|  | Element of policy proposal  | Source of analysis  | Portfolio lead |
| --- | --- | --- | --- |
| Regulating the availability of Common Fund Orders |
|  | Each funding agreement for a class action funding scheme is not enforceable and has no effect unless the court does not make a common fund order. Other contrary agreements or arrangements are not enforceable and have no effect. | **Reports**PJC Report: Chapter 9 (pp. 95 – 125), Recommendation 7ALRC Report: Section 4 (pp. 96-99), Recommendation 3**Supplementary analysis** Section 1: Regulating the availability of Common Fund Orders | AGD |
| Clarifying court powers to approve or vary funding distribution methods |
|  | The constitution of a class action litigation funding scheme must provide that each funding agreement include a claim proceeds distribution method. Any contrary agreement or arrangement is unenforceable. | **Reports**PJC Report: Chapter 11 (pp. 147 – 170)**Supplementary analysis** Section 2: Clarifying court powers to approve or vary funding distribution methods  | TSY |
|  | The claims distribution method in a funding agreement for a class action funding scheme is not enforceable and has no effect unless the court has approved or varied it. Other contrary agreements or arrangements are not enforceable and have no effect.  | **Reports**PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 11 ALRC Report: Section 6 (pp. 169 – 177), Recommendation 14 **Supplementary analysis**Section 2: Clarifying court powers to approve or vary funding distribution methods Section 5: Extending the jurisdictional impact of some recommendations | TSY AGD (only for supplementary analysis of extending jurisdictional impact) |
|  | In proceedings which are sufficiently progressed, the Court may make orders to approve or vary the claim proceeds distribution method in a funding agreement for the scheme to ensure that method is fair and reasonable when considering the interests of the scheme’s general members as a whole. | **Reports** PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 11ALRC Report: Section 6 (pp. 169 – 177), Recommendation 14 **Supplementary analysis**Section 2: Clarifying court powers to approve or vary funding distribution methods Section 5: Extending the jurisdictional impact of some recommendations | TSY AGD (only for supplementary analysis of extending jurisdictional impact) |
|  | In considering whether the claim proceeds distribution method is fair and reasonable, the Court must only have regard to a specified list of factors. These factors can be omitted, modified or varied by regulation.  | **Reports**PJC Report: Chapter 13 (pp. 189 – 206) **Supplementary analysis**Section 2: Clarifying court powers to approve or vary funding distribution methods  | TSY  |
| Introducing a rebuttable presumption about the distribution of claim proceeds to cover costs |
|  | A rebuttable presumption that the claim proceeds distribution method is not fair and reasonable if more than 30 percent (in aggregate) of the claim proceeds for the scheme is to be paid or distributed to entities who are not the scheme’s general members.  | **Reports**PJC Report: Chapter 13 (pp. 189 – 206), Recommendation 20 **Supplementary analysis**Section 3: Introducing a rebuttable presumption about the distribution of claim proceeds to cover costs  | TSY  |
| Requiring a consideration of fee assessor and contradictor advice and payment of costs |
|  | The constitution of a class action funding scheme must provide that each funding agreement require the funder to pay the reasonable costs of a litigation funding fees assessor or contradictor unless a court orders otherwise. Any contrary agreement or arrangement is unenforceable.  | **Reports**PJC Report: Chapter 11 (pp. 147 – 170), Recommendations 16, 18ALRC Report: Section 5 (pp. 136 – 141) **Supplementary analysis**Section 4: Requiring consideration of fee assessor and contradictor advice and payment of costsSection 5: Extending the jurisdictional impact of some recommendations  | AGD |
|  | If the Court has referred the funding agreement to a litigation fee assessor for inquiry into the funder’s remuneration, the Court must receive and consider the assessor’s report unless it is not in the interests of justice to do so. | **Reports**PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 13 ALRC Report: Section 5 (pp. 136 – 141) **Supplementary analysis**Section 4: Requiring consideration of fee assessor and contradictor advice and payment of costsSection 5: Extending the jurisdictional impact of some recommendations | AGD |
|  | Where the Court has appointed a contradictor to represent the scheme’s general members, the Court must consider the contradictor’s representations in deciding to approve or vary the claim proceed distribution method unless it is not in the interests of justice.  | **Reports**PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 18 ALRC Report: Section 5 (pp. 136 – 141) **Supplementary analysis**Section 4: Requiring consideration of fee assessor and contradictor advice and payment of costsSection 5: Extending the jurisdictional impact of some recommendations | AGD |
| Extending the jurisdictional impact of some recommendations |
|  | Elements listed at rows 1, 3, 4, 7, 8, 9 and 15 of this table. | **Reports**PJC Report: Recommendations 7, 11, 12, 13, 16, 18ALRC Report: Recommendation 14**Supplementary analysis**Section 5: Extending the jurisdictional impact of some recommendations | AGD |
| Addressing conflicts of interest involving plaintiffs’ lawyers and funder |  |
|  | As a condition of its Australian Financial Services Licence (AFSL), funders of a litigation funding scheme must maintain adequate practices for ensuring lawyers providing services in relation to the scheme do not have a material financial interest in the funder. | **Reports**PJC Report: Chapter 15 (pp. 255 – 283), Recommendation 26ALRC Report: Section 7 (pp. 217 – 227), Recommendation 21 **Supplementary analysis**Section 6: Addressing conflicts of interest involving plaintiffs’ lawyers and funders  | TSY |
|  | As a condition of licence, lawyers providing services in relation to the scheme cannot obtain a material financial interest in the funder. | As above | As above  |
|  | As a condition of licence, if a lawyer providing services in relation to the scheme does have or obtains a material financial interest in the funder, the funder must take action to ensure the lawyer stops providing the services or relinquishes the interest. | As above | As above  |
|  | Funders of insolvency litigation funding schemes or litigation funding arrangements must maintain adequate practices for ensuring that a lawyer providing services in relation to the scheme or arrangement does not have or obtain a material financial interest in the person.  | As above | As above |
| Other elements  |
|  | The constitution of a class action litigation funding scheme must provide that each funding agreement specify that the agreement is subject to the laws of a particular State or Territory and the exclusive jurisdiction of Australian Courts. Any contrary agreement or arrangement is unenforceable. | **Reports**PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 12ALRC Report: Section 6 (pp. 169 – 177), Recommendation 14**Supplementary analysis**Section 5: Extending the jurisdictional impact of some recommendations | AGD |