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NORTON ROSE FULBRIGHT

Submission to the ALRC:

Inquiry into Class Action Proceedings and Third Party Litigation Funding

Norton Rose Fulbright

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Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

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Introduction

Norton Rose Fulbright Australia welcomes the opportunity to provide a submission to the Australian Law Reform Commission's (**ALRC**) Inquiry into Class Action Proceedings and Third-Party Litigation Funders. We are a global law firm and our submissions draw on our local and international experience in acting in class action proceedings. A number of our Australian partners are experienced insurance law litigators and are uniquely placed to address some of the issues raised by the ALRC Discussion Paper.[1]

We have acted in many of the most significant class actions in Australia in both the Federal and State courts. These include Australia's largest natural disaster class action to date, arising from the 2011 Queensland floods, and the class actions emanating from the 2009 Victorian Black Saturday bushfires, which resulted in the largest settlement in Australian class action history. We have acted in defence of parties and as advisors to directors and officers (**D&O**) insurers in securities class actions (both Australian and London market). We have also acted in some of the most significant product liability class actions in Australia in recent years, particularly actions relating to healthcare products, and on instructions from local and London market insurance underwriters in a number of class actions involving financial and regulatory services.

In our 2016 Litigation Trends Annual Survey, we asked corporate counsel[2] to rank what they considered to be the greatest risks to their organisations. Class actions ranked in their top five risks. In our 2017 Litigation Trends survey,[3] class actions had become the second most concerning issue on US corporate counsel's radar, principally because of the significant financial exposure that class action litigation posed.

Similar concerns have also been apparent for some time in the Australian market. While we acknowledge that the incidence of class actions in Australia needs to be considered in perspective, as cautioned by Professor Morabito in his recently published report,[4] it is apparent that the overall level of class action litigation continues to rise, and the value of settlements is increasing.

There has been broad support for reform to the laws and regulations relevant to class actions for many years. In light of the trajectory of class actions in Australia, both in number and value, we consider that the ALRC's inquiry has come at an opportune time to holistically review the class action and funding framework in Australia, and to consider changes that are aimed at balancing the competing policy drivers underpinning the regime. The integrity of Australia's capital markets, the protection of consumer interests, the promotion of access to justice and the efficiency and fairness of our civil litigation procedures must be balanced.

While we have responded to the majority of the ALRC's proposals, our focus has concentrated on the following issues:

- The extent to which increases in the cost of D&O insurance have been driven by class action settlements and the risk of class actions being brought against Australian businesses;
- Whether there are other ways to address business concerns regarding securities class actions than amending continuous disclosure laws;
- Whether there is a need for greater regulation of funders, through both financial services regulation and through the procedural means available to the Federal Court;
- Recognising the growing demand for alternative fee arrangements such as contingency fee arrangements in commercial litigation, and the potential for greater access to alternative sources of funding for class actions if contingency fees were introduced, balanced with the need for adequate safeguards for group members; and
- Alternative means of funding class actions and resolving disputes.

We are grateful for the opportunity to make this submission.

1 Australian Law Reform Commission, Class Action Proceedings and Third Party Litigation Funding, Discussion Paper No 85 (2018) (DP 85).

2 We polled more than 600 corporate counsel representing companies across 24 countries on disputes-related issues and concerns. Norton Rose Fulbright, *2016 Litigation Trends Annual Survey* (15 September 2016) <http://www.nortonrosefulbright.com/knowledge/publications/157892/2016-litigation-trends-annual-survey>.

3 We polled more than 300 senior corporate counsel representing US-based organizations. Norton Rose Fulbright, *2017 Litigation Trends Annual Survey* (25 October 2017) <http://www.nortonrosefulbright.com/knowledge/publications/157833/2017-litigation-trends-annual-survey>.

4 V Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia' (11 July 2018) <https://ssrn.com/abstract=3212527>.

Continuous disclosure obligations

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 regard 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.

Response

Whilst there may be very good reasons to review the economic impact of continuous disclosure obligations on listed entities, the availability and pricing of directors' and officers' insurance (**D&O**), particularly the recent increases in premiums which have been observed in the market, ought not be an impetus for driving any reform. D&O premiums have seen significant recent increases, it has been widely acknowledged that the market has been underpriced for many years and is only now undergoing a correction to address the cumulative impact of historic exposures. We acknowledge that securities class actions have been the most significant contributing factor to the recent spike in premiums, however reform of the continuous disclosure laws is not the solution to providing affordable and competitive D&O cover for Australian corporations. We consider that other reforms contemplated by the inquiry are more likely to result in better outcomes for shareholders and corporations than 'watering down' the current disclosure regime. Despite the rising cost of D&O, there is presently no evidence to suggest that insurance is unaffordable or that there is a material underinsurance risk requiring policy intervention.

We observe that the ASX issued its most recent guidance note on the continuous disclosure requirements on 8 May 2018.[5] As noted by the ASX, compliance with Listing Rule 3.1 is critical to the integrity and efficiency of the ASX. The guidance note specifically references the right of shareholders to bring class actions as an important remedial aspect of the continuous disclosure obligations.

The guidance note followed extensive consultation by the ASX and ASIC on the meaning of "immediate" and provides the foundation on which legal expectations of listed entities, their boards and executive management have been set. It is significant that the regulators did not consider the need, or take the opportunity, to lower the bar for corporations. We note that the high standards of disclosure are considered by the ASX as a differentiator for the Australian market, making it a safe and reliable market and therefore a desirable destination for capital.

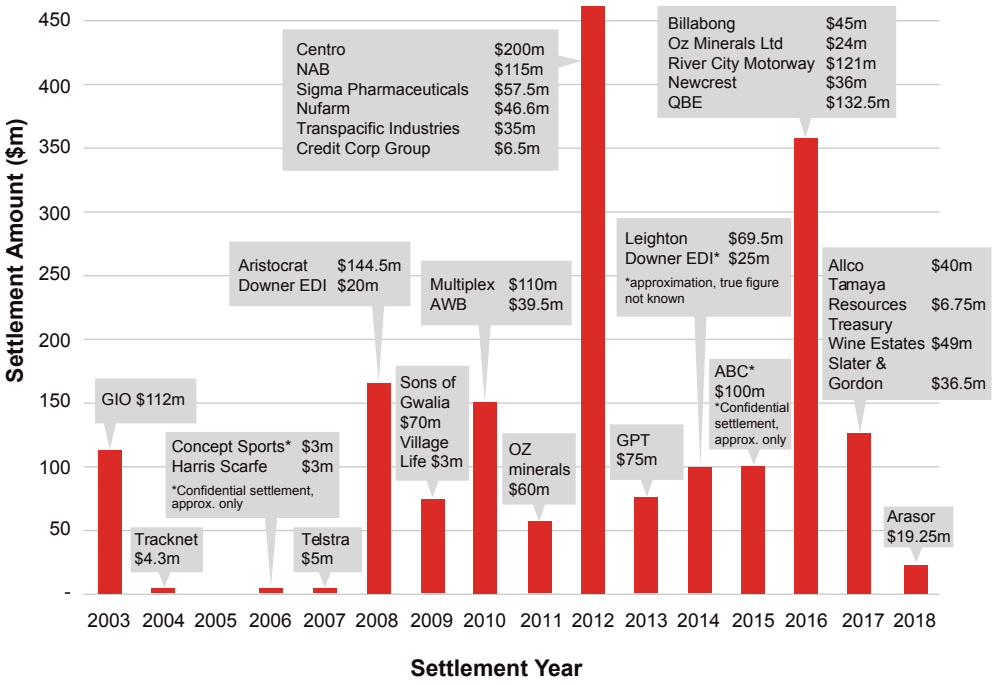
In our view it would only become necessary to review the continuous disclosure laws if Australia began to be perceived as a high risk jurisdiction and an expensive jurisdiction in which to maintain a listing, including by reason of the prohibitive cost or lack of availability of good quality D&O cover. That is not the current market position.

5 ASX, *ASX Listing Rules Guidance Note 8, Continuous Disclosure: Listing Rules 3.1 – 3.1B* (11 May 2018) <https://www.asx.com.au/documents/rules/gn08_continuous_disclosure.pdf>.

Despite known risks of shareholder class actions, failed managed funds investment schemes, regulatory prosecutions, insolvency risk and the usual breach of directors' duties claims, pricing of D&O insurance has for the past 10 years been falling, or at best, has remained static. Publicly listed corporations have enjoyed very competitive rates. Australia has been seen as a relatively stable and known market by D&O insurers. Where one insurer might reduce capacity because of recent claims experience another has been prepared to enter the market and fill the capacity vacated. The influx of capital over this period has been a key driver in underwriters not increasing (or being able to increase) premiums to at least cover annual losses.

The Australian D&O annual premium pool is between $250 million and $300 million. Figure 1 below shows the estimated[6] Australian securities class action settlements since the first settlement in 2003 to Q1, 2018:

Figure 1 - Security Class Action Settlements[7]



Over the period, total settlements of securities class actions in the aggregate equaled approximately $1.8 billion. The settlement amounts exclude defence and coverage costs which average $10 million per proceeding.

Figure 1 identifies that in 2012 and 2016, total settlements in the aggregate are likely to have exceeded the annual premium pool for those years. However, as D&O cover is a long tail, claims made and notified insurance product, the year in which the claim is notified may be many renewal periods before the insurer is required to pay the settlement. The insurers paying the claims settlements in any particular year are likely to have a very different level of exposure to the market than they had in the year the risk was written.

6 Settlement figures are approximate in some cases.

7 Compiled with assistance from Susie Amos, Finity Consulting

With better data and a longer claims experience now available in relation to the number of proceedings and value of settlements, underwriters have better information to price this line of business. Figure 1 shows that in the years 2012 and 2016, securities class actions alone (without any other type of directors' claim) extinguished the premium pool in those years. The data clearly shows the number and value of securities class actions is increasing, and for the period 2011 to 2017, the mean aggregate of settlement payments and defence costs[8] has exceeded $200 million. Once cost of capital is factored in, the current level of claims losses makes the current level of premium charged unsustainable, and premium increases inevitable and necessary. This is apparent from the gradual rise on D&O loss ratios across the period, as show in Figure 2 below.

Figure 2 - D&O Loss Ratios[9]

In response some local and overseas insurers have reduced their capacity to underwrite D&O Side C cover below a $50 million attachment point. It is at the primary and lower excess levels up to this attachment point where the most significant impact on pricing has occurred. However, most insurers are not leaving the market altogether. They are either ceasing to write Side C (entity) cover, where the securities claims have greatest impact; or they are moving up the placement to a higher excess layer. The market is also seeing an increase in coinsurance arrangements with greater participation from the London market and local insurers. Anecdotally we also understand that the current Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry is also having an impact on the appetite to underwrite financial institutions' D&O cover. Our discussions with underwriters confirm that notwithstanding the class action claims and settlements, insurers remain attracted to writing D&O insurance in Australia. The recent reports issued by global brokers Aon and Marsh are consistent with our own experience.[10]

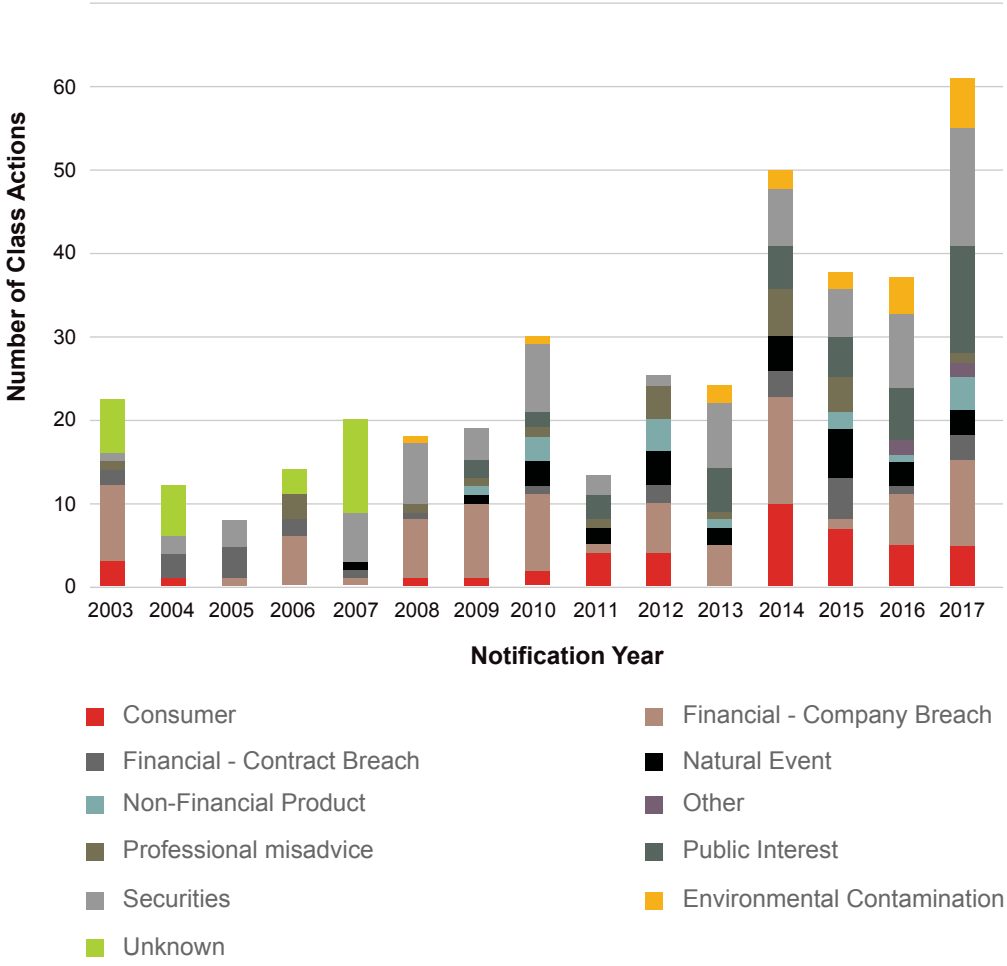
8 Assuming defence costs per proceeding average $10 million.

9 Compiled with assistance from Susie Amos, Finity Consulting

10 Aon, *Directors & Officers (D&O) Insurance Market Insights – Q2 2018* (June 2018) <http://www.aon.com.au/australia/insights/insurance-market-updates/2018/files/insurance-market-updates-q2-2018.pdf>; Marsh, *Directors & Officers Liability Insurance Market Update* (1 June 2018) <https://www.marsh.com/au/insights/research/directors-and-officers-liability-insurance-market-update.html>.

Although much of the media attention and other commentary focusses on securities class actions, Figure 3 below demonstrates that, although securities class actions constitute a significant proportion of class actions in Australia, they are only part of the picture.

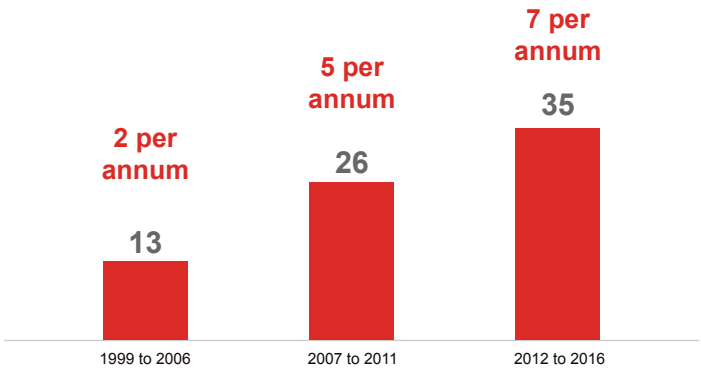
Figure 3 - Number of Class Actions - by Type[11]



11 Compiled with assistance from Susie Amos, Finity Consulting

Data provided by Finity Consulting shown in Figure 4 below confirms that the number of securities class actions filed is increasing:

Figure 4 - Security Class Action - Counts[12]



We also observe from our experience and discussions, that the impact of D&O pricing on SME and unlisted entities is less pronounced. Whilst there have been some premium increases, we understand that they are more modest. Further, this market segment is moving away from stand-alone D&O and purchasing management liability cover instead, which is more relevant to the needs of their business.

In our view, the recent increase in premiums for D&O cover is an overdue and necessary reaction to the realities of the Australian market. We also consider that the increase in pricing is one which the market can and will absorb.

For corporations, the cost of purchasing D&O cover is an operational cost and one means of addressing the exposure of capital to class action liabilities. It is our experience that in the most recent renewal season, corporations have undertaken their own assessment of their exposure and have been prepared to absorb higher retention limits as a way of managing increased cost of cover.[13] This process may well be driving good risk management practices within their business.

Amending the continuous disclosure laws would undermine an important element of Australia's corporations' framework. Further, changes to the continuous disclosure regime would not necessarily mean that class actions arising from alleged misleading of the market would be reduced. Novel class actions may still emerge in response to any amended legislation.

The continuous disclosure laws are just one facet of good governance required of Australian boards and executive management. The potential for a significant civil remedy in damages poses another lever for encouraging proper market disclosure. This fact is recognised by ASIC in its statements encouraging private actions.[14]

As a suggested alternative to amending the continuous disclosure laws, consideration could

12 Compiled with assistance from Susie Amos, Finity Consulting. Source: Finity Class Action Database - compiled from various publicly available information

13 Aon, *Directors & Officers (D&O) Insurance Market Insights – Q2 2018*, above n 10.

14 Australian Securities and Investment Commission, *ASIC Information Sheet 151* (September 2013) <https://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf>.

be given to requiring leave to be obtained[15] before commencing a securities class action, as is the case in Canada.[16] Without going down the certification path, we think that the Australian courts could adopt more of a gatekeeper role for certain types of class action proceedings. A leave to proceed requirement may be warranted for securities class actions because of the nature of these proceedings, where generally ASIC or the ASX has a role to play in investigating breaches of the ASX Listing Rules and where litigation funders appear more willing to provide funding. A suggested test could be adapted from the derivative action test under the Corporations Act, with the court requiring that it be satisfied that the applicant is acting in good faith, it is in the interests of the shareholders that the applicant be granted leave and there is a serious question to be tried.

The courts already have the power to determine whether the representative is a suitable person to bring the claim, whether the action is appropriate to proceed as a class action and whether one or more actions proceed rather than another. The proposed application could be ex parte and not subject to appeal by the respondent. The applicant may be required to provide affidavit material setting out the material disclosure, the information available to the entity, the relevant offending conduct of the prospective defendant, the plaintiff's shareholding, specifying the shares traded and potentially impacted over the relevant trading period, and whether the proceeding is funded by a litigation funder. If the court is satisfied on the material then leave to proceed is ordered. The Federal Court Class Action Users group would be ideally placed to consider whether a leave application would be an additional useful procedure for the court.

A similar leave process to that of Canada could be adopted by Australian courts without incurring the onerous costs involved in certification which is the experience of the USA and Canadian courts. It would provide a mechanism to prevent the commencement of hopeless but costly proceedings and reduce the strain on courts and the financial burden on corporations and their D&O insurers. It would also circumvent the concerns regarding the front loading of costs which certification systems generate, whilst providing the community with the protection that comes through oversight by the courts to ensure that both private and public resources are not expended on expensive unmeritorious litigation.

We note the recent research by Professor Morabito which suggests that the comparative level of class action activity in Australia is either on par or behind that of other jurisdictions,[17] and that only a small number of companies have been the subject of class actions.[18] However we do not wish to downplay the significant concern of Australian businesses that they may be subject to threats of class action. We acknowledge and agree with Professor Morabito that further research needs to be done in this area. This would enable all participants to be better informed about the costs and impact of class actions, and to enable the ALRC to adequately assess whether the interests of justice are being appropriately balanced for all participants.

15 To prevent forum shopping, this would need to be provided for in the Corporations Act or by agreement of the Standing Committee of Attorneys-General to implement uniform procedural requirements.

16 The *Securities Acts* in a number of Canadian provinces (eg Quebec Securities Act and Ontario Securities Act) establish a regime of statutory civil liability to address breaches of disclosure obligations in the secondary market. Investors do not have to prove personal reliance on misinformation or an omission to inform. To prevent unmeritorious litigation from proceeding, the court is required to conduct a preliminary examination of the proceedings to assess whether the action is brought "in good faith" and whether there is a reasonable possibility that the claim will be resolved in the plaintiff's favour (Dominic Dupoy and Andres C Garin, "Supreme Court of Canada renders its first decision on the secondary market liability provisions of the Quebec Securities Act", Norton Rose Fulbright Legal Update (April 2015) <http://www.nortonrosefulbright.com/knowledge/publications/127938/supreme-court-of-canada-renders-its-first-decision-on-the-secondary-market-liability-provisions-of-the-quebec>).

17 V Morabito, "An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia" (11 July 2018), 11 <https://ssrn.com/abstract=3212527>.

18 V Morabito, "The First Twenty Five Years of Class Actions in Australia (Fifth Report; An Empirical Study of Australia's Class Action Regimes; An Empirical Study of Australia's Class Action Regimes" (July 2017), 31<http://ssrn.com/abstract=3005901>.

Regulation of 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.

Response

Subject to the following comments, we generally support the ALRC's proposal to require third party litigation funders to be regulated.

It is important to identify precisely what outcome is sought to be achieved through requiring litigation funders to be subject to regulation, so as to determine as part of the package of reforms proposed by the ALRC whether and to what extent regulation is required to meet those objectives.

Australia's financial services and consumer credit regimes are founded on an understanding that consumers should be able to access and benefit from financial products, but that certain protections are required. Given their relative complexity and the potential for consumers to suffer serious adverse economic consequences as a result of irresponsible lending practices, the performance of financial products or the advice provided in respect to them, it is appropriate that the providers of financial services and products meet higher standards of conduct. These standards include disclosure requirements to ensure consumers understand the products they are acquiring, higher governance and management standards and greater protections against insolvency of financial service providers. These principles provide the basis for the licensing, conduct and disclosure regime governing financial services substantially contained in Chapter 7 of the *Corporations Act 2001* (Cth), and the consumer credit regime under the National Credit Code[19] and *National Consumer Credit Protection Act 2009* (Cth).

It is important for the ALRC to recognise that many calls for regulation of litigation funders have been made in the context of calls to introduce measures aimed at limiting the number of class actions being commenced. It may be implied that the outcome being sought by imposing regulation is to reduce the number of funders operating in the market, and therefore curtail the growth in funded class action litigation.

In our view, the imposition of regulation on funders is desirable for a number of reasons; but it is not an approach that is appropriate if the intention is to reduce class action litigation (nor do we consider that such an approach is likely to be effective in achieving that end in any event). The regulation of consumer credit and financial products and services is not intended to create a barrier to market entry, but to lift the standard of conduct of product issuers and distributors and provide an enhanced layer of consumer protections. If these are the objectives of the proposed reform to the laws governing the conduct of litigation funders, then the imposition of regulation is an appropriate course for policymakers to pursue.

We are, however, apprehensive about supporting the adoption of a new litigation funding licensing regime when there exists already a complex but comprehensive licensing, conduct and disclosure regime that applies to financial products, consumer credit and managed investments schemes, and which we consider could be appropriately modified (by instrument or otherwise) to apply to litigation funders to the extent necessary to achieve the desired consumer protections. On the contrary, a new litigation funding licence has the potential to create administrative and legal inconsistencies with the existing regimes. That course should only be considered if, after careful review and consideration, it is not considered possible to incorporate litigation funding appropriately into the existing consumer credit or financial services regimes.

19 Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth).

Different Australian courts have found litigation funding arrangements to be managed investment schemes, financial products and credit facilities.[20] The provision of litigation funding would therefore be regulated under one of a number of regimes but for intervention of Parliament, and the introduction of specific relief excluding litigation funding from the definition of a managed investment scheme, and carving it out of both the financial services and consumer credit regimes.[21] The appropriate question to consider, in our view, is therefore not whether it is appropriate for regulation to be imposed on litigation funders, but whether there continues to be a sound public policy basis to maintain (in full or to some extent) that relief.

There are genuine grounds to ensure that litigation funders are regulated and we consider the financial services regime to be the most suitable to be applied, principally because the regime has existing mechanisms that could readily be applied to address the key risks with litigation funding that have been identified. We therefore generally support the proposal to require litigation funders to be licensed, but consider requiring them to hold an Australian Financial Services Licence rather than a bespoke litigation funding licence to be a more appropriate solution.

Finally, as the ALRC discussion paper acknowledges, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has demonstrated that "the effectiveness of a licensing regime depends on strong oversight and enforcement by the regulator."[22] Consideration must be given to the adequacy of resources and funding arrangements for ASIC in the context of any extension of its role to the management and oversight of litigation funders. Varying the recently introduced industry funding arrangements to ensure ASIC can levy litigation funders may provide an adequate solution to any concerns over the capacity of ASIC to take on the additional administrative burden.

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.

Response

As noted above, we do not support a bespoke licence for litigation funders. However if this is the preferred model, we generally agree that the most important aspects of the existing financial services regime that should apply to litigation funders are regulations governing:

1. the character and qualification of persons responsible for the management of the funding business, to ensure that the funding business is operated by persons who are appropriately qualified and who have not engaged in criminal or dishonest conduct;
2. minimum capital requirements, so as to ensure that consumers who have entered into arrangements with litigation funders are protected against the risk of the funder being unable to meet its financial commitments; and

20 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11; *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138; *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* (2012) 246 CLR 455.

21 *Corporations Regulation 2001* (Cth).

22 DP85, [3.29].

3. the adequacy of disclosures made to class members as to the financial risks of entering into a funding arrangement.

We address the character and qualifications issue under question 3.1 below.

We address the issue of regulatory capital requirements under question 3.2 below.

With respect to disclosure, the need to impose any part of the existing financial product disclosure regime must be weighed against existing safeguards for consumers of litigation funding that arise through court processes and the duties owed to them by the lawyer(s) representing them in the proceeding. In the usual course, where a financial product is sold to a consumer, a high level of disclosure is considered necessary because of the complexity of the product and the real risk of harm that could be suffered if the consumer does not fully appreciate the risks they are taking on.

In the context of litigation funding, the greatest risk to consumers arising from disclosures made by the funder to the class seem to be:

a. failing to understand that significant rights are given up to obtain the benefit of the funding (ie, a significant proportion of the proceeds of litigation that would otherwise go to the class are paid to the funder) and to appreciate the potential conflict between the interests of the class and the interests of the funder;
b. being misinformed about the prospects of success; and
c. in the case of the representative plaintiff, not appreciating the risk of personal liability for unpaid legal fees and cost orders in the event the funder is unable to meet its financial obligations.

There are already a range of safeguards for class members in this regard, including that the class members have access to the lawyer on the record for the class and that lawyer owes fiduciary duties to the class members, and that any settlement must be approved by the Court.

Further, funders can be liable for breach of contract and in tort, or for misleading and deceptive conduct or unconscionable conduct under statute. In the context of those protections, extending the general principle under financial services law to communicate in a manner which is "clear, honest and accurate" may not provide any real additional protection for consumers. However, we consider there is value in including such an obligation provided that non-compliance is a relevant factor to any decision to withdraw a licence, or vary licence conditions, so that the regulator has the ability to take action against funders who engage in poor disclosure practices. Again, given there exists already a comprehensive disclosure regime that applies to the providers of financial products and services, consideration should be given to extending that regime to litigation funders rather than imposing only the general disclosure principle to communicate in a manner which is clear, honest and accurate to an alternative licensing regime.

We note that the other regulatory requirements the ALRC has proposed should apply to funders would apply if funders are made subject to AFSL requirements.

Finally, whilst we agree with the inclusion of the general obligation to treat customers fairly, honestly and efficiently, we note that evidence was led in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry to the effect that only once in the history of the provision has ASIC taken enforcement action for breach of the general obligation. One recommendation that we think may be made by the Royal

Commission is to extend the civil and/or criminal penalty regime under the *Corporations Act 2001* (Cth) to breaches of this general obligation, so that enforcement action can be taken for non-compliance. The ALRC should be mindful of the real prospect of regulatory reform around the general obligation in formulating its recommendations.

Overarching obligations

In addition to licensing of funders, we suggest consideration be given to amending section 37N of the *Federal Court of Australia Act 1976* (Cth) so that litigation funders are expressly subject to the overarching obligations contained in section 37M of the *Federal Court of Australia Act 1976* (Cth). Only parties and their lawyers are currently subject to these obligations.

In Victoria, the overarching obligations in the *Civil Procedure Act 2010* (Vic) apply, in addition to the parties and their legal representatives, to any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding. This expressly includes insurers and litigation funders.

In its recent report, *Access to Justice – Litigation funding and Group proceedings*[23] (**VLRC report**), the Victorian Law Reform Commission has opined that the overarching obligations in the Civil Procedure Act have provided the Court with adequate powers to address non-compliance with the overarching obligations such as a costs order or other sanctions. Their consultation with the Victorian Supreme Court Judges indicated that the codification of the overarching obligations has been a useful means of conveying expected standards of behavior, even to non-party insurers and funders.[24] This is consistent with our experience in Victorian courts.

The *Civil Procedure Act 2005* (NSW) provides that any person with a relevant interest in a proceeding (such as a funder) must not, by their conduct, cause a party to a proceeding to breach the party's duty to assist the court to further the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings and comply with the court's orders.[25] The Rules of the Supreme Court 1971 (WA) also impose duties on interested non-parties[26] (a) not to engage in conduct which is misleading or deceptive, or to aid, abet or induce such conduct, in connection with the conduct of the case; (b) to cooperate with the parties and the Court in connection with the conduct of the case; (c) to use reasonable endeavours to ensure that the goal in Order 1 rule 4A and the objects in Order 1 rule 4B are attained.[27]

We submit that consideration should be given to this additional element alongside a licensing regime.

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?

Response The ALRC suggests that the person should possess the financial skills required to operate a funding business and the legal skills to understand civil litigation,[28] but that they do not

23 Victorian Law Reform Commission, *Access to Justice – Litigation funding and Group proceedings* (March 2018) <http://lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Report_forweb.pdf>.

24 Ibid, [2.109].

25 *Civil Procedure Act 2005* (NSW) s56.

26 Interested non party is defined to mean a person, other than a practitioner for the party, who — (a) provides funding or other financial assistance to the party for the purposes of conducting the case; and (b) exercises direct or indirect control or influence over the way in which the party conducts the case, *Rules of Supreme Court 1971* (WA) O 9A r1.

27 *Rules of Supreme Court 1971* (WA) O 9A.

28 DP 85, [3.39]

need to be regulated to the same extent as legal professionals.

We agree with the ALRC and submit that the minimum requirements should be consistent with existing requirements applicable to AFSL holders. In our view, the litigation funder should be required to meet the 'organisational competence' requirements under the existing regime, and nominated responsible managers should be required to demonstrate appropriate levels of expertise and have sufficient litigation experience.

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.

Response

For reasons expressed above, we submit that the level of capital adequacy applicable to litigation funders should be consistent with the requirements applicable to AFSL holders generally. The risk to consumers and defendant organisations arising from litigation funder insolvency is real and justifies the imposition of a capital adequacy requirement to ensure funders operating in Australia are capable of meeting their financial obligations.

Security for costs provides some level of protection, but is not sufficient to guarantee that the funder can meet its obligations across a range of funded matters. Security for costs also requires the defendant to initiate the step of seeking security and only increases legal costs of the proceeding in establishing the requisite amount of security to be "paid into court". The AFSL capital adequacy standards, while not as onerous as those administered by APRA for certain financial services organisations, would provide a sufficient level of protection.

We agree with the proposal that an exemption could be available on application for funders who are regulated overseas. Again, this should be consistent with the requirements governing other regulated financial service activities carried on by foreign regulated entities.

Question 3–3

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

Response

We agree with the proposal that they should be required to join the AFCA scheme for resolution of complaints. Complaints handling is an important aspect of the existing regulatory regime, and provides a first avenue of redress which can prevent unnecessary escalation of disputes and congestion in the courts.

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.

Response

We agree with this proposal, except to note that additional reporting obligations must be supported either or collectively by:

a. a requirement that the reports are publicly disclosed to provide consumers with transparency and assist them in determining the appropriateness of entering into a

funding arrangement with a particular litigation funder;
b. an ability of the regulator to withdraw the right of the particular funder to rely on the exemption in circumstances of non-compliance (thereby requiring the funder to apply for an AFSL or risk prosecution for carrying on financial services activities without a licence).

In addition, funders should be required to state that they will not seek to influence the client's lawyer.[29]

The Law Commission of Ontario (LCO) is also considering third party litigation funding in the context of reviewing the Ontario Class Proceedings Act. Having reviewed the submissions prepared in the context of the experience of our Canadian partners, we commend a number of additional suggestions as worthy of consideration in the Australian context. The US Chamber Institute for Legal Reform submission (which appears to have been adopted by at least two other submitters to the LCO inquiry)[30] outlines several criteria to be included in legislation for approval of litigation funding agreements, including at a minimum that:

a. Funding arrangements should be promptly disclosed to both the court and defendants and cannot be the subject of a claim for privilege;
b. The funding must be necessary to ensure access to justice in the circumstances of the particular case;
c. The funder must be financially able to satisfy an adverse costs award in the litigation;
d. Any compensation to be provided to the funder under the arrangement must be fair and reasonable having regard for the objectives of the class proceedings legislation;
e. The representative plaintiff must have had independent legal advice on the lawyer's retainer and third party funding agreement; and
f. To the extent that confidential information may be provided to the funder over the course of the litigation, the funder must keep the information confidential and be subject to the same confidentiality rules and orders as the representative plaintiff.

Funders should also be required to provide information about their fee structure and publish information about the returns to class members. This documentation should be in plain English, with requirements to update the documentation periodically.

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).

Response

We agree with this proposal.

Proposal 4-3

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

29 The Association of Litigation Funders of England & Wales, *Code of Conduct for Litigation Funders* (January 2018) <http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf>

30 US Chamber Institute for Legal Reform, *Recipe for Reform: A Proposal for Improving Canadian Class Action Procedures*, (October 2017) <https://www.instituteforlegalreform.com/research/recipe-for-reform-a-proposal-for-improving-canadian-class-action-procedures>, US Chamber Institute for Legal Reform, Submission to Law Commission of Ontario Inquiry, <https://www.lco-cdo.org/wp-content/uploads/2018/06/U.S.-Chamber-Institute-for-Legal-Reform-CA-Submission.pdf>; Innovative Medicines Canada and MEDEC, Submission in response to the Law Commission of Ontario's consultation, "A Public Discussion on Class Actions in Ontario" (31 May 2018) <https://www.lco-cdo.org/wp-content/uploads/2018/06/Innovative-Medicines-Canada-and-MEDEC-CA-Submission.pdf>
International Association of Defence Counsel, Submissions to the Law Commission of Ontario Regarding its Class Action Project: Objectives Experiences and Reforms <https://www.lco-cdo.org/wp-content/uploads/2018/06/International-Association-of-Defence-Counsel-CA-Submission.pdf>

Response

We agree with the proposal for the development of voluntary accreditation courses, and on the basis that solicitors without this accreditation would not be precluded from acting in class actions.

In addition, we also support recommendation 13 contained in the VLRC Report[31] and suggest that the Standing Committee of Attorneys-General develop guidelines to be issued to legal practitioners on their duties and responsibilities to all class members in class actions, providing specific direction on the recognition, avoidance and management of conflicts of interest.

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.

Response

We agree with this proposal.

Consideration should also be given to the engagement of communications experts to review and draft the form of the notice to group members.

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.

Response

As a Law Firms Australia member law firm we generally support the joint submission[32] made in relation to potential double up of funder fees and contingency fees, supervision by the courts and statutory limitations on contingency fee arrangements. In addition we make the following submissions.

The Commission's proposal limits any solicitor's contingency fee arrangement to the solicitor acting for the representative plaintiff in class actions. If contingency fees are to be permitted, we favour the broader approach proposed in the VLRC report,[33] namely that contingency fees be permitted for all legal disputes save for family law, criminal law and personal injury proceedings,[34] and that this be considered on a nationally consistent basis.

31 Victorian Law Reform Commission, above n 23, 93.

32 This comment is based on a draft of the LFA submission.

33 Victorian Law Reform Commission, above n 23, Terms of reference item 2, [3.64] – [3.65]; Recommendation 7, 62 – 63.

34 We do not support the proposal to permit contingency fees in personal injury class actions.

We observe that outside the sphere of class action litigation, clients have sought to have lawyers provide services on a value-based arrangement rather than measured by units of time spent. Over the last 10 to 15 years, law firms have faced strong client pressure to provide alternative fee arrangements to hourly billing. The approach adopted is driven by either time, cost or value. Contingency fee charging is a value proposition. Other value fee options available include performance fee, risk sharing, gain share, and third party funding.

Value based costing carries with it more risk for the law firm than cost based or time- based charging methods.

In a global market, where commercial enterprise transcends geographical boundaries, lawyers need to be able to compete including by offering alternative fee proposals, particularly on cross border transactions and litigation. If permitted, in a free market economy contingency fees will provide Australian legal firms with greater capability to compete internationally. We cite in particular our experience in international arbitration where clients competitively tender for lawyers and look to retain their lawyers on contingency fee arrangements. Australian lawyers are losing out to lawyers in the United Kingdom and the US where lawyers are permitted to charge on a contingency fee basis. The quality of Australian legal services internationally is highly regarded, however Australian lawyers need greater flexibility in their fee proposition to better compete in global litigation. As a global law firm we support the introduction of contingency fees, in all litigation save for personal injury disputes, family law and criminal law.

We acknowledge the inherent conflicts which contingency fees create for law firms. However, legal practice is a sophisticated profession and is highly regulated with the ability to manage potential conflicts. Contingency fee billing is recognised in democratic and other common law jurisdictions as a legitimate fee billing practice, subject to certain conditions and constraints. We can see a place for contingency billing in the Australian context. Ultimately, we consider that contingency fees provide an alternative competitive billing strategy which can assist to improve access to justice.

We also accept that the introduction of contingency fees would provide greater access to justice across a broader range of cases compared with reliance on third party funding alone. Plaintiff law firms are more likely to agree to act on a contingency fee basis in smaller disputes where a litigation funder cannot achieve the commercial rate of return for the proceeding to be viable. Certain types of proceeding may not be able to sustain both a contingency fee and litigation funding. By creating a market where lawyers have a commercial incentive to take on cases and to effectively compete with litigation funders, we would expect both downward pressure on costs and litigation funding commissions. That mechanism in and of itself should increase access to justice for those persons and corporations who cannot financially sustain meritorious litigation because of the costs involved.

We also consider that the legal justice system is better served through lawyers providing an alternative means of financing class proceedings. Conflicts of interest can arise regardless of whether the litigation is being funded by a litigation funder or a law firm, through a success or contingency fee. However the lawyer's overriding duty to the court provides the plaintiff with an additional substantive protection: a breach of the lawyer's duty to the court poses the significant penalty of loss of licence to practice.

We are concerned about the bad behaviours which contingency fee arrangements may encourage and the inherent conflict of interest which contingency fee billing can give rise to and which must be managed. Following the introduction of the *Future of Financial Advice*

(FOFA) reforms, Australian financial institutions have been required to move away from conflicted remuneration (commissions) in favour of fee for service. The primary reason for the move to a fee for service is the recognition that advice ought not to be linked to the commission received for selling a particular financial product. It may be considered anomalous for Australian lawyers to be able to move to utilize a remuneration arrangement which results in a better financial outcome for the lawyer dependent on the size of the settlement. We therefore consider that an important protection is requiring the specialist class action docket judge to determine the reasonableness of the contingency fee early in the commencement of the proceeding, with a right to adjust that fee at the approval stage or on judgment.

We endorse an approach of capping contingency fees and regulating a maximum sliding scale of contingency fees which is dependent upon the nature of the dispute. Further detail is provided in our response to proposal 5-2.

If contingency fees are implemented they must be regulated so that the lawyer, like the litigation funder, is not incentivised to prefer the lawyer's financial interests over that of the client or to disregard the lawyer's duty to the court. There are additional protections against the risk of a lawyer preferring their own interests ahead of their clients. In addition to scrutiny of the courts throughout the conduct of the litigation, lawyers will also be subject to scrutiny by the State professional standard bodies, the licensing body, and in class actions, through the approvals process.

As noted in the ALRC's discussion paper, there are already concerns about conflicts of interest under the existing billing arrangements. We acknowledge the suggestion in the discussion paper that the introduction of contingency fees could mitigate conflicts of interest and promote better conduct. Contingency fees align the interests of the solicitors and the client/class[35] as it increases the incentive to maximise the return to the class at the earliest possible time (unlike time based billing).[36]

We acknowledge that introducing contingency fees could serve to increase the risk of solicitors being placed in a position of conflict between their own pecuniary interests, their duty to the court and their duty to their client. The greatest risk of conflict will arise when settlement discussions take place and the financial return to the lawyer is closer to being crystallised. In the case of class action litigation it may also heighten the risk of conflicts of duty between the duties owed to the representative plaintiff and those owed to the rest of the group (for example, where the representative plaintiff has a weaker case and it may be in their interests to settle for a smaller amount and the law firm wishes to reduce its exposure and resolve the proceeding). However the significant penalty which can be imposed as a result of a breach by the lawyer of his/her duty to the court, together with the overall responsibility which the approving judge has to act in the interests of the class, provide reasonable protections to minimize the potential for the conflict to cause detriment to the plaintiff and class members.

While access to justice is a strong concern, we do not consider that introducing contingency fees alone will have the result of improving access to justice.[37] We agree with the view noted at [5.19] of the Discussion Paper that introducing contingency fees would not result in a greater uptake of public interest cases. While it may result in some smaller actions being able to proceed, we consider most solicitors would select clear cut, lower risk matters in

35 Michael Legg, 'Contingency Fees—Antidote or Poison for Australian Civil Justice?' (2015) 39 *Australian Bar Review* 244, 250, cited in DP 85, [5.13]

36 DP 85, [5.13]

37 The Productivity Commission defined "promoting access to justice' to simply mean, 'making it easier for people to resolve their disputes' (Productivity Commission, *Access to Justice Arrangements: Inquiry Report No. 72*, Overview (September 2014), 3.

which to act on a contingency basis. We therefore support a flat 1% levy being imposed on all contingency fees recovered for the creation of a fund to promote access to justice, to be administered by each State legal aid commission.

If contingency fees are to be introduced, they need to be considered as part of a holistic package of reforms of solicitors' conduct rules and access to justice measures on a national basis. There would need to be increased regulation and training of solicitors, and the need to consider re-introducing restrictions on advertising.

In the case of class action proceedings, we also support additional safeguards such as Court approval being required (as set out below).

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.

Response

We support this proposal. The powers in sections 33M and 33N of the *Federal Court of Australia Act 1976* (Cth) to consider costs should be amended, so that these issues are considered at the threshold stage or early in the proceedings.

The common fund approach as proposed in Recommendation 8 of the VLRC Report is one way contingency fees could be permitted in class actions, whereby the solicitor's fee could be provided for out of the common fund.

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?

Response

We oppose contingency fees being permitted in any form of personal injury litigation, including class actions.

We note that the VLRC has proposed that contingency fees should not be permitted in individual personal injury claims but considers the ban should not apply in personal injury class actions, as this would prevent this funding option from being made available in meritorious mass tort class actions.[38]

We agree with paragraph 5.42 of the ALRC's Discussion Paper which provides sound reasons for prohibiting contingency fees in such matters, including class actions.

We consider that the current arrangements which plaintiff lawyers enter into with personal injury claimants of providing "no win, no fee" and an "uplift" of up to 25% of the scale costs is an effective means for providing access to justice for injured plaintiffs.

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.

Response

We support the proposal that the Court's power to reject, vary or set commission rates for both third party litigation funding and contingency fee arrangements for Part IVA proceedings be clarified through statute.

38 Victorian Law Reform Commission, above n 23, [3.72].

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%?

Response

We support contingency fee arrangements and commission rates being subject to statutory caps. In the USA and Canada, where contingency fees are permitted, similar constraints exist. By way of example, we set out below in Figure 5 the approach adopted in various States in the US.

Figure 5

State	Medical Malpractice ONLY	General Limit
California	Sliding scale - not to exceed 40% of first $50,000; 33% of next $50,000; 25% of next $500,000; 15% of anything above $600,000. CAL. BUS & PROF. CODE § 6146	None
Connecticut	None	Applies to personal injury, wrongful death and property damage actions. Sliding scale - not to exceed 1/3 of first $300,000; 25% of next $300,000; 20% of next $300,000; 15% of next $300,000; 10% of anything above $1.2million. CONN. GEN. STAT. §52.251C
Delaware	Sliding scale - not to exceed 25% of first $100,000 ; 25% of next $100,000l 10% of damages over $200,000. DEL. CODE TIT. 18, § 6865	None
Florida	Limits contingent fees to 30% of the first $250,000 recovered and 10% of any amount exceeding $250,000. FLA. CONST. ART. I. § 26	Describes fee in personal injury cases that will be presumed excessive; determined by stage of lawsuit. FLA. BAR. REG. R. 4-1.5(f)(4)(B)(i)(b)
Illinois	Total fee for plaintiff's attorney or attorneys shall not exceed 33% of all sums recovered. PUBLIC ACT 97-1145	None
Louisiana	None	None

State	Medical Malpractice ONLY	General Limit
Massachusetts	Sliding scale - fee may not exceed 40% of first $150,000; 33.33% of next $150,000; 30% of next $200,000; and 25% of damages that exceed $500,000. Further limits if claimants recovery insufficient to pay medical expenses. MASS. GEN. LAWS CH. 231 § 60I	None
Michigan	None	Maximum contingency fee for a personal injury action is one third of the amount recovered. MICH. CT. R. 8.121(B)
New Jersey	None	Limits attorney's contingent fee in tort actions to 33 1/3% of the first $500,000 recovered. 30% of the next $500,000, 25% of the next $500,000, 20% of the next $500,000, and a resonable percentage approved by the court for any amount exceeding $2 million. Also imposes a 25% cap for a pretrial settlement on behalf of a minor or incompentent plaintiff. N.J. Ct. R. § 1:21-7
New York	Sliding Scale - fees may not exceed 30% of first $250,000; 25% of second $250,000; 20% of next $500,000; 15% of next $250,000; and 10% over $1.25 million. NY JUD. LAW § 474-A	None
Pennsylvania	None	None
Virginia	None	None

A similar approach should be adopted in the Australian context. To avoid forum shopping a level playing field across all States is desirable.

The court has a discretion in relation to costs. The Discussion Paper acknowledges that there are proceedings where the legal costs and funding commissions in total exceed the return to the class members. Whilst undesirable, in borderline claims that eventuality may occur. However, likewise the court can intervene to ensure that the return to the plaintiff law firm and funder are proportionate to the return to the class members.

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?

Response

Further consideration should be given to establishment of a class proceedings fund as is the case in Ontario and Quebec and as previously suggested by the ALRC in report 46, "Grouped Proceedings in the Federal Court".[39] The Ontario Class Proceedings Fund (**CPF**)

39 Australian Law Reform Commission "Grouped proceedings in the Federal Court" Report No 46 (1988) suggested a special fund to provide support for the applicant's proceedings and to meet the costs of the respondent if the action is unsuccessful, with a merit test applied to any applications for aid.

was established in 1992, and many CPF supported claims have served as test cases.[40] The CPF received a $500,000 endowment from the Law Foundation of Ontario. The CPF receives a levy in the amount of 10% of any awards or settlements in favour of the plaintiffs in proceedings funded by the CPF plus a return of any funded disbursements. Funding covers approved disbursements and adverse costs awards and is provided based on several factors including the strength of the claim and the public interest involved.[41]

A similar fund could be implemented in Australia although we anticipate a greater initial starting fund would be required. In this regard, the VLRC Report noted that there could be scope for Law Aid to fund, in part, class actions.[42] It was established with $1.68 million in seed funding. The VLRC Report states: "In return for covering the cost of disbursements, Law Aid has a statutory entitlement to a fee of 10 per cent in successful cases. However, it has not been necessary for this amount to be charged. It commonly charges 5.5 per cent."[43]

Consolidation hearing

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.

Response

We support the proposal that all class actions are initiated as open class actions. This was always intended to be the framework for Australian class action litigation. It provides consistency and certainty of outcome for all members impacted by the alleged wrongful conduct. Open class actions enable defendants to achieve a greater certainty of outcome and reduce (but do not eliminate) the prospect of competing class actions.

We do not support the general approach that 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. We consider that a blanket rule should not be legislated or proscribed by the Federal Court. The better approach is the case-dependent approach, which is also endorsed by the VLRC in its report.[44]

In this respect we endorse the comments of Professor Morabito in his recent research report "Competing Class Actions and comparative perspectives on the Volume of Class Action litigation in Australia".[45] We do not favour a "one size fits all" approach. The current "case-dependent approach" provides the courts with greater flexibility and accommodates the

40 Law Foundation of Ontario, *Class Proceedings Fund: 20 years in review* (2013) <http://www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf>

41 Law Foundation of Ontario, *Class Proceedings Fund*, <http://www.lawfoundation.on.ca/class-proceedings-fund/>

42 Victorian Law Reform Commission, above n 23, [5.129]

43 Michael J Lombard, Law Aid, All You Need to Know (2018) Law Aid <http://lawaid.com.au/law-aid-all-you-need-to-know/>, cited in Victorian Law Reform Commission, above n 23, [5.130]

44 Victorian Law Reform Commission, above n 23, [4.85] and Recommendation 11, regarding consideration to amending the Supreme Court's practice note to include guidance for the Court and parties on managing competing class action, allowing the Court to respond flexibly.

45 V Morabito, "An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia" (July 11, 2018), 19-21 <https://ssrn.com/abstract=3212527>.

development of class action legal principles. The past two years have demonstrated that class action litigation is continuing to develop and our justice systems need to have flexibility to accommodate and develop court practices which best suit the legal dispute, the parties involved, their lawyers and the court.

We agree that the appeal(s) in the *GetSwift Limited*[46] class actions ought to be allowed to play out, and guidance obtained from the experienced justices involved on the way forward.

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.

The ALRC also sets out a proposed case management procedure for competing class actions and seeks views of stakeholders on the timeframes for the process (at [6.48]).

The ALRC also seeks the views of stakeholders as to the criteria the Court should apply when determining the lawyer and funder that will have carriage of the class action, noting that in any such determination, a multifactorial approach will be required. The ALRC draws stakeholders attention to the criteria applied in Canada and set out at paragraph 6.25,[47] and notes the matters that Lee J considered in *GetSwift Limited*.[48]

Response

We support a proposal that the Federal Court should consider further case management processes, with input from the Federal Court Class Action Users group. As noted above, we do not support a proposal to introduce a carriage motion. If a carriage motion is to be implemented, the Ontario experience suggests that careful consideration must be given to the factors which will determine carriage, and "first to file" should not be a relevant criterion in determining which representative should have carriage.

The Law Commission of Ontario's recent review of class actions notes that carriage motions often create delays and inefficiency in the judicial system. In a recent decision of the Ontario Supreme Court, *Quenneville v. Audi AG*,[49] the judge said that carriage motions result in "a blood sport of lawyer-bashing" and that it "is gross and not helpful." His Honour suggested that some of the factors under consideration had become dysfunctional, for example the factor relating to the quality of proposed class counsel descends into a beauty pageant.

At this stage, the ALRC has not yet reached a view on whether the time limits for the interlocutory process should be set out in statute or otherwise left to the discretion of the Court. We consider that the time limits for any interlocutory process should be left to the discretion of the Court and should not be prescribed.

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?

Response

While we acknowledge the concern that introducing different rules in the Federal Court

46 *Perera v GetSwift Limited* [2018] FCA 732

47 As noted in the Discussion Paper, the 3 judicially developed criteria for determining a carriage motion are access to justice, the best interests of all class members and fairness to defendants. To apply these criteria, the courts have developed 16 factors that should be considered: (1) The quality of the proposed representative plaintiffs (2) Funding (3) Fee and consortium agreements (4) The quality of proposed class counsel (5) Disqualifying conflicts of interest (6) Preparation and readiness of the action (7) Relative priority of commencement of the action (8) Case theory (9) Scope of causes of action (10) Selection of defendants (11) Correlation of plaintiffs and defendants (12) Class definition (13) Class period (14) Prospect of success: (leave and) certification (15) Prospect of success against the defendants (16) Interrelationship of class actions in more than one jurisdiction (*David v Loblaw; Breckon v Loblaw*, 2018 ONSC 1298).

48 [2018] FCA 732

49 2018 ONSC 1530.

may result in forum shopping, further consultation is required in respect of the additional workload that conferring exclusive jurisdiction would place on the Federal Court.

Recommendation 12 of the VLRC report[50] regarding a cross-vesting judicial panel might be another way of addressing forum shopping concerns in the interim period. We support this recommendation.

Canada has recently approved principles for dealing with multi-jurisdictional class actions, which might inform such a process. The protocol includes the following:[51]

- prior to a date for the first case management conference in any of the actions being set, Plaintiff's counsel post the pleading in its action on the Canadian Bar Association Class Action Database and compile a Notification List listing the names of all known counsel and judges in any actions, with all known contact information;
- A framework for communication between judges in different provinces dealing with potentially overlapping class actions, allowing them to speak to each other and to conduct a joint case management hearing if the judges in both jurisdictions agree; and
- A requirement that a party bringing a motion to stay or dismiss proceedings based in whole or in part on the existence of other actions, or for certification if certification would involve class members in other actions, must provide all judges and all counsel in the relevant actions with a copy of the Notification List and a copy of the notice of motion or application.

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.

Response

We support this proposal. Similar orders have been made in the Supreme Court of Victoria as part of the court's obligation to ensure that the interests of all members are properly protected.

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?

Response

As noted in the ALRC discussion paper, Professor Legg argues that what should be disclosed is:

- The aggregate settlement sum
- Legal fees
- Funder's fee
- Settlement distribution scheme costs
- What the claim was thought to be worth and why.[52]

We consider that the current level of disclosure of settlement agreements is appropriate (typically the settlement sum, legal fees, funder's fee and administrative costs associated with distribution) and that the court should retain the discretion to order that some terms

50 Victorian Law Reform Commission, above n 23, 86.

51 Linda Fuerst, "CBA proposal for a framework to facilitate court to court communication and coordination of overlapping class actions clears the first hurdle" on Norton Rose Fulbright *Securities Litigation and Enforcement Blog* (February 2018) <https://www.securitieslitigation.blog/2018/02/cba-proposal-for-a-framework-to-facilitate-court-to-court-communication-and-coordination-of-overlapping-class-actions-clears-the-first-hurdle/>.

52 DP 85, [7.39].

of the settlement are confidential. We do not support a proposal that would require respondents to disclose an assessment as to the "value" of the claim, or for the settlement terms to be disclosed in all cases.

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.

Response

We recognise that there is merit in redress schemes for particular types of claims where liability appears clear cut and when a regulator directs compensation to be paid. There may be instances in which a corporation might recognise wrongful conduct which requires recompense where a redress scheme may be an attractive option. Our own experience in acting for respondent clients in claims before the Financial Ombudsman Service, where there are a significant number of impacted customers, or in circumstances where pursuant to enforceable undertakings compensation programmes have been agreed, indicates the costs of implementation remain significant. We therefore consider that a real deterrent to corporations voluntarily agreeing to a redress scheme is the cost of funding and administering such schemes.

Advantages of redress schemes

A redress scheme is likely to be advantageous to consumers who typically have small individual claims. In cases where a class action is likely to yield a very small return to affected class members, even though the overall damage to the class is large, the motivation of individuals to come forward to claim a share of the fund is likely to be very weak. In such circumstances, a compensatory collective redress scheme would likely achieve greater access to justice and at a fraction of the cost of a class action.

For example, the Kilmore East-Kinglake bush fire class action recovered $494 million but $60 million went on legal fees. In the Centro shareholder class action, $30 million from a $200 million settlement went on legal fees and then the litigation funders were entitled to around 40% of the damages awarded. In the Great Southern financial product class action a settlement of $23.8 million was reached - but $20 million went in legal fees.[53]

The introduction of a redress scheme would substantially reduce the claimants' legal costs, and eliminate all third party funding costs for that particular dispute.

Disadvantages of redress schemes

Some of the disadvantages of collective redress schemes have been noted in commentary regarding the recent announcement of the National Redress Scheme (NRS) for institutional abuse. The Catholic Church, the Anglican Church, the Salvation Army, the Scouts and the YMCA announced in May 2018 that they would join the National Redress Scheme, which will provide access to counselling, a direct personal response from the institution and a monetary payment to survivors of institutional child sexual abuse. Some commentators argue that the redress scheme is unsatisfactory because:

1. no institution can be forced to join;
2. there are no incentives for institutions to join the scheme (other than to say sorry);

53 Associate Professor Michael Legg, "Many wrongs can make a right: how mass redress schemes can replace court action", *The Conversation*, 24 November 2015, <https://theconversation.com/many-wrongs-can-make-a-right-how-mass-redress-schemes-can-replace-court-action-51118>.

3. legal support is required to receive compensation from the NRS and will have to be funded out of the money to be given to the victims;
4. there is a compensation ceiling of $150,000; and
5. many victims could access compensation more effectively by other means.[54]

One issue with redress schemes is that the rule of law is replaced with consent and due process replaced with administrative steps. The public resolution of a dispute by an independent judiciary considering evidence, applying the law and giving reasons for a decision is lost. However, a redress scheme is more or less akin to settlement, which is of course encouraged by the courts, and happens in most litigated disputes.

An application for a redress scheme crystallises the company's liability in circumstances where there is a chance that no claim will be brought. However, this too can be a positive, as it holds businesses accountable for their actions at all times.

There is also a risk that not all potential claims would be captured within the particular redress scheme, exposing the company to litigation in any event. Despite this, a redress scheme, at the very least, would prevent some litigation.

We consider there are a number of strong arguments for the implementation of redress schemes. However, they do not provide a solution for all civil wrongs. Ultimately, their implementation must be for the benefit of consumers, and not businesses. It is essential that the scheme is not tilted in favour of the stronger party. A possible scenario may arise where a business has engaged in a serious contravention, but consumers, without legal advice, may not appreciate the significance of the breach or the financial impact. Any redress scheme requires close involvement by the relevant regulator to closely control the terms of redress schemes. In an environment where regulators are expected to do more with finite funds, the financial impact on regulators is a necessary consideration of whether a redress scheme is appropriate for particular circumstances.

Whilst we support the concept of redress schemes, in reality we anticipate that there will only be limited circumstances in which collective redress schemes will operate successfully.

Question 8-1

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

Response

A redress scheme should only be implemented if it enhances access to justice, reduces the costs of proceedings, and promotes efficiency in the use of court resources.

The European Commission[55] has previously recommended the following principles to be taken into account in the implementation of redress schemes:

1. As a general rule, collective redress claims should be pursued on an opt-in basis, requesting the express consent of victims. Any exception to this rule should be duly justified by reasons of sound administration of justice.
2. The systems of collective redress should cover both injunctive and compensatory collective redress actions.
3. A coherent collective redress scheme should be ensured by procedural safeguards in order to avoid the development of abusive litigation, such as in the US class action system. These safeguards must cover, amongst other things:

54 Mary Lloyd, "National redress scheme could leave claimants worse off, lawyers and survivors warn", *ABC News website*, 1 June 2018, <http://www.abc.net.au/news/2018-06-01/survivors-warn-claimants-could-be-worse-off-under-redress-scheme/9822658>.

55 The European Commission, *Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* (2013/396/EU) (11 June 2013) EUR-Lex <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>.

a. contingency fees should not be permitted. But, if a Member State allows for such a reimbursement model, it should be subject to appropriate national regulation;
b. punitive damages must be prohibited in collective redress claims;
c. the "loser pays" principle is a central safeguard against abusive litigation; and
d. there must be limitations on third-party funding. The funders should be free from conflicts of interest, and they should have sufficient funds to support the legal action.

The model established by the EU and UK Competition and Markets Authority (CMA) provides a useful guide as to how these principles can be implemented in practice. The CMA has the authority to certify voluntary redress schemes entered into by businesses which are the subject of a competition law infringement finding by the CMA or the EU Commission. The legislation permits businesses to submit a voluntary redress scheme to the CMA for approval as a mechanism to compensate consumers.

Once the scheme is formally approved by the CMA, the infringing party has a statutory duty to comply with it. The CMA has the power to offer a reduction in the level of the penalty of up to 20% to reflect the infringing party's voluntary provision of redress.[56] An important feature is that neither individuals nor businesses are obliged to accept redress under the scheme, and are free to pursue private enforcement action through the courts. At a high level, this necessarily ensures that the legislature does not circumvent the role of the courts (which is of course essential if a redress system is implemented in Australia).

It is essential the CMA has the power to offer a reduction in the level of the penalty which would otherwise be imposed by the CMA. This provides an incentive for an infringing business to enter into a redress scheme and compensate customers. It may also reduce costs for the business, and provides an incentive to enter the scheme rather than litigate the infringement. It is also worth noting that the CMA has made clear that it does not view an application for a compensation scheme as an admission of liability, which is an additional incentive.

56 Competition and Markets Authority, *Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law* (14 June 2016) Payment System Regulator <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/453925/Voluntary_redress_schemes_guidance.pdf>.

Conclusion

We trust that this submission is helpful to the Commission.

Our views can be summarised as follows:

- In lieu of amending continuous disclosure laws, consideration should be given to introducing a leave requirement for securities class actions.
- While we support regulation of litigation funders, we do not support the proposal to develop a bespoke scheme. We support proposals to increase regulation of litigation funding to ensure funders have sufficient capital in the jurisdiction to cover contingent liabilities and governance processes in place subject to scrutiny by Australian regulators, which would be achieved through extending the existing financial services regime to funders. We also suggest consideration be given to imposing obligations on funders through the *Federal Court of Australia Act 1976* (Cth) and *Federal Court Rules 2011* (Cth).
- Contingency fees can enable access to justice for matters which would not be funded by third party funders, and should be permitted (except in personal injury, family and criminal matters) provided effective safeguards are in place to manage conflicts of interest.
- We do not support proposals to impose blanket rules on the Federal Court and remove the Court's discretion to case manage competing class actions. However we do support development of a multi-jurisdictional working group to consider strategies for managing competing class actions.
- Further consideration be given to a class proceedings fund and implementation of collective redress schemes for certain types of matters.

If the ALRC would like us to expand on any of the matters raised we would be happy to do so.

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