
Parliamentary Joint Committee on Corporations and Financial Services

Litigation funding and the regulation of the class action
industry

December 2020

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
AFPL	Australian Funding Partners Limited
AFSL	Australian Financial Services Licence
AICD	Australian Institute of Company Directors
ALFA	Association of Litigation Funders of Australia
ALRC	Australian Law Reform Commission
ALRC Final Report	Australian Law Reform Commission, <i>Integrity, fairness and efficiency – An inquiry into class action proceedings and third-party litigation funders</i> , Final Report, December 2018
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	Australian Securities Exchange
ATE insurance	After-the-event insurance
ATO	Australian Taxation Office
Australian Solicitors' CASAC	Legal Profession Uniform Law Australian Solicitors' Corporations and Securities Advisory Committee
Civil Procedure Act committee	<i>Civil Procedure Act 2005</i> (NSW) Parliamentary Joint Committee on Corporations and Financial Services
Conduct Rules	Conduct Rules 2015
Corporations Act	<i>Corporations Act 2001</i>
COVID-19	Coronavirus disease 2019
D&O	Directors and officers
Delegated Legislation Committee	Senate Standing Committee for the Scrutiny of Delegated Legislation
Federal Court	Federal Court of Australia
Federal Court Act	<i>Federal Court of Australia Act 1976</i>
FSI	Financial Services Inquiry
High Court	High Court of Australia
Instrument 787	ASIC Corporations Instrument 2020/787
July 2020 regulations	Corporations Amendment (Litigation Funding) Regulations 2020
LRCWA	Law Reform Commission of Western Australia
MIS	Managed Investment Scheme
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
NSW	New South Wales

PDS	Product Disclosure Statement
UK	United Kingdom
UK ALF	United Kingdom Association of Litigation Funders
US	United States
VLRC	Victorian Law Reform Commission
Victorian Civil Procedure Act	<i>Civil Procedure Act 2010 (Vic)</i>
Victorian Supreme Court Act	<i>Supreme Court Act 1986 (Vic)</i>

Executive Summary

Introduction

Every civilised system of government requires that the state should make available to all its CITIZENS a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.¹

The purpose of a civil justice system is to ensure a fair and reasonable society, and that when a damage is inflicted upon a person that is unlawful, that they are restored to their previous state.

Courts and civil remedies were not established as novel investment vehicles to deliver handsome profits to innovative financiers or creative lawyers. Most Australians would be comfortable with the idea that profits may be made incidentally while delivering the core objective of access to justice. But they would be rightly horrified to learn that for some participants in our justice system, return on investment and profit from risk-taking has become their primary motivation.

Australia's highly unique and favourably regulated litigation funding market has become a global hotspot for international investors, including many based in tax havens and with dubious corporate histories, to generate investment returns unheard of in any other jurisdiction – in some cases of more than 500 per cent.

This is directly the result of a regulatory regime described by the Australian Securities and Investments Commission (ASIC) as 'light touch' and under which no successful action by a regulator has ever been taken against a funder.

Participants in class actions are the biggest losers in this deal. When they finally get their day in court, it is the genuinely wronged class action members who are getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders.

Given the significant costs involved in bringing civil proceedings in Australia, the inquiry heard consistent support for class actions as a legitimate tool to overcome this barrier for many members of the community who wish to enforce their rights and obtain redress through the courts. As a way to improve access to justice, class actions provide a vehicle for the pursuit of collective claims, which are often individually of a smaller dollar value and may be otherwise uneconomical to litigate.

¹ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909, HL, 976 (Lord Diplock)

The Parliamentary Joint Committee on Corporations and Financial Services (committee) concurs with the findings of numerous previous reviews: namely, that class actions, when working as originally intended, should facilitate access to justice, discourage wrongdoing, and promote the efficient and effective use of court resources.

Litigation funding too, provides a way for representative plaintiffs and class members to meet the costs of litigation. These costs include their own legal costs and, in the event of an unsuccessful outcome, the defendant's legal costs. When litigation funders pay lawyer's fees and indemnify representative plaintiffs for adverse costs, it significantly changes the viability of class actions under Australia's 'loser pays' approach to civil litigation. Litigation funders also potentially close the considerable gap in financial resources between the two sides of a class action, reducing the defendant's ability to defeat the case through superior economic power. Therefore, the committee recognises that, in many instances, a class action in Australia may not proceed without a litigation funder.

However, while no witness in the inquiry proposed Australia abolish class actions or litigation funding, there was virtually unanimous agreement the current regulatory arrangements are too light touch and greater oversight of the industry is required. The only debate was about the extent and nature of that regulation. Those who most fiercely resisted comprehensive regulation of the industry were the vested interests who benefited from the status quo. While they enthusiastically professed to be only concerned with the interests of class action members, their opposition to measures designed to protect class members undermines that claim.

This inquiry was referred because of significant concerns about the current operation of the litigation funding and class action industries, including:

- the significant growth in shareholder class actions, and related issues;
- the increase in multiple and competing class actions and the delays added in resolving those matters;
- the excessive profits obtained by litigation funders compared to the risks the funders are taking;
- the scant regulatory framework covering litigation funders, including:
 - issues of the funder's duties to class action members; and
 - the determination and oversight of funding fees;
- whether the interests of class members are being served by the current regulatory environment; and
- inconsistencies between federal, state and territory class action regimes.

The federal class action regime has been in place for almost three decades. While the procedural mechanism has developed significantly through the common law, the statutory provisions have remained relatively unchanged.

Uncertainties about power and procedure need to be clarified and procedural efficiency prioritised. A review of these matters is therefore, timely.

Further, litigation funding has been allowed to develop with limited regulation, except for some degree of court oversight, and evidence to the committee, and recent case law including *Bolitho v Banksia Securities Limited*, suggested this has been inadequate. The growth in the scale of litigation funding, the participation of international litigation funders in the Australian market, and the frequency of windfall profits, highlights the need to reassess whether representative plaintiffs, class members and defendants are achieving reasonable, proportionate and fair outcomes. The Australian Government recently extended the application of some aspects of financial services regulation to litigation funding in class actions. The committee has considered those amendments in the context of a broader regulatory approach incorporating both financial services regulation and enhanced oversight by the Federal Court of Australia (Federal Court).

A particular issue identified through the inquiry is the asymmetry of information between market participants, which stems from regulatory failure. Mum and dad investors signing up to a litigation funding agreement as part of a class action can never hope to have the sophisticated understanding of corporate law or financial products that their lawyers and funders possess. If this asymmetry is not addressed to protect the interests of class members, increasing competition from more funders entering the market will not deliver lower prices for consumers. This is borne out by experience: the entrance of more players from the international litigation funding industry has done little to dent the spectacular returns earned by funders.

A broader issue of transparency was another common theme. The operations of many funders are highly opaque, including their ultimate owners, the amount of tax they pay in Australia, and even their returns. Time and time again the committee was told these matters were commercially confidential, and when challenged with examples of publicly reported returns, they were dismissed as unrepresentative or simplistic. Given these enormous profits are being generated from our legal system, the litigation funding industry is not just another competitive market. It requires much higher degrees of transparency to assure Australians the legal system their taxes fund is not being hijacked for profit. In short, the committee was tasked with inquiring into whether the current level of regulation, practices and procedure applying to Australia's growing class action and litigation funding industry is appropriate, and whether it is delivering fair and equitable outcomes for class members.

Having considered the evidence put to it, the committee considers the concerns about the class action and litigation funding industries to be wellfounded. In the committee's view, the class action system needs to be reformed to reflect the underlying tenets of its original intent: that is, to deliver reasonable, proportionate and fair access to justice in the best interests of class members.

Accordingly, the committee identifies those areas where it sees significant value in reforming the current regime. Nevertheless, the committee is aware of the adverse consequences that could arise from ill-judged regulation. Therefore, the reforms proposed by the committee, while comprehensive, are measured and targeted.

The committee's approach to reform has been guided by the principle of reasonable, proportionate and fair access to justice in the best interests of class members. The rest of the executive summary provides an overview of the key issues and the committee's recommendations for reform.

Reasonable, proportionate and fair class action procedure

Commencing a class action

If the criteria and process to commence a class action sets the bar too low to commence a class action, the class action system can be susceptible to exploitation for financial gain. The class action regime should be cost-effective and accessible with appropriate safeguards to curb any abuse of process. The committee recommends measures to ensure that procedural proportionality is considered at the outset of a class action.

Resolution of competing and multiple class actions

Separate and concurrent class actions which litigate the same legal claims, for the same or overlapping class members, against the same defendant, undermine the objectives of the class action regime, which is for a single decision to resolve many claims that are the same or similar. For this reason, the court must undertake a process for determining how to manage the competing and multiple actions, with parties often incurring substantial additional costs and delay. The powers and processes to manage and resolve competing and multiple class actions need amending to be clear, yet flexible, in order to respond to the circumstances of the case in a reasonable, proportionate and fair manner.

The committee makes a number of recommendations to facilitate greater oversight of competing and multiple class actions and with respect to how the Federal Court should manage and resolve competing and multiple class actions, including when they are filed in different jurisdictions.

Class closure orders

The federal regime intends for class actions to be 'open'. That is, the class action is on behalf of all class members irrespective of whether they had been identified, or consented to joining the action. A particular challenge with open class actions is reaching a settlement when the number of class members and the quantum of the claim are unknown.

The committee's recommendation regarding the power of the Federal Court to 'close' the class seeks to strike a balance between protecting the rights of class members whose legal claims are determined by the outcome of a class action, and facilitating reasonable, proportionate and fair resolutions to class actions through settlement.

Common fund orders

Another challenge with open class actions is that the costs incurred in the class action can be borne by the representative plaintiff, rather than among all those who share in the proceeds of a successful outcome. One tool used by the Federal Court to address this issue of 'free riding' has been the 'common fund order', requiring all class members to equally contribute to the costs from their share of the proceeds from a settlement or judgment.

Evidence to the committee was divided on the value of common fund orders in class actions. Given the High Court of Australia's judgement in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 (Brewster), the power of the Federal Court to make a common fund order has been, and could continue to be, contested in the courts. The committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in Brewster.

Protecting class members from adverse costs

The risk that a litigation funder could be liable to pay for the defendant's costs if the class action is unsuccessful should act as a deterrent to financing unmeritorious class actions. Often, the litigation funder is ordered to pay security for those costs at the outset of a class action. Insurance products for adverse costs and security for costs are available and are often purchased by litigation funders, thereby reducing their risk and often increasing costs for class members.

The committee's recommendations codify the common industry practice of litigation funders indemnifying the representative plaintiff for adverse costs, and introduce a presumption that a litigation funder will provide security for costs in class actions. The objective is to ensure appropriate levels of indemnity are provided for the representative plaintiff and proportionate risk undertaken by the litigation funder.

Reasonable, proportionate and fair costs in class actions

Court regulation of litigation funding fees

The Federal Court has limited powers to regulate litigation funders and intervene in their contractual relationships with representative plaintiffs, even in instances where the fees appear unreasonable, disproportionate or unfair. Greater oversight by, and interventionist powers for, the Federal Court are required to constrain the large portions of settlement sums that are obtained by litigation funders by way of reimbursement of fees and commissions.

To complement the financial services regulation of litigation funding in class actions, the committee recommends expanded and strengthened powers for the Federal Court to regulate litigation funding fees. Critical to this reform is assistance from financial experts to assist the Federal Court in ensuring that fees are reasonable, proportionate and fair. Increased transparency through appropriately measured public disclosure of transaction costs and division of a settlement would also aid in achieving this objective.

In addition, the committee notes the proposal by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the Australian Government investigate the best way to implement this floor. The committee also recommends the Australian Government investigate whether a graduated minimum return above this floor is appropriate for shorter, less risky and less complex cases.

Contradictors and the interests of class members

Significant challenges exist for class members to represent their interests at the stage when the Federal Court's approval is sought for a class action settlement. Moreover, the objections that class members may have to a settlement are unlikely to be shared by the parties who negotiated the settlement and agreed to the proposed terms.

A contradictor is an advocate, usually a senior barrister, appointed by the Federal Court to represent the interests of class members. The committee encourages the wider use of contradictors. In many instances when a contradictor has been appointed, the fees and commission sought by the class action lawyers and litigation funder have been reduced, improving the financial outcomes for class members.

The committee makes a number of recommendations to introduce a new approach to the use of contradictors in the Federal Court. In essence, there should be a presumption for a contradictor to be appointed in certain circumstances.

Legal costs

During the inquiry, Victoria became the first and only jurisdiction in Australia to permit lawyers for the representative plaintiff in a class action to charge for legal costs on a 'contingency fee' basis. That is, where the legal fees to be paid in a successful outcome are calculated as a percentage of the money recovered in the class action.

The committee considers the public interest outcomes potentially achieved with the availability of contingency fee billing in class actions are not outweighed by the potential for their exploitation for the benefit of lawyers' profits, even with the existence of safeguards. A measured and steady approach to the use of contingency fees in class actions is essential.

A law firm billing on a contingency fee basis is offering both a legal service and a funding service. With the aim of a consistent regulatory approach to the activity of financing class actions, the committee recommends the application of the financial services regulation, to which third-party litigation funders are subjected, to lawyers operating on a contingency fee basis. The committee recommends a review to consider the feasibility of this proposal. The committee also suggests further consideration of the application of an 'uplift' fee of up to 25 per cent on billed costs in litigation funded class actions because the risk may not justify the returns.

Other regulatory measures

Conflicts of interest in litigation funded class actions

The interests of a litigation funder, lawyer and representative plaintiff differ and, at times, conflict. The level of power and influence litigation funders have in class actions gives rise to situations where their financial interests trump those of the representative plaintiff and class members. The committee makes a number of recommendations to raise the obligations placed on litigation funders and lawyers to avoid conflicts of interest, and to disclose (to the representative plaintiff, class members and the Federal Court) and manage those conflicts when they do arise.

The detriment to the representative plaintiff and class members when their lawyer also has an interest in the litigation funder financing the class action can be so significant that arrangements of this nature should be prohibited.

In addition to conflict of interest obligations, litigation funders should be required to meet the same standards of conduct obligations that are already imposed on parties to a class action and their lawyers. The committee recommends augmenting the standards to which parties, lawyers and funders are held, and broadening the range of penalties available to the Federal Court for non-compliance.

Financial services regulation of litigation funding

From August 2020, litigation funders in class actions must comply with the requirements of the Australian Financial Service Licence (AFSL) and Managed Investment Scheme (MIS) regimes. The committee has applied 'fit-for-purpose' principles in its consideration of the application of the AFSL and MIS regime to litigation funders in class actions. ASIC has taken a flexible and facilitative approach to modify the requirements to better tailor them to the litigation funding context. This approach should continue, with a fit-for-purpose regime for litigation funders legislated by the Australian Parliament.

The committee also recognises the potentially disproportionate burden this regime could place on small not-for-profit litigation funders already operating as charities who only occasionally finance class actions for the benefit of their members, and recommends the Australian Government investigate the best way to provide them an exemption.

Continuous disclosure

Claims for a breach of continuous disclosure laws underpin many shareholder class actions. Shareholder class actions are generally economically inefficient and not in the public interest. Even successful actions amount to shareholders effectively suing themselves and in net terms being no better off. Evidence to the committee focused on the ease with which shareholder class actions may be triggered by an alleged breach of Australia's continuous disclosure provisions. Reform is required to continuous disclosure laws given the increasing prevalence of this type of shareholder class action.

Temporary amendments were made to continuous disclosure laws in 2020 to raise the bar for establishing a breach, both for private and regulator action. The committee recommends these temporary arrangements be made permanent.

Competing class actions are frequently shareholder class actions. The adverse consequences of increased costs and delays are exacerbated by the economically inefficient nature of shareholder class actions. The committee recommends limiting class actions with claims in corporations law to the Federal Court so as to avoid additional challenges when competing shareholder class actions are filed in different jurisdictions. This reform would also eliminate the possibility of law firms running shareholder class actions on a contingency fee basis.

National consistency

There is an intention for the multiple class action regimes operating at the federal and state level to be consistent. Throughout the report, various issues are discussed which eventuate, wholly or in part, due to inconsistencies in power or approach across class

action regimes. The committee makes recommendations which seek to address these inconsistencies, to increase certainty and to reduce complexity.

Moreover, the committee's recommendations on class action procedure relate to the federal class action system. If some or all of these recommendations are implemented, there is potential for the class action and litigation funding markets to file more class actions in jurisdictions with more favourable regulations and court rules. The committee recommends the Australian Government work with state and territory governments to achieve consistent class action regimes across jurisdictions.

List of Recommendations

Recommendation 1

6.80 The committee recommends the Australian Government investigate legislative change which promotes procedural proportionality in class actions, with the objective of facilitating the pursuit of class actions where the potential costs and drawbacks are balanced against the potential benefits for the parties to litigation, the class members, as well as the impacts on court resources, regulatory outcomes and the public interest.

Recommendation 2

7.75 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce an express power for the Federal Court of Australia to resolve competing and multiple class actions. The power should maintain the Federal Court of Australia's discretion to allow more than one class action with respect to the same dispute to continue.

Recommendation 3

7.76 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to include:

- a requirement that the Federal Court of Australia holds a selection hearing to determine which of the competing or multiple class actions should proceed, the Federal Court of Australia should select a class action which advances the claims and interests of class members in an efficient and cost-effective manner, with regard to the stated preferences of the class members; and
- a requirement that on the filing of a class action, the Federal Court of Australia orders a standstill in that proceeding for 90 days, so that any other competing or multiple class actions can be appropriately considered and filed, and that any book building that occurs during the standstill period should be given no weight by the Federal Court of Australia.

Recommendation 4

7.77 The committee recommends the Australian Government seek to ensure that state and territory Supreme Courts with class action procedures adopt a protocol with the Federal Court of Australia similar to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings* and the *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings*.

Recommendation 5

8.50 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce an express power to order class closure orders, modelled on, or similar to, section 33ZG of the *Supreme Court Act 1986* (Vic).

Recommendation 6

8.51 The committee recommends the criteria for the Federal Court of Australia to apply in determining whether to close the class or re-open the class should be set out in the Federal Court of Australia's Class Actions Practice Note. The committee also recommends that if an order to close the class is made, it should be final unless the Federal Court of Australia finds that it is in the interests of justice to re-open the class.

Recommendation 7

9.124 The committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

Recommendation 8

10.61 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended so that litigation funding agreements with respect to class actions must expressly provide a complete indemnity in favour of the representative plaintiff against an adverse costs order.

Recommendation 9

10.62 The committee recommends the Federal Court of Australia not approve a litigation funding agreement unless the agreement provides a complete indemnity for adverse costs.

Recommendation 10

10.63 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to include a statutory presumption that a litigation funder in a class action provide security for costs.

Recommendation 11

11.58 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce:

- a requirement for a litigation funding agreement to obtain approval of the Federal Court of Australia to be enforceable; and
- a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.

Recommendation 12

11.59 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to require that any litigation funding agreement in a class action in the Federal Court of Australia is governed by Australian law and the Federal Court of Australia approves a litigation funding agreement only if the agreement provides that the litigation funder submit irrevocably to the jurisdiction of the Federal Court of Australia.

Recommendation 13

11.92 The committee recommends the Australian Government amend the Federal Court of Australia's Class Actions Practice Note to the effect that, pursuant to section 54A of the *Federal Court of Australia Act 1976*, at any point in a proceeding, the Federal Court of Australia may appoint a referee to act as a litigation funding fees assessor.

Recommendation 14

11.93 The committee recommends a litigation funding fees assessor appointed by the Federal Court of Australia be a professional with market capital or finance expertise.

Recommendation 15

11.94 The committee recommends section 43 of the *Federal Court Act 1976* be amended to expressly state that the Federal Court of Australia can make a costs order against a litigation funder.

Recommendation 16

11.95 The committee recommends the Federal Court of Australia's Class Actions Practice Note state the Federal Court of Australia may order the costs of the work undertaken by a referee appointed by the Federal Court of Australia as a litigation funding fees assessor be paid by a litigation funder, in circumstances where the conduct of a litigation funder justifies such an order being made.

Recommendation 17

11.112 The committee recommends that the Federal Court of Australia should require the following information to accompany an application for approval of a class action settlement. The information below should be published following the judgment approving a settlement:

- the date the proceeding commenced;
- the estimated number of class members before opt out;
- the number of people who have opted out;
- the number of registered class members;
- the number of funded and unfunded class members;
- the identity and location of the litigation funder;
- the amount of security for costs paid;
- the estimated value of the claims at the outset and at the time of settlement;
- the settlement sum and any non-monetary relief;
- the funding commissions payable under litigation funding agreements;
- the total amount of the funding commission (and per cent of the gross settlement sum) that the litigation funder would be paid, as the case may be:
 - pursuant to its contractual entitlements under the litigation funding agreements;
 - following a funding equalisation order (if one is sought);
 - following a common fund order (if one is sought); and
 - following any other order to share costs across class members.
- the total costs broken down into legal fees, counsel's fees, expert fees and their disbursements;
- any costs orders paid in the proceedings;
- payments to representative plaintiffs (their claims and recognition payments);
- other reimbursements and payments, including pursuant to cy-près orders;
- the average payment to all class members, funded class members and unfunded class members (and the per cent of the gross settlement sum);
- the number of class members who reached compromises, executed releases or covenanted not to sue during the class action, the estimated value of their claims and the value of such releases (aggregated and anonymised); and
- the amount of corporate tax paid in Australia by the litigation funder in the three previous financial years.

Recommendation 18

12.70 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to:

- **introduce a presumption that the Federal Court of Australia is to appoint a contradictor in instances where there is the potential for significant conflicts of interest to arise, or complex issues are likely to arise at the settlement approval application;**
- **include guidance on scenarios in which a conflict of interest is likely to arise, including:**
 - **where there is a material conflict between the interests of the representative plaintiff and those of some sub-groups of class members, including between those with different sorts of interests or claims, and between those who have signed up with the litigation funder and/or the representative plaintiff's solicitor and those who have not;**
 - **where the proposed return to the class members does not appear to be in accordance with the possible prospects of success;**
 - **where an issue arises as to whether some class members should be included or excluded from claiming settlement proceeds where they did not register in time pursuant to some registration process ordered by the Federal Court of Australia to identify the number, identity and claims of class members;**
 - **where there is an application, or an order has been made, for a common fund order or a funding equalisation order, or an equivalent order; and**
 - **where it is proposed that the solicitors for the representative plaintiff are to be appointed as the administrator of the settlement and where there may be other means available to administer the scheme more cheaply, efficiently or quickly;**
- **ensure the Federal Court of Australia retains discretion to appoint a contradictor and provide non-exhaustive guidance for the Federal Court of Australia as to the factors to which it should have regard when considering whether to exercise its discretion to appoint a contradictor; and**
- **ensure the Federal Court of Australia may order the costs arising from the work undertaken by a contradictor be paid by the plaintiff law firm, or the litigation funder, in circumstances where the conduct on the part of the lawyer or the litigation funder justifies such an order being made.**

Recommendation 19

12.71 The committee recommends the Australian Government implement a procedure to facilitate communication of class members' concerns and objections to the settlement to a contradictor, when appointed. Class members should be informed of the contradictor's appointment in the class action and the questions to be determined by the contradictor. One option which should be considered is the introduction of such a power in the notice provisions in Division 3 of Part IVA of *Federal Court of Australia Act 1976* and supplemented by processes described in the Federal Court of Australia's Class Actions Practice Note.

Recommendation 20

13.62 The committee recommends the Australian Government consult on:

- the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);
- whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor; and
- whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.

Recommendation 21

14.192 The committee recommends the Australian Government review the feasibility of applying the Australian Financial Services Licence and the Managed Investment Scheme regimes to lawyers operating on a contingency fee arrangement in class actions.

Recommendation 22

14.201 The committee recommends the Australian Government consider options to establish rules that govern the ability of lawyers to charge an uplift fee on the total amount of legal costs in class action proceedings, with particular reference to:

- uplift fees which are conditional on a successful outcome; and
- the potential appropriateness of capped uplift fees of less than 25 per cent on the total costs.

Recommendation 23

15.79 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to require that the first notices provided to potential class members by legal representatives clearly describe:

- the obligation of legal representatives to avoid and manage conflicts of interest; and
- the detail of any conflicts in that particular case.

Recommendation 24

15.80 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to require that, in a litigation funded class action, the first notices provided to potential class members by legal representatives clearly describe:

- the obligation on litigation funders to avoid conflicts of interest;
- the obligation as a holder of an Australian Financial Services Licence to have arrangements to manage conflicts of interest;
- if the litigation funder is the responsible entity of a registered Managed Investment Scheme, to place the interest of members above their own in the instance of a conflict; and
- the detail of any conflicts in that particular case.

Recommendation 25

15.81 The committee recommends the representative plaintiff's lawyers and litigation funders be required to disclose the following to the Federal Court of Australia:

- any potential conflicts of interest;
- any new conflicts or potential conflicts which arise after the first case management conference; and
- the conflict management policy when applying to the Federal Court of Australia for approval of a litigation funding agreement.

Recommendation 26

15.105 The committee recommends the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and the Legal Profession Uniform Conduct (Barristers) Rules 2015 be amended to prohibit solicitors, law firms and barristers from having a financial or other interest in a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting.

'Other interest' should encompass other arrangements that do not necessarily amount to a pecuniary interest in the litigation funder, but which nonetheless may give rise to the likelihood that the interests of the litigation funder may

be prioritised over the interests of the representative plaintiff or class members, including common directorships, family ties and ongoing and/or reciprocal commercial arrangements.

Recommendation 27

15.131 The committee recommends the Australian Government consider options for the Federal Court of Australia to have the power to hold parties, their lawyers, and litigation funders to the same standards of conduct in class actions, including:

- sections 37N and 43 of the *Federal Court of Australia Act 1976* be amended so as to impose on litigation funders the obligation to act consistently with the overarching purpose in section 37M of the *Federal Court of Australia Act 1976* and to permit the Federal Court of Australia to order costs against litigation funders for failure to act consistently with the overarching purpose; and
- the *Federal Court of Australia Act 1976* be amended to reflect the statutory standards of conduct in sections 16 to 26 of the *Civil Procedure Act 2010* (Vic), including requirements such as:
 - the statutory standards apply to conduct in court, to interlocutory or appeal stages, and in respect of dispute resolution processes; and
 - the Federal Court have the express power to order costs against litigation funders for non-compliance with the overarching purpose of section 37N, as well as the power to order other disciplinary sanctions such as remedying the contravention or preventing a specific step or action being taken.

Recommendation 28

16.94 The committee supports the regulations issued by the Treasurer which clarify that litigation funders require an Australian Financial Service License and that they be regulated as Managed Investment Schemes. Noting that ASIC has provided relief from a number of MIS requirements, the committee recommends the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders. However, the committee recommends that the Australian Government consult on the best way to exempt not-for-profit litigation funders who held charitable status at the time the regulations were issued, have run no more than three class actions in the last five years, and exist solely to support and protect the members of the associated charitable entity.

Recommendation 29

17.136 The committee recommends the Australian Government permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

Recommendation 30

17.137 The committee recommends the Australian Government amend Part 9.6A of the *Corporations Act 2001* and section 12GJ of the *Australian Securities and Investments Commission Act 2001* so that exclusive jurisdiction is conferred on the Federal Court of Australia with respect to civil matters, commenced as class actions, arising under that legislation.

Recommendation 31

18.37 The committee recommends that, irrespective of whether none, some, or all of the committee's recommendations regarding the Federal Court of Australia's class action regime are adopted and implemented, the federal, state and territory governments work towards achieving consistency in class action regimes across jurisdictions.

Chapter 1

Introduction and report structure

Duties of the Committee

1.1 The Parliamentary Joint Committee on Corporations and Financial Services (committee) is established by Part 14 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Section 243 of the ASIC Act sets out the committee's duties as follows:

1. to inquire into, and report to both Houses on:
 - a. activities of ASIC or the Takeovers Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or
 - b. the operation of the corporations legislation (other than the excluded provisions); or
 - c. the operation of any other law of the Commonwealth, or any law of a State or Territory, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); or
 - d. the operation of any foreign business law, or of any other law of a foreign country, that appears to the Parliamentary Committee to affect significantly the operation of the corporations legislation (other than the excluded provisions); and
2. to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and
3. to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.¹

¹ *Australian Securities and Investments Commission Act 2001*, s. 243.

Terms of Reference

1.2 On 13 May 2020, the following matters were referred to the committee for inquiry and report by 7 December 2020:

Whether the present level of regulation applying to Australia's growing class action industry is impacting fair and equitable outcomes for plaintiffs, with particular reference to the following:

1. what evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income;
2. the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;
3. the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs;
4. the financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;
5. Australian financial services regulatory regime and its application to litigation funding;
6. the regulation and oversight of the litigation funding industry and litigation funding agreements;
7. the application of common fund orders and similar arrangements in class actions;
8. factors driving the increasing prevalence of class action proceedings in Australia;
9. what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy;
10. the effect of unilateral legislative and regulatory changes to class action procedure and litigation funding;
11. the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement;
12. the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic;
13. evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders; and
14. any matters related to these terms of reference.²

² House of Representatives, *Votes and Proceedings*, No. 54, 13 May 2020, pp. 879–882.

Why was the inquiry referred?

- 1.3 The Attorney-General, the Hon Christian Porter MP, referred the inquiry to the committee because of concerns that included the number of class actions, whether they are benefitting class action members, whether class actions, and in particular shareholder class actions, are in the public interest, the size of the returns to litigation funders, and the current regulatory regime for litigation funding.³

Jurisdictional issues

- 1.4 Australia's class action regime varies across federal, state and territory jurisdictions. In this report, the committee focuses on developments and trends at the federal level and what occurs in the Federal Court of Australia (Federal Court). That said, the committee also considers unilateral developments at a state level where they may have broader ramifications. The committee also covers issues around national consistency at the end of the report.

Terminology

- 1.5 This report will use the terms 'class actions' and 'class members' noting that some legislative regimes in Australia use other terminology, such as 'representative proceedings' or 'group proceedings', and by extension, 'group members'.
- 1.6 The payment of legal costs from a client to a lawyer where a 'no win, no fee' arrangement is in place is conditional, or contingent, on a successful outcome in the case. Consistent with the approach of the class action industry and the legal profession, this report uses the term 'contingency fee' to specifically refer to a percentage-based contingency fee charged by lawyers.

Conduct of the inquiry

- 1.7 The committee advertised the inquiry on its webpage and invited submissions from a range of relevant stakeholders. The committee set a closing date for submissions of 11 June 2020.
- 1.8 The committee received 101 submissions, which are listed in Appendix 3. The committee also received additional information, including answers to questions taken on notice (as listed in Appendix 3).
- 1.9 The committee held public hearings in Canberra via videoconference on 13, 24, 27, and 29 July 2020 and on 3 August 2020 (as listed in Appendix 4).

³ The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 13 May 2020, pp. 3340–3343.

Extension to the inquiry

1.10 On 2 December 2020, the House of Representatives extended the reporting time to 21 December 2020.⁴

Scope and structure of the report

1.11 This report comprises 18 chapters, including this introductory chapter. Matters raised in this report are intended to provide an indicative, though not exhaustive, overview of the issues examined during the committee's inquiry.

1.12 The report is divided into five parts:

- Part 1 provides background information, data and trends on class actions and litigation funding, and then sets out the rationale for the committee's approach to the key issues;
- Part 2 considers reasonable, proportionate and fair powers, procedure and practice in Federal Court class actions;
- Part 3 considers reasonable, proportionate and fair litigation funding fees and legal costs in class actions;
- Part 4 considers other regulatory measures, including oversight of conflicts of interests in litigation funded class actions and the financial services regulation of litigation funders in class actions; and
- Part 5 considers two final matters: shareholder class actions and national consistency across Australia's class action regimes.

1.13 The report chapters are structured as follows:

Part 1: Background, data, key issues, and committee's approach

- Chapter 2 covers the establishment of the federal class action regime, state and territory regimes, the origins of Australia's litigation funding industry, and major milestones that have influenced the development of class actions and litigation funding.
- Chapter 3 outlines the class action process.
- Chapter 4 presents data and trends in class actions and litigation funding in Australia.
- Chapter 5 sets out the principles that guide the committee in addressing the issues in the rest of the report, outlines the key issues before the committee, and identifies the areas where reform is needed.

Part 2: Reasonable, proportionate and fair class action procedure

- Chapter 6 covers the thresholds and processes for commencing a class action.
- Chapter 7 considers the resolution of competing class actions.
- Chapter 8 covers class closure orders in open class actions.
- Chapter 9 considers common fund orders.

⁴ House of Representatives, *Votes and Proceedings (Proof)*, No. 88, 2 December 2020, p. 1458.

- Chapter 10 deals with protecting class members from adverse costs.

Part 3: Reasonable, proportionate and fair costs in class actions

- Chapter 11 considers regulation of litigation funding fees by the Federal Court.
- Chapter 12 discusses the contradictors and the interests of class action members.
- Chapter 13 discusses reasonable, proportionate and fair litigation funding fees.
- Chapter 14 discusses reasonable, proportionate and fair legal costs.

Part 4: Other regulatory measures

- Chapter 15 looks at conflicts of interest in litigation-funded class actions.
- Chapter 16 reviews the financial services regulation of litigation funding.

Part 5: Final matters

- Chapter 17 looks at the issues around shareholder class actions and litigation funding.
- Chapter 18 considers national consistency.

Instruments referred by the Senate Standing Committee for the Scrutiny of Delegated Legislation

1.14 On 23 April 2020, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Delegated Legislation Committee)⁵ drew the committee's attention to the following instruments, noting that they contain significant policy matters relating to the regulation of litigation funding schemes:⁶

- ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 [F2020L00034]; and
- ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37 [F2020L00035].

1.15 On 8 October 2020, the Delegated Legislation Committee drew the committee's attention to the Corporations Amendment (Litigation Funding)

⁵ Since 4 December 2019, standing order 23(4) has required the Senate Standing Committee for the Scrutiny of Delegated Legislation to scrutinise each legislative instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate. These may include instruments which contain significant policy matters or significant elements of a regulatory scheme, instruments which amend primary legislation, and instruments which have a significant impact on personal rights and liberties.

⁶ Correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation, 23 April 2020.

Regulations 2020 [F2020L00942], on the ground that it raises significant issues or otherwise gives rise to issues that are likely to be of interest to the Senate.⁷

1.16 The committee considered the above instruments in Chapter 16.

Acknowledgments

1.17 The committee thanks all individuals and organisations who participated in the inquiry, especially those who made written submissions and participated in public hearings. In particular, the committee notes its appreciation to Dr Peter Cashman and Ms Amelia Simpson for their numerous research papers on various topics arising in the inquiry.

Note on references

1.18 Some references to the Committee Hansard are to the Proof Hansard and page numbers may vary between Proof and Official transcripts.

⁷ Correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation, 8 October 2020.

Part 1
**Background, data, key issues and committee's
approach**

Chapter 2

Origins of Australia's class action regime and litigation funding industry

Introduction

- 2.1 The first part of this chapter briefly sets out the origins and establishment of a federal class action regime in Australia. Australia's class action regimes at the state and territory level are then outlined.
- 2.2 The second part focuses on third-party litigation funding (hereafter referred to as litigation funding). This refers to the financing by a third-party of some or all of a party's legal costs and disbursements.¹ This part briefly covers historical barriers to litigation funding and the current legal landscape.
- 2.3 The final section provides a summary of milestone events that have shaped the evolution of the class action and litigation funding industry in Australia.

Rationale for a class action regime

- 2.4 A class action is a legal procedural device that allows multiple individuals to group together their common legal claims. A class action allows multiple claims against the same defendant to be brought by representatives on behalf of some or all of those persons. Generally, class actions assist courts in managing situations that would be unmanageable if each individual pursued a separate lawsuit. A class action regime forms part of the procedural law (the rules and procedures) which outlines how the court is to deal with and determine these collective claims.²
- 2.5 In 2018, the Australian Law Reform Commission (ALRC) observed that a class action regime:
 - facilitates access to justice by enabling groups of people to pursue redress more cheaply and efficiently than would otherwise be the case;
 - assists in the vindication of statutory policies by penalising wrongdoers, and discouraging further wrongdoing; and
 - encourages efficiency in the use of court resources, allowing the Federal Court of Australia (Federal Court) to direct its resources to other pressing

¹ Although other forms of litigation use litigation funding, this report focuses on its use in class actions.

² Attorney-General's Department, *Submission 93*, pp. 2–3.

matters, and maintaining the integrity of the civil justice system which is essential to the rule of law.³

Origins of a class action regime in Australia

ALRC Report—October 1988

- 2.6 In February 1977, the then Attorney-General, Mr R J Ellicott QC, asked the ALRC to review the adequacy of laws relating to class actions.
- 2.7 In 1988, after an eleven-year inquiry, the ALRC identified the objectives of a class action procedure to be:
- to enhance access to justice for claimants by allowing for the collectivisation of claims that might not be economically viable as individual claims; and
 - to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits.⁴
- 2.8 The ALRC recommended the implementation of a class action procedure designed for Australian needs and conditions, but based on overseas experience,⁵ including that:
- class members be required to contribute to legal costs under a fee agreement in the event that the litigation is successful;
 - courts have express powers to approve fee agreements for lawyers in class proceedings at any stage prior to their conclusion;
 - contingency fees based on percentages of compensation obtained not be allowed;
 - a special fund to provide funding for class actions be established;
 - the tort and crime of 'maintenance' be abolished; and
 - third-party litigation funders sharing in the compensation obtained not be permitted.⁶

³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 25; see also Attorney-General's Department, *Submission 93*, p. 3; Michael Legg, 'Evaluating Class Action Effectiveness', *Precedent*, vol. 129, July/August 2015, pp. 10–11; The Hon Justice Bernard Murphy, Justice of the Federal Court of Australia, *Access to justice under the Part IVA regime*, Keynote address at the seminar 'Class Actions - Current Issues after 25 years of Part IVA' – University of New South Wales – 23 March 2017, p. 1.

⁴ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, pp. 8, 10; The Hon. Michael Duffy MP, Attorney-General, *House of Representatives Hansard*, 14 November 1991, 3174–3175, cited in Allens, *Submission 69*, p. 16.

⁵ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, October 1988; Ken Adams, Helen Mould and Damian Grave, *Introduction*, in '25 Years of Class Actions in Australia 1992–2017', Herbert Smith Freehills, 2017, p. 1.

⁶ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, pp. 3–4.

Establishment of federal class action regime

2.9 In 1991, the Australian Parliament amended the *Federal Court of Australia Act 1976* (Federal Court Act) to include a new Part IVA on Representative Proceedings.⁷ The reforms came into effect in March 1992,⁸ and largely gave effect to the recommendations in the ALRC's 1988 report.⁹

2.10 The federal regime provides that a class action may be commenced when the following three thresholds are satisfied:

- seven or more persons have claims against the same person;
- the claims of all of 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.¹⁰

2.11 Other features of Part IVA include:

- Provision of an opt-out system for class members—section 33J.
- Class membership does not require consent—section 33E.¹¹
- Inclusion of support for people with a disability—section 33R.
- Requirement to give notice to class members—section 33X.
- Capacity to add members to the class if their event occurred after the proceeding was commenced—section 33K.
- Requirement for court approval for settling or discontinuing a class action—section 33V.
- Continuation of Federal Court procedures for cost rules, with additions relating to reimbursement of the representative applicant.¹²

2.12 In October 1992, an amendment to Part IVA provided class members with immunity from cost orders.¹³

⁷ Federal Court of Australia Amendment Bill 1991; The Hon Justice Murray Wilcox AO QC, *Class Actions in Australia: Recollections of the Early Days*, in '25 Years of Class Actions in Australia 1992–2017', Herbert Smith Freehills, 2017, p. 1.

⁸ Professor Vince Morabito, Department of Business Law and Taxation, Monash Business School, Ethical Regulation Research Group, Monash University, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 8.

⁹ Federal Court of Australian Amendment Bill 1991, *Explanatory Memorandum*, p. 2.

¹⁰ *Federal Court of Australia Act 1976*, s. 33C.

¹¹ Federal, state and territory governments, government agencies, ministers and officials cannot become class members without providing written consent: *Federal Court of Australia Act 1976*, ss. 33E(2).

¹² Federal Court of Australia Amendment Bill 1991, *Explanatory Memorandum*, pp. 4–11.

¹³ Professor Vince Morabito, Department of Business Law and Taxation, Monash Business School, Ethical Regulation Research Group, Monash University, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 9.

2.13 Additionally, the overarching purpose of civil practice and procedure in the Federal Court applies to the class action regime—that is, to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.¹⁴

State and territory class action regimes in Australia

2.14 State class action regimes introduced after the federal regime are based on the federal regime. Current state and territory class action regimes are a mixture of legislated regimes and rules-based approaches. Rules-based approaches existed in most Australian jurisdictions before the legislated regimes. However, rules-based approaches were not regularly used because they:

- lacked clarity;
- had limited scope; and
- did not protect class members from limitations on future actions if the proceeding was disbanded.¹⁵

2.15 As a result, several states have implemented legislated regimes. Statutory class action regimes at the state level exist in Victoria, New South Wales (NSW), Tasmania and Queensland. This means class actions can be filed and heard in the Supreme Courts of these states.

2.16 The current arrangements in each state and territory are summarised in the following sections. The Federal Court also has registries in the states and territories which operate under the regime described in the previous section.

Victoria—2000

2.17 A class action regime has operated in Victoria since January 2000, enabling class actions under the jurisdiction of the Supreme Court of Victoria. The Victorian Parliament passed the legislation which introduced Part 4A on Group Proceedings into the *Supreme Court Act 1986* (Vic). Although amending legislation was passed and received Royal Assent in November 2000, it was deemed to have come into operation on 1 January 2000 when the Supreme Court rules initially established the regime.¹⁶ The Victorian class action regime is based on, and closely mirrors, the federal regime.

NSW—2011

2.18 A class action regime began in NSW in March 2011, enabling class actions under the jurisdiction of the Supreme Court of NSW. The NSW Parliament passed legislation which introduced Part 10 on Representative Proceedings into the

¹⁴ *Federal Court of Australia Act 1976*, s. 37M.

¹⁵ Law Reform Commission of Western Australia, *Representatives Proceedings—Final Report*, Project 103, October 2015, p. 21.

¹⁶ *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), ss. 2(2).

Civil Procedure Act 2005 (NSW). This class action regime is modelled on the federal and Victorian legislation.¹⁷

Queensland—2017

2.19 A class action regime has operated in Queensland since March 2017, enabling class actions under the jurisdiction of the Supreme Court of Queensland. The Queensland Parliament passed legislation which introduced Part 13A into the *Civil Proceedings Act 2011* (Qld). This class action regime is modelled on legislative schemes in place in the Federal Court, and in the Supreme Courts of NSW and Victoria.¹⁸

Tasmania—2019

2.20 A class action regime has operated in Tasmania since September 2019, enabling class actions under the jurisdiction of the Supreme Court of Tasmania. The Tasmanian Parliament passed the legislation which introduced Part VII on Representative Proceedings into the *Supreme Court Civil Procedure Act 1932* (Tas).¹⁹

Western Australia—in progress

2.21 In June 2019, the Civil Procedure (Representative Proceedings) Bill 2019 was introduced into the Western Australian (WA) Legislative Assembly. The bill would establish a legislative representative proceedings regime in the Supreme Court of WA, which is modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth). At the time of drafting this report, the bill was before the WA Legislative Council. This legislative scheme would replace the current rules-based approach for representative proceedings that operates under the Rules of the Supreme Court 1971.²⁰

South Australia—Rules-based approach

2.22 A rules-based approach to representative proceedings has been in place the Supreme Court Rules since 1947. In 1977, the Law Reform Committee of South Australia recommended a legislative class action regime. The South Australian legislature has not implemented this recommendation.²¹ Currently, in

¹⁷ *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), sch. 6.

¹⁸ *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld), s. 10.

¹⁹ *Supreme Court Civil Procedure Amendment Act 2019* (Tas).

²⁰ Civil Procedure (Representative Proceedings) Bill 2019 (WA).

²¹ Supreme Court Rules 1947 (SA) Order 16, Rule 9. For a discussion on the South Australian rules-based approach, see Law Reform Commission of Western Australia, *Representatives Proceedings—Final Report*, Project 103, October 2015, p. 21.

South Australia, representative actions can be brought under provisions in the South Australian Uniform Civil Rules 2020.²²

Australian Capital Territory – Rules-based approach

2.23 Currently, in the Australian Capital Territory, representative actions can be brought under rules 265–270 in the Court Procedures Rules 2006.

Northern Territory – Rules-based approach

2.24 Currently, in the Northern Territory, representative actions can be brought under Order 18—Representative Proceeding (Rules 18.01–18.04) in the Supreme Court Rules 1987.

Litigation funding in Australia

Historical legal barriers to litigation funding

2.25 The act of third-party litigation funding was, and in some parts of Australia remains, a criminal offence and a common law tort.²³ Originating in the United Kingdom, the law of 'maintenance' prohibits a person, when not connected to the legal case, from financially assisting a party to the dispute to maintain the litigation.²⁴ The law of 'champerty', a form of maintenance, bars a third-party from funding the costs of litigation in return for a share in the outcome of the action.²⁵

2.26 The original underlying public policy rationale for the crime and the civil wrong was that parties may be pressured by exploitative funders to bring unmeritorious claims, or the funder may seek to influence the case to further their own interests.²⁶

²² The Uniform Civil Rules 2020 are made under the *Supreme Court Act 1935* (SA), the *District Court Act 1991* (SA), and the *Magistrates Court Act 1991* (SA); South Australian Government Gazette, *Supplementary Gazette*, no. 39, 14 May 2020, p. 1200.

²³ See *Clyne v NSW Bar Association* (1960) 104 CLR 186.

²⁴ *Neville v London Express Newspaper Ltd* [1919] AC 368, 382. The law of maintenance, and the subset of champerty, has been traced back to the *Statute of Westminster the First* (3 Edw I c 25) of 1275.

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

²⁶ Attorney-General's Department, *Submission 93*, p. 8; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 59. See also New South Wales Law Reform Commission, *Barratry, Maintenance and Champerty*, Discussion Paper 36, May 1994; *Re Trepcza Mines Ltd (No 2)* [1963] Ch 199; *Trendtex Trading Corporation v Credit Suisse* [1980] 1 QB 629, 653.

Litigation funding in insolvency matters

- 2.27 In 1996, a decision of the Federal Court established the legitimacy of providing litigation funding to insolvency practitioners.²⁷ In that case, the Federal Court held that the specific circumstances fell into one of the recognised exceptions to maintenance and champerty — that being, a trustee in bankruptcy may lawfully assign any of the bankrupt's right of actions to a third party or creditor.²⁸
- 2.28 Therefore, a contract between the liquidator of a company and the insurance company, which stated that the liquidator could request funding from the insurance company to pursue actions on behalf of insolvent companies and individuals, was upheld.²⁹

Expansion of the legitimacy of litigation funding agreements

- 2.29 Following the United Kingdom,³⁰ between 1969 and 2002, states and territories moved to abolish the crime and tort of maintenance and champerty.
- 2.30 Victoria,³¹ NSW,³² South Australia³³ and the Australian Capital Territory³⁴ abolished both the crime and the tort.³⁵
- 2.31 In Queensland, WA and the Northern Territory, champerty remains a civil wrong.³⁶
- 2.32 In 2006, the High Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*³⁷ (Fostif) applied these considerations to a litigation funding agreement. The High Court held that even though litigation funding agreements involve maintenance and champerty, they are enforceable as long as they are in no other way illegal

²⁷ *Movitor Pty Ltd (receivers and manager appointed) (in liq) v Sims* (1996) 64 FCR 380.

²⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 59.

²⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 59.

³⁰ Maintenance and champerty were both a crime and a civil wrong in the United Kingdom until their abolition in 1967 by subsection 14(2) of the *Criminal Law Act 1967* (UK).

³¹ *Abolition of Obsolete Offences Act 1969* (Vic) amending *Crimes Act 1958* (Vic), s. 322A; *Wrongs Act 1958* (Vic), s. 32(2).

³² *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), repealed by *Statute Law (Miscellaneous Provisions) Act 2011* (NSW). The abolition of the tort is preserved by schedule 2 of the *Civil Liability Act 2002* (NSW) and of the crime by schedule 3 to the *Crimes Act 1900* (NSW).

³³ *Criminal Law Consolidation Act 1935* (SA), sch. 11.

³⁴ *Civil Wrongs Act 2002* (ACT), s. 221.

³⁵ *Civil Liability Act 2002* (Tas), s. 28E, abolished the common law tort of champerty.

³⁶ In Queensland, the crime was abolished by the introduction of the *Criminal Code Act 1899* (Qld): *Murphy Operator v Gladstone Ports Corporation (No 4)* [2019] QSC 228, 40 [105].

³⁷ (2006) 229 CLR 386.

or against public policy.³⁸ This case provided certainty that litigation funders have a legitimate role in funding class actions, and can exercise broad influence over how they are conducted.³⁹ Since the decision in *Fostif*, a litigation funding industry has developed in Australia.

Current legal landscape for litigation funding in Australia

- 2.33 For the purposes of the validity of modern litigation funding agreements in Australia, the law of champerty remains relevant.⁴⁰
- 2.34 First, in jurisdictions where the crime and the tort have been abolished, questions of illegality and public policy still arise when considering whether a funding agreement is enforceable. The High Court in *Fostif* was unequivocal in concluding that the common type of funding agreements entered into between a funding entity and a party to the litigation are not, by their nature or terms, contrary to public policy and are enforceable.⁴¹ However, the limit of these considerations in the context of new types of arrangements, such as the securitisation of funding agreements, has not been settled.⁴²
- 2.35 Second, in those jurisdictions where the tort remains, it is open that maintenance and champerty could be an available course of action, as demonstrated in a class action in the Supreme Court of Queensland in 2019.⁴³ In that case, the defendant argued that the litigation funding agreement was not enforceable by reason of maintenance, champerty or public policy.⁴⁴
- 2.36 The litigation funding agreement was held to be enforceable on an assessment of public policy grounds.⁴⁵ While the plaintiff asked that the Supreme Court of Queensland declare the torts extinguished or provide them with a 'decent common law burial',⁴⁶ the Court did not decide the arguments on maintenance or champerty as it considered that it was not required to do so, given the

³⁸ *Deloitte Touche v JP Morgan* (2007) 158 FCR 417. See also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 [91], [93], [95] (Gummow, Hayne and Crennan JJ).

³⁹ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. 16.

⁴⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 61.

⁴¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 61.

⁴² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 61.

⁴³ *Murphy Operator & Ors v Gladstone Ports Corporation & Anor* (No 4) [2019] QSC 228.

⁴⁴ *Murphy Operator & Ors v Gladstone Ports Corporation & Anor* (No 4) [2019] QSC 228 [1], [131], [149].

⁴⁵ *Murphy Operator & Ors v Gladstone Ports Corporation & Anor* (No 4) [2019] QSC 228 [131], [149]

⁴⁶ *Murphy Operator & Ors v Gladstone Ports Corporation & Anor* (No 4) [2019] QSC 228 [72].

application did not bring any cause for action based on the tort of maintenance or champerty.⁴⁷

Milestone events

2.37 This section provides a non-exhaustive list of milestone events, including significant court-based precedents and legislative changes that have influenced the federal class action and litigation funding industry in Australia.⁴⁸ They also provide context for understanding some of the key issues and concerns arising from the current operation of the class action and litigation funding industry, as well as the associated regulatory framework. Many of these issues are covered in later parts of this report.

- The Full Court of the Federal Court unanimously rejected a constitutional challenge to the validity of Part IVA regime in April 2000.⁴⁹
- The *Migration Act 1958* was amended in October 2001 to prohibit the engagement of the Part IVA regime in proceedings concerning visas, deportations or removal of non-citizens.⁵⁰
- The first involvement of litigation funders in class action litigation occurred in December 2001.
- The High Court of Australia (High Court) unanimously rejected a constitutional challenge to the validity of the Victorian class action regime in June 2002.⁵¹
- In August 2006, the High Court held that the fact that the class action before the Court was funded by a commercial litigation funder, that exercised a significant level of control over the way the litigation was conducted, did not justify the conclusion that the litigation in question was contrary to public policy or an abuse of process.⁵²
- The first involvement of overseas-based litigation funders in an Australian class action occurred in December 2006.⁵³
- In December 2007, the Full Court of the Federal Court held that restricting the represented group in a class action to only those claimants who signed, at the outset of the litigation, a litigation funding agreement with the

⁴⁷ *Murphy Operator & Ors v Gladstone Ports Corporation & Anor (No 4)* [2019] QSC 228 [130]–[131], [150].

⁴⁸ Professor Vince Morabito, Department of Business Law and Taxation, Monash Business School, Ethical Regulation Research Group, Monash University, Fifth Report: The First Twenty-Five Years of Class Actions in Australia, July 2017, pp. 8–21.

⁴⁹ *Femcare Ltd v Bright* [2000] FCA 512.

⁵⁰ *Migration Act 1958*, ss. 486B(4).

⁵¹ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

⁵² *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

⁵³ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCA 1420.

funders that supported the litigation and/or a fee and retainer agreement with the representative plaintiff's solicitors did not contravene any provisions of Part IVA. This is known as a 'closed class'.⁵⁴

- In October 2009, a decision of the Full Court of the Federal Court caused class actions to be placed on hold because the funding arrangements probably constituted a Management Investment Scheme.⁵⁵ The Australian Government intervened to address this problem with regulatory changes.
- In June 2013, the Full Court of the Federal Court directed the trial judge to make security for costs orders in favour of the respondents that would require contributions from class members as there was no litigation funder.⁵⁶
- In October 2016, the Federal Court endorsed common fund orders in the early stages of litigation.⁵⁷
- In November 2016, the Federal Court held that the Court has the power to approve the settlement and reduce the funding commission.⁵⁸
- In 2017, the Full Court of the Federal Court held that an open class can be 'closed' where it would facilitate a settlement.⁵⁹
- In 2019, the High Court held that the Federal Court and the Supreme Court of NSW do not have the power to order common fund orders in the early stages of litigation.⁶⁰

⁵⁴ *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

⁵⁵ *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

⁵⁶ *Madgwick v Kelly* (2013) 212 FCR 1.

⁵⁷ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

⁵⁸ *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 [157] (per Murphy J).

⁵⁹ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98.

⁶⁰ *Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

Chapter 3

The class action process

Introduction

3.1 This chapter sets out the Federal Court of Australia's (Federal Court) procedure and case management of class actions. It begins with a summary of the 'opt-out' nature of Australian class actions and the difference between open and closed class actions. This is followed by a summary of the key aspects of the Federal Court's Class Actions Practice Note in order to provide an overview of how class actions progress through the Federal Court. The final section covers various types of legal costs in class actions.

Open class actions and the 'opt-out' approach

3.2 In 1988, the Australian Law Reform Commission (ALRC) found:

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

3.3 The ALRC concluded that, in order to achieve a single binding decision, all related claims must be included within the class action and not just those who had taken the step of joining the class action.²

3.4 Following on from the ALRC findings, the federal class action system adopted an 'open' or 'opt-out' approach. That is, a class action could be commenced on behalf of all class members who fell within the particular definition of the class, regardless of whether they had been identified or consented to the initiation of the action.³

3.5 The Attorney-General's Department summarised how the open class feature was integral to the design of Australia's federal class action regime:

When the class action regime commenced, it was considered preferable for class actions to be commenced as an 'open class' on behalf of all group members irrespective of whether they had been identified or consented to joining the action. Members would then have the opportunity to opt-out if they did not want to be bound by the resolution of the action. Open classes

¹ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, p. 44.

² Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, pp. 49–50.

³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 90; Association of Litigation Funders of Australia, *Submission 57*, p. 19.

were seen as protecting particularly vulnerable groups who might face additional hurdles to take active steps in order to join.⁴

Class closure orders

- 3.6 An open class action can pose problems when it comes to quantifying the claims, as not all class members are necessarily identified, or even identifiable. Given that understanding the total quantum of registered members' claims is important to facilitating a settlement, the Federal Court developed 'class closure orders' to respond to this challenge.⁵
- 3.7 A class closure order operates to require individuals who meet the definition of a class member to either opt-out (discussed below) or register their participation in the class action by a certain date. If a class member has not registered or opted-out by that date, their claim is extinguished and they are not entitled to share in any settlement proceeds.⁶
- 3.8 Class members may opt-out of a class action by giving a written opt out notice to the Federal Court by a set date.⁷

Closed class actions

- 3.9 A 'closed' class action means the class is limited to class members who have signed up with the representative plaintiff's solicitors and/or the litigation funder.⁸ Closed class actions have been permissible since the Full Court of the Federal Court's decision in *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd* (Multiplex) in 2007.⁹
- 3.10 In that case, it was held that section 33C of the *Federal Court of Australia Act 1976* (Federal Court Act) expressly provided that a proceeding could be commenced by only some of the persons who had claims against a defendant.¹⁰

⁴ Attorney-General's Department, *Submission 93*, p. 5, citing Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, p. 92.

⁵ See, for example, Clayton Utz, *Submission 26*, pp. 8–9; Australian Institute of Company Directors, *Submission 40*, p. 16; Norton Rose Fulbright, *Submission 45*, p. 9; Herbert Smith Freehills, *Submission 51*, pp. 5–6; Allens, *Submission 69*, p. 20.

⁶ See, for example, Norton Rose Fulbright, *Submission 45*, p. 9; Allens, *Submission 69*, p. 20.

⁷ *Federal Court of Australia Act 1976*, s. 33J, ss. 33X(1)(a); Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 12.2; Federal Court of Australia, Sample Opt Out Notice, October 2013, www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/sample-opt-out-notice (accessed 18 September 2020).

⁸ Attorney-General's Department, *Submission 93*, p. 5.

⁹ (2007) 164 FLR 275.

¹⁰ Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave, Helen Mould (eds), *25 Years of Class Action in Australia*, University of Sydney Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017, p. 205; see also Australian Law Reform

Federal Court class action procedure

3.11 The procedural framework for class actions in the Federal Court is set out in:

- Part IVA of the Federal Court Act;
- Federal Court of Australia Rules, in particular Division 9.3; and
- various Federal Court Practice Notes, including:
 - the Central Practice Note (CPN-1), the guide to practice and case management procedure in the Federal Court in all proceedings;¹¹
 - the Class Actions Practice Note (GPN-CA), which sets out the management of class actions;¹² and
 - any applicable National Practice Area practice note, such as the Commercial and Corporations Practice Note (C&C-1).¹³

Federal Court case management of class actions

3.12 The Federal Court's Class Actions Practice Note provides the Federal Court's case management procedure for class actions, from filing to settlement. This next section summarises key procedural steps pursuant to the Federal Court's Class Actions Practice Note.¹⁴

3.13 A class action is commenced by filing an 'originating application' and a statement of claim,¹⁵ which collectively must:

- describe or otherwise identify class members either by name or characteristic;
- specify the nature of the claims and the relief claimed by the representative plaintiff on its own behalf and on behalf of the class members; and

Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 67.

¹¹ Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 20 December 2019 www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cpn-1 (accessed 18 November 2020).

¹² Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/GPN-CA.pdf (accessed 18 November 2020).

¹³ Federal Court of Australia, *Commercial and Corporations Practice Note (C&C-1)*, National Practice Area Practice Note, 25 October 2016 www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/c-and-c-1 (accessed 18 November 2020).

¹⁴ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019.

¹⁵ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl. 3.1. A statement of claim is a written declaration by the representative plaintiff which contains the facts that are to be relied upon to support a claim against the defendant and the relief claimed. An affidavit may be filed in the place of a statement of claim. The 'concise statement pleadings process' as set out in the Central Practice Note and the Commercial and Corporations Practice Note will usually be inappropriate for class actions.

- specify the common questions of law or fact which are said to arise in the action.¹⁶
- 3.14 The statement of claim is composed so that the representative plaintiff's 'personal claims can be used as the vehicle for determining the common questions in the action'.¹⁷
- 3.15 The class action is then allocated to a 'class actions management judge' to manage and deal with interlocutory issues (applications to the court in the preparation of a case, prior to the court's final order) until the time when the class action is ready for an initial trial, at which point it will be allocated to a judge for hearing.¹⁸
- 3.16 The first case management hearing is set for a date within four weeks from the date the class action is filed.¹⁹ Prior to the first case management hearing, the costs agreement between the representative plaintiff and their lawyers, and any litigation funding agreement, must be provided to the Court (and an appropriately redacted version of the litigation funding agreement must be sent to the other party).²⁰
- 3.17 The first case management hearing addresses:
- any issues relating to the description of class members;
 - any pleadings issues;²¹
 - discovery;
 - the financial basis upon which the class action is conducted and any orders sought in relation to those matters;
 - whether any competing class action has been filed;
 - whether the defendant proposes to seek an order for security for costs; and
 - timeframes for the next steps, such as delivery of a defence, interlocutory applications, and further case management hearings (if required).²²

¹⁶ *Federal Court of Australia Act 1976*, s. 33H; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 3.1.

¹⁷ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 3.2.

¹⁸ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 4.1.

¹⁹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 7.1.

²⁰ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 6.1.

²¹ Pleadings are written statements sent between the parties and lodged with the court which define the issues to be decided in an action.

²² Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 7.8.

3.18 An integral part of the first case management hearing is to consider the 'Case Management Imperatives', including, in brief:

- identifying and narrowing the issues in dispute, including in any possible cross-claim;
- taking to trial only the critical point(s) in issue;
- considering the use of, and timing for, any alternative dispute resolution, including mediation;
- considering how best to manage justiciable issues, such as possible separation of liability and quantum or penalty, preliminary issues of fact and law, and whether or not some or all of the issues are susceptible to being referred to a referee;
- considering how best to manage lay and expert evidence efficiently and how to limit it to what is necessary and how best to put forward relevant evidence (for example, by affidavit, statement, oral evidence or a combination);
- setting an appropriately early trial date and maintaining that date;
- eliminating or minimising the number of interlocutory hearings, and any interlocutory disputes being determined 'on the papers' wherever possible;
- eliminating or reducing the burden of discovery;
- using collaborative tools to minimise the length of the trial hearing;
- making appropriate admissions in relation to the facts and matters which are not seriously in dispute;
- capping the amount of costs to be recoverable; and
- receiving short-form reasons for judgment to facilitate the expeditious delivery of any judgment.²³

3.19 The Federal Court's Class Actions Practice Note sets out a process for subsequent case management hearings to deal with issues such as:

- competing class actions²⁴;
- referral of the matter to mediation;²⁵
- opt-out notices;²⁶
- communication with class members;
- issues relating to common questions for trial;

²³ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, para. 7.8(h); Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 20 December 2019, sub-cl. 8.5.

²⁴ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl. 8.

²⁵ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl. 10.

²⁶ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl. 12.

- whether 'sub-groups' should be formed and 'sample class members' put forward;²⁷ and
 - the possible use of referees or assessors.²⁸
- 3.20 The Federal Court's Class Actions Practice Note requires the initial trial of the class action to be aimed at:
- resolving all common questions;
 - any non-common questions raised by the applicant; and
 - any issues common to sub-groups of the class membership.²⁹
- 3.21 Following an initial trial, it is also necessary to determine whether the individual claims of class members are to be determined within the existing or a separate proceeding.³⁰
- 3.22 A settlement agreement between the parties must be approved by the Court.³¹
- 3.23 The Federal Court has a discretionary power under subsection 33ZF(1) of the *Federal Court of Australia Act 1976* to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. Traditionally, the Federal Court has liberally interpreted the provisions of Part IVA of the Federal Court Act.³²
- 3.24 Subsection 33ZF(1), or the cognate provisions in state class action legislation, has been invoked by the Federal Court to make procedural orders, in response to novel issues arising in class actions, such as to:
- allow one class action to proceed and permanently stay (that is, pause) others when more than one concurrent class action is brought on behalf of the same or overlapping class members,³³

²⁷ *Federal Court of Australia Act 1976*, s. 33Q. If there are issues common to the claims of only some of the class members, the Court may establish a sub-group consisting of those group members and appoint a person to be the sub-group representative party on behalf of the sub-group members (termed 'sample class members').

²⁸ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 9.2.

²⁹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 3.2, sub-cl. 13.1.

³⁰ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 3.2, sub-cl. 13.1.

³¹ *Federal Court of Australia Act 1976*, ss. 33V(1); Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl. 14.

³² Peta Spender, 'Excellence, Innovation and Courtesy: Federal Court Procedure and Modernity' in Pauline Ridge and James Stellios (eds), *The Federal Court's Contribution to Australian Law: Past, Present and Future*, The Federation Press, 2018, p. 30.

³³ *Perera v GetSwift Limited* [2018] FCAFC 202 [44]; *Wigmans v AMP Ltd* [2019] NSWCA 243.

- 'close the class' in open class actions, with an order that class members must register with the class action before a certain date in order to share in the proceeds of any settlement or damages;³⁴
- make a 'common fund order' in an open class action, requiring all class members to equally contribute from their share of the proceeds of a settlement or damages to the costs of the litigation, including the litigation funder's commission;³⁵
- make a 'funding equalisation order' to redistribute settlement funds from unfunded class members to all class member;³⁶
- reinstate class members after they exercise the right to opt out under section 33J of the Federal Court Act;³⁷ and
- require discovery from class members.³⁸

³⁴ *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1.

³⁵ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

³⁶ *Kirby v Centro Properties Ltd* (2008) 253 ALR 65 [31], [37].

³⁷ *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 364 [6].

³⁸ *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 2]* [2010] FCA 176 [15], [16], [23].

Chapter 4

Data and trends in class actions and litigation funding

Introduction

- 4.1 This chapter provides some information, data, and trends in class actions and litigation funding in Australia including:
- jurisdictional distribution of class actions;
 - types and prevalence of class actions;
 - percentage of class actions that are settled;
 - involvement of litigation funders in class actions;
 - size and value of the class action industry; and
 - fees to lawyers and litigation funders, and returns to class members.
- 4.2 The challenges in getting data on class actions and litigation funding have been noted in previous inquiries and by stakeholders. The Australian Law Reform Commission (ALRC) noted various reasons for omissions in the dataset for its inquiry, including the incidence of court confidentiality orders.¹

Jurisdictional distribution of class actions

- 4.3 The data on class actions filed in Australia between 1992 and March 2017 indicate class actions were distributed between the courts as follows:
- 79 per cent in the Federal Court (regime introduced in 1992);
 - 16 per cent in the Supreme Court of Victoria (regime introduced in 2001);
 - 5 per cent in the Supreme Court of New South Wales (NSW) (regime introduced in 2011); and
 - none in the Supreme Court of Queensland (regime introduced in 2017).²
- 4.4 The distribution between the states and territories (including Federal Court registries in states and territories) was:
- 45 per cent in NSW;
 - 42 per cent in Victoria; and

¹ See, for example, Professor Vince Morabito, 'Class Actions: Looking into The Fishbowl – Open Justice and Federal Class Action Settlements', *Australian Law Journal*, vol. 93, no. 6, 2019, p. 446; Professor Vince Morabito, *Committee Hansard*, 27 July 2020, p. 6; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 71–72.

² Professor Vince Morabito, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 22.

- 13 per cent in other states and territories.³

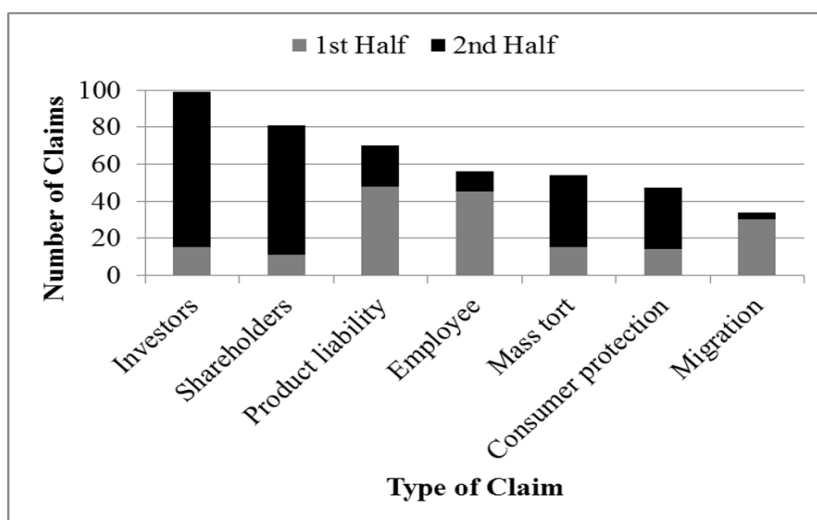
Types and prevalence of class actions

4.5 In the 25 years from 1992 to 2017, 500 class actions were filed in Australia.⁴ Of that total, 180 were investor or shareholder class actions.⁵ Figure 4.1 presents the distribution of the most common types of class action.

4.6 The distribution between types of claims pursued as class actions has changed significantly between 1992 and 2017. In particular, Figure 4.1 shows:

- a decrease in product liability and employee class actions since 2005; and
- a marked increase in the prevalence of shareholder and investor class actions since 2005.

Figure 4.1 Types of class actions in Australia over 25 years



1st Half: 1992–2005, 2nd Half: 2005–2017.

Source: Professor Vince Morabito, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 28.

Increasing prevalence of shareholder class actions

4.7 Shareholder class actions include claims by shareholders against companies for misleading or deceptive conduct and/or breaches of requirements to disclose information to the Australian Securities Exchange (ASX).⁶

³ Professor Vince Morabito, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 26.

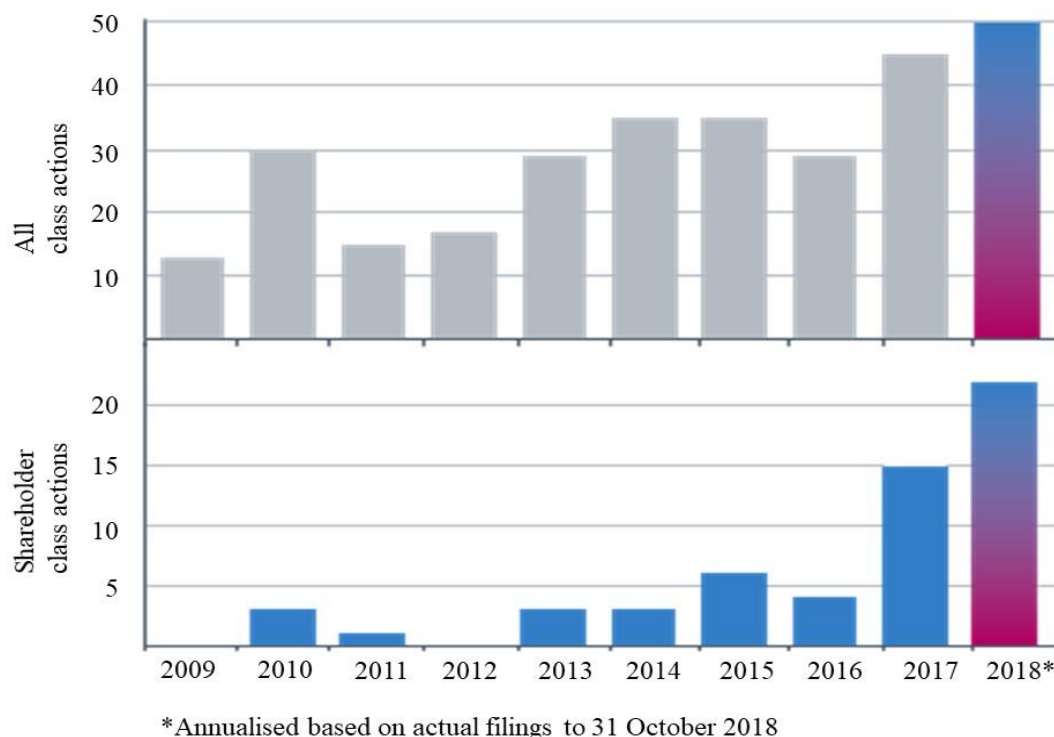
⁴ Professor Vince Morabito, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 22.

⁵ Professor Vince Morabito, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 27.

⁶ Securities class actions involve claims about shares or other securities. Investor class actions include claims by investors who have lost money due to the misconduct or negligence of companies

- 4.8 Figure 4.2 shows an increasing prevalence in the total number of class actions up to 2018 and a dramatic increase in the prevalence of shareholder class actions. The Business Council of Australia noted that shareholder class actions accounted for almost 50 per cent of all filings in 2017 and 2018.⁷
- 4.9 In 2019, 44 class actions were filed, of which 10 were shareholder class actions (23 per cent).⁸

Figure 4.2 Prevalence of class actions and shareholder class actions



Source: Allens, *Class Action Risk 2018*, pp. 3–4.

- 4.10 Using figures from Allens (see figure 4.2),⁹ there were 12 class actions filed in 2009 and 50 in 2018. However, the more recent increase in the total number of class actions filed looks to be largely driven by a marked increase in shareholder class actions. For example, when shareholder class actions are removed from the picture, it appears the total number of all other class actions filed was relatively stable for the six years between 2013 and 2018. Using available data, it appears there were 12 other class actions filed in 2009, 27 in 2010, 13 in 2011, 17 in 2012,

managing or acting as trustees of financial investments. Slater and Gordon Lawyers, Class Actions 101, www.slatergordon.com.au/class-actions/class-actions-101.

⁷ Business Council of Australia, *Submission 86*, p. 4. This fell to 23 per cent of all filings in 2019, partly due to a rise in consumer class actions – many as a result of the Royal Commission into Banking and Financial Services.

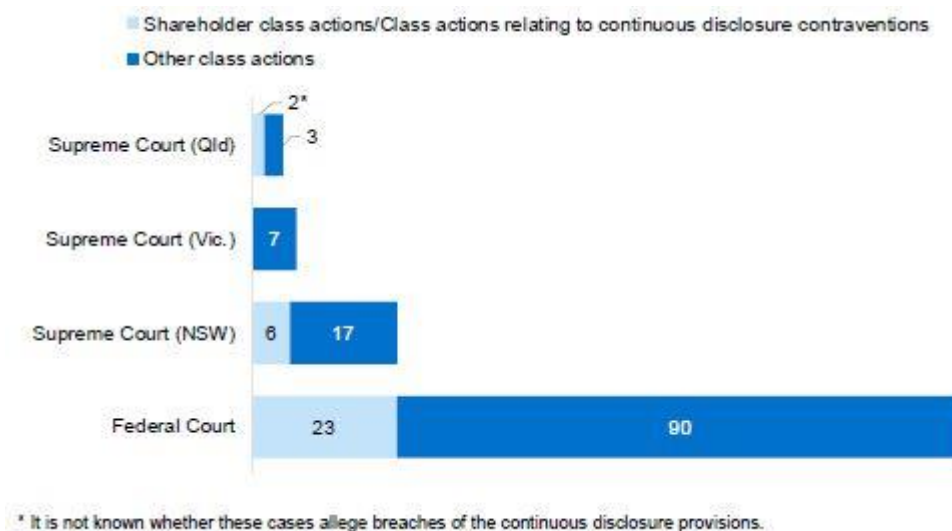
⁸ Allens, *Class action risk 2020*, pp. 4, 6.

⁹ Allens, *Class action risk 2018*, pp. 3–4.

26 in 2013, 32 in 2014, 29 in 2015, 26 in 2016, 28 in 2017 and 28 in 2019. In other words, the recent spike in class actions appears to be almost entirely attributable to an increase in shareholder class actions.

- 4.11 In its 2018 report, the ALRC noted that shareholder class actions are the most popular type of class action. In the Federal Court between 2013 and 2018, shareholder claims accounted for 34 per cent of filed class actions and 52 per cent of filed funded class actions. All shareholder claims in that period received third-party litigation funding.¹⁰
- 4.12 Figure 4.3 shows the number of shareholder class actions currently before the Federal Court, Supreme Court of NSW and Supreme Court of Queensland. The light blue indicates the number of shareholder class actions relating to contraventions of continuous disclosure laws in the Federal Court and the Supreme Court of NSW.

Figure 4.3 Number of class actions before the courts in Australia (as at May 2020)



Source: Australian Securities and Investments Commission, *Submission 39*, p. 32.

Other factors influencing the prevalence of class actions in Australia

- 4.13 Evidence to the committee suggested a number of other factors may influence the prevalence of class actions in Australia:
- The number of jurisdictions in Australia with class actions procedures (now five) has grown over time, creating more opportunities for class actions.¹¹

¹⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An inquiry into Class Action Proceedings and Third Party Litigation Funders*, Report No. 134 (2018), p. 77.

¹¹ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 6; NSW Young Lawyers, *Submission 89*, p. 6.

- Class action systems mature over time, leading to natural growth as stakeholders learn how to use the system.¹²
- Misconduct identified in the Financial Services Royal Commission.¹³
- Particular features of Australia's class action regime may also increase prevalence, such as:
 - common fund orders;¹⁴
 - funding equalisation orders;¹⁵ and
 - competing and multiple class actions.¹⁶
 - third-party litigation funders are allowed to contract law firms to run class actions.¹⁷
 - minimal regulatory oversight of litigation funders.¹⁸
 - law firms and litigation funders that are willing to provide funding and indemnities for adverse cost orders.¹⁹
- Substantive laws for which a claim of compensation can be brought and the tendency of parliaments to create new or extend old provisions that allow civil claims for compensation.²⁰
- The difficulty in complying with some substantive laws and the ease of satisfying the tests to prove civil damage claims.²¹

¹² See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Premier Litigation Funding Management, *Submission 20*, p. 6; Law Council of Australia, *Submission 67*, p. 28.

¹³ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 6; Woodsford Litigation Funding Limited, *Submission 16*, p. 7; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 5; Maurice Blackburn Lawyers, *Submission 37*, p. 3; Professor Peta Spender, *Submission 50*, p. 2; Law Council of Australia, *Submission 67, Attachment B, B1*; Omni Bridgeway, *Submission 73*, p. 28; Communications Workers Union Victoria, *Submission 83*, p. 4; Phi Finney McDonald, *Submission 87*, p. 29.

¹⁴ See, for example, Menzies Research Centre, *Submission 66*, pp. 22–24; Allens, *Submission 69*, pp. 14–15; Ai Group, *Submission 92*, p. 12.

¹⁵ See, for example, Dr Michael Duffy, *Submission 47*, p. 3; Federal Chamber of Automotive Industries, *Submission 70*, p. 8; NSW Young Lawyers, *Submission 89*, p. 6.

¹⁶ Norton Rose Fulbright, *Submission 45*, p. 5.

¹⁷ Omni Bridgeway, *Submission 73*, p. 22.

¹⁸ The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 13 May 2020, p. 3341.

¹⁹ See, for example, Dr Michael Duffy, *Submission 47*, p. 3; Federal Chamber of Automotive Industries, *Submission 70*, p. 8; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 49.

²⁰ Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Committee Hansard*, 29 July 2020, p. 47; Law Council of Australia, *Submission 67*, p. 28.

²¹ Ms Louise Petschler, General Manager Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 29 July 2020, p. 3.

- The inherent complexity and uncertainty of the substantive law, including:
 - employment award complexity and lack of a casual employee definition;²²
 - deemed manufacturer provisions²³ in the Australian Consumer Law;²⁴
 - corporations and financial services laws;²⁵ and
 - environmental laws.²⁶

4.14 Dr Warren Mundy also observed that the number of class actions would naturally grow as the system matures and the economy grows, noting:

- as a relatively new economic area, class actions and litigation funding would be likely to grow more rapidly than the general economy; and
- the development of a sizeable self-managed superannuation industry has increased the activity and awareness of matters relating to personal investment.²⁷

Competing class actions

4.15 Some data indicates that separate and concurrent class action proceedings relating to the same defendant and same subject matter are common in Australia.²⁸ In its 2018 report, the ALRC reported that 513 class actions were commenced with respect to 335 legal disputes between 1991 and 2017.²⁹

4.16 Herbert Smith Freehills noted that 643 class actions were commenced in relation to 420 legal disputes between 1992 and 2019. Herbert Smith Freehills also presented data on the trend over recent years. In the past five years, 53 class actions were filed in relation to 21 legal matters.³⁰

²² Australian Industry Group, *Submission 92*, p. 17. See also Law Council of Australia, *Submission 67*, p. 28; Litigation Lending Services Ltd, *Submission 36*, p. 3.

²³ The actual manufacturer is not relieved of liability if there is a deemed manufacturer. The definition of a manufacturer under the ACL means that a person can be deemed to be a manufacturer. A deemed manufacturer is potentially liable for problems or defects in the goods, even if they had no role in, or control over, their manufacture. Amanda Ryding, *Supplier beware: tips and traps for Australian suppliers of goods manufactured by others*, Colin Biggers & Paisley Lawyers, 11 March 2014.

²⁴ Federal Chamber of Automotive Industries, *Submission 70*, p. 8.

²⁵ See, for example, Australian Institute of Company Directors, *Submission 40*, p. 2; Business Council of Australia, *Submission 86*, p. 2.

²⁶ Litigation Lending Services Ltd, *Submission 36*, p. 3.

²⁷ Dr Warren Mundy, *Committee Hansard*, 13 July 2020, p. 18.

²⁸ See, for example, Clayton Utz, *Submission 26*, p. 4; Herbert Smith Freehills, *Submission 51*, p. 2.

²⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders, Final Report*, December 2018, p. 102.

³⁰ Herbert Smith Freehills, *Submission 51*, p. 3.

4.17 When separate and concurrent class actions have overlapping class members, by virtue of the classes being 'open', these are termed competing class actions.³¹ This means there is a possibility a person may be a class member of more than one class action and therefore would be seeking relief from the defendant for the same claim in different proceedings. Herbert Smith Freehills noted that in the 53 class actions over the last five years, the definition of class members was substantially the same across each competing claim.³²

Size, value and cost of the class action industry

4.18 Class actions account for a small proportion of total litigation. The 2018 ALRC inquiry noted that class actions were less than one per cent of litigation actions in the Federal Court in 2017–18.³³ Maurice Blackburn noted that in 2019, the 44 class actions filed was much lower than the 2800 litigation actions occurring between corporations.³⁴

4.19 Similarly, the Australian Securities and Investments Commission (ASIC) noted that the scale of Australia's financial markets (\$1.84 trillion market capitalisation with an average turnover of \$5.9 billion a day) is large compared to the exposure to class action damages.³⁵

4.20 Nevertheless, the sums of money involved in class actions, including defence costs, claims and settlements, is substantial:

- Australian Industry Group estimated that claims against businesses in the 2018–19 financial year alone exceeded \$10 billion.³⁶
- The Business Council of Australia (BCA) referred to a Marsh Pty Ltd report indicating that the average class action seeks between \$50 million and \$75 million in compensation.³⁷

³¹ Norton Rose Fulbright, *Submission 45*, p. 5, citing Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 110.

³² Herbert Smith Freehills, *Submission 51*, p. 3.

³³ Australian Law Reform Commission, *Integrity, fairness and Efficiency – An inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 29.

³⁴ Maurice Blackburn Lawyers, *Submission 37*, pp. 54–55.

³⁵ Australian Securities and Investments Commission, *Submission 72 to the ALRC inquiry into Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, p. 3; See also Maurice Blackburn Lawyers, *Submission 37*, p. 5; ISS Securities Class Action Services, *Submission 62*, p. 3.

³⁶ Ai Group, *Submission 92*, p. 21.

³⁷ Business Council of Australia, *Submission 86*, p. 4. This fell to 23 per cent of all filings in 2019, partly due to a rise in consumer class actions – many as a result of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

- Maurice Blackburn suggested that over the 25 years that class actions have been available in Australia, settlements and judgments total approximately \$3.5 billion.³⁸
- The estimated total of historical settlements for securities class actions in Australia is \$1.8 billion, plus defence costs.³⁹
- For the period 2013 to 2016, the average total value of securities class actions settlements was around \$300 million per year.⁴⁰

4.21 While it is difficult to draw conclusions from figures that measure different indicators, the estimated total of historical settlements for shareholder and investor class actions in Australia appears to be approximately 45 per cent of total class action settlements and judgments. This is another indication that shareholder class actions constitute, at the time of writing, a substantial part of Australia's class action industry.

Litigation funding in class actions

4.22 Litigation funding has become more common in recent years. The ALRC found that litigation funding in class actions increased significantly since 2008 as shown in Figure 4.4:

- between 2008 and 2012, 40 per cent of finalised Federal Court class actions were third-party funded;
- in 2017 and 2018, 77 per cent of finalised Federal Court class actions were third-party funded.⁴¹

4.23 Further, approximately half of the funded class actions related to shareholder claims and approximately one quarter related to investor claims.⁴² In other words, approximately three quarters of all funded class actions were either shareholder or investor class actions.

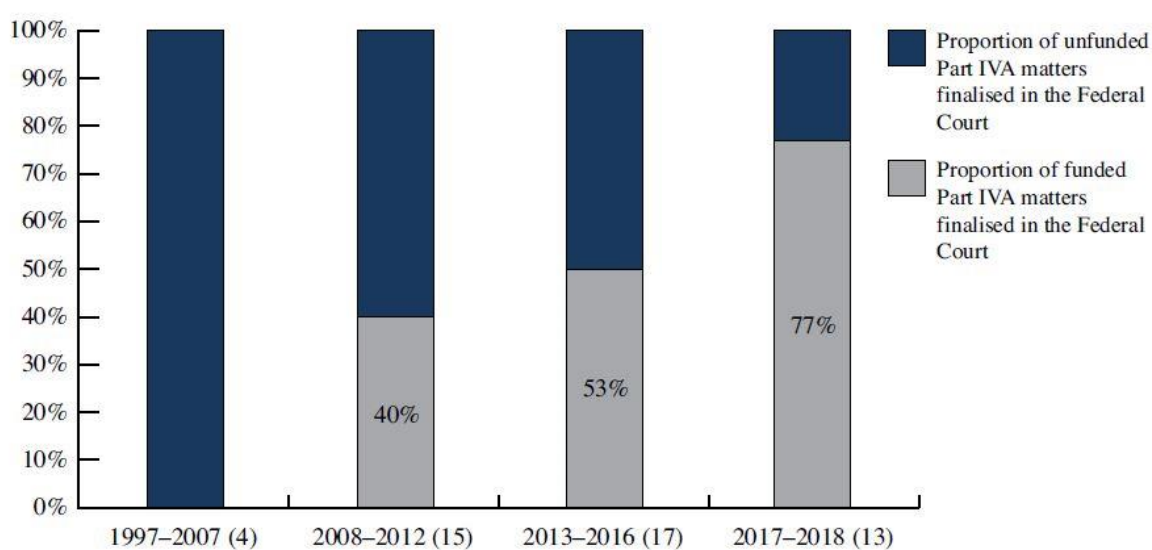
³⁸ Maurice Blackburn Lawyers, *Submission 37*, p. 51.

³⁹ AXA XL Insurance Reinsurance, *Underwriting Directors and Officers Insurance...what's the right price?*, D&O White paper, 2019, p. 17.

⁴⁰ XL Catlin & Wooton + Kearney, *Show me the money! The impact of securities class action on the Australian D&O Liability insurance market*, Whitepaper 2, September 2017, p. 10.

⁴¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 74; Attorney-General's Department, *Submission 93*, p. 8. These

⁴² Professor Vince Morabito, *Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, July 2017, p. 34.

Figure 4.4

Source: Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 75.

Numbers of litigation funders operating in Australia

- 4.24 The exact number of litigation funders operating in Australia is unknown. The Association of Litigation Funders of Australia (ALFA) submitted that there is no research or specific evidence with respect to the number.⁴³
- 4.25 In 2018, the ALRC indicated that approximately 25 litigation funders operated in Australia and 33 funders operated in either the United Kingdom or Australia, or both jurisdictions.⁴⁴ ALFA understood there to be approximately 33 funders currently operating in Australia.⁴⁵
- 4.26 Determining the number of foreign litigation funders operating in Australia is difficult. Data collated by the Parliamentary Library indicate that, as at 18 June 2020, 22 litigation funding companies were known to be operating in Australia, 14 litigation funders were foreign owned or based overseas, six were Australian owned or based, and the information for two funders was unknown.⁴⁶ Confidential data provided to the committee indicate that the number of foreign litigation funders operating in Australia could be higher.

⁴³ Ms Pip Murphy, Chief Executive Officer, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 33.

⁴⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 65, 81.

⁴⁵ Ms Pip Murphy, Chief Executive Officer, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 33; See also Menzies Research Centre, *Submission 66*, p. 11.

⁴⁶ This data is from research undertaken by the Parliamentary Library. See also Mr Stuart Clark, *Submission 22*, p. 4; Menzies Research Centre, *Submission 66*, p. 11; Attorney-General's Department, *Submission 93*, p. 16.

Returns to class members in class actions

- 4.27 Returns to class members decrease when a class action involves a litigation funder. The ALRC found that when litigation funders were involved in a class action, the median return to class members was 51 per cent, compared to 85 per cent when a funder was not involved.⁴⁷
- 4.28 Analysis by Dr Peter Cashman and Ms Amelia Simpson of empirical data provided by the Law Council of Australia found that, across the period 2001 to 2020, the portion of the gross settlement of funded class actions going to lawyers and litigation funders was 41.4 per cent.⁴⁸

⁴⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 70.

⁴⁸ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.3*, pp. 35–36.

Chapter 5

Key issues and the need for reform

Introduction

- 5.1 The committee has been tasked with inquiring into whether the present level of regulation, practices and procedure applying to Australia's growing class action and litigation funding industry is appropriate and whether it is delivering fair and equitable outcomes for class members.
- 5.2 This chapter outlines the key issues before the committee, and highlights those areas where reform is needed. Accordingly, it serves as a high-level overview of the remainder of the report, where these issues and areas for reform are considered in greater detail.
- 5.3 First, however, the committee provides a rationale for its approach to the issues raised during the inquiry and a brief explanation of the lens it has used in assessing areas for reform and making recommendations.
- 5.4 To be clear, the committee considers class actions to be an important feature of Australia's legal landscape. The committee notes that in evidence to the inquiry, no one disputed the important role of class actions in Australia's civil justice system. Based on evidence to the inquiry, the committee concurs with the findings of numerous previous reviews: namely, that class actions, when working as originally intended, should facilitate access to justice, discourage wrongdoing, and promote the efficient and effective use of court resources.
- 5.5 Further, the committee also considers there to be a role for litigation funders. Simply put, litigation funders enable individuals to pay for the high costs of accessing the civil justice system in Australia. In particular, the nature of Australia's adverse costs regime means that the unsuccessful party to civil proceedings pays for their own legal costs as well as those of the successful party.¹ Therefore, as evidence to the inquiry demonstrated, litigation funders play a vital role in effectively filling the funding gap that would otherwise exist because no ordinary Australian or group of Australians could afford to be exposed to the risk of an adverse costs order in the event that a class action did not succeed. As litigation funders effectively cover that risk, the committee

¹ Stephen Colbran et al, *Civil Procedure – Commentary and Materials*, 6th edition, LexisNexis Butterworths, 2015, p. 1090. See *Court Procedures Rules 2006* (ACT), r. 1721(1); *Uniform Civil Procedure Rules 2005* (NSW), r. 42.1; *Supreme Court Rules 1961* (NT), r. 63.03(1); *Uniform Civil Procedure Rules 1999* (Qld), r. 681; *Supreme Court Civil Rules 2006* (SA), r. 263(1); *Supreme Court Civil Procedure Act 1932* (Tas), s. 12(2); *Supreme Court Act 1986* (Vic), s. 24; *Rules of the Supreme Court* (WA), O. 66 r. 1.

recognises that, in many instances, a class action could not proceed in Australia without a litigation funder.²

- 5.6 That said, this inquiry was referred because of significant concerns about the current operation of the litigation funding and class action industries. In the committee's view, these concerns, articulated through the remaining chapters, are well-founded.
- 5.7 In the committee's view, the class action system needs to be reformed to reflect the underlying tenets of its original intent: that is, to deliver reasonable, proportionate and fair access to justice in the best interests of class members.
- 5.8 Accordingly, in this report, the committee identifies those areas where it sees significant value in reforming the current regime. The reforms proposed by the committee are both comprehensive and measured. Because it is fundamental to the committee's approach, it bears restating that the committee's views and recommendations for reform are guided by the principle of reasonable, proportionate and fair access to justice in the best interests of class members.

Key issues

- 5.9 The Attorney-General, the Hon Christian Porter MP, referred the inquiry to the committee because of concerns about:
- the significant growth in shareholder class actions, and related problems including:
 - the ease with which shareholder class actions may be started;
 - the economic inefficiencies of shareholder class actions; and
 - the lack of a clearly identified public good pertaining to shareholder class actions;
 - the increase in multiple and competing class actions and the additional time taken to resolve those matters;
 - the excessive profits obtained by litigation funders compared to the risks the funders are taking;
 - the scant regulatory framework covering litigation funders, including:
 - issues of the funder's duties to class action members; and
 - the determination and oversight of funding fees;
 - whether the interests of class members are being served by the current regulatory environment; and
 - inconsistencies between federal, state and territory class action regimes.³

² The committee notes that Australia's costs regime differs to that of the United States, where each party typically bears its own legal costs.

³ The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 13 May 2020, p. 3341.

- 5.10 The committee received conflicting views on the overall benefits and disadvantages of the current class action and litigation funding regime.
- 5.11 Before moving to some of the substantive issues considered by the committee in this report, the dot points below provide a snapshot of some of the issues identified by submitters and witnesses.
- 5.12 Submitter arguments for class actions having a positive impact included:
- increasing access to justice;
 - efficient use of court resources by combining multiple of the same or similar claims;
 - reduced power imbalance between individuals and organisations;
 - increased capacity to provide compensation to those who suffered damages;
 - deterrence of civil wrongdoing;
 - contribution to law enforcement, allowing regulators to focus in other areas;
 - levelling the playing field for companies that do not engage in misconduct;
 - increased confidence in markets; and
 - improved superannuation outcomes.⁴
- 5.13 Submitter arguments for class actions having a negative impact included:
- increased risk aversion by directors and officers;
 - diversion of time and resources away from running a business;
 - limiting information released to the market;
 - increased cost of doing business arising from litigation costs;
 - rising insurance costs;
 - changing capital structure preferences;
 - uneconomic nature of shareholder class actions;
 - ineffective access to justice resulting from shareholder class actions; and
 - litigation funding industry super-profits.⁵

⁴ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, p. 16; Ms Paola Balla, *Submission 10*, p. 3; Harbour Litigation Funding, *Submission 11*, p. 7; Slater and Gordon, *Submission 18*, p. 10; Premier Litigation Funding Management, *Submission 20*, p. 7; Litigation Capital Management, *Submission 23*, p. 24; Public Interest Advocacy Centre, *Submission 27*, p. 5; Therium Capital Management Australia, *Submission 29*, p. 6; Shine Lawyers, *Submission 35*, pp. 5–6; Maurice Blackburn Lawyers, *Submission 37*, pp. 45, 51–54; Dr Michael Duffy, *Submission 47*, pp. 3–4; Omni Bridgeway, *Submission 73*, p. 28; Phi Finney McDonald, *Submission 87*, p. 30; Public Interest Advocacy Centre, *Submission 27*, p. 5; Ms Debby Blakey, Chief Executive Officer, HESTA Superannuation, *Committee Hansard*, 3 August 2020, p. 12; NSW Young Lawyers, *Submission 89*, p. 29.

⁵ See, for example, Australian Institute of Company Directors, *Submission 40*, pp. 4–5, 7; King&Wood Mallesons, *Submission 53*, p. 5; Health Industry Companies, *Submission 74*, p. 17; Allens, *Submission 69*, p. 4; Menzies Research Centre, *Submission 66*, p. 5; Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 1; Mr Robert Johanson, Chair, Corporate Governance Working Group, Business Council of Australia, *Committee Hansard*, 29 July 2020, p. 2; Business Council of Australia, *Submission 86*, p. 4; Ai Group, *Submission 92*, p. 21; Mr Tom Lunn,

- 5.14 Given the high-level nature of the concerns outlined in the following sections, specific references for each point are not included here. Rather, they may be found in the relevant chapters where the matters are considered in detail.

Uncertainty in court procedures and powers

- 5.15 Class actions are unique because they determine the legal rights of people that are not before the courts. This introduces complexity because the court needs to balance the interests of class members (that are not before the court) with the parties that are before the court (the representative plaintiff and the defendant).
- 5.16 There have been challenges to the courts' powers subsequent to the Australian Law Reform Commission's Final Report in 2018 which have created greater uncertainty around various court procedures and powers. Procedural contests increase costs and delays, with detrimental impacts on class members and an additional burden on court resources.⁶ Further, uncertainty can lead to a greater number of procedural contests as parties may seek to test or define the boundaries of the courts' powers.
- 5.17 The current ambiguity and uncertainty detracts from the underlying rationale of a class action regime, namely providing access to justice.
- 5.18 In Chapters 6 to 10, the committee makes a series of recommendations for reform that seek to clarify and, where necessary, expand the courts powers and practice with a view to introducing greater certainty and, as a result, reducing challenges, costs and delays in the system.

Competing class actions

- 5.19 The data in Chapter 4 indicate that the number of competing and multiple class actions is increasing. Competing and multiple class actions must be managed and resolved by the courts because they undermine the objectives of a class action system; that is, to remedy all those who have suffered loss, and to provide the defendant with the benefit of finality with respect to the dispute. Court resolution of competing and multiple class actions can result in additional costs and excessive delays before the substantive matters are heard. This means class members have to wait far longer before their substantive claims are resolved.
- 5.20 It also poses a substantial additional burden on business as defending each class action consumes significant company resources and costs. In addition, the nature of competing and multiple class actions can be detrimental to the standing of the defendant business as it can appear that a particular business is 'under siege'.

Senior Policy Manager, Insurance Council of Australia, *Committee Hansard*, 27 July 2020, p. 48; Mr Scott Leney, Marsh Pty Ltd, *Committee Hansard*, 27 July 2020, p. 49.

⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018.

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- 5.21 Competing and multiple class actions also consume additional court resources. This is exacerbated when competing class actions are filed in courts across different jurisdictions.
- 5.22 It is clear from the evidence that reforms are required to reduce the cost, complexity and delays caused by competing and multiple class actions. To this end, the committee's recommendations are designed to meet the underlying objectives of Australia's class action regime by improving the efficiency, and reducing the cost, of administering justice.

Returns to class members

- 5.23 The data indicate that, in many cases, litigation funders are obtaining windfall profits well in excess of the risks they are taking. And those windfall profits are coming at the expense of the class members' share of the proceeds from a successful outcome. For example, the Attorney-General highlighted the Australian Law Reform Commission finding in its Final Report that 'when litigation funders were involved in a class action, the median return to class members was just 51 per cent, compared to 85 per cent when a funder was not involved'.⁷
- 5.24 To be clear, the incidence of windfall profits is not restricted to isolated instances of illegal or egregious behaviour. Rather, there appears to be a systemic and inappropriate skewing of the proceeds of a successful class action in favour of litigation funders at the expense of class members. This clearly fails the test of a reasonable, proportionate and fair division of the returns between class members, lawyers and litigation funders.
- 5.25 Accordingly, the committee makes a series of recommendations across various chapters to address these matters. The committee notes the proposal by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the Australian Government investigate the best way to implement this floor. The committee also recommends the Australian Government investigate whether a graduated minimum return above this floor is appropriate for shorter, less risky and less complex cases.

⁷ The Hon Christian Porter MP, Attorney-General, 'Improving justice outcomes for class action members', *Media release*, 13 May 2020.

Conflicts of interest

- 5.26 Conflicts of interest are related to the returns to class members because, in many cases, litigation funders have the ability to control or influence key decisions in class actions in a way that prioritises their interests over those of class members.
- 5.27 The committee proposes addressing this imbalance in reasonable, proportionate and fair outcomes with recommendations on financial services regulations and greater court oversight and intervention.

Regulation of litigation funders

- 5.28 The bulk of the evidence to the inquiry either argued explicitly, or acknowledged tacitly, that prior to the Australian Government's legislative reforms in August 2020, litigation funders were insufficiently regulated.
- 5.29 The committee recognises that the Australian Government has made a good start by introducing the requirement for litigation funders to hold an Australian Financial Services License (AFSL). The application of the AFSL regime covers issues such as the funder's duties to class action members. In addition to its use of reasonable, proportionate and fair principles, the committee also applies 'fit-for-purpose' principles in its consideration of the application of the managed investment scheme regime to litigation funders.
- 5.30 Beyond the current financial services regulations, however, other matters remain unaddressed at present. These include the appropriateness of the fees charged by litigation funders and, relatedly, whether the interests of class members are being served by the current regulatory environment.
- 5.31 Competing objectives are at play. First, the fees charged by litigation funders are integral to the overall reasonable, proportionate and fair division of any successful settlement, and therefore are a key component of ensuring the interests of class members are appropriately met.
- 5.32 Second, it is vital to ensure that litigation funders receive appropriate returns because the retention of a viable litigation funding market also underpins the ability of ordinary Australians to access justice in the first place.
- 5.33 The committee recognises that, yet again, there is a fine balance to be struck. While it is clear that the current regime needs reform to accord with the overarching principles that the committee is applying, the committee has crafted its recommendations carefully in an attempt to adjust the dial in a measured and appropriate way. The committee makes recommendations on these matters in Chapters 11 to 13 and 15 to 17.

Increase in shareholder class actions

5.34 In moving the motion to establish this inquiry, the Attorney-General drew attention to the increasing prevalence of class actions in Australia:

The class action industry in Australia is growing at an unprecedented rate. Federal Court data shows that the class action industry filings have increased by 325 per cent in the last decade. Other reports have indicated that class actions have tripled in the last seven years across Australia. So there are, firstly, real and unanswered questions arising as to why this is happening and why it is happening at such a rapid rate. What are the policy settings and what have been the changes that might be contributing to that phenomenal growth in the class action industry? And what is the link between that growth and litigation funding?⁸

5.35 The previous chapter on data identified a marked increase in class actions in recent years, predominantly driven by a spike in shareholder class actions in 2017 and 2018.

5.36 Evidence to the committee focused on the ease with which shareholder class actions may be triggered by an alleged breach of Australia's continuous disclosure provisions. It was also argued that shareholder class actions are economically inefficient, overwhelmingly opportunistic, generate windfall profits for class action law firms and litigation funders, and do not contribute to the public good.

5.37 Given the apparent detriment caused by the increased prevalence of private litigant shareholder class actions, and the apparent lack of any accompanying public good, the committee considers reforms to the underlying substantive law on continuous disclosure are necessary. The committee adopts this approach rather than recommending further reforms to class action procedure because, in this instance, the problem itself appears relatively discrete and the optimal solution is to target the reform to the underlying source of the problem.

National consistency

5.38 The committee considers national consistency to be important because the state class action regimes were originally intended to reflect the federal regime. Unintended consequences may arise from jurisdictional inconsistencies between the federal, state and territory regimes. Evidence throughout the report indicates that various aspects of the class action regime would benefit from national consistency. Benefits may include:

- reduced class action forum shopping across jurisdictions;
- greater constraints on Corporations Act-related class actions including shareholder class actions;
- reduced challenges in resolving competing and multiple class actions;

⁸ The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 13 May 2020, p. 3341.

- reduced load on court resources; and
- reduced use of contingency fee-based actions by lawyers.

5.39 However, the committee recognises that worthwhile innovations can and do occur in state and territory jurisdictions. Accordingly, the committee makes some recommendations that the federal class action regime be amended to mirror changes made at the state level where appropriate. That being acknowledged, the committee considers harmonisation would contribute to reasonable, proportionate and fair outcomes.

Part 2
**Reasonable, proportionate and fair class action
procedure**

Chapter 6

Commencing a class action

Introduction

- 6.1 Chapter 4 provided data on the prevalence of class actions. A purported reason for the increase in class actions in Australia is the ease with which they can be commenced. It has been argued that this feature of Australia's class action regime has attracted litigation funders to the Australian market.
- 6.2 The federal class action regime has been described as 'plaintiff-friendly' because of the low hurdle to commence a class action. There were calls for this to be addressed through the introduction of a certification process, whereby the Federal Court of Australia (Federal Court) would be required to approve the case as a class action before it can commence. The first half of this chapter considers the case for certification of class actions in the Federal Court.
- 6.3 The second half of this chapter explores concerns about one of the three threshold criteria to commence a class action: the requirement that the claims of class members give rise to a substantial common issue of law or fact. There was concern that the identification of the common issue occurs late in the piece, after considerable costs have been incurred. This chapter considers proposals in submissions to bring forward the determination of the common issues question thereby impacting the point at which discovery is conducted.

Concerns about the low bar to commence a class action

- 6.4 A number of submitters considered Australia's class action regime to contain a 'low hurdle' to commence a class action, contributing to a 'plaintiff-friendly' class action regime.¹ The Risk and Insurance Management Society considered there to be 'minimal threshold requirements' to commencing a class action.² King & Wood Mallesons submitted that this low hurdle can have the potential to encourage speculative claims.³ The Insurance Council of Australia and Yarra Capital Management supported increasing the current threshold criteria to commence a class action.⁴

¹ See, for example, King & Wood Mallesons, *Submission 53*, p. 2; Health Industry Companies, *Submission 74*, p. 16.

² Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3.

³ King & Wood Mallesons, *Submission 53*, p. 2.

⁴ Insurance Council of Australia, *Submission 68*, p. 2; Yarra Capital Management, *Submission 71*, p. 1.

- 6.5 Currently, section 33C of the Federal Court Act provides that an applicant may commence a class action if:
- seven or more persons have claims against the same person;
 - 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 those persons give rise to a substantial common issue of law or fact.⁵
- 6.6 King & Wood Mallesons noted that when the Federal Court has considered the requirements to commence a class action, it has adopted a broad interpretation of the requirements, including:⁶
- the concept of a 'claim' has a wide meaning, need not be based on the same conduct and may arise out of disparate transactions;⁷
 - a class action can be commenced even in circumstances where there is only one substantial common issue of law or fact;⁸ and
 - 'substantial' means 'real or of substance' rather than 'large or weighty', an interpretation that tolerates more disparity in the claims of the individual members of the class.⁹

Support for a United States-style certification process

- 6.7 Certification of a class action is the process of obtaining the court's approval for a class action to commence, requiring the representative plaintiff to establish that the preliminary criteria have been met and the proceeding should commence as a class action.¹⁰
- 6.8 It was noted the Australian class action regime does not have a 'certification' procedure at the commencement stage of a class action proceeding, unlike the United States (US) and Canada.¹¹ Submissions suggested Australia could adopt

⁵ *Federal Court of Australia Act 1976*, s. 33C.

⁶ King & Wood Mallesons, *Submission 53*, p. 2.

⁷ *Allphones Retail Ltd v Weimann* [2009] FCAFC 135 [80]; *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896 [43].

⁸ *Dillon v RBS Group (Australia) Pty Ltd* [2017] FCA 896 [53].

⁹ *Wong v Silkfield Pty Ltd* (1999) 199 CLR 386 [27].

¹⁰ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. 75.

¹¹ See, for example, Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3; U.S. Chamber Institute for Legal Reform, *Submission 21*, pp. 2–3; Ashurst, *Submission 41*, p. 6; Yarra Capital Management, *Submission 71*, p. 3; Health Industry Companies, *Submission 74*, p. 16.

a similar process to the US' certification process to allow for early judicial scrutiny of whether a class action should proceed.¹²

- 6.9 The Insurance Council of Australia supported the introduction of a more robust certification process for class actions.¹³ In particular, there was support for the introduction of a certification process for shareholder class actions.¹⁴ The Australian Institute of Company Directors (AICD) submitted that, in order to address the unsuitably low threshold for launching a securities class action, a certification process, similar to that in Canada and the US, for securities class actions be introduced to assess the merits of claims early in the process.¹⁵

Existing procedural mechanisms to halt a class action

- 6.10 This section summarises the interlocutory applications available once a class action has been filed which can act as a check and balance on cases commenced as class actions.

A declaration that the proceeding is not properly commenced as a class action

- 6.11 The defendant may submit to the Federal Court that the class action's originating application does not give rise to any substantial common issue of law or fact as required by paragraph 33C(1)(c) of the Federal Court Act.
- 6.12 The defendant must establish that the alleged common question(s) in the application is not arguable.¹⁶ It is immaterial that it might be considered that the alleged common claim is weak.¹⁷
- 6.13 A class action which is found to have met the requirement of section 33C of the Federal Court Act may nevertheless be the subject of what is colloquially known as a 'de-class' order.¹⁸

¹² See, for example, Ashurst, *Submission 41*, p. 6; King & Wood Mallesons, *Submission 53*, p. 2; Mr Tom Lunn, Senior Policy Manager, Insurance Council of Australia, *Committee Hansard*, 27 July 2020, p. 48.

¹³ Insurance Council of Australia, *Submission 68*, p. 2.

¹⁴ Australian Institute of Company Directors, *Submission 40*, p. 15; Ashurst, *Submission 41*, p. 6.

¹⁵ Ms Louise Petschler, General Manager Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 29 July 2020, p. 1.

¹⁶ *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135 [64].

¹⁷ *Bywater v Appco Group Australia Pty Ltd* [2018] FCA 707 [11].

¹⁸ *Bright v Femcare* [2002] FCAFC 243 [128] (Kiefel J).

An order to 'de-class' a class action

- 6.14 There is an existing mechanism for the Federal Court to consider whether a proceeding filed as a class action should proceed as a class action. The defendant may make an application to 'de-class' the class action, or the Federal Court can make the order on its own motion.¹⁹
- 6.15 Pursuant to subsection 33N(1) of the Federal Court Act, the Federal Court may order that a proceeding no longer continue as a class action, where it is satisfied it is in the interests of justice to do so because:
- the class action will not provide an efficient and effective means of dealing with the claims of class members;
 - all of the relief sought can be obtained by means of a proceeding other than a class action;
 - the costs incurred if the class action were to continue are likely to exceed the costs that would be incurred if each class member conducted a separate proceeding; or
 - it is otherwise inappropriate that the claims be pursued by a class action.²⁰
- 6.16 When the Federal Court is considering the 'inefficiency' and 'inappropriateness' grounds, the Federal Court focuses closely on matters such as the commonality and non-commonality of issues raised in the class action, as well as the purpose of that proceeding.²¹
- 6.17 The Federal Court has said that it could be difficult to reach the requisite level of satisfaction required by subsection 33N(1) of the Federal Court Act where the class action is at an early stage. The Federal Court has noted that, to give effect to the legislative intent, a class action should continue, through case management, to the stage of resolution of the common issues and, after the case has reached that stage, an order under section 33N of the Federal Court Act would be made.²²
- 6.18 The consequence of a 'de-class' order is that the proceeding may be continued as an individual proceeding by the representative plaintiff.²³ A class member

¹⁹ *Federal Court of Australia Act 1976*, ss. 33N(1).

²⁰ *Federal Court of Australia Act 1976*, ss. 33N(1).

²¹ *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200 [130] (Jacobson J, with whom French J agreed).

²² *Zhang De Yong v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 45 FCR 384; *Vasram v AMP Life Ltd* [2000] FCA 1676; *Bright v Femcare* [2002] FCAFC 243; *Jenkins v Northern Territory of Australia* [2017] FCA 1263; *Guglielmin v Trescowthick (No 2)* [2005] FCA 138.

²³ *Federal Court of Australia Act 1976*, ss. 33P(a).

may apply to the Federal Court to be joined as an applicant to the representative plaintiff's individual proceeding.²⁴

Strike out the pleadings

6.19 'Pleadings' are statements sent between the parties and lodged with the court which define the issues to be decided in a civil action. In the Federal Court, the statement of claim is the 'opening pleading' to a class action.

6.20 The pleadings from the representative plaintiff in a class action must include:

- the material facts on which a party relies that are necessary to give the opposing party fair notice of the case to be made against that party at trial, but not the evidence by which the material facts are to be proved;
- the law relied on; and
- the specific relief sought or claimed (if damages are sought, the amount of money liable to be paid).²⁵

6.21 There are rules which seek to limit the generality of pleadings, with which parties must abide.²⁶ If a party to a class action considers that the pleadings are not sufficiently clear, it can ask the Federal Court to order that other party provide further information on the claims, the nature of the case and the damages sought.²⁷

6.22 A party to a class action can also apply to the Federal Court to have pleadings 'struck out', which removes it from the case file with the Federal Court, if it:

- fails to disclose a reasonable cause of action;
- contains scandalous, frivolous or vexatious material;
- is evasive or ambiguous;
- is likely to cause prejudice, embarrassment or delay in the proceeding; or
- is otherwise an abuse of the process of the court.²⁸

Summary judgment

6.23 A defendant to a class action may apply to the Federal Court for a 'summary judgment', which asks the Federal Court to find in its favour, bringing the class action to conclusion, if:

- the representative plaintiff has no reasonable prospect of successfully prosecuting the proceeding or part of the proceeding;
- the proceeding is frivolous or vexatious;
- no reasonable cause of action is disclosed; or

²⁴ *Federal Court of Australia Act 1976*, ss. 33P(b).

²⁵ Federal Court Rules 2011, r. 16.02, r. 16.44.

²⁶ Federal Court Rules 2011, Division 16.4.

²⁷ Federal Court Rules 2011, r. 16.45.

²⁸ Federal Court Rules 2011, r. 16.21.

- the proceeding is an abuse of the process of the Federal Court.²⁹

Concerns with existing interlocutory applications

6.24 With respect to de-class orders, some submitters considered that the interlocutory applications available to a defendant to contest the commencement of a class action are inadequate. King & Wood Mallesons noted that de-classing applications are insufficient because:

- the burden is placed on the defendant to make an application, who bears the onus of proof and exposure to an adverse costs order for the application;
- applications are comparatively rare; and
- they do not have a great degree of success due to the broad wording of the legislative provision.³⁰

6.25 PwC submitted that pleadings in class actions are not always stated with sufficient clarity, making it difficult for the defendant to know the case it is required to meet. As a result, PwC submitted that time and costs are spent on court applications to seek clarity on or to alter pleadings issues.³¹

Certification of class actions

Certification process in the United States and Canada

6.26 Submissions discussed the features of the certification procedure in the US.³² In the US, rule 23 of the Federal Rules of Civil Procedure (US Rules) provides for a certification process at the start of a class action. This requires the court to determine, at an early practical stage after a civil claim is commenced as a class action, whether to certify the action as a class action.³³

6.27 In order to be certified under rule 23, the court must find:

- the class is 'so numerous that joinder of all members is impracticable';
- there are questions of law or fact common to the class;
- the representative parties have claims and defences typical of the class; and
- the representative parties and their counsel will adequately protect the interests of the unnamed members of the class.³⁴

²⁹ Federal Court Rules 2011, r. 26.01.

³⁰ King & Wood Mallesons, *Submission 53*, p. 2. See also Mr Alexander Morris, Partner, King & Wood Mallesons, *Committee Hansard*, 13 July 2020, pp. 39–40.

³¹ PwC, *Submission 85*, p. 2.

³² See, for example, Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 16; Australian Institute of Company Directors, *Submission 40*, p. 16; Health Industry Companies, *Submission 74*, p. 16.

³³ Federal Rules of Civil Procedure (U.S), para. 23(c)(1)(a).

³⁴ Federal Rules of Civil Procedure (U.S), ss. 23(a).

6.28 Additionally, the court must also be satisfied:

- the common issues predominate over individual issues; and
- the class action provides a 'superior' means of fairly and efficiently resolving similar claims.³⁵

6.29 The predominance element requires that questions of law or fact common to the class members predominate, or are most prominent, over any questions affecting only individual members.³⁶ The superiority element requires the putative class to show that a class action is superior to other available methods for the fair and efficient adjudication of the matter.³⁷

6.30 Dr Peter Cashman and Ms Amelia Simpson noted that the court decisions in class actions in the US have recently 'raised the bar' for certification. It was noted many class actions filed in recent years did not reach the stage of a certification decision. In the cases which did reach the certification stage, data indicates approximately half were denied certification. The other half of cases was granted certification for settlement purposes only, the applications for which had the support of both parties.³⁸

6.31 Class actions in Canada must also be certified by the court according to a set of criteria which focus on:

- the commonality of legal and factual issues among class members;
- the suitability of the proposed representative; and
- the manageability of the action, including by comparison to alternatives.³⁹

6.32 The certification tests in each Canadian province vary, but are generally considered to be less onerous than judicial approaches in the US to rule 23 certification.⁴⁰ However, in Ontario, recent statutory amendments introduced a 'predominance' and 'superiority' test similar to the US' rule 23, which is expected to make certification of class actions in Ontario more difficult than in the other provinces.⁴¹

³⁵ Federal Rules of Civil Procedure (U.S), para. 23(b)(3).

³⁶ Kenneth M Kliebard et al, *Class/collective actions in the United States: Overview*, 1 June 2019, [www.uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a168847](http://www.uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a168847) (accessed 17 September 2020).

³⁷ Kenneth M Kliebard et al, *Class/collective actions in the United States: Overview*, 1 June 2019.

³⁸ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 16.

³⁹ *Class Proceedings Act*, 1992, SO 1992, c 6, ss. 5(1).

⁴⁰ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 14.

⁴¹ *Smarter and Stronger Justice Act*, 2020, SO, 2020, c 11, Schedule 4, ss. 7(1).

Relevant factors in the consideration of the case for a certification process

Similarities and differences between certification in the US and existing interlocutory applications in Australia

- 6.33 Dr Cashman and Ms Simpson emphasised that the requirements of certification under rule 23 are more onerous than the threshold criteria for commencing a class action in Australia.⁴²
- 6.34 However, it has been noted that many of the issues examined and settled in the certification process under the US Rules generally reflect the considerations arising in the interlocutory applications (discussed above) that a defendant to a class action may employ in the Australian regime.⁴³ However, the US Rules differ from the Australian approach because:
- the US approach places the onus of satisfying the court that the requirements have been met on the plaintiffs, whereas the onus is on the defendant in Australia to make an interlocutory application; and
 - the US approach requires this assessment to occur 'at an early practicable time' after filing, whereas the interlocutory applications available to a defendant to prevent a class action from proceeding do not have this type of requirement.⁴⁴

Certification to ensure adherence with existing threshold criteria

- 6.35 In 1988, the Australian Law Reform Commission (ALRC) considered the proposal of a preliminary hearing (a certification or authorisation hearing) to ensure the requirements for commencing a class action had been complied with. Having considered the operation of the certification process in the US and Canada, the ALRC deemed certification unnecessary.⁴⁵
- 6.36 In 2018, the ALRC reconsidered the case for certification and concluded it 'remains unpersuaded that the introduction of a certification procedure would enhance the practice and procedure of the class action regime in Australia'.⁴⁶

⁴² Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 16; See also Australian Institute of Company Directors, *Submission 40*, p. 16.

⁴³ Elisa Mendoza, Securities Class Action Services, *Navigating the Australian Securities Class Action Landscape*, Paper, October 2018, p. 5, www.icp.net.au/wp-content/uploads/2016/11/navigating-australian-sca-landscape.pdf (accessed 10 November 2020).

⁴⁴ U.S. Chamber Institute for Legal Reform, *Ripe for Reform – Improving the Australian Class Action Regime*, Paper, March 2014, p. 5, www.instituteforlegalreform.com/wp-content/uploads/media/RipeForReformUS_web1.pdf (accessed 10 November 2020).

⁴⁵ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, p. 63.

⁴⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 102.

- 6.37 Certification was also opposed by other witnesses on the grounds that its introduction would increase costs, which are ultimately passed on to class members in the event of a successful outcome, and would cause delay in the resolution of the claim.⁴⁷
- 6.38 Mr Matt Corrigan of the ALRC told the committee a certification requirement 'would be a burden on the system without significant benefit' by increasing costs and delay for little return.⁴⁸

The risk of adverse costs as a deterrent

- 6.39 Submitters also noted the prospect of an adverse costs order for litigation funders acts as a significant deterrent against the pursuit of unmeritorious claims.⁴⁹
- 6.40 Generally, in civil matters in Australia, the unsuccessful party to proceedings pays for their own legal costs, as well as those of the successful party. This is commonly known as 'adverse costs'. Australia's costs regime differs to that of the US, where each party typically bears its own legal costs.⁵⁰
- 6.41 In a class action with litigation funding, the litigation funder will usually agree to pay any adverse costs order and to provide any amount which may be required as security for costs.⁵¹ While adverse costs and security for costs is discussed in more detail in Chapter 10, some discussion about the deterrent effect of these costs orders is relevant to the consideration of certification and is therefore discussed in this chapter.
- 6.42 There is a view that claimants, and by extension lawyers and litigation funders, are dissuaded from pursuing frivolous litigation at the risk of being ordered to

⁴⁷ See, for example, Mr Andrew Saker, Managing Director and Chief Executive Officer, *Committee Hansard*, 13 July 2020, p. 58; Mr John Walker, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 44; Mr Patrick Moloney, Chief Executive Officer, Litigation Capital Management, *Committee Hansard*, 24 July 2020, p. 45; Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 73.

⁴⁸ Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 73.

⁴⁹ See, for example, Harbour Litigation Funding, *Submission 11*, p. 4; Balance Legal Capital, *Submission 13*, p. 2; Slater and Gordon, *Submission 18*, p. 10; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 4; Shine Lawyers, *Submission 35*, p. 67; ISS Securities Class Action Services, *Submission 62*, p. 3; Omni Bridgeway, *Submission 73*, pp. 1, 5, 7, 10; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 4; Phi Finney McDonald, *Submission 87*, p. 15; Professor Vince Morabito, *Committee Hansard*, 24 July 2020, p. 9.

⁵⁰ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, p. 118.

⁵¹ See, for example, Association of Litigation Funders of Australia, *Submission 57*, p. 8; Phi Finney McDonald, *Submission 87*, p. 15; NSW Young Layers, *Submission 89*, p. 8; Dr Peter Cashman, 'The Use and Abuse of Security for Costs in Class Actions', *Journal of Civil Litigation and Practice*, vol. 7, 2018, p. 29.

pay the defendant's legal fees and, therefore, bear almost the entire cost of the proceedings.⁵²

- 6.43 The ALRC considered this to be a strong disincentive to bringing unmeritorious claims.⁵³ In the views of Mr Corrigan and Mr Patrick Moloney, Chief Executive Officer of Litigation Capital Management, there is little evidence that unmeritorious class actions are being pursued in Australia.⁵⁴
- 6.44 The Grata Fund submitted the risk of adverse costs not only can act as a deterrent to the pursuit of unmeritorious actions, but also creates a barrier to the pursuit of meritorious claims in Australia. It cited data from the Public Interest Law Clearing House (now JusticeConnect) that nine out of ten meritorious claims are not reaching the court due to the financial barrier of the risk of adverse costs orders.⁵⁵
- 6.45 However, the AICD noted the deterrent factor of potential liability for an adverse costs order is not as effective if parties can obtain after-the-event (ATE) insurance.⁵⁶ In that instance, the ATE policy indemnifies, up to a certain sum, a litigation funder from paying adverse costs if the representative plaintiff's case is unsuccessful.⁵⁷ The cost of the ATE insurance premiums is sometimes passed on to the representative plaintiff and class members.⁵⁸

Committee view

- 6.46 The support expressed by some stakeholders for a certification process similar to the US can be expressed in two different ways: 1) support for introducing similar threshold criteria to that contained in the certification process in the US, similar to what Ontario has recently done; or 2) support for introducing a certification process for assessing compliance with the threshold criteria that currently exists in the Federal Court Act. The committee has considered both options.

⁵² Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 4.

⁵³ Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 73.

⁵⁴ Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 73; Mr Patrick Moloney, Chief Executive Officer, Litigation Capital Management, *Committee Hansard*, 24 July 2020, p. 45.

⁵⁵ Grata Fund, *Submission 76*, p. 7.

⁵⁶ Australian Institute of Company Directors, *Submission 40*, p. 4.

⁵⁷ Professor Michael Legg, *Submission 30*, p. 1.

⁵⁸ See, for example, Australian Securities and Investments Commission, *Submission 39*, p. 19; Omni Bridgeway, *Submission 73*, p. 7; Menzies Research Centre, *Submission 66*, p. 29; Mr Andrew Saker, Managing Director and Chief Executive Officer, Omni Bridgeway, *Committee Hansard*, 13 July 2020, p. 58.

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- 6.47 The committee considers the existing criteria in section 33C of the Federal Court Act for commencing a class action to be reasonable, proportionate and fair. An additional step of certifying a class action is not necessary to ensure the threshold criteria in section 33C of the Federal Court Act have been complied with. Defendants have options to seek an early resolution if they are concerned about a lack of clarity in the case they are required to meet, consider the claims to be baseless or consider that a class action is an ineffective or inefficient way of dealing with the claims.
- 6.48 Additionally, the risk of an adverse costs order is a feature of the Australian civil curial system which can act as an effective deterrent to the bringing of speculative claims, or claims with little merit, a feature which is not present in the US class action system.
- 6.49 The committee recognises that litigation funders can minimise the risk of adverse costs by purchasing an ATE insurance policy and passing on the costs of the insurance premium to class members. In some instances, this could result in the litigation funder not having any exposure to adverse costs.
- 6.50 The committee acknowledges that this type of scenario could be perceived as a catalyst for the introduction of a certification process given the necessity for a safeguard on the initiation of entrepreneurial class actions by litigation funders. The committee is of the view that restraint on speculative or unmeritorious litigation, spearheaded by litigation funders, should be achieved through means other than a certification process. Certification would lead to added costs and delay by effectively conducting a 'mini trial'. As seen in the US certification process, 'pre-certification discovery' often expands past discovery on the procedural threshold questions to the merits of the causes of action.
- 6.51 If the committee's recommendations in Chapter 10 are implemented, there would be codified requirements for a litigation funder to indemnify the representative plaintiff from adverse costs risks and a presumption the litigation funder would pay security to the court for those costs. The committee considers that these changes would be a more effective mechanism to deter the bringing of class actions which do not have any real prospect of success.

Concerns about identification of common claims

- 6.52 In class actions, common issues between class members may be limited so that only some parts of the claim are common to class members.⁵⁹
- 6.53 Where the common issues of law or fact are limited in scope, it may be the case that a separate and individual action is also commenced in order for an individual to demonstrate their full personal entitlement to relief. Therefore, King & Wood Mallesons questioned the utility and efficacy of the current class action system where there are tenuous common issues among the class.⁶⁰
- 6.54 Moreover, the Federal Court's ruling on the common issues in a class action often occurs at the close of evidence at trial.⁶¹ This can give rise to several issues. First, there can be a lack of clarity about the apportionment of loss between class members and attributing liability to the defendant, which stands in the way of an early resolution of the action.⁶²
- 6.55 Second, the Federal Court often grants broad requests for discovery early in the proceedings.⁶³ Discovery refers to the various procedures by which parties to litigation are able to obtain information and documents held by the other party. The purpose of discovery is to 'ensure the parties are fully apprised of the case to be met at trial, and have access to relevant information that may support their own case'.⁶⁴
- 6.56 Discovery is often a time-consuming and expensive exercise for the parties.⁶⁵ This means that high costs can be incurred before the common issues between class members are identified.
- 6.57 The contribution of the size and cost of discovery processes to the significant expense of a class action was recognised in the ALRC's Final Report.⁶⁶ In *Perera v GetSwift Limited (GetSwift)*,⁶⁷ the Federal Court recognised:

Discovery costs... can quickly spiral, particularly if the scope of discovery is too large and primary and secondary reviews of documents are conducted

⁵⁹ King & Wood Mallesons, *Submission 53*, p. 2; PwC, *Submission 85*, p. 2.

⁶⁰ King & Wood Mallesons, *Submission 53*, p. 2.

⁶¹ Mr Alexander Morris, King & Wood Mallesons, *Committee Hansard*, 13 July 2020, pp. 39–40.

⁶² PwC, *Submission 85*, p. 2.

⁶³ King & Wood Mallesons, *Submission 53*, p. 3.

⁶⁴ Stephen Colbran et al, *Civil Procedure – Commentary and Materials*, 6th edition, LexisNexis Butterworths, 2015, p. 631. See Federal Court Rules 2011, Part 20.

⁶⁵ See, for example, King & Wood Mallesons, *Submission 53*, p. 3; Dr Peter Cashman and Ms Amelia Simpson, correspondence received 17 September 2020, p. 41.

⁶⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 39.

⁶⁷ [2018] FCA 732.

by employees of firms of solicitors who may not have sufficient expertise and seniority to make decisions to weed out irrelevant documents.⁶⁸

Proposal for change to the process for determining common issues in a class action

- 6.58 Various stakeholders advocated to change the process for determining common issues in a class action. King & Wood Mallesons suggested that there should be judicial consideration of the common issues which are alleged within the class action at an earlier stage than is presently occurring.⁶⁹ This would involve a change to delay the point at which the Federal Court orders discovery.⁷⁰
- 6.59 A proposal was also put forward by PwC for shareholder class actions. PwC suggested that a system should be implemented where each shareholder class action is required to obtain early court certification before it can proceed.⁷¹
- 6.60 These proposals essentially argue that a decision would be made on whether the case should progress as a class action before any discovery would be ordered by the Federal Court.
- 6.61 King & Wood Mallesons suggested a new procedure for commencing a class action with a discovery process modelled on the approach of the Supreme Court of New South Wales in commercial litigation:
- shortly after the close of pleadings and before discovery, the representative plaintiff provide the Federal Court with an outline of the evidence it intends to use and the questions of law and fact common to both its and other class members' claims that it seeks to have determined following an initial trial, on the basis of that evidence;⁷²
 - the defendant may file responsive evidence and submissions;
 - the Federal Court holds a hearing and determines whether the proceeding should continue as a class action; and
 - if it is determined the class action should proceed, the Federal Court would determine the common questions of law and fact to be determined at an initial trial.⁷³

⁶⁸ *Perera v GetSwift Limited* [2018] FCA 732 [228].

⁶⁹ King & Wood Mallesons, *Submission 53*, pp. 2–3. See also Mr Alexander Morris, King & Wood Mallesons, *Committee Hansard*, 13 July 2020, pp. 39–40.

⁷⁰ Mr Alexander Morris, King & Wood Mallesons, *Committee Hansard*, 13 July 2020, pp. 39–40.

⁷¹ PwC, *Submission 85*, pp. 3–4.

⁷² King & Wood Mallesons, *Submission 53*, p. 3, proposed that the outlines and submissions would describe, so far as the applicant is best able, the evidence it anticipates leading at an initial trial of the proceedings and the questions of law and fact common to both its and other group members' claims that it seeks to have determined following an initial trial on the basis of that evidence.

⁷³ King & Wood Mallesons, *Submission 53*, p. 3.

6.62 King & Wood Mallesons highlighted the benefits of the proposed process:

- deterring speculative claims from being commenced in the hope of fishing by way of discovery;
- avoiding proceedings being continued where it is apparent at an early stage that the class action structure is not appropriate, or adapting the scope or the class action element of the proceedings; and
- confining the scope of discovery required to be given by both parties for the purpose of an initial trial.⁷⁴

6.63 PwC suggested that a system should be implemented where each shareholder class action is required to obtain early court certification before it can proceed. This would involve the representative plaintiff submitting to the Federal Court:

- pleadings which clearly sets out all the facts, the cause of the loss by class members (in cases where there is more than one defendant, the loss must clearly differentiate what loss is allegedly attributable to which defendant), and the date the loss was suffered;
- an outline with all the evidence the representative plaintiff expects to file for each allegation;
- a quantification of the loss claimed, including the method of calculation;
- an estimate of the costs, including for legal services and disbursements such as expert witnesses;
- a certification from counsel (a barrister) which states that upon consideration of the available evidence and outlines provided to the Federal Court, the counsel is satisfied that there is a reasonable basis for each of the allegations made by the class, including causation and quantification, and the claim is properly formulated.⁷⁵

6.64 PwC considered the benefits from this procedure would be:

- improved clarity in the claims by the representative plaintiff, thereby assisting the Federal Court in its task of considering whether the class action should proceed and the defendant in understanding the case it needs to meet early on; and
- early and thorough estimated quantification of claims and the cost of the proceeding, therefore enabling the defendant to assess exposure and consider appropriate responses on a less speculative basis; and
- facilitation of early dispute resolution outside the courtroom.⁷⁶

⁷⁴ King & Wood Mallesons, *Submission 53*, p. 3.

⁷⁵ PwC, *Submission 85*, p. 3.

⁷⁶ PwC, *Submission 85*, pp. 3–4.

Relevant factors in the consideration of the case for changes to discovery

Existing rules on discovery in class actions in the Federal Court

- 6.65 There are existing rules concerning the necessity, proportionality and cost of discovery in class actions.⁷⁷ Discovery is ordered by the Federal Court on application by a party and is only ordered if it would facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.⁷⁸ An application for discovery can only be made once pleadings and defences have been filed.⁷⁹
- 6.66 The Federal Court's Central Practice Note mandates that a request for discovery must be able to demonstrate:
- the utility of the request and the appropriateness of discovery occurring at that time;
 - the relevance and importance of the documents sought;
 - the limited and target nature of the request; and
 - the documents sought are, or are likely to be, significantly probative in nature or they material to a party's case in the proceeding.⁸⁰
- 6.67 Importantly, a request must also be proportionate to the nature, size and complexity of the case, and not amount to an unreasonable economic or administrative burden.⁸¹

Pre-certification discovery in the US

- 6.68 Regarding the proposal by King & Wood Mallesons, the Federal Court would identify the common questions of law and fact, to be determined at an initial trial, prior to discovery. This is different to the approach to certification in the US, where pre-certification discovery occurs.
- 6.69 In the US, the court undertakes a 'rigorous analysis'⁸² of whether the criteria in rule 23 has been met. Parties therefore undertake pre-certification discovery on the matters concerning whether the requirements of rule 23 have been met.⁸³ This is different to what is termed 'merits discovery' in the US, which is

⁷⁷ Federal Court Rules 2011, Division 7.3; Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 20 December 2019, cl. 10.

⁷⁸ Federal Court Rules 2011, r. 20.11, r. 20.12.

⁷⁹ Federal Court Rules 2011, r. 20.11, sub-r. 20.13(3).

⁸⁰ Federal Court Rules 2011, Division 7.3; Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 20 December 2019, sub-cl. 10.6.

⁸¹ Federal Court Rules 2011, Division 7.3; Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 20 December 2019, sub-cl. 10.7.

⁸² *Wal-Mart Stores Inc v Dukes*, 564 US 338 (2011).

⁸³ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. 78.

discovery related to legal issues to be examined and decided at trial. However, an examination of rule 23 requirements often overlaps with the merits of the causes of action. Therefore, pre-certification discovery often involves controlled discovery into the merits of the claims brought for alleged breaches of the law, to the extent that those aspects are relevant to making the certification decision on an informed basis.⁸⁴

Information asymmetry

- 6.70 Some opposition was expressed to changing the class action discovery process to be similar to that in the commercial list in the Supreme Court of New South Wales. Class actions often involve a level of information asymmetry that is greater than what is present in ordinary commercial litigation. It was noted the representative plaintiff, and their legal team, often don't have possession of the documents that are required to build the case.⁸⁵
- 6.71 In the *GetSwift* case, the Federal Court acknowledged that addressing information asymmetry between the representative plaintiff and the defendant is an important part of securities class actions. In the context of securities class actions, it was noted that discovery plays an important role in permitting the representative plaintiff to obtain information as to precisely what occurred within the company during the relevant period.⁸⁶
- 6.72 Mr Walker of the Association the Litigation Funders of Australia did not support the King & Wood Mallesons proposal and submitted certification is 'a barrier to entry which ought not to be created'.⁸⁷

Previous inquiries

- 6.73 While the issues around managing discovery were not revisited in the ALRC Final Report, it stated that no additional powers were needed to enable the Federal Court to manage the discovery process in class actions.⁸⁸

Committee view

- 6.74 Significant costs stem from the discovery process in class actions. Any efficiency changes to the discovery process in class actions must have special regard to any

⁸⁴ Rebecca Justice Lazarus, 'Discovery prior to class certification: New considerations and challenges' Mealey's Litigation Report, vol. 9, no. 21, January 2010, p. 2.

⁸⁵ Dr Peter Cashman and Ms Amelia Simpson, correspondence received 17 September 2020, p. 51.

⁸⁶ [2018] FCA 732 [228].

⁸⁷ Mr John Walker, Chairman, Association the Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 44.

⁸⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 39. The ALRC noted its 2011 report, *Managing Discovery: Discovery of Documents in Federal Courts*.

adverse consequences on all parties to litigation, particularly any incursions on entitlements to obtain information relevant to one's case.

- 6.75 Determinations on whether a class action is to proceed, based on outlines of evidence the parties intend to use, provided to the Federal Court prior to the process of discovery, could present issues when an information asymmetry exists between the parties.
- 6.76 The committee recognises that in the US, certification involves an examination of common issues as part of the predominance criterion. However, discovery is conducted prior to the certification process and often involves consideration, to some extent, of the merits of the claims.
- 6.77 The committee considers that a process which would require the Federal Court to determine the common questions of law and fact to be determined at trial prior to discovery, is likely to step outside the consideration of procedural requirements and touch on the merits of the claims. To touch on the merits of the claims would, in effect, signify an application for summary judgment before orders for discovery and any consideration of the evidence.
- 6.78 That said, the committee considers that procedural proportionality in class action should be improved. The time and expense of class actions should be proportionate to what is at stake. To that end, the committee sees value in ensuring proportionality is a factor to be considered at the outset of a class action. The cost that large, complex and lengthy class actions impose on all parties should be balanced against the potential benefits and drawbacks for parties to the litigation, class members and beyond, such as the role of the class action in the regulatory landscape.⁸⁹
- 6.79 Procedures to identify, at an early stage, the quantum of the claims and an estimate of the legal costs to be expended, would assist the Federal Court in assessing procedural proportionality.

Recommendation 1

- 6.80 The committee recommends the Australian Government investigate legislative change which promotes procedural proportionality in class actions, with the objective of facilitating the pursuit of class actions where the potential costs and drawbacks are balanced against the potential benefits for the parties to litigation, the class members, as well as the impacts on court resources, regulatory outcomes and the public interest.**

⁸⁹ See, for example, Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms*, Final Report, July 2019, p. 50.

Chapter 7

Resolution of competing class actions

Introduction

- 7.1 Competing class actions occur when two or more class actions are brought on behalf of the same or overlapping class members, relating to the same defendant(s) and same subject matters.
- 7.2 Competing class actions in the same court, or across different jurisdictions, must be resolved or managed by the Federal Court of Australia (Federal Court) because their presence undermines the objectives of the class action regime. The increasing prevalence of competing class actions in Australia is concerning given the costs, delay and complexity added to the resolution of the substantive claims of class members by addressing the multiplicity issues.
- 7.3 The Australian Law Reform Commission's (ALRC) 2018 Final Report made several recommendations which sought to limit the incidence of competing and multiple class actions and improve the Federal Court's powers and procedures to manage and resolve them. Submissions to this inquiry considered and assessed these proposals. Therefore, those recommendations, as well others proposed by submitters, are considered in this chapter in the context of whether they would promote class action procedures which are reasonable, proportionate and fair.
- 7.4 This chapter begins by setting out the trend over recent years of an increased prevalence of competing class actions. The adverse impacts and benefits of this, as identified by submitters, are then canvassed. The remainder of the chapter explores different proposals for reform. The chapter concludes with the committee's views and recommendations.

Prevalence of competing class actions

- 7.5 Separate and concurrent class action proceedings which relate to the same defendant and same subject matter are common in the Australian class action regime.¹
- 7.6 A 'competing' class action is when two or more class actions are brought on behalf of the same or overlapping class members, requiring at least one case to be on an 'open' basis.² In this instance, there is a possibility a person may be a

¹ See, for example, Clayton Utz, *Submission 26*, p. 4; Herbert Smith Freehills, *Submission 51*, p. 2.

² Clayton Utz, *Submission 26*, p. 4; Federal Court Rules 2011, Division 7.3; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 8.1. An 'open' class action is a class action commenced on behalf of all class members who fell within the particular definition of the class, regardless of whether they had been identified or consented to the initiation of the action. See Australian Law Reform Commission, *Integrity, Fairness and Efficiency –*

class member of more than one class action and therefore would be seeking relief from the defendant for the same claim in different proceedings.

- 7.7 'Multiple' class actions represent different class members, requiring at least one 'closed' class action.³ The term 'multiplicity' refers to competing and multiple class actions.⁴
- 7.8 The ALRC reported that, between 1991 and 2017, 513 class actions were commenced in relation to 335 legal disputes.⁵ Herbert Smith Freehills noted that, between 1992 and 2019, 643 class actions were commenced in relation to 420 legal disputes, with multiplicity therefore occurring at a rate of approximately 34 per cent.⁶
- 7.9 Herbert Smith Freehills further commented that from a sample of class actions over the previous five years, 53 class actions were filed in relation to 21 legal matters, of which the definition of class members was substantially the same across each competing claim.⁷
- 7.10 Some submissions highlighted that the majority of competing class actions are shareholder class actions.⁸ The ALRC noted in its Final Report that, in 2018 alone, 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; and
 - two competing class actions against Commonwealth Bank.⁹

An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders, Final Report, December 2018, p. 90.

- ³ See, for example, Clayton Utz, *Submission 26*, p. 4; Herbert Smith Freehills, *Submission 51*, p. 2.
- ⁴ Clayton Utz, *Submission 26*, p. 5, supported the ALRC's recommendation the Federal Court Act be amended so all class actions are initiated on an open basis. It considered this would eliminate the issue of multiple class actions and the problems they create.
- ⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 102. See, for example, Clayton Utz, *Submission 26*, p. 4; Herbert Smith Freehills, *Submission 51*, p. 2.
- ⁶ Herbert Smith Freehills, *Submission 51*, p. 2.
- ⁷ Herbert Smith Freehills, *Submission 51*, p. 3.
- ⁸ See, for example, Australian Institute of Company Directors, *Submission 40*, p. 15; Herbert Smith Freehills, *Submission 51*, p. 3; Allens, *Submission 69*, p. 16. See also Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 103.
- ⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 80.

Purpose of class actions undermined

7.11 Competing class actions must be addressed when they arise because they undermine the objectives of Australia's class action regime. According to the ALRC:

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:

- remedy for all those who have suffered loss, and
- the respondent with the benefit of finality with respect to the dispute.¹⁰

Adverse impacts of competing class actions

7.12 This section discusses the several adverse impacts of competing class actions on defendants, the representative plaintiff and class members, as well as the court. The Hon Chief Justice Allsop AO of the Federal Court made the following observation about multiplicity:

...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 defendant].¹¹

Delay and increased costs for all parties

7.13 Competing class actions cause delay to the resolution of the legal claims in a class action because the steps to resolve those substantive issues are paused until the multiplicity issues are resolved.¹² Competing class actions allow different teams of lawyers and litigation funders to compete against one another, often driving up the price of the litigation for class members by reason that the procedural contest is often drawn out, therefore also increasing the costs for the defendant.

7.14 It can take between two and 20 months after the second class action is filed with the court to resolve multiplicity issues. Appeals on decisions concerning multiplicity add further time and cost to an already delayed resolution of the class action.¹³

7.15 Herbert Smith Freehills and the Australian Institute for Company Directors (AICD) drew attention to five competing class actions filed against AMP between 9 May 2018 and 7 June 2018. Each of the five plaintiffs brought stay applications against the other competing actions:

¹⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 102.

¹¹ *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [2].

¹² Norton Rose Fulbright, *Submission 45*, p. 5, citing *Perera v GetSwift Ltd* (2018) 263 FCR 92.

¹³ Herbert Smith Freehills, *Submission 51*, p. 3.

The multiplicity issues were heard in December 2018 at first instance, and determined in May 2019. The matter was appealed to the Court of Appeal, which upheld the first instance decision in October 2019.¹⁴

- 7.16 At the time of writing, the AMP matter was subject to an appeal in the High Court, *Wigmans v AMP Limited & Ors* (S67/2020) (*Wigmans*).¹⁵ The decision in that appeal could be significant for the Supreme Court of New South Wales [NSW]' future approach to dealing with competing class actions.¹⁶ This is discussed later in this chapter.
- 7.17 Other adverse consequences of multiplicity include increased burden on judicial and court resources, and increased costs for the defendant in defending similar or the same claim multiple times.¹⁷
- 7.18 In addition, competing class actions can have negative impacts on class members. It can create confusion and stress for class members to choose between different class actions.¹⁸ Class members can also incur more costs due to the duplication of work and therefore receive smaller returns.¹⁹ AustralianSuper submitted that, in its experience as an institutional investor and class member, examining competing claims is a time-consuming process. It requires an assessment of the legal basis and potential success of each case, as well as comparing and weighing up the proposed fees by the lawyers and funders.²⁰

Diversion of defendant company resources and reputational damage

- 7.19 Norton Rose Fullbright highlighted the adverse consequences on defendants:

Not only is there increased time and expense of defending multiple proceedings in respect of the same or overlapping subject matter, but there is the foregone opportunity cost of defendants as resources are diverted away from core business operations. Additionally, defendants face the increased burden of having to ensure consistency of their position across

¹⁴ Herbert Smith Freehills, *Submission 51*, p. 10 (footnote 7); see also Australian Institute of Company Directors, *Submission 40*, p. 15.

¹⁵ *Wigmans v AMP Limited & Ors* (S67/2020).

¹⁶ Norton Rose Fullbright, *Submission 45*, p. 5.

¹⁷ See, for example, Australian Institute of Company Directions, *Submission 40*, p. 15; Norton Rose Fullbright, *Submission 45*, p. 5; NSW Young Lawyers, *Submission 89*, p. 31; Allens, *Submission 69*, pp. 6, 14; *Perera v GetSwift Ltd* (2018) 263 FCR 92.

¹⁸ Allens, *Submission 69*, pp. 6, 14.

¹⁹ See, for example, Australian Institute of Company Directions, *Submission 40*, p. 15; Norton Rose Fullbright, *Submission 45*, p. 5; NSW Young Lawyers, *Submission 89*, p. 31; *Perera v GetSwift Ltd* (2018) 263 FCR 92.

²⁰ AustralianSuper, *Submission 48*, p. 3.

multiple proceedings where the claims are put in similar but not the same terms.²¹

7.20 The AICD noted the negative impact on public perception, and therefore on market value, of a company who is facing several class actions:

... they create an unfair impression that the company is under 'siege' in the public sphere, causing further damage to a company's brand and underlying market value.²²

Competing class actions across different jurisdictions

7.21 A further complication for the management and resolution of competing class actions is they can be filed across different jurisdictions, as occurred in the AMP competing class actions.²³ The AICD referred to the case *Money Max Int Pty Ltd v QBE Insurance Group Ltd*,²⁴ in which the Federal Court recognised competing class actions can cause:

increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents, particularly when they are commenced in different courts (such as in both the Federal Court and a State Supreme Court).²⁵

7.22 NSW Young Lawyers noted 'judges are very concerned not to interfere with the processes of other courts or veer into territory which may resemble a breach of comity'.²⁶ The principle of comity is understood to be an expectation that a court would not take steps which could undermine or cause interference in the integrity or process of a court in a different jurisdiction, and vice versa.²⁷ In consolidating the five class action proceedings in the AMP case, the judges of different courts emphasised that comity was of utmost importance.²⁸

²¹ Norton Rose Fulbright, *Submission 45*, p. 6.

²² Australian Institute of Company Directors, *Submission 40*, p. 15.

²³ NSW Young Lawyers, *Submission 89*, p. 31.

²⁴ (2016) 245 FCR 191.

²⁵ Australian Institute of Company Directors, *Submission 40*, p. 15; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 [196].

²⁶ NSW Young Lawyers, *Submission 89*, p. 31. Section 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* grants the state Supreme Courts with 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 in the interests of justice to make the transfer. The Federal Court has the corresponding power to transfer proceedings to the state Supreme Courts.

²⁷ *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143 [10]–[11].

²⁸ *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143 [10]–[11]; *Wigmans v AMP Ltd*; *Fernbrook (Aust) Investments Pty Ltd v AMP*; *Wileypark Pty Ltd v AMP Ltd*; *Georgiou v AMP Ltd*; *Komlotex Pty Ltd v AMP Ltd* [2019] NSWSC 603 [15], [18] (Ward CJ).

Benefits of competing class actions

- 7.23 As one way to resolve competing class actions, courts may undertake a 'selection' hearing, or colloquially known 'beauty parades', to select which competing class action(s) will continue. This was termed a 'selection hearing' by the ALRC.²⁹
- 7.24 Phi Finney McDonald argued that 'beauty parades' in shareholder class actions had resulted in substantial recoveries for class members from settlement sums. They submitted that when there are competing class actions, the financial terms of engagement offered by the plaintiff lawyers and litigation funder in each class action are often considered by the court when undertaking the exercise of considering how to resolve competing class actions. The fees charged by each 'team' have been a key consideration when determining which case is in the best interests of class members.³⁰
- 7.25 For example, the Federal Court in *Perera v GetSwift Limited* (GetSwift)³¹ conducted a tender process between three competing class actions to find no significant differences existed between the cases in terms of scope, pleadings, preparation, experience or competence of the legal practitioners or the number of class members. It was held that one case was to continue as the funding model was 'very likely to produce a better return for class members in the vast bulk of realistic scenarios at all stages of the proceeding'.³² Justice Murphy remarked that the tender process in GetSwift resulted in a significant reduction in the funding rates offered to class members.³³
- 7.26 Phi Finney McDonald concluded that court's approach to resolving competing class actions illustrates that increased competition in the litigation funding market is placing downward pressure on the fees charged, thus delivering benefits for consumers.³⁴
- 7.27 Conversely, Clayton Utz considered a 'beauty parade' to be an expensive, time consuming and inappropriate use of court resources when their objective is to

²⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 107.

³⁰ Phi Finney McDonald, *Submission 87*, p. 13.

³¹ [2018] FCA 732.

³² *Perera v GetSwift Limited* [2018] FCA 732 [305]–[324].

³³ See also Federal Court of Australia, *Civil Justice Reforms in Class Actions and Litigation Funding* (Honorable Justice Bernard Murphy, *Speech delivered at the ALDA Class Action Litigation Funding Reform Conference*), 26 October 2016, www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/20181026#_ednref34 (accessed 8 September 2020).

³⁴ Phi Finney McDonald, *Submission 87*, p. 13.

select which team of lawyers and litigation funders will be entitled to secure the proceeds from any settlement or judgment.³⁵

Current approach to resolving competing class actions

7.28 Part IVA of the *Federal Court of Australia Act 1976* (Federal Court Act) does not provide a mechanism for dealing with competing class actions.³⁶ Instead, the Federal Court uses discretionary case management mechanisms to resolve competing class actions, having regard to a number of factors.³⁷

7.29 Multiplicity issues in class actions have been managed or resolved in the following ways:

- endorsing one open class and closing the others, with joint case management and trial;³⁸
- selecting one proceeding to move forward and permanently pausing the others;³⁹
- consolidating the claims into one proceeding, with either one law firm selected to represent the representative plaintiffs, or allowing all law firms to continue but subject to a cooperation arrangement between them;⁴⁰
- requiring the multiple proceedings to harmonise (e.g. two broadly equivalent pleadings and possibly the use of common counsel and solicitors, with joint case management);
- allowing the multiple proceedings to continue in parallel until such time as the court considers necessary to resolve; and
- requiring 'overlapping' class members to select between the competing class actions.⁴¹

7.30 Herbert Smith Freehills highlighted that a lack of uniformity in approach confounded the other issues arising from multiplicity by creating inconsistency and uncertainty.⁴² By contrast, Norton Rose Fullbright viewed the flexibility

³⁵ Clayton Utz, *Submission 26*, p. 5.

³⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 105.

³⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 105.

³⁸ *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* [2017] FCA 947. A joint trial of both proceedings was ordered and the opposing applicants' lawyers and funders were required to cooperate.

³⁹ *Wigmans v AMP Ltd* (2019) 373 ALR 323.

⁴⁰ *Southernwood v Brambles* [2019] FCA 1021.

⁴¹ See, for example, Norton Rose Fulbright, *Submission 45*, p. 6; Herbert Smith Freehills, *Submission 51*, p. 3; Law Council of Australia, *Submission 67*, p. 22.

⁴² Herbert Smith Freehills, *Submission 51*, p. 3.

afforded to the courts to deal with competing class actions as highly desirable.⁴³ In its view, the success of the class action regime is attributable to broad powers permitting the Federal Court to 'over time, in individual cases, develop new procedures in form and contour as [they have] responded to the [changing] practical and economic circumstances'.⁴⁴

Federal Court's Practice Note on Class Actions

7.31 The ALRC's Final Report contained four recommendations concerning competing class actions, one of which was for the Federal Court's Class Actions Practice Note to be amended to include a case management procedure for managing competing class actions.⁴⁵

7.32 The Federal Court's Class Actions Practice Note was amended in December 2019 to include a new process for how competing class actions are managed in the Federal Court:

- if the lawyers for the parties to a class action in the Federal Court become aware that a competing class action is being filed, or is about to be filed, in the Federal Court or a state Supreme Court, they are to, immediately upon becoming aware, notify the Federal Court judge's associate;
- if the competing class action is filed in the Federal Court, the judge's associate will arrange for the competing class actions to be listed for a case management hearing together with the first filed class action as soon as practicable;
- if the competing class action is filed in a state Supreme Court, the Federal Court will advise the parties as to the procedure to be adopted as to the management of the competing class actions including by convening a joint case management hearing of the type contemplated by protocols with the state Supreme Courts;
- prior to the case management hearing, the lawyers for the competing class actions should provide the judge with an agreed proposal for the resolution of issues arising from the existence of the competing class actions. In the event the parties' lawyers fail to reach agreement, the parties submit competing proposals;
- the Federal Court will ascertain:
 - whether there is any dispute that either of the competing class actions is a class action for the purpose of the legislation;

⁴³ Norton Rose Fulbright, *Submission 45*, p. 6.

⁴⁴ Norton Rose Fulbright, *Submission 45*, p. 6.

⁴⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 114 (recommendation 5).

- any issue concerning the description of class members in the competing class actions;
 - any issue concerning the identification of the common questions of fact or law in the originating process filed in the competing class actions;
 - any other issues concerning the adequacy of the originating process;
 - 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 legal representatives / litigation funders; (to the extent relevant) 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 class actions (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 class members); and
- the Federal Court will then determine how to proceed with the conduct of the class actions depending upon an analysis of all the relevant circumstances.⁴⁶

Options for reform

7.33 This section outlines five reform proposals. The first three are ALRC recommendations. The fourth and fifth are amendments endorsed by the ALRC in its Final Report.

Express statutory power to resolve competing class actions

7.34 The ALRC's Final Report recommended that the federal class action laws contain an express power for the Federal Court to resolve competing class actions.⁴⁷ Presently, the Federal Court Act does not include an express power to resolve competing class actions.

7.35 The ALRC noted that an express power for the Federal Court to resolve competing class actions would enable the Federal Court to maintain its discretion to allow more than one class action with respect to the same dispute to continue. The ALRC recommended that a management process, contained in the Federal Court's Class Actions Practice Note, would set out the process to give effect to the statutory power.⁴⁸

⁴⁶ Federal Court Rules 2011, Division 7.3; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 8.1–8.6, www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/GPN-CA.pdf (accessed 18 November 2020).

⁴⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 107 (recommendation 4).

⁴⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 107.

7.36 Dr Cashman and Ms Simpson noted the approach taken in the United States to resolving competing class actions filed in different federal courts.⁴⁹ The Federal Multidistrict Litigation Statute in the US Code authorises a panel, made up of the federal judiciary, to centralise similar actions filed in different federal courts, including class actions, in a single court with a single judge to coordinate pre-trial proceedings in the cases. Either the parties to the case may request the panel centralise the case, or the panel may do so on its own motion.⁵⁰

Support for the proposal

7.37 The AICD supported the ALRC's proposal for the Federal Court to have an express power to resolve competing class actions. The AICD proposed the Federal Court have the power to select one action to proceed and stay the others, as well as the power to consolidate, join and amend class actions to create a class action which includes common issues derived from various claims.⁵¹

7.38 Clayton Utz held the view that, in the instance where competing class actions arise, the Federal Court should be required to select only one class action to proceed. In the view of Clayton Utz, a requirement that only one class action proceed is preferable to the Federal Court having the option to consolidate because this option might not be chosen, therefore there would be competing actions which proceed, and when the cases are consolidated, all the teams of lawyers are often involved in running the consolidated proceeding which can drive up costs.⁵²

Opposition to the proposal

7.39 Conversely, Norton Rose Fulbright supported amending the Federal Court's Class Actions Practice Note, as opposed to statutory changes, because 'reactive legislative intervention has the potential to stifle the ability of the courts to respond dynamically to unforeseen and evolving issues'.⁵³

7.40 In addition, Norton Rose Fullbright pointed to the fact that, at the time of writing, there is an appeal before the High Court regarding the capacity of lower courts to flexibly respond to competing class actions.⁵⁴ Further detail about this case is provided in Box 7.1.

⁴⁹ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 16.

⁵⁰ 28 U.S.C. §1407.

⁵¹ Australian Institute of Company Directors, *Submission 40*, p. 16.

⁵² Clayton Utz, *Submission 26*, p. 6. This decision would be made on the papers (i.e. without a hearing), with a 10-page limit on submissions and 50 page limit on supporting affidavits. An appeal on the decision of the court would also be determined without a hearing, limited to the materials before the first judge with an additional five pages of submissions.

⁵³ Norton Rose Fulbright, *Submission 45*, p. 6.

⁵⁴ Norton Rose Fulbright, *Submission 45*, p. 6; *Wigmans v AMP Limited & Ors*, S67/2020.

Box 7.1 The issue of competing class actions in the Wigmans class action

The *Wigmans v AMP Limited & Ors* (S67/2020) (*Wigmans*) case appeals the decision of the New South Wales Court of Appeal to uphold the decision of the Supreme Court to permanently stay four out of the five competing class actions against AMP.⁵⁵

In *Wigmans*, each of the representative plaintiffs sought a stay of proceedings against the other class actions. Each class action was proposed to be conducted on the basis of different funding models and with different incentives, disincentives and risk profiles.⁵⁶

The Supreme Court of New South Wales ordered a stay of proceedings for four class actions under section 183 of the *Civil Procedure Act 2005* (NSW) (*Civil Procedure Act*), equivalent to section 33ZF of the *Federal Court Act*. In determining which class action should progress, the Supreme Court of New South Wales applied a 'multi-factorial analysis' of the 'relevant factors to be considered and balanced in a qualitative appraisal' to be taken into account:

- the competing funding proposals, costs estimates and net hypothetical return to class members;
- the proposals for security for costs;
- the nature and scope of the causes of action advanced;
- the size of the respective classes;
- the extent of any book build;
- the experience of the legal practitioners and availability of legal resources;
- the state of progress of the proceedings; and
- the conduct of the representative plaintiffs to date.⁵⁷

The principal issue arising in the *Wigmans* appeal is whether, in assessing which one or more competing class actions ought to continue, the Supreme Court of New South Wales was permitted to:

- undertake a comparative assessment of the different funding models on offer in order to choose the most beneficial proceeding for class members;
- order a permanent stay of proceedings in the other class actions.⁵⁸

⁵⁵ *Wigmans v AMP Ltd* [2019] NSWCA 243. A order to 'stay' a proceeding is an order to suspend all or part of an action.

⁵⁶ *Wigmans v AMP Limited & Ors*, S67/2020.

⁵⁷ *Wigmans v AMP Ltd* [2019] NSWCA 243 [17]–[18].

⁵⁸ *Wigmans v AMP Limited & Ors* [2020] HCA Trans 52 (17 April 2020), lines 223–225; Marion Antoinette Wigmans 'Written submissions (Appellant)', *Wigmans v AMP Limited & Ors*, S67/2020, 5 June 2020, p. 3; See, for example, Norton Rose Fulbright, *Submission 45*, p. 6; Professor Peta Spender, *Submission 50*, p. 3.

- 7.41 The provisions of Part IVA of the Federal Court Act have remained largely unchanged since their introduction in 1992. Professor Peta Spender highlighted that the courts 'have developed lateral solutions to many of the problems that have arisen during the pendency of the class action regime in Australia'.⁵⁹ The *Wigmans* case, among others, was identified as an example of the court's recently demonstrated reticence to use the generic provisions in class action legislation to 'extend the operation of judicial power'.⁶⁰
- 7.42 Norton Rose Fullbright submitted if, and only if, the decision in *Wigmans* limits the flexibility of the courts to deal with competing class actions, statutory intervention may be warranted to create an express power for courts to control competing class action proceedings. They considered any action in this regard prior to the High Court's decision would be premature.⁶¹

Protocols between state Supreme Courts and the Federal Court

- 7.43 The ALRC's Final Report recommended that the state and territory Supreme Courts with class action procedures 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* (NSW Protocol).⁶²
- 7.44 Subsequent to the ALRC's recommendation, the Federal Court and the Supreme Court of Victoria have entered into a *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings* (Victoria Protocol).⁶³
- 7.45 NSW Young Lawyers expressed caution about legislative intervention to introduce an express power to resolve competing class actions, noting that, as a first step, the effectiveness of the NSW Protocol and the Victoria Protocol should be monitored, particularly once the High Court has delivered its judgment in *Wigmans*. NSW Young Lawyers further submitted other jurisdictions with class actions regimes should consider entering into a similar arrangement with the Federal Court.⁶⁴

⁵⁹ Professor Peta Spender, *Submission 50*, p. 3.

⁶⁰ Professor Peta Spender, *Submission 50*, p. 3.

⁶¹ Norton Rose Fullbright, *Submission 45*, p. 6.

⁶² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 124 (recommendation 6).

⁶³ *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings* (5 June 2019). Other jurisdictions with class action regimes (Tasmania and Queensland) have not entered into similar protocols. See, for example, Clayton Utz, *Submission 26*, p. 6; NSW Young Lawyers, *Submission 89*, p. 32.

⁶⁴ NSW Young Lawyers, *Submission 89*, p. 32.

7.46 Submitters noted the importance of having a nationally consistent approach to dealing with competing class actions.⁶⁵

Exclusive Federal Court jurisdiction for matters under the Corporations Act

7.47 The ALRC recommended amending Part 9.6A of the *Corporations Act 2001* (Corporations Act) and section 12GJ of the *Australian Securities and Investment Commission Act 2001* (ASIC Act) so that exclusive jurisdiction is conferred on the Federal Court with respect to civil matters, commenced as class actions, arising under that legislation.⁶⁶ As this recommendation related to the specific issue of competing shareholder class actions, this proposal is considered in Chapter 17 on shareholder class actions.

Amendments to the Federal Court's Class Actions Practice Note

Timeframes to lodge competing class actions

7.48 A prominent issue with competing class actions, in particular with shareholder class actions, is that, upon the filing of the first class actions, there is a 'rush to court' attitude by other putative plaintiffs and their lawyers who are yet to file their class action. Those parties and their lawyers perceive that a first filed class action may have an advantage from that fact of being first. This leads to subsequent competing class actions being quickly filed which may compromise due diligence in preparation of the case.

7.49 An example is the AMP matter, where evidence at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was given on 16 and 17 April 2018. Two competing AMP class actions were commenced on 9 May 2018, the third on 25 May 2018, the fourth on 6 June 2018 and the fifth on 7 June 2018.⁶⁷

7.50 The Federal Court noted in the GetSwift shareholder class action the trend where shareholder class actions are issued 'very speedily' after a share price collapse:

The Court must strongly discourage a rush to the Court in large and complex class proceedings, carrying as it does the consequent risks of insufficient due diligence and the commencement of unmeritorious, or at least weak, cases. Unless the hasty filing of such cases is effectively discouraged even those solicitors or funders who wish to take an appropriately cautious approach are likely to be dragged into the same

⁶⁵ See, for example, Clayton Utz, *Submission 26*, p. 6; Australian Institute of Company Directors, *Submission 40*, p. 16.

⁶⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 126 (recommendation 7). This recommendation has not yet been implemented. See Clayton Utz, *Submission 26*, p. 6.

⁶⁷ *Perera v GetSwift Limited* [2018] FCAFC 202 [119]; see also Australian Institute of Company Directors, *Submission 40*, p. 15; Herbert Smith Freehills, *Submission 51*, p. 10.

practice. That is so because the first action filed is likely to obtain a 'first mover' advantage in terms of book building and, once one action is filed, other solicitors or funders are pressed to speedily follow or they may not be included in the mix when the Court considers the competing proceedings.⁶⁸

7.51 A 'book build' refers to the process to identify, communicate with, and enrol class members in the action and by signing the litigation funding agreement.⁶⁹

7.52 The Federal Court commented in the GetSwift case:

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.⁷⁰

7.53 The ALRC considered that a key interlocutory step to be included in the Federal Court's Class Actions Practice Note was a time constraint on the filing of competing class actions. The ALRC considered that the Federal Court's Class Actions Practice Note should require potential claimants (and their lawyers/litigation funders) to consider and lodge a competing class action within a defined period of time. This would mean that class action B, which concerns the same issues as already filed class action A, would not be able to be initiated after a certain time.⁷¹

7.54 The ALRC endorsed an approach whereby there would be 90 days for potential claimants (and their lawyers/litigation funders) to consider and lodge a competing class action. It concluded that the benefit of this time constraint existing in the Federal Court's Class Actions Practice Note, rather than statute, is that if 90 days proves too long or short, it can easily be amended by the Federal Court.⁷²

⁶⁸ *Perera v GetSwift Limited* [2018] FCAFC 202 [279].

⁶⁹ *Omni Bridgeway, Submission 73*, p. 24.

⁷⁰ *Perera v GetSwift Limited* [2018] FCAFC 202 [280].

⁷¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 114; Clayton Utz, *Submission 26*, p. 6, submitted that a competing class action should be permanently stayed if filed more than 60 days after the first class action.

⁷² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 116.

Selection hearings

7.55 The ALRC's Final Report recommended:

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.⁷³

7.56 In the instance of competing class actions, the ALRC recommended a 'selection hearing' be held in every instance where there are competing class actions, at the conclusion of which the Federal Court would:

- determine the shape of the action going forward;
- determine the representative plaintiff, lawyer and litigation funder;
- approve any funding agreement and costs agreement on a common fund basis; and
- subsequently hold the first case management conference.⁷⁴

7.57 As noted above, the Federal Court's Class Actions Practice Note was amended in 2019 to implement a process to determine the suitability of the competing class actions for joint or concurrent hearing of a selection hearing. The Federal Court's Class Actions Practice Note currently states that the Federal Court will then determine how to proceed with the conduct of the class actions depending upon an analysis of all the relevant circumstances.⁷⁵

7.58 The ALRC's Final Report also suggested that what, if any, criteria should be laid out for the Federal Court to decide which class action is to proceed. The ALRC opted for a principles-based approach to considering the question of which class action should proceed, as opposed to a multi-factorial list that the Federal Court would consider.⁷⁶

7.59 The ALRC endorsed an approach where the Federal Court is to select the class action which best advances the interests of the class members in an effective and cost-efficient manner, having regard to the stated preferences of the class members.⁷⁷

⁷³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 107.

⁷⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 115.

⁷⁵ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 8.1–8.6.

⁷⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 119.

⁷⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 119.

- 7.60 Norton Rose Fullbright held a different view and advocated for the Federal Court's Class Actions Practice Note to be amended to include an indicative list of considerations to be taken into account by the Federal Court in assessing which proceedings should continue, similarly to Part 15 of the Federal Court's Class Actions Practice Note which applies to settlement approval.⁷⁸
- 7.61 The ALRC noted that at the selection hearing, representatives for each class action should make their case as to why their class action should be selected to proceed and the other actions stayed. The Federal Court has noted that when this process is conducted with the defendant present, the defendant would likely obtain a reasonable understanding of the approximate size of the 'war chest' available for the case against it'.⁷⁹ Consequently, the ALRC was of the view that the defendant should not be involved in the selection hearing process, other than in respect of the form of security of costs proposed by the class actions.⁸⁰

Committee view

- 7.62 Competing and multiple class actions impede the objectives of Australia's class action regime to increase the efficiency and cost of the administration of justice. Competing and multiple class actions add unnecessary cost, delay and complexity for plaintiffs and defendants.
- 7.63 The committee welcomes the Federal Court's ongoing improvement to its case management processes and practice but is concerned about the level of uncertainty associated with current practices. The Federal Court's approach to resolving competing and multiple class actions, and associated challenges to the approach adopted, add considerable time and cost to the proceedings before the substantial legal issues are considered. The committee considers one way of ensuring class action procedure is reasonable, proportionate and fair would be to clarify the powers of the Federal Court with respect to competing and multiple class actions.
- 7.64 Clarified powers, alongside reforms to provide guidance to resolving competing and multiple class actions and measures to limit a 'rush to court' attitude, would seek to enhance procedural efficiency and fairness in class actions. To that end, the committee is of the view that the following multi-faceted approach would assist to address the issue of competing and multiple class actions.
- 7.65 The ALRC set out that, in order to resolve competing class actions, a process is needed which achieves:

⁷⁸ Norton Rose Fulbright, *Submission 45*, p. 7; Federal Court Rules 2011, Division 7.3; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 15.5.

⁷⁹ *Perera v GetSwift Limited* [2018] FCAFC 202 [281].

⁸⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 119.

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- identification of any potential competing class actions as soon as practicable; and
 - efficient resolution of which action (representative plaintiff, lawyer and funder) will lead the class action going forward.
- 7.66 The committee considers that the 2019 changes to the Federal Court's Class Actions Practice Note go some way to addressing the former but do little to address the latter. The Federal Court's Class Actions Practice Note outlines the obligations on parties to notify the Federal Court of competing class actions and sets out the process for the Federal Court to bring the cases together for a case management hearing and a selection hearing.
- 7.67 However, there is no guidance in the Federal Court's Class Actions Practice Note for the Federal Court with respect to how the Federal Court is to resolve the competing class actions or assess which class action(s) should proceed.
- 7.68 Therefore, the first reform to be considered should be changes to the Federal Court's Class Actions Practice Note to state that, at the stage of a selection hearing, the Federal Court should apply a principles-based approach to this decision-making exercise. The committee considers that the most appropriate approach would be a requirement for the Federal Court to select the class action which advances the claims and interests of class members in an efficient and cost-effective manner, with regard to the stated preferences of the class members.
- 7.69 Second, the committee considers action is required to curb the 'rush to court' attitude of the representative plaintiff's legal and litigation funding teams. The Federal Court's Class Actions Practice Note should contain a timeframe within which a competing or multiple class action ought to be filed with the Federal Court. The committee considers the 90-day time frame suggested by the Full Court of the Federal Court in *GetSwift*, and endorsed by the ALRC, to be appropriate for all class actions, but at a minimum for shareholder class actions. The committee anticipates that this amendment would reduce on the 'rush to court' attitude of parties and their lawyers because the bookbuild which occurs in those 90-days will not be given weight by the Federal Court, if and when it considers which competing class action should proceed.
- 7.70 Third, the committee considers the power of the Federal Court to decide that only one of the competing or multiple class actions will proceed is integral to facilitating a process which promotes reasonable, proportionate and fair outcomes for all parties to a class action. The power to decide that only one of the competing or multiple class actions should continue, should be one of the options available within the Federal Court's discretion. Therefore, the committee supports an express statutory power for the Federal Court to resolve competing and multiple class actions.

- 7.71 The committee recognises that the Wigmans case is currently before the High Court which is considering the flexibility of the Supreme Court of New South Wales to deal with competing class actions. The decision could have implications for the Federal Court's power to order that one class action is to proceed and stay the competing class actions. Accordingly, an appropriate balance ought to be struck between the Federal Court having adequate powers to make orders which ensure a reasonable, proportionate and fair process in class actions and avoiding any action which inappropriately impedes developments in common law jurisprudence.
- 7.72 In determining the scope of this power, consideration ought to be given to the myriad of ways the Federal Court has addressed the resolution and management of competing and multiple class actions to date. The new statutory power should in no way limit these options being available to the Federal Court. In particular, this power should enable the Federal Court to maintain its discretion to allow more than one class action with respect to the same dispute to continue, as well as the power to select which action would proceed and stay the other class actions.
- 7.73 The committee has arrived at this conclusion from the body of evidence before it on competing and multiple class actions. The committee is not taking a view on the merits of the matters in the Wigmans case currently before the High Court.
- 7.74 Lastly, the committee considers that the Federal Court's arrangements with the Supreme Courts in NSW and Victoria through the establishment of protocols is a step in the right direction to addressing the challenges when competing class actions are filed in different jurisdictions. Further harmonisation in this area should be pursued to reduce uncertainty.

Recommendation 2

- 7.75 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce an express power for the Federal Court of Australia to resolve competing and multiple class actions. The power should maintain the Federal Court of Australia's discretion to allow more than one class action with respect to the same dispute to continue.**

Recommendation 3

- 7.76 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to include:**
- a requirement that the Federal Court of Australia holds a selection hearing to determine which of the competing or multiple class actions should proceed, the Federal Court of Australia should select a class action which advances the claims and interests of class members in an efficient**

and cost-effective manner, with regard to the stated preferences of the class members; and

- a requirement that on the filing of a class action, the Federal Court of Australia orders a standstill in that proceeding for 90 days, so that any other competing or multiple class actions can be appropriately considered and filed, and that any book building that occurs during the standstill period should be given no weight by the Federal Court of Australia.

Recommendation 4

- 7.77 The committee recommends the Australian Government seek to ensure that state and territory Supreme Courts with class action procedures adopt a protocol with the Federal Court of Australia similar to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings* and the *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings*.

Chapter 8

Class closure orders

Introduction

- 8.1 Quantifying the claims of the class members to a class action is critical to achieving a settlement. This is particularly challenging with an open class action because it is brought on behalf of all class members who fall within the particular definition of the class. To facilitate settlements in open class actions, the Federal Court of Australia (Federal Court) can make a 'class closure' order. An order of this type requires class members to take a step to participate in the class action, or opt-out, otherwise their legal claim would be extinguished. If class members do not register or opt-out, they would not have the right to share in any proceeds obtained in a settlement or judgment.
- 8.2 The intention of the Federal Court's class action regime is to facilitate and promote open class actions. Given this intention, and the frequency of open class actions, it is critical to achieve an appropriate balance between upholding this objective, protecting the rights of class members with passive involvement in the class action, and facilitating reasonable, proportionate and fair resolutions to class actions through settlement.
- 8.3 This chapter considers the utility and frequency of class closure orders in open class actions, their advantages and drawbacks. The Federal Court's power to make a class closure order was once clearly established; however, submissions highlighted that a recent court decision has cast doubt on this. This chapter considers proposals for reform which would rectify this ambiguity about the availability of class closure orders in open class actions in the Federal Court.

Class closure orders

- 8.4 Numerous submissions emphasised that, in an opt-out class action regime, the Federal Court's ability to 'close the class' is integral to facilitating settlements when the class action has an 'open' class.¹
- 8.5 Class closure orders generally have two parts. The first is an order for the publication of notices to class members requiring them to either opt-out or register their participation in the proceeding by a certain date.²
- 8.6 The second is an order concerning the consequences for those who neither opt-out nor register. It is common for an order to state that, if a class member

¹ See, for example, Clayton Utz, *Submission 26*, pp. 8–9; Australian Institute of Company Directors, *Submission 40*, p. 16; Norton Rose Fulbright, *Submission 45*, p. 9; Herbert Smith Freehills, *Submission 51*, pp. 5–6; Allens, *Submission 69*, p. 20.

² See, for example, Norton Rose Fulbright, *Submission 45*, p. 9; Allens, *Submission 69*, p. 20.

has not registered or opted-out by a certain date, their claim is extinguished and they are not entitled to share in any settlement proceeds.³

8.7 Class closures most often occur to facilitate a mediation or settlement, but are also commonly made:

- when seeking the court's approval of a proposed settlement agreement; or
- after judgment on the common questions to facilitate the determination of individual claims or settlement.⁴

8.8 There are two types of class closure. The 'soft' form permits a class member who did not register prior to a mediation to continue to participate in the class action if a settlement is not reached at that mediation. The 'hard' form of class closure does not permit the continued participation of an unregistered class member after an unsuccessful mediation.⁵

Benefits and drawbacks of 'closing the class'

8.9 Submissions emphasised two key benefits of class closure orders.

8.10 First, a class closure order enables the identity and number of class members entitled to share in the any settlement to be determined – information which is critical to developing a settlement proposal.⁶ Submissions noted a class closure order enables the parties to understand the total quantum of registered members' claims and permits a settlement amount to be capped by reference to the claims of the registered class members only.⁷

8.11 Herbert Smith Freehills highlighted that understanding the value of the claims in a class action is important to ensure that the procedural steps taken in a class action are proportionate to the potential quantum settlement of the case.⁸

8.12 It was also noted that, without a class closure order, settlement discussions may stall and multiple rounds of negotiations may take place. Herbert Smith Freehills warned this potentially results in a greater total payment to class members than their originally bargained position.⁹

³ See, for example, Norton Rose Fulbright, *Submission 45*, p. 9; Allens, *Submission 69*, p. 20.

⁴ Norton Rose Fulbright, *Submission 45*, p. 8.

⁵ Clayton Utz, *Submission 26*, p. 8.

⁶ See, for example, Norton Rose Fulbright, *Submission 45*, p. 9; Herbert Smith Freehills, *Submission 51*, p. 5; Allens, *Submission 69*, p. 20.

⁷ See, for example, Australian Institute of Company Directors, *Submission 40*, p. 16; Herbert Smith Freehills, *Submission 51*, p. 5; Allens, *Submission 69*, p. 20.

⁸ Herbert Smith Freehills, *Submission 51*, p. 5.

⁹ Herbert Smith Freehills, *Submission 51*, p. 6. See also Allens, *Submission 69*, p. 20.

8.13 The importance of class closure in shareholder class actions was recognised by the Australian Law Reform Commission (ALRC):

...[i]t 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.¹⁰

8.14 Second, a class closure order promotes the finality of the matter because unregistered class members are bound by the settlement and cannot litigate the common claims which were the subject of the class action.¹¹

8.15 That is, unregistered class members are bound by the settlement but are not entitled to share in any proceeds of a successful class action outcome or bring a separate action of their own. The extinguishment of rights and exclusion from sharing in the proceeds of any settlement sum or award of damages is significant. Therefore, there is a question as to whether class closure to facilitate a settlement is in the interests of class members.

8.16 The Federal Court has drawn attention to the challenges created by Part IVA of the *Federal Court of Australia Act 1976* (Federal Court Act) in ensuring that the interests of all class members are upheld.¹² Likewise, the submission from the Attorney-General's Department noted:

In class actions, where the outcome affects class members who have not directly participated in the proceedings, the Court has additional supervisory responsibilities to protect the interests of class members.¹³

8.17 The concerns with respect to closed class actions also arise when an open class is subsequently closed to enable mediation. Namely, vulnerable groups who may be less likely to take steps to register, or face barriers to register, are disadvantaged.¹⁴ The ALRC's report *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders* noted:

Accordingly, there is a careful balance that needs to be struck between facilitating the resolution of disputes through mediation and the

¹⁰ Clayton Utz, *Submission 26*, p. 8, citing Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 94.

¹¹ See, for example, Norton Rose Fulbright, *Submission 45*, p. 9; Herbert Smith Freehills, *Submission 51*, p. 5; Allens, *Submission 69*, p. 20.

¹² *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020 [19].

¹³ Attorney-General's Department, *Submission 93*, p. 16.

¹⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 95.

development of a de-facto closed class regime at the point that the proceedings are prepared for mediation.¹⁵

The Federal Court's power to order interlocutory class closure

- 8.18 The ALRC concluded that case law had established the Federal Court has the power to order class closure immediately prior to mediation to facilitate a settlement.¹⁶ Submitters noted this may no longer be the case given the decision in *Haselhurst v Toyota Motor Corporation Australia Ltd* (Haselhurst),¹⁷ which was affirmed in *Wigmans v AMP Ltd*.¹⁸
- 8.19 In Haselhurst, the New South Wales (NSW) Court of Appeal concluded it does not have power under section 183 of the *Civil Procedure Act 2005* (NSW) to order soft closure in class action proceedings prior to a court-approved settlement or judgment.¹⁹
- 8.20 In the view of Allens, the decisions in the Haselhurst and Wigmans cases 'directly conflict with, and cast doubt upon, the long-standing acceptance by the Federal Court that section 33ZF [of the Federal Court Act] permits the making of a class closure order'.²⁰
- 8.21 In Haselhurst, the NSW Court of Appeal distinguished a decision of the Supreme Court of Victoria.²¹ In some Victorian cases, the making of a class closure order was permitted for the reason that some of those cases involved orders made after settlement or judgment.²² In the cases where the order was made prior to settlement, the Supreme Court of Victoria was permitted to make the order because, unlike the relevant NSW legislation, section 33ZG of the *Supreme Court Act 1986* (Vic) (Victorian Supreme Court Act) expressly permits the making of an order to require class members to take a step in the proceeding in order to share in the settlement.²³

¹⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 95.

¹⁶ *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296. Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 94.

¹⁷ [2020] NSWCA 66. See, for example, Clayton Utz, *Submission 26*, p. 9; Norton Rose Fulbright, *Submission 45*, p. 8; Herbert Smith Freehills, *Submission 51*, p. 5; Allens, *Submission 69*, p. 20.

¹⁸ [2020] NSWCA 104.

¹⁹ *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 [121]–[123]

²⁰ Allens, *Submission 69*, p. 20.

²¹ *Matthews v SPI Electricity Pty Ltd* (No 13) (2013) 39 VR 255.

²² *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 [93].

²³ *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66 [80]–[90].

8.22 This means the Supreme Court of Victoria has legislative power to make interlocutory class closure orders.²⁴ Section 33ZG of the Victorian Supreme Court Act permits the Supreme Court of Victoria to make an order under section 33ZF of the Victorian Supreme Court Act requiring class members to take a positive step to participate in a class action, such as responding to a class closure notice. An order to this effect must be considered by the Supreme Court of Victoria to be appropriate or necessary to ensure that justice is done in the proceeding.²⁵ There is no equivalent provision to section 33ZG in either the federal or NSW class action regimes.²⁶

Recent limitations on the Federal Court's powers

8.23 The decision of the NSW Court of Appeal in *Haselhurst* could be understood to be part of a broader, recent trend of appellate courts to read broad provisions in class action legislation more narrowly than previous interpretations or understandings. Professor Peta Spender of the Australian National University Law School noted that, in more recent times, the courts have demonstrated a reticence to use the generic provisions, including section 33ZF of the Federal Court Act, and its equivalent provision in state legislation, to 'extend' the operation of judicial power to the making of some particular procedural orders.²⁷

8.24 This reticence can be seen in the *Haselhurst* decision, in the High Court of Australia's (High Court) decision in 2019 concerning common fund orders (Chapter 9),²⁸ and in a case currently before the High Court on resolution of competing class actions (Chapter 7).²⁹

Federal Court interpretation of Haselhurst decision

8.25 The Federal Court has considered the impact of the *Haselhurst* decision on its power to make a class closure order. In summary, the Federal Court has held that it does not have the power under section 33ZF of the Federal Court Act to make a class closure order at an early stage in the proceeding but it can make an order at the conclusion of a class action. This is evidenced in the two cases discussed below.

²⁴ Clayton Utz, *Submission 26*, p. 9; Herbert Smith Freehills, *Submission 51*, p. 5.

²⁵ Section 33ZF of the *Supreme Court Act 1986* (Vic) is the same as section 33ZF of the *Federal Court of Australia Act 1976*, that is, a court may make any orders it thinks are appropriate or necessary to ensure that justice is done in the proceeding. Section 33ZG does not limit that section in any way.

²⁶ Herbert Smith Freehills, *Submission 51*, pp. 10–11 (footnote 16).

²⁷ Professor Peta Spender, *Submission 50*, p. 3.

²⁸ *BMW Australia Ltd v Brewster* [2019] HCA 45; *Westpac Banking Corporation v Lenthall* [2019] HCA 45.

²⁹ *Wigmans v AMP Ltd* [2020] NSWCA 104; *Wigmans v AMP Limited & Ors* (S67/2020).

8.26 In *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 3)*,³⁰ the Federal Court considered whether section 33ZF of the Federal Court Act empowers the Federal Court to make a class closure order at an early stage in the proceeding. It held the reasoning in *BMW Australia Ltd v Brewster* and *Haselhurst* was ‘directly applicable’³¹ and therefore it did not have the power to make a class closure order under section 33ZF.³² The Federal Court considered that a class closure order:

...is not truly supplementary to, but instead goes well beyond the scope of the specific provisions in the statutory scheme concerning the distribution of money paid under settlement approved by the court, the orders that may be made in determining a matter in a representative proceeding, and the effect of a judgment given in a representative proceeding. It is also substantially at odds with the opt out nature of representative proceedings under Pt IVA.³³

8.27 However, the Federal Court has expressed the view it is still within its power to make a class closure order under section 33V of the Federal Court Act at the time of settlement approval.³⁴ In *Fisher (trustee for Tramik Super Fund Trust) v Vocus Group Ltd (No 2) (Fisher)*,³⁵ the Federal Court held the decision in *Haselhurst* was distinguishable. The class closure order in *Haselhurst* concerned a pre-trial class closure order. The order in *Fisher* concerned an application which was made at the conclusion of the proceeding, at the time when the parties were seeking approval of a settlement pursuant to subsection 33V(1) of the Federal Court Act. The Federal Court therefore made a class closure order as sought.³⁶

Adverse impacts of procedural ambiguity

8.28 Submitters noted that interlocutory issues, such as class closure orders, add substantial costs to class action litigation in two ways.³⁷

8.29 First, the uncertainty is said to increase the cost of litigation funding. A lack of predictability in these types of procedural issues purportedly increases the risk for the litigation funder, potentially reducing the availability of litigation

³⁰ [2020] FCA 748.

³¹ [2020] FCA 748 [214].

³² [2020] FCA 748 [292].

³³ [2020] FCA 748 [214].

³⁴ *Inabu Pty Ltd v CIMIC Group Ltd* [2020] FCA 510 [8].

³⁵ [2020] FCA 579.

³⁶ *Fisher (trustee for Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 [61]. See also *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 [27]; *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [23]–[24].

³⁷ See, for example, Australian Institute of Company Directions, *Submission 40*, p. 15; Norton Rose Fulbright, *Submission 45*, p. 5; NSW Young Lawyers, *Submission 89*, p. 31.

funding and leading to litigation funding being offered on less beneficial terms for consumers.³⁸

8.30 Second, more time and money than what is already spent on procedural and interlocutory matters will be expended on testing the boundaries of decisions in procedural contests.³⁹ The Federal Chamber of Automotive Industries submitted that, until such uncertainty is resolved, time and resources will continue to be spent on litigating procedural matters.⁴⁰

Proposed reforms

8.31 Three options for reform have been proposed. These include amending the Federal Court's Class Actions Practice Note, and two approaches to introducing an express power for the Federal Court to make a class closure order.

Federal Court's Class Actions Practice Note

8.32 The ALRC concluded that in achieving a balance between facilitating the resolution of class actions at mediation and upholding the open class nature of the regime:

- the Federal Court is the best place to strike that balance; and
- it should not always be assumed that the need to protect more vulnerable groups, who may be more likely to be precluded from a settlement for a failure to register, is outweighed by the need to facilitate a successful mediation.⁴¹

8.33 The ALRC recommended the Federal Court's Class Actions Practice Note be amended to provide criteria for when it is appropriate to order class closure during the course of a class action and the circumstances in which a class may be reopened.⁴²

8.34 The ALRC noted that if the class is closed at a point during proceedings, it should ordinarily be final, but the Federal Court should retain discretion to re-open the class if it is in the interests of justice. The ALRC recommended that the ordinary finality of an order should be a consideration for the Federal Court

³⁸ Dr Peter Cashman and Ms Amelia Simpson, correspondence received 17 September 2020, p. 34.

³⁹ Dr Peter Cashman and Ms Amelia Simpson, correspondence received 17 September 2020, p. 34.

⁴⁰ Federal Chamber of Automotive Industries, *Submission 70*, p. 7. See also Queensland Law Society, *Submission 46*, p. 4.

⁴¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 95.

⁴² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 94–96 (recommendation 2).

when making orders to close the class to facilitate a resolution of the dispute.⁴³ Clayton Utz supported these recommendations.⁴⁴

Statutory power to make a class closure order

- 8.35 Some submitters considered statutory reform is necessary given the Haselhurst decision.⁴⁵ The Australian Institute of Company Directors, Norton Rose Fulbright and Allens recommended the Federal Court Act be amended to include an express power to make class closure orders.⁴⁶
- 8.36 Similarly, Clayton Utz and Herbert Smith Freehills recommended the Federal Court Act be amended so as to introduce an equivalent provision to section 33ZG of the Victorian Supreme Court Act.⁴⁷
- 8.37 Herbert Smith Freehills noted the ALRC in 2000 recommended the Federal Court Act be amended to introduce an explicit power to make class closure orders.⁴⁸ It appears this was accepted by the Victorian legislature.⁴⁹
- 8.38 Allens addressed the concerns raised by the Supreme Court of NSW regarding the class closure orders. It considered class closure does not undercut the opt-out rationale of the class action regime because class closure orders are:
- often made by consent;
 - typically expressed to be a 'soft' closure (i.e. the class is re-opened after an unsuccessful mediation); and
 - only ordered at the discretion of the court, who takes into account a range of considerations, including:
 - the interests of the class as a whole in requiring class members to take steps to facilitate settlement;
 - the complexity and likely duration of the case;
 - the attitude of the parties; and

⁴³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 96.

⁴⁴ Clayton Utz, *Submission 26*, p. 9.

⁴⁵ See, for example, Clayton Utz, *Submission 26*, p. 9; Norton Rose Fulbright, *Submission 45*, p. 10; Herbert Smith Freehills, *Submission 51*, p. 6; Allens, *Submission 69*, p. 20.

⁴⁶ Australian Institute of Company Directors, *Submission 40*, p. 16; Norton Rose Fulbright, *Submission 45*, p. 10; Allens, *Submission 69*, pp. 20–21.

⁴⁷ Clayton Utz, *Submission 26*, p. 9; Herbert Smith Freehills, *Submission 51*, p. 5.

⁴⁸ Herbert Smith Freehills, *Submission 51*, pp. 10–11 (footnote 16); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Final Report, February 2000, p. 546.

⁴⁹ Vince Morabito, 'Judicial Responses to Class Action Settlements That Provide No Benefits To Some Class Members', *Monash University Law Review*, vol. 23, 2006, pp. 103–104.

– the point that the case has reached.⁵⁰

8.39 Concerning the requirement for class members to take the active step to register under a class closure order, the point was made that class members invariably will be required to take the step to identify themselves at some point during a class action. In Allen’s view, determining when this is to occur is a power appropriately left with the court under case management discretion.⁵¹

Committee view

8.40 The procedural law set by the class action regime presents a range of procedural issues for the Federal Court to address that do not arise when a person individually pursues the vindication of legal rights.

8.41 When compared to the practice and procedure of civil litigation outside of Part IVA of the Federal Court Act, the application of class action procedure is complex. This complexity exists in part because class actions allow for the collectivisation of individual claims, not all of which are before the court. Accordingly, it is necessary for the procedure and case management adopted by the Federal Court to ensure class members who are not before the court are not unjustly disadvantaged by the actions of those parties who are.

8.42 The resolution of a class action determines the legal rights and claims of not only those engaged in each step of the case, but all class members. Therefore, a myriad of issues do, and ought to, arise for the Federal Court’s consideration in achieving reasonable, proportionate and fair outcomes for not only the representative plaintiff and the defendant, but also everyone bound by the outcome of the class action.

8.43 Additionally, the class action regime has remained largely unamended since its introduction, and the Federal Court has used the broad powers in Part IVA of the Federal Court Act to respond to novel issues such as the growth of the litigation funding industry. The committee recognises that the Federal Court’s powers to make particular, specific orders under broad, generic provisions of the Federal Court Act, such as class closure orders under section 33ZF, is in a state of flux.

8.44 The Federal Court’s ability to close the class is integral to facilitating settlements in open class actions and upholding the objective of the class action regime to provide the respondent with the benefit of finality with respect to the dispute.

8.45 The Federal Court has been using the broad power in section 33ZF of the Federal Court Act to make class closure orders. The committee recognises that the

⁵⁰ Allens, *Submission 69*, p. 20.

⁵¹ See *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 [94] (Kiefel CJ, Bell and Keane JJ); Herbert Smith Freehills, *Submission 51*, p. 10 (footnote 15).

decision in *Haselhurst* has placed the Federal Court's power to order a class closure order prior to settlement in doubt.

- 8.46 The state class action regimes introduced after the federal regime are based on the federal regime, but have significant differences. The Victorian regime contains a unique provision, with no counterpart in the class action regime at the federal level, which gives the Supreme Court of Victoria the express power to close the class when it is appropriate and necessary in the interests of justice.
- 8.47 To that end, the committee recommends that an express power to order a class closure order be introduced to Part IVA of the Federal Court Act to the effect of section 33ZG in the Victorian Supreme Court Act.
- 8.48 The procedure in class actions is already complex enough, with case management including many steps and unique considerations. Consequently, it is more open to challenges by the parties, which often occurs. The contest and dispute of procedural and interlocutory issues appears to comprise a significant portion of the time and costs spent on class action litigation. The committee is conscious of not unnecessarily adding procedural requirements which could burden parties with increased delay, costs and procedural contests.
- 8.49 Accordingly, the committee considers that the criteria for the Federal Court to apply in determining whether to close the class or re-open the class should be set out in the Federal Court's Class Actions Practice Note. The committee also considers that if an order to close the class is made, it should be final unless the Federal Court finds that it is in the interests of justice to re-open the class.

Recommendation 5

- 8.50 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce an express power to order class closure orders, modelled on, or similar to, section 33ZG of the *Supreme Court Act 1986 (Vic)*.**

Recommendation 6

- 8.51 The committee recommends the criteria for the Federal Court of Australia to apply in determining whether to close the class or re-open the class should be set out in the Federal Court of Australia's Class Actions Practice Note. The committee also recommends that if an order to close the class is made, it should be final unless the Federal Court of Australia finds that it is in the interests of justice to re-open the class.**

Chapter 9

Common fund orders

Introduction

- 9.1 Common fund orders are a tool the Federal Court of Australia (Federal Court) may use to overcome the unique problem which arises in open class actions where some class members may obtain a benefit from a successful action although they have not contributed to the costs of running that action.
- 9.2 Submitters noted the broader impacts of common fund orders on class actions and litigation funding with respect to:
- the 'open' or opt-out basis of the class action regime;
 - the types of legal matters routinely funded by litigation funders;
 - Australia's litigation funding industry; and
 - the regulation of the rate of commission charged by litigation funders.
- 9.3 Competing, and at times conflicting, views were expressed regarding how, or the extent to which, class actions and litigation funding in Australia have been modified by the availability of common fund orders, as well as the benefits flowing from such changes.
- 9.4 In order to provide context for the above issues, this chapter begins by looking at how common fund orders became a feature of the class action regime. It also highlights recent court decisions which have affected the Federal Court's ability to make common fund orders.
- 9.5 The subsequent sections present evidence on the impact of common fund orders on class actions and litigation funding. This is followed by a section which sets out the diversity of views on common fund orders by examining the opposing positions on whether common fund orders should have a place in Australia's class action regime. The chapter concludes with the committee's view on these matters.

What is a common fund order?

- 9.6 A common fund order is an order made by the Federal Court that requires all class members to equally contribute from their share of the proceeds from a settlement or judgment to the costs of the litigation, including the litigation funder's commission.¹ This includes those class members who have registered

¹ See, for example, Litigation Lending Services Ltd, *Submission 36*, p. 19; Maurice Blackburn Lawyers, *Submission 37*, p. 37; Attorney-General's Department, *Submission 93*, p. 9.

to share in the proceeds of the class action but have not entered into a funding agreement with the litigation funder.²

9.7 While an application for a common fund order is commonly made early in the proceedings,³ an application can also be made at settlement.⁴ Professor Peta Spender, of the Australian National University law school, explained the effect of a common fund order when granted early in the proceeding as follows:

- Judges make a common fund order early in the proceedings with the idea that they are likely to approve a settlement or a judgment with the terms of that common fund order being complied with, but they don't fully promise it.⁵

9.8 Clayton Utz considered an 'early stage' or 'interlocutory' common fund order as a 'misnomer':

Making a common fund order at an early stage of a proceeding is a slight misnomer. It is impossible to make a common fund order until the conclusion of a proceeding. When people speak of a common fund order at an early stage of a proceeding, they mean that the court gives an indication that it will make a common fund order with a particular funding commission at the conclusion of the proceeding but reserves the option of altering that commission. So, a common fund order at an early stage of a proceeding is simply an assurance to a litigation funder that a common fund order may be given at a later date. Clayton Utz submits that these assurances are of little importance since the court retains the power to alter the common fund order that it indicated it would make.⁶

The issue of 'free-riding' in open class actions

9.9 The rationale of a common fund order is to address a disparity of outcomes between funded and unfunded class action members, where unfunded class members could 'free ride' by claiming the benefits of a settlement or judgment sum without contributing to the risks and funding costs.⁷

9.10 Prior to common fund orders becoming a feature of the Australian class action regime in 2016, the Federal Court utilised funding equalisation orders after settlement or judgment in open class actions as a way of addressing this

² See, for example, King & Wood Mallesons, *Submission 53*, p. 4; Allens, *Submission 69*, p. 15.

³ *Federal Court of Australia Act 1976*, s. 33ZF. See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.

⁴ *Federal Court of Australia Act 1976*, s. 33V.

⁵ Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 22.

⁶ Clayton Utz, *Submission 26*, pp. 7–8.

⁷ See, for example, King & Wood Mallesons, *Submission 53*, p. 4; Law Council of Australia, *Submission 67*, p. 24; Allens, *Submission 69*, p. 17; NSW Young Lawyers, *Submission 89*, pp. 7, 22; NSW Bar Association, *Submission 96*, p. 10.

perceived or actual unfairness between funded and unfunded class members.⁸ The first funding equalisation order was made in 2009.⁹

9.11 The submission from the Attorney-General's Department explained an equalisation funding order as follows:

An equalisation order allows a deduction to be made from an unfunded member's entitlement that is equivalent to that paid by funded group members to the litigation funder. The deduction is then redistributed back on a pro-rata basis across the entire class, including to unfunded members. The total the funder receives is no more than that to which they are entitled under the signed agreements. The cost of litigation is thus borne equitably between all group members.¹⁰

9.12 NSW Young Lawyers provided the committee with two ways equalisation funding orders can operate in practice:

First, the litigation funder receives the commissions payable under funding agreements signed by the funded group members. Second, the commission payable by unfunded group members, if they had signed the funding agreement, is calculated and totalled. Third, that total commission is shared equally among all group members.

An alternative method of calculation is to divide the funding commission (paid by funded group members) by the total settlement or judgment sum. That percentage is the proportion to be deducted from the unfunded group member pool of funds and added to the funded group member pool of funds.¹¹

Availability of common fund orders

9.13 The first common fund order in Australia was made in 2016 in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd (Money Max)*.¹² Subsequently, common fund orders became a standard feature of the Australian class action regime.¹³

9.14 In the Money Max case, the Full Court of the Federal Court held that it had the power to make a common fund order at an early stage of the proceeding under section 33ZF of the *Federal Court of Australia Act 1976* (Federal Court Act). Section 33ZF provides the Federal Court with a general power to 'make any order the

⁸ Norton Rose Fulbright, *Submission 45*, p. 2.

⁹ *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19.

¹⁰ Attorney-General's Department, *Submission 93*, p. 9.

¹¹ NSW Young Lawyers, *Submission 89*, pp. 22–23 (footnote 98).

¹² (2016) 245 FCR 191. See, for example, Attorney-General's Department, *Submission 93*, pp. 9–10; Omni Bridgeway, *Submission 73*, p. 24.

¹³ Law Institute of Victoria, *Submission 3*, p. 12.

Court thinks appropriate or necessary to ensure that justice is done in the proceeding'.¹⁴

- 9.15 The significance of this decision is that it was the first in which an order was made that enabled a litigation funder to collect a commission from all class members in an open class and not only from those who had entered into a litigation funding agreement with the funder.¹⁵

Common fund order at beginning of class actions

- 9.16 Multiple submissions identified the High Court decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall*¹⁶ (Brewster) in December 2019 as one of the most, if not the most, significant development since the Australian Law Reform Commission's (ALRC) Final Report,¹⁷ as it has cast doubt on the availability of common funds orders only three years after the Money Max decision endorsed them.¹⁸
- 9.17 In Brewster, the High Court considered the question of whether the Federal Court and the Supreme Court of New South Wales (NSW) had the power to make a common fund order.¹⁹ It was held that the Courts were not authorised under section 33ZF of the Federal Court Act and section 183 of the *Civil Procedure Act 2005* (NSW) (Civil Procedure Act) to make common fund orders, at least at an early stage of the proceeding.²⁰
- 9.18 It was widely accepted among participants to this inquiry that the precedent set in the Brewster case was that the Federal Court is not permitted to make a

¹⁴ (2016) 245 FCR 191. See, for example, Maurice Blackburn Lawyers, *Submission 37*, p. 37; Norton Rose Fulbright, *Submission 45*, p. 2; Law Council of Australia, *Submission 67*, p. 8; Attorney-General's Department, *Submission 93*, pp. 9–10.

¹⁵ *Omni Bridgeway*, *Submission 73*, p. 24.

¹⁶ [2019] HCA 45.

¹⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018.

¹⁸ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, pp. 19–20; Harbour Litigation Funding, *Submission 11*, p. 7; Woodsford Litigation Funding Limited, *Submission 16*, p. 7; Shine Lawyers, *Submission 35*, p. 7; Norton Rose Fulbright, *Submission 45*, p. 3; Dr Michael Duffy, *Submission 47*, p. 3; Law Council of Australia, *Submission 67*, p. 31; Federal Chamber of Automotive Industries, *Submission 70*, p. 3; *Omni Bridgeway*, *Submission 73*, p. 33; NSW Young Lawyers, *Submission 89*, p. 20.

¹⁹ The High Court heard together an appeal from the Federal Court concerning the interpretation of section 33ZF of the *Federal Court of Australia Act 1976*, and an appeal from the Supreme Court of New South Wales concerning the equivalent provision in New South Wales, section 183 of the *Civil Procedure Act 2005* (NSW).

²⁰ *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 [3] (Kiefel CJ, Bell and Keane JJ).

common fund order under section 33ZF of the Federal Court Act at an early stage of the proceeding.²¹

Common fund order at resolution of class action

- 9.19 Numerous submissions highlighted that it appears the High Court in *Brewster* left open the question of whether the Federal Court and the Supreme Court of NSW can make a common fund order at the settlement stage or following judgment.²² This was described as a 'live, uncertain issue',²³ notably exhibited by the divergent views expressed in subsequent decisions of the Federal Court in response to the *Brewster* ruling.²⁴
- 9.20 Subsequent to the *Brewster* decision, the Federal Court in one instance declined to make a common fund order due to doubts regarding the Federal Court's power to make such an order at any stage of the proceeding.²⁵
- 9.21 In several decisions, the Federal Court has expressed that the High Court in *Brewster* did not preclude a common fund order from being made on resolution of a class action at the point of settlement under section 33V of the Federal Court Act.²⁶ In some cases where this view was expressed, the Federal Court made a

²¹ See, for example, Clayton Utz, *Submission 26*, p. 7; Maurice Blackburn Lawyers, *Submission 37*, p. 37; Professor Peta Spender, *Submission 50*, p. 4; King & Wood Mallesons, *Submission 53*, p. 4; Menzies Research Centre, *Submission 66*, p. 24; Omni Bridgeway, *Submission 73*, p. 24; NSW Young Lawyers, *Submission 89*, p. 21; Attorney-General's Department, *Submission 93*, p. 22; NSW Bar Association, *Submission 96*, p. 10. Allens, *Submission 69*, p. 19, preferred the view that the effect of the decision was that the Federal Court is not permitted to make a common fund order at all, even at settlement.

²² See, for example, Clayton Utz, *Submission 26*, p. 7; Norton Rose Fulbright, *Submission 45*, p. 3; Omni Bridgeway, *Submission 73*, p. 24, citing *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 [68] (Kiefel CJ, Bell and Keane JJ); Mr John Emmerig, Chair, Federal Litigation and Dispute Resolution Section, Law Council of Australia, *Committee Hansard*, 29 July 2020, pp. 23, 26.

²³ Mr John Emmerig, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 26.

²⁴ See, for example, Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19; Shine Lawyers, *Submission 35*, p. 7; Maurice Blackburn Lawyers, *Submission 37*, p. 37; AustralianSuper, *Submission 48*, p. 2; Norton Rose Fulbright, *Submission 45*, p. 3; Federal Chamber of Automotive Industries, *Submission 70*, p. 9.

²⁵ In *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637, Foster J at [418] stated 'there are statements made in each of the judgments of the Justices who comprised the majority in *Brewster* which indicate that those Justices are of the opinion that, not only does this Court and the Supreme Court not have the power to make a [common fund order] at an early stage in a group proceeding brought under Pt IVA of the FCA Act or Pt 10 of the CPA, but also the two Courts in question do not have the power to make a [common fund order] at any time'. See, for example, Woodsford Litigation Funding Limited, *Submission 16*, p. 6; Shine Lawyers, *Submission 35*, p. 8; Menzies Research Centre, *Submission 66*, pp. 24–25; Allens, *Submission 69*, p. 18; NSW Bar Association, *Submission 96*, p. 10.

²⁶ In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, Beach J at [31] held that 'there is no considered majority dicta [in *Brewster*] which clearly precludes section 33V(2) from being used for [the purposes of making a [common fund order]]'. In *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66, Anastassiou J at [9] expressed the view that the High Court in *Brewster*

funding equalisation order in some of those proceedings,²⁷ and a common fund order in others.²⁸ In *Fisher (trustee for Tramik Super Fund Trust) v Vocus Group Ltd (No 2)*, it was remarked that some of reasoning in *Brewster* expressed strong reasons for favouring a funding equalisation order over a common fund order.²⁹

- 9.22 Submitters raised concerns about the uncertainty created by the divergent judicial views which have emerged within Federal Court since *Brewster* as to whether common fund orders continue to be permitted under the Federal Court's power to approve class action settlements.³⁰
- 9.23 The decisions in two appeals concerning the question of whether the Federal Court and Supreme Court of NSW have the power to make a common fund order at the resolution of a class action (either settlement or judgment) may have, to some extent, clarified the divided judicial opinion on the decision reached in *Brewster* with respect to the permissibility of making a common fund order at the resolution of a class action.³¹

was not strictly required to decide whether section 33V conferred the power to make a [common fund order] at the time of settlement. In *Fisher (trustee for Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579, Moshinsky J commented at [72]–[73] that while the majority in *Brewster* clearly favoured the funding equalisation mechanism, his Honour 'did not consider there to be a clear majority view expressed to the effect that there is no power under s 33V to make a common fund order'. In *Pearson v State of Queensland (No 2)* [2020] FCA 619, Murphy J concluded at [265] that he was not required to revisit the extant common fund order, but if he had been required to do so, his Honour would have considered it appropriate to make a common fund order under section 33V. In *Uren v RMBL Investments Ltd & Anor (No 2)* [2020] FCA 647, Murphy J at [50]–[53] commented that 'neither the ratio of *Brewster*, nor the considered dicta of the majority, stand for the proposition that the Federal Court has no power to make a common fund order upon court approval of a settlement under s 33V(2) of the FCA'. In *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423, Lee J at [6]–[12] considered *Brewster* and concluded that it did not stand for the proposition that the Federal Court did not have power to make a common fund order at settlement.

²⁷ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461 [29]; *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66 [38]; *Fisher (trustee for Tramik Super Fund Trust) v Vocus Group Ltd (No 2)* [2020] FCA 579 [74].

²⁸ *Uren v RMBL Investments Ltd & Anor (No 2)* [2020] FCA 647 [50]–[53].

²⁹ *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579 [69]–[72].

³⁰ See, for example, Shine Lawyers, *Submission 35*, p. 7; Maurice Blackburn Lawyers, *Submission 37*, pp. 37, 43; Norton Rose Fulbright, *Submission 45*, p. 3; AustralianSuper, *Submission 48*, p. 2; King & Wood Mallesons, *Submission 53*, p. 4; Association of Litigation Funders of Australia, *Submission 57*, p. 21; Menzies Research Centre, *Submission 66*, p. 24; Federal Chamber of Automotive Industries, *Submission 70*, p. 9; Omni Bridgeway, *Submission 73*, pp. 24–25; NSW Young Lawyers, *Submission 89*, p. 23; Mr John Emmerig, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 26; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 1.

³¹ *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; *Brewster v BMW Australia Ltd* [2020] NSWCA 272. The appeals concerned the question of whether the Federal Court and Supreme Court of New South Wales have the power under section 33V and section 173 of the Civil Procedure Act to make a common fund order at the resolution of a class action

- 9.24 In both appeals, the Full Court of the Federal Court and the NSW Court of Appeal held consistent views that the majority decision of the High Court in *Brewster* was limited to common fund orders made at an early stage in the proceeding.³²
- 9.25 Further, the Courts held that there was no obiter dictum³³ by the majority of the High Court in *Brewster* that there is no power to make a common fund order at the point of settlement or judgment in a class action.³⁴
- 9.26 However, both the Full Court of the Federal Court and the NSW Court of Appeal declined to answer the question of whether the Federal Court and the Supreme Court of NSW have the power to make a common fund order at the resolution of a class action (either settlement or judgment) because there was no application before the Courts for this type of common fund order.³⁵ The Full Court of the Federal Court noted that mediation for the class action in question will be held at some point in the future, and an application for a common fund order may be sought upon settlement. Therefore, at that point, the questions about the Court's power to make a common fund order at resolution of a class action may be considered and answered.³⁶
- 9.27 In addition, the defendant in the Federal Court class action has sought to appeal the decision of the Full Court of the Federal Court to the High Court, namely the question of whether the Federal Court had the power to make a common fund order at settlement or judgment.³⁷

³² *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [32] (Lee J, Middleton and Moshinsky JJ agreeing); *Brewster v BMW Australia Ltd* [2020] NSWCA 272 [28], [30], [41]–[43] (Bell P, Bathurst CJ and Payne JA agreeing).

³³ Obiter dictum is judicial observations that do not form part of the essential reasoning of a case.

³⁴ *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [32], [41] (Lee J, Middleton and Moshinsky JJ agreeing); *Brewster v BMW Australia Ltd* [2020] NSWCA 272 [28], [30], [41]–[43] (Bell P, Bathurst CJ and Payne JA agreeing). Of the three justices in *Brewster* who made observations on the power to make a common fund order at the conclusion of proceedings, Gageler J (at [117]) and Edelman J (at [207]) said that there was a power but Gordon J (at [135], [141], [134], [149]) said there was no power. The other judgments of the plurality (Kiefel CJ, Bell and Keane JJ) and of Nettle J were confined to the Federal Court's power under section 33ZF to make a common fund orders at an early stage of the proceeding.

³⁵ *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [43], [68] (Lee J, Middleton and Moshinsky JJ agreeing); *Brewster v BMW Australia Ltd* [2020] NSWCA 272 [44] (Bell P, Bathurst CJ and Payne JA agreeing).

³⁶ *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [69] (Lee J, Middleton and Moshinsky JJ agreeing).

³⁷ Cat Fredenburgh, 'High court asked to deal death blow to common fund orders', *Lawyerly*, 7 December 2020, www.lawyerly.com.au/high-court-asked-to-put-the-nail-in-the-coffin-of-common-fund-orders/ (accessed 8 December 2020).

Federal Court's Class Actions Practice Note

9.28 Submitters drew the committee's attention to a change in the Federal Court's Class Actions Practice Note implemented shortly after the Brewster decision.³⁸

9.29 The Federal Court's Class Actions Practice Note was amended to include the following clause:

Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action.³⁹

9.30 Several submitters suggested that the guidance in Class Actions Practice Note indicates the Federal Court's willingness to make an order substantially similar to a common fund order under section 33V of the Federal Court Act or in the equitable jurisdiction of the Federal Court, in appropriate circumstances.⁴⁰

9.31 However, Litigation Capital Management commented:

[T]he Practice Note alone does not offer sufficient certainty for a prudent litigation funder to invest considerable sums (usually in excess of \$5 million) into a class action without also undertaking a book build in order to guarantee a minimum return.⁴¹

9.32 In a recent decision of the Full Court of the Federal Court on the issue of common fund orders, Justice Lee noted that, subsequent to the Brewster decision, the term 'expense sharing order' has been used in class actions to distinguish between the order contemplated by the Federal Court's Class Actions Practice Note and the orders that, until the Brewster decision, had been made pursuant to section 33ZF of the Federal Court Act (on a mistaken basis according to the Brewster decision).⁴²

³⁸ See, for example, Litigation Capital Management, *Submission 23*, p. 25; Shine Lawyers, *Submission 35*, p. 8; Maurice Blackburn Lawyers, *Submission 37*, p. 40; Menzies Research Centre, *Submission 66*, p. 24; Omni Bridgeway, *Submission 73*, p. 25.

³⁹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl 15.4 www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/GPN-CA.pdf (accessed 18 November 2020).

⁴⁰ See, for example, Shine Lawyers, *Submission 35*, p. 8; Maurice Blackburn Lawyers, *Submission 37*, p. 40; Menzies Research Centre, *Submission 66*, p. 24; Omni Bridgeway, *Submission 73*, p. 25.

⁴¹ Litigation Capital Management, *Submission 23*, p. 25.

⁴² *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [10] (Lee J, Middleton and Moshinsky JJ agreeing).

Impacts of common fund orders

9.33 Submissions identified that common fund orders affected three key changes to class actions and litigation funding in Australia, in that:

- the number of class actions filed on an open class basis increased;⁴³
- a broader range of matters received funding from litigation funders;⁴⁴ and
- the Federal Court gained a supervisory role with respect to litigation funding commissions.⁴⁵

Open class actions

9.34 Until common fund orders were endorsed in 2016, Australia's class action regime featured a larger number of closed class actions and equalisation funding orders in open class actions.

9.35 Closed class actions have been permissible in the federal class action regime from 2007.⁴⁶ Closed class actions require litigation funders to undertake a 'book build' process to identify, communicate with, and enrol class members in the action and by signing the litigation funding agreement.⁴⁷

9.36 Submissions suggested that closed classes were more prevalent in the period between 2007 and 2016.⁴⁸ According to Omni Bridgeway, after the *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd* decision in 2007 and prior to the Money Max decision in 2016, most funded class actions in Australia were 'closed', or opt-in, class actions, where each class member must have signed a litigation funding agreement with the litigation funder.⁴⁹

9.37 The Law Council of Australia agreed, noting that as classes were often closed, the legal costs and litigation funding commission were spread only across a

⁴³ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, pp. 13–14; Law Council of Australia, *Submission 67*, p. 8; Omni Bridgeway, *Submission 73*, p. 6.

⁴⁴ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5.

⁴⁵ See, for example, Professor Vicki Waye, *Submission 5*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, pp. 13–14; Attorney-General's Department, *Submission 93*, p. 10.

⁴⁶ *Multiplex Funds Management Ltd v Dawson Nominees Pty Ltd* (2007) 164 FLR 275.

⁴⁷ Omni Bridgeway, *Submission 73*, p. 24.

⁴⁸ See, for example, Law Council of Australia, *Submission 67*, p. 8; Omni Bridgeway, *Submission 73*, p. 24; Attorney-General's Department, *Submission 93*, p. 9.

⁴⁹ Omni Bridgeway, *Submission 73*, p. 24. Between 2011 and 2016, Professor Morabito found that 48 per cent of funded Federal Court class actions were closed: Attorney-General's Department, *Submission 93*, p. 9, citing Professor Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia*, 2017, pp. 39–41.

subset of the class which had similar claims and who had entered into the funding agreement.⁵⁰

9.38 The transition from closed class actions to having an 'open' class membership is understood to have been a result of the Money Max decision in 2016, in which common fund orders were endorsed.⁵¹

9.39 Therefore, common fund orders promote class actions having an open class because a litigation funder can seek for their commission to be spread across all class members, not just those who have signed the litigation funding agreement. As a result, common fund orders eliminate the need for litigation funders to book build.⁵²

Variety in types of funded class actions

9.40 Prior to common fund orders, the requirement to book build represented a significant challenge to initiating class action proceedings with litigation funding where there were a large number of smaller value claims.⁵³ Additionally, in actions other than shareholder class actions, ascertaining the identities of class members can be more difficult in the absence of details such as a shareholder register.⁵⁴

9.41 It was submitted that, with the Federal Court's power to make a common fund orders, litigation funders have expanded the types of substantive legal issues for which they provide funding because the damages owed to an entire class can be aggregated and not every class member needs to be identified and have a contractual relationship with the funder.⁵⁵ Therefore, a litigation funder may be more willing to fund a proceeding where an application for a common fund

⁵⁰ Law Council of Australia, *Submission 67*, p. 8.

⁵¹ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, pp. 13–14; Law Council of Australia, *Submission 67*, p. 8; Omni Bridgeway, *Submission 73*, p. 6; Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 29.

⁵² See, for example, Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 5; Shine Lawyers, *Submission 35*, p. 11; Maurice Blackburn Lawyers, *Submission 37*, p. 38; Menzies Research Centre, *Submission 66*, p. 21; Law Council of Australia, *Submission 67*, p. 24; Allens, *Submission 69*, p. 15; Federal Chamber of Automotive Industries, *Submission 70*, p. 7.

⁵³ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Slater and Gordon, *Submission 18*, p. 9; Federal Chamber of Automotive Industries, *Submission 70*, p. 6.

⁵⁴ See, for example, Shine Lawyers, *Submission 35*, p. 11; Litigation Lending Services Ltd, *Submission 36*, p. 20.

⁵⁵ See, for example, Balance Legal Capital, *Submission 13*, p. 3; Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 5.

order can be made because the risk that the litigation funder faces on their return is reduced.⁵⁶

Power to amend litigation funding commissions

- 9.42 At the settlement approval stage, the Federal Court considers relevant litigation funding agreements for class actions.⁵⁷ Pursuant to the decision in *Money Max*, where the Federal Court has made a common fund order, the litigation funder's fee is unequivocally a matter within the Federal Court's control.⁵⁸
- 9.43 The rate of commission to be paid to the litigation funder must be approved by the Federal Court.⁵⁹ The Federal Court can alter the percentage rate that is contained in the funding agreement.⁶⁰ Professor Michel Legg made the point that the Federal Court must ensure that when making a common fund order, class members are not worse off under the common fund order than what was contractually agreed.⁶¹ Submissions noted the Federal Court is increasingly willing to constrain litigation funders' commissions under common fund orders.⁶²
- 9.44 However, in the absence of a common fund order, there are differing judicial opinions in the Federal Court as to whether section 33V of the Federal Court Act allows the Federal Court to approve the settlement terms but alter the terms of a litigation funding agreement.⁶³ If the Federal Court considers a commission is excessive, it can refuse the application to approve the terms of a settlement agreement. This approach may prompt the litigation funder to renegotiate or take the case to judgment seeking to claim its contractual entitlement.⁶⁴

⁵⁶ See, for example, Shine Lawyers, *Submission 35*, p. 11; Litigation Lending Services Ltd, *Submission 36*, p. 20; Norton Rose Fulbright, *Submission 45*, p. 4; NSW Young Lawyers, *Submission 89*, p. 21; Ai Group, *Submission 92*, p. 12.

⁵⁷ *Federal Court of Australia Act 1976*, s. 33V.

⁵⁸ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, p. 4; Slater and Gordon, *Submission 18*, p. 9; Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 6; Maurice Blackburn Lawyers, *Submission 37*, p. 38; Augusta Ventures (Australia) Pty Ltd, *Response to Submission 92*, p. 2.

⁵⁹ See, for example, Australian Securities and Investments Commission, *Submission 39*, p. 19; Attorney-General's Department, *Submission 93*, p. 10.

⁶⁰ See, for example, Slater and Gordon, *Submission 18*, p. 9; NSW Young Lawyers, *Submission 89*, p. 23, Attorney-General's Department, *Submission 93*, p. 10; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 [133]-[134] (Murphy J).

⁶¹ *Committee Hansard*, 13 July 2020, p. 29.

⁶² See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, p. 4; Law Council of Australia, *Submission 67*, p. 14; MinterEllison, *Submission 25*, p. 3.

⁶³ See, for example, Professor Michael Legg, *Submission 30*, p. 4; Law Council of Australia, *Submission 67*, p. 8.

⁶⁴ Law Council of Australia, *Submission 67*, p. 23.

9.45 The Law Council of Australia made the point that, before common fund orders, the Federal Court did not intervene in the private contracts between the litigation funder and the members of the closed class.⁶⁵

9.46 The Attorney-General's Department contrasted the supervisory role of the Federal Court when a common fund order is made as opposed to a funding equalisation order:

If the [common fund order] is made, the court has the power to set the size of the funding fee, which may be at a lower rate than would otherwise be payable. Unlike a funding equalisation order, in which the amount payable by unfunded class members will likely be equivalent to the contractually agreed funding fee, a [common fund order] clearly provides for court approval of the funding fee. This approval is likely to occur later in proceedings, such as at settlement.⁶⁶

Arguments for the availability of common fund orders

Improved access to justice

9.47 The availability of a common fund order, and therefore a decreased need to book build, was considered by some submitters to increase access to justice for class members because:

- it has become more viable to fund claims other than shareholder claims, such as consumer class actions or class actions on behalf of superannuation fund members;⁶⁷ and
- more litigation funders have entered the Australian market, thereby increasing competition and placing downward pressure on commission prices;⁶⁸ and
- some class actions may not have proceeded in the absence of common fund orders.⁶⁹

9.48 Shine Lawyers stressed the positive impact of common fund orders on the ability for consumer class actions to obtain third-party litigation funding:

An analysis of the first 25 years of class actions in Australia found that just 9% of proceedings commenced over that period may be characterised as consumer claims. By way of contrast, once common fund orders were available, in 2018/19, consumer protection claims represented around 30%

⁶⁵ Law Council of Australia, *Submission 67*, p. 8; see also King & Wood Mallesons, *Submission 53*, p. 3.

⁶⁶ Attorney-General's Department, *Submission 93*, p. 9.

⁶⁷ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Harbour Litigation Funding, *Submission 11*, p. 7; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 5; Shine Lawyers, *Submission 35*, p. 12; Law Council of Australia, *Submission 67*, pp. 24–25.

⁶⁸ See, for example, Norton Rose Fulbright, *Submission 45*, p. 3; Dr Michael Duffy, *Submission 47*, p. 3.

⁶⁹ See, for example, Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 5; Shine Lawyers, *Submission 35*, p. 12.

of all claims filed, a significant increase from the 9% over the first 25 years of the regime.⁷⁰

- 9.49 Allens expressed a different view as to whether costs are reduced due to avoiding the need to book build. Allens submitted that class members who wish to share in the proceeds of a settlement or judgment are required to identify themselves. In order to facilitate class members coming forward, Allens made the point that the claim, generally through the litigation funder, is advertised to identify relevant class members. Allens therefore considered any suggestion that common fund orders avoid these costs ignores the reality that the class action regime requires any class member wishing to obtain relief must eventually take some step to join in any successful outcome.⁷¹
- 9.50 If common fund orders were unavailable in open class actions in the Federal Court, a consequence is that litigation funders are likely to revert to the practice of book building.⁷² Shine Lawyers argued that the requirement to book build may create adverse outcomes for those unable to take positive steps to participate in a class action, particularly for more vulnerable groups in the community:

The provision for common fund orders in 'open class' proceedings is important to ensure the interests of all class members is protected and to ensure that meritorious class actions that might be otherwise impractical to prosecute are able to be pursued.⁷³

- 9.51 Allens and Clayton Utz held a different view on the access to justice outcomes of common fund orders. Specifically, attention was drawn to the fact that a common fund order facilitates the bringing of proceedings on behalf of some class members who do not, or may not, wish to pursue claims and who have not, or may not have, consented to the terms of the funding agreement.⁷⁴
- 9.52 Allens framed the access to justice issue in the following terms:

Access to justice can be a problem if a person who has a grievance which they wish to pursue in court is unable to pursue their claim – most commonly because of the expense of litigation (including the risk of an adverse costs order).

...

⁷⁰ Slater and Gordon, *Submission 18*, p. 9.

⁷¹ Allens, *Submission 69*, p. 18.

⁷² See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, pp. 13–14; Shine Lawyers, *Submission 35*, p. 7; Norton Rose Fulbright, *Submission 45*, p. 4.

⁷³ Shine Lawyers, *Submission 35*, pp. 11–12.

⁷⁴ See, for example, Clayton Utz, *Submission 26*, p. 8; Allens, *Submission 69*, p. 15.

If a person does not wish to pursue a claim, there is no 'access to justice' issue and there is no problem that is solved by the making of a common fund order.⁷⁵

- 9.53 Allens submitted that the relationship created between a funder and class members through a common fund order accords a benefit to the funder, to which the funder had no entitlement in contract or law prior to the order, and places a burden on the class member.⁷⁶
- 9.54 Mr Alexander Morris, partner at King & Wood Mallesons, made the point that common fund orders are not a necessary part of access to justice for securities class actions because book building in securities class actions is relatively practical and easy given shareholder registries.⁷⁷

Promotion of open class actions

- 9.55 Numerous submissions reflected on the intention of the Australian Parliament when establishing the class action regime in 1998, namely for an open class action procedure to be one of the tenets of the regime:

Open class representative actions allow those who are from low socio-economic backgrounds, those less educated, and those located in remote locations or who may be unable to take positive steps to have themselves included in proceedings to obtain access to justice.⁷⁸

- 9.56 A principal reason submitters supported common fund orders was that they facilitate open classes, and open class actions enable greater access to justice than closed class actions.⁷⁹ Therefore, common fund orders uphold a key policy intention of the federal class action legislation.⁸⁰
- 9.57 Additionally, submissions warned about the adverse effects that a return to closed class actions could have on access to justice.⁸¹ Norton Rose Fulbright submitted that the access to justice intentions of the class action regime are facilitated through its 'opt-in' design. Therefore, proceedings commenced on a

⁷⁵ Allens, *Submission 69*, p. 16.

⁷⁶ Allens, *Submission 69*, p. 15. See also Ai Group, *Submission 92*, p. 12.

⁷⁷ *Committee Hansard*, 13 July 2020, p. 36.

⁷⁸ The Hon. Michael Duffy, Attorney-General, *House of Representatives Hansard*, 14 November 1991, pp. 3174–3175.

⁷⁹ See, for example, Professor Michael Legg, *Committee Hansard*, 13 July 2020, pp. 29–30; Investor Claim Partner Pty Ltd, *Submission 7*, p. 4; Maurice Blackburn Lawyers, *Submission 37*, p. 38, citing *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 [205]; Association of Litigation Funders of Australia, *Submission 57*, pp. 20–21.

⁸⁰ See, for example, Norton Rose Fulbright, *Submission 45*, p. 4; Law Council of Australia, *Submission 67*, pp. 24–25; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19.

⁸¹ See, for example, Shine Lawyers, *Submission 35*, p. 7; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19.

closed basis run contrary to this objective and undermine the intended passive role of class members.⁸²

Achieving finality in a dispute

9.58 A stated benefit of common fund orders is that the filing of proceedings on an open basis facilitates the determination of the claims of all class members.⁸³ Open classes allow for certainty and finality of outcome from a settlement or judgment because a greater number of class members can participate in the claim, therefore enabling the claims of all potential plaintiffs to be dealt with in one action, subject to those who have taken the step to opt-out who could commence a separate proceeding.⁸⁴

9.59 Proponents of open class actions argued that the resolution of one closed class proceeding does not create the same level of certainty of outcome, because individuals with common claims who were not included in the closed class may still pursue their claims in a separate proceeding.⁸⁵

9.60 Omni Bridgeway disagreed, noting that closed classes promote finality of outcome because:

- the represented class represents the bulk of those interested in pursuing the case and opt-outs will be small or non-existent;
- it is unlikely that there will be significant additional people who have not already signed a funding agreement wishing to participate in any settlement; and
- an estimate can be made of total claim size, both for the funded members and for unfunded members if the class is opened and then closed for settlement purposes.⁸⁶

⁸² Norton Rose Fulbright, *Submission 45*, p. 4. See also Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, pp. 49–50.

⁸³ Norton Rose Fulbright, *Submission 45*, p. 4.

⁸⁴ See, for example, Premier Litigation Funding Management, *Submission 20*, p. 6; Litigation Capital Management, *Submission 23*, p. 5; Maurice Blackburn Lawyers, *Submission 37*, p. 38; Norton Rose Fulbright, *Submission 45*, p. 4; Law Council of Australia, *Submission 67*, pp. 24–25.

⁸⁵ See, for example, Litigation Capital Management, *Submission 23*, p. 25; Norton Rose Fulbright, *Submission 45*, pp. 3–4; See also Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988, pp. 49–50.

⁸⁶ Omni Bridgeway, *Submission 73*, p. 26; see also Allens, *Submission 69*, p. 18.

Downward pressures on litigation funding fees

- 9.61 Submissions argued the availability of common fund orders has been an influential factor in the growth in the number of class actions,⁸⁷ as well as the number of participants in Australia's litigation funding market.⁸⁸
- 9.62 The Law Council of Australia observed that prior to common fund orders, the litigation funding market in Australia 'was much smaller and more oligopolistic'.⁸⁹ While the Menzies Research Centre agreed that the advent of common fund orders correlates to an increase in the number of class actions in Australia, it considered that determining the current size of the litigation funding industry, and any impact on it created by common fund orders, is more difficult given the lack of regulatory oversight.⁹⁰
- 9.63 Norton Rose Fulbright indicated that a benefit of the reduced risk on investment aided by common fund orders is that smaller litigation funding firms have been incentivised to enter the Australian market. It was suggested that litigation funders are more willing to fund matters without engaging in the extensive book building process. Further, smaller plaintiff law firms which would otherwise be unable to carry open class proceedings on a 'no win, no fee' basis could obtain litigation funding which allowed them to compete with larger plaintiff law firms.⁹¹
- 9.64 Proponents of common fund orders suggested this increased competition in the market, aided by the availability of common fund orders, has placed downward pressure on commission fees charged by litigation funders, ultimately benefiting class members by reducing costs and increasing net recoveries.⁹²
- 9.65 Professor Vince Morabito conducted a review of common fund orders made in Federal Court proceedings between the Money Max decision in 2016 and the

⁸⁷ See, for example, Menzies Research Centre, *Submission 66*, pp. 22–24; Omni Bridgeway, *Submission 73*, p. 28.

⁸⁸ See, for example, Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 6; Association of Litigation Funders of Australia, *Submission 57*, p. 20; Law Council of Australia, *Submission 67*, p. 14; Omni Bridgeway, *Submission 73*, p. 28.

⁸⁹ Law Council of Australia, *Submission 67*, p. 25.

⁹⁰ Menzies Research Centre, *Submission 66*, pp. 22–24.

⁹¹ Norton Rose Fulbright, *Submission 45*, p. 4.

⁹² See, for example, Woodsford Litigation Funding Limited, *Submission 16*, pp. 5–6; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 2; Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 6; Shine Lawyers, *Submission 35*, p. 12; Maurice Blackburn Lawyers, *Submission 37*, p. 39; Law Council of Australia, *Submission 67*, p. 25; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19; Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 16; Mr John Emmerig, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 23; Mr Ryan Perry, Attorney-General's Department, *Committee Hansard*, 29 July 2020, p. 52; Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 18.

Brewster decision in 2019. This review found the commissions paid to funders, pursuant to such orders, ranged from 8.3 per cent to 30 per cent of the gross settlement sums, with the median commission rate being equal to 21.9 per cent of the gross settlement sum.⁹³ Professor Morabito concluded that, in most cases, the median return to class members was greater when a common fund order was made.⁹⁴ Professor Morabito contended that common fund orders benefit class members more than litigation funders.⁹⁵ Several participants to the inquiry referenced this research.⁹⁶

9.66 Shine Lawyers highlighted comments from Justice Lee on the effect of competitive pressure:

Any interested observer of the market for litigation funding in Australia, would be aware that the market is in a state of flux and is dynamic. This dynamism has two facets. The first is the increasing number of funders coming into the litigation funding market. The second, which no doubt is related to the first, is the apparent downward pressure on funding rates.⁹⁷

9.67 Concern was raised about the adverse impact on competition in the market if common fund orders were unavailable in open class actions in the Federal Court. It was argued that a market with fewer participants is likely to lead to a climb in the rate of commission charged by litigation funders, ultimately operating to the detriment of claimants at the resolution of claims.⁹⁸

9.68 Norton Rose Fulbright considered that the end of the availability of common fund orders at an interlocutory stage will have a greater impact on smaller litigation funders, who may be more hesitant to fund class actions due to less certainty and therefore greater exposure on their investment. However, this change is likely to have minimal impact on larger and more established litigation funders' willingness to fund class actions.⁹⁹

⁹³ Professor Vince Morabito, *Submission 6*, p. 2. See also Vince Morabito, 'An evidence-based approach to class action reform in Australia, Common Fund Orders, Funding Fees and Reimbursement Payments', January 2019, p. 12, cited in Maurice Blackburn Lawyers, *Submission 37*, p. 39.

⁹⁴ Professor Vince Morabito, *Submission 6*, p. 2.

⁹⁵ Professor Vince Morabito, *Submission 6*, p. 2.

⁹⁶ See, for example, Maurice Blackburn Lawyers, *Submission 37*, p. 39; Law Council of Australia, *Submission 67*, p. 8; Mr Ryan Perry, Principal Policy Officer, Legal System Branch, Attorney-General's Department, *Committee Hansard*, 29 July 2020, p. 52; Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group, Attorney-General's Department, *Committee Hansard*, 29 July 2020, p. 51.

⁹⁷ *Lenthall v Westpac Life Insurance Services Ltd* [2018] FCA 1422 [18], cited by Shine Lawyers, *Submission 35*, p. 12.

⁹⁸ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 1.

⁹⁹ Norton Rose Fulbright, *Submission 45*, p. 3.

Court oversight of litigation funding agreements

- 9.69 One of the key areas of contention regarding the impact of common fund orders is whether the Federal Court's oversight of litigation funding agreements operates to effectively safeguard class members from onerous litigation funding commissions.
- 9.70 A number of submissions contended that common fund orders are implemented in a way that is fair and reasonable for class members, ensuring that litigation funders are less likely to benefit from windfall gains and that they address any prejudice to the parties.¹⁰⁰ A related benefit is greater transparency of privately negotiated litigation funding agreements.¹⁰¹
- 9.71 Further, in instances where a litigation funder may pursue their own commercial interests to the detriment of class members, the Federal Court is alive to this issue and intervenes as necessary.¹⁰²
- 9.72 A key concern expressed in submissions was that, if common fund orders were unavailable in open class actions in the Federal Court, the Federal Court's ability to exercise oversight of litigation funding fees is uncertain.¹⁰³ Mr Meyerowitz-Katz considered privately negotiated rates to be generally higher than those permitted by the Federal Court, leading to significantly increased portions of resolution sums being awarded to funders.¹⁰⁴
- 9.73 The continued availability of funding equalisation orders, as confirmed by the High Court in *Brewster*, did not appear to mitigate this concern because, unlike

¹⁰⁰ See, for example, Slater and Gordon, *Submission 18*, p. 9; Maurice Blackburn Lawyers, *Submission 37*, p. 38; Professor Peta Spender, *Submission 50*, pp. 3–4; Association of Litigation Funders of Australia, *Submission 57*, p. 20; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, pp. 20–21; Mr Patrick Moloney, Chief Executive Officer, Litigation Capital Management, *Committee Hansard*, 24 July 2020, p. 37; Ms Janice Saddler, Shine Lawyers, *Committee Hansard*, 27 July 2020, p. 19; Mr John Emmerig, Law Council of Australia, *Committee Hansard*, 29 July 2020, pp. 20–21; Ms Pauline Wright, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 30.

¹⁰¹ Law Council of Australia, *Submission 67*, p. 24.

¹⁰² Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5. See the discussion in Chapter 12 and Appendix 2 regarding the case of *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842.

¹⁰³ The Law Council of Australia *Submission 67*, p. 8. It was noted that there is differing judicial opinion on whether the Federal Court presently has the power to interfere and vary the terms of a litigation funding agreement as demonstrated in, for example, *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, *Earglow Pty Ltd v Newcrest Mining Limited* [2006] FCA 1433, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq) (No 3)* [2017] FCA 330 and *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409.

¹⁰⁴ Mr Daniel Meyerowitz-Katz, *Submission 1*, p 1.

common fund orders, it is unclear whether a funding equalisation order grants the Federal Court the ability to modify a litigation funder's commission rates.¹⁰⁵

Arguments against availability of common fund orders

Increased prevalence of funded class actions

- 9.74 Some submitters argued that when the Federal Court grants an application for a common fund order, there is less pressure placed on the litigation funder to book build, therefore constructing a lower bar for commencing a class action.¹⁰⁶ Submitters contended that as a result, there has been a proliferation of class action litigation, including competing class actions, generating large profits for litigation funders, at the expense of claimants, and potentially without their knowledge or consent.¹⁰⁷
- 9.75 The Menzies Research Centre noted that common fund orders have facilitated the ease with which class action proceedings are commenced because litigation funders are not required to identify class members and seek their agreement to the litigation funding agreement.¹⁰⁸
- 9.76 Allens agreed, arguing that common fund orders encourage a 'race to court' because litigation funders are discouraged from undertaking a book build for reason that with a common fund order, they may bring a class action as soon as they identify one class member to be the representative plaintiff, with the belief that at least six claimants have similar claims.¹⁰⁹ Professor Legg also pointed out that that it is possible for only the representative plaintiff to have signed the

¹⁰⁵ Professor Vince Morabito, *Submission 6*, p. 2. In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia (No 3)* [2020] FCA 461 at [20] it was stated that 'judges who have applied funding equalisation mechanisms appear to have assumed that they lack the power to modify [the funding commission rates]'. Nothing in the judgments handed down by the majority justices in *Brewster* suggests that this judicial belief is incorrect. On the contrary, one of the dissenting justices in *Brewster*, Edelman J, stated at [185]: '... the fund equalisation solution suffers from the difficulty that it involves no necessary assessment by the court of the reasonableness of the remuneration costs incurred by the group members who enter into contracts with a litigation funder. Without such assessment, the group members who did not enter contracts might have unreasonable and excessive remuneration costs imposed upon them in the process of equalisation with those members who might have entered contracts in a "compliant" manner'.

¹⁰⁶ See, for example, Norton Rose Fulbright, *Submission 45*, p. 4; Menzies Research Centre, *Submission 66*, p. 21; Allens, *Submission 69*, pp. 6, 15, 16; Federal Chamber of Automotive Industries, *Submission 70*, p. 7.

¹⁰⁷ See, for example, Menzies Research Centre, *Submission 66*, pp. 22–24; Allens, *Submission 69*, pp. 14–15; Ai Group, *Submission 92*, p. 12.

¹⁰⁸ Menzies Research Centre, *Submission 66*, p. 21.

¹⁰⁹ Allens, *Submission 69*, pp. 6, 15. See also Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 30.

litigation funding agreement and therefore class actions can be commenced very quickly.¹¹⁰

9.77 The Menzies Research Centre described common fund orders to be a distortion of the class action regime that could not have been envisaged when the regime was designed and implemented.¹¹¹ Concern was expressed that a person can become a class member without their knowledge, let alone their consent.¹¹²

9.78 Mr Andrew Saker, Managing Director and Chief Executive Officer of Omni Bridgeway, supported a closed class or opt-in system because undertaking a book build results in the litigation funder gauging the degree of interest among persons affected in pursuing the claim, as well as ensuring that the class members are familiar with their obligations, such as payment of fees.¹¹³

9.79 Allens was concerned the elimination of the book build process removed an integral step in the pre-commencement assessment of the merits and viability of the claims in a class action.¹¹⁴ Similarly, Clayton Utz stated that a key risk with the availability of common fund orders is that:

...litigation funders may commence proceedings without undertaking investigations to determine whether there is a genuine interest among group members in the litigation being brought (as measured by, for example, the willingness of group members to sign litigation funding agreements).¹¹⁵

9.80 A slightly stronger viewpoint was also expressed that common fund orders encourage speculative class action litigation.¹¹⁶ Reasons for this view include that a common fund order removes the risk that insufficient class members will agree to the litigation funder's commission.¹¹⁷

9.81 One reason for Omni Bridgeway's preference for closed class actions was that:

...all class members have taken active steps to participate in the action, indicating support for the class action by the affected individuals and

¹¹⁰ Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 29.

¹¹¹ Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 11.

¹¹² Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 11.

¹¹³ Mr Andrew Saker, Managing Director and Chief Executive Officer, Omni Bridgeway, *Committee Hansard*, 13 July 2020, p. 50.

¹¹⁴ Allens, *Submission 69*, p. 18.

¹¹⁵ Clayton Utz, *Submission 26*, p. 8.

¹¹⁶ See, for example, Federal Chamber of Automotive Industries, *Submission 70*, p. 9; Ai Group, *Submission 92*, p. 12.

¹¹⁷ Ai Group, *Submission 92*, p. 12.

signalling it is not merely a speculative endeavour by a litigation funder or entrepreneurial lawyers.¹¹⁸

Windfall profits to litigation funders

- 9.82 The Menzies Research Centre argued that common fund orders 'were created as a vehicle for litigation funders...to boost their profits'.¹¹⁹ The Menzies Research Centre submitted that a common fund order enables litigation funders to magnify the claim size in class actions, therefore increasing their profits. In its view, through allowing the expansion of the damages pool, the commissions obtained by litigation funders have increased exponentially. It noted the class action relating to Takata airbags in BMWs, where the litigation funder sought to have the entire class of potentially 200 000 members pay its commission, when only 33 class members had entered into a litigation funding agreement and agreed to the funder's terms.¹²⁰
- 9.83 Allens took a similar view, namely that with a common fund order, litigation funders stand to receive a far greater return than what they are contractually entitled to receive under the litigation funding agreement.¹²¹ By comparing a common fund order with a funding equalisation order, Allens drew attention to the fact that, although the 'headline rate' under a common fund order which has been set by the Federal Court may be less than the 'headline rate' in the litigation funding agreement, a greater portion of the resolution sum is contributed by each class member and, therefore, the litigation funder is paid a higher overall commission.¹²²
- 9.84 For example, the common fund order sought by the litigation funder in *Cantor v Audi (No 5)* was highlighted in the Federal Chamber of Automotive Industries submission.¹²³ In that case, pursuant to the litigation funding agreement, the litigation funder was entitled to recover from the 693 class members who had signed the litigation funding agreement, 30 per cent of the total amount which those class members would receive under the settlement, in addition to a management fee. The litigation funder made an unsuccessful application for a common fund order, where it sought to recover from all 43 000 class members 10 per cent of the settlement sum to be distributed among class members, plus

¹¹⁸ Omni Bridgeway, *Submission 73*, p. 26; see also Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 4.

¹¹⁹ Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 11.

¹²⁰ Menzies Research Centre, *Submission 66*, p. 22.

¹²¹ Allens, *Submission 69*, p. 15.

¹²² Allens, *Submission 69*, pp. 15–17.

¹²³ Federal Chamber of Automotive Industries, *Submission 70*, pp. 3–4.

legal costs and the management fee. If the common fund order was made, the litigation funder's return would have increased from \$985 000 to \$7.5 million.¹²⁴

- 9.85 Allens noted that a funding equalisation order generally results in a lower overall amount being paid in commission to a litigation funder even though the 'headline rate' in the litigation funding agreement may be higher than what may be set under a common fund order:

Under a funding equalisation order, the burden of paying the litigation funder is shared equally among all group members in proportion to the amount that they receive. Importantly, and unlike common fund orders, the total burden on group members is not increased, but is limited to the contractual obligations voluntarily incurred by those group members who entered into funding agreements. Although the 'headline rate' in a litigation funding agreement may be higher than the 'headline rate' in a common fund order, the actual amount paid by group members (after the funding equalisation order spreads this burden among all group members) will generally be much lower.¹²⁵

- 9.86 In a recent decision of the Full Court of the Federal Court on the issue of common fund orders, Justice Lee noted that whether a common fund order or a funding equalisation order will return a larger profit to the litigation funder will 'depend on the precise circumstances':

In *Caason*, the Settlement [common fund order] was perceived to be fair and reasonable (and hence just) because, among other things, it provided a greater return for both funded and unfunded group members (and a lesser commission for the funder) than would have been the case if an FEO had been made... In *Hodges*, the Settlement [common fund order] was perceived to be fair and reasonable on the basis that in the circumstances of that case, it resulted in the funders receiving less in total funding commission from all group members than they would have received in the event that the funding agreements had been enforced according to their terms.¹²⁶

Ineffective regulation of litigation funding fees

- 9.87 Some inquiry participants were concerned about the effectiveness of the Federal Court to safeguard against litigation funders profiting at the expense of plaintiffs. Some submissions expressed the view that the supervisory role of the Federal Court is not appropriate or effective in lowering the costs of litigation funding for claimants and, therefore, regulation independent of, or in addition

¹²⁴ *Cantor v Audi (No 5)* [2020] FCA 637 [445].

¹²⁵ Allens, *Submission 69*, p. 17.

¹²⁶ *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [60] (Lee J, Middleton and Moshinsky JJ agreeing).

to, the Federal Court's oversight role of litigation funders is to be considered preferable.¹²⁷

- 9.88 The Menzies Research Centre questioned the Federal Court's ability to effectively safeguard against litigation funders receiving 'extraordinary levels of return'.¹²⁸ The Menzies Research Centre argued that, when the Federal Court reviews the commission and charges sought by the litigation funder and the legal fees charged by the plaintiff law firm, the Federal Court wrongly focuses on the commission as a percentage of the compensation awarded to class members rather than considering the profit measures, such as the return on invested capital (ROIC), used by litigation funders (see Chapter 13 for discussion on calculating reasonable, proportionate and fair litigation funding fees). The Menzies Research Centre concluded that this leads to an undesirable situation:

The approach taken by the court in relation to the funder's remuneration is haphazard and undertaken without regard to principles of corporate finance or benchmarks for risk adjusted rates of return.¹²⁹

- 9.89 Ms Rebecca LeBherz and Mr Justin McDonnell agreed, and set out the ROIC obtained by the litigation funder in the case of *Endeavour River Pty Ltd v MG Responsible Entity Limited*,¹³⁰ comparing it to the average ROIC on other types of investment:

At the reduced amount of 25%, the funder would receive \$8,614,973 or 457% of its costs. The Judge estimated that the funder had outlaid monies over a 12–14-month period (the proceedings were filed on 16 August 2018 and settled in principle at a mediation on 30 May 2019). The litigation risks often cited by funders were identified by the Judge. The risk factor was, arguably, minimised. The average year on year performance of private equity funds is around 12–15% per annum. An individual's superannuation fund is doing well at 7–10% per annum (but 5% is more usual). The funder took the offered 25%.¹³¹

- 9.90 Allens submitted that the speculative exercise of determining the appropriate commercial return for litigation funders should not be a task for the Federal Court, whose role is instead to determine the issues in dispute between the parties.¹³²

¹²⁷ See, for example, Associate Professor Sulette Lombard, *Committee Hansard*, 24 July 2020, p. 12; MinterEllison, *Submission 25*, p. 5; King & Wood Mallesons, *Submission 53*, p. 4; Allens, *Submission 69*, pp. 10–14; Ai Group, *Submission 92*, p. 4.

¹²⁸ Menzies Research Centre, *Submission 66*, p. 19.

¹²⁹ Menzies Research Centre, *Submission 66*, p. 18.

¹³⁰ [2019] FCA 1719.

¹³¹ Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 4.

¹³² Allens, *Submission 69*, p. 14.

- 9.91 The Ai Group agreed, noting that courts are not well placed to determine very complex financial matters. The Ai Group considered the case *Bolitho & Anor v Banksia Securities Limited*¹³³ demonstrates that the courts do not necessarily always have the knowledge that is needed to address these issues.¹³⁴
- 9.92 King & Wood Mallesons stressed that it is not appropriate to expect the court to act as a price regulator, especially when it determines an appropriate rate of commission based on evidence predominately put forward by the funded representative plaintiff.¹³⁵

Competing class actions

- 9.93 Some submissions drew a link between common fund orders and the recent increase in the number of competing class actions.¹³⁶ Allens pointed to evidence indicating an increase in the number of class actions since the advent of common fund orders in the Money Max decision in 2016.¹³⁷
- 9.94 Submitters largely agreed that an increase in competing class actions is not a desirable outcome.¹³⁸ Dr Peter Cashman, a proponent of common fund orders, recognised the role of their advent in increasing the number of competing class actions. However, he considered that this was the downside to the benefits of common fund orders, namely the promotion of open class actions and resultant downward pressure on commission rates (downward pressure on commission rates is discussed later in this chapter).¹³⁹ Litigation Lending Services also acknowledged the drawback of facilitating competing class actions but considered that it can be addressed and is not a reason to discount the benefits of common fund orders.¹⁴⁰
- 9.95 On the contrary, Maurice Blackburn and the NSW Bar Association argued that common fund orders can be used as a tool by judges to manage competing class

¹³³ Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020.

¹³⁴ Ai Group, *Submission 92*, p. 4; Mr Stephen Smith, Head of National Workplace Relations Policy, Ai Group, *Committee Hansard*, 29 July 2020, p. 14. The Banksia class action is discussed in Chapters 12 and 15 and Appendix 2.

¹³⁵ King & Wood Mallesons, *Submission 53*, p. 4.

¹³⁶ See, for example, Litigation Lending Services Ltd, *Submission 36*, p. 20; Norton Rose Fulbright, *Submission 45*, p. 4. Competing class actions are discussed in Chapter 7.

¹³⁷ Allens, *Submission 69*, p. 16.

¹³⁸ See, for example, Litigation Lending Services Ltd, *Submission 36*, p. 20; Maurice Blackburn Lawyers, *Submission 37*, p. 39; Norton Rose Fulbright, *Submission 45*, p. 5; Allens, *Submission 69*, pp. 6, 14–17; Omni Bridgeway, *Submission 73*, p. 28; NSW Young Lawyers, *Submission 89*, p. 23; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19.

¹³⁹ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19.

¹⁴⁰ Litigation Lending Services Ltd, *Submission 36*, p. 20.

actions, pointing to the comments of Justice Beach in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)*:¹⁴¹

...one advantage of early common fund orders was that it assisted to resolve the problem of competing class actions, whether each competing action had their own litigation funder or only one of the competing actions had a funder. For the Court, it did not matter how many members each had signed up or at what contractual commission rates. If one action was to be the winner, the associated funder had to accept the rate to be ultimately struck by the Court under a common fund order. Control of the commission rate was ceded to the Court as the price of success.¹⁴²

Options for reform

Legislative intervention

- 9.96 This section discusses the viewpoint expressed in several submissions that the Australian Parliament should intervene to provide clarity and certainty about the availability of common fund orders after the High Court's decision in *Brewster*.
- 9.97 There were opposing views: whether legislation should expressly allow or expressly ban the Federal Court making a common fund order.
- 9.98 Most litigation funders¹⁴³ and plaintiff law firms¹⁴⁴ supported the Federal Court's power to make common fund orders, and by extension the Federal Court's oversight role of litigation funding agreements, as did a number of other stakeholders.¹⁴⁵
- 9.99 The ALRC recommended in its Final Report that Part IVA of the Federal Court Act should be amended to provide the Federal Court with an express statutory power to make common fund orders on the application of the plaintiff or the

¹⁴¹ Maurice Blackburn Lawyers, *Submission 37*, p. 39; NSW Bar Association, *Submission 96*, p. 11.

¹⁴² [2020] FCA 461 [33], cited in Maurice Blackburn Lawyers, *Submission 37*, p. 39.

¹⁴³ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, pp. 13–15; Harbour Litigation Funding, *Submission 11*, pp. 6–7; Balance Legal Capital, *Submission 13*, p. 3; Woodsford Litigation Funding Limited, *Submission 16*, p. 5; Premier Litigation Funding Management, *Submission 20*, p. 6; Litigation Capital Management, *Submission 23*, pp. 5, 25; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, pp. 2, 5; Augusta Ventures (Australia) Pty Ltd, *Submission 31*, pp. 5–6; Litigation Lending Services Ltd, *Submission 36*, p. 5; Association of Litigation Funders of Australia, *Submission 57*, p. 20.

¹⁴⁴ See, for example, Slater and Gordon, *Submission 18*, p. 9; Maurice Blackburn Lawyers, *Submission 37*, pp. 38–39; Shine Lawyers, *Submission 35*, p. 11; Adero Law, *Submission 38*, p. 3; Norton Rose Fulbright, *Submission 45*, pp. 3–4.

¹⁴⁵ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 5; Professor Vicki Waye, *Submission 5*, p. 5; Professor Vince Morabito, *Submission 6*, p. 2; Professor Peta Spender, *Submission 50*, p. 4; Dr Peter Cashman, *Submission 55*, p. 3; Law Council of Australia, *Submission 67*, pp. 23–26; NSW Young Lawyers, *Submission 89*, p. 2.

Federal Court's own motion.¹⁴⁶ The ALRC noted in its Final Report that it considered an express statutory power to grant a common fund order to be consistent with its other recommendations, including that:

- class actions be initiated as an open class;
- the Federal Court have the power to deal with competing class actions; and
- the Federal Court have an express statutory power to reject, vary, or amend the terms of a third-party litigation funding agreement.¹⁴⁷

9.100 Numerous submissions recommended the Australian Parliament give effect to the ALRC's recommendation for an express statutory power to make common fund orders.¹⁴⁸ Some specified that this statutory power should expressly allow the Federal Court to make a common fund order at any point in the proceeding.¹⁴⁹ Other recommendations were of a more general nature, noting support of an express statutory power to make an order.¹⁵⁰

9.101 Several proponents of this proposal drew attention to the following passage in Beach J's decision in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)*:¹⁵¹

... flowing from *BMW Australia Ltd v Brewster*, I now have less flexibility to deal with commission rates. In my respectful view, this is something that the legislature should address sooner rather than later ... Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place

¹⁴⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 96 (recommendation 3).

¹⁴⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 99. See recommendations 1, 4 and 14. See Chapters 7 and 11.

¹⁴⁸ See, for example, Professor Vince Morabito, *Submission 6*, p. 2; Premier Litigation Funding Management, *Submission 20*, p. 6; Litigation Capital Management, *Submission 23*, p. 25; Shine Lawyers, *Submission 35*, p. 8; Litigation Lending Services Ltd, *Submission 36*, p. 20; Maurice Blackburn Lawyers, *Submission 37*, p. 37; Norton Rose Fulbright, *Submission 45*, p. 3; Dr Peter Cashman, *Submission 55*, p. 1; Association of Litigation Funders of Australia, *Submission 57*, pp. 4–5; Law Council of Australia, *Submission 67*, p. 31; NSW Young Lawyers, *Submission 89*, p. 2; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 19; Professor Vince Morabito, *Committee Hansard*, 24 July 2020, p. 10; Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 22.

¹⁴⁹ See, for example, Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 5; Norton Rose Fulbright, *Submission 45*, p. 1; NSW Young Lawyers, *Submission 89*, p. 20.

¹⁵⁰ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, p. 15; Woodsford Litigation Funding Limited, *Submission 16*, p. 6; AustralianSuper, *Submission 48*, p. 2.

¹⁵¹ [2020] FCA 461.

closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play.¹⁵²

9.102 NSW Young Lawyers qualified their support for an express statutory power, recommending that the Federal Court should be permitted to make a common fund order at any stage of the proceeding only when the litigation funder is no better off than class members after settlement or judgment. NSW Young Lawyers considered that this is the risk that the litigation funder ought to bear, with further consideration to be given to the application of this rule when a claim that appears to have value is later discovered to be valueless.¹⁵³

9.103 Of those who opposed the use of common fund orders, most believed that legislation is required to provide certainty after the Brewster decision, with the effect of prohibiting the Federal Court from making a common fund order.¹⁵⁴ Allens considered that the Brewster decision provides enough clarity that the Federal Court and Supreme Court of NSW do not have the power to make a common fund order at any stage of the proceeding and opposes any legislation which would alter this position.¹⁵⁵

9.104 A middle ground approach was taken by Clayton Utz and Therium Capital Management Australia, recommending that the Australian Parliament legislate to make it clear that the Federal Court is permitted to make a common fund order at the conclusion of the proceeding.¹⁵⁶ Clayton Utz submitted:

If common fund orders are to be permitted, measures should be considered to ensure common fund orders do not encourage class actions being commenced without the same level of investigation (both of the merits of the claim and the level of interest among potential group members) that would occur if common fund orders were not available and a litigation funder were forced to conduct a book build. That can in part be achieved

¹⁵² [2020] FCA 461 [34]. See, for example, Professor Vince Morabito, *Submission 6*, p. 2; Investor Claim Partner Pty Ltd, *Submission 7*, p. 15; Maurice Blackburn Lawyers, *Submission 37*, p. 41; Law Council of Australia, *Submission 67*, p. 24; NSW Bar Association, *Submission 96*, p. 11.

¹⁵³ NSW Young Lawyers, *Submission 89*, p. 23, noting *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [18]-[19] (Beach J): 'No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery.'

¹⁵⁴ King & Wood Mallesons, *Submission 53*, p. 4; Federal Chamber of Automotive Industries, *Submission 70*, pp. 9 and 11; Omni Bridgeway, *Submission 73*, p. 26; Ai Group, *Submission 92*, p. 12; Mr James Mathias, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 11; Ms Kristen Wydell, Chartered Accountants ANZ, Fellow Chartered Accountant, Chartered Accountants Australia & New Zealand, *Committee Hansard*, 27 July 2020, p. 58; Mr Stephen Smith, Head of National Workplace Relations Policy, Ai Group, *Committee Hansard*, 29 July 2020, p. 14.

¹⁵⁵ Allens, *Submission 69*, p. 19.

¹⁵⁶ See, for example, Clayton Utz, *Submission 26*, p. 8; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 5.

by ensuring that a common fund application may only be made at the end of proceedings and that litigation funders have no guarantee that such an order will be made unless and until their investment in the litigation and its benefit to group members generally have been demonstrated.¹⁵⁷

9.105 NSW Bar Association submitted that while it did not have a position for or against common fund orders, it agreed with the comment of Justice Beach that their availability should be addressed by the Australian Parliament sooner rather than later. NSW Bar Association encouraged a uniform approach to the equitable distribution of the proceeds of class actions to apply in all jurisdictions with class actions to avoid the issue of forum shopping.¹⁵⁸

One inclusive fee

9.106 NSW Young Lawyers proposed the following 'ideal form' of a common fund order:

...when a percentage of the gross settlement is paid to the funder, out of which 'expenses paid by the funder in the course of funding the litigation, including legal costs, disbursement and any premium paid in relation to the provision of security for costs' must be deducted'.¹⁵⁹

9.107 In other words, the NSW Young Lawyers supported a single and inclusive litigation funding fee as it would act as a tool to encourage litigation funders to minimise costs.¹⁶⁰

Committee view

9.108 Common fund orders have positive and adverse impacts on the operation of a reasonable, proportionate and fair class action system and litigation funding industry.

9.109 The principle that some class members who have signed a litigation funding agreement should not be burdened with the costs of that service, when other class members who similarly benefit from a successful outcome are not required to contribute to the costs incurred, is consistent with the objective of implementing class action procedures and achieving outcomes which are reasonable, proportionate and fair.

9.110 The committee expresses below its view on two key aspects of the debate on common fund orders. First, the impact of the availability of common fund orders in the Federal Court on the class action and litigation funding industry in Australia. Second, common fund orders are the subject of procedural contests

¹⁵⁷ Clayton Utz, *Submission 26*, p. 8.

¹⁵⁸ NSW Bar Association, *Submission 96*, p. 11.

¹⁵⁹ NSW Young Lawyers, *Submission 89*, p. 23, citing *Impiombato v BHP Billiton Limited* [2018] FCA 1272 [15] (Moshinsky J).

¹⁶⁰ NSW Young Lawyers, *Submission 89*, p. 24.

which have created uncertainty about their availability and application in open class actions in the Federal Court.

Impacts of common fund orders

- 9.111 First, the availability of a common fund order encourages class actions to operate with an open class. Open class actions are a key tenet of the federal class action system that enables a common binding decision for all with common claims without a requirement to take positive steps for participation, thereby increasing the efficiency of the administration of justice. In this regard, open class actions promote certainty and finality of outcome for defendants from a settlement or judgment as all common claims are resolved, subject to those of individuals who have actively taken the step to opt out.
- 9.112 However, common fund orders may also encourage commencement of class actions without undertaking investigations to determine interest among class members and the potential for less consideration of the merits and viability of the claims.
- 9.113 Further, the committee notes the evidence from submitters of the increased prevalence of competing class actions since the advent of common fund orders. In Chapter 7, the committee recommends a multifaceted approach to addressing the issues associated with competing class actions, including clarifying in statute and the Federal Court's Class Actions Practice Note the powers and process to manage and resolve competing and multiple class actions.
- 9.114 Second, the Federal Court's intervention to amend and restrain funding commissions sought by litigation funders when a common fund order has been made is a positive step. Increased oversight has led to heightened transparency of the funding fees and commissions charged by litigation funders, illustrating that their returns are often unreasonable compared to the costs incurred or risks assumed.
- 9.115 The committee recognises the uncertainty, created by divided judicial opinion in the Federal Court, regarding the Federal Court's power to adjust litigation funding fees in the absence of a common fund order. For these reasons, in Chapter 11 the committee recommends legislative amendments to give the Federal Court the ability to adjust, vary and reject the terms of litigation funding agreements, including the fees and commissions charged, in any class action, rather than just those where a common fund order has been made, to ensure the costs are reasonable, proportionate and fair. Therefore, if these reforms were implemented, the Federal Court's power to intervene in the contractual relationship of the litigation funder and the representative plaintiff (and class members) would no longer be unique to common fund orders.
- 9.116 However, litigation funding fees, often stated as a percentage of the settlement sum, has in many cases led to outcomes where large portions of the settlement flow to litigation funders, where unreasonable and disproportionate profits are

obtained at the expense of class members. The Federal Court's power to amend the commission rates is just one piece of the puzzle to ensuring reasonable, proportionate and fair costs, and thus outcomes, in funded class actions

- 9.117 The committee's views on potential approaches to limit windfall profits for litigation funders are discussed in Chapter 13. In that chapter, the committee notes the proposal by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the Australian Government investigate the best way to implement this floor. The committee also recommends the Australian Government investigate whether a graduated minimum return above this floor is appropriate for shorter, less risky and less complex cases.
- 9.118 Codified requirements on what is considered a fair and reasonable return to litigation funders is a more robust and effective way of addressing the high cost of litigation funding than leaving this issue to potentially be resolved by market forces or ad-hoc judicial intervention.

Availability of common fund orders

- 9.119 The committee notes the uncertainty in recent years concerning the availability of common fund orders. Uncertainty can lead to increased costs. The committee heard that the availability of common fund orders resulted in an increased number and variety of class actions involving a litigation funder. A lack of predictability in outcomes may deter litigation funders from funding particular cases, potentially resulting in a more limited number of funders in the Australian market and less beneficial funding terms for consumers. Additionally, uncertainty or ambiguity relating to the scope of the Federal Court's procedural powers is conducive to procedural contests by the parties, thus increasing costs and delays in the resolution of the substantive claims for class members.
- 9.120 There have been some developments since the Brewster decision which offer some clarity on the Federal Court's approach to common fund orders. The committee welcomes the amendment to the Federal Court's Class Actions Practice Note following the decision in Brewster, which indicates to all participants to funded class actions the position of the Federal Court when it comes to the sharing of costs among class members.
- 9.121 In addition, the recent decisions of the Full Court of the Federal Court and the NSW Court of Appeal also provide some clarity on the Brewster decision. That is, those Courts decided that the High Court's decision in Brewster on the lack of a power to make a common fund order is limited to common fund orders made at an early stage in the proceeding and does not impact on power to make a common fund order at the point of settlement or judgment in a class action.

9.122 The committee considers that when an application for a common fund order can only be made at the resolution (either settlement or judgment) of a class action, litigation funders may be more encouraged to undertake a book build, thereby possibly leading to a greater investigation of the level of interest among class members. Further, the application of the common fund order would be made when there is greater certainty about the class action profile (number of class members, quantum of claim) and the transaction costs incurred (the division of the proceeds from a settlement or judgment). The availability of a common fund order at the end of a proceeding promotes outcomes which are reasonable, proportionate and fair for all class members as all who financially benefit from the class action are required to contribute to the costs incurred.

9.123 With the aim of optimising clarity and certainty about the availability and application of common fund orders in the Federal Court, the committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in *Brewster*.

Recommendation 7

9.124 The committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.

Chapter 10

Protecting class members from adverse costs

Introduction

- 10.1 The financial barrier to accessing the class action regime established by the 'loser pays' rule, where a representative plaintiff would be liable to pay for the defendant's legal costs if their case was unsuccessful, was a catalyst for the advent of litigation funding in Australia.
- 10.2 A further barrier can be the requirement to provide security to the court, usually early on in the class action proceedings, to establish that sufficient funds would be available in the event that the class action was unsuccessful. Litigation funding overcame both these barriers to accessing the class action regime because a litigation funding agreement invariably indemnifies the representative plaintiff for any adverse costs order and is typically required by the Federal Court of Australia (Federal Court) to pay security for costs.
- 10.3 An indemnity against adverse costs orders not only acts as a mechanism to protect the representative plaintiff from incurring significant costs. It also places a level of risk on those subject to such orders in bringing a class action. This is critical to ensuring that litigation funders appropriately assume sufficient levels of risk for financing class actions. This effectively acts as a safeguard against the possibility of unmeritorious or 'entrepreneurial' class action litigation. Additionally, a security for costs order provides assurance to defendants that their litigation costs will be covered if the class action is unsuccessful.
- 10.4 Insurance products are available to litigation funders to indemnify against this risk. The insurance premiums are expensive. The premium costs are often passed on to class members as litigation funding agreements often require that cost of the premium is deducted from the settlement sum. Submitters were concerned that, in some cases, the litigation funder could obtain windfall profits which are not commensurate with the risks undertaken as their risks are insured and they are often not burdened with the costs of that insurance.
- 10.5 This chapter canvasses these issues, the current practice of the Federal Court regarding adverse costs and security for costs orders, and proposals for reform. The chapter concludes with the committee's views and recommendations.

Financial barrier to accessing the class action regime

- 10.6 Australia's civil litigation system adopts a 'loser pays' rule which, in most circumstances, including class actions, requires the unsuccessful party to litigation to pay the legal costs of the successful party.¹ This is commonly known as 'adverse costs'.²
- 10.7 If it is deemed necessary by the Federal Court, an applicant, or in the case of class actions – the representative plaintiff – pays security to the Federal Court to ensure that there are available funds in the event the defendant is successful and an adverse costs order is made.³ Class members can be required to contribute to this security.⁴
- 10.8 In a class action undertaken by the plaintiff law firm on a 'no win, no fee' basis, the representative plaintiff's lawyers usually do not indemnify the representative plaintiff for adverse costs and are not usually required to provide security for costs.⁵ Therefore, the risk of adverse costs, and the potential

¹ Stephen Colbran et al, *Civil Procedure – Commentary and Materials*, 6th edition, LexisNexis Butterworths, 2015, p. 1090. See *Court Procedures Rules 2006* (ACT), r. 1721(1); *Uniform Civil Procedure Rules 2005* (NSW), r. 42.1; *Supreme Court Rules 1961* (NT), r. 63.03(1); *Uniform Civil Procedure Rules 1999* (Qld), r. 681; *Supreme Court Civil Rules 2006* (SA), r. 263(1); *Supreme Court Civil Procedure Act 1932* (Tas), s. 12(2); *Supreme Court Act 1986* (Vic), s. 24; *Rules of the Supreme Court* (WA), O. 66 r. 1.

² In general terms, costs are usually ordered on a conservative basis, known as costs on a 'standard' or 'ordinary' basis, and normally amount to less than the expenses actually incurred. Costs may also be determined on an 'indemnity' basis where an award for costs covers all costs, including fees, charges, disbursements, expenses and remuneration that have not been unreasonably incurred. Usually, particular circumstances must be shown to justify such an award, such as the rejection of a generous offer of settlement. See *Court Procedures Act 2004* (ACT), r. 1752(4); *Civil Procedure Act 2005* (NSW), r. 42.5; *Supreme Court Act 1961* (NT), r. 63.27; *Civil Proceedings Act 2011* (Qld), r. 703(3); *Supreme Court Act 1935* (SA), r. 264(5)(b); *Supreme Court Act 1986* (Vic), r. 6.30.1.

³ *Federal Court of Australia Act 1976*, ss. 56(1); *Federal Court Rules 2011*, r. 19.01. This is a request to the Federal Court asking it to require the plaintiff pay a sum of money to the Federal Court which would be appropriate to meet the defendant's litigation costs in the event that the plaintiff's case is unsuccessful. This payment is held by the Court to ensure that there are available funds in the event the defendant is successful and is awarded costs.

⁴ In a class action which is not funded by a third-party litigation funder, if a security for costs order is made, the Federal Court may require that class members contribute to security. This is different to other costs orders in class actions. The Federal Court Act requires that costs orders, other than security for costs orders, can only be made against the representative plaintiff and class members are immune from contributing. See *Federal Court of Australia Act 1976*, ss. 43(1A); *Bray v Hoffman-La Roche* (2003) 130 FCR 317; Dr Peter Cashman, 'The Use and Abuse of Security for Costs in Class Actions', *Journal of Civil Litigation and Practice*, vol. 7, 2018, pp. 22–23.

⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 187; NSW Young Lawyers, *Submission 89*, p. 8, unless a firm volunteers up security for costs, courts will not order security for costs from a law firm acting on a 'no win, no fee' basis: *Madgwick v Kelly* (2013) 299 ALR

requirement to pay security, presents a financial barrier to commencing class actions in the federal regime.⁶

- 10.9 In its 2018 Final Report, the Australian Law Reform Commission (ALRC) commented on the failure of Part IVA of the Federal Court Act (or any other relevant legislation) to relieve the pressure of adverse costs on a representative applicant:

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.

- 10.10 Litigation funders agree to pay any adverse costs order and to provide any amount which may be required as security for costs.⁷ The ALRC described litigation funding as filling the gap created by the costs regime in the Federal Court:

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.⁸

- 10.11 With respect to security for costs, the Federal Court generally, as a matter of practice, requires litigation funders to provide security for costs when funding class actions.⁹ Professor Vince Morabito submitted that security for costs has been ordered in all class action supported by litigation funders.¹⁰

188 [43]-[47] (Allsop CJ, Middleton J), agreeing with *Kelly v Willmott Forests Ltd (in liquidation)* (2012) 300 ALR 675 [101]-[103] (Murphy J).

⁶ Grata Fund, *Submission 76*, p. 7.

⁷ See, for example, Association of Litigation Funders of Australia, *Submission 57*, p. 8; Phi Finney McDonald, *Submission 87*, p. 15; NSW Young Lawyers, *Submission 89*, p. 8; Dr Peter Cashman, 'The Use and Abuse of Security for Costs in Class Actions', *Journal of Civil Litigation and Practice*, vol. 7, 2018, p. 29.

⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 49.

⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 160.

¹⁰ Professor Vince Morabito, *Submission 6*, p. 1.

Ensuring appropriate levels of risk in funded class actions

10.12 This section considers the role of adverse costs and security for costs orders in creating appropriately sufficient levels of risk for litigation funders financing class actions so as to safeguard the possibility of unmeritorious or 'entrepreneurial' class action litigation.

Adverse costs

Objective

10.13 Submitters noted the prospect of an adverse costs order for litigation funders acts as a significant deterrent against the pursuit of unmeritorious claims.¹¹ There is a view that claimants, and by extension lawyers and litigation funders, are dissuaded from pursuing frivolous litigation at the risk of being ordered to pay the defendant's legal fees and, therefore, bear almost the entire cost of the proceedings.¹²

Insurance to indemnify against the risk

10.14 A litigation funder may assume the risk of an adverse costs order, or they may take out an after-the-event (ATE) insurance policy to insure against this risk. In the latter scenario, ATE insurance indemnifies, up to a certain sum, a litigation funder from paying adverse costs if the representative plaintiff's case is unsuccessful.¹³ The cost of the ATE insurance premiums is often passed on to the representative plaintiff and class members.¹⁴

10.15 The Australian Institute of Company Directors noted the deterrent factor of potential liability for an adverse costs order is not as effective if parties can obtain ATE insurance.¹⁵

¹¹ See, for example, Harbour Litigation Funding, *Submission 11*, p. 4; Balance Legal Capital, *Submission 13*, p. 2; Slater and Gordon, *Submission 18*, p. 10; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 4; Shine Lawyers, *Submission 35*, p. 67; ISS Securities Class Action Services, *Submission 62*, p. 3; Omni Bridgeway, *Submission 73*, pp. 1, 5, 7, 10; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 4; Phi Finney McDonald, *Submission 87*, p. 15; Professor Vince Morabito, *Committee Hansard*, 24 July 2020, p. 9.

¹² Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 4.

¹³ Professor Michael Legg, *Submission 30*, p. 1.

¹⁴ See, for example, Australian Securities and Investments Commission, *Submission 39*, p. 19; Omni Bridgeway, *Submission 73*, p. 7; Menzies Research Centre, *Submission 66*, p. 29; Mr Andrew Saker, Managing Director and Chief Executive Officer, Omni Bridgeway, *Committee Hansard*, 13 July 2020, p. 58; Menzies Research Centre, *Submission 66*, p. 29.

¹⁵ Australian Institute of Company Directors, *Submission 40*, p. 4.

Level of risk assumed and reasonable litigation funding fees

10.16 When the Federal Court considers the question of whether a settlement agreement contains a reasonable funding commission, the quantum of adverse costs exposure that a litigation funder has assumed under a particular contractual agreement in a class action is an important factor.¹⁶

10.17 The Petersen case demonstrates that, in those circumstances, the litigation funder had limited risk to adverse costs through the purchase of ATE insurance (see Box 10.1).

Box 10.1 ATE insurance, level of risk and reasonable return - *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*

The Petersen class action is instructive because it illustrates:

- the limitations of the Federal Court's power to amend the terms of litigation funding agreements in the absence of an express power to do so; and
- the impact of the existence of an ATE insurance policy on the level of risk undertaken by the litigation funder and resultant impact on a fair and reasonable commission.¹⁷

In the Petersen class action, the litigation funder agreed to indemnify the representative plaintiff against any adverse costs order, up to a specified cap, in the class action. An ATE insurance policy was purchased, with an initial payment paid by the litigation funder of \$355 300. The contingent premium payable on success, by the litigation funder to the insurer, was just over \$1.06 million.¹⁸

The litigation funding agreement entitled the litigation funder to a commission of 25 per cent of any gross settlement, or three times the aggregate of all costs (including adverse costs and any security for costs paid in cash) and also to be reimbursed for the premium in full for the ATE insurance.¹⁹

At settlement approval for the class action, the litigation funder sought an order from the Federal Court that it would be reimbursed for the total ATE insurance premium (just over \$1.42 million) from the settlement sum.²⁰

This application was opposed by the representative plaintiff. It submitted that the insurance was only for the litigation funder's benefit, since the insurance covered the risk of an adverse costs order to which only the litigation funder was exposed, pursuant to its indemnity to the representative plaintiff.²¹

¹⁶ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 [80].

¹⁷ [2018] FCA 1842.

¹⁸ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [198].

¹⁹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [201].

²⁰ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [198].

²¹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [199].

The Federal Court held the representative plaintiff's request that the Federal Court not approve the reimbursement for the ATE insurance amounted to a request that the Federal Court 'effectively rewrite the funding agreement'. It noted that, while it considered the Federal Court to have the power to vary a funding commission under section 33V, this power had recently been doubted and 'varying other terms of the agreement would be a further step further' than varying litigation funding commission term.²²

In these circumstances, the Federal Court held that this issue is relevant to the level of risk the litigation funder assumed and 'what constitutes a reasonable reward for that risk'.²³

In that context, the Federal Court noted the litigation funder was only required to advance \$355 300 to pass off the risk of adverse costs and the \$1.06 million was ultimately carried by the representative plaintiff (and class members via a common fund order). In these circumstances, the Federal Court held the litigation funder did not have any adverse costs exposure because if the case was unsuccessful, the ATE insurer would pay the adverse costs up to the specified limit. If the case was successful, the contingent premium of \$1.06 million was not an expense of the litigation funder as it was payable only on success and by deduction from the settlement sum.²⁴

As a result, the Federal Court concluded the litigation funder's exposure to adverse costs was low, its cost in insuring that risk was low, and the substantial cost of adverse costs was ultimately met directly by the representative plaintiff and class members. The Federal Court further held that the money paid by the litigation funder for security for costs was not really at risk because it had the ATE policy and, if the case was unsuccessful, the insurer was obliged to pay the adverse costs and the litigation funder would have recovered the amount it had already paid to the Federal Court.²⁵

The low risk of adverse costs and the substantial costs passed on to class members were two key factors, among others, which led the Federal Court to reduce the litigation funder's commission from 25 per cent to 13.7 per cent.²⁶

²² *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [209].

²³ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [197]–[202].

²⁴ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [206].

²⁵ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [245]–[253].

²⁶ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [257].

Costs of ATE insurance

- 10.18 The cost of ATE insurance was variously viewed by submitters as 'substantial'²⁷ to 'astronomical'.²⁸ Dr Cashman noted ATE insurance premiums can be between 30 to 50 per cent of the cover, a small portion of which is paid at the outset and the balance is contingent on a successful outcome.²⁹ Therefore, the insurer does not receive the balance of the premium if the case is unsuccessful.³⁰
- 10.19 If the case is successful, the premium is payable, and the issue arises as to who pays for the outstanding balance of the premium.³¹ In some instances, the cost of the premium is passed on to the class members as the litigation funding agreement stipulates the sum is payable from the settlement or judgment amount.³²
- 10.20 However, this is not always the case. Omni Bridgeway submitted it generally does not pass on the costs of ATE insurance to the class members.³³ Instead, its exposure to pay any adverse costs order, in the event the claims are unsuccessful, is reflected in the amount of commission charged under its litigation funding agreement and it does not charge this cost as a separate reimbursable sum from the settlement sum.³⁴
- 10.21 Another approach, as explained by Dr Cashman, is that as part of the settlement, the defendant agrees to pay all transaction costs, including the outstanding ATE premium balance, on top of the amounts payable for class members, rather than out of the proceeds payable to class members.³⁵

²⁷ See, for example, Professor Michael Legg, *Submission 30*, p. 1; Omni Bridgeway, answer to question on notice, 17 July 2020 (received 3 August 2020), p. 6.

²⁸ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 29.

²⁹ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.3*, p. 32.

³⁰ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 29.

³¹ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 29.

³² See, for example, Australian Securities and Investments Commission, *Submission 39*, p. 19; Omni Bridgeway, *Submission 73*, p. 7; Menzies Research Centre, *Submission 66*, p. 29; Mr Andrew Saker, Omni Bridgeway, *Committee Hansard*, 13 July 2020, p. 58; Menzies Research Centre, *Submission 66*, p. 29.

³³ See, for example, Omni Bridgeway, *Submission 73*, p. 7; Mr Andrew Saker, Omni Bridgeway, *Committee Hansard*, 13 July 2020, p. 58; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 29.

³⁴ See, for example, Omni Bridgeway, *Submission 73*, p. 7; Omni Bridgeway, answer to written question on notice, 17 July 2020 (received 3 August 2020), p. 6; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 29. Omni Bridgeway noted the exposure to adverse costs represents about 70 per cent of the clients' costs, assuming only one separately represented defendant.

³⁵ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 29.

Security for costs

Objective

10.22 For the Federal Court to exercise its discretion to order security for costs, the defendant must satisfy the Federal Court that the plaintiff, for example, would be unable to pay the costs of the defendant if so ordered.³⁶ Further reasons the Federal Court may order security for costs include:

- the plaintiff is ordinarily resident outside Australia;
- the plaintiff is suing for someone else's benefit;
- the plaintiff is impecunious; or
- any other relevant matter.³⁷

10.23 If the Federal Court considers that security for costs is required, the defendant provides an estimate to the Federal Court of its likely recoverable costs in the proceeding. The security ordered must be in a form which will provide adequate and fair protection to the defendant. This form may be the payment of money into the Federal Court, bank bonds or guarantees.³⁸

10.24 An order for security for costs has been viewed as necessary in a funded class action because a litigation funder is a non-party who stands to financially benefit from the outcome of proceedings.³⁹ The Federal Court has stated that a litigation funder ought to 'bear part of the risk'.⁴⁰

10.25 Dr Cashman has noted that, on face value, there may be little reason to doubt the financial capacity of a litigation funder who has contractually agreed to pay any order for adverse costs and any amount that may be required by way of security for costs. However, security for costs may be deemed necessary in class actions with litigation funding for the following reasons:

- the financial capacity of the litigation funder may not be readily apparent;
- the litigation funder may be based in a jurisdiction outside of Australia; or
- the litigation funding agreement may provide that in certain circumstances the litigation funder may decline to continue funding the case.⁴¹

³⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 160.

³⁷ Federal Court Rules 2011, r. 19.01.

³⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 160.

³⁹ *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148; *Idoport Pty Limited v National Australia Bank Ltd* [2001] NSWSC 744; *Chartspike Pty Ltd v Chaboud* [2001] NSWSC 585.

⁴⁰ *Chartspike Pty Ltd v Chaboud* [2001] NSWSC 585 [5] (Young CJ in Eq).

⁴¹ Dr Peter Cashman, 'The Use and Abuse of Security for Costs in Class Actions', *Journal of Civil Litigation and Practice*, vol. 7, 2018, pp. 22–23.

10.26 In a decision of the Supreme Court of New South Wales (NSW), it was stated:

...courts should be particularly concerned that persons whose involvement in litigation purely for commercial profit should not avoid responsibility for the costs if the litigation fails.⁴²

Insurance to indemnify against the risk

ATE insurance

10.27 As an ATE policy creates a fund of monies which is accessible to satisfy adverse costs in the chance of their advent, litigation funders have attempted to use an ATE insurance policy to satisfy security for costs. The Federal Court has not accepted an ATE insurance policy as an adequate form of security but it has accepted a deed of indemnity from an ATE insurer, which is explained in Box 10.2 below.

10.28 Whether an ATE policy has been accepted as security for costs in a particular case depended on the terms of those policies. This is because:

Although an ATE policy is a way of funding litigation in the sense of creating a pool of money for that purpose, it is also a form of insurance which means it has the characteristics (and limitations) of an insurance policy.⁴³

Box 10.2 ATE insurance as security for costs - *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*

The Federal Court considered the adequacy of an ATE policy as security for costs in the Petersen class action.⁴⁴ The litigation funder agreed to indemnify the representative plaintiff against any adverse costs order, up to a specified cap, in the class action. An ATE insurance policy was purchased, which indemnified the representative plaintiff for the defendant's costs up to \$5.5 million, with an initial premium of \$355 300 paid by the litigation funder. The contingent premium payable on success was just over \$1.06 million.⁴⁵

The Federal Court ordered security for costs. The litigation funder sought to provide the ATE insurance policy as security. The Federal Court held it was possible for an ATE policy to provide sufficient security for a defendant's cost, however the ATE policy purchased by the litigation funder in this case did not provide adequate security.⁴⁶

⁴² *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2008] NSWCA 148 [51] (Hodgson JA).

⁴³ Odette McDonald and Roop Sandhu, 'Adverse costs: Insurance as security for costs in class actions', Paper, 20 October 2017, p. 14.

⁴⁴ [2017] FCA 699.

⁴⁵ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [198].

⁴⁶ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699 [92], [107]–[127].

In the Petersen class action, the Federal Court noted the considerations that led it to the conclusion that the ATE policy in question did not by itself provide adequate security, including:

- the plaintiffs, rather than the defendants, were named in the ATE policy as the insured. Although the plaintiffs undertook to claim on the ATE policy, and do so expeditiously, in the event of an adverse costs order, that undertaking by the plaintiffs did not extend to suing the insurer to enforce legitimate claims the insurer would not meet;
- the undertakings did not give rise to contractual rights between the plaintiffs and the defendants, since the undertakings were only given to the court;
- while it was open to the defendant to make a claim on the policy under relevant legislation, this would have encountered difficulties given that the insurer was in a jurisdiction outside Australia;
- there was a risk that the policy could be cancelled for non-disclosure because it was obtained by the litigation funder for the benefit of the plaintiffs but without input from the plaintiffs;
- there were exclusion clauses within the policy which created a more than merely 'theoretical' risk for the defendants; and
- if the policy was cancelled, the defendant's protection for costs incurred up to that point 'would have evaporated'.⁴⁷

In this case, the Federal Court held that an appropriate form of security was payment of money into the court, the provision of a bank guarantee or an appropriately worded unconditional indemnity from an ATE insurance provider.⁴⁸ The litigation funder paid \$1.486 million into the court as security for costs.⁴⁹

Deed of indemnity as security for costs

10.29 A deed of indemnity is another kind of product which may be available from an ATE insurance provider. The factors that prevent an ATE insurance policy from sufficing security for costs do not apply to a deed of indemnity. This is because it is given by the ATE insurer directly to the defendant and a deed is generally not subject to cancellation or exclusions (since they are irrevocable). Therefore, the issue of a lack of protection for the defendant's costs up to the point when a policy is cancelled does not arise.⁵⁰

⁴⁷ Odette McDonald and Roop Sandhu, 'Adverse costs: Insurance as security for costs in class actions', Paper, 20 October 2017, p. 16.

⁴⁸ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699 [187].

⁴⁹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [204].

⁵⁰ Odette McDonald and Roop Sandhu, 'Adverse costs: Insurance as security for costs in class actions', Paper, 20 October 2017, p. 17.

- 10.30 Deeds of indemnity have been accepted as adequate security for costs in class actions in Australian courts.⁵¹ Presently, there are no Australian insurers offering a deed of indemnity. They are generally provided by insurers based in the United Kingdom.⁵²
- 10.31 In the instance where the deed of indemnity is provided by a foreign insurer, payment into the court of a relatively modest amount is required to accompany the deed of indemnity. This is usually a sum sufficient to cover the defendant's costs of enforcing the deed.⁵³
- 10.32 For example, in the ALRC's Final Report, it noted that in *Capic v Ford Motor Company of Australia Ltd*,⁵⁴ the Federal Court approved security for costs being provided by way of a deed of indemnity from an ATE insurer in the United Kingdom, with the payment of \$20 000 into the Federal Court for the purpose of covering the enforcement costs of the deed in the United Kingdom if the defendant's case was successful.⁵⁵
- 10.33 The drawbacks of a deed of indemnity are that few insurers are prepared to assume the more extensive risks of such a product, and when an insurer is prepared to do so, the costs of the deed can significantly exceed the cost of an ATE policy.⁵⁶

Class actions with claims arising under the Fair Work Act

- 10.34 In industrial matters, the 'loser-pays' rule is generally not applied. A party to proceedings arising under the *Fair Work Act 2009* (Fair Work Act) in the Federal Court usually pays its own costs.⁵⁷ However, the Federal Court held in *Turner v*

⁵¹ *DIF III Global Co-Investment Fund, LP v BBLP LLC* [2016] VSC 401; *Australian Property Custodian Holdings Ltd (in liq) v Pitcher Partners* [2015] VSC 513.

⁵² Litigation Capital Management, *Security for costs 'in a form enforceable in Australia'*, 4 February 2019, www.lcmfinance.com/lcm-investment-manager-susanna-taylor-responds-to-the-alrcs-recommendation-regarding-security-for-costs-in-class-actions/ (accessed 6 October 2020).

⁵³ Odette McDonald and Roop Sandhu, 'Adverse costs: Insurance as security for costs in class actions', Paper, 20 October 2017, p. 17.

⁵⁴ Order of Perram J in *Capic v Ford Motor Company of Australia Limited* (Federal Court of Australia, NSD724/2016, 9 June 2020).

⁵⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 165.

⁵⁶ Odette McDonald and Roop Sandhu, 'Adverse costs: Insurance as security for costs in class actions', Paper, 20 October 2017, p. 17.

⁵⁷ *Fair Work Act 2009*, s. 570. A party may be ordered to pay the other party's costs if unless the Federal Court considers: the proceedings were instituted vexatiously or without reasonable cause; the party's conduct caused the other party to incur costs; or a party fails to comply with the Federal Court's Practice Note or the court's orders. See also Federal Court of Australia, [Employment and Industrial Relations Practice Note](#) (E&IR-1), National Practice Area Practice Note, 20 December 2019, sub-cl. 10.1.

Tesa Mining (NSW) Pty Limited (Tesa Mining),⁵⁸ the Fair Work Act does not qualify or confine the power of the Federal Court to order costs against a non-party, including a litigation funder.⁵⁹ Therefore, litigation funders may be liable for adverse costs and security for costs orders in class actions with claims arising under the Fair Work Act.⁶⁰

10.35 The Ai Group noted the litigation funder in the Tesa Mining class actions has sought leave to appeal the Federal Court's decision. The Ai Group submitted the decision in Tesa Mining must not be disturbed and litigation funders must be exposed to adverse costs order against unsuccessful class actions.⁶¹ The Ai Group recommended the Fair Work Act be amended to exclude litigation funders of class actions from the operation of the 'no costs' jurisdiction of the Fair Work Act, consistent with the decision of Tesa Mining.⁶²

Proposed reforms

ALRC recommendations

10.36 The ALRC recommended Part IVA of the *Federal Court of Australia Act 1976* (Federal Court Act) be amended so that litigation funding agreements with respect to class actions must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order.⁶³ This recommendation was supported in submissions.⁶⁴ The ALRC noted that this recommendation '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'.⁶⁵

10.37 The ALRC also recommended that the Federal Court Act be amended to include a statutory presumption that litigation funders in class actions provide security

⁵⁸ [2019] FCA 1644.

⁵⁹ *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644 [78].

⁶⁰ *Turner v Tesa Mining (NSW) Pty Limited* [2019] FCA 1644 [69], [78].

⁶¹ Ai Group, *Submission 92*, p. 20.

⁶² Ai Group, *Submission 92*, p. 20.

⁶³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 169 (recommendation 14), 171.

⁶⁴ See, for example, Law Institute of Victoria, *Submission 3*, p. 4; Professor Vicki Waye, *Submission 5*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, p. 15.

⁶⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 169

for costs in a form that is enforceable in Australia.⁶⁶ The ALRC commented that this would introduce a prohibition on the litigation funder from seeking contributions to the security.⁶⁷ Some submissions expressed support for this recommendation.⁶⁸

10.38 The ALRC explained the effect of this recommendation, if implemented, would be to move the onus from the defendant to the litigation funder:

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. 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.⁶⁹

10.39 The ALRC also commented that the provision of indemnities from ATE insurers to satisfy security for costs orders is a recent development in Australia.⁷⁰ It noted that the part of its recommendation requiring security for costs to be enforceable in Australia sought to not impose any restrictions on the forms of security available, but considered it unreasonable, as a matter of public policy, that a defendant may be required to litigate in a foreign country in order to recover the security for costs provided.⁷¹ As noted above, the ALRC recommended that the Federal Court Act should be amended to include a statutory presumption that litigation funders in class action provide security for costs in a form that is enforceable in Australia.

⁶⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 163 (recommendation 12).

⁶⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 164. In the United Kingdom, paragraph 25.14(2)(b) of the *Civil Procedure Rules* (UK) expressly provides that a third-party litigation funder may be ordered to provide security for costs.

⁶⁸ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, p. 14; Australian Finance Industry Association, *Submission 81*, p. 6.

⁶⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 164.

⁷⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 171.

⁷¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 165.

Returns which are reasonable, proportionate and fair to risk assumed

10.40 Chapter 13 considers various approaches to determining reasonable, proportionate and fair returns to litigation funders. One such approach uses investment and insurance risk-return principles, as proposed by Mr Sean McGing, an actuary.

10.41 Mr McGing submitted that returns should be commensurate with the risk taken. Higher risks should be associated with higher returns to compensate for the greater uncertainty and the higher losses over time expected on some of those investments. Conversely, lower risks should be associated with lower returns.⁷² A funder should be able to earn a return that reflects their opportunity cost of capital, which is the return an investor could receive on comparable investments of the same risk or variability.⁷³

10.42 Consistent with this approach, it is suggested that the basis for determining fees in line with those principles should depend on the inputs. The case advanced was that, as the inputs-based principle is used for investments and insurance, it is a suitable basis for determining a return for a litigation funder.⁷⁴ Specifically, the submission proposing this approach noted:

Therefore, the fair and reasonable returns for a litigation funder should be linked strongly to the level of funding it provides, together with the time horizon and level of risk undertaken.⁷⁵

10.43 Hence, a litigation funder would be entitled to obtain a single fee of return from financing a class action, with the core inputs, such as capital invested and risk undertaken over the time horizon, determining the level of return.

10.44 One of the specific risks identified in litigation funding was adverse costs. The approach noted that the corresponding risk mitigation factor is whether this risk is reduced by the terms of a litigation funding agreement or by ATE insurance.⁷⁶

10.45 The approach also described that payment of security for costs can lock away capital and therefore requires a reasonable rate of return. However, the approach considered that security for costs can be insured for a fixed, non-refundable cost.⁷⁷

⁷² Mr Sean McGing, *Submission 101*, p. 19.

⁷³ Professor Bob Officer, *Submission 100*, p. 3.

⁷⁴ Mr Sean McGing, *Submission 101*, pp. 3, 5.

⁷⁵ Mr Sean McGing, *Submission 101*, pp. 3–4.

⁷⁶ Mr Sean McGing, *Submission 101*, pp. 19–20.

⁷⁷ Mr Sean McGing, *Submission 101*, p. 21.

Justice fund

- 10.46 Dr Peter Cashman submitted that the Australian Government should provide funding to establish a statutory fund, known as a 'Justice Fund' to provide financial assistance in meritorious class actions. The Justice Fund would provide an indemnity for any adverse costs or security for costs orders made. It is intended that the Justice Fund would become self-sufficient after time because a portion of the settlements it has funded would be returned to the fund.
- 10.47 Dr Cashman noted that both the ALRC in its 1988 Report and the Victorian Law Reform Commission in a 2008 report recommended that such a fund should be established.⁷⁸ The ALRC noted that a recommendation to establish a public fund to protect principal applicants from an adverse costs order had never been adopted by the Australian Government.⁷⁹ The Law Council of Australia, Allens and the Grata Fund also supported a Justice Fund.⁸⁰

Committee view

Mandatory indemnity for adverse costs

- 10.48 The committee accepts that the risk of paying the defendant's legal costs in the event the plaintiff is unsuccessful dissuades, to some extent, the bringing of cases which lack a solid prospect of success.
- 10.49 As a matter of principle, the committee considers litigation funders should indemnify a representative plaintiff from adverse costs in every class action. This protects the representative plaintiff, and class members, and ensures that funders assume risk when they can potentially profit significantly from a class action. The risk of adverse costs is a key control in Australia's civil action regime on the commencement of unmeritorious claims.
- 10.50 A requirement that litigation funders indemnify the representative plaintiff for adverse costs orders would not change present industry practice, as most litigation funding agreements include this term of indemnity.
- 10.51 However, amendments are required to mandate practice that litigation funders are required to cover representative plaintiffs against the potential of adverse costs. As part of the Federal Court approval process of litigation funding agreements, as recommended in this report, the committee considers that an

⁷⁸ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, December 1988; Victorian Law Reform Commission, *Civil Justice Review*, Final Report, March 2008; Dr Peter Cashman, *Submission 55*, p. 1.

⁷⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 49.

⁸⁰ See also Law Council of Australia, *Submission 67*, p. 7; Grata Fund, *Submission 76*, p. 9; Allens, *Submission 69*, p. 23.

agreement should not be approved if this if does not provide a full indemnity for adverse costs.

Security for costs

- 10.52 The committee also considers there should be a presumption in law that litigation funders provide security for costs in class actions. Again, the inclusion of this term of indemnity is often in litigation funding agreements and the Federal Court often, if not always, requires a litigation funder to provide security for costs.
- 10.53 Presently, the Federal Court considers whether to order security for costs only when an application for such an order is made by the defendant. A preferable approach is one which entails a presumption that security for costs will be required in every class action unless the litigation funder can establish why security of costs should not be ordered in the particular case.
- 10.54 Currently, the defendant carries the onus of substantiating why an order should be made. If a presumption were in place, the onus would shift on to the litigation funder to make the case for why the order should not be made.
- 10.55 Security for costs is a necessary protection for a defendant to a class action. A security for costs order is targeted and effective for ensuring litigation funders meet their obligations to a defendant in a class action.
- 10.56 This security for costs presumption is necessary because the Australian Financial Services Licence (AFSL) does not require litigation funders to have adequate financial resources. Nor does the AFSL extend to holding adequate security for costs for litigation purposes. The AFSL requirements do not seek to prevent AFSL holders from becoming insolvent, or failing due to poor business models or cash flow problems.⁸¹
- 10.57 Further, the Australian Securities and Investments Commission's financial requirements do not protect against credit risk or provide compensation for loss, or address the risk that a litigation funder may run out of funds before a case is complete.
- 10.58 To satisfy a security for costs order, litigation funders are, at times, currently providing to the courts a deed of indemnity from an ATE insurance provider. A deed is most commonly provided by insurers from the United Kingdom. To the committee's knowledge, there are no Australian insurers offering this type of product. Accordingly, these deeds are not enforceable in Australian courts.
- 10.59 The committee notes the ALRC's recommendation that the form of security for costs provided by the litigation funder must be in a form enforceable in

⁸¹ See, for example, Australian Securities and Investments Commission, *Submission 39*, pp. 4, 20–26; Dr Warren Mundy, *Committee Hansard*, p. 30.

Australia. The committee recognises that this jurisdictional requirement could restrict the options available to a litigation funder to satisfy a security for costs order. The committee also acknowledges the argument that a defendant should not have to litigate in a foreign jurisdiction in order to recover their legal costs when they have been successful in a class action.

Returns to class members

10.60 The committee has concerns about the high cost of ATE insurance policy premiums and deed of indemnity costs being passed on to class members. In Chapter 13, the committee makes recommendations to ensure reasonable, proportionate and fair litigation funding fees and returns to class members. In that chapter, the committee notes the proposal by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the Australian Government investigate the best way to implement this floor. The committee also recommends the Australian Government investigate whether a graduated minimum return above this floor is appropriate for shorter, less risky and less complex cases.

Recommendation 8

10.61 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended so that litigation funding agreements with respect to class actions must expressly provide a complete indemnity in favour of the representative plaintiff against an adverse costs order.

Recommendation 9

10.62 The committee recommends the Federal Court of Australia not approve a litigation funding agreement unless the agreement provides a complete indemnity for adverse costs.

Recommendation 10

10.63 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to include a statutory presumption that a litigation funder in a class action provide security for costs.

Part 3
Reasonable, proportionate and fair costs in class actions

Chapter 11

Federal Court regulation of litigation funding fees

Introduction

- 11.1 The regulation of litigation funding in class actions at the federal level has been performed primarily by the Federal Court of Australia (Federal Court) through its supervisory role in approving class action settlements and other case management processes.
- 11.2 Notwithstanding the establishment of the class action regime, the development of the common law, and the statutory removal of the prohibitions on maintenance and champerty, there has otherwise been little legislative intervention in the Federal Court's regulation of litigation funding arrangements.
- 11.3 During the inquiry, there was a diversity of views on the effectiveness of the Federal Court's oversight of litigation funders in class actions in achieving reasonable, proportionate and fair outcomes for class members. Criticism was levelled at the lack of power or disposition of the Federal Court to limit litigation funders from obtaining excessive profits and taking large portions of class action settlements.
- 11.4 Submissions indicated that the Federal Court's ability to regulate litigation funding fees is curtailed because of the uncertainty surrounding, and limits on, the Federal Court's power to intervene in the contractual relationship between a litigation funder and a representative plaintiff.
- 11.5 In determining whether the settlement should be approved, the Federal Court can be informed and assisted by different parties and professionals about the fairness and reasonableness of the settlement and whether it is in interests of class members, the representative plaintiff and the defendant. Submissions reflected concerns about the potential incursions on the independence of some of the mechanisms employed by the Federal Court, and the relative infrequency of the use of independent parties.
- 11.6 Further, submissions raised concerns about open justice given the gaps in data on class actions and litigation funding due to confidentiality orders and other practices.
- 11.7 By exploring these issues, this chapter considers the current powers, practice and procedure of the Federal Court, their potential challenges and deficiencies. Options to improve the Federal Court's powers, practice and procedure in class actions to achieve reasonable, proportionate and fair outcomes for class

members and litigation funding fees are canvassed and the committee's views expressed.

Effectiveness of court oversight of litigation funding fees

11.8 Conflicting views were put to the committee regarding the capacity of the Federal Court to ensure that both legal costs and litigation funding fees incurred in class actions are fair and reasonable.

11.9 For example, the Menzies Research Centre was critical of the current approach to regulation through the courts:

The judges do not have the experience and training in corporate finance to properly assess the risks and returns [involved in funding litigation]. Nor does the legislation require them to. They are not provided with the data required to undertake the exercise and receive no assistance from the parties. Even the appointment of an independent contradictor is a laboured exercise. The idea that a lawyer is the best person to appoint to explain, using principles of corporate finance, why a fee structure is reasonable is baffling. Consequently, courts are left as unwitting accomplices in what is unconscionable conduct on the part of the litigation funding industry. The litigation funding industry operates without any true 'market'. The returns are only possible because they are approved and enabled by a judge. Most concerning, the levels of these returns defy all understood corporate finance principles of risk-adjusted return and escape all meaningful scrutiny.¹

11.10 Omni Bridgeway disagreed:

In assessing the reasonableness of a proposed settlement which involves a commission payment to a litigation funder, the courts take into account the specific risks and costs associated with the particular case... It is done by specialist judges with extensive class action experience, with the acknowledgement that hindsight assessment of risk is inappropriate, as the decision to accept the risk is made the time the investment is made. A court's assessment is multi-factored and informed.²

11.11 The key issues and arguments raised in these statements from the Menzies Research Centre and Omni Bridgeway are explored further in this chapter.

¹ Menzies Research Centre, *Submission 66*, p. 28.

² Omni Bridgeway, *Submission 73.1*, p. 6.

Limitations of court oversight

- 11.12 Submissions noted four challenges faced by courts in performing an effective oversight role of litigation funding in class actions.
- 11.13 First, the Federal Court's purview for overseeing and regulating the conduct and operations of litigation funding arrangements is limited to the case before it and the issues arising therein.³
- 11.14 Second, the scope of the Federal Court's regulatory power does not extend to a litigation funder's adherence to good governance and legal compliance more generally.⁴ For example, it was noted the Federal Court cannot ensure a litigation funder's capital adequacy requirements.⁵
- 11.15 Third, the Federal Court does not examine the terms of litigation funding agreements until an application for settlement approval is filed with the Federal Court. Additionally, as noted above, there is uncertainty as to whether the Federal Court has the power to alter the terms of the litigation funding agreement at that stage.⁶ This is compounded by the uncertainty regarding the availability of common fund orders because, under a common fund order, it is clear the Federal Court has the power to amend the commission rate in a litigation funding commission.⁷
- 11.16 Last, over time the Federal Court has used the broad powers available to it under the *Federal Court of Australia Act 1976* (Federal Court Act) in order to develop tailored responses to issues arising in class actions and the evolution of litigation funding. However, as observed by Professor Peta Spender, there is 'an increasing reticence of appellate courts to use generic provisions of the relevant legislation to "extend" the operation of judicial power'.⁸

³ Ashurst, *Submission 41*, p. 2; Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

⁴ MinterEllison, *Submission 25*, p. 5, citing Australian Law Reform Commission, *An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Discussion Paper, June 2018, p. 50. See also Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

⁵ Australian Institute of Company Directors, *Submission 40*, p. 2.

⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 169.

⁷ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191. Common fund orders are discussed in Chapter 9.

⁸ Professor Peta Spender, *Submission 50*, p. 3.

Current court oversight of litigation funding agreements

11.17 The regulation of litigation funding in class actions at the federal level has been performed primarily by the Federal Court through its supervisory and case management role of class actions.⁹ The Federal Court's role has been described as a regulatory 'gap-filler'.¹⁰

11.18 This section covers those aspects of the Federal Court's powers, practice and procedure in class actions, which relate specifically to litigation funders.

Disclosure of legal and litigation funding costs arrangements

11.19 It is a requirement to disclose legal and litigation funding costs agreements, on a confidential basis, to the Federal Court prior to the first case management hearing.¹¹ The Federal Court Class Actions Practice Note requires the provision of an appropriately redacted version of the litigation funding agreement to the other parties.¹²

11.20 There is an ongoing obligation for the Federal Court to be notified if and when:

- there is a change to the costs agreement or the litigation funding agreement;
- there is a change in the litigation funder involved in the class action; or
- the litigation funder becomes insolvent or otherwise unable or unwilling to continue to provide funding for the class action.¹³

11.21 The Federal Court's Class Actions Practice Note states the Federal Court may undertake a 'more extensive examination and assessment of legal costs and a more extensive examination of the litigation funder's records' where:

- the class members include persons who are not clients of the representative plaintiff's lawyers or of the litigation funder;

⁹ Litigation funders were exempt from the application of certain aspects of financial services regulation under the *Corporations Act 2001* until the exemptions were repealed on 22 August 2020.

¹⁰ Associate Professor Sulette Lombard and Professor Christopher Symes, *Submission 4*, p. 3.

¹¹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 6.1, www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/GPN-CA.pdf (accessed 18 November 2020). See also Professor Peta Spender, *Submission 50*, p. 3.

¹² Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, para. 6.4(b). The funding agreement can be redacted 'to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding'. Two examples of such information are the budget or estimate of costs for the litigation or the funds available to the applicants, in total or for any step or stage in the proceeding; and any assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding. See also Law Council of Australia, *Submission 67*, p. 21.

¹³ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 6.3.

- the deduction per class member constitutes a significant proportion of the settlement amount otherwise payable to each class member; or
- the litigation funder imposes charges beyond the percentage commission set out in the litigation funding agreement.¹⁴

11.22 The Law Council of Australia submitted that the Federal Court's Class Actions Practice Note strikes the appropriate balance between transparency of litigation funding agreements and limiting the potential for the defendant lawyers to gain an unfair advantage.¹⁵

Settlement approval

11.23 A proposed settlement agreement between the parties to a class action must be court approved.¹⁶ Section 33V of the Federal Court Act states a class action may not be settled or discontinued without the Federal Court's approval. If approval is given to a settlement, the Federal Court may make such orders as are just regarding the distribution of any money paid under a settlement or paid into the Court.¹⁷

11.24 The Federal Court can approve a proposed settlement agreement only if the Court considers the proposed settlement:

- to be fair and reasonable having regard to the claims made on behalf of the class members who will be bound by the settlement; and
- to have been undertaken in the interests of class members, as well as those of the representative plaintiff, and not just in the interests of the representative plaintiff and the defendant.¹⁸

11.25 The Federal Court has described this role in the following terms:

The Court assumes an onerous and protective role in relation to class members' interests which is not unlike the role the Court assumes when approving settlements on behalf of persons with a legal disability.¹⁹

¹⁴ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 16.4.

¹⁵ Law Council of Australia, *Submission 67*, p. 21.

¹⁶ *Federal Court of Australia Act 1976*, s. 33V.

¹⁷ *Federal Court of Australia Act 1976*, ss. 33V(2).

¹⁸ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 15.3.

¹⁹ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [4]. See also *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020 [21] (Perram J).

Changing contractually agreed litigation funding fees

- 11.26 Compared to the Federal Court's power to regulate legal costs in class actions, the ability of the Federal Court to alter the contractual agreements between a representative plaintiff (and potentially class members) with a litigation funder is less clear.²⁰
- 11.27 The Federal Court considers the terms of a litigation funding agreement when an application is made for settlement approval pursuant to section 33V of the Federal Court Act.
- 11.28 Section 33V, together with section 33ZF, of the Federal Court Act, allow the Federal Court to refuse to approve a settlement agreement if the Court considers legal costs or the litigation funding fees are disproportionate or excessive.²¹
- 11.29 However, except in the instance where the Federal Court has made a common fund order (discussed in Chapter 9), there are differing judicial opinions in the Federal Court as to whether section 33V allows the Court to approve the settlement terms but alter the terms of a litigation funding agreement.²²
- 11.30 Some Federal Court cases have held that, in a settlement approval application under section 33V of the Federal Court Act, the Federal Court has the power to amend the commission class members were required to pay pursuant to the funding agreement.²³ Other Federal Court judgments have stated that the Federal Court is not so empowered.²⁴
- 11.31 For example, in the class action *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* (Endeavour River class action),²⁵ the Federal Court considered that the proposed litigation funding commission was not fair and reasonable. However, it noted the different views which have been expressed in decisions of the Federal Court about whether it has the power to approve a settlement but vary the rate of commission charged by the litigation funder. The Federal Court concluded that, if it had approved the settlement agreement but varied the funding commission, questions would have arisen about the Federal Court's

²⁰ Professor Michael Legg, *Submission 30*, p. 4; Michael Legg, 'Class Action Settlements in Australia – The Need for Greater Scrutiny', *Melbourne University Law Review*, vol. 38, 2014, p. 603.

²¹ *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [22].

²² Professor Michael Legg, *Submission 30*, p. 4; Law Council of Australia *Submission 67*, p. 8.

²³ *Earglow Pty Ltd v Newcrest Mining Limited* [2006] FCA 1433; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq) (No 3)* [2017] FCA 330; *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409.

²⁴ *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289.

²⁵ [2020] FCA 968.

power to do so.²⁶ It sought to avoid this problem by appointing a contradictor, discussion on which is in Appendix 2.

Increased Federal Court powers to regulate fees

11.32 This section considers options under which the Federal Court's ability to provide case-by-case supervision and regulation of litigation funders returns can be clarified and strengthened.

Express power to approve and alter litigation funding agreements

11.33 Mr Matt Corrigan, of the Australian Law Reform Commission (ALRC), noted that the ALRC's Final Report 'proposed a significant increase in the regulation of litigation funders through the court process'.²⁷

11.34 The ALRC's Final Report recommended Part IVA of the Federal Court Act be amended to provide:

- the Federal Court with an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements; and
- that litigation funding agreements with respect to class actions are enforceable only with the approval of the Federal Court.²⁸

11.35 The ALRC noted that requiring court approval of a litigation funding agreement would seek to protect the interests of class members, consistent with the Federal Court's unique supervisory role in class actions:

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.²⁹

11.36 In summary, this enhanced supervisory role expands 'the role of Court from approving the distribution of settlements to ensuring the proceeding is advanced upon fair and reasonable terms'.³⁰

²⁶ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [3]–[5].

²⁷ Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 68.

²⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 169 (recommendation 14).

²⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 170.

³⁰ Australian Law Reform Commission, answer to written question on notice, 28 July 2020 (received 30 July 2020).

11.37 The ALRC described the overall intended outcomes of these recommendations as:

- ensuring that class action litigation funding only occurs with the approval of the Federal Court;
- binding contractual entitlements in relation to funding are only created following Federal Court approval; and
- Court approval would involve the Federal Court reviewing, amending or setting the commission rates and terms.

11.38 The ALRC explained that if these changes were implemented, a litigation funder would be required to make submissions to the Federal Court as to why it is in the interests of justice in a particular case for the litigation funding agreement to be approved by the Federal Court. Theoretically, the ALRC observed that this change:

- removes any notion of a right to fund class actions as an ordinary commercial transaction; and
- recognises that litigation funders in Australia do more than fund a particular action—they are intimately involved in the management of the plaintiff law firm, not just in terms of costs, but the broader litigation strategy.³¹

11.39 Numerous submitters supported the Federal Court having the power to amend litigation funding agreements.³² For example, Professor Legg considered the Federal Court needed clearer power to ensure proportionate funding fees, which could be achieved by implementing the ALRC's recommendation 14.³³

11.40 Allens also considered it appropriate for the Federal Court to have an express power to review and vary the funding commission rate as part of a settlement approval, if the Federal Court considers that rate to be disproportionate or excessive in all the circumstances of the case.³⁴

11.41 The Law Council of Australia suggested that an express statutory provision requiring the Federal Court to approve a litigation funding agreement could go one step further to require the Federal Court to set the litigation funding commission, rather than the fee being privately negotiated between the parties and then approved by the Federal Court. This fee would be set at an

³¹ Australian Law Reform Commission, answer to written question on notice, 28 July 2020 (received 30 July 2020).

³² See, for example, Professor Vicki Waye, *Submission 5*, p. 5; Professor Vince Morabito, *Submission 6*, p. 2; Investor Claims Partner Pty Ltd, *Submission 7*, p. 15; Professor Michael Legg, *Submission 30*, p. 3; Maurice Blackburn Lawyers, *Submission 37*, p. 15; Allens, *Submission 69*, p. 12; Federal Chamber of Automotive Industries, *Submission 70*, p. 10.

³³ Professor Michael Legg, *Submission 30*, p. 3.

³⁴ Allens, *Submission 69*, p. 12.

interlocutory stage which the Federal Court may then revisit at any time before the conclusion of a proceeding. The Law Council of Australia proposed guidance for the Federal Court when considering litigation funding agreements.³⁵

11.42 Justice Lee of the Federal Court expressed support for criteria to guide the Federal Court as to when to exercise this proposed power:

...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.³⁶

11.43 With respect to court approval of litigation funding agreements, the ALRC noted:

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.³⁷

11.44 Ashurst supported the scrutiny of litigation funding agreements at the beginning of proceedings, in addition to settlement approval.³⁸

³⁵ Law Council of Australia, *Submission 67*, p. 25, submitted that the factors to take into account when the Federal Court is considering what is a fair and reasonable fee include the amount likely to be advanced (and then ultimately advanced) by the funder to cover the costs of the claim; the amount, if any, that the funder is required to provide as security for the defendant's costs; whether the funder obtained adverse costs insurance ('after the event' insurance) and whether or not it is intended to recover the premium from the compensation pool; the period of time until recovery; the level of risk that the claim may be unsuccessful; the likelihood of the case settling or going to trial; whether the funding agreement is non-recourse; whether the fee is over the common fund or only with respect to those who have committed to a funding agreement; whether a funding equalisation formula is to be used; whether the funding agreement allows the funder to discontinue funding at any point; the state of competition in the litigation funding market; and the proportion of the claim recovered by each claimant.

³⁶ *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289 [47].

³⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 170.

³⁸ Ashurst, *Submission 41*, p. 3.

Litigation funding agreements governed by Australian law

- 11.45 The Attorney-General's Department noted 'a significant number of foreign litigation funders are not, in fact, incorporated in Australia, and as such are subject to less domestic scrutiny'.³⁹ Similarly, Mr Stuart Clark and the Menzies Research Centre noted that, as some of these foreign entities have little or no presence in Australia, questions arise about the ability of those who have signed up to a litigation funding agreement to enforce its terms.⁴⁰
- 11.46 Submissions noted a significant number of the litigation funders operating in Australia are foreign entities, or are locally created companies investing on behalf of offshore funds.⁴¹ Indeed, the U.S. Chamber Institute for Legal Reform described Australia as a 'honeypot' for foreign funders.⁴²
- 11.47 The ALRC stated that in 2018, there were approximately 25 litigation funders operating in Australia. It noted that, as at June 2018, there were 33 funders operating in either the United Kingdom or Australia, or both jurisdictions.⁴³ According to the Association of Litigation Funders of Australia (ALFA), the exact number of litigation funders operating in Australia is unknown, as there is no research or specific evidence with respect to the number. Nonetheless, ALFA thought approximately 33 funders operated in Australia.⁴⁴
- 11.48 As at 18 June 2020, from a dataset of 22 litigation funding companies known to be operating in Australia, 14 litigation funders were foreign owned or based overseas, 6 were Australian owned or based, and this information was unknown for two funders.⁴⁵
- 11.49 The ALRC recommended that, in the context of class actions, Australian law should govern any litigation funding agreement and the litigation funder should submit irrevocably to the jurisdiction of the Federal Court.⁴⁶ The ALRC explained that, in instances where litigation funding is used to support class actions in Australia, disputes arising from that agreement must be capable of

³⁹ Attorney-General's Department, *Submission 93* p. 16.

⁴⁰ Mr Stuart Clark, *Submission 22*, p. 4; Menzies Research Centre, *Submission 66*, p. 29.

⁴¹ Mr Stuart Clark, *Submission 22*, p. 4; Menzies Research Centre, *Submission 66*, p. 11.

⁴² U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 2.

⁴³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 65, 81.

⁴⁴ Ms Pip Murphy, Chief Executive Officer, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 33.

⁴⁵ This data is from research undertaken by the Parliamentary Library.

⁴⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 169 (recommendation 14).

being adjudicated in Australia. Therefore, the ALRC considered it appropriate to restrict litigation funders to Australian law and jurisdiction.⁴⁷

11.50 Mr Stuart Clark and the Menzies Research Centre supported this recommendation as an additional measure to the application of Australian Financial Services Licence (AFSL) requirements.⁴⁸

Committee view

11.51 The Federal Court has a constrained capability to regulate litigation funding in class actions because its purview is limited to the live issues that arise in the case before it. The Federal Court cannot, and should not, regulate a litigation funder's adherence to good governance and legal compliance more generally. The Australian Government's recent decision to place the conduct and operations of litigation funders in class actions within the purview of financial services regulation addresses this previously existing gap in oversight.

11.52 The ability of the Federal Court to have an active role in constructing litigation funding arrangements and resolving litigation funding issues in class actions on a case-by-case basis would complement the robust oversight that the Australian Investment and Securities Commission now places on litigation funders under the application of the Managed Investment Scheme regime and the AFSL regime.

11.53 The Federal Court's supervisory and protective role in class actions is vital. Yet, its current implementation is weak and appears to be favouring the provision of windfall profits to litigation funders. The weight of evidence on the disproportionately generous portions from settlement sums and damages awards going to litigation funders, at the expense of class members and defendants, warrants judicial intervention in these contractual relationships. The uncertainty surrounding the Federal Court's present power to do so must be addressed.

11.54 To this end, the current requirement for a litigation funding agreement to be disclosed to the Federal Court is not sufficient. An express power should be introduced in the Federal Court Act to require that, not only must a litigation funding agreement be disclosed the Federal Court, but a litigation funding agreement must be approved by the Federal Court in order for it to be enforceable. The Federal Court must have the power to alter, vary or amend the terms of any litigation funding agreement, both prior to, and at the resolution of, a class action. This will help prevent the current excessive and disproportionate costs charged, and profits gained, by litigation funders.

⁴⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 171.

⁴⁸ Mr Stuart Clark, *Submission 22*, p. 2; Menzies Research Centre, *Submission 66*, p. 31.

11.55 The Federal Court's ability to consider, critique and amend the terms of litigation funding agreements from the beginning of proceedings would add the appropriate and necessary interrogation of the terms of funding agreements to ensure that the contractual arrangements are not weighted so heavily in the favour of litigation funders to the detriment of class members.

11.56 Additionally, there are a number of foreign litigation funders operating in the Australian class action market. Given the large profits flowing to litigation funders from funding class action litigation, these arrangements must be subject to Australian laws and oversight.

11.57 If a foreign litigation funder seeks to profit from class action litigation in Australia, it is only appropriate that its funding arrangements are subject to, and in accordance with, Australian law. There should be no question as to the Federal Court's jurisdiction to adjudicate and resolve any issues arising from a litigation funding agreement pertaining to a class action in its own jurisdiction.

Recommendation 11

11.58 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce:

- a requirement for a litigation funding agreement to obtain approval of the Federal Court of Australia to be enforceable; and
- a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.

Recommendation 12

11.59 The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to require that any litigation funding agreement in a class action in the Federal Court of Australia is governed by Australian law and the Federal Court of Australia approves a litigation funding agreement only if the agreement provides that the litigation funder submit irrevocably to the jurisdiction of the Federal Court of Australia.

Experts to assist the Federal Court in assessing fees

11.60 To assist the Federal Court in its assessment of whether the costs to be deducted from a settlement sum are fair and reasonable, it can draw on:

- the confidential advice of counsel retained by the representative plaintiff;
- the advice of an independent costs assessor retained by the representative plaintiff's solicitors;
- the assessment and report of a referee to act as an independent costs assessor appointed by the Federal Court; and

- the submissions of a contradictor in representing the interests of the class members.⁴⁹
- 11.61 Professor Legg suggested that, in empowering the Federal Court to approve and amend litigation funding agreements, the Federal Court should have available to it the procedures currently available to obtain assistance in determining the fairness and reasonableness of legal costs.⁵⁰
- 11.62 The first two parts of this section consider the limitations of the advice of counsel and costs assessors retained by the plaintiff lawyers in relation to legal costs. The final part of this section discusses the referral of legal and litigation funding costs issues to a referee for assessment and report. Discussion on contradictors is contained in the next chapter.

Advice of counsel

- 11.63 The application to the Federal Court for approval of the settlement agreement includes a confidential opinion provided by counsel for the representative plaintiff on the reasonableness of the fees and disbursements to be paid by the plaintiff law firm.⁵¹
- 11.64 The Federal Court has described the role of counsel in providing this advice as follows:

In providing this opinion counsel [are] required to act as officers of the Court rather than as advocates for the class and to candidly canvass the matters relevant to settlement approval, including their view as to the strengths and weaknesses of the case on liability and quantum.⁵²

- 11.65 Mr John Emmerig, Chair of the Litigation and Dispute Resolution Section, Law Council of Australia, explained:

To approve a settlement in a closed confidential hearing—that is a hearing in which the defendants do not participate—the court receives a copy of the settlement agreement, an opinion from a QC and usually an affidavit from a senior solicitor outlining the strengths and weaknesses of the claim that was attempted to be prosecuted, in a very open and transparent way. Then there's an interrogation process between the judge... with the barristers and the solicitors involved.⁵³

⁴⁹ Professor Michael Legg, *Submission 30*, p. 4.

⁵⁰ Professor Michael Legg, *Submission 30*, p. 4.

⁵¹ See, for example, Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 25; Omni Bridgeway, *Submission 73.1*, p. 6.

⁵² *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [30].

⁵³ Mr John Emmerig, Chair, Litigation and Dispute Resolution Section, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 20. See also Mr Alexander Morris, King & Wood Malleons, *Committee Hansard*, 13 July 2020, p. 41.

11.66 Dr Peter Cashman commented that this approach of a confidential hearing, without the defendant, is slightly 'one sided' and the Federal Court would be aided by also receiving evidence from the defendant.⁵⁴

Costs assessor appointed by plaintiff lawyer

11.67 Commonly, in the application for approval of a settlement agreement, the representative plaintiff's solicitor will include the advice of an independent costs assessor on the reasonableness of the legal costs proposed to be deducted from the settlement sum.⁵⁵

11.68 Dr Cashman and Ms Simpson submitted that a close commercial relationship often develops between law firms and the costs assessors they engaged, with the opinion of the assessor not infrequently to the effect that the fees charged were reasonable with occasional minor qualifications made by the assessor.⁵⁶

11.69 The independence of the advice by costs assessors engaged by the plaintiff lawyers has been questioned by the Federal Court:

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.⁵⁷

...

I am yet to see a cost assessor retained by a solicitor who has formed the robustly independent view that the fees charged by his retaining solicitor were unreasonable.⁵⁸

11.70 The Federal Court identified that the potential for bias in the advice of a costs assessor engaged by the representative plaintiff for the settlement approval of a class action was amplified by the following factors:

- the expert is engaged by a firm of solicitors which is, in reality, acting for itself in seeking that its costs be approved;
- there is no opposing expert's report;
- there is usually no contradictor in the application; and
- class members can object to the quantum of costs claimed but such objections are usually at a high level of generality.⁵⁹

⁵⁴ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 25.

⁵⁵ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 15.5.

⁵⁶ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.3*, p. 16.

⁵⁷ *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [113].

⁵⁸ *Lifepan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 [40] (Lee J).

⁵⁹ *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [116].

- 11.71 The ALRC also noted in its Final Report these vulnerabilities of an assessment conducted by an expert engaged by the representative plaintiff.⁶⁰
- 11.72 Additionally, the affidavit with the advice from the representative plaintiff's costs assessor is usually provided to the Federal Court on the day of the settlement approval hearing. Therefore, the representatives for the defendant and the Federal Court have a limited opportunity to test the affidavit evidence.⁶¹
- 11.73 The next section discusses the criticism regarding the lack of an opposing costs expert. The next chapter addresses the criticism regarding the appointment of contradictors.

Court-appointed referee as a costs assessor

- 11.74 Since 2009, the Federal Court has had the power to appoint an independent costs referee to assess the reasonableness of overall costs in a class action.⁶² This approach has been adopted in a number of cases.⁶³
- 11.75 A costs assessor, appointed as a referee, conducts an inquiry and presents a report to the Federal Court as to the question of whether the costs of the lawyers and/or the litigation funder are fair and reasonable.⁶⁴ The issues to be examined by the costs assessor are set by the Federal Court in each case where one is appointed. A referral to a costs assessor can be made at any point during a proceeding.⁶⁵
- 11.76 The Federal Court's Class Actions Practice Note was amended in 2019 to include Clause 16.3 which states, when considering the reasonableness of legal costs in class action settlements of significant size, the Federal Court may appoint a referee to inquire into and report on the reasonableness of the legal costs proposed to be deducted from the settlement sum.⁶⁶

⁶⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 137–138.

⁶¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 138.

⁶² *Federal Court of Australia Act 1976*, ss. 54A(1).

⁶³ See, for example, *Caason Investments Pty Ltd v Cao* (No 2) [2018] FCA 527 [121]–[124]; *Dillon v RBS Group (Australia) Pty Ltd* (No 2) [2018] FCA 395 [66]; *Lifepan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 [40]–[41]; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* (No 3) [2018] FCA 1842; *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited* (No 4) [2020] FCA 1053.

⁶⁴ Federal Court Rules 2011, r. 28.6.

⁶⁵ *Federal Court of Australia Act 1976*, ss. 54A(2).

⁶⁶ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 16.3.

- 11.77 Clause 16.4 of the Federal Court's Class Actions Practice Note states the Federal Court may undertake a 'more extensive examination and assessment of legal cost and a more extensive examination of the litigation funder's records' in certain circumstances.⁶⁷
- 11.78 This amendment implements a recommendation of the ALRC that the Federal Court's Class Actions Practice Note include a clause that the Federal Court may appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval.⁶⁸ Submissions noted the courts are increasingly using this power to assist their assessment of whether the costs are fair and reasonable.⁶⁹
- 11.79 The use of a costs referee to interrogate the costs of litigation funders has also been increasing. For example, in the class action *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*,⁷⁰ a report of a costs assessor appointed by the plaintiff lawyers was provided to the Federal Court on whether the costs charged by the plaintiff law firm, as well as the litigation funder, were fair and reasonable. The Federal Court held 'it would have been wrong to rely upon the report of a costs assessor appointed by [the plaintiff lawyers]'.⁷¹ Therefore, it appointed a costs referee to provide a report for the Federal Court as to whether the costs charged by the plaintiff law firm, as well as the litigation funder, were fair and reasonable.⁷²

Committee view

- 11.80 It is clear from the evidence to the inquiry that neither advice from counsel involved in the class action, nor the opinion of a professional retained by the litigation funder, would be appropriate to assist the Federal Court in undertaking an assessment of the litigation funding agreement to ensure it is reasonable, proportionate and fair. The barrister retained in the class action is unlikely to have the required expertise in capital market and finance principles to effectively undertake this assessment. The opinion of a professional with this

⁶⁷ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 16.4. See paragraph 11.21 above.

⁶⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 136 (recommendation 8).

⁶⁹ See, for example, Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 25; Mr Crispian Lynch, Partner, Gilbert + Tobin, *Committee Hansard*, 27 July 2020, p. 11.

⁷⁰ [2018] FCA 1842.

⁷¹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, 18 [91], [98]–[102]. In this case, the report of the costs referee concluded that the costs incurred were fair and reasonable, which was adopted by the Federal Court.

⁷² *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, 18 [90].

experience, yet retained by the litigation funder, may give rise to similar questions which emerge for costs assessors retained by plaintiff law firms with respect to potential, actual or perceived bias and resultant incursions on their independence.

- 11.81 The committee considers it critical that an independent litigation funding fees assessor with relevant expertise assist and inform the Federal Court's assessment of litigation funding agreements.
- 11.82 The Federal Court Act already has the power to appoint a referee of this type. In practice, the Federal Court has appointed a referee to act as a costs assessor to inquire into and report on the litigation funding charges proposed to be deducted from a settlement sum, as well as the legal costs. However, the committee considers there would be great benefit in the expertise of a litigation funding costs assessors being drawn on more commonly in the Federal Court. The committee suggests that this objective could be achieved through amendments to the Federal Court's Class Actions Practice Note.
- 11.83 The Federal Court's Class Actions Practice Note was amended in 2019 to add in a statement that a referee may be appointed to scrutinise the reasonableness of legal costs. It is silent on the use of referees to assess litigation funding fees.
- 11.84 The Federal Court already has the power to refer matters to a referee at any point. To further enhance clarity about this power, practice and what litigation funders should expect, it should be expressly stated in the Federal Court's Class Actions Practice Note that a referee to act as a litigation funding fees assessor can be appointed at any point during a class action proceeding, including:
- if recommendation 11 is implemented, the point when the litigation funder seeks the Federal Court's approval of the litigation funding agreement;
 - if recommendation 11 is not implemented, the point when the litigation funder provides the Federal Court with its litigation funding agreement in accordance with existing Clause 6.1 of the Federal Court's Class Actions Practice Note;
 - at the point when there is an application for the Federal Court's approval of a proposed settlement agreement; and
 - at any point in between these two applications.
- 11.85 Further, stating this power and practice in the Federal Court's Class Actions Practice Note would provide clarity and set expectations in the class action and litigation funding industry that litigation funding agreements may be comprehensively scrutinised by capital market or finance experts.
- 11.86 Clarification is also needed on the desired expertise of a litigation funding fees assessor to effectively execute the role, the point at which the Federal Court could refer issues to the assessor, and who is liable for the costs for the work of a litigation funding fees assessor.

- 11.87 The professionals currently used by the Federal Court as referees to assess legal costs are commonly practitioners in legal costing services. The committee considers that referees appointed to undertake an assessment of litigation funding fees should have capital market or finance expertise.
- 11.88 The ALRC recognised that embedding the practice of appointing a referee to assess legal costs in a class action would provide the groundwork to establish a panel of competent and reputable independent costs consultants. Embedding this practice for litigation funding fees would similarly establish a panel of competent and reputable experts in the capital market or finance from which the Federal Court can select a referee.
- 11.89 With respect to the costs of a litigation funding fees assessor, the common law clearly allows for costs orders generally to be made against a non-party if the interests of justice require. The Federal Court has previously ordered costs of referees against litigation funders. However, currently the costs order provisions in the Federal Court Act do not expressly state that the Federal Court has the power to make a costs order against a litigation funder.
- 11.90 The committee supports the introduction of an express power for the Federal Court to make a costs order against a litigation funder. To complement this power, guidance could be provided in the Federal Court's Class Actions Practice Note which states that the Federal Court may order the costs arising from the work of a litigation funding fees assessor be paid by the litigation funder in circumstances where the conduct on the part of the litigation funder justifies such an order being made.
- 11.91 These reforms together would make it expressly clear that costs orders generally, as well as a costs order for a litigation funding fees assessor, can be made against a litigation funder. The committee expects the potential liability for costs will have some deterrent effect for litigation funders that propose to charge higher than accepted costs unless they are absolutely justifiable and reasonable.

Recommendation 13

- 11.92 The committee recommends the Australian Government amend the Federal Court of Australia's Class Actions Practice Note to the effect that, pursuant to section 54A of the *Federal Court of Australia Act 1976*, at any point in a proceeding, the Federal Court of Australia may appoint a referee to act as a litigation funding fees assessor.**

Recommendation 14

- 11.93 The committee recommends a litigation funding fees assessor appointed by the Federal Court of Australia be a professional with market capital or finance expertise.**

Recommendation 15

11.94 The committee recommends section 43 of the *Federal Court Act 1976* be amended to expressly state that the Federal Court of Australia can make a costs order against a litigation funder.

Recommendation 16

11.95 The committee recommends the Federal Court of Australia's Class Actions Practice Note state the Federal Court of Australia may order the costs of the work undertaken by a referee appointed by the Federal Court of Australia as a litigation funding fees assessor be paid by a litigation funder, in circumstances where the conduct of a litigation funder justifies such an order being made.

Transparency of litigation funding in class actions

Lack of transparency

11.96 The lack of transparency of settlement agreements was an issue raised in submissions.

11.97 Professor Vince Morabito concluded the Federal Court has not had complete adherence to the principles of open justice with respect to the judicial review of settlement agreements in class actions.⁷³ Professor Legg and Professor Spender both submitted that greater transparency will aid the reasonableness and proportionality of legal and litigation funding costs.⁷⁴

Gaps in class actions and litigation funding data

11.98 Professor Morabito's research from 2019 found that, of the class action settlements approved by the Federal Court during the class action regime's 27 years of operation, no reliable information was available for more than half (55.8 per cent) of the 154 approved settlement agreements, with respect to one or more of the following five core terms:

- the gross settlement sum;
- the sum paid for legal fees and disbursements;
- the funding commission payable to litigation funders;
- the reimbursement awards to representative plaintiffs; and

⁷³ Professor Vince Morabito, 'Class Actions: Looking into The Fishbowl – Open Justice and Federal Class Action Settlements', *Australian Law Journal*, vol. 93, no. 6, 2019, p. 446.

⁷⁴ See, for example, Professor Michael Legg, *Submission 30*, p. 4; Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

- the proportion of the settlement fund that is envisaged will be left for distribution to class members after deduction of the sums listed above.⁷⁵

11.99 Professor Morabito noted some key reasons for this outcome:

- the making of non-publication or confidentiality orders with respect to settlement deeds, settlement agreements and documents filed in the process of settlement applications, including reports and affidavits by independent costs assessors;⁷⁶
- in the absence of non-publication of confidentiality orders, prior to the decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*,⁷⁷ there was a reluctance to reveal the funding commission the litigation funder would be entitled to receive under the litigation funding agreement; and
- in almost a third of cases (31.8 per cent), the court did not release judicial pronouncements following the completion of the court's assessment of the proposed settlement agreement.⁷⁸

11.100 The presence of confidentiality orders in finalised class actions truncated the usable dataset for the ALRC's Final Report. Of the 91 finalised matters, 23 per cent had confidentiality orders in place, preventing the settlement amount, the cost of legal fees, or the funding commission rate from being published. In a further 22 per cent, the settlement approval judgment did not disclose one or more of those elements.⁷⁹

⁷⁵ Professor Vince Morabito, 'Class Actions: Looking into The Fishbowl – Open Justice and Federal Class Action Settlements', *Australian Law Journal*, vol. 93, no. 6, 2019, p. 447. See also Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

⁷⁶ Pursuant to section 37AF of the *Federal Court of Australia Act 1976*, a party to proceedings may apply to the Federal Court for a confidentiality order. See Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 149.

⁷⁷ (2016) 245 FCR 191. See, for example, Attorney-General's Department, *Submission 93*, pp. 9–10; *Omni Bridgeway*, *Submission 73*, p. 24.

⁷⁸ Professor Vince Morabito, 'Class Actions: Looking into The Fishbowl – Open Justice and Federal Class Action Settlements', *Australian Law Journal*, vol. 93, no. 6, 2019, p. 447–48. See also Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

⁷⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 72.

Confidentiality orders in class actions

11.101 Class action settlements are different from other forms of settlement because the law requires the Federal Court's approval.⁸⁰ A reasoned judgment can only be delivered if the terms of the settlement are entirely or, at least in large part, public.⁸¹ Parties can apply to the Federal Court for a confidentiality order.⁸² When deciding whether to make said order, the Federal Court 'must take into account the primary objective of the administration of justice is to safeguard the public interest in open justice'.⁸³

11.102 The ALRC noted:

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).⁸⁴

11.103 Mr Matt Corrigan, of the ALRC, noted that, in some cases, it may be only some parts of the settlement agreement, such as information concerning legal costs or the litigation funder's fee, that are subject to a confidentiality order.⁸⁵

11.104 Professor Morabito concluded his research indicates that there has been improved transparency in recent years. Between 2014 and 2018, judicial pronouncements following settlement agreements occurred in 92.8 per cent of cases. A decreased use of non-publication and confidentiality orders had also been observed.⁸⁶

⁸⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 148.

⁸¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 149.

⁸² *Federal Court of Australia Act 1976*, s. 37AF.

⁸³ *Federal Court of Australia Act 1976*, s. 37AE.

⁸⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 148.

⁸⁵ Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 67.

⁸⁶ Professor Vince Morabito, 'Class Actions: Looking into the Fishbowl – Open Justice and Federal Class Action Settlements', *Australian Law Journal*, vol. 93, no. 6, 2019, p. 449; See also Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020). The courts have required parties to frame their evidence to allow it to be publicly

Case for improved transparency

11.105 Professor Legg and Professor Spender suggested that there should be greater transparency of the court's process in approving settlements and information should be publicly available so as to aid in the development of a body of precedent.⁸⁷

11.106 NSW Young Lawyers submitted that, unless the Federal Court determines it is appropriate to make a confidentiality order, the Federal Court should require the following information to accompany an application for approval of a settlement and publish the following information in the judgment approving a settlement:

- the date the proceeding commenced;
- the estimated number of group members before opt out;
- the number of valid opt outs;
- the number of registered group members;
- the number of funded and unfunded group members;
- the identity and location of the funder;
- the amount of security for costs paid;
- the estimated value of the claims at the outset and at the time of settlement;
- the settlement sum and any non-monetary relief;
- the funding commissions payable under funding agreements (per cent);
- the total amount of the funding commission (and per cent of the gross settlement sum) that the funder would be paid, as the case may be:
 - pursuant to its contractual entitlements under the funding agreements;
 - following a funding equalisation order (if one is sought); and
 - following a common fund order (if one is sought);
- the total costs broken down into legal fees, counsel's fees, expert fees and their disbursements;
- any costs orders paid in the proceedings;
- payments to representative plaintiffs (their claims and recognition payments);
- other reimbursements and payments, including pursuant to cy-près orders;
- the average payment to all group members, funded group members and unfunded group members (and the per cent of the gross settlement sum); and
- the number of group members who reached compromises, executed releases or covenanted not to sue during the class action, the estimated

available. See for example, *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 [102]; *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837.

⁸⁷ Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

value of their claims and the value of such releases (aggregated and anonymised).⁸⁸

Committee view

11.107 The lack of transparency of litigation funding in class actions was a key concern. The operations and ownership of, and returns to, litigation funders in Australia are opaque. Given the excessive profits obtained from class actions, the litigation funding industry requires increased degrees of transparency.

11.108 The committee is concerned by the volume of class actions for which there is limited or no information known about the transaction costs and how much is recouped by class members. The committee notes the importance of confidentiality orders in facilitating settlements. However, the use of confidentiality orders presents barriers to proper analysis of class actions data.

11.109 Greater levels of transparency lead to enhanced scrutiny and improved accountability. The application of the AFSL and Managed Investment Scheme regimes to litigation funding in class actions improves the transparency of the operations of funders in Australia. To further the objective of open justice, increased transparency in the public sphere of the outcomes and division of class action settlements must also be improved. To this end, the committee sees value in collating into one document the characteristics of, and transaction costs involved in, a class action, similar to the list proposed by NSW Young Lawyers.

11.110 The committee considers that this document should be filed with the Federal Court in every application for approval of a class action settlement. This document would only be published once the settlement is approved.

11.111 This would assist the public (including, for example, putative class members, professionals in the class action industry and academics) to access information relating to, and scrutinise, the profile of class membership, the returns to lawyers and litigation funders, and returns to class members.

Recommendation 17

11.112 The committee recommends that the Federal Court of Australia should require the following information to accompany an application for approval of a class action settlement. The information below should be published following the judgment approving a settlement:

- **the date the proceeding commenced;**
- **the estimated number of class members before opt out;**
- **the number of people who have opted out;**
- **the number of registered class members;**
- **the number of funded and unfunded class members;**

⁸⁸ NSW Young Lawyers, *Submission 89*, p. 33.

- the identity and location of the litigation funder;
- the amount of security for costs paid;
- the estimated value of the claims at the outset and at the time of settlement;
- the settlement sum and any non-monetary relief;
- the funding commissions payable under litigation funding agreements;
- the total amount of the funding commission (and per cent of the gross settlement sum) that the litigation funder would be paid, as the case may be:
 - pursuant to its contractual entitlements under the litigation funding agreements;
 - following a funding equalisation order (if one is sought);
 - following a common fund order (if one is sought); and
 - following any other order to share costs across class members.
- the total costs broken down into legal fees, counsel's fees, expert fees and their disbursements;
- any costs orders paid in the proceedings;
- payments to representative plaintiffs (their claims and recognition payments);
- other reimbursements and payments, including pursuant to cy-près orders;
- the average payment to all class members, funded class members and unfunded class members (and the per cent of the gross settlement sum);
- the number of class members who reached compromises, executed releases or covenanted not to sue during the class action, the estimated value of their claims and the value of such releases (aggregated and anonymised); and
- the amount of corporate tax paid in Australia by the litigation funder in the three previous financial years.

Chapter 12

Contradictors and the interests of class action members

Introduction

- 12.1 The settlement of a class action determines the rights of class members who may not have been actively involved in the steps of the litigation. Class members are typically not involved in the dispute resolution process that results in a settlement and, in open class actions, often have not contracted with the lawyers and litigation funders.
- 12.2 The settlement sum and its distribution between the lawyers, litigation funder and class members can be, or be perceived to be, not reasonable, proportionate or fair, and thus not in the interests of class members. A key interest of class members is the extent to which they are compensated for the civil wrongdoing by which they were impacted.
- 12.3 This passive participation of class members is different to the involvement of the representative plaintiff, the defendant, their lawyers and the litigation funder. Once a class action settlement has been reached between the representative plaintiff and defendant, there can be little incentive for the parties, their lawyers, and the litigation funder to cause any delay to its approval by the Federal Court of Australia (Federal Court).
- 12.4 There are financial and procedural barriers for class members to object to a settlement. A question then arises as to how the interests of class members are represented and upheld at the stage of settlement approval in a class action. The Federal Court assumes a protective role of the interest of class members, while the impartiality of judicial officers appropriately places limits on the strength and extent of any advocacy of the interest of class members that can be undertaken by a presiding judge.
- 12.5 A contradictor can be appointed by the Federal Court to represent the interests of class members at settlement approval to assist the Federal Court as to whether the settlement agreed, as reached by the parties, should be approved. In particular, a contradictor assesses whether the costs that have been incurred and proposed to be deducted from the settlement sum are reasonable, proportionate and fair.
- 12.6 This chapter explores the role of a contradictor as an advocate, how commonly contradictors are used in class actions, and the benefits and drawbacks of the work of a contradictor. Four class action cases involving a contradictor are then considered, with a focus on their role and impact in achieving improved outcomes for class members.

12.7 These cases are:

- *Bolitho & Anor v Banksia Securities Limited* (Banksia class action);¹
- *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* (Endeavour River class action);²
- *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* (Webster class action);³ and
- *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* (Petersen class action).⁴

12.8 The class actions are discussed in more detail in Appendix 2.

Limited representation of class members' interests

12.9 Whether class action settlements that are reached between the representative plaintiff and the defendant are in the best interests of class members was queried by various stakeholders. Emphasis was placed on the large portions of settlement sums going to litigation funders and lawyers, which consequently reduced the level of compensation received by class members.

12.10 Settlements determine the rights of all class members.⁵ The representative plaintiff's lawyer is authorised to make decisions about the terms of settlement and makes submissions to the Federal Court about the reasons why it should approve the proposed settlement terms. However, unless class members have signed a legal retainer with the plaintiff lawyer, a class member is not the lawyer's client. Further, the question of whether the representative plaintiff's lawyer is a fiduciary to the class is unsettled.⁶

12.11 Class members may object to the settlement. A class member who objects to the proposed settlement terms notifies the plaintiff lawyers and the litigation funder, and then files the objection with the Federal Court.⁷ For example, in the Petersen class action,⁸ 23 class members filed objections to the settlement approval. This was approximately 11 per cent of the 193 registered class members.⁹

¹ (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020).

² [2020] FCA 968.

³ [2020] FCA 1053.

⁴ [2018] FCA 1842.

⁵ *Federal Court of Australia Act 1976*, s. 33ZB.

⁶ Dr Cashman and Ms Simpson, *Submission 55.3*, p. 55.

⁷ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, p. 718.

⁸ [2018] FCA 1842.

⁹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [68]–[69].

- 12.12 If a class member has an objection to the settlement terms, they usually have limited resources to contest the terms of settlement and the class member is usually unrepresented at the approval hearing (an independent lawyer would be at the class member's expense).¹⁰
- 12.13 Mr Justin McDonnell, Partner at King&Wood Mallesons, noted the significant number of objections in the class actions concerning per- and polyfluoroalkyl substances (PFAS) groundwater contamination, namely, '80 different objections across three class actions'.¹¹ Mr McDonnell added that, although there may be a number of objectors within a class, these objections are often not raised before the court as most class members are not prepared or resourced to come forward with their objections.¹²
- 12.14 Therefore, concerns arise about the interests of class members going largely unrepresented at the settlement stage. This creates problems because the interests of all class members do not necessarily align with the interest of the representative plaintiff, the legal representatives or the litigation funder.¹³
- 12.15 Further, the alignment of the representative plaintiff and the defendant's interests has been described by the Federal Court in the following terms:
- [T]he Court assumes its onerous burden at a stage of the proceeding when the interest of the applicant and the 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".¹⁴
- 12.16 Submissions noted the limited incentive for the defendant law firm, plaintiff law firm or the litigation funder to delay the court's approval of a settlement agreement.¹⁵ Mr Jeremy Kirk SC noted it is generally in the interests of all parties for a settlement to be upheld and, commonly, it is a term of the settlement that all parties support the application for its approval by the court.¹⁶

¹⁰ Associate Professor Sulette Lombard and Professor Christopher Symes, answer to written question on notice, 29 July 2020 (received 18 August 2020); Professor Peta Spender, answer to a written question on notice, 29 July 2020 (received 20 August 2020).

¹¹ Mr Justin McDonnell, Partner, King&Wood Mallesons, *Committee Hansard*, 13 July 2020, p. 39.

¹² Mr Justin McDonnell, Partner, King&Wood Mallesons, *Committee Hansard*, 13 July 2020, p. 39.

¹³ Business Council of Australia, *Submission 86*, p. 9, citing Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, pp. 717–718.

¹⁴ See *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 429 [63].

¹⁵ See, for example, Menzies Research Centre, *Submission 66*, p. 18; Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020).

¹⁶ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, p. 718. Submissions from Ashurst and the Business Council of Australia referred to the work of Mr Jeremy Kirk SC on the use and value of contradictors; see Ashurst, *Submission 41*, pp. 3–4 (including footnotes 5, 7); Business Council of Australia, *Submission 86*, p. 9.

- 12.17 Omni Bridgeway sought to challenge this viewpoint by referring to the specific requirement placed on the Federal Court to ensure a settlement agreement is in the interests of class members, as well as those of the representative plaintiff, and not just in the interests of the representative plaintiff and the defendant.¹⁷
- 12.18 Additionally, Omni Bridgeway contended that, as the plaintiff lawyers are paid by the litigation funder periodically during the litigation, they do not hold a significant financial interest in the outcome of the matter.¹⁸

Role of a contradictor

- 12.19 One mechanism utilised by the Federal Court to represent the interests of class members at settlement approval hearing is the appointment of a contradictor.¹⁹ A contradictor is an independent lawyer, usually senior counsel (barrister), appointed by the Federal Court to represent the class members' interests.²⁰ This is to assist the Federal Court to effectively discharge its judicial function under section 33V of the *Federal Court of Australia Act 1976* (Federal Court Act), namely, to approve a settlement.²¹
- 12.20 The nature of the involvement of a contradictor is at the court's discretion. The issues that a contradictor examines are set by the court and are specific to the circumstances of the case. A contradictor's examination of the issues can expand and change as necessary.²²
- 12.21 A contradictor can identify what evidence is needed to assist and inform the court in its assessment about the reasonableness and fairness of costs. A contradictor can require certain information to be disclosed from the lawyers and litigation funder involved in the case.²³
- 12.22 Additionally, the contradictor can propose to the court the evidence it considers should be sought from experts. For example, the contradictor can propose to the

¹⁷ Omni Bridgeway, *Submission 73*, p. 5; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 15.3, www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/GPN-CA.pdf (accessed 18 November 2020).

¹⁸ Omni Bridgeway, *Submission 73.1*, p. 6.

¹⁹ See *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 [108].

²⁰ See, for example, *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569; *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439; *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719; *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053.

²¹ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653, cited in *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719 [36].

²² *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [21].

²³ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [15].

court that an expert opinion should be sought from a finance or capital market expert, on issues relating to a funding commission.²⁴

12.23 A costs assessor and a contradictor may be appointed in the same case to assess the reasonableness of legal fees and funding commissions. In that instance, a contradictor can represent the interests of class members through submissions to the costs assessor.²⁵

12.24 Associate Professor Sulette Lombard and Professor Christopher Symes noted the Supreme Court of Victoria recently clarified the role of the contradictor at the stage of settlement approval.²⁶ In the *Banksia* class action, the role of a contradictor was considered and defined.²⁷ A contradictor's role is to ensure that there 'is a real contest between conflicting interests' when the outcome is final and binding for parties.²⁸ A contradictor assists the court by being 'armed with the rights and powers of a party in the proceeding'.²⁹

12.25 Mr Kirk SC noted that, due to the adversarial model of the Australian curial system, and the critical importance of a presiding officer maintaining actual and perceived impartiality, it is inappropriate for a judge to take on the role as an advocate for the interests of class members at the stage of settlement approval. In the view of Mr Kirk SC, a legal practitioner is best placed to advocate for the interests of class members:

What is required is a sceptical, detailed review and critique of the proposed settlement scheme and how it affects the interests of all group members. That review is best undertaken by practitioners familiar with the practice of law in relation to class actions, and familiar with where the problems – the bodies, as it were – may lie. It does not require an attitude of hostility, by any means. But it does benefit from the sort of critical mindset that is the operating system of a practising litigator.³⁰

²⁴ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [26].

²⁵ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [6].

²⁶ Associate Professor Sulette Lombard and Professor Christopher Symes, answer to written question on notice, 29 July 2020 (received 18 August 2020).

²⁷ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [78]–[123].

²⁸ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [110]. In determining the role of a contradictor, the Supreme Court of Victoria rejected the application seeking to limit the contradictor's role.

²⁹ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [110].

³⁰ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, p. 720.

Benefits and drawbacks of contradictors

12.26 In the four case studies, the work by the contradictor led to the Federal Court approving settlement agreements with reduced legal costs and litigation funding fees than the amounts proposed in the agreements:

- Endeavour River class action: The contradictor considered it fair and reasonable that the commission sought by the litigation funder be reduced from 32 per cent to 25 per cent, a reduction in commission of approximately of \$3.5 million. This was approved by the Federal Court.
- Webster class action: The contradictor considered it fair and reasonable that the commission sought by the litigation funder be reduced from 28 per cent of the settlement sum to 23 per cent, a reduction in commission of \$1.875 million. This was approved by the Federal Court.
- Petersen class action: The commission sought by the litigation funder was reduced from 25 per cent of the settlement sum to a 13.7 per cent, a reduction in commission from \$3 million to \$1 million.

12.27 Some other key benefits arising from the appointment of a contradictor in these cases included:

- the costs of the contradictor's involvement were borne by the litigation funder;³¹ and
- the work of a contradictor can be equally important in achieving improved financial outcomes for class members when there are objections to the settlement amount, as well as when there are none.³²

12.28 In one instance, the Banksia class action, the remit of the contradictor's work was extensive and led to allegations of serious misconduct on the part of the lawyers and litigation funders spanning over several years.³³

12.29 Dr Cashman, among others, noted that a contradictor is highly valuable in challenging lawyers and funders' fees.³⁴ Contradictors were seen to be an effective tool to place scrutiny on the distribution of settlement sums between

³¹ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [165].

³² *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [68]–[69].

³³ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020 www.supremecourt.vic.gov.au/sites/default/files/2020-10/Contradictor%27s%20Revised%20List%20of%20Issues%20-%2010%20September%202020.pdf (accessed 16 November 2020).

³⁴ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3; Professor Michael Legg, *Submission 30*, p. 30; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 25; Associate Professor Sulette Lombard and Professor Christopher Symes, answer to a written question on notice, 29 July 2020 (received 18 August 2020).

class members, lawyers and litigation funders, particularly when the settlement sum is less than what was anticipated.³⁵

12.30 Mr Kirk SC noted that while the contradictor's costs may come out of the settlement sum, 'the short-term cost of a contradictor may often be to the gain of those group members'.³⁶

12.31 Conversely, the Menzies Research Centre submitted that courts have failed to protect consumers' interests, questioned the utility of a contradictor, and noted litigation funders often oppose the appointment of a contradictor.³⁷ Both the Menzies Research Centre and Professor Spender also noted litigation funders may try to narrow the scope, role or ability of a contradictor.³⁸

12.32 In addition, the Menzies Research Centre questioned whether a senior barrister is the most appropriate person to undertake an assessment of fees which requires the application of corporate finance principles.³⁹

Current incidence of appointment of contradictor

12.33 The committee heard opposing views on whether the Federal Court commonly appoints a contradictor, as well as the extent to which contradictors have effectively protected class members' interests in cases where they have been appointed.

12.34 Ashurst and the Queensland Law Society remarked that the Federal Court commonly approaches the assessment of the costs without a contradictor to assist it.⁴⁰ Other submitters stated that the Federal Court is obtaining assistance from independent parties at an increasing rate.⁴¹

³⁵ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3.

³⁶ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, p. 720.

³⁷ Menzies Research Centre, *Response to Supplementary Submission 73.1*, p. 7, noting *Bolitho & Anor v Banksia Securities Limited* (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020); *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837.

³⁸ Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020), noting *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968. See also Menzies Research Centre, *Response to Supplementary Submission 73.1*, p. 7, noting *Bolitho & Anor v Banksia Securities Limited* (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020); *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837.

³⁹ Menzies Research Centre, *Submission 66*, p. 28.

⁴⁰ See, for example, Ashurst, *Submission 41*, p. 2; Queensland Law Society, *Submission 46*, p. 2. See also Menzies Research Centre, *Response to Supplementary Submission 73.1*, p. 7.

⁴¹ See, for example, Professor Peta Spender, answer to written question on notice, 29 July 2020 (received 20 August 2020); Omni Bridgeway, answer to written question on notice, 17 July 2020 (received 3 August 2020); Mr Crispian Lynch, *Committee Hansard*, 27 July 2020, p. 11.

12.35 The Victorian Law Reform Commission's (VLRC) Final Report noted that, in class actions in the Common Law Division of the Supreme Court of Victoria, the appointment of a contradictor for settlement approval is now the 'default' position.⁴²

Increasing the use of contradictors in class actions settlements

12.36 This section canvasses the support for increasing the use of contradictors in class action settlements, as expressed in submissions as well as by the VLRC, and describes the models to achieve this as proposed by the VLRC and Mr Kirk SC.

12.37 The Law Council of Australia considered wider use of contradictors to be an effective safeguard to protect class members' interests.⁴³

12.38 The Business Council of Australia recommended the Federal Court should have a duty to consider the appointment of a contradictor when considering the fairness and reasonableness of the costs and the settlement agreement.⁴⁴ Ashurst also supported a requirement for a contradictor to assist the Federal Court in considering the appropriateness of funding arrangements.⁴⁵

12.39 The VLRC inquiry concluded that contradictors should be readily available in class actions involving complex settlements. It endorsed an approach whereby a presumption would exist for class actions in the Common Law Division, or class actions with complex settlement distribution schemes, that a contradictor will be appointed at settlement approval. The VLRC considered that placing this presumption in the Supreme Court of Victoria's Practice Note 'would convey the changed attitude of the Supreme Court of Victoria to using contradictors at settlement approval'.⁴⁶

12.40 The VLRC further endorsed amendment of the Practice Note to include increased guidance for the Supreme Court of Victoria when exercising its discretion to appoint a contradictor. The VLRC suggested the guidance be non-exhaustive and include factors such as:

- the desirability of the appointment in light of the complexity of the settlement and potential impact on class members;
- the time and costs involved in bringing the contradictor up to speed;
- the level of unrepresented objections received;

⁴² Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, June 2018, Victoria, p. 100. Class actions are heard both in the Common Law Division and Commercial Court of the Supreme Court of Victoria.

⁴³ Law Council of Australia, *Submission 67*, p. 22.

⁴⁴ Business Council of Australia, *Submission 86*, p. 9.

⁴⁵ Ashurst, *Submission 41*, p. 3.

⁴⁶ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, June 2018, Victoria, p. 101.

- the relative proportion of fees to proposed compensation for each class member; and
- any other matter the court deems appropriate.⁴⁷

12.41 Mr Kirk SC argues that the Federal Court should, in general, require a contradictor to be appointed to represent the interests of class members in cases where:

- there is some significant potential for conflicts of interest; or
- the issues likely to arise on the approval application are not simple.⁴⁸

12.42 Conflicts of interest could arise in the following scenarios:

- (a) Where there is a material conflict between the interests of the representative plaintiff and those of some sub-groups of class members, including between those with different sorts of interests or claims, or between those who have signed up with the litigation funder and/or the representative plaintiff's solicitor and those who have not.
- (b) Where the proposed return to the class members does not appear in accordance with with the possible prospects of success. This may be indicative of a desire to settle the case to ensure that the lawyers and litigation funder obtain a sufficient return on their investment. Mr Kirk SC considered careful review of the settlement is required 'to ensure that the interests of class members are not being sold cheap'.
- (c) Where an issue arises as to whether some class members should be included or excluded from claiming settlement proceeds where they did not register in time pursuant to some registration process ordered by the Federal Court to identify the number, identity and claims of class members.
- (d) Where there is an application for a common fund order, or such an order has been made.⁴⁹ In determining whether to make a common fund order, there are relevant factors for the Federal Court to consider, including what is a reasonable rate of return for litigation funders and what level of risk they assumed in funding the proceeding. Mr Kirk SC noted the defendant likely has no particular interest in providing evidence on these points as it is in their interest to finalise the claims against them through the

⁴⁷ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, June 2018, Victoria, p. 101.

⁴⁸ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, pp. 719–720.

⁴⁹ A common fund order is an order made by the Federal Court that requires all class members to equally contribute from their share of the proceeds to the costs of the litigation, including the litigation funder's commission. This includes those class members who have registered to share in the proceeds of the class action but have not entered into a funding agreement with the litigation funder. Chapter 9 addresses common fund orders.

settlement. With respect to the representative plaintiff, they have contracted with the litigation funder to pay the commission and, therefore, it may be in the representative plaintiff's interests to secure a common fund order. If this is the case, their legal representatives must represent this interest at settlement approval.

- (e) Where it is proposed that the solicitors for the representative plaintiff are to be appointed as the administrator of the settlement and where there may be other means available to administer the scheme more cheaply, efficiently or quickly.⁵⁰

12.43 These are factors also identified by Mr Kirk SC as relevant to the Federal Court's consideration, in addition to:

- the existence of any conflicts between the interests of the representative plaintiff or their legal representatives on the one hand and some or all class members on the other, and the nature and significance of the conflict;
- whether or not a common fund order is sought;
- the number of class members involved and potentially detrimentally affected;
- the potential significance to class members of the legal rights being determined;
- the amounts of money involved, including the overall settlement sum, and the proportion proposed to go to the legal representatives and any funder;
- the size of the claims being made by class members;
- the likely amount of administration involved in the settlement distribution scheme;
- the stage at which the proceedings has reached and the familiarity of the approving judge with the issues; and
- the costs of retaining a contradictor, any undue delay that this may cause, and whether such costs and delay are reasonable and proportionate in light of the issues, rights and amounts at stake.⁵¹

12.44 In a recent decision of the Full Court of the Federal Court on the issue of common fund orders, Justice Lee observed that, in the absence of opposing class

⁵⁰ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, pp. 720–726. A settlement administration scheme will typically involve elements such as the appointment of an administrator of the scheme (it is usually the representative plaintiff's solicitors who seek this role); the establishment of a procedure for the identification and verification of class members entitled to participate in the settlement; the identification of the formula or means by which claims are to be assessed and determined; the establishment of a dispute resolution mechanism; and some provision for supervision of the scheme by the court.

⁵¹ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, p. 728.

members to the approval of a proposed settlement agreement, 'it may be appropriate for a contradictor to be appointed'.⁵²

12.45 The Law Council of Australia submitted that the determination of whether the circumstances of any settlement lend themselves to the appointment of a contradictor should be a decision of the court.⁵³

12.46 Further aspects of the contradictor's role in class action settlements, as described by Mr Kirk SC, include:

- *Scope of role:* The contradictor may be given leave of the court to address the issues they think are relevant to protecting the class members' interest; however, more commonly the focus will be some particular concern that has led to the requirement to appoint the contradictor.
- *Timing of appointment:* The judge presiding over the settlement approval should have sufficiently considered the settlement approval application before setting a date for final hearing of the application, so as to identify possible issues of concern. At the first return date for the application, the parties could draw the attention of the judge to any issues which might be of concern.
- *Taking instructions:* A contradictor would not take instructions from class members. Nonetheless, as their role is to represent the interests of the class members, a contradictor would pay close attention to any concerns expressed by class member to the Federal Court, or to the contradictor, as well as address any issues raised by the judge.
- *Access to and tendering material:* a contradictor should have access to all material provided to the Federal Court at the application for approval settlement, including confidential material if relevant to the issues the contradictor is examining. The contradictor should be permitted to tender any further relevant evidence to assist the court.⁵⁴

12.47 The Law Council of Australia submitted that an increased use of contradictors in class actions would 'most appropriately be achieved through a practice note or guidelines issued on a court-by-court basis'.⁵⁵

⁵² *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 [69] (Lee J, Middleton and Moshinsky JJ agreeing).

⁵³ Law Council of Australia, *Submission 67*, p. 22.

⁵⁴ Jeremy Kirk SC, 'The case for contradictors in approving class action settlements', *Australian Law Journal*, vol. 92, no. 9, 2018, pp. 728–729.

⁵⁵ Law Council of Australia, *Submission 67*, p. 22.

Committee view

- 12.48 A class action settlement agreement determines the right and interests of all class members. It is critical that a settlement is fair and reasonable in the interests of all class members who will be bound by it.
- 12.49 The legal costs and litigation funding fees significantly impact on the extent to which class members are adequately compensated for the civil wrongdoing which affected them. The dispute resolution process resulting in a settlement often does not involve class members. In open class actions, class members often have not contracted with the lawyers and litigation funders. Consequently, the class members commonly have little to no participation in the process involved to resolve their legal claims and the costs incurred to achieve that outcome.
- 12.50 The committee recognises that this outcome arises from an objective of the class action regime to facilitate access to justice by enabling groups of people to pursue redress more cheaply and efficiently than would otherwise be the case. However, the processes are open to potential abuse, namely the windfall profits that can be made at the expense of class members.
- 12.51 There are significant barriers for class members to represent their own interests at the point of settlement agreement and settlement approval. The interests of the other parties' to a settlement—the representative plaintiff, the defendant, the legal representatives and the litigation funder—often do not align with the class members' interests.
- 12.52 When a class action has reached the point where a settlement has been agreed and is put to the Federal Court for approval, the defendant would see little incentive in delaying the finalisation of the case against them. The representative plaintiff's interests may differ from, or be in direct conflict with, the interests of some class members, particularly when issues arise with respect to sharing the payment of transaction costs. Their legal representatives and the litigation funder could be similarly disincentivised to risk any delay in receiving their remuneration and/or return on investment from the settlement sum.
- 12.53 A process exists for class members to raise their objections to a settlement and, as demonstrated in the Petersen class action, this process is utilised by class members.⁵⁶ However, the nature of the position of class members in a class action means that, generally, they are less involved in the steps of the proceeding, are less informed about the details of the case, and have greater limitations on their access to relevant documents. These barriers create a

⁵⁶ The committee has used the Petersen class action to highlight some issues relevant to the inquiry. The committee does not express a view as to the merits of the Petersen class action, nor the Federal Court's decision. The committee notes that the judgement in the Petersen class action stated 'if the case had proceeded to trial...it was likely to fail': *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* (No 3) [2018] FCA 1842 [16].

situation where class members may not be pleased with the terms of the settlement but are discouraged from bringing their objections before the Federal Court, or are unable to do so.

- 12.54 Further, when objections are filed with the Federal Court, a class member is required to represent themselves or be liable for the costs of independent legal representation. This is an onerous burden and a significant barrier that ought to be addressed. Therefore, it is critical that there is a mechanism through which it can be ensured that the interests of class members are fully and properly considered at the point when the Federal Court is asked to approve a settlement agreement.
- 12.55 The committee recognises there is a requirement on the Federal Court to ensure a settlement agreement is in the interests of class members, as well as those of the representative plaintiff, and not just in the interests of the representative plaintiff and the defendant. The Federal Court does not, and should not, act as the advocate for the class members' interests.
- 12.56 The committee notes that the Federal Court has the power to appoint a contradictor and has, on occasion, done so. The committee has not received sufficient information to determine how commonly the Federal Court appoints contradictors.
- 12.57 The committee considers contradictors are an effective tool that can be used by the Federal Court to protect class members against excessive legal costs and litigation funding fees. To the committee's knowledge, in instances where a contradictor has been appointed, this has been an effective mechanism to represent the interests of class members by robustly scrutinising the distribution of settlement sums between class members, lawyers and litigation funders. This has resulted in settlement agreements which are more financially advantageous for class members than when first proposed to the Federal Court for approval. This was well illustrated when a contradictor was appointed in the Endeavour River class action and the Webster class action.
- 12.58 Further, the extensive work of the contradictor in the Banksia class action uncovered serious allegations of misconduct by the lawyers and litigation funders. The committee acknowledges that the remitter proceeding from the Banksia class action is ongoing. From the information available to date about the alleged impropriety of the litigation funder and the legal representatives for the representative plaintiff, the committee makes the following points:
- the alleged misconduct on the part of the 'team' for the representative plaintiff and class members appears to be particularly egregious;
 - it is alleged this conduct went on for a considerable amount of time without detection; and

- it appears it was only at the point when a contradictor was appointed that the alleged self-interest driving the serious contraventions of legal and ethical obligations and duties was uncovered.
- 12.59 While allegations of misconduct of this sort are rare, this case illustrates that it is within the power and ability of a contradictor to bring alleged misconduct of this sort to light. The wider use of contradictors in the Federal Court would act as an effective check and balance on the class action and litigation funding industry, if and when required.
- 12.60 The improved outcomes for class members after the contradictor's examination of costs support the need for the wider use of contradictors. Accordingly, the committee considers that an appropriate approach to prevent class action litigation from being used as a vehicle by litigation funders and plaintiff lawyers to obtain windfall profits at the expense of the class members, would be to appoint a contradictor when certain circumstances arise.
- 12.61 In cases where there is limited potential for conflicts of interests to arise, the judge should, as currently occurs, place sufficient scrutiny on the terms of the proposed settlement agreement with the assistance of a referee to act as a legal costs assessor or a litigation funding fees assessor, if required (see Chapter 11).
- 12.62 The committee considers that, in instances where there is some potential for significant conflicts of interest to arise, or complex issues are likely to arise at the settlement approval application, there is a need for a contradictor to be appointed to represent the interests of class members.
- 12.63 The committee suggests that there should be a presumption that a contradictor would be appointed in those instances. Conflicts of interest of this nature could arise in the following scenarios:
- Where there is a material conflict between the interests of the representative plaintiff and those of some sub-groups of class members, including between those with different sorts of interests or claims, and between those who have signed up with the litigation funder and/or the representative plaintiff's solicitor and those who have not.
 - Where the proposed return to the class members does not appear to be in accordance with the possible prospects of success.
 - Where an issue arises as to whether some class members should be included or excluded from claiming settlement proceeds where they did not register in time pursuant to some registration process ordered by the Federal Court to identify the number, identity and claims of class members.
 - Where there is an application, or an order has been made, for a common fund order, a funding equalisation order, or an equivalent order.
 - Where it is proposed that the solicitors for the representative plaintiff are to be appointed as the administrator of the settlement and where there may be

other means available to administer the scheme more cheaply, efficiently or quickly.

12.64 A presumption ensures the Federal Court retains discretion and the presumption can be rebutted in suitable cases. Increased guidance for the Federal Court when exercising its discretion to appoint a contradictor should be non-exhaustive and include factors such as:

- the desirability of the appointment in light of the complexity of the settlement, the number of class members involved, and the potential impact on class members;
- the time and costs involved in bringing the contradictor up to speed;
- the level of unrepresented objections received;
- the relative proportion of fees to proposed compensation for each class member;
- the nature and significance of the conflicts of interest between the interests of the representative plaintiff or their legal representatives on the one hand, and some or all class members on the other;
- the potential significance to class members of their legal rights being determined;
- the amounts of money involved, including the overall settlement sum, and the proportion proposed to go to the legal representatives and any litigation funder;
- the size of the claims being made by class members;
- the likely amount of administration involved in the settlement distribution scheme;
- the stage the proceedings has reached and the familiarity of the approving judge with the issues; and
- the costs of retaining a contradictor, any undue delay that this may cause, and whether such costs and delay are reasonable and proportionate in light of the issues, rights and amounts at stake.

12.65 The committee acknowledges the question of whether a barrister is well placed to assess the return to litigation funders. Contradictors appointed in class actions, along with the Federal Court, appear to be tackling this issue by seeking the expert opinion of market capital and finance experts on the question of litigation funding costs, as demonstrated in the Endeavour River class action. Contradictors would still have the option to obtain assistance from a litigation funding fees assessor in undertaking their assessment, if one has been appointed by the Federal Court.

12.66 Moreover, if the committee's other recommendations in Chapter 11 and 13 are implemented; the litigation funding fee would have been considered and approved by the Federal Court prior to the settlement approval stage. The committee recommended in Chapter 11 that a litigation funding agreement require the Federal Court's approval to be enforceable, and the introduction of

a power for the Federal Court to alter the terms of a litigation funding agreement. In Chapter 13, the committee notes the proposal by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the Australian Government investigate the best way to implement this floor. The committee also recommends the Australian Government investigate whether a graduated minimum return above this floor is appropriate for shorter, less risky and less complex cases.

- 12.67 The committee acknowledges the high costs associated with the assistance of a contradictor and this could be problematic in low-value settlements. In circumstances where the benefits of a contradictor are outweighed by the disproportionality of the costs to the issues, right and amounts at stake, one option could be the referral of issues with respect to the legal costs or litigation funding fees to a referee to act as a legal costs assessor or a litigation funding fees assessor.
- 12.68 The committee considers that the Federal Court's Class Actions Practice Note should state that the Federal Court may order the costs arising from the work of a contradictor be paid by the plaintiff law firm, or the litigation funder, in circumstances where the conduct on the part of the lawyer or the litigation funder justifies such an order being made.
- 12.69 Class members should be made aware when a contradictor has been appointed in the class action. Consideration should be given to how class members can most practically and efficiently be informed about the appointment, the questions to be determined by the contradictor, and the most straightforward way class members can inform the contradictor of their concerns and/or objections to the settlement. One option could be via the notice provisions in the Federal Court Act and be supplemented in the Federal Court's Class Actions Practice Note.

Recommendation 18

12.70 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to:

- **introduce a presumption that the Federal Court of Australia is to appoint a contradictor in instances where there is the potential for significant conflicts of interest to arise, or complex issues are likely to arise at the settlement approval application;**
- **include guidance on scenarios in which a conflict of interest is likely to arise, including:**
 - **where there is a material conflict between the interests of the representative plaintiff and those of some sub-groups of class members, including between those with different sorts of interests or**

- claims, and between those who have signed up with the litigation funder and/or the representative plaintiff's solicitor and those who have not;
- where the proposed return to the class members does not appear to be in accordance with the possible prospects of success;
 - where an issue arises as to whether some class members should be included or excluded from claiming settlement proceeds where they did not register in time pursuant to some registration process ordered by the Federal Court of Australia to identify the number, identity and claims of class members;
 - where there is an application, or an order has been made, for a common fund order or a funding equalisation order, or an equivalent order; and
 - where it is proposed that the solicitors for the representative plaintiff are to be appointed as the administrator of the settlement and where there may be other means available to administer the scheme more cheaply, efficiently or quickly;
- ensure the Federal Court of Australia retains discretion to appoint a contradictor and provide non-exhaustive guidance for the Federal Court of Australia as to the factors to which it should have regard when considering whether to exercise its discretion to appoint a contradictor; and
 - ensure the Federal Court of Australia may order the costs arising from the work undertaken by a contradictor be paid by the plaintiff law firm, or the litigation funder, in circumstances where the conduct on the part of the lawyer or the litigation funder justifies such an order being made.

Recommendation 19

12.71 The committee recommends the Australian Government implement a procedure to facilitate communication of class members' concerns and objections to the settlement to a contradictor, when appointed. Class members should be informed of the contradictor's appointment in the class action and the questions to be determined by the contradictor. One option which should be considered is the introduction of such a power in the notice provisions in Division 3 of Part IVA of *Federal Court of Australia Act 1976* and supplemented by processes described in the Federal Court of Australia's Class Actions Practice Note.

Chapter 13

Reasonable, proportionate and fair litigation funding fees

Introduction

- 13.1 In referring the inquiry, the Attorney-General, the Hon Christian Porter MP, drew attention to the excessive returns being attained by litigation funders at the expense of class members and defendants.¹
- 13.2 There were serious concerns that the excessive profits obtained by litigation funders in Australia's class action system were facilitated by the current billing practice of the litigation funder taking a percentage of the recovered sum.
- 13.3 Submitters encouraged the committee to consider alternatives to the current billing methods. Accordingly, this chapter discusses a range of alternatives to percentage-based fees. The chapter concludes with the committee's views on these matters.

Litigation funding fees – current practices

- 13.4 When there is a settlement or judgment in favour of the representative plaintiff in a litigation funded class action, the litigation funding agreement typically provides that the litigation funder stands to be reimbursed for the costs it incurred during the proceedings, as well as a commission which 'is meant to reflect the risk that the funder accepts'.²
- 13.5 The commission is calculated either as a percentage of the sum of money recovered or on a multiple of the costs spent by the litigation funder in the proceeding.³ Mr Ben Phi, Managing Director of Phi Finney McDonald, noted some litigation funding agreements stipulate whichever is higher of the multiple of the costs or the percentage will be charged, whereas others agreements may provide whichever is lower will be the basis for the commission calculation.⁴

¹ The Hon. Christian Porter, Attorney-General, 'Improving justice outcomes for class actions members', *Media Release*, 13 May 2020, www.attorneygeneral.gov.au/media/media-releases/improving-justice-outcomes-class-action-members-13-may-2020 (accessed 14 October 2020).

² Professor Michael Legg, *Submission 30*, p. 4; See also Australian Securities and Investment Commission, *Submission 39*, p. 19.

³ Omni Bridgeway, *Submission 73*, p. 7.

⁴ Mr Ben Phi, Managing Director, Phi Finney McDonald, *Committee Hansard*, 27 July 2020, p. 44.

- 13.6 The costs for which the litigation funder is reimbursed, known collectively as 'project costs',⁵ include:
- legal costs which the litigation funder has paid out, which is usually 70 per cent of the plaintiff lawyers' fees, paid at regular intervals by the litigation funder to the lawyers;⁶ and
 - disbursements, such as barristers' fees, investigators, expert witnesses, third party discovery consultants and possibly after-the-event insurance premium.⁷
- 13.7 The services provided by litigation funders often include indemnities or security for adverse cost orders, supervising lawyers and coordinating class actions.⁸

Key concerns about litigation funder returns

Decreased returns to class members

- 13.8 Litigation funders have a substantial impact on the percentage of the settlement returned to the class members. The Australian Law Reform Commission (ALRC) found that the median return to class members in funded class actions was 51 per cent. In contrast, in unfunded proceedings, the median return was 85 per cent of the settlement award.⁹
- 13.9 Analysis by Dr Cashman and Ms Simpson of empirical data on class actions and litigation funding provided to the inquiry by the Law Council of Australia found that, in the period 2001 to 2020, the portion of settlements being paid other than to class members from the gross settlement (including approved legal fees and commission) of the funded class actions is 41.4 per cent. That is, on average

⁵ Omni Bridgeway, *Submission 73*, p. 6; Donaldson Law, *Submission 65*, p. 2.

⁶ Donaldson Law, *Submission 65*, p. 2; A plaintiff law firm is usually paid its outstanding professional fees upon the successful finalisation of the matter out of settlement or damages. This typically comprises at least the 30 per cent of their professional fees which were not paid as part of interim payments from the litigation funder through project costs. In addition, in some cases the class action law firm charges an uplift of 25 per cent (i.e. an additional 25 per cent of the total amount of their professional fees). In addition, some class action lawyers charge interest on their outstanding professional fees (and uplift) at rates up to 6 per cent.

⁷ Australian Securities and Investment Commission, *Submission 39*, p. 19.

⁸ See, for example, Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 66; Productivity Commission, *Access to Justice Arrangements*, No. 72, 5 September 2014, pp. 22, 61, 627; Dr Warren Mundy, *Submission 17*, pp. 5–6.

⁹ Australian Law Reform Commission, *Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 70. In Omni Bridgeway's opinion, comparisons between returns to group members in funded and unfunded class actions are not valid, because in most instances without funding those cases would not have proceeded at all: Omni Bridgeway, *Submission 73*, p. 5.

approximately 40 per cent of the amounts otherwise payable to class members is paid as transaction costs to lawyers and litigation funders.¹⁰

13.10 The ALRC found that in the period 2013–2018:

- legal fees ranged from 2 per cent of a \$250 million settlement, to 50 per cent of a \$6.75 settlement and a \$3 million settlement; and
- funding commissions ranged from 17 per cent of a \$6.75 settlement and a \$3 million settlement; to 62 per cent of a \$6.6 million settlement.¹¹

13.11 The Federal Court has noted the issue of disproportionate transaction costs in class actions:

The Part IVA regime is intended to provide access to justice to the applicant and class members and it is not intended solely for the benefit of service providers such as lawyers and funders. The legitimate use of the Court's processes should not be undermined by proceedings that disproportionately benefit the funder and/or solicitor rather than the litigant.¹²

Fees as a percentage of the settlement

13.12 A class action settlement sum can vary enormously and is unknown until case completion. Giving a litigation funder a percentage of the settlement can result in excessive and inequitable returns relative to the members of a class action. A less than fair return for the litigation funder is also possible, but less likely.¹³ Giving the litigation funder a percentage of the settlement does not explicitly consider what the litigation funder contributed. There are no underlying financial principles involved in the percentage split of a settlement between a litigation funder and a plaintiff.¹⁴

13.13 The Menzies Research Centre argued that, when the Federal Court reviews the commission and charges sought by the litigation funder and the legal fees charged by the plaintiff law firm, the Federal Court wrongly focuses on the commission as a percentage of the compensation awarded to class members rather than considering the profit measures, such as the return on invested capital (ROIC), used by litigation funders. The Menzies Research Centre concluded that this leads to an undesirable situation:

¹⁰ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.3*, pp. 35–36.

¹¹ Professor Michael Legg, *Submission 30*, p. 2; Australian Law Reform Commission, *Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 84.

¹² *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [5], [129].

¹³ Mr Sean McGing, *Submission 101*, p. 3.

¹⁴ Mr Sean McGing, *Submission 101*, p. 3.

The approach taken by the court in relation to the funder's remuneration is haphazard and undertaken without regard to principles of corporate finance or benchmarks for risk adjusted rates of return.¹⁵

13.14 The case of *Endeavour River Pty Ltd v MG Responsible Entity Limited* (Endeavour River class action) was raised by participants during the inquiry.¹⁶ Ms Rebecca LeBherz and Mr Justin McDonnell noted the returns to the litigation funder, setting out the ROIC obtained in comparison to the average ROIC on other types of investment:

At the reduced amount of 25%, the funder would receive \$8,614,973 or 457% of its costs. The Judge estimated that the funder had outlaid monies over a 12–14-month period (the proceedings were filed on 16 August 2018 and settled in principle at a mediation on 30 May 2019). The litigation risks often cited by funders were identified by the Judge. The risk factor was, arguably, minimised. The average year on year performance of private equity funds is around 12–15% per annum. An individual's superannuation fund is doing well at 7–10% per annum (but 5% is more usual). The funder took the offered 25%.¹⁷

13.15 Some inquiry participants considered this return to be excessive.¹⁸ The Menzies Research Centre and Mr Stuart Clark commented this decision does not reflect community expectations.¹⁹ The representative plaintiff in the Endeavour River class action, Mr Rod Gibson, made a submission and gave evidence to the committee. Reflecting on the amount that he had received from the settlement sum in comparison to his loss on the original investment, Mr Gibson commented that, in his view, this return was better than receiving '100 per cent of nothing':

Without this case, and the many others like it, investors such as myself would have received no compensation for their losses, and would have very little recourse to efficiently and effectively pursue their rights in the context of corporate misconduct.²⁰

¹⁵ Menzies Research Centre, *Submission 66*, p. 18.

¹⁶ *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719.

¹⁷ Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 4.

¹⁸ Mr Justin McDonnell, Partner, King & Wood Mallesons, *Committee Hansard*, 13 July 2020, p. 48; Mr Stuart Clark, *Committee Hansard*, 13 July 2020, p. 16; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 23.

¹⁹ Menzies Research Centre, *Response to Supplementary Submission 73.1*, p. 9; Mr Stuart Clark, *Committee Hansard*, 13 July 2020, p. 16.

²⁰ Mr Rod Gibson, *Submission 19*, p. 2.

Multiple fees or fees in addition to a commission

- 13.16 A litigation funding agreement may also include a 'project management fee' and/or a 'settlement administration fee', in addition to the litigation funder's commission.²¹
- 13.17 The latter fee concerns the fees related to the work undertaken to distribute the settlement to the class members after the settlement has been approved by the court. It is typically undertaken by the plaintiff law firm, but it can also be an independent entity, such as an accounting firm.²² The costs associated with the administration of the settlement can be, and often are, deducted from the settlement sum or damages award.
- 13.18 Of concern to Dr Peter Cashman was the 'project management fee', in addition to a commission fee, being recovered from the settlement sum.²³ Dr Cashman stated there is not a standard approach to the charging of project management fees: some funders don't impose them; others charge this fee separately to a commission fee; or, in some instances, the costs of project management are factored into the commission rate charged.²⁴
- 13.19 Dr Cashman added there is divided judicial opinion on whether it is appropriate for these charges be taken from the settlement sum or damages awarded to the class members on top of the deduction of the commission. A question arises as to whether the litigation funder should bear these 'project management' costs as an expense of doing business and, therefore, be paid out of the sum obtained from the settlement by way of commission.²⁵

Examples of excessive litigation funder returns

- 13.20 Selected class action settlements were provided by the Attorney-General's Department to highlight distributions of settlements to litigation funders and class members (see Box 13.1).
- 13.21 These examples also provided some brief excerpts of judicial opinion on litigation funding fees.²⁶ In one case, the Federal Court described the litigation

²¹ See, for example, Maurice Blackburn Lawyers, *Submission 37*, p. 13; Australian Securities and Investment Commission, *Submission 39*, p. 19; Association of Litigation Funders of Australia, *Submission 57*, p. 15; Phi Finney McDonald, *Submission 87*, p. 11.

²² See, for example, Law Institute of Victoria, *Submission 3*, p. 16; Law Council of Australia, *Submission 67, Attachment A*, p. 1.

²³ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 28.

²⁴ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 28; See also Omni Bridgeway, *Submission 73*, p. 6. For example, Omni Bridgeway has a 'Client Team' who undertakes many of the administrative tasks relating to managing group members' claims at no additional charge to group members.

²⁵ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 28.

²⁶ Attorney-General's Department, *Submission 93*, p. 4.

funding commission as an 'unprecedentedly large amount'.²⁷ In another case, the Supreme Court of New South Wales stated the rate of commission sought was 'arguably excessive', and the return would be 'stratospheric, in the tens of thousands of per cent' compared to the actual costs the funder paid.²⁸

Box 13.1 Case examples of settlement distribution

Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc) [2018] FCA 1289

- Class action in the Federal Court related to ratings for Collateralised Debt Obligations.
- \$215 million settlement approved by Court included \$92 million for two Singapore-based funders equivalent to a 460 per cent return on investment.
- \$20 million went to the representative plaintiff's legal representatives.

Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No 3) [2019] NSWSC 871

- Shareholder class action in the Supreme Court of New South Wales.
- The Court rejected the common fund order application that would entitle the funder to between 25 per cent and 30 per cent of the net recovery.
- The settlement is subject to a confidentiality order.

Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited [2020] FCA 510

- An application to the Federal Court seeking approval of a settlement agreement of a shareholder class action.
- From the notice of proposed settlement, the litigation funder was to be paid \$8.6 million in funding fees out of a total settlement sum of \$32.4 million. This equated to approximately 26 per cent of the gross settlement.
- Approximately \$10.8 million of the settlement was to be paid in legal costs incurred in conducting the proceeding and for the estimated costs of administering the settlement.
- \$13 million was to be distributed to the class members, equivalent to 40 per cent of the gross settlement.

Endeavour River Pty Ltd v MG Responsible Entity Limited [2019] FCA 1719

- An application to the Federal Court seeking approval of a settlement agreement of a shareholder class action.
- Settlement of \$42 million included legal costs and interest, with the litigation funder to deduct \$13.47 million as commission, equivalent to 32 per cent of the gross settlement.
- The Court stated the funder's proposed commission was not 'fair and reasonable in the interests of the class members'.

²⁷ *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc) [2018] FCA 1289.*

²⁸ *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No 3) [2019] NSWSC 871.*

- At the time of the proposed settlement, the funder had only paid \$1.86 million in legal costs and disbursements. Murphy J noted the 'the proposed funding commission is more than seven times that amount'.
- The Court later approved the litigation funder's commission at a level equivalent to 25 per cent of the settlement plus GST, amounting to a 390 per cent return on investment, according to the litigation funder's half yearly results.

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

- Class action in the Federal Court on behalf of several hundred Bank of Queensland customers for the fraudulent misappropriation of their retirement savings by a financial advisor and related companies through unauthorised withdrawals from the Bank.
- The Court approved the proposed \$12 million settlement but disallowed the legal and funding costs.
- The Court said the total legal fees of \$6.5 million were 'plainly disproportionate'. The Court considered it 'appropriate' to reduce the legal costs of \$4.57 million that were claimed as part of the settlement by 40 per cent.
- The litigation funder sought a funding rate of 25 per cent of the gross settlement, but the judge approved a rate of 8.3 per cent of the gross settlement. On that basis the funder was paid a total of just less than \$6 million, a reduction of \$2 million.
- The Court held that the class should get at least \$4 million of the settlement, equivalent to one third of the sum. The Judge considered two thirds of the settlement sum to costs and the litigation funder's commission was 'reasonable and proportionate'.

Achieving reasonable, proportionate and fair fees

13.22 The Attorney-General's Department's submission stated the Australian Government considers further investigation is required to assess the appropriateness of returns to litigation funders and lawyers, and most importantly, that the regime provides just and effective outcomes for members of the class action.²⁹ Similar sentiments were expressed by some defendant law firms, business representatives and researchers.³⁰

13.23 Other submitters noted the necessary and important role litigation funders have in the Australian market, yet queried the ways in which returns to litigation funders can be more reasonable and proportionate.³¹

13.24 The ALRC argued that reforms are necessary to ensure greater judicial control of class actions and litigation funders. Mr Matt Corrigan from the ALRC stated:

There is a legitimate policy question as to the use of judicial resources to secure small sums for individual group members while creating enormous returns to lawyers and funders.³²

13.25 The Federal Court has noted the issue of disproportionate transaction costs in class actions. For example, the Federal Court remarked in the Petersen class action:

The Part IVA regime is intended to provide access to justice to the applicant and class members and it is not intended solely for the benefit of service providers such as lawyers and funders. The legitimate use of the Court's processes should not be undermined by proceedings that disproportionately benefit the funder and/or solicitor rather than the litigant.³³

13.26 Professor Michael Legg submitted that the yardstick against which the Federal Court assesses costs has rightly moved from a question of whether the costs were fair and reasonable to a question of whether the costs are reasonable and proportionate.³⁴ However, Professor Legg submitted that the issue with the

²⁹ Attorney-General's Department, *Submission 93*, p. 4.

³⁰ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 3; King & Wood Mallesons, *Submission 53*, p. 22; Menzies Research Centre, *Submission 66*, p. 4; Business Council of Australia, *Submission 86*, p. 9

³¹ See, for example, Professor Michael Legg, *Submission 30*, p. 3; Dr Warren Mundy, *Committee Hansard*, 13 July 2020, p. 27; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 23.

³² Mr Matt Corrigan, General Counsel, Australian Law Reform Commission, *Committee Hansard*, 27 July 2020, p. 66.

³³ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [5], [129].

³⁴ Proportionality of costs is required by various statutes and has been extensively considered by the courts: See *Legal Profession Uniform Law 2014* (NSW), s. 172; Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.3*, p. 9; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (No 3)* [2017] FCA 330 [181] (Beach J); *Caason Investments Pty Limited v*

application of this standard is that the Federal Court tends to focus on whether the costs are 'proportionate to the expected realistic return at the time the work was performed and not the actual recovery'.³⁵

13.27 Professor Legg proposed an improved standard for both legal and litigation funding costs in class actions would be whether the costs are 'fair, reasonable and proportionate to the risk undertaken and the outcome achieved'.³⁶

Single, inclusive fee

13.28 Professor Legg considered a litigation funder should be entitled to a single fee which incorporates any administrative costs, legal costs or ATE insurance premiums, rather than allowing for additional costs to be added to the funding commission.³⁷

13.29 Mr Daniel Meyerowitz-Katz considered transparency is needed for the fees charged under litigation funding agreements in order to prevent the inclusion of hidden management fees and administration fees in addition to the 'headline' commission rate.³⁸

13.30 Mr Phi submitted a benefit of greater competition in the litigation funding market is the emerging trend whereby litigation funders increasingly offer an all-in figure; that is, the fee charged includes all of the legal costs they have paid out to the plaintiff lawyers during the course of the class action.³⁹

Reasonable, proportionate and fair litigation funding fees

13.31 This section sets out potential alternatives to the current practice of charging for litigation funding with the objective of achieving reasonable, proportionate and fair fees. The positive outcomes flowing from achieving this objective could include:

- protecting class action members from excessive fees;
- providing fairer outcomes for businesses, corporations, shareholders and governments that defend funded class actions; and
- ensuring the more appropriate use of scarce judicial resources.

13.32 The section concludes with the following alternatives to percentage-based fees:

- empirical assessments of past cases;

Cao (No 2) [2018] FCA 527 [148]–[152] (Murphy J); *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 [80] (Murphy, Gleeson and Beach JJ).

³⁵ Professor Michael Legg, *Submission 30*, p. 4.

³⁶ Professor Michael Legg, *Submission 30*, p. 4.

³⁷ Professor Michael Legg, *Submission 30*, p. 3.

³⁸ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 4.

³⁹ Mr Ben Phi, Managing Director, Phi Finney McDonald, *Committee Hansard*, 27 July 2020, p. 43.

- percentage caps;
- sliding scales;
- investment and insurance risk-return approaches; and
- net present value estimates of costs and benefits of litigation funding.

Empirical analysis of past cases

13.33 Omni Bridgeway argued that courts should rely on industry-wide empirical analysis of historical cases to determine fair returns to litigation funders. Omni Bridgeway drew attention to empirical analysis by Professor Vince Morabito, suggesting that the median return to litigation funders was 25 per cent of the settlement amount.⁴⁰

13.34 Omni Bridgeway also argued it would be appropriate to analyse returns across all funded cases in a litigation funders' portfolio, including those that were lost, and the costs of running the business.⁴¹ The Productivity Commission suggested that compensation for risk should reflect a spread of wins and losses across a firm's overall caseload.⁴²

Minimum return to class members

13.35 Omni Bridgeway recommended the introduction of a statutory requirement that no less than 50 per cent of the gross proceeds from a funded class action be returned to class members.⁴³ It submitted that in only a minority of cases do class members receive a return of less than 50 per cent.⁴⁴ Omni Bridgeway further considered that where returns are less than 50 per cent, the funder should be required to carry that burden, not the claimants.⁴⁵

Percentage caps

13.36 A percentage cap puts a cap on the percentage of a settlement that a litigation funder can claim. Because it would increase proportionately with the size of the settlement or award, it would not prevent windfall profits on high-value claims, or protect consumers. Further, a percentage cap on litigation funding fees could diminish funding availability for smaller or riskier claims and may perversely increase prices.⁴⁶

⁴⁰ Omni Bridgeway, *Submission 73*, pp. 7–8.

⁴¹ Omni Bridgeway, *Submission 73*, p. 5.

⁴² Productivity Commission, *Access to Justice Arrangements*, No. 72, 5 September 2014, p. 628.

⁴³ Omni Bridgeway, *Submission 73*, pp. 5, 14.

⁴⁴ Omni Bridgeway, *Submission 73*, p. 9.

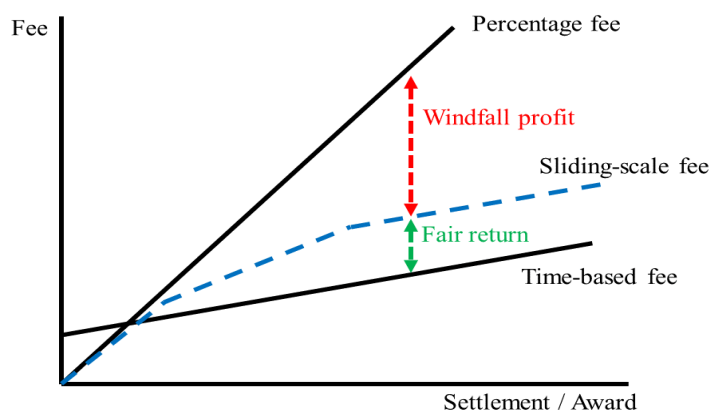
⁴⁵ Omni Bridgeway, *Submission 73*, p. 9.

⁴⁶ Dr Warren Mundy, *Submission 17*, pp. 9–10; Productivity Commission, *Access to Justice Arrangements*, No. 72, 5 September 2014, p. 616; Mr John Walker, Chairman, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 32.

Sliding scales

13.37 The Productivity Commission has previously considered the use of a sliding scale to mitigate some concerns about percentage fees and caps. With a sliding scale, the percentage limit progressively drops as the settlement or award increases, as shown in Figure 13.1.

Figure 13.1 A sliding scale for percentage based contingency fees



Source: Productivity Commission, *Access to Justice Arrangements*, No. 72, 5 September 2014, p. 628.

13.38 The Productivity Commission recommended that if lawyers were allowed to use percentage-based contingency fees, the fees should be subject to a sliding scale to prevent windfall profits.

13.39 However, the Productivity Commission did not recommend a sliding scale for litigation funders:

While there is likely to be some overlap, litigation funders provide a different service to lawyers — they provide funding and manage claims on behalf of clients rather than providing legal advice. As noted above, current commissions charged by funders appear commensurate to the services offered. Further, if a limit is imposed on lawyers using damages-based billing, then to some degree funders' fees will become constrained, as they would have to differentiate their service offering to justify charging higher amounts, a point noted by Maurice Blackburn. Therefore, the Commission considers that there is no need to place a limit on the fees of litigation funders.⁴⁷

13.40 Dr Warren Mundy noted that with a wide range of matters and a relatively low number of litigation funded actions to provide empirical data, it would be challenging to design an appropriate sliding scale for litigation funders.⁴⁸

⁴⁷ Productivity Commission, *Access to Justice Arrangements*, No. 72, 5 September 2014, pp. 22, 61, 627; see also Dr Warren Mundy, *Submission 17*, pp. 5–6.

⁴⁸ Dr Warren Mundy, *Submission 17*, p. 6; Productivity Commission, *Access to Justice Arrangements*, No. 72, 5 September 2014, p. 627.

Investment and insurance risk-return approach

13.41 The committee received competing evidence on using a risk-return approach to calculate the appropriate return to a litigation funder.

13.42 Mr Sean McGing, an actuary, submitted that as a matter of principle, a reasonable return for litigation funders should depend on the inputs. He argued that this principle is used for investments and insurance, and is therefore a suitable basis for determining a return for a litigation funder.⁴⁹

13.43 Mr McGing considered giving litigation funders a percentage of the settlement is inconsistent with investment and insurance principles of assessing risk versus return on capital invested and the amount at risk:

A litigation funder's inputs, by definition, are the funding or the promise of funding it provides in a litigation matter.

Therefore, the fair and reasonable returns for a litigation funder should be linked strongly to the level of funding it provides, together with the time horizon and level of risk undertaken.

There may be some level of notional funding that the litigation funder provides to notionally insure against amounts at risk becoming payable and a fair and reasonable return should be expected on those parts of its input.⁵⁰

13.44 Mr McGing noted the relationship between risk and return, namely that returns should be commensurate with the risk taken. Higher risks require a higher return for an investor to compensate for the greater uncertainty and the higher losses over time expected on some of those investments. Similarly, lower risks require a lower return for an investor.⁵¹ A funder should be able to earn a return that reflects their opportunity cost of capital which is the return an investor could receive on comparable investments of the same risk or variability.⁵²

13.45 Mr McGing proposed that courts or others scrutinising or authorising litigation funding agreements should use the risk-return principles used in investment and insurance, including:

- A litigation funder's decision to fund a class action would use information that is known to it at the time of that decision.
- Litigation funders need to have expectations about the prospective funding commission in the event of success or settlement.
- A litigation funder would be able to determine a reasonable estimate of its likelihood of losing capital at the time it commenced funding a proceeding.

⁴⁹ Mr Sean McGing, *Submission 101*, pp. 3, 5; see also Professor Bob Officer, *Submission 100*, p. 5.

⁵⁰ Mr Sean McGing, *Submission 101*, pp. 3–4.

⁵¹ Mr Sean McGing, *Submission 101*, p. 19.

⁵² Professor Bob Officer, *Submission 100*, p. 3.

- The application of investment and insurance principles is a fundamentally sound approach to determine a fair and reasonable return for a litigation funder.
- Applying this framework would result in a fair and reasonable profit for a litigation funder.
- A suitable fair and reasonable total return for an investor is a refund of money invested by the investor plus or minus earnings which comprise income and capital growth.
- The core inputs driving the level of return an investor sees as fair and reasonable are the amounts of:
 - capital invested, held (notionally or physically) for amounts potentially at risk, and depleted to cover costs/expenses specifically attributable to the investment;
 - time horizon over which capital is subject to risk; and
 - risk undertaken over the time horizon.
- The insurance premium component reflecting the notional capital at risk rises with an increase in the uncertainty of the expected outcome (the risk).
- It is possible to estimate a probability of loss of capital for a litigation funder.
- A risk and profit uplift factor of 25 per cent on costs is fair and reasonable.
- A 20 – 30 per cent per annum investment return is a fair and reasonable investment return for an investor with a litigation funder's characteristics.⁵³

13.46 Table 13.1 shows the types of risks that Mr McGing suggested should be considered in an investment-risk approach. Mr McGing advised that the 25 per cent plus or minus 5 per cent would apply before taking into account the return for capital or other potential amounts at risk in particular cases, which could lead to higher or lower rates.⁵⁴

13.47 Using an insurance-risk approach, Mr McGing also suggested 25 per cent was an appropriate risk-based profit margin for litigation funders. Mr McGing noted that an insurance premium depends on the best estimate of the probability of the loss occurring. The premium also allows for the uncertainty around that best estimate, reflecting the size of the entity, and a profit margin.⁵⁵

⁵³ Mr Sean McGing, *Submission 101*, p. 17.

⁵⁴ Mr Sean McGing, *Submission 101*, pp. 24–27. The 25 per cent is similar to the uplift factor used by law firms for 'no win, no fee' cases under agreements regulated by the statutes governing legal professional conduct in each state and territory: see Australian Law Reform Commission, Report 134, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 27; see also Federal Chamber of Automotive Industries, *Submission 70*, p. 12.

⁵⁵ Mr Sean McGing, *Submission 101*, p. 18.

Table 13.1 Reasonable internal rates of return for litigation funders

Area	Factor	Rate of return	Further comments
Base equity listed investment	Accessible financial market equity listed investment (gross before tax)	8 per cent round to 10 per cent	Weighted / average exposure to total capital invested.
Specialist private business	Specialist, unlisted/private business – greater risk to capital	+ 10 per cent = total of 20 per cent	Margin over listed-compensation for greater uncertainty / variability of returns, lower capital base, less market power. Elements similar to smaller business private equity.
Specialist litigation funder risk	Specialist litigation funder risk	+ 5 per cent = total of 25 per cent	Uncertainty around duration capital is tied up, thus heightening illiquidity risk.

Source: Mr Sean McGing, *Submission 101*, p. 17.

13.48 Conversely, Mr Rory Markham, Managing Director of Adero Law, did not agree that the uplift of 25 per cent permitted in 'no win, no fee' arrangements could be 'sensibly used as a proxy for funding'. Mr Markham considered the 25 per cent uplift permitted in 'no win, no fee' arrangements 'has a historical role quite disconnected to funding' which 'reflects the money, salaries, council fees and court disbursement' incurred, most likely, over several years.⁵⁶

13.49 Omni Bridgeway identified further considerations relevant to the approach proposed by Mr McGing:

- litigation funders may be incentivised to incur additional costs and defer settlement to inflate the value of the overall return; and
- the reality that when the decision to invest in financing a class action, there is an agreed budget but this is subject to change as the commitment of funding is open and uncapped.⁵⁷

⁵⁶ Mr Rory Markham, Managing Director, Adero Law, *Committee Hansard*, 27 July 2020, p. 41.

⁵⁷ Omni Bridgeway, *Response to Submission 100 and 101*, p. 2.

Net present value of litigation funding

- 13.50 Professor Bob Officer submitted that a court considering the fairness and reasonableness of a litigation funding agreement may need to take account of the timing of benefits and costs.⁵⁸ Because the costs and benefits associated with the fees of a litigation funder may occur at different times during the case, they may affect the appropriate rate of return to the litigation funder.⁵⁹
- 13.51 The risks a litigation funder faces arise in part because its decision to fund a class action occurs at a time when the size and timing of benefits and costs were uncertain. Professor Bob Officer suggested net present value estimates account for the timing of financial benefits and costs in assessing returns to litigation funders.⁶⁰

Box 13.2 Application of net present value approach

Professor Officer provided an example with lawyers' and other costs paid out by the litigation funder over two years. Assuming the opportunity cost of capital is 3 per cent for a secure investment, the net present value of the following costs would be \$1.03 million:

- 80 per cent of the total cost will occur in the first year with:
 - 60 per cent probability that these costs will be \$1m;
 - 30 per cent probability they will be \$1.2m; and
 - 10 per cent will be \$0.7m; and
- 20 per cent of the costs will occur in the second year.⁶¹

In the example, Professor Officer assumed that the court would make its decision within two years, with a 75 per cent probability of a decision in the first year and a 25 per cent probability of a decision in the second year. Adding probabilities of a settlement of 20 per cent of \$zero, 60 per cent of \$15m and 20 per cent of \$20m, the net present value of the benefits would be \$9.06 million.⁶²

In order to estimate the return to the litigation funder, combine the net present value of the costs, with the 25 per cent uplift factor from investment and insurance principles. Professor Officer assumed an uplift factor of 20 per cent, which would see \$1.236 million going to the litigation funder. Those funds would equate to 13.6 per cent of the net present value of the settlement benefits of \$9.06 million.⁶³

⁵⁸ Professor Bob Officer, *Submission 100*, pp. 2–3.

⁵⁹ For example, the probability of a settlement or successful trial varies over time.

⁶⁰ Professor Bob Officer, *Submission 100*, pp. 2–3.

⁶¹ Professor Bob Officer, *Submission 100*, p. 4.

⁶² Professor Bob Officer, *Submission 100*, pp. 4–5.

⁶³ Professor Bob Officer, *Submission 100*, p. 5.

13.52 Omni Bridgeway identified some further considerations relevant to the approach proposed by Professor Officer:

- how the interest rate applies over time;
- the importance of taking account of notional capital, including the capital at risk and the overheads for running the litigation funding business attributable to a specific class action; and
- the wider applicability of the example provided by Professor Officer given the malleability of reasonable return to funders from a settlement sum when a sensitivity analysis is applied to the variables in the formula.⁶⁴

Committee view

13.53 Litigation funders appear to be making windfall profits from Australia's class action system at the expense of class members and defendants. Litigation funders ought to be reimbursed for the costs incurred and make a profit which is reasonable and proportionate to the risk undertaken. However, the slice of settlement sums going to litigation funders is often disproportionate to the costs incurred and risk undertaken. The current percentage-based billing practice contained in litigation funding agreements enables windfall profits to be obtained. Currently, the difference between the capital a litigation funder has put at stake and the profit made is often unreasonable, disproportionate and unfair. The unfairness is primarily borne by the class members because their share of the settlement is significantly reduced by the excessive proportion going to litigation funders.

13.54 The committee is not persuaded by the argument that it is better for class members to get 50 per cent of something with the involvement of a litigation funder, as opposed to 100 per cent of nothing without the involvement of a litigation funder. The committee considers that such arguments ignore the possibility that class members could receive substantially more than 50 per cent of something, with litigation funders still receiving a return that is reasonable, proportionate and fair for the risks they have taken.

13.55 The use of percentage-based fees appears to contribute significantly to the windfall returns achieved by litigation funders. The committee has considered a range of alternative approaches for estimating fair returns to litigation funders. The alternatives include empirical analysis of past cases, percentage limits, sliding scales, investment and insurance risk-return principles, net present value estimates, and a guaranteed statutory minimum return of the gross proceeds of a class action (including settlements).

13.56 The committee notes suggestions about using empirical analysis of past cases. The committee also notes related suggestions that estimating a litigation funder's returns should consider the returns and success rate of the funder's

⁶⁴ Omni Bridgeway, *Response to Submission 100 and 101*, p. 2.

portfolio of cases. It is useful to have such aggregate empirical information available. However, the committee considers that such empirical aggregate information should not override the merits of an individual case and fair outcomes for class members and defendants.

- 13.57 A cap on the percentage of the settlement available to litigation funders would address some windfall returns. However, small-dollar value class actions would be uneconomic for litigation funders, while funders may still make windfall profits on large class actions.
- 13.58 A sliding scale has some potential to address concerns regarding windfall profits. With a sliding scale, the percentage limit reduces as the size of the class action increases. However, the committee notes that the Productivity Commission did not recommend a sliding scale for litigation funders because the types of services provided are different to those provided by law firms.
- 13.59 The committee notes the investment and insurance risk-return principles proposed by Mr McGing and net present value methods offered by Professor Officer. These models intend for a litigation funder's return to be commensurate with the risk taken.
- 13.60 However, the committee has not received sufficient evidence to quantify what an appropriate risk-based premium should be in order to achieve outcomes for both class members and litigation funding returns that are reasonable, proportionate and fair. The committee notes that the implementation of such an approach would be complex and demanding for the Federal Court.
- 13.61 An alternative suggestion that has arisen late in the inquiry is for a guarantee that class action members receive a statutory minimum percentage of the gross litigation funding proceeds.⁶⁵ The committee notes that this proposal focuses on protecting the class action members and maintaining access to justice. The committee recommends that the Australian Government should consult further on this proposal, to clarify issues including:
- the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);
 - whether a minimum gross return of 70 per cent to class members, is appropriate; and
 - whether a graduated approach would ensure even higher returns are guaranteed for class members in more straightforward cases.

⁶⁵ Ronald Mizen, *Litigation funding rules on the brink as dissent grows*, in *Australian Financial Review*, 11 November 2020.

Recommendation 20

13.62 The committee recommends the Australian Government consult on:

- **the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);**
- **whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor; and**
- **whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.**

Chapter 14

Reasonable, proportionate and fair legal costs

Introduction

- 14.1 This chapter has three discrete parts. The first considers the drivers of the high costs incurred in class actions and the issue of oversight. The proposal for a legal costs assessor to have regular and ongoing oversight of costs from the outset of a class action is canvassed.
- 14.2 The second part, and the focus of this chapter, is on the practice of lawyers for the representative plaintiff in class actions operating on a percentage-based contingency fee. That is, if the class action is successful, rather than billing for the amount of work performed, the legal fees are calculated as a percentage of the money recovered in the case. This is known as a 'contingency fee'.
- 14.3 During the course of the inquiry, the Victorian Parliament passed laws which permit the lawyers for the representative plaintiff in class actions to enter into a contingency fee arrangement. In all other Australian jurisdictions, lawyers are prohibited from charging on a contingency fee basis.
- 14.4 There is long standing debate about the merit of contingency fees, with strongly held positions and arguments for and against the actual or proposed lifting of the prohibition on contingency fee agreements. Within the legal profession, as well as beyond, there is a significant difference of opinion as to whether contingency fees should be an available method of billing for lawyers in class actions.
- 14.5 Given the recent changes in Victoria, the debate on the role and merit of contingency fees in Australia's class action systems and litigation funding industry seems more relevant than ever. While the regulation of lawyers and their costs in class actions is a matter for the states and territories, the impacts of the availability of contingency fees in one jurisdiction are broad. This chapter examines the arguments for and against the prohibition on contingency fees in Australia and concludes with the committee's views on contingency fees.
- 14.6 The final part discusses the practice of charging an uplift fee when a lawyer operates on a 'no win, no fee' basis. The rationale to charge for this uplift on the legal costs is to recompense lawyers for undertaking some risk in the litigation, as they are not paid unless the class action is successful. The appropriateness of charging an uplift fee was queried by some stakeholders when the class action is financed by a litigation funder who assumes most of the risk.

Ongoing and regular oversight of costs

14.7 The costs incurred in bringing or defending a class action are substantial. Dr Peter Cashman and Ms Amelia Simpson noted that the factors giving rise to high costs include:

- the complexity of the legal and factual issues arising out of claims and defences;
- the wide ambit of many of the claims pleaded and pursued by applicants;
- the joinder of multiple defendants;
- the denial of liability and the vigorous defence of claims by defendants;
- cross claims and contribution claims by defendants;
- specific procedural factors unique to class actions;
- competing and overlapping class actions;
- delays in obtaining hearing dates and delays in the delivery of judgments;
- interlocutory disputation and appeals;
- legal profession cultural factors impacting on the conduct of class action litigation;
- the time billing practices of lawyers;
- economic incentives for the prolongation of litigation;
- litigation funding arrangements, including funding commissions calculated as a multiple of costs incurred and remuneration arrangements with those managing the litigation on behalf of the funders providing the capital;
- the absence of any effective applicant client control over legal costs and funding commissions;
- the 'divided' legal profession (solicitors and barristers) and the role and costs of counsel;
- duplication of work and over servicing;
- the role and costs of expert witnesses;
- the review and processing of voluminous document discovery;
- the absence of effective procedural and evidentiary mechanisms for getting to the truth early;
- the disinclination to seek the expedited resolution of dispositive issues;
- perceived and legal constraints on proactive judicial intervention; and
- the need for a claims resolution process to resolve individual claims of class members.¹

14.8 As discussed in Chapter 11, a costs assessor, appointed as a referee, conducts an inquiry and presents a report to the Federal Court of Australia (Federal Court) as to the question of whether the costs of the lawyers and/or the litigation funder are fair and reasonable.² The issues to be examined by the costs

¹ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.3*, p. 2.

² Federal Court Rules 2011, r. 28.6.

assessor are set by the Federal Court in each case where one is appointed. A referral to a costs assessor can be made at any point during a proceeding.³

- 14.9 The Federal Court's Class Actions Practice Note was amended in 2019 to include a Clause 16.3 which states, when considering the reasonableness of legal costs in class action settlements of significant size, the Federal Court may appoint a referee to inquire into and report on the reasonableness of the legal costs proposed to be deducted from the settlement sum.⁴
- 14.10 Donaldson Law recommended that an independent legal costs assessor be appointed by the Federal Court for each class action. Donaldson Law saw the role of independent assessor as twofold: providing an independent overview of costs and auditing accounts paid by the funder.⁵
- 14.11 Donaldson Law further submitted that this independent review of costs should occur regularly, rather than waiting until the settlement or judgment stage.⁶ In that sense, Donaldson Law argued the class members as well as the funder would be protected from any potential excessive costing practices of law firms.⁷ Donaldson Law contended independent scrutiny of the quality and legitimacy of the costs charged would remove any potential incentive that may be present for lawyers to not resolve claims as efficiently and cost effectively as possible.⁸
- 14.12 Therium Capital Management Australia (Therium) made the point that it is already implementing this approach in its litigation funding practice. Therium explained that in a number of its recent cases, it has required an independent costs assessor to be appointed from the outset of a class action to oversee legal costs at regular intervals during the case, leading to positive results for class members.⁹
- 14.13 For example, in *Perera v GetSwift Limited* (GetSwift)¹⁰ one of the competing class actions was funded by Therium. The representative plaintiff's lawyers made an application to the Federal Court for a costs assessor to be appointed to conduct regular inquiries, on a six monthly basis, as to the question of legal costs charged.¹¹ In approving this application, the Federal Court commented:

³ *Federal Court of Australia Act 1976*, ss. 54A(2).

⁴ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 16.3.

⁵ Donaldson Law, *Submission 65*, p. 3.

⁶ Mr Adair Donaldson, Director, Donaldson Law, *Committee Hansard*, 27 July 2020, p. 4.

⁷ Donaldson Law, *Submission 65*, p. 3.

⁸ Donaldson Law, *Submission 65*, p. 3.

⁹ Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 3.

¹⁰ [2018] FCA 732.

¹¹ *Perera v GetSwift Limited* [2018] FCA 732 [226]–[228].

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 [section] 33V stage and check all the costs incurred during the course of the proceeding. Indeed the proposal has a very 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.¹²

14.14 In Chapter 6, proposals which sought to address the significant cost of discovery in class actions were discussed. In *GetSwift*, the Federal Court noted the practical benefit that ongoing costs assessment could have on the costs of discovery, particularly in securities class actions where discovery is often significant (in terms of size, resources, time and cost):

No doubt a costs referee, in assessing reasonableness on an ongoing basis, would be conscious that there might be significant costs savings in having more targeted reviews, with documents perhaps being refined by coders or artificial intelligence experts. Similarly, no doubt if the scope of documents to be produced was well delineated, junior barristers might be in a better position to make forensic judgments than junior solicitors or paralegals who may be charging at a higher time costing rate. It would also allow a form of intervention if costs were starting to rise unreasonably and prevent the Court being presented, at a later s 33V hearing, with a result which, if not a fait accompli, is potentially difficult to then address.¹³

14.15 Some stakeholders considered that a litigation funder provides effective oversight and management of lawyers' fees and performance during the class action, as the litigation funder pays the lawyers' fees at regular intervals.¹⁴

Committee view

14.16 The committee considers that regular, ongoing and independent oversight of legal fees is a useful mechanism at the Federal Court's disposal to achieve reasonable, proportionate and fair outcomes for class members and legal costs incurred.

14.17 The Federal Court has the power to appoint a costs assessor at any point in the proceeding, and submissions to the inquiry have indicated that an ongoing costs assessor has, at times, been appointed from the outset of a class action.

14.18 The committee is not convinced that the appointment of an ongoing costs assessor at the outset should be required for every class action. The committee recognises that the benefits of this ongoing oversight come with the costs of the work undertaken. A balance would need to be struck between the necessity of

¹² *Perera v GetSwift Limited* [2018] FCA 732 [227].

¹³ *Perera v GetSwift Limited* [2018] FCA 732 [228].

¹⁴ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3; NSW Young Lawyers, *Submission 89*, p. 16.

this oversight in order to achieve reasonable, proportionate and fair legal costs, with the imperative of not unnecessarily increasing the costs of class action litigation. It should remain at the discretion of the Federal Court to appoint a costs referee on the application by a party or on its own motion and tailor their involvement as to the needs of the case.

Contingency fees

14.19 This section defines 'no win, no fee' arrangements and contingency fee arrangements, highlighting the similarities and differences. The prohibition on contingency fees is then explained.

'No win, no fee' billing

14.20 Solicitors representing plaintiffs in a class action commonly bill the representative plaintiff pursuant to a conditional fee agreement, otherwise known as a 'no win, no fee' agreement.¹⁵

Conditional on success

14.21 A 'no win, no fee' fee arrangement is a type of speculative billing, where payment by the client to the lawyer for the legal services rendered is conditional on a successful outcome in the case.¹⁶ The legal costs are not charged to the client if the case is unsuccessful. Conditional 'no win, no fee' billing is permitted for most civil matters in Australia.¹⁷

14.22 In a conditional fee arrangement, the client is still responsible for payment of disbursements, which are payments to third-parties connected to the proceeding, such as expert reports, court fees and barrister's fees, as well as any adverse costs orders and security for costs.¹⁸

Time-based billing

14.23 In Australia, lawyers' fee arrangements commonly take the form of input-based fee arrangements, where the lawyer is paid based on the amount of work

¹⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 27.

¹⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 187.

¹⁷ *Legal Profession Act 2006* (ACT), s. 283; *Legal Profession Uniform Law* (NSW), s. 181; *Legal Profession Act* (NT), s. 318; *Legal Profession Act 2007* (Qld), s. 323; *Legal Practitioners Act 1981* (SA), sch 3, cl. 25; *Legal Profession Act 2007* (Tas), s. 307; *Legal Profession Uniform Law Application Act 2014* (Vic), sch 1, cl. 181; *Legal Profession Act 2008* (WA), s. 283.

¹⁸ See, for example, *Legal Profession Uniform Law 2014* (NSW), s. 181(6); *Legal Profession Uniform Law Application Act 2014* (Vic), s. 181(6). Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 187.

performed.¹⁹ This is termed 'time-based billing'.²⁰ If a lawyer is operating on a 'no win, no fee' basis, the legal costs to be paid are billed to the client on a time-based arrangement.

Uplift

14.24 Lawyers are permitted to charge an additional fee, known uplift fee of no more than 25 per cent on the billed amount if there is a successful outcome.²¹ The purpose of the uplift fee is to recompense solicitors for undertaking some risk in the litigation and is viewed as a form of interest for the deferred payment of fees.²²

Controls

14.25 Legal costs agreements are regulated by State and territory legislation.²³ Requirements under the Legal Profession Uniform Law, enacted in Victoria and NSW, include:

- lawyers must not act in a way that unnecessarily results in increased legal costs for the client and must act reasonably to avoid unnecessary delay resulting in increased legal costs;
- clients have a right to negotiate costs agreements; and
- costs agreements:
 - must be written or evidenced in writing;
 - cannot exclude costs assessment processes; and
 - must comply with the general law of contract.²⁴

14.26 In the costs agreement, the uplift fee must be provided separately, or a range of estimates must be provided with an explanation of the major variables that will

¹⁹ *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.

²⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 188.

²¹ *Legal Profession Act 2006 (ACT)*, ss. 284(2); *Legal Profession Uniform Law (NSW)*, para. 182(3)(a); *Legal Profession Act (NT)*, ss. 319(2); *Legal Profession Act 2007 (Qld)*, ss. 324(2); *Legal Practitioners Act 1981 (SA)*, sch 3, sub-cl. 26(2); *Legal Profession Act 2007 (Tas)*, ss. 308(2); *Legal Profession Uniform Law Application Act 2014 (Vic)*, sch 1, para. 182(3)(a); *Legal Profession Act 2008 (WA)*, ss. 284(2).

²² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 188.

²³ *Legal Profession Act 2006 (ACT)*; *Legal Profession Uniform Law 2014 (NSW)*; *Legal Profession Act 2006 (NT)*; *Legal Profession Act 2007 (Qld)*; *Legal Practitioners Act 1981 (SA)*; *Legal Profession Act 2007 (Tas)*; *Legal Profession Uniform Law Application Act 2014 (Vic)*; *Legal Profession Act 2008 (WA)*.

²⁴ *Legal Profession Uniform Law 2014 (NSW)*, s. 180, s. 184; *Legal Profession Uniform Law Application Act 2014 (Vic)*, s. 180, 184.

affect the amount of the uplift fee. Contravention of the 'no win, no fee' arrangement obligations constitutes an offence and renders the agreement invalid.²⁵

14.27 If a costs agreement breaches the 'no win, no fee' arrangement requirements:

- the costs are recoverable in accordance with an applicable scale of costs as set out in law or according to the fair and reasonable value of the legal services provided;
- a law practice is not entitled to recover any amount in excess of the amount that the practice would have been entitled to recover if the costs agreement had not been void and must repay any excess amount received; and
- a law practice is not entitled to recover the uplift fee or any part of it and must repay any amount received in relation to the uplift fee to the person from whom it was received.²⁶

14.28 There are further requirements on a 'no win, no fee' arrangement:

- a 'successful outcome' must be clearly defined;
- a 'cooling off period' must be established; and
- the client must be informed of the right to seek independent legal advice.²⁷

Class actions

14.29 In a class action settlement, the Federal Court approves reasonable legal fees and disbursements and this amount is then deducted from the settlement sum. In a 'no win, no fee' arrangement, the representative plaintiff is still usually responsible for payment of disbursements.²⁸ Typically, there is no order or security for costs in class actions undertaken on a 'no win, no fee' basis.²⁹ Adverse costs and security for costs are discussed in Chapter 10.

²⁵ See, for example, *Legal Profession Act 2006* (ACT), para. 284(3)(b); *Legal Profession Uniform Law 2014* (NSW), s. 182(3); *Legal Profession Uniform Law Application Act 2014* (Vic), s. 182(3).

²⁶ See, for example, *Legal Profession Act 2006* (ACT), para. 284(3)(b).

²⁷ *Legal Profession Uniform Law 2014* (NSW), s. 181(2)–(4); *Legal Profession Uniform Law Application Act 2014* (Vic), ss. 181(2)–(4). Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 187. For example, the Federal Court did not approve an uplift fee in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [10]–[12], for reason that it did not provide the parties with the ability to know what circumstances would constitute a 'successful outcome'.

²⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 187; Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, March 2018, p. 57.

²⁹ NSW Young Lawyers, *Submission 89*, p. 8.

Percentage-based contingency fees by lawyers

- 14.30 Except in Victoria, legal practitioners are prohibited from charging on a 'contingency fee' basis in Australia (see discussion below). This section describes how contingency fee arrangements differ to a 'no win, no fee' arrangement. Contingency fees are permitted in Ontario, Canada, in England and Wales, and in the United States.³⁰
- 14.31 Like 'no win, no fee' arrangements, a 'contingency fee' arrangement is also a type of speculative billing, where payment by the client to the lawyer for the legal services rendered is conditional on a successful outcome in the case. The legal costs are not charged to the client if the case is unsuccessful.
- 14.32 If the case is successful and there is a contingency fee arrangement in place, the legal fees to be paid are calculated as a percentage of the money recovered in the case.³¹ For this reason, contingency fees are also known as percentage-based fee arrangements.³²
- 14.33 To some extent, there are similarities between contingency fee arrangements and litigation funding fees and 'no win, no fee' arrangements. First, the fees of litigation funders are also often calculated as a percentage of the money recovered in the case. Second, as discussed above, the payment for legal costs from a client to a lawyer where a 'no win, no fee' arrangement is in place is also conditional, or contingent, on a successful outcome in the case.
- 14.34 However, the term 'contingency fee' is used in the class action industry, the legal profession, and in this report, as a reference to a percentage-based contingency fee charged by lawyers.

Ban on contingency fees

- 14.35 Until recently, contingency fees were prohibited in all Australian states and territories. It is unlawful in all states and territories in Australia, except in Victoria, to enter costs agreements under which legal fees are calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any related proceeding.³³

³⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 190; U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 11; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 30.

³¹ Maurice Blackburn Lawyers, *Submission 37*, p. 18.

³² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 187.

³³ *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.

14.36 Contravention of the prohibition on contingency fees can amount to unsatisfactory professional conduct, or professional misconduct, and result in a civil penalty.³⁴

14.37 The restriction on lawyers' use of contingency fees derives from the remnants of the rules of champerty.³⁵ As explained in Chapter 2, the underlying policy behind the rules of champerty was to avoid a third party, who finances litigation, from being tempted by their own personal gain from the litigation, to act contrary to the due administration of justice and the effective resolution of a dispute.³⁶

Previous inquiries

14.38 The Productivity Commission, the Victorian Law Reform Commission (VLRC) and the Australian Law Reform Commission (ALRC) have supported lifting the ban on contingency fee arrangements provided that specific safeguards accompany the change.

14.39 These recommendations to lift, in varying degrees, the ban on contingency fees, and the necessary associated safeguards, suggested by these bodies are discussed throughout this chapter. They were widely referred to in submissions. The details of the recommendations are provided in Box 14.1.

Box 14.1 Recommendations from previous inquiries to lift contingency fee ban

Productivity Commission

The Productivity Commission released its *Access to Justice Arrangements* report in December 2014. The report looked at a range of issues relevant to promoting access to justice and equality before the law. The report included a chapter on litigation funding and made recommendations including, removing restrictions on contingency fees subject to certain limitations:

- The Australian, State and Territory Governments should remove restrictions on contingency fees, with the following consumer protections:
 - prohibition on contingency fees for criminal and family matters;
 - comprehensive disclosure requirements at the outset of the agreement;
 - percentages should be capped on a sliding scale for retail clients, with no percentage restrictions for sophisticated clients; and

³⁴ NSW Bar Association, *Submission 96*, p. 4.

³⁵ Law Council of Australia, *Percentage Based Contingency Fee Agreements*, Final Report of the Working Group, 2014, p. 4.

³⁶ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42 [93] (Gummow, Hayne and Crennan J).

- there should be no additional fees. For example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate.³⁷

Victorian Law Reform Commission

The VLRC issued its report, *Access to Justice—Litigation Funding and Group Proceedings*, in March 2018, making 31 recommendations on areas including regulation of class actions, supervision of litigation funders and contingency fee arrangements.

The recommendations relating to contingency fees included that:

- the Victorian Attorney-General should propose to the Council of Attorneys-General to support reforms to enable lawyers to charge contingency fees;
- contingency fee arrangements should be pursued at a national level;
- the Supreme Court of Victoria should have the power to make a common fund order for contingency fees, subject to the following conditions:
 - an application for the order would be sought from the Supreme Court of Victoria at the commencement of proceedings;
 - the percentage allocated for a contingency fee would be indicated when the application is made but approved by the Federal Court at an appropriate time, most likely at settlement approval;
- contingency fees should cover all services, including fees arising from:
 - litigation services;
 - provision of security for costs;
 - disbursements; and
 - an indemnity for adverse costs.³⁸

Australian Law Reform Commission

The ALRC's Final Report in 2018 recommended removing restrictions on contingency fees for lawyers acting for the representative plaintiff in class actions, with constraints and related recommendations, including:

- There may not be an additional contingency fee from a litigation funder.
- A contingency fee cannot be recovered in addition to professional fees for legal services charges on a time-cost basis.
- Lawyers must advance the costs of disbursements and account for such costs within the contingency fee.
- Lawyers must provide security for costs.
- Contingency fees can only proceed with the Federal Court's agreement.
- The Federal Court should have the express capacity to reject, vary or amend the terms of a contingency fee agreement.

³⁷ Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, pp. 601–637.

³⁸ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, pp. xx, 63–67.

- 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.
- Law firms must also clearly communicate to potential class members any conflicts of interest and how those conflicts will be avoided or mitigated.³⁹

Recent changes in Victoria

14.40 Since July 2020, it is lawful for a plaintiff law firm to charge for legal services on a contingency fee arrangement in class actions in the Supreme Court of Victoria.⁴⁰

14.41 On 1 July 2020, amendments to the *Supreme Court Act 1986* (Vic) (Victorian Supreme Court Act) permitted lawyers acting for the plaintiff in class actions to enter into a contingency fee arrangement. This is referred to as a 'group costs order'.⁴¹

14.42 On application by a plaintiff in a class action, the Supreme Court of Victoria may make a 'group costs order' for the legal costs to be calculated as a percentage of an award or settlement, liability for which is to be shared among all class members.⁴² An example of a group costs order in a class action is provided below in Box 14.2.

14.43 If a group costs order is made, the law practice representing the representative plaintiff is liable to cover any costs payable to the defendant in the proceeding, and must give any security for the defendant's costs as ordered by the Supreme Court of Victoria.⁴³ The Supreme Court of Victoria may amend a group costs order during the course of the proceeding, including the percentage set in the order.⁴⁴

14.44 The amendments to the Victorian Supreme Court Act override the prohibition on contingency fee arrangements in the Legal Profession Uniform Law, which

³⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 11 (recommendations 17–22).

⁴⁰ Part 2 of the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic), inserting *Supreme Court Act 1986* (Vic), s. 33ZDA.

⁴¹ *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(1).

⁴² *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(1). Common fund orders are used in the Federal Court, and are discussed in Chapter 9. The Supreme Court of Victoria has not made a common fund order for litigation funding costs in Victorian class actions. The VLRC recommended the introduction of common fund orders: Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. 130. A 'group costs order' is essentially a common fund order for sharing the costs of a contingency fee across class members.

⁴³ *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(2).

⁴⁴ *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(3).

prevents lawyers from entering a costs agreement under which a contingency fee is payable.⁴⁵

14.45 Subsequent to the introduction of group costs order in Victoria, the Supreme Court of Victoria's Practice Note on the Conduct of Group Proceedings was updated. The updated version notes that an order is to be by an interlocutory application, at the earliest practical time after the originating pleadings are filed.⁴⁶

14.46 The Practice Note also reflects the statutory provisions to reiterate the terms of the order approved, including the amount of any percentage ordered, may be subject to review at any stage of the proceeding, including at judgment or settlement approval.⁴⁷

14.47 Importantly, the updated Practice Note implements the recommendation of the VLRC that the litigation services to which the group costs order applies should include:

- all services provided by the law firm;
- provision for security for costs if required;
- disbursements; and
- an indemnity for adverse costs.⁴⁸

⁴⁵ *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(4).

⁴⁶ Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions)*, 1 July 2020, sub-cl. 13.1, www.supremecourt.vic.gov.au/sites/default/files/2020-07/SC%20Gen%2010%20-%20Class%20Actions_0.pdf (accessed 12 November 2020).

⁴⁷ Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions)*, 1 July 2020, sub-cl. 13.4.

⁴⁸ Supreme Court of Victoria, *Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions)*, 1 July 2020, sub-cl. 13.5; Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, March 2018, p. xx.

Box 14. Example of a class action with a group costs order

In August 2020, a class action was filed in the Supreme Court of Victoria on behalf of business owners. These businesses are seeking compensation for economic loss alleged to have been caused by negligence, in relation to the hotel quarantine program in Victoria, during the Stage 3 and/or Stage 4 restrictions imposed in Melbourne and regional Victoria, in response to the 'second wave' of COVID-19 outbreak.⁴⁹

The solicitors acting for the representative plaintiff intend to make an application to the Supreme Court of Victoria for a 'group costs order', meaning, in this case:

- the representative plaintiff's legal costs will be calculated as a percentage of the amount of any judgment award or settlement, to be shared among the representative plaintiff and all class members;
- the percentage will be determined by the Supreme Court of Victoria;
- the group costs order is inclusive of all the plaintiff's legal fees and disbursements of running the class action, including funding fees (see below paragraph); and
- in the instance there is not a successful outcome in the class action for the representative plaintiff, class members cannot be pursued for costs by the defendant as the Supreme Court of Victoria prohibits orders for costs against class members.⁵⁰

The solicitors have a portfolio finance arrangement in place with Regency V Funding Pty Ltd (Regency) for disbursements, such as barristers' fees, expert witness fees, and court fees. This arrangement provides an indemnity for potential adverse costs. The solicitors must pay any amounts to Regency for the portfolio funding arrangement out of any amount that the solicitors are paid pursuant to the group costs order (if made).⁵¹

Group costs orders and Managed Investment Scheme

14.48 Omni Bridgeway considered whether group costs orders satisfy the requirements of a Managed Investment Scheme (MIS) under section 9 of the *Corporations Act 2001* (Corporations Act). As discussed in Chapter 16, litigation funding in class actions is regulated as an MIS.

14.49 In summary, Omni Bridgeway made the following observations about group costs orders as an MIS:

⁴⁹ 5 Boroughs NY Pty Ltd, 'Class Action Summary Statement', *5 Boroughs NY Pty Ltd v State of Victoria*, S ECI 2020 03402, 21 August 2020, p. 1 www.supremecourt.vic.gov.au/sites/default/files/2020-10/5%20Boroughs%20-%20CASS.pdf (accessed 17 November 2020).

⁵⁰ 5 Boroughs NY Pty Ltd, 'Funding Information Summary Statement', *5 Boroughs NY Pty Ltd v State of Victoria*, S ECI 2020 03402, 21 August 2020, p. 1.

⁵¹ 5 Boroughs NY Pty Ltd, 'Funding Information Summary Statement', *5 Boroughs NY Pty Ltd v State of Victoria*, S ECI 2020 03402, 21 August 2020, p. 1.

- A law firm operating under a group costs order undertakes a similar activity to a third-party litigation funder in a class action.
- There is a lack of clarity with respect to how group costs orders are treated under the Corporations Act, which Omni Bridgeway considered should be resolved given a law firm operating under a group costs order is a similar commercial activity to third-party litigation funder financing a class action.
- Absent any applicable exemptions, proceedings conducted under a group costs order appear to satisfy the requirements of an MIS under section 9 of the Corporations Act.
- There is ambiguity as to whether a group costs order is exempt from the application of the MIS regime pursuant to the *ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38* (ASIC Conditional Costs Instrument).
 - The ASIC Conditional Costs Instrument exempts 'conditional costs agreements', as defined in section 181 of the *Legal Profession Uniform Law*, from being regulated as an MIS.
 - There is doubt as to whether a group costs order meets the definition of a conditional costs agreement.
- If group costs orders *are not exempt* from the application of the MIS provisions, by reason of the ASIC Conditional Costs Instrument, there is a risk that group costs orders are an MIS.
 - Pursuant to section 258 of the *Legal Profession Uniform Law*, a law practice is not permitted to promote or operate an MIS.⁵²
- If group costs orders *are exempt* from the application of the MIS provisions by reason of the ASIC Conditional Costs Instrument, Omni Bridgeway considers this is an anomalous position where third-party funded class actions are treated as an MIS; however, a law firm funded class action under a group costs order is not.
- Omni Bridgeway recommended the Corporations Amendment (Litigation Funding) Regulations 2020 be amended to expressly include group costs orders in the Supreme Court of Victoria as part of the MIS regime.⁵³

14.50 Subsequent to the July 2020 reforms to apply the Australian Financial Services Licence (AFSL) and the MIS regimes to litigation funding in class actions, the Legal Profession Uniform General Rules 2015 was amended to provide a grace period until 22 August 2021 for law practices to provide 'legal services in relation to an MIS despite an associate of the law practice having an interest in

⁵² Equivalent provisions exist in other states and territories. See, for example, Legal Profession Regulations 2018 (Tas), r. 12; Legal Profession Regulation 2017 (Qld), r. 12.

⁵³ Omni Bridgeway, *Submission 73.2*, pp. 4–7.

the MIS or the responsible entity for the MIS, if the MIS is a litigation funding scheme'.⁵⁴

Arguments for retaining the ban on contingency fees

14.51 Several submitters considered the ban on contingency ought to remain.⁵⁵

Key arguments for retaining this ban included:

- potential conflicts of interest that may arise which are not capable of being adequately managed; and
- questions about the likely benefits that would flow to class members, and access to justice more broadly.

Ethical obligations of lawyers and conflicts of interests

Compromise of lawyers' duties

14.52 This section explores the primary concern about the use of contingency fees that arises from the potential compromise of lawyers' professional and ethical duties. It was considered contingency fees create an unmanageable conflict of interest between a lawyer's duty to the court and the client, and the lawyer's direct financial interest in the outcome.⁵⁶

14.53 Lawyers have a paramount duty to the court and the administration of justice and, secondly, a duty to act in the best interests of a client.⁵⁷ The NSW Bar Association described:

A legal practitioner is an officer of a supervising court and provider of professional services. Although acting for a client, the practitioner's paramount duty is to the court. She or he stand in a position of trust with respect to the court and the client, and enjoys significant privileges and public trust in dealing with witnesses and adverse parties.⁵⁸

⁵⁴ Legal Profession Uniform General Rules 2015, cl. 91BA.

⁵⁵ See, for example, Premier Litigation Funding Management, *Submission 20*, p. 4; U.S. Chamber Institute for Legal Reform, *Submission 21*, pp. 10–16; Australia Institute of Company Directors, *Submission 40*, pp. 2, 18; Herbert Smith Freehills, *Submission 51*, pp. 6–8; Law Firms Australia, *Submission 54*, pp. 2–3; Allens, *Submission 69*, pp. 22–25; Omni Bridgeway, *Submission 73*, pp. 18–20; Health Industry Companies, *Submission 74*, pp. 5–15; Ai Group, *Submission 92*, p. 13; NSW Bar Association, *Submission 96*, pp. 4–9.

⁵⁶ See, for example, Australia Institute of Company Directors, *Submission 40*, p. 18; Law Council of Australia, *Submission 67*, p. 12; NSW Bar Association, *Submission 96*, p. 6; Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, June 2018, Victoria, p. 59.

⁵⁷ Law Council of Australia, *Australian Solicitors' Conduct Rules* (2015) r. 3, 4.1.1.

⁵⁸ NSW Bar Association, *Submission 96*, p. 6.

14.54 Lawyers also have a duty to avoid any compromise to their integrity and professional independence.⁵⁹

14.55 Contingency fees enable lawyers to 'purchase a share in the litigation' and have a direct financial interest in the case.⁶⁰ The Law Council of Australia considered there is a significant additional risk of a lawyer compromising their ethical obligations to the court and to their client if the lawyer holds a direct financial interest in the outcome of a client's case.⁶¹

14.56 The Attorney-General's Department noted:

The Attorney-General has expressed concerns that moves to allow contingency fees will create conflicts of interest. Giving lawyers a direct and potentially substantial financial interest in a matter could compromise their fundamental duty to the court, as well as to their clients. Additionally, there may be concerns that permitting lawyers to enter into contingency fee arrangements may be inconsistent with the professional detachment and impartial indifference that the community expects of the legal profession.⁶²

14.57 Similarly, the Law Council of Australia is opposed to contingency fees:

...the potential benefits of removing the prohibition on contingency fees are outweighed by the potential impact on the ethical obligations of members of the legal profession.⁶³

14.58 The NSW Bar Association submitted the ethical concerns raised by contingency fees cannot be reconciled with lawyers' ethical consideration and professional obligations.⁶⁴

Duty to the client

14.59 Lawyers have fundamental duties to:

- act in the best interests of a client for the matter in which the lawyers represents the client;
- deliver legal services competently, diligently and as promptly as reasonably possible; and
- avoid any compromise to their integrity and professional independence.⁶⁵

⁵⁹ Law Council of Australia, *Australian Solicitors Conduct Rules* (2015), r. 3–5, r. 11.

⁶⁰ See, for example, Law Firms Australia, *Submission 54*, p. 2; Allens, *Submission 69*, p. 24.

⁶¹ Law Council of Australia, *Submission 67*, p. 12.

⁶² Attorney-General's Department, *Submission 93*, pp. 13–14.

⁶³ Law Council of Australia, *Submission 67*, p. 12.

⁶⁴ NSW Bar Association, *Submission 96*, p. 5.

⁶⁵ Law Council of Australia, *Australian Solicitors Conduct Rules* (2015), sub-r. 4.1.

14.60 With respect to duties concerning conflicts of interest, a lawyer must not:

- act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the lawyer, or an associate of the lawyer; and
- exercise any undue influence intended to persuade the client to benefit the lawyer in excess of the lawyer's fair remuneration for legal services provided to the client.⁶⁶

14.61 In addition to the professional ethical obligation placed on lawyers under the Solicitors Conduct Rules, the lawyer-client relationship is a fiduciary one, where the client places their confidence, good faith, reliance and trust in the lawyer. The lawyer must not act in any way other than in the interests of their client.⁶⁷

14.62 The Law Council of Australia submitted, and other submissions agreed, that contingency fees creates a serious risk that a lawyer may compromise their ethical duties because the lawyer may:

- seek to influence the point at which a matter settles in order to maximise fees and/or minimise their risk, even if such timing may not be consistent with the client's best interests; and
- be tempted to compromise their duty to act in the best interests of their client by having a personal financial interest in the conduct and outcome of the matter.⁶⁸

14.63 Omni Bridgeway noted some situations in which a conflict could arise to the detriment of class members:

- the economics of a case change and a legal firm facing disbursements (typically around 40-50 per cent of total costs) and adverse costs will be under pressure to settle, which may not be in clients' interests;
- a case is going well but the legal firm needs the cash flow for other reasons, so advises clients to settle; and
- the legal firm, to save money on disbursements and ensure a greater return, chooses not to use barristers, affecting the quality of representation for the client.⁶⁹

⁶⁶ Law Council of Australia, *Australian Solicitors Conduct Rules* (2015), sub-r. 12.1–12.2.

⁶⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 220; U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 16.

⁶⁸ Law Council of Australia, *Submission 67*, p. 13. See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 18; Allens, *Submission 69*, p. 24; Omni Bridgeway, *Submission 73*, p. 19.

⁶⁹ Omni Bridgeway, *Submission 73*, p. 19.

14.64 The Law Council of Australia, among others, did not consider that regulation or court supervision could satisfactorily overcome the risk of a lawyer compromising their ethical obligations.⁷⁰ The NSW Bar Association submitted:

The practice of law is, and should remain, a profession driven by ethics, not a business driven by profit. This distinction is basic and important. To extend entrepreneurial litigation to the very person arguing the case is inconsistent with the notions of independent, professional detachment and impartial indifference to the outcome of the case.⁷¹

14.65 The U.S. Chamber Institute for Legal Reform submitted litigation which is 'lawyer funded, lawyer managed and lawyer settled' is unacceptable.⁷² A submission from health industry companies considered that contingency fees 'fly in the face of a lawyer's fiduciary duty to their client'.⁷³

Duty to the court

14.66 Lawyers have an overriding duty of honesty and candour to the court, both in presentation of the law and presentation of the facts. All other duties to the court override a lawyer's duties to the client in the event of inconsistency.⁷⁴

14.67 A lawyer must not:

- mislead the court as to the law;
- present any evidence to the court that is known to be false or misleading, including concealing a material fact; and
- be a party to the presentation of evidence or make allegations that lack an evidentiary foundation.⁷⁵

14.68 Dr Michael Duffy, among others, noted that a potential conflict between lawyers' duties to the client and to the court may raise more of an issue than any potential conflicts between lawyers and clients.⁷⁶ Dr Duffy explained:

Potential conflict between lawyers' duty to the client and duty to the civil courts may perhaps be more of an issue. For instance, the civil justice system requires both sides to disclose all relevant documentation whether it assists or harms their case which sits somewhat uneasily with remuneration being

⁷⁰ Law Council of Australia, *Submission 67*, p. 12. See, for example, Law Firms Australia, *Submission 54*, p. 2; Health Industry Companies, *Submission 74*, p. 2.

⁷¹ NSW Bar Association, *Submission 96*, p. 4.

⁷² U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19. See, for example, Health Industry Companies, *Submission 74*, p. 2.

⁷³ Dr Michael Duffy, *Submission 47*, p. 2. See, for example, Australian Institute of Company Directors, *Submission 40*, p. 18; Health Industry Companies, *Submission 74*, p. 2.

⁷⁴ Law Council of Australia, *Australian Solicitors Conduct Rules* (2015), sub-r. 3.1.

⁷⁵ The Honorable Justice Emilios Kyrrou, 'A Lawyer's Duty', *Law Institute Journal*, vol. 89, 2015, p. 34.

⁷⁶ Dr Michael Duffy, *Submission 47*, p. 2. See, for example, Law Firms Australia, *Submission 54*, p. 2; Ai Group, *Submission 92*, p. 15.

contingent on only one case outcome. Mandated standard form discovery obligation notices to litigants in contingently funded actions might of course alleviate this issue somewhat.⁷⁷

14.69 Law Firms Australia described another scenario where a conflict of this nature may arise:

Contingency fees may also create a risk of conflict with a lawyer's duties to the Court. For example, there may be situations where a lawyer must cease to act for a client in order to comply with their professional obligations, but in a contingency fee agreement, this ceasing to act may necessitate forgoing payment.⁷⁸

Different duties to litigation funders

14.70 It was submitted that there are distinct and notable differences between the charging of fees calculated on a percentage basis by a lawyer and a litigation funder.⁷⁹

14.71 A lawyer is a plaintiff's only source of advice in relation to their claims and their case. A litigation funder has a very different role in litigation. They are not a fiduciary, nor are they subject to the ethical or professional obligations placed on lawyers.⁸⁰

14.72 The Ai Group's submission drew attention to a passage of the Supreme Court of New South Wales on this difference:

It is one matter for a "litigation funder" as they are known, to bargain for a percentage of the proceeds but in my opinion, it is an entirely different matter for a legal practitioner, with the obligations thereby imposed, to enter into an arrangement which contemplates significant financial benefits beyond anything contemplated as costs, if the litigation succeeds.

...

The courts rely upon the integrity of those who are admitted to practice before them, not only to represent the interests of their clients but to do so in a way which does not compromise the duties owed to the court... When a legal practitioner has a significant financial interest in the outcome of the litigation, there will inevitably be a temptation for that practitioner to depart from that duty. In my opinion, it would be entirely wrong for the law to allow this to occur.⁸¹

⁷⁷ Dr Michael Duffy, *Submission 47*, p. 2.

⁷⁸ Law Firms Australia, *Submission 54*, p. 2.

⁷⁹ See, for example, Premier Litigation Funding Management, *Submission 20*, p. 4; Litigation Capital Management, *Submission 23*, p. 22; Law Firms Australia, *Submission 54*, p. 2; Allens, *Submission 69*, p. 24; Omni Bridgeway, *Submission 73*, p. 18; Health Industry Companies, *Submission 74*, p. 7; Ai Group, *Submission 92*, p. 15.

⁸⁰ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19; Law Council of Australia, *Submission 67*, p. 13.

⁸¹ Ai Group, *Submission 92*, pp. 14–15.

14.73 Some submissions considered, given the independent role of lawyers and their ethical duties, the conflicts of interest are more pronounced in contingency fee arrangements compared to third-party litigation funding arrangements.⁸²

14.74 Omni Bridgeway argued that, under current funding arrangements, the representative plaintiff's lawyers and the litigation funder 'act as a check on each other'. Both are subject to court supervision, and the lawyers, who owe fiduciary duties to their clients, prevent any potential overreach by the litigation funder. A contingency fee arrangement removes the advantages of these checks and balances.⁸³

14.75 Submissions drew attention to the importance which was placed on the independence of lawyers in funded class actions when the High Court in the *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* held that litigation funding does not offend public policy or constitute an abuse of process.⁸⁴ Allens explained:

In that case, the [High] Court found third party litigation funding permissible because of the independent role of the lawyer as a bulwark for the client against the commercial interests of the third party litigation funder.

...

In considering the validity of third party funding, the High Court was concerned that the decisions of funders may be influenced by conflicts of interest. However, it ultimately acknowledged that such a risk could be managed by the independence of the legal profession. Such independence, and the balance sought to be struck by it, will be threatened if the ban on contingency fees is lifted.⁸⁵

14.76 Litigation Capital Management also considered that any the conflicts of interest said to arise in a tripartite arrangement (the client, the lawyers and the litigation funder) would be exacerbated by the lawyers also performing the role of a funder:

Presently, the lawyers can advise a litigant to take a course that may be contrary to the interests of the funder. However, if the lawyers are the funder, they will be constantly faced with decisions on how and when to disclose specific conflicts to clients, and how and when to advise clients against the lawyers' own interests. The resulting minefield is unlikely to be entirely transparent, nor easily regulated.⁸⁶

⁸² See, for example, Law Firms Australia, *Submission 54*, p. 2; Allens, *Submission 69*, p. 24; Omni Bridgeway, *Submission 73*, p. 18; Health Industry Companies, *Submission 74*, p. 7.

⁸³ Omni Bridgeway, *Submission 73*, p. 18.

⁸⁴ (2006) 229 CLR 386. See, for example, Law Firms Australia, *Submission 54*, p. 2; Allens, *Submission 69*, p. 22.

⁸⁵ Allens, *Submission 69*, pp. 22, 24.

⁸⁶ Litigation Capital Management, *Submission 23*, p. 22.

Exacerbated conflicts of interest compared to a 'no win, no fee' arrangement

14.77 Opponents to contingency fees recognised that conflicts of interest arise in the case of 'no, win, no fee' arrangements (detailed further below).⁸⁷ However, it was submitted by the U.S. Chamber Institute for Legal Reform the conflict in contingency fee arrangements is:

...sharpened or made more difficult by virtue of the enormous sums that might be at stake in the case of a contingency involving a multi-million dollar potential settlement.⁸⁸

14.78 Similarly, the NSW Bar Association considered:

Contingency fees would inevitably shift the focus of the lawyer's performance of professional functions away from professional responsibility, to instead the pursuit of profit. The opportunity of contingency fees will result in the client's cause of action becoming an asset of the lawyer's practice. This contrasts with the present situation where the value of a law practice reflects work in progress and goodwill associated with professional reputation and relationships...⁸⁹

Limited impact on improving access to justice

14.79 Submissions considered the access to justice arguments in support of contingency fees to be doubtful or weak.⁹⁰ The Law Council of Australia was not convinced access to contingency fees would significantly improve access to justice.⁹¹ In its view, the risks associated with contingency fees outweighed the potential limited advantages.⁹²

14.80 On one hand, some submitters considered there was not a gap in access to justice that needs to be met. The availability of contingency fee arrangements was considered not to have a significant impact on case selection because there are the options of litigation funding or a 'no win, no fee' model.⁹³ Submissions noted that, to their knowledge, it is not the case that meritorious claims are not being pursued due to a lack in the availability of funding.⁹⁴ The Australian Institute

⁸⁷ See, for example, Law Council of Australia, *Submission 67*, p. 14; U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19; NSW Bar Association, *Submission 96*, p. 6.

⁸⁸ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19.

⁸⁹ NSW Bar Association, *Submission 96*, pp. 6–7.

⁹⁰ See, for example, Herbert Smith Freehills, *Submission 51*, pp. 7–8; Health Industry Companies, *Submission 74*, p. 8.

⁹¹ Law Council of Australia, *Submission 67*, p. 12.

⁹² Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 17.

⁹³ Allens, *Submission 69*, pp. 22–23.

⁹⁴ Allens, *Submission 69*, p. 22.

for Company Directors stated it was not aware of evidence that there is unmet demand, or limited access to justice, in the current market.⁹⁵

- 14.81 On the other hand, some submitters considered that, regardless of whether there is a gap in access to justice that another form of funding could address, access to contingency fees would not effectively fill that gap. Several submissions considered contingency fees would not significantly expand the range of class actions being run by litigation funders or law firms on arrangements.⁹⁶
- 14.82 Submissions noted that permitting lawyers to charge on a contingency fee basis does not necessarily translate to the running of *difficult or risky cases*. Law firms would be less likely than litigation funders to take on risky cases given lower access to capital and less ability to spread risk across a portfolio of cases. For these reasons, submitters held the view lawyers would only take on cases which have a high prospect of success.⁹⁷
- 14.83 Herbert Smith Freehills considered the availability to bill on a contingency fee basis would incentivise lawyers to seek the maximum amounts recoverable, therefore encouraging them to seek and institute *high value* claims – namely, the types of claims that litigation funders already undertake.⁹⁸
- 14.84 However, as noted by the U.S. Chamber Institute for Legal Reform, law firms would have difficulty in competing with litigation funders for *high value claims* given a more limited ability to raise capital compared to a litigation funder.⁹⁹ In such a case, submissions expressed doubt as to whether contingency fees would create increased competition within the litigation funding market, thus having a limited impact of driving down commission rates.¹⁰⁰
- 14.85 Furthermore, Omni Bridgeway submitted that contingency fee arrangements would not result in *small or medium-dollar value claims* being pursued by law firms on a contingency fee basis. Omni Bridgeway considered that if these cases are not attractive to litigation funders, they will similarly not be attractive to law firms.¹⁰¹

⁹⁵ Australian Institute of Company Directors, *Submission 40*, p. 18.

⁹⁶ See, for example, Litigation Capital Management, *Submission 23*, p. 21; MinterEllison, *Submission 25*, p. 2; Herbert Smith Freehills, *Submission 51*, p. 8; Omni Bridgeway, *Submission 73*, p. 20; Health Industry Companies, *Submission 74*, p. 8.

⁹⁷ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 12; MinterEllison, *Submission 25*, p. 2; Law Council of Australia, *Submission 67*, p. 12.

⁹⁸ Herbert Smith Freehills, *Submission 51*, p. 8.

⁹⁹ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 12; see also MinterEllison, *Submission 25*, p. 2; Herbert Smith Freehills, *Submission 51*, p. 8.

¹⁰⁰ See, for example, Litigation Capital Management, *Submission 23*, p. 20; Allens, *Submission 69*, p. 23.

¹⁰¹ Omni Bridgeway, *Submission 73*, p. 20.

14.86 Litigation Capital Management explained:

Basic commercial sense also suggests that lawyers will not agree to fund smaller claims on a contingency basis, if those claims do not at least offer the prospect of a return commensurate with the 'no win, no fee' model, being the opportunity cost of the firm charging its solicitors on an hourly basis, plus a commission to allow for the time value of money and the risk of a complete loss.¹⁰²

14.87 Lastly, MinterEllison submitted '*public interest*' cases may not benefit from the introduction of contingency fees as they may not generate a significant enough monetary return.¹⁰³ Herbert Smith Freehills contended it is difficult to see the profit motive in social justice class actions with likely small-dollar value claims with low potential damages.¹⁰⁴

14.88 The Law Council of Australia also noted the potential for contingency fees to increase access to justice is limited because only a few law firms would be able to assume the risk of an adverse costs order and provide security for costs.¹⁰⁵ If the Supreme Court of Victoria approves a 'group costs order', the plaintiff law firm is liable to pay any costs payable to the defendant and must give security for costs in the instance it is ordered by the Supreme Court of Victoria.¹⁰⁶

14.89 Under the contingency fee model recommended by the ARLC, the plaintiff law firm would be subject to a presumption that they will be required to provide security for costs in a class action with a contingency fee arrangement.¹⁰⁷ The ALRC considered this requirement would negate the need for the law firm to provide to indemnify the representative plaintiff from adverse costs.¹⁰⁸

14.90 Omni Bridgeway argued that high upfront costs and the potential for adverse costs orders are prohibitive to all but the most financially robust litigation funders.¹⁰⁹ The Law Council of Australia considered it unclear whether allowing contingency fees would encourage significant competition from smaller law firms.¹¹⁰ In the view of the Law Council of Australia:

¹⁰² Litigation Capital Management, *Submission 23*, p. 21.

¹⁰³ MinterEllison, *Submission 25*, p. 2.

¹⁰⁴ Herbert Smith Freehills, *Submission 51*, p. 8.

¹⁰⁵ Law Council of Australia, *Submission 67*, p. 14.

¹⁰⁶ *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(2).

¹⁰⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 205 (recommendation 18).

¹⁰⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 212–213.

¹⁰⁹ Omni Bridgeway, *Submission 73*, p. 20.

¹¹⁰ Law Council of Australia, *Submission 67*, p. 16.

Percentage-based fee agreements would only benefit large law firms that are already billing via conditional fee arrangements – generating a higher premium with no commensurate increase in risk.¹¹¹

Encouragement for unmeritorious class actions

14.91 There is concern that lawyers may be more willing to take instructions to commence speculative class actions on a contingency fee, with the intention to settle quickly and receive the agreed percentage of the settlement.¹¹² Submitters noted this is likely to lead to an overall increase in the volume of class actions as class actions with more marginal claims would be taken on by law firms on a contingency fee basis.¹¹³ Queensland Law Society noted the potential negative impact of using up court resources.¹¹⁴

14.92 In the view of the U.S. Chamber for Legal Reform, the risk of adverse costs is not an effective safeguard because most class actions settle out of court, often to avoid the high costs of going to trial, regardless of the merit of the case.¹¹⁵

14.93 Health Industry Companies argued:

The financial rewards inherent in a contingency fee may result in a case without merit proceeding because the economic reward justifies 'having a go' given that the 'upside' could be so significant while the 'downside risk' is comparatively immaterial.¹¹⁶

14.94 They also stressed the detrimental impacts of fostering this type of entrepreneurial litigation on Australia's health care system and on innovation and investment.¹¹⁷

¹¹¹ Law Council of Australia, 'Contingency Fees opposed by Law Council', *Media Release*, 13 March 2020, cited in Omni Bridgeway, *Submission 73*, p. 20.

¹¹² See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 15; Allens, *Submission 69*, p. 23; Ai Group, *Submission 92*, p. 13; Health Industry Companies, *Submission 74*, p. 7.

¹¹³ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 15; Allens, *Submission 69*, p. 23; Omni Bridgeway, *Submission 73*, p. 29.

¹¹⁴ Queensland Law Society, *Submission 46*, p. 3.

¹¹⁵ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 15.

¹¹⁶ Health Industry Companies, *Submission 74*, p. 15.

¹¹⁷ Health Industry Companies, *Submission 74*, pp. 7–15.

Decreased returns to class members

14.95 The VLRC identified that a result of running a class action on contingency fees without litigation funding could be higher legal fees.¹¹⁸

14.96 Submitters also expressed doubt as to whether contingency fees would improve financial outcomes for class members in a class action.¹¹⁹ It was submitted that, in order to render the case financially viable for the law firm, law firms would charge higher legal fees when operating on a contingency fee basis. Class members would receive less, while lawyers would take a larger percentage of the proceeds, which would have gone to the class members on a different method of billing.¹²⁰

14.97 A submission from Health Industry Companies commented:

From an economic perspective for a law firm, there is no difference to conducting a matter on a no-win/no-fee basis than upon a contingency fee basis except at the point of settlement or judgment. The capital outlay is the same, the cash flow is the same, the level of risk taken by the law firm is the same - the only difference is the amount of reward, and more particularly, the amount of reward taken from the claimant.¹²¹

14.98 Further, unless contingency fees were capped, subject to a sliding scale (discussed below), a law firm may charge the same or more than a litigation funder to reflect the pursuit of a smaller-dollar value yet riskier claim.¹²²

14.99 In addition, it was noted that, absent a requirement for a law firm to indemnify the representative plaintiff for adverse costs or security for costs, a law firm may be unlikely to do so. In such circumstances, the representative plaintiff and class members would be assuming a much higher risk, or incurring much higher costs to insure against this risk with insurance from an after-the-event insurance provider.¹²³

14.100 The NSW Bar Association submitted:

Without an in-depth analysis of the operation of contingency fee regimes in comparable jurisdictions (including the USA, UK and Canada) that demonstrate that the rule of law (through improved access to justice) is served by permitting lawyers to receive a percentage of judgments and

¹¹⁸ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, June 2018, Victoria, p. 58.

¹¹⁹ See, for example, Allens, *Submission 69*, pp. 22–23; NSW Bar Association, *Submission 96*, p. 9; Health Industry Companies, *Submission 74*, p. 7.

¹²⁰ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 12; Ai Group, *Submission 92*, p. 13.

¹²¹ Health Industry Companies, *Submission 74*, p. 6.

¹²² U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 12; see also Litigation Capital Management, *Submission 23*, p. 21; Allens, *Submission 69*, p. 23.

¹²³ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 13.

settlements, it is not possible to make any finding as to the impact that the introduction of contingency fees would have on financial outcomes for plaintiffs in class actions.¹²⁴

14.101 Additionally, some submissions considered contingency fees would not provide another method of billing, but just replace 'no win, no fee' billing – a lower cost option for plaintiffs.¹²⁵

14.102 Lastly, the U.S. Chamber noted that in the United States that lawyers are acting on a contingency fee basis, alongside a litigation funder, and therefore two fees, calculated as a percentage of the settlement sum, are being deducted.¹²⁶ The ALRC proposed a way to address this risk, which is discussed below in the context of safeguards.

Uncertainty as to costs payable by plaintiff

14.103 In the view of some health industry companies, contingency fees would not provide clarity or certainty to plaintiffs regarding how much they are to be charged for legal services. They contended that contingency fees provide less certainty than 'no win, no fee' arrangements because:

...unless the quantum of damages is guaranteed from the commencement of a matter, there is no way to discern whether contingency fees are better or worse value than other options. This assumes (sometimes incorrectly), that other options were offered for consideration.¹²⁷

Arguments for lifting the ban on contingency fees

14.104 Plaintiff law firms advocated for the lifting of the ban on contingency fees.¹²⁸ The Law Institute of Victoria, and several other submitters, also supported changes to assure the availability of contingency fees.¹²⁹

¹²⁴ NSW Bar Association, *Submission 96*, p. 9.

¹²⁵ See, for example, Litigation Capital Management, *Submission 23*, p. 21; Health Industry Companies, *Submission 74*, pp. 2, 7.

¹²⁶ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 11.

¹²⁷ Health Industry Companies, *Submission 74*, p. 13.

¹²⁸ See, for example, Slater and Gordon, *Submission 18*, p. 6; Shine Lawyers, *Submission 35*, pp. 12–13; Maurice Blackburn Lawyers, *Submission 37*, p. 18.

¹²⁹ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2; Law Institute of Victoria, *Submission 3*, p. 9; Professor Vince Morabito, *Submission 6*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, p. 11; Harbour Litigation Funding, *Submission 11*, p. 4; Dr Warren Mundy, *Submission 17*, p. 9; Ashurst, *Submission 41*, p. 5; Dr Michael Duffy, *Submission 47*, p. 2; Professor Peta Spender, *Submission 50*, p. 1; National Council of Women Australia, *Submission 77*, pp. 2, 4; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 5; NSW Young Lawyers, *Submission 89*, p. 9.

14.105 Key arguments for lifting this ban included:

- greater alignment of interests between lawyers and clients; and
- improved access to justice and increased returns to class members.

14.106 Much of the support for contingency fees was dependent on appropriate safeguards being in place. This section includes discussion as to how submitters perceived the ability of these safeguards to counteract some of the risks associated with contingency fees, with the subsequent section detailing these controls in further detail.

Manageable conflicts of interest

14.107 Supporters of contingency fees recognised that this method of billing establishes a vested interest in the outcome of the case for the lawyer. Supporters noted:

- current forms of billing for legal costs involve vested interests of lawyers in the outcomes of the case; and
- contingency fees better align the interests of lawyers with that of their client than current forms of billing for legal costs.¹³⁰

14.108 First, it was noted contingency fees are not significantly different to 'no win, no fee' arrangements in terms of the potential for conflicts of interest.¹³¹ Maurice Blackburn submitted 'lawyers having a financial interest in the outcome of the dispute – only getting paid if they win – is nothing new'.¹³²

14.109 In 'no win, no fee' arrangements and a contingency fee arrangement, a lawyer has a financial interest in the litigation.¹³³ Whether a lawyer undertakes a case on a 'no win, no fee' basis, or a contingency basis, the lawyer runs the risk of not being paid if the action does not succeed.¹³⁴ In the view of some submitters, there is no evidence to suggest that lawyers will not be able to continue to manage potential conflicts of interest if contingency fees are permitted.¹³⁵

14.110 Maurice Blackburn submitted:

Lawyers acting on a conditional fee basis have long demonstrated that they are able to act professionally and ethically and achieve better outcomes for clients and that they can acceptably manage any actual or perceived conflicts

¹³⁰ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2; Dr Warren Mundy, *Submission 17*, p. 9; Shine Lawyers, *Submission 35*, p. 13; Maurice Blackburn Lawyers, *Submission 37*, p. 24; Dr Michael Duffy, *Submission 47*, p. 2; NSW Young Lawyers, *Submission 89*, p. 15.

¹³¹ Law Institute of Victoria, *Submission 3*, pp. 5–6.

¹³² Maurice Blackburn Lawyers, *Submission 37*, p. 24.

¹³³ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2.

¹³⁴ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2.

¹³⁵ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2; Law Institute of Victoria, *Submission 3*, p. 9; Dr Michael Duffy, *Submission 47*, p. 2.

of interest in circumstances where their "investment" in the litigation may be worth many millions of dollars.¹³⁶

14.111 Reference was made to the view of the Productivity Commission that contingency fees would not create insurmountable conflicts of interest compared to other forms of billing.¹³⁷

14.112 Second, it was submitted that there is an economic incentive under a contingency fee arrangement for lawyers to minimise costs and achieve high returns for clients.¹³⁸ Submissions argued contingency fees encourage lawyers to obtain a better outcome for clients to a greater degree than 'no win, no fee' arrangements.¹³⁹ This was said to be the case because 'the more the client wins, the more the lawyer wins'.¹⁴⁰

14.113 Submitters contended that contingency fees provide value-based billing to clients because costs are aligned to outcomes, rather than hours spent working on the matter, as occurs in the hourly rate billing method.¹⁴¹ It was argued that traditional billing methods incentivise inefficiency while percentage based billing encourages law practices to resolve matters efficiently.¹⁴²

14.114 Supporters of contingency fees recognised the suggestion that lawyers could be incentivised to settle cases cheaply for the sake of certainty of being paid. It was noted there is an effective safeguard against this in the requirement for court approval of any settlement agreements in class actions.¹⁴³

¹³⁶ Maurice Blackburn Lawyers, *Submission 37*, p. 24.

¹³⁷ See, for example, Law Institute of Victoria, *Submission 3*, p. 6; Maurice Blackburn Lawyers, *Submission 37*, p. 25, noting Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, p. 625.

¹³⁸ See, for example, Law Institute of Victoria, *Submission 3*, p. 9; Maurice Blackburn Lawyers, *Submission 37*, p. 25; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 5.

¹³⁹ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2; Shine Lawyers, *Submission 35*, p. 13; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 5.

¹⁴⁰ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2.

¹⁴¹ Mr Andrew Watson, Principal Lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 27 July 2020, p. 20.

¹⁴² See, for example, Law Institute of Victoria, *Submission 3*, pp. 5, 9; Mr Andrew Watson, Principal Lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 27 July 2020, p. 26.

¹⁴³ Maurice Blackburn Lawyers, *Submission 37*, p. 25; see also Law Institute of Victoria, *Submission 3*, p. 8.

Improved access to justice outcomes

14.115 Submissions proposed that contingency fees would promote improved access to justice outcomes for class members with both small- and high-dollar value claims.¹⁴⁴

14.116 The VLRC considered contingency fees would allow larger law firms to compete with litigation funders to fund high-value claims and smaller firms to pursue a greater number of lower-valued claims.¹⁴⁵

14.117 Regarding *lower-valued claims*, it was submitted contingency fees would lead to smaller-dollar value but meritorious claims being pursued through a class action. Submissions noted that these types of cases do not proceed in the current environment because:

- they are a less attractive, uneconomical or unviable investment for litigation funders;¹⁴⁶ and
- the estimated return to lawyers on a 'no win, no fee' basis fails to sufficiently equate to a financially viable outcome for lawyers.¹⁴⁷

14.118 The ALRC noted contingency fees would allow lawyers to be compensated for costs and carrying the risk of adverse costs.¹⁴⁸ Submissions identified access to contingency fees would encourage class actions with small-to-medium-dollar value claims to proceed where the representative plaintiffs would not be able to fund disbursement costs or run the risk of adverse costs orders, or the solicitors would not have had the financial capacity to run the case on a 'no win, no fee' basis.¹⁴⁹

14.119 Dr Warren Mundy agreed:

...the prospect of higher fees under damages based billing may induce some lawyers, depending on their risk appetite and ability to finance the litigation and bear losses, to take on matters which otherwise would not be litigated.¹⁵⁰

¹⁴⁴ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2; Law Institute of Victoria, *Submission 3*, p. 5; Harbour Litigation Funding, *Submission 11*, p. 4; Shine Lawyers, *Submission 35*, p. 13; Maurice Blackburn Lawyers, *Submission 37*, p. 25; Professor Peta Spender, *Submission 50*, p. 1.

¹⁴⁵ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. 55.

¹⁴⁶ See, for example, Law Institute of Victoria, *Submission 3*, p. 6; Maurice Blackburn Lawyers, *Submission 37*, p. 22; Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 26.

¹⁴⁷ Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 4.

¹⁴⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 199.

¹⁴⁹ See, for example, Shine Lawyers, *Submission 35*, p. 13; Law Institute of Victoria, *Submission 3*, p. 5; Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, p. 625; Dr Warren Mundy, *Committee Hansard*, 13 July 2020, p. 32.

¹⁵⁰ Dr Warren Mundy, *Submission 17*, p. 8.

14.120 Investor Claim Partner submitted:

The primary impact of the introduction of contingency fees would be to enable law firms to equate risk and reward in their pricing policy and therefore enable them [sic] to source and deploy greater amounts of capital in class actions. This would enhance access to justice and deepen competitive tensions causing the pricing for funding to further decrease.¹⁵¹

14.121 With respect to *high value claims*, the Law Institute of Victoria considered allowing contingency fees would promote a more level playing field for law firms to compete with terms offered by litigation funders because they would be able to offer terms on a comparable basis.¹⁵²

14.122 On that point, supporters of contingency fees did recognised the commercial reality of law firms could mean that they are unable to meet the significant capital costs required to solely fund class actions.¹⁵³

14.123 Given this reality, Maurice Blackburn submitted contingency fees would not necessarily enable law firms to compete directly with litigation funders for high-value claims. However, the availability of contingency fees would place downward pressure on litigation funding commissions given contingency fees provide the prospect of higher returns to class members, as detailed below. It was suggested this downward pressure on legal costs and litigation funding fees created by increased competition could increase the number of class actions.¹⁵⁴

Careful selection of meritorious class actions

14.124 Given the 'loser pays' rule in Australian civil litigation, lawyers are dissuaded from accepting to act in frivolous or unmeritorious actions for risk of being ordered to pay the defendant's legal costs.¹⁵⁵

14.125 Submissions noted that under a 'no win, no fee' arrangement, there is a disincentive to pursue frivolous or unmeritorious claims. There are significant risks assumed by both the plaintiff and the lawyer in this type of arrangement. While the plaintiff does not assume a risk relating to the payment of legal costs of their lawyers if the case is successful, they assume the risk of paying the defendant's legal costs in the event they are unsuccessful by reason of the 'loser pays' costs-shifting rule. Meanwhile, the lawyers assume the risk of not being

¹⁵¹ Investor Claim Partner Pty Ltd, *Submission 7*, p. 11.

¹⁵² Law Institute of Victoria, *Submission 3*, p. 7. See, for example, Slater and Gordon, *Submission 18*, p. 12.

¹⁵³ Shine Lawyers, *Submission 35*, p. 13.

¹⁵⁴ Maurice Blackburn Lawyers, *Submission 37*, p. 23; Shine Lawyers, *Submission 35*, p. 13; see also Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 200.

¹⁵⁵ See, for example, Law Institute of Victoria, *Submission 3*, p. 9; Dr Warren Mundy, *Submission 17*, p. 9.

paid for their work if the case is unsuccessful but do not assume a risk relating to potential payment of the defence's legal costs.¹⁵⁶

14.126 Law firms who take on a case on a contingency fee basis would assume the same considerable financial risk of not recovering payment for their work if the case is unsuccessful, which would act as a deterrent to accepting instructions to commence frivolous, unmeritorious or speculative cases.¹⁵⁷

14.127 Law firms may assume higher financial risk under the contingency fee model where they are required to indemnify for adverse costs. Mr Watson, Principal Lawyer at Maurice Blackburn, noted the requirement to assume liability for adverse costs and the requirement to provide security for costs if so ordered by the court under a 'group costs order' in the Supreme Court of Victoria creates additional cost and risk for law firms when compared to 'no win, no fee' arrangements.¹⁵⁸ As noted elsewhere in this report, the prospect of an adverse costs order acts as a significant deterrent against the pursuit of unmeritorious claims.¹⁵⁹

14.128 Additionally, NSW Young Lawyers pointed out that there is a common law precedent, as well as statutory powers, for courts to make costs orders against legal practitioners who have pursued an unmeritorious claim.¹⁶⁰

Increased returns to class members

14.129 The ALRC contended that while a class action run on a contingency fee basis without litigation funding could increase payments to lawyers, it could also increase the returns to class members.¹⁶¹ Ashurst submitted the rate charged under a contingency fee could be lower than what is charged by litigation funders.¹⁶²

¹⁵⁶ See, for example, Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, pp. 4–5; NSW Young Lawyers, *Submission 89*, p. 15.

¹⁵⁷ See, for example, Law Institute of Victoria, *Submission 3*, p. 9; Dr Warren Mundy, *Submission 17*, p. 9.

¹⁵⁸ Mr Watson, Principal Lawyer, Maurice Blackburn Lawyers, *Committee Hansard*, 27 July 2020, p. 26.

¹⁵⁹ See, for example, Harbour Litigation Funding, *Submission 11*, p. 4; Balance Legal Capital, *Submission 13*, p. 2; Slater and Gordon, *Submission 18*, p. 10; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 4; Shine Lawyers, *Submission 35*, p. 67; Institutional Shareholder Services Securities Class Action Services, *Submission 62*, p. 3; Omni Bridgeway, *Submission 73*, pp. 1, 5, 7, 10; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 4; Phi Finney McDonald, *Submission 87*, p. 15; Professor Vince Morabito, *Committee Hansard*, 24 July 2020, p. 9.

¹⁶⁰ NSW Young Lawyers, *Submission 89*, p. 15.

¹⁶¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 205.

¹⁶² Ashurst, *Submission 41*, p. 5.

14.130 Many submitters noted that under a contingency fee arrangement, only one fee would be deducted from the settlement sum or damages, as opposed to legal fees and the litigation funding fee.¹⁶³

14.131 The Law Institute of Victoria submitted a comparison between the actual return to class members in 10 litigation funded class actions, and the return class members would have received had a contingency fee instead been charged by the law firms. It was estimated that almost an additional \$90 million would have gone to class members had a contingency fee of 25 per cent been charged.¹⁶⁴

Figure 14.1 Comparison between actual return to class members in class actions with litigation funding and hypothetical returns to class members in class action on a contingency fee basis

Actual		25% contingency fee		35% contingency fee	
Settlement sums (\$m)	737.2	Settlement sums (\$m)	737.2	Settlement sums (\$m)	737.2
Funder Revenue (\$m)	256.2	Contingency fee (\$m)	184.3	Contingency fee (\$m)	258
Paid to Claimants (\$m)	464.6	Paid to Claimants (\$m)	552.9	Paid to Claimants (\$m)	479.2
% to Claimants	63%	% to Claimants	75%	% to Claimants	65%
Funder Profit (\$m)	168.9	Benefit to Claimants (\$m)	88.3	Benefit to Claimants (\$m)	14.6

Source: Law Institute of Victoria, *Submission 3*, p. 8.

14.132 Maurice Blackburn argued that, if a 25 per cent contingency fee arrangement were to have been in place for 16 litigation funded class actions Maurice Blackburn settled between 2006 and 2018, class members would have, on average, received 75 per cent of the settlement as opposed to the 60 per cent that was actually returned in the funded class actions.¹⁶⁵

14.133 Maurice Blackburn submitted billing on a contingency fee basis would particularly assist in increasing the returns to class members in class actions with smaller-dollar value claims than when a litigation funder is involved. This is

¹⁶³ See, for example, Law Institute of Victoria, *Submission 3*, p. 5; Slater and Gordon, *Submission 18*, p. 6; Shine Lawyers, *Submission 35*, p. 13; Maurice Blackburn Lawyers, *Submission 37*, pp. 16, 21; Ashurst, *Submission 41*, p. 5; NSW Young Lawyers, *Submission 89*, pp. 10–11.

¹⁶⁴ Law Institute of Victoria, *Submission 3*, p. 8.

¹⁶⁵ Maurice Blackburn Lawyers, *Submission 37*, p. 21.

because the combination of legal costs and litigation funding commission being charged are likely to constitute a higher proportion of the overall resolution sum.¹⁶⁶

14.134 Slater and Gordon submitted that, if a 25 per cent contingency fee arrangement were to have been in place for 10 litigation funded class actions Slater and Gordon resolved over the past ten years, class members would have received an additional \$29.7 million collectively.¹⁶⁷

Simplified legal retainer agreements

14.135 Submissions noted that percentage-base billing provides clarity and predictability to clients about the legal costs they are liable to pay.¹⁶⁸ On this view, contingency fee agreements are likely to contain less complex terms than found in standard legal retainer agreements, especially when they include time-based billing.¹⁶⁹

14.136 Identified benefits of improved clarity and simplicity of the fees payable to lawyers included:

- consumers may be better placed to compare billing arrangements offered by different law firms, thus encouraging competition; and
- consumers can make better informed decisions about their legal affairs.¹⁷⁰

Essential safeguards

14.137 As mentioned at various places throughout this chapter, much of the support for lifting the ban on contingency fees was conditional on certain safeguards being introduced to place checks and balances on the use of this form of billing.¹⁷¹ Opponents of contingency fees submitted that, if the ban were to be lifted, controls on their use are imperative.¹⁷²

14.138 The Productivity Commission, ALRC and VLRC have recommended various forms of safeguards to protect the interests of class members and to limit

¹⁶⁶ Maurice Blackburn Lawyers, *Submission 37*, p. 22.

¹⁶⁷ Slater and Gordon, *Submission 18*, p. 6.

¹⁶⁸ See, for example, Law Institute of Victoria, *Submission 3*, p. 7; Maurice Blackburn Lawyers, *Submission 37*, p. 23; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 5.

¹⁶⁹ Law Institute of Victoria, *Submission 3*, p. 7.

¹⁷⁰ Law Institute of Victoria, *Submission 3*, p. 7.

¹⁷¹ See, for example, Slater and Gordon, *Submission 18*, p. 6; Shine Lawyers, *Submission 35*, p. 14; Maurice Blackburn Lawyers, *Submission 37*, pp. 19–20; Ashurst, *Submission 41*, p. 5; Association of Litigation Funders of Australia, *Submission 57*, p. 21; NSW Young Lawyers, *Submission 89*, p. 14.

¹⁷² See, for example, Litigation Capital Management, *Submission 23*, p. 21; U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19; Mr Stuart Clark, *Submission 22*, p. 6; Law Firms Australia, *Submission 54*, p. 3; Allens, *Submission 69*, p. 24; Omni Bridgeway, *Submission 73*, p. 20.

'windfall' payments to lawyers charging on a percentage basis and to increase returns to members. Submissions proposed additional potential safeguards.

14.139 In summary, these safeguards include:

- limiting contingency fees to law firms acting for the representative plaintiff in class actions;
- requiring lawyers to indemnify the representative plaintiff for adverse costs and/or security for costs;
- preventing a contingency fee and a litigation funding commission being charged to the representative plaintiff;
- preventing a contingency fee and another fee for legal services billed on a time-cost basis from being charged;
- requiring court approval of contingency fee arrangements and the court having the power to amend contingency fee arrangements;
- subjecting the returns to plaintiff law firms acting for the representative plaintiff to caps, a sliding scale or a reasonable rate of return on invested capital assessment;
- requiring law firms billing on a contingency fee basis to be subject to the financial services regulation that applies to litigation funders;
- narrowing the types of cases in which contingency fees can be charged; and
- application of the same contractual and statutory protections for the representative plaintiff which are present in 'no win, no fee' arrangements.

Lawyers acting for the representative plaintiff in a class action

14.140 The ALRC recommended that the ban on contingency fees should be lifted only for class actions, and only for the lawyers acting for the representative plaintiff.¹⁷³ The same approach was taken in the recommendation of the VLRC, and the Victorian contingency fee model under the Victorian Supreme Court Act is consistent with this recommendation.¹⁷⁴

¹⁷³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 205 (recommendation 17).

¹⁷⁴ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. xx.

14.141 Proponents of contingency fees considered their availability should be limited to class actions.¹⁷⁵ Opponents to contingency fees agreed that any lifting of the ban should be restricted to class actions.¹⁷⁶

Indemnity for adverse costs and security for costs

14.142 While some submitters were opposed to contingency fees in Australia, they widely considered that if the ban were to be lifted on contingency fees, the lawyer must be required to indemnify the client against any adverse costs order and provide security for costs if ordered.¹⁷⁷ Some supporters of contingency fees agreed.¹⁷⁸

14.143 Law Firms Australia agreed with the ALRC that there be a positive presumption that applies to law firms to provide security for costs in a contingency fee arrangement.¹⁷⁹ NSW Young Lawyers noted that a requirement of a law firm to pay security for costs also serves to protect the interests of the defendant in a class action.¹⁸⁰

14.144 Omni Bridgeway highlighted that requiring a law firm to provide security for costs will mean that the law firm has financial obligations and legal obligations to the clients. Omni Bridgeway described the 'worst-case scenario' to result from these dual obligations to be where:

...those conflicts could become so significant that the firm would need to stand down from continuing to act as the class lawyers, with flow-on effects for group members.¹⁸¹

¹⁷⁵ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 2; Law Institute of Victoria, *Submission 3*, p. 9; Professor Vince Morabito, *Submission 6*, p. 5; Investor Claim Partner Pty Ltd, *Submission 7*, p. 11; Harbour Litigation Funding, *Submission 11*, p. 4; Dr Warren Mundy, *Submission 17*, p. 9; Slater and Gordon, *Submission 18*, p. 6; Shine Lawyers, *Submission 35*, pp. 12–13; Maurice Blackburn Lawyers, *Submission 37*, p. 18; Ashurst, *Submission 41*, p. 5; Dr Michael Duffy, *Submission 47*, p. 2; Professor Peta Spender, *Submission 50*, p. 1; National Council of Women Australia, *Submission 77*, p. 2; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 5; NSW Young Lawyers, *Submission 89*, p. 8.

¹⁷⁶ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19; Law Firms Australia, *Submission 54*, p. 2; Omni Bridgeway, *Submission 73*, p. 20.

¹⁷⁷ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19; Law Firms Australia, *Submission 54*, p. 3; Allens, *Submission 69*, p. 25; Omni Bridgeway, *Submission 73*, p. 20. The submission from the Attorney-General's Department also noted that an ancillary policy question that might be considered if the prohibition on contingency fees is lifted, whether the lawyer should be liable for security for costs orders and adverse costs orders: Attorney-General's Department, *Submission 93*, p. 14.

¹⁷⁸ See, for example, Maurice Blackburn Lawyers, *Submission 37*, p. 22; Ashurst, *Submission 41*, p. 5.

¹⁷⁹ Law Firms Australia, *Submission 54*, p. 3.

¹⁸⁰ NSW Young Lawyers, *Submission 89*, p. 14.

¹⁸¹ Omni Bridgeway, *Submission 73*, p. 20.

Preventing 'hybrid' billing

14.145 Concern was raised about the potential for class members to be charged a contingency fee in addition to a litigation funding fee.¹⁸²

14.146 The ALRC recommended that, in lifting the ban on contingency fees, 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
- a law firm who enters into a contingency fee agreement must advance the cost of disbursements, and account for such costs within the contingency fee.¹⁸³

14.147 This was considered to protect the representative plaintiff and class members from paying, in the event the class action is successful, from the money recovered:

- a percentage of the recovered amount to both a litigation funder and the solicitors; and
- a fee to solicitors on an hourly basis as well as an additional contingency fee.¹⁸⁴

14.148 The Attorney-General's Department noted that an ancillary policy issue, that might be considered if the prohibition on contingency fees is lifted, is :

...whether hybrid billing should be permissible or whether it would further reduce the share of the award or settlement received by the representative plaintiff and class members'.¹⁸⁵

14.149 The NSW Bar Association pointed out the Victorian 'group costs order' provisions do not prohibit the charging of both an hourly rate and a contingency fee, nor do they prohibit there being both a contingency fee and a litigation funder fee in the same proceeding.¹⁸⁶ While Law Firms Australia did not support

¹⁸² U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 11.

¹⁸³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 208.

¹⁸⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 205 (recommendation 18).

¹⁸⁵ Attorney-General's Department, *Submission 93*, p. 14.

¹⁸⁶ NSW Bar Association, *Submission 96*, p. 8.

contingency fees, it considered a safeguard against double charging would be necessary in the event the ban was lifted.¹⁸⁷

14.150 Mr Stuart Clark, as well as the U.S. Chamber Institute for Legal Reform, also considered that, if contingency fees were to be permitted, there must be a safeguard against a litigation funder and a lawyer charging a 'success fee' in the same class action.¹⁸⁸

Preventing windfall profits

Court approval

14.151 An integral safeguard is that the contingency fee arrangement must be approved by the Federal Court, and that the Federal Court has the power to amend the terms of the agreement. This was recommended by the ALRC and the VLRC, and is a component in the Victorian contingency fee legislation.¹⁸⁹

14.152 Submissions supported this safeguard.¹⁹⁰ Slater and Gordon considered that the court would set a fee which represents a reasonable, rather than windfall, return to lawyers.¹⁹¹

14.153 Maurice Blackburn submitted the court is well placed to make the inquiry into whether the proposed contingency fee is reasonable in the circumstances given its role in regulating the legal costs to be deducted from class action settlements.¹⁹²

14.154 Whereas Health Industry Companies, who opposed contingency fees, expressed the opinion that the court would not be able to provide guidance on whether the fee arrangements are reasonable or proportionate.¹⁹³

¹⁸⁷ Law Firms Australia, *Submission 54*, p. 2.

¹⁸⁸ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 19; Mr Stuart Clark, *Committee Hansard*, 13 July 2020, p. 26; see also Law Firms Australia, *Submission 54*, p. 2.

¹⁸⁹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 205 (recommendation 19); Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. 68 (recommendation 8); *Supreme Court of Victoria Act 1986* (Vic), ss. 33ZDA(1).

¹⁹⁰ See, for example, Law Institute of Victoria, *Submission 3*, p. 7; Slater and Gordon, *Submission 18*, p. 6; MinterEllison, *Submission 25*, p. 3; Shine Lawyers, *Submission 35*, p. 14; Association of Litigation Funders of Australia, *Submission 57*, p. 21; Allens, *Submission 69*, p. 25; NSW Young Lawyers, *Submission 89*, p. 14.

¹⁹¹ Slater and Gordon, *Submission 18*, p. 6.

¹⁹² Maurice Blackburn Lawyers, *Submission 37*, pp. 19–20.

¹⁹³ Health Industry Companies, *Submission 74*, p. 13.

Statutory caps or sliding scales

14.155 Some proponents of contingency fee arrangements considered a critical safeguard to be statutory caps on the percentage under a contingency fee.¹⁹⁴

14.156 Dr Warren Mundy noted in his submission the recommendation of the Productivity Commission that percentage limits in contingency fee arrangements be set on a sliding scale to prevent windfall profits.¹⁹⁵ Dr Mundy remarked that a single percentage cap on fees does not provide sufficient protection from windfall profits because a lawyer's fee increases proportionately with the size of the settlement or award.¹⁹⁶ For a sliding scale, the percentage limit progressively drops as the settlement or award increases.¹⁹⁷

14.157 The Productivity Commission suggested that a sliding scale for contingency fees should strike a balance between curtailing windfall profits while allowing a fair return. An appropriate return to lawyers providing funding would include interest for delaying the payment of fees and compensation for the additional risk borne.¹⁹⁸ The Productivity Commission recommended percentage rates in a contingency fee arrangement should be capped on a sliding scale for retail clients, while no percentage cap should apply to sophisticated clients.¹⁹⁹

Reasonable rate of return

14.158 Mr Stuart Clark submitted the returns to litigation funders must be equivalent to a normal return on invested capital. This must involve an assessment of the real risk undertaken. Mr Clark argued that, if the ban on contingency fees is lifted in Australia, these same controls on the returns to lawyers under a contingency fee arrangement must apply.²⁰⁰

¹⁹⁴ See, for example, Shine Lawyers, *Submission 35*, p. 14; Ashurst, *Submission 41*, p. 5.

¹⁹⁵ Productivity Commission, *Access to Justice Arrangements*, No. 72, Chapter 18, Volume 2, September 2014, pp. 22, 61, 627; Dr Warren Mundy, *Submission 17*, pp. 5–6; Dr Warren Mundy, *Committee Hansard*, 13 July 2020, p. 17.

¹⁹⁶ Dr Warren Mundy, *Submission 17*, p. 9.

¹⁹⁷ Dr Warren Mundy, *Submission 17*, pp. 5–6.

¹⁹⁸ Productivity Commission, *Access to Justice Arrangements*, No. 72, September 2014, Chapter 18, Volume 2, p. 628.

¹⁹⁹ Dr Warren Mundy, *Submission 17*, p. 6; Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, p. 627. See *Corporations Act 2001*, s. 761GA, for definition of sophisticated investor.

²⁰⁰ Mr Stuart Clark, *Submission 22*, p. 6.

Financial services regulation

- 14.159 Some submitters queried whether law firms charging on a contingency fee basis should be subject to the regulatory regimes which apply to litigation funders.²⁰¹
- 14.160 The application of financial services regulation to litigation funders in class actions is discussed in Chapter 16. In summary, since July 2020 litigation funding in class actions must comply with regulations of the AFSL and MIS regimes, and the anti-hawking regime. Lawyers operating on a 'no win, no fee' basis in class actions are currently exempt from this type of regulation.
- 14.161 The Menzies Research Centre submitted that, if contingency fees were permitted in Australia, any law firm charging on this basis should be required to hold an AFSL and have their operations regulated by the Australian Securities and Investment Commission.²⁰²
- 14.162 Omni Bridgeway agreed, noting that lawyers should be subject to the same or similar obligations as litigation funders, including licensing regimes. Absent this, Omni Bridgeway submitted 'contingency fees may place unmanageable costs and financial obligations on law firms who seek to act as both litigator and funder'.²⁰³

Capital adequacy

- 14.163 Queensland Law Society expressed concern that contingency fees could lead to law firms being 'overly exposed' and considered limitations could be placed on how many class actions a firm could undertake on a contingency fee basis at any given time:

Opponents may seek to challenge the financial capacity of firms that take on too many contingency fee matters and the courts may therefore need to develop numerical limits on such cases per firm.

...

Restrictions on when a firm could charge contingency fees to avoid that firm being overly exposed and to reduce the risk of a conflict of interest may be needed. For example, there could be a minimum asset requirement and a limit on the number of matters each firm could run on this basis. Identification of matters would enable the exposure risk to be fully understood and a decision made whether a security for costs application is necessary.²⁰⁴

²⁰¹ See, for example, Litigation Capital Management, *Submission 23*, p. 21; Ashurst, *Submission 41*, p. 5; Law Firms Australia, *Submission 54*, p. 3.

²⁰² Menzies Research Centre, *Submission 66*, p. 31.

²⁰³ Omni Bridgeway, *Submission 73*, p. 20.

²⁰⁴ Queensland Law Society, *Submission 46*, p. 3.

Personal injury class actions

14.164 Allens submitted contingency fee arrangements should not be available in personal injury claims because of the unique nature of these claims, including the limitations on the quantum of damages that can be recovered and the underlying purpose of the heads of damage available (for example, future loss of earnings and future care).²⁰⁵

Contractual and statutory protections

14.165 The ALRC considered that the existing regulation of the formation of 'no win, no fee' billing may be adapted for contingency 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.²⁰⁶

National uniformity

14.166 Some submissions noted the permissibility of contingency fees in Victoria may encourage 'forum shopping'. In other words, law firms seeking to use contingency fees may commence class actions in the Supreme Court of Victoria to take advantage of the outlier regime.²⁰⁷

14.167 The NSW Bar Association, as well as Omni Bridgeway, commented that, in order to prevent the issue of 'forum shopping', other jurisdictions may move to introduce contingency fees. It was considered this course of action is not desirable as it would be pre-emptive of any nationally consistent approach to contingency fees and further complicate the court system.²⁰⁸

14.168 Given contingency fees are permitted in Victoria, MinterEllison considered similar legislation should be enacted in all Australian jurisdictions that have a class actions regime in order to promote consistency and avoid forum shopping.²⁰⁹

²⁰⁵ Allens, *Submission 69*, p. 25.

²⁰⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 217.

²⁰⁷ See, for example, Law Council of Australia, *Submission 67*, p. 29; Omni Bridgeway, *Submission 73*, p. 32; Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 17.

²⁰⁸ NSW Bar Association, *Submission 96*, p. 12; Omni Bridgeway, *Submission 73*, p. 32.

²⁰⁹ MinterEllison *Submission 25*, p. 1.

Federal law class actions

- 14.169 There is federal legislation which confers jurisdiction on state and territory courts in respect of causes of action arising under federal legislation.²¹⁰ This permits a class action advancing federal causes of action to be brought in state and territory Supreme Courts. Therefore, the Federal Court has concurrent jurisdiction with the state and territory Supreme Courts for class actions on that subject matter.
- 14.170 King & Wood Mallesons highlighted the introduction of contingency fees in Victoria creates a situation where state and territory courts, in exercising federal jurisdiction, operate under different approaches to contingency fees. This means that class actions advancing federal causes of action brought in the Supreme Court of Victoria may involve a contingency fee. Whereas, if filed in a state or territory class action regime other than Victoria, this would not be permitted. A uniform approach was encouraged by King & Wood Mallesons.²¹¹
- 14.171 King & Wood Mallesons suggested that, until it is decided by the Australian Parliament that the charging of contingency fees is permitted for class actions arising under federal law, reform is required. Namely, this reform should have the effect of prohibiting lawyers to operate on a contingency fee basis in a class action with causes of action arising under federal law. King & Wood Mallesons noted the *Federal Court of Australia Act 1976* (Federal Court Act) and legislation conferring jurisdiction on state and territory courts in respect of causes of action arising under federal legislation, would require amendment to give effect to this intention.²¹²
- 14.172 Some submitters, such as Omni Bridgeway, considered restricting class actions advancing claims arising from federal law to the Federal Court would help eliminate these risks.²¹³ Chapter 17 discusses the proposal to grant the Federal Court exclusive jurisdiction over class actions with claims arising from the Corporations Act and the *Australian Securities and Investment Commission Act 2001* (ASIC Act).

Committee view

Benefits of contingency fees outweighed by risks

- 14.173 The committee considers the Australian Government should take a measured and steady approach to the use of contingency fees in class actions. On balance,

²¹⁰ See, for example, *Admiralty Act 1988* (Cth); *Corporations Act 2001* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth).

²¹¹ King & Wood Mallesons *Submission 53*, p. 5.

²¹² King & Wood Mallesons, *Submission 53*, p. 5.

²¹³ Omni Bridgeway, *Submission 73*, p. 32. See also Menzies Research Centre, *Submission 66*, p. 32; Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 13.

the committee considers that the public interest outcomes potentially achieved with the availability of contingency fee billing in class actions have not been outweighed by the potential for their exploitation for the benefit of lawyers' profits, even with the existence of safeguards. The committee is not persuaded that the ability of lawyers to bill representative plaintiffs and class members on a contingency fee basis would lead to reasonable, proportionate and fair outcomes. The committee sets out the keys factors underpinning this view.

- 14.174 First, contingency fees create too great a risk that lawyers could compromise their ethical and professional obligations to the court and to the client if they have a direct financial interest in the outcome. While the committee recognises there is the potential for conflicts of interest in 'no win, no fee' arrangements, contingency fees exacerbate this potential for conflict by virtue of the windfall profits that could be made from percentage-based fees.
- 14.175 Second, a law firm billing on a contingency fee basis is offering both a legal service *and a funding service*. As law firm funding services are economically similar to third-party litigation funding services, they should be subject to similar regulatory arrangements. This includes the basis upon which reasonable, proportionate and fair fees should be calculated.
- 14.176 The committee received cogent evidence that the profit from funding a class action, which is commonly calculated on a percentage of money recovered, is creating windfall profits for litigation funders. The committee understands that the windfall returns to litigation funders have been one factor prompting calls for the lifting of the prohibition on contingency fees to allow law firms to compete with litigation funders to increase competition in the market and place downward pressure on commission rates. Another reason for this call may be that lawyers wish to also obtain windfall returns.
- 14.177 Third, the alleged potential of contingency fees to positively impact access to justice outcomes may be overstated. Only a select few law firms would have access to sufficient capital to be able to undertake the risk required to compete for cases that are typically funded by litigation funders. Therefore, the advent of contingency fees may operate to financially benefit a small group of law firms, rather than create competition and place downward pressure on the market rate of fees.
- 14.178 It has been suggested that contingency fees could enable law firms to address unmet legal need by funding smaller-dollar value class actions. It may be that, if a law firm undertook the class action on a contingency fee basis, and there was a prohibition on a litigation funding fee also being deducted from the settlement amount, only one success fee would be deducted from the money recovered in the litigation. This is compared to two fees being deducted when there is both a litigation funder plus a law firm operating on a 'no win, no fee' basis.

14.179 However, law firms may be less eager to fund small to medium-dollar value class actions because the sum that could potentially be recovered by the class would be less likely to compensate the law firm for the risk undertaken. It is also possible that law firms may offer both their legal and funding services at a higher price, compared to litigation funders, as they are assuming a greater risk with less access to capital and diversity of portfolio. This may constitute a significant portion of smaller to medium-sized settlements sums.

14.180 Moreover, the committee has not received sufficient evidence to draw any conclusive findings with respect to the impact that the introduction of contingency fees would have on the financial outcomes of class members.

14.181 The committee acknowledges that the ALRC, VLRC and Productivity Commission have recommended the introduction of contingency fees in class actions. These recommendations to lift the ban on contingency fees have been measured, as this method of billing has been recommended only for class actions, and was dependant on a number of accompanying safeguards, including:

- the law firm operating on a contingency fee basis must indemnify the representative plaintiff for any adverse costs order and provide security for costs if ordered;
- 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
- a law firm who enters into a contingency fee agreement must advance the cost of disbursements, and account for such costs within the contingency fee; and
- a law firm who enters into a contingency fee agreement must hold an AFSL and have their operations regulated by the Australian Securities and Investment Commission.

14.182 It is difficult to ascertain whether these safeguards would be implemented to the extent required to ensure that contingency fees operate in accordance with class members' interests and achieve reasonable, proportionate and fair class action outcomes.

Consistent regulatory approach

14.183 As already indicated, the committee holds the view that if a law firm undertakes to run a class action on a contingency fee basis, they should be subject to similar regulatory arrangements. To that end, the committee endorses the application of the same financial services regulation that applies to litigation funders. The committee considers that lawyers who undertake class actions on a contingency fee basis should hold an AFSL.

- 14.184 The committee notes the calls for MIS regulation to apply to group costs orders in the Supreme Court of Victoria. The committee understands that the application of the MIS regime to contingency fee arrangements presents some challenges given section 258 of the *Legal Profession Uniform Law*, as well as provisions in other state and territory legislation, prohibits a law practice from promoting or operating an MIS.
- 14.185 The committee is aware of the temporary measure introduced in the Legal Profession Uniform General Rules 2015 to provide a grace period until 22 August 2021 for law practices to provide legal services in relation to an MIS despite an associate of the law practice having an interest in the MIS or the responsible entity for the MIS, if the MIS is a litigation funding scheme.
- 14.186 While recognising these practical implementation challenges, the committee considers the application of the MIS regime to contingency fee arrangements would achieve consistent regulation for entities undertaking similar commercial activities, namely financing class action litigation. The committee recommends the Australian Government review the feasibility of applying the AFSL and MIS regimes to lawyers operating on a contingency fee arrangement in class actions.
- 14.187 The committee considers that the Australian Government review the appropriateness of the prohibition on lawyers from operating or promoting an MIS. This should include the impact of the temporary measure and consider whether the temporary measure, or a modified form, should be extended or made permanent, and mirrored in other relevant state and territory statutes.
- 14.188 Noting that in Chapter 16, the committee recommends the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders, the committee notes the potential application of the AFSL and MIS regimes to lawyers operating on a contingency fee model would require the same flexible and facilitative approach to developing a fit-for-purpose regime tailored for contingency fee arrangements.

National uniformity

- 14.189 In Chapter 17, it is recommended that the Federal Court have exclusive jurisdiction for class actions with claims arising from the Corporations Act or the ASIC Act. Therefore, law firms would not be permitted to operate on a contingency fee basis in, for example, shareholder class actions.
- 14.190 Given the proliferation of shareholder class actions and their adverse consequences, the committee considers that the availability of contingency fee billing for a shareholder class action filed in the Supreme Court of Victoria supports the argument for exclusive jurisdiction to be granted to the Federal Court.

14.191 However, it would remain possible for a law firm to operate on a contingency fee for a class action with claims arising under federal law, other than under the Corporations Act or ASIC Act, if filed in the Supreme Court of Victoria.

Recommendation 21

14.192 The committee recommends the Australian Government review the feasibility of applying the Australian Financial Services Licence and the Managed Investment Scheme regimes to lawyers operating on a contingency fee arrangement in class actions.

Other legal costs issues

Lawyers' uplift fees in 'no win, no fee' arrangements

14.193 As discussed earlier in the chapter, a lawyer can charge an uplift fee of up to 25 per cent on their costs when operating on a 'no win, no fee' basis.

14.194 The rationale for an uplift fee is to recompense solicitors for undertaking some risk in the litigation, and is viewed as a form of interest for the deferred payment of fees.²¹⁴

14.195 In funded class actions, the arrangement may be such that the litigation funder pays a percentage, commonly around 70 per cent, of the lawyers' costs during the class action, with the remaining 30 per cent conditional on a successful income.²¹⁵

14.196 It was submitted that the costs paid by the litigation funder during the class action do not include an uplift fee. Rather, at settlement, the representative plaintiff's lawyer seeks to obtain approval to be awarded from the settlement sum the outstanding 30 per cent of its legal costs plus an uplift fee on the total costs.²¹⁶

14.197 Some submitters expressed concern about lawyers being permitted to charge an uplift fee on their total costs under an arrangement of this structure. It was observed the risk undertaken by the lawyers has been significantly minimised as they have been paid a good portion of their costs during the class action. This risk has instead been passed on to the litigation funder.²¹⁷

²¹⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 188.

²¹⁵ Donaldson Law, *Submission 65*, p. 2.

²¹⁶ Donaldson Law, *Submission 65*, pp. 2–3; Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 29; Mr Adair Donaldson, Director, Donaldson Law, *Committee Hansard*, 27 July 2020, p. 3.

²¹⁷ See, for example, Donaldson Law, *Submission 65*, p. 2; Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 29; Mr Adair Donaldson, Director, Donaldson Law, *Committee Hansard*, 27 July 2020, p. 3.

Committee view

14.198 The committee did not receive sufficient evidence to determine whether lawyers operating on a 'no win, no fee basis' are charging an uplift fee on their total costs, or only on the percentage of their costs which have not yet been paid by the litigation funder and are conditional on a successful outcome in the case.

14.199 The committee suggests the Australian Government investigate whether, and to what extent, it is common practice for lawyers to include in the costs agreement an uplift on the total amount of legal costs when the litigation funder has paid a significant percentage of the legal costs during the class action and the remaining portion of costs are conditional on a successful outcome in the case.

14.200 The committee considers that charging an uplift fee, of up to 25 per cent, on the entirety of the legal costs, when the lawyers are receiving payment at regular intervals from the litigation funder while conducting the class action, is neither reasonable nor proportionate to the level of risk they have assumed. Lawyers' remuneration should reflect their significantly reduced level of risk when a significant portion of their fees has been paid by the litigation funder during the conduct of a class action.

Recommendation 22

14.201 The committee recommends the Australian Government consider options to establish rules that govern the ability of lawyers to charge an uplift fee on the total amount of legal costs in class action proceedings, with particular reference to:

- **uplift fees which are conditional on a successful outcome; and**
- **the potential appropriateness of capped uplift fees of less than 25 per cent on the total costs.**

Part 4
Other regulatory measures

Chapter 15

Conflicts of interest in litigation funded class actions

Introduction

- 15.1 Two primary concerns arise with respect to the tripartite relationship between the litigation funder, the lawyer and the representative plaintiff in a class action. First, the ability of the interests of a litigation funder, which can be in conflict with those of the representative plaintiff and/or class members, to be prioritised given the permissible level of control and influence a litigation funder has to achieve outcomes which are in its interests.
- 15.2 The first part of this chapter focuses on the different interests in the tripartite relationship. Consideration is given to how current litigation funding practices, made permissible by the common law, enable litigation funders to hold significant sway when it comes to important decisions in a class action proceeding. Current approaches to managing conflicts of interest are highlighted, with submitters views on their effectiveness discussed. Options for reform are canvassed to avoid conflicts of interest, and when conflicts do arise, ensure their transparency through effective and ongoing disclosure, and protecting the interests of class members.
- 15.3 Second, there are concerns about instances where the representative plaintiff's lawyer either has some form of interest in the litigation funder involved in the proceeding, or obtains some kind of benefit, beyond remuneration for the legal services rendered, from the litigation funder's financing of the class action. The next part of this chapter considers this issue, using the Banksia class action to illustrate the compromise to a lawyer's necessary objectivity and independence when this type of arrangement exists, and the court's response to the advent of such conflict. Reform options, such as a prohibition on dual interests in a class action as a lawyer and litigation funder, and statutory standards of conduct, are explored.

Different interests in the tripartite relationship

- 15.4 The interest and aims of the three parties to the tripartite relationship in a funded class action have been described as the following:
- the litigation funder has an interest in minimising the legal and administrative costs associated with the class action and maximising their return;
 - the lawyers acting for the representative plaintiff have an interest in receiving fees and costs associated with the provision of legal services; and

- the representative plaintiff and class members have an interest in minimising the legal and administrative costs associated with the class action, minimising the remuneration paid to the funder, and maximising the amounts recovered from the defendant.¹
- 15.5 Mr James Mathias, Chief of Staff of the Menzies Research Centre, argued that litigation funders are driven by profits and not the interests of people within the class action.²
- 15.6 Conversely, others considered that interests of litigation funders and the representative plaintiff and class members are aligned as both parties 'want the lawyers to effectively and efficiently prosecute the case to ensure the best outcome (financial return) for both parties'.³
- 15.7 Some submissions pointed to the benefits of a tripartite relationship between a litigation funder, the plaintiff lawyer, and the representative plaintiff. These included:
- effective oversight and management of lawyers' fees and performance during the class action, as the litigation funder pays the lawyers' fees at regular intervals;⁴
 - protecting the interests of class members in the sense that litigation funders have more business experience dealing with lawyers than the representative plaintiffs, and so if a lawyer is under-performing, they are more likely to be able to identify this, and intervene, than an unfunded representative plaintiff;⁵ and
 - litigation funders encouraging lawyers to focus on evidence and argument most conducive to maximising net returns.⁶

¹ Treasury, *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)*, October 2015, p. 6. See also MinterEllison, *Submission 25*, p. 9; Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 1; Allens, *Submission 69*, p. 12.

² Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 13.

³ Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 3.

⁴ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3; NSW Young Lawyers, *Submission 89*, p. 16.

⁵ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3.

⁶ Investor Claims Partners, *Submission 7*, p. 11.

Conflicts of interest

- 15.8 The difference in interests can become problematic when the interests of the litigation funder determine and influence outcomes.⁷ Situations may arise where decisions are made which are in the interests of the litigation funder or the lawyers and contrary to the interest of the representative plaintiff and class members.⁸
- 15.9 The following are examples of conflicts of interest where the circumstances can give rise to the prioritisation of the interests of the litigation funder over the interests of the representative plaintiff and class members, to their detriment:
- First, a conflict may arise when the settlement offer may be attractive to the funder, due to the size of the sum and the funder's interest in avoiding further delays in providing a quick return to shareholders. However, the lawyers acting for the class members may regard the damages payable as insufficient.
 - Second, the litigation funder often undertakes the 'book build'⁹ process. The litigation funder has an interest in maximising the number of class members signing up to a class action, which could increase the likely length of proceedings and delay the time for any settlement or resolution to be achieved.¹⁰

Issues arising from litigation funder's level of control in class actions

- 15.10 There is potential for a litigation funder's interests, which can be in conflict with those of the class members, to be prioritised given the degree of control and influence litigation funders are permitted to exercise, and often do, in class actions.
- 15.11 Several submitters were concerned about the significant level of control or influence a litigation funder may have over class action proceedings.¹¹ The Australian Law Reform Commission (ALRC) noted the inherent risk that

⁷ Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 1.

⁸ Health Industry Companies, *Submission 74*, p. 15.

⁹ A 'book build' refers to the process to identify, communicate with, and enrol class members in the action and by signing the litigation funding agreement: Omni Bridgeway, *Submission 73*, p. 24.

¹⁰ Health Industry Companies, *Submission 74*, p. 16.

¹¹ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 6; Mr Stuart Clark, *Submission 22*, p. 2; MinterEllison, *Submission 25*, p. 9; Clayton Utz, *Submission 26*, p. 2; Australian Institute of Company Directors, *Submission 40*, p. 17; Menzies Research Centre, *Submission 66*, p. 29; Federal Chamber of Automotive Industries, *Submission 70*, p. 4; Business Council of Australia, *Submission 86*, p. 9; Mr Mark Morris, *Submission 75*, p. 3; Mr Adair Donaldson, Director, Donaldson Law, *Committee Hansard*, 27 July 2020, p. 1.

litigation funders may exercise influence over the conduct of proceedings to the detriment of class members.¹²

15.12 These concerns about litigation funder control and conflicts of interests were spelt out in the case *QPSX LDD v Ericsson Australia Pty Ltd (No 3)*:

For the assumption of control by a non-party raises the possibility that decisions may be made affecting the conduct of the litigation which serves the interests of the funder in a way that is incompatible with the interests of the funded party and the legitimate purposes for which the litigation is to be prosecuted or defended.¹³

Key stages of a class action proceeding where control is sought

15.13 There are certain steps or decisions made in a class action over which a litigation funder may have, or may seek to have, control or influence. MinterEllison stated:

In our experience litigation funders increasingly hold a unique role in class action proceedings and appear to wield a prominent and powerful voice in relation to the control and direction of the applicant's case, in particular during the settlement phase and discussion.¹⁴

15.14 The Menzies Research Centre submitted:

While litigation funders...like to portray themselves as simple financiers of litigation which is then left to the client and 'their' lawyer to run the case this is clearly untrue. The litigation funder controls the proceedings, makes the key strategic decisions and will ultimately determine when and what terms the proceedings will be settled. While class members, or some of them, may be 'consulted', the final decision will rest with funder as has been demonstrated in a number of recently, well published, disputes between funder and client.¹⁵

15.15 Ms Rebecca LeBherz and Mr Justin McDonnell identified the following aspects of class action proceedings as 'vulnerable' to control by litigation funders:

- settlement;
- the approval, removal and substitution of lawyers;
- amendments to pleadings; and
- the quantum of solicitor's fees.¹⁶

¹² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 18, 153; Australian Institute of Company Directors, *Submission 40*, p. 17.

¹³ [2005] FCA 933 [55].

¹⁴ MinterEllison, *Submission 25*, p. 9.

¹⁵ Menzies Research Centre, *Submission 66*, p. 29.

¹⁶ Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 4.

15.16 For example, Omni Bridgeway set out that its role when funding class actions includes:

- overseeing the litigation;
- negotiating litigation budgets with the representative plaintiff's lawyers;
- ensuring, so far as possible, that the legal costs and strategies are proportionate to the sums at stake;
- liaising with the lawyers on a day-to-day basis (subject always to the representative plaintiff's rights to override Omni Bridgeway's instructions and the lawyers' paramount professional duties to the claimants);
- assisting the claimants on litigation strategy; and
- attending and participating in mediations.¹⁷

Authorised levels of control and influence

15.17 In 2006, the High Court of Australia in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* (Fostif)¹⁸ confirmed litigation funders have a role to play in financing class actions and can exercise broad influence and some degree of control over the day-to-day conduct of the class action.¹⁹ The ALRC explained:

The Court held [in Fostif] 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.²⁰

15.18 The High Court in Fostif recognised this level of control had the potential to 'corrupt' court processes, but considered the courts could rely on their inherent powers to take any steps necessary to prevent an abuse of process and ensure a fair trial.²¹

15.19 The ALRC explained the degree of control a litigation funder is permitted to have over proceedings in Australia differs from what is permissible in the United Kingdom (UK):

¹⁷ See, for example, Omni Bridgeway, *Submission 73*, p. 6; Omni Bridgeway, answer to written question on notice, 17 July 2020 (received 3 August 2020), p. 2.

¹⁸ (2006) 229 CLR 386.

¹⁹ *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; Attorney-General's Department, *Submission 93*, p. 8; Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. 32.

²⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 60.

²¹ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. 32; *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 435 (Gummow, Hayne and Crennan JJ).

The majority [in *Fostif*] 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.

...

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.²²

Methods of obtaining control and influence

15.20 Some stakeholders argued that the contractual and business relationships of litigation funders are of such a nature that they can exert high levels of control and influence in class actions, therefore favouring their interests over those of the class members.

15.21 The key ways in which a litigation funder is placed in a position to practically exert control over, or influence, decisions in a class action are:

- the presence of commercial pressures and business incentives which may encourage lawyers to prefer the interests of litigation funders over the interests of class members; and
- an express grant through the terms of the litigation funding agreement.

Business relationships

15.22 Several submitters pointed out that a lawyer's interests in preserving a good working relationship with a litigation funder may conflict with the interests of the representative plaintiff and class members. Litigation funders pay the lawyers' bills and can be repeat clients of plaintiff law firms.²³ Given that maintaining good relationships with the litigation funder may be important for lawyers, there may be a commercial incentive for the law firm to prioritise the

²² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 60–61.

²³ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3; Donaldson Law, *Submission 65*, p. 4; Allens, *Submission 69*, p. 11; NSW Young Lawyers, *Submission 89*, p. 16.

interests of the litigation funder over the interests of the representative plaintiff and class members.²⁴

Contractual grant of control

Litigation funders in Australia

Contractual relationships

15.23 It appears that in the tripartite relationship of a representative plaintiff, lawyer and litigation funder, the contractual arrangements can vary:

- A representative plaintiff will sign:
 - a legal retainer (that is, a contract for legal services) with a lawyer; and
 - a litigation funding agreement (that is, a contract for funding services) with a litigation funder.
- There may or may not be a separate contract between the lawyer and litigation funder. If such a contract is entered into, Shine Lawyers identified common terms of these agreements include:
 - requirements for the litigation funder and the law firm to act in accordance with the funding agreement and the legal retainer;
 - the requirements in relation to invoicing and the payment of costs and disbursements;
 - other practical matters, such as resolution of disputes, governing law and termination provisions.²⁵

15.24 Shine Lawyers noted that if this contract affects the rights of the funded class members, it is shared with them.²⁶

Right to instruct lawyers

15.25 While the litigation funder is not the 'client', a litigation funding agreement with the representative plaintiff often states that the litigation funder is permitted to give 'instructions' to the lawyer.²⁷ 'Instructions' are directions from the client.

²⁴ See, for example, Donaldson Law, *Submission 65*, p. 4; Allens, *Submission 69*, p. 11; Ai Group, *Submission 92*, p. 16.

²⁵ Shine Lawyers, answer to written question on notice, 14 August 2020 (received 3 September 2020), p. 2.

²⁶ Shine Lawyers, answer to written question on notice, 14 August 2020 (received 3 September 2020), p. 2.

²⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 167; Law Council of Australia, *Submission 67*, pp. 21–22.

A lawyer cannot act on a client's behalf without instructions and must act in accordance with a client's instructions.²⁸

15.26 Several submitters noted that the litigation funder can provide instructions to the lawyers with the following caveats:

- if the lawyers consider the instructions are not in their client's interest, they may seek instructions directly from their client and those instructions will prevail;
- if the client considers the instructions are not in its interest, it may instruct its lawyers directly and those instructions will prevail; and
- in respect of settlement, any difference between clients and funders is usually arbitrated by the most senior counsel briefed in respect of the claim.²⁹

15.27 For example, Omni Bridgeway, Australia's largest litigation funder, provides a funding service through which it has the contractual right to instruct the lawyers.³⁰ The terms relating to instructions used by Omni Bridgeway are set out in Box 15.1.

Box 15.1 Litigation funders' contractual right to instruct lawyers

Omni Bridgeway's submission noted that its litigation funding agreement contains the following terms:

- Omni Bridgeway gives the day-to-day instructions to the lawyers on all matters concerning the class action, however the representative plaintiff may override any instruction given by Omni Bridgeway by giving their own instructions to the lawyers;
- Except in relation to settlement, if the lawyers consider there is a conflict between the obligations they owe to Omni Bridgeway and those they owe to the representative plaintiff, the lawyers may:
 - seek instructions from the representative plaintiff, whose instructions will override those that may be given by Omni Bridgeway;
 - give advice to the representative plaintiff and take instructions from the represented plaintiff, even though that advice is, and those instructions are, or may be, contrary to Omni Bridgeway's interests; and
 - refrain from giving Omni Bridgeway advice and from acting on Omni Bridgeway's instructions, where that advice is, or those instructions are, or may be, contrary to the representative plaintiff's interests.³¹

²⁸ Law Council of Australia, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, sub-r. 8.1.

²⁹ See, for example, *Investor Claims Partners, Submission 7*, p. 11; *Woodsford Litigation Funding Limited, Submission 16*, p. 4; *Maurice Blackburn Lawyers, Submission 37*, p. 28.

³⁰ *Omni Bridgeway, Submission 73*, pp. 21–22.

³¹ *Omni Bridgeway, Submission 73*, pp. 21–22.

15.28 Omni Bridgeway submitted that it does not have control of proceedings and representative plaintiffs 'have the ultimate say, and instruct their own lawyers'.³²

15.29 The Association of Litigation Funders of Australia (ALFA) submitted that litigation funders play an important role in the litigation, but do not control the proceedings.³³ Mr Walker, Chairman of ALFA, compared the operation of a litigation funder to that of a board to explain the degree of control and the ability to influence. Mr Walker stated that if the litigation funder is sophisticated and has the material capacity to provide viable services beyond just funding, it will seek to do so. However, lawyers control the litigation at the direction of the representative plaintiff. Further, Mr Walker explained the process for when conflicts arise:

All of the contracts say that if there's any conflict between the interests of the clients and the lawyers then the lawyers obviously seek instructions from the clients and the clients can override any position that's taken by the funder.³⁴

15.30 Mr Ben Hardwick, Head of Class Actions at Slater and Gordon, agreed that opinions from litigation funders are valuable, given they are often former lawyers. However, the lawyers are responsible for the advice to clients.³⁵

Practice of litigation funders in the United Kingdom

15.31 Some litigation funders operating in Australia, who are also members of the UK Association of Litigation Funders (ALF), cede control in class action proceedings as this is an essential requirement in litigation funding agreements in the UK.³⁶

15.32 The UK ALF administers self-regulation of the UK's litigation funding industry in line with a published Code of Conduct.³⁷ The Code of Conduct limits the control able to be exercised by a litigation funder:

...funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their

³² See, for example, Omni Bridgeway, *Response to Supplementary Submission 73.1 by Menzies Research Centre*, p. 9; Mr Andrew Saker, Managing Director and Chief Executive Officer, Omni Bridgeway Limited, *Committee Hansard*, 13 July 2020, p. 61.

³³ Association of Litigation Funders of Australia, *Submission 57*, p. 9.

³⁴ Mr Walker, Chairman, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 44.

³⁵ Mr Ben Hardwick, Head of Class Actions, Slater and Gordon, *Committee Hansard*, 27 July 2020, p. 21.

³⁶ Mr Justin McDonnell, *Committee Hansard*, 13 July 2020, p. 36. Members of the United Kingdom Association of Litigation Funders who operate in Australia include Augusta Ventures, Balance Legal Capital, Burford Capital, Harbour Litigation Funding, Therium Capital Management Limited, Vannin Capital and Woodsford Litigation Funding Limited.

³⁷ Harbour Litigation Funding, *Submission 11*, p. 4.

professional duties. Independent counsel must be satisfied that the funding agreement clearly sets out protections against control for claimants.³⁸

No contract between lawyers and litigation funder

15.33 Premier Litigation Funding Management submitted it only ever has a litigation funding agreement with the representative plaintiff, meaning it funds the representative plaintiff, who then pays the legal fees.³⁹

15.34 Vannin Capital, also a member of the UK ALF, funded the class action *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* (No 3) (Petersen class action).⁴⁰ In this case, Vannin Capital did not have a written agreement with the representative plaintiff's lawyers.⁴¹

No right to instruct lawyers

15.35 Therium Capital Management Australia (Therium) noted it is a member of the UK ALF.⁴² It explained that its relationship with the lawyers acting for the representative plaintiffs is limited to payment of their legal fees. It noted its litigation funding agreement states clearly that the lawyer's primary duty is to the class members, and that the lawyers take instructions from the representative plaintiff on behalf of the class members, and not from Therium Capital Management.⁴³

15.36 Premier Litigation Funding Management, also a member of the UK ALF, noted that under its litigation funding agreement, the representative plaintiff always retains the exclusive right to instruct their lawyer.⁴⁴ Litigation Capital Management submitted the representative plaintiff:

...provides the instructions and it is the solicitors that undertake the day-to-day conduct of the claim. Aside from key matters, such as settlement, LCM does not seek to interfere in the matter, and never in the lawyers' relationship with their clients.⁴⁵

15.37 Additionally, Augusta Ventures (Australia) stated that it does not seek to control the class action litigation it is funding.⁴⁶ Woodsford Litigation Funding

³⁸ Harbour Litigation Funding, *Submission 11*, p. 5.

³⁹ Premier Litigation Funding Management, *Submission 20*, p. 5.

⁴⁰ [2018] FCA 1842.

⁴¹ Mr Damian Scattini, Partner, Quinn Emanuel Urquhart & Sullivan, *Committee Hansard*, 27 July 2020, p. 9.

⁴² See, for example, Harbour Litigation Funding, *Submission 11*, p. 4; see also Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 3.

⁴³ Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 3.

⁴⁴ Premier Litigation Funding Management, *Submission 20*, p. 5.

⁴⁵ Litigation Capital Management, *Submission 23*, p. 21.

⁴⁶ Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 4.

Limited submitted its litigation funding agreement requires the representative plaintiff's lawyers to give preference to the interests of the class members when those interests diverge from Woodford's interests.⁴⁷

Current framework for managing conflicts of interest

15.38 There are several components to the management of conflicts of interest between a representative plaintiff, their lawyers and the litigation funder, including:

- requirements under financial services regulation;
- provisions of a litigation funding agreement and oversight by the Federal Court of Australia (Federal Court); and
- lawyers' ethical and professional obligations.

Financial services regulation

Former regulations

15.39 Litigation funders were exempt by regulation from holding an Australian Financial Services Licence (AFSL) and the Managed Investment Scheme (MIS) regime by Corporations Amendment Regulation 2012 (No. 6).⁴⁸ The AFSL exemption was available if the litigation funders maintained and followed acceptable practices for managing conflicts of interest for the duration of the litigation scheme.⁴⁹ The Australian Securities and Investments Commission's (ASIC) Regulatory Guide 248 detailed the requirements for managing conflicts of interests.⁵⁰

15.40 Woodsford Litigation Funding Limited argued the ASIC Regulatory Guide 248, lawyers' professional obligations, and the terms of litigation funding agreements were sufficient to ensure that the relationships between the funder, lawyers and representative plaintiff do not impact on the representative plaintiff's lawyers' duties to their client, including the duty to act in the best interests of their clients.⁵¹

15.41 Other stakeholders considered the requirements under the ASIC Regulatory Guide 248 to be inadequate. Mr Stuart Clark identified the following weaknesses of the ASIC Regulatory Guide 248:

⁴⁷ Woodsford Litigation Funding Limited, *Submission 16*, p. 4.

⁴⁸ Australian Securities and Investments Commission, *Submission 39*, pp. 5–6.

⁴⁹ Australian Securities and Investments Commission, *Submission 39*, pp. 5–6; Corporations Amendment Regulation 2012 (No. 6), as amended by the Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1).

⁵⁰ Australian Securities and Investment Commission, *Regulatory Guide 248, Litigation schemes and proof of debt schemes: Managing Conflicts of interest*.

⁵¹ Woodsford Litigation Funding Limited, *Submission 16*, pp. 4–5.

- no mechanism to enforce compliance with the requirements of the ASIC Regulatory Guide 248;
- no requirement imposed on litigation funders to report on a regular basis in relation to their compliance with the ASIC Regulatory Guide 248; and
- no oversight of litigation funders in terms of their compliance with Regulatory Guide 248 by ASIC or any other regulator.⁵²

15.42 Given these weaknesses, submitters remarked it was not surprising that ASIC has not investigated or initiated action against a litigation funder for breach of the requirements, or any enforcement action, even when potential conflicts of interest have been raised in court proceedings.⁵³

Current regulations

15.43 Chapter 16 discusses the application of financial services regulation to litigation funding in class actions. The conflict of interest requirements placed on litigation funders since August 2020 through the MIS and AFSL provisions were welcomed.⁵⁴

Australian Financial Services Licence

15.44 The July 2020 Regulations remove the bespoke conflict of interest requirements that attached to the AFSL exemption (also removed). When a litigation funder holds an AFSL, they will be subject to provisions on managing conflicts of interest under paragraph 912A(1)(aa) of the *Corporations Act 2001* (Corporations Act).

15.45 ASIC's Regulatory Guide 181 details ASIC's approach to compliance with the obligation to manage conflicts of interest in paragraph 912A(1)(aa), guidance for licences generally on controlling and avoiding conflicts of interest and on disclosing conflicts of interests.⁵⁵ There are no obligations on an AFSL holder to regularly report to ASIC on the arrangements for the management of conflicts of interest concerning paragraph 912A(1)(aa).

⁵² Mr Stuart Clark, *Submission 22*, p. 4.

⁵³ See, for example, Professor Vicki Waye, *Submission 5*, p. 2; U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 8; Allens, *Submission 69*, p. 12; Australian Law Reform Commission, *Inquiry into class action proceedings and third-party litigation funders*, Discussion Paper, June 2018, p. 72.

⁵⁴ See, for example, U.S. Chamber Institute for Legal Reform, *Submission 21*, pp. 8–9; Mr Stuart Clark, *Submission 22*, pp. 2–5; Australian Institute of Company Directors, *Submission 40*, p. 17; Professor Peta Spender, *Submission 50*, pp. 2–3; King & Wood Mallesons, *Submission 53*, p. 4; Chartered Accountants ANZ, *Submission 58*, p. 4; Menzies Research Centre, *Submission 66*, p. 29; Business Council of Australia, *Submission 86*, p. 9.

⁵⁵ Australian Securities and Investment Commission, *Regulatory Guide 181: Licensing: Managing conflicts of interest*.

Managed Investment Scheme

15.46 Litigation funding in class actions is now regulated as an MIS. Provisions under the Corporations Act place obligations on the responsible entity of an MIS. MISs must be registered if they have more than 20 members or are promoted by a person in the business of promoting MISs. An obligation on the responsible entity is the duty to act in the best interests of the scheme's members. If there is a conflict between the members' interests and the responsible entity's interests, the members' interests take priority.⁵⁶

15.47 ASIC noted the requirement to place the members' interests above the responsible entity's interests (i.e. the litigation funder) will elevate the obligations required of litigation funders compared to the guidance in the ASIC Regulatory Guide 248.⁵⁷ The Australian Institute of Company Directors agreed:

In the AICD's view this is a significant and welcome change to regulatory settings. It will assist in addressing the material risk that funders will act in their own commercial interests rather than those of class members who are seeking access to justice.⁵⁸

Federal Court

15.48 Some submissions considered the Federal Court is best placed to determine conflict of interest issues between class members and litigation funders.⁵⁹ It was submitted that the Federal Court has 'close oversight, regular case management intervention and careful scrutiny' of the matters arising in the case before it, given its fundamental role in ensuring that settlements are in the interest of class members and not just the representative plaintiff.⁶⁰

15.49 The Federal Court's Class Actions Practice Note requires that costs agreements include provisions for managing conflicts of interest between the representative plaintiff, class members, lawyers and litigation funders.⁶¹ Some of the provisions

⁵⁶ Australian Securities and Investments Commission, *Submission 39*, pp. 8, 11; Australian Institute of Company Directors, answer to question on notice, 29 July 2020 (received 19 August 2020), p. 2.

⁵⁷ Ms Karen Chester, Deputy Chair, Australian Securities and Investment Commission, *Committee Hansard*, 29 July 2020, p. 28.

⁵⁸ Australian Institute of Company Directors, answer to question on notice, 29 July 2020 (received 19 August 2020), p. 2.

⁵⁹ See, for example, Law Institute of Victoria, *Submission 3*, p. 11; Professor Vicki Waye, *Submission 5*, p. 2; Maurice Blackburn Lawyers, *Submission 37*, p. 29; Phi Finney McDonald, *Submission 87*, p. 19; NSW Young Lawyers, *Submission 89*, p. 16.

⁶⁰ See, for example, Law Institute of Victoria, *Submission 3*, p. 10; Shine Lawyers, *Submission 35*, p. 9; Maurice Blackburn Lawyers, *Submission 37*, p. 28.

⁶¹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, sub-cl. 5.9, www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/GPN-CA.pdf (accessed 18 November 2020); Mr Matt Corrigan,

used in litigation funding agreements, as submitted by litigation funders to this inquiry, were noted in the first part of this chapter.

15.50 Some submissions argued that the courts have been active in dealing with relationships between plaintiff law firms and litigation funders that could compromise the interests of class members and noted have stayed proceedings to avoid potential abuse of process.⁶²

15.51 Maurice Blackburn submitted:

The point is that there is certainly no evidence of widespread failure in the management of the tripartite relationship under the current regime leading to detrimental outcomes for class members. On the rare occasion when issues of concern have arisen the courts have shown a willingness to scrutinise relationships and intervene to protect group members when necessary.⁶³

Lawyers' ethical and professional obligations

15.52 As noted in Chapter 14, lawyers have obligations to their clients to avoid conflicts of interest.⁶⁴ A lawyer must not:

- act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the lawyer, or an associate of the lawyer; and
- exercise any undue influence intended to dispose the client to benefit the lawyer in excess of the lawyer's fair remuneration for legal services provided to the client.⁶⁵

15.53 In addition to the professional ethical obligation placed on lawyers under the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Australian Solicitors' Conduct Rules), the lawyer-client relationship is a fiduciary one, where the client places their confidence, good faith, reliance and trust in the lawyer. The lawyer must not act in any other way than in the interests of their client.⁶⁶

15.54 Litigation funders commented that the representative plaintiff's lawyers are mindful of their duties and have carefully managed their relationships with the

General Counsel, Australian Law Reform Commission, answer to question on notice, 27 July 2020 (received 29 July 2020), p. 2.

⁶² Professor Vicki Waye, *Submission 5*, p. 5.

⁶³ Maurice Blackburn Lawyers, *Submission 37*, p. 29.

⁶⁴ Maurice Blackburn Lawyers, *Submission 37*, p. 28.

⁶⁵ Law Council of Australia, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, sub-r. 12.1–12.2.

⁶⁶ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 16.

funders and any potential conflicts of interest or adverse impact on their clients, the class members and the court.⁶⁷

Improving mechanisms to manage conflicts of interest

15.55 Some stakeholders considered that the current conflict management requirements are unlikely to be sufficient for the unique conflicts that arise in the context of litigation funding.⁶⁸ This section canvasses various reforms to conflict management requirements as proposed in submissions.

Requirement to avoid conflict of interest

15.56 MinterEllison noted the statutory duty to avoid conflicts of interest imposed on lawyers under the Legal Profession Uniform Law. MinterEllison submitted that, given a litigation funders' integral involvement in the litigation, similar aspects of the obligations currently applicable to lawyers should be imposed on litigation funders. Namely, a statutory duty to avoid conflicts of interest should apply to litigation funders.⁶⁹

Improved disclosure processes

Federal Court

15.57 The ALRC recommended that the Federal Court's Class Actions Practice Note 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.⁷⁰

15.58 Allens considered greater disclosure should occur at the first case management hearing. Specifically, there should be a requirement on the plaintiff lawyers to disclose to the Federal Court any potential conflicts of interest that may affect their ability to act in the best interests of the representative plaintiff and class members. Additionally, there should be an ongoing obligation on the lawyers acting for the representative plaintiff to:

⁶⁷ See, for example, *Litigation Capital Management, Submission 23*, p. 21; *Therium Capital Management (Australia) Pty Ltd, Submission 29*, p. 3.

⁶⁸ See, for example, *Risk and Insurance Management Society Australian Chapter, Submission 12*, p. 4; *U.S. Chamber Institute for Legal Reform, Submission 21*, p. 8; *Mr Stuart Clark, Submission 22*, p. 4; *MinterEllison, Submission 25*, pp. 6–7; *Australian Institute of Company Directors, Submission 40*, p. 17; *Professor Peta Spender, Submission 50*, p. 2; *Menzies Research Centre, Submission 66*, p. 29; *Allens, Submission 69*, p. 12; *National Council of Women of Australia, Submission 77*, p. 3; *Business Council of Australia, Submission 86*, p. 9.

⁶⁹ *MinterEllison, Submission 25*, p. 7.

⁷⁰ *Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 229 (recommendation 22).

- notify the Federal Court if any new conflicts or potential conflicts arise after the first case management conference; and
- disclose to the Federal Court the conflict management policy at the same time the litigation funding agreement is disclosed.⁷¹

15.59 Omni Bridgeway advocated for the full disclosure by lawyers of all relationships they have or had with the litigation funder to enable the client to make an informed decision on the question of funding and its risks and benefits.⁷²

ASIC

15.60 The ALRC recommended that litigation funders be required report annually to the regulator on their compliance with the requirement to implement practices and procedures to manage conflicts of interest under the bespoke arrangements in the ASIC Regulatory Guide 248. This recommendation was supported in submissions.⁷³

15.61 MinterEllison further suggested that, although litigation funders have been brought within the AFSL regime, the ASIC Regulatory Guide 248 should remain in place as it is specific guidance that is tailored for licensed third-party litigation funders.⁷⁴

Cession of control

15.62 Some submissions recommended that there should be limits placed on the level of control a litigation funder can have over proceedings.⁷⁵

15.63 Ms LeBherz and Mr McDonnell submitted that, if litigation funders cede control, the following would occur:

- the plaintiffs retain control of their own proceedings;
- the litigation funder does not have the right to direct the steps to be taken in dealing with and settling claims, but has a clear right of consultation;
- the litigation funder does not have a veto right over settlements;
- there would be no qualifications on the duties and obligations of the plaintiff lawyers; and
- there would only be a need to seek instructions from a funder if the lawyers form an opinion that separate instructions are needed.⁷⁶

⁷¹ Allens, *Submission 69*, p. 13.

⁷² Omni Bridgeway, *Submission 73*, p. 21.

⁷³ See, for example, MinterEllison, *Submission 25*, p. 9; Ashurst, *Submission 41*, p. 4; Professor Peta Spender, *Submission 50*, p. 2; Grata Fund, *Submission 76*, p. 3.

⁷⁴ MinterEllison, *Submission 25*, p. 9.

⁷⁵ See, for example, Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, pp. 1, 3; Menzies Research Centre, *Submission 66*, p. 32.

⁷⁶ Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 3.

15.64 Ms LeBherz and Mr McDonnell noted this approach would be consistent with the approach taken in the UK (as explained above), as well as Hong Kong. It was suggested that the requirement for a litigation funder to cede control of a matter to a plaintiff could be integrated as a condition of an AFSL.⁷⁷

Contradictors

15.65 In Chapter 12, the committee makes recommendations for a presumption that a contradictor is appointed to represent the interests of class members in cases where there is some significant potential for conflicts of interest. A contradictor's role is to ensure that there 'is a real contest between conflicting interests' when the outcome is final and binding for parties.⁷⁸

Committee view

15.66 Class action litigation is a mechanism for the vindication of legal rights for a collective group of people with the same or similar claims. This mechanism should not be expropriated by litigation funders for their commercial gain. The representative plaintiff, on behalf of the class members, and with the advice of their lawyers, should have decision-making power on matters pertaining to those claims and their case.

15.67 The concerns about the conflicts that can arise between a litigation funder's interests and those of the class members are acute because the nature of the arrangements in the tripartite relationship creates scenarios where the interests of litigation funders can be prioritised.

15.68 The High Court's decision with respect to the permissibility of litigation funding in Australia also set the standard for the levels of control and influence a litigation funder may exert in a class action. The high degree of control, exemplified by the fact that litigation funders can retain lawyers for the class action and instruct them, deviates from what is permissible in comparable jurisdictions, such as the UK. The combination of self-interested commercial objectives and high levels of control can, and has, led to decisions which are not consistent with the interests of class members.

15.69 The MIS regime requires litigation funders in class actions to place the interests of the members' above its own interests in the event of a conflict. This is a critical reform to curtail the ability of litigation funders to use their control of class actions to further their own commercial interests to the detriment of class members.

15.70 There are several other facets to ensuring conflicted interests in the tripartite relationship do not result in unreasonable, disproportionate or unfair outcomes

⁷⁷ Ms Rebecca LeBherz and Mr Justin McDonnell, *Submission 49*, p. 3.

⁷⁸ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [110]. In determining the role of a contradictor, the Supreme Court of Victoria rejected the application seeking to limit the contradictor's role.

for class members. First and foremost, a standard should be set that those operating the litigation—the lawyers and the litigation funders—have an obligation to avoid conflicts of interest. Next, in instances where conflicts do arise, there are robust and appropriate disclosure and management processes and requirements. Finally, there should be effective mechanisms to protect the interests of class members when conflicts of interest arise in key decisions to be made about the class action, such as settlement. Options to implement these steps are discussed below.

- 15.71 One option to ensure conflicts of interest are avoided is to require litigation funders to cede control in class actions. It was identified by litigation funders who submitted to the inquiry that there are several litigation funders who implement a business model in Australia in which control is ceded. The less control a litigation funder has over the decisions and outcomes in a class action, the less chance the interests of class members may be subordinated to those of the litigation funder or the lawyer. However, the committee acknowledges the investment of capital, without a degree of control over the decisions which affect the returns on that investment, could depress the interest of litigation funders to operate in the Australian market.
- 15.72 Moreover, even in circumstances where litigation funders do not have formalised or express grounds to control the direction or decisions in a class action, the desire to maintain good business relationships between the lawyer and litigation funder can be conducive to the perceived or actual exertion of influence and pressure.
- 15.73 For these reasons, the committee endorses an approach whereby litigation funders are not required to cede control, but instead are held to the similar standard of lawyers to avoid conflicts of interest. One safeguard recommended in Chapter 11 is the introduction of a requirement that a litigation funding agreement is not enforceable unless approved by the Federal Court. This would involve scrutiny of the degree of control sought by the litigation funder, the funder's ability to unilaterally instruct a plaintiff law firm, and the provisions relating to management and resolution of conflicts of interest.
- 15.74 Class members should be informed of the requirements of lawyers and litigation funders to avoid conflicts to interest so the standard to which they should hold them is clear. Appropriate and effective disclosure is also required if class members are to give informed consent to any conflicts of interest that arise in their case.
- 15.75 To this end, the committee supports the recommendation of the ALRC to introduce to the Federal Court's Class Actions Practice Note a requirement that the first notices to class members must clearly describe the obligations on legal representatives to avoid and manage conflicts and the details of any conflicts.

- 15.76 The committee adds to this recommendation that, in a litigation funded class action, the first notice to class members should also inform class members of the obligation on litigation funders to avoid conflicts of interest and to have arrangements to manage conflicts of interest. In addition, if the litigation funder is a responsible entity of a registered MIS, the funder is under an obligation to place the interests of members above their own in the instance of a conflict. The Federal Court's Class Actions Practice Note should require this to be described in the first notice to class members.
- 15.77 Where there has been a failure to avoid conflicts of interest, improved and earlier transparency is required so the Federal Court can consider whether the conflict can be appropriately managed, and if so, how. Conflicted interests disclosure requirements should be ongoing for the duration of the class actions. Legal representatives and litigation funders should notify the Federal Court when any new conflicts or potential conflicts arise after the first case management conference. Lawyers and litigation funders for the class action must also disclose to the Federal Court the conflict management policy when applying to the Federal Court for approval of a litigation funding agreement.
- 15.78 The last consideration is the effective protection of class members' interests when conflicts arise, particularly in key decisions in the class action, such as settlement approval. The introduction of a presumption that a contradictor is appointed in instances where there is some significant potential for conflicts of interest would operate as a safeguard against the potentially conflicting interests of those appearing before the Federal Court at the settlement approval (the representative plaintiff, their legal representatives and the litigation funder) taking precedence over those of class members.

Recommendation 23

15.79 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to require that the first notices provided to potential class members by legal representatives clearly describe:

- **the obligation of legal representatives to avoid and manage conflicts of interest; and**
- **the detail of any conflicts in that particular case.**

Recommendation 24

15.80 The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to require that, in a litigation funded class action, the first notices provided to potential class members by legal representatives clearly describe:

- the obligation on litigation funders to avoid conflicts of interest;
- the obligation as a holder of an Australian Financial Services Licence to have arrangements to manage conflicts of interest;
- if the litigation funder is the responsible entity of a registered Managed Investment Scheme, to place the interest of members above their own in the instance of a conflict; and
- the detail of any conflicts in that particular case.

Recommendation 25

15.81 The committee recommends the representative plaintiff's lawyers and litigation funders be required to disclose the following to the Federal Court of Australia:

- any potential conflicts of interest;
- any new conflicts or potential conflicts which arise after the first case management conference; and
- the conflict management policy when applying to the Federal Court of Australia for approval of a litigation funding agreement.

Dual interests of lawyer and litigation funder in a class action

15.82 Some submissions noted there have been instances where litigation funders and lawyers acting for the representative plaintiff have been related parties, such as they co-exist within a single entity and/or under the direction of a single director.⁷⁹ Arrangements with dual interests raise issues for the necessary objectivity and independence a lawyer is required to employ in the giving of legal advice. A lawyer's duties to the court and to the client are likely be compromised.⁸⁰

⁷⁹ See, for example, Maurice Blackburn Lawyers, *Submission 37*, p. 29; Law Council of Australia, *Submission 67*, p. 17.

⁸⁰ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 [63].

Banksia class action

- 15.83 During the inquiry, reference was made to the case *Bolitho v Banksia Securities Limited (No. 4)* (Bolitho No 4).⁸¹
- 15.84 The Supreme Court of Victoria held in Bolitho No 4 that it is improper for the representative plaintiff's lawyers to have a financial interest in the outcome of a class action by way of an interest in the litigation funding company.⁸² The Supreme Court of Victoria concluded that informed consent was not sufficient to stop the arrangement from affecting the 'proper administration of justice including the appearance of justice', and the legal representatives were prohibited from acting in the matter by the power of the Supreme Court of Victoria's inherent jurisdiction.⁸³
- 15.85 Maurice Blackburn submitted the decision of the Supreme Court of Victoria in Bolitho No 4 is illustrative of the Court's position that it will not permit lawyers to have a financial interest in the litigation funder financing the case.⁸⁴ The Law Council of Australia considered it to be a case where the court 'has been careful to prevent such relationship creating an abuse of process, or an injury to class members'.⁸⁵
- 15.86 More recently, there have been allegations that the lawyers in the Banksia class action circumvented the Bolitho No 4 decision and maintained dual interests as lawyer and litigation funder, along with other allegations of misconduct. The details of the Bolitho No 4 decision and subsequent events are summarised below in Box 15.2.

⁸¹ [2014] VSC 582. See, for example, Mr Stephen Smith, Health of National Workplace Relations Policy, Ai Group, *Committee Hansard*, 29 July 2020, pp. 2, 15; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 31; Mr Matt Corrigan, *Committee Hansard*, 27 July 2020, p. 72.

⁸² [2014] VSC 582. See, for example, Mr Stephen Smith, Health of National Workplace Relations Policy, Ai Group, *Committee Hansard*, 29 July 2020, pp. 2, 15; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 31; Mr Matt Corrigan, *Committee Hansard*, 27 July 2020, p. 72.

⁸³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 227.

⁸⁴ Maurice Blackburn Lawyers, *Submission 37*, p. 29.

⁸⁵ Law Council of Australia, *Submission 67*, p. 17, referred to other cases including *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* (2017) 53 VR 709; *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653; *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2016) 243 FCR 474.

Box 15.2 Dual interests in the Banksia class action

Bolitho No 4 Decision

In the Banksia class action, the late Mr Mark Elliott and Mr Norman O'Bryan SC represented Mr Bolitho as solicitor and barrister respectively. BSL Litigation Partners Ltd, now Australian Funding Partners Limited (AFPL), was incorporated to fund the class action.

An application was brought by one of the defendants for an order restraining Mr Bolitho from continuing to retain Mr Mark Elliot and Mr O'Bryan. The application to restrain Mr Mark Elliott and Mr O'Bryan was brought because Mr Mark Elliott was the managing director, secretary and 45 per cent shareholder in AFPL, and 45 per cent of the remaining shares in AFPL were controlled by Mr O'Bryan's wife.⁸⁶

In November 2016, the Supreme Court of Victoria found that Mr Mark Elliott and Mr O'Bryan should not continue to act for Mr Bolitho as solicitor and barrister in circumstances where they each had an interest in AFPL because:

- there was a risk (or perceived risk) that Mr Mark Elliott's ability to act objectively and independently in discharging his duty as a solicitor would be compromised in view of his substantial financial interest in the outcome of the class action, thus adversely affecting the integrity of the judicial process;⁸⁷
- the 45 percent interest of Mr O'Bryan's wife in AFPL further impacted the position of Mr Mark Elliott, because it meant that Mr Bolitho was not represented by any independent senior lawyers unconnected to AFPL;⁸⁸ and
- Mr O'Bryan's family's significant financial interest in AFPL would lead a hypothetical observer to perceive that his independence as an officer of the court may be compromised.⁸⁹

Subsequently, Mr Bolitho engaged a new solicitor, Mr Zita of Portfolio Law, and Mr O'Bryan stated that his wife had disposed of all interests in AFPL.⁹⁰ Mr O'Bryan continued to act as senior counsel in the class action.⁹¹

Alleged circumventing of the Bolitho No 4 Decision

⁸⁶ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

⁸⁷ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 [53].

⁸⁸ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 [54]–[55].

⁸⁹ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 [63].

⁹⁰ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues', Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, p. 23.

⁹¹ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues', Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020.

The conduct of the legal representatives in this class action subsequent to the Bolitho No 4 decision is presently the subject of further scrutiny by the Supreme Court of Victoria.⁹²

It is alleged by the contradictor appointed by the Supreme Court of Victoria that Mr Mark Elliot and Mr O'Bryan SC maintained the dual interests as funder and lawyer after the Bolitho No 4 decision.⁹³ The contradictor's claims set out that Mr Mark Elliot, Mr Alex Elliott (son of Mr Mark Elliott) and Mr O'Bryan SC circumvented the Bolitho No 4 Decision as:

- Portfolio Law was the 'post box' lawyer who in effect delegated the role of acting as solicitor to Mr Mark Elliott and Mr Alex Elliott, thereby Mr Mark Elliott continued to exercise control of the proceeding and to act as the de facto solicitor;
- Mr Alex Elliott was involved as a solicitor and employee of Elliott Legal and an employee or agent of AFPL;
- Mr O'Bryan had an arrangement or understanding with Mr Mark Elliott/AFPL pursuant to which he continued to maintain an interest in AFPL and/or the litigation funding enterprise conducted by AFPL, and pursuant to that arrangement or understanding, had an ongoing financial interest in the litigation (over and above the legal fees that he was properly entitled to charge); and
- Mr Mark Elliott/AFPL arranged for Mr Bolitho and class members to be represented by a solicitor on the record, namely Portfolio Law, who would not (and did not) independently represent the interests of Mr Bolitho and class members, but rather, permitted Mr Mark Elliott/AFPL and Mr O'Bryan to continue doing so.⁹⁴

Further alleged misconduct

Ultimately, it is alleged that Mr Mark Elliott, his son Mr Alex Elliot, Mr O'Bryan, Mr Symons (the junior barrister) and Mr Zita, advanced their own interests at the expense and detriment of the interests of class members, to secure for themselves, and/or each other, payments that exceeded a fair and reasonable amount in respect of:

- legal costs and disbursements;
- the litigation funding commission; and
- the scheme administration costs.

The contradictor's claims set out that the impropriety undertaken to advance their own interests included:

⁹² *Bolitho & Anor v Banksia Securities Limited* (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020).

⁹³ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues', Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020.

⁹⁴ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues', Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, pp. 36–40.

- issuing of cost disclosure documents and invoices which did not accurately reflect the real fee arrangements;
- in reaching a settlement agreement and in seeking the Supreme Court of Victoria's approval of the settlement agreement, providing false or misleading information to numerous parties, including the Court, on matters including:
 - fee agreements;
 - work completed;
 - fees charged and paid;
 - the role and commission of the litigation funder; and
 - a misleading assessment of the reasonableness of the costs by a costs assessor appointed by the team of lawyers and litigation funder;⁹⁵
- submitting to the Court that there was no conflict of interests and that the appointment of a contradictor was unwarranted;
- attempting to prevent or dissuade an appeal on the costs and commission charged.⁹⁶

Incidence of dual interests

15.87 Professor Peta Spender submitted there are significant links between some litigation funders and lawyers; however, there is limited publicly available information about these relationships. Reasons for this include confidentiality orders made by the Federal Court in relation to settlement approval, as well as the fact that, under ASIC Regulatory Guide 248, it was difficult to ascertain whether litigation funders were complying with the conflict of interest requirements.⁹⁷

15.88 Regarding the alleged issues in the *Banksia* class action, Dr Cashman considered the conduct to be an 'atypical' case and should not be considered as 'a litmus test of what happens in the real world'.⁹⁸

15.89 However, the 'team' of Elliott Legal or Portfolio Law as solicitor firm and Mr O'Bryan and Mr Symons as counsel, has been used in a number of class actions. A number of these class actions were stayed by the Supreme Court of Victoria due to the following relationships:

- The representative plaintiff was Melbourne City Investments (MCI).

⁹⁵ *Bolitho v Banksia Securities Ltd & Ors* [2020] VSC 524 [36]–[38], [41], the costs assessor retained by the legal representatives has been joined to the proceedings as they may have engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

⁹⁶ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues', Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020.

⁹⁷ Professor Peta Spender, *Submission 50*, p. 2.

⁹⁸ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 31.

- Mr Mark Elliott, through his litigation funding company BSL Litigation Partners Limited (now AFPL) was the sole director and shareholder of MCI.
- Elliott Legal (or Portfolio law) brought cases on behalf of MCI as the representative plaintiff.
- These cases were permanently stayed as an abuse of process by the Supreme Court of Victoria because:
 - MCI was purchasing shares in companies for the purpose of providing MCI with a platform for commencing class actions alleging breaches of continuous disclosure obligations by listed companies; and
 - the commencement of those class actions was for the predominant purpose of enabling Mr Mark Elliott to earn legal fees in acting for MCI in the proceeding.⁹⁹

15.90 Other class actions involved relationships where:

- Elliot Legal was the solicitor on record, Mr O'Bryan and Mr Symons were the senior and junior counsel and AFPL funded the class actions;¹⁰⁰
- Portfolio Law was the solicitor on record, Mr O'Bryan and Mr Symons were the senior and junior counsel and AFPL funded the class action;¹⁰¹ and
- Elliot Legal was the solicitor on record, Mr O'Bryan and Mr Symons were the senior and junior counsel and a person known to Mr O'Bryan funded the class action.¹⁰²

⁹⁹ *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 3)* [2014] VSC 340; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787; *Melbourne City Investments Pty Ltd v Leighton Holdings Ltd* [2015] VSC 119; *Melbourne City Investments Pty Ltd v Myer Holdings Limited (No 2)* [2016] VSC 655. Some cases were dismissed: *Melbourne City Investments Pty Ltd v WorleyParsons Limited*; *Melbourne City Investments Pty Ltd v WorleyParsons Limited (No 2)* (2014) 104 ACSR. Some cases were struck out: *Melbourne City Investments Pty Ltd v UGL Limited* [2015] VSC 540.

¹⁰⁰ *Camping Warehouse Australia Pty Limited v Downer EDI Limited* [2016] VSC 784. The settlement was approved by the Supreme Court of Victoria.

¹⁰¹ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053. The settlement was approved by the Federal Court of Australia. However, the Federal Court asked parties whether they sought to revisit the settlement subsequent to the alleged misconduct in the Banksia class action. This is discussed in Appendix 2.

¹⁰² *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747. This case ran to judgment and the Federal Court found that Myer had breached its continuous disclosure obligations and engaged in misleading and deceptive conduct by failing to update its profit guidance. However, the shareholders were not able to establish that they had suffered loss flowing from those breaches.

Ban on lawyers' dual interests

15.91 The ALRC has recommended the enactment of a prohibition of cross-interests (both direct and indirect) between funders and class action law firms.¹⁰³ Specifically, the ALRC recommended that the Australian Solicitors' Conduct Rules 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.¹⁰⁴ Some submissions expressed support for this recommendation.¹⁰⁵

15.92 The Law Council of Australia explained that, when there are cross-interests between the lawyer and litigation funder, the conflict of interest is not manageable and therefore the conduct should be prohibited altogether:

A solicitor or law firm with a financial or other interest in a litigation funder that is funding the same matter in which the solicitor or law firm is acting would be in a position of conflict. That solicitor or law firm would have difficulty, for example, in advising group members dispassionately on the terms of the funding agreement. In the view of the Law Council, this is not a conflict that could be adequately resolved by appropriate disclosure.¹⁰⁶

15.93 Some submitters suggested extensions to this proposed reform:

- inclusion of other arrangements that do not necessarily amount to a pecuniary or other interest in the litigation funder, but which nonetheless may give rise to the likelihood that interests of the litigation funder may be prioritised over the interests of the representative plaintiff or class members, including common directorships, family ties and ongoing and/or reciprocal commercial arrangements;¹⁰⁷ and
- the prohibition apply to barristers by amendments to the Legal Profession Uniform Conduct (Barristers) Rules 2015.¹⁰⁸

¹⁰³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 225 (recommendation 21).

¹⁰⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 225 (recommendation 21).

¹⁰⁵ See, for example, Associate Professor Sulette Lombard and Professor Christopher Symes, *Submission 4*, p. 5; MinterEllison, *Submission 25*, p. 3; Maurice Blackburn Lawyers, *Submission 37*, p. 30; Law Council of Australia, *Submission 67*, p. 17; Allens, *Submission 69*, p. 13; Omni Bridgeway, *Submission 73*, p. 21; National Council of Women of Australia, *Submission 77*, p. 3.

¹⁰⁶ Law Council of Australia, *Submission 67*, p. 17.

¹⁰⁷ See, for example, Associate Professor Sulette Lombard and Professor Christopher Symes, *Submission 4*, p. 5; Allens, *Submission 69*, p. 13.

¹⁰⁸ Law Council of Australia, *Submission 67*, p. 17; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 229.

- 15.94 The Law Council of Australia suggested there should be appropriate exceptions to this prohibition, such as when the litigation funder is a publicly listed company and the lawyer's interest is immaterial.¹⁰⁹
- 15.95 The Law Council of Australia is responsible for the oversight and review of the Australian Solicitors' Conduct Rules. It noted that Rule 12 (conflicts concerning a solicitor's own interests) is scheduled for potential review in the future to ensure that it responds to the realities of modern business practices. It was submitted that consideration of the ALRC's recommendation may form part of that process.¹¹⁰
- 15.96 Additionally, some submitters considered the alleged issues and misconduct arising in this case is a strong reason for litigation funders to be regulated under financial services regulation ASIC, as discussed in Chapter 16.¹¹¹

Penalties

- 15.97 A breach of the Australian Solicitors' Conduct Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority in each state and territory, such as the Office of the Legal Services Commission.¹¹²
- 15.98 Following a finding that a practitioner's conduct constitutes unsatisfactory professional conduct or professional misconduct, a range of sanctions may be imposed, which range in severity from a caution, to being struck off the roll of practitioners. Available sanctions include:
- removing the practitioner's name from the local or interstate roll;
 - suspending, cancelling, or imposing conditions upon the practitioner's practising certificate;
 - cautioning or reprimanding the practitioner;
 - fining the practitioner, with the maximum allowable fine ranging from \$10,000–\$100,000;
 - requiring the practitioner to comply with a compensation, costs, or other payment order;
 - requiring the practitioner to apologise;
 - requiring the practitioner to seek advice or complete a course in legal education;
 - requiring the practitioner to seek counselling or medical treatment; and

¹⁰⁹ Law Council of Australia, *Submission 67*, p. 17.

¹¹⁰ Law Council of Australia, *Submission 67*, p. 35.

¹¹¹ See, for example, Mr Stuart Clark, *Committee Hansard*, 13 July 2020, p. 16; Mr Stephen Smith, Health of National Workplace Relations Policy, Ai Group, *Committee Hansard*, 29 July 2020, p. 2.

¹¹² Law Council of Australia, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, sub-r. 2.3.

- imposing conditions or limitations on the practitioner or the practitioner's legal practice, such as periodic inspections or working under supervision.¹¹³

15.99 The Supreme Court in each jurisdiction has inherent jurisdiction over all practising lawyers and hears appeals from the relevant disciplinary tribunals.¹¹⁴

Committee view

15.100 Conflicts of interest arise from an arrangement where the lawyer or law firm acting for the representative plaintiff is, in some way, connected to the litigation funding entity financing the case.

15.101 Simply put, these conflicts are unmanageable. This was illustrated in the Bolitho No 4 decision where the Supreme Court of Victoria held that, with the solicitor and barrister involved in the case holding dual interests, it was necessary that they be prohibited from acting in the matter.

15.102 It is clear to the committee that there should be a strict separation between the litigation funder and the representative plaintiff's lawyers in a class action. A prohibition is the best approach for ensuring uncompromised, objective and independent advice to, and advocacy of, the representative plaintiff.

15.103 Indirect interests should not be captured by the prohibition. However, non-pecuniary interests which allow a degree of control over decisions, whereby the interests of a litigation funder could be prioritised over those of the representative plaintiff and class members, should fall within the scope of the prohibition.

15.104 The committee considers it appropriate that the Australian Solicitors Conduct Rules contain this prohibition given the appropriate regulatory bodies already enforce compliance with the Australian Solicitors Conduct Rules, and the range and potentially significant nature of the penalties that can follow a contravention of those rules.

Recommendation 26

15.105 The committee recommends the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and the Legal Profession Uniform Conduct (Barristers) Rules 2015 be amended to prohibit solicitors, law firms and barristers from having a financial or other interest in a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting.

¹¹³ Australian Law Reform Commission, *Discovery in Federal Court*, Consultation Paper, November 2010, p. 134.

¹¹⁴ Australian Law Reform Commission, *Discovery in Federal Court*, Consultation Paper, November 2010, p. 134.

'Other interest' should encompass other arrangements that do not necessarily amount to a pecuniary interest in the litigation funder, but which nonetheless may give rise to the likelihood that the interests of the litigation funder may be prioritised over the interests of the representative plaintiff or class members, including common directorships, family ties and ongoing and/or reciprocal commercial arrangements.

Statutory standards of conduct

15.106 This section considers whether the Federal Court has available to it the powers to regulate the conduct of litigation funders during an active class action.

15.107 Dr Cashman and Ms Simpson highlighted that the statutory standards in the *Civil Procedure Act 2010 (Vic)* (Victorian Civil Procedure Act) 'loom large' in the ongoing costs dispute in the Banksia class action.¹¹⁵ In the Banksia class action, the contradictor submitted that there have been contraventions of the paramount duty to the Supreme Court of Victoria to further the administration of justice and the overarching obligations as set out in sections 16 to 26 of the Victorian Civil Procedure Act.

15.108 The federal class action regime does not have equivalent statutory standards of conduct that apply to litigation funders. Rather, there is an overarching purpose provisions with which parties and their lawyers must comply. However, this provision does not currently extend to litigation funders.

15.109 This section considers two proposals. First, the ALRC proposed that the overarching purpose should apply to litigation funders, with the possibility to order costs against litigation funders for non-compliance. Second, Dr Cashman advocated for the introduction of statutory standards of conduct similar to those in the Victorian Civil Procedure Act.

Overarching purpose of civil practice and procedure

15.110 Section 37M of the Federal Court Act states the overarching purpose of civil practice and procedure is to facilitate the just resolution of disputed claims according to the law and as quickly, inexpensively and efficiently as possible.¹¹⁶

15.111 The overarching purpose includes the following objectives:

- the just determination of all proceedings before the Court;
- efficient use of the judicial and administrative resources available for the purposes of the Court;
- the efficient disposal of the Court's overall caseload;
- the disposal of all proceedings in a timely manner; and

¹¹⁵ Dr Cashman and Ms Simpson, *Submission 55.3*, p. 25.

¹¹⁶ *Federal Court of Australia Act 1976*, ss. 37M(1).

- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.¹¹⁷

15.112 All parties to litigation are required to act consistently with the overarching purpose.¹¹⁸ In addition, a party's lawyer must take account of the duty imposed on the party to act consistently with the overarching purpose and assist the party to comply with the duty.¹¹⁹

15.113 The Federal Court can order a party to class action litigation, or their legal representative, to bear costs personally if they do not act consistently with the overarching purpose.¹²⁰ If the Federal Court orders a lawyer to bear costs personally because of failure to comply with the duties, the lawyer cannot recover the costs from their client.¹²¹ Further, in exercising its discretion to award costs in a civil proceeding, the Federal Court must take into account any failure to comply with the overarching duties.¹²²

15.114 The ALRC recommended sections 37N and 43 of the Federal Court Act be amended so as to impose on litigation funders the obligation to act consistently with the overarching purpose in section 37M of the Federal Court Act. The litigation funder would be required to take account of the obligation to act consistently with the overarching purpose placed on the party and the party's lawyer, and be required to assist the party and its lawyers to comply with those duties.¹²³ The ALRC also recommended the Federal Court have the express power to order costs against litigation funders for failure to act consistently with the overarching purpose.¹²⁴

15.115 There was broad support for the statutory overarching principles to apply to litigation funders.¹²⁵ Allens considered the extension of the duties to litigation

¹¹⁷ *Federal Court of Australia Act 1976*, ss. 37M(2).

¹¹⁸ *Federal Court of Australia Act 1976*, ss. 37N(1).

¹¹⁹ *Federal Court of Australia Act 1976*, ss. 37N(1), ss. 37N(2).

¹²⁰ *Federal Court of Australia Act 1976*, ss. 43(3).

¹²¹ *Federal Court of Australia Act 1976*, ss. 37N(5).

¹²² *Federal Court of Australia Act 1976*, ss. 37N(4).

¹²³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 331.

¹²⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 165 (recommendation 13). Section 43 of the *Federal Court of Australia Act 1976* contains the Federal Court's general power to order costs.

¹²⁵ Investor Claim Partner Pty Ltd, *Submission 7*, p. 3; Norton Rose Fulbright, *Submission 45*, p. 2; Dr Cashman, *Submission 55*, p. 1; Law Council of Australia, *Submission 67*, p. 21; Allens, *Submission 69*, p. 12; Yarra Capital Management, *Submission 71*, p. 4; Australian Finance Industry Association, *Submission 81*, pp. 5–6.

funders would recognise the role that litigation funders play in class actions and work towards ensuring fair and equitable outcomes for class members. Sanctions for non-compliance with the overarching principles were also supported.¹²⁶

Victorian statutory standards of conduct

15.116 The Law Council of Australia, Dr Peter Cashman and Allens drew attention to the fact that the Victorian class action regime was amended to implement the Victorian Law Reform Commission's (VLRC) recommendations in respect to the overarching obligations in the Victorian Civil Procedure Act.¹²⁷

15.117 In civil litigation in Victoria, including class actions, overarching obligations apply to parties and their legal representatives, and any person providing financial assistance, in so far as that person exercises any control or influence over a party or the proceedings, including insurers and litigation funders.¹²⁸ Those who breach overarching purposes are exposed to costs consequences.¹²⁹

15.118 Sections 16 to 26 of the Victorian Civil Procedure Act set out the overarching obligations, which largely correspond to recommendations made by the VLRC, and require litigation funders (and parties and lawyers) to, in summary:

- act honestly;
- only make claims that have a proper basis;
- only take steps to resolve or determine dispute;
- cooperate in the conduct of civil proceeding;
- not mislead or deceive;
- use reasonable endeavours to resolve dispute;
- narrow the issues in dispute;
- ensure costs are reasonable and proportionate;
- minimise delay; and
- disclose the existence of documents.¹³⁰

15.119 Dr Cashman recommended the Federal Court Act be amended to include statutory standards of conduct modelled on those incorporated in Victorian Civil Procedure Act. It was submitted the inclusion of these obligations would

¹²⁶ Allens, *Submission 69*, p. 12.

¹²⁷ Dr Peter Cashman, *Submission 55*, p. 1; Law Council of Australia, *Submission 67*, p. 9; Allens, *Submission 69*, p. 12; Victorian Law Reform Commission, *Civil Justice Review*, Report, May 2008, p. 150.

¹²⁸ *Civil Procedure Act 2010* (Vic), ss. 10(1).

¹²⁹ *Civil Procedure Act 2010* (Vic), s. 16. See Law Council of Australia, *Submission 67*, p. 9.

¹³⁰ *Civil Procedure Act 2010* (Vic), s. 17–26.

improve the standards of conduct in class action litigation and better regulate the conduct of litigation funder.¹³¹

15.120 Dr Cashman submitted that the Victorian statutory standards place more stringent obligations on parties, lawyers and litigation funders than the 'vague, very amorphous' overarching purpose obligations in the Federal Court Act.¹³²

15.121 Dr Cashman noted that these obligations apply not only to conduct in court, but to interlocutory or appeal stages, and in respect of dispute resolution, like mediation.¹³³

15.122 Dr Cashman further submitted that monetary penalties are not enough and non-cost sanctions are needed to deter inappropriate forensic conduct and give judicial officers wide express powers to deal with non-compliance.¹³⁴ Dr Cashman noted that non-compliance with the overarching obligations in the Victoria can be sanctioned with 'a wide array of disciplinary and penal powers'.¹³⁵ In addition to requiring the contravening party to pay costs or compensate the affected person, the Supreme Court of Victoria can order that the contravening party must take steps to remedy the contravention or that they are not permitted to take certain steps in a proceeding.¹³⁶

Committee view

15.123 The committee considers that litigation funders should be held to the same standards as parties and lawyers to the litigation, particularly given the level of control they can exert over proceedings.

15.124 There is an existing framework within the Federal Court Act which, through amendment, could ensure litigation funders are held to the current standard to which parties and lawyers are held. That said, the committee sees value in elevating the standards of conduct to which all parties are held, including litigation funders, in the federal class action regime.

15.125 The committee notes that the alleged misconduct on the part of the lawyers and the litigation funder in the Banksia class action appears to be atypical in the class action and litigation funding industry. Nonetheless, it is important that if allegations of this sort arose in the federal class action regime, the Federal Court would have the appropriate framework of powers and penalties to sanction the parties involved.

¹³¹ Dr Peter Cashman, *Submission 55*, p. 1.

¹³² *Committee Hansard*, 24 July 2020, p. 20.

¹³³ *Civil Procedure Act 2010* (Vic), s. 11; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 20.

¹³⁴ Dr Peter Cashman, *Submission 55*, p. 1.

¹³⁵ Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 20.

¹³⁶ *Civil Procedure Act 2010* (Vic), s. 28–29.

- 15.126 If the recommendation to prohibit dual interests, with appropriate penalties for non-compliance, is implemented, this would address parts of the alleged misconduct in the Banksia matter. The committee considers that statutory standards of conduct, such as those in the Victorian Civil Procedure Act, and the range of penalties for non-compliance, would permit the Federal Court to appropriately sanction misconduct which impedes the efficient, effective and fair resolution of class actions, as well as dishonest and misleading conduct. The codification of these standards would also be a clear articulation of the expected and accepted conduct in class actions.
- 15.127 As noted, there is presently a framework in the Federal Court which could be amended to apply standards of conduct to litigation funders. The committee endorses an approach where the overarching purpose in the Federal Court Act is expanded and bolstered to include the statutory standards of conduct placed on litigation funders under the Victorian Civil Procedure Act.
- 15.128 In order to affect compliance with the standards of conduct, the committee considers the Federal Court should have a range of measures to sanction non-compliance, to stop any behaviour, and to require a litigation funder to remedy any harm caused by its wrongdoing. A costs order against a litigation funder should be part of the range of penalties available to the Federal Court. Accordingly, the committee repeats its suggestion in Chapter 11 that the Federal Court Act be amended to expressly state the Federal Court may order costs against a litigation funder.
- 15.129 Some of the obligations in the Victorian Civil Procedure Act's standards of conduct reflect the obligations placed on litigation funders through the AFSL and MIS regimes, such as the duty to act honestly. Importantly, the focus of the statutory standards is the conduct of a litigation funder in the proceedings and the facilitation of a fair, efficient and affordable civil law system. By contrast, the regulatory powers of ASIC are targeted at the regulation of litigation funders as providers of a financial product to ensure they are complying with their obligations pursuant to the AFSL and the MIS regimes.
- 15.130 Therefore, the ability of the Federal Court to sanction misconduct on the part of litigation funders on a case-by-case targeted basis, if and when it arises in the case before the court, would complement the regulatory powers of ASIC.

Recommendation 27

15.131 The committee recommends the Australian Government consider options for the Federal Court of Australia to have the power to hold parties, their lawyers, and litigation funders to the same standards of conduct in class actions, including:

- **sections 37N and 43 of the *Federal Court of Australia Act 1976* be amended so as to impose on litigation funders the obligation to act consistently**

with the overarching purpose in section 37M of the *Federal Court of Australia Act 1976* and to permit the Federal Court of Australia to order costs against litigation funders for failure to act consistently with the overarching purpose; and

- the *Federal Court of Australia Act 1976* be amended to reflect the statutory standards of conduct in sections 16 to 26 of the *Civil Procedure Act 2010* (Vic), including requirements such as:
 - the statutory standards apply to conduct in court, to interlocutory or appeal stages, and in respect of dispute resolution processes; and
 - the Federal Court have the express power to order costs against litigation funders for non-compliance with the overarching purpose of section 37N, as well as the power to order other disciplinary sanctions such as remedying the contravention or preventing a specific step or action being taken.

Chapter 16

Financial services regulation of litigation funding

Introduction

- 16.1 Since August 2020, in order to provide litigation funding in class actions, litigation funders must hold an Australian Financial Services Licence (AFSL) and comply with the requirements of the Managed Investment Scheme (MIS) regime under the *Corporations Act 2001* (Corporations Act). Prior to August 2020, litigation funders were exempt from these regulations and were therefore regulated differently to other financial services.¹ The courts had the primary oversight function of litigation funders.
- 16.2 The first half of this chapter sets out the previous and current regulatory environment for litigation funding. It begins with a summary of court decisions in 2009 and 2012, which found that certain financial services regulation applied to litigation funders, and the exemptions which were introduced in reaction to these decisions. The key reasons underpinning the calls for litigation funding to be regulated as a financial service are then outlined.
- 16.3 The announcement in May 2020 and subsequent commencement of the regulations in August 2020, which repealed the exemptions for litigation funders from the AFSL and MIS regimes, are discussed, along with the regulatory relief provided by the Australian Securities and Investment Commission's (ASIC) for aspects of the MIS regime.
- 16.4 Overall, submitters supported the regulation and licencing of litigation funders. However, for many, this support was dependant on the regulation being fit for purpose. The introduction of the application of the AFSL and MIS regimes to litigation funding in class actions was a matter of contention during the inquiry. The second half of this chapter canvasses the different views on the new regulation and proposals made by submitters on how to tailor the regulations to the bespoke activity of litigation funding. The chapter concludes with the committee's views on these matters.
- 16.5 Importantly, prior to August 2020, litigation funding activity was exempt from the AFSL and MIS regimes. The changes which commenced in August 2020 apply only when a litigation funder finances a class action. This is termed a 'litigation funding scheme' which is defined, in summary, to be when an entity

¹ Other financial services may include: providing financial product advice to clients; dealing in a financial product; making a market for a financial product; operating a registered scheme; providing custodial or depository services; and providing traditional trustee company services. Australian Securities and Investments Commission, *Submission 39*, p. 20.

that is not a party to the litigation (a third-party litigation funder), pays the costs of litigation and/or indemnifies parties from costs orders. Litigation funding in cases involving a single plaintiff, or litigation funding in insolvency matters, remain exempt from the regulations.

- 16.6 Non-financial service regulation of litigation funding, including remuneration, prudential matters and court supervision are discussed in Chapters 10 to 13 and Chapter 15.

Court decisions on financial services regulations

- 16.7 Decisions of the Federal Court of Australia (Federal Court), the Supreme Court of New South Wales (NSW) and the High Court in 2009 and 2012 found that litigation funding schemes were an MIS and a credit facility.² As a result, litigation funding schemes potentially trigger the application of the Corporations Act, the *Australian Securities and Investments Commission Act 2001* (ASIC Act), and the *National Consumer Credit Protection Act 2009* (National Credit Act).³
- 16.8 In *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd*,⁴ the Federal Court found the arrangements between the claimants in the class, the firm of solicitors representing them and the litigation funder of the proceedings, constituted an MIS. Following this decision, many third-party litigation funding arrangements fell within the definition of an MIS.⁵
- 16.9 A responsible entity of a registered MIS must hold an AFSL.⁶ ASIC noted that although 'the court found that the litigation funder and the firm of solicitors representing the class action members were operating the scheme between them', the court 'did not resolve who was the "operator" of the scheme'.⁷
- 16.10 *The Chameleon Mining* cases also altered the regulation of litigation funding.⁸ In June 2011, the NSW Court of Appeal held that the litigation funding

² *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643; *International Litigation Partners Pte Ltd v Chameleon Mining NL (receiver and manager appointed)* [2012] HCA 4.

³ Australian Securities and Investments Commission, *Submission 39*, p. 6; *Brookfield Multiplex Ltd and Another v International Litigation Funding Partners Pte Ltd and Others* (2009) 180 FCR 11 (Sunderberg and Dowsett JJ, Jacobson J dissenting).

⁴ (2009) 260 ALR 643.

⁵ Australian Securities and Investments Commission, *Submission 39*, pp. 7, 11.

⁶ Australian Securities and Investments Commission, *Submission 39*, p. 11.

⁷ Australian Securities and Investments Commission, *Submission 39*, p. 11.

⁸ The funding agreement in the *Chameleon Mining* cases was for commercial litigation, not a class action. See Professor Michael Legg, High Court excludes litigation funding from licensing regime, Clayton Utz, 11 October 2012, <https://www.claytonutz.com/knowledge/2012/october/high-court-excludes-litigation-funding-from-licensing-regime> (accessed 26 October 2020).

agreement was a financial product under the *Corporations Act* because it was a facility involving the management of financial risks. As a result, litigation funders would need to hold an AFSL. On appeal, the High Court determined in October 2012 that the litigation funding was a credit facility and that litigation funders do not need an AFSL.⁹

Exemption from regulations between 2012 and 22 August 2020

16.11 Following the above court decisions, the then government exempted litigation funders from needing to hold an AFSL and from the MIS regime by Corporations Amendment Regulation 2012 (No. 6).¹⁰ The AFSL exemption was available if the litigation funder maintained and followed practices for managing conflicts of interest for the duration of the litigation funding scheme.¹¹

16.12 The 2012 regulations also specified that litigation funding schemes were financial products under the Corporations Act.¹² As a result, litigation funders and their funding agreements were subject to consumer protections in the ASIC Act. Relevant consumer protections include unfair contract terms and misleading and deceptive conduct provisions.¹³

⁹ Australian Law Reform Commission, *Integrity, fairness and efficiency – An inquiry into class action proceedings and third-party litigation funders*, Final Report, December 2018, p. 155; *Chameleon Mining NL v International Litigation Partners Pte Ltd* (2010) 79 ACSR 462; *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50; *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455.

¹⁰ Australian Securities and Investments Commission, *Submission 39*, pp. 5–7.

¹¹ Australian Securities and Investments Commission, *Submission 39*, pp. 5–6; Corporations Amendment Regulation 2012 (No. 6), as amended by the Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1) (Corporations Amendment Regulations); Australian Securities and Investment Commission, Regulatory Guide 248, *Litigation schemes and proof of debt schemes: Managing Conflicts of interest*.

Two additional exemptions were implemented through legislative instruments. The exemption of litigation funding schemes from the application of the National Credit Act is in ASIC Credit (Litigation Funding—Exclusion) Instrument 2020/37. ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 exempts litigation funding schemes that are funded under a conditional costs agreement from the application of Chapters 5C and 7 of the Corporations Act. Both exemptions apply until 31 January 2023 and are not impacted by the July 2020 regulations. See Corporations Amendment (Litigation Funding) Regulations 2020, Explanatory Statement, 23 July 2020, pp. 4, 6; Australian Securities and Investments Commission, *Submission 39*, p. 6.

¹² Australian Securities and Investments Commission, *Submission 39*, p. 10.

¹³ Australian Securities and Investments Commission, *Submission 39*, p. 7.

Calls for litigation funding to be regulated as a financial service

16.13 The above exemptions meant that litigation funders faced considerably fewer regulatory obligations and were subject to less oversight than entities that sell other financial products. As a result, likely risks to customers arose from the following issues:

- The increasing diversity and size of the domestic and international market of litigation funders, where there is a lack of transparency and accountability regarding their business models, competence and finances.
- The inadequate product disclosure to class actions members of the risks of adverse cost orders and litigation funder capital holdings.
- Misaligned interests leading to claimants being encouraged to settle a dispute before trial, even if doing so is not in their best interests.¹⁴

16.14 Through submissions and oral evidence, the committee heard a range of concerns and arguments for further regulation of litigation funders. Those that may fall within the scope of current financial service regulations include:

- (a) the increasing number of domestic and foreign litigation funders financing class actions in Australia;
- (b) foreign litigation funders being beyond the reach of some financial services accountability mechanisms;
- (c) the lack of transparency regarding the number of litigation funders, domestic and foreign, operating in Australia;
- (d) complex conflicts of interest arising from the nature of class actions;
- (e) the diversity of litigation funder legal structures, including publicly listed corporations, private companies, private equity firms, and hedge funds;
- (f) whether there is sufficient disclosure of fees;
- (g) whether adequate financial service dispute resolution mechanisms apply;
- (h) whether litigation funders should be subject to auditing and reporting requirements;
- (i) whether there is enough consumer protection for plaintiffs and class members; and
- (j) whether the fit and proper person tests and best interest duty should apply.¹⁵

¹⁴ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020, p. 8.

¹⁵ See, for example, Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 3; Ai Group, *Submission 92*, p. 5; Australian Institute of Company Directors, *Submission 40*, pp. 17–18; Business Council of Australia, *Submission 86*, p. 9; Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 34; Ms Janice Saddler, Shine Lawyers, *Committee Hansard*, 27 July 2020, p. 19; Mr Tom Lunn, Senior Policy Manager, Insurance Council of Australia, *Committee Hansard*, 27 July 2020, p. 48; Australian Law Reform Commission, *Integrity, fairness and efficiency – An inquiry into class action proceedings and third-party litigation funders*, Final Report, December 2018, pp. 29–31; Productivity Commission, *Access to Justice Arrangements*,

- 16.15 The Productivity Commission recommended the Australian Government establish a licence for third-party litigation funders to ensure funders hold adequate capital to cover financial obligations and inform clients of responsibilities for managing risks and conflicts of interests.¹⁶
- 16.16 Dr Warren Mundy, who was a Productivity Commissioner for that inquiry, submitted that an AFSL is an appropriate licence, and ASIC is the appropriate regulator.¹⁷
- 16.17 The Association of Litigation Funders of Australia (ALFA) and Litigation Capital Management did not oppose introducing AFSLs for litigation funders.¹⁸
- 16.18 Omni Bridgeway, another litigation funder operating in Australia, indicated that it supported further regulation of litigation funding through the AFSL regime and appropriate parts of the MIS regime. Omni Bridgeway noted the Australian Government's AFSL and MIS reforms improve transparency and improve confidence in the system so that all stakeholders, including class members, defendants and the court, can have confidence in both the litigation funding participants as well as the system.¹⁹
- 16.19 Professor Peta Spender was in favour of the use of the AFSL regime, noting that it is a reasonably versatile regime and ASIC can shape the AFSL licence conditions.²⁰ Similarly, the Law Council of Australia supported the use of AFSLs and the MIS regime and tailoring by ASIC to suit litigation funding.²¹
- 16.20 A benefit of applying the AFSL regime to litigation funders is that it will bring transparency to the number of litigation funders, domestic and foreign, operating in Australia.²² Currently, there is no research or specific evidence with

Inquiry Report, No. 72, 5 September 2014, pp. 621–632; Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, March 2018, pp. XVI, 18, 19.

¹⁶ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report, No. 72, 5 September 2014, p. 621–632; Australian Law Reform Commission, *Integrity, fairness and efficiency – An inquiry into class action proceedings and third-party litigation funders*, Final Report, December 2018, pp. 40–41.

¹⁷ Dr Warren Mundy, *Committee Hansard*, p. 27; Dr Warren Mundy, *Submission 17*, p. 7.

¹⁸ See, for example, Mr John Walker, Chairman, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 32; Mr Patrick Moloney, Chief Executive Officer, Litigation Capital Management, *Committee Hansard*, 24 July 2020, p. 33.

¹⁹ Mr Andrew Saker, Managing Director and Chief Executive Officer, Omni Bridgeway Limited, *Committee Hansard*, 13 July 2020, p. 49.

²⁰ Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 18.

²¹ Mr Greg Golding, Member, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 19.

²² Mr Alexander Morris, Partner, King & Wood Mallesons, *Committee Hansard*, 13 July 2020, p. 45.

respect to that figure.²³ Prior to the application of the AFSL, there is was standing, general obligation to register as a litigation funder, other than requirements to comply with specific court rules to make their involvement in class actions known to the court.²⁴

Application of AFSL and MIS regimes to litigation funding in class actions

- 16.21 On 22 May 2020, the Treasurer, the Hon Josh Frydenberg MP, announced that litigation funders in class actions would be subject to further regulatory oversight from 22 August 2020. The aim was to enhance the transparency of the operations of litigation funders in Australia via the MIS, AFSL and anti-hawking regimes which focus on conduct and disclosure for financial services and products.²⁵ Litigation funders holding an AFSL will be subject to provisions on managing conflicts of interest in paragraph 912A(1)(aa) of the *Corporations Act*.²⁶
- 16.22 Between 22 May and 22 August 2020, ASIC worked with the Department of the Treasury on implementation and transitional issues for the above reforms.²⁷ On 23 July 2020, the Corporations Amendment (Litigation Funding) Regulations 2020 (July 2020 regulations) were registered to implement the above announcement.²⁸ The July 2020 regulations also clarify that an interest in a litigation funding scheme or a litigation funding arrangement is a financial product under the Corporations Act.²⁹ The regulations do not apply to schemes or arrangements entered into before 22 August 2020, thereby limiting any potential disruption to existing contractual arrangements and litigation proceedings.³⁰

²³ Ms Pip Murphy, Chief Executive Officer, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, p. 33.

²⁴ Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division, Attorney-General's Department, *Committee Hansard*, 29 July 2020, pp. 53, 60–61.

²⁵ The Hon Josh Frydenberg MP, Treasurer, 'Litigation funders to be regulated under the Corporations Act', *Media Release*, 22 May 2020; Australian Securities and Investments Commission, *Submission 39*, p. 5.

²⁶ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020, p. 6.

²⁷ Australian Securities and Investments Commission, *Submission 39*, p. 3.

²⁸ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020.

²⁹ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020, pp. 1, 8. A 'litigation funding arrangement' is when a litigation funder finances a case involving a single plaintiff: Corporations Regulations 2001, sub-cl. 5C.11.01(4).

³⁰ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020, p. 2.

16.23 The July 2020 regulations do not remove the exemptions that currently apply to litigation funding schemes in the insolvency context and litigation funding arrangements involving a single plaintiff. The conflict of interest requirements that attach to the AFSL exemption for services for insolvency litigation funding schemes and litigation funding arrangements involving a single plaintiff also remain.³¹

Managed investment schemes

16.24 MISs provide a mechanism for investors to bring together their funds to undertake an investment scheme. MIS provisions in the Corporations Act place obligations on the responsible entity. MISs must be registered if they have more than 20 members or are promoted by a person in the business of promoting MISs. The responsible entity has the duty to act in the best interests of the scheme's members. If there is a conflict between the members' interests and the responsible entity's interests, the members' interests take priority.³²

16.25 A registered MIS has a constitution which must make adequate provision for:

- the consideration to be paid to acquire an interest in the scheme;
- the powers of the responsible entity to make investments of, or otherwise dealing with, scheme property, including powers to borrow or raise money for the scheme;
- the method for dealing with member complaints;
- any rights of members to withdraw from the scheme;
- rights of the responsible entity to any fees, remuneration, expenses or indemnity; and
- winding up of the scheme.³³

16.26 Providers of financial advice must hold an AFSL and comply with the duty to act in the best interests of the customer. There are also requirements for ongoing fee-charging, conflicted remuneration, professional standards and giving the client a statement of advice.³⁴

16.27 ASIC noted that the assessment of an MIS registration application does not involve an evaluation of the merits of a scheme or whether the terms of the constitution are fair or appropriate for scheme members. A litigation funder would only be able to charge fees for the proper performance of its duties as a responsible entity. However, there is no cap on the fees or profits, nor any prescribed fee schedule or formula that determines the fees that a responsible

³¹ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020, pp. 1, 5, 6.

³² Australian Securities and Investments Commission, *Submission 39*, pp. 8, 9, 11.

³³ Australian Securities and Investments Commission, *Submission 39*, p. 12.

³⁴ Australian Securities and Investments Commission, *Submission 39*, p. 4.

entity may be entitled to receive. The Product Disclosure Statement (PDS) must provide information about the costs of the scheme and any amounts that members have to pay and any associated commissions. Members also receive audited copies of annual financial statements.³⁵

16.28 ASIC noted that the legal structure of some litigation funding arrangements might not meet the definition of an MIS.³⁶

Australian Financial Services Licence

16.29 The requirements for litigation funders to hold an AFSL began on 22 August 2020. The AFSL requirements target compliance with the corporations law and are not prudential or intended to ensure the financial viability of litigation funders.³⁷

16.30 To provide financial services, a person must hold an AFSL or be authorised to provide services as a representative of an AFSL holder or be otherwise exempt. An intermediary providing financial advice on litigation funding schemes or a responsible entity of a registered MIS must hold an AFSL. AFSL holders are obliged to:

- act honestly, efficiently and fairly in providing financial services;
- maintain an appropriate level of competence to provide financial services;
- have adequate financial, technical and human resources to provide the financial services covered by the licence;
- have operators of the MIS who are fit and proper persons;
- be a public company;
- have appropriate arrangements for managing conflicts of interests;
- hold an AFSL to operate one or more MISs under that AFSL;
- comply with licence conditions and financial service laws;
- take reasonable steps to supervise its representatives;
- be a member of the Australian Financial Complaints Authority;
- maintain an internal dispute resolution procedure; and
- hold adequate coverage of professional indemnity insurance.³⁸

16.31 ASIC is not a prudential regulator. The AFSL requirement to have adequate financial resources does not extend to holding sufficient security for costs for litigation purposes. The AFSL requirements do not seek to prevent AFSL holders from becoming insolvent, failing due to poor business models or cash flow problems. ASIC's financial requirements do not protect against credit risk

³⁵ Australian Securities and Investments Commission, *Submission 39*, pp. 12, 18.

³⁶ Australian Securities and Investments Commission, *Submission 39*, pp. 3–4.

³⁷ The requirements discussed apply to retail clients and may not apply to wholesale clients.

³⁸ The Hon Josh Frydenberg MP, Treasurer, 'Litigation funders to be regulated under the Corporations Act', *Media Release*, 22 May 2020; Australian Securities and Investments Commission, *Submission 39*, pp. 4, 11, 20–22.

or provide compensation for loss or address the risk that a litigation funder may run out of funds before a case is complete. However, AFSL holders that offer financial services to retail clients must have arrangements (potentially including professional indemnity insurance) for compensating retail clients for losses they suffer as a result of a breach by the licensee or its representatives of their obligations.³⁹

16.32 AFSL financial requirements aim to ensure that AFSL holders have:

- sufficient financial resources to conduct their financial services business in compliance with the Corporations Act and provide a financial buffer that decreases the risk of disorderly or non-compliant wind-up if the business fails; and
- incentives to comply with the Corporations Act through the risk of financial loss.⁴⁰

16.33 Other requirements that arise for AFSL holders include:

- providing a Financial Services Guide to ensure that retail clients receive sufficient information to make an informed decision;
- providing a PDS;
- distributors complying with financial product advice laws;
- compliance with personal financial advice laws;
- compliance with professional standards requirements;
- notifying ASIC of significant breaches;
- complying with anti-hawking laws;
- product design and distribution laws from October 2021; and
- potential for investigation using ASIC's Product Intervention Powers.⁴¹

ASIC relief from aspects of the AFSL and MIS regimes

16.34 The ASIC Corporations Instrument 2020/787 (Instrument 787) provides regulatory relief to support the transition to the regulation of litigation funding in class actions under the AFSL and MIS regimes.⁴² Some of the AFSL and MIS obligations may be difficult for responsible entities of litigation funding schemes to comply with, as discussed in the below section. The following paragraphs discuss ASIC's consultation process and the resulting exemptions and modifications to address practical difficulties with application of the AFSL and MIS regimes to litigation funding schemes.

³⁹ See, for example, Australian Securities and Investments Commission, *Submission 39*, pp. 4, 20–26; Dr Warren Mundy, *Committee Hansard*, p. 30.

⁴⁰ Australian Securities and Investments Commission, *Submission 39*, pp. 4, 20.

⁴¹ Australian Securities and Investments Commission, *Submission 39*, pp. 27–31.

⁴² ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020.

16.35 ASIC undertook targeted consultation with industry participants, including law firms, litigation funders and industry bodies. ASIC did not issue a consultation paper due to time constraints. ASIC received written submissions from various industry participants. ASIC met with interested parties as part of the consultation process. ASIC hosted an industry briefing on the relief it was proposing and considered feedback from the industry.⁴³ ASIC also had access to submissions and oral evidence received by the committee.

16.36 Instrument 787 provides relief to the responsible entity of a registered litigation funding scheme from certain obligations arising under the Corporations Act for:

- the giving of a PDS to some members of a registered litigation funding scheme;
- the use of application forms;
- some content requirements of a PDS;
- modification of the withdrawal procedures for scheme members; and
- obligations for the valuation of scheme property.⁴⁴

16.37 ASIC has also:

- Issued a no-action position for the obligation of a responsible entity under Chapter 2C of the Corporations Act to set up and maintain a register of members of a registered litigation funding scheme.⁴⁵
- Indicated that the above relief focused on preparing for the start of the new regime on 22 August 2020 and that it may consider further relief in the future.
- Advised the industry that it will also consider applications for relief on a case-by-case basis, acknowledging the varying nature of litigation funding schemes in the market.⁴⁶

16.38 These relief measures are expanded on in the following section.

⁴³ Australian Securities and Investments Commission Corporations (Litigation Funding Schemes) Instrument 2020/787, *Explanatory Statement*, 21 August 2020, p. 3.

⁴⁴ Australian Securities and Investments Commission Corporations (Litigation Funding Schemes) Instrument 2020/787, *Explanatory Statement*, 21 August 2020, pp. 3–4.

⁴⁵ Australian Securities and Investments Commission, 'No-action position for responsible entities of certain registered litigation funding schemes in relation to member registers', 21 August 2020, asic.gov.au/media/5759483/20200818-litigation-funding-no-action-position.pdf (accessed 20 November 2020).

⁴⁶ Australian Securities and Investments Commission, *20-192MR ASIC manages transition to new regulatory regime for litigation funding schemes*, 21 August 2020.

Concerns about the application of the ASFL and MIS regimes

- 16.39 Many submitters supported fit for purpose regulation of litigation funding.⁴⁷ Some submitters were more receptive to the application of the AFSL regime to litigation funders than the application of the MIS regime.⁴⁸ Others, including ALFA, submitted that both the AFSL and MIS regimes, in their current form, are not appropriate regulatory apparatus for litigation funding.⁴⁹
- 16.40 Prior to a discussion on the details of the concerns about the AFSL and MIS regime, three general concerns expressed in submissions are discussed.
- 16.41 First, the broad application of the regulations was highlighted in some submissions. It was noted that the requirement of litigation funders in class actions to hold an AFSL likely extends to not-for-profit litigation funders, such as the National Farmers Federation and the Grata Fund.⁵⁰ This was a matter of concern for some inquiry participants given the high costs of complying with the AFSL regime, which can be over \$1 million per year. The Grata Fund suggested not-for-profit litigation funders should be exempt from the regulations, or the costs of maintaining compliance with the regulation be reduced, so as to not discourage the funding of public interest litigation.⁵¹
- 16.42 Second, concerns were heard about the short time available to comply with the July 2020 regulations. Submitters noted there was limited time for ASIC to make any adaptations through regulatory relief.⁵² Further, the establishment of responsible entities, the registration of schemes and provision of the required documentation and contracts would be challenging in the time available.⁵³ There

⁴⁷ See, for example, Slater and Gordon, *Submission 18*, p. 7; Litigation Capital Management, *Submission 23*, pp. 4, 7–13; Ashurst, *Submission 41*, p. 1; Allens, *Submission 69*, p. 2; Prospa, *Submission 56*, p. 3; Association of Litigation Funders of Australia, *Submission 57.1*, p. 9; Omni Bridgeway, *Submission 73*, p. 2; Australian Finance Industry Association, *Submission 81*, p. 2; Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 34; Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 16;

⁴⁸ See, for example, HESTA, *Submission 28*, p. 6; Mr Greg Golding, Member, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 22.

⁴⁹ See, for example, Woodsford Litigation Funding Limited, *Submission 16*, p. 5; Association of Litigation Funders of Australia, *Submission 57*, pp. 17–19; Association of Litigation Funders of Australia, *Submission 57.1*, p. 4; Phi Finney McDonald, *Submission 87*, pp. 19–20; NSW Young Lawyers, *Submission 89*, p. 17.

⁵⁰ See, for example, Mr Ben Hardwick, Head of Class Actions, Slater and Gordon, *Committee Hansard*, 27 July 2020, p. 31; Grata Fund, *Submission 76*, pp. 5–6.

⁵¹ Grata Fund, *Submission 76*, pp. 5–6.

⁵² See, for example, Mr John Walker, Chairman, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, pp. 40–41; Ms Susanna Taylor, Senior Investment Manager, Litigation Capital Management, *Committee Hansard*, 24 July 2020, p. 44.

⁵³ Mr John Walker, Chairman, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, pp. 40–41.

were also concerns that ASIC may not be able to process applications for AFSLs in time.⁵⁴ The regulations to implement the AFSL and MIS regimes for litigation funders do not cover schemes that started before 22 August 2020.⁵⁵

16.43 Last, there was a sentiment among some submissions that courts are better placed to regulate and manage litigation funders.⁵⁶

16.44 As noted above, prior to the commencement of the regulations, ASIC introduced some regulatory relief to support the transition to the regulation of litigation funding in class actions under the AFSL and MIS regimes.⁵⁷ This next section sets out some practical difficulties in the application and implementation of the AFSL and MIS regimes to litigation funding in class actions, as identified in submissions and oral evidence. Where applicable, the exemptions and modifications as provided in Instrument 787 are discussed.

Australian Financial Services Licence

16.45 Some submitters expressed that regulation by way of a licence is needed but it ought to be bespoke regulation tailored to litigation funding.⁵⁸ Maurice Blackburn referenced the ALRC's conclusion that applying the AFSL regime, without modification, to litigation funders would be inappropriate.⁵⁹ Numerous submissions encouraged amendments to the AFSL regime so as to better fit the litigation funding context, some of which are discussed in this section.⁶⁰

⁵⁴ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, p. 12; Balance Legal Capital, *Submission 13*, p. 6; Maurice Blackburn Lawyers, *Submission 37*, p. 33.

⁵⁵ Mr Ronald Mizen, 'Fight brews over class-action rules', *Australian Financial Review*, 14 October 2020, p. 9.

⁵⁶ See, for example, Professor Vicki Waye, *Submission 5*, p. 4; Woodsford Litigation Funding Limited, *Submission 16*, p. 5; Slater and Gordon, *Submission 18*, p. 2; see also Australian Law Reform Commission, *Integrity, fairness and efficiency – An inquiry into class action proceedings and third-party litigation funders*, Final Report, December 2018, pp. 30, 31. Associate Professor Sulette Lombard and Professor Christopher Symes, *Submission 4*, p. 4, expressed support for an Australian industry Code of Conduct.

⁵⁷ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020.

⁵⁸ See, for example, Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 4; Litigation Capital Management, *Submission 23*, p. 7; MinterEllison, *Submission 25*, p. 6; Litigation Lending Services Ltd, *Submission 36*, p. 10; Allens, *Submission 69*, pp. 10–12; Mr Stephen Smith, Head of National Workplace Relations Policy, Ai Group, *Committee Hansard*, 29 July 2020, p. 12.

⁵⁹ Maurice Blackburn Lawyers, *Submission 37*, p. 35.

⁶⁰ See, for example, MinterEllison, *Submission 25*, p. 7; Litigation Capital Management, *Submission 23*, pp. 7–8; Professor Peta Spender, *Submission 50*, pp. 2–3; Association of Litigation Funders of Australia, *Submission 57.1*, pp. 3–4; Omni Bridgeway, *Submission 73*, p. 23.

Capital adequacy requirements

16.46 Deficiencies of the AFSL regime were highlighted in submissions. For example, as noted above, the AFSL requirements are not prudential regulation and are not intended to ensure the financial viability of litigation funders. ASIC's submission commented:

In the case of litigation funding schemes, the requirements are not designed to address the risk that a litigation funder does not have adequate resources to continue funding a prolonged class action to its conclusion or to meet or provide security for an adverse costs order in legal proceedings.⁶¹

16.47 Omni Bridgeway, MinterEllison and Allens submitted that a licence regime should include capital adequacy requirements.⁶² Litigation Capital Management recommended that the AFSL requirements applying to litigation funders should be tailored to require each licence holder to have ongoing access to a minimum of \$5 million in assets in Australia. Omni Bridgeway agreed that the requirement of onshore capital adequacy is critical.⁶³ Litigation Capital Management suggested that the capital adequacy requirements be on a 'per project' basis because:

...a larger book of claims probably means that the funder has committed more future capital. But it also means that the funder has more forecast income and, importantly, an increased hedging of risk across all of its funded claims. In addition, a "per project" capital requirement would likely make it uneconomic to fund smaller claims.⁶⁴

16.48 It was submitted that a preferred approach to ensuring litigation funders could meet an adverse costs order would be through the court requiring a litigation funder to pay security into the court.⁶⁵ This is discussed in Chapter 10.

Competence of AFSL holders

16.49 Other modifications to the requirements of an AFSL, as noted by submitters, included the standards to which holders are held with respect to skills, knowledge and competency.

⁶¹ Australian Securities and Investments Commission, *Submission 39*, pp. 23–24.

⁶² MinterEllison, *Submission 25*, p. 8; Allens, *Submission 69*, p. 12; Omni Bridgeway, *Submission 73*, p. 23. MinterEllison proposed that the applicable prudential requirements should include those that already exist under the AFSL regime in addition to further obligations: (a) satisfy the 'Base Level Financial Requirements' set out in ASIC Regulatory Guide 166; (b) comply with the minimum financial requirements that apply to specific classes of AFSL holders; (c) satisfy ASIC that it has sufficient assets to cover the potential liabilities associated with an unsuccessful case; and (d) maintain liquid capital reserves equal to at least twice the amount of its investments in litigation. See also Chartered Accountants ANZ, *Submission 58*, p. 4.

⁶³ Litigation Capital Management, *Submission 23*, pp. 7–8.

⁶⁴ Litigation Capital Management, *Submission 23*, p. 8.

⁶⁵ Professor Vicki Waye, *Submission 5*, p. 3.

16.50 ALFA submitted that a 'responsible manager' for a litigation funding AFSL should be granted some relief from the experience and educational qualification requirements under ASIC Regulatory Guide 105. A 'responsible manager' is someone within the organisation who, due to their skills and experience in providing financial services and their responsibilities within the financial services business, is held out to ASIC as proof of the applicant's organisational competence to provide the financial services authorised by the licensee. ALFA observed:

Litigation funding has not been subject to the AFSL regime since the exemptions were introduced into the Regulations in 2013. Consequently, there are very limited persons who are able to demonstrate knowledge of both MIS regulation under the AFSL regime and the litigation funding industry as required by ASIC Regulatory Guide 105.⁶⁶

16.51 MinterEllison submitted a tailored test of a 'fit and proper person' should apply for litigation funders.⁶⁷ Litigation Capital Management agreed that in order for a litigation entity to obtain an AFSL, they should have the skills and knowledge to demonstrate competency to effectively provide litigation finance services.⁶⁸

⁶⁶ Association of Litigation Funders of Australia, *Submission 57.1*, p. 14.

⁶⁷ MinterEllison, *Submission 25*, p. 7, to be a 'fit and proper' person to engage in the litigation funding business an applicant must: (a) be competent to operate a litigation funding business and have the legal skills to understand civil litigation (including an understanding of overarching obligations, court rules and processes) and assess the legal merits of a case (as demonstrated by the responsible manager's knowledge, skills and experience); (b) have the attributes of good character, diligence, honesty, integrity and judgement; (c) not be disqualified by law from performing their role in their litigation funding business; (d) have no conflict of interest in performing their role in their litigation funding business; alternatively, ensure that any conflict that exists will not create a material risk that the person will fail properly to perform their role in their litigation funding business; (e) disclose whether the person is or has been a bankrupt or subject to an arrangement under Part 10 of the *Bankruptcy Act 1966* (Cth) or has been an officer of a corporation that has been wound up in insolvency or under external administration; (f) disclose whether the person has been the subject of disciplinary action, however expressed, in another profession or occupation that involved a finding adverse to the person; and (g) disclose any convictions, including spent convictions.

⁶⁸ Litigation Capital Management, *Submission 23*, p. 8, considered that the following factors be considered in the decision-making process: (a) the legal education, qualifications and experience; (b) insolvency education, qualifications and experience if providing litigation finance in the insolvency space; (c) understanding of solicitors' obligations as officers of the Court, and their obligations to their clients; and (d) understanding of the requirements of the AFSL. Litigation Capital Management considered persons holding a current solicitor's practising certificate in Australia and members of the Institute of Chartered Accountants should be deemed to satisfy the above requirement, and litigation funders should not be required to meet the training and qualification standards with regards to the provision of broader financial product advice.

Reporting and transparency

16.52 Allens and Omni Bridgeway submitted that the requirements of an AFSL for litigation funders in class actions should include reporting standards and obligations to ASIC.⁶⁹

16.53 Litigation Capital Management recommended that the AFSL requirements which apply to litigation funders should be tailored to require all funders to regularly lodge publicly available audited financial statements. It was considered that this transparency would give clients and defendants clear visibility as to the litigation funder's resources and their ability to meet a prospective adverse costs order.⁷⁰

Conflicts of interest

16.54 Reporting and disclosure requirements with respect to conflicts of interest were also recommended.⁷¹ There are no obligations on an AFSL holder to regularly report to ASIC on the arrangements for the management of conflicts of interest concerning paragraph 912A(1)(aa).

16.55 MinterEllison further suggested that, although litigation funders have been brought within the AFSL regime, ASIC Regulatory Guide 248 should remain in place as it provides specific guidance that is tailored for licensed third-party litigation funders.⁷²

Dispute resolution

16.56 The Federal Court's oversight role in class actions and the involvement of the Australian Financial Complaints Authority (AFCA) was considered to be 'incompatible' by Slater and Gordon.⁷³ Concern was raised about how the timelines and processes of the Federal Court and AFCA would co-exist and intersect, and the conflicts that may arise in that regard.⁷⁴

16.57 Litigation Capital Management queried the appropriateness of AFCA as a resolution forum for complaints relating to litigation funding in class actions. It submitted that AFCA is an inappropriate forum for the resolution of consumer complaints about funders, as it may impede the efficient resolution of the litigation by the court. Further, there are risks that this will 'fetter or usurp'

⁶⁹ See, for example, Allens, *Submission 69*, p. 12; Omni Bridgeway, *Submission 73*, p. 23.

⁷⁰ Litigation Capital Management, *Submission 23*, p. 8; see also Chartered Accountants ANZ, *Submission 58*, p. 4.

⁷¹ See, for example, Chartered Accountants ANZ, *Submission 58*, p. 4; Omni Bridgeway, *Submission 73*, p. 23.

⁷² MinterEllison, *Submission 25*, p. 9.

⁷³ Slater and Gordon, *Submission 18*, p. 8.

⁷⁴ Professor Vicki Waye, *Submission 5*, p. 4.

court supervisory functions and questions arise regarding confidentiality in the litigation context.⁷⁵

16.58 ALFA was concerned that AFCA's dispute resolution processes may place responsible entities of a MIS in a position of conflict in complying with court directions. To address this, amendments to the Corporations Act were suggested to the effect that all class members, and potential class members, are deemed to be 'wholesale' clients. This would mean that litigation funders could obtain a 'wholesale only' AFSL and therefore would not be subject to the obligation to become members of AFCA.⁷⁶

16.59 Alternatively, ALFA suggested:

...litigation funding should be expressly carved out from AFCA's jurisdiction where the complaint arises from the licensee's compliance with the Court Rules, a Court order or direction, or where appropriate resolution of a complaint as determined by AFCA would be in conflict with a Court Rule, Court order, direction or other Court Supervision.⁷⁷

Other concerns

16.60 Questions were raised with respect to how the requirements of the AFSL regime add to the existing statutory requirements and contractual practices of litigation funding. One observation was that the obligations placed on AFSL holders to act honestly, fairly and efficiently adds little to existing obligations imposed under sections 12BF, 12CB and 12DA of the ASIC Act.⁷⁸

16.61 Further, the necessity of the requirement to issue a PDS was questioned in addition to the terms and conditions in a litigation funding agreement, particularly as litigation funding provides non-recourse finance to class members.⁷⁹ With respect to the PDS requirements, Instrument 787 modifies some of the required information of a PDS in order to 'ensure that the overarching objective of clear, concise and effective disclosure is satisfied and that the information disclosed is not confusing or misleading'.⁸⁰

⁷⁵ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 84; Litigation Capital Management, *Submission 23*, p. 14; see also Association of Litigation Funders of Australia, *Submission 57.1*, p. 12.

⁷⁶ Association of Litigation Funders of Australia, *Submission 57.1*, p. 12.

⁷⁷ Association of Litigation Funders of Australia, *Submission 57.1*, p. 13.

⁷⁸ Professor Vicki Waye, *Submission 5*, p. 3. These provisions relate to unfair terms of consumer contracts and small business contracts; unconscionable conduct in connection with financial services; and misleading or deceptive conduct.

⁷⁹ Professor Vicki Waye, *Submission 5*, p. 3. Balance Legal Capital, *Submission 13*, p. 3, noted that litigation funding is non-recourse so that if the case loses, the litigation funder loses its investment and claimants have no downside risk.

⁸⁰ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020, cl. 11.

16.62 Another concern expressed was the risk that a licensing regime may unnecessarily stifle competition among funders and thus artificially inflate the cost of funding.⁸¹ This could have flow on effects for putative class members by limiting accessibility to litigation funding or having the significant additional overhead costs of complying with the AFSL requirements passed on to class members. Ultimately, the outcome would be smaller returns for class members and larger profits for litigation funders.⁸²

Managed investment scheme

16.63 Numerous submitters expressed concern about the appropriateness and suitability of the application of the MIS regime to litigation funding in class actions. A general characterisation adopted by some participants to the inquiry was that this change was 'trying to force the funded class action square peg down the MIS round whole'.⁸³

16.64 Some submitters considered that the MIS regime was not fit for purpose for litigation funding regardless of any modifications that could be made.⁸⁴ Others considered that the MIS can be appropriately amended to be workable and suitable for litigation funding.⁸⁵

⁸¹ See, for example, Associate Professor Sulette Lombard and Professor Christopher Symes, *Submission 4*, p. 4; Professor Vince Morabito, *Committee Hansard*, 24 July 2020, p. 10; Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 3; Professor Vince Morabito, *Submission 6*, p. 1; Premier Litigation Funding Management, *Submission 20*, p. 5.

⁸² See, for example, Associate Professor Sulette Lombard and Professor Christopher Symes, *Submission 4*, p. 4; Investor Claim Partner Pty Ltd, *Submission 7*, pp. 8–9; Mr Andrew Roman, *Submission 8*, p. 3; Balance Legal Capital, *Submission 13*, p. 6; Slater and Gordon, *Submission 18*, p. 2; Premier Litigation Funding Management, *Submission 20*, p. 5; Therium Capital Management (Australia) Pty Ltd, *Submission 29*, p. 4.

⁸³ Mr John Walker, Chairman, Association of Litigation Funders of Australia, *Committee Hansard*, 24 July 2020, pp. 32; see also Mr Ben Hardwick, Head of Class Actions, Slater and Gordon, *Committee Hansard*, 27 July 2020, p. 31; Ms Susanna Taylor, Senior Investment Manager, Litigation Capital Management, *Committee Hansard*, 24 July 2020, pp. 44; Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 4; Professor Vicki Waye, *Submission 5*, p. 4; Slater and Gordon Lawyers, *Submission 18*, p. 7; Augusta Ventures (Australia) Pty Ltd, *Submission 31*, p. 16; Association of Litigation Funders of Australia, *Submission 57.1*, p. 3.

⁸⁴ Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 22; Professor Peta Spender, *Submission 50*, p. 5; Shine Lawyers, *Submission 35*, p. 10. Dr Michael Duffy, *Submission 47*, pp. 2–3, considered that time will tell whether these regulations are sufficiently flexible to be adapted to litigation funding.

⁸⁵ See, for example, Omni Bridgeway, *Submission 73*, pp. 2, 23; Mr Andrew Saker, Managing Director and Chief Executive Officer, Omni Bridgeway, *Committee Hansard*, 13 July 2020, p. 50; Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 34; Mr Greg Golding, Member, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 22. The Association of Litigation Funders of Australia, opposes the application of the MIS to litigation funders but was willing and able to constructively seek to minimise the negative

16.65 Mr Andrew Watson, Principal Lawyer at Maurice Blackburn Lawyers commented:

[The MIS regime] is ill-adapted for what is essentially not an investment in the traditional sense. This is not an investment in olive groves that don't subsequently bear any fruit. It's not an investment in timber plantations. This is a situation where by design people don't put any of their own money upfront, and at the end of the process, people are recompensed in a way that is supervised by a court. So the managed investment scheme regulation is inherently ill-adapted for litigation funding...⁸⁶

Intention and scope of the MIS regime

16.66 Submissions noted that, previously, Treasury and ASIC had expressed a certain viewpoint on litigation funding constituting an MIS:

We note that in many respects the managed investment scheme regime was not conceived with class actions in mind and thus does not operate in a meaningful way when it is applied to class actions.

...

This position was also supported by the recommendation of the Turnbull Review of the Managed Investment Act to explicitly exclude class actions and costs paid for legal proceedings from the definition of managed investment scheme for reasons of clarity and certainty.⁸⁷

16.67 Concerns arose with respect to the incompatibility between litigation funding and the types of products to which the MIS regime contemplates or naturally applies.⁸⁸ It was noted that the MIS provisions are directed towards funds management and are unsuitable for non-recourse lending.⁸⁹ Omni Bridgeway submitted:

Many of the concepts do not apply well to funded class actions. The typical concerns of the MIS regime are protecting other people's money, whereas in a class action it is the funder's money that is at risk.⁹⁰

16.68 Professor Michael Legg submitted that the application of the MIS regime to litigation funding in class actions would either be 'too broad or too narrow', with

consequences by recommended specific modifications to tailor the its application to litigation funding, *Submission 57.1*, p. 2.

⁸⁶ *Committee Hansard*, 27 July 2020, p. 32.

⁸⁷ Maurice Blackburn Lawyers, *Submission 37*, p. 35, citing Australian Securities and Investments Commission, *Submission 72 to the Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, September 2018, [80]–[81]; see also Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 22; Phi Finney McDonald, *Submission 87*, pp. 19–20.

⁸⁸ See, for example, *Litigation Capital Management, Submission 23*, p. 9; Allens, *Submission 69*, p. 11.

⁸⁹ Balance Legal Capital, *Submission 13*, p. 3, noted that litigation funding is non-recourse so that if the case loses, the litigation funder loses its investment and claimants have no downside risk.

⁹⁰ Omni Bridgeway Limited, *Submission 73*, p. 23.

the application of 'onerous obligations that aren't necessary', or cases will fall outside the scope of the regulation which should be subject to it.⁹¹

Impact on the opt-out nature of class actions

16.69 The interaction between the MIS regime and the opt-out nature of class actions was a principal concern to some submitters. The issue raised was that if class members participate in an MIS by accepting a PDS, this would shift class actions to an opt-in model.⁹²

16.70 This concern has been addressed in the relief provided in Instrument 787.⁹³ Firstly, Instrument 787 makes clear the fact that class members are not always identified, or identifiable, through the different treatment of 'active' and 'passive' class members. Relief is provided from the obligation to give a PDS to 'passive'⁹⁴ members of an open litigation funding scheme on the condition that the PDS is available of the MIS operator's website and referred to in any advertising material.⁹⁵

16.71 Further, another difficulty of applying the MIS requirements to open class actions is the requirement in the MIS regime that a registered MIS must set up and maintain a register of members and convene member meetings.⁹⁶ As noted above, ASIC has a no-action position on the requirement to maintain a member register.⁹⁷

⁹¹ Professor Michael Legg, *Committee Hansard*, 13 July 2020, p. 34.

⁹² See, for example, Litigation Capital Management, *Submission 23*, p. 10; Association of Litigation Funders of Australia, *Submission 57.1*, p. 6.

⁹³ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020.

⁹⁴ A 'passive' member of an MIS is defined as a class member who has not signed a litigation funding agreement, has not entered into a legal retainer with the lawyer, or has not notified the funder or the lawyer that the person agrees to, or wishes to, participate in the MIS: ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020, definition of 'passive member'.

⁹⁵ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020, cl. 5, 6.

⁹⁶ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020, cl. 8; *Corporations Act 2001*, ss. 168(a), s. 196. See Association of Litigation Funders of Australia, *Submission 57.1*, p. 6; Australian Investments and Securities Commission, *Submission 39*, pp. 14, 17.

⁹⁷ Australian Securities and Investments Commission, 'No-action position for responsible entities of certain registered litigation funding schemes in relation to member registers', 21 August 2020, asic.gov.au/media/5759483/20200818-litigation-funding-no-action-position.pdf (accessed 20 November 2020).

'Responsible entity' of an MIS

16.72 This section expands on some of the points made in the following comment by Professor Duffy:

Regulation as a managed investment scheme seems particularly inapt for [third-party litigation funding]. The requirements of a constitution, compliance plan and a responsible entity seem to be ill fitted to the arrangements between lawyers, funders and litigants. At a stretch, the funder might perform some of the functions of the responsible entity and the agreements between the parties may have some aspects of a constitution and compliance plan (possibly enhancing disclosure between the parties) but this seems to be a severe straining of the regulatory regime.⁹⁸

16.73 Questions were raised about the 'operator' of a MIS. As explained above, the 'responsible entity' operates the MIS. Litigation Capital Management submitted that a litigation funder does not 'operate' a MIS.⁹⁹ Rather, it is the representative plaintiff who provides the instructions to the lawyers and the lawyers who have the day-to-day operation of the class action case. Litigation Capital Management queried how a litigation funder could be understood to 'operate' the MIS if its role is only to finance the legal costs.¹⁰⁰

16.74 The Legal Profession Uniform Law prohibits law firms from promoting or operating an MIS.¹⁰¹ However, subsequent to the July 2020 reforms, the Legal Profession Uniform General Rules 2015 was amended to provide a grace period until 22 August 2021 for law practices to provide legal services in relation to an MIS despite an associate of the law practice having an interest in the MIS or the responsible entity for the MIS, if the MIS is a litigation funding scheme.¹⁰²

16.75 Professor Vicki Waye observed another, yet related, challenge with litigation funders as the 'responsible entity' of a litigation funding scheme. The 'responsible entity' is required to act in the interests of members rather than its own interests if a conflict arises. Professor Waye considered that placing 'fiduciary like' obligations on litigation funders is inappropriate as the litigation funder is the party underwriting the litigation and placing its assets at risk. Professor Waye submitted:

Rather, the best placed party to act in the interests of class members is the class law firm not the funder. Imposing stronger than currently articulated

⁹⁸ Maurice Blackburn Lawyers, *Submission 37*, p. 36, citing Michael Duffy, 'Two's company, three's a crowd? Regulating third party litigation funding, claimant protection in the tripartite contract, and the lens of theory', *University of NSW Law Journal*, vol. 39, p. 165.

⁹⁹ To 'operate' a MIS refers to the acts which constitute the management of or carrying out the activities which constitute a MIS: *Corporations Act 2001*, s. 601FB.

¹⁰⁰ See, for example, Litigation Capital Management, *Submission 23*, p. 12; Ms Susanna Taylor, Senior Investment Manager, Litigation Capital Management, *Committee Hansard*, 24 July 2020, p. 44.

¹⁰¹ *Legal Profession Uniform Law (NSW)*, s. 258.

¹⁰² *Legal Profession Uniform General Rules 2015*, cl. 91BA.

burden on class law firms to ensure that funding arrangements are in the class members' best interest and made on the best possible terms would be a more apposite and effective means to protecting class member interests.¹⁰³

16.76 ALFA noted:

If funders are deemed to be the operators of the MISs, they will be required to be responsible entities with duties as non-recourse lenders to act in the best interests of unknown people in open classes to whom the capital is advanced. A law which requires funders to act in the best interests of borrowers would be unique and clearly capable of detrimentally affecting availability of capital and its pricing.¹⁰⁴

Scheme property

16.77 Questions were also raised about 'scheme property' in a litigation funding scheme. First, the requirement on the funder to identify scheme property and hold it separately from the other property of the responsible entity was described as challenging because of the contingent nature of the class members' claims. Moreover, the Association for Litigation Funders of Australia submitted that the unsuitability of the MIS regime is illustrated by the fact that scheme property cannot include a funder's promise to fund the litigation.¹⁰⁵

16.78 Second, the requirement to value scheme property is challenging due to the contingent nature of the settlement benefits and unknown legal costs.¹⁰⁶ The relief measures in Instrument 787 include relief from the obligation to value scheme property.¹⁰⁷

Scheme constitution

16.79 Several difficulties were noted with respect to the requirement of an MIS constitution. An MIS constitution requires certain elements, including the consideration to be paid to acquire an interest in the MIS, the powers of the responsible entity relating to making investments, complaints and winding up. Professor Waye observed that aspects of an MIS constitution lack utility as litigation funders make no investments on behalf of class members and winding

¹⁰³ Professor Vicki Waye, *Submission 5*, p. 4.

¹⁰⁴ Association of Litigation Funders of Australia, *Submission 57.1*, p. 6.

¹⁰⁵ Association of Litigation Funders of Australia, *Submission 57.1*, p. 5.

¹⁰⁶ See, for example, Professor Vicki Waye, *Submission 5*, p. 4; Association of Litigation Funders of Australia, *Submission 57.1*, p. 11; Omni Bridgeway, *Submission 73*, p. 23.

¹⁰⁷ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020, cl. 7. Australian Securities and Investments Commission Corporations (Litigation Funding Schemes) Instrument 2020/787, *Explanatory Statement*, 21 August 2020, p. 5, ASIC noted 'Given the potential uncertainty as to the nature and characterisation of scheme property of a litigation funding scheme, and how it might best be valued, ASIC has formed the view that an exemption from the obligation to value scheme property at regular intervals is appropriate at this time'.

up provisions are redundant because litigation funders do not hold scheme property.¹⁰⁸

16.80 Further, pursuant to the MIS provisions, the constitution must make provision for member withdrawals while the scheme is liquid. The responsible entity of a registered MIS must not allow a member to withdraw from an MIS that is not liquid other than in accordance with the MIS' constitution and sections 601KB to 601KE of the Corporations Act.

16.81 Professor Waye expressed concern about this requirement in the litigation funding context. ALFA was similarly concerned.¹⁰⁹ An MIS is liquid when 80 per cent of the scheme's property is liquid. However, as non-assignable claims are not liquid assets, therefore, all litigation funding schemes are illiquid schemes.¹¹⁰

16.82 The regulatory relief provides an exemption from the application of the withdrawal provisions in the MIS regime.¹¹¹ It was recognised that the Federal Court Rules for class actions specifically provide for how and when a general member may withdraw from a class action. In the Explanatory Statement to Instrument 787, ASIC stated:

ASIC takes the view that requiring responsible entities of litigation funding schemes to comply with the withdrawal rules in sections 601KB to 601KE of the Act is not necessary in the light of the specific provision for withdrawals set out in the court rules.¹¹²

Multiple MISs

16.83 ALFA recommended the introduction of a new 'in kind' licence authorisation so as to allow for multiple MISs to be registered under one authorisation, rather than requiring a separate authorisation for each MIS.¹¹³

Interplay between the courts and ASIC

16.84 A concern raised by submitters, such as Litigation Capital Management, was the interaction of the MIS regime and the court's powers and processes regarding class action and litigation funders:

...great care needs to be taken in introducing an MIS regime to ensure that the regime does not usurp or fetter the Court's powers, or interfere with the Courts' overarching purpose of facilitating the just resolution of disputes

¹⁰⁸ Professor Vicki Waye, *Submission 5*, p. 4.

¹⁰⁹ Association of Litigation Funders of Australia, *Submission 57.1*, pp. 10, 12.

¹¹⁰ Professor Vicki Waye, *Submission 5*, p. 4.

¹¹¹ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020, cl. 9.

¹¹² Australian Securities and Investments Commission Corporations (Litigation Funding Schemes) Instrument 2020/787, *Explanatory Statement*, 21 August 2020, p. 6.

¹¹³ Association of Litigation Funders of Australia, *Submission 57.1*, p. 13.

according to law as quickly, inexpensively and efficiently as possible. It must be an explicit feature of any introduced regime that Court Rules and orders must prevail if a conflict arises with the operation or regulation of the MIS.¹¹⁴

16.85 ALFA noted that regulating litigation funding in class actions would create an interface between the courts and ASIC. It was submitted that the financial services regulation would need to be 'submissive' to the court's oversight. ALFA recommended a provision to the effect that in the instance of a conflict between the MIS regime and court oversight, the latter will prevail.¹¹⁵

Committee view

16.86 Evidence to the committee demonstrated broad support for greater regulation of the litigation funding industry, albeit acknowledging that regulation needs to be appropriate.

16.87 The committee considers that, on balance, the Australian Government's move to apply the AFSL and MIS regimes to litigation funders financing class actions in Australia is a step in the right direction. The regulation of litigation funding in class actions is now appropriately aligned with that which applies to other financial services.

16.88 The committee notes that both the Australian Government and the Australian Securities and Investments Commission recognised that the AFSL and MIS schemes needed certain modifications in order to ensure they did not impose an undue regulatory burden on the litigation funding industry. After consulting with stakeholders, ASIC has provided relief to enable the implementation of the AFSL and MIS regimes to litigation funders.

16.89 Aspects of the relief respond to and address concerns raised during the inquiry. The committee acknowledges the greater level of concern among stakeholders with respect to the application and implementation of the MIS regime to litigation funding schemes, compared to the AFSL regime.

16.90 However, and importantly, relief has been provided for various requirements of the AFSL and MIS regimes so as to cater for the opt-in nature of the class action regime and to avoid impediments to class actions being on an open basis. In addition, concerns were expressed in submissions about the interplay of the MIS requirements and court processes. Relief from compliance with the requirements regarding how a member may withdraw from a litigation funding scheme illustrates that the regulation can be modified so as to give prominence to court rules and processes.

16.91 Noting the above relief, the committee considers that a fit-for-purpose MIS regime tailored for litigation funders is necessary to achieve efficient and

¹¹⁴ Litigation Capital Management, *Submission 23*, p. 11.

¹¹⁵ Association of Litigation Funders of Australia, *Submission 57.1*, pp. 7, 9.

effective regulation. Therefore, the committee is recommending that the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders.

16.92 The committee notes concerns about whether not-for-profit litigation funders may be subject to the litigation funding regulations. The committee is therefore recommending that the Australian Government consult on the best way to provide regulatory clarity for not-for-profit litigation funders.

16.93 The committee notes that windfall returns to litigation funders, prudential matters and court supervision are not addressed by the AFSL and MIS regimes. Other chapters in this report contain the committee's consideration, conclusions and recommendations on those matters.

Recommendation 28

16.94 The committee supports the regulations issued by the Treasurer which clarify that litigation funders require an Australian Financial Service License and that they be regulated as Managed Investment Schemes. Noting that ASIC has provided relief from a number of MIS requirements, the committee recommends the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders. However, the committee recommends that the Australian Government consult on the best way to exempt not-for-profit litigation funders who held charitable status at the time the regulations were issued, have run no more than three class actions in the last five years, and exist solely to support and protect the members of the associated charitable entity.

Part 5
Final matters

Chapter 17

Shareholder class actions and litigation funding

Introduction

- 17.1 As the data in Chapter 4 illustrate, the recent increase in class actions can be almost wholly attributed to the spike in shareholder class actions in 2017 and 2018.¹ The proliferation of shareholder class actions in that period was a key concern for some stakeholders given the undesirable outcomes for companies, shareholders, the insurance market and the economy.
- 17.2 Shareholder class actions often rely on a breach of either continuous disclosure or the misleading or deceptive conduct provisions of the *Corporations Act 2001* (Corporations Act).² Indeed, many shareholder class actions were grounded in both continuous disclosure and misleading or deceptive conduct claims.³ Submissions which expressed concern about the economically inefficient nature of shareholder class actions emphasised the link between the statutory thresholds to establish a breach of continuous disclosure and the increasing prevalence of shareholder class actions.
- 17.3 Prior to a temporary amendment introduced by the Australian Government during the COVID-19 pandemic, there was no requirement to prove fault associated with continuous disclosure. In 2020, this was amended to introduce a requirement to prove fault for both private and regulatory actions with allegations of contraventions of continuous disclosure.
- 17.4 Much of the evidence received on the issue of shareholder class actions discussed the merit of this amendment. There was a focus on whether it achieves the stated objective of preventing companies' exposure 'to the threat of opportunistic class actions for allegedly falling foul of their continuous disclosure obligations if their forecasts are found to be inaccurate'.⁴ The evidence was sharply divided.

¹ See Allens, *Class Actions Risk 2018*, p. 3; Business Council of Australia, *Submission 86*, p. 4; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An inquiry into Class Action Proceedings and Third Party Litigation Funders*, Report No. 134 (2018), p. 76; Australian Institute of Company Directors, *Submission 40*, p. 3; King & Wood Mallesons, *The Review: Class Actions in Australia 2019/20*, p. 4.

² Attorney-General's Department, *Submission 93*, p. 5; Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.2*, Annexure A.

³ King & Wood Mallesons, *The Review: Class Actions in Australia 2019/20*, pp. 6–9.

⁴ The Hon Josh Frydenberg MP, Treasurer, 'Temporary changes to continuous disclosure provisions for companies and officers', *Media Release*, 25 May 2020.

17.5 Accordingly, the first part of this chapter canvasses submitters' views on why shareholder class actions are an economically inefficient mechanism for remedying civil wrongdoing. The remainder of the chapter focuses on the evidence received on the merits of Australia's current continuous disclosure laws. This includes a comparison with the continuous disclosure laws in international jurisdictions, and the views expressed during the inquiry with respect to:

- the extent to which the COVID-19 amendments achieve their intended objectives;
- the arguments for and against making permanent the COVID-19 amendments; and
- options to limit the negative impacts of shareholder class actions.

Economic inefficiency of shareholder class actions

17.6 Stakeholders outlined various reasons why shareholder class actions are not in the public interest and are economically inefficient:

- defendants incur significant costs in defending shareholder class actions, which are largely borne by shareholders;
- the main beneficiaries of shareholder class actions are litigation funders and the class action lawyers, whose costs and commissions absorb a large portion of settlement sums; and
- there are broader negative impacts of shareholder class actions on companies' operational costs and economic growth.

Significant impacts on defendants and shareholders

17.7 On average, securities class actions seek between \$50 million and \$75 million in compensation.⁵ For a case to progress to the mediation stage, legal costs to defend the class action are typically around \$10 million.⁶ This burden often falls on a listed entity's shareholders.

17.8 In a successful shareholder class action, including claims for a breach of the continuous disclosure requirements, the compensation paid to the affected shareholder class members is extracted from other shareholders, thus creating another set of victims. There is limited impact on the directors and officers of

⁵ Business Council of Australia, *Submission 86*, p. 4; See also XL Catlin & Wooton + Kearney, *Show me the money! The impact of securities class action on the Australian D&O Liability insurance market*, Whitepaper 2, September 2017, p. 9.

⁶ XL Catlin & Wooton + Kearney, *Show me the money! The impact of securities class action on the Australian D&O Liability insurance market*, Whitepaper 2, September 2017, p. 8.

the company who were responsible for the breach or contravention of the law. This is known as the 'circularity problem'.⁷

Reduced returns for class members

- 17.9 Shareholder class actions typically disproportionately benefit litigation funders rather than plaintiffs in those proceedings, with the costs of litigation falling on the shareholders of the listed entity.⁸
- 17.10 The following table sets out the data, collated in a report by King & Wood Mallesons, of shareholder class actions with allegations of continuous disclosure (often among other allegations, such as a breach of misleading or deceptive conduct) which were settled between July 2019 and June 2020.⁹ This data illustrates that the transaction costs involved in shareholder class actions are significant and large portions of the settlement amount flow to the class action lawyers and litigation funders. In summary, the costs incurred in these shareholder class actions consumed between 20 to 60 per cent of settlement sums across those cases.
- 17.11 The table itemises the settlement sum, the applicant's costs (legal and other costs), the sum or portion of the settlement that the litigation funder received, the administration costs for running the class action and the amount received by each class member. The settlement figure is the gross settlement including the applicant's legal costs, unless otherwise noted.¹⁰

⁷ Paul Miller, 'Shareholder class actions: Are they good for shareholders?', *Australian Law Journal*, vol. 86, 2012, pp. 635–637; see, for example, King & Wood Mallesons, *Submission 53*, p. 5; Australian Securities Exchange Limited, *Submission 72*, pp. 1–2. Professor Kevin Davis, *Submission 79*, pp. 1–2.

⁸ Australian Securities Exchange Limited, *Submission 72*, p. 2.

⁹ King & Wood Mallesons, *The Review: Class Actions in Australia 2019/20*, pp. 6–9.

¹⁰ Some sums are rounded up.

Table 17.1 Settlements for class actions related to continuous disclosure, July 2019 – June 2020

Case	Settlement /damages	Applicant's costs	Litigation funding costs	Admin. costs	Class member payments (each)	Total costs (%)	Matters Raised
Sirtex ¹¹	\$40m	\$9.28m	\$10.214m	\$250,000	\$25,000x2	50	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations
Forge ¹²	\$16.5m	\$4.2m	\$3.95m (commission) + \$90,000 (reimbursement)	Included in costs	\$10,000	50	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations
Webster ¹³	\$37.5	\$5.207m + \$118,475 (contradictor costs)	\$8.62m	Not disclosed	\$15,000	32	Breach of continuous disclosure obligations, misleading or deceptive conduct disclosure obligations
Endeavour River ¹⁴	\$42m	\$2.562m + \$19,310 (special referee costs)	\$10.7m (commission) + \$5,717 (reimbursement)	\$130,000	\$12,500	31.5	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations

¹¹ Kuterba v Sirtex Medical Limited (No 3) [2019] FCA 1374.

¹² *Rushleigh Services Pty Ltd v Forge Group Limited (in liquidation) (Receivers and Managers appointed)* [2019] FCA 2113.

¹³ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053.

¹⁴ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968.

UGL ¹⁵	\$18m	\$5.95m	\$4.05m (commission) + \$15,054 (reimbursement)	Included in costs	\$82,281	50	Breach of continuous disclosure obligations
Ballamy's 1 ¹⁶	\$30m	\$3.561m	28.99%	\$203,264	\$30,000	40	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations
Ballamy's 2 ¹⁷	\$19.7m	\$3.592m	28.99%	\$135,793	\$25,000	47	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations
CIMIC ¹⁸	\$32.4m	\$10.828m	\$8.6m	\$94,051	\$25,000	60	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations
Vocus ¹⁹	\$35m	\$2.131m	\$3.897m (commission) + \$886,986 (reimbursement)	\$265,427	\$15,500	20.5	Breach of continuous disclosure obligations, misleading or deceptive conduct obligations

Source: King & Wood Mallesons, *The Review: Class Actions in Australia 2019/20*, pp. 6–9.

¹⁵ *Clime Capital Limited v UGL Pty Limited* [2020] FCA 66.

¹⁶ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461.

¹⁷ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461.

¹⁸ *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited* [2020] FCA 510.

¹⁹ *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579.

Undesirable economic outcomes

17.12 Shareholder class actions place upward pressure on the price of directors' and officers' (D&O) insurance, impact the willingness of directors to take on roles on Australian boards, and create a risk-averse decision-making environment within companies.

Price of D&O insurance

17.13 The committee heard concerns about the impact of shareholder class actions on D&O insurance.²⁰ D&O insurance policies are personal liability policies that cover directors and officers for legal liability arising out of claims made against them in respect of their managerial decisions.

17.14 Australian D&O insurance premiums rose faster than anywhere else in the world in 2019.²¹ The Australian Institute of Company Directors (AICD) considered that the D&O insurance market is deteriorating with premiums increasing rapidly. Premium increases of more than 50 per cent have become common.²² The Business Council of Australia indicated that D&O insurance premiums are now between \$5 million and \$10 million (up from \$500 000 - \$800 000) for coverage of between \$100 million and \$200 million.²³

17.15 The AICD and the Business Council of Australia suggested that shareholder class actions are the most significant driver for the increased cost of D&O insurance in Australia.²⁴ Ashurst submitted that shareholder class actions are impacting the ability of listed entities and their directors to insure against that risk.²⁵ Indeed, it was highlighted that some insurers are unwilling to provide D&O cover, and are exiting from the Australian market.²⁶

17.16 Marsh Pty Ltd indicated that increases in the costs of D&O insurance were affecting the whole market, not just listed companies. As a result, not-for-profit organisations and small and medium-sized businesses were paying higher

²⁰ Clayton Utz, *Submission 26*, p. 10.

²¹ Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 2.

²² Australian Institute of Company Directors, *Submission 40*, p. 5.

²³ Business Council of Australia, *Submission 86*, p. 4.

²⁴ Australian Institute of Company Directors, *Submission 40*, p. 5; Business Council of Australia, *Submission 86*, p. 4, argued that shareholder class actions are causing a dramatic rise in D&O insurance premiums, with an average increase of 118 per cent in 2019.

²⁵ Ashurst, *Submission 41*, p. 1.

²⁶ See, for example, Australian Institute of Company Directors, *Submission 40*, p. 5; Business Council of Australia, *Submission 86*, pp. 1–2; see also Minter Ellison, *Submission 25*, p. 13. Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 2, noted that Allianz and Lloyd's of London syndicates Neon, Pioneer and Acapella, have withdrawn from the market. Chubb, Zurich and Vero have introduced restrictions so strict they amounted to a de facto withdrawal.

premiums, despite not being involved as defendants in shareholder class actions. Marsh Pty Ltd noted the potential for the premium increases to stifle entrepreneurship, investment and growth when the economy can least afford it.²⁷

17.17 Other submitters were less convinced that premium rises were driven primarily by the increase in class action activity. Shine Lawyers and Investor Claim Partner argued that the increases in D&O insurance might be a result of increased corporate misconduct, rather than a problem with class actions.²⁸

17.18 It was also suggested that D&O insurance premiums may be rising as a result of the findings of the Financial Services Royal Commission and the Australian Securities and Investments Commission's 'why not litigate' policy.²⁹ Omni Bridgeway noted that D&O insurance covers a wide range of potential claims in addition to those associated with shareholder class actions.³⁰

17.19 Omni Bridgeway also proposed an alternative explanation for premium rises—that D&O insurance may have been substantially under-priced for a long time. As a result, recent rises in premiums were reflecting risks that were previously present, but not priced, in the market.³¹

Disincentive to fulfil directors and officers roles

17.20 Companies need experienced leaders to drive financial sustainability and growth through innovation. Insurance was described as a 'risk mitigation tool with appropriate cover being crucial to attracting and retaining skilled and dedicated directors to Australian boards'.³²

17.21 The AICD and MinterEllison speculated that if insurance cover for securities claims (Side C cover) is less available, it is more likely that directors and officers would be defendants in shareholder class actions. That may affect the ability of companies to attract and retain appropriately qualified and experienced directors and officers.³³

²⁷ Mr Scott Leney, Marsh Pty Ltd, *Committee Hansard*, 27 July 2020, p. 49.

²⁸ See, for example, Investor Claim Partner Pty Ltd, *Submission 7*, p. 17; Shine Lawyers *Submission 35*, p. 6.

²⁹ See, for example, Association of Litigation Funders of Australia, *Submission 57*, p. 7; Omni Bridgeway, *Submission 73*, pp. 29–31; AXA XL Insurance Reinsurance, *Underwriting Directors and Officers Insurance...what's the right price?* D&O White paper, 2019, p. 18.

³⁰ Omni Bridgeway, *Submission 73*, p. 31.

³¹ Omni Bridgeway, *Submission 73*, pp. 29–30.

³² Australian Institute of Company Directors, *Submission 40*, p. 5.

³³ See, for example, Minter Ellison, *Submission 25*, p. 14; Australian Institute of Company Directors, *Submission 40*, p. 9.

17.22 Blue Energy, a small listed oil and gas exploration company, submitted that it has abandoned the idea of holding insurance cover for securities claims as it is out of its financial reach. It expressed concern that the upward trend of the cost of D&O insurance will have a severe impact on the ability of companies to attract experienced officeholders.³⁴ Health Industry Companies also expressed concern with respect to the decreasing availability and increasing cost of D&O insurance on a board's ability to attract and retain directors and senior executives.³⁵

Risk-averse decision-making

17.23 The Business Council of Australia submitted that shareholder class actions imposed disproportionate costs on business and presented significant risks to economic growth.³⁶ The Business Council of Australia also argued that shareholder class actions create risk-averse, compliance-oriented companies with harmful long-term impacts on economic growth and job creation and investors' returns on equity.³⁷

17.24 The AICD submitted that data indicates that Australian boards are generally conservative and risk-averse. The AICD's latest director sentiment index for the first half of 2020 shows that 74 per cent of directors agree there is a risk-averse decision-making culture on Australian boards.³⁸ The main reason given for this is the excessive focus on compliance over performance. Allens raised similar concerns:

...[T]he risk of shareholder class actions has resulted in an over-concentration on continuous disclosure discussions at the board level, sometimes at the expense of other matters such as pursuing profit making objectives of the company for the benefit of shareholders.³⁹

Shareholder class actions and continuous disclosure

17.25 Submissions identified that a key factor driving the increasing prevalence of shareholder class actions is the interaction between the class action regime and the continuous disclosure laws as they existed prior to the temporary amendments made to the continuous disclosure test during the COVID-19 pandemic.⁴⁰

³⁴ Blue Energy, *Submission 42*, p. 2.

³⁵ Health Industry Companies, *Submission 74*, p. 17.

³⁶ Business Council of Australia, *Submission 86*, pp. 1–2.

³⁷ Business Council of Australia, *Submission 86*, p. 2.

³⁸ Australian Institute of Company Directors, *Submission 40*, p. 5.

³⁹ Allens, *Submission 69*, p. 4.

⁴⁰ Australian Institute of Company Directors, *Submission 40*, pp. 4–5.

17.26 Some submissions highlighted that a combination of the following factors influence the high prevalence of shareholder class actions with claims of a contravention of continuous disclosure:

- a strict liability continuous disclosure obligation for listed entities;
- minimal threshold requirements for the commencement of class action claims and no certification procedures;
- access to evidence collected by ASIC; and
- the growing litigation funding market.⁴¹

17.27 The 2018 review conducted by the Australian Law Reform Commission (ALRC) considered the interaction of class actions and continuous disclosure. The review identified concerns related to:

- a greater propensity for Australian companies to be the target of funded shareholder class actions;
- falls in the value of shareholdings of companies subject to class actions; and
- the impact on the availability of D&O insurance.⁴²

17.28 As noted above, temporary changes were made to remove the strict liability requirement in continuous disclosure. Given that this threshold was considered by submitters to be a key factor in the prevalence of shareholder class actions with continuous disclosure claims, much of the evidence received on shareholder class actions focused on this amendment. Accordingly, this section considers Australia's continuous disclosure laws and their recent amendment. This includes exploring differing views on the effectiveness and desirability of the changes as expressed by submitters.

Australia's continuous disclosure requirements

17.29 Continuous disclosure is part of a broader corporate law system which aims to find an appropriate balance in the control of companies by managers, and the accountability of managers to shareholders.⁴³

17.30 For entities listed on the ASX, the continuous disclosure requirements that the entity must satisfy are detailed in Chapter 3 of the Listing Rules. Listing Rule 3.1 sets out the continuous disclosure rules. Listed entities are required to provide

⁴¹ See, for example, Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3; Allens, *Submission 69*, p. 4; Michael Legg, 'Shareholder class actions in Australia – the perfect storm?' *University of New South Wales Law Journal*, vol. 31, no. 3, 2008 p. 669; Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 12.

⁴² Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 263.

⁴³ *Financial Services Reform Act 2001*. The continuous disclosure regime is one of the responses to the 1987 stock market crash. At the time it was noted that the crash could have been avoided or limited by timely and adequate disclosure of relevant information to investors and shareholders.

market-sensitive information that would have a material effect on the share price.⁴⁴

17.31 Section 674 of the Corporations Act states that listed disclosing entities must follow disclosure requirements in the Listing Rules.⁴⁵ Section 674 of the Corporations Act provides a right for any person who suffers loss as a result of a contravention of ASX Listing Rule 3.1 to seek compensation from the relevant listed company and any person involved in the contravention.

17.32 Box 17.1 provides information on the nature of material and market-sensitive information, the tests and processes to be applied for continuous disclosure and relevant defences and safe-harbours.

Box 17.1 Aspects of continuous disclosure in Australia

Material and market-sensitive information

Information is considered material if its omission, misstatement or non-disclosure has the potential to adversely affect:

- decisions about the allocation of scarce resources made by users of the financial report; or
- the discharge of accountability by the management or governing body of the entity.⁴⁶

The ASX states that market-sensitive information includes matters of fact, opinion and intention, such as:

- a transaction that significantly changes an entity's activities;
- a material mineral or hydrocarbon discovery;
- a material acquisition or disposal;
- the granting or withdrawal of a material licence;
- the entry into, variation or termination of a material agreement;
- becoming a plaintiff or defendant in a material lawsuit;
- if earnings will be materially different from market expectations;
- the appointment of a liquidator, administrator or receiver;
- the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
- under subscriptions or over subscriptions to an issue of securities;
- giving or receiving a notice of intention to make a takeover; and

⁴⁴ Australian Securities Exchange Limited, *Submission 72*, p. 2; Australian Securities Exchange Limited, *ASX Listing Rules*, Listing Rule 3.1, 1 December 2019, p. 301, provides 'once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information'.

⁴⁵ *Corporations Act 2001*, s. 674.

⁴⁶ *Accounting Standard AASB 1031*, 1995, pp. 7–8.

- any rating applied by a rating agency to an entity or its securities.⁴⁷

Tests to be applied

The ASX has developed an Abridged Guide to continuous disclosure, which describes the test for determining whether information is market sensitive as follows:

...a reasonable person is taken to expect information to have a material effect on the price or value of an entity's securities if the information 'would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of' those securities.⁴⁸

It should be noted that the test in section 677 [of the Corporations Act] is an objective one and the fact that an entity's officers may honestly believe that information is not market sensitive and therefore does not need to be disclosed will not avoid a breach of Listing Rule 3.1, if that view is ultimately found to be incorrect.⁴⁹

It should be noted that a listed entity must disclose information under Listing Rule 3.1 and section 674 [of the Corporations Act], even if does not appear to be in its short term interests to do so (eg because the information might have a materially negative impact on the price of its securities and jeopardise a transaction that it is trying to conclude). It must also comply with those obligations even where it is party to a confidentiality or non-disclosure agreement that might otherwise require it to keep information confidential.⁵⁰

Application to litigation funders

Litigation funders may be subject to continuous disclosure laws in two ways. First, any listed litigation funder is subject to the same continuous disclosure laws as other listed companies. Second, the Australian Securities and Investments Commission (ASIC) noted that the application of Managed Investment Scheme laws to litigation funders might lead to litigation funders being subject to continuous disclosure laws.⁵¹

Defences and safe harbours

⁴⁷ Australian Securities Exchange Limited, *Continuous Disclosure: An Abridged Guide*, p. 3. The ASX Abridged Guide to continuous disclosure suggests that company officers should ask themselves the following questions and if the answer to either is yes, the information may be market sensitive. (1) Would this information influence my decision to buy or sell securities in the entity at their current market price? (2) Would I feel exposed to an action for insider trading if I were to buy or sell securities in the entity at their current market price, knowing this information had not been disclosed to the market?

⁴⁸ Australian Securities Exchange Limited, *Continuous Disclosure: An Abridged Guide*, p. 3.

⁴⁹ Australian Securities Exchange Limited, *Continuous Disclosure: An Abridged Guide*, p. 3.

⁵⁰ Australian Securities Exchange Limited, *Continuous Disclosure: An Abridged Guide*, p. 4.

⁵¹ Australian Securities and Investments Commission, *Submission 39*, p. 19.

Defences and safe-harbours may protect directors and officers in some circumstances. There is a due diligence defence in subsection 674(2B) of the Corporations Act, which protects officers if they can prove that they took all steps that were reasonable in the circumstances to ensure that the entity complied with its continuous disclosure obligations. The due diligence defence available to directors and officers is not open to the company.⁵²

The Corporations Act also contains safe-harbour provisions which protect directors from personal liability if their conduct is reasonably likely to result in a better outcome for a company at risk of actual or potential insolvency. These provisions allow directors to take reasonable risks to turn the company around, without immediately commencing administration or liquidation processes.⁵³

Relief

The Corporations Act also contains provisions that can provide relief from liability for civil claims in some circumstances. Dr Michael Duffy drew attention to section 1317S of the Corporations Act.⁵⁴ If a person thinks that proceedings will or may begin against them, they can apply to the court for relief. If the person appears to have breached a civil penalty provision but has acted honestly, the court may find that the person can be excused for the breach. Similar relief from certain breaches of the common law is also available in section 1318.⁵⁵ The precursors to section 1317S and 1318 were developed between 1890 and 1910 in response to liabilities faced by directors.⁵⁶

The AICD noted that sections 1317S and 1318 provide a wide discretion for the courts, and drew attention to a relevant case:

In *Daniels v Anderson* (1995) 37 NSWLR 438 at 525, the NSW Court of Appeal in considering an equivalent provision to section 1318 of the Act stated that the purpose of the section is to 'excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are businessmen and women who act in an environment involving risk in commercial decision-making.'⁵⁷

The AICD also noted the difference between relief and defence provisions, observing that relief provisions generally operate to relieve a person of liability if

⁵² Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 261.

⁵³ Law Institute of Victoria, *Submission 3*, p. 15.

⁵⁴ Dr Michael Duffy, *Submission 47*, p. 5.

⁵⁵ *Corporations Act*, s. 1317S, 1318.

⁵⁶ *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, 205–212.

⁵⁷ Australian Institute of Company Directors, *The honest and reasonable director defence – A proposal for reform*, 2014, p. 18.

the person is found to be in breach of the law, whereas a defence may prevent a finding that there has been a breach of the law.⁵⁸

Recent changes to right to seek compensation for breach of continuous disclosure

17.33 On 25 May 2020, the Australian Government announced temporary amendments to continuous disclosure to enable companies and officers to more confidently provide guidance to the market during the COVID-19 crisis. On 23 September 2020, the amendments were extended until 23 March 2021.⁵⁹ The amendments were permitted pursuant to special determination powers granted to the Treasurer during the COVID-19 pandemic under section 1362A of the Corporations Act.⁶⁰

What has been temporarily amended?

17.34 The amendment removed the strict liability (no requirement to prove fault) associated with continuous disclosure. That is, the amendments temporarily replace the objective tests in paragraphs 674(2)(b) and 675(2)(b) of the Corporations Act.

17.35 Accordingly, the test for establishing a contravention of the continuous disclosure requirement is:

... whether the entity knows, or was reckless or negligent with respect to whether that information would, if it were generally available, have a material effect on the price or value of the entity's ED securities.⁶¹

17.36 Importantly, the amendments apply to private claims via class actions, as well as to civil regulatory action by ASIC:

All civil consequences of breaching the continuous disclosure provisions are affected by this Determination. This includes all civil consequences enforced by the Australian Securities and Investments Commission, including infringement notices for breaches of the continuous disclosure provisions under Part 9.4AA of the Act.⁶²

⁵⁸ Australian Institute of Company Directors, *The honest and reasonable director defence – A proposal for reform*, 2014, p. 18.

⁵⁹ The Hon Josh Frydenberg MP, Treasurer, 'Extension of temporary changes to continuous disclosure provisions for companies and officers', *Media Release*, 23 September 2020.

⁶⁰ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, p. 1.

⁶¹ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, p. 3.

⁶² Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, p. 4; See also Mr Daniel Crennan QC, Deputy Chair, Australian Securities and Investments Commission, *Committee Hansard*, 29 July 2020, p. 28.

17.37 The requirement to prove recklessness or negligence has not removed the obligation on listed companies to disclose market-sensitive information continuously.⁶³

17.38 The amendments apply to any future civil actions (even after the determination is repealed) regarding alleged breaches that were committed while the determination was in force.⁶⁴ After the amendments are automatically repealed (currently 23 March 2021), the protections provided by the amendments immediately cease. As a result, companies may be required to disclose information immediately after the repeal of the determination.⁶⁵

Objective of the temporary amendment

17.39 In making the announcement, the Australian Government argued that the amendments would help to reduce the prospect of class actions against companies operating under the circumstances of the pandemic:

The heightened level of uncertainty around companies' future prospects as a result of the crisis also exposes companies to the threat of opportunistic class actions for allegedly falling foul of their continuous disclosure obligations if their forecasts are found to be inaccurate.

In response, companies may hold back from making forecasts of future earnings or other forward-looking estimates, limiting the amount of information available to investors during this period.

The changes announced today will make it harder to bring such actions against companies and officers' during the Coronavirus crisis while allowing the market to continue to stay informed and function effectively.⁶⁶

What remains unchanged by the temporary amendment?

17.40 In addition to the continuous disclosure obligations, there are prohibitions on engaging in conduct that is misleading or deceptive. A failure to disclose, or inaccurate disclosures, may be subject to enforcement action under misleading or deceptive provisions.⁶⁷

17.41 CPA Australia noted that the continuous disclosure regime sits alongside and interacts in a complex manner with provisions in the Corporations Act and in the *Australian Securities and Investment Commission Act 2001* (ASIC Act) that

⁶³ The Rule of Law Institute of Australia, *Submission 99*, p. 7.

⁶⁴ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, p. 4.

⁶⁵ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, p. 4.

⁶⁶ The Hon Josh Frydenberg MP, Treasurer, 'Temporary changes to continuous disclosure provisions for companies and officers', *Media Release*, 25 May 2020.

⁶⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 261.

prohibit a person from engaging in misleading or deceptive conduct, for which there are differing defences.⁶⁸

17.42 Submitters noted that the COVID-19 amendments do not apply to the use of misleading or deceptive conduct laws in shareholder class actions.⁶⁹ For example, Norton Rose Fulbright submitted that:

However, we note that the Determination (in addition to not impacting on criminal proceedings) does not preclude civil proceedings – and therefore class actions – from being commenced in connection with a disclosure omission under the misleading and deceptive conduct provisions of the Corporations Act. Consequently, the interim safe harbour may not in the end lead to any significant reduced threat of shareholder class actions pleading COVID-19 related disclosure deficiencies.⁷⁰

17.43 Some submitters suggested that a fault element or due diligence defence should also apply to misleading or deceptive conduct provisions to provide sufficient protection for companies to give and update guidance.⁷¹ In the United States, the analogous deceptive practices law has been interpreted by the Supreme Court to require 'intent to deceive, manipulate, or defraud'.⁷²

Return to the pre-2002 test

17.44 The statutory provisions for breaches of continuous disclosure laws in Australia have changed over time.⁷³

17.45 Following the 1987 stock market crash, a number of reforms were introduced in 1992 to prohibit companies from 'intentionally, recklessly or negligently' failing to comply with continuous disclosure obligations in the ASX Listing Rules. Intentional or reckless breaches were criminal offences, but civil penalties were not available.⁷⁴

17.46 During development of the 1992 reforms it was considered whether liability should fall on directors, or the company. The Corporations and Securities Advisory Committee (CASAC) suggested that the reporting obligations and liabilities for continuous disclosure should rest on the directors and not on the company itself. CASAC suggested that director liability would encourage

⁶⁸ CPA Australia, *Submission 44*, p. 5.

⁶⁹ See, for example, MinterEllison, *Submission 25*, p. 10; Ashurst, *Submission 41*, pp. 5–6; King & Wood Mallesons, *Submission 53*, p. 5; Health Industry Companies, *Submission 74*, pp. 18–19.

⁷⁰ Norton Rose Fulbright, *Submission 45*, p. 10.

⁷¹ Australian Institute of Company Directors, *Submission 40*, p. 13; King & Wood Mallesons, *Submission 53*, p. 5; Business Council of Australia, *Submission 86*, pp. 7–8.

⁷² Australian Institute of Company Directors, *Submission 40*, p. 13.

⁷³ Australian Securities Exchange Limited, *Submission 72*, p. 2.

⁷⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 261–262.

directors to ensure compliance and avoid possible detriment to investors or creditors from giving shareholders the right to sue the company. However, continuous disclosure provisions introduced in 1992 applied liability to the company.⁷⁵

17.47 In 2002, further amendments were made to the continuous disclosure regime, which added civil penalties and removed the requirement to prove intent or fault for civil claims, while retaining a requirement to establish causation.⁷⁶

Comparison with international continuous disclosure regimes

17.48 Australia's continuous disclosure laws have some similarities and differences to laws in other jurisdictions. While the ASX Listing Rules are similar, some aspects of the statutory regimes and penalties are different. This section discusses the differences and similarities with other jurisdictions, the tests for private and regulator claims, and defences or safe-harbours for forward-looking statements.

17.49 Table 17.2 summarises the continuous disclosure obligations, tests for breaches and the civil liabilities, penalties and safe-harbours that may apply to companies, directors and officers. The table includes information for Australia, Canada, Hong Kong, South Africa, the United Kingdom (UK) and the United States (US) that was collated for the AICD by Herbert Smith Freehills.⁷⁷

Similarities

17.50 Herbert Smith Freehills suggested that the ASX Listing Rules create a sensible and balanced continuous disclosure regime that protects investors and ensures the operation of a fair and informed market.⁷⁸ The regulatory burden created by

⁷⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 261–262; Corporate and Securities Advisory Committee, Parliament of Australia, *Report on Enhanced Statutory Disclosure System*, 1991, p. 24.

⁷⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 262; See also King & Wood Mallesons, *Submission 53*, p. 5.

⁷⁷ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), Attachments 1 and 2. The Herbert Smith Freehills analysis that is attached to the AICD's submission provides further details on each of the categories.

⁷⁸ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), p. 1.

the ASX Listing Rules on continuous disclosure is similar to that imposed by the relevant securities exchanges in other comparable jurisdictions.⁷⁹

Differences

17.51 There are several areas in which Australia's corporate disclosure and liability civil regime is different to other comparable jurisdictions and the following subsections discuss some examples.

Test for private and regulator claims

17.52 The COVID-19 amendments discussed in the previous section temporarily remove the strict liability (no requirement to prove fault) for both private actions and regulatory actions concerning civil claims. For private actions, one area of difference between Australia and other jurisdictions is the test for private claims. The associated lack of a requirement to prove fault is not a feature of the continuous disclosure regime in some comparable jurisdictions such as the US and UK.⁸⁰

17.53 The 2020 amendments align Australia with the US and UK, but not with Canada, Hong Kong and South Africa. However, the amendments also remove strict liability for regulatory claims by ASIC, which appears to be unique among comparable jurisdictions (see Table 17.2).

17.54 Some stakeholders observed these differences in submissions. The U.S. Chamber Institute for Legal Reform submitted that in its view, Australia has a plaintiff-friendly class action system and one of the most onerous continuous disclosure private enforcement regimes in the world.⁸¹

17.55 The AICD summarised its view as follows:

By way of contrast, in the US and the UK, the link to liability under legislation is more remote, requiring an element of misleading conduct or misbehaviour on the part of the company and its officers. In some of the other smaller jurisdictions, where the legislative framework is closer to the Australian provisions, the disclosure requirements are not linked with class action laws. For example, Hong Kong does not currently have a class action regime.⁸²

17.56 In England and Wales, negligence is not a sufficient ground for liability, and the claimant must establish that the conduct of the company directors or officers

⁷⁹ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), p. 1.

⁸⁰ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), p. 1.

⁸¹ U.S. Chamber Institute for Legal Reform, *Submission 21*, p. 2.

⁸² Australian Institute of Company Directors, *Submission 40*, pp. 4–5.

was reckless or dishonest.⁸³ Claimants must also show that they placed reasonable reliance on the statement (or omission) in making their investment decision.⁸⁴

Defences or safe-harbours for forward-looking statements

17.57 In the US, a safe-harbour exemption may apply to forward-looking disclosures. Cautionary statements are required to identify important factors that could cause company results to differ materially from those in the disclosure. The safe-harbour applies to private civil actions but not to civil and criminal enforcement actions by regulators. Canada has a similar defence for forward-looking disclosures.⁸⁵

17.58 In Australia, there is no safe-harbour or defence provided by identifying a disclosure as a forward-looking or including a cautionary statement.⁸⁶ Under subsection 728(2) of the Corporations Act, disclosures about a future matter require reasonable grounds for making the statement. A court may order any person involved in making such a misleading statement to pay compensation to any person who suffers damage. An officer may also be held liable for misleading statements made by a company.⁸⁷

⁸³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 267–268.

⁸⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 279.

⁸⁵ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), p. 2.

⁸⁶ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), p. 2.

⁸⁷ Australian Institute of Company Directors, *Submission 40*, Appendix 1 (Herbert Smith Freehills, Advice on comparative analysis of international corporate disclosure and liability regimes, June 2018), p. 2.

Table 17.2 Comparison of continuous disclosure civil liabilities

Continuous disclosure civil liabilities	Australia	Canada	Hong Kong	South Africa	United Kingdom	United States
Continuous disclosure obligation	Yes	Yes	Yes	Yes	Yes	Yes
Intentional, reckless or negligent (non-strict liability) test for private claims against the company	Yes since COVID-19 amendments	No	No	No	Yes	Yes
Intentional, reckless or negligent (non-strict liability) test for regulator action on company ⁸⁸	Yes since COVID-19 amendments	No	No	No	No	No
Company defences or safe-harbours	No	Yes	Yes	No	No	Yes
Directors and officers liable if the company breaches	Yes	Yes	Yes	Yes	Yes	Yes
Directors, officers defences, safe-harbours	Yes	Yes	No	No	No	Yes

⁸⁸ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, p. 4.

Penalties for false or misleading statements	Yes	Yes	Yes	Yes	Yes	Yes
Requirements for forward-looking statements	Yes	No	No	Yes	No	Yes
Directors personally liability for forward-looking statements	Yes	Yes	Yes	Yes	Yes	Yes
Safe-harbour for forward-looking statements	No	Yes	No	No	Yes	Yes
Market causation claims allowed (Myer decision) ⁸⁹	Yes	No	No	No	No	Yes
Certification or screening process ⁹⁰	No	Yes	N/A	Yes	Yes	Yes

Source: Australian Institute of Company Directors, Submission 40, Herbert Smith Freehills advice on Comparative analysis of international corporate disclosure and liability regimes, June 2018, Attachments 1 and 2.

⁸⁹ Australian Institute of Company Directors, *Submission 40*, p. 15; XL Catlin & Wooton + Kearney, *How did we get here? The history and development of securities class actions in Australia*, Whitepaper 1, May 2017, p. 8.

⁹⁰ Australian Institute of Company Directors, *Submission 40*, p. 15; XL Catlin & Wooton + Kearney, *How did we get here? The history and development of securities class actions in Australia*, Whitepaper 1, May 2017, p. 8.

Effectiveness of the COVID-19 amendments

- 17.59 Some submitters and witnesses have raised concerns about whether the COVID-19 amendments to continuous disclosure laws are sufficiently clear and effective in meeting their stated objective.
- 17.60 The Association of Litigation Funders of Australia suggested that companies are being warned by defendant law firms not to place too much weight on the COVID-19 amendments.⁹¹
- 17.61 Maurice Blackburn questioned whether companies were required to give forecasts under the ASX Listing Rules and therefore whether the amendments were necessary at all.⁹²
- 17.62 Ashurst contended that there is a lack of clarity about whether the negligence requirement in the continuous disclosure amendments provides any practical barrier to claims.⁹³ Dr Michael Duffy submitted that the operation of the amendments might be uncertain because they mix issues of objective materiality with corporate knowledge or negligent behaviour.⁹⁴
- 17.63 While Allens welcomed and supported the amendments to continuous disclosure laws, it identified that the COVID-19 amendments only protect from a breach of the continuous disclosure laws where the failure was due to an innocent (and non-negligent) mistake about price impact and does not protect any other form of innocent breach. For example, where the company incorrectly takes the view that the information is too inherently uncertain to warrant disclosure; or where the information is known to one officer but not others.⁹⁵
- 17.64 It was also put to the committee that the COVID-19 amendments may not provide the intended protection because the negligence test depends on what a reasonable person would expect.⁹⁶ Allens submitted that:

The inclusion of a negligence standard, rather than only the subjective fault elements of knowledge and recklessness, retains the objective 'reasonable person' element of the unmodified test, because the standard test for negligence also hinges on what a 'reasonable person' would expect. As such, there is a real question whether the temporary amendment provides any material protection from civil liability compared to the unmodified test.⁹⁷

⁹¹ Association of Litigation Funders of Australia, *Submission 57*, p. 2.

⁹² Maurice Blackburn Lawyers, *Submission 37*, pp. 57–59.

⁹³ Ashurst, *Submission 41*, pp. 5–6.

⁹⁴ Dr Michael Duffy, *Submission 47*, p. 5.

⁹⁵ Allens, *Submission 69*, pp. 4, 8.

⁹⁶ See, for example, Allens, *Submission 69*, p. 8; Health Industry Companies, *Submission 74*, pp. 18–19.

⁹⁷ Allens, *Submission 69*, p. 8.

17.65 Professor Peta Spender identified a potential inconsistency between the amendments and the ASX Listing Rules, regarding a reasonable person test. The amendments replaced the reasonable person standard with a new temporary test of whether the entity knows or was reckless or negligent. However, the amended continuous disclosure obligations rely on the ASX Listing Rule 3.1, which uses the reasonable person test.⁹⁸

17.66 Dr Michael Duffy noted that a negligence test might already exist depending on how corporate knowledge is used in non-disclosure and the application of the ASX Listing Rules between shareholders and corporations.⁹⁹

17.67 When extending the amendments in September 2020, the Treasurer indicated that the amendments were working as intended:

Importantly evidence to date shows that the temporary exemption has assisted companies to continue to update the market during this difficult and uncertain time. In fact, Treasury has identified that there has been an increase in the number of material announcements to the market during the period the relief has been in place, relative to the same period last year.

So while this temporary measure has not detracted from information being provided to the market, it has made it harder to bring such actions against companies and officers during the coronavirus crisis and while allowing the market to continue to stay informed and function effectively.¹⁰⁰

Support of and opposition to the temporary amendment to continuous disclosure

17.68 One of the main points of contention in the inquiry was whether civil claims about continuous disclosure breaches should have to prove fault on the part of the company. Submitters' arguments for and against the current continuous disclosure regime, as amended by the COVID-19 determination, are explored.

⁹⁸ Professor Peta Spender, *Submission 50*, p. 5.

⁹⁹ Dr Michael Duffy, *Submission 47*, p. 5.

¹⁰⁰ The Hon Josh Frydenberg MP, Treasurer, 'Extension of temporary changes to continuous disclosure provisions for companies and officers', *Media Release*, 23 September 2020.

Arguments for the pre-COVID-19 status quo

17.69 The committee received representations arguing against the COVID-19 amendments.¹⁰¹ The following paragraphs discuss views of submitters, including:

- market integrity and efficiency;
- investor protection;
- preventing corporate misconduct;
- maintaining trust and the reputation of Australia's markets;
- the impact on retail investors;
- the economic significance of capital markets;
- unintended consequences for capital raising;¹⁰² and
- a level playing field for companies who comply with pre-COVID-19 continuous disclosure laws.¹⁰³

Integrity, efficiency and reputation of Australia's market

17.70 The efficient operation of markets requires share prices to reflect all available information.¹⁰⁴ Investors rely on the accuracy of the information to determine the value of the company.¹⁰⁵ Investors and shareholders can have confidence that they are participating in a market unaffected by material omission or deception.¹⁰⁶

17.71 Continuous disclosure rules reduce information asymmetry and engender trust in Australia's markets. Continuous disclosure laws contribute to the strong reputation of the markets. A permanent relaxation of continuous disclosure

¹⁰¹ See, for example, Law Institute of Victoria, *Submission 3*, p. 16; Professor Peta Spender, *Submission 50*, pp. 4–5; Shine Lawyers, *Submission 35*, pp. 20–21; Maurice Blackburn Lawyers, *Submission 37*, p. 59; HESTA, *Submission 28*, p. 4; AustralianSuper, *Submission 48*, p. 2; Australian Council of Superannuation Investors, *Submission 61*, p. 1; Omni Bridgeway, *Submission 73*, p. 1; Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 2; Phi Finney McDonald, *Submission 87*, p. 31.

¹⁰² Australian Securities and Investments Commission, *Opening Statement*, 29 July 2020, pp. 3–4. See also Australian Securities and Investments Commission, *Submission to Australian Law Reform Commission Inquiry into class action proceedings and third party litigation funders*, September 2018, p. 3; Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 259.

¹⁰³ Therium Capital Management (Australia) Pty Ltd, *Submission 31*, p. 3.

¹⁰⁴ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 259.

¹⁰⁵ HESTA, *Submission 28*, p. 4.

¹⁰⁶ Law Institute of Victoria, *Submission 3*, p. 16.

rules may have far-reaching consequences contrary to shareholders' interests, the viability of securities markets and the availability of capital.¹⁰⁷

17.72 In its submission to the ALRC inquiry, ASIC noted that the continuous disclosure obligations protect shareholders, promote market integrity and influence the reputation of Australia's financial markets. ASIC noted that the economic significance of fair and efficient capital markets (\$1.84 trillion market capitalisation) 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.¹⁰⁸ Shine Lawyers argued for caution in modifying the continuous disclosure regime, given the critical role of continuous disclosure protecting the investments of vast sums of capital.¹⁰⁹

Impact on retail investors

17.73 Mr Rod Gibson and Augusta Ventures (Australia) was opposed to the COVID-19 amendments due to the impact on retail investors.¹¹⁰ For example, Augusta Ventures (Australia) stated to the committee that:

There is voluminous academic research confirming an efficient market requires the availability of timely accurate and readily accessible information. This is even more critical where the market includes a large number of "retail" investors which is the case in Australia with around 35% of ordinary Australians holding listed shares. Many developed economies also have continuous disclosure regimes to enhance market integrity and transparency.¹¹¹

Corporate misconduct

17.74 Some submitters suggested increasing disclosure addresses corporate misconduct highlighted by the Financial Services Royal Commission and the increasing number of ASX speeding tickets.¹¹² ASX speeding tickets (formally ASX aware letters) are sent to companies when the ASX has concerns about

¹⁰⁷ See, for example, Litigation Capital Management, *Submission 23*, pp. 5, 7, 24; Maurice Blackburn Lawyers, *Submission 37*, pp. 57–59.

¹⁰⁸ Australian Securities and Investments Commission, *Submission to Australian Law Reform Commission Inquiry into class action proceedings and third party litigation funders*, September 2018, p. 3; ASIC's submission 39 to the litigation funding inquiry indicated that its submission to the ALRC contained relevant information that it did not repeat, p. 3.

¹⁰⁹ Shine Lawyers, *Submission 35*, p. 5.

¹¹⁰ See, for example, Mr Rod Gibson, *Submission 19*, p. 3; Augusta Ventures (Australia) Pty Ltd, *Submission 29*, p. 7.

¹¹¹ Augusta Ventures (Australia) Pty Ltd, *Submission 29*, p. 7.

¹¹² Associate Professor Sean Foley and Dr Angelo Aspris, *Submission 78*, p. 2.

whether a company has disclosed market-sensitive information at the appropriate time under continuous disclosure laws.¹¹³

17.75 Maurice Blackburn suggested that investors were not in favour of the amendments, because they may be used to protect poor quality disclosure about matters unrelated to COVID-19 at a time when the investment community most needs reliable information.¹¹⁴

Anchor point of regulatory regime

17.76 Continuous disclosure laws are an anchor point for other elements of Australia's regulatory regime, including low document capital raising and insider trading. ASIC also described the importance of continuous disclosure for preventing insider trading:

An effective continuous disclosure regime should minimise the potential for insider trading and other forms of market abuse that may stem from companies withholding or selectively disclosing materially price sensitive information.

Our research found that over the past ten years, there has been a sustained improvement in cleanliness of Australia's listed equity market. It suggests that insider information and the loss of confidentiality ahead of material announcements has declined. Around 95% of material announcements exhibited no (or negligible) anomalous trading patterns ahead of an announcement in the period 1 November 2014 to 31 October 2015.¹¹⁵

Deterrence

17.77 The Australian Competition and Consumer Commission (ACCC) supported retaining the pre-COVID arrangements around class actions and litigation funding to ensure businesses are effectively deterred from conduct that harms consumers and small businesses. The ACCC noted that the threat of further costs from damages payouts resulting from private litigation can be the difference between a party profiting from, or being deterred from, unlawful conduct.¹¹⁶

Arguments for making the COVID-19 amendments permanent

17.78 This section highlights the key arguments put to the committee for making the COVID-19 amendments to the continuous disclosure laws permanent.

¹¹³ Australian Securities Exchange Limited, *ASX Listing Rules Guidance Note 8*, p. 62.

¹¹⁴ Maurice Blackburn Lawyers, *Submission 37*, pp. 57–59.

¹¹⁵ Australian Securities and Investments Commission, *Submission to Australian Law Reform Commission Inquiry into class action proceedings and third party litigation funders*, September 2018, p. 3; ASIC's submission 39 to the litigation funding inquiry indicated that its submission to the ALRC contained relevant information that it did not repeat, p. 3.

¹¹⁶ See, for example, Australian Competition and Consumer Commission, *Submission 15*, p. 3; See also Investor Claims Partner Pty Ltd, *Submission 7*, p. 7.

Impact on market integrity and insider trading

17.79 The ASX welcomed and supported the COVID-19 amendments and indicated that the reforms had not changed the way it monitors and enforces continuous disclosure rules. The ASX stated:

We don't see the steps taken to date as inconsistent with strong and effective continuous disclosure rules and the maintenance of market integrity, and those remain our primary focus.¹¹⁷

17.80 The ASX also noted that permanent reform consistent with the amendments should not reduce the quality of disclosure by listed entities. The ASX indicated it was confident in the enforcement powers that it and ASIC have.¹¹⁸

17.81 River Capital suggested that making the amendments permanent would not weaken insider trading protections and that it would be beneficial because it would:

- reduce the increases in director and officer insurance premiums;
- discourage opportunistic litigation funders;
- encourage disclosure in times of uncertainty; and
- remove obstacles for attracting and retaining quality directors.¹¹⁹

Plaintiffs should have to prove fault

17.82 Some submitters argued that the fault element should be made permanent.¹²⁰ River Capital suggests that it would be in the interest of all stakeholders in Australian capital markets if liability were limited to circumstances in which there is a degree of fault.¹²¹

17.83 River Capital noted that the amendments restore a due diligence defence to continuous reporting that is present for other documents regulated by the Corporations Act, including prospectuses.¹²²

17.84 Yarra Capital Management suggested that the COVID-19 amendments provide an opportunity to road test continuous disclosure reforms that:

- require plaintiffs to demonstrate some level of intent or fault;
- include due diligence defences for companies and their officers; and

¹¹⁷ Mr Daniel Moran, Group General Counsel and Company Secretary, Australian Securities Exchange Limited, *Committee Hansard*, 29 July 2020, p. 29.

¹¹⁸ Australian Securities Exchange Limited, *Submission 72*, p. 2.

¹¹⁹ River Capital, *Submission 32*, p. 4.

¹²⁰ See, for example, Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3; River Capital, *Submission 32*, p. 4; Norton Rose Fulbright, *Submission 45*, p. 10; PwC, *Submission 85*, p. 3; Business Council of Australia, *Submission 86*, p. 3.

¹²¹ River Capital, *Submission 32*, p. 3.

¹²² River Capital, *Submission 32*, p. 4.

- make Australia less appealing to litigation funders.¹²³

Additional recommendations for reform to continuous disclosure

17.85 Some submitters supported further amendments to the continuous disclosure regime in addition to the temporary measures introducing a requirement to prove fault, including:

- providing further defences and safe-harbours;
- limiting action for an alleged contravention of continuous disclosure requirements to ASIC; and
- placing caps on damages for findings of a breach of continuous disclosure requirements.

Defences and safe-harbours

17.86 Several submitters drew attention to the importance of defences and safe-harbours in the COVID-19 amendments and the potential for them to apply to other obligations.¹²⁴ For example, the Business Council of Australia recommended continuing the COVID-19 amendments, adding due diligence defences for misleading or deceptive conduct, and reasonable steps defences for commercial judgments made by directors and officers.¹²⁵ The Australian Finance Industry Association argued for a broader safe-harbour provision with a good faith test.¹²⁶

Limiting action to ASIC

17.87 Submitters proposed public enforcement of continuous disclosure and misleading or deceptive conduct laws by ASIC and removing the rights for private actions.¹²⁷ For example, King & Wood Mallesons submitted that:

The Corporations Act and ASIC Act should be amended to provide for a defence on the part of issuers from civil compensation liability where the conduct (i.e., disclosure or omission to disclose, or misleading conduct) is not intentional, reckless or negligent. Such a defence could be limited to claims for civil compensation on the part of private claimants only. The current strict position on continuous disclosure could, if thought consistent with appropriate public policy aims, be maintained so as to allow regulators

¹²³ Yarra Capital Management, *Submission 71*, pp. 1–2.

¹²⁴ See, for example, Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3; River Capital, *Submission 32*, p. 4; Ashurst, *Submission 41*, p. 2; Business Council of Australia, *Submission 86*, p. 1.

¹²⁵ Business Council of Australia, *Submission 86*, p. 1.

¹²⁶ See, for example, Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3; Australian Finance Industry Association, *Submission 81*, p. 2.

¹²⁷ See, for example, Australian Institute of Company Directors, *Submission 40*, p. 10; King & Wood Mallesons, *Submission 53*, p. 6; Australian Finance Industry Association, *Submission 81*, p. 2; Business Council of Australia, *Submission 86*, p. 1.

to bring enforcement action for civil penalties if they consider it necessary to do so to achieve their regulatory objectives.¹²⁸

17.88 The AICD suggested removing the right to undertake private actions for continuous disclosure breaches as an emergency and temporary measure to address the heightened uncertainty arising from the COVID-19 pandemic.¹²⁹

The AICD submitted that:

Moving to solely public enforcement, while significant, would not lead to any 'watering down' of market disclosure. ASIC would continue to enforce breaches of the law, and individuals and entities would remain liable for such breaches. There is additional regulatory protection from the ASX who oversees compliance with the Listing Rules and has a range of powers available to it.¹³⁰

17.89 The AICD also suggested considering alternative collective redress mechanisms for shareholders who have suffered a loss. One such approach could be to enable ASIC to seek compensation on behalf of affected shareholders. The benefits of such a mechanism are that it would maximise returns to class members by reducing litigation fees, as well as costs of competing claims.¹³¹

17.90 The ASX argued that a well-resourced and focused ASIC remains the best way to enforce the continuous disclosure and the underlying objectives. Regulatory enforcement provides appropriate deterrence – including through the prospect of regulatory actions being taken against individual directors and officers – and is more likely to deliver consistent regulatory outcomes. The deterrence effect of regulatory action has been enhanced recently through significantly increased penalties.¹³²

Limits on damages

17.91 The Business Council of Australia suggested putting limits on the damages for breaches of continuous disclosure laws. The Business Council of Australia noted that caps and limits on damages are used in other areas, such as motor vehicle insurance, workers' compensation insurance and a claim for economic loss against a professional.¹³³

¹²⁸ King & Wood Mallesons, *Submission 53*, p. 5.

¹²⁹ Australian Institute of Company Directors, *Submission 40*, p. 10.

¹³⁰ Australian Institute of Company Directors, *Submission 40*, p. 10.

¹³¹ Australian Institute of Company Directors, *Submission 40*, pp. 11–12.

¹³² Australian Securities Exchange Limited, *Submission 72*, p. 3.

¹³³ Business Council of Australia, *Submission 86*, pp. 9–10.

Proposals for the way forward

Review of continuous disclosure laws

17.92 The Productivity Commission's 2014 report, *Access to Justice Arrangements*, highlighted the ongoing debate about the interaction of continuous disclosure laws, class actions and litigation funding arrangements. The Productivity Commission concluded that:

... in terms of achieving a balance of risks, public debate about the underlying law is clearly more appropriate than attempting to stifle a mechanism that provides broader access to justice benefits.¹³⁴

17.93 The ALRC recommended that the Australian Government commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations and those relating to misleading or deceptive conduct.¹³⁵ The ALRC added that participants in its inquiry supported a balanced, unbiased legal and economic review of the Australian provisions and an analysis of whether there was any substance to the unforeseen and potentially adverse consequences.¹³⁶

17.94 Mr Matt Corrigan of the ALRC emphasised the finding of the ALRC's recent report that particular issues with shareholder class actions 'should be dealt with specifically and not addressed by changes to the class action procedures or litigation funding more generally'.¹³⁷

17.95 Some submissions commented on the lack of empirical evidence presently available. The Risk and Insurance Management Society noted that there is 'minimal empirical evidence as to the true impact of the current continuous disclosure and misleading or deceptive conduct regimes on the Australian class actions market'.¹³⁸ MinterEllison argued that there is a lack of evidence regarding the impact of class actions combined with the Australian corporate regulatory environment:

...there has been no in-depth, empirically-based research examining the impact of the continuous disclosure and misleading or deceptive conduct regimes on corporate Australia when coupled with exposure to an increasing number of funded shareholder class actions.¹³⁹

¹³⁴ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report, No. 72, 5 September 2014, p. 621.

¹³⁵ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 263–264.

¹³⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 265.

¹³⁷ Mr Matt Corrigan, *Committee Hansard*, 27 July 2020, p. 66.

¹³⁸ Risk and Insurance Management Society Australian Chapter, *Submission 12*, p. 3.

¹³⁹ MinterEllison, *Submission 25*, p. 1.

17.96 Shine Lawyers suggested that considering modifications to the continuous disclosure regime through the lens of class actions and litigation funding, may not provide a sufficiently broad-ranging inquiry that addresses all relevant factors.¹⁴⁰ Augusta Ventures (Australia) argued that any examination of the continuous disclosure regime deserves full consideration of the evidence, long term policy impacts and whether they deliver tangible benefits to the community.¹⁴¹

17.97 Several submitters supported the ALRC recommendation for a separate review of continuous disclosure laws.¹⁴² There were also calls for a broad review covering all relevant aspects of disclosure laws from a wide range of submitters, not just those opposed to the COVID-19 amendments.¹⁴³ Norton Rose Fulbright submitted:

We believe that longer-term law reform addressing the underlying tests for entities to disclose material, price sensitive information in the Corporations Act ought to be pursued as a core part of the Australian Government's strategy to support businesses and build towards economic recovery and growth in the next critical 12 to 24 month period. Any such law reform ought to be pursued as part of a separate inquiry, with a dedicated industry consultation process.¹⁴⁴

Extension of temporary measures

17.98 The Business Council of Australia and Allens supported permanent and comprehensive reforms to the continuous disclosure regime. The Business Council of Australia suggested extending the COVID-19 amendments until permanent reforms are put in place.¹⁴⁵

17.99 The Rule of Law Institute of Australia advocated for the extension of the COVID-19 while a review is undertaken:

¹⁴⁰ Shine Lawyers, *Submission 35*, p. 5.

¹⁴¹ Augusta Ventures (Australia) Pty Ltd, *Submission 29*, p. 7.

¹⁴² See, for example, CPA Australia, *Submission 44*, p. 5; Australian Council of Superannuation Investors, *Submission 61*, pp. 1, 3.

¹⁴³ See, for example, MinterEllison, *Submission 25*, p. 11; Clayton Utz, *Submission 26*, p. 10; Insurance Council of Australia, *Submission 68*, p. 2; Allens, *Submission 69*, p. 5.

¹⁴⁴ Norton Rose Fulbright Australian, *Submission 45*, p. 10; see also Association of Litigation Funders of Australia, *Submission 57*, p. 3; Law Council of Australia, *Submission 67*, p. 32; Mr Tom Lunn, Senior Policy Manager, Insurance Council of Australia, *Committee Hansard*, 27 July 2020, p. 48.

¹⁴⁵ See, for example, Business Council of Australia, *Submission 86*, p. 3; Allens, *Submission 69*, p. 4, it was submitted that permanent reforms should: ensure markets and investors are well informed; ensure directors and officers, and investors, are protected from unfair and unreasonable costs; penalties are fair and proportionate under an appropriate regulatory framework. Allens was also in favour of implementing more comprehensive and permanent reforms to prevent the proliferation of opportunistic shareholder class actions in Australia.

With no end in sight for the pandemic, and the economy in recession, now is not the time to increase pressure on business. The logical next step would be an extension of Frydenberg's temporary change. This would enable policy makers to take up the ALRC's suggestion and focus on the legal and economic impact of continuous disclosure - which lies at the heart of shareholder class actions - and determine whether the changes need to go further.¹⁴⁶

Restricting shareholder class actions to the federal jurisdiction

17.100 Another alternative to address the increasing prevalence of shareholder class actions is to allow the Federal Court to have exclusive jurisdiction for shareholder class actions, and more broadly class actions with respect to financial services and products.

17.101 This reform was proposed by the ALRC through a recommendation to amend Part 9.6A of the Corporations Act and section 12GJ of the ASIC Act so that exclusive jurisdiction is conferred on the Federal Court with respect to civil matters, commenced as class actions, arising under that legislation.¹⁴⁷

17.102 Claims arising under the Corporations Act and the Australian Securities and Investments Commission Act can be pursued in the Federal Court or in a state or territory Supreme Court.¹⁴⁸ A case can be transferred between the Federal Court and the state and territory Supreme Courts if it appears, having regard to the interests of justice, that it is more appropriate for the proceeding to be determined by the other Court.¹⁴⁹

17.103 The ALRC noted:

- there should be no or very limited difference in the outcome whether a matter is filed in a state Supreme Court or in the Federal Court; and
- the vast majority of securities class actions have been initiated in the Federal Court.¹⁵⁰

¹⁴⁶ The Rule of Law Institute of Australia, *Submission 99*, p. 12.

¹⁴⁷ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 126 (recommendation 7). This recommendation has not yet been implemented. See Clayton Utz, *Submission 26*, p. 6.

¹⁴⁸ *Corporations Act 2001*, s. 1337B; *Australian Securities and Investments Commission Act 2001*, s. 12GJ.

¹⁴⁹ *Corporations Act 2001*, s. 1337H; *Australian Securities and Investments Commission Act 2001*, s. 12GK.

¹⁵⁰ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 127.

- 17.104 Regarding shareholder class actions in Australia since 2010, 68 were conducted in the Federal Court, 12 in the Supreme Court of Victoria, 17 in Supreme Court of New South Wales and 2 in Supreme Court of Queensland.¹⁵¹
- 17.105 The ALRC noted the Federal Court has developed an established body of case management jurisprudence to manage cases efficiently and effectively, which is not yet present in the state courts.¹⁵² The ALRC noted that the difference in procedural practice between the courts was a factor influencing the representative plaintiff and their team's decision to file in one jurisdiction over another, with an eye to obtaining a procedural advantage.¹⁵³
- 17.106 Omni Bridgeway considered that the different rules which apply in the Federal Court and the state Supreme Courts give rise to circumstances where competing class actions are filed in both jurisdictions. Omni Bridgeway agreed with the ALRC that giving the Federal Court exclusive jurisdiction over federal laws, such as matters arising under the Corporations Act, would help eliminate the risk of competing class actions across multiple jurisdictions.¹⁵⁴
- 17.107 The Menzies Research Centre agreed that the Federal Court should have sole jurisdiction of class actions based on federal law, such as the Corporations Act and specifically with respect to securities class actions.¹⁵⁵
- 17.108 The Law Council of Australia opposed any amendment to give the Federal Court exclusive jurisdiction of class actions with claims arising from the Corporations Act. It considered that the existing powers to move cases from one jurisdiction to another, with the broad case management powers available to the courts, are adequate to deal with competing class actions in different jurisdictions. Further, conferring exclusive jurisdiction to the Federal Court would restrict litigant choice as to forum and could lead to increased delays.¹⁵⁶

¹⁵¹ Professor Vince Morabito, Department of Business Law and Taxation, Monash Business School, Ethical Regulation Research Group, Monash University, *An evidence-based approach to class action reform in Australia: shareholder class actions in Australia – myths and facts*, November 2019, p. 15.

¹⁵² Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 127; *Perera v GetSwift Limited* [2018] FCA 732 [3], [6].

¹⁵³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 127–128; *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143 [15].

¹⁵⁴ Omni Bridgeway, *Submission 73*, p. 32.

¹⁵⁵ Menzies Research Centre, *Submission 66*, p. 32; Mr James Mathias, Chief of Staff, Menzies Research Centre, *Committee Hansard*, 13 July 2020, p. 13.

¹⁵⁶ Law Council of Australia, *Submission 67*, pp. 29–30.

Alternatives to shareholder class actions

17.109 Directors and officers have broad discretion in the management of listed companies. The breadth of that discretion may allow directors and officers to act in their interests, rather than shareholders' interests. If that occurs, there are 'hidden' costs to the company's shareholders (some of the company's wealth flows to the directors and officers and away from shareholders who may suffer reduced share value or dividends). Such hidden costs are called agency costs.¹⁵⁷ A purpose of corporations law and associated regulations is to achieve accountability of directors and officers without unduly infringing on their discretionary powers.

17.110 Shareholder class actions are one of several mechanisms for limiting agency costs in listed corporations. Noting that deterrence of misconduct is one of the purposes of class actions, the ASX observed that securities class actions might have a positive impact on the governance of listed entities and the accountability of their directors and senior management, promoting greater transparency and better investor outcomes over time. However, the ASX noted that the delays associated with class actions could limit the effectiveness of the deterrence:

...the contribution of securities class actions to enforcement outcomes would be impacted by the timeliness of those proceedings, which often take many years to resolve, and the tendency of those proceedings to settle rather than proceed to judgment.¹⁵⁸

17.111 There are several other mechanisms through which agency costs can be reduced, including shareholder voting, independent directors and auditors, market forces, and actions by corporate regulators. All of the mechanisms have significant limitations. However, the use of multiple mechanisms may be effective in limiting agency costs.¹⁵⁹

Corporate regulators

17.112 Corporate regulators, including ASIC and the ASX, help reduce agency costs through their monitoring and enforcement activities. However, the capacity of corporate regulators to reduce agency costs and effectively deter wrongdoing relies on them having the appropriate regulatory powers and the willingness and resources to effectively enforce those powers.

17.113 The ASX monitors and enforces its Listing Rules and may use its censure, suspension and removal powers to manage non-compliance. The ASX is obliged

¹⁵⁷ Ian Ramsay, 'Corporate governance, shareholder litigation and the prospects for a statutory derivative action', *University of New South Wales Law Journal*, vol. 15, no. 1, 1992, p. 151; Paul Tracy, *Agency Costs*, Investing Answers, 5 August 2020, <https://investinganswers.com/dictionary/a/agency-costs> (accessed 30 September 2020).

¹⁵⁸ Australian Securities Exchange Limited, *Submission 72*, p. 2.

¹⁵⁹ Ian Ramsay, 'Corporate governance, shareholder litigation and the prospects for a statutory derivative action', *University of New South Wales Law Journal*, vol. 15, no. 1, 1992, pp. 151, 152.

as a licensed market operator to notify ASIC where the ASX has reason to suspect a significant contravention of continuous disclosure listing rules. ASIC may investigate and use enforceable undertakings, infringement notices, disqualification orders, civil penalty proceedings, and criminal prosecutions.¹⁶⁰

17.114 If a listed entity breaches Listing Rule 3.1, it may also breach subsection 674(2) of the Corporations Act. Criminal offence penalties can be up to \$110 000 and civil penalties up to \$1 million. Alternatively, if ASIC has reasonable grounds to suspect a breach, it may issue an infringement notice imposing a penalty of up to \$100 000. Under subsection 674(2A) of the Corporations Act, officers may be liable for a penalty of up to \$200 000.¹⁶¹

17.115 Over the last five years, ASIC has concluded five civil matters, two criminal matters, one enforceable undertaking and 16 administrative remedies (infringement notices).¹⁶² Concerns were raised that if corporate regulation were the only mechanism employed, then there are risks that it may become excessively bureaucratic and expand its jurisdiction over time.¹⁶³

Committee view

Shareholder class actions are inefficient and contrary to the public interest

17.116 In the committee's view, shareholder class actions are generally economically inefficient and not in the public interest.

17.117 Shareholder class actions appear to often generate excessive profits for litigation funders and lawyers at the expense of listed companies and their shareholders. The company, rather than the directors and officers, are most often the liable party in shareholder class actions. Due to the circularity problem, the unnecessarily high costs of defending the class action litigation and any settlement payments are ultimately borne by shareholders. In essence, money is being taken from one group of shareholders and passed to another to compensate the latter group for wrongdoing by directors and officers. While some individual shareholders may gain, overall shareholders are losing money, particularly long-term or passive investors.

17.118 Shareholder class actions do not appear to be limiting agency costs in corporations. Indeed, it appears that shareholder class actions may be costing shareholders more than the problems they seek to resolve. They provide limited deterrence for corporate misconduct, because those responsible for continuous

¹⁶⁰ Australian Securities Exchange Limited, *Submission 72*, p. 2.

¹⁶¹ Australian Securities Exchange Limited, *Continuous Disclosure: An Abridged Guide*, p. 1.

¹⁶² Australian Institute of Company Directors, *Submission 40*, p. 11; ASIC enforcement outcomes January 2015 to December 2019.

¹⁶³ Ian Ramsay, 'Corporate governance, shareholder litigation and the prospects for a statutory derivative action', *University of New South Wales Law Journal*, vol. 15, no. 1, 1992, p. 152.

disclosure breaches do not receive timely sanctions or bear the full costs of their actions.

17.119 Additionally, the increasing prevalence of shareholder class actions has broader undesirable outcomes on the availability and cost of D&O insurance, with consequential challenges for attracting and retaining experienced and high quality directors and officers. A culture of risk-averse decision-making across Australian boards is a further adverse outcome of shareholder class actions, with harmful long-term impacts on economic growth, job creation and investors' returns on equity.

Focus of the evidence to the committee

17.120 Evidence to the committee with respect to concerns about the increase in shareholder class actions focused on the provisions of Australia's continuous disclosure laws. As part of its response to the COVID-19 pandemic, the Australian Government moved to amend Australia's continuous disclosure laws on a temporary basis.

17.121 The temporary amendments do not address other laws used in shareholder class actions, such as misleading or deceptive conduct laws. The committee does not have information on what proportion of shareholder class actions rely on continuous disclosure versus misleading or deceptive conduct laws, and whether there were any differences in the outcomes of those cases.

17.122 Accordingly, the committee is not in a position to be definitive about whether other elements of Australia's substantive corporations law are impacting on the prevalence of shareholder class actions. Hence, the committee focuses on the connection between the continuous disclosure regime and shareholder class actions.

Shareholder class actions with claims for continuous disclosure contravention

17.123 The committee agrees with the sentiment expressed by the Productivity Commission in 2014 and the ALRC in 2018 that, to limit the adverse outcomes of shareholder class actions, focus should be placed on the underlying law—namely, continuous disclosure—rather than the procedural mechanism of class actions.

17.124 The committee recognises that continuous disclosure is an important mechanism in the efficient operation of the market. On the one hand, an effective continuous disclosure regime helps ensure transparency, thus enabling investors and shareholders to make informed decisions. On the other hand, several submitters and witnesses argued that, in too many instances, class action lawyers and litigation funders were taking advantage of Australia's continuous disclosure regime to launch opportunistic shareholder class actions.

17.125 It is clear to the committee that a balance needs to be struck. Market transparency and integrity is obviously fundamentally important.

However, a plethora of economically inefficient shareholder class actions is having a detrimental effect on business.

- 17.126 The committee notes that one of the main points of contention was whether claims about continuous disclosure breaches should have to prove fault on the part of the company.
- 17.127 The committee notes that in 2002, the Howard government lowered the threshold for bringing shareholder class actions. Prior to 2002, a fault element was needed to bring a shareholder class action based on an alleged breach of the continuous disclosure laws. In 2002, the fault element was removed. The committee notes that in 2020, the Treasurer reinstated the fault element with respect to an alleged breach of the continuous disclosure laws for both private litigants and for the regulator, ASIC.
- 17.128 The COVID-19 amendments align the requirement to prove fault for continuous disclosure breaches in Australia with requirements in other jurisdictions, such as the US and UK. Raising the bar in this manner makes it much more difficult to bring a shareholder class action.
- 17.129 The committee notes that some submitters were also in favour of a broader review of substantive laws related to shareholder class actions. The committee considers that allowing the COVID-19 amendments to lapse (currently 23 March 2021), pending a review, would be disruptive to business while it deals with the continuing challenges associated with the COVID-19 pandemic.
- 17.130 In the committee's view, the most appropriate approach going forward would be to retain the fault element. This would stem the flow of opportunistic class actions and brings the fault element requirement in Australia into line with comparable jurisdictions. Accordingly, the committee considers that the most appropriate course of action is for the Australian Government to permanently legislate the laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

Restricting shareholder class actions to the federal jurisdiction

- 17.131 The committee sees merit in the proposal for class actions with claims arising under the Corporations Act and the Australian Securities and Investment Commission Act being heard solely in the Federal Court. This would eliminate issues arising from competing shareholder class actions being lodged in different jurisdictions.
- 17.132 Moreover, the primary benefit of the Federal Court having sole jurisdiction for hearing shareholder class actions is that the reforms to improve the Federal Court's procedural efficiency and to extend and enhance the Federal Court's regulation of the fees, operation and conduct of litigation funders, will apply to all securities class actions commenced in Australia. This would also avoid incentives for putative representative plaintiffs and their legal and litigation

funding team to file a class action in another jurisdiction to side step the committee's proposed reforms to strengthen the Federal Court's capability to regulate litigation funders and to address procedural inefficiencies.

17.133 Options to achieve this outcome include amending Part 9.6A of the Corporations Act and section 12GJ of the ASIC Act so that:

- there is a presumption that, in the first instance, civil matters commenced as class actions arising under that legislation are filed in the Federal Court unless it appears, having regard to the interests of justice, that it is more appropriate for the proceeding to be determined by the State or Territory Supreme Court; or
- exclusive jurisdiction is conferred on the Federal Court with respect to civil matters, commenced as class actions, arising under that legislation.

17.134 The committee recommends the Australian Government implement the second option.

Transaction costs of shareholder class actions

17.135 In addition, reforms to reduce the transaction costs of shareholder class actions set out in other chapters of this report include:

- regulation of litigation funders through the Australian Government's new requirements for financial services licensing and the application of managed investment scheme laws (Chapter 16);
- enhanced powers for courts to supervise litigation funding agreements and settlements (Chapter 11); and
- a minimum gross return to class members (Chapter 13).

Recommendation 29

17.136 The committee recommends the Australian Government permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

Recommendation 30

17.137 The committee recommends the Australian Government amend Part 9.6A of the *Corporations Act 2001* and section 12GJ of the *Australian Securities and Investments Commission Act 2001* so that exclusive jurisdiction is conferred on the Federal Court of Australia with respect to civil matters, commenced as class actions, arising under that legislation.

Chapter 18

National consistency

Introduction

- 18.1 The purpose of this chapter is two-fold. First, to demonstrate that several issues have been raised during this inquiry which are understood to be an adverse consequence of multiple class action regimes and the differences, even when minor, that exist between them.
- 18.2 Second, to highlight that several recommendations in this report would amend the Federal Court of Australia's (Federal Court) powers, practice and procedure, creating tighter regulation and oversight which would not be present in other class action regimes. A key consideration in assessing and taking forward these proposals for change is the intent for consistency across Australia's multiple class action regimes, and a reflection on the adverse consequences of divergent powers and practice in class actions.

Intent of consistent class action regimes

- 18.3 It was intended for the class action regimes in Australia to operate in a nationally consistent way as they have been established by similar legislation.¹ With some minor variations,² the legislative class action regimes in the Supreme Courts of Victoria and New South Wales (NSW) largely mirror the federal regime.³ The regime in the Supreme Court of Queensland is substantially modelled on the federal, Victorian and NSW regimes,⁴ as is the regime in the Supreme Court of Tasmania.
- 18.4 The Supreme Court of Victoria noted:

Sensibly, state legislation mirrors (almost entirely) the federal model, allowing learnings in the federal sphere to be translated to the State sphere and vice versa. There is constant cross-pollination of decisions and principles derived from those decisions.⁵

¹ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. 8.

² Slater and Gordon, *Submission 18*, p. 12, for example, the *Civil Procedure Act 2005* (NSW) outlines a different test for standing to commence a class action against multiple defendants than that set out in the equivalent provisions of the *Federal Court of Australia Act 1976* (Cth).

³ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 127.

⁴ Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 (Qld), *Explanatory Note*, p. 3.

⁵ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. 8, citing Supreme Court of Victoria, *Submission 30*.

Issues arising from existence of federal and state-based class action regimes

18.5 This report has canvassed issues which are understood to be a product of courts across different jurisdictions with class action regimes. Such issues include the challenges arising from the incidence competing class actions being exacerbated when the competing actions are in different jurisdictions, as well as the adverse consequences resulting from unilateral reform in a single jurisdiction.

Competing class actions across different courts

18.6 With class action regimes across jurisdictions within Australia, competing class actions can be in a state Supreme Court as well as in the Federal Court. Courts seek to manage and resolve competing class actions, as their presence undermines the objectives of the class action regime to provide a remedy for all those who have suffered loss and the defendant with the benefit of finality with respect to the dispute.⁶ With courts having developed their own rules and case management processes for class actions, the management and resolution of competing class actions can pose more challenges when the competing actions are in different courts.⁷

Contingency fees

18.7 The regulation of lawyers and their costs, including in class actions, is a matter for the states and territories. Victoria is the only jurisdiction in Australia that has introduced the ability for representative plaintiffs' lawyers in class action to bill for legal costs on a contingency fee basis.

18.8 One challenge with the introduction of contingency fees in Victoria is that inconsistency is created for the availability of contingency fees in class actions with claims under federal law, including shareholder class actions. Class actions advancing federal causes of action brought in the Supreme Court of Victoria may involve a contingency fee. Whereas, if filed in the Federal Court or a state or territory class action regime other than Victoria, this would not be permitted.

⁶ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 102.

⁷ Australian Institute of Company Directors, *Submission 40*, p. 15; NSW Young Lawyers, *Submission 89*, p. 31; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 [196]; *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143 [10]–[11].

- 18.9 Another adverse impact of this change in Victoria is the potential for 'forum shopping', where law firms seeking to use contingency fees may commence class actions in the Supreme Court of Victoria to take advantage of the regime.⁸ A related concern is that other jurisdictions may make changes to permit contingency fees, an outcome which concerned submitters as it would add further inconsistency and confusion to the class action system.⁹
- 18.10 In its report, the Victorian Law Reform Commission (VLRC) considered that the issue of contingency fees 'requires national consideration'.¹⁰ The VLRC recommended the Victorian Attorney-General propose the then Council of Attorneys-General for their agreement in principle that lawyers should be permitted to charge contingency fees, subject to safeguards, and seek a strategy to for reform. The VLRC considered that consistency provides greater certainty for stakeholders reduces likelihood of 'forum shopping' and encourages national jurisprudence.¹¹

Proposed approaches to address issues

Protocol for competing class actions

- 18.11 The Federal Court has entered protocols with the Supreme Courts in Victoria and NSW regarding the management of competing class actions. The committee considers that the Federal Court's arrangements with the Supreme Courts in NSW and Victoria through the establishment of these protocols is a step in the right direction to addressing the challenges when competing class actions are filed in different jurisdictions. To promote further harmonisation in this area, thereby reducing uncertainty, in Chapter 7 the committee recommends the Australian Government seek to ensure that state and territory Supreme Courts with class action procedures adopt similar protocols.

Restricting shareholder class actions to the federal jurisdiction

- 18.12 One option to address competing shareholder class actions across different jurisdictions is to allow the Federal Court to have exclusive jurisdiction for shareholder class actions, and more broadly class actions with respect to financial services and products.
- 18.13 In Chapter 17, the committee recommends the Australian Government amend Part 9.6A of the *Corporations Act 2001* and section 12GJ of the *Australian Securities*

⁸ See, for example, Law Council of Australia, *Submission 67*, p. 29; Omni Bridgeway, *Submission 73*, p. 32; Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, 29 July 2020, p. 17.

⁹ NSW Bar Association, *Submission 96*, p. 12; Omni Bridgeway, *Submission 73*, p. 32.

¹⁰ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. xvii.

¹¹ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. xvii; Attorney-General's Department, *Submission 93*, p. 13.

and Investments Commission Act 2001 so that exclusive jurisdiction is conferred on the Federal Court with respect to civil matters, commenced as class actions, arising under that legislation.

Increasing consistency federal and state-based class action regimes

18.14 With respect to some discrete issues identified in the inquiry, submitters have called for an approach to reform in the federal regime which adopts a power or practice developed in a state-based regime. While the merits of these proposed reforms have been assessed for their potential to promote reasonable, proportionate and fair outcomes in litigation funded class actions, a related benefit is advancing consistency across class action regimes.

Consistency with class closure orders

18.15 While the class action regimes at a state level largely mirror the federal regimes in terms of their establishing legislation, there are some differences.

18.16 A key difference between the Victorian regime and the federal and NSW regimes, is a provision that expressly permits making class closure orders. There is no equivalent in the federal or NSW regime, which until recently did not stand in the way of making class closure order prior to settlement or judgment, as it was understood that the Federal Court and Supreme Court of NSW were to do so pursuant to the power of a broad provision in both regimes. However, recent court decisions have limited the scope of this broad power so that class closure prior to settlement or judgment is not permitted.

18.17 Given the benefits which flow from class closure orders, such as the facilitation of settlements and promotion of finality of disputes, the committee has recommended that the federal regime introduce a similar power to that in the Victorian regime. This reform intends to ensure the Federal Court has the power to continue the practice of making class closure orders prior to a settlement or judgment, consistent with the Victorian regime.

18.18 If this recommendation was implemented, this would clarify the power for the Federal Court to make a class closure order of this type, yet the Supreme Court of NSW would still be limited in that regard, as the initial decision limiting the scope of the broad power was made in the NSW Court of Appeal.

Consistency regarding standards of conduct

18.19 In class actions in the Supreme Court of Victoria, parties to litigation, their lawyers, and litigation funders must comply with overarching obligations. Compared to the overarching purpose with which parties and their lawyers (but currently not litigation funders) must comply under the Federal Court Act, the Victorian obligations impose higher standards with a broader range of penalties and orders available to the Court for non-compliance. In Chapter 15, the committee recommends consideration of an approach to reform where the overarching purpose in the Federal Court Act is expanded to apply to litigation

funders and bolstered to include the statutory standards of conduct, and the associated broad range of penalties, under the Victorian Civil Procedure Act.

Calls for national consistency

18.20 In calling for national consistency across Australia's class action regimes, some submissions highlighted the reasons for why achieving national consistency is important.¹²

18.21 Clayton Utz warned that if changes are implemented to the class action regime in the Federal Court, which are not implemented in the states-based class action regimes, some jurisdictions may become 'magnets for class actions'.¹³

18.22 Allens submitted that any reform at the federal level should be enacted consistently across the federal and state regimes.¹⁴ Omni Bridgeway agreed, warning against any unilateral reform by the Australian Government which is confined to a single jurisdiction as this could promote forum shopping. Additionally, reforms which are adopted nationally would reduce complexity.¹⁵

18.23 Health Industry Companies argued that access to justice would not be served by outcomes resulting in forum shopping as this could lead to unmanaged court loads and delay.¹⁶

18.24 The VLRC in its 2018 report agreed with the Law Council of Australia that:

For the legal system to be seen as enabling access to justice and for the community to be confident in the justice system, we should have consistent regimes throughout Australia as much as possible.¹⁷

18.25 The VLRC further commented:

The common procedural form of Australian class action regimes is a valuable basis on which to ensure they evolve in a broadly consistent way. Consistency provides greater certainty for stakeholders, reduces the likelihood of 'forum shopping' and encourages national jurisprudence as to important procedural and other issues that arise.¹⁸

¹² Clayton Utz, *Submission 26*, p. 9; Maurice Blackburn Lawyers, *Submission 37*, p. 25; Allens, *Submission 69*, p. 3; NSW Young Lawyers, *Submission 89*, p. 30.

¹³ Clayton Utz, *Submission 26*, p. 9.

¹⁴ Allens, *Submission 69*, p. 3.

¹⁵ Omni Bridgeway, *Submission 73*, p. 32; see also Health Industry Companies, *Submission 74*, p. 18.

¹⁶ Health Industry Companies, *Submission 74*, p. 18.

¹⁷ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. 8, citing Law Council of Australia, *Submission 21*.

¹⁸ Victorian Law Reform Commission, *Access to justice: litigation funding and group proceedings*, Report, March 2018, Victoria, p. vi.

- 18.26 Clayton Utz encouraged the Australian Government to engage with states and territories with a view to achieving uniform class action regimes.¹⁹ Another suggestion was that the Council of Australian Governments establish a working group to attempt to bring uniformity to Australia's class action legislation.²⁰
- 18.27 While recognising the benefits of uniformity across jurisdictions, NSW Young Lawyers balanced the need for national uniformity with the lack of reform to the federal regime since its introduction, observing that 'the absence of reform has necessarily led to limited and gradual judicial interventions to ensure justice is done in the conduct of [class actions]'.²¹ Maurice Blackburn submitted that uniformity is preferable but 'rarely a reality', resulting in a situation which is conducive for states to engage in ongoing policy initiatives and common law developments.²²
- 18.28 Similarly, Slater and Gordon submitted that class action regimes, which are not entirely harmonious, has allowed for the incremental development of the law'. Further, disconformity is not unique to class actions and is present across different procedural requirements in civil litigation.²³

Committee view

- 18.29 The focus of this report is the class action regime in the Federal Court. The committee has considered the state-based regimes to the extent that they have been identified by submitters as relevant to the consideration of issues raised during this inquiry, and in terms of understanding the role of the federal regime in the context of class action system and industry in Australia. However, the committee has not comprehensively examined the state-based regimes.
- 18.30 The impacts of unilateral reform stretch beyond state borders. An example is the introduction of contingency fees in Victoria, which could lead to an influx of class actions being filed in the Supreme Court of Victoria to take advantage of this method of billing, with adverse impacts on court resources and potential delays.
- 18.31 This report makes several recommendations for reform to the Federal Court's powers, practice and procedure, with the objective of improving the reasonableness, proportionality and fairness of the federal class action regime and outcomes for all parties to funded class actions. The heightened oversight and regulation of class actions and litigation funding in the Federal Court, which is

¹⁹ Clayton Utz, *Submission 26*, p. 9.

²⁰ Mr Daniel Meyerowitz-Katz, *Submission 1*, p. 6.

²¹ NSW Young Lawyers, *Submission 89*, p. 30.

²² Maurice Blackburn Lawyers, *Submission 37*, p. 25.

²³ Slater and Gordon, *Submission 18*, p. 12.

not present in other regimes, may provide parties with some incentive to select another forum to litigate the class action.

18.32 The committee's recommendations for reform in the federal class action regime seek to promote reasonable, proportionate and fair outcomes for class members, elevate the standards to which litigation funders are held in terms of their contractual relationships, and place appropriate boundaries on profits obtained from litigation funders, with several measures also seeking to improve procedural efficiencies. In summary, the recommendations relate to:

- expanded powers of the Federal Court to intervene in litigation funding arrangements, such as:
- the requirement that it approve litigation funding agreements in order for them to be enforceable; and
- powers to alter, vary or reject the terms of a litigation funding agreement;
- a requirement for litigation funding agreements to indemnify parties for adverse costs and a presumption that a litigation funder in a class action will be required to provide security for costs;
- increased transparency of litigation funding agreements;
- heightened obligations and increased transparency and disclosure requirements regarding conflicts of interest;
- wider use of referees to assess litigation funding fees and contradictors to protect the interests of class members; and
- the powers and procedure to manage and resolve competing class actions.

18.33 Further, the committee has examined issues relating to the basis on which reasonable, proportionate and fair litigation funding fees are determined. In Chapter 13, the committee notes the proposal by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the Australian Government investigate the best way to implement this floor. The committee also recommends the Australian Government investigate whether a graduated minimum return above this floor is appropriate for shorter, less risky and less complex cases.

18.34 The committee notes the intention of the class action regimes in Australia to be nationally consistent. The class action regimes in Victoria, NSW, Queensland and Tasmania largely mirror the federal regime. The committee considers it critical, where feasible, for consistency to be maintained, or sought to be achieved, as it provides certainty for court users and stakeholders and encourages the development of nationally applicable principles and jurisprudence.

18.35 In the instance that some or all of the committee's recommendations with respect to the Federal Court's power, practice and procedure are adopted and implemented, the federal class action regime may diverge significantly from

other regimes in Australia. The committee recognises the potential for adverse consequences to arise from this outcome. Class action jurisdictions other than the Federal Court could start to appear more attractive as class action litigation forums. The consequential impacts on court resources and delays may be considerable.

18.36 For this reason, the committee considers that, irrespective of whether none, some, or all of the committee's recommendations regarding the Federal Court's class action regime are adopted and implemented, the federal, state and territory governments work towards achieving consistency in class action regimes across jurisdictions.

Recommendation 31

18.37 The committee recommends that, irrespective of whether none, some, or all of the committee's recommendations regarding the Federal Court of Australia's class action regime are adopted and implemented, the federal, state and territory governments work towards achieving consistency in class action regimes across jurisdictions.

Senator James Paterson
Chair

Minority Report by Labor Members

- 1.1 Over the last three years, the current Government's approach to policy-making in relation to class actions and litigation funding has been an embarrassing shambles.
- 1.2 First, in December 2017, it commissioned the Australian Law Reform Commission (ALRC) to conduct a comprehensive review of class action proceedings and third-party litigation funders.
- 1.3 Second, after the ALRC completed its review in December 2018, the Government studiously ignored the ALRC's 24 recommendations and barely uttered a word about class actions or litigation funding for almost 18 months.
- 1.4 Third, in the middle of a global health and economic crisis, the Attorney-General established this supposedly urgent inquiry into litigation funding and the regulation of the class action industry.
- 1.5 Fourth, before this Committee had even received its first submission or held its first public hearing, the Treasurer pre-empted the outcome of the Government's own inquiry by announcing that litigation funders would be required to hold an Australian Financial Services Licence (AFSL) and comply with the managed investment scheme regime under the *Corporations Act 2001* – proposals that had already been considered and opposed by (among others) the ALRC, the Department of the Treasury and the Australian Securities and Investment Commission (ASIC).
- 1.6 Fifth, only three days later, the Treasurer used an emergency power enacted by the Parliament in response to the COVID-19 pandemic to temporarily amend Australia's continuous disclosure laws for the express purpose of protecting companies from the supposed 'threat of opportunistic class actions' – a decision the Treasurer made despite ASIC's warning that the changes could undermine Australia's reputation as a safe place to invest.
- 1.7 And now, three years after the ALRC launched its inquiry into class action proceedings and third-party litigation funders, this Committee is tabling a report that largely repeats the recommendations that the ALRC made two years ago – and which the Prime Minister, the Treasurer and the Attorney-General have ignored ever since.
- 1.8 If that was all the majority report did, this inquiry could be dismissed as a waste of the Parliament's time and resources. But, alarmingly, the Government members of the Committee have gone well beyond the terms of reference of this inquiry by endorsing the Treasurer's ill-considered and rushed 'temporary' changes to Australia's continuous disclosure laws. If Liberal members of this Committee had their way, those changes would be made permanent.

- 1.9 Inexplicably, Liberal members have also endorsed the Treasurer's Corporations Amendment (Litigation Funding) Regulations 2020 – despite acknowledging that those regulations are not fit-for-purpose.
- 1.10 This Committee could have taken the opportunity presented by this inquiry to encourage the Government to adopt a rational and evidence-based approach to policy-making in relation to class actions and litigation funding. The Liberal members of this Committee have not done so.
- 1.11 Parliamentary committees should not be in the business of endorsing incompetent and irrational decision-making by members of the executive branch, as the majority report does.
- 1.12 Though Labor members are sympathetic – at least in principle – to a significant number of the Committee's recommendations (noting that Liberal members have largely re-stated recommendations that were made by the ALRC two years ago),¹ Labor members cannot endorse the Committee's report.

Continuous disclosure laws

The Treasurer's changes to the continuous disclosure regime

- 1.13 Shortly after this inquiry was established, the Treasurer used an emergency power enacted by the Parliament in response to the COVID-19 pandemic to water down Australia's continuous disclosure laws 'temporarily', claiming that the changes would protect companies from the 'threat of opportunistic class actions'.² The changes were made without warning, without evidence and without any process of public consultation.
- 1.14 Australia's continuous disclosure obligations require companies to keep markets fully informed of anything that could materially affect their share price. Those laws protect shareholders, promote market integrity and – by making Australian markets more attractive to investors – make it easier for Australian businesses to raise capital.
- 1.15 As the majority report acknowledges, changes to Australia's continuous disclosure laws can have far-reaching short, medium and long-term consequences for Australian businesses, Australian markets and the Australian economy.
- 1.16 In other words, Australia's continuous disclosure regime is important. It is far too important to be treated like an ideological plaything – and yet, in the middle of a global health and economic crisis, that is how Mr Frydenberg treated it.

¹ See 'Conclusion' below.

² The Hon Josh Frydenberg MP, Treasurer, 'Temporary changes to continuous disclosure provisions for companies and officers', *Media Release*, 25 May 2020.

- 1.17 In documents obtained under freedom of information laws, we learned that the Treasurer's 'temporary' changes to the continuous disclosure regime were made in an extraordinary rush and against the advice of ASIC.³ We learned that the Treasurer ignored, without explanation, a clear warning from ASIC that the then-existing regime was 'a fundamental tenet of our markets and is particularly important during times of market uncertainty and volatility (e.g. the GFC, Covid-19 pandemic)'. We learned that the Treasurer ignored, without explanation, ASIC's advice that Australia's then-existing continuous disclosure regime was 'working well' and increased 'the attractiveness of Australian markets for investors'. And we learned that Mr Frydenberg ignored, without explanation, ASIC's clear advice that '[t]he economic significance of fair and efficient capital markets dwarfs any exposure to class action damages.'
- 1.18 Liberal members of the Committee learned those things too. But, like the Treasurer, they have ignored them.
- 1.19 Australia's continuous disclosure regime was not part of the Committee's terms of reference. While a number of submitters referred to continuous disclosure laws, and a small number commented on the Treasurer's changes directly, there are undoubtedly many economists, companies and institutional investors who would have welcomed an opportunity to make submissions on that issue but did not do so because nothing in the terms of reference would have alerted them to the fact that the Committee was proposing to consider those laws in detail (let alone recommend permanent changes to those laws).
- 1.20 This Committee should not recommend permanent changes to 'a fundamental tenet of our markets' in the absence of a proper process of review, deliberation and debate. Against the background we have set out above, the Committee's recommendation that Mr Frydenberg's changes to Australia's continuous disclosure regime be made permanent is, with respect, reckless and grossly irresponsible.
- 1.21 Accordingly, Labor members reject Recommendation 29 of the majority report.

³ See Ben Butler, 'Josh Frydenberg watered down company disclosure laws despite ASIC warning against it', *The Guardian (online)*, 21 July 2020.

A better approach

- 1.22 In its 2018 report into class action proceedings and third-party litigation funders, the ALRC concluded – correctly – that it was not appropriate to assess Australia’s continuous disclosure laws ‘solely through the lens of what is, in essence, a procedural law’ (i.e. class actions).⁴ That is precisely what the Treasurer did when he made temporary changes to the continuous disclosure regime in May of this year, and the Liberal members of the Committee are repeating the same fundamental error in the majority report.
- 1.23 Consistent with Recommendation 24 of the ALRC’s 2018 report into class action proceedings and third-party litigation funders, 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* and the *Australian Securities and Investments Commission Act 2001*.
- 1.24 As the ALRC argued in its 2018 report, that review ‘should undertake wide consultation; collect and draw from an evidence-based; and should be conducted by agencies with sophisticated understandings of the regulatory provisions, class action law and procedure, and the securities market’.⁵
- 1.25 It is worth noting that, had the Morrison Government implemented Recommendation 24 of the ALRC’s report when it was first made two years ago, the review of continuous disclosure laws would have been completed by now.

The Corporations Amendment (Litigation Funding) Regulations 2020

Background

- 1.26 In 2009, the Federal Court made an unexpected decision in the case of *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (Multiplex). As a result of that decision, litigation funding arrangements were, in the words of the Department of the Treasury, brought ‘into the corporate regulatory net for the first time’.⁶
- 1.27 The upshot of the Federal Court’s decision was that litigation funders had to hold an AFSL and funded class actions were regulated as managed investment schemes.

⁴ Australian Securities and Investments Commission, *Submission to Australian Law Reform Commission Inquiry into class action proceedings and third party litigation funders*, September 2018, p. 264.

⁵ Australian Securities and Investments Commission, *Submission to Australian Law Reform Commission Inquiry into class action proceedings and third party litigation funders*, September 2018, p. 264.

⁶ Treasury, *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)*, October 2015, p 5.

- 1.28 In July 2013, in response to the unexpected Multiplex decision, the then-Labor Government introduced the Corporations Amendment Regulation 2012 (No 6), which exempted litigation funders from the new requirements.
- 1.29 The then-Government consulted widely and publicly on drafts of the Corporations Amendment Regulation 2012 (No 6) over the course of 2011 and 2012. The regulations were developed carefully, consultatively and on the basis of expert advice.
- 1.30 In a review completed by the Department of the Treasury in late-2015, when the current Prime Minister was the Treasurer, the Treasury found that the Corporations Amendment Regulation 2012 (No 6) had ‘been successful’.⁷ The review also found that if the exemptions had not been put in place:
- decisions like Multiplex ‘would have imposed a considerable additional regulatory burden on litigations funders, in turn raising the cost for consumers of pursuing court proceedings and potentially reducing their capacity to seek justice’;⁸
 - the additional requirements under the Corporations Act ‘may have resulted in some litigation firms leaving the market, dampening competition and/or raising the price at which litigation funding was offered, thus impacting on consumers’ ability to access the justice system’.⁹
- 1.31 In other words, the Department of the Treasury – under the current Government – concluded that requiring litigation funders to hold an AFSL and subjecting funded class actions to the managed investment scheme rules would increase costs for plaintiffs and adversely impact the ability of Australians to access the justice system.
- 1.32 And it is not just the Treasury that supported the Corporations Amendment Regulation 2012 (No 6). More recently, in 2018, ASIC told the ALRC that:
- There is no evidence to indicate that Parliament intended third-party litigation funders to be regulated as a financial product under the Corporations Act. We note that in many respects the managed investment scheme regime was not conceived with class actions in mind and thus does not operate in a meaningful way when it is applied to class actions.¹⁰

⁷ Treasury, *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)*, October 2015, p. 23.

⁸ Treasury, *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)*, October 2015, p 5.

⁹ Treasury, *Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)*, October 2015, p 5.

¹⁰ Australian Securities and Investments Commission, *Submission to Australian Law Reform Commission Inquiry into class action proceedings and third party litigation funders*, September 2018, p. 17.

- 1.33 For these and other reasons, the ALRC rejected the suggestion that litigation funders be required to hold an AFSL, or that litigation funding schemes be required to comply with the managed investment scheme rules under the *Corporations Act 2001*.

The Treasurer's new regulations

- 1.34 On 22 May 2020, the Treasurer announced that from August 2020, litigation funders would need to hold an AFSL and that funded class actions would become subject to the managed investment scheme rules.¹¹ Like the changes to the continuous disclosure laws, which the Treasurer would announce three days later, the Treasurer's announcement was made without warning, without evidence and without any process of public consultation. It was also made against the advice of ASIC and the Treasurer's own department.
- 1.35 We do acknowledge that many submitters to the inquiry expressed some measure of support, at least in principle, for requiring for-profit litigation funders to hold an appropriately tailored financial services licence. But, as the majority report recognises (at least implicitly), the Treasurer's new regulations are not tailored. For example, the new regulations apply indiscriminately to for-profit and not-for-profit litigation funders.
- 1.36 There is no evidence that the impact of the regulations on not-for-profit litigation funders was even raised in the Treasurer's office, let alone considered, before the Treasurer made his announcement on 22 May 2020. Indeed, it's not clear that the Treasurer was even aware that not-for-profit funders existed.
- 1.37 In any event, because of the very high cost of complying with the AFSL regime, Mr Frydenberg has made it more difficult (if not impossible) for not-for-profit organisations like the Australian Farmers Fighting Fund and the Grata Fund to bring class actions in the future. Whether deliberate or not, this represents a direct attack on public interest litigation and access to justice in Australia.

Managed investment scheme rules

- 1.38 The application of the managed investment scheme rules to class actions is a particularly egregious example of ill-judged regulation.
- 1.39 Not a single submitter to this inquiry – including submitters who claimed to support the new regulations – could explain how the managed investment scheme rules would operate in practice in the context of funded class actions.
- 1.40 Not even ASIC could explain it. And evidently, ASIC still can't explain it.
- 1.41 In response to questions on notice, ASIC admitted that – as recently as 16 November 2020 – it was still receiving advice from external counsel about

¹¹ The Hon Josh Frydenberg MP, Treasurer, 'Litigation funders to be regulated under the Corporations Act', *Media Release*, 22 May 2020.

how basic concepts under the managed investment scheme rules could possibly be applied to class actions.¹²

- 1.42 Since the regulations came into force, the corporate regulator has spent over \$60 000 of taxpayers' money on advice about 'the proper interpretation of the definitions of "managed investment scheme", "member" of a managed investment scheme, and "scheme property" ... in the context of litigation funding scheme in the form of a funded class action'.¹³
- 1.43 That means that, for the last three months, funded class actions have been subject to a regulatory scheme that not even the regulator understands.
- 1.44 Perhaps even more incredibly, ASIC has admitted that it is impossible for some class actions to comply with the managed investment scheme rules. As the majority report acknowledges, those rules require (among other things) a registered scheme to set up and maintain a register of members and convene member meetings. For open class actions, that is literally impossible.
- 1.45 While ASIC has relieved funded class actions from the need to comply with a number of obligations under the managed investment scheme rules, ASIC does not have the power to grant relief from the member register obligations. The best it has been able to do is issue a 'no-action' position.¹⁴
- 1.46 A 'no-action' position is nothing more than an expression of regulatory intent about how ASIC will exercise its powers. As a matter of law it does not relieve a funded class action from the need to comply with the member register requirement, and it does not preclude third parties – including the Director of Public Prosecutions – from taking legal action to punish contraventions of the member register obligations.
- 1.47 In other words, the Treasurer has introduced a regulatory scheme that is literally impossible for many litigation funding schemes to comply with. He has produced a textbook example of ill-judged regulation.
- 1.48 There is evidence in the majority report that Liberal members recognise this. While Recommendation 28 of the majority report begins with an expression of support for Mr Frydenberg's regulations, it goes on to say that the Government should 'legislate a fit-for-purpose MIS regime tailored for litigation funders'.

¹² Australian Securities and Investments Commission, answer to questions on notice, 10 November 2020 (received on November 2020).

¹³ Australian Securities and Investments Commission, answer to questions on notice, 10 November 2020 (received on November 2020).

¹⁴ Australian Securities and Investments Commission, 'No-action position for responsible entities of certain registered litigation funding schemes in relation to member registers', 21 August 2020, <https://asic.gov.au/media/5759483/20200818-litigation-funding-no-action-position.pdf> (accessed 19 December 2020).

Such a recommendation only makes sense if Liberal members accept that the managed investment scheme regime, in its current form, is *not* 'fit-for-purpose'.

- 1.49 If Recommendation 28 is to be taken at face value, Liberal members support regulations that – by their own admission – are not fit-for-purpose. The only alternative explanation is that Liberal members do not support the regulations but decided that it was better to produce an incoherent and disingenuous recommendation than it was to criticise the Treasurer, or his regulations, directly.
- 1.50 Whatever the motivations of Liberal members, neither the Parliament nor the Australian people are well-served by the analysis of the Treasurer's regulations in the majority report or by Recommendation 28.
- 1.51 Labor members reject Recommendation 28 of the majority report and instead recommend that the Government urgently repeal the measures introduced by the Corporations Amendment (Litigation Funding) Regulations 2020.

Other aspects of the majority report

- 1.52 Due to the very short amount of time that we have had to review and respond to the 450-page majority report, we have not had time to prepare a comprehensive response. Suffice it to say that, in addition to the matters identified above, there are many aspects of the majority report that Labor members cannot support.
- 1.53 Some of the statements in the report are just factually wrong. For example, Liberal members of the Committee have repeatedly cited a supposed proposal 'by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the government investigate the best way to implement this floor'.¹⁵
- 1.54 To our knowledge, no law firm or funder has proposed a 70 per cent 'floor'. Rather, in the spirit of compromise, at least one law firm has proposed amendments to the Corporations Amendment (Litigation Funding) Regulations 2020 so that a litigation funder that guarantees a 70 per cent minimum return to plaintiffs would not have to comply with the managed investment scheme rules. If implemented, that proposal would arguably create an incentive for litigation funders to guarantee a 70 per cent minimum return to plaintiffs – but it would not mandate it (contrary to the suggestion by Liberal members).
- 1.55 Other assertions scattered throughout the majority report are unsubstantiated, poorly reasoned or both. For example, in support of the proposition that 'litigation funders are obtaining windfall profits well in excess of the risks they are taking ... [a]nd those profits are coming at the expense of the class members' share of the proceeds from a successful outcome', Liberal members cite the

¹⁵ See, for example, paragraphs 5.25, 9.117, 10.61, 12.65 and Recommendation 20 in the majority report.

ALRC's finding that 'when litigation funders were involved in a class action, the median return to class members was just 51 per cent, compared to 85 per cent when a funder was not involved'.¹⁶

- 1.56 On no reasonable view does it follow that, because median returns to class members are lower when a funder is involved, funders are obtaining windfall profits at the expense of class members. As the Liberal members acknowledge elsewhere in their report, 'in many instances, a class action could not proceed in Australia without a litigation funder'.¹⁷ So if you take the litigation funder out of the equation, that does not necessarily mean higher returns for plaintiffs – in many cases it means no returns for plaintiffs because many class actions would not proceed at all.

Tax transparency

- 1.57 One curious feature of the majority report that is worth noting is the inclusion of a recommendation that, in any application for approval of a class action settlement, litigation funders should be required to disclose and make public (among other things) the amount of corporate tax they have paid in Australia in the three previous financial years.¹⁸ That aspect of Recommendation 17 of the majority report is left unexplained.
- 1.58 We were surprised to see Liberal members of the Committee support a measure that would require companies to be more transparent about their tax affairs. We note that the same members of this Committee have repeatedly voted to retain the 'exempt proprietary company list' which allows certain proprietary companies to avoid lodging financial reports with ASIC (including information about their tax affairs).
- 1.59 We hope that Recommendation 17 of the majority report signals a change of attitude by Liberal members about the importance of corporate tax transparency – and not merely a selective and unprincipled application of disclosure obligations on some companies and not others.

Conclusion

- 1.60 To the extent the recommendations in the majority report repeat – in whole or in part – recommendations or findings that were made by the ALRC two years ago, they are measured, targeted, evidence-based and warrant careful consideration by the Government. Those recommendations include Recommendations 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 23, 26 and 27 of the majority report.

¹⁶ See paragraph 5.23 in the majority report.

¹⁷ See paragraph 5.5 in the majority report.

¹⁸ See Recommendation 17 in the majority report.

- 1.61 Moreover, consistent with the findings of the ALRC two years ago, Labor members agree with Government members that the Federal Court could and should make better and more regular use of independent fee assessors and contradictors to represent the interests of plaintiffs. We also agree that there should be greater transparency around the process in approving settlements and, as recommended by the ALRC, better processes for managing or prohibiting conflicts of interest.
- 1.62 However, for the reasons outlined above, Labor members reject Recommendations 28 and 29 of the majority report. As Recommendations 20 and 21 are premised on the idea that the managed investment scheme rules should apply to litigation funding schemes, we also reject those recommendations.
- 1.63 Finally, though we do not disagree with the sentiment in Recommendation 1 of the majority report, Labor members are concerned by the vague and open-ended nature of that recommendation. In particular, we are concerned that, given its cynical, incompetent and disingenuous approach to lawmaking in respect of class actions and litigation funding, the Morrison Government will treat Recommendation 1 as a licence to further undermine the ability of ordinary Australians to access the justice system to vindicate their rights.
- 1.64 All such efforts should be fiercely resisted by the Parliament.
- 1.65 In light of the above, Labor members make the following recommendations.

Recommendation 1

- 1.66 Labor members recommend that the Government formally respond to the Australian Law Reform Commission's 2018 report entitled *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*. Labor members note that, in doing so, the Government would also be providing a response to most of the recommendations in the majority report.**

Recommendation 2

- 1.67 Labor members recommend that the Government urgently repeal the measures introduced by the Corporations Amendment (Litigation Funding) Regulations 2020.**

Recommendation 3

- 1.68 Labor members recommend that the Government implement Recommendation 24 of the Australian Law Reform Commission's report by commissioning a comprehensive 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 and the Australian Securities and Investments Commission Act 2001.

Mr Steve Georganas MP
(Deputy Chair)

Mr Patrick Gorman MP

Senator Deborah O'Neill

Senator Louise Pratt

Appendix 1

Previous inquiries and recent developments

The first part of this appendix provides an overview of previous inquiries into class actions and litigation funding, the findings of which have been instructive in considering the current concerns with the regulation of the class action industry.

The details and main recommendations of the following inquiries are summarised:

- Australian Law Reform Commission (ALRC) in December 2018;
- Victorian Law Reform Commission (VLRC) in March 2018;
- Law Reform Commission of Western Australia (LRCWA) in June 2015;
- Productivity Commission in December 2014;
- VLRC in March 2008;
- ALRC in December 2000; and
- ARLC in October 1988.

The second part of this appendix details a number of actions, cases and policy developments which have progressed since the Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018 (ALRC Final Report), and provides some detail on the so-called 'robodebt' class action.

Previous inquiries

ALRC report – December 2018

The ALRC's extensive report into class actions and litigation funding was published in 2018.¹ The Final Report contained 24 recommendations. The major recommendations were delivered in four groups.

The first group of recommendations concerned the Federal Court of Australia's (Federal Court) case management of class actions, and largely involved recommended changes to court procedures. Some of these may have significant impacts on policy matters for class actions, for example:

- that all class actions should be initiated as open class, with criteria for moving between open and closed class actions;²

¹ Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018.

² An open class action enables all victims of a civil wrong to participate in the class action and not just those who take active steps to join.

- giving the Federal Court the express power to make common fund orders;³
- giving the Federal Court the express power to resolve competing class actions;⁴
- giving the Federal Court exclusive jurisdiction over securities class actions and class actions involving financial services and products; and
- expanding the coverage of the protocol for cooperation between courts on class actions to include all states and territories with class action regimes.⁵

The second group of recommendations concerned settlement procedures and would:

- allow the Court to appoint a referee to assess if legal costs charged prior to settlement are reasonable;
- allow tendering of settlement administration; and
- require settlement administrators to provide a report on distribution of the settlement sum.⁶

The ALRC report's third group of recommendations was on the regulation of litigation funders, including:

- constraints on recovering unpaid legal fees from the representative plaintiff or class members if there is a court approved litigation funding agreement;
- a statutory presumption that third-party litigation funders provide security for costs;
- power for the Federal Court to award costs against litigation funders and insurers who fail to comply with the overarching purposes of the Federal Court Act;
- third-party litigation funding agreements for class actions:
 - are enforceable only with the approval of the Federal Court;
 - can be rejected, varied or amended by the Federal Court;
 - must provide indemnity for the representative plaintiff against cost orders; and
 - Australian law governs funding agreement and the litigation funder submits irrevocably to the jurisdiction of the Federal Court;

³ See the section on common fund orders under recent events for a description of common fund orders.

⁴ Competing class actions involve separate and concurrent class action proceedings which relate to the same defendant and same subject matter.

⁵ Recommendations 1–7: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 9, 126–127.

⁶ Recommendations 8–10: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 9–10.

- annual reporting by third-party litigation funders to the Australian Securities and Investments Commission (ASIC) on management of conflicts of interests; and
- include law firm financing and portfolio financing in the definition of a litigation funding scheme in the Corporations Regulations 2001 (Corporations Regulations).⁷

The fourth group of recommendations concerned solicitors' fees and conflicts of interest on matters, including that:

- lawyers acting for the representative plaintiff in a class action should be able to use contingency fees, with constraints and related recommendations, including:
 - there may not be an additional contingency fee from a litigation funder;
 - a contingency fee cannot be recovered in addition to professional fees for legal services charges on a time-cost basis;
 - lawyers must advance the costs of disbursements and account for such costs within the contingency fee;
 - lawyers must provide security for costs;
 - contingency fees can only proceed with the Federal Court's agreement;
 - the Federal Court should have the express capacity to reject, vary or amend the terms of a contingency fee agreement;
 - solicitors and law firms be prohibited 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; and
 - law firms must also clearly communicate to potential class members any conflicts of interest and how those conflicts will be avoided or mitigated.⁸

The ALRC made two further recommendations to address related challenges:

- 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.
- 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*

⁷ Recommendations 11–16: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 10.

⁸ Recommendations 17–22: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 11.

(Corporations Act) and the *Australian Securities and Investment Commission Act 2001* (ASIC Act).⁹

Victorian Law Reform Commission Report – March 2018

The VLRC issued a report in March 2018, making 31 recommendations on areas including regulation of class actions, supervision of litigation funders and contingency fees.¹⁰

The recommendations relating to the regulation of class actions included:

- a certification requirement, in which formal court approval is required before a class action can commence, should not be introduced in Victoria;
- additional powers for the Supreme Court of Victoria to:
 - discontinue class actions;
 - substitute another class member as representative plaintiff;
 - give discretionary orders about the distribution of money;
 - provide guidance for independent assessments of settlements and costs;
 - review and vary legal costs and litigation funding fees and charges;
 - approve common fund orders; and
- a proposal for a cross-vesting judicial panel to make decisions on multiple class actions in multiple jurisdictions.¹¹

The recommendations on the regulation of litigation funders related to the powers of the Supreme Court of Victoria and regulatory bodies, including:

- stronger national regulation and supervision of the litigation funding industry;
- disclosure of litigation funding agreements and charges to the Supreme Court of Victoria and other parties to class actions; and
- the plaintiff's lawyers to notify class members of litigation funding charges.¹²

The recommendations relating to contingency fees included that:

- the Victorian Attorney-General should propose to the Council of Attorneys-General to support reforms to enable lawyers to charge contingency fees;
- contingency fees should be pursued at a national level;

⁹ Recommendations 11–16: Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 12.

¹⁰ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018.

¹¹ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, pp. xix–xxii.

¹² Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. xx.

- the Supreme Court of Victoria should have the power to make a common fund order for contingency fees;
- contingency fees should cover all services, including fees arising from:
- litigation services;
- provision of security for costs;
- disbursements; and
- an indemnity for adverse costs.¹³

Law Reform Commission of Western Australia – June 2015

In June 2015, the LRCWA completed its review of class actions for Western Australia. The recommendations included bringing forward legislation to establish a class action regime in Western Australia based on the federal regime to reduce interlocutory disputes, lower costs and alleviate procedural barriers.¹⁴

Productivity Commission – December 2014

The Productivity Commission released its report, *Access to Justice Arrangements* in December 2014.¹⁵ The report looked at a range of issues relevant to promoting access to justice and equality before the law. The report included a chapter on litigation funding and made recommendations, including:

- The Australian, State and Territory Governments should remove restrictions on contingency fees, with the following consumers protections:
 - prohibition on contingency fees for criminal and family matters;
 - comprehensive disclosure requirements at the outset of the agreement;
 - percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients; and
 - there should be no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).¹⁶
- The Australian Government should establish a licence for third party litigation funding companies designed to ensure 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:
 - Regulation of the ethical conduct of litigation funders should remain a function of the courts.
 - The licence should require litigation funders to be members of the Financial Ombudsman Scheme.

¹³ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, p. xx.

¹⁴ Law Reform Commission of Western Australia, *Representative Proceedings - Final report*, Project 103, June 2015, pp. 3–4.

¹⁵ Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, p. 637.

¹⁶ Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, pp. 601–637.

- Where there are any remaining concerns relating to categories of funded actions, such as securities class actions, these should be addressed directly through amendments to underlying laws, rather than through any further restrictions on litigation funding.¹⁷
- To ensure appropriate competition between lawyers and litigation funders, Court rules should be amended to ensure that both:
 - the discretionary power to award costs against non-parties in the interests of justice; and
 - obligations to disclose funding agreements apply equally to lawyers charging damages-based fees and litigation funders.¹⁸

Victorian Law Reform Commission Report – March 2008

In 2008, the VLRC reviewed a number of aspects of class action law and practice in Victoria.¹⁹ The report made a number of recommendations, including:

- in a class action, not all class members need to have claims against all defendants, but at least against one defendant;
- clarification of the options available to the Supreme Court of Victoria to deal with the situation where damages awarded to the class have not been claimed by class members;
- establishment of a statutory 'Justice Fund' to provide financial assistance to litigants with meritorious claims and provide indemnities against adverse costs orders;
- introduction of percentage-based contingency fees for civil litigation, subject to certain consumer safeguard and determination by an independent council that contingency fees were appropriate in class actions; and
- introduction of statutory standards of conduct to apply to the participants of civil litigation, including litigation funders.²⁰

Australian Law Reform Commission report – December 2000

The ALRC published a report after conducting a review of the federal civil justice system.²¹ Among many other topics, the ALRC highlighted issues in the class action regime, concerning:

- settlements;
- the nature of overlapping claims;

¹⁷ Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, p. 633.

¹⁸ Productivity Commission, *Access to Justice Arrangements*, Chapter 18, Volume 2, p. 637.

¹⁹ Victorian Law Reform Commission, *Civil Justice Review*, Final Report, March 2008.

²⁰ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, pp. 5–10; Victorian Law Reform Commission, *Civil Justice Review*, Final Report, March 2008.

²¹ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Final Report, December 2000.

- the representative plaintiff's liability for adverse costs; and
- ethical issues arising in the context of opt-out classes where members may have competing interests or be unidentified.²²

While concluding that the Part IVA regime was working in accordance with legislative intentions, the ALRC made a number of recommendations concerning class action procedure and oversight of legal costs, including:

- amending Part IVA of the Federal Court Act to provide for Federal Court approval of costs agreements before opt-out dates and to require the closure of classes at a certain point before judgment;
- express powers to be given to the Federal Court regarding approval of fee arrangements for the applicant's lawyer;
- the development of guidelines or a practice note for legal practitioners involved in class actions, addressing practices relating to the choice of representative plaintiff, procedures to bring about fair costs agreements, practitioner obligations with regards to competing interests of class members, arrangements for settlement, procedures for class closure, and the defendant's legal representative's communication with class members;
- the Federal Court Rules should elaborate procedures for resolving overlapping claims and obligations of lawyers in class actions around notice requirements and settlements;
- Part IVA of the Federal Court Act should be reviewed; and
- the legal profession should abide by practice rules relating to their obligations arising in representative actions.²³

Australian Law Reform Commission Report – October 1988

In 1988, after an eleven-year inquiry, the ALRC published its report on class actions, which, as noted above, led to the introduction of Part IVA of the *Federal Court of Australia Act 1976* (Federal Court Act), commencing operation in March 1992.²⁴

Across the report's 357 pages, the ALRC made comments on the catalysts for a new regime to deal with multiple civil wrongs and recommendations with respect to matters including:

- jurisdiction of the new regime and interactions with the state and territory jurisdictions;
- class action membership, including the opt out nature;
- threshold requirements and processes for commencing a class action;
- the conduct of class actions, including case management, the role of the representative plaintiff and class members and numerous procedural rules;

²² Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 5.

²³ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, p. 5.

²⁴ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Final Report, October 1988.

- the conclusion of class actions and appeals, including settlement, judgments and distribution of resolution sums; and
- costs and funding, including of lawyers' costs rules, regulation of costs arrangements and public financing of class actions.

A number of recommendations were made with respect to public funding, lawyers fee arrangements, contingency fees and immunity from costs orders for class members, including:

- class members should be required to contribute to legal costs under a fee agreement, in the event that the litigation is successful;
- courts should have express powers to approve fee agreements for lawyers in class proceedings at any stage prior to their conclusion;
- contingency fees based on percentages of compensation obtained not be allowed, as this was perceived to be the method least likely to produce a remuneration which is fair to the parties and to the solicitor in most cases;
- establishment of a special fund to provide funding for class actions;
- abolishing the tort and crime of 'maintenance'; and
- third-party litigation funders sharing in the compensation obtained not be permitted.²⁵

Events since the Australian Law Reform Commission's 2018 report

This section briefly notes the key developments in the class action industry and litigation funding since the ALRC published its Final Report in 2018. These topics are discussed in greater detail across numerous chapters of the report.

Financial services regulation of litigation funders

Litigation funding is subject to legal precedents and a range of legislation and regulations, including the Corporations Act, Corporations Regulations, the ASIC Act, and ASIC instruments. These are briefly summarised below, along with reforms which came into effect in July 2020.

Corporations Act

All incorporated litigation funders are regulated by the Corporations Act on the same basis as other corporations. Publicly listed litigation funders on the Australian Securities Exchange (ASX) are required to comply with ASX Listing Rules that are enforceable under the Corporations Act.²⁶

ASIC Act

Litigation funders, as providers of financial services and products, are directly subject to the consumer protections in the ASIC Act (and are required to ensure that the terms of their funding agreements are consistent with them). Division 2 of Part 2

²⁵ Dr Peter Cashman and Ms Amelia Simpson, *Submission 55.1*, pp. 3–4.

²⁶ *Corporations Act 2001*, s. 674.

of the ASIC Act contains protections against unfair contract terms, unconscionable conduct, and misleading and deceptive conduct. It also requires due skill and care in the provision of financial services.²⁷

Legal precedents

Federal Court and High Court decisions in 2009 and 2012 found that litigation funding schemes were a Managed Investment Scheme (MIS) or a credit facility respectively – potentially triggering the application of the:

- Corporations Act;
- ASIC Act; and
- *National Consumer Credit Protection Act 2009*.²⁸

Subsequently, in 2012, a 'light touch' approach to regulating litigation funders under the Corporations Regulations was introduced to provide legal certainty for funders.²⁹

Corporations regulations

The Corporations Regulations specify that litigation funding schemes are financial products under the Corporations Act. From July 2013 to July 2020, litigation funders were specifically exempted by regulation from the requirement to hold an Australian Financial Services Licence (AFSL), provided that the litigation funder had appropriate processes for managing conflicts of interest. The Corporations Regulations also exempted litigation funding from the requirements of the Consumer Credit Code and the definition of an MIS under the Corporations Act.³⁰

Two additional exemptions were implemented through legislative instruments. The exemption of litigation funding schemes from the application of the National Credit Act is in ASIC Credit (Litigation Funding – Exclusion) Instrument 2020/37. The ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38 exempts litigation funding schemes that are funded under a conditional costs agreement from the application of Chapters 5C and 7 of the Corporations Act. Both exemptions apply until 31 January 2023 and are not impacted by the July 2020 regulations discussed below.³¹

²⁷ Victorian Law Reform Commission, *Litigation Funding and Group Proceedings: Consultation Paper*, July 2017, pp. 37–38.

²⁸ *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 260 ALR 643; *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* [2012] HCA 4.

²⁹ Australian Securities and Investments Commission, *Submission 39*, p. 6.

³⁰ Australian Securities and Investments Commission, *Submission 39*, p. 6.

³¹ Corporations Amendment (Litigation Funding) Regulations 2020, *Explanatory Statement*, 23 July 2020, pp. 4, 6; Australian Securities and Investments Commission, *Submission 39*, p. 6.

July 2020 reforms

On 22 May 2020, the Australian Government announced it would regulate litigation funders under the Corporations Act, by requiring them to hold an AFSL and comply with the requirement of the MIS regime. The Australian Government indicated that the removal of these exemptions is to provide greater transparency around the operation of litigation funders in Australia.³² On 23 July 2020, the Corporations Amendment (Litigation Funding) Regulations 2020 (July 2020 regulations) was registered to implement this announcement. The amendments took effect on 22 August 2020.

Disclosure of litigation funding agreements

In December 2019, the Federal Court issued a revised Class Actions Practice Note, requiring funding agreements to be disclosed prior to the initial case management conference. The Federal Court's Class Actions Practice Note also provides for redaction to conceal information that might reasonably be expected to confer a tactical advantage on the other party. The Federal Court's Class Actions Practice Note addresses:

- disclosure to class members of costs agreements and litigation funding agreements; and
- disclosure of costs agreements and litigation funding agreements to the court and other parties.³³

The Supreme Court of Western Australia has introduced rules requiring interested non-parties, such as litigation funders, to be identified to the court and places duties on these parties in relation to the conduct of the case, including a duty to cooperate with the parties and the Court, and not engage in misleading or deceptive conduct.³⁴

Continuous disclosure amendments

Under the continuous disclosure requirements in the Corporations Act, ASX-listed entities are required to notify the ASX of information that is:

- not generally available; and
- a reasonable person would expect to have a material effect on the price or value of securities of the entity.³⁵

In May 2020, to address economic uncertainty associated with the COVID-19 pandemic, the Hon Josh Frydenberg MP, Treasurer, made a six-month temporary amendment to continuous disclosure laws to enable companies and officers to more

³² The Hon Josh Frydenberg MP, 'Litigation funders to be regulated under the Corporations Act', *Media Release*, 22 May 2020.

³³ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, General Practice Note, 20 December 2019, cl. 6.

³⁴ Rules of the Supreme Court 1971, Order 9A.

³⁵ River Capital, *Submission 32*, p. 2.

confidently provide guidance to the market during the COVID-19 crisis. The amendments were permitted pursuant to special determination powers granted to the Treasurer during the COVID-19 pandemic under section 1362A of the Corporations Act.³⁶

The amendments remove the strict liability (no requirement to prove fault) associated with continuous disclosure and temporarily replace the objective tests in paragraphs 674(2)(b) and 675(2)(b) of the Corporations Act. This means plaintiffs are required to prove a fault element for a breach of continuous disclosure laws.³⁷ On 23 September 2020, the amendments were extended until 23 March 2021.³⁸

Judgment entered for a shareholder class action

Since the ALRC's 2018 report, two shareholder class actions in Australia have proceeded to judgment, rather than being resolved through settlement.

In October 2019, the first shareholder class action to proceed to judgment was *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* (Myer case). It was held that Myer had breached the continuous disclosure laws, but no loss or damage flowed from this failure.³⁹ The Myer case is noteworthy given it set a precedent that shareholder class actions may be able to rely on the 'fraud on the market' theory and therefore may not have to prove individual losses.⁴⁰

The second shareholder class action to reach judgment was in October 2020, in *Crowley v Worley Limited*.⁴¹ This case found in favour of the defendant as the Federal Court held that Worley had not engaged in misleading and deceptive conduct and had not breached the continuous disclosure regime.⁴²

³⁶ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, 25 May 2020, p. 1.

³⁷ Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, *Explanatory Statement*, 25 May 2020, p. 3. 2.1 The new temporary test is whether the entity knows, or was reckless or negligent, with respect to whether that information would if it were generally available, and have a material effect on the price or value of the company's securities.

³⁸ The Hon Josh Frydenberg MP, Treasurer, 'Extension of temporary changes to continuous disclosure provisions for companies and officers', *Media Release*, 23 September 2020.

³⁹ [2019] FCA 1747.

⁴⁰ Australia Law Reform Commission (ALRC), *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, pp. 278–279. The ALRC described the 'fraud on the market theory' as a shortcut for causation which presumes that shareholders rely on the integrity of the market price in making their investment decisions. Assuming that disclosures or failures to disclose affects all shareholders through the share price, individual shareholders do not need to establish their explicit reliance on the disclosures.

⁴¹ [2020] FCA 1552.

⁴² Omni Bridgeway, *Submission 73.2*, p. 8.

Contingency fees in Victoria

On 1 July 2020, amendments to the *Supreme Court Act 1986* (Vic) to permit allow lawyers acting for the representative plaintiff in class actions to receive a contingency fee came into force.⁴³ This is referred to as a 'group costs order'.

Common fund orders

Common fund orders are an order made by Federal Court to overcome the unique problem which arises in open class actions where some class members may obtain a benefit from a successful action when they have not contributed to the costs of running that action.⁴⁴

Common fund orders became standard practice in the Federal Court since the decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* approved their use for litigation funding fees in class actions.⁴⁵

A common fund order is an order made by the Federal Court that requires all class members to equally contribute from their share of the proceeds to the costs of the litigation, including the litigation funder's commission.⁴⁶ This includes those class members who have registered to share in the proceeds of the class action but have not entered into a funding agreement with the litigation funder.⁴⁷

In its 2018 report, the ALRC recommended that the Federal Court Act be amended so as to give the Federal Court express power to make common fund orders in class actions.⁴⁸ The VLRC also recommended that the *Supreme Court Act 1986* (Vic) be amended to include the power to approve a common fund order.⁴⁹

Some doubt was expressed at the time as to whether the ALRC's recommendation was necessary, as the Federal Court had already used the power in section 33ZF of

⁴³ *Supreme Court Act 1986* (Vic), s. 33ZDA, amended by *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic).

⁴⁴ An open class action enables all victims of a civil wrong to participate in the class action and not just those who take active steps to join.

⁴⁵ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

⁴⁶ See, for example, *Litigation Lending Services Ltd*, *Submission 36*, p. 19; *Maurice Blackburn Lawyers*, *Submission 37*, p. 37.

⁴⁷ See, for example, *King&Wood Mallesons*, *Submission 53*, p. 4; *Allens*, *Submission 69*, p. 15.

⁴⁸ Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 205 (recommendation 19). See also recommendations 17 and 18.

⁴⁹ Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, March 2018, pp. 130–131 (recommendation 27). The Supreme Court has not made common fund orders for litigation funding costs in Victorian class actions.

the Federal Court Act, and courts had used similar provisions in state legislation, to grant a common fund order in a class action financed by a litigation funder.

However, in December 2019, the High Court held in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (Brewster)⁵⁰ that the Federal Court and the Supreme Court of NSW did not have the power to make a common fund order at an early stage of the proceeding.⁵¹ The Federal Court has subsequently applied and interpreted the decision in Brewster, leading to some uncertainty concerning the status of the availability of common fund orders.

Class closure orders

The ALRC recommended that the Federal Court's Class Actions Practice Note be amended to provide criteria for when it is appropriate to order class closure during the course of a class action and the circumstances in which a class may be re-opened.

If a class closure order is made, class members must register with the class action before a certain date in order to be entitled to share in the proceeds of any settlement or judgment. Generally, a class closure order will state that class members who do not register by the set date will remain class members and therefore have their rights extinguished upon settlement or judgment, but are not entitled to share in any proceeds of a settlement or judgment.⁵²

Since the ALRC published its report, a decision of the Court of Appeal of New South Wales has cast doubt on the power of the court to order class closure.

Robodebt class action

In 2015, an automated debt recovery program, the Income Compliance Program, was introduced by the Australian Government. This program was based on identifying historical discrepancies between an individual's income reported to Centrelink and income assessed by the Australian Taxation Office (ATO). This is colloquially known as 'robodebt'.⁵³

The 'robodebt' program conducted over one million reviews of past income, and issued up to three quarters of a million debt notices to current and former social

⁵⁰ [2019] HCA 45.

⁵¹ The High Court heard together an appeal from the Federal Court concerning the interpretation of section 33ZF of the Federal Court Act, and an appeal from the Supreme Court of New South Wales concerning the equivalent provision in New South Wales, section 183 of the *Civil Procedure Act 2005* (NSW).

⁵² Allens Linklaters, *Submission 69*, p. 20.

⁵³ Senate Community Affairs References Committee, *Centrelink's Compliance Program*, Report, September 2020, p. 1.

security recipients over five years. The people issued with these notices were required to participate in a process to reconfirm the earned income, already reported to Centrelink, for up to seven years earlier. Approximately 347 000 people who were unable to complete this process were pursued for debts.⁵⁴

In November 2019, a class action on behalf on Australians who were issued with a robodebt by Centrelink was commenced.⁵⁵ The class action alleged the robodebt scheme, on the whole, was unlawful.⁵⁶ It was argued robodebt was calculated by Centrelink by applying averaged ATO PAYG income data across either part or all of the fortnights in which the recipient received payments and by treating those averaged amounts as the recipients actual earning in the relevant debt period. The representative plaintiff argued that robodebts were invalid because the amount of social security payments a person is entitled to is based on how much the person actually earned, not the averaged ATO amounts. The class action sought compensation for the alleged invalid debts that were raised against the affected individuals.⁵⁷

In May 2020, the Australian Government announced that around 470 000 debts issued under the Income Compliance Program were 'insufficient under law'. These debts were based entirely or partially on averaged income, rather than on other documentary evidence, and will be repaid to individuals.⁵⁸

In November 2020, it was announced that the representative plaintiff had reached a settlement with the Australian Government in the robodebt class action. In settling the class action, the Australian Government has not admitted that it was legally liable to the class members. This settlement is made up of the following financial outcomes:

- the Australian Government is to pay \$112 million in compensation to approximately 400 000 eligible individual class members, including legal costs;

⁵⁴ Senate Community Affairs References Committee, *Centrelink's Compliance Program*, Report, September 2020, p. 1.

⁵⁵ *Prygodicz v Commonwealth of Australia* (Federal Court of Australia, VID1252/2019).

⁵⁶ Senate Community Affairs References Committee, *Centrelink's Compliance Program*, Report, September 2020, p. 1.

⁵⁷ Gordon Legal, 'Gordon Legal secures landmark settlement in robodebt class action', *Media Release*, 16 November 2020 www.gordonlegal.com.au/news/robodebt-settlement-media-release/ (accessed 17 November 2020); Gordon Legal, 'Opt-out notice', *Prygodicz v Commonwealth of Australia* (Federal Court of Australia, VID1252/2019), p. 1 www.gordonlegal.com.au/media/1229/opt-out-notice.pdf (accessed 17 November 2020).

⁵⁸ Senate Community Affairs References Committee, *Centrelink's Compliance Program*, Report, September 2020, p. 7.

- the Australian Government is repaying more than \$720 million in debts invalidly collected from class members and will continue to provide refunds;
- the Australian Government will discontinue claims for approximately \$398 million in debts it had invalidly asserted against class members of the class action; and
- subject to the Federal Court's approval, a Settlement Distribution Scheme will provide that eligible individual class members entitlements will be assessed and all amounts due to them be paid in 2021.⁵⁹

The settlement reached between the parties must be approved by the Federal Court. At the time of writing, the Federal Court had not approved the proposed robodebt class action settlement.⁶⁰

⁵⁹ Gordon Legal, 'Gordon Legal secures landmark settlement in robodebt class action', *Media Release*, 16 November 2020.

⁶⁰ Gordon Legal, 'Gordon Legal secures landmark settlement in robodebt class action', *Media Release*, 16 November 2020.

Appendix 2

Legal precedent summaries

The role of contradictors

The following four case studies support the evidence presented in Chapter 12, regarding the role of contradictors. In the following four different class actions, a contradictor was appointed.

Case 1 – Banksia class action

The case *Bolitho & Anor v Banksia Securities Limited* (Banksia class action)¹ involves serious allegations of misconduct on the part of the representative plaintiff's legal representatives and the litigation funder which came to light through the work of a contradictor.

Case summary

This class action against Banksia Securities Limited in the Supreme Court of Victoria (Supreme Court) was brought by Mr Laurence Bolitho (the representative plaintiff), a depositor who owned debentures in Banksia, who claimed that he and group members suffered loss and damage of more than \$100 million as a result of the conduct of the defendants.

Dual interests of lawyer and litigation funder

When the class action began in December 2012, Mr Norman O'Bryan SC and the late Mr Mark Elliott represented Mr Bolitho. BSL Litigation Partners Limited, now Australian Funding Partners Limited (AFPL), was incorporated to fund the class action.

An application was brought by one of the defendants to the class action for an order restraining Mr Bolitho from continuing to retain Mr O'Bryan and Mr Mark Elliott.² The application to restrain Mr Mark Elliott and Mr O'Bryan was brought because Mr Mark Elliott was the managing director, secretary and 45 per cent shareholder in AFPL, and 45 per cent of the remaining shares in AFPL were controlled by Mr O'Bryan's wife.

In November 2016, the Supreme Court found that Mr Mark Elliott and Mr O'Bryan should not continue to act for Mr Bolitho as solicitor and counsel respectively in

¹ *Bolitho & Anor v Banksia Securities Limited* (Supreme Court of Victoria, S CI 2012 07185, commenced 27 July 2020).

² *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

circumstances where they each had an interest in AFPL (Bolitho No 4 Decision).³ Subsequently, Mr Bolitho engaged a new solicitor, Mr Anthony Zita of Portfolio Law, and Mr O'Bryan stated that his wife had disposed of all interests in AFPL.⁴ Mr O'Bryan continued to act as senior counsel in the class action alongside Mr Michael Symons as junior counsel.

A settlement for the class action was reached and approved by the Supreme Court of Victoria in 2018.⁵ A debenture holder objected to that approval in the Court of Appeal and the settlement was in part set aside.⁶ The Court of Appeal found that the settlement sum of \$64 million was fair and reasonable but concluded that the Supreme Court had erred in approving distribution to AFPL of its claimed commission and legal costs. Those matters were remitted to the Supreme Court for proper scrutiny of these claims (the remitter proceeding).⁷

Remitter proceeding and role of contradictor

The remitter proceeding is currently before the Supreme Court. It concerns an application by AFPL for approval of the distribution from the settlement sum of the litigation funder's commission, the legal costs and disbursements, and for approval of the procedure for a settlement scheme. At the first directions hearing of the remitter proceeding in November 2018, a contradictor was appointed.⁸

The contradictor has assessed whether there had been any conduct by Mr Mark Elliott/AFPL, Mr Alex Elliot (son of Mr Mark Elliott who was involved as a solicitor and employee of Elliott Legal and an employee or agent of AFPL), Mr O'Bryan, Mr Symons and Mr Zita/ Portfolio Law, in respect of the applications brought for payment to AFPL of legal costs and disbursements, and litigation funding commission, which meant that the Supreme Court should exercise its discretion under section 33ZF of the Supreme Court Act to reduce or disallow AFPL's claims for those payments.⁹

³ *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

⁴ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, p. 23, www.supremecourt.vic.gov.au/sites/default/files/2020-10/Contradictor%27s%20Revised%20List%20of%20Issues%20-%2010%20September%202020.pdf (accessed 16 November 2020).

⁵ *Re Banksia Securities Ltd (recs & mgrs apptd) (in liq)* [No 2] [2018] VSC 47.

⁶ *Botsman v Bolitho* [2018] VSCA 278.

⁷ *Botsman v Bolitho* [2018] VSCA 278.

⁸ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [8].

⁹ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [12]. Mr Alex Elliott, son of late Mr Mark Elliott, is also a party to the remitter proceeding. *Bolitho & Anor v Banksia Securities Limited & Ors (No 11)* [2020] VSC 567 [46].

In April 2019, the contradictor provided the Supreme Court with substantial particulars of the 'disentitling conduct' by filing a Revised List of Issues. The contradictor was granted leave to amend this Revised List of Issues if and when necessary.¹⁰

The most recent version of this Revised List of Issues was filed on 10 September 2020, which examines a much broader set of questions. It is a 208-page document which submits numerous allegations of breaches of fiduciary, professional, contractual and/or statutory duties by Mr Mark Elliott/AFPL, Mr Alex Elliot, Mr O'Bryan, Mr Symons and/or Mr Zita/Portfolio Law (individually and/or collectively).¹¹

Alleged misconduct

Ultimately, it is alleged that those involved advanced their own interests at the expense and detriment of the interests of class members, to secure for themselves, and/or each other, payments that exceeded a fair and reasonable amounts in respect of:

- legal costs and disbursements;
- the litigation funding commission; and
- the scheme administration costs.¹²

The contradictor's claims set out that the impropriety undertaken to advance their own interests included:

- circumventing the Bolitho No 4 Decision as Mr Mark Elliott/AFPL and Mr O'Bryan continued to maintain the dual interests of litigation funder and legal representative;¹³

¹⁰ *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [21].

¹¹ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020.

¹² Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, p. 146.

¹³ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, pp. 36–40. The contradictor alleges that Mr O'Bryan had an arrangement or understanding with Mr Mark Elliott/AFPL pursuant to which he continued to maintain an interest in AFPL and/or the litigation funding enterprise conducted by AFPL, and pursuant to that arrangement or understanding, had an ongoing financial interest in the litigation. Mr Mark Elliott/AFPL arranged for Mr Bolitho and group members to be represented by a solicitor on the record, namely Portfolio Law, who would not (and did not) independently represent the interests of Mr Bolitho and group members, but rather, permitted Mr Mark Elliott/AFPL and Mr O'Bryan to continue doing so. Mr Mark Elliott/AFPL continued to exercise control over the proceeding and to act as the de facto instructing solicitor. Mr Alex Elliott, son of Mark Elliott, was involved as a solicitor and employee of Elliott Legal and an employee or agent of AFPL.

- issuing of cost disclosure documents and invoices which did not accurately reflect the real fee arrangements;
- in reaching a settlement agreement and in seeking the Supreme Court's approval of the settlement agreement, providing false or misleading information to numerous parties, including the Court, on matters including:
 - fee agreements;
 - work completed;
 - fees charged and paid;
 - the role and commission of the litigation funder; and
 - a misleading assessment of the reasonableness of the costs by a costs assessor appointed by the team of lawyers and litigation funder;¹⁴
- submitting to the Supreme Court that there was no conflict of interests and that the appointment of a contradictor was unwarranted;
- failing to meet duties they each owed to manage and/or avoid conflicts of interest; and
- attempting to prevent or dissuade an appeal on the costs and commission charged.¹⁵

The contradictor submits:

- there has been contravention(s) of:
 - the paramount duty to the Supreme Court to further the administration of justice and the overarching obligations as set out in sections 16 to 25 of the *Civil Procedure Act 2010* (Vic);
 - the duties of legal representatives to:
 - (i) act with independence;
 - (ii) avoid any compromise to their integrity and professional independence;
 - (iii) not engage in conduct that is prejudicial to the administration of justice or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute; and
 - (iv) act with care, skill, competence and diligence;
- the misconduct is capable of constituting:
 - unsatisfactory professional conduct and/or professional misconduct under sections 295 to 298 of the Legal Profession Uniform Law; and
 - an abuse of process;

¹⁴ *Bolitho v Banksia Securities Ltd & Ors* [2002] VSC 524 [36]–[38], [41], the costs assessor retained by the legal representatives has been joined to the proceedings as they may have engaged in conduct that was misleading or deceptive or likely to mislead or deceive.

¹⁵ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, pp. 11–157.

- orders should be made to the effect that:
 - the litigation funder is not entitled to recover its commission, or receive a reduced commission;
 - the legal representatives are not entitled to receive any remuneration from the settlement sum, or receive a reduced fee;
 - the individuals compensate class members for their losses materially contributed to by the contraventions;
 - the individuals pay for the costs of the litigation and the contradictor on an indemnity basis.¹⁶

Since the trial of the remitter proceedings began on 27 July 2020 in the Supreme Court, Mr O'Bryan and Mr Symons have:

- decided not to argue against the Supreme Court making findings against them in respect to the serious allegations of impropriety made in the Revised List of Issues;
- consented to the entry of judgment for monetary liability in an amount to be assessed by the Supreme Court; and
- accepted that it is appropriate that their names be removed from the Supreme Court Roll.¹⁷

The final hearing dates are scheduled for the end 2020.¹⁸

Cases 2 and 3 - Murray Goulburn class actions

Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2) [2020] FCA 968

The case *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2) (Endeavour River class action)*¹⁹ illustrates:

- the limitations of the Federal Court of Australia's (Federal Court) power to regulate litigation funding commissions;
- the Federal Court's power to appoint a contradictor;
- the role of a contradictor; and
- the Federal Court's ability to seek evidence from an expert in the capital market or finance.

¹⁶ Mr Peter Jopling QC, 'Contradictor's Revised List of Issues' Submission in *Bolitho & Anor v Banksia Securities Limited*, S CI 2012 07185, 10 September 2020, pp. 157–161. Costs on an indemnity basis covers all costs, including fees, charges, disbursements, expenses and remuneration that have not been unreasonably incurred.

¹⁷ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5) [2020] FCA 1405 [16]–[18]*.

¹⁸ Supreme Court of Victoria, 'Live stream of Banksia Securities Limited trial', 22 September 2020, www.supremecourt.vic.gov.au/news/banksia-securities-limited-trial (accessed 2 October 2020).

¹⁹ [2020] FCA 968.

Case summary

A proposed settlement for a closed investor class action was sought pursuant to section 33V of the Federal Court Act. The Federal Court held in October 2019 that the proposed settlement sum and the terms of settlement were fair and reasonable. However, the Federal Court was not satisfied that the funding commission charged was fair and reasonable.²⁰

Pursuant to the funding agreement, the class members were to pay 30 or 35 per cent of the gross settlement. At the point of settlement approval, a rate of 32 per cent was sought by the litigation funder. As the settlement was for \$42 million, including legal costs and interest, and the litigation funder sought to deduct \$13.47 million as commission.

The Federal Court noted the different views which have been expressed in decisions of the Federal Court about whether it has the power to approve a settlement but vary rate of commission charged by the litigation funder. The Federal Court noted that, if it had approved the settlement agreement but varied the funding commission, questions would have arisen about its power to do so.²¹ It sought to avoid this problem by taking the approach described below.

Appointment of contradictor

The Federal Court expressed a preliminary view that a rate of 32 per cent was excessive, but a rate of 25 per cent would be reasonable. The Federal Court adjourned the case in order to give the litigation funder the opportunity to decide whether to press the application for approval at a rate of 32 per cent. If the litigation funder was to press approval at the 32 per cent rate, the Federal Court indicated that a suitably qualified contradictor would be appointed to represent the class members' interests in relation to the reasonableness of the proposed funding commission.²² The litigation funder maintained its contention that 32 per cent was fair and reasonable.

The Federal Court appointed a contradictor to represent the members' interests. The contradictor was asked to answer the question of whether a commission rate of 30 or 35 per cent was fair and reasonable and, if not, what rate would be fair and reasonable.²³

²⁰ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [3].

²¹ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [3]–[5].

²² *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [6].

²³ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [14].

The appointment of a contradictor was 'uncontentious'. However, the litigation funder sought to restrict the role of contradictor so as to prevent it from accessing certain documents. The Federal Court rejected this application.²⁴

Access to documents

To assist the Federal Court in its decision of whether to approve the proposed settlement, the litigation funder was required to file a confidential affidavit containing information about every Australian funded investor or shareholder class action in which the litigation funder has provided funding, including the commission and other charges, their estimate of the size or value of the claim, the estimated legal costs, the terms of the legal retainer and terms relating to security for costs and adverse costs orders. The representative plaintiff's lawyers were required to file a confidential affidavit disclosing similar information.²⁵

Expert opinion

The contradictor proposed to engage an expert to provide an opinion and to give evidence on the funding commission issue. The Federal Court considered it would be assisted by evidence from an expert in the capital market or finance regarding the rates of return available for other types of investment, including those that are comparable with litigation funding in terms of risk, security and liquidity.

To ensure the costs of this expert evidence were reasonable and proportionate to the amount in dispute, the contradictor was required to provide the Federal Court with a brief of questions and obtain a quote from an appropriate expert. A quote was obtained from a Professor Emeritus at the University of Melbourne and chairman of a publicly listed financial advisory and investment company, which the Federal Court considered to be modest.²⁶

The litigation funder opposed the contradictor's proposal to obtain evidence from the expert because:

- the proposed expert's evidence would sit at the periphery of the judge's consideration in determining whether to approve a settlement under section 33V;
- the litigation funder had been making significant efforts to narrow the issues in dispute;
- as the litigation funder had already foreshadowed lowering its commission rate to 28 per cent, the amount remaining in dispute would not justify the cost and complexity of permitting the contradictor to file expert evidence, noting that the litigation funder would likely need to file responsive expert

²⁴ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [11].

²⁵ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [15].

²⁶ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [18]–[19].

evidence. The difference between a commission rate of 28 per cent and 25 per cent was approximately \$1.28m. It was anticipated that the costs of both the contradictor and the litigation funder leading expert evidence would likely exceed this amount.²⁷

The litigation funder informed the Federal Court that it was prepared to consent to an order approving a funding commission of 28 per cent and sought the contradictor's consent, thereby resolving the dispute about the rate of commission.

The contradictor's response indicated that it was not its role to enter into commercial negotiation and, moreover, it could not decide whether a 28 per cent rate was fair and reasonable without having the benefit of the expert opinion it sought.²⁸

The Federal Court informed the litigation funder that if it continued to seek a commission rate of 28 per cent, it was likely to allow the contradictor to obtain the expert report it proposed. Ultimately, the litigation funder accepted a commission rate of 25 per cent and this brought the matter to a close.²⁹

Fair and reasonable fee

The Federal Court recognised that this commission rate resulted in a rate of the return on invested capital for the litigation funder of 5.02 times, or 502 per cent.³⁰

The Federal Court outlined its reasons for why it considered 25 per cent to be fair and reasonable in this case. The Federal Court noted it had regard to the confidential information provided by the litigation funder which disclosed the average rate of return it had achieved in shareholder and investor class actions over time.

The Federal Court concluded that, while the rate of 25 per cent was in excess of the litigation funder's average rate of return on shareholder or investor class actions in Australia, it was not manifestly excessive or unreasonable.³¹ This is because the Federal Court considered that the litigation funder took on funding the case at a time where there were risks of liability and quantum of any settlement, and assumed high legal costs and exposure to substantial adverse costs.³²

Costs of the contradictor

The litigation funder was ordered to pay for the costs of the contradictor:

...the appointment of a Contradictor was only necessary because the Funder pressed for a funding commission which in [the court's] preliminary view

²⁷ *Omni Bridgeway*, answer to written question on notice, 17 July 2020 (received 3 August 2020), p. 1.

²⁸ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [22].

²⁹ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [26].

³⁰ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [41].

³¹ *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [38], [47].

³² *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [43]–[45].

was not fair and reasonable. Then, prior to the hearing as to the reasonableness of the proposed funding commission, and after the Contradictor had completed significant work, the Funder altered its position and accepted the lower funding rate which the Court had earlier flagged as reasonable.³³

Submitters' views

The Endeavour River class action was raised by participants during the inquiry, with differing views expressed regarding the return to the litigation funding. Some inquiry participants considered a return of 5.02 times to be excessive.³⁴

The committee received submissions from the litigation funder in this class action, Omni Bridgeway. Omni Bridgeway submitted further costs were subsequently incurred, meaning that it received a return of 3.43 times its investment, which calculates to 3.28 times its investment when including capitalised overheads. The class members received 68 per cent of the settlement sum after costs and fees were deducted.³⁵

The representative plaintiff, Mr Rod Gibson, stated:

Without this case, and the many others like it, investors such as myself would have received no compensation for their losses, and would have very little recourse to efficiently and effectively pursue their rights in the context of corporate misconduct.³⁶

Mr Gibson also noted that, although there were a significant number of class members, there were zero objections to the proposed settlement received by the Federal Court.³⁷

Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4) [2020] FCA 1053

The case *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)*³⁸ (Webster class action) illustrates:

- the option for the Federal Court to appoint both a costs referee under section 54A of the Federal Court Act as well as a contradictor, and how this practically assists the Federal Court in its consideration of approving a proposed settlement agreement;

³³ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [165], citing *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968 [26], [50]–[51].

³⁴ Mr Justin McDonnell, Partner, King&Wood Mallesons, *Committee Hansard*, 13 July 2020, p. 48; Mr Stuart Clark, *Committee Hansard*, 13 July 2020, p. 16; Dr Peter Cashman, *Committee Hansard*, 24 July 2020, p. 23.

³⁵ Omni Bridgeway, answer to written question on notice, 17 July 2020 (received 3 August 2020).

³⁶ Mr Rod Gibson, *Submission 19*, p. 2; *Committee Hansard*, 3 August 2020, pp. 1–11.

³⁷ Mr Rod Gibson, *Submission 19*, p. 2.

³⁸ [2020] FCA 1053.

- an example of when the role of the Federal Court in protecting the interests of class members extends past the point of settlement approval, highlighting:
 - the ability of the Federal Court to, on its own motion, invite parties to consider revisiting the reasonableness of the settlement agreement subsequent to new information coming to light, which was the result of the work undertaken by a contradictor in another case; and
 - the contradictor in this case being given the opportunity to make submissions on the question of whether the settlement should be revisited.³⁹

The same professionals who made up the legal representatives and litigation funding 'team' for the representative plaintiff in the Banksia class were involved in this case. Mr Elliot's legal firm, Elliott Legal, was the solicitor for the representative plaintiff, and Mr O'Bryan and My Symons were senior and junior counsel, and the funder was an associate of Mr O'Bryan and a shareholder and non-executive director of AFPL.⁴⁰

Settlement approval

At the time when the application was made to the Federal Court to approve the settlement agreement in the Webster class action, the misconduct alleged in the Banksia class action was known to the judge in the Webster class action, however, was denied by the relevant persons.

Consequently, the Federal Court considered it appropriate to appoint:

- an independent costs expert as a referee under section 54A of the Federal Court to conduct an inquiry as to the reasonableness of the legal costs charged or proposed to be charged for the proceeding and settlement administration;⁴¹ and
- a contradictor to represent the class members' interests and to assist the Federal Court in discharging its function under section 33V of the Federal Court Act in relation to the reasonableness of the proposed legal cost, as well as the litigation funding charges.⁴²

Regarding the report on the legal costs by the costs referee, the contradictor (as well as the representative plaintiff lawyers) provided materials and made submissions to the costs expert. The costs expert's report noted the representative plaintiff's legal representation engaged in conduct such as non-compliant or non-existent costs

³⁹ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 5)* [2020] FCA 1405.

⁴⁰ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405 [4].

⁴¹ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [5].

⁴² *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [5], [8].

disclosure statements, poor time recording, excessive hourly rates and overworking the matter.

The report concluded that the legal costs should be allowed in a total of approximately \$5.21 million, almost \$1.2 million less than the approximately \$6.4 million which the representative plaintiff's solicitors had claimed. This included reductions of approximately 32 per cent and 15 per cent in relation to senior counsel and junior counsel's fees. The representative plaintiff's solicitors accepted the costs referee's findings and submitted that the Federal Court should adopt the report, as did the contradictor.⁴³

With respect to the litigation funding fees, the contradictor did not consider that a commission rate of 28 per cent was fair and reasonable (a commission of \$10.5 million). The contradictor considered that a rate of 23 per cent was reasonable (a commission of \$8.26 million), reducing the commission claimed by the funder by \$1.875 million. The contradictor considered that the costs and risks the litigation funder had taken on in funding the proceeding were much lower than was alleged by the litigation funder.⁴⁴ The Federal Court accepted this submission and altered the funding commission accordingly (under a common fund order, which is discussed in Chapter 9).⁴⁵

Costs of the contradictor

There is no 'hard and fast rule' as to who pays for the costs of a cost referee when appointed by the Federal Court. In this case, the representative plaintiff's solicitors were ordered to pay the fees of the costs referee, for reason of the alleged misconduct described above.⁴⁶ With respect to the contradictors fees, the Federal Court held that there was no conduct on the part of the litigation funder which would have justified an order that the litigation funder pay the contradictors charges. Rather, it was considered 'just' under subsection 33V(2) of the Federal Court Act for the costs of the contradictor to be paid out of the settlement sum.⁴⁷

⁴³ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [6].

⁴⁴ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405 [14].

⁴⁵ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [10]. The Federal Court in this case determined that it had the power to amend the litigation funding commission because it has made a common fund order. A common fund order was not present in the Endeavour River class action, hence the reticence of the Court in that case to amend the litigation funding commissions due to uncertainty about whether the Court is empowered to do so.

⁴⁶ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [161].

⁴⁷ *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053 [168]. Subsection 33V(2) provides that if the Federal Court approves a settlement in a class action, the Federal Court may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

Revisiting the approved settlement agreement

Subsequent to the settlement approval hearing in the Webster class action, the misconduct alleged by the contradictor in the Banksia class action was particularised in the Revised List of Issues (as noted in case example 1 above). In light of the issues alleged in this public document, alongside the concessions made by Mr O'Bryan and My Symons, the judge in the Webster class action was concerned about the possibility that the Federal Court may have been misled when approving the legal costs and litigation funding charges in the Webster class action.⁴⁸

Consequently, on the Federal Court's own motion, the judge asked the parties whether they wished to revisit the approval of the legal costs and litigation funding charges.⁴⁹ In addition to the parties, the views of the contradictor appointed for the settlement approval were also sought.

The contradictor submitted that it did not intend to make an application to revisit the approval of the legal costs and litigation funding charges. In setting out the reasons for this position, the contradictor noted key differences between the Banksia class action and the Webster class action.

An important difference was that in the Webster class action, the judge had the advantage of a report prepared by an independent costs referee, who conducted substantial investigations into the costs claimed by the legal practitioners. This identified and articulated a number of concerns with legal costs claimed by Mr O'Bryan and Mr Symons and significant reductions were applied to the fees claimed by them. Whereas in the Banksia class action, the costs assessment was performed by a costs assessor engaged by the representative plaintiff's lawyers.⁵⁰

The contradictor noted the role that the costs assessor played in assessing an appropriate commission rate for the litigation funder. The issue of whether the legal representatives were on a 'no win, no fee' basis was directly relevant to the risk the funder took by funding the proceeding and therefore whether the quantum of any funding commission was fair and reasonable.⁵¹

The contradictor highlighted the costs referee conducted their assessment of the reasonableness of the amounts claimed in legal accosts without reliance on the fee arrangements entered into with Elliott Legal, Mr O'Bryan and Mr Symons. This was because the costs referee found that they that they were invalid or did not exist.

⁴⁸ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405.

⁴⁹ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405 [2]–[3], [15], [19].

⁵⁰ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405 [23].

⁵¹ *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405 [12]–[13].

Therefore, the level of risk assumed by the litigation funder was determined from evidence tendered in the settlement approval application about when the funder was actually legally obliged to pay those disbursements, rather than the risk being assessed based on what was stated in the agreements. This allowed the Federal Court to determine at the settlement approval stage that the funder's risk was actually lower than what the litigation funder's submission sought to portray and the funding commission was altered accordingly.⁵²

The settlement agreement was not revisited in the Federal Court as none of the parties wished to do so in response to the Federal Court's correspondence.

Case 4 – Petersen class action

The committee received material from the following participants to the class action *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* (Petersen class action):⁵³

- the members of the class from the Superannuation Crisis Support Group (SCSCG);⁵⁴
- the plaintiff law firm, Quinn Emanuel Urquhart & Sullivan (Quinn Emanuel);⁵⁵
- the litigation funder, Vannin Capital (Vannin);⁵⁶ and
- a second law firm, Gilbert + Tobin, which replaced the first plaintiff law during the class action.⁵⁷

Mr Nigel Jeffares, Founder and Member of the SCSCG appeared before the committee on 24 July 2020.⁵⁸ Mr Damian Scattini, Partner at Quinn Emanuel, and Mr Crispian Lynch, Partner at Gilbert + Tobin, appeared before the committee on 27 July 2020.⁵⁹

By way of context for the discussion in this section on the Petersen class action, there were varied and sometimes conflicting views expressed by different parties on numerous aspects of this class action.

⁵² *Webster (Trustee) v Murray Goulburn C-Operative Co Limited (No 5)* [2020] FCA 1405 [23].

⁵³ [2018] FCA 1842.

⁵⁴ Superannuation Crisis Support Group, *Submission 90*.

⁵⁵ Quinn Emanuel Trial Lawyers, *Response to Submission 90*.

⁵⁶ Vannin Capital, *Response to Submission 90*.

⁵⁷ Gilbert + Tobin, *Response to Submission 90*.

⁵⁸ Mr Nigel Jeffares, Founder and Member of the Superannuation Crisis Support Group, *Committee Hansard*, 24 July 2020, pp. 54–63.

⁵⁹ Mr Crispian Lynch, Partner, Gilbert + Tobin, *Committee Hansard*, 27 July 2020, pp. 8–16; Mr Damian Scattini, Partner, Quinn Emanuel Urquhart & Sullivan, *Committee Hansard*, 27 July 2020, pp. 8–16.

For the purposes of this appendix, discussion of the Petersen class action in this section is limited to:

- the settlement of the class action;
- the work of Tobin + Gilbert akin to a contradictor; and
- the Federal Court's reduction of the legal fees and litigation funding fees to ensure proportionality with the settlement achieved.

Summary of facts of the class action and timeline

This class action was brought in the Federal Court on behalf of several hundred Bank of Queensland customers for the fraudulent misappropriation of their retirement savings by a financial advisor and related companies through unauthorised withdrawals from the Bank.⁶⁰

In 2016, Quinn Emanuel commenced the class action on behalf of the representative plaintiff. The representative plaintiff and Quinn Emanuel were funded by Vannin Capital. In 2018, the parties to the proceeding agreed to a settlement, the details of which are discussed below. Shortly thereafter, a dispute arose between Quinn Emanuel and Vannin Capital. From March 2018, Gilbert + Tobin acted for the representative plaintiff.⁶¹

Concerns expressed by SCSG and other class members

Some of the key concerns expressed in the SCSG submission were:

- the length, slow pace and expense of the class action;
- the lack of information received by class members during the class action;
- the lack of representation of class members interests at the settlement mediation;
- the settlement sum obtained;
- the unexpectedly large portions of the settlement sum deducted for transaction costs;
- decisions made during the class action which were not in the best interests of the class members;
- the physical and emotional toll of the prolonged class action on the representative plaintiff and class members.⁶²

Settlement agreement

The \$12 million settlement agreed to by the parties at the mediation proposed to leave only 2 per cent of the settlement (approximately \$250 000) to the class members. Quinn Emanuel sought to have \$4.57 million in legal costs and

⁶⁰ See, for example, Attorney-General's Department, *Submission 93*, p. 4; Vannin Capital, *Response to Submission 90*, p. 1.

⁶¹ Gilbert + Tobin, *Response to Submission 90*, p. 1.

⁶² Superannuation Crisis Support Group, *Submission 90*.

Vannin sought to have \$5 million in fees (\$3 million of which was commission) deducted from the settlement sum.⁶³

The SCSG submission noted that the estimated settlement amount was \$80 million.⁶⁴ The judgement noted that Quinn Emanuel and Vannin considered the damages 'would be in the order of \$60 million'.⁶⁵ The submissions from the participants in the Petersen class action pointed to the circumstances of the case which led to a settlement of \$12 million, according to their interpretations as well as the reasons noted in the Federal Court's judgment.⁶⁶ These include:

- A significant proportion of the class members' claims were statute barred,⁶⁷ meaning those claims were unable to participate in the settlement at all.⁶⁸
 - The Federal Court commented 'it is unfortunate (and unsatisfactory) that [those with statute barred claims] were not earlier informed about the possibility or likelihood that their claims would be statute barred'.
 - Quinn Emanuel commented 'With the benefit of hindsight, we would have filed actions on behalf of only those group members with a contractual claim. Unfortunately, we had to conduct exhaustive investigations before we could reach that conclusion'.⁶⁹
- If the matter proceeded to trial, the representative plaintiff and class members faced a significant risk that they would be unable to establish their claims, and the case had low prospects of success.⁷⁰

⁶³ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [5], [10], [12], [228]; Gilbert + Tobin, *Response to Submission 90*, p. 1; Superannuation Crisis Support Group, *Submission 90*, p. 2. Regarding Quinn Emanuel's costs, the Federal Court noted \$1 002 408 had already been already paid to it. If the claimed costs were approved, the firm would have been paid an amount of \$3 575 000 from the settlement fund. Quinn Emanuel did not seek approval of \$1 941 877 in disbursements it incurred in the proceeding (essentially because they were paid by Vannin, and Vannin sought approval for their reimbursement). In assessing the proportionality of costs, the disbursements incurred were also taken into account. Quinn Emanuel ran up total costs of approximately \$6 519 285.

⁶⁴ Superannuation Crisis Support Group, *Submission 90*, p. 2.

⁶⁵ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [146].

⁶⁶ Vannin Capital, *Response to Submission 90*, pp. 2–3; Quinn Emanuel Trial Lawyers, *Response to Submission 90*, p. 3.

⁶⁷ If an action is 'statute barred' this means that it cannot be maintained because the statutory period of time within which a plaintiff must commence legal proceedings has lapsed.

⁶⁸ Vannin Capital, *Response to Submission 90*, p. 2.

⁶⁹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [55]; Vannin Capital, *Response to Submission 90*, p. 2.

⁷⁰ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [16], [63]; Vannin Capital, *Response to Submission 90*, p. 2; Mr Crispian Lynch, Partner, Gilbert + Tobin, *Committee Hansard*, 27 July 2020, p. 14.

- The quantum of the settlement represented a high proportion of the aggregate value of class members' claims that were not statute barred and within the range of reasonableness in light of the best recovery.⁷¹
- A related class action achieved a settlement that provided compensation to a significant sub-set of the Petersen class action members which was taken into account in the settlement.⁷²

Objections to the settlement

Twenty-three class members filed objections to settlement approval. This was approximately 11 per cent of the 193 registered class members. Gilbert + Tobin maintained a register of emails and phone calls received from class members following receipt of the notices of proposed settlement. Approximately half of the correspondence from class members was neutral, while the other half of class members indicated they were unhappy with the settlement. The Federal Court noted potential reasons for this high level of objection:

- many class members have strong feelings about the case and feel highly aggrieved about the fraudulent misappropriation of their retirement savings;
- class members were informed only after the settlement that the settlement amount would be substantially consumed by legal costs and funding charges; and
- class members were informed only after the settlement that some of their claims were statute barred.⁷³

The objections related to, among other issues:⁷⁴

- whether the settlement is in the interests of group members, or only in the interest of the representative plaintiff, defendant, and representative plaintiff and litigation funder;
- the size of the settlement sum, including how it was calculated;
- the size of the fees and costs sought to be deducted from the settlement by the Quinn Emanuel;
- the making of a common fund order (see Chapter 9 for discussion on common fund orders);
- settlement distribution scheme, including lack of detail as to the calculation of payments to group members; and

⁷¹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [64]; Vannin Capital, *Response to Submission 90*, p. 2.

⁷² Quinn Emanuel Trial Lawyers, *Response to Submission 90*, p. 3.

⁷³ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [68]–[69].

⁷⁴ The other issues, which are less relevant for the purposes of this chapter, included: the limitation period and statute barred matters; non-disparagement clauses in the settlement deed; and general concerns about the effect of fraud on the group members: *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [70].

- conflicts between Quinn Emanuel and Vannin and Quinn Emanuel ceasing to act for the class members.⁷⁵

Quasi-contradictor

Law firm Gilbert + Tobin became involved in the case after the mediation at which the settlement was reached. This was because Quinn Emanuel withdrew as lawyers for the representative plaintiff. Gilbert + Tobin acted for the representative plaintiff for the limited purposes of:

- obtaining the Federal Court's approval of the already agreed settlement; and
- making submission concerning the reasonableness and proportionality of Quinn Emanuel's legal costs and Vannin's funding commission.⁷⁶

Mr Lynch described Gilbert + Tobin's role in the Petersen in the class action as 'a quasi contradictor':

In the Peterson class action, we, in a sense, took on that quasi-contradictor role: we were charged with assisting the court by producing submissions on questions of reasonableness and proportionality. So there is a practice that has evolved to assist in that respect.⁷⁷

...

...the court was assisted by a party independent of Quinn Emanuel and independent of Vannin making submissions as to reasonableness and proportionality. If Quinn Emanuel had continued acting—and it seems to be a suggestion in the judgement that Quinn Emanuel could have continued to act—this was clearly a case where the court would have nonetheless been assisted by an independent firm or independent counsel doing the very things we were doing.⁷⁸

Reduced transaction costs

As noted in Chapter 11, the Federal Court also appointed an independent costs assessor to assess the reasonableness of the legal costs and litigation funding fees.⁷⁹ The report of the costs referee concluded that the costs incurred were fair and reasonable, which was adopted by the Federal Court.⁸⁰

⁷⁵ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [70].

⁷⁶ Gilbert + Tobin, *Response to Submission 90*, p. 1.

⁷⁷ Mr Crispian Lynch, Partner, Gilbert + Tobin, *Committee Hansard*, 27 July 2020, p. 11.

⁷⁸ Mr Crispian Lynch, Partner, Gilbert + Tobin, *Committee Hansard*, 27 July 2020, p. 14.

⁷⁹ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, 18 [91], [98]–[102].

⁸⁰ *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [97]–[99].

However, as noted by Mr Scattini, the Federal Court reduced the costs 'on the grounds of proportionality'.⁸¹ The Federal Court considered the legal costs to be disproportionate and reduced the claimed costs of \$4.57 million by 40 per cent, a reduction of just over \$1.8 million.

Regarding the litigation funding fee, in approving the application for a common fund order, the Federal Court reduced Vannin's litigation funding commission from 25 per cent of the settlement sum to a funding rate of 13.7 per cent, a reduction in commission from \$3 million to \$1 million.

As a result, with respect to the amount recovered by the class members, approximately \$4 million, or 33 per cent of the settlement sum, was distributed to the representative plaintiff and class members.

The Federal Court made the following remarks about the final outcome in the class action:

As a result of these orders the applicant and class members will be approximately \$3.8 million better off than they would have been had the funding charges been approved in the amounts sought. They may remain unsatisfied with the result, and such a reaction would be understandable given what has happened to them. However, they should keep in mind that:

- they would have recovered nothing without Vannin's funding and Quinn Emanuel acting largely on a no win-no fee basis;
- there are no real winners in a settlement like this and Quinn Emanuel and Vannin have suffered substantial reductions to their proposed costs and funding charges; and
- they are better off than if the case had proceeded to trial as in my view it was likely to fail.⁸²

⁸¹ Mr Damian Scattini, Partner, Quinn Emanuel Urquhart & Sullivan, *Committee Hansard*, 27 July 2020, p. 14.

⁸² *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [6].

Appendix 3

Submissions and additional information

Submissions

- 1 Mr Daniel Meyerowitz-Katz
 - 1.1 Supplementary to submission 1
- 2 Australian Lawyers Alliance
- 3 Law Institute of Victoria
- 4 Associate Professor Sulette Lombard and Professor Christopher Symes
- 5 Professor Vicki Waye
- 6 Professor Vince Morabito
- 7 Investor Claim Partner Pty Ltd
- 8 Mr Andrew Roman
- 9 Mr Rod Barton MP
- 10 Ms Paola Balla
- 11 Harbour Litigation Funding
- 12 Risk and Insurance Management Society Australasia Chapter
- 13 Balance Legal Capital
- 14 Marsh Pty Ltd
- 15 Australian Competition and Consumer Commission
- 16 Woodsford Litigation Funding Limited
- 17 Dr Warren Mundy
- 18 Slater and Gordon
- 19 Mr Rod Gibson
- 20 Premier Litigation Funding Management
- 21 United States Chamber Institute for Legal Reform
- 22 Adjunct Professor S Stuart Clark AM FAICD
- 23 Litigation Capital Management
- 24 Mr Michael Quinn
- 25 MinterEllison
- 26 Clayton Utz
- 27 Public Interest Advocacy Centre
- 28 Health Employees Superannuation Trust Australia
- 29 Therium Capital Management (Australia) Pty Ltd
- 30 Professor Michael Legg
- 31 Augusta Ventures (Australia) Pty Ltd
- 32 River Capital
- 33 Southern Cross Litigation Finance
- 34 Australian Restructuring Insolvency and Turnaround Association
- 35 Shine Lawyers
- 36 Litigation Lending Services Ltd

- 37 Maurice Blackburn Lawyers
- 38 Adero Law
- 39 Australian Securities and Investments Commission
- 40 Australian Institute of Company Directors
- 41 Ashurst
- 42 Blue Energy Limited
- 43 Consumer Action Law Centre
- 44 Certified Practising Accountants Australia
- 45 Norton Rose Fulbright
- 46 Queensland Law Society
- 47 Dr Michael Duffy
- 48 AustralianSuper
- 49 Mr Justin McDonnell and Ms Rebecca LeBherz
- 50 Professor Peta Spender
- 51 Herbert Smith Freehills
- 52 Mr Stewart Levitt
 - 52.1 Supplementary to submission 52
- 53 King and Wood Mallesons
- 54 Law Firms Australia
- 55 Dr Peter Cashman
 - 55.1 Supplementary to submission 55
 - 55.2 Supplementary to submission 55
 - 55.3 Supplementary to submission 55
 - 55.4 Supplementary to submission 55
 - 55.5 Supplementary to submission 55
- 56 Prospa
- 57 Association of Litigation Funders of Australia
 - 57.1 Supplementary to submission 57
 - Response to supplementary submission 57.1 by the Treasury
- 58 Chartered Accountants Australia and New Zealand
- 59 Dr Kenneth Menz
- 60 Mr John Telford
- 61 Australian Council of Superannuation Investors
- 62 Institutional Shareholder Services Securities Class Actions Services
- 63 Transport Alliance Australia
- 64 Operation Redress Pty Ltd
- 65 Donaldson Law
- 66 Menzies Research Centre
- 67 Law Council of Australia
- 68 Insurance Council of Australia
- 69 Allens
- 70 Federal Chamber of Automotive Industries

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- 71 Yarra Capital Management
- 72 Australian Securities Exchange
- 73 Omni Bridgeway Limited
- 73.1 Supplementary to submission 73
 - 73.2 Supplementary to submission 73
 - Response to supplementary submission 73.1 by Menzies Research Centre
- 74 Health Industry Companies - Joint Submission
- 75 Mr Mark Morris
- 76 Grata Fund
- 77 National Council of Women Australia
- 78 Associate Professor Sean Foley and Dr Angelo Aspris
- 79 Professor Kevin Davis
- 80 Goal Group
- 81 Australian Finance Industry Association
- 82 Mr Nicos Andrianakis
- 83 Communication Workers Union Victoria
- 84 Professor Brian Fitzpatrick
- 85 PricewaterhouseCoopers
- 86 Business Council of Australia
- 87 Phi Finney McDonald
- 88 Examples of form letters
- 89 NSW Young Lawyers
- 90 Superannuation Crisis Support Group
- Gilbert and Tobin response
 - Quinn Emanuel Trial Lawyers response
 - Vannin Capital response to the Quinn Emanuel response
 - Vannin Capital Response
- 91 Dr Philip Makepeace, Dr Arthur Walsh, and Dr John Camacho
- 92 Australian Industry Group
- Adero Law response
 - Augusta response
- 93 Attorney-General's Department
- 94 Mr Lindsay Clout
- 95 Group of 100
- 96 NSW Bar Association
- 97 *Name Withheld*
- 98 *Name Withheld*
- 99 Rule of Law Institute of Australia
- 100 Professor R.R. Officer AM
- Response to the submission from Professor Bob Officer and Mr Sean McGing
- 101 Mr Sean McGing

- Response to the submission from Professor Bob Officer and Mr Sean McGing

Answers to Questions on Notice

- 1 Attorney-General's Department - Senator O'Neill - Correspondence about class actions or litigation funding - Written questions on notice from 22 May 2020 (received 11 June 2020)
- 2 Department of the Treasury - Senator O'Neill - Correspondence about class actions or litigation funding - Written questions on notice from 22 May 2020 (received 18 June 2020)
- 3 Australian Securities and Investments Commission - Mr Georganas MP - Written questions on notice from 3 July 2020 (received 10 July 2020)
- 4 The Hon Josh Frydenberg MP, Treasurer - Mr Georganas MP - Correspondence about class actions or litigation funding - Written questions on notice from 3 July 2020 (received 15 July 2020)
- 5 Attorney-General's Department - Mr Georganas MP - Correspondence about class actions or litigation funding - Written questions on notice from 3 July 2020 (received 21 July 2020)
- 6 Department of the Treasury - Mr Georganas MP - Class actions and litigation funding - Written questions on notice from 3 July 2020 (received 23 July 2020)
- 7 Correction to answer - Department of the Treasury - Senator O'Neill - Written questions on notice from 22 May 2020 (received 24 July 2020)
- 8 Australian Law Reform Commission - Mr Falinski MP - Existing regulatory requirements for litigation funders - public hearing on 27 July 2020 (received 29 July 2020)
- 9 Australian Law Reform Commission - Senator O'Neill - Cost of the Australian Law Reform Commission's litigation funding inquiry and report – public hearing on 27 July 2020 (received 29 July 2020)
- 10 Australian Law Reform Commission - Mr Falinski MP - Comparison between funded and unfunded class actions - written question on notice Q015-01 - 28 July 2020 (received 29 July 2020)
- 11 Australian Law Reform Commission - Mr Falinski MP - Comparison between funded and unfunded class actions - written question on notice Q015-03 - 28 July 2020 (received 29 July 2020)
- 12 Australian Law Reform Commission - Mr Falinski MP - Access to justice - written question on notice Q015-05 - 28 July 2020 (received 29 July 2020)
- 13 Australian Law Reform Commission - Mr Falinski MP - Measures to reduce payments to lawyers and separately returns to funders - written question on notice Q015-06 - 28 July 2020 (received 29 July 2020)
- 14 Australian Law Reform Commission - Mr Falinski MP - The regulation of fees - written question on notice Q015-07 - 28 July 2020 (received 29 July 2020)
- 15 Department of the Prime Minister and Cabinet - Senator O'Neill - Written questions on notice from 22 May 2020 (received 30 July 2020)

- 16 Australian Law Reform Commission - Mr Falinski MP - Return to the class in funded and unfunded proceedings - written question on notice Q015-02 - 28 July 2020 (received 30 July 2020)
- 17 Australian Law Reform Commission - Mr Falinski MP - Additional regulatory oversight to protect plaintiffs - written question on notice Q015-04 - 28 July 2020 (received 30 July 2020)
- 18 Professor Lombard - Senator Paterson - The growth of the litigation funding market in Australia - public hearing 24 July 2020 (received 30 July 2020)
- 19 Mr McDonnell - Mr Falinski MP - Hall v Saunders Law Ltd & Ors [2020] EWHC 404 - written question on notice 021 - 31 July 2020 (received 31 July 2020)
- 20 Omni Bridgeway - Mr Falinski MP - Contradictor access to documents – written question on notice QoN 05-01 - 17 July 2020 (received 3 August 2020)
- 21 Omni Bridgeway - Mr Falinski MP - Number of shareholders lost– written question on notice QoN 05-02 - 17 July 2020 (received 3 August 2020)
- 22 Omni Bridgeway - Mr Falinski MP - Returns in previous class actions - written question on notice QoN 05-03 - 17 July 2020 (received 3 August 2020)
- 23 Omni Bridgeway - Mr Falinski MP - Returns in Australia compared to rest of world - written question on notice QoN 05-04 - 17 July 2020 (received 3 August 2020)
- 24 Omni Bridgeway - Mr Falinski MP - Current ROIC and IRR of funds - written question on notice QoN 05-05 - 17 July 2020 (received 3 August 2020)
- 25 Omni Bridgeway - Mr Falinski MP - Current class actions in Australia - written question on notice QoN 05-06 - 17 July 2020 (received 3 August 2020)
- 26 Omni Bridgeway - Mr Falinski MP - ROIC and IRR of funds since 2010 - written question on notice QoN 05-07 - 17 July 2020 (received 3 August 2020)
- 27 Omni Bridgeway - Mr Falinski MP - What risks justify returns - written question on notice QoN 05-08 - 17 July 2020 (received 3 August 2020)
- 28 Omni Bridgeway - Mr Falinski MP - Level of control in class actions - written question on notice QoN 05-09 - 17 July 2020 (received 3 August 2020)
- 29 Omni Bridgeway - Mr Falinski MP – Copy of affidavit in Murray Goulburn - written question on notice QoN 05-10 - 17 July 2020 (received 3 August 2020)
- 30 Omni Bridgeway - Mr Falinski MP - Investor information - written question on notice QoN 05-11 - 17 July 2020 (received 3 August 2020)
- 31 Menzies Research Centre - Senator O'Neill - Quote from Federal Court Judge Michael Lee - public hearing on 13 July 2020 (received 4 August 2020)
- 32 Menzies Research Centre - Mr Falinski MP - Quote from Federal Court Judge Michael Lee - public hearing on 13 July 2020 (received 4 August 2020)
- 33 Menzies Research Centre - Senator O'Neill - CLASS ACTIONS - MYTHS v FACTS CPD SERIES 2020 - public hearing on 13 July 2020 (received 4 August 2020)
- 34 Dr Mundy - Mr Falinski MP - Written questions on notice from 7 August 2020 (received 7 August 2020)

- 35 Dr Cashman - Mr Falinski MP - Written questions on notice from 7 August 2020 (received 8 August 2020)
- 36 Marsh Pty Ltd - Mr Falinski MP - Directors and Officers Liability Policies - written question on notice QoN 012-01 - 28 July 2020 (received 9 August 2020)
- 37 Marsh Pty Ltd - Mr Falinski MP - Type of insurance to compensate loss or harm - written question on notice QoN 012-02 - 28 July 2020 (received 9 August 2020)
- 38 Marsh Pty Ltd - Senator O'Neill - ASX200 listed companies - written question on notice QoN 014-01 - 28 July 2020 (received 9 August 2020)
- 39 Marsh Pty Ltd - Senator O'Neill - Increase in premium for the ASX200 in 2019 - written question on notice QoN 014-02 - 28 July 2020 (received 9 August 2020)
- 40 Marsh Pty Ltd - Senator O'Neill - Data for the first quarter of 2020 - written question on notice QoN 014-03 - 28 July 2020 (received 9 August 2020)
- 41 Marsh Pty Ltd - Senator O'Neill - Increases to D&O renewals - written question on notice QoN 014-04 - 28 July 2020 (received 9 August 2020)
- 42 Superannuation Crisis Support Group - Senator O'Neill - The costs agreement - public hearing on 24 July 2020 (received 10 August 2020)
- 43 Association of Litigation Funders of Australia - Ms Hammond MP - ALFA Submissions - 4 Cases - public hearing on 24 July 2020 (received 13 August 2020)
- 44 Association of Litigation Funders of Australia - Ms Hammond MP - Augusta's Referral Fee Issue - public hearing on 24 July 2020 (received 13 August 2020)
- 45 Association of Litigation Funders of Australia - Mr Falinski MP - Release of data provided by John Walker or Phillipa Murphy to Professor Morabito - public hearing on 24 July 2020 (received 13 August 2020)
- 46 Association of Litigation Funders of Australia - Mr Falinski MP - The allegations made in respect of Richard Hill - public hearing on 24 July 2020 (received 13 August 2020)
- 47 Association of Litigation Funders of Australia - Senator Paterson - The allegations made in respect of Paul Lindholm - public hearing on 24 July 2020 (received 13 August 2020)
- 48 Department of the Prime Minister and Cabinet - Mr Georganas MP - Correspondence regarding class actions and litigation funding - Written questions on notice from 3 July 2020 (received 14 August 2020)
- 49 Insurance Council of Australia - Mr Falinski MP - Meeting with the Treasurer - public hearing on 27 July 2020 (received 17 August 2020)
- 50 Insurance Council of Australia - Mr Falinski MP - Donation to a political party - public hearing on 27 July 2020 (received 17 August 2020)
- 51 Slater and Gordon - Ms Hammond MP - Slater and Gordon resolved class action particulars - public hearing on 27 July 2020 (received 17 August 2020)
- 52 Slater and Gordon - Mr Falinski MP - Keep Corporations Honest particulars - public hearing on 27 July 2020 (received 17 August 2020)

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- 53 Slater and Gordon - Mr Falinski MP - Association between American Chamber of Commerce and Federal Treasurer - public hearing on 27 July 2020 (received 17 August 2020)
 - 54 Slater and Gordon - Ms Hammond MP - Political Donations - public hearing on 27 July 2020 (received 17 August 2020)
 - 55 Slater and Gordon - Senator Paterson - Funding contributors of Keep Corporations Honest campaign; Contributors listed on KCH website - public hearing on 27 July 2020 (received 17 August 2020)
 - 56 Attorney-General's Department - Senator O'Neill - Correspondence with Mr Stuart Clark - Written question on notice from 28 July 2020 (received 18 August 2020)
 - 57 Attorney-General's Department - Senator O'Neill - Advices to the Attorney-General and the regulation of the litigation funding schemes - Written question on notice from 28 July 2020 (received 18 August 2020)
 - 58 Attorney-General's Department - Senator O'Neill - Dataset provided by the Federal Court - Written questions on notice from 28 July 2020 (received 18 August 2020)
 - 59 Associate Professor Sulette Lombard and Professor Christopher Symes - Mr Falinski MP - Consideration of a voluntary Code of Conduct like the UK - Written questions on notice from 29 July 2020 (received 18 August 2020)
 - 60 Associate Professor Sulette Lombard and Professor Christopher Symes - Mr Falinski MP - Ability of a judge to regulate funders - Written questions on notice from 29 July 2020 (received 18 August 2020)
 - 61 Maurice Blackburn Lawyers - Ms Hammond MP - Maurice Blackburn's history in Class Actions - public hearing on 27 July 2020 (received 19 August 2020)
 - 62 Maurice Blackburn Lawyers - Mr Falinski MP - Keep Corporations Honest campaign - public hearing on 27 July 2020 (received 17 August 2020)
 - 63 Maurice Blackburn Lawyers - Mr Falinski MP - Meeting with the Victorian Attorney-General - public hearing on 27 July 2020 (received 17 August 2020)
 - 64 Maurice Blackburn Lawyers - Ms Hammond MP - Donations to Australian political parties - public hearing on 27 July 2020 (received 17 August 2020)
 - 65 Shine Lawyers - Ms Hammond MP - Conducted Class Actions - public hearing on 27 July 2020 (received 19 August 2020)
 - 66 Shine Lawyers - Mr Falinski MP - Keep Corporations Honest - public hearing on 27 July 2020 (received 19 August 2020)
 - 67 Shine Lawyers - Mr Falinski MP - No Win No Fee/Contingency Fees/Funding Fees - public hearing on 27 July 2020 (received 19 August 2020)
 - 68 Shine Lawyers - Ms Hammond MP - Political Donations and approaches, revenue, salaries and charge out rates - public hearing on 27 July 2020 (received 19 August 2020)
 - 69 Australian Institute of Company Directors - Mr Georganas MP - Regulation of litigation funders - public hearing on 29 July 2020 (received 19 August 2020)

- 70 Law Council of Australia - Mr Falinski MP - Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3) [2018] FCA 184 case - public hearing on 29 July 2020 (received 19 August 2020)
- 71 Law Council of Australia - Senator O'Neill - Examples of cases which may not have proceeded in the absence of third-party funding - public hearing on 29 July 2020 (received 19 August 2020)
- 72 Law Council of Australia - Mr Falinski MP - Common fund orders increasing returns to class members - public hearing on 29 July 2020 (received 19 August 2020)
- 73 Australian Industry Group - Ms Hammond MP - Project costs - public hearing on 29 July 2020 (received 19 August 2020)
- 74 Department of the Treasury - Senator Pratt - Advice to the Treasurer - public hearing on 29 July 2020 (received 19 August 2020)
- 75 Department of the Treasury - Senator O'Neill - File list entitled 'Markets Regulation - Advice - Corporations - Disclosure' - written question on notice Q007-01 - 28 July 2020 (received 19 August 2020)
- 76 Department of the Treasury - Senator O'Neill - Briefing/advice on the regulation of litigation funders and/or litigation funding of class actions - written question on notice Q007-02 - 28 July 2020 (received 19 August 2020)
- 77 Department of the Treasury - Senator O'Neill - Regulation impact statement entitled 'regulating litigation funders under the Corporations Act' - written question on notice Q007-03 - 28 July 2020 (received 19 August 2020)
- 78 Department of the Treasury - Senator O'Neill - Litigation funding schemes - written question on notice Q007-04 - 28 July 2020 (received 19 August 2020)
- 79 Australian Competition and Consumer Commission - Ms Hammond MP - Complaints against litigation funders - public hearing on 29 July 2020 (received 20 August 2020)
- 80 Professor Spender - Mr Falinski MP - Consideration of a voluntary Code of Conduct like the UK - written questions on notice from 29 July (received 20 August 2020)
- 81 Professor Spender - Mr Falinski MP - Ability of a judge to regulate funders - written questions on notice from 29 July (received 20 August 2020)
- 82 Professor Spender - Mr Falinski MP - Regulation of litigation funders and lawyers - written questions on notice from 29 July (received 20 August 2020)
- 83 Attorney-General's Department - Senator O'Neill - Discussions between the Treasurer and Attorney-General - public hearing on 29 July 2020 (received 21 August 2020)
- 84 Attorney-General's Department - Senator O'Neill - SSC Advisory and Mr Clark - public hearing on 29 July 2020 (received 21 August 2020)
- 85 Attorney-General's Department - Senator O'Neill - Legislation for the Attorney-General - public hearing on 29 July 2020 (received 21 August 2020)

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- 86 Australian Securities and Investments Commission - Mr Falinski MP - Mr Richard Langley Stewart Hill - public hearing on 29 July 2020 (received 21 August 2020)
 - 87 Australian Securities and Investments Commission - Mr Falinski MP - Who may 'run' a litigation funder in Australia - public hearing on 29 July 2020 (received 21 August 2020)
 - 88 Australian Securities and Investments Commission - Mr Falinski MP - Ai Group report - public hearing on 29 July 2020 (received 21 August 2020)
 - 89 Australian Securities and Investments Commission - Senator Paterson - Number of successful actions taken by ASIC against litigations funders - public hearing on 29 July 2020 (received 21 August 2020)
 - 90 Australian Securities and Investments Commission - Mr Falinski MP - Why litigation funders were exempt from certain provisions of the *Corporations Act 2001* - public hearing on 29 July 2020 (received 21 August 2020)
 - 91 Australian Securities and Investments Commission - Senator Pratt - ASIC's submission to the Australian Law Reform Commission inquiry into class action proceedings and third-party litigation funders - public hearing on 29 July 2020 (received 21 August 2020)
 - 92 Australian Securities and Investments Commission - Senator O'Neill - Litigation funding - written question on notice QoN008-02 - 28 July 2020 (received 21 August 2020)
 - 93 Australian Securities and Investments Commission - Mr Falinski MP - The running of litigation funding companies - written question on notice QoN020-01 - 28 July 2020 (received 21 August 2020)
 - 94 Australian Securities and Investments Commission - Mr Falinski MP - Action against litigation funders - written question on notice QoN020-02 - 28 July 2020 (received 21 August 2020)
 - 95 Health Employees Superannuation Trust Australia - Mr Falinski MP - Australian Financial Services Licence (AFSL) - public hearing on 3 August 2020 (received 24 August 2020)
 - 96 Health Employees Superannuation Trust Australia - Mr Falinski MP - Engagement examples - public hearing on 3 August 2020 (received 24 August 2020)
 - 97 Health Employees Superannuation Trust Australia - Mr Falinski MP - Sponsorship - public hearing on 3 August 2020 (received 24 August 2020)
 - 98 Health Employees Superannuation Trust Australia - Mr vanManen MP - Class actions and the increasing cost of directors liability insurance - public hearing on 3 August 2020 (received 24 August 2020)
 - 99 Shine Lawyers - Mr Falinski MP - Class actions - written question on notice QoN011-01 - 28 July 2020 (received 24 August 2020)
 - 100 Shine Lawyers - Mr Falinski MP - Contingency fee arrangement - written question on notice QoN011-02 - 28 July 2020 (received 24 August 2020)

- 101 Shine Lawyers - Mr Falinski MP - Law firms - written question on notice QoN011-03 - 28 July 2020 (received 24 August 2020)
- 102 Shine Lawyers - Mr Falinski MP - The Johnson & Johnson Pelvic mesh case - written question on notice QoN011-04 - 28 July 2020 (received 24 August 2020)
- 103 Shine Lawyers - Mr Falinski MP - The Johnson & Johnson Pelvic mesh case fees- written question on notice QoN011-05 - 28 July 2020 (received 24 August 2020)
- 104 Shine Lawyers - Mr Falinski MP - The Johnson & Johnson Pelvic mesh case on a no win, no fee basis - written question on notice QoN011-06 - 28 July 2020 (received 24 August 2020)
- 105 Shine Lawyers - Mr Falinski MP - Uplift charged or payable in the Pelvic mesh class action - written question on notice QoN011-08 - 28 July 2020 (received 24 August 2020)
- 106 Shine Lawyers - Mr Falinski MP - Litigation funding for the Pelvic mesh class action - written question on notice QoN011-09 - 28 July 2020 (received 24 August 2020)
- 107 Shine Lawyers - Mr Falinski MP - Litigation funding for the Pelvic mesh class action - written question on notice QoN011-10 - 28 July 2020 (received 24 August 2020)
- 108 Shine Lawyers - Mr Falinski MP - Charge on a contingency fee - written question on notice QoN011-11 - 28 July 2020 (received 24 August 2020)
- 109 Shine Lawyers - Mr Falinski MP - Reason why the Pelvic mesh class action was included in the Keep Corporations Honest campaign - written question on notice QoN011-12 - 28 July 2020 (received 24 August 2020)
- 110 Associate Professor Sulette Lombard and Professor Christopher Symes - Mr Falinski MP - written questions on notice from 29 July 2020 (received 24 August 2020)
- 111 Insurance Council of Australia - Mr Falinski MP - Difference between director and officer liability insurance and product liability insurance - written question on notice QoN013-01 - 28 July 2020 (received 25 August 2020)
- 112 Insurance Council of Australia - Mr Falinski MP - Product liability insurance - written question on notice QoN013-02 - 28 July 2020 (received 25 August 2020)
- 113 Health Employees Superannuation Trust Australia - Mr Falinski MP - HESTA is a passive investor in Omni Bridgeway - written question on notice QoN022-01 - 6 August 2020 (received 27 August 2020)
- 114 Health Employees Superannuation Trust Australia - Mr Falinski MP - Companies that HESTA holds shares in have been subject to class actions - written question on notice QoN022-02 - 6 August 2020 (received 27 August 2020)
- 115 Association of Litigation Funders of Australia - Litigation funding agreements from Augusta Venture, ICP and Vannin Capital - public hearing 24 July 2020 (received 28 August 2020)

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- 116 Health Employees Superannuation Trust Australia - Mr Falinski MP - Debby Blakey correspondence about class actions or litigation funding - written questions on notice QoN027 - 7 August 2020 (received 28 August 2020)
 - 117 Health Employees Superannuation Trust Australia - Mr Falinski MP - Mary Delahunty correspondence about class actions or litigation funding - written questions on notice QoN028 - 7 August 2020 (received 28 August 2020)
 - 118 Herbert Smith Freehills (on behalf of JLT Risk Solutions, a subsidiary of Marsh Pty Ltd) - Senator O'Neill - Local council insurance - public hearing 27 July 2020 (received 31 August 2020)
 - 119 Australian Securities and Investments Commission - Senator O'Neill - Department of the Treasury correspondence on litigation funding - written question on notice QoN008-01 - 28 July 2020 (received 31 August 2020)
 - 120 Attorney-General's Department - Mr Georganas MP - Cases filed in the Federal Court of Australia by a corporation - written question on notice QoN031-01 - 14 August 2020 (received 1 September 2020)
 - 121 Shine Lawyers - Ms Hammond MP - Standard agreement between a law firm and the litigation funder - written question on notice QoN030-01 - 14 August 2020 (received 3 September 2020)
 - 122 Shine Lawyers - Ms Hammond MP - Consumers - written question on notice QoN030-02 - 14 August 2020 (received 3 September 2020)
 - 123 Maurice Blackburn Lawyers - Senator Paterson - Copies of agreements with litigation funders - written question on notice QoN035-01 - 24 August 2020 (received 14 September 2020)
 - 124 Maurice Blackburn Lawyers - Senator Paterson - Class actions involving Claims Funding Europe - written question on notice QoN035-02 - 24 August 2020 (received 14 September 2020)
 - 125 Maurice Blackburn Lawyers - Senator Paterson - Class actions involving International Litigation Funding Partners - written question on notice QoN035-03 - 24 August 2020 (received 14 September 2020)
 - 126 Maurice Blackburn Lawyers - Senator Paterson - Class actions involving Claims Funding Australia - written question on notice QoN035-04 - 24 August 2020 (received 14 September 2020)
 - 127 Maurice Blackburn Lawyers - Senator Paterson - Class actions involving CFA, CFI and ILFP - written question on notice QoN035-05 - 24 August 2020 (received 14 September 2020)
 - 128 Department of the Treasury - Mr Georganas MP - Tax deductions claimed by corporations - written question on notice QoN032-01 - 14 August 2020 (received 21 September 2020)
 - 129 Australian Securities and Investments Commission - Senator O'Neill - ASIC's processes in relation to litigation funding schemes - written question on notice QoN 038-01 - 3 September 2020 (received 25 September 2020)

- 130 Australian Securities and Investments Commission - Senator O'Neill - Initial and ongoing costs for litigation funders - written question on notice QoN 038-02 - 3 September 2020 (received 25 September 2020)
- 131 Australian Securities and Investments Commission - Senator O'Neill - ASIC's consultation with litigation funders, lawyers and other stakeholders in relation to the Corporations Amendments (Litigation Funding) Regulations 2020 - written question on notice QoN 038-03 - 3 September 2020 (received 25 September 2020)
- 132 The Hon Josh Frydenberg MP, Treasurer - Mr Georganas MP - Organisations affected by new regulations - written question on notice QoN 033 - 14 August 2020 (received 4 October 2020)

Additional Information

- 1 Correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation to the Parliamentary Joint Committee on Corporations and Financial Services (received 23 April 2020 and 11 June 2016)
- 2 Additional information from Omni Bridgeway - Case studies of matters founded by Omni Bridgeway (received 3 August 2020)
- 3 Correspondence from Mr Stuart Clark (received 18 August 2020)
- 4 Correspondence from the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to Australian Securities and Investments Commission instruments 2020/37 and 2020/38 (received 8 October 2020)

Additional Hearing Information

- 1 Omni Bridgeway response to evidence from Mr Mark Morris at the public hearing on 3 August 2020 (received 14 August 2020)

Tabled Documents

- 1 Australian Securities and Investments Commission - Opening Statement - from public hearing on 29 July 2020
- 2 Senator Deborah O'Neill - Alison Eveleigh, 'A significant inequality of arms: Funding to better outcome in PFAS class action, judge says', *Lawyerly*, 9 June 2020
- 3 Senator Deborah O'Neill - Tammy Mills, 'Powerful US business lobbyist enters Australia's class action debate', *Sydney Morning Herald*, 16 June 2020
- 4 Senator Deborah O'Neill - Danny Hakim, 'Big Tobacco's Staunch Friend in Washington: U.S. Chamber of Commerce', *New York Times*, 9 October 2015
- 5 Senator Deborah O'Neill - Smith v Commonwealth of Australia (No 2) [2020] FCA 837, Lee J, 5 June 2020
- 6 Senator Deborah O'Neill - United States Chamber Institute for Legal Reform, 2017 Speaker Showcase: 'Through the Binoculars: Global Problems, Universal Solutions' - Transcript of a 37 second excerpt of a video recording featuring Mr Stuart Clark

Appendix 4

Public hearings

Monday, 13 July 2020

Committee Room 2S1

Parliament House, Canberra

Menzies Research Centre

- Mr James Mathias, Chief of Staff

Mr Stuart Clark AM, Private capacity

Professor Michael Legg, Private capacity

Dr Warren Mundy, Private capacity

King and Wood Mallesons

- Mr Alexander Morris, Partner

Ms Rebecca LeBherz, Private capacity

Mr Justin McDonnell, Private capacity

Omni Bridgeway Limited

- Mr Andrew Saker, Managing Director and Chief Executive Officer

Friday, 24 July 2020

Committee Room 2S1

Parliament House, Canberra

Professor Vince Morabito, Private capacity

Dr Sulette Lombard, Private capacity

Professor Kevin Davis, Private capacity

Professor Peta Spender, Private capacity

Dr Peter Cashman, Private capacity

Association of Litigation Funders of Australia

- Mr John Walker, Chairman
- Ms Pip Murphy, Chief Executive Officer

Litigation Capital Management

- Mr Patrick Moloney, Chief Executive Officer
- Ms Susanna Taylor, Senior Investment Manager

Federal Chamber of Automotive Industries

- Mr Tony Grasso, Chairman
- Mr Tony McDonald, Director
- Mr Greg Williams, Legal Advisor

Superannuation Crisis Support Group

- Mr Nigel Jeffares, Founder and Member of working group

Mr Rod Barton, MP (VIC), Private capacity

Monday, 27 July 2020

Committee Room, 2S1

Parliament House, Canberra

Donaldson Law

- Mr Adair Donaldson, Director

Quinn Emanuel Urquhart & Sullivan

- Mr Damian Scattini, Partner

Gilbert + Tobin

- Mr Crispian Lynch, Partner

Maurice Blackburn Lawyers

- Mr Andrew Watson, Principal Lawyer

Slater and Gordon Lawyers

- Mr Ben Hardwick, Head of Class Actions
- Mr Andrew Paull, Practice Group Leader

Shine Lawyers

- Ms Janice Saddler, Head of Class Actions

Phi Finney McDonald

- Mr Ben Phi, Managing Director

Mr Stewart Levitt, Private capacity

Adero Law

- Mr Rory Markham, Managing Director

Insurance Council of Australia

- Mr Tom Lunn, Senior Policy Manager, Consumer Outcomes

- Mr Ewen McKay, Chair of the Professional Indemnity Committee of the Insurance Council of Australia

Marsh Pty Ltd

- Mr Craig Claughton, Managing Director and Head of Financial and Professional Liability
- Mr Scott Leney, Chief Executive Officer Australia

Chartered Accountants ANZ

- Ms Kristen Wydell, General Manager Professional Standards

Australian Law Reform Commission

- Mr Matt Corrigan, General Counsel

Wednesday, 29 July 2020

Committee Room S23

Parliament House, Canberra

Australian Institute of Company Directors

- Mr Christian Gergis, Head of Policy
- Ms Louise Petschler, General Manager Advocacy

Business Council of Australia

- Mr Robert Johanson, Chair of the Corporate Governance Working Group
- Mr Simon Pryor, Head of Major Projects, Regulation and Corporate Governance

Australian Industry Group

- Mr Stephen Smith, Head of National Workplace Relations Policy

Law Council of Australia

- Ms Pauline Wright, President
- Mr John Emmerig, Chair, Federal Litigation and Dispute Resolution Section
- Mr John Farrell, Senior Policy Lawyer
- Mr Greg Golding, Member, Corporations Committee, Business Law Section

Australian Securities and Investments Commission

- Mr Daniel Crennan QC, Deputy Chair
- Ms Karen Chester, Deputy Chair
- Ms Cathie Armour, Commissioner

Australian Securities and Investments Commission

- Mr Daniel Moran, Group General Counsel and Company Secretary

Australian Competition & Consumer Commission

- Mr Marcus Bezzi, Executive General Manager Specialised Enforcement and Advocacy
- Mr Nicholas Heys, Deputy General Manager Enforcement Coordination

Attorney-General's Department

- Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group
- Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division
- Dr Albin Smrdel, Assistant Secretary, Legal System Branch
- Mr Ryan Perry, Principal Legal Officer, Legal System Branch

Department of the Treasury

- Ms Christine Barron, Division Head, Markets Conduct Division
- Ms Mohita Zaheed, Principal Adviser, Financial System Division
- Ms Jillian Craven, Manager, Law Design Office
- Ms Erin Wells, Assistant Secretary, Law Design Office
- Ms Ruth Moore, Manager, Market Conduct Division

Monday, 3 August 2020

Committee Room 1R3

Parliament House, Canberra

Mr Rod Gibson, Private capacity

Dr Philip Makepeace, Private capacity

Dr Arthur Walsh, Private capacity

Dr John Camacho, Private capacity

Health Employees Superannuation Trust Australia

- Ms Debby Blakey, Chief Executive Officer
- Ms Mary Delahunty, Head of Impact

Mr Mark Morris, Private capacity