy choice to reduce the burden of opportunistic litigation.[76]

Canada

9.39 Canada took a different policy approach. The various provinces have each enacted (largely uniform) securities legislation that create a civil statutory cause of action for misrepresentation.[77] The cause of action arises when a prospectus contains a misrepresentation of a material fact. The definition of 'misrepresentation' encompasses both an untrue statement or a material fact that is not disclosed. The statutory cause of action usually forms the basis of class action proceedings because it is more amenable to the Canadian certification procedure than common law misrepresentation claims. This is because, under most provincial Securities Acts, the statutory cause of action is:

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68 *Financial Services and Markets Act 2000* (UK) c 8, sch 10A para 3(1).
69 Ibid para 5(1).
70 Ibid para 2.
71 Ibid para 3(3) and para 5(1)(a).
72 Ibid para 3(2).
73 Ibid para 5(2).
74 [1982] QB 1053.
75 *Financial Services and Markets Act 2000* (UK) c 8, sch 10A para 6.
76 HM Treasury, *Extensions of the statutory regime for issuer liability* (2008) 29.
77 *Securities Act*, RSBC 1996, c.418, s 131(1); *Securities Act*, RSA 2000, s S-4, s 203(1); *Securities Act* 1988, SS 1988-89, c. S-42.2, s 137(1); *Securities Act*, CCSM, c. S50, s 141; *Securities Act*, RSO 1990, c. S-5, s 130(1); *Securities Act*, RSQ, V-1.1, s 217; *Securities Act*, RSNB, c. S-5.5; *Securities Act*, RSNS 1989, c. 418, s 137(1); *Securities Act*, RSPEI 1988, c. S-3, s 16(1); *Securities Act*, RSN 1990, c. S-13, s 130(1); *Securities Act*, RSY 2002, c. 201, s 25(1); *Securities Act*, RSNWT 1988, c. S-5, s 30(1).

- typically restricted to misrepresentation contained in a limited number of defined documents;
- typically restricted to purchasers who invest pursuant to a prospectus, during the offering period, such that the price and the time period of purchase are standard among the proposed class; and
- typically provides for "deemed reliance" by a purchaser on any misrepresentations. At common law, each claimant must prove reliance whether the claim is framed as a fraudulent or negligent misrepresentation.[78]

9.40 Civil liability in respect of secondary market disclosure obligations was introduced first in some Canadian provinces in 2005 and now all the provinces have provisions modelled on the Ontario *Securities Act* RSO 1990, c. S-5 (*Securities Act*).[79] The provisions provide a statutory right of action to an investor who acquires or disposes of the securities of a responsible issuer between the time a misrepresentation is made, or the responsible issuer fails to make a timely disclosure (including for failure to make continuous disclosure of a 'material change' in the affairs of a responsible issuer)[80] until the misrepresentation is corrected or the subsequent disclosure is made.[81] An investor has the right to sue 'without regard to whether the person or company relied on the misrepresentation'. The *Securities Act* limits the defences available to responsible issuers and their directors in respect of 'core documents'.[82] For misrepresentations made in non-core documents, or by public oral statements, the investor must prove that the potentially liable party knowingly permitted the misrepresentation, was wilfully blind to the misrepresentation, or was guilty of gross misconduct in connection with the misrepresentation. Conversely, misrepresentations in core documents attract a form of strict liability subject only to 'due diligence' defences. The *Securities Act* also provides for limitations on liability.[83]

9.41 The continuous disclosure obligation does not arise on the occurrence of any change but only on the occurrence of a 'material change'. Section 1(1) of the *Securities Act* defines a material change to mean:

> (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or

78 *Carom v Bre-X Minerals Ltd* (2000) 196 DLR (4th) 344 [57].

79 *Securities Act*, RSO 1990, c. S-5, Part XXIII.1; McCarthy Tétrault Co-Counsel, "Secondary Market Civil Liability Status Report", *Business Law Quarterly* (Vol 3, Issue 3, June – August 2008), 9.

80 *National Instrument 51-102 Continuous Disclosure Obligations* contains policy statements and guidelines on the issue of continuing disclosure.

81 *Securities Act*, RSO 1990, c. S-5, s 138.3.

82 See *Securities Act*, RSO 1990, c. S-5, s 138.1; being a prospectus, rights offering circular, takeover bid circular, issuer bid circular, directors' circular, MD&A, AIF, information circular, material change reports, annual financial statements and interim financial statements.

83 The total liability of a responsible issuer or a corporate influential person who unknowingly authorizes or permits a misrepresentation is limited to the greater of $1m or the 5% of its market capitalization.

> (ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable...

'Material fact', when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

9.42 As the Supreme Court of Canada has remarked, these provisions,

> emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors. Historically, Canadian investors in the secondary trading market did not have access to a statutory cause of action when they suffered losses as a result of breaches of legislated continuous disclosure obligations. In common law jurisdictions, investors had to rely on the tort of negligent misrepresentation, which required, among other things, that investors prove that they had relied on the misinformation or omission to their detriment.84

9.43 However, in order to discourage the kind of suits that had become common in the United States, in addition to reducing the burden of proof on investors, the new liability regime was accompanied by a 'screening mechanism' to ensure that only claims with a reasonable chance of success would be brought. That screening mechanism requires that leave must be obtained before the action can be commenced. Leave requires satisfying the court that:

> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.[85]

9.44 In its 'Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change"', the Canadian Securities Administrators said:

> This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind the strike suit.86 (emphasis added)

9.45 The Supreme Court of Canada has stated that this leave provision sets out 'a different and higher standard that the general threshold for the authorization of a class

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84 *Theratechnologies Inc v 121851 Canada Inc* [2015] 2 SCR 106, [27].

85 *Securities Act*, RSO 1990, c. S-5, s 138.8, and equivalent provisions in the *Securities Acts* of the other Provinces.

86 CSA Notice 53-302, reproduced in (2000) OSCB 7383, 7390.

action...'[87] and reflects a legislative objective of creating a 'robust screening mechanism'[88] that should be 'more than a speed bump'.[89]

9.46 The fact that different policy approaches have been taken in cognate jurisdictions does not necessarily mean that Australia's policy settings should be reviewed, let alone altered. Nevertheless, it is instructive that the policies settled upon in England and Wales and Canada were arrived at with knowledge and understanding of the development of class action litigation and with some acknowledgement that there was a need to 'enable defendants to fend off coercive efforts by plaintiffs to negotiate cash settlement'[90] and 'reduce the burden of oppressive litigation'.[91] Those who advocated for the amendments to Australia's continuous disclosure obligations (removing any requirement to prove intent or fault) did not have the benefit of any knowledge of the way in which securities class actions might, and indeed have, evolved and it is at least possible that, with the benefit of twenty years' experience, different policy considerations might be taken into account. Professor Legg and Dr Metzger consider that an assessment of whether the current laws achieve the goals of the continuous disclosure obligations in an optimal manner requires an assessment, inter alia, of whether the removal of fault or intent by the FSRA remains desirable and whether contraventions should be subject to private enforcement (including by class action) or only be able to be pursued by a government regulator.[92]

9.47 Somewhat presciently, Professor Boros observed in 2009,

> Devising an appropriate remedial regime in the context of disclosure breaches raises a number of difficult questions. Whether they will become sufficiently controversial to stimulate pressure for reform may depend upon whether or not class actions continue to play an increasing role in remedying disclosure breaches. If we do end up having that debate, then the question of actions against the entity versus actions against the responsible actors and punitive/deterrent versus compensatory remedies will clearly be central to it. However, arguably, attention should also be given to the relationship between the patchwork of remedies relating to continuous disclosure, misleading disclosure and directors' and officers' statutory duties, and harmonising the available public law responses.[93]

9.48 In assessing appropriate policy settings, it might be considered important to determine the extent to which the private enforcement of securities claims through class actions has, as suggested by ASIC, helped to 'democratise access to justice by addressing the power imbalance that exists between shareholders and defendants.'[94] Whilst it is true

87 *Theratechnologies Inc v 121851 Canada Inc* [2015] 2 SCR 106 [35].
88 Ibid [19].
89 *Theratechnologies Inc v 121851 Canada Inc* [2015] 2 SCR 106 [38]; *Canadian Imperial Bank of Commerce v Green* [2015] 3 SCR 801; See also *Coffin v Atlantic Power Corp* 2015 ONSC 3686 (Ontario Superior Court of Justice).
90 CSA Notice 53-302, reproduced in (2000) OSCB 7383, 7390.
91 HM Treasury, above n 78, 23 [7.4].
92 M Legg, J Metzger, *Submission 12*.
93 Boros, above n 53, 438.
94 ASIC, *Submission 72*.

that often, the only practical means for shareholders to enforce their rights is through a funded shareholder class action, an economic analysis of whether class actions are indeed the most efficient means for just claims to be vindicated would be useful in determining whether alternative means, such as a collective redress regime would in fact be more efficient and provide broader access to justice than can be obtained through the class action regime. There is little evidence of how many corporations are the subject of ASIC's attention for breach of their continuous disclosure obligations, but which are not also the target of a shareholder class action.[95] Such evidence might inform questions about whether the current policy settings certain advantage certain shareholders over others simply because their claims are more attractive to third-party litigation funders. Is there a valid policy reason for equally deserving shareholders, who are unable to attract litigation funding, to be unable to vindicate their claims?

9.49 As has been described in Chapter 2, third-party litigation funding is not available to all investors who may wish to pursue a shareholder claim. Funders report that fewer than 5% of matters brought to them as funding opportunities are funded and the recent phenomena of competing shareholder class actions is deterring some funders from attempting to compete in what they fear to be 'a race to the bottom'.[96]

Relative efficiency of shareholder class actions

9.50 As described in Chapter 3, shareholder claims have certain characteristics. Amongst those characteristics is that, whilst it is usual for a very high proportion of Part IVA claims to settle (60%), not one shareholder claim has been the subject of judicial determination – 100% of shareholder claims have, to date, settled prior to judgment. For the period between 2013 and October 2018, the median settlement sum was $36 million (with the range being from $3 million to $132.5 million). The median return to shareholders was 51% (with the range being from 29% to 69%).[97]

9.51 Professor Legg and Dr Metzger observe that the only question that really matters in this context is whether the claims are meritorious. This is difficult to assess against the background of there being up to 41 corporate and corporate insolvency claims before the Federal Court,[98] in circumstances where not one shareholder claim has yet proceeded to judgment, and where the median return to funders and lawyers in those matters that have been finalised to date through court approved settlements is 49%, as compared with that returned to those shareholders who seek to enforce their rights.

9.52 What needs to be examined, according to Professor Legg and Dr Metzger, is whether there are actual contraventions that caused real loss and whether the persons who control the corporations are using shareholder and insurance funds to buy peace of mind and shield their conduct from examination. Or, alternatively, is the law too easily

95 Although some academic work has begun on this issue; see, S Foley, *Submission 8*.
96 Hugh McLernon, IMF Bentham, (Remarks, AILA National Conference, 2 November 2018).
97 See Chapter 3, Table 3.8.
98 See: www.fedcourt.gov.au/law-and-practice/class-actions/class-actions.

contravened? Has the consumer protection ethos turned every price drop into a securities fraud?[99]

9.53 Financial Recovery Technologies submitted that it 'strains credulity' to suggest that 'issuers willingly pay tens of millions of dollars … to avoid trying what they believe are fundamentally flawed or weak cases...'.[100] On the other hand, Allens drew the ALRC's attention to the very significant potential exposure faced by defendants because of the sheer number of allegedly 'damaged shares' and the alleged 'loss' said to be attached to each share. They assert that, 'it is rational and responsible for defendants (and insurers) to look to eliminate that exposure at an appropriate level if the opportunity presents itself irrespective of the strength of its defence.'[101]

9.54 Assuming a meritorious claim, the related question that must then be asked is whether the level of transaction costs is unduly incentivising lawyers and funders to bring actions?[102] The Ontario Law Commission has reported that multiple interviewees stated that 'access to justice was hindered by "*de minimis*" claims, that is cases where some believe class members obtain minimal compensation compared to the fees of plaintiff counsel'.[103] The ALRC had similar observations expressed to it, most importantly by group members who had received some compensation upon the settlement of their respective class actions.[104]

The practical (and economic) impact of securities class actions on board behaviours

9.55 The prospect of a shareholder class action can serve as a positive influence on a firm's governance and culture, improving accountability. Dr Foley submitted that shareholder class actions result in quantifiable changes at the firm level, pointing in particular to his study that revealed marked increases in spending on audit fees by companies after having been the subject of a class action.[105]

9.56 Other authors have, however, question the ability of shareholder class actions to deter future breaches. Miller suggests that, as a system of enforcement, 'punishing' the victims (shareholders – by reducing the value of their investments) in order to indirectly motivate the perpetrators (management) seems perverse.[106] Similar arguments are made by Zandstra, Harris and Hargoran[107] and Boros.[108]

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99 M Legg, J Metzger, *Submission 12*.
100 Financial Recovery Technologies, *Submission 15*.
101 Allens, *Submission 52*.
102 M Legg, J Metzger, *Submission 12*.
103 Law Commission of Ontario, above n 54, 10.
104 Confidential interviews with lead plaintiffs and group members involved in a range of class actions.
105 S Foley, *Submission 8*.
106 Miller, above n 35, 646.
107 A Zandstra, J Harris and A Hargovan, 'Widening the net: Accessorial liability for continuous disclosure contraventions' (2008) 22 *Australian Journal of Corporate Law* 51.
108 Boros, above n 53, 436.

9.57 Consequently, stakeholders have questioned whether the current law is best serving shareholders and Australia's investment environment more generally.[109] Allens framed the issue in this way:

> the problem is that the principles underpinning class actions in a securities law context – being a mechanism for promoting timely and appropriate disclosure, incentivising compliance, deterring wrongdoing, and providing a remedy for shareholders harmed by inappropriate disclosure – are often undermined when the listed entity is confronted with a claim (or threat of a claim) when the quantum of damages bears no proportion to the materiality of the wrong committed.[110]

9.58 The ALRC was also told that continuous disclosure is 'a key focus' for boards 'which strive to do all they can to ensure that their companies comply with their continuous disclosure obligations – both because of the imperative of complying with the company's legal obligations and also because of the related class action risk'.[111] The following issues were raised specifically:

- judgment calls in relations to earnings guidance require a synthesis of developing and uncertain information, often in relation to disparate parts of a business. While it is easy to be critical of judgments in hindsight, it should not be assumed that such decisions are not made with a very high level of diligence – the shareholder class action model does not allow for a fair and balanced consideration of the judgment call made in the moment; the price-driven model assumes that the wrong decision was made; [112]
- decisions are often made with acute awareness that disclosing 'just in case' the guidance is not achieved may inappropriately reduce shareholder value – which may itself result in a class action;[113]
- the acute awareness of class action risk may result in over-disclosure – which may of itself create an uninformed (or misinformed) market;[114]
- class action risk has significantly curtailed the extent to which many companies are prepared to provide future earnings guidance;[115]
- over-concentration of focus and time on continuous disclosure issues is at the expense of consideration of other risks and also at the expense of pursuing the profit-making objectives of the company for the benefit of shareholders.[116]

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109 MinterEllison, *Submission 45*; M Legg, J Metzger, *Submission 12*.
110 Allens, *Submission 52*.
111 Ibid.
112 Allens, *Submission 52*; Law Firms Australia, *Submission 51*; MinterEllison, *Submission 45*.
113 Ibid.
114 Allens, *Submission 52*; Clayton Utz, *Submission 42*.
115 Allens, *Submission 52*.
116 King & Wood Mallesons, *Submission 65*; Allens, *Submission 52*; MinterEllison, *Submission 45*; AICD, *Submission 35*.

The economic impact of class actions on corporations and classes of investors

9.59 MinterEllison observed that the economic impact of class actions on corporate Australia is relatively unexplored and should be canvassed as part of any review.[117] Submission drew attention the following potential impacts:

- payment or contribution to payments of settlements by the company in the absence of any, or sufficient, insurance cover;[118]
- the affect on the value of the investments of shareholders who hold a shareholding in the target company at the time of such settlement (or subsequently);[119]
- alteration in the treatment of current shareholders – for example, by withholding dividend payments for a particular period;[120]
- downward pressure on share price of the target company upon announcement of a class action;[121]
- inability to access equity markets because the spectre of a shareholder class action commenced as a result of share price drops following negative market announcements makes certain categories of corporate entities 'unlistable'.[122]

9.60 There has been some, albeit limited, academic discourse as to whether shareholder class actions concerning disclosure breaches that affect only the secondary trading of listed securities can be justified in terms of providing compensation to injured shareholders. Miller observes that this counterintuitive view rests upon what has come to be referred to as the 'circularity problem'.[123] The consequence of the circularity problem was described by Alexander in this way:

> Payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up.[124]

9.61 The circularity problem, as explained by Miller, starts with the observation that there are effectively three groups of 'shareholders' affected in any shareholder class action: the first are those who suffer loss because of the effect that the company's breach has on the share price (the victims), the second are those who sold their shares (at the

117 MinterEllison, *Submission 45*.
118 Law Firms Australia, *Submission 51*; MinterEllison, *Submission 45*.
119 Law Firms Australia, *Submission 51*; MinterEllison, *Submission 45*; K Lenz, *Submission 1*; AICD, *Submission 35*; K Davis, *Submission 6*.
120 MinterEllison, *Submission 45*.
121 King & Wood Mallesons, *Submission 65*; MinterEllison, *Submission 45*; K Davis, *Submission 6*.
122 Law Firms Australia, *Submission 51*; MinterEllison, *Submission 45*; AICD, *Submission 35*.
123 Miller above n 36, 635.
124 Janet Alexander, 'Rethinking Damages in Securities Class Actions' (1996) 48 *Stanford Law Review* 1487, 1503.

necessarily inflated price) to those who bought at the inflated price (the winners) and the third are those who are shareholders of the company at the time that it is targeted in the shareholder class action (the targets). The resources that fund a class action settlement, or adverse judgment, directly diminish the company's assets, creating a corresponding reduction in the residual claims of shareholders. He notes that, ultimately, the costs of any settlement or adverse judgment are borne by the company's existing shareholders, who ultimately also bear the company's indirect costs of defending the class action, including the diversion of company resources and management distraction.[125]

9.62 He further notes that:

> some shareholders may find themselves in more than one group at the same time. Shareholders who bought in the non-disclosure period (victims) and who still hold shares in the company at the time of the class action (targets) may effectively fund at least part of their own compensation.[126]

9.63 Professor Legg observes further that it is usually the small shareholders who do not trade actively but rather 'buy and hold' who are adversely affected by the circularity problem. It is most likely that such shareholders will buy the shares before any contravention (therefore not purchasing as a result of the contravention) and will still be holding them once the contravention comes to light. Consequently, the small shareholder will only fund, but not participate in, a settlement or judgment.[127]

9.64 He observes that the utility of compensation in the on-market situation generally goes unquestioned and has led to an analysis that suggests that when shareholders are diversified, the payment of compensation is a "pocket-shifting" exercise where the shareholders who traded are paid by the shareholders who did not, but with large transaction costs due the lawyer's fees and the litigation funder's share of any recovery. The pocket shifting occurs because most securities class actions settle and settlements are funded by the corporate defendant or an insurance policy. Rarely are individual wrongdoers such as directors, or third parties such as auditors or advisers, required to contribute financially to a settlement.[128]

9.65 Others refute what Professor Legg describes as:[129]

> a frequently repeated misnomer that shareholder class actions amount to "one group of shareholders paying another group of shareholders" [on the basis that] sophisticated investors are aware that shareholder class action claims are predominantly paid out by insurance policies held by respondent companies, rather than from companies' own assets.

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125 Miller, above n 35, 636-7.
126 Ibid, 637.
127 Legg, above n 7, 709; and see Travis Souza, 'Freedom to Defraud: Stoneridge, Primary Liability and the Need to Properly Define Section 10(B)' (2008) 57(4) *Duke Law Journal* 1179.
128 Ibid.
129 Phi Finney McDonald, *Submission 34*.

9.66 Maurice Blackburn criticise the circularity theory on the basis of the different behaviours demonstrated by different classes of shareholders:

> after revelations of a failure to make timely disclosure, individual shareholders … are often disappointed and frustrated with the firm's failures, and in many cases will sell out of the company to avoid further losses. In those circumstances there is no circularity: individuals recoup some of the losses they have suffered as a result of the firm's misconduct...
>
> Institutional investors with much larger holdings may be less likely to sell out of a company following a corrective disclosure, and in some cases may even see a buying opportunity following a corrective disclosure…[130]

9.67 They point to recent empirical evidence to suggest that:

> a careful analysis refutes the suggestion that shareholder class actions have a negative impact on the value of the investments of shareholders. Instead they can be a means of restoring value by generating positive change in the defendant's conduct, in addition to their broader role in ensuring market integrity.[131]

9.68 Despite the view held by some that, if there is going to be a class action in any case, it is in the interests of any individual shareholder to join (and some institutional investors consider that they have a fiduciary obligation to do so), 'there has never been any broad consideration by the investment community as a whole as to whether shareholder class actions are in the best collective interests of shareholders.[132] The singular lack of unanimity on the validity of the claims and counter-claims put in respect of this issue suggests to the ALRC that review is indeed warranted.

Particular legal and regulatory issues suggested for review

Market-based causation

9.69 Whilst the relative ease of proof of breach of the statutory provisions ought to be counterbalanced by the causation requirements, the dearth of matters proceeding to trial and then judgment has precluded any determinative consideration of the principles of reliance in the context of shareholder class actions.[133] Applicants seek to overcome the causation requirements through the 'fraud on the market' theory and a statutory construction of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act) that does not require reliance by the entity

130 Maurice Blackburn Lawyers, *Submission 37*.
131 Ibid.
132 Allens, *Submission 52*.
133 See, *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2014] VSC 357 (where the court refused to strike out the pleading on the basis that the claimants did not plead material facts sufficient to prove that each claimant relied on the allegedly deficient statements); *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 (where Edelman J held that a claim for compensation based on market based causation was at least arguable); similarly, *Melbourne City Investments Pty Ltd v UGL Ltd* [2015] VSC 540; *Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482 (where Brereton J accepted that causation could be established via market-based causation).

that suffers loss as a prerequisite to recovery.[134] The fraud on the market theory is 'in essence a shortcut for causation'; it presumes that shareholders rely on the integrity of the market price in making their investment decisions such that a misleading statement or omission affects all shareholders through the share price.[135] Individual shareholders do not therefore need to establish reliance. As remarked upon by Foster J in *Crowley v WorleyParsons Limited*,[136] it is 'a concept which is almost always invoked by the plaintiff in every investor class action'. The statutory construction of the Corporations Act and the ASIC Act relies on the purpose of the legislation so that individual reliance is replaced with third party or indirect reliance. As Professor Legg notes:

> this argument extends the existing case law on [section 18 of the *ACL*] which has found causation to be satisfied when customers have been misled by a trader so that they purchase more of that trader's products and less of a rival trader's product, so that the rival, although not misled, suffers loss or damage as a result of the customer's reliance.[137]

Whether this is in fact an appropriate extension of the s 18 jurisprudence has not been tested.

9.70 In addition to the higher fault standard that obtains in England and Wales, and consistent with the Australian position, claimants under s 90A of the *FSMA* must show that they placed reasonable reliance on the statement (or omission) in making their investment decision. Whether courts in England and Wales will show any enthusiasm for the 'fraud on the market' theory remains to be seen. There is currently no case law on the issue.

9.71 With the exception of the courts in Quebec, Canadian courts have rejected the 'fraud on the market' theory of damages in securities cases.[138] The presumption of reliance created by the fraud on the market theory is of no application; actual reliance is a necessary component where negligence or fraudulent misrepresentation is pleaded.

9.72 Several submissions focussed particularly on this issue and suggested that it would be appropriate for a review to consider whether there should be any legislative intervention to remove the uncertainty around this aspect of the law.[139]

9.73 Submissions raised a variety of other matters for the consideration of any review.

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134 Legg, above n 7, 681.
135 Ibid 682.
136 [2017] FCA 3 [36].
137 Legg above n 7, 682.
138 *Kripps v Touche Ross & Co* (1990) 52 BCLR (2d) 291 (Supreme Court of British Columbia); *Carom v Bre-X Minerals Ltd* (1998) 41 OR (3d) 780 (Ontario Court (General Division)).
139 King & Wood Mallesons, *Submission 65*; Law Council of Australia (Corporations Committee), *Submission 62*; Allens, *Submission 52*; Ashurst, *Submission 25*; M Legg, J Metzger, *Submission 12*.

ASX Listing Rules

9.74 Charted Accountants of Australia and New Zealand recommended that any review of the impact of continuous disclosure obligations on entities should include all applicable requirements including the ASX Listing Rules and the ASX Corporate Governance Council's principles and recommendations.[140]

9.75 Allens also suggested that sensible reforms that could be considered might include:[141] relaxing the requirement that information be disclosed 'immediately' in favour of a requirements that it be disclosed 'as soon as practicable' or 'promptly'[142]; providing further guidance in relation to the test for materiality, including by formalising the percentage by which a matter will be either deemed material or not; and reviewing the proper intent and operation of the definition of 'aware' in ASX Listing Rule 19.2 to make it clear that it does not extend to constructive knowledge (which can cover information which is not actually known by key decision makers within the entity).

9.76 In a similar vein, RIMS Australasia suggested the introduction of 'periodic' rather than continuous disclosure obligations.[143]

Measure of loss

9.77 Professor Legg and Dr Metzger consider that an assessment of whether the current laws achieve the goals of the continuous disclosure obligations in an optimal manner requires an assessment, inter alia, of whether compensation should remain as a remedy or be capped, or a measure of loss added to the statutory provisions.[144] Allens were similarly minded.[145]

9.78 Ashurst observed that the principles to be applied when assessing damages where shares have been traded before, during and after the misleading conduct alleged by someone unaware of or not influenced by that conduct have not yet been fully explored. They point, by way of example to a share trading fund that employs an index tracking policy.[146] The ALRC's attention had also been drawn to this issue in private consultations with various institutional investors whose investment portfolio is entirely intermediated and who exercise no control over trading, holding or investment decisions.

Defences

9.79 Some submissions urged a consideration of the availability of appropriate defences, whilst not wishing to see any diminution in the standard of the overarching obligation. Zurich Australia Insurance Ltd submitted that some certainty or guidance as to the continuous disclosure obligations in respect of forward-looking statements would

140 Chartered Accountants Australia and New Zealand, *Submission 28*.
141 Allens, *Submission 52*.
142 A similar submission was made by Risks and Insurance Management Society Australasia, *Submission 59*.
143 Ibid.
144 M Legg, J Metzger, *Submission 12*.
145 Allens, *Submission 52*.
146 Ashurst, *Submission 25*.

be timely. It considered that such certainty could be achieved by enacting a 'reasonable steps' defence similar to section 1022B of the Corporations Act in respect of product disclosure statements. It considered further that ASIC could publish a Regulatory Guide to supplement RG170,[147] in order to clarify the kinds of minimum steps required of listed corporations before and after publishing forward-looking statements.[148] RIMS Australasia also urged a consideration of the introduction of 'safe harbour' provisions in the context of forward-looking statements.[149]

9.80 Allens[150] and Ashurst[151] also urged consideration of the introduction of defences for the company similar to those available to individuals alleged to have been 'involved' in a contravention, including for example, defences of due diligence, reasonable and honest belief or reliance on professional advisers.

The alleged impact on D&O insurance

9.81 The ALRC was told by insurers and brokers that a direct link exists between an increased number of class actions and the resultant insurance claims paid and premiums, retention and the availability of D&O insurance.[152] As IMF Bentham Ltd observed there is a lack of verifiable data on which to rely in testing the hypothesis[153]– hence the proposal that this issue be considered within the context of a broad economic and legal review of the underlying substantive law.[154] The ALRC viewed this particular issue as being 'the canary in the coal-mine'– something is not quite right but the evidence is not yet available to establish precisely what.

9.82 A company D&O policy provides cover liabilities incurred by directors and officers in the performance of their duties. If such cover is not in place, the personal assets of directors and officers may be exposed. Coverage under Australian D&O policies is usually divided in to three types, reflected in the 'insuring clauses' of the policies:

- coverage for the individual director (Side A coverage); coverage will usually be provided for defence costs, judgments, settlements (subject to a consent requirement), adverse costs orders and interest in respect of a claim made against a director arising from some act or omission in his/her capacity as such. Coverage will also commonly extend to costs incurred by a director in responding to a formal investigation by a body such as ASIC or the ACCC;

147 Australian Securities and Investments Commission, *Prospective Financial Information* Regulatory Guide 170 (April 2011).
148 Zurich Australia Insurance Ltd, *Submission 49*.
149 Risks and Insurance Management Society Australasia, *Submission 59*.
150 Allens, *Submission 52*
151 Ashurst, *Submission 25*.
152 Marsh, *Submission 11*.
153 IMF Bentham Ltd, *Submission 50*.
154 Similar issues in relation to D&O cover have arisen in the US and there have been similar calls for a structural analysis of the D&O insurance market: Thomas A Dubbs, 'A Scotch Verdict on "Circularity" and Other Issues' (2009) *Wisconsin Law Review* 455, 463.

- coverage for the company in respect of its indemnification of a director (Side B coverage); the scope of Side B coverage is almost identical to that of Side A coverage. The key difference is that Side B coverage will often be subject to a deductible;

- coverage for the company's own liability in respect of a 'securities' claim (Side C coverage); coverage is usually offered as part of, and sharing limits with, Side A and Side B coverage, although it is possible to purchase stand-alone Side C coverage.[155]

9.83 In a report by XL Catlin and Wotton+Kearney, published in September 2017, the impact of securities class actions on the Australian D&O market was explored.[156] The report suggests that there is an observable adverse impact on that market which can be measured by the sustained and growing unprofitability of the ABC D&O market segment since 2011. It suggests that the principal drivers of this outcome have been:

- the significant increase in the frequency of securities class actions in recent years: tripling in the period 2011 to 2016, in comparison to the preceding period;

- nine out of ten filed securities class actions proceeding to a settlement;

- the trend of increasing defence costs for securities class actions;

- the AUD$40 million historical average cost to insurers for each securities class action settlement;

- chronic under-pricing of ABC D&O business by insurers since at least 2011; and

- indications that the current ABC D&O market premium pool is thoroughly inadequate to meet the current and projected levels of insured securities class action losses and probably needs to triple to restore sustainable profitability.[157]

9.84 Marsh submitted to this Inquiry that:

> The current state of class action proceedings and third-party litigation funders is undermining the stability of that regime by eroding the availability of insurance coverage and contributing to significantly higher pricing for D&O Liability products offered in the Australian and global insurance markets that write Australian risks.[158]

Marsh reports that between 2011 and 2018, the cost of D&O Insurances for its clients increased 353%, with an increase of 202% in the period 2016-2018. It asserts that increases in premium of 353%, and a corresponding increase in retentions of 440%,

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155 Guy Narburgh and Sally-Anne Ivimey, "Side by Side (A, B and C): Securities class actions and D&O insurance" in Damian Grave and Helen Mould (Eds), *25 Years of Class Actions in Australia*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (2017) 372-3.

156 XLCatlin and Kearney, above n 43.

157 Ibid 15.

158 Marsh, *Submission 11*.

as experienced by Marsh's ASX200 clients are unsustainable in the long term. As a result, Marsh submitted that the claims experience is adversely impacting the appetite of insurers to write the coverage at all, or in a meaningful way to meet market demand. Marsh pointed to those insurers who, to date, have withdrawn from providing D&O cover to ASX listed companies – WR Berkley, AAI trading as Vero Insurance, Lloyd's Novae and Lloyd's Canopius. It also observed that a number of other insurers have ratcheted back their exposure to D&O liabilities, including XLCatlin, Zurich, Chubb, Allianz and Liberty.[159]

9.85 Similarly, the Insurance Council of Australia (ICA) pointed to the relatively small Australian D&O premium pool of approximately $280 million and the increasing number of shareholder class actions where the average settlement sum is $50 million. The ICA said, '… the Directors and Officers insurance market has now become unprofitable with the current premium pool being inadequate to cover these increasing and expensive claims…'. [160]

9.86 Despite the concerns of insurers and brokers, Norton Rose Fulbright argued that 'there is presently no evidence to suggest that insurance is unaffordable or that there is a material underinsurance risk requiring policy intervention'.[161] They expressed the view that:[162]

> the recent increase in premiums for D&O cover is an overdue and necessary reaction to the realities of the Australian market. We also consider that the increase in pricing is one which the market can and will absorb.

9.87 Similar views were expressed by others.[163] Norton Rose Fulbright expressed the firm view that the availability and pricing of D&O insurance was not a sound impetus for driving any reform. Rather, they suggested consideration be given to a leave mechanism as discussed above at [9.43]–[9.45] and in Chapter 4.[164]

9.88 Professor Legg and Dr Meztger also drew attention to the under-pricing of D&O insurance over a sustained period and suggested that any broad review should include data and analysis of how D&O insurance is priced and payments made. They posited that, given that it is Side C cover that has been the primary source of payments (because most shareholder class actions are brought against the company only), a solution might be to price Side C separately and in a manner that enables it to be offered profitably. They caution, however, that such a solution might lead lawyers and funders to change how

159 Ibid.
160 Insurance Council of Australia, *Submission 47*.
161 Norton Rose Fulbright, *Submission 40*.
162 Ibid.
163 NSW Society of Labor Lawyers, *Submission 55*; Slater and Gordon, *Submission 54*; Maurice Blackburn, *Submission 37*; Phi Finney McDonald, *Submission 34*; Therium Australia Ltd, *Submission 19*; Financial Recovery Technologies, *Submission 15*; Bennelong Funds Management, *Submission 10*.
164 Norton Rose Fulbright, *Submission 40*.

they frame class actions by adding claims against directors so as to be able to access the Side A and B insurance.[165]

Concluding observations

9.89 As was observed by the Hon Ron Sackville AO QC, well-intentioned reforms do not always achieve their objectives. He points to legislation allowing for representative proceedings, or class actions, as an example of 'double-edged' reforms.[166] He identifies that the supporters of the procedural reforms argue that they have removed barriers that prevent powerless individuals from enforcing their rights collectively, thereby increasing the accountability of large corporations and governments for illegal or improper behaviour and that there is empirical evidence suggesting that in some situations, the procedure is capable of achieving the objectives sought by the original reform proposals. However, he draws attention to the creation of the new industry, that of litigation funding, endorsed by the High Court in *Campbells Cash and Carry v Fostif Pty Ltd*,[167] and the fact that the funding criteria applied by litigation funders, unsurprisingly, limits their involvement to the most commercially rewarding claims. Consequently, representative proceedings on behalf of shareholders are more frequently supported by litigation funders than representative proceedings on behalf of poor and disadvantaged groups.[168]

9.90 The call for a review of the substantive law that underpins shareholder class actions is directed at no more than a thorough understanding of the 'double-edged' nature of the reforms ushered in by the *FSRA* and their consequent interaction with the earlier reform objectives of Part IVA of the FCA Act. It is only with a thorough understanding of the claims and counter-claims that have been made throughout the course of this Inquiry that all stakeholders can have confidence in one another as shareholder class actions continue to be prosecuted, thereby preserving the integrity of the civil justice system.

165 M Legg, J Metzger, *Submission 12*.
166 The Hon Ronald Sackville AO QC, 'Law and Poverty: A Paradox' (2018) 41 *New South Wales Law Journal* 80, 92-93.
167 (2006) 229 CLR 386.
168 Ibid.

Appendix A
Preliminary Consultations
February–June 2018

Name	Location
Allens	Sydney
Allianz Insurance	Sydney
Professor John Armour, Oxford Law Faculty	London
Arnold Bloch Leibler (ABL)	Melbourne
Australian Institute of Company Directors	Sydney
Australian Securities and Investment Commission	Sydney
Australian Shareholders Association	Sydney
Balance Legal Capital	London
Burford Capital	Sydney
James Clanchy, Commercial Arbitrator	London
Clayton Utz	Sydney
Colin Biggers & Paisley	Sydney
Competition Appeal Tribunal	London
Federal Court of Australia	Melbourne
Federal Court of Australia—Class Action User Group	Sydney/Melbourne
Justice	London
4 New Square	London
The Hon Raymond Finkelstein AO QC	Melbourne
Grata Fund	Sydney

Name	Location
Harbour Litigation Funding	London
Professor Ian Harper	Melbourne
Ms Wendy Harris QC	Melbourne
Harbour Litigation Funding	Melbourne
Professor Deborah Hensler	Melbourne
Herbert Smith Freehills, Roundtable discussion with 12 Partners	London
Herbert Smith Freehills (Melbourne)	Melbourne
Herbert Smith Freehills (Sydney)	Sydney
Professor Andrew Higgins, Oxford Law Faculty	London
Professor Christopher Hodges, Oxford Law Faculty	London/Sydney
IMF Bentham (Melbourne)	Melbourne
IMF Bentham (Perth)	Melbourne
IMF Bentham (Brisbane)	Brisbane
Investor Claim Partner Pty Ltd	Sydney
Johnson Winter and Slattery	Sydney
King & Wood Mallesons	Sydney
Lander and Rogers	Melbourne
Law Council of Australia	Sydney
Law Society of NSW—Costs Committee	Sydney
Law Society of NSW—Ethics Committee	Sydney
Professor Legg, Professor Degeling and Dr Metzger	Sydney
Leigh Day	London
Litigation Lending	Sydney
LMC Finance	Sydney

Name	Location
Martin Bengtzen	London
Maurice Blackburn (Melbourne)	Melbourne
Maurice Blackburn (Sydney)	Sydney
Dr Warren Mundy	Sydney
Phi Finney McDonald	Melbourne
Justin McDonnell	Brisbane
Professor Vince Morabito	Melbourne
Professor Rachael Mulheron	London
Queensland Law Society	Brisbane
Slater and Gordon	Melbourne
Squire Patton Boggs	Sydney
Stewarts	London
Thomas Miller	London
3VB	London
US Chamber Institute for Legal Reform	Sydney
Victorian Law Reform Commission	Melbourne
Victorian Legal Services Commissioner	Sydney
Walter Merricks CBE, Representative Plaintiff	London
Zurich Insurance	Sydney

Appendix B
Consultations
July–December 2018

Name	Location
Australian Competition and Consumer Commission	Sydney
Australian Institute of Company Directors: Director Roundtable	Sydney
The Australian Legal Costing Group	Melbourne
Augusta Ventures (Australia) Pty Ltd	Sydney
AustralianSuper	Melbourne
CBUS (Industry Super)	Brisbane
Charles Bannister	Sydney
Dr Michael Duffy	Melbourne
Dr Sean Foley	Sydney
Brett Jordan	Sydney
Mr James Palmer	Sydney
Group member	Sydney
Group Members	Brisbane
Group Member	Sydney
John Walker	Sydney
Maddens Lawyer	Melbourne
Professor Vince Morabito	Melbourne
Public Interest Advocacy Centre	Sydney
Representative Plaintiff	Brisbane

Name	**Location**
Representative Plaintiff	Brisbane
Representative Plaintiff	Sydney
Representative Plaintiff	Brisbane
Jonathan Tapp	Sydney
Therium	Brisbane
Shine Lawyers (Brisbane)	Brisbane

Appendix C
Proposals and Questions from DP85

1. Introduction to the Inquiry

Proposal 1–1 The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) with regards to:

- the propensity for corporate entities to be the target of funded shareholder class actions in Australia;
- the value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and
- the availability and cost of directors and officers liability cover within the Australian market.

3. Regulating Litigation Funders

Proposal 3–1 The *Corporations Act (2001)* (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.

Proposal 3–2 A litigation funding licence should require third-party litigation funders to:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interest;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

Question 3–1 What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

Question 3–2 What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

Question 3–3 Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?

4. Conflicts of Interest

Proposal 4–1 If the licensing regime proposed by Proposal 3–1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission *Regulatory Guide 248* and should be required to report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

Proposal 4–2 If the licensing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the *Corporations Regulations 2001* (Cth).

Proposal 4–3 The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.

Proposal 4–4 The Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.

Proposal 4–5 The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.

Proposal 4–6 The Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.

5. Commission Rates and Legal Fees

Proposal 5–1 Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements.

This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:

- an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;
- a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and
- under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.

Proposal 5–2 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

Question 5–1 Should the prohibition on contingency fees remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated?

Proposal 5–3 The Federal Court should be given an express statutory power in Part IVA of the *Federal Court of Australia Act 1976* (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements.

If Proposal 5–2 is adopted, this power should also apply to contingency fee agreements.

Question 5–2 In addition to Proposals 5–1 and 5–2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:

- Should contingency fee arrangements and commission rates also be subject to statutory caps that limit the proportion of income derived from settlement or judgment sums on a sliding scale, so that the larger the settlement or judgment sum the lower the fee or rate? or
- Should there be a statutory provision that provides, unless the Court otherwise orders, that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%?

Question 5–3 Should any statutory cap for third-party litigation funders be set at the same proportional rate as for solicitors operating on a contingency fee basis, or would parity affect the viability of the third-party litigation funding model?

Question 5–4 What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a ‘class action reinvestment fund’ be a viable option?

6. Competing Class Actions

Proposal 6–1 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that:

- all class actions are initiated as open class actions;
- where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;
- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and
- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.

Proposal 6–2 In order to implement Proposal 6–1, the Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

Question 6–1 Should Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under this legislation?

7. Settlement Approval and Distribution

Proposal 7–1 Part 15 of the Federal Court of Australia's Class Action Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.

Question 7–1 Should settlement administration be the subject of a tender process? If so:

- How would a tender process be implemented?
- Who would decide the outcome of the tender process?

Question 7–2 In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?

8. Regulatory redress

Proposal 8–1 The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.

Question 8–1 What principles should guide the design of a federal collective redress scheme?

Appendix D
Submissions

Name	Number
Allens	52
Ashurst	25
Association of Litigation Funders of Australia	58
Augusta Ventures (Australia)	70
Australian Bar Association	69
Australian Institute of Company Directors	35, 78
Australian Lawyers Alliance	7
Australian Shareholders Association	9
Australian Securities and Investments Commission	72
AustralianSuper	33
D Barrow	24
Bennelong Funds Management	10
R Bungey	13
Burford Capital	38
L Cantrill	26
Cbus Super	46
Chartered Accountants Australia and New Zealand	28
CHOICE	22, 71
Clayton Utz	42
Consumer Action Law Centre	67

Name	Number
Professor K Davis	6
C Dealehr	21
DLA Piper Australia	27
Dr M Duffy	36
Environmental Justice Australia	16
Dr S Foley	8
Financial Recovery Technologies	15
Grata Fund	29
Harbour Litigation Funding	17
Healthcare Companies and Businesses Group	63
HESTA	61
IMF Bentham Limited	50, 77
Institute of Public Accountants	18
Insurance Council of Australia Limited	47
International Litigation Partners	31
Investor Claim Partner, J Walker	2
Johnson Winter & Slattery	14
King & Wood Mallesons	65
Law Council of Australia	62
Law Firms Australia	51, 73
Law Society of NSW	64, 75
Legal Aid NSW	60
Professor M Legg & Dr J Metzger	12
Levitt Robinson	56

Name	Number
Litigation Capital Management Limited	30
Phi Finney McDonald	34
Maurice Blackburn	37, 74
Maddens Lawyers	32
Marsh Australia	11
K Menz	1
MinterEllison	45, 76
M E Morris	57
Dr W Mundy	4
New South Wales Society of Labor Lawyers	55
NSW Young Lawyers	68
Norton Rose Fulbright	40
PF2 Securities Consulting Pty Ltd	20
Public Interest Advocacy Centre	39
Queensland Law Society	66
Risks and Insurance Management Society Australasia	59
Vicki Ruhr	3
Shine Lawyers Brisbane	43
Professor Peta Spender	53
Slater and Gordon Lawyers	54
Supreme Court of Victoria	41
Professor JA Tarr	5
Therium Australia Limited	19
US Chamber Institute for Legal Reform	44

Name	Number
Victorian Legal Services Board & Commissioner	23
Woodsford Litigation Funding	48
Zurich Australia Insurance Limited	49

Appendix E
ALRC Dataset: Class Action Proceedings Finalised in the Federal Court of Australia (1997–October 2018)

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
1997													
1. Lopez v Star World Enterprises Pty Ltd (Star World Enterprises) [1999] FCA 104	PL	1999	ND	1.45	SG	700	48	ND	1			800	52
2. Wong v Silkfield [2000] FCA 1421	Co	2000	ND	.446	Hogan Besley Boyd	ND	ND	ND	ND			ND	ND
1998													
3. J F Yandle & Co Pty Limited v CSN Pty Limited [2000] FCA 1823	PL	2000	ND	ND	Long Howland Houston	ND	ND	ND	ND			ND	N/A
1999													
4. Home Alarm Systems (Williams v FAI Home Security Pty Ltd) [2001] FCA 399	PL	2001	ND	0.91	MB	415	46	ND				495	54
5. Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2] (Vitamins Cartel Settlement) [2006] FCA 1388	Ct	2006	ND	41	MB	10,500	26	ND				ND	74
6. King v AG Australia Holdings Ltd (GIO) [2003] FCA 980	Sh	2006	151	112	MB	15,000	16	ND	1			23,099	84
7. Neil v P & O Cruises Australia Limited [2002] FCA 1325	Co	2002	ND	ND	SG	ND	ND	ND	ND			107	ND
2000													
8. Pacemaker Case (Courtney v Medtel Pty Ltd) [2004] FCA 1406	PL	2004	ND	4.7	MB	2,300	49	0	0			462	51
9. Reiffel v ACN 075 839 226 Pty Limited (No 2) [2004] FCA 1128	In	2004	ND	ND	SG	ND	ND	ND	ND			89	ND

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
2001													
10. Darcy v Medtel Pty Limited (No 4) [2004] FCA 1599	Co	2004	ND	N/A	MB	N/A[1]	N/A	ND	ND			160	N/A
2002													
11. Lukey v Corporate Investment Australia Funds Management Pty Ltd (Tracknet) [2003] FCA 1602	In	2004	ND	4.3	MB	2,600	60	ND				156	40
12. Guglielmin v Trescowthick (No. 5) (Harris Scarfe) [2006] FCA 1385	Sh	2006	20	3	DBH	1,550	52	ND				4500	48
13. Petrusevski v Bulldogs Rugby League Club Limited [2004] FCA 1712	Co	2004	ND	.2	ND	50	25	ND				59	75
2004													
14. Cadence Asset Management Pty Ltd v Concept Sports Limited (Concept Sports) VID1209/2005[2]	Sh	2006	5	3	MB	ND		ND		IMF	23	136	ND
15. Dorajay Pty Ltd v Aristocrat Leisure Ltd (Aristocrat Leisure) [2009] FCA 19	Sh	2008	396	144.5	MB	8,500	6	77	0.7	ILF	26	2856	68
16. Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd [2004] FCA 1114	O	2004	ND	C	AL	C						ND	N/A
17. Crawford v Bank of Western Australia Ltd [2005] FCA 949	Co	2005	ND	C	FL	C						ND	N/A
18. Georgiou v Old England Hotel Pty Ltd [2006] FCA 705	Co	2006	ND		MB	ND						ND	N/A

1 To be paid by the respondent.
2 Ceased to be a Part IVA matter prior to settlement.

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
2005													
19. Haslam v Money for Living (Aust) Pty Ltd (Administrators Appointed) [2007] FCA 897	Co	2007	ND	N/A[3]	RK	C						50	N/A
20. Lehmann v Winning Time Pty Ltd [2009] FCA 724	In	2009	ND	C	MP	C						ND	N/A
2006													
21. P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (Multiplex) [2010] FCA 1029	Sh	2010	200	110	MB	11,000	10	ND	0.3	ILFP	32	109	58
22. Taylor v Telstra Corporation Ltd (Telstra Shareholder) [2007] FCA 2008	Sh	2007	300	5	SG	1,250	25	ND				30,000	75
23. Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd (Corrugated Cardboard Cartel) [2011] FCA 671	Ct	2011	679	120	MB	25,000	21	1,171	1			7500	79
24. Leonie's Travel Pty Ltd v Air New Zealand Ltd [2013] FCA 73	Co	2013	ND	0.04	SG	C						ND	N/A
25. Peterson v Mercke Sharp & Dohme (Australia) Pty Limited [2015] FCA 123	PL	2015	ND	0.50	SG	0	0	0	0			1660	100
(2008) *Reeves v Merck Sharp & Dohme (Australia) Pty Limited & Anor* VID 859/2008	PL	2015	ND	0.05								87[4]	

3 These proceedings were settled together with a concurrent representative proceeding commenced against the defendant in the Supreme Court of Victoria (see Harrison & Anor v Kerrili Pty Ltd [2007] VSC 277). Although the settlement details were C, the Supreme Court of Victoria's judgment indicates that the settlement sought in the Federal Court proceedings was the rescission of particular contracts.

4 See, Slater and Gordon, Notice to Group Members (1 March 2013): media.slatergordon.com.au.

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
2007													
26. Village Life (Richard Vernon v Village Life Limited & Ors) [2009] FCA 516	Sh	2009	30	3	SG	ND		ND	3	IMF	ND	ND	N/A
27. Wingecarribee Shire Council v Lehman Brothers Australia Limited [2013] FCA 1350	In	2013	ND	C	SPB	C				IMF	C	72	N/A
28. Fowler v Airservices Australia [2009] FCA 1189	Em	2009	ND	C	D	C						33	N/A
29. Paxtours International Travel Pty Ltd v Singapore Airlines Ltd NSD787/2007	Co	2012	ND	0.16	SG	ND		ND				236	N/A
30. John Watson & Kaye Watson in their own right and as representatives of the Group Members v AWB Ltd: AWB (Watson v AWB) NSD2020/2007	Sh	2010	ND	39.5	MB	ND		N/A	0.7	IMF	18	1300	N/A
31. De Brett Seafood Pty Ltd & Anor v Qantas Airways Limited & Ors (Air Cargo) [2015] FCA 979	Ct	2014	ND	38	MB	13,000	34	ND		IMF	37	ND	29
32. Rubber Chemicals Cartel (Wright Rubber Products Pty Ltd v Bayer AG) [2011] FCA 1172	Ct	2011	ND	1.5	MB	1,100	73	ND	2			ND	27
2008													
33. Clime Capital Limited v Credit Corp Group Ltd (No 3) (Credit Corp Group) [2012] FCA 218 NSD1994/2008	Sh	2012	ND	6.5	WR	2,500	39	138	2	IMF	ND	311	ND

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
34. Richard Kirby v Centro Properties Limited, VID326/2008	Sh	2012	ND	150[5]	MB	21,100	14	ND		IMF	40%[6]	1000[7]	46
Richard Kirby v Centro Retail Ltd VID327/2008	Sh												
(2010) Nicholas Stott v PWC VID1028/2010	Sh												
35. Vlachos v Centro Properties Limited VID366/2008	Sh			50[8]	SG	10,060	20	ND	0.3	CLF	ND	5000[9]	N/A
(2010) Vlachos v PWC VID1041/2010	Sh												
36. Pharm-a-Care Laboratories Pty Ltd v Commonwealth [2012] FCA 370	PI	2011	ND	67.5	MTP	5,000	7	ND		IMF	37	161	56
37. Imobilari Pty Ltd v Opes Prime Stockbroking Limited [10]	In	2009	N/A		SG	N/A						N/A	
38. Construction, Forestry, Mining and Energy Union v Contract Blinds Pty Ltd [2009] FCA 572	Em	2009	ND	0.32	CF-MEU[11]	40	12.5	N/A				42	87.5

5 IMF Bentham, "Centro Settlement Sets Record, but do Questions Remain?" Legacy Newsletters (03 April, 2013)
6 Justin Whealing, "Lawyers to Earn Millions After Centro Settles" Lawyers Weekly (19 June 2012)
7 Ibid.
8 IMF Bentham, Above n 4.
9 Justin Whealing, Above n 5.
10 This claim was finalised as part of a scheme of arrangement settling multiple proceedings against Opes Prime Stockbroking Limited.
11 The applicants were represented by Timothy Wetheral and then by the CFMEU.

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
2009													
39. Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd [2011] FCA 801	Sh	2011	185	39	MB	3.1	8	702	1.8	IMF	38[12]	1600[13]	63
40. Anthony Scott & Anor v Oz Minerals Limited NSD1433/2010	Sh	2011	185	21	SG	1.8	3.33	400	1.9	LLS	13	140	83.67
41. Weimann v Allphones Retail Pty Ltd [2011] FCA 537	Fr	2011	ND	C	CM	C						21	N/A
42. Mark Harrison & Anor v Sandhurst Trustees Ltd [2011] FCA 541	In	2011	ND	29	SG	1.9	6.55	Included in fees				5100	93.45
43. Mercedes Holdings Pty Limited v Waters (2015) 232 FCR 97	In	2015	420	C	K, HWL, JWS	7.8	N/A	ND		IMF	33+[14]	N/A	N/A
2010													
44. Richards v Macquarie Bank Ltd (No 4) (Storm Financial) [2013] FCA 438	In	2013	ND	82.5	LR	6.8	8	ND				1050	92
45. Sherwood v Commonwealth Bank of Australia (No 5) (Storm Financial – CBA) [2015] FCA 688	In	2015	ND	33.68	LR	9.8	29	ND				143	71
46. The Boase Family Trust with Trustee Timothy Boase as the Representative Party & Ors v Sullivan Commercial Pty Ltd t/as McGees Property & Anor [2013] FCA 15	In	2012	C		TB	C						22	N/A

12 Michael West, "Oz Minerals Settles Two Lawsuits on Debt Claims" Sydney Morning Herald (10 May 2011).
13 Oz Minerals Class Action: https://www.mauriceblackburn.com.au/past-class-actions/oz-minerals-class-action/ .
14 The settlement was confidential, however, the payment to the litigation funder consumed 'just over one third of the settlement moneys.'

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
47. Collin v Aspen Pharmacare Australia Pty Ltd [2013] FCA 1336	PL	2013	C		ATB	C						32	N/A
48. Ian Winterford v Pfizer Australia Pty Ltd [2015] FCA 426	PL	2015	C		ATB	C						172	N/A
49. Casey v DePuy International Ltd [2012] FCA 1370	PL	2012	ND	ND[15]	MB	ND						ND	N/A
50. Brisbane Broncos Leagues Club Ltd v Alleasing Finance Australia Pty Limited [2012] FCA 1112	O	2012	C		SG	C							N/A
51. Earglow Pty Limited v Sigma Pharmaceuticals Limited [2012] FCA 1496	Sh	2012	ND	C	SG	C				CLF	C	C	N/A
2011													
52. Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (GPT Management) [2014] FCA 680	Sh	2013	ND	75	SG	9.3 mil	11	455	0.6	CLF	25-30	2300+[16]	63.4-69.4
53. Hadchiti v Nufarm Limited (Nufarm) [2012] FCA 1524	Sh	2012	ND	C	SG, MB	C				CLF/ ILFP	C		

15 Compensation was assessed based on categories assigned by a compensation protocol.

16 Carolyn Cummins, "GPT Pays $75m to Settle Class Action" Sydney Morning Herald (8 May 2013).

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
54. David Kelly & Margaret Kelly v Willmott forests Ltd (In liq) & Ors [2017] FCA 689	In	2016	ND	3.1	MK	8,562	208	88	2.15			738[17]	0[18]
David Kelly & Margaret Kelly v Mis Funding VID1483/2011	In												
Aaron Grant v Commonwealth Bank of Australia VID1484/2011	In												
Braeden Stephen Lord v Willmott Forests Ltd (In Liquidation) in its Personal Capacity and in its Capacity as Responsible Entity of the Willmott Forests Premium Forestry Blend – 2010 Project VID187/2013	In			1								165[19]	
55. Farey v National Australia Bank Ltd (Bank Fees) [2016] FCA 340	Co	2016	ND	6.6	MB	600	9	N/A	0.9	IMF	62	ND	29
56. Stanford v DePuy International Ltd (No 6) (DePuy Hip Implants) [2016] FCA 1452	PL	2016	ND	250	MB, SL	36,000	14	ND				4000	86
2012													
57. Caason Investments Pty Limited v Cao (No 2) (Caason) [2018] FCA 527	Sh	2018	ND	19.25	PA, SPB	7,500	40	ND		ILP	30	ND	30

17 The class comprised approximately 3,156 persons, but there were only 730 registered class members (entitled to benefit under the settlement).

18 The settlement did not provide for any compensation or damages to be paid to the class members. Class members received grace periods for the repayment of loans or a reduction in outstanding loans.

19 The class comprised approximately 344 persons, but there were only 162 registered class members (entitled to benefit under the settlement).

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
58. Wepar Nominees Pty Ltd v Schofield (No 2) (White Sands Petroleum) [2014] FCA 225	In	2014	ND	3.25	PA	1,000	32	Included in fees		LCM	33	262	35
59. Brannaghan v Thiess Pty Ltd and Degremont Pty Ltd trading as Thiess Degremont Joint Venture [2013] FCA 790	Em	2013	C		SG	C						C	
60. Robert William Lee & Anor v Bank of Queensland Limited [2014] FCA 1376	In	2014	ND	9.6	LR	2,147	10.93	~$368	1.88			392	87.19
61. Clurname Pty Limited & Anor v Commonwealth Bank of Australia NSD778/2012	In	2015	ND	C	SPB	1,937	N/A	C		ILP	C		
62. Muswellbrook Shire Council v Royal Bank of Scotland NV [2017] FCA 414	In	2017	ND	C	SPB	C				IMF	C		
63. Hopkins v AECOM Australia Pty Ltd [2016] FCA 1096	Sh	2016	ND	121	MB	19,188	15.85	ND	N/A	IMF	33	696	51
2013													
64. Inabu Pty Ltd v Leighton Holdings (Leighton) [2014] FCA 911	Sh	2014	ND	69.45	MB	3,900	6	ND	N/A	ILFP	ND	6000+	N/A
65. Paul Leslie McAlister by his Litigation Representative the NSW Trustee & Guardian v State of New South Wales & Ors [2017] FCA 93	Co	2018	ND	7.02	MB	2,900	42	Included in fees				70	58
66. Camilleri v The Trust Company (Nominees) Limited (Australian Capital Reserve) [2015] FCA 1468	In	2015	ND	25	SG	4,900	20	684	3			ND	80

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
67. Gray v Cash Converters International Limited (No 2) (Cash Converters (NSW)) [2015] FCA 1109	PL	2015	ND	20	MB	3,000	15	1,624	7			40,000	85
68. City of Swan v McGraw-Hill Companies Inc (Standard & Poors) [2016] FCA 343	In	2016	ND	150-250[20]	SPB	4,537	2	ND		IMF	33%	92[21]	~65
69. Bradley Duncan v Owners Corporation for SP82638; Owners Corporation of Strata Plan 82638 v Villa World Developments Pty Limited[22] NSD2001/2013, NSD2000/2013	PL	N/A				N/A						N/A	
70. Lex Wotton & Ors v State of Queensland [2018] FCA 915	PI	2018	ND	30	LR	2,415	8	1,550	5			447	87
71. Bulense Holdings Pty Limited v Arup Pty Ltd [2015] FCA 726	In	2015	ND	C	MB	C				IMF	C	379	N/A
72. Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Limited [2014] FCA 982	In	2014	ND	C	WR	C				C	C	ND	N/A
73. Tyson Duval-Comrie (by his Litigation Representative Kairstien Wilson) v Commonwealth of Australia [2016] FCA 1523	Em	2016	ND	100+[23]	MB	0[24]	0	0[25]	0			9700+	100

20 Australian Financial Review "S&P Reaches Settlement in Multimillion Dollar Class Action" (February 19, 2016).

21 David Weber, "Settlement Reached in Class Action Against McGraw-Hill Financial, Standard & Poor's Over Lehman Brothers Collapse" ABC News (20 February 2016).

22 These proceedings were dismissed with the parties bearing their own costs, but it is unclear whether there was a settlement.

23 Maurice Blackburn, "One Month to go—Workers with Intellectual Disabilities Urged to Sign up for Payment Scheme" (30 March 2017): https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2017/one-month-to-go-workers-with-intellectual-disabilities-urged-to-sign-up-for-payment-scheme/ .

24 Under the terms of this settlement, the Commonwealth agreed to bear the costs of the proceeding so that claims under the scheme would not be reduced by legal costs.

25 Under the terms of this settlement, the Commonwealth agreed to administer the scheme to relieve the group members of administrative costs.

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
74. Blairgowrie Trading Ltd v Allco Finance Group (Receivers & Managers Appointed) (In Liquidation)) [2017] FCA 330 NSD1609/2013	Sh	2017	ND	40	MB	10,500	26.25	N/A		ILFP	22%	1127	51.75
2014													
75. Jones v Treasury Wines Estates Limited NSD660/2014	Sh	2017	ND	49	MB	11,500	24	294	0.6	IMF	ND	600	N/A
76. Earglow Pty Ltd v Newcrest Mining Limited (Newcrest) [2016] FCA 1433	Sh	2016	ND	36	SG	10,300	29	360	1	CLF	19	4442[26]	52
77. Sydney Forex Pty Limited v Westpac Banking Corporation NSD1222/2014	In	2015	ND	N/A[27]	ML	ND	N/A	N/A				N/A	N/A
78. Liverpool City Council v McGraw Hill Financial, Inc & Anor [2018] FCA 1289	In	2018	238	215	SPB	20,000	9.3	342	0.15	LCP/ ILP	42	88	47
79. HFPS PTY LTD (as Trustee for the Hunter Facility Project Services Pty Ltd Superannuation Fund & Anor v Tamaya Resources Ltd (In Liquidation) & Ors [2017] FCA 650	Sh	2018	ND	6.75	OL, MB	3,420	50	270	4	ILP	17	863	29
80. Tobias Mitic v Oz Minerals [2017] FCA 409	Sh	2016	ND	32.5	AC	12,600	38	ND		HLF	27	N/A	35
81. Hodges v Sandhurst Trustees Limited [2018] FCA 1346	In	2018	ND	28	MD	3,800	13.5	260	0.9	LH	30	804	55.6
82. (2017) Smith v Sandhurst Trustees Limited NSD 1488/2017	In			11		1,800	16	250	2.3	LH/JK	25	ND	56.7

26 This is the number of registered class members at the time of the approval application. There were an unknown number of unregistered class members.

27 The settlement of this claim took the form of an agreement not to close particular bank accounts.

Case and YEAR filed	Type	Finalised	Claim ($ mil) ($ k)	Final award ($ mil) (%)	Lawyer ($ k)	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
						(%)							
83. Dillon v RBS Group (Australia) Pty Limited (No 2) [2018] FCA 395	In	2018	ND	12.58	SG	4,486	36	250	2			130	62
2015													
84. Newstart 123 Pty Ltd v Billabong International Ltd (Billabong) [2016] FCA 1194	Sh	2016	ND	45	SG	5.6 mil	12	541	1.2	CLF	ND	1255	N/A
85. Clarke Superannuation Fund v Sandhurst Trustees Limited (No 2) [2018] FCA 511	In	2018	29.8	16.85	SL	5 mil	31	260	1.5	JK	30	ND	39
86. Foley v Gay (Gunns) [2016] FCA 273	Sh	2016	ND	16	MB	2,300	15	Included in fees		IMF	31	300	54
87. Money Max Int Pty Limited as Trustee for the Goldie Superannuation Fund v QBE Insurance Group Limited [2018] FCA 1030	Sh	2018	ND	132.5	MB	22,500	17	251	0.18	ILFP	23	1290	59
88. Slater and Gordon (Matthew Hall v Slater & Gordon Limited) VID1213/2016	Sh	2017	250	36.5	MB	4,000	11	ND		ILP	22	3000	67
2016													
89. Santa Trade Concerns Pty Limited v Robinson (No 2) [2018] FCA 1491	Sh	2018	ND	3	PA	1,500	50	ND		IMF	17	215	33
90. Graham Phillips & Anor v Reckitt Benckiser (Australia) Pty Ltd [2017] FCA 1165	PL	2017	ND	3.5	BL	ND		ND		2FS	20	10,817	N/A[28]
91. Lifeplan Australia Friendly Society Limited v S&P Global Inc [2018] FCA 379	In	2018	62	C	JWS	4,900	N/A	N/A	N/A			ND	N/A

Note: Percentages are rounded up or down; where range of numbers or percent, the highest has been captured; distribution of award captured at settlement approval or judgment for applicant, this means that settlement distribution amount may be an allocation only and does not reflect the final cost of distribution (if known).

28 The settlement sum is $3.5 million less the litigation funder's commission (20%) and unspecified administration costs.

Westpoint Proceeding, where Applicants Represented by ASIC

Case and YEAR filed	Type	Finalised	Claim ($ mil)	Final award ($ mil)	Lawyer	Legal fees		Settlement fees		Funder	Fees (%)	Class	Class (% received)
Rikys v Bongiorno Financial Advisers (Aust) Pty Ltd [2009] FCA 1603	In	2009	ND	2.5	N/A[29]	N/A	N/A	N/A	N/A			108	N/A
Adamson v Professional Investment Services Pty Ltd ACN 074 608 558 [2009] FCA 1235	In	2009	ND	5.9	N/A[30]	N/A	N/A	N/A	N/A			101	N/A
Stoyef v Masu Financial Management Pty Ltd (No 2) [2008] FCA 1849	In	2008	ND	C	N/A[31]	N/A	N/A	N/A	N/A			36	
Goodman, in the matter of Glenhurst Corporation Pty Ltd (In Liq) (ACN 006 277 087) [2010] FCA 667	Inv	2010	ND	2.5	N/A[32]	N/A	N/A	N/A				97	N/A
Markov v Dukes [2010] FCA 1419	Inv	2010	ND	1	N/A[33]	N/A	N/A	N/A				N/A	N/A
Casey v State Trustees Limited (ACN 064 593 148) [2010] FCA 163	Inv	2010	ND	13.5	N/A[34]	N/A	N/A	N/A				526	N/A

Provided by Professor Vince Morabito, Private Correspondence, 8 November 2018

29 Represented by ASIC.
30 Represented by ASIC.
31 Represented by ASIC.
32 Represented by ASIC.
33 Represented by ASIC.
34 Represented by ASIC.

Table of Abbreviations

Type of matter (T)	
In	Investment matter
Sh	Shareholder matter
PL	Product Liability matter
Co	Consumer matter
Pi	Public interest matter
Em	Employment matter
Ct	Cartel

Third-party litigation funder	
LH	Litman Holdings
LCP	Litigation Capital Partners
CLF	Comprehensive Legal Funding
HLF	Harbour Litigation Funder
ILP	International Litigation Partners
ILFP	International Litigation Funding Partners
IMF	IMF Bentham Australia
JK	JustKapital
LCM	Litigation Capital Management
LLS	Litigation Lending Services
VC	Vannin Capital
2FS	Second Floor Litigation Services
	No funder in that matter

Law firm for the applicant	
SG	Slater and Gordon
MB	Maurice Blackburn
DBH	Duncan Basheer Hannon
AL	Andma Legal
FL	Fiocco's Lawyer
RK	Russel Kennedy
MP	McKean and Park
SPB	Squire Patton Boggs
D	Deacons
WR	William Roberts
MTP	McLachlan Thorpe Partners

Law firm for the applicant	
CM	Chew and Matthews
K	Carneys
LR	Levitt Robinson
TB	T Boase
ABL	Arnold Bloch Leibler
ATB	Arnold Thomas & Becker
MK	Macpherson Kelly
SL	Shine Lawyers
PA	Piper Alderman
AM	Attwood Marshel
ML	Mitry Lawyers
OL	O'Donnel Legal
AC	ACA Lawyers
MD	Meridian Lawyers
BL	Bannister Law
OB	O'Brien Lawyers
JWS	Johnson Winter & Slattery
HWL	HWL Ebsworth

ND	Not Disclosed

Appendix F
ALRC Snapshot: Class Action Proceedings Finalised in the Federal Court of Australia (1997–October 2018)

Case name	Type	Finalised	Claim ($ mil)	Final award ($ mil)	Lawyer	Legal fees $	Legal fees % of award	Funder	Funder fee % of award	Class	Class % received
1. Lopez v Star World Enterprises Pty Ltd (*Star World Enterprises*) [1999] FCA 104 VID133/1997	PL	1999	ND	1.45	SG	700	48			800	52
2. Home Alarm Systems (*Williams v FAI Home Security Pty Ltd*) [2001] FCA 399	PL	2001	ND	0.91	MB	415	46			495	54
6. Lukey v Corporate Investment Australia Funds Management Pty Ltd (*Tracknet*) [2003] FCA 1602	In	2004	ND	4.3	MB	2,600	60			156	40
5. Pacemaker Case (*Courtney v Medtel Pty Ltd*) [2004] FCA 1406	PL	2004	ND	4.7	MB	2,300	49			462	51
13. *Petrusevski v Bulldogs Rugby League Club Limited* [2004] FCA 1712	Co	2004	ND	.2	ND	50	25	ND			59
7. Guglielmin v Trescowthick (No. 5) (*Harris Scarfe*) [2006] FCA 1385	Sh	2006	20	3	DBH	1,550	52			4500	48
3. Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2] (*Vitamins Cartel Settlement*) [2006] FCA 1388	Ct	2006	ND	41	MB	10,500	26			ND	74
4. King v AG Australia Holdings Ltd (*GIO*) [2003] FCA 980	Sh	2006	151	112	MB	15,000	16			23,099	84
16. Taylor v Telstra Corporation Ltd (*Telstra Shareholder*) [2007] FCA 2008	Sh	2007	300	5	SG	1,250	25			30,000	75
9. Dorajay Pty Ltd v Aristocrat Leisure Ltd (*Aristocrat Leisure*) [2009] FCA 19	Sh	2008	396	144.5	MB	8,500	6	ILF	26	2856	68
32. Construction, Forestry, Mining and Energy Union v Contract Blinds Pty Ltd [2009] FCA 572	Em	2009	ND	0.32	CF-MEU[1]	40	12.5			42	88

1 The applicants were represented by Timothy Wetheral and then by the CFMEU.

Case name	Type	Finalised	Claim ($ mil)	Final award ($ mil)	Lawyer	Legal fees $	Legal fees % of award	Funder	Funder fee % of award	Class	Class % received
15. P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (*Multiplex*) [2010] FCA 1029	Sh	2010	200	110	MB	11,000	10	ILFP	32	109	58
26. Rubber Chemicals Cartel (*Wright Rubber Products Pty Ltd v Bayer AG*) [2011] FCA 1172	Ct	2011	ND	1.5	MB	1,100	73			ND	27
30. Pharm-a-Care Laboratories Pty Ltd v Commonwealth [2012] FCA 370	PI	2011	ND	67.5	MTP	5,000	7	IMF	37	161	56
33. Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd [2011] FCA 801	Sh	2011	185	39	MB	3.1	8	IMF	38	1600	63
17. Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd (*Corrugated Cardboard Cartel*) [2011] FCA 671	Ct	2011	679	120	MB	25,000	21			7500	79
34. Anthony Scott & Anor v Oz Minerals Limited NSD1433/2010	Sh	2011	185	21	SG	1.8	3.33	LLS	13	140	84
36. Mark Harrison & Anor v Sandhurst Trustees Ltd [2011] FCA 541	In	2011	ND	29	SG	1.9	6.55			5100	93
28. Richard Kirby v Centro Properties Limited VID326/2008	Sh	2012	ND	150	MB	21,100	14	IMF	40	1000	46
46. Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (*GPT Management*) [2014] FCA 680	Sh	2013	ND	75	SG	9.3 mil	11	CLF	25-30	2300	69
38. Richards v Macquarie Bank Ltd (No 4) (*Storm Financial*) [2013] FCA 438	In	2013	ND	82.5	LR	6.8	8			1050	92
25. De Brett Seafood Pty Ltd & Anor v Qantas Airways Limited & Ors (*Air Cargo*) [2015] FCA 979	Ct	2014	ND	38	MB	13,000	34	IMF	37	ND	29
52. Wepar Nominees Pty Ltd v Schofield (No 2) (*White Sands Petroleum*) [2014] FCA 225	In	2014	ND	3.25	PA	1,000	32	LCM	33	262	35

Case name	Type	Finalised	Claim ($ mil)	Final award ($ mil)	Lawyer	Legal fees $	Legal fees % of award	Funder	Funder fee % of award	Class	Class % received
54. Robert William Lee & Anor v Bank of Queensland Limited [2014] FCA 1376	In	2014	ND	19.6	LR	2,147	10.93			392	87
39. Sherwood v Commonwealth Bank of Australia (No 5) (*Storm Financial – CBA*) [2015] FCA 688	In	2015	ND	33.68	LR	9.8	29			143	71
60. Camilleri v The Trust Company (Nominees) Limited (Australian Capital Reserve) [2015] FCA 1468	In	2015	ND	25	SG	4,900	20			ND	80
61. Gray v Cash Converters International Limited (No 2) (*Cash Converters (NSW)*) [2015] FCA 1109	PL	2015	ND	20	MB	3,000	15			40,000	85
49. Farey v National Australia Bank Ltd (*Bank Fees*) [2016] FCA 340	Co	2016	ND	6.6	MB	600	9	IMF	62	ND	29
48. David Kelly & Margaret Kelly v Willmott forests Ltd (In liq) & Ors [2017] FCA 689	In	2016	ND	3.1	MK	8,562	208			738	0
74. Tobias Mitic v Oz Minerals [2017] FCA 409	Sh	2016	ND	32.5	AC	12,600	38	HLF	27	N/A	35
57. Hopkins v AECOM Australia Pty Ltd [2016] FCA 1096	Sh	2016	ND	121	MB	19,188	15.85	IMF	33	696	51
70. Earglow Pty Ltd v Newcrest Mining Limited (*Newcrest*) [2016] FCA 1433	Sh	2016	ND	36	SG	10,300	29	CLF	19	4442[2]	52
79. Foley v Gay (*Gunns*) [2016] FCA 273	Sh	2016	ND	16	MB	2,300	15	IMF	31	300	54
62. City of Swan v McGraw-Hill Companies Inc (*Standard & Poors*) [2016] FCA 343	In	2016	ND	150-250	SPB	4,537	2	IMF	33%	92	65
50. Stanford v DePuy International Ltd (No 6) (*DePuy Hip Implants*) [2016] FCA 1452	PL	2016	ND	250	MB, SL	36,000	14			4000	86

2 This is the number of registered class members at the time of the approval application. There were an unknown number of unregistered class members.

Case name	Type	Finalised	Claim ($ mil)	Final award ($ mil)	Lawyer	Legal fees $	Legal fees % of award	Funder	Funder fee % of award	Class	Class % received
67. Tyson Duval-Comrie (by his Litigation Representative Kairstien Wilson) v Commonwealth of Australia [2016] FCA 1523	Em	2016	ND	100	MB	0[3]	0			9700+	100
68. Blairgowrie Trading Ltd v Allco Finance Group (Receivers & Managers Appointed) (In Liquidation)) [2017] FCA 330	Sh	2017	ND	40	MB	10,500	26.25	ILFP	22%	1127	51
81. Slater and Gordon (Matthew Hall v Slater & Gordon Limited) VID1213/2016	Sh	2017	250	36.5	MB	4,000	11	ILP	22	3000	67
73. HFPS PTY LTD (as Trustee for the Hunter Facility Project Services Pty Ltd Superannuation Fund & Anor v Tamaya Resources Ltd (In Liquidation) & Ors [2017] FCA 650	Sh	2018	ND	6.75	OL, MB	3,420	50	ILP	17	863	29
51. Caason Investments Pty Limited v Cao (No 2) (Caason) [2018] FCA 527	Sh	2018	ND	19.25	PA, SPB	7,500	40	ILP	30	ND	30
82. Santa Trade Concerns Pty Limited v Robinson (No 2) [2018] FCA 1491	Sh	2018	ND	3	PA	1,500	50	IMF	17	215	33
78. Clarke Superannuation Fund v Sandhurst Trustees Limited (No 2) [2018] FCA 511	In	2018	29.8	16.85	SL	5 mil	31	JK	30	ND	39
72. Liverpool City Council v McGraw Hill Financial, Inc & Anor [2018] FCA 1289	In	2018	238	215	SPB	20,000	9.3	LCP/ILP	42	88	47
75. Hodges v Sandhurst Trustees Limited [2018] FCA 1346	Inv	2018	ND	28	MD	3,800	13.5	LH	30	804	56
76. (2017) *Smith v Sandhurst Trustees Limited* NSD 1488/2017	Inv	2018	ND	11	MD	1,800	16	LH/JK	25	ND	57

3 Under the terms of this settlement, the Commonwealth agreed to bear the costs of the proceeding so that claims under the scheme would not be reduced by legal costs.

Case name	Type	Finalised	Claim ($ mil)	Final award ($ mil)	Lawyer	Legal fees $	Legal fees % of award	Funder	Funder fee % of award	Class	Class % received
59. Paul Leslie McAlister by his Litigation Representative the NSW Trustee & Guardian v State of New South Wales & Ors [2017] FCA 93	Co	2018	ND	7.02	MB	2,900	42			70	58
80. Money Max Int Pty Limited as Trustee for the Goldie Superannuation Fund v QBE Insurance Group Limited [2018] FCA 1030	Sh	2018	ND	132.5	MB	22,500	17	ILFP	23	1290	59
64. Lex Wotton & Ors v State of Queensland [2018] FCA 915	PI	2018	ND	30	LR	2,415	8			447	87
83. *Dillon v RBS Group (Australia) Pty Limited* (No 2) [2018] FCA 395	In	2018	ND	12.58	SG	4,486	36			130	62

Note: Percentages are rounded up or down; where range of numbers or percent, the highest has been captured; distribution of award captured at settlement approval or judgment for applicant, this means that settlement distribution amount may be an allocation only and does not reflect the final cost of distribution (if known).

Table of Abbreviations

Type of matter (T)	
In	Investment matter
Sh	Shareholder matter
PL	Product Liability matter
Co	Consumer matter
Pi	Public interest matter
Em	Employment matter

Third-party litigation funder	
LH	Litman Holdings
LCP	Litigation Capital Partners
CLF	Comprehensive Legal Funding
HLF	Harbour Litigation Funder
ILP	International Litigation Partners
ILFP	International Litigation Funding Partners
IMF	IMF Bentham Australia
JK	JustKapital
LCM	Litigation Capital Management
LLS	Litigation Lending Services
VC	Vannin Capital
2FS	Second Floor Litigation Services
	No funder in that matter

Law firm for the applicant	
SG	Slater and Gordon
MB	Maurice Blackburn
DBH	Duncan Basheer Hannon
AL	Andma Legal
FL	Fiocco's Lawyer
RK	Russel Kennedy
MP	McKean and Park
SPB	Squire Patton Boggs
D	Deacons
WR	William Roberts
MTP	McLachlan Thorpe Partners

Law firm for the applicant	
CM	Chew and Matthews
K	Carneys
LR	Levitt Robinson
TB	T Boase
ABL	Arnold Bloch Leibler
ATB	Arnold Thomas & Becker
MK	Macpherson Kelly
SL	Shine Lawyers
PA	Piper Alderman
AM	Attwood Marshel
ML	Mitry Lawyers
OL	O'Donnel Legal
AC	ACA Lawyers
MD	Meridian Lawyers
BL	Bannister Law
OB	O'Brien Lawyers
JWS	Johnson Winter & Slattery
HWL	HWL Ebsworth

ND	Not Disclosed

Appendix G
Table of Third-Party Litigation Funders

Funder	Member of ALF or ALFA
1st Class Litigation Funding	No
Acasta Europe Ltd with Sparkle Capital Ltd	No
Augusta Ventures	Both
Australian Funding Partners Ltd	No
Balance Legal Capital LLP	Both
Burford Capital	ALF
Calunius Capital LLP	ALF
Chancery Capital Ltd	No
Claims Funding Australia Pty Ltd	No
Claims Funding Europe Ltd	No
Commercial Litigation Funding Ltd	No
Comprehensive Legal Funding LLC	No
Ferguson Litigation Funding Ltd	No
Grosvenor Litigation Services Pty Ltd	ALFA
Harbour Litigation Funding Ltd	ALF
IMF Bentham Ltd and Bentham Europe Ltd	No
International Justice Fund Ltd	No
International Litigation Partners	No
International Litigation Funding Partners	No
Investor Claim Partner	ALFA
Invicta Capital Funding	ALF (pending)
Ironbark Funding	No
Litigation Capital Management	No
Litigation Funding Solutions	No

Funder	**Member of ALF or ALFA**
Litigation Lending Management Pty Ltd t/as Litigation Lending Services	ALFA
Litman Holdings Pty Ltd /Agora Capital Corporation	No
Macquarie Specialised Investment Solutions	No
Managed Legal Solutions Ltd	No
Omni-Bridgeway	No
Redress Solutions PLC	Yes
Therium Group Holdings Ltd	Yes
Vannin Capital Ltd	Yes (both)
Woodsford Litigation Funding Ltd	Yes

Appendix H
Suggested Legislative Amendments

PROPOSED AMENDMENTS TO THE *FEDERAL COURT OF AUSTRALIA ACT 1976* (Cth)

> **Recommendation 1** Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that all representative proceedings are initiated as open class.

Amend section 33C (1)

Commencement of proceeding

33C (1)

…

a proceeding may be commenced by one or more of those persons as representing ~~some or~~ all of them.

Recommendation 14 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

a. third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Court;

b. the Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;

c. third-party litigation funding agreements of representative proceedings must expressly provide for a complete indemnity in favour of the representative plaintiff against any adverse costs order awarded against the representative plaintiff; and

d. Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Court.

Recommendation 19 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and
- the Court has an express statutory power to reject, vary, or amend the terms of such percentage-based fee agreements.

Interpretation

33A

…

Insert

Costs agreement means any fee and retainer agreement and costs disclosure entered into between the representative party's lawyers and the representative party and/or any class members, whether in standard form or otherwise and includes a Percentage-based fee agreement.

…

Litigation funding agreement means any agreement by which a litigation

funder is to pay or contribute to the costs of the proceedings, any security for costs or any adverse costs order and/or to receive payment of commission, costs or charges of any type in relation to the proceedings, whether by way of third-party or commercial litigation funding or by way of litigation funding provided by some of the class members.

...

Percentage-based fee agreement means an agreement between a solicitor and a representative plaintiff, whereby the solicitor's agreed fee is contingent on the success of the case and is determined as a percentage of the approved settlement sum or judgment sum awarded in the representative proceeding.

Insert new

Division 2A – Costs Agreements and Funding Agreements

Litigation funding agreements

33WA (1) In any proceeding (including an appeal) conducted under this Part, a Litigation funding agreement in respect of that proceeding

a. is enforceable only if approved by the Court;

b. must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order;

c. must be governed by Australian law; and

d. must provide that the funder submits irrevocably to the jurisdiction of the Court.

(5) Without limiting the operation of section 33ZF, the Court may reject, vary or amend the terms of any Litigation funding agreement referred to in subsection (1).

(6) Unless the Court otherwise orders, a litigation funder who is funding any proceeding (including an appeal) conducted under this Part, will be required to give security for costs in a form that is enforceable in Australia.

(7) A solicitor, who is acting for a representative plaintiff whose action is funded in accordance with a Litigation funding agreement that has been approved by the Court, may not seek to recover any unpaid legal fees from the representative plaintiff or from any group member.

33WB (1) In any proceeding (including an appeal) conducted under this Part, a

Percentage-based fee agreement in respect of that proceeding is enforceable only if approved by the Court.

(2) Without limiting the operation of section 33ZF, the Court may reject, vary or amend the terms of any Percentage-based fee agreement referred to in subsection (1).

(3) Unless the Court otherwise orders, a solicitor who is funding any proceeding (including an appeal) conducted under this Part on the basis of a Percentage-based fee agreement, will be required to give security for costs in a form that is enforceable in Australia.

Recommendation 3 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion.

33WC The Court may at any stage of a representative proceeding, on application made by the representative party or of its own motion, make a common fund order.

Recommendation 4 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to give the Court an express statutory power to resolve competing representative proceedings.

33ZFB Two or more proceedings

Without limiting the operation of section 33ZF, where:

(1) two or more representative proceedings are commenced against the same person; and

(2) the claims against the person are in respect of, or arise out of the same, similar or related circumstances, **(*competing claims*)**

the Court may, of its motion or on application by a party or a group member, where it is satisfied that it is in the interests of justice to do so;

(a) fix a date by which any additional competing claims must be filed; and

(b) consolidate two or more of the competing claims and stay the

remaining competing claims; or

(c) determine which representative proceeding will progress and stay the remaining competing claims.

Recommendation 13 Section 37N and s 43 of the *Federal Court of Australia Act 1976* (Cth) should be amended to expressly empower the Court to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.

37N Parties to act consistently with the overarching purpose

Insert new subsection 2A

(2A) A third-party litigation funder who is funding a representative proceeding commenced under Part IVA must, in its dealings with the group members and the lawyer for the representative plaintiff in relation to that proceeding (including negotiations for the settlement of the proceeding):

(a) take account of the duty imposed on a party by subsection (1);

(b) take account of the duty imposed on a party's lawyer by subsection (2); and

(c) assist the group members and the lawyer to comply with those duties.

Insert a new subsection 2B:

(2B) An insurer of a party to a civil proceeding before the Court, and who takes an active part in the conduct of that proceeding (including negotiations for settlement), must:

(a) take account of the duty imposed on a party by subsection (1);

(b) take account of the duty imposed on a party's lawyer by subsection (2); and

(c) assist the party and the lawyer to comply with those duties.

Amend subsection 4:

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1), ~~or~~ (2), (2A) or (2B).

43(3) Costs

Insert new

i. make an order for costs against a non-party.

Recommendation 7 Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) should be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under that legislation.

PROPOSED AMENDMENTS TO THE *CORPORATIONS ACT 2001* (Cth)

9 Dictionary

Unless the contrary intention appears:

…

Insert new definition

representative proceeding means a proceeding that may be commenced under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and a proceeding that, but for section 1337B(1A), could have been commenced under Part 4A of the *Supreme Court Act 1986* (Vic), Part 10 of the *Civil Procedure Act 2005* (NSW), or Part 13A of the *Civil Proceedings Act 2011* (Qld), and under any similar representative procedures in other States and Territories.

1337B Jurisdiction of Federal Court and State and Territory Supreme Courts

Insert new

(1A) Where a civil matter arising under the Corporations legislation is commenced as a representative proceeding, the Federal Court of Australia has exclusive jurisdiction with respect to that matter.

Amend

(6) This section has effect subject to section 1337B(1A) and section 1337D.

1337C Jurisdiction of Family Court and State Family Courts

Amend

(4) This section has effect subject to section 1337B(1A) and section 1337D.

PROPOSED AMENDMENTS TO THE *AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001* (Cth)

12GA Interpretation

Insert new

(d) a reference to a representative proceeding is a reference to a proceeding that may be commenced under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and a proceeding that, but for section 12GJ(1A), could have been commenced under Part 4A of the *Supreme Court Act 1986* (Vic), Part 10 of the *Civil Procedure Act 2005* (NSW), or Part 13A of the *Civil Proceedings Act 2011* (Qld), and any other similar representative procedures in other States and Territories.

…

12GJ Jurisdiction of courts

Insert new

(1A) Despite subsection (4), where a matter referred to in subsection (1) is commenced as a representative proceeding, the jurisdiction conferred by subsection (1) on the Federal Court of Australia is exclusive of the jurisdiction of any other court.

Amend

(2) Subject to subsection (1A), with respect to any matter:

(a) arising under this Division; or

(b) arising under Part 3 in its application in relation to an investigation of a contravention of this Division;

in respect of which a civil proceeding is instituted under this Subdivision

or under Part 3 as so applying:

(c) the several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subjectmatter or otherwise; and

(d) subject to the Constitution, jurisdiction is conferred on the several courts of the Territories.