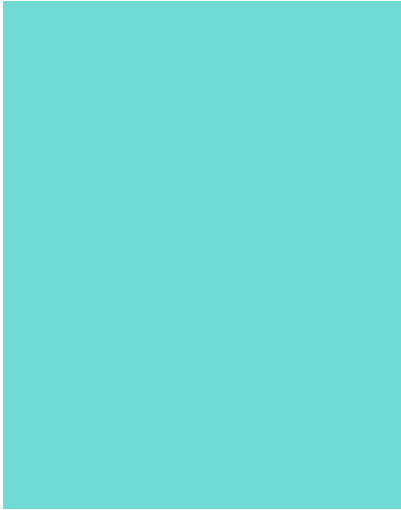


Class Actions and Third-Party Litigation Funders

**SUBMISSION TO THE AUSTRALIAN
LAW REFORM COMMISSION INQUIRY**

30 July 2018



Contents

1.	Overview of our submission	1
2.	Regulation of litigation funding	3
3.	Funding arrangements and contingency fees	5
4.	Competing class actions	8
5.	Settlement approval	11
6.	Further information	14

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at aus.marketing@ashurst.com.

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. Further details about Ashurst can be found at www.ashurst.com.

© Ashurst 2018. No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to aus.marketing@ashurst.com. Ref: 655000398.04 30 July 2018

1. Overview of our submission

1. We welcome the opportunity to make this submission in response to the Australian Law Reform Commission's Discussion Paper 85, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*.
2. The present inquiry is timely as the evolution of class actions over more than 25 years has fundamentally altered the landscape from that envisaged by the members of the Australian Law Reform Commission who recommended the introduction of the regime.¹
3. In this submission we respond to proposals and answer questions raised in the Discussion Paper, focusing on those most relevant to our practice.

Areas for reform

4. With regard to the key issues raised by the Discussion Paper:
 - (a) We believe the litigation funding industry should now be regulated at a national level both prudentially and to better manage conflicts of interest. The need arises because of the recent increase in the number of funded class actions and the decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*² sanctioning orders that litigation funding costs be paid out of a common fund by members of an open class.
 - (b) The proposal to introduce contingency fees should be treated with caution. Percentage based contingency fees raise ethical problems and may lead to an increase in speculative claims. There may be merit in court supervised contingency fees in class actions if this would materially increase the return to class members by reducing funding costs.
 - (c) Competing class actions are costly, inefficient and ought not be permitted. Whatever the outcome of the appeals against the decision in *Perera v GetSwift Limited*,³ the court should be given express power to stay duplicative class actions. Courts should use the cross-vesting system co-operatively to prevent the same claim from being prosecuted in different jurisdictions.
 - (d) In order to protect class members not actively involved in proceedings, the court should appoint contradictors, experts and referees to test whether terms of settlement and legal and funding costs are fair and reasonable.

A review of the impact of shareholder class actions

5. Shareholder class actions are time consuming and costly, absorb court resources and increase the cost of insurance. It is worth considering whether the social benefits of continuous disclosure and misleading or deceptive conduct laws both require and justify these negative consequences.
6. We agree with the proposal that the Australian Government should commission a review of the economic impact of shareholder class actions.
7. One reason for the proliferation of shareholder class actions has been the removal of any need to show fault or intent from the statutory provisions most commonly relied on in these claims.⁴ It is worth reviewing whether strict liability is appropriate for civil claims.

¹ Vince Morabito, "The First Twenty-Five Years of Class Actions in Australia", An Empirical Study of Australia's Class Action Regimes (Fifth Report, July 2017).

² [2016] FCAFC 148.

³ [2018] FCA 732.

⁴ Michael Legg, "Shareholder Class Actions in Australia – The Perfect Storm" (2008) 31 *UNSW Law Journal* 669, 686.

8. Alternatively, it may be desirable to create a defence such as a due diligence defence for a company which takes all steps that are reasonable to ensure that it complies with its continuous disclosure obligations.⁵
9. The issues of causation and the proper measurement of loss in shareholder class actions are controversial and yet to be fully explored by the courts.⁶ A review could also consider possible reforms in these areas. It would be possible for shareholder claims to be restricted to shareholders who relied on the disclosure or non-disclosure the subject of the claim.
10. The concept of indirect causation was supported by Perram J, obiter dictum, in *Grant-Taylor v Babcock & Brown Limited (In liquidation)*,⁷ and by the Full Federal Court on an appeal against refusal of leave to amend a pleading in *Caason Investments Pty Ltd v Cao*.⁸
11. In *HIH Insurance Limited (In liquidation) & Ors* Brereton J held that claimants who acquired shares at prices inflated due to misleading or deceptive conduct were able to rely on indirect causation to recover the difference between the false price and the price that would otherwise have been paid, regardless of whether they relied on the financial statements.⁹
12. The recognition of indirect market causation is yet to be considered by the High Court and its limits are yet to be explored. The consequent uncertainty necessarily adds to the cost of shareholder class actions.
13. Another way of moderating the damages being sought in shareholder class actions is by setting the rules governing assessment of damages.
14. In *HIH Insurance (In Liq)*, Brereton J provided guidance as to how damages should be assessed for shareholders who purchased shares when the market price was inflated as a result of misrepresentations made by the company.¹⁰
15. Nevertheless, the principles to be applied when assessing damages where shares have been traded before, during and after the misleading conduct alleged by someone unaware of or not influenced by that conduct have not yet been fully explored. For example, should a share trading fund that employs an index tracking policy be able to recover in the same ways as a shareholder who read and acted on a misleading announcement?
16. For these reasons, it is also worth considering whether Parliament should specify the tests for causation and the measure of loss that should apply in shareholder class actions.¹¹

⁵ Compare s 674(2B), which provides a defence for persons involved in a contravention.

⁶ Andrew Watson and Jacob Varghese, "The Case for Market-Based Causation" (2009) 32 UNSWLJ 948; Ross Drinnan and Jenny Campbell, "Causation in Class Actions" (2009) 32 UNSWLJ 928; Damian Grave, Leah Watterson and H Mould H, "Causation, Loss and Damage: Challenges for the New Shareholder Class Action" (2009) 7 C&SLJ 483; Gerard Craddock, "Causation in securities litigation" (2012) 86 ALJ 813 Tim Finney and Ben Phi, "Establishing causation in Australian shareholder class actions" (2015) 129 *Precedent* 28.

⁷ [2015] FCA 149.

⁸ *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94.

⁹ [2016] NSWSC 482.

¹⁰ [2017] NSWSC 380.

¹¹ See John Emmerig and Michael Legg, "Twenty five years of Australian class actions – time for reform" (2017) 36 *Civil Justice Quarterly* 164.

2. Regulation of litigation funding

A national licensing regime

17. We submit that a national licensing regime for litigation funders should be introduced and that the Australian Securities and Investments Commission should be the regulator. We agree that the licencing regime should sit outside the Australian Financial Services Licence regime but impose comparable obligations, including all those set out at proposal 3-2 of the Discussion Paper.¹² In addition to the requirement for all communications with class members or potential class members to be clear, honest and accurate, funders should be required to ensure that the terms of the funding agreements are drafted using plain language (similar to the requirement for opt out notices as set out in Federal Court Class Actions Practice Note (GPN-CA), paragraph [11]).
18. The court is not well positioned to regulate litigation funders as its supervisory role is largely limited to the cases before it at particular points in time. Further, as noted by the Victorian Law Reform Commission, legislation rather than court procedure is the appropriate vehicle for policy reform.¹³
19. Particularly since the acceptance of common fund orders, litigation funders provide a service to a wide cross-section of the community, including shareholders and consumers who may have limited or no knowledge of the litigation. As such, regulation of litigation funders is required to ensure that they will have sufficient capital to fund litigation and meet adverse cost orders, and are managed by people with the appropriate character and skills.
20. The character and organisational competence requirements that apply to responsible managers of Australian Financial Service Licence holders should also apply to the responsible officers of litigation funders. We agree that the skill and knowledge requirements for funders should cover both financial skills required to operate a funding business and the legal skills to understand civil litigation.¹⁴ We also agree that regulation akin to that of the legal profession is not necessary given the involvement of legal practitioners.¹⁵
21. Third-party litigation funders should also be subject to financial standards including *at least* the base level financial requirements applicable to Australian Financial Services License holders or comparable overseas requirements.¹⁶ A resources test based on a percentage of total exposure to costs of litigation as well as adverse costs may be an appropriate guide.¹⁷
22. We agree that the regime should allow for companies that are regulated overseas to apply for exemption from the financial regulatory requirements which will be granted where the overseas requirements are comparable to the requirements in Australia.¹⁸
23. Further, class members with complaints against a litigation funder should be able to have recourse to the Australian Financial Complaints Authority. The types of complaints which may be appropriate for this forum include disclosure and fees. While typically a court will have a

¹² Discussion Paper 85 [3.4].

¹³ Victorian Law Reform Commission, Access to Justice - Litigation Funding and Group Proceedings, Report (March 2018), [2.21].

¹⁴ Discussion Paper 85 [3.39].

¹⁵ Discussion Paper 85 [3.42].

¹⁶ Discussion Paper 85 [3.53].

¹⁷ Discussion Paper 85 [3.60].

¹⁸ Discussion Paper 85 [3.62].

supervisory role regarding these matters, the alternative forum would be more accessible for consumers.

Conflicts of interests

24. In recognition of the exemption of litigation funding arrangements from the National Credit Code, litigation funders are currently required to have and follow adequate procedures for managing conflicts of interests and to review the procedures at least every 12 months.
25. The Regulatory Guide published by the Australian Securities and Investments Commission identifies many conflicts faced by third-party litigation funding, to be addressed by those procedures.
26. We agree that the present regulation of litigation funders is inadequate and that, whether or not a licensing regime is introduced (as we submit it should), it would be appropriate to require litigation funders to report annually to the regulator on compliance. These reports should include details of the procedures and how the procedures were implemented.
27. Further, we agree with proposal 4-6 that the first notices provided to potential class members by legal representatives should be required to clearly describe any actual or potential conflicts of interest and the proposed management of those conflicts of interest.
28. If specialist accreditation is developed by the various law societies, it would make sense for that to be coordinated in the interests of efficiency. The Law Society of New South Wales, the Law Institute of Victoria and the Queensland Law Society, among others, currently offer specialist accreditation in various areas of litigation practice. They have also agreed on a policy for the mutual recognition of specialist accreditation.

3. Funding arrangements and contingency fees

Funding fees

29. Currently, in an application for court approval of a settlement, the parties will usually need to persuade the court that a proposed settlement is fair and reasonable and that amounts to be deducted from a proposed settlement for litigation funding charges are appropriate having regard to the terms of the litigation funding agreement.¹⁹
30. Litigation funding agreements should be filed with the court at the commencement of proceedings²⁰ and scrutinised at an early stage of any proceeding in which they are used, as well as when the court is asked to approve a settlement.
31. In addition, we believe the level of funding fees should be further regulated. It is difficult for the court to benchmark funding rates internationally and assess what level of return is appropriate.²¹
32. We support the introduction of a statutory limit or guidance in the Practice Note based on a detailed review of international practice (noting, in this regard, that headline comparisons of funding commission rates need to be treated with some caution and the way in which those figures are derived requires careful analysis).
33. Areas for possible regulation include:
 - (a) a cap on percentage of commission;
 - (b) a cap on the dollar amount of commission;
 - (c) consideration of the net percentage distribution to group members (taking into account both funding commission, legal costs and project management fees); and
 - (d) a requirement for an amicus or contradictor to assist the court in considering the appropriateness of funding arrangements.
34. Otherwise, we consider that the rate to be set should be further developed by the courts in particular cases.
35. In *Money Max Int Pty Ltd v QBE Insurance Group Ltd* Murphy J applied the following considerations, which had been identified by the Full Court, when approving a funding commission of \$30.75 million:²²
 - "(a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. That can be said to show acceptance of a particular rate by astute class members;*
 - (b) the information provided to class members as to the funding commission. That may be important to understand the extent to which class members were informed when agreeing to the funding commission rate;*
 - (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. It will be relevant to know the broad parameters of the funding commission rates available in the market;*

¹⁹ Class Actions Practice Note (GPN-CA), paragraphs 14.3 and 15.2(b).

²⁰ This is required by Class Actions Practice Note (GPN-CA), paragraph 6.1.

²¹ *Perera v GetSwift Limited* [2018] FCA 732.

²² *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030.

- (d) *the litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding;*
- (e) *the quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding;*
- (f) *the legal costs expended and to be expended, and the security for costs provided, by the funder;*
- (g) *the amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;*
- (h) *any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court; and*
- (i) *class members' likely recovery "in hand" under any pre-existing funding arrangements."*

36. The Full Court also referred to the express provision in the *Private Securities Litigation Reform Act 1995* (US) that an attorney's percentage fee should not exceed a reasonable percentage of the amount of any damages and prejudgment interest and to the tendency for a percentage fee to decrease as the amount of the recovery increases.²³
37. We suggest that there may be merit in applying the same standards to litigation funders in Australia as apply to attorneys in the United States who charge a fee calculated as a percentage rate of any judgment or settlement amount.

Contingency fees

38. If class actions currently funded by litigation funders could be funded less expensively by lawyers charging contingency fees calculated as a percentage rate of a settlement or judgment instead of involving a litigation funder, the proposal is worth considering.
39. This possibility is supported by a study of attorneys' fees approved in class actions in the United States, which showed that the mean fee (which includes funding and legal costs) to recovery ratio in securities cases was 25%, which appears to be low compared with combined funding commissions historically charged in Australia together with reimbursement to the funder of legal costs on an indemnity basis.²⁴
40. In addition to the proposal in the Discussion Paper that lawyers charging contingency fees be required to indemnify their clients against adverse costs orders, the lawyers should also be required to provide security for costs where security is ordered.
41. Further, if contingency fees were introduced, it would be necessary to consider the extent to which any litigation funding regulatory regime should apply to firms charging clients on that basis. For example, prudential standards and supervision may be necessary where a law firm will be responsible for disbursements and adverse costs on behalf of a large class.
42. In addition, in approving any percentage rate, the factors described above in relation to the reasonableness of funding commission rates ought to apply.

²³ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148, [88].

²⁴ Theodore Eisenberg and Geoffrey P Miller, "Attorney Fees and Expenses in Class Action Settlements: 1993-2008" (2010) 7 *Journal of Empirical Legal Studies* 248-281 cited in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [140].

43. We believe that the suggestion that contingency fees will improve access to justice by encouraging lawyers to pursue claims presently ignored by third-party funders deserves scrutiny, particularly given the divergence of views among legal professional bodies in Australia in recent years.
44. Contingency fees may increase legal costs and reduce the compensation available to applicants. Caps on recovery would be required if contingency fees were introduced, but such caps risk creating the default level of fee.²⁵
45. Contingency fees create a conflict between the interests of lawyers and their clients.²⁶ Lawyers acting on a contingency basis are at a greater risk of being compromised ethically in relation to the duty to act in the best interests of the client if they have a financial interest in the outcome of the proceeding. These factors could undermine public confidence in the administration of justice.
46. In addition, contingency fees may be negotiated in the context of a power imbalance between lawyers and clients.²⁷ The lawyers will often be the best informed and uniquely able to assess the merits of a claim.
47. These issues can potentially be addressed by the court to some extent in the context of class actions if the arrangement is subject to the court's approval at the start of a case and appropriate protections are in place, as with litigation funders.
48. While a nationally consistent approach to contingency fees should be adopted, the Commonwealth should not intervene in regulating cost agreements. Any proposal to introduce contingency fees should be addressed through the Council of Attorneys-General.

²⁵ Michael Legg, "Contingency fees – Antidote or poison for Australian civil justice? (2015) 39 *Australian Bar Review* 244.

²⁶ Vince Morabito, "Federal Class Actions, Contingency Fees and the Rules Governing Litigation Costs" (1995) 21 *Monash University Law Review* 231, 246.

²⁷ Stuart Clark and Christina Harris, "The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?" (2008) *Melbourne University Law Review* 775, 810.

4. Competing class actions

Case management of competing class actions

49. Competing class actions are defined in the Discussion Paper as two or more class actions where there is a non-theoretical possibility that a person may be a class member of more than one class and, as a result, would be seeking relief from the respondents for the same claim in multiple proceedings.²⁸ This definition may need to be expanded because the classes may be defined so that there is no overlap in class membership, yet potential members can choose between two or more class actions.
50. We believe that competing class actions ought not be allowed, as they are a waste of the resources of the court and the parties.
51. In *Perera v GetSwift Limited* the Court addressed the problem of three competing open security class actions by allowing one to proceed and staying the other two.²⁹ The Court noted the difference between Australia and other jurisdictions such as the United States and Canada where carriage of a class action can be determined by a certification process at commencement. This option was rejected when Australia's class action regime was designed on the grounds that the Court would have other case management tools.
52. The Court adopted a multifactorial approach to compare the competing open class proceedings, referring to the factors identified by the Court in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (*Bellamy's*) and some new factors relied on by the parties in their submissions.
53. Despite the reservations expressed by Beach J in *Bellamy's*, Lee J decided that he had the power to stay two of the proceedings and allow one to proceed. Justice Lee made this decision on the basis that to allow duplicative open class proceedings to proceed would perpetuate unnecessary multiplicity and would not otherwise be an appropriate vehicle for enforcing the substantive rights of group members, would bring the administration of justice into disrepute, and would amount to an abuse of the Court's process.
54. Appeals against the *GetSwift* decision are now pending which challenge the power of the Court to manage competing class actions by choosing one proceeding over another.
55. Whatever the outcome of the *GetSwift* appeals, it is strongly desirable that a clear procedure be established for the most efficient prosecution of class actions in order to avoid increased costs, delay and wastage of court resources.³⁰ We agree with the ALRC's proposal that where there are two or more competing class actions, the court should permit only one to proceed, unless the interests of justice require more than one action to stay on foot.³¹ We also agree that the most appropriate mechanism to address this is through the Practice Note.³²
56. We agree with the ALRC's proposals regarding the key interlocutory steps which should take place following the initiation of a class action,³³ with the exception that we consider the respondent should be involved in the selection hearing and its interest should be a consideration for the court

²⁸ Paragraph [6.30].

²⁹ [2018] FCA 732.

³⁰ Discussion Paper 85 at [6.5]-[6.14].

³¹ Discussion Paper 85 at [6.28], [6.31]-[6.32].

³² Discussion Paper 85 at [6.43].

³³ Discussion Paper 85 at [6.46]-[6.47].

in deciding which firm will have carriage of the matter.³⁴ As noted by the ALRC, this is the position in Ontario.³⁵

57. It is problematic to allow applicants to put material before the court on a selection hearing when the respondent does not have access to that material. If that were the case, when the court chooses the applicant to proceed, it becomes much more informed of that applicant's case at an early stage without hearing from the respondent. The interests of a respondent ought to be represented in relation to vexation and as a matter of procedural fairness limits should be placed on the material put before the court that is not available to the respondent. Perhaps a similar approach to litigation funding agreements could be adopted whereby the respondent is only prevented from accessing specific material that would confer a tactical advantage (for example via redaction).³⁶ We consider that respondents should be involved in the selection hearing, including with respect to issues relating to security.
58. Also with respect to the ALRC's proposed key interlocutory steps, the time limits for other class actions to be filed should be left to the discretion of the court (as opposed to being set out in statute) to allow greater flexibility.³⁷
59. We agree with the approach adopted by Lee J in *GetSwift* and that favoured by the ALRC that there should be no "first mover advantage" given to the firm/funder that is the first to file.³⁸ The criteria that should be applied when determining the lawyer and funder that will have carriage (and whether it is in the interests of justice for more than one to proceed) should follow the approach taken by Lee J in *GetSwift* (as set out at [6.51] of the Discussion Paper),³⁹ with the addition of the following factors developed by the Canadian Courts:⁴⁰
- (a) disqualifying conflicts of interest; and
 - (b) the interrelationship of class actions in more than one jurisdiction.

Power to order common funds

60. Some uncertainty remains about whether the court has the power to make a common fund order. Two issues arise.⁴¹ First, whether a common fund order is an exercise of judicial power for the purpose of Chapter III of the Constitution.⁴² Secondly, a common fund order may constitute an acquisition of property other than on just terms.⁴³ These arguments have so far been rejected but have not been tested in the High Court of Australia.

Cross-vesting and exclusive jurisdiction

61. The five concurrent class actions against AMP in the Supreme Court of New South Wales and the Federal Court of Australia⁴⁴ echo what occurred in *Johnson Tiles*. In that case, class actions were

³⁴ Discussion Paper 85 at [6.52].

³⁵ Discussion Paper 85 at [6.52].

³⁶ Discussion Paper 85 at [6.52].

³⁷ Discussion Paper 85 at [6.48].

³⁸ Discussion Paper 85 at [6.49]-[6.50]; *Perera v GetSwift Limited* [2018] FCA 732 at [170]; [174]-[175].

³⁹ Discussion Paper 85 at [6.51].

⁴⁰ Discussion Paper 85 at [6.25].

⁴¹ Perry Herzfeld, "Competing Class Actions" and Jeremy Kirk, "The Case for Contradictors in approving class action settlements" NSW Bar Association Seminar papers given on 14 June 2018.

⁴² See *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148, [171] to [173].

⁴³ See *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 [107] to [117].

⁴⁴ Anna Prytz, "AMP class action battle opens with jurisdiction stoush", *The Sydney Morning Herald* 8 June 2018.

commenced in both the Federal Court of Australia and the Supreme Court of Victoria. The Federal Court proceeding was transferred to the Supreme Court and then stayed.⁴⁵

62. In the current AMP proceedings, AMP has applied to the Federal Court to transfer four competing class actions to the Supreme Court of New South Wales and the applicants in the four Federal Court proceedings applied to the Supreme Court of New South Wales to transfer a competing class action to the Federal Court of Australia. On 9 July 2018 Stevenson J refused to transfer the Supreme Court of New South Wales proceeding to the Federal Court of Australia and referred to a foreshadowed anti-suit injunction application.⁴⁶ On 11 July 2018 Lee J ordered the parties to inform the Court by 13 July 2018 whether an application would be made to preserve the status quo pending the determination of the transfer applications by the Federal Court.⁴⁷ On 12 July 2018 the parties undertook not to seek anti-suit relief until the Federal Court determines the application to transfer the Federal Court proceedings to the Supreme Court of New South Wales.⁴⁸
63. While the dispute in relation to the forum of the AMP class actions is an unsatisfactory waste of resources, we are not in favour of the proposal that exclusive jurisdiction be conferred on the Federal Court of Australia in relation to the causes of action typically pleaded in shareholder class actions.
64. A co-operative approach to cross-vesting class actions is preferable to giving the Federal Court exclusive jurisdiction for class action claims under the *Corporations Act* and the *Australian Securities and Investments Commission Act*. In that regard we agree with the recommended approach of the Victorian Law Reform Commission, being that a proposal should be put to the Council of Attorneys-General that:⁴⁹

a cross-vesting judicial panel for class actions be established. The judicial panel would make decisions regarding the cross-vesting of class actions, where multiple class actions relating to the same subject matter or cause of action are filed in different jurisdictions.

65. Creating pockets of exclusive jurisdiction adds unnecessary complexity, and there is a risk that claims will be distorted by parties seeking to rely on alternative causes of action to avoid federal jurisdiction. Further, the *Corporations Act* and the *Australian Securities and Investments Commission Act* depend on power referred by the States and there is a risk that the States will not uniformly agree to exclusivity of jurisdiction.

⁴⁵ *Johnson Tiles Pty Ltd & Anor v Esso Australia Pty Ltd & Ors* [2003] VSC 27. See further, Vince Morabito, "Competing class actions and a comparative perspectives on the volume of class action litigation in Australia", (11 July 2018).

⁴⁶ *Wigmans v AMP Ltd* [2018] NSWSC 1045.

⁴⁷ *Wileypark Pty Ltd v AMP Limited* [2018] FCA 1052.

⁴⁸ *Wigmans v AMP Limited* [2018] NSWSC 1118.

⁴⁹ Litigation Funding and Group Proceedings: Report, ALRC, Recommendation 12.

5. Settlement approval

Contradictors for settlement approvals

66. We support the practice of appointing contradictors for settlement approvals.⁵⁰
67. An amicus curiae seeks to advise and assist the court by making submissions and (unlike an intervener) without becoming a party or appearing on the record. An amicus curiae may be appointed by applying to intervene or on the invitation of the court. The hearing of an amicus curiae is entirely at the court's discretion.⁵¹
68. Group members in class actions tend to be substantially uninvolved in, and uninformed about the details of, the litigation. By the time of an application for approval of settlement, the role of respondents in contesting the position of the applicant has fallen away and the circumstances may be such that the applicant's legal representatives have a conflict of interest and duty which limits their ability to represent all relevant interests.⁵² A contradictor should be appointed except where the expected cost and delay is disproportionate.
69. The need for a contradictor is apparent where:
- (a) there is a conflict between group members who are clients of the applicant's solicitor or who have entered into a funding agreement and those who have not;
 - (b) group members will receive very little return for their claim relative to the return to the litigation funder and the legal costs;
 - (c) there are outstanding issues concerning who will be included in the settlement;
 - (d) there has not been adequate disclosure to all class members about the share of the settlement proceeds the funder will receive.
70. To date, contradictors have been appointed in settlement approvals in a limited number of cases. On 4 July 2018, Lee J appointed a contradictor in relation to the approval of a settlement in *Clurname Pty Ltd v McGraw-Hill Financial Inc.*⁵³ The order identifies certain topics on which assistance is sought: who is entitled to participate in the settlement; the quantum of the funding commission; the funding equalisation order; whether the quantum of legal costs ought be approved without further material; the costs equalisation order; the requirement for group members to provide a deed of release; the proposed confidentiality orders; and the administration of the settlement scheme.
71. We agree that further legislative intervention is not required, however it would be helpful to amend the Class Actions Practice Note (GPN-CA) to indicate that a contradictor will be a matter to be considered at the first return of an application for approval of a proposed settlement.

⁵⁰ See generally Jeremy Kirk, "The Case for Contradictors in approving class action settlements" NSW Bar Association Seminar paper given on 14 June 2018. Mr Kirk has authorised us to make a copy of this paper available to the Australian Law Reform Commission for the purpose of its inquiry. See also Michael Legg, "Class Action Settlements in Australia – the Need for Greater Scrutiny" (2014) 38 *Melbourne University Law Review* 590, 611.

⁵¹ *Levy v State of Victoria* (1997) 189 CLR 579.

⁵² Jeremy Kirk, "The Case for Contradictors in approving class action settlements" NSW Bar Association Seminar paper given on 14 June 2018.

⁵³ Proceeding NSD957/2007:
<https://www.comcourts.gov.au/file/Federal/P/NSD957/2015/3733197/event/29459288/document/1204386>

Confidentiality of settlements

72. The publication of reasons for judgment which explain why a settlement is fair and reasonable is necessary as an extension of the principle of open justice.⁵⁴ This is particularly so in class action settlements which involve the interests of many people who may not be actively involved in the proceeding.
73. On the other hand, parties may settle litigation for a variety of reasons, such as legal uncertainty, expected defence costs, insurer's priorities and distraction of management. If confidentiality is important to a party, settlement may be achieved sooner and cheaper if confidentiality is available.
74. Certain elements of a class action settlement such as the total settlement amount, the process by which it is distributed to group members, the legal fee and the funder's fee should be disclosed.
75. On the other hand, confidentiality orders will frequently be appropriate where the publication of details in the reasons for judgment is not necessary to explain why the settlement is fair and reasonable and would cause prejudice to the administration of justice.
76. We consider that the Court should retain its present discretion to decide in each case the extent to which a settlement should be confidential.

Referees for assessing applicants' costs

77. We agree that 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.
78. It is preferable if the costs expert who reviews the reasonableness of the applicant's costs for the purpose of an application to approve a settlement is appointed by the Court. This avoids the problem of selection bias.⁵⁵
79. The Federal Court of Australia has the power to refer proceedings and questions to a referee for report.⁵⁶ The Court then has a discretion whether to adopt the report. Under the Federal Court Rules, the Court may refer one or more questions or issues arising in a proceeding, whether of fact or law or both, and whether raised by pleadings, agreement of parties or otherwise.⁵⁷
80. A similar power has been used by State courts to obtain reports by referees on the costs of the administration of settlement schemes.⁵⁸
81. In a class action involving a substantial amount of costs, a special referee is more appropriate than a court appointed expert.
82. In *Money Max Int Pty Ltd v QBE Insurance Group Limited* proceeding, Murphy J appointed both a Court appointed costs assessor and subsequently a referee pursuant to s 54A of the *Federal Court of Australia Act 1976* to inquire and report on whether the costs of the solicitors for the applicant were reasonable.⁵⁹ The costs were reduced by \$639,036.82 from \$22,514,715.33 to \$21,875,678.51.
83. As noted in the Discussion Paper, in *Caason Investments Pty Limited v Cao (No 2)* Murphy J appointed a special referee to review the reasonableness of the applicants' legal costs and

⁵⁴ *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited (No 3)* [2012] VSC 625.

⁵⁵ Michael Legg, "Class Action Settlements in Australia – the Need for Greater Scrutiny" (2014) 38 *Melbourne University Law Review* 590, 609.

⁵⁶ Section 54A of the *Federal Court of Australia Act 1976*, introduced by the *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).

⁵⁷ *Federal Court Rules 2011* (Cth), r 28.61.

⁵⁸ For example, *Downie v Spiral Foods Pty Ltd & Ors* [2017] VSC 7.

⁵⁹ *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030.

disbursements and found referees to be a useful tool in assessing the reasonableness of costs charged in class actions.⁶⁰

84. In addition, in *Perera v GetSwift Limited* [2018] FCA 732, one of the applicants (Mr Webb) requested that the Court appoint a referee to conduct periodic reviews of the reasonableness of his legal costs, with only those costs assessed as reasonable being costs included for part-payment of Mr Webb's legal costs.⁶¹
85. Justice Lee considered the proposal had considerable advantage as it would allow for an iterative process through which any practice that was resulting in unnecessary costs would be addressed at an early stage.⁶² His Honour noted that arguments that such a mechanism would create additional cost are misconceived as the ongoing involvement of a referee would remove the requirement for a referee or independent costs consultant at settlement stage.⁶³
86. We agree with the views of Lee J that there are considerable advantages to the appointment of a referee prior to settlement.
87. The power to appoint a referee to report on the reasonableness of the applicant's costs should not be exercised where the court is satisfied that the cost of the expert's report will exceed the cost of any saving to class members.

⁶⁰ [2018] FCA 527, [123].

⁶¹ *Perera v GetSwift Limited* [2018] FCA 732 [226].

⁶² *Perera v GetSwift Limited* [2018] FCA 732 [227].

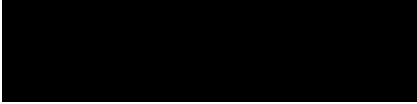
⁶³ *Perera v GetSwift Limited* [2018] FCA 732 [227].

6. Further information

Please contact us if you would like to discuss our views based on our experience acting in class action proceedings or if you have any queries in relation to this submission.



John Pavlakis
Partner
Sydney



Mark Bradley
Partner
Melbourne



Ian Bolster
Partner
Sydney





ashurst

www.ashurst.com