Burford Capital Response to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders

30 July 2018

Burford Capital welcomes the opportunity to respond to the Discussion Paper dated June 2018 (**Discussion Paper**) of the Australian Law Reform Commission (the **ALRC**) as part of its Inquiry into Class Action Proceedings and Third-Party Litigation Funders (**Inquiry**). Burford is the world's largest provider of third-party funding of litigation, or 'litigation finance' as it is often called. Burford has billions of dollars committed to litigation finance around the world and is a London Stock Exchange listed firm with a current market capitalisation of approximately AUD $7 billion.

Before addressing the specifics of the proposals in the Discussion Paper to which we respond, we wish to note that we support the work and objectives of the Inquiry. We understand that the ALRC has the remit to consider the role played by third-party funding in the class action landscape and we believe that now is an opportune time to do so. Although we do not agree with all the recommendations in the Discussion Paper, we recognise and applaud the thorough and rigorous approach the ALRC has taken and appreciate the opportunity to comment and engage with the ALRC further as it prepares a final report.

The Australian litigation finance landscape

As an initial matter we would like to emphasise that third-party funding is becoming increasingly valuable to Australian commercial litigants and Australian law firms in many instances beyond class actions, and this more typical corporate use of litigation finance in overseas jurisdictions has been the main focus of Burford's business and growth. The ALRC should ensure that its recommendations recognise that not all litigation finance is for class actions. For Burford, a relatively new entrant in Australia, class actions have been only a tiny fraction of what we do globally and the financing of them is not reflective of the way the rest of the demand and supply of litigation finance is developing. The ALRC's recommendations should be designed not to jeopardise unduly the supply of capital for commercial users of litigation finance, but rather to allow for the most professional, effective and efficient financing of legal services to emerge, recognising that companies like Burford provide solutions in response to clear business need.

Consequently, Burford welcomes the opportunity this provides to contribute to the further professionalisation of third-party funding in Australia and directs its responses and comments below to that end.

Principles that should inform any regulatory approach

Understandably, the ALRC has considered litigation finance as it presently exists in Australia, but it would be a mistake to assume that current use represents the full potential scope of litigation finance activity.

Litigation finance as it exists today in Australia has substantially focused on funding class actions, and it has flourished in that segment of the legal market because Australia permits class actions but does not permit contingency fees. That is an unusual position globally, and it has dramatically affected the development of the litigation finance industry in Australia.

However, class actions are a tiny portion of the Australian litigation environment, as the Discussion Paper recognises. The Australian courts hear thousands of civil cases each year. During the last four years, an average of only about 22 class actions per year have been filed. That is well less than 1% of Australian civil litigation.

It is important to note that there appears to be burgeoning client demand for litigation finance of non-class action commercial litigation. This represents a significantly greater portion of civil matters filed in Australia, but until now it has been a very small part of the Australian litigation finance landscape—a dynamic that is the complete inverse of most common law jurisdictions, where the bulk of litigation finance activity is devoted to non-class civil litigation. For example, in the United States, Burford's largest area of activity, we have never directly financed a class action in the Australian sense from the billions of dollars we have 'funded' in that market.

The business of financing non-class civil litigation does not in itself call out for regulation, and we take to heart the suggestions in the Discussion Paper (which are reflective of views in the industry) that without the overlay of class action considerations, there would be little or no case for intervention. No common law country has seen fit to engage in any significant regulatory activity around single-party commercial litigation finance. The reason no such regime exists is that the judiciary has ample power to regulate litigation funding in cases before it, and commercial (as opposed to consumer) non-bank finance activity receives either no or little regulation in most jurisdictions.

We recognise that the consumer element to class actions may give rise to some particular requirements and also that, if the government were to reintroduce licencing based on the AFSL model, it is important to keep a level playing field and difficult to justify different types of regulation for different types of litigation funding from the point of view of a workable regime. However, that is a pragmatic consideration, and while important, it should not overshadow the more important point: that there is no justification to regulate the provision of external finance for ordinary civil litigation. Moreover, the ability to finance expensive litigation is important for Australian businesses, and rendering this a less attractive jurisdiction in which to fund matters will result in capital flight to other jurisdictions to the detriment of Australian legal practice and Australian companies.

This remains a very important consideration if the ALRC is of the view that class action considerations justify removing the existing licencing exemption for the funding of class action litigation. While Burford reacts to and comments on the ALRC's various proposals as they relate to the Australian class action litigation environment, we are strongly of the view that the impact of regulation in non-class action matters should remain in mind as the ALRC finalises its recommendations. The best way to ensure that there is a level playing field of regulation is that the regime overall should be as light touch as possible.

Given the existing ASIC-regulated landscape in Australia of financial products and services, and while we otherwise consider regulation of litigation finance unnecessary given the power and ability of the judiciary to act, Burford does not raise particular objection to removal of the existing exemptions as the ALRC suggests, as long as two points of principle are paramount: it is critical (1) that the definition of 'funding' that is used in any new regime is sufficiently broad to encompass anyone or any entity who is funding litigation; and (2) that the requirements of a licencing regime recognise and credit where comparable (or higher) tests and standards have already been met by a funder in other jurisdictions. Otherwise duplicative regulation would be imposed, which would be neither efficient nor fair and furthermore damaging to the development of the industry, Australia's high standing in respecting international comity and the availability of capital in Australia.

In relation to the first point of principle, if there is to be a new regulatory burden, Burford would be strongly opposed to regulation that singled out 'litigation funders' based on their self-proclaimed business models as opposed to measuring actual conduct in the marketplace. It must not be the case that professional, dedicated 'third-party litigation funders' are subject to more onerous obligations than other capital providers whose assistance supports litigation. Thus, if an outcome of the inquiry is effectively to remove the existing exemptions for litigation funders, the vast array of the types of funding available should be borne in mind. Consider, for instance, these examples:

- If a bank is advancing capital against a law firm's potential receivables from a litigation matter, that is 'funding'.
- If an insurer is paying the costs of a case proceeding, whether due to subrogation or otherwise, that is 'funding'.
- If a family office or high net worth individual is paying the legal fees in a case or advancing the costs of an insolvency proceeding, that is 'funding'.
- If a law firm raises external capital (for example, by a public listing) and then uses its own capital to 'fund' a case, that too is 'funding'.

Professional litigation funders should not be penalised with regulations that are more onerous than other providers of comparable services.

In relation to the second point of principle, Burford acknowledges that the ALRC has already recognised the need to give credit to funders who have met comparable standards overseas to those here proposed and we endorse that view. We provide further detail on this point in the responses that follow.

With this in mind and assuming the overarching principle of not over-regulating, we turn to the specifics of the proposals.

I. *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.*

- ***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?*
- ***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.*

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

Burford's response to Proposal 3-1

We refer to our general comments above. Given the ample power of the judiciary to regulate litigation funding in cases before it, no country in the world—including Australia—has heretofore deemed it necessary to create a licencing regime for litigation funders. Third-party funders operate at high professional standards without licencing schemes in the US and the UK, to name two prominent examples, and the vast majority of litigation finance providers in Australia have served clients well without them. So while we are sensitive to the particular considerations concerning class actions that have led to the proposal to create a licencing regime, we believe that Australia could very likely continue to function effectively without its addition.

As an existing precedent, the Association of Litigation Funders of England and Wales (ALF), of which Burford is a founding member, provides a voluntary code of conduct for funders that generally tracks the licencing requirements laid out in Proposal 3-2. The voluntary code has worked exceptionally well in the UK.

It is for this reason that we do not believe a licencing regime to be necessary. However, we recognise that Australia already has a financial services licencing regime so broad as to catch the offering of financial products and services across the board, unless expressly exempted. This turns on its head the regulatory position as it applies to litigation finance in the other jurisdictions in which it operates. Litigation finance was singled out for exemption under the *Corporation Regulations* and we understand the ALRC to now be effectively reconsidering whether that exemption should continue in light of some issues that relate to the consumer aspects of class actions. Our comments about what practical measures may be put in place if the exemption is withdrawn are therefore made in light of the specific Australian regime, consistent with the principle that there is no basis to single out litigation finance for regulation.

Bearing that principle in mind, if the existing exemption is effectively withdrawn, then the question arises how should licencing requirements fall on funders. In that light, the requirements addressed in Proposal 3-2 reflect good sense, and we would note that they effectively replicate a process that is already occurring as a result of market dynamics, namely the ongoing professionalisation of third-party funding providers. This is of course a desirable outcome that benefits all parties: Australian claimants, Australian law firms—and third-party funders that are committed to operating in Australia for the long term. Less professional funders may be able to 'get by' in the short term but will ultimately suffer—and in the meantime will most certainly harm not only the interests of the claimants and firms they serve but also the reputation of the funding industry writ large. We recognise that this risk of failure has to a large extent animated the concern expressed in Australia, although it is worth bearing in mind that a regime designed to deal with this risk should be as light touch as possible and not interfere unduly with market dynamics, or else it might itself contribute to the burden on and consequent failure of some entities.

As the industry continues its trend toward professionalisation, another benefit we anticipate is the diversification of the companies currently offering third-party funding in Australia. In the past, the Australian litigation finance landscape has been dominated by a tiny handful of companies, and as a result, they have been able to offer a narrower set of offerings (focusing their funding only on class actions, e.g., rather than providing broader value to commercial litigants) as well as more restrictive terms (e.g., requiring that they be able to control litigation-related decision making). It is to the great benefit of users of litigation finance in Australia (including, and perhaps especially, by corporate entities) to attract global funders and increase the supply of capital for these purposes, rather than relying on a small pool of domestic firms. The recommendations of the Inquiry will have a significant impact on how available global capital will be in Australia for use in litigation finance.

Should the ALRC ultimately determine that effectively withdrawing the licencing exemption for litigation finance outweighs the burdens, costs and inefficiencies of a licencing regime, we would—echoing our comments above—strongly urge it to:

1. Focus its efforts explicitly on the funding of class action matters;
2. Limit the impact of regulation on the funding of non-class action matters;
3. Ensure that the regime overall should be as light touch as possible; and
4. Ensure that structures are in place to enable the most professional, effective and efficient financing of legal services.

Burford's response to Proposal 3-2

Should Proposal 3-1 be deemed necessary to move forward, we would then accept the type of requirements laid out in Proposal 3-2, *so long as* there was a system to recognise and credit where providers of external finance already meet these requirements. It will be apparent that the litigation funding business is not confined geographically. This, of course, includes funders which operate in Australia as part of a broader international group. If a licencing regime is not to be a barrier to capital entry into Australia, appropriate recognition should be given to such a funder where it or its group already meets comparable (or higher) standards to those proposed in comparable jurisdictions.

We would note that as a global finance firm focused on law that is publicly traded on the London Stock Exchange (LSE), Burford is already regulated under UK, Guernsey and US requirements. In particular, we are regulated by these agencies: the UK's Financial Conduct Authority (FCA); the Solicitor's Regulatory Authority (SRA) in England and Wales because we are licensed as an Alternative Business Structure (ABS); the Guernsey Financial Services Commission (GFSC) because we operate an insurance business headquartered in Guernsey; and the Securities and Exchange Commission (SEC) in the US. Although the SEC is a US agency, its rules apply across our global business. Of course we also comply with existing regulations in every jurisdiction in which we operate, including in Australia.

Indeed Burford operates in Australia in a manner that provides a model for licensed litigation finance companies to follow:

- We follow strict compliance programs (including of LSE listing rules, voluntary codes such as ALF, anti-corruption, anti-bribery and data protection and privacy legislation).
- We have rigorous conflict of interests and know your client tests.
- Our key officers have satisfied fit and proper person tests.
- We have annual and transparent financial auditing by Ernst & Young.
- We are regulated by and meet the strict standards of scrutiny of the US SEC of our business and employee and officer conduct.

Unless Burford's compliance with existing regimes in comparable jurisdictions to Australia were recognised, the proposed licencing would be duplicative and unnecessarily costly and burdensome. That would be neither efficient nor fair. It would be damaging to the development of the industry, in particular its attractiveness to global litigation finance and, were that to be diminished, so would Australia's high standing in respecting international comity as well as the availability of capital.

Burford therefore wholeheartedly endorses the ALRC's expressed view at [3.62] that:

> *…there would be no need for foreign litigation funders to meet the specific Australian requirements provided they meet comparable requirements in their home jurisdiction.*

As a note, it is worth emphasising that Burford does not consider itself 'foreign' or to have a 'home' jurisdiction. We are listed on the London Stock Exchange, have our largest operations in the United States and growing business in Europe, Asia and Australia. We nonetheless understand the ALRC to be referring to funders which operate under regulation and rules in non-Australian jurisdictions which have already met comparable or higher standards than currently exist in Australia or are being proposed. It is certainly the case that compliance with such standards should be appropriately recognised and credit given.

Question 3-1: Minimum requirements for character and qualifications

Should Proposal 3-1 be enacted, we agree there should be demonstrated good character and appropriate qualifications of designated responsible officers.

Fit and proper person tests

As a default test we recognise the appropriateness of the good fame and character test pursuant to the current AFSL. Any such regime now brought in for litigation funding (as defined in a principled way as we have suggested) should recognise where the responsible managers have already satisfied comparable good fame and character tests, such as the fit and proper person test required by the FCA in the UK.

We agree with the ALRC's observation that it is not necessary that litigation funders be regulated similarly to legal practitioners as their involvement is mediated by legal practitioners who act for class members, in the case of class action litigation. There is, however, a caveat to this: if a funder insists on control rights under a funding agreement with clients, either to direct or veto legal strategy or settlement, then it might be considered appropriate for there to be at least one responsible manager who has a practising certificate. Rather unusually (in the Australian context) Burford does not in fact exercise control rights in its standard litigation finance agreements. The responsible manager of its Australian business is Craig Arnott, a former barrister in New South Wales who holds a current practising certificate as a solicitor in England & Wales (as required by the SRA) as he is the Compliance Officer for Legal Practice (COLP) of the ABS licence Burford holds.

Burford is proud to have built a team of over 100 qualified people around the world, 50 of them lawyers.

The members of the board of our UK entity Burford Capital Holdings (UK) Limited which supervises the Australian business have all already satisfied the FCA fit and proper person tests. We provide some further information about each of these directors:

Sir Peter Middleton, GCB, Chairman

Sir Peter Middleton has served as Chairman of Burford Capital Limited since its inception, including of Burford Capital Holdings (UK) Limited. Sir Peter spent nearly 30 years at HM Treasury, working closely with nine Chancellors, and was Permanent Secretary from 1983 to 1991. He chaired an industry review for the Thatcher Government and a review of Civil Justice for the Blair Government. Sir Peter was UK Chairman of Marsh & McLennan Companies from 2007 to 2013, Chairman of Marsh Ltd from 2004 to 2013, Chairman of Mercer Ltd, from 2009 to 2014 and Chairman of the Centre for Effective Dispute Resolution from 2004 to 2011. He was Chairman of Camelot Group PLC from 2004 to 2010; a Director, Chairman and Deputy Chairman of United Utilities from 1994 to 2007; and a Board member of OJSC Mobile Telesystems from 2005-2007, Bass PLC from 1992 to 2001 and General Accident (later CGU) from 1992 to 1995. Sir Peter joined Barclays in 1991 as Group Deputy Chairman and Executive Chairman of BZW, became Chairman of Barclays Capital following the reorganisation of BZW in October 1997 and was Group Chief Executive from November 1998 until October 1999. He became Group Chairman of Barclays Bank PLC in April 1999 and retired in August 2004. He was also President of the British Bankers Association from 2004 to 2006 and a member of the National Institute for Economic Research from 1996 to 2007.

Christopher Bogart, Chief Executive Officer

Christopher Bogart co-founded Burford in 2009 and has served as Chief Executive Officer since its inception and Director, Burford Capital Holdings (UK) Limited. Mr. Bogart is widely recognised as a pioneer of the litigation finance industry. He is the only Band 1-ranked individual by Chambers in litigation finance, which commented: “He is a greatly respected figure in the litigation funding market on both sides of the Atlantic. Sources are forthcoming in their praise, with one remarking that ‘he is massively impressive. He’s a world class CEO—the single most impressive, smartest person in the market.’” He was recently named one of the top 10 Legal Innovators by the Financial Times. Previously, Mr. Bogart held numerous senior executive positions with Time Warner. As Executive Vice President & General Counsel of Time Warner Inc., he managed one of the largest legal functions in the world. Mr. Bogart came to Time Warner from Cravath, Swaine & Moore, where he was a litigator representing companies such as IBM, GE and Time Warner. Mr. Bogart was the gold medalist and graduated with distinction from the Faculty of Law of the University of Western Ontario and served as a law clerk to the Chief Justice of Ontario.

Jonathan Molot, Chief Investment Officer

Jonathan Molot co-founded Burford in 2009 and has since its inception served as Chief Investment Officer and as Director of Burford Capital Holdings (UK) Limited. Mr. Molot is a Professor of Law at Georgetown University Law Center and a leading expert on litigation finance. Mr. Molot has taught on litigation risk management and finance at Harvard Law School, Georgetown University Law Center and George Washington University Law School. His articles have appeared in the Yale Law Journal, the Stanford Law Review, the Columbia Law Review, the Vanderbilt Law Review, and the Virginia Law Review, while his much-referenced articles on litigation finance have appeared in the University of Chicago Law Review, the Georgetown Law Review, the Indiana Law Journal and the Southern California Law Review. Mr. Molot served as counsel to the economic policy team on the Obama-Biden Presidential Transition Team and as a senior advisor in the Treasury Department at the start of the Obama Administration. He clerked for Supreme Court Justice Breyer and practiced law at Cleary, Gottlieb, Steen & Hamilton in New York, and at Kellogg, Huber, Hansen, Todd, Evans & Figel in

Washington, D.C. Mr. Molot graduated magna cum laude from Yale College and magna cum laude from Harvard Law School, where he was Articles Co-Chair of the Harvard Law Review and won the Sears Prize, awarded to the two top-performing students in a class of over 500.

Timothy Dutton CBE QC
Timothy Dutton serves as a non-executive director of Burford Capital Holdings (UK) Limited and Chairman of its Investment Committee (including of Australian matters). Voted Silk of the Year in 2010, Mr. Dutton was Head of Chambers at Fountain Court from 2008 to 2013. He has advised and acted in hundreds of cases concerning almost all fields of regulated activity and is ranked by both Chambers UK & Legal 500 as a leading Silk and a star individual. He served as Chairman of the Bar Council in 2008, Chairman of the Association of Regulatory and Disciplinary Lawyers in 2009, a Deputy High Court Judge and Trustee and Governor of the Legal Education Foundation.

Craig Arnott, Managing Director
Craig Arnott is Burford's Managing Director responsible for its underwriting and investment activities in Australia, the UK, continental Europe and Asia. Based in London and a native of Australia, Mr. Arnott has over 22 years of experience in large and complex commercial litigation and advisory work and across multiple jurisdictions, especially in relation to antitrust matters. Prior to joining Burford, he most recently was a barrister at Sixth Floor Selborne and Wentworth Chambers in Sydney. Before being called to the Bar, he was a Partner and Head of Competition/Antitrust Law in London at the international firm Fried Frank Harris Shriver & Jacobson. He had worked also at Ashurst in London and commenced his legal career as a litigator at Cravath, Swaine & Moore in New York. Mr. Arnott was a Rhodes Scholar from Australia-at-Large, holds BCL and D.Phil degrees from the University of Oxford, where he is an alumnus of Balliol College and graduated at the University of Queensland with First Class Honours in both his Law and Arts degrees, with the University Medals in both. He was law clerk to the Hon. W. Pincus of the Federal Court of Australia.

Qualifications test

Burford concurs with the ALRC's observation that the requisite skills and knowledge requirements for litigation funding should cover sufficient legal skills to understand civil litigation, court rules and processes as well as financial skills to operate a funding business. Any such regime should recognise where designated responsible managers have already demonstrated comparable skills in the jurisdictions in which they operate which are considered comparable to Australia's. We suggest that it should be uncontroversial that the UK and US are comparable in this regard.

Legal skills

We would highlight that the Burford Directors indicated above exemplify appropriate legal skills to understand civil litigation, court rules and processes, and in any proposed licencing regime there should be an avenue for this to be recognised as meeting Australian requirements (although we note that the responsible manager of our Australian business is also qualified in Australia and practiced in New South Wales both as a solicitor and barrister).

Financial skills

In terms of financial skills to operate a funding business we would highlight that Burford's primary responsible manager is its CFO, supported by a qualified 12-person finance team who are US and UK qualified and trained. Again, there should be recognition that this meets comparable Australian standards. We set out key members of our finance team and their qualifications below:

Elizabeth O'Connell, Chief Financial Officer
Elizabeth O'Connell is Chief Financial Officer of Burford and leads its finance and investor relations functions. Ms. O'Connell, one of Burford's founders, was previously a Managing Director and Chief Financial Officer of Glenavy Capital LLC, an international investment firm and one of the founding shareholders of Burford. Ms. O'Connell was also the Chief Financial Officer of Churchill Ventures Limited, a technology and media company listed on the American Stock Exchange. Previously, Ms. O'Connell was a senior investment banker with extensive transactional activity all over the world. She was a senior Equity Syndicate Director at Credit Suisse. Before that, she spent the bulk of her investment banking career at Salomon Brothers (later Citigroup), with broad experience in M&A and equity activity focused on telecom and media. She began her finance career in foreign exchange sales at Bank of America. Ms. O'Connell is a Chartered Financial Analyst. She earned her MBA in finance from The University of Western Ontario Richard Ivey School of Business, and a BA from The University of Western Ontario.

Leslie Paster, Financial Controller
Leslie Paster is Burford's Financial Controller based in the UK. Mr. Paster is responsible for the management of the UK Finance team and the preparation of the Group's annual and interim accounts. Prior to joining Burford Mr. Paster worked at the Medical Defence Union where he spent nearly 15 years as Finance Manager and then Financial Controller. Whilst there he gained experience accounting for professional indemnity claims and misconduct charges against medical professionals. Mr. Paster is a chartered accountant who qualified with Ernst & Young. He graduated with a BSc in Economics & Accounting from the University of Bristol. Mr Paster is also the Compliance Officers for Finance and Administration (COFA) for purposes of the SRA's regulation of Burford's ABS licence in England & Wales.

Charles Utley, Chief Accounting Officer
Charles Utley is Burford's Chief Accounting Officer, responsible for accounting policy and financial reporting. Mr. Utley brings over 20 years of experience in the interpretation and application of accounting standards within the financial sector. Prior to joining Burford, he was a Managing Director at Barclays, where he spent 11 years in a variety of senior accounting roles. He led the technical accounting and product control teams at Barclays, overseeing the firm's legacy assets that were impacted by the financial crisis, including structured products, private equity and real estate. Before Barclays, Mr. Utley spent eight years at PwC, rising to the level of Director, with a particular focus on the development and implementation of commercial solutions to complex accounting issues arising from the development of new products or the adoption of new accounting standards. Mr. Utley is a graduate of the Bradford University School of Management and is a qualified Chartered Accountant with the Institute of Chartered Accountants in England and Wales.

Christina Yue, Vice President of Finance
Christina Yue is based in Burford's New York office. Prior to joining Burford, Ms. Yue was most recently a manager at Ernst & Young. In her role at Ernst & Young, she audited large hedge funds, fund of funds, and mutual funds that collectively have more than $20 billion in assets under management. She graduated magna cum laude from SUNY Binghamton with a BSc in Accounting.

Question 3-2: Financial standards of solvency, independent auditing, minimum capital adequacy and cash buffers

As a default test we recognise the appropriateness of a number of the base level financial requirements pursuant to the existing AFSL. These should include (i) solvency, (ii) audit requirements and (iii) capitalisation and/or cash minimum requirements. We observe that there are many difficulties (as suggested in the Discussion Paper at footnote 64) with establishing net asset positions. Burford engages with its auditors to establish this (which is very time consuming and costly given this is non-traditional asset class) and currently has in excess of AUD $2 billion in assets. It may be that the asset requirement is best replaced by a capitalisation requirement.

We also observe that the proposed further requirements floated by the US Chamber Institute for Legal Reform (ILR), a separately incorporated affiliate of the US Chamber of Commerce, are entirely unnecessary, and are arguably designed to be extremely intrusive and to establish cumbersome barriers to entry. It will have been apparent to the ALRC that the ILR is a blinkered opponent to litigation finance because it opposes litigation—including meritorious litigation. Its goals are not those of the ALRC.

Solvency and audit requirements

Solvency and audit requirements go hand-in-hand as the key task for an independent auditor is to attest to an entity as a going concern. This is fundamental and in order to demonstrate financial fitness, licensed funders would, under Proposal 3-2, be required to be independently audited annually. We regard this as a critical requirement in any fit-for-purpose licencing regime, if such a regime is to be introduced at all. The audit could obviously be used to affirm to the licencing authority that the funder is solvent and can meet an appropriate threshold of access to capital.

The core of the funding business is to be able to fund. Capital adequacy is an important consideration for clients, especially non-class action commercial users of litigation finance: when choosing a third-party funder, an essential consideration for the client and counsel must be their demonstrated financial capacity to meet all of their ongoing funding obligations. When some capital is to be paid in the future, clients must be confident that capital will be available to them at the point when it is needed. Even when capital availability is not an issue—such as when the client is receiving all the capital up front—clients need to focus on the size and structure of their financial providers to assess their stability and incentives and the materiality of the investment to them. This is important because if a transaction is material to the financier, there may be contractual provisions in the litigation funding agreement that will—if it comes under pressure—permit the financier to act in a manner that may be inconsistent with client interests.

Burford (including the parent company and other entities within the Burford group) is audited by an independent external auditor, currently Ernst & Young (E&Y) at least annually to comply with LSE rules as well as GFSC and SEC rules. Audit results are communicated to investors and shareholders and available on the Burford website. This means that, as a publicly traded company (one of just two publicly traded third-party funding companies worldwide, and the largest by a substantial margin), Burford regularly publishes audited financial reports that provide transparency into the growth and stability of our business. As of the time of writing, Burford had assets of approximately AUD $2.15 billion and a market capitalisation of approximately AUD $7 billion.

Recognition of this existing audit compliance across our whole business should be made in any audit requirement of a licencing regime, as that business includes our Australian business.

Minimum capital requirement and cash buffer

There is considerable merit in a minimum capital requirement, but determining what that should be is more open to debate. We note in particular that in ASIC's Regulatory Guide 166 (RG 166), *Licencing: Financial Requirements* (September 2017), it is stated at [RG 166, 166.10] that any such requirements take into account the nature, scale and complexity of the business concerned. In recognition of this, it is reasonable that there be a number of avenues that could be selected to show that minimum capitalisation and/or cash levels are available:

> **Capitalisation:** There is no legitimate reason to believe that public companies wherever listed with large capitalisation that are independently audited will not be solvent or able to raise capital to meet their obligations, at least if a suitably substantial capitalisation threshold is chosen. For this reason, Burford believes that firms that are independently audited and have at least the equivalent of AUD $1 billion in capitalisation should be deemed to meet a financial standards test of capital adequacy and financial resources. Such a threshold provides an objective and market-tested measure which also can be communicated to users of litigation finance and the public at large to give credence to, and provide confidence in, the industry. It is consistent with ASIC's approach that if there is standard set that can appropriately indicate that sufficient financial resources exist to satisfy a licensee's obligations, then this should be deemed sufficient. [RG 166, 166.18]
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> **Alternative objective measure:** Burford recognises that many funders will not be able to satisfy such a capitalisation standard and it is appropriate that they should have the ability to demonstrate their financial strength through annual auditing in order to show their capacity to meet their obligations.
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> The key to assessing compliance here should be the same as under the existing ASIC financial requirements regime, namely, that if an AFS licensee does not have enough cash to meet its liabilities, over a specified timeframe, there is a greater risk that the licensee may not provide financial services in compliance with its regulatory obligations. [RG 166, 166.53]
>
> Therefore, if financial adequacy is to form part of a licence requirement and the capitalization test is not met, the funder should be able to show by another reasonably objective measure that it will have sufficient, or access to sufficient, financial resources over a 12-month basis.
>
> Burford notes the mechanisms under the existing AFSL regime referred to in the Discussion Paper (at [3.53]). However, we also recognise the inherent difficulty of analysing the complexity of

litigation finance liabilities. They are contingent on very many variables. The ASIC tests referred to in the Discussion Paper require making an assessment of likelihood of occurring that may be unrealistic in relation to litigation risk in any given year. This is not to say that such assessments cannot reasonably be made, only that there should be other objectively-based avenues available.

It therefore makes more sense to provide for a more objective measure to demonstrate financial strength, if the capitalisation test is not met. This could be done by modifying the ASIC approach to reasonable estimate cash projections in its Regulatory Guide (cf. Table 4 of RG 166 at [166.44]). In order to be objective, the test would be premised on providing an audited profit and loss statement. This comports with the requirement that should be an annual independently audited profit and loss statement produced as part of a regime for licensed funders, or their group if part of a group. Once that is available, an objective measure of cash sufficiency is possible.

Therefore, adopting the ASIC approach, the test adapted to a 12 month period would be:

> *to have in cash an amount equal to 20% of the funder's actual cash outflow for the most recent financial year for which it has had prepared an independently audited profit and loss statement.*
>
> *As ASIC recognises, where an Australian entity is part of a broader group, it will be sufficient to point to the audited profit and loss statement and cashflow of the broader group.*

Arbitrary cash buffer: an alternative to this approach is to determine an arbitrary cash buffer. The Code of Conduct for the members of the Association of Litigation Funders of England and Wales requires a commitment to 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." (The most recent version of this Code of Conduct is available here > ALF Code of Conduct.) This is most obviously shown by cash and is currently set at £5 million. In Burford's view this should be set to at least the average cost of two or three large class actions (as that is the rationale for the regime).

Question 3-3: Australian Financial Complaints Authority scheme

Burford endorses the concept of needing a dispute resolution system, but this is one area where it is best to recall the need for light touch regulation. As the Discussion Paper suggests, it is not entirely clear there is an obvious model to impose on funders for a dispute resolution system. If consumers of litigation funding services were granted a new access to the Australian Financial Complaints Authority (AFCA) scheme, a new mandate for AFCA would have to developed, meaning new resources and new expense. It would be very unfair for that burden and expense to fall on all funders whether or not their model of business is likely to be exposed to consumer complaint. Such a development would show the way in which regulation can beget regulation. Burford considers it more appropriate, at least in the first instance, for funders to determine what is the best model of dispute resolution, for instance, it may be that there is a procedure for an independent barrister to arbitrate or mediate. Given that this is potentially an expensive regulatory overlay, the ALRC should recommend that the requirement be for funders to show they have a dispute resolution system in place and this be monitored to determine if it is in practice adequate.

II. *Conflicts of Interest*

Proposal 4–1 *If the licencing regime proposed by Proposal 3–1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248 and should be required to report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.*

Proposal 4–2 *If the licencing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the Corporations Regulations 2001 (Cth).*

Proposal 4–3 *The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.*

Proposal 4–4 *The Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.*

Proposal 4–5 *The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.*

Proposal 4–6 *The Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case*

Burford's response to Proposal 4-1

We concur with Proposal 4-1. Burford has developed a conflicts policy to comply with ASIC Regulatory Guide 248 (with the assistance of its legal advisers at Allens).

However, we do note that conflict of interest issues are particularly profound for funders who exercise control over litigation and/or its settlement. Not all third-party funders doing business in Australia control litigation decision-making or settlement; Burford does not.

Burford's response to Proposals 4-2, 4-3

We accept Proposal 4-2 and note only our comments about the definition of funding needing to include all forms of litigation funding, and understand this to be thrust of the ALRC's recommendation here.

We accept Proposal 4-3 without comment.

Burford's response to Proposal 4-4

As to Proposal 4-4, we believe that the Australian Solicitors' Conduct Rules need not be revised as proposed or need only be amended to prohibit solicitors and law firms from having *ownership* interests (rather than '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. The issue to be addressed by Proposal 4-4 is solicitors' and law firms' ability to represent their clients without conflict; the current expression of the proposal is too vague, as 'financial and other interests' could be interpreted to preclude their accepting financing. Just as a law firm should be able to take its commercial banking business to the same bank that finances its clients, a law firm should be able to accept funding for its firm from a third-party litigation funder that is providing financing to its clients. Provided that the third-party funder does not control litigation-related decision making or settlement, as Burford does not as a matter of course, the funder is equally passive as a commercial bank—perhaps more so given that funding is non-recourse—and therefore able to provide funding to both without conflict.

Burford's response to Proposal 4-5

We reject Proposal 4-5 as it is written, as not only unnecessary but as harmful to the fairness and efficiency of the Australian judicial system. As written, the proposal could open the door to blanket disclosure of third-party funding in every dispute proceeding. That is because on its face, Proposal 4-5 would result in the disclosure not only of the fact of funding but also the identity of the funder involved and even the funding documents themselves, to which privilege applies as it discloses assessment of the prospects of litigation.[1]

It is for this reason that proposals for blanket disclosure obligations—rather than those focused on the *fact* of the funding or identity of the funder—are simply an invitation to gamesmanship by lawyers to engage in complicated, expensive and time-wasting disclosure and privilege battles. Such a blanket obligation would create substantial detours and delays in Australian litigation, making the Australian courts more expensive and less fair.

In this context, it's fair to ask: what is the purpose of disclosure? And: does disclosing third-party funding serve that purpose?

Disclosure rules principally exist to ensure that adjudicators—judges—aren't inadvertently deciding a matter in which they have a conflict. They don't exist to provide an informational advantage to a litigation adversary, and they have been deliberately drawn those rules narrowly. Thus, when Homebase litigates, it must disclose that it is owned by Wesfarmers, in case the assigned judge has some Wesfarmers stock,

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[1]That is because those terms could "give a clue as to the contents of" legal advice or "betray the trend of the legal advice given": *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1, 26 and *Ventouris v Mountain* [1991] 1 WLR 607, 615. The terms of success fees have been held or conceded to be privileged: See, e.g., Morgan J and Popplewell J respectively in *Edwardian Group Ltd & Anor v Singh & Ors* [2017] EWHC 2805 (Ch) (in which Morgan J accepted a concession that the success fee was privileged, and also found that a range of documents related to litigation funding were also privileged) and *Excalibur Ventures v Texas Keystone Inc* [2012] EWHC 2176 at [12], [23] and [25]. Similarly, the premium paid for ATE insurance may be privileged for the same reason: *Barr v Biffa Waste Services Limited* [2009] EWHC 1033 (TCC) at [48]-[49] (Coulson J, again approving a concession by Counsel) and *In re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch); [2017] 1 WLR 3539 at [113].

because a busy judge can be forgiven for not knowing that Wesfarmers bought Homebase in 2016. However, the rules don't go further. Instead of buying Homebase, Wesfarmers could have provided it with lots of debt capital and taken a bevy of warrants in return, and that would not be disclosed; those indirect transactions as regarded as too attenuated to give rise to judicial conflict—notwithstanding that Wesfarmers can probably exercise the same amount of influence under either structure. But this is a conscious choice: disclosing every attenuated relationship of capital or influence would bring the litigation system to its knees.

Lawyers' conflicts are a separate issue, but they are dealt with pursuant to applicable ethical rules, and third-party funding does not pose novel issues not already addressed by existing ethics rules. Certainly no filing-style disclosure is needed to address lawyer conflict issues.

Similarly, there is no basis for one litigant to have disclosure about the confidential financial arrangements of another; courts do not inquire into all the various business relationships that litigants have, because they are rightly considered irrelevant. Third-party funding, certainly in non-class action civil litigation, is simply another such private financial transaction. Litigants need only disclose documents that are relevant to the issues in dispute—but no judge has ever found that the private financial arrangements entered into by litigants pass that threshold of relevance. Quite the contrary: in jurisdictions around the world, and as exemplified in our footnote, judges have time and time again found that documents created in connection with third-party funding (as any materials prepared in anticipation of litigation) are privileged and protected from disclosure.

Clearly, then, there is no rationale for disclosure when financing is provided to a single claimant engaged in commercial litigation: it does not serve the purpose for which disclosure is intended, and third-party funding poses no novel issues not addressed by existing rules, because it is no different than any other kind of capital provision. Further, it's clear that mandating such disclosure would result in a less just, more costly and burdensome judicial system. Anyone who has spent any time in courtrooms where high-stakes commercial matters are being litigated has witnessed demands for disclosure of irrelevant information as a mechanism of delay, frolic and detour. Mandatory disclosure of third-party funding in every dispute would make the problem worse—adding to the already extraordinary cost of litigation and slowing down an already overburdened system.

We believe that no requirement for disclosure is needed, and certainly not as a blanket requirement in all disputes. We recognise that there is some rationale and in some jurisdictions some desire for disclosure in two contexts: arbitration, where the different status of an arbitrator versus a judge creates greater potential for conflicts to arise; and class actions and other multiparty litigations, given the considerably more active role that the court plays because there is generally not a single plaintiff with the scale and sophistication to manage the proceedings in the way a corporate client does. However, even in these contexts we would argue that it would be far preferable to leave disclosure to the discretion of the court rather than mandating it as a requirement.

Further, if there is to be disclosure in these limited contexts, there is a right way and a wrong way to approach it. An exemplar of the right way to handle disclosure was provided recently in an order released in May 2018 by US Judge Dan Polster, who is overseeing the opioids multidistrict litigation:

- Judge Polster called for the disclosure of third-party funding to be made *ex parte* and *in camera* to him. It makes very good sense for financing to be disclosed to the judge but not the defendant: no defendant yet has provided any justification for being told about a plaintiff's sensitive financial arrangements other than pure voyeurism.
- The judge made clear that the purpose of the disclosure is simply to affirm to him that there is no conflict and the funder exercises no control over the matter.
- He stipulated in advance that no discovery would be permitted into third-party funding arrangements, which he recognised as protected attorney work product.
- Notably, Judge Polster did not ask to see the funding agreements themselves, merely a summary.

This common sense approach ensures that disclosure may be used in a limited fashion to confirm that the presence of the third-party funder neither creates conflicts nor impacts control—but without opening the floodgates into matters that are not relevant to the issues in dispute.

We would urge the ALRC either to remove Proposal 4-5 or to revise it to make explicit that disclosure of the fact of third-party funding, when deemed necessary, is to be made to the judge *ex parte* and *in camera*, *without* the possibility of discovery into third-party funding arrangements by litigation opponents, and *without* a requirement to disclose the funding arrangements themselves.

As currently written, Proposal 4-5 poses a potential and significant harm to the fairness and efficiency of the Australian judicial system. While adding expensive delays to proceedings and thereby harming Australian litigants, law firms and businesses is not the intent of the proposal, in opening the floodgates to blanket disclosure, that would certainly be its effect.

Burford's response to Proposal 4-6

We concur that it is useful to provide class members with a clear explanation of the obligations of lawyers and third-party funders to avoid conflicts of interest and that were such conflicts to exist they should be communicated to potential class members (although it is to an extent superfluous as funders are required currently to show that they have compliant conflict of interest policies). We point out that this proposal should apply equally to relevant Practice Notes of the State Supreme Courts.

III. *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.*
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?*
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.*
Question 5–2 *In addition to Proposals 5–1 and 5–2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:*

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

Question 5–3 *Should any statutory cap for third-party litigation funders be set at the same proportional rate as for solicitors operating on a contingency fee basis, or would parity affect the viability of the third-party litigation funding model?*
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?*

Burford's response to Proposals 5-1, 5-2, and Question 5-1

Burford strongly favours the ALRC's Proposal 5-1 that solicitors acting in class action proceedings be permitted to enter into contingency fee agreements on the bases noted in that Proposal.

Acting on contingency in this way, of course, is itself a form of litigation funding, just one where a law firm takes on the risk. It would only be fair that this means under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order. Otherwise there would not be a level playing field with the obligations that dedicated litigation funders take on. If the contingency rules are relaxed, it would undermine the perception of doing so if they were thought to favour one particular business model of funding.

However, we would advocate no less strongly that this permission to work on a contingent basis be extended more broadly than the ALRC has proposed, to solicitors representing clients in all other types of disputes. In doing so, the ALRC would bring Australia in line with other leading jurisdictions the world over that have determined that contingency fee arrangements promote access to justice to the benefit of litigants and society at large, and that have as result removed historical barriers to contingent fee arrangements.

It is worth emphasising that when law firms work on a contingent basis, they provide clients access to counsel and the courts without regard to the economic obstacles that can otherwise prevent those with meritorious claims from seeking and getting justice. There is no reason to provide that access to some litigants but to deny it to others. If potential class members benefit from the willingness of a leading Australian law firm to represent their claim on a no-win, no-fee basis, surely a small Australian business pursuing a high-stakes commercial claim would welcome and benefit from that same offering. Therefore, in response to Question 5-1, we do not believe that it is necessary or advisable to maintain categorical restrictions of any kind on when and by whom contingent fees may be used. We do concur with Proposal 5-2 that court approval of contingency fees in class actions is sound, although individual judges may desire that it be disclosed when a law firm is working on a contingent basis in representing a class.

We would highlight that in working on a contingent fee basis, law firms assume an extraordinary amount of risk on behalf of their clients and the ALRC has rightly identified what those components should be. As Proposal 5-1 notes, law firms working on a contingent basis would risk not only the cost of their own time (i.e., the hourly rates they would otherwise be able to charge clients were they not working on a contingent basis) but also 'the cost of disbursements' and indemnification against adverse costs. An agreement to represent a client on a contingent basis thus creates an extraordinary financial obligation and risk of outright capital loss to a law firm whose clients, however meritorious their claims, may well lose. Thus, in concrete terms, a law firm working on contingency risks financial losses of many millions of dollars in costs paid for lawyers' fees, case expenses and indemnity for or insurance against adverse costs.

The extraordinary financial risk that law firms assume in representing clients on a contingent basis makes third-party funding all the more essential. Even the most successful contingent fee law firm will need a partner in managing contingent risk, because a successful law firm may agree to represent several deserving clients, all with meritorious but highly risky and expensive matters, all of which may prove unsuccessful. Because law firms are normally cash-in, cash-out partnerships without access to outside equity or long-term debt, they may be particularly stressed by assuming a significant amount of contingent fee risk, and particularly welcoming of third-party funders' ability to share that risk. Lacking access to third-party funding, law firms may be forced to make money-driven decisions that put perverse pressures on their capacity to represent clients. For example, a practice group at a large firm may find itself under pressure from firm management either to shed its contingent fee matters or devote more work to hourly fee business, which would interfere with its ability to represent its contingent fee clients diligently. Third-party financing to the firm returns the focus to the lawyers' ability to provide clients with the quality representation they deserve. In another example, a law firm's senior partners may discourage the firm from taking meritorious contingent fee clients because partners must pay for clients expenses out of their short term profits but will not see the benefit of a successful outcome in the long term (because partners have no permanent equity in their law firms post-retirement). Third-party funding provides law firms much-needed sources of capital to help them manage their risk and keep their focus on serving clients.

For that reason, we call out for praise the caveat in Proposal 5-1 that:

> *…an action that is funded through a contingency fee agreement cannot also be* <u>directly</u> *funded by a litigation funder or another funding entity which is also charging on a contingent basis (emphasis added)*

This would preclude a third-party funder providing funding for a class action claim in which a law firm was working on a contingent fee basis, but it *would* allow that law firm working on contingency to accept for the firm itself funding from the third-party funder. We note that many of the world's most successful law firms, including law firms that operate in Australia, welcome the access to third-party capital to the firm in that it allows them to keep their focus on representing clients as robustly as possible. Burford welcomes the opportunity to partner with law firms to provide funding to the firm, often on a portfolio basis, and a significant portion of the USD $1.3 billion we committed to commercial litigation and arbitration in 2017 took this form.

Burford responds to Proposal 5-3 and Questions 5-2, 5-3

We agree with the ALRC's overarching desire to ensure that law firms and third-party funders work with litigants in ways that are fair and equitable, but we do not believe that the proposal is necessary and therefore we would answer Questions 5-2 and 5-3 in the negative.

In Burford's view, Proposal 5-3 is unnecessary and would be an instance of unmerited regulation because the courts have demonstrated ample power to supervise commission rates and effectively choose a rate by approving a particular funding package in the case of common fund orders. It is unwise to confer on the courts price-setting powers embodied in legislation when case law already provides adequate supervision. This is an area the courts and judicial practice has wisely eschewed, and to allow the court's price-setting powers would take Australia away from the mainstream and effect no further useful purpose beyond what is already achieved by existing judicial supervision.

In relation to Questions 5-2 and 5-3, it is similarly not necessary or advisable for the ALRC to engage (or suggest the government engage) in arbitrary price-setting by establishing statutory caps and commission rates for law firms or third-party funders. As an abstract matter, setting caps may seem to offer protection, but in practice, it will narrow the marketplace of law firms and third-party funders and thus limit the choices and flexibility that should be afforded to Australian litigants.

Again, we refer the ALRC to the successful precedent offered by the Association of Litigation Funders of England and Wales, whose Code of Conduct does not set caps but does make clear that funders may not recoup more than is agreed upon in advance by the client. According to the Code of Conduct, a third-party funder "receives a share of the proceeds if the claim is successful (as defined in the LFA [litigation funding agreement]); and does not seek any payment from the Funded Party in excess of the amount of the proceeds of the dispute that is being funded, unless the Funded Party is in material breach of the provisions of the LFA."

We believe that the ALRC will have a more positive impact on protecting litigants and law firms that utilise third-party funding by emphasising the need for professional litigation funding agreements that clearly communicate financial obligations by all parties. A litigant may consider such an agreement against other competing offers and make a decision about the best possible funding arrangement on that basis. Corporate litigants are sophisticated parties that will enter into such agreements with professional counsel. In the current class action regime, the financial obligations of class members to law firms and to third-party funders are already subject to judicial review and approval, and we trust that this process will result in the best outcome for Australian litigants.

Burford's response to Question 5-4

Burford recognises this proposal is directed at small and mid-size funded matters, which is a section of litigation finance underserved and in which Burford itself rarely participates. Nonetheless, Burford favours market solutions and cautions against regulatory overreach in this regard. The difficulty of how such a fund would be paid for is a considerable one. However, so is the way such a fund would operate in determining "meritorious matters". Public funds or taxation should not be used for this purpose. Burford believes that there is no demonstrated merit, at least yet, in pursuing this proposal.

IV. *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.*

Burford's response to Proposal 6-1

Burford is strongly supportive of the notion that the legal framework for class actions should provide recourse to claimants who have been adversely impacted by corporate defendants' conduct and enable redress for losses suffered to be provided in a fair and expedient manner, and to as many claimants as possible. Class actions typically involve claimants who are unfamiliar with legal proceedings, but whose way of life or financial security may have been substantially affected by the conduct of the respondent and the subsequent pursuit of litigation. Providing claimants with timely relief is an essential corollary of providing access to justice. At the same time, these objectives should be achieved without creating an excessive cost burden for the claimants or respondents or resulting in heavy administrative and procedural pressures on the courts.

It is public knowledge that Burford has entered into Australian litigation funding backing a group of plaintiffs against AMP Limited (**the AMP matter**) and that has been filed on an open basis. Other actions have also been filed and, as at the date of this response, there are issues relating to them that remain to be agitated. Burford therefore respectfully wishes to offer no comment on these issues until they are determined.

V. *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.*

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?*

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?*

Burford's response to Proposal 7-1, and Questions 7-1 and 7-2

Issues as to the reasonableness of costs charged prior to settlement approval and settlement administration may arise in the AMP matter in which Burford is involved and Burford therefore respectfully wishes to offer no comment on these issues until they are determined.

VI. *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?*

Burford's response to Proposal 8-1, and Question 8-1

The primary goal of a collective redress scheme is to provide claimants an opportunity to receive compensation and other forms of redress without the need to litigate. Given the costs and time burden that come with litigation, the benefits of having a simpler, cost-efficient and standardised alternative for victims to obtain compensation could be seen to outweigh the inevitable deficiencies of such a one-size-fits-all approach.

A collective redress scheme aims to deter litigation. Potential defendants would be incentivised to trigger or participate in such schemes to discourage legal action by claimants before it is taken.

The use of collective redress schemes has been considered in a number of countries, but most schemes have been ad hoc in nature, dealing with specific incidents (for example, loss to insurance policyholders, victims of disasters from corporate negligence, consumer losses from using defective products) and operated by different regulatory or administrative bodies.

However, replacing legal redress (a 'day in court') with a voluntary scheme comprising essentially administrative steps inevitably has shortcomings.

First, having a standardised approach in providing redress may make it impractical for the circumstances of individual victims to have due consideration. This could mean that certain victims may not be adequately or fairly compensated. The Discussion Paper [8.17] makes the well-founded observation that collective redress scheme would work well only with small claim amounts. But there is a further inherent problem with designing a collective scheme where there will often be a lack of homogeneity/similarity between claims.

Second, such schemes very likely in practice do not offer finality for any of the parties. Taking an opt-in approach and applying certain generic eligibility criteria would carry a risk that not all potential claims would be captured within the particular redress scheme, thus exposing the company to litigation in any event. As such, collective investment schemes may not offer finality to a dispute and yet without providing finality the very *raison d'être* of such schemes is undermined. The possibility of claimants bringing subsequent or satellite proceedings to court undermines the very objective of collective redress schemes of procedural efficiency.

Third, having a corporation offering a voluntary redress scheme could be inconsistent with its defence of a case brought in court. It would be difficult for a company to challenge its liability while simultaneously offering compensation on a voluntary basis to those that suffered loss as a result of its conduct.

Fourth, looking at the few areas where there has been some success in the UK, they have all been *following* a legal action, in which the court has established the boundaries of liability and the way to measure quantum. The collective scheme has then been put in place so that others do not have to go through the same court delay. This is the case with for example deafness or miner's disability claims. In the UK, the Consumer Rights Act 2015 also provides for a scheme allowing victims of anti-competitive conduct to obtain compensation for their loss. To date, however, very few actions have been commenced under the Act. None was deemed 'suitable' to proceed by the Competition Appeals Tribunal, so the impact of the scheme remains uncertain.

Burford does not therefore in principle object to the establishment of a federal collective redress scheme as proposed in the Discussion Paper, so long as individuals and businesses are not deprived of their rights to pursue private enforcement action through the courts, but the shortcomings of these schemes should be recognised. The ability of courts to provide justice and final adjudication is a hallmark of Australia's success and reputation as a democracy under the rule of law. It remains to be seen whether voluntary schemes would in practice achieve the cost savings and efficient delivery of redress that it is intended they achieve. The experience in the UK is that operation of these schemes has largely been slow and ineffective and often led to (or arose from) related litigation in any event. They are likely to suffer in Australia as well from adverse perception to the extent they are seen to 'fail'.

Crucially, while the use of alternative redress schemes to provide relief in a direct and cost effective manner to individuals and corporations that have suffered losses would be welcome, they should not in any way affect the legal rights and ability to seek recourse through the courts that a victim would otherwise have. In that sense, the usefulness of collective redress schemes may remain limited and representative actions will continue to be a more effective and flexible mechanism for providing redress to victims.