PHI FINNEY MCDONALD

Submission to the Australian Law Reform Commission:

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Background

1.1. This is a submission by Phi Finney McDonald in response to the Australian Law Reform Commission's Discussion Paper, Inquiry into Class Action Proceedings and Third-Party Litigation Funders, issued in June 2018. The Discussion Paper contemplates whether and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation, and in particular whether there is adequate regulation of the following matters:

(a) conflicts of interest between lawyer and litigation funder;

(b) conflicts of interest between litigation funder and plaintiffs;

(c) prudential requirements, including minimum levels of capital;

(d) distribution of proceeds of litigation including the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;

(e) character requirements and fitness to be a litigation funder;

(f) the relationship between a litigation funder and a legal practice;

(g) the costs charged by solicitors in funded litigation, including but not limited to class action proceedings; and

(h) any other matters related to the Terms of Reference.

1.2. The Discussion Paper also considers what changes, if any, should be made to Commonwealth legislation to implement its recommendations.

1.3. Phi Finney McDonald is a boutique law firm based in Melbourne, Australia. We specialise in complex and large-scale litigation, with a focus on class actions. Our founding principals previously led the project litigation practice at one of Australia's largest plaintiff firms. With over

forty years' combined litigation experience and twenty-five years of specialist class actions experience, together we have achieved almost half a billion dollars in class action settlements.

1.4. Phi Finney McDonald's principals and senior lawyers have substantial experience in class action litigation in the Federal Court of Australia, as well as the Supreme Court of Victoria and the Supreme Court of New South Wales. We are experienced in conducting class actions under a variety of funding models, including third party funded litigation, "No Win, No Fee" litigation and client-funded litigation under a variety of payment arrangements. We have conducted a broad variety of class actions by subject matter and type – including securities class actions, product liability claims, financial products and services cases, institutional abuse cases and claims against government.

1.5. As set out in our responses to those questions, our general position is that the Federal class actions regime does not require radical overhaul, but rather ongoing incremental improvements designed to achieve the following central aims:

(a) alignment and consistency with other key jurisdictions;

(b) high-level guidance for the Court and litigants, with a focus on disclosure, that allows the Court maximal flexibility and discretion in managing class action litigation; and

(c) an avoidance of overly prescriptive, "one size fits all" legislation or regulations which are likely to have perverse consequences and, in some cases, may impede access to justice.

1.6. In broad terms, we consider that the legislative mechanisms are already in place to achieve the effective and efficient management of class action proceedings in the interests of the litigants and group members in the proceeding.

1.7. The policy of the law is, and should be, to encourage the settlement of disputes. We should be cautious of erecting impediments or costs in the way of that policy goal, unless there is a clear reason to do so.

Responses to Discussion Paper Proposals and Questions

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.**

2.1. At the outset, we note that public concerns regarding the compliance of the listed entities with their obligations is not confined to the field of securities class actions. In the last twelve months, there have been numerous scandals arising from listed companies concealing material information from the market, which is later made public through the media or regulatory action: see for example recent public scandals regarding the continuous disclosure practices of companies including Big Un Limited, GetSwift Limited, and AMP Limited. While some of those scandals have since resulted in the initiation of securities class actions, it is clear that their existence has not been manufactured by a class actions "industry" looking to create and promote business opportunities for itself.

2.2. Class actions provide a mechanism for private enforcement of claims which, in turn forms only one part of the regulatory regime which seeks to curb corporate misconduct. It is the ongoing occurrence of such misconduct (and the resulting exposure to claims by disadvantaged investors) which has driven any growth in the number of shareholder class actions and public interest in that area of litigation. To the extent that this may in turn result in a rise in the cost of premiums for responsive directors and officers' insurance policies, the primary question that arises from a reform perspective is not "how do we reduce the instances of claims to which such policies respond?" but rather "how do we reduce the instances of misconduct resulting in such claims?"

2.3. The propensity for corporations to be the subject of a funded shareholder class action reflects the maturity of the law in this area: increasingly, experienced litigators and funders are skilled at

identifying those instances of apparent corporate misconduct likely to result in a viable claim brought on behalf of aggrieved investors. This does not indicate that the exposure to class actions is excessive or incorrect.

2.4. We agree with the general proposition that, broadly speaking, potential viable shareholder class actions are often easier to identify, and to secure funding for, than other sorts of claims (whether financial or non-financial) that are suitable to be brought as a representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) and equivalent state legislation. In our view, this does not reflect a dynamic of shareholder class actions "crowding out" opportunities for other sorts of class actions, but rather the following factors:

(a) the continuous disclosure regime for ASX-listed entities results in a substantial amount of information being made public which can be used to assess the likelihood of misconduct having occurred. This can, in some cases, reduce the extent of "information asymmetry" as between potential claimants and potential respondents which has the effect of rendering uncertain whether claimants have adequate grounds to bring claims seeking to recover or compensate loss and damage; and

(b) while the appropriate measures of how continuous disclosure contraventions and misleading conduct by listed entities causes investor loss and damage remain contested by parties to shareholder class actions, at a baseline it is possible for prospective litigants to assess the potential aggregate value of claimant claims quickly and without first needing to take detailed individual instructions from potential group members in any shareholder class action. This is distinct from the typical experience in respect of other financial claims and in particular "mass tort" claims, where the nature and extent of group member losses may be broad in scope, variable in nature and difficult to ascertain or quantify. Such claims may also be less easily brought as a representative proceeding on behalf of all affected claimants.

2.5. There is no evidence that the announcement or commencement of a class action targeting a listed entity has a negative impact on the trading value of that entity beyond that already caused by the alleged misconduct the subject matter of the proceeding. Typically, the likely settlement sum for a securities class action is a small fraction of the negative equity impact of the announcement(s) or company development(s) the subject of the claim. Further, while it is a frequently repeated misnomer that shareholder class actions amount to "one group of shareholders paying another group of shareholders", sophisticated investors are aware that shareholder class action claims are predominantly paid out by insurance policies held by respondent companies, rather than from the companies' own assets. Entities that are too small

to hold responsive insurance policies with meaningful coverage are rarely if ever the subject of such claims.

2.6. Listed entities are not required, and many entities elect not, to take out directors and officers' insurance policies including a "side C" component which responds to securities claims brought directly against the company itself (rather than claims made against the company's directors and officers). While we consider that it would be appropriate for companies to disclose such choices to prospective investors so that those investors can better assess the risk of their investment, in our view, the appropriate response to any rise in the cost of premiums for policies including such coverage is to allow the market to stabilise around an appropriate price point and then to allow market participants (i.e. companies and, indirectly, investors) to make individual decisions as to the importance of obtaining such coverage relative to its cost.

2.7. This may result in more companies electing not to obtain such insurance, or to under-insure relative to the risk of securities claims (both in terms of the potential size of claims and their likelihood of occurring). Greater uncertainty as to the existence of a responsive insurance policy is likely to introduce a further layer of caution to the decision-making processes of litigants and their funders, as it increases the risk of non-recovery in respect of otherwise meritorious claims, and hence may result in such claims not being pursued. However, that outcome is no different in kind than the existing risks of under-insurance and non-recovery that apply to the identification and assessment of potential claims. We consider that risk to be preferable to the industry-wide impact of loosening the standards of regulation of corporate behaviour in response to a concern as to a perceived rise in private litigation, which outcome not only would remove or weaken the capacity of investors to vindicate their rights but may also have the effect of encouraging an increase in corporate misconduct, and thereby tend to bring the conduct of corporate activity in Australia into disrepute.

2.8. In any event, there is no evidence available to suggest that the cost of premiums for responsive insurance companies is "too high", in particular by reference to the premium costs for equivalent policies in other jurisdictions.

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.

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.**

3.1. Broadly, we have no objection to the proposal to introduce a licensing regime for third-party litigation funders. We consider that such a regime could have the effect of increasing transparency and certainty to the market and, potentially, decreasing unnecessary interlocutory disputes between class action litigants as to the adequacy of the applicant's funding arrangements. We consider such effects would be to the long-term benefit of both funders and class action participants.

3.2. In our view, the primary risk attaching to a licensing regime is the introduction of unduly onerous or restrictive requirements for funder capital adequacy, and in particular, any requirements that substantial amounts of liquid assets be held in Australia. The litigation funding market in Australia includes many international funders, whose presence in this jurisdiction we consider helps to drive competition, which in turn can reduce the proportionate amounts of class action settlements being paid to funders and, concomitantly, increase returns to group members. Any regime requiring such funders to hold substantial liquid assets in Australia may:

(a) reduce competition in the sense that certain funders may conclude that obtaining a licence is not in their commercial best interests; and/or

(b) increase the cost of funding for such funders and thereby increase the amount of the commercial return which funders seek from class action resolutions.

3.3. While the above impacts could counteract recent downward trends in the amounts of commission sought by funders (whether pursuant to litigation funding agreements or Court-set common fund orders), such capital adequacy requirements are still likely to be met by sufficient numbers of existing funders to ensure that there remains reasonably healthy competition in this space.

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?

3.4. Rather than introduce minimum requirements, we consider that any licensing regime should be framed around the prospects of the denial or revocation of licences in circumstances where funding entities and/or their responsible entities have not complied with the licences' terms or where they have qualities that may bring the licensed funding industry into disrepute.

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.

3.5. In our view, a requirement to maintain capital in Australia would be likely to reduce (but not eliminate) competition in the commercial class action sphere and result in increased costs for group members.

3.6. As such, any licencing requirement introduced should be sufficiently flexible to recognise the various ways in which litigation funders can satisfy concerns in relation to their capacity to comply with their obligations to group members and defendants. In particular:

(a) to the extent that requirements are framed around satisfaction that the funder is able to meet any order to pay an opposing party's costs, the regime should recognise the increasing availability and take-up of "after the event" insurance policies which provide insurance against that eventuality and may also be used to provide security for the respondent's costs; and

(b) we support the ALRC's proposal to exempt funders subject to adequate comparable requirements in another country. Such an exemption should extend to different forms of

regulation, including the United Kingdom's self-regulatory system, provided relevant system is sufficiently robust and appropriate to protect the interests of group members in proceedings funded by the relevant funder.

Question 3-3: Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?

3.7. We broadly support the availability of a complaints mechanism for group members which complements the courts' supervisory and protective role. We note, however, that the interaction between such a system and the Court's existing functions will require careful consideration. For instance, it is unclear how a complaints scheme would address a complaint regarding the terms of a proposed or approved settlement of a funded class action in circumstances where the settlement was due to be considered for approval by the Court hearing the class action, or where that settlement had already been so approved.

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.

4.1. We support a reporting requirement to ensure that Regulatory Guide 248 is complied with, and also support regulator reporting on such compliance to the Australian Securities and Investments Commission (**ASIC**).

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).

4.2. We support the proposed amendment to the definition of 'litigation scheme' subject to the definitions of 'law firm financing' and 'portfolio funding' being carefully framed so as to apply only to circumstances where a third-party entity has a direct interest in the resolution proceeds of representative proceedings.

4.3. Specifically, the definition of 'law firm financing' ought not extend to regular financing arrangements for law firms where the financier has no interest in resolution proceeds other than indirectly by reference to the law firm's recovery of its own legal costs. Any amendments should

also have specific regard to the financing arrangements that sit behind firms acting on a contingency fee basis (assuming such arrangements are permitted in future), as set out in our responses to proposals 5-1 and 5-2 below.

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.

4.4. We support this proposal. As the incidence of overlapping class actions increases, specialist accreditation will assist group members and Courts to identify the legal practitioners with proven expertise who are best equipped to represent them. Accreditation would also provide practitioners with an opportunity to reflect on the procedural and ethical questions specific to the conduct of representative 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.

4.5. We consider that the existing legal and ethical obligations on solicitors, together with the regulatory compliance and disclosure regimes for funders contemplated by proposals 3-1 and/or 4-1, are sufficient to ensure that potential conflicts of interest are disclosed and managed, and actual conflicts are avoided. In particular, we consider that a robust disclosure regime would ensure that the potential for real conflicts of interest would be brought to the attention of group members, the Courts and regulatory bodies. We note that the Courts already have a wide suite of powers sufficient to equip them to deal with major concerns as to conflicts, and those powers would be increased by several of the ALRC's proposals which we support.

4.6. Our concern about a prohibition of such interests arises from the potential for inadvertent consequences and in particular the risk of unavoidable non-compliances. As the litigation funding market in Australia deepens and matures, the likelihood of solicitors inadvertently obtaining indirect interests in litigation funders' operations (for instance, by investing in an industry or retail superannuation fund which in turn invests in an investment fund involved in litigation funding) increases. Certainly, solicitors and law firms should be obliged to make prominent disclosure of all such interests of which they are aware, but a restrictive prohibition may cause an array of unintended consequences in future.

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

4.7. We take no position on this proposal.

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

4.8. We support this proposal, which we consider to be in the interests of group members and consistent with the current practice of many legal representatives of applicants in representative proceedings.

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.**

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.

5.1. We are open to the introduction of contingency fee agreements in class action proceedings with leave of the Court. However, we consider that many of the potential issues identified in connection with litigation funding would still be present in class actions conducted on a contingency fee basis.

5.2. For instance, the same issues of capital adequacy (particularly in the context of the plaintiff's capacity to provide security for costs or meet any adverse costs order) would apply to circumstances where the plaintiff's lawyers, rather than a third party, offered to meet these costs as part of the "bargain" in exchange for the right to charge a contingency fee – only now it would be the capital adequacy or financing arrangements of the relevant law firm which would be under scrutiny. This may also give rise to potential conflicts of interest issues similar to those which exist in funded class actions, as the lawyers would need to balance the objective of conducting the proceeding in the best interests of group members with a desire to avoid an adverse costs order for which the firm (and potentially its individual partners, jointly and severally) would be liable.

5.3. Similarly, questions of potential conflict of interest in respect of the charging of fees would continue to require management in much the same manner as they do in respect of funded class actions. For instance, courts would be required to consider whether the contingency fee proposed to be charged by the lawyers constituted an inappropriate "windfall" relative to the cost and risk associated with conducting the proceeding, analogous to the considerations which apply to the making of a common fund order. Conversely, if the right to charge a contingency fee was procedurally constrained by some legislated or regulated requirement of proportionality to the amount of work performed by the lawyers (most likely on an "hours of work performed" basis), then in some instances this might incentivise the lawyers to "overwork" the case in order to maximize their eventual fee entitlement.

5.4. Against the above considerations, in cases where the plaintiff's lawyers are able to fund cases in full on a contingency fee basis, then (assuming the fee arrangement was fair and reasonable) this may have the substantial benefit of removing a costs layer associated with the litigation, and hence may increase the net return to group members in many instances.

5.5. We agree that an action that is funded through a contingency fee agreement should not also be directly funded by a litigation funder who receives a commission, but this should not prevent litigation funders indirectly funding such an action by financing the firm, subject to adequate disclosure of those arrangements. We support the ALRC's view that any limitation should not prevent the involvement of a litigation funder where the funding sits behind the solicitor, as opposed to alongside the solicitor. Many smaller firms will require some form of financing to

indemnify the representative applicant against an adverse costs order. We do not consider that there is a good reason that litigation funders should be prevented from providing this finance.

5.6. Any prohibition on law firms entering into financing arrangements in order to offer contingency fee agreements would likely have the practical impact of limiting the availability of contingency fee arrangements to proceedings conducted by law firms with substantial balance sheet positions. This would profoundly reduce the potential positive impacts of permitting contingency fee arrangements and also potentially introduce an uneven playing field between law firms acting in this area.

5.7. In our view, there is no principled basis why contingency fee arrangements should be limited to representative proceedings. While it is true that time-based invoices can be 'lengthy and too complex' for some clients, this is true in all forms of litigation, not just class action proceedings.

5.8. Notwithstanding our position, as the ALRC notes, lawyers acting for group members in class action proceedings are subject to greater judicial supervision, including in respect of litigation funding arrangements, and the recovery of legal costs is subject to court approval. In our view, this makes class action proceedings a suitable testing ground for the introduction of contingency fees. If contingency fee agreements operate well in class action proceedings, they should be made available in all litigation over time, with due consideration at the appropriate stage for whether and to what extent similar judicial oversight arrangements should be extended to non-representative proceedings conducted on a contingency fee basis.

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?

5.9. In our view, the availability of contingency fee arrangements should be consistent across all types of class actions, and ultimately consistent across all forms of litigation.

5.10. If leave of the Court is required to enter into a contingency fee arrangement, it is appropriate to allow the Court, in exercising that discretion, to have regard to relevant regulation of damages and legal fees. There is no reason to limit the Court's discretion to allow contingency fee arrangements for all types of class actions if the Court considers it to be in the best interests of group members to do so.

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.

5.11. We agree that the administration of justice would benefit from certainty regarding the scope of the Court's power to reject, vary or set commission rates. We would expect the Court to exercise this power more cautiously than the power to set the commission rate in a common fund order or the power to disallow legal costs. As third-party litigation funding agreements are contracts between private parties, where funded class actions are conducted pursuant to group members having entered litigation funding agreements rather than pursuant to a common fund order, privity of contract should be respected unless there is a clear basis in the interests of justice to vary the funding terms. This might include where there was clear information asymmetry or unequal bargaining positions as between the funder and funded group members, or where the funding agreement entitled the funder to a clearly disproportionate windfall commission payment.

5.12. We support the same power being extended to contingency fee agreements.

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%?**

5.13. We do not oppose the introduction of statutory limitations on commission rates and contingency fee arrangements, provided they do not erode the Court's ability to ensure that the proportion of settlements returned to the class is reasonable and appropriate.

5.14. We have confidence in the Court's capacity to regulate contingency fee arrangements and commission rates, balancing the interests of group members, solicitors and funders, including 'the fact that litigation funders assume the substantial costs and risks of a representative

proceeding and should be allowed a commercially realistic return'.[1] This is a delicate balance: if the funder's interests are not afforded sufficient weight, the availability of funding for actions in Australia may decline over time.

5.15. In our view, the imposition of an overly inflexible sliding scale approach may not allow the Court sufficient flexibility to consider complex integers informing what is an appropriate funding arrangement or outcome in a specific case. However, if the sliding scale was applied as a rebuttable presumption capable of variation at the Court's discretion, rather than as a statutory cap, this would have the advantage of both introducing more predictability to funded litigation outcomes whilst maintaining the necessary flexibility to deal with unusual or novel situations where departure from the sliding scale is considered necessary.

5.16. To the extent that mandated caps are considered desirable, we note our response to question 5-3 below.

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?

5.17. We consider that it is too soon to determine whether and how statutory caps should differentially apply as between third-party funded litigation and contingency fee litigation. If contingency fee arrangements are permitted, we consider that the Court's approval of fee arrangements for both contingency fee matters and third-party funded matters will enable the development of jurisprudence that will then guide regulators and legislators as to appropriate capping arrangements.

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?

5.18. There are a range of meritorious claims that are unable to attract third-party litigation funding, typically because they are not economically viable. This is true of class actions and conventional litigation.

5.19. In our view, the most straightforward step the Australian Government could take in order to support meritorious but economically unviable claims is to increase funding to the legal

[1] *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409 [29] per Middleton J.

assistance sector. Community legal centres and State legal aid commissions provide important vehicles for such claims to be brought.

5.20. We otherwise would support the establishment of a class action reinvestment fund with the characteristics suggested by the ALRC.

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 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.

6.1. Proposal 6-1 would introduce a regime that tends to result in only one representative proceeding being brought against respondents in respect of the same subject matter. In our view, the regime is inconsistent with Part IVA of the FCAA, which expressly contemplates that multiple class actions may be brought against the one respondent for the same cause of action.[2] Currently Part IVA facilitates the *reduction* of multiple proceedings with duplicative subject matter rather their elimination; even if "open" class actions are considered the default position under Part IVA, the opt out regime contemplates that group members may not wish their rights to be vindicated as part of an open class action, and may wish to vindicate their rights by alternate means.

6.2. In our view, a requirement to initiate *all* class actions on behalf on an open class of group members would unjustifiably limit claimants' right to prosecute their claims as they see fit. In some circumstances, a group of claimants may wish to issue a closed class action for the

[2] McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd [2017] FCA 947 at [34].

specific purpose of maintaining control of the conduct of their claims on terms they have agreed. That may involve negotiating better funding terms than those offered or proposed to be offered in any open class proceeding, or choosing alternate legal counsel who they consider better suited to prosecute their claims. Where this occurs, and subject to the requirements that those group members opt out of any duplicative open proceedings and otherwise satisfy the Court that their proceeding does not constitute an abuse of process, they should be permitted to do so.

6.3. Conversely, a compulsory open class regime risks installing a binary system where group members have no choice *other than* to participate in an open class proceeding or to prosecute their claims on an individual basis. While we respect the capacity of the courts to ensure that open class proceedings are conducted properly, we do not consider that the elimination of multiplicity provides adequate justification for imposing such a severe restriction on group members' options.

6.4. If the ALRC does determine that the class actions regime should encourage the commencement of open class actions as a default position, we propose that the legislative amendments necessary to give effect to this make clear that group members would retain the opportunity to institute separate proceedings as part of a closed class with leave of the Court. Again, such leave would only be granted in circumstances where the Court was satisfied that the closed class proceeding did not overlap with any extant open class proceeding in respect of participating group member claims and was not otherwise an abuse of process.

6.5. We otherwise support the ALRC's proposal to introduce legislative amendments to the FCAA that would mandate the Court's choice between competing class actions to the extent that those class actions were overlapping and duplicative open class proceedings, on the terms outlined.

6.6. We consider the proposed discretion to allow competing class actions where the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so, should be stated more broadly. The language of s 33ZF of the FCAA could provide a broader discretion to allow multiple actions to proceed if it is 'appropriate or necessary to ensure that justice is done'.

6.7. We support the proposal that litigation funding agreements with respect to a class action are enforceable only with the approval of the Court.

6.8. Because we do not support the prohibition of "closed" class actions, we do not consider that court approval of costs agreements or litigation funding agreements should be confined to the making of common fund orders, as such orders will not be necessary where:

(a) Proceedings are issued on behalf of a closed class of group members that have each entered into litigation funding agreements; and

(b) The Court otherwise has been granted the power (by legislative amendment) to vary the terms of those funding agreements.

6.9. Subject to the above submissions, we support the proposed amendment to the Federal Court of Australia's Class Action Practice Note so as to provide a further case management procedure for competing class actions.

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?

6.10. While there is no question that both State and Federal courts are competent to hear such matters, we are concerned by the risk of "jurisdictional arbitrage" resulting from litigants deliberately choosing a legal forum for the commencement of proceedings based on perceived benefits deriving from the regulation (or absence of regulation) of class actions in that forum.

6.11. However, rather than confer exclusive jurisdiction on the Federal Court in respect of representative proceedings, we respectfully suggest the Attorney-General should work with the Council of Australian Governments to ensure regulatory consistency across jurisdictions and remove the risk of such jurisdictional arbitrage.

6.12. We note the further specific risk of competing class actions being commenced in different courts. In our view, this risk could be adequately managed by establishing a panel comprising of judges of the various courts with regimes for the conduct of the representative proceedings, which panel would be responsible for the determination of cross-vesting questions in these circumstances.

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.

7.1. We support this proposal. The Court should be empowered to make such an order if is in the best interests of group members.

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?**

7.2. In our view, Courts are already empowered by section 33ZF of the FCAA to order that a tender process occur, and should use this power in appropriate cases, but this should not be required for all class action settlements. The Court is well-placed to determine whether a tender process is appropriate having regard to the potential to decrease the risk of conflicts of interest and the cost of losing the plaintiff firms' institutional knowledge of the claim.

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?

7.3. The primary reason the plaintiffs may seek confidentiality orders as to the quantum of settlement is that often defendants will only agree to settle the class action on the basis that the quantum is kept confidential from the public. Presumably, this stipulation is motivated by a desire to protect the commercial or public reputation of the defendant, who may be concerned that a large settlement sum will be treated by the public as a *de facto* admission of liability.

7.4. Orders for the general confidentiality of components of the settlement sum to be distributed are primarily intended to prevent the public or journalists from reverse engineering the quantum of the settlement sum, and thus undermining any agreement to keep that amount confidential. Insofar as such an order is sought, the plaintiff ought to inform the Court as to the basis for the proposed order.

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?

8.1. We do not support the adoption of a collective redress mechanism similar to those in place in the United Kingdom.

8.2. The ALRC notes the view that private actions unnecessarily duplicate public enforcement in follow-on compensation claims. A single federal collective redress scheme is proposed to 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.

8.3. In our view, even absent such a redress scheme, there is nothing preventing a corporation from providing appropriate redress to those entitled to a remedy. Currently, a corporation can choose to resolve claims quickly and cheaply – whether by setting up a redress scheme of its own volition, by way of an undertaking with the relevant regulator, or by resolving a class action early. In most cases, this does not occur.

8.4. There is nothing to suggest that more corporations would choose to establish a redress scheme if the proposal is implemented. In our view, the only reason corporations would decide to apply for redress scheme approval under the proposed regime would be to reduce and manage the financial outflows resulting from contraventions and resulting liability to claimants. If a scheme is attractive to a corporation because it pays claimants less than the amounts that may be recoverable through litigation, the scheme will impose an equivalent disadvantage on such claimants.

8.5. Unless the amounts recoverable under any redress scheme are equivalent to those likely to be recovered through litigation, many claimants will choose to remain outside the scheme and litigate. In that case, the redress scheme does not address the duplication of effort and costs in separate, sequential public and private enforcement actions. Rather, the redress scheme adds another layer of enforcement.

8.6. There are a number of inherent conflicts of interest likely to arise in regulatory redress schemes. A regulator is focussed as much on deterring future conduct rather as compensating past wrongs. Unless a regulator's purpose is confined solely to seeking redress for victims, the regulator will be pursuing often incompatible goals. By contrast, a lawyer with carriage of a client's claim has a range of duties requiring them to pursue the best outcome for that client.

8.7. The experience in the United Kingdom includes the establishment of redress schemes where a regulator allows the relevant corporation to select and then remunerate the supposedly independent scheme administrator. The administrator then makes binding determinations and assessments after having taken video-taped evidence from victims who are unrepresented by lawyers. The interests of claimants are not adequately protected in such an arrangement.

8.8. As a general rule, if a redress scheme is attractive to a corporation that would otherwise face litigation, we should ask why. Acting rationally, corporations want to minimise the costs flowing from their wrongdoing. Consequently, a redress scheme a corporation submits to will invariably be structured in their favour, while cloaked in the garb of reasonableness and efficiency.

PHI FINNEY MCDONALD

30 July 2018