



Submission to Australian Law
Reform Commission

Inquiry into Class Action
Proceedings and Third-Party
Litigation Funders (DP 85)

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1. Introduction to the Inquiry

Proposal 1-1

The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) with regards to:

- the propensity for corporate entities to be the target of funded shareholder class actions in Australia;
- the value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and
- the availability and cost of directors and officers liability cover within the Australian market.

We are all shareholders now (echoing the sentiment of John F Kennedy's 1962 statement that 'Consumers, by definition, include us all'), and an informed market and investor protection is key to protecting Australians' investments, including through superannuation. An examination of the operation of the continuous disclosure regime and prohibition on misleading conduct in conjunction with the mechanisms for enforcing those provisions is desirable.

While the ALRC does not seek comment on the current operation of shareholder class actions as its proposal is for a further review, this submission sets out some of the questions or issues that merit examination.

As a starting point it is necessary to comprehend the objectives of the continuous disclosure regime and the prohibition on misleading conduct. In short, those objectives may be expressed as market integrity and investor protection. However, these laws also assist in preventing market manipulation and insider trading. More generally, the need to disclose may also discourage questionable corporate conduct where the disclosure regime would require that the conduct be made public. The disquieting revelations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry suggest that tools to discourage corporate misconduct are clearly needed.

If those goals are accepted, then the question becomes whether the current laws achieve those goals in an optimal manner. This requires an assessment of the operation of the laws, the remedies that are available and the mechanisms for enforcement. This would include consideration of such matters as whether the removal of intent or fault by the *Financial Services Reform Act 2001*(Cth) remains desirable, what the test for causation should be and whether it should be specified in the legislation, whether compensation should remain as a remedy, or be capped, or a measure of loss added to the Act, and whether contraventions

should be subject to private enforcement (including the class action) or only be able to be pursued by a government regulator.

While the ALRC has focussed on the propensity for corporations to be sued through a class action, this is only an indirect indicator of what really matters – are the claims meritorious? This may be assessed by asking whether there are actual contraventions that caused real loss. If the law was broken, then as a society we should expect that the law will be enforced. In the realm of shareholder class actions, that translates to what a settlement means. Are corporations accepting they have committed a breach and looking to remedy it? Where all settlements are accompanied by a non-admission of liability it is difficult to answer this question in the positive, but perhaps they are. Are the persons that control the corporations using shareholder and insurance funds to buy 'peace' and shield their conduct from examination?

Alternatively, is the law too easily contravened? Has the consumer protection ethos turned every 'price-drop' into a 'securities fraud'? Are settlement payments to avoid the additional costs of share price decline, reputational harm and employee diversion away from running the company and to defending litigation?

A related question is, assuming a meritorious claim, how much of the compensation paid goes to those who suffered loss, and how much is consumed in transaction costs, mainly legal fees and litigation funding fees? Does the level of transaction costs unduly incentivise lawyers and funders to bring actions?

The ALRC then refers to the value of the investments of shareholders at the time the class action is announced/commenced. We assume this issue is focussed on the ability of the threat of litigation or its actual commencement to result in the share price declining, ie that shareholder value may suffer as a result of the class action.

A further question here is the circularity or pocket-shifting argument. The utility of compensation in the on-market situation has been questioned and led to analysis that suggests that when shareholders are diversified, the payment of compensation is a 'pocket shifting' exercise where the shareholders who traded are paid by the shareholders who did not, but with large transaction costs due to the lawyer's fees and the litigation funder's share of any recovery. The pocket-shifting occurs because most securities class actions settle and settlements are funded by the corporate defendant or an insurance policy. Rarely are individual wrongdoers such as directors, or third parties such as auditors or advisers, required to contribute financially to a settlement.

The ALRC's third concern is the availability and cost of directors and officers (D&O) insurance as a result of shareholder class actions. This concern reflects the insurers' response to not making money on D&O insurance – leave the market or increase premiums.

However, it must be recognised that insurers knew that they were under-pricing D&O insurance in 2009 after the Aristocrat shareholder class action settlement of \$144.5 million where it was estimated insurance paid about \$100 million of the settlement.¹ An important question is why the insurance market did not adapt sufficiently. This introduces another part of the puzzle – the insurance market and how it prices risks. A review responding to Proposal 1-1 needs to include data and analysis of how D&O insurance is priced and the payments made.

D&O insurance policies obtained by corporations commonly contain three insuring clauses. 'Side A' covers individual directors and officers in respect of personal liability incurred in their capacity as a director or officer of the company and for which they have not or cannot claim indemnity from the company. 'Side B' reimburses the company in respect of its indemnification of its directors and officers. 'Side C' provides indemnity to listed companies for claims made against them in relation to their securities. While side A and side B deal with claims against the directors, side C provides coverage for the corporation. Side C is significant because it means that the company is able to insure against shareholder class actions. Side C is also the clause which has been the primary source of payments. This is not surprising because most shareholder class actions are brought against the company only.

This has two important ramifications. First the problem is not really insurance for directors. It is insurance for corporations against shareholder claims. Consequently, one of the chief arguments given for D&O insurance – to attract top talent and to encourage commercial risk taking aimed at generating profits may not be endangered. Directors and officers are not being sued at an alarming rate and it should be profitable for insurers to offer this coverage.

Second, the 'leave the market or increase premiums' responses are not the only options. A third option would be to offer and price side C separately. AIG Australia did just this after the Aristocrat class action settlement.² However, the rest of the insurance market did not follow. If side C is priced in a manner that reflects the risk of shareholder class action payments, then it should be able to be offered profitably. Of course, lawyers and funders may then change how they frame class actions by adding claims against directors so as to be able to access the side A and side B insurance. A new dynamic may then arise and need to be addressed.

3. Regulating Litigation Funders

Proposal 3-1

The Corporations Act (2001) (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.

¹ Michael Legg, 'The Aristocrat Leisure Ltd shareholder class action settlement' (2009) 37 *Australian Business Law Review* 399.

² Michael Legg, 'The Aristocrat Leisure Ltd shareholder class action settlement' (2009) 37 *Australian Business Law Review* 399.

Proposal 3–2

A litigation funding licence should require third-party litigation funders to:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interest;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

We agree that the *Corporations Act 2001* (Cth) (the “Act”) should be amended³ to require that litigation funders be required to obtain and maintain a statutorily mandated litigation funding license. A mandatory licensing regime is long overdue in Australia and it is unfortunate that licensing was not required at the time of the 2012 amendments to the Act⁴ or following the 2014 recommendations of the Productivity Commission.⁵ It is time to act to impose meaningful, statutory regulation on the third-party funding sector.⁶

We agree that the initial proposed requirements should be included in the regulatory scheme. In particular, it is vital that the disclosure and management of conflicts of interest be maintained. We also agree that an annual audit, similar to that required by the Act,⁷ should be a mandatory component of the holding and maintaining of the license.

In addition to the regulations proposed, we believe it would be prudent to include specific provisions requiring that the funder not take any steps in any funded action that would cause or be likely to cause a solicitor or barrister representing a group member in a funded class action to act in breach of their professional duties; and not to seek to influence a solicitor or barrister representing group members in a funded class action to cede control of any conduct of the dispute to the funder.⁸ Though these circumstances may be indirectly addressed by the

³ The alternative of a stand-alone litigation funding act could also be adopted.

⁴ See *Corporations Amendment Regulation 2010* (No 6) (Cth).

⁵ See Productivity Commission, *Access to Justice Arrangements*, Productivity Commission Inquiry Report No 72, Vol 2 (2014) 633.

⁶ See Poonam Puri, “Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System” (2014) 55 *Canadian Business Law Journal*, 34, 50-52 (concluding that legislative standards are the preferred method for regulation of litigation funders).

⁷ See *Corporations Act 2001* (Cth) s 989B; *Corporations Regulations 2001* (Cth) r 7.8.13.

⁸ See *Code of Conduct for Litigation Funders*, UK Association of Litigation Funders (January 2018) [9.2], [9.3].

existing conflicts of interest disclosure rules,⁹ it is worthwhile to make these obligations explicit in a comprehensive set of regulations.

Question 3–1

What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

We see no reason why the officers of litigation funders should be held to any lesser standard than officers of holders of Australian Financial Services licenses. We agree, however, that there is no compelling reason to hold litigation funders to a higher or more onerous standard. Therefore, we would look to the existing ASIC regulations and requirements for AFS license holders to guide the new regulatory framework.

At a minimum, an officer of a litigation funder should be able to demonstrate the same “good fame and character” as is expected for holders of AFS licenses. Thus, an officer should have to address whether she has been convicted of fraud within the last 10 years; whether she has ever held an AFS license that was suspended or cancelled or been employed in a senior management position at a litigation funder that was unable to meet its funding obligations; or whether any banning order or disqualification order has been made against that person in relation to the provision of a financial services or similar product. If the officer is a qualified solicitor, the regulations should additionally require consideration of whether any disciplinary proceedings have been brought against that person and whether any suspension from practice had ever been imposed.

As a general matter, the minimum qualifications for officers of litigation funders should mirror those contained in the ASIC regulations for holders of AFS licenses. As the DP notes, qualified solicitors will already have had to demonstrate sufficient qualifications to be admitted to practice and are officers of the court, so additional, specific experience requirements above those contained in the ASIC regulations are not necessary.

Question 3–2

What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

We agree that security for costs alone is not a sufficient protection against the dangers of a litigation funder failing to fulfil its obligations. Therefore, the regulations should include a specific provision requiring minimum safe holdings to demonstrate capital adequacy. The first Code of Conduct from the UK Association of Litigation Funders to establish a specific amount

⁹ See Australian Securities & Investments Commission, *Litigation schemes and proof of debt schemes: Managing conflicts of interest*, Regulatory Guide 248 (2013).

of required available capital, released in 2014, set that minimum amount at £2 million.¹⁰ Just two years later, that minimum amount was more than doubled to £5 million,¹¹ which was maintained as the minimum requirement in the most recent version of the Code.¹² This increase suggests that the need for capital adequacy is increasing in the litigation funding market.

It would be reasonable for the Australian capital adequacy framework to be based on that already administered by ASIC for AFS license holders. We agree with the approach cited in the DP from the U.S. Chamber of Commerce as a model that will require the holding of adequate capital resources and provide for ongoing reporting and monitoring to ensure the obligations are being satisfied.

Question 3–3

Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?

Litigation funders should be required to join the Australian Financial Complaints Authority scheme to provide additional protection to group members and other consumers of litigation funding services. The regulatory regime established should be comprehensive and requiring litigation funders to join the AFCA would fill any gaps that might remain, even after court supervision of the actions in which litigation funders are associated. Should a dispute arise in the context of the litigation, the Court could refer the parties to AFCA for resolution of that dispute. However, if a dispute arises outside or after the conclusion of the litigation, recourse to AFCA would likely provide for a quicker and cheaper resolution than other alternatives.

4. Conflicts of Interest

Proposal 4–1

If the licensing regime proposed by Proposal 3–1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248 and should be required to report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

Proposal 4–2

¹⁰ See *Code of Conduct for Litigation Funders*, UK Association of Litigation Funders (January 2014) [9.4.2] <<http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf>>.

¹¹ See *Code of Conduct for Litigation Funders*, UK Association of Litigation Funders (November 2016) [[9.4.2] <<http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf>>.

¹² See *Code of Conduct for Litigation Funders*, UK Association of Litigation Funders (January 2018) [9.4.2].

If the licensing regime proposed by Proposal 3–1 is not adopted, ‘law firm financing’ and ‘portfolio funding’ should be included in the definition of a ‘litigation scheme’ in the Corporations Regulations 2001 (Cth).

Proposal 4–3

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

Proposal 4–4

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

Proposal 4–5

The Australian Solicitors’ Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.

Proposal 4–6

The Federal Court of Australia’s Class Action Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.

Certification and Adequate Representation

In our view, a statutorily required certification of a proposed class action provides a means of addressing issues related to conflicts of interest.¹³

Though not considered in the DP, it is our view that a certification procedure, which includes a requirement that the court find that the representative party is an adequate representative for the group members, would give the court the power to administer an effective regime for managing conflicts, as well as class counsel and litigation funders. Specifically, the certification process would allow for the “unbundling” of the tripartite relationship between the group members, prospective class counsel and litigation funders. The court should therefore be required to find that the representative plaintiff is adequate to represent the class as a whole, including by determining that there are no conflicts that should disqualify the representative party from representing the claims of the group members.

¹³ See also submissions in response to Chapters 5 and 6, *below*.

An additional certification requirement should be that class counsel is able to represent the group members adequately. The administration of adequacy of both the representative party and class counsel could also be a factor to address issues that arise with respect to competing class actions.¹⁴

The involvement of a litigation funder could be part of the consideration for adequate representation and certification would allow for competition amongst litigation funders.¹⁵ It would also provide an additional mechanism for disclosure of conflicts and court review of conflicts procedures. Certification would also, at a minimum, mitigate the risks identified in the DP of funders exerting pressure on solicitors to settle matters prematurely, or on terms that are not in the best interests of the group members, and shopping for solicitors who are amenable to early settlement.¹⁶

We urge the ALRC to consider the specific inclusion of a certification provision in Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Conflicts Management

We recommend that Proposal 3-1 be adopted to require licensing for litigation funders.

Should this proposal not be adopted, it will be necessary that a robust conflicts disclosure and management regime be maintained. Therefore, the next-best option would be to keep the existing requirements for conflicts management and disclosure and to support those regulations with additional reporting requirements allowing for better enforcement of the regulations. Further, the definition of 'litigation scheme' should be as broad as possible to include any funding entity or funding arrangement, such as 'law firm financing' and 'portfolio funding.' Any entity that engages in a third-party derived method of litigation financing should be subject to the conflicts management requirements and attendant reporting requirements.

Accreditation

We support the proposal for a voluntary accreditation program for solicitors in class action law and practice, with specific requirements for continuing education on conflicts identification, disclosure and management. There seems to be little reason why accreditation and continuing education could not be made part of the existing CPD requirements for solicitors. Such requirements would assist in updating practitioners on developments in class

¹⁴ See submission in response to Chapter 6, *below*.

¹⁵ See submission in response to Chapter 5, *below*.

¹⁶ DP at [4.35].

actions and the litigation funding industry where issues related to conflicts identification and management arise.

Prohibition on Financial Interests in Litigation Funders

We support the proposal to amend the Australian Solicitors' Conduct Rules to prohibit solicitors and law firms from having a financial interest in a litigation funder that is funding an action in which the solicitors or law firm is acting. The potential for collusion is too great where the lawyer and funder are too closely associated.¹⁷ Adoption of this proposal may not be necessary if the proposal to partially remove the bar on contingency fees is adopted.¹⁸ However, to the extent that the contingency fee proposal is not adopted or there remain matters for which the ban on contingency fees remains, solicitors and law firms acting in those matters should be prohibited from holding a financial interest in the litigation funder.

Disclosure

We support the proposal to amend the Australian Solicitors' Conduct Rules to require the disclosure of third-party funding in all dispute resolution proceedings, including arbitration. Conflicts identification, disclosure and management are important to all dispute resolution processes, whether in or out of court. Disclosure that allows for the discovery of conflicts may be of most importance in arbitration where the outcome is binding on the parties. Although there may currently be few arbitrations, or other alternative procedures, that are financed by a third-party funder, it would be prudent to anticipate the possibility of such a funding arrangement by requiring disclosure in all processes.

Notices

We support the proposal to require the inclusion of information about conflicts and conflicts management in the first notice provided to potential class members, whether that is a general notice or opt-out notice.

However, care needs to be taken that this additional information is provided in an accessible manner that does not confuse group members. The ALRC should consider recommending that the Federal Court, or a body such as the National Judicial College of Australia, undertake or fund research into the drafting and presentation of effective class actions notices.

The Federal Judicial Center in the United States developed illustrative class action notices to demonstrate how lawyers and judges might comply with Federal Rule of Civil Procedure

¹⁷ See John Emmerig & Michael Legg, "Twenty-five years of Australian class actions – time for reform" (2017) 36 *Civil Justice Quarterly* 164, 172.

¹⁸ See submission in response to Chapter 5, *below*.

23(c)(2)(B), which says that class action notices “must concisely and clearly state in plain, easily understood language” specific information about the nature and terms of a class action and how it might affect potential class members’ rights.¹⁹

To develop the notices the Federal Judicial Center undertook research into past notices and problems with comprehension, created class action notices and forms which were then tested on non-lawyers and made available for public comment. The Federal Judicial Center also drew on expert assistance such as linguists.

The Federal Judicial Center created a Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide which provides guidance through the following questions²⁰

- Are the notices designed to come to the attention of the class?
- Does the outside of the mailing avoid a “junk mail” appearance?
- Do the notices stand out as important, relevant, and reader-friendly?
- Are the notices written in clear, concise, easily understood language?
- Do the notices contain sufficient information for a class member to make an informed decision?
- Have the parties used or considered using graphics in the notices?
- Does the notice avoid redundancy and avoid details that only lawyers care about?
- Is the notice in “Q&A” format? Are key topics included in logical order?
- Are there no burdensome hurdles in the way of responding and exercising rights?

5. Commission Rates and Legal Fees

Proposal 5–1

Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements. This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:

- an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;
- a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and
- under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.

¹⁹ <https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction>

²⁰ <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>

Proposal 5–2

Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

Proposal 5–3

The Federal Court should be given an express statutory power in Part IVA of the Federal Court of Australia Act 1976 (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements.

If Proposal 5–2 is adopted, this power should also apply to contingency fee agreements.

Certification and Adequate Representation

In our view, a statutorily required certification of a proposed class action provides a means of addressing issues associated with compensation and fees for solicitors or law firms and litigation funders.²¹

Certification would allow for the court to supervise a pre-commencement process, the result of which would be the appointment of class counsel and a preliminary assessment of the litigation funding agreement. Class counsel would be required to demonstrate that the solicitors or law firm are adequate to represent the best interests of the class. Considerations such as an estimate of fees and costs and the proposed funder compensation could be taken into account by the court when considering whether the applying solicitors are able to represent the best interests of the class adequately. Certification can also serve to “unbundle” the tripartite arrangement that often currently exists amongst the solicitors or law firm, litigation funder and group members at the time of commencement. A pre-commencement certification procedure that requires consideration of fees, costs and proposed funder compensation would provide for increased competition, as raised in the DP,²² and allow for court supervision of new entrants into both the practice of class action law and the litigation funding industry.

We urge the ALRC to consider the specific inclusion of a certification provision in Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Lifting the Ban on Contingency Fees

We support the proposed limited lifting of the ban on contingency fees in class actions (perhaps more accurately referred to as allowing for a common fund application). As noted in

²¹ See also submissions in response to Chapter 4, *above*, and Chapter 6, *below*.

²² See DP at [5.11].

the DP, contingency fees can provide for alignment of lawyer and client interests, as both are interested in maximizing recovery at a minimum cost.²³ There are dangers in allowing contingency fees that might exacerbate unethical lawyer behaviour, but the existing Australian Solicitors' Conduct Rules, fiduciary obligations and duties to clients and duties to the court should serve to mitigate those concerns.²⁴ Additionally court approval and oversight of the fee awarded would be a crucial consumer protection especially for absent group members. Indeed, it is court oversight that makes a contingency fee in a class action acceptable, but not in legal practice more generally.

We agree that lawyers and litigation funders should not be allowed to "double-up" on contingency fees, such that there should be a prohibition on allowing both the lawyers and funder to charge on a contingent basis. Should the lawyer and funder each be receiving some compensation on a percentage basis, it should be as a result of a common fund order being made in the proceeding, which would require specific court oversight and approval.²⁵

This begs the question of how lawyer's fees are to be structured in class actions. The DP proposes that lawyers should be prohibited from charging contingency fees in class actions in which fees are also charged on a time-cost basis. In principle, we agree that only one fee arrangement should be allowed for lawyers in a class action. However, the DP also proposes, in Chapter 6, that approvals of lawyers' fees and litigation funder's fees should be determined on the basis of a common fund order (a proposal that we endorse). These proposals, taken together, create a question as to whether lawyers in class actions should be able to charge fees on a time-cost basis at all. In our view, if the proposal to approve fees based on a common fund order is adopted, it follows that the only fee arrangement that should be available to be collected from that common fund are contingency fees.

Allowing lawyers to charge on a time-cost basis and collect out of a common fund could serve to undermine the benefits of having the common fund. Time-cost fees could disrupt the benefits of lawyer and client interest alignment that the charging of contingency fees is meant to support by incentivizing class action lawyers to spend additional time on matters that are likely to settle in order to generate fees that would not be recoverable on a contingent basis. This situation would also introduce, or exacerbate, a misalignment of compensation by creating circumstances in which lawyers could be overcompensated. Moreover, it is difficult for the court to administer proportionality of costs and to effectively review fees charged on a time-cost basis. Therefore, we recommend that contingency fees be the only available method for fee recovery in class actions.

²³ See Michael Legg, "Contingency fees – Antidote or poison for Australian civil justice?" (2015) 39 *Australian Bar Review* 244, 250.

²⁴ See *ibid.* at 258-261; Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report (2018) 61.

²⁵ See submission in response to Chapter 6, *below*.

We also endorse the proposal that solicitors charging on a contingent basis must advance disbursements and indemnify the representative plaintiff against an adverse costs order, as would be expected of a litigation funder. Solicitors that elect to receive the potential benefits of contingency fees should not be relieved from assuming the same risks as third-party litigation funders.²⁶ Requiring indemnification by solicitors charging fees on a contingent basis would also assist in controlling for the filing of unmeritorious cases.²⁷

Court Approval of Contingency Fees

It is reasonable to involve the court at an early stage of the litigation and require court approval of contingency fees. The Federal Court has already demonstrated that it will protect class member interests by reviewing legal fees at the conclusion of a class action where there is a question regarding the possible necessity of reducing fees, including by the appointing of independent costs experts or referees.²⁸ Class member interests could be protected at the initial stages of the litigation by requiring preliminary court approval of the charging of contingency fees. We suggest, however, that such approval would be more effective and beneficial if conducted as part of a statutorily mandated process of certification, as referred to above.

Statutory Power Related to Contingency Fee

As noted in the DP, the Federal Court has on several occasions used the combined powers in ss 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth) to reject, vary or set the fees that litigation funders will receive as part of the process of approving settlement under a common fund order.²⁹ Although the Federal Court seems to be consistently applying these provisions in this manner, a specific legislative provision would create certainty and provide specific authorization for the courts, rather than perpetuating the reliance on s 33ZF as a gap filler in the legislation.³⁰ The legislation should apply equally to contingency fees as to third-party litigation funder's fees.

²⁶ See Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report (2018) 65.

²⁷ See Michael Legg, “Contingency fees – Antidote or poison for Australian civil justice?” (2015) 39 *Australian Bar Review* 244, 252.

²⁸ See, e.g., *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030; *Perera v GetSwift Ltd* [2018] FCA 732.

²⁹ See, e.g., *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] FCA 330.

³⁰ See Michael Legg & James Metzger, “Section 33ZF: Class Actions Problem Solver” in Damian Grave & Helen Mould (eds), *25 Years of Class Actions in Australia* (Herbert Smith Freehills 2017) 349.

Question 5-1

Should the prohibition on contingency fees remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated?

Contingency fees should not be specifically limited or prohibited in class actions for certain types of matters, such as personal injury matters. In the first instance, if Proposal 5-2 is adopted, as we endorse it should be, then the court will be required to have initial oversight over the giving of leave to charge on a contingent fee basis. Thus, the court will be able to reject contingency fees in individual proceedings where the charging of a contingency fee would be inappropriate. Moreover, as the VLRC has already recognized, a blanket ban on contingency fees in personal injury matters could result in an insurmountable obstacle for commencing a class action for claims related to personal injuries suffered in connection with a mass tort.³¹ This undesirable consequence of a prohibition on contingency fees in the type of matter identified in the DP suggests that court administration through the grant of leave is a preferable course of action.

Question 5-2

In addition to Proposals 5-1 and 5-2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:

- Should contingency fee arrangements and commission rates also be subject to statutory caps that limit the proportion of income derived from settlement or judgment sums on a sliding scale, so that the larger the settlement or judgment sum the lower the fee or rate? or
- Should there be a statutory provision that provides, unless the Court otherwise orders, that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%?

Question 5-3

Should any statutory cap for third-party litigation funders be set at the same proportional rate as for solicitors operating on a contingency fee basis, or would parity affect the viability of the third-party litigation funding model?

On balance, we do not recommend establishing a statutory cap for contingency fees and funding commission rates. A statutory cap will likely be too blunt an approach that does not allow for the percentage rate to reflect differences in the risks of individual cases.³² Not allowing for this kind of flexibility might restrict access to justice in that riskier cases will not

³¹ Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report (2018) 64, [3.72].

³² See Michael Legg, “Contingency fees – Antidote or poison for Australian civil justice?” (2015) 39 *Australian Bar Review* 244, 266.

be pursued because of the limitations imposed by the statutory cap.³³ Further, a statutory cap could result in the cap becoming the default rate.³⁴ It is preferable that the court exercise oversight over the process of rate and fee setting, whether at the commencement of the class action or at the time of settlement approval, or both. Initial questions about actual or proposed contingency of funding commission percentage rates could also be considered by the court if a process of certification is introduced into the legislation, potentially avoiding the need for statutory caps altogether.

In the interests of jurisdictional consistency, it is also worth noting that the VLRC recently concluded that caps should not be set should Victoria lift the prohibition on contingency fees in class actions, as (under its common fund-centred approach) the court would set the amount of the fee.³⁵

Question 5–4

What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a ‘class action reinvestment fund’ be a viable option?

We support continued initiatives to develop alternative options for class action financing. The public fund established in Victoria³⁶ and the Ontario public fund cited in the DP provide good models for adoption more broadly. The promotion and support of private, crowd-funded initiatives such as the Grata Fund would also enhance access to justice, especially for riskier or lower value class actions. Finally, we would advocate for more public support and adequate funding for Legal Aid, Aboriginal Legal Services and Community Legal Centres, all of which should have significant roles to play in the discovery, development and prosecution of class action claims.

6. Competing Class Actions

Proposal 6–1

Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended so that:

- all class actions are initiated as open class actions;
- where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing

³³ See *ibid.*; Poonam Puri, “Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System” (2014) 55 *Canadian Business Law Journal*, 34, 50.

³⁴ Michael Legg, “Contingency fees – Antidote or poison for Australian civil justice?” (2015) 39 *Australian Bar Review* 244, 266.

³⁵ See Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report (2018) 66, [3.88]; see also submission in response to Chapter 6, *below*.

³⁶ See Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report (2018) 137.

proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;

- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and
- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.

Proposal 6-2

In order to implement Proposal 6-1, the Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

Certification

In our view, a statutorily required certification of a proposed class action, provides the necessary structure for dealing with competing class actions.³⁷

We note the concerns about cost and delay associated with certification, however, certification as a concept means little without knowing what it is that needs to be certified, ie what are the class action commencement requirements that an applicant has the onus to prove.³⁸ If the requirements are onerous then more time and cost will go into attempting to demonstrate that they are satisfied and in challenging that finding. However, if the certification regime adopts the same requirements as already exists in ss 33C and 33D then any additional cost should be nominal. What will need to be added is criteria for choosing between competing class actions

Opt out only

We agree that the class action legislation should be structured so that all class actions operate on an opt out or open basis and not on a closed basis. The opt out class action was chosen because it promotes access to justice as group members who cannot be identified at the outset or who are unable to affirmatively participate due to social or economic barriers, are not excluded from the legal system and a potential remedy.³⁹ The opt out class action

³⁷ See also submission in response to Chapters 4 and 5, *above*.

³⁸ Michael Legg, 'Competing Class Actions: A Suggested Solution through Certification' (2018) 7 *Journal of Civil Litigation and Practice* 38, 42.

³⁹ ALRC, *Grouped Proceedings in the Federal Court*, Report No. 46 (1988) [106]; Second Reading Speech by the Attorney-General, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 14 November 1991, 3177; Benjamin Kaplan, 'Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)' (1967) 81 *Harvard Law Review* 356, 397-398 ("requiring the individuals to affirmatively request inclusion in the lawsuit would result in freezing out the claims of people - especially small claims held by small people - who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step."); Vince Morabito, 'Class Actions: The Right to Opt Out

also results in the efficient use of judicial resources as one proceeding instead of many are processed by the Court system and all group members are bound by the outcome unless they affirmatively opt out.⁴⁰ The use of a closed class method of group definition that was allowed by the Full Federal Court of Australia in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 was based on statutory construction principles.⁴¹ However, the result is contrary to advancing access to justice and improving judicial efficiency. Moreover, the concerns that drove litigation funders to seek to develop this precedent, mainly that some group members would ‘free-ride’ and take the benefit of the litigation without contributing to legal fees or funder’s fees, can be addressed through a common fund approach.⁴²

Common fund

We also agree that the common fund approach to litigation funding fees and lawyer fees, meaning those fees must be court determined, should be the only method of charging those fees in the class action context. For that approach to work effectively, litigation funding agreements can only be enforceable, at least in relation to the payment of any fee, upon court order. However, we disagree with the suggestion in the DP at [6.35] that the funding rate and lawyers’ fee should be determined at the beginning of proceedings. The uncertainties present at the beginning of a class action are too great for a fee award to be set at that point and would not be able to have regard to the actual result achieved.⁴³ Such an approach could result in funders/lawyers being routinely under or over compensated and in the former situation may see proceedings abandoned or settled cheaply. It is better to award a fee once the class action has concluded and all information is known. A compromise position was put forward by Professor Legg in his common fund article in the *Civil Justice Quarterly* that proposed:

a presumption as to the reasonableness of a funding arrangement could operate in defined circumstances. For example, where the retainer is negotiated or bargained for at arm's length, with a representative party that is an adequate representative for the group and has the benefit of independent legal advice. Where the Court or

Under Part IVA of the Federal Court of Australia Act 1976 (Cth)’ (1994) 19 *Melbourne University Law Review* 615, 631-632.

⁴⁰ ALRC, *Grouped Proceedings in the Federal Court*, Report No. 46 (1988) [108]; Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 37; Rachel Mulheron, ‘Justice Enhanced: Framing an Opt-Out Class Action for England’ (2007) 70 (4) *Modern Law Review* 550, 556.

⁴¹ For a critique of the Full Federal Court’s interpretation of Part IVA see Michael Legg, ‘Funding a Class Action through Limiting the Group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) Permit?’ (2010) 33 *Australian Bar Review* 17.

⁴² Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52.

⁴³ Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, Report on Contingent Fees in Class Action Litigation (2006) 25 *Review of Litigation* 459, 481-485.

representative party believes that the representative party requires assistance a quasi-guardian for the group could be appointed to negotiate the funding agreement. However, the final amount to be awarded must be approved by the Court once there is a settlement or judgment.⁴⁴

Guidance as to the criteria to be employed in awarding these fees will be crucial in balancing (a) the need to reward lawyers and funders adequately for their efforts and risks undertaken, and (b) the aim of ensuring relief, mainly compensation, is obtained for the benefit of group members and not unnecessarily reduced by transaction costs. This balance is key to the class action achieving its access to justice objective.

Stay of competing class actions

We agree that where there are two or more competing class actions, the Court must determine which one of those proceedings will progress. While the stay may be the appropriate procedure in many cases, it may also be that the court should use its powers to effectively combine class actions, or add parts of one class action to another, where they are not completely overlapping. Consolidation⁴⁵ or joinder⁴⁶ or amendment⁴⁷ may permit the court to create a class action which includes common issues derived from various claims that were previously in different class actions. The court and group members should not be placed in a position where class actions can only proceed as originally filed.

The procedural tools available will also impact when a choice between competing proceedings cannot be made.

The issue may be illustrated by reference to *Smith v Australian Executor Trustees Ltd*; *Creighton v Australian Executor Trustees Ltd*. The first class action filed was brought as an open class with lawyers acting on a conditional fee basis and the risk of an adverse costs order was addressed through an after-the-event (ATE) insurance policy. The second class action was a closed class with a litigation funder paying legal costs and indemnifying the applicant in relation to any adverse costs order. There were four loans or facilities common to both proceedings but another 24 (12 in each proceeding) that were not common.⁴⁸ There

⁴⁴ Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52.

⁴⁵ *Federal Court Rules 2011* (Cth) r 30.11. Rule 30.11 states that 'any party to any of the proceedings may apply to the Court for an order'. It may be desirable to amend rule 30.11 to allow the court to act on its own motion.

⁴⁶ *Federal Court Rules 2011* (Cth) Div 9.1.

⁴⁷ *Federal Court Rules 2011* (Cth) r 8.21.

⁴⁸ *Smith v Australian Executor Trustees Limited*; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17, [12], [15].

were also differences as to the defaults and consequences alleged. Ball J described the situation as being one of “substantial overlap and substantial differences between the two proceedings”.⁴⁹ Choosing one class action would mean that some allegations would not go forward. Alternatively combining the allegations may mean that a plaintiff and lawyer (and possibly litigation funder) may have to bring claims that they had not wanted to bring.

Ball J held that it was inappropriate for the court to select one class over another where the two classes ‘offer[ed] true alternatives in the sense that they have different funding models and frame their cases in significantly different ways’. Ball J determined to first allow group members to decide which class action they would opt out of, but if they failed to choose, the court would make orders removing them from the class action they had not affirmatively joined.⁵⁰

If consolidation or joinder was available to address the above situation, rather than just a stay, then the problem with only some allegations going forward could be addressed. Equally it must be recognised that

- (1) there may be cases where the class actions are sufficiently different that it is not possible to choose one or combine them in some manner so that both must continue;⁵¹ and
- (2) if a judicially constructed class action was to be used it is still necessary to have a representative party and lawyer, possibly also a litigation funder, that are prepared to bring that case as they take on various obligations such as liability for an adverse costs order.⁵²

Criteria for choosing between competing class actions

If Part IVA is to be amended to require that where there are two or more competing class actions, the Court must choose between the competing proceedings, then a list of open-ended criteria could be included in a practice note for consideration. The concern with this approach is that it can lead to inconsistencies in application as different judges give various factors more or less weight.

We would recommend that there be an objective specified in relation to the choice of a proceeding.

In the United States the *Private Securities Litigation Reform Act* (PSLRA) adopted this approach for shareholder class actions. The PSLRA builds on the class action requirement in

⁴⁹ *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17, [15].

⁵⁰ *Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd* [2016] NSWSC 17.

⁵¹ Michael Legg, ‘Competing Class Actions: A Suggested Solution through Certification’ (2018) 7 *Journal of Civil Litigation and Practice* 38, 45.

⁵² See Michael Legg, ‘Entrepreneurs and Figureheads - Addressing Multiple Class Actions and Conflicts of Interest’ (2009) 32(3) *University of New South Wales Law Journal* 909, 925.

rule 23 of the Federal Rules of Civil Procedure of an adequate representative party, by requiring the court to consider the losses allegedly suffered by the various plaintiffs that seek to serve as the lead plaintiff and select the 'presumptively most adequate plaintiff', being the 'person or group of persons that ... has the largest financial interest' in the suit.⁵³ The Canadian approach outline in the DP [6.25] also sets out criteria for all class actions, namely: access to justice, the best interests of all class members and fairness to defendants.

A suggested approach would be to specify in the legislation that the court is to choose the proceeding that best advances the claims and interests of group members in an efficient and cost-effective manner.

Question 6–1

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

No. The jurisdiction of a court to hear a corporate law matter should not be determined by the procedural form that is employed.

Moreover, *Wigmans v AMP Ltd* [2018] NSWSC 1045 demonstrates that 'there is no relevant juridical or procedural advantage or disadvantage to any party' by reason of a class action being commenced in the Supreme Court of New South Wales rather than the Federal Court, despite the content of affidavits filed by the solicitors for applicants that had commenced class actions in the Federal Court. *Wigmans v AMP Ltd* [2018] NSWSC 1045 also demonstrates that while the cross-vesting scheme may only allow for a judge to transfer proceedings to another court, the anti-suit injunction provides the court with power to enjoin a party from commencing or continuing proceedings in another court.

It is accepted that the commencement of class actions in different courts creates additional costs and delay while an application to transfer the proceedings to one court is made and decided. To date the cross-vesting legislation, including Corporations Act s 1337H, has worked effectively. The AMP class actions are testing the cross-vesting regime but the effectiveness of the regime cannot be judged until the AMP applications have been resolved.⁵⁴ However, to the extent that there is concern that the current scheme is not working effectively, the proposal of the Victorian Law Reform Commission to establish an Australian version of the United States multi-district litigation panel is to be preferred.

⁵³ 15 USC §78u-4(a)(3)(B)(iii)(I)(bb). The legislation is summarised in Michael Legg, 'Entrepreneurs and Figureheads - Addressing Multiple Class Actions and Conflicts of Interest' (2009) 32(3) *University of New South Wales Law Journal* 909.

⁵⁴ *Wigmans v AMP Limited* [2018] NSWSC 1118, [19].

7. Settlement Approval and Distribution

Proposal 7–1

Part 15 of the Federal Court of Australia’s Class Action Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.

The court should have available to it a range of mechanisms to ensure that costs are fair, reasonable and proportionate. Referring to the use of the referees in the practice note is supported.

Question 7–1

Should settlement administration be the subject of a tender process? If so:

- How would a tender process be implemented?
- Who would decide the outcome of the tender process?

The introduction of competition into the settlement distribution process through permitting the appointment of an administrator other than the solicitor who ran the class action holds out the prospect of reduced costs. However, a tender process should not be required in every class action as there may be situations where the cost and delay in conducting the tender process would be greater than any savings achieved.

In the QBE Insurance class action, Murphy J recounted the settlement distribution costs from a number of shareholder class actions:⁵⁵

- *Camping Warehouse v Downer EDI* [2016] VSC 784 at [177] and [181], in which an amount of \$25,000 per calendar month and a further amount of \$22 per month for each class member for a maximum of approximately 12 months was approved. If a similar calculation was applied to the present proceeding, assuming a timeline of six months to distribution, it would amount to \$480,132;
- *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (Earglow) at [111], in which an amount of \$429,706.25 (including the costs of the settlement approval hearing) was approved;
- *Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395 (Dillon) at [81], in which an amount of \$250,000 was approved in circumstances where there are only 130 participating class members;
- *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511 at [3] at [36], in which an amount of \$260,000 was approved; and

⁵⁵ *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030, [149].

- *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [273], in which an amount of \$551,270 was approved for administration costs, with a possible additional allowance of up to \$181,000 for reviews that were conducted;
- The quote in QBE was \$251,202

This may be contrasted with the Kilmore-East Kinglake bushfire class action settlement, involving personal injury and economic loss/property damage where the distribution costs were \$30 million.⁵⁶ In the Bonsoy class action the settlement administration cost \$3,425,816.13.⁵⁷ The ongoing DePuy ASR Implants (hips) class action had approved administration costs of \$3,671,716.66 as at 28 June 2017.⁵⁸

The mechanics of a tender process would need to be addressed. The process could involve the judge who conducts the settlement approval hearing making a selection or, if preferred, a registrar, court-appointed expert or referee conducting the tender and providing the judge with a recommendation.⁵⁹

The court would issue a request for tender as part of the notices given for settlement approval which would invite tenderers to submit a proposal to administer the settlement. The key question would be what is it that is being put out for tender.

A number of options arise:

1. The solicitor on the record as part of seeking settlement approval could still be required to put forward a settlement distribution scheme (SDS) for court approval, which would be what the tenderers offered to administer.
2. The tenderers could be asked to put forward their own SDS, including costs and timeline, for distributing the funds from the class action.
3. The tenderers could have the option of submitting a tender for the existing SDS and/or putting forward their own SDS for distributing the funds from the class action.

Option 1 would mean that competition could only really occur as to the cost and efficiency of administering the same SDS. Option 2 would allow for more innovative approaches to the structuring of an SDS to be put forward. However, choosing between different types of SDS may make arriving at a choice more difficult. Option 3 would seek to obtain the best of both options 1 and 2, although making a choice may be more complicated.

⁵⁶ Michael Legg, 'Kilmore-East Kinglake bushfire class action settlement distribution scheme: Fairness, cost and delay post settlement' (2018) 44(3) *Monash University Law Review* forthcoming.

⁵⁷ *Downie v Spiral Foods Pty Ltd* [2017] VSC 7, [8].

⁵⁸ *Stanford v DePuy International Limited (No 7)* [2017] FCA 748.

⁵⁹ Michael Legg, 'Kilmore-East Kinglake bushfire class action settlement distribution scheme: Fairness, cost and delay post settlement' (2018) 44(3) *Monash University Law Review* forthcoming.

Option 1 could still result in significant reductions in cost if lower hourly rates were used than those typically charged by lawyers (and their paralegals). However, greater savings and certainty around cost may be achieved through employing alternative fee arrangements (AFAs). AFAs are not just different forms of billing they are a different mind set because they shift the focus from the lawyer's input into the process, being their time, to the lawyer's output or achievement.⁶⁰ In an SDS the administrator should be rewarded not for taking more time, but instead for the efficient and accurate distribution of the funds in accordance with the terms of the SDS to the claimants. For example, the administration of an SDS could be undertaken using a fixed amount or capped amount which would implicitly incentivise the administrator to undertake the SDS as efficiently as possible so as to maximise profit. Other forms of charging could also be employed.⁶¹

The approach to the tender process may change over time. To start with option 1 may be the easiest to conduct and would also have an educational function for potential administrators as they saw how an SDS currently operates. However, with time and experience in undertaking an SDS administrators may become more comfortable with an option 2 approach and looking to win tenders based on innovative solutions.

The tender process may also require that participating group member information be provided to tenderers, especially under options 2 and 3. This would necessitate steps to protect confidentiality, legal professional privilege and privacy.

Question 7–2

In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?

Yes.⁶²

Orders being granted to render the amount of a settlement, the legal fees or the litigation funder's fee confidential should be kept to a minimum because class actions have a public interest element.

The class action settlement cannot be treated like other litigation where the persons affected are present and wish to have the resolution of their dispute kept confidential. Class actions have a representative capacity and resolve numerous persons' claims, primarily the claims of

⁶⁰ Michael Legg, Testimony to Law Society of New South Wales, Future of Law and Innovation in the Profession Commission of Inquiry, 7 July 2016 available at <https://youtu.be/ECQUtkt31JM>.

⁶¹ Michael Legg, 'Kilmore-East Kinglake bushfire class action settlement distribution scheme: Fairness, cost and delay post settlement' (2018) 44(3) *Monash University Law Review* forthcoming.

⁶² Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590.

group members who are not before the court. Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals.⁶³ Class actions are not simply disputes between private parties about private rights.⁶⁴ A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings.

What should be disclosed?

- The aggregate settlement sum
- Legal fees
- Funder's fee
- Settlement distribution scheme costs
- Ideally what the claim was thought to be worth and why.

In *De Brett Seafood Pty Limited v Qantas Airways Limited (No 7)* [2015] FCA 979 the balancing of open justice and confidentiality was addressed through some paragraphs of the judgment being redacted when it was released on the basis that they referred to confidential information. For example some or all of the text in relation to the following was redacted:

- The risks of maintaining a representative proceeding
- The range of reasonableness of the settlement in light of the best recovery
- The range of reasonableness of the settlement in light of all the attendant risks of litigation

The judge also granted confidentiality orders in relation to a number of affidavits at the time of the hearing and approval of settlement. However, the formal judgment was not handed down until much later. At that time his Honour stated:

⁶³ The objective of class action litigation when introduced into the Federal Court was to provide access to justice, to resolve disputes more efficiently, to avoid respondents facing multiple suits and the risk of inconsistent findings, and to reduce costs for the parties and the courts: See Second Reading Speech, Federal Court of Australia Amendment Bill 1991 (Cth), House of Representatives, 14 November 1991 (Michael Duffy, Attorney-General of Australia) 3176. However, a further objective, deterring contravention of the law was also recognised. See Second Reading Federal Court of Australia Amendment Bill 1991, Minister for Justice and Consumer Affairs, Australia, *Parliamentary Debates*, Senate, 13 November 1991 p 3023. See also Access to Justice Taskforce, Federal Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) 114 ('class actions can have a strong regulatory impact with the potential scale of the pecuniary damages providing a strong incentive to abide by existing laws').

⁶⁴ *Madgwick v Kelly* (2013) 212 FCR 1, 21 [91] (referring to the 'significant statutory and public policy in proceedings under Pt IVA' and that Pt IVA is 'an important statutory mechanism for the vindication of the rights of parties'); Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282–4.

given my approval of the settlement, and the time that has elapsed since those documents were prepared, it would be appropriate to either discharge or vary those orders so that (as far as the proper administration of justice allows) the full extent of the information the Court has relied upon is open to the public.

This approach has much to recommend it. Protect confidentiality only to the point where it is required. The effluxion of time will mean that confidentiality no longer needs to be maintained.

In *Hodges v Waters (No 7)* [2015] FCA 264, the parties placed the court in a difficult position by making the proposed settlement subject to confidentiality being maintained. Perram J stated:

[63] The settlement agreement and the distribution scheme are agreed between the parties to the litigation to be confidential. The operation of the settlement deed is such that its confidentiality is a condition precedent to the settlement taking place.

[64] There is no question about the power of the court to approve a confidential settlement either of representative proceedings under s 33V of the Federal Court of Australia Act 1976 (Cth) (see, for example, *Fowler v Airservices Australia* [2009] FCA 1189) or of trust proceedings under s 63. The more difficult question is whether that power should be exercised in this case. The options were but two:

- (a) to refuse to approve the settlement under s 33V or to give the judicial advice under s 63 in which case the proceedings would continue until they were tried or another non-confidential settlement was reached; or
- (b) to approve the settlement notwithstanding its confidential nature.

[65] Neither course is attractive. As to (a), making the case run merely because the settlement is confidential ensures transparency of process but creates a great deal of financial risk in the process. As to (b), while each unitholder has been told their approximate individual settlement sum, none has been told:

- (i) the global amount paid by KPMG; or
- (ii) the details of the distribution arrangements; or
- (iii) the size of some of the funder's fees which are to be deducted from the settlement.

[66] It is thus, perhaps, difficult for them to understand precisely how the compensation to be allotted to them has been calculated and more difficult still to put together any argument as to why any such settlement should be refused.

[67] In this case, three circumstances seem to me germane in considering whether to accept the confidentiality of the settlement:

(i) as discussed below, I consider the claims against the respondent as being at the weak end of the spectrum and the unitholders' position in the litigation precarious. For the reasons I develop later, the present proposed settlement stands a significant chance of being the class members' best outcome. Scotching it because of concerns about the confidential nature of its terms is not something lightly to be done;

(ii) one of the ends served by the need to get the approval of the court of any settlement under s 33V is external and independent scrutiny. Notwithstanding that the precise global terms of the settlement are to remain confidential, the fact remains that the court has had access to all of the terms of the settlement in assessing whether to grant leave under s 33V and has given them anxious consideration. Effectively, the court exercises a protective jurisdiction in the interests of all class members and does so with full knowledge of every detail of the settlement. This then is not a situation in which there is no scrutiny of the reasonableness of the settlement;

(iii) class members who were sufficiently enthusiastic to see the details of the settlement were provided with them on the execution of appropriate confidentiality agreements. Only one class member, however, took advantage of this.

[68] Taking each of those matters into account, this is a case where I conclude that it is appropriate that I not refuse to approve the settlement just because its terms are to remain confidential.

This decision highlights the problems with confidentiality, particularly for group members who don't know how much the remaining solvent defendant, KPMG,⁶⁵ contributed to the settlement, how the settlement was to be distributed or the funder's fee. The sole protection is the review of the settlement terms by the judge. The review by a judge and the provision of reasons is a significant protection, but the scrutiny that open justice seeks to provide is nonetheless diminished when essential information is unavailable.

In *Camilleri v Trust Company (Nominees) Limited* [2015] FCA 1468, Moshinsky J explained:

⁶⁵ The class action arose out of losses suffered by the MFS Premium Income Fund. Octaviar Limited (formerly MFS Limited) was the former responsible entity of the Fund. However, Octaviar was in liquidation. The remaining defendants were the former directors and officers of Octaviar and KPMG, the auditor of the fund.

[59] The applicants seek an order that certain materials filed in support of the application be kept confidential. It is appropriate that the opinions of the applicants' solicitor and counsel remain confidential. In the event that the approval were challenged and overturned on appeal, and the trial then proceeded, it would give TCL an unfair advantage if it had access to the opinions of the applicants' lawyers. I raised with senior counsel for the applicants whether confidentiality needed to be maintained over the percentage which the settlement sum represents of the applicants' lawyers' estimated 'best case' outcome. I also raised whether the percentage applied in calculating loss in respect of "Rollover Notes" needed to be kept confidential. I am satisfied that it is appropriate for both of these percentages to remain confidential because, if the approval were to be overturned and the trial were to proceed, these figures could directly or indirectly assist TCL. Very briefly, this is because divulging the percentage applied to calculate loss in respect of "Rollover Notes" may implicitly convey information helpful to TCL if the matter were to proceed. And divulging the percentage which the settlement represents of the estimated 'best case' outcome would, through a process of 'reverse engineering', enable TCL to calculate the applicants' lawyers' estimate of loss in respect of "Rollover Notes", which could be helpful to TCL if the matter were to proceed.

The reasoning of Moshinsky J raises the concern about the disclosure of material in a settlement approval judgment being used by a defendant if the settlement was overturned. The concerns could be addressed by only suppressing the information until the deadline to appeal has passed.

In *Foley v Gay* [2016] FCA 273, Beach J stated:

[29] The terms of the settlement deed have been negotiated on a confidential basis. The group represented in these proceedings is a closed class and there may be other aggrieved persons who might consider claims against the respondents. Delicately expressed, disclosure of the terms of settlement could interfere with the proper processes for any such persons to legitimately consider and pursue their rights against the respondents.

[30] Further, the loss assessment formula is the product of legal advice provided to the applicant concerning the relative strengths and weaknesses of the claims in these proceedings. Publication of the formula could facilitate the reverse-engineering of that advice and thus the disclosure of the substance of privileged communications.

[31] Further, the copies of fee and retainer agreements and correspondence with group members are privileged, as is counsels' opinion. Further, the applicant's financial arrangements with third parties are confidential as between them.

[32] In my view, the non-publication orders are appropriate.

The concerns raised by Beach J suggest that waiting for the deadline for an appeal to pass would be insufficient, and it would be necessary to wait for the statute of limitations to run on all claims against the defendant in case there was a claimant who was not bound by the class action. Beach J refers to the closed class nature of the proceeding (not all putative group members are included in the class action) before him, but the argument would also apply if there had been group members who opted out. The timeframe in which redacted judgments or confidentiality orders would need to be revisited could be lengthy. However, it should be noted that his Honour appeared to be chiefly concerned with the quantum of the settlement, as the amount of legal fees charged was disclosed.⁶⁶

In *Lifeplan Australia Friendly Society Limited v S&P Global Inc* [2018] FCA 379, Lee J dealt with a settlement approval application in the context where there were a number of related proceedings raising similar issues of law and fact before the Court and set down for trial. As a result it was necessary to suppress the publication of key documents such as the settlement agreement itself in order to prevent the strengths and weaknesses of the case against the respondents becoming known, which would have in turn disadvantaged the respondents in those other proceedings. Justice Lee described the facts of *Lifeplan* as:⁶⁷

a paradigm example where the primary objective of the administration of justice (of safeguarding the public interest in open justice: see s 37AE of the Act) is outweighed by the necessity to prevent prejudice to the proper administration of justice by me revealing details of the settlement in this proceeding, except to the extent necessary for me to explain my reasons.

However, Lee J also referred to the importance of open justice in the following terms:

[67] It must be remembered that Part VAA of the FCAA provides that the starting point for the consideration of non-publication orders is the safeguarding of the public interest in open justice. In that regard, s 37AE provides clearly the mandatory consideration the Court must take into account in determining whether or not to exercise its power under Part VAA:

⁶⁶ *Foley v Gay* [2016] FCA 273, [20]-[23].

⁶⁷ *Lifeplan Australia Friendly Society Limited v S&P Global Inc* [2018] FCA 379, [20]. See also [69].

In deciding whether to make a suppression order or non-publication order, the Court *must* take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

(Emphasis added)

[68] Non-publication orders should not be sought in some routine, automatic fashion. The grounds for making an order require the Court to be satisfied that the making of the order, relevantly, is necessary to prevent the mischief identified in ss 37AG(1)(a)-(b) of the FCAA. Relevantly for present circumstances, the Court must be satisfied that the order is necessary "to prevent prejudice to the proper administration of justice" (see s 37AG(1)(a)). As the High Court remarked in *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 at 664 [30], the word 'necessary' is a "*strong word*".

In summary the reasons put forward for granting orders preventing the publication of settlement information or suppressing access to settlement related documents are:

1. Confidentiality is a condition precedent to the settlement, ie if confidentiality is not granted then the settlement ceases to have effect.
2. Possibility of a settlement being overturned on appeal and the case proceeding to trial so that respondents have an unfair advantage having seen the applicant's settlement materials
3. Possibility of claimants who are not group members bringing suit based on knowledge of the details of the settlement.
4. Related proceedings before the court where the settlement materials may assist a party with trial strategy.

There are clearly legitimate reasons for keeping certain information confidential, items 2 and 4 being clear examples. However, it is important that the protected information is limited to that which it is necessary for disclosure to be prevented. It is difficult to see how fees and costs could ever need protection.

All but the first reason could be addressed by placing a time limit on the relevant orders so that they ceased to have effect once the event of concern, eg the time for an appeal or the statute of limitations, had passed. Similarly, this type of information in the judgment could be redacted until the event has passed. This would allow for greater evaluation of the effectiveness of class actions in the longer term but would do little for group members or members of the public who wanted to understand the workings of a class action at the time of settlement. A group member considering an appeal (which is permitted by *Federal Court of Australia Act 1976* (Cth) s 33ZC(6)) could be significantly hampered in exercising their right to appeal. Presumably the Court would find a way to alter orders to prevent this. For example, making the information available upon the signing of non-disclosure agreements.

But this step would still impose an additional hurdle that may be sufficient to dissuade the very person that class actions were designed to assist.

Differing views may be taken about the legitimacy of granting confidentiality in the circumstances of item 1 and 3. The facts of *Hodges v Waters (No 7)* [2015] FCA 264 that were able to be disclosed suggest that KPMG acted in this manner for commercial and reputational purposes. *Foley v Gay* [2016] FCA 273 is an attempt to prevent non-group members obtaining information that might assist in them bringing claims. We would argue that they are not necessary "to prevent prejudice to the proper administration of justice".

8. Regulatory redress

Proposal 8-1

The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.

Question 8-1

What principles should guide the design of a federal collective redress scheme?

Regulatory redress schemes are an alternative to the class action or litigation approach to dealing with mass harm. Put another way, regulatory redress schemes are mass alternative dispute resolution procedures. As a result they tend to have many of the advantages of alternative dispute resolution, ie voluntary, cheaper and faster. Equally, differences between ADR and litigation, such as standards of procedural fairness and determining outcomes on bases other than the law, need to be recognised and either accepted or guarded against. The participation of a regulator can assist with this.⁶⁸

⁶⁸ See Michael Legg, 'ADR and Class Actions Compared' in Michael Legg (ed), *The Future of Dispute Resolution* (Lexis Nexis, 2013) Ch 17; Michael Legg, 'Many wrongs can make a right: how mass redress schemes can replace court action' *The Conversation*, 24 November 2015; Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311.

A federal collective redress scheme could formalise voluntary resolution schemes such as those used in the Storm financial collapse⁶⁹ or in relation to bad financial advice,⁷⁰ or the refund programs for fees-for-no-service in relation to financial advisers.⁷¹

Concerns levelled at collective redress schemes include:

- the administrator lacks independence and is too closely aligned with the corporation's view of the conduct or approach to quantification of loss.
- compensation claims are subject to unduly high levels of proof.
- information to make and assess claims is held by the corporation and cannot be accessed or is not provided in a timely fashion to claimants
- criteria for valid compensation claims and harm suffered is based on the corporation's view of the law.
- no or insufficient legal advice for claimants.

However, all of these issues can be addressed through scheme design, including appointing an independent administrator, providing for independent sign-off or oversight of the scheme and ensuring representation for participants. Importantly though, the scheme should not become a mini-administrative agency or court as the benefits of informality, cost and speed are then lost.

Guidance for the conduct of a federal collective redress scheme may be obtained from ASIC's regulatory guide on client review and remediation conducted by advice licensees⁷² and the UK Competition and Markets Authority's guidance on approval of voluntary redress schemes for infringements of competition law.⁷³ The Commonwealth Redress Scheme for Institutional Child Sexual Abuse also provides another template.

⁶⁹ Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311.

⁷⁰ ASIC, 18-049MR Update on Advice Compliance Report: Additional \$21.4 million compensation paid to customers, 20 February 2018 <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-049mr-update-on-advice-compliance-report-additional-214-million-compensation-paid-to-customers/>.

⁷¹ ASIC, 17-438MR Update on financial advice institutions fees-for-no-service refund programs, 15 December 2017 <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-438mr-update-on-financial-advice-institutions-fees-for-no-service-refund-programs/>.

⁷² ASIC, Client review and remediation conducted by advice licensees – Regulatory Guide 256 (September 2016) <https://asic.gov.au/media/4009895/rg256-published-15-september-2016.pdf>.

⁷³ Competition and Markets Authority, Guidance on approval of voluntary redress schemes for infringements of competition law, 14 August 2015 <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>.