



Submission to the Australian Law Reform Commission

Class Action Proceedings and Third Party Litigation Funders

30 JULY 2018

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1 | INTRODUCTION

“Give access to the courts to those in the community who have been effectively denied justice”¹

- 1.1 In 1992, the Federal Court class action regime was introduced with a view to ensuring enhanced access to justice, reduced costs of proceedings and efficiency in the use of court resources.
- 1.2 Since that time, the procedures have provided access to the courts and the opportunity for justice to those whose claims were too small, or who were simply unable to afford adequate representation. Shine Lawyers have been standing up for the rights of everyday Australians for over 40 years and are one of Australia’s largest litigation law firms. Shine Lawyers currently have eight class actions filed in the Federal and State Courts and we expect to file at least another three in the coming months. Furthermore, we have one matter in the Administration phase of the procedure and one completed Administration phase.
- 1.3 Our objective in relation to this inquiry is to be realistic and reasonable in our views. There are many stakeholders, all of whom are very strong advocates for their respective positions. We do not see the benefit of joining this chorus of voices. In this submission, Shine Lawyers has sought to advance the interests of lead applicants and group members who otherwise might not have a voice in this discussion.

¹ Commonwealth, Hansard, Second Reading Speech, 14 November 1991, 3174-3175 (Duffy).

2 | EXECUTIVE SUMMARY

In response to the Commission's Discussion Paper 'Inquiry into the Class Actions Proceedings and Third-Party Litigation Funders' dated June 2018, Shine Lawyers:

- 2.1 Believe that the objectives of access to justice, reducing costs of proceedings, promoting efficiency in the use of court resources are paramount when considering amendments to Commonwealth regulations and legislation in relation to representative proceedings.
- 2.2 Welcome the development of specialist accreditation for solicitors in class action law and practice (Proposal 4-3) as it will assist group members to make an informed decision and identify suitable legal representation with appropriate experience and training.
- 2.3 Support the proposal that all class actions should be initiated as open class actions (Proposal 6-1) as this will allow those who are poor, less educated, located in remote locations or who may be unable to take positive steps to have themselves included in proceedings to obtain access to justice.
- 2.4 Agree 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 interests of justice to do so.
- 2.5 Submit that it is in the interests of the group members that a clear case management framework in relation to the commencement of representative proceedings be adopted. This would avoid increased overall costs, problematic case management and potential delay for access to justice for group members.
- 2.6 Agree that the Federal Court of Australia's Class Action Practice Note (CPN-CA) should be amended to provide a further case management procedure for competing class actions (Proposal 6-2).
- 2.7 Contend that Lord Jackson's report on the escalating costs of litigation in England and Wales published on 14 January 2010 provides appropriate guidance to the ALRC on a model of approving costs agreement prior to prosecuting the proceedings in response to the proposed process required to implement Proposal 6-1.
- 2.8 Agree in principle with Proposal 8-1 and acknowledge that redress schemes would reduce the time and cost involved in pursuing adversarial litigation. Despite this, there are obvious challenges and schemes must minimise the scope for exploitation of potentially vulnerable claimants who do not benefit from the shield of strong legal representation.
- 2.9 Agree with Proposal 5-1 and Proposal 5-2 of the Discussion Paper as contingency fee agreements, including extending them to personal injury class actions, will ensure access to justice, providing options to those Australians unable to afford legal representation and ensure legal representation without financial burden upfront.
- 2.10 Believe that a tender process for settlement distribution would not be suitable where the respondent remains involved in the process in order to individually test and negotiate individual claims or in mass tort and product liability settlement distribution schemes with individualised loss assessments.

3 | ACCESS TO JUSTICE

Terms of Reference

The increased prevalence of class action proceedings in courts throughout Australia, and the important role they play in securing access to justice; and

The importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages award.

RESPONSE TO PROPOSAL 4-3

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.

- 3.1 Shine Lawyers welcome the development of specialist accreditation for solicitors in class action law and practice.
- 3.2 We believe that implementing specialist accreditation for solicitors in class actions will assist class members in retaining suitable legal representation. This will ensure that group members are represented by solicitors who possess the necessary qualifications and experience to run the proceeding in a way that is in the best interests of the group members.
- 3.3 As evidenced in the Discussion Paper, class actions practice area is a rapidly expanding area of law with between 51% and 70% of legal representatives acting for class representatives since 2005 having no prior experience in class actions.
- 3.4 Shine Lawyers welcome the added experience and competition that new firms bring to the practice area. However, this should not come at a cost to the group members' ability to access justice by utilising solicitors better trained in all aspects of the law pertaining to class actions, including the identification and management of conflicts of interests and duties.

RESPONSE TO PROPOSAL 6-1

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 proceedings(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of just 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' cost agreement for a class action is granted on the basis of a common fund order.*

- 3.5 Shine Lawyers support the proposal that all class actions should be initiated as open class actions.
- 3.6 The concept of "open class" or opt out procedure was deemed preferable by the Government for both equity and efficiency reasons.² Open class representative actions allow those who are poor, less educated, located in remote locations or who may be unable to take positive steps to have themselves included in proceedings to obtain access to justice.³
- 3.7 Closed class proceedings have emerged predominately in response to actions which have fee arrangements with a solicitor and/or third party litigation funder.⁴ Closed class proceedings prima facie appear to provide benefit to the legal representatives and litigation funders and ignores the public benefit of open class proceedings.
- 3.8 It has been noted that open classes may soon become more common following the recent approval of 'common funds' by the Full Federal Court.⁵ Whilst Shine Lawyers believe that the interests of the class members is paramount, the provision for common fund orders in open class proceedings is important to encourage third party litigation funding where appropriate. Importantly, Proposal 6-1 includes the stipulation that the approval of any funding agreement or cost agreement is granted on the basis of a common fund order.
- 3.9 We agree that third party litigation funding can increase access to justice for the prosecution of genuine claims by plaintiffs who would otherwise lack the resources to pursue a claim, and that matters most likely to be funded have the characteristics of high costs, large payouts and low risk.⁶ Only 15.4% of claims filed in the Federal Court of Australia that received funding between March 2013 and March 2018 were consumer protection claims, product liability claims or mass tort claims. Further, the statistics indicate that 100% of claims by shareholders were funded compared to 30.7% to 50% of consumer claims.⁷
- 3.10 Open class proceedings are particularly pertinent to these consumer actions and smaller claims which are more likely to include the minority groups referred to by Duffy in his second reading speech. Furthermore, these actions are usually difficult to ascertain the identities of the entire class, in the absence of details such a shareholder register.
- 3.11 By initiating proceedings as an open class and ensuring a common fund is available, the risk to the funder is reduced, which may serve to encourage funding of those matters

² Commonwealth, Hansard, Second Reading Speech, 14 November 1991, 3174-3175 (Duffy).

³ Ibid.

⁴ Vince Morabito, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29 *Sydney Law Review*.

⁵ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

⁶ Australian Law Reform Commission, Class Action Proceedings and Third-Party Litigation Funding, Discussion Paper No 85 (2018).

⁷ Australian Law Reform Commission, Class Action Proceedings and Third-Party Litigation Funding, Discussion Paper No 85 (2018).

that would otherwise not attract funding, such as medical product liability and small claims worth \$30 million or less.

- 3.12 We must continue to ensure such parties, including those who may be unable to take positive steps to have themselves included in any class, have access to justice whilst simultaneously promoting increased litigation funding.

Competing Class Actions

- 3.13 Shine Lawyers agree that competing class actions do not promote efficiency in the use of court resources and do not protect the interests of plaintiffs and class members if the issue is not resolved early in the proceedings.
- 3.14 Shine Lawyers acknowledge that a group member should be afforded the right to choose their legal representatives and funder. However, we believe the benefits of consolidating competing class actions (which has been discussed in great detail and we will not repeat) outweigh any such disadvantage to group members.
- 3.15 Further, Shine Lawyers echo the comments of Lee J,⁸ and add that only a small percentage of group members would not be afforded the right to their choice of lawyer, which is supported by our experience:
- a) that the number of group members who actively contact legal representatives prior to any media communications and/or the filing of the claim is proportionately low to the number of overall group members;
 - b) where multiple open class proceedings are filed group members may contact multiple law firms; and
 - c) a not insignificant number of group members will not contact a law firm until a settlement or resolution is announced and action is required to receive compensation.⁹
- 3.16 Lastly, Shine Lawyers submit that should Proposal 4-3 be adopted the Courts should consider, in addition to the 16 factors discussed at 6.25 and 6.51 of the Discussion Paper, whether the legal representatives of competing class actions have lawyers with specialist accreditation in class action law and practice.

RESPONSE TO QUESTION 6-1

Question 6-1

Should Part 9.6A of the Corporations Act 2001 (Cth) and s 12GJ of the Australian Securities and Investment 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?

- 3.17 As evidenced by the current competition to run a class action against AMP, jurisdiction is likely to be a significant factor in determining competing class actions. Shine Lawyers

⁸ Justice Lee, 'Certification of Class Actions: A "Solution" in Search of a Problem?' (Paper presented to the Commercial Law Association Seminar Class Actions – Different Perspectives, 20 October 2017).

⁹ For example, in respect to a recently settled class action that Shine Lawyers are co-administrators of 12.5% of registrants had not contacted a law firm prior to the settlement notice being received.

submit that it is in the interests of the group members that a clear framework in relation to the commencement of representative proceedings be adopted.

- 3.18 Justice Lee, in the judgment of *Perera v Getswift Limited*,¹⁰ discussed the issue of the bringing of concurrent proceedings in different courts relating to the same subject-matter. Lee J discusses the possibility, as seen in the AMP proceedings, that promoters of class actions may commence securities class actions in the same matter in different courts.¹¹ Shine Lawyers agrees with Lee J that this is likely to result in increased overall costs, problematic case management and emphasises the potential for delayed access to justice for group members.
- 3.19 A further complication arises, as seen in the multiple AMP proceedings where a plaintiff may file in a State Court and an Applicant may file in the Federal Court of Australia. These matters are currently for determination before both Courts what remains is a possibility that there will continue to be concurrent proceedings in different courts relating to the same subject-matter.
- 3.20 Shine Lawyers believes that the following reasons demonstrate a compelling argument that the Federal Court of Australia is the appropriate jurisdiction for representative proceedings arising under Part 9.6A of the Corporations Act 2001 (Cth) and s 12GJ of the Australian Securities and Investment Commission Act 2001 (Cth) for the following reasons:
- a) the statutory regime imposing the obligations has been created by the Commonwealth of Australia under Part 9.6A of the Corporations Act 2001 (Cth) and s 12GJ of the Australian Securities and Investment Commission Act 2001 (Cth); and
 - b) as the legislation is Commonwealth legislation the superior court of the Commonwealth ought to hear matters concerning breaches arising from these sections, that court being the Federal Court of Australia.
- 3.21 Shine Lawyers submit that legislation should be enacted to affect this change rather than common law or the inherent jurisdiction of the Courts.

RESPONSE TO PROPOSAL 6-2

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.

- 3.22 Shine Lawyers agree with Proposal 6-2 of the Discussion Paper.
- 3.23 In response to the proposed process required to implement Proposal 6-1 Shine Lawyers say that Lord Jackson's report on the escalating costs of litigation in England and Wales published on 14 January 2010 provides appropriate guidance to the Commission on a model of approving costs agreements of both the applicant and respondent prior to prosecuting the proceedings.

¹⁰ [2018] FCA 732 [113].

¹¹ Ibid, [376].

3.24 An approach of this nature would afford group members the following benefits:

- a) the provision of a detailed breakdown of legal costs of the Applicants' and Respondents' solicitors prior to the commencement of proceedings to assist in open discourse in relation to the necessity of work involved;
- b) the disclosure of both parties budgets may provide a precise mechanism for group members to make an informed decision regarding the reasonableness of any settlement and contribute meaningfully to this process; and
- c) the exchange of fee estimates may contribute to the early resolution of claims, for example, when a respondent's solicitors' projected costs are considerable when compared to the plaintiff's claim.

3.25 Shine Lawyers do not envisage that this process will be burdensome on either party. The statistics indicate that in the majority of cases the Applicants solicitors seek litigation funder which inevitably requires a detailed budget. Similarly, it is not uncommon for Respondent solicitors to tender for work or provide a detailed budget to a client before being instructed to act. Further, the advent of 'After the Event' insurance requires accurate disclosure of parties costs which will assist funders and/or solicitors to defray the risk of an adverse costs order.

3.26 We believe a court supervised cost management system in which all parties are required to disclose their budgets could provide group members sufficient confidence in the fees they are being charged by their solicitors and would promote more effective costs disclosure by lawyers.

3.27 While the details of Proposal 6-1 are not presently formalised, it is Shine Lawyers' experience that the First Case Management Hearing that is routinely in our experience listed within three to four weeks of filing more than adequately address all matters that ought to be addressed at the outset of the matter. Our experience is very positive in relation to the current practice that is consistent with and undertaken in accordance with the Practice Note.¹²

RESPONSE TO PROPOSAL 8-1

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 litigate the claim should they so choose.

3.28 Shine Lawyers agree with Proposal 8-1 of the Discussion Paper.

3.29 Shine Lawyers acknowledge that redress schemes would reduce the time and cost involved in pursuing adversarial litigation and allows affected individuals and businesses a swift and cost-efficient resolution of their claims. We agree that a redress scheme may

¹² Federal Court of Australia's Class Action Practice Note (GPN-CA), s. 7.5-7.11.

be a suitable alternative to litigation for individuals and corporations obtaining compensation.

RESPONSE TO QUESTION 8-1

Question 8-1

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

- 3.30 Shine Lawyers advocates for implementation of a redress scheme that is adequately guided by the needs of the affected party.
- 3.31 The challenge we observe with redress schemes is that if the scheme is one that permits self-reporting or self-monitoring then there may be inadequate impartiality and objectivity in the implementation and execution of the scheme. . A scheme that requires the establishment of a pool of suitable independent monitors and law firms who would be appointed to any approved redress scheme with responsibility for monitoring the establishment, implementation and execution of the scheme is one that we submit would be in the best interests of consumers. The cost of the independent monitor would be paid by the redressor.
- 3.32 We observe some inherent difficulties in schemes being administered by the redressors, because consumers are vulnerable and do not benefit from the expertise that might otherwise be available to claimants through legal representation. As a result, we believe any redress scheme that is self-reported and self-monitored would be at risk of not adequately compensate consumers for their loss and may not be able to facilitate access to justice the same way contemplated by Part IVA Federal Court Act 1975 (Cth) – Paris check my citation.
- 3.33 Shine Lawyers submits that a redress scheme model in which the regulators appoint and supervise an independent body with independent monitors and law firms. The independent body would have available to them a panel of independent experts and law firms who would have experience with both consumer and industry issues. The cost of the redress scheme should be paid by the redressor.
- 3.34 Further, we note the UK Collective Redress Scheme, referenced by the Commission, is limited insofar as it only applies to breaches of consumer rights provided for under the Competition Act 1998 (UK) and victims of anti-competitive conduct. The catalyst for such a scheme was that only one representative proceeding had been brought successfully in the UK,¹³ with many consumers left unable to obtain redress for competition breaches of companies even as a follow-on action.¹⁴ In contrast, as noted in the Discussion Paper, no shareholder class action has been finalised with a judgment of the Federal Court and 64% of shareholder matters are settled.¹⁵

¹³ Cary J, Kilaniotis L, McGregor A. "United Kingdom: Private Antitrust Litigation" published online on the Global Competition Review, 21 July 2016. <<https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2017/1067870/united-kingdom-private-antitrust-litigation>>

¹⁴ Department for Business Innovation & Skills. Private Actions in Competition Law: A consultation on options for reform – final impact assessment, January 2013. p. 31.

¹⁵ Australian Law Reform Commission, Class Action Proceedings and Third-Party Litigation Funding, Discussion Paper No 85 (2018), 2.21.

3.35 In response to section 8.18 of the Discussion Paper, Shine Lawyers says that any advantage to the “defendants who can avoid, or at least minimise, reputational loss and costs involved in litigation, and allow the company to present the scheme as indicative of a new culture of compliance within the organisation” should not guide the design of a federal collective redress scheme. If the rights of claimants entitled to compensation are sacrificed for the reputational advantage of defendant sufficient access to justice cannot be achieved for those claimants.

4 | CONTINGENCY FEES

Terms of Reference

The importance of ensuring that the costs of such proceedings are appropriate and proportionate.

The importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards.

RESPONSE TO PROPOSAL 5-1 AND PROPOSAL 5-2

Proposal 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 5-2

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.

- 4.1. Shine Lawyers agree with Proposal 5-1 and Proposal 5-2 of the Discussion Paper.
- 4.2. Calculating the fees payable to lawyers as a percentage of the judgment or settlement sum could provide certainty to both claimants and legal practitioners. The simplicity of this calculation would be a useful tool in communication with group members and avoids the complex task of predicting how much time will be required to resolve the matter.¹⁶ A clear understanding as to the ultimate cost of legal representation will ensure client satisfaction and avoid disputes if the cost of legal proceedings are underestimated.¹⁷
- 4.3. Contingency fee arrangements will also ensure legal practitioners, and law firms, have a vested interest in the resolution of legal proceedings. It will create an equal distribution of risk between the stakeholders.¹⁸ We do not believe this will create an incentive to facilitate earlier resolution of litigation but rather ensure the interests of the client and legal practitioner are aligned. The united interests of these two stakeholders will ensure the resolution of the matter with an emphasis on recognising what is best for the claimant at the earliest time, encouraging best-practice conduct.¹⁹
- 4.4. Contingency fee agreements would ensure access to justice, by encouraging firms to self-fund litigation and thereby providing options to those Australians unable to afford legal representation. Importantly, access to these various types of funding options will ensure legal representation without financial burden upfront.²⁰ The lack of burden will

¹⁶ Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 26.

¹⁷ Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 26.

¹⁸ Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 23.

¹⁹ Australian Law Reform Commission, Class Action Proceedings and Third-Party Litigation Funding, Discussion Paper No 85 (2018) 84.

²⁰ Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 24.

potentially increase those medium and small sized actions, promoting the resolution of legitimate and meritorious claims in Australia.²¹

- 4.5. Shine Lawyers acknowledge safeguards are critical to facilitate contingency fee arrangements in Australia and agree potential safeguards to implement could include:
- a) statutory caps on the percentage of contingency agreements; and
 - b) the ability for court intervention at the earliest opportunity.

RESPONSE TO QUESTION 5-1

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?

- 4.6. Shine Lawyers submit that contingency fees should encompass personal injury class actions.
- 4.7. We believe contingency fee on these types of matters will give access to justice to a broader range of Australians who otherwise would be unable to seek recompense. We acknowledge however, appropriate safeguards such as those adopted in the United Kingdom need to be put in place.
- 4.8. We believe with the right mechanisms in place, contingency fee arrangements have a valid and important role to play in the Australian legal system. Contingency fee arrangements will provide another option to litigation funding and will ensure access to justice to the wider Australian community.
- 4.9. As the introduction of these funding options become commonplace in similar international jurisdictions, valuable guidance is available to ensure the existence of contingency fee agreements upholds the integrity of Australia's civil justice system.

²¹ Australian Law Reform Commission, Class Action Proceedings and Third-Party Litigation Funding, Discussion Paper No 85 (2018) 84.

5 | SETTLEMENT APPROVAL AND DISTRIBUTION

Terms of Reference:

The importance of ensuring that the costs of such proceedings are appropriate and proportionate.

The importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards.

PLAINTIFF AND DEFENDANTS COSTS

RESPONSE TO PROPOSAL 7-1

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.

- 5.1. Shine Lawyers do not agree with proposal 7-1 of the Discussion Paper.
- 5.2. We acknowledge that additional oversight of solicitor's costs is necessary and in the best interests of group member. However, our overriding concern is that while the appointment of a panel of reputable independent cost consultants appears attractive, it is difficult to see how these consultants would not be subject to the same market pressures and potential biases as cost assessors.
- 5.3. We note that the power to appoint a costs referee is already within the powers of the Court. For example, in a recent settlement approval hearing in the Federal Court of Australia, Lee J appointed a cost assessor of his own motion.²²
- 5.4. We agree the appointment of a referee should remain a discretionary power.
- 5.5. As mentioned previously in this submission, Shine Lawyers supports the adoption of a similar approach to the budgeting of legal costs that resulted from the Lord Jackson Reforms. We submit that this will better facilitate the transparency of costs in representative proceedings.
- 5.6. Shine Lawyers believe the current settlement approval process provides group members with access to justice because group members have the opportunity to address the judge during the hearing of the approval to voice their objections.
- 5.7. Shine Lawyers represented one of the Representative Applicants in *Stanford v DePuy International Ltd*.²³ At the hearing of the approval application for this matter, 14 group members (or persons speaking on their behalf) appeared and addressed the Court orally in relation to their opposition to the settlement. These group members raised valid and important points about the settlement from their perspective. Justice Wigney carefully considered these group member's arguments (nine pages of Justice Wigney's judgment is dedicated to the submissions of these group members). This demonstrates the fact

²² *Dillon v RBS Group (Australia) Pty Limited* (No 2) [2018] FCA 395.

²³ *Stanford v DePuy International Ltd* (No 6) [2016] FCA 1452.

that the current settlement approval process provides group members true access to justice.

RESPONSE TO QUESTION 7-1

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?*

- 5.8. We note that the founding principle of the class actions regime was to develop a framework that allowed large groups of people the opportunity to obtain redress and do so more cheaply and efficiently than would be the case with pursuing individual actions.²⁴
- 5.9. In this respect, we acknowledge that the process of administering a settlement must be accurate (in terms of payments to group members), but also quick and low cost. This is particularly important for group members whose claims have an injury component.
- 5.10. In our experience, costs tend to accrue more so in the determination of the common issues rather than settlement administration. However, costs can amass in the course of settlement distribution that have the potential erode group members' claims. Accordingly, we share the view that in certain cases it is appropriate for parties other than the applicants' solicitors to administer settlement distribution schemes in order to offer a competitive market rate for the resolution of group members' claims.
- 5.11. The exception to this and consistent with Murphy J's comments²⁵ is the benefit afforded to group members in cases involving personal injury, property damage or diminution and economic loss in maintaining the plaintiff's solicitors as settlement administrators.
- 5.12. We agree with the position stated in the Discussion Paper that personal injury claims are unique because the plaintiff firm generally has significant personal involvement with group members. As a result of the plaintiff firm's personal involvement with group members throughout the proceeding and their 'detailed and nuanced understanding of the different categories of claim and of the complexities within each category of claim they are able to ensure the settlement distribution process is accurate, fast, and cost effective.
- 5.13. It is our view that the retention of plaintiff's solicitors as settlement administrators in these cases is paramount to ensuring group members' costs are kept to a minimum and to avoid any unnecessary emotional distress caused to group members by the appointment of a settlement administrator which might arise in circumstances where the subject matter of the action deal with personal and intimate details.
- 5.14. We believe a tender process for settlement distribution would not be suitable where:
- a) the respondent remains involved in the process in order to individually test and negotiate individual claims; or

²⁴ Commonwealth, Hansard, Second Reading Speech, 14 November 1991, 3174-3175 (Duffy).

²⁵ *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [158].

- b) the claim relates to a mass tort or product liability settlement distribution schemes with individualised loss assessments.

5.15. A competitive tendering system may exhibit the following process principles:

- a) maintaining Court oversight pursuant to Clause 14.6 of Part 14 of the Federal Court of Australia's Class Action Practice Note; and
- b) costs disclosure.

6 | CONCLUSION

- 6.1. Shine Lawyers welcomes the opportunity to answer any queries the Commission may have in relation to our Submission. For further information please contact:

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