HARBOUR
LITIGATION FUNDING

July 2018 - Response from Harbour Litigation Funding Limited (Harbour)

Discussion Paper 85 (DP 85) - Inquiry into Class Actions Proceedings and Third Party Litigation Funders

Our responses draw upon our long-standing experience as:

- a funder of global disputes, in 13 different jurisdictions and under 4 sets of arbitral rules
- a funder of class actions in 4 different jurisdictions and
- a funder of Australian disputes since 2013.

1. Introduction to the Inquiry	Harbour's response
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;	We have no comments but hope that any review takes place against the background of the following important general observations: - Australia has a robust class actions regime that is, amongst other things, able to provide effective redress to multiple victims of corporate wrongdoing. This is an enviable position to be in, compared and contrasted with the challenges of seeking mass redress in other jurisdictions. - Serious corporate wrongdoing continues to take place on a global scale, in spite of the existence of strict corporate governance regulations and the threat of regulatory enforcement. It is not difficult to identify numerous examples of recent, and serious, corporate wrongdoing. These include the VW emissions scandal, the AMP overcharging scandal, the Tesco profits scandal and the European Trucks Cartel.

• the availability and cost of directors and officers' liability cover within the Australian market.	- It is in our view essential that an effective means of private enforcement - mass redress for victims of corporate wrongdoing - exists alongside and as a support to a strict regulatory regime. - Any watering down of the force of corporate governance regulations, or tempering of the ability of victims to seek private redress, will not engender greater corporate responsibility.
3. Regulating Litigation Funders	Harbour's response
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.	We believe a licensing regime goes too far. The DP 85 does not set out *why* a system of self-regulation could not be set up, rolled out and operated successfully, as has been the case in the UK. There are moves afoot to franchise the UK Association of Litigation Funders (ALF) Code of Conduct and membership approval model, with proposals for this expected to be published in Autumn 2018. This will help achieve a greater consistency of approach globally, whilst recognising the relevant differences of each jurisdictional approach to funding and incorporating those differences into the constitution of the relevant ALF country body. In 2011, ALF was established in the UK and approved by the Civil Justice Council and Lord Justice Jackson. ALF is charged with administering self-regulation of the UK's litigation funding industry in line with the Code of Conduct. The Code was settled after months of research by a high-level Working Party that included senior lawyers, academics and business managers. The Code has 3 key requirements, all of which relate to concerns identified by ALRC. - **Capital Adequacy**, where funders must maintain adequate financial resources at all times in order to meet their obligations to fund all of the disputes they have agreed to fund, and to cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months. Capital Adequacy is assessed, annually, by an independent auditor. - **Termination and Settlement**, where funders must behave reasonably and only withdraw from funding in specific circumstances. Independent counsel must be satisfied that the funding agreement clearly sets out such protections for claimants, and includes a suitable ADR mechanism (i.e. that any dispute about termination or settlement is resolved via a

	binding opinion from an independent QC, who has been either instructed jointly or appointed by the Bar Council). - **Control**, where funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. Independent counsel must be satisfied that the funding agreement clearly sets out protections against control for claimants. This system has been effective because reputation is the cornerstone of a funder's existence, and we also believe that non-ALF members operate at a disadvantage in the UK market. It is important to note that in the UK, as recently as 25 January 2017, the Ministry of Justice (MoJ) rejected calls (by corporate lobbyists) for statutory regulations to be placed on litigation funders. The MoJ concluded that "*government does not believe that the case has been made out for moving away from voluntary regulation... and we are not aware of specific concerns about the activities of litigation funders*". We believe that this rejection is a testament to the fact that self-regulation works. We believe that Australia should adopt the approach taken to litigation funding in the UK.
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);	We agree that all these points are important but believe this can be achieved successfully as set out in our response at 3-1, in combination with our response at 4-1. A complaints process could be enshrined within the local ALF constitution. In the event it is decided to go further: • Which body would oversee this process and have they agreed to do so? • Where will the budget come from for them to do so? • Who is proposed to conduct the audit? This appears to lead to an excess of additional bureaucracy for all involved while the self-regulatory approach is one which offers a mechanism for dealing with all these topics.

• have adequate risk management systems; • have a compliant dispute resolution system; • be audited annually.	
Question 3–1 What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?	We refer to our response at 3-1.
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 refer to our response at 3-1.
Question 3–3 Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?	This could be a good way to deal with complaints. In a system of self-regulation, such as in the UK, the ALF has to deal with complaints about its members i.e. we are adjudicating on ourselves or our competitors. In a system where this is done by a third party, one needs to be confident that those adjudicating complaints are adequately au fait with the slightly esoteric area of litigation funding.
4. Conflicts of interest	Harbour's response
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.	We agree with this proposal.

Proposal 4–2 If the licensing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the Corporations Regulations 2001 (Cth).	We agree with this proposal.
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.	We have no comment on this proposal.
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.	We have no comment on this proposal other than that conflicts of interest would need to be managed carefully if this proposal will not be accepted.
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.	We believe that, other than for class actions, disclosure should be at the discretion of the plaintiff and therefore we do not agree with this proposal. Many large institutions that we fund, globally, choose to keep the fact of their funding private. They are entitled to do so because (a) the arrangement is private and confidential, and (b) the funder's commission is not recoverable from the defendant. There are occasions where well-resourced corporates or persons who use funding as a hedging tool are reluctant to have such confidential arrangements disclosed. In contrast, a funded party who is insolvent or who the defendant believes has limited assets will want the fact that it has entered into a funding agreement to be disclosed.

	The issue is most prevalent in security for cost applications and notification of a funding agreement is more relevant where the defendant raises this issue. The court process around security for costs adequately deals with this issue when it is being raised. If disclosure is mandated across all disputes in Australia, it is essential that clear protections are implemented regarding commercially sensitive information. We consider the amount of funding to be provided and the 'return' due to the Funder as sensitive, and which if disclosed can offer the defendant an unfair advantage. This unfair advantage can manifest itself as follows: 1. if defendants know the limits of the opponent's budget, they know how to exhaust that budget 2. if defendants know the funder's commission rates, they can work out how to put economic pressure on the funder i.e. by putting pressure on the potential profitability of the case. A concern raised by DP 85 is that *funders enable commencement of classes*. As one of the largest and most active funders in the world, we have funded 91 cases across numerous jurisdictions and over a period of some 10 years, covering anything from single-case funding to class actions and arbitration. There is a risk of bestowing funders with the reputation that they control litigation and cause conflicts of interest whereas it would in fact be challenging to do so in any given market and for any given funding class.
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.	We agree with this proposal.

5. Commission rates and legal fees	Harbour's response
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.	We have no comment on this proposal, save that it is important that litigation funders, and lawyers acting on contingency, operate on a 'level playing field'. That is, rules that concern the funding of a dispute should apply equally to litigation funders and lawyers acting on contingency. We hereby think of capital adequacy requirements, for example, or covering adverse costs if there is to be a 'sole funder'.
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.	We have no comment on this proposal.

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?	We have no comment in relation to this question. As a general observation, we would find it odd to permit contingency fees for certain types of cases but not others, or vice versa.
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.	We do not agree with this proposal, for the following reasons: - A court should only intervene in relation to a contract, and consider amending or striking down specific clauses, in exceptional circumstances. This is particularly true where the contract has been negotiated at arm's-length by parties of comparable bargaining power. - A professional funder takes considerable risk at the outset of a dispute, typically bearing an own-side and adverse costs exposure of millions of $. That exposure remains unless and until the dispute is successful and damages are recovered from the defendant. Against that background, it is important that a funder has certainty in relation to the commission it will receive if the dispute is successful. - We are concerned at recent examples of intervention by the Australian courts, in relation to class action settlements. Our concern is that such intervention has taken place with the benefit of hindsight analysis, when the risk profile of the dispute is markedly different to the risk profile known to the professional funder when it first committed to funding. - Commission rates are set in function of the risks a funder takes by funding a particular class. Doing so at different stages in the proceedings represents different risks. It would be extremely difficult for the court, at a distance, to determine and assess the risks being taken on a particular case. - In what other commercial contract does the court interfere in pricing in this way? - It would be unfair to expect the funder to add to the risk it already runs of no certainty of outcome, with the possibility of lower returns being imposed. This could well have the perverse outcome that the most credible funders, who raise their funds from professional institutional investors and consequently have sophisticated financial management, will

	withdraw from the market as they cannot predict returns with the reasonable certainty demanded by their investors.
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?	We refer to our response at proposal 5-3. A cap should not apply in either case but in the event it does, it should apply to anyone who is acting as a funder. Statutory capping fails to take into account the risk the funder takes: a) while the funder cannot determine litigation strategy; and/or b) if there is a decline in the merits or value of the claim that is not of the funder's making, meaning the funder is penalised even though it carried the full risk throughout the life of the case.
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?	Other funding options seen by us are primarily on a pro bono basis.
6. Competing class actions	Harbour's response
Proposal 6–1 Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended so that: • all class actions are initiated as open class actions; • where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise	We agree in part with this proposal. Our comments are as follows: - Some class actions are not suitable to be initiated as open-class actions. One example would be the Montara oil spill class action, which is funded by Harbour. Although, from a time and costs perspective, it would have been attractive to avoid a bookbuild – one that involved extensive due diligence in relation to more than 15,000 seaweed farmers – the bookbuild was entirely necessary. For this reason, there should an available exception (or exceptions) to the general rule. - It is not clear *how* the court shall determine which case should go forward – and how the court will determine whom it thinks is better qualified, and what to do if actions are equally

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.	qualified. How will the court deal with the risk that the criteria become artificially manipulated and that a single determinant (e.g. price) becomes dominant and obscures the best answer from a broader perspective? - If the court is to determine which of two or more competing actions will progress, the criteria applied to such a determination must be simple, clear, consistent and fair. Otherwise, we are concerned at the potential for the process to engender poor behaviours amongst competing law firms (and funders). - The determination process should not involve the defendant(s). We are concerned that, as matters stand, defendants are party to information which could give them a potentially unfair strategic advantage. - In relation to the enforcement of litigation funding agreements, we repeat our view that a court should only intervene in exceptional circumstances. If, however, enforcement is to be determined by the Court, for the sake of certainty such determination should take place at an early stage of the proceedings.
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.	We have no comment on this proposal.
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?	We have no comment on this proposal.

7. Settlement approval and distribution	Harbour's response
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.	We have no comment on this proposal save that the introduction of costs budgeting in the UK has been helpful, and any costs assessment must take into account the costs and conduct of the defendant and its legal team.
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?	We have no comment in relation to this question. We do not get involved in the settlement administration process but wonder whether technology can be used to make the process of distribution of funds as effective as possible?
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?	From a funder's perspective we have no concerns about the terms of a class action settlement being made public.
8. Regulatory redress	**Harbour's response**
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	We have no comment on this proposal but offer the observation that such schemes have worked poorly in the UK. They have not changed behaviour, nor have they led to the courts being used less for such claims. Schemes have ended up being bureaucratic and expensive to administer with little benefit to either party – they are very vulnerable to abuse in a way that court proceedings are not.

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?	We have no comment in relation to this proposal, other than what we have mentioned above.

We would be happy to discuss any further questions you may have.

[redacted]

Submitted by

Harbour Litigation Funding Limited
180 Piccadilly
St. James's, London W1J 9ER
United Kingdom
+44 20 3829 9320