

Attachment A: Proposed litigation funding reforms and portfolio leads

	Element of policy proposal	Source of analysis	Portfolio lead
Regulating the availability of Common Fund Orders			
1.	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.	<p>Reports</p> <p>PJC Report: Chapter 9 (pp. 95 – 125), Recommendation 7</p> <p>ALRC Report: Section 4 (pp. 96-99), Recommendation 3</p> <p>Supplementary analysis</p> <p>Section 1: Regulating the availability of Common Fund Orders</p>	AGD
Clarifying court powers to approve or vary funding distribution methods			
2.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170)</p> <p>Supplementary analysis</p> <p>Section 2: Clarifying court powers to approve or vary funding distribution methods</p>	TSY
3.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 11</p> <p>ALRC Report: Section 6 (pp. 169 – 177), Recommendation 14</p> <p>Supplementary analysis</p> <p>Section 2: Clarifying court powers to approve or vary funding distribution methods</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	<p>TSY</p> <p>AGD (only for supplementary analysis of extending jurisdictional impact)</p>

	Element of policy proposal	Source of analysis	Portfolio lead
4.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 11</p> <p>ALRC Report: Section 6 (pp. 169 – 177), Recommendation 14</p> <p>Supplementary analysis</p> <p>Section 2: Clarifying court powers to approve or vary funding distribution methods</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	<p>TSY</p> <p>AGD (only for supplementary analysis of extending jurisdictional impact)</p>
5.	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.	<p>Reports</p> <p>PJC Report: Chapter 13 (pp. 189 – 206)</p> <p>Supplementary analysis</p> <p>Section 2: Clarifying court powers to approve or vary funding distribution methods</p>	<p>TSY</p>
Introducing a rebuttable presumption about the distribution of claim proceeds to cover costs			
6.	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.	<p>Reports</p> <p>PJC Report: Chapter 13 (pp. 189 – 206), Recommendation 20</p> <p>Supplementary analysis</p> <p>Section 3: Introducing a rebuttable presumption about the distribution of claim proceeds to cover costs</p>	<p>TSY</p>

	Element of policy proposal	Source of analysis	Portfolio lead
Requiring a consideration of fee assessor and contradictor advice and payment of costs			
7.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170), Recommendations 16, 18</p> <p>ALRC Report: Section 5 (pp. 136 – 141)</p> <p>Supplementary analysis</p> <p>Section 4: Requiring consideration of fee assessor and contradictor advice and payment of costs</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	AGD
8.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 13</p> <p>ALRC Report: Section 5 (pp. 136 – 141)</p> <p>Supplementary analysis</p> <p>Section 4: Requiring consideration of fee assessor and contradictor advice and payment of costs</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	AGD

	Element of policy proposal	Source of analysis	Portfolio lead
9.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 18</p> <p>ALRC Report: Section 5 (pp. 136 – 141)</p> <p>Supplementary analysis</p> <p>Section 4: Requiring consideration of fee assessor and contradictor advice and payment of costs</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	AGD
Extending the jurisdictional impact of some recommendations			
10.	Elements listed at rows 1, 3, 4, 7, 8, 9 and 15 of this table.	<p>Reports</p> <p>PJC Report: Recommendations 7, 11, 12, 13, 16, 18</p> <p>ALRC Report: Recommendation 14</p> <p>Supplementary analysis</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	AGD

	Element of policy proposal	Source of analysis	Portfolio lead
Addressing conflicts of interest involving plaintiffs' lawyers and funder			
11.	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.	<p>Reports</p> <p>PJC Report: Chapter 15 (pp. 255 – 283), Recommendation 26</p> <p>ALRC Report: Section 7 (pp. 217 – 227), Recommendation 21</p> <p>Supplementary analysis</p> <p>Section 6: Addressing conflicts of interest involving plaintiffs' lawyers and funders</p>	TSY
12.	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
13.	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
14.	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

	Element of policy proposal	Source of analysis	Portfolio lead
Other elements			
15.	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.	<p>Reports</p> <p>PJC Report: Chapter 11 (pp. 147 – 170), Recommendation 12</p> <p>ALRC Report: Section 6 (pp. 169 – 177), Recommendation 14</p> <p>Supplementary analysis</p> <p>Section 5: Extending the jurisdictional impact of some recommendations</p>	AGD