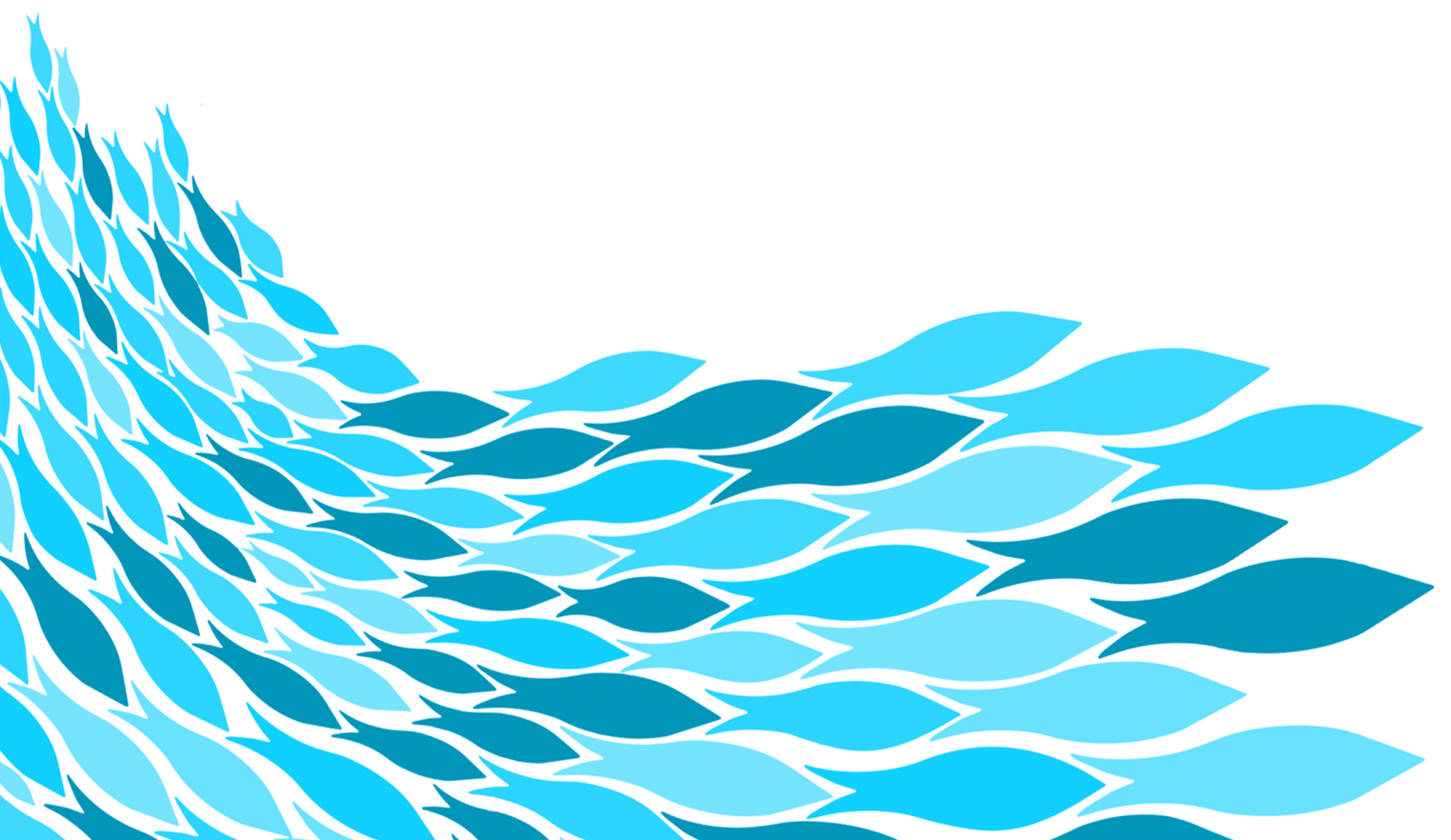




Submission to the Australian
Law Reform Commission Inquiry
into Class Action Proceedings and
Third-Party Litigation Funding

Submitted by
Slater and Gordon
AUGUST 2018



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Slater and Gordon Lawyers

Submission to the Australian Law Reform Commission: Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Scope of submissions

Slater and Gordon Lawyers is a leading consumer and class action plaintiff law firm, with a decades-long history of obtaining redress for claimants in disputes against corporations and governments, in circumstances where our clients would not have had the ability to assert their rights or seek a remedy for their losses had they been acting alone.

Access to justice – particularly against entities with vastly greater resources and power than our clients – is at the core of Slater and Gordon's purpose. In the 1990s, we pioneered innovative "No-Win, No-Fee" conditional legal costs arrangements to make litigation of meritorious claims a more accessible option for our clients. Around the same time, we began to act for clients in then-novel class action litigation, and since that time have represented consumers and investors in some of Australia's most complex, innovative and hard-fought group litigation. In doing so, we have represented group members on "No-Win, No-Fee" and litigation-funded bases, in a wide range of disputes. Of particular relevance to the present inquiry of the Australian Law Reform Commission (**'the Commission'**), for over a decade we have acted for group members in securities and investor class actions, including with the support of third-party litigation funders.

Over the course of our experience in acting for investors and consumers in class action litigation since the 1990s, attacks on Australia's class action regimes by corporate interests, and consequential reviews and examinations of their effectiveness, have been the regimes' constant companions. Although the terms of these debates have shifted over the years, many features have remained surprisingly constant: criticism from corporate interests is directed not at the substantive laws or causes of action being relied upon by claimants, but rather at the procedural mechanisms allowing individual people and entities to seek redress collectively. Concern is raised about trends and increasing numbers of claims, without attempting to discern between meritorious and unmeritorious claims. Complaints are made by defendant interests about costs and inefficiencies in group litigation without recognising the role that defendants and their lawyers themselves play in driving up those costs for strategic reasons. Caution is urged in relation to the costs of this form of accountability on corporations, while scant regard is paid to the costs to individuals and the Australian economy of corporate malfeasance in the absence of the accountability and private enforcement mechanisms provided by the class action procedure.

Through it all, the empirical evidence has also remained remarkably consistent. There is no 'flood' of class action litigation in Australia, and never has been. There is no spate of unmeritorious claims being issued by avaricious plaintiff lawyers. There is no epidemic of group members being taken advantage of or disadvantaged by the use of class actions. While there have been isolated instances where the class action mechanism has been used improperly or opportunistically by newer participants in the class action landscape, there has been no evidence that courts' existing powers and processes have been incapable of dealing with those. There is, however, a clear and consistent track record of hundreds of millions of dollars of losses being restored to group members which would not have occurred but for the availability of the class action mechanism – in almost all instances, losses which could not have been pursued had claimants been forced to act individually.

The empirical data continues to make clear what has by now been the case for decades: Australia's class action regimes are effective and efficient mechanisms, which have been vital tools in protecting

the interests of investors and consumers against the relative power and resources of large corporations and governments. It is not a coincidence that, in this regard, the class actions regime is operating entirely as was intended when it was first recommended around 30 years ago.

Against this background, we welcome the opportunity to contribute to the discussion concerning this vital mechanism for protecting and advancing consumers' and investors' rights.

Our experience

Although our history and experience in class action proceedings spans almost the entire existence of the Australian class actions regime, in the context of the present inquiry we anticipate that more current and recent developments in the field will be of most relevance. In this regard, we currently act for group members in the following proceedings:

- (a) *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* (VID 163 of 2017) – a Part IVA Federal Court proceeding brought on behalf of shareholders against Bellamy's Australia Ltd, in which the issue of multiple proceedings and litigation funding terms has been in part resolved by the Court;
- (b) *Court v Spotless Group Holdings Ltd* (VID 561 of 2017) – a Part IVA Federal Court proceeding brought on behalf of shareholders against Spotless Group Holdings Ltd;
- (c) *Whittenbury v Vocation Ltd* (VID 561 of 2017) – a Part IVA Federal Court proceeding (acting jointly with Maurice Blackburn Lawyers) brought on behalf of shareholders in Vocation Ltd;
- Herridge v Electricity Networks Corporation* (CIV 2259 of 2015) – multi-party proceedings issued in the Supreme Court of Western Australia against a number of parties in respect of the Parkerville bushfires in Western Australia;
- (d) *Creighton v Australian Executor Trustees Ltd* (2015/306222) – a New South Wales Part 10 claim on behalf of debenture holders in Provident Capital Ltd against Australian Executor Trustees, which was issued in the Federal Court and then transferred on application of the Respondent to the NSW Court. This claim is also attended by the existence of multiple class action proceedings;
- (e) *Fernbrook (Aust) Investments Pty Ltd v AMP Limited* (VID 670 of 2018) – A Part IVA claim on behalf of shareholders against AMP, in which the issues of multiple jurisdictions and competing proceedings are live issues;

In relation to matters concerning settlements and the administration of settlement distribution schemes, we have also acted in numerous class action proceedings and multi-party actions that have successfully resolved in recent years, the settlements for which have been administered by Slater and Gordon staff, including:

- (f) *Kamasae v Commonwealth of Australia* (S CI 2014 6770) – a proceeding brought in the Supreme Court of Victoria against the Commonwealth of Australia and two service provider companies – G4S and Broadspectrum (formerly Transfield) – that operated the Manus Island Regional Processing Centre on Manus Island in Papua New Guinea. The

settlement of the class action was approved by the Court in September 2017, securing \$70 million for group members (exclusive of legal costs), which has now been distributed, the complex settlement administration having been completed in under nine months;

- (g) *Newstart 123 Pty Ltd v Billabong International Ltd* (VID 143 of 2015) – a Part IVA Federal Court proceeding brought on behalf of shareholders in Billabong International Ltd, which was settled more than six months prior to the scheduled commencement of trial for \$45 million inclusive of legal costs;
- (h) *Earglow Pty Ltd v Newcrest Mining Ltd* (VID 406 of 2014) – a Part IVA Federal Court proceeding brought on behalf of shareholders in Newcrest Mining Ltd in 2014, and settled in 2016 just prior to the commencement of trial for \$36 million inclusive of legal costs;
- (i) *Giles v Commonwealth of Australia* (S CI 2009/00329777) – a claim brought in the Supreme Court of NSW against the Fairbridge Foundation, the State of New South Wales, and the Commonwealth of Australia, which was settled for \$24 million in 2014, with compensation paid to victims of child abuse at the Fairbridge Farm School in Molong;
- (j) *A v Peters* (S CI 2012/02791) – a Part 4A proceeding issued in the Supreme Court of Victoria in May 2012, which was settled for \$13.75 million in 2014, prior to the commencement of trial, to resolve the claims of 60 women who contracted Hepatitis C at the Croydon Day Surgery between January 2008 and December 2009;
- (k) *Earglow Pty Ltd v Sigma Pharmaceutical Ltd* (VID 933 of 2010) – a Part IVA Federal Court proceeding brought on behalf of shareholders in Sigma Pharmaceuticals in 2010, and settled in 2012 at a relatively early stage of proceedings for \$57.5 million inclusive of costs.

The approach to reform

At the outset, although we will respond to the Commission's specific proposals and questions below, we consider it important to address a number of overarching issues concerning reform proposals in this field.

There has been much public discussion in recent years concerning the operation of Australian class action regimes. In recent times, this has no doubt been heightened by the unusual circumstances surrounding the current *GetSwift*¹ and *AMP*² litigation, however the debate itself dates back much further. While much of this discussion and debate has been productive, identifying important issues for the continued development of the regime, some repeated arguments have proceeded on the basis of incomplete or misleading premises, and in at least some respects, some recent opinion and editorial commentary in the media concerning the regimes has been, we suspect, disingenuous at best.

Fortunately, the operation of Australian class action regimes has been quite comprehensively studied, in particular through the work of Professor Vince Morabito, but also via data available from the Federal

¹ *Perera v GetSwift Limited* [2018] FCA 732

² *Fernbrook (Aust) Investments Pty Ltd v AMP Limited; Wileypark Pty Ltd v AMP Limited; Marion Antoinette Wigmans v AMP Limited; Komlotex Proprietary Limited as Trustee for Breda Sinclair Industries Superannuation Fund v AMP Limited.*

Court of Australia and relevant state Supreme Courts, as well as the experience and data gathered by a number of law firms acting for plaintiffs and defendants within the regime, who effectively act as 'repeat users' of the system. We suggest that this kind of empirical data provides by far the most solid basis upon which to consider any reform proposals.

We therefore urge the Commission to adopt an evidence-based approach to all reform proposals in this area. Arguments will be advanced by interested parties (both notionally plaintiff- and defendant-associated alike) that express measurable, and in some cases contested, propositions in conclusory or absolute terms. In forming its recommendations, we encourage the Commission to examine the explicit and implicit premises in such statements and submissions, and compare them to the actual empirical data available concerning the operation of the class actions regimes in Australia. We suggest that this will, again, provide the strongest basis for any reform proposals to be made.

In relation to broader questions of law reform, we also take the opportunity to reiterate the following points that have made in previous similar inquiries:

- (a) There is value to corporate entities in particular in the certainty and stability afforded by the maintenance of the status quo, and conversely there will inevitably be costs associated (at least initially) with any changes to the law that are introduced. Businesses and members of the community derive significant value from the continuation of existing processes and standards, and the continued applicability of the now decades' worth of case law concerning class action procedures.
- (b) Many of the issues and concerns identified concerning class actions to date have related to specific cases or circumstances in particular factual contexts. Such issues have generally been capable of being addressed appropriately and in response to the particular facts involved, by courts exercising their broad case-management and supervisory powers concerning class actions and civil procedure. In a law reform context, therefore, attention should be paid not only to circumstances where such concerns have arisen, but also to whether courts were equipped with appropriate powers to be able to address them adequately. Where courts have demonstrated that they are already able to address issues appropriately where they arise, we suggest that there may be a higher bar for any reform proposals to clear than may otherwise have been the case, since in general 'one size fits all' rules may be expected to be less well adapted to the particular needs of individual cases than the decisions of experienced members of the judiciary who are familiar with the details of the cases concerned.
- (c) There is by now a long and well-established body of case law concerning courts' approaches to case-management and other issues in class actions proceedings, including in relation to protections afforded to group members and considerations to apply in dealing with legal costs and third-party litigation funders. Most of this jurisprudence relies on the broad powers currently in existence in Part IVA of the *Federal Court Act of Australia Act 1976* (Cth) ('the FCA Act') and its state analogues. Consideration should be given in any law reform context to whether and how the certainty and predictability afforded by this body of case law would be affected by any reform proposals.
- (d) Finally, we note that corporate entities are not the only parties affected by class action processes, funded shareholder class actions are not the only kind of class action

brought, and the availability of class actions serves a broader purpose than just the adjudication of disputes between parties in a particular case. The class action mechanism gives force and weight to a vast array of Australian laws and standards of conduct (including continuous disclosure obligations), which would be considerably less consequential and more poorly observed if corporations and governments were not aware that consumers and investors could act collectively to seek redress where it would prove impossible to do so individually. The combination of clear and appropriate legal standards, and strong enforcement mechanisms, has helped sustain higher safety and disclosure standards, and played a part helping derive greater economic benefits for the Australian community as a result. It is essential that any reform proposals be considered in light of the broader role that such legal standards and group-based claim mechanisms play.

We respond below to certain of the specific proposals and questions raised by the Commission in its Discussion Paper where we believe we can contribute to the debate concerning those issues.

1. Introduction to the Inquiry

Proposal 1-1: A review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges

- 1.1. Against the current and developing background of corporate misfeasance, and the extraordinary disparity in the power and resources that exists between Australian Stock Exchange ('the ASX') listed companies and retail investors (and consumers) affected by their conduct, we question the social or legal utility of any review of continuous disclosure obligations that was not explicitly framed to strengthen measures by which those companies can be held to account for their misconduct by investors and consumers. We anticipate that this would not be the purpose for which this proposal's supporters would intend that such a review should be used, however.
- 1.2. On the basis that any such review would afford consumers and investors (and those representing them) the ability to put forward submissions and evidence, we have no objection in principle to such a review being commissioned. We are confident that any such review would ultimately find what the empirical data has shown for some time now: that the existing suite of laws and procedural mechanisms available to enforce them have proved effective in improving the efficiency of the market and raising disclosure standards, that they have afforded entities who have suffered losses the ability to seek redress, and that there is no coherent social, legal or moral case for lowering the standards of conduct expected of large Australian corporations. Put plainly, the system currently works, and is working as intended.
- 1.3. We would, however, have concerns about any choice to commission such a review in the present climate, where such a process would inevitably be costly and time-consuming, considering the ongoing exposure of corporate malpractice in Australia through the current Royal Commission and otherwise, while critical regulatory agencies such as the Australian Securities and Investments Commission ('ASIC') and Australian Competition and Consumer Commission ('ACCC') have been expected to adjust to years of budget cuts. We expect that the Commonwealth funds that would be applied to a review of continuous disclosure laws and class actions would generate far greater economic and social utility by instead being restored to those agencies' budgets.
- 1.4. Should such a review be commissioned, it would be at least the fourth governmental inquiry addressing the operation and effectiveness of Australia's class action regimes in as many years.

In the absence of any new information to suggest that the position has changed meaningfully from that which existed at the times of those previous inquiries, and without any clear identification of an empirically-observed problem needing to be remedied or addressed, in circumstances where the regime has been repeatedly shown to be effective it is unclear what would be hoped to be achieved by a further process of inquiry.

- 1.5. The intent of Australia's continuous disclosure regime, and the importance of not undermining it, is perhaps stated most authoritatively by the Commonwealth Treasury itself, in its July 2018 submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry:

*"There is a core set of regulatory provisions that apply to corporate governance. These include the duties imposed on directors, and the periodic and continuous reporting requirements that apply to companies to ensure transparency to the market. These provisions recognise that there are divergent interests and information imbalances between the owners of a company (the shareholders, the principals) and the managers of the company (directors and executives, the agents). They are designed to ensure the shareholders are empowered to hold their agents to account. Without effective corporate governance standards, boards and executives can misuse their position of power in relation to their shareholders (and their customers) for personal gain and in ways that can fundamentally damage the financial sector and economy."*³

- 1.6. We fully agree with the views expressed by the Treasury in this regard.
- 1.7. Beyond this, we also note that the Australian public appears to have little appetite for suggestions of lowering corporate standards of behavior at present – and, we suggest, for good reason. The evidence adduced in recent months alone in the course of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry makes plain the considerable crisis facing participants in Australia's finance sector. Such misconduct is not confined to the banking or finance sector, however: examples identified to date in 2018 alone identify that aspects of corporate Australia are replete with a culture of malfeasance.
- 1.8. Rod Sims, chairman of the ACCC, recently set out a list of enforcement activity this year. Included in the instances of identified wrongdoing were the following examples:⁴
- (a) Ford was ordered to pay \$10m in penalties after it admitted that it had engaged in unconscionable conduct in the way it dealt with complaints about PowerShift transmission cars, sometimes telling customers that shuddering was the result of the customer's driving style despite knowing the problems with these cars;
 - (b) Telstra was ordered to pay penalties of \$10 million in relation to its third-party billing service known as "premium direct billing" under which it exposed thousands of its own mobile phone customers to unauthorised charges;
 - (c) Flight Centre was ordered to pay \$12.5 million in penalties for attempting to induce three international airlines to enter into price-fixing agreements;

³ The Treasury, Submission on Key Policy Issues, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, 13 July 2018, 7 [29]

⁴ Ross Gittins, 'How common is corporate crime? Too common', *The Age*, 18 July 2018

(d) Woolworths had proceedings instituted against it alleging that the environmental representations made about some of its Homebrand picnic products were false, misleading and deceptive.

- 1.9. Despite the demonstrated and ongoing need for greater and more effective regulation of Australian corporate entities, the 2018 Federal budget included a reduction in funding for the Australian Securities and Investments Commission ('the ASIC') of \$28 million over three years.
- 1.10. Our experience in acting for investors and consumers over the course of decades informs our strong view that without viable enforcement mechanisms in place, corporate laws and standards of conduct are meaningless. Regulatory agencies play a central and critical role in this regard, although even without the constraints on their resources from budget cuts, the scale of the problem is greater than can be completely addressed by regulatory action alone. The private enforcement and vindication of aggrieved parties' rights is an essential complement to the regulatory function in this regard, as has been noted on multiple occasions by the regulators themselves.⁵
- 1.11. Private action, particularly through collective mechanisms such as class actions, permits losses to be pursued by those most directly affected by breaches in corporate laws, and allows more regulatory resources to be directed elsewhere. In a period where the regulators are increasingly financially constrained, we suggest that the role of private enforcement actions takes on an increased importance.
- 1.12. Regulatory and private enforcement action both rely on a clear set of laws and legal standards to operate – in the present context, Australia's continuous disclosure regime has existed for almost as long as its class action regime has. As noted below, the standards that ASX-listed companies are expected to adhere to are not, by this stage, unclear or ambulatory – there is literally decades of history for corporations and their legal advisers to draw upon in this regard. Complaints about boardroom members' concern about unclear standards or fears of being sued are therefore, we suggest, misconceived: continuous disclosure obligations are not new or poorly-defined, and in any event would ordinarily be capable of being satisfied by companies applying the rule of thumb that if they are uncertain whether a piece of information ought to be disclosed to people who have invested or are considering investing in the company, then they ought err on the side of disclosure. The *rea*/ complaint from corporate Australia about class action litigation appears to be simply to the effect that companies are increasingly being held to account when they fail to meet the standards expected of them by Australian society. We suggest this is a poor basis for reform.
- 1.13. As is explored below, there is no evidence to support any suggestion that an increase in class action activity indicates an increase in the rate of unmeritorious claims being issued: the class actions being run seek to enforce standards of corporate behavior and obtain redress for losses caused by breaches of those standards, as is intended by the laws in place. It would be a

⁵ Alexx Boxsell, 'Regulators praise private court actions', *The Australian Financial Review*, 5 April 2012

Australian Institute of Company Directors, *Q&A with Greg Medcraft*, (1 September 2012), Company Directors, <<http://www.companydirectors.com.au/director-resource-centre/publications/company-director-magazine/2012-back-editions/september/interview-qa-with-greg-medcraft>>

Money Management, *ASIC backs private litigation*, (25 June 2014), <<https://www.moneymanagement.com.au/news/financial-planning/asic-backs-private-litigation>>

retrograde step to use the fact of increased numbers of meritorious claims to redefine what a 'meritorious' claim is, which we expect would be the ultimate purpose of any review into continuous disclosure obligations.

- 1.14. Despite the lack of justification for a review into continuous disclosure obligations, should one be commissioned we submit that it is essential that it be permitted to consider the full context of ASX-listed entities' participation in the Australian economy – in particular the substantial benefits such corporations obtain from their listed status (particularly through access to capital and capacity for growth, as well as reputational and other intangible benefits), and the outsized impacts they can have on individuals' investments and superannuation assets through their conduct. The three specific areas of focus identified for such a review by the Commission in Proposal 1-1 would be, with respect, dangerously one-sided if considered in isolation from the broader context within which ASX-listed entities and the continuous-disclosure regime operate.
- 1.15. Lowering the expected standards of corporate conduct because of an increased propensity for aggrieved parties to hold corporations accountable for breaches of those standards would be likely to result in a situation where corporations continue to enjoy the substantial benefits and advantages of their listed status, while leaving investors and consumers and, ultimately, the Australian economy to bear the costs of breaches of those standards.
- 1.16. Any review should also consider the problem of short-termism in corporate decision making, where corporate executives and boards are incentivised to maximise market favour in the next reporting window, and push longer-term issues into future periods. Short-termism is a significant drag on shareholder value, as preventable problems (or prudent long-term opportunities) are left unaddressed such that present-period costs do not impact on current results. The requirement that companies have reasonable basis for forward looking statements, including guidance, and the growing expectation that this requirement will be enforced by aggrieved investors, provides a meaningful force against short-termism, and ultimately improves shareholder value.
- 1.17. As such, in our submission it is also essential that any review to be commissioned should also consider the benefits to the Australian economy of the strong continuous disclosure standards that have remained in place, coupled with the enforcement mechanisms that have remained available concerning them. The combination of strong disclosure standards and effective enforcement mechanisms has provided certainty and security for investors and other Australian companies, and has led to improved economic outcomes for the Australian market as well as improved disclosure standards within the market. We expect that the consequence of a weakened regime would be a reduction in disclosure standards and worse investment outcomes for individual and corporate investors – including, relevantly, Australian superannuation funds. The net result to the Australian economy may be significant.
- 1.18. We suggest it is essential that any review that is proposed considers all aspects of the continuous disclosure regime, rather than merely examining the aspects of the regime that corporate Australia might not like in isolation.

Background and history of continuous disclosure regime

- 1.19. Continuous disclosure obligations serve an important consumer- and investor-protection function, but more broadly help drive higher standards of corporate accountability and,

ultimately, help enforce a more efficient and well-informed market. Through all of these means, they create value for Australian companies, individuals, and the Australian economy itself.

- 1.20. The introduction of Australia's continuous disclosure laws in 1994 followed a pattern of corporate misconduct in the late 1980s when *"many people lost money in circumstances that could have been avoided by timely and adequate disclosure of relevant information to investors"*.⁶
- 1.21. The central aim of the legislation was to provide statutory backing to the ASX Listing Rules, and in doing so, encourage the timely disclosure of relevant information, so that investors could *"have confidence in the integrity of the market place and make informed investment decisions"*.⁷
- 1.22. While the continuous disclosure rules impose an ongoing obligation on listed corporations, it is important that this responsibility is not considered in isolation. Companies that list on the ASX obtain significant benefits from listing in terms of access to capital, a greater public and investor profile, improved efficiency and valuation of securities, and perceptions of maturity and stability of investments among others. It is not unreasonable to assess that many companies have enabled tens, if not hundreds, of millions of dollars' worth of growth over the years as a result of listing. Considering the breadth of the substantial benefits enjoyed by listed companies, the attendant ongoing disclosure requirements are a fair and minimally burdensome standard of conduct that Australian's have a right to expect is displayed in exchange.
- 1.23. The ASX is one of the top ten exchanges globally for raising capital, boasting \$1.5 trillion in trading turnover in 2017, and facilitating over 2,200 listed companies across multiple sectors and geographies.⁸ The size of the market and the sheer scale of investments being protected by the continuous disclosure rules are particularly relevant factors to consider in any assessment of the law reform proposals: in circumstances where only a small proportion of companies have been the subject of a shareholder class action, criticisms expressed in terms of the individual effects of the regime on companies tend to ignore the fact that those effects are dwarfed by the size of the overall market being protected, and the economic value created and enabled, by the operation of the continuous disclosure rules.
- 1.24. Historically, the first iteration of Australia's continuous disclosure laws for ASX listed entities did not include any provision for the imposition of civil penalties. The obligation for a company to disclose information was therefore principally (though not exclusively) enforceable as a breach of the criminal law – and as a consequence, an enquiry as to whether the entity acted intentionally, recklessly or negligently was an element of the offence.
- 1.25. Establishing that an entity or individual had the requisite state of mind when withholding material information from the market proved challenging. The prospect of a regulatory body, or alternatively, an investor alleged to have suffered loss as a result of a company's non-disclosure, identifying sufficient evidence as to the company's state of mind to establish a proper basis for commencing a proceeding before the receipt of discovery was low. Companies rarely, if ever, confess to having deliberately withheld information from the market at the time of a corrective disclosure.

⁶ Commonwealth, *Parliamentary Debates*, Senate, 2 February 1994, 168-172 (John Faulkner)

⁷ Ibid

⁸ Australian Stock Exchange, *Listing with ASX* <<https://www.asx.com.au/listings/index.htm#>>

- 1.26. The difficulty in pursuing claims involving a mental-state element is evidenced by the fact that, as at 2001, there had not been a single criminal prosecution for a contravention of the continuous disclosure provisions since their introduction in 1994.⁹ It seems uncontroversial to suggest that there will have been numerous instances of inadequate disclosure by listed companies in this seven-year period, however without a viable method of enforcing the standards expected of these companies, the utility of the continuous disclosure rules was severely constrained. Losses will have been caused to investors through these instances of non-disclosure all the same, however they will have been left to be borne by those investors alone. Over this period, the listed entities concerned enjoyed the benefits that flowed from their listed status, but bore no risk of being held accountable for losses they caused as a result of that status.
- 1.27. In response to this state of affairs, when the relevant provisions were amended by the *Financial Services Reform Act 2001* (Cth) in March 2002, the civil penalty regime was extended to continuous disclosure breaches. Simultaneously, for civil liability the mental-state elements of the provisions were removed – recognising, it seems, the expectation that a listed entity should be accountable for losses caused by conduct within its control in this manner, regardless of its intent.¹⁰ Requirements to establish intentionality, recklessness or negligence were maintained in respect of criminal liability, pursuant to the Criminal Code.
- 1.28. In *ASIC v Chemeq Ltd*,¹¹ Justice French of the Federal Court observed that:
- "the importance attached to the continuous disclosure provisions of the Act by the legislature is emphasized by the penalties for their contravention which have recently been significantly increased and their widened scope since 2002 which is now not limited to intentional, reckless or negligent non-disclosure. That is not to say that elements of intention or recklessness or negligence will not be relevant to the penalty to be imposed".*¹²
- 1.29. The removal of the mental-state elements for the purpose of establishing civil liability was a deliberate choice by the legislature, and it removed a critical barrier which had effectively prevented the successful prosecution of any listed entity for breach of disclosure obligations. As was observed at the time, *"with no apparent risk in breaching the law Australian companies would appear to have little incentive to comply with it"*.¹³
- 1.30. The amendments enabled effective enforcement action in respect of identified wrongdoing, and in our submission have played a central role in incentivizing higher standards of corporate conduct and protecting investor value. It is not the case, however, that the removal of the mental-state elements created a flood of shareholder or regulatory litigation.

⁹ Joe Longo, 'Market Misconduct Provisions of the Financial Services Reform Act: Challenges for Market Regulation' (Paper presented at Centre for Corporate Law and Securities Regulation seminar on Market Misconduct and the Financial Services Reform Bill), Melbourne, 25 July 2001, 41.

¹⁰ Law Council of Australia, *Submission to the Australian Stock Exchange Regarding Continuous Disclosure*, 16 December 2011

¹¹ [2006] FCA 936

¹² *Ibid* at [46]

¹³ Australian Labour Party, 'Labor's Plan To Improve Corporate Governance Practices' (Media Release, 28 March 2001) 2.

The statutory threshold

- 1.31. The Discussion Paper appears to proceed on the basis that the current statutory framework regulating ASX listed entities' market disclosure obligations is onerous. We disagree with this premise.
- 1.32. The Commission further suggests that factors informing the tendency for securities class actions to settle might include "*the cost of running a matter to final determination, the risk of litigating unsettled legal principles (such as the market-based causation theory), and the difficulty of disproving contravening conduct in the face of the low statutory threshold*".¹⁴ While some of these elements will likely be relevant to parties in different contexts, we think the more straightforward explanation for such settlements is the fact that listed entities and their legal advisers are aware of the disclosure standards all such companies are expected to meet, and they recognise they will have some liability where they have breached those standards and caused loss.
- 1.33. We therefore disagree with the notion that securities class actions have a tendency to settle principally for the reasons referenced above, or with any implication that a tendency for such cases to settle is an undesirable state of affairs. There have clearly been cases in which running a case to trial and beyond would have been more economical for a defendant party confident that it had not breached its disclosure obligations than the settlement ultimately reached (indeed, in an environment where most shareholder class actions seek losses of over \$50 million, we would expect that this is the norm). In circumstances where a defendant feels that it has not breached any of its statutory or listing rules requirements, they have the choice to pursue the claim to trial and full judgment, or otherwise seek preliminary determinations of breach issues for instance. The defendants we have observed in Australian shareholder class actions have invariably been represented by very sophisticated and experienced teams of commercial and class action lawyers; it would be surprising, to say the least, if despite this representation companies were regularly paying tens of millions of dollars in compensation for claims they considered were meritless. It seems to us that the more likely explanation is that such companies settle in order to make the best commercial arrangements they can to conclude proceedings when they recognise they will face some liability for breaking the rules by which they know they must abide as a condition of listing.
- 1.34. We further disagree with the Commission's characterisation of the statutory threshold as 'low'. As noted above, the mens rea elements were:
- (a) included in the original iteration of the legislation in circumstances where criminal penalties were the principal means of enforcement;
 - (b) productive of no meaningful enforcement action against a listed entity until the statutory reforms of 2002; and
 - (c) deliberately altered in those reforms in respect of civil claims in order to give real force to the continuous disclosure standards expected of listed entities.

¹⁴ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018) 32

- 1.35. The law as presently drafted cannot in our view be characterised as 'onerous'. It merely requires the timely disclosure to the market of information that is price-sensitive. A substantial number of large listed entities appear to have no difficulty with this concept. When considering the small number of claims filed and breaches determined as compared to the size of the ASX and the duration of the listing rules regime, if the existing regime were truly 'onerous', it might be expected that a substantially greater number of listed companies would be caught out more often. There is nothing 'onerous' about what is required of companies in this regard, though, or about the fact that these standards are able to be enforced by investors who have suffered losses as a result of breaches.
- 1.36. A listed entity is required pursuant to s 674(2) of the *Corporations Act 2001* (Cth) ('the **Corporations Act**')¹⁵ to disclose information only in circumstances where it is material, not otherwise generally available, and not caught by any of the exceptions in Listing Rule 3.1A¹⁶.
- 1.37. Further, an entity must have information – that is, its officers, as defined in section 9 of the *Corporations Act*¹⁷ and ASX Listing Rule 19.12¹⁸, must be aware of the information within the meaning of Listing Rule 19.12 – in order for a disclosure obligation to arise.
- 1.38. In the premises of the preceding two paragraphs, we do not consider that there is any basis to the suggestion that the continuous disclosure rules are unjustifiably onerous or burdensome, particularly when considered in light of the benefits corporations enjoy as a result of their listed status, and the economic benefits generated for the Australian market by the efficiency and security created by these standards of behaviour.
- 1.39. The purpose of the continuous disclosure laws is to ensure that the share market operates on an informed basis. The continuous disclosure of material information "*allows securities, or more importantly their associated risk, to be priced accurately allowing for the appropriate distribution of capital through the economy*".¹⁹ The civil liability provisions exist to achieve this objective – ensuring that listed entities conduct their business in a manner which means that the market is properly apprised of all relevant information required to reach an informed view of the value of a company.
- 1.40. It is true that the 2002 changes to Australia's continuous disclosure laws resulted in an increase in the number of companies held to account – the rates escalating from *zero* criminal prosecutions before 2002, to 70 shareholder claims seeking to recover losses for investors from 1 December 2004 to 31 May 2017.²⁰ This is hardly an overwhelming volume of claims, however, and moreover appears to have been the intent of those reforms.
- 1.41. We suggest that any assessment of the functioning of the regime should take account of the following values articulated by Chief Justice Allsop AO of the Federal Court: "*the vindication of just claims, the encouragement of proper behaviour by putative wrongdoers, and the elimination,*

¹⁵ *Corporations Act 2001* (Cth), s 674(2)

¹⁶ Australian Securities Exchange, *Listing Rules*, r 3.1A

¹⁷ *Corporations Act 2001* (Cth), s 9

¹⁸ Australian Securities Exchange, *Listing Rules*, r 19.12

¹⁹ Brahma Dharmananda, 'Market Disclosure Obligations and Director's Duties', 26 October 2009, 18

²⁰ Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia', July 2017, 28.

without undue expense, of unworthy claims".²¹ Measured against this standard, we consider the evidence establishes that the combination of continuous disclosure obligations and class action procedures has been successful.

- 1.42. Market participants have observed that *"increased class action activity was prompting more companies to update the market with bad news instead of riding out confession season in the hope that trading picked up"*.²² This is exactly what should be happening, and in our submission is a sign that the existing regime is working as intended. In our experience, significant shareholder value has frequently been destroyed when those hopes prove to be fanciful, and a corporate entity finally reveals its true position to the market in a late corrective disclosure. Timely disclosure, on the other hand, permits trading in securities to be conducted on an informed basis.
- 1.43. We consider that the successful prosecution and resolution of shareholder class action proceedings has therefore encouraged proper behavior by putative wrongdoers, and otherwise provided a viable mechanism for meritorious claims to be vindicated. In our experience and observation over the life of the continuous disclosure regime, corporate disclosure standards have risen over the last decade, which we attribute largely to the effect of shareholder class actions on corporate behaviour.

Meritorious claims

- 1.44. Implicit in other criticisms of the regime has been a contention that some claims are pursued which lack merit, or which settle despite a lack of wrongdoing on the part of a defendant out of a desire to avoid costs or public embarrassment. In this regard, we note the recent return of calls for the introduction of a US-style system of certification for class actions to 'weed out hopeless claims before companies incur unnecessary legal costs'.²³ As we have noted in previous submissions, we think there is very little substance to this line of argument.
- 1.45. This issue has now been examined on multiple occasions, with consistent conclusions being drawn. In our assessment, calls for the introduction of certification procedures, and the review of continuous disclosure laws are solutions to problems that have not been shown to exist. The available evidence does not support any suggestion that there is a mass of unmeritorious claims being issued which require a change in the rules to address it. The system already has built-in disincentives to avoid unmeritorious claims, and Courts already have adequate powers to enforce them.
- 1.46. The adverse costs rules in the Australian legal system, combined with lawyers' professional and ethical obligations to have a proper basis to commence proceedings, have been effective in avoiding the feared flood of unmeritorious litigation. Added to this, class action lawyers in Australia will typically act on a conditional-fee basis or act with the backing of a third-party litigation funder, ensuring that all affected parties have a direct financial incentive to pursue successful proceedings only – issuing a speculative or unmeritorious claim does not make any financial sense in that context. It is difficult to comprehend how a certification regime, which is

²¹ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018) 28, citing The Honourable Chief Justice JLB Allsop, 'Class Actions' (Speech, Law Council of Australia, 13 October 2016)

²² Vesna Poljak, 'Confession season starts on high', *The Australian Financial Review*, 7 May 2018

²³ Chris Merritt, 'Call for US-style vetting process for class actions', *The Australian*, 20 July 2018

an often lengthy and complex preliminary exercise in US-class action litigation, could achieve this aim any more effectively than existing legal mechanisms to prevent 'hopeless' claims.

- 1.47. Although there have been some rare instances where proceedings have been discontinued at an early stage where a defendant has adduced evidence to disprove allegations of wrongdoing, it is not the case that investor class actions are initiated against listed entities merely in response to instances of material falls in a company's share price. In considering the viability of a prospective claim, most practitioners considering initiating such a claim engage in extremely thorough and careful investigative processes to determine whether there exists sufficient evidence to sustain an allegation that a company has engaged in relevant breaches of the *Corporations Act* and the *Australian Securities and Investments Act 2001* (Cth)²⁴ ('the ASIC Act'), and to determine whether there is a proper basis to pursue proceedings, before taking steps to issue a claim. As observed in the Victorian Law Reform Commission ('the VLRC') Report:

*"It is important that the damages which are capable of being recovered justify the cost of litigation. Legal claims often involve layers of potential damages. For a legal claim to be successful it must have a strong inner core of liability."*²⁵

- 1.48. We also note in this regard that the VLRC Report also concluded that the involvement of litigation funders in the legal system does not cause an upsurge in speculative or insubstantial claims.²⁶
- 1.49. Seventy-one per cent of all shareholder class actions filed in Australia as at 31 May 2017 were supported by litigation funders.²⁷ As noted above, funders make a careful assessment of the viability and risk attending a potential class action proceeding before committing to funding the claim. The clearest indicator of the merits of funded class actions at the Federal level is the high rates of settlement approvals and the extremely low rates of claims failing or being struck out. A careful process of due diligence precedes any commitment by a litigation funder to fund a claim, and a law firm to commit to issuing the proceeding. The result is that the claims that are issued are considered by multiple parties to be valid and sustainable before they ever reach a court registry: the system is not set up to incentivise unmeritorious claims.

Efficient markets and effective regulation

- 1.50. The existing disclosure rules are appropriate because they provide the information necessary for investors and participants in the market to be well informed. Not only is this productive of greater value for the Australian economy, but it is also in practice a small price for companies to pay considering the benefits they receive from being listed. Absent these standards, the size of the market means that listed entities would be capable of potentially causing substantial loss to others while facing minimal risk of being held accountable for their actions. Litigation or regulatory action is an entirely appropriate response when the standards are breached – such action can serve as a corrective measure, to ensure that losses caused by companies are not externalised and borne by other investors or the wider economy, and incentivise proper conduct. This is not a negative state of affairs, but rather an important feature in a well-operating system.

²⁴ *Australian Securities and Investments Act 2001* (Cth)

²⁵ Victorian Law Reform Commission, 'Access to Justice – Litigation Funding and Group Proceedings', Report (2018) 23.

²⁶ *Ibid* at 23

²⁷ Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia', July 2017, 30.

Listed companies are sizeable and sophisticated enough to know the rules that will apply to them when they decide to list; it is not burdensome or onerous to expect them to abide by them, or for them to be held accountable for losses caused where they do not do so.

- 1.51. A well-informed market has greater economic benefits for the country than the alternative, and allows individuals and other entities (such as superannuation funds, which are major investors in ASX-listed companies and which are the custodians of the assets of a vast array of individual Australians), to make better investment decisions, as well as rendering investments and the movement of capital generally lower risk and more safe. The costs to individual listed companies of having to comply with the rules must be considered in the context of the broader costs to the economy and Australian society that would be produced by lowering the standards set by those rules. The case for lowering the standards, or removing means of holding corporations accountable for breaches, does not appear to have been made out.

The propensity for corporate entities to be the target of funded shareholder class actions in Australia

- 1.52. Having regard to the number of ASX listed entities, empirical research concerning the operation of the Federal class actions regime indicates that only a very small proportion of those companies have ultimately become the subject of shareholder class action litigation.
- 1.53. The ASX boasts more than 2,100 listed companies and issuing entities.²⁸ Since the genesis of the federal class action regime, an average of only 1.88 companies have become the subject of shareholder class actions per year,²⁹ and over the five years to July 2017, the 43 shareholder class actions filed concerned the conduct of a total of 27 companies, equating to class actions filed every year with respect to the conduct of an average of only five companies.³⁰
- 1.54. The thrust of this debate has been regularly miscast in terms of absolute rates of claims without consideration being given to crucial contextual considerations. The correct measure for the purposes of any reform exercise should be the numbers and rates of *meritorious* and *unmeritorious* claims – and the data does not establish that there is a problem in this regard. As observed by Professor Vince Morabito in his exhaustive review of the 25 year history of the regime:

“There are a number of factors which suggest that we are not witnessing the proverbial opening of the floodgates with respect to these two categories of class actions.”³¹

Over the last five years, class actions were filed every year with respect to the conduct of, on average, five companies. Symbolic of this scenario are the shareholder class actions, filed over this five year period that saw the involvement of Mark Elliott: 15 class actions on behalf of the shareholders of 8 companies. It should also be noted that if one person, albeit a very active and creative one such as Mark Elliott, was able to “generate” just over

²⁸ Australian Stock Exchange, *Corporate overview* <<https://www.asx.com.au/about/corporate-overview.htm>>

²⁹ Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia', July 2017, 31.

³⁰ Ibid at 31

³¹ Ibid at 29

*one-third of the country's shareholder class actions over the last five years, then the shareholder class action industry cannot be as vibrant as we have been led to believe.*³²

- 1.55. Despite an apparent increase in the level of activity in respect of Part IVA shareholder claims in the recent years, the use of this mechanism has concerned the conduct of a "very small number of companies and a miniscule proportion of all publicly listed companies".³³
- 1.56. The claims that have been commenced have, to an almost overwhelming degree, been brought in response to alleged breaches of the disclosure and listing rules by listed entities, brought on a proper basis by lawyers and members of counsel who are officers of the court, and supervised by judges who are very experienced in securities litigation class-action case management. Cases which a defendant considers are without merit or are otherwise inappropriate can be responded to by those parties in a variety of forms to test or overturn the proceedings, including in applications for the proceeding to be struck out or for orders under s33N (or its equivalents) of the relevant legislation. The cases that have settled have been the subject of judicial scrutiny to ensure that resolutions are fair and reasonable and are reached in the interests of group members.
- 1.57. The above factors are how the merits of the claims are tested in Australia's class actions regime. Above all else, it is the *merits* of the claims that are brought which should be the test for a well-functioning regime. Consideration of the "*propensity for corporate entities to be the target of funded shareholder class actions in Australia*" is, with respect, a meaningless basis upon which law reform options can be considered without also considered whether those entities have in fact breached their obligations: corporate entities that contravene the rules and laws that apply to them *should* properly be held to account. It is hard to imagine the logic of this proposition being applied in other contexts – for example, data about the numbers of fines issued and prosecutions commenced in respect of speeding drivers would seem unlikely to result in suggestions being taken seriously that speed limits should be abolished or dramatically increased.
- 1.58. If more corporate entities breach the rules and cause losses, then there should be more regulatory or private enforcement action (including class actions) that follows. If third-party funding enables some such claims to proceed in circumstances where they otherwise might not, then that is still more enforcement activity than otherwise would have been the case. The propensity for corporate entities which breach the rules to be the subject of meritorious class actions is an appropriate goal of the system, and should be supported.
- 1.59. Conversely, the propensity for corporate entities that have not done anything wrong to become the target of a class action, is a circumstance that does not seem to arise in practice, as there are existing built-in procedures and mechanisms to provide clear discouragement in those circumstances. If there was an increased rate of unmeritorious claims being pursued, we would agree that this would be a circumstance worthy of reform – but the evidence does not suggest this is the case.

³² Vince Morabito, *Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (11 July 2018), 31

³³ *Ibid*

- 1.60. Professor Morabito's most recent empirical research reinforces that, on the basis of an objective assessment of the rates of class action claims filed in Australia (both over the lifespan of the regime, but also in more recent times) a total of approximately 563 class actions were filed up to 31 May 2018, constituting an average of just 21.4 class actions filed every 12 months since 4 March 1992.³⁴
- 1.61. He concludes that "*in a country with a population of over 24 million people, an annual average of 24 class actions filed over the last four years in the country's national court, cannot rationally be viewed as excessive*".³⁵ We agree.
- 1.62. In our view, it is essential that any contemplation of reform in the class actions space be firmly grounded in a balanced assessment of the available evidence. There is no 'flood' of litigation, and over the course of the lifetime of the continuous disclosure rules only a small proportion of ASX-listed companies have been the subject of shareholder class actions. We suggest that this state of affairs does not provide support for any proposal to depart from the status quo by lowering expected corporate standards or conduct or limiting the means by which investors can hold corporations who breach those standards to account.

The value of the investments of shareholders of the corporate entity

- 1.63. In our view, it is unclear why class action processes should be treated any differently than any other legal claim in this respect.
- 1.64. If a company has a liability of any kind, this is a matter that will generally always be relevant to any measure of its value and assets, regardless of the ownership structure involved. If a company causes losses as a result of its conduct and there is a cause of action available to aggrieved parties, then in principle we suggest that the damages they are liable to pay should be assessed in the orthodox way, by reference to the amount of loss caused, regardless of the nature or status of the company. Any suggestion that a listed company should somehow have a greater shield against liability than an unlisted one in this regard seems fundamentally problematic, and may give rise to a number of perverse incentives for companies to structure themselves in ways that may avoid liability for valid claims.
- 1.65. It is not consistent with our experience that the announcement of a shareholder class action necessarily causes the share price of a company to further decline. An announcement of a prospective class action in respect of a potential securities claim follows both the release of the relevant information initially withheld from the market, and the material decline in share price that is the subject of the claim.
- 1.66. Further, if there is concern that private enforcement of shareholder rights can affect investment value, it is difficult to ascertain why regulatory action would not have the same effect. One such example is the Commonwealth Bank of Australia, which currently faces a shareholder class action after admitting to breaches of anti-money laundering and counter terrorism financing laws – in this regard, it was recently fined \$700 million – the largest civil penalty in Australian corporate history. We note that regulatory consequences and penalties do not appear to be the

³⁴ Vince Morabito, *Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia* (11 July 2018), 8

³⁵ *Ibid* at 9

subject of the same criticisms as class actions in terms of their potential effects on listed entities' share prices, despite the similar purposes and effects between the two mechanisms.

The availability and cost of directors and officers liability cover within the Australian market

- 1.67. It is also unclear why the availability and cost of directors and officers (D&O) liability cover within the Australian market is of such significant concern to necessitate a review of the continuous disclosure regime.
- 1.68. It is important to note at the outset that the debate regarding increasing challenges in securing this species of insurance coverage seems to be driven principally by anecdotal reporting and commentary. There currently seems to be very little data to properly inform the debate.
- 1.69. As the Discussion Paper has indicated, there is evidence to suggest that insurance for D&O liability cover – in particular, the Side C cover extension that is taken up by ASX listed entities to cover the costs associated with class actions – has been subject to 'chronic under-pricing'.
- 1.70. As such, it follows that any material increase in the cost of this insurance cover is the result of more accurate pricing of the costs associated with a failure to comply with the legislative obligations imposed by the *Corporations Act* and the *ASIC Act*. This does not appear to be reflective of an upsurge in the number of actions being issued – which we again note is not borne out by the evidence, as shown in the empirical data presented by Professor Morabito.
- 1.71. It should also be noted that a fixation on a percentage increase in the price of D&O liability cover, assessed against a starting point of 'chronic under-pricing' is a poor basis for any law reform analyses: relative increases will plainly appear large when compared to inappropriately low starting figures. In the context of the present debate, we suggest that a focus on the actual costs and figures involved will be more informative. A simple analysis of the absolute cost of the insurance relative to the size of the businesses being insured should be sufficient to conclude that the case for changes to continuous disclosure rules has not been made out in this regard.
- 1.72. If it can be assumed that \$100 million of insurance coverage costs *up to* approximately \$500,000 per year, as recent media reports would suggest,³⁶ we acknowledge that this is not an insignificant amount of money. However, this is presented as the upper end of a range of costs that may apply to a large listed entity that required this level of coverage (noting that the majority of shareholder class actions to date have resolved for amounts substantially lower than \$100 million). There has been no evidence to date to suggest that this is an oppressive cost, given the financial position of businesses that are likely to require this level of coverage – especially in the context of the profits and executive remuneration reported for top ASX listed companies.
- 1.73. Further still, it should be emphasised that this cost represents a tiny fraction of the losses suffered by shareholders where breaches of the *Corporations Act* and *ASIC Act* occur. The cost of D&O liability cover realistically represents the cost of doing business for entities of this scale, and it is not appropriate to characterise a correction in the pricing of these policies as an issue that justifies the weakening of the continuous disclosure regime to the detriment of investors and consumers.

³⁶ Alice Uribe, 'Royal commission adds pressure to loss-making directors' and officers' insurance, *The Australian Financial Review*, 8 July 2018

- 1.74. Although it is perhaps trite to observe, it also bears repeating that ASX listed companies can always mitigate their risk by complying with their legislative obligations in the first instance – the absence of evidence of unmeritorious claims being brought by claimants underscores the point that the most effective legal strategy companies can employ will be to maintain high disclosure standards. We also note that, although it may not be practical, it is not mandatory for ASX listed companies to take out Side C cover in order to be listed on the ASX. Similarly, we suggest that the purported difficulties presented by the availability or cost of insurance cover might further encourage ASX listed entities to ensure their conduct complies with their existing legislative obligations – and it is likely that a broad increase in corporate disclosure standards would limit the number of shareholder claims brought against listed entities, thereby reducing the cost of insurance over time.
- 1.75. To the extent that the cost of Side C coverage has increased, this appears to be a correction to more appropriately price in the risk of corporations being found to be liable for losses caused to investors. In this regard, given the absence of evidence of unmeritorious claims being brought, it appears to principally be a consequence of the sector's own conduct. For law reform purposes, it seems counterintuitive for listed entities to receive protection from the consequences of their own failings by making it harder for them to be held accountable, leaving the losses they cause to be borne by investors and the broader community in this context.
- 1.76. If a review as proposed is commissioned, it will be necessary for the anecdotal evidence of corporate entities to be properly tested having regard to evidence of the actual cost of insurance, and the rate at which insurance entities have either left or entered the Australian market for Side C coverage. Even if the absolute cost of such insurance can be shown to be high and difficult to obtain (which we are presently not convinced of), in our view companies do not have a right to be able to insure the possible cost of failing to comply with statutory obligations, or a corresponding right for such obligations to be weakened if their 'right to insurance' is not met. Again, the exercise appears to be one of listed companies seeking to take the benefit of existing in a market (that has bequeathed upon them significant capital investment) without the corresponding cost.

2. Incidence

- 2.1. We note the Commission's comments in relation to the current and recent trends concerning class action litigation in Australia, and note that no specific proposals or questions are advanced in relation to this topic.

3. Regulation of litigation funders

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

- 3.1. In the event that the litigation funder licensing requirements set out in Proposal 3-2 are recommended, we agree that careful consideration will be required to ensure that the role of the Australian Financial Complaints Authority ('the AFCA') can *"complement and not overlap with the primary role of the courts in supervising the class action regime"*.³⁷

³⁷ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 61

- 3.2. In particular, there is a risk that any external determination processes available through AFCA could operate on a different timetable to a proceeding or settlement distribution scheme, which could ultimately delay distribution to other group members who are not a party to the complaint. Once a dispute is being handled within an external system such as AFCA, it is unclear what powers a court could exercise to ensure that this process did not disrupt or delay a court-based process such as a settlement distribution scheme. External dispute-resolution organisations such as AFCA will not owe obligations to other group members in a class action or be required to have regard to their interests or the interests of the proceeding overall, necessarily –presumably, their remit will be confined to determining the dispute between the funder and the complainant. Such an arrangement presents a multitude of opportunities for the external dispute resolution process to disrupt or interfere with the orderly conduct of a class action or settlement distribution process, which we submit should be avoided.
- 3.3. Further, it is unclear how the outcomes of complaints made within the AFCA scheme would interact with court proceedings. In order for AFCA's recommendations to have effect, courts may be required to make rulings or otherwise consider how to apply the outcome of an AFCA complaint. Similarly, the Court may need to consider whether the outcome ought to be applied to all group members in the class action, or just to those who have lodged a particular complaint. The necessity of the Court's involvement in these considerations means that in most instances it may be more efficient for issues relating to terms of funding agreements to be directly handled by the supervising judge, rather than to be initially considered by an external party such as AFCA.
- 3.4. For example, in the context of a class action settlement, the objection process provides the best and most appropriate means by which complaints from group members can be considered and resolved. It occurs at the point in a claim when a funding agreement or relationship will have a specific impact on group members' outcomes, and also occurs following a notification process by which all group members are informed of the ability to raise a complaint or objection, as well as the precise effect of any funding arrangements on each group member's entitlements. It also can result in tangible results that can affect the entire class, in that the Court can reflect on group members' complaints when deciding whether or not to grant or reject a proposed settlement.
- 3.5. It also bears noting that the publication of a settlement approval decision will often detail the nature and quantity of complaints or objections from group members – often at some length – which provides for a greater level of transparency to both group members and the public than might be produced in a dispute resolution process managed by an external regulator. Considering the volume of open and confidential material made available to a court in the course of a settlement approval application, we expect that the determination of such objections by a court will also invariably be conducted on a better informed basis than would be the case through an external dispute-resolution process.
- 3.6. More broadly, we are mindful of courts' ultimate roles in the administration of justice, and in the class action context the specific tests applied to ensure a settlement is fair and reasonable and that arrangements put in place are in the interests of group members and not simply the named parties to the litigation. The position occupied by courts in the management of class action proceedings is unique, and in our submission renders them best placed to determine the majority of intra-litigation disputes between group members and funders.

4. Conflicts of interest

- 4.1. The Commission's Discussion Paper posits that "*while funding agreements generally make clear that solicitors act for the class members, funders, at least in the Australian context, are often intimately involved in proceedings. Solicitors may be influenced by the commercial needs of funders with whom they have established a relationship, and may face further conflicts where there are multiple classes within the one action*".³⁸ The Commission has also referred to other circumstances in which a conflict between the interests of the applicant and the litigation funder might arise. We have commented extensively on these issues previously, including in our earlier submission to the VLRC; we repeat those comments below in responding to the Commission's proposals as appropriate.
- 4.2. As a consumer-focused law firm, we support any effort that will strengthen the protections and rights available to group members in class action proceedings, and which will enhance public confidence in the integrity of the class action regimes. We therefore support the Commission's proposals concerning the management of conflicts of interest in group litigation.
- 4.3. However, we have reservations about the comments made in the Discussion Paper concerning the justification for such reforms based on the experience of class action litigation to date, as well as the public and media commentary on this issue. Our observation is that this issue in particular has been driven by anecdotal reports and speculation about the kinds of relationship dynamics that exist between lawyers, group members and funders, rather than any actual data or evidence as to the conduct of particular actors or the experiences in particular cases. We are concerned that much of the speculation and hearsay that has passed for evidence in this area to date, at least some of which appears to have been received by the Commission in respect of existing practices, is inaccurate and ill-informed, and wrongly conveys the impression that the theoretical conflicts said to exist between lawyers duties to their clients and their relationships with litigation funders have commonly arisen in practice. In our experience and observation of the industry to date, this has simply not been the case.
- 4.4. We note in particular the comment made by the Commission in the Discussion Paper that it "*has heard of pressure being placed on solicitors for representative plaintiffs by litigation funders to settle class action proceedings prematurely*".³⁹ This is an extremely serious allegation, and if it has occurred it is essential that it be examined in detail and addressed publicly. As things presently stand, however, it has been expressed in a manner so non-specific as to make it near-impossible to respond to, leaving many respondents to the Discussion Paper in the difficult position of having to address an issue which appears to be the only suggestion that a greater 'conflict problem' is anything other than hypothetical, without having any actual details about what is said to have occurred. We suggest this is a poor basis upon which to conduct a law reform discussion. An allegation as serious as this should be examined publicly to enable a debate as to whether it highlights a gap in the existing regulatory environment. In the current circumstances this is not possible.
- 4.5. In any event, we have significant reservations about the veracity of such a statement, and suggest that if the Commission intends to use such a report as a justification for any particular

³⁸ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018) 63

³⁹ *Ibid* at 72

form of recommendation, then further examination of this report should occur. Specifically, we note the following:

- (a) The Commission should consider the nature of the source of this report: did it come from a funder or a lawyer acting for a representative plaintiff? If it did not, how did this party come to possess this information? It is unlikely that other participants in any piece of litigation (or indeed any non-participants in the litigation) would be privy to such communications.
 - (b) The Commission should consider whether this comment was made in relation to any specific piece of litigation, or to describe a relationship between a funder and a law firm more generally. For obvious reasons, that context can significantly change the interpretation of any communications between the funder and the firm in this regard.
 - (c) The Commission should examine and explain what 'prematurely' is meant to mean in this context, and how this relates to the actual value of any claim that is sought to be resolved. If a claim settles early at full value, or for an amount that leaves group members with a strong return having regard to the costs of further litigation, it should be explained why this is considered to be a negative outcome. Consideration should also be given to whether a funder would actually be likely to adopt an approach seeking to settle claims for sub optimal value, given it has a direct interest in maximising the size of any claim.
 - (d) The Commission should also consider what the instructions of the representative plaintiff were in this context, and more fundamentally, what the plaintiff's lawyers actually did following such a communication from a funder. If a disagreement as to the conduct of the litigation was resolved between the lawyers and the funder through further debate and discussion, it should be considered whether this is not, in fact, an example of the status quo operating well. Conversely, if there is a suggestion that a settlement proceeded for a sub-optimal outcome, it would need to be explained how and why a court approved it.
- 4.6. It will be apparent that we have significant reservations as to the accuracy of the reports that the Commission has heard of in this regard. We submit that significantly more information should be available as to any actual problems that have emerged in relation to the management of conflicts, and significantly more interrogation of anecdotal reports should occur, before such material should be used as a basis for law reform decisions.
- 4.7. In relation to the broader suggestion that, at least hypothetically, there exists an unmanaged greater risk of conflicts arising in the tripartite relationships between lawyers, funders and group members, we make two primary points.
- 4.8. First, it is inconsistent with our extensive experience acting for group members in funded proceedings. Litigation funding entities are acutely aware of the requirement for the Court to ultimately consider whether to approve a settlement of proceedings. Although we are aware of speculation amongst participants in the D&O insurance market to the effect that the Court will 'rubber-stamp' any settlement brought before it, this is not consistent with either our belief or experience. As a matter of practice, pressure being brought to bear by a funder to settle a case early makes little sense: funders make their money by recovering a proportion of the damages paid, so they have a clear incentive to see the claim be as large as possible. In addition, it should be noted that defendants will obviously need to agree to a resolution of a claim before any settlement can exist, and in our experience defendant lawyers are equally as conscious as

plaintiff lawyers that any deal that is struck to resolve a claim will need to be capable of being approved by a court. All lawyers involved in such a negotiation would also be aware that the factors giving rise to a settlement – including any pressure from a funder – will be required to be disclosed to the court in the settlement approval materials filed. For all of these reasons, a suggestion of pressure to settle inappropriately originating from funders makes little sense.

- 4.9. Further, it wrongly characterises the relationship between lawyers and litigation funders as one in which the funder exercises a high degree of control over the substantive legal matters and decisions made in any given proceeding. Again, having regard to our experience and practice, litigation funding entities rely heavily on the advice provided by lawyers and counsel in developing views about the litigation – and in particular, in assessing whether a settlement offer is fair and reasonable, and in the best interests of group members.
- 4.10. In the event that a disagreement exists between the lawyers conducting the litigation and a funder, in our experience this is generally resolved by way of vigorous discussion between both groups – in many respects, the ultimate decision made benefits from the involvement of a broader range of individuals with different perspectives and experience. Further to this, the role of counsel on the rare occasions where these differences of opinion arise must be noted. Counsel provide a further independent perspective and are often the ultimate arbiter in situations like this.
- 4.11. As we have previously observed in our submission to the VLRC's review, there is little empirical evidence of conflicts causing detriment to consumers of litigation funding,⁴⁰ and participants in the sector have observed that *"while risks of conflict in funded class actions are possible, they are likely overstated as a practical matter for the following reasons:*
- (a) Group members are always represented by a lawyer who is required to act in their best interests;*
 - (b) Pursuant to s 33V of the FCA Act, any settlement must be approved by the Court;*
 - (c) There are limited instances where a settlement has been rejected by group members on the ground of substantive unfairness that could be reasonably linked with any perceived conflict of interest between the funder and group members. Similarly, there is limited empirical evidence as to the performance or position of conflict of their funders;*
 - (d) Recent regulations have introduced a requirement that all funders maintain a management of conflicts policy"*⁴¹
 - (e) As the Commission has further observed, ASIC Regulatory Guide 248 requires that "certain terms must be included in the funding agreement, including a cooling-off period so that*

⁴⁰ Wayne Attrill, 'The Regulation of Conflicts of Interest in Australian Litigation Funding' (Paper prepared for the UNSW Class Actions: Securities and Investor Cases Seminar), Sydney, 29 August 2013, 2

⁴¹ Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 205, 223

members may seek legal advice, and an obligation for solicitors to give priority to the instructions given by a member over those of a funder".⁴²

- 4.12. As to the Commission's observation that "*solicitors may be influenced by the commercial needs of funders with whom they have established a relationship*", as we have noted in the context of the VLRC Inquiry, in our experience this is unlikely to arise. A situation in which fidelity to a funder overrode a lawyer's professional obligations to their clients is unlikely to be beneficial to either the lawyer or the funder.
- 4.13. We acknowledge that the maintenance of professional relationships with litigation funders is important for some firms, but it is our strong view that this outcome is best achieved by the provision of robust and frank advocacy on behalf of a client group. It is, after all, the court and clients to whom lawyers owe their professional obligations, in priority to any relationship that exists with a litigation funder.
- 4.14. In our view, funders looking for 'repeat business' would be poorly served by working with lawyers who do not act independently and in their clients' interests, and sophisticated funders would almost invariably recognize that working with lawyers who were exposed to a conflict of interest in this way would place their own investment in a case at risk, and would avoid doing so.
- 4.15. We make these points not to dismiss the Commission's proposals in respect of enhanced conflict management – rather, we consider that it is important that any proposed law reform be proportionate to the problem it seeks to cure. As noted above, the imposition of any reforms will inevitably have at least some costs associated with them, which is why we suggest it is important to ensure that there is a clear understanding of the scope and scale of the *actual*, rather than hypothetical, problem.
- 4.16. For this reason, whilst it is not our experience that the conflicts of interest contemplated frequently manifest in practice, we support the Commission's conflict management proposals. The proposals are not unduly onerous for the majority of practitioners and litigation funders, and although we doubt that they will lead to any major changes given the risks to date have been largely hypothetical rather than actual, we expect that their presence will enhance public confidence in Australia's class actions regimes.

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

- 4.17. We support 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 ASIC 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.

⁴² Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 69, citing ASIC Regulatory Guide 248 [248.88]

- 4.18. We do not consider the reporting requirement to present an undue or onerous burden for the litigation funding entities with which we are familiar and which operate in the Australian market, given their present compliance with the requirement to implement these conflict management practices internally. The implementation of this proposal will cause limited disruption or additional cost, but will be likely to enhance confidence in the class actions regimes and the role played by third-party litigation funders.

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 'litigation scheme' in the *Corporations Regulations 2001* (Cth).

- 4.19. We also support the Commission's Proposal 4-2, made in the context of a changing litigation funding market. We agree that there is no reason in principle why alternative methods of funding litigation, such as 'law firm financing' and 'portfolio funding', ought not be regulated in the same manner to the existing or standard practice model. The implementation of this proposal would produce certainty surrounding funding arrangements and serve to eliminate potential loopholes that could undermine confidence in the integrity of the class action and litigation-funding regimes.

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 interest and duties in class action proceedings.

- 4.20. The Commission's Proposal 4-3 is principally concerned with increasing practitioners' awareness and management of the types of conflicts that are thought to potentially arise more frequently in class action proceedings. We support the Proposal both as a means to achieve better conflict management outcomes (particularly where a conflict arises between the duties owed by a lawyer to different categories of members within a group), but also consider that an accreditation scheme provides further benefits.
- 4.21. Our support of the proposal proceeds on the basis that the Commission does not intend to preclude lawyers from acting in class action proceedings in the absence of specialist accreditation, as is indicated in the Discussion Paper.⁴³ If such accreditation were to be considered a precondition to being able to practice in the class actions space, we would not support this proposal: restricting consumers' and individuals' rights to engage lawyers of their own choosing in this regard, where they otherwise wished to pursue or investigate a potential representative proceeding, would be an undesirable outcome. Moreover, in the context of class action proceedings which are ordinarily large scale and complex in nature, it is often necessary to resource cases with lawyers of varying degrees of experience – for this reason, any scheme should not bar lawyers from practicing in the absence of obtaining specialist accreditation.
- 4.22. We agree that specialist accreditation should act as a marker of competence and experience, and offer a means for group members to identify practitioners with proven expertise in class action proceedings. Such accreditation programs have operated effectively for many years in other areas, and although a class-action-based regime would differ from these in that it relates

⁴³ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 76

principally to a procedural rather than substantive area of the law, we see no reason in principle why it could not be effective.

- 4.23. As to the operation of the proposed specialist accreditation, we strongly agree with the Commission that for accreditation to be most useful, it should be consistent across jurisdictions. As there are some differences between the representative proceeding legislation between states and the Federal regime, it seems most appropriate that the accreditation should require expertise both in relation to federal class action proceedings, and the class actions regime in the State in which the lawyer principally practices.
- 4.24. Having regard to the instances where a lawyer may have cause to practice in group litigation in other states pursuant to state-based legislation, we consider that class actions ought be considered an area in which a high degree of similarity exists between jurisdictions, such that the accreditation ought be mutually recognised across states and territories.
- 4.25. We otherwise agree with the Commission that training in all aspects of procedural law relevant to class actions would be valuable for new entrants in particular. It will be apparent that the source of a significant proportion of the procedural and public controversies in the class action field have arisen in proceedings run by lawyers or firms with little or no previous experience in the conduct of group litigation, rather than the small group of firms that has been conducting such litigation for significantly longer. As an increasing number of new firms or firms which have not historically had a class actions practice enter the space, the protection of group members and maintenance of public confidence in the profession necessitates the availability of specialist training.
- 4.26. In the context of situations involving coextensive or 'competing' class actions, the presence of an accredited specialist in one proceeding may also assist the Court in determining which firm is best placed to advance the claims of group members. We note that in at least one Canadian carriage motion, the Court considered the respective attorneys' expertise of applicable laws as a relevant determining factor. The Court observed that a practitioner in one of the firms had developed extensive knowledge through "*speaking engagements, writing and serving on the [relevant] committees of various bar groups*". One lawyer had also authored an article dealing with the relevant law, and another was a contributing author and chapter editor of a relevant publication.⁴⁴ We are aware of similar considerations being applied in other carriage motion determinations.⁴⁵
- 4.27. In our view, it is likely that as more participants enter the class actions space, questions of the respective capabilities and experience of law firms and individual practitioners will become an increasingly relevant determining factor where multiple proceedings exist. Accreditation provides an objective standard against which courts can assess the relative expertise and suitability of lawyers to conduct proceedings in the best interests of group members.

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

⁴⁴ *Crocker & Ors v KV Pharmaceutical Company* 782 F.Supp.2d 760 (E.D. Mo. 2010), 5

⁴⁵ See *Nowak v Ford Motor Co* 240 F.R.D. 335 (E.D. Mich. 2006), 361; *Shelley L Anderson v Fiserv Inc* 2010 WL 571812 (Anderson), 2; *In re Trader Joe's Tuna* 2016 WL 7407329, 3

- 4.28. Proposal 4-4 might be thought to give rise to the question of how the proposed prohibition is any different from permitting lawyers to charge contingency fees.
- 4.29. While superficially there are some similarities between the two scenarios, we consider that there are good reasons for prohibiting lawyers and law firms from having a financial stake in a litigation funding vehicle that funds proceedings in which they act, which do not arise in respect of contingency fees.
- 4.30. Our principal submission in this regard concerns the role of the Court in regulating lawyers' and law firms' conduct. We consider that, as officers of the Court – and particularly in circumstances where the Court is required to exercise a high degree of control over proceedings as the ultimate protector of group members – lawyers are properly subject to a high degree of oversight when acting in class action proceedings. Such supervision is not, in our view, a formality or a mere 'rubber-stamping' of the conduct of class actions, but rather is a substantive and ongoing form of scrutiny that we consider is essential to the success of the class actions regime.
- 4.31. The ability to charge contingency fees is proposed to be made subject to obtaining the leave of the Court, which we agree is an appropriate use of courts' oversight powers and function, particularly given its role in the class actions context. This has the effect that any financial benefit which lawyers (or a law firm) might derive as a product of a contingency fees arrangement will always remain subject to close supervision by the relevant court.
- 4.32. It is true that litigation funders have become increasingly regulated by courts. A funder's return on investment is now frequently subjected to an assessment by a court, either in the context of approving a common fund order, or approving a funder's recovery pursuant to a funding agreement as part of settlement approval.
- 4.33. However, as has been noted by the Commission in the context of the proposal to introduce licensing for litigation funders, neither they nor their employees are subject to the same obligations as lawyers acting on behalf of clients – and most critically, they do not owe a duty to the Court.
- 4.34. It is likely in our view that most lawyers would, if permitted to invest in litigation funding entities, treat their obligations of conflict disclosure and management with the utmost care. However, we can conceive of scenarios in which the lower visibility of litigation funders' commercial activities and decision making could result in the materialization of a conflict going undetected. There may be a range of adverse consequences arising from such a possibility, including additional uncertainty and confusion for group members and a risk that courts may consider affidavit material from lawyers filed in support of settlement approval applications to be less reliable or more likely to be affected by self-interest. In our view the regime is best served by having lawyers occupy a single role and having all of their interests in the proceeding be identifiable and disclosed.
- 4.35. For this reason, we support the Commission's Proposal 4-4.

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

- 4.36. As a matter of principle, we agree with the Commission's proposition that "*prospective class members should receive information regarding actual and perceived conflicts of interest that may affect the conduct and management of their claim*".⁴⁶ We support all efforts to provide greater information to group members to empower them to make informed decisions about their involvement in litigation. We are also conscious, however, of the existing high volume of material that class members receive at an early stage of the proceeding, and suggest that careful thought will need to be given to the importance, prominence and timing of any conflict-management information to be provided relative to other information included in court-ordered notices.
- 4.37. As we have previously expressed in our submission to the VLRC, group members should be provided as much information as possible that is relevant to their decision whether to participate in the proceeding. Such information should be disclosed to group members in clear terms and as soon as is practicable, consistently with the position set out in clause 5.3 of the Federal Court of Australia's *Class Action Practice Note* (**Practice Note**).
- 4.38. It is now common practice for some form of 'equalisation' process between funded and unfunded group members to be applied in respect of contributions to the costs of, and litigation funding charges associated with, a proceeding. Information about funding terms which affect the proportion (even approximately) by which a group member's eventual damages is likely to be reduced is clearly of direct relevance to their decision about whether to participate in a class action or whether to seek to opt out and pursue their claim elsewhere. It is therefore a substantive matter about which group members should be fully and appropriately informed.
- 4.39. The first notice to group members (at least in respect of matters involving a litigation funder) in Federal Court proceedings is often an 'opt-out' notice which ordinarily canvasses several issues including applicable funding arrangements, group members' liability to pay costs, a description of the claims and parties, an explanation of the nature of a representative proceeding, and a process for registering a claim or opting-out. As a product of the sheer volume of information required to be notified to group members, notices (even those prescribed by the Court) are often lengthy and complex.
- 4.40. In our experience, group members who have received such notices have frequently complained that they are difficult to comprehend in their entirety. This confusion often leads to a need for clarification by way of communications with the relevant law firm acting for the group – which is consistent with ensuring group members understand their rights, but which inevitably result in additional legal costs. Where such clarification is not provided, we are aware of many instances of group members mistakenly opting out of a claim by completing and returning a form included in the notice, in circumstances where they did not understand the contents of the notice.
- 4.41. Against this background, we suggest that any suggestion of additional lengthy or complex of information in an initial notice to group members must be weighed against the importance of the information already being conveyed in those notices, and the risks of that existing information being less likely to be considered or understood if further topics were to be required to be included.

⁴⁶ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 64

- 4.42. As we have noted above, we consider that the theoretical risks of conflicts of interest largely have not materialised in practice. We agree that those risks exist at a hypothetical level at least, and that group should have access to information about conflict-management issues in a class action, however we do not consider that these conflict risks are of such significance or urgency that they would justify a risk of detracting from the important information already provided to group members concerning commencement and opt-out issues.
- 4.43. As an alternative, we suggest that the provision of a website link to the set of relevant conflict disclosures in the notice is a more appropriate course. Group members would thereby have access to this information should it be required, without further complicating an already information-laden notice. This would be consistent with the Commission's proposal, which is that the first notice distributed should include information (or a link to information) regarding conflicts of interest.⁴⁷
- 4.44. Of course, courts will remain best placed to consider whether this is the appropriate level of information about conflict management in respect of any given case. In the event that there is a particularly acute risk of a conflict materialising, courts must retain the discretion to require that a notice should set out conflict-related information more fully than might ordinarily be the case.
- 4.45. We therefore suggest that the precise formulation of such conflict-management disclosures will be most appropriately determined by the court in the context of a particular case, rather than being prescribed in a Practice Note or any amendment to the relevant legislation.
- 4.46. Finally, it should be noted that group members who request information regarding a funded class action are ordinarily provided with a comprehensive set of documents concerning the management and conduct of the litigation, including the relevant funding and costs agreements and a disclosure statement which sets out potential conflicts which may exist or may arise, and how they will be managed.

5. Commission Rates and Legal Fees

- 5.1. As we have noted in previous submissions, we support the introduction of contingency fee arrangements in the Australian legal sector, in particular in relation to class action litigation. In our view, the availability of such arrangements will enhance access to justice and will assist in directing greater proportions of class action settlements to group members. Contingency fees are likely to enable some claims to be pursued that would not otherwise have been possible, particularly in the context of smaller or moderately-sized claims that would typically be unattractive to a third-party funder, and maintain safeguards against the risks of unmeritorious claims being pursued, since lawyers' and clients' financial interests continue to be aligned.
- 5.2. We agree with the Commission's view that "*it is critical that the introduction of contingency fee arrangements, and the ongoing provision of funding through litigation funders, does not damage the integrity of, and confidence in, the civil justice system*". The Commission has proposed that "*the Court should be required to approve contingency fee agreements at the earliest opportunity,*

⁴⁷ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 80

*and that the Court be given specific statutory powers to reject, set or amend contingency fees and commission rates of litigation funding agreements".*⁴⁸ We agree with this approach.

- 5.3. The Commission also queries whether "*further statutory interventions, in the form of statutory caps or statutory maximums, are necessary and appropriate*".⁴⁹ We similarly agree that there is merit in having some form of extrinsic guidance or standards in place in this regard, although we consider that as a general proposition the courts will be best placed to set those standards and make decisions about whether any particular contingency fee arrangements should be approved.

Proposal 5-1: Confined to solicitors acting for the representatives plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements.

- 5.4. The Commission has proposed that statutes regulating the legal profession should permit lawyers acting for the representative applicant in class action proceedings, to enter into contingency fee arrangements.
- 5.5. We support of this proposal, and consider that the introduction of contingency fees would represent a positive development towards increasing access to justice. We consider that the availability of this funding structure – with the close supervision of the Court – offers a further means for claimants to collectively advance their claims, and to pursue some kinds of meritorious claims that may not have been previously considered viable.
- 5.6. The Commission notes that "*contingency fees may be particularly useful in class action proceedings, providing a level of clarity and certainty for class members. Time-based billing invoices can be 'lengthy and too complex' for some clients, and may not receive the same scrutiny in class actions as other matters, as most class members are not actively involved in the matter. Contingency fee arrangements are likely to be comparatively more straightforward*".⁵⁰
- 5.7. We agree with this conclusion, and consider that clarity to group members is a key attraction of a contingency fee model. We do not agree that time-based billing practices receive lower-than-usual scrutiny in class actions, however – on the contrary, the scrutiny that is applied is, in our experience, significantly greater than that which would exist in individual litigation. For litigation-funded matters, funders routinely apply close supervision to the legal costs of the representative plaintiff's lawyers, and in all class action proceedings costs are invariably closely scrutinised in the course of any settlement approval process. In our experience, the attention paid to the costs involved in pursuing a class action proceeding is far greater than that which tends to exist in other forms of litigation.
- 5.8. The Commission has also observed that "*there is also the possibility that introducing contingency fees will broaden access to justice for mid-sized class action claims*".⁵¹ We agree with this assessment, and envisage that a broader suite of funding models that may be adopted

⁴⁸ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 81

⁴⁹ *Ibid* at 82

⁵⁰ *Ibid* at 89

⁵¹ *Ibid* at 89

in different cases will result in a greater number of law firms being more willing to bear the risk of prosecuting high-risk, low-value claims – as their exposure to this risk can be better diversified across a number of differently funded matters. This appears particularly relevant in the context of 'smaller' class action claims, which would currently be unlikely to attract the interest of a commercial third-party funder despite being meritorious.

Duplicate contingency fee charges

- 5.9. The Discussion Paper proposes that an action that is funded through a contingency fee arrangement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingency basis.
- 5.10. That is, "*under the proposal, a representative plaintiff can be charged either a contingency fee by its solicitors, or can enter into a funding agreement with a third-party litigation funder, pursuant to which the funder will take a commission calculated as a percentage of the sum recovered – not both*".⁵²
- 5.11. We support the Commission's position that the proposed model should not exclude all 'hybrid' models of funding.⁵³ Arrangements whereby funds are returned to litigation funders from lawyers rather than claimants (that is, where the funding sits behind the lawyer, as opposed to alongside the lawyer) may be permissible subject to appropriate disclosures being made, and would be consistent with the intention of the proposal – being the protection of class members from the possibility of paying out a percentage of any eventual settlement to both lawyers and funders.⁵⁴
- 5.12. We consider permitting such contingency-fee arrangements would serve to increase innovation in the pricing and structure of legal services and enhance consumer choice. This would enable law firms, clients and litigation funders to employ the funding option that best reflects the circumstances and needs of the client and the nature of the particular case at hand.
- 5.13. The legal market presently accepts shared or blended funding arrangements between law firms and funders – for instance, where law firms agree to share a component of Work In Progress (billing) on a "No-Win, No-Fee" basis, or where funders contribute to disbursements only. We consider that there is no reason in principle why such an agreement cannot successfully be applied to contingency fee arrangements. So long as the return paid to group members is not affected and the risk of "double dipping" is eliminated, permitting such arrangements would act as a further incentive to fund meritorious matters.
- 5.14. The Discussion Paper also proposes that a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis. We agree with the proposition that a single, comprehensible fee model should apply in relation to any individual piece of litigation, but note that some complexities will arise in relation to how a contingency-fee arrangement might be implemented in this regard. Due to these complexities, we would be concerned by any approach that prevented fee arrangements from being revisited by the Court during the course of a claim (with a client's instructions, obviously).

⁵² Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 89

⁵³ ALRC Discussion Paper, p 90

⁵⁴ ALRC Discussion Paper, p 90

- 5.15. Even where a legal costs approach is approved by the Court at the commencement of proceedings, it is important to recognise that the financial prospects of a case can vary over time – as a case could become significantly more costly to run or more time-consuming, often due to factors outside of an applicant's control. In particular, where a contingency fee rate is set at the outset by the Court and is known to a defendant, there is a real risk that such a party may take advantage of the applicant's funding model by pursuing a litigation strategy that maximises the applicant's costs at the early stages of a proceeding, potentially leaving lawyers in a position where the anticipated recoveries from a claim are exceeded by the legal costs incurred in prosecuting the claim to finality. While it might be argued that this risk should be borne by the lawyers involved if they do not seek to set an appropriate contingency rate at the outset, we are concerned that such an arrangement might simply serve to incentivise lawyers to seek the highest possible contingency rates in order to guard against this possibility, which would in turn increase the risk of lawyers seeking to receive unjustifiable 'windfall' benefits from claims if rates are set too high.
- 5.16. In order to guard against this, we propose that a mechanism be introduced that permits the court to adjust or revisit an approved contingency fee rate, if circumstances change throughout the case in a manner which could not have been predicted by the applicant at the commencement of the proceeding.
- 5.17. Alternatively, a court might instead grant leave for an applicant to revert back to a conditional fee arrangement in these circumstances, where a client wishes to do so, in order that there can be greater certainty in respect of costs recovery.
- 5.18. Further, to ameliorate many of these risks, we also suggest that a court's approval of a contingency fee arrangement at the commencement of a proceeding might be limited to the funding model in *general terms* – leaving the approval of a specific rate for determination at the conclusion of proceedings, once it is clear what outcome has been reached and how much work and expense was involved in arriving at that point.
- 5.19. Another important consideration is the question of how the proposed limitation will affect the question of coextensive or competing class actions. We are concerned that, in a multiplicity context, there may be a propensity for less experienced lawyers to seek to under-cut competing contingency fee proposals in a particular case in an attempt to 'win' the right to pursue the claim, without regard to the likely value of the claim and the reasonable costs expected to be involved in prosecuting it. Such a situation appears likely to lead to worse outcomes, and poorer representation, for group members than might have been the case with lawyers proposing to charge a more realistic rate.
- 5.20. This issue was agitated by Justice Lee of the Federal Court in the recent judgment in the matter of *Perera v GetSwift Limited* at [230]:

"One of the reasons why [third party litigation] funding has changed the nature of litigation in this country is that it has allowed for an 'equality of arms' between those acting for applicants and those acting for respondents. The Court is jealous to consider the interests of group members because of its protective role, and hence the focus is on the costs which are going to be visited upon absent non-parties. There is no equivalent focus by the Court on the costs incurred by the respondent."

A cap in costs would raise the prospect of an uncapped respondent conducting litigation in such a manner as to take tactical advantage of a costs cap. One only needs to reflect on this briefly to realise that it could tempt behaviour which would be inconsistent with the overarching purpose. Again, this is not to suggest that such conduct would occur, simply that caps do not commend themselves as a development which is to be encouraged."

- 5.21. Justice Lee further noted the "difficulty that might be occasioned by cost capping, which may encourage a respondent to wear down the resources of an applicant subject to a cap".⁵⁵
- 5.22. It is essential in this context to consider the more nuanced relationship between contingency fees and the initial projected budget for the prosecution of the proceedings that is set by the applicant's representatives at the outset of the proceeding. The imposition of a set contingency fee from the early stages of a claim might, by stealth, have an unintended effect on those projected legal costs, as identified above by Justice Lee, thereby conferring a strategic advantage on the defendant in the proceeding.
- 5.23. To overcome this risk, we propose that either:
- (a) Proposed contingency fee charges should not form part of the Court's list of considerations in determining how to manage a multiplicity of claims;
 - (b) There be some flexibility in relation to how contingency fee arrangements are applied, to enable fair recoveries of fees and expenses while eliminating risks of 'windfall' benefits flowing to lawyers.
- 5.24. We suggest that the proposals identified above may help to achieve this – including by permitting applications to be made throughout the course of a class action to seek approval of modifications to proposed contingency-fee arrangements, including if appropriate by reverting to a time-based billing model. Ideally, we suggest that the preferred approach should be that a court is empowered to approve of the use of a contingency fee model at the outset of a claim, and might approve of a range of contingency rates that could be applied in the matter, which should be disclosed to group members. Then, upon the conclusion of the proceeding, the Court should consider and set the actual contingency rate to be applied from within that range, having regard to the size of the settlement and the evidence put forward by the lawyers concerned as to the actual work performed in the course of the claim.
- 5.25. These proposals may go some way to avoiding a "race to the bottom" in terms of pricing in any multiplicity disputes, while also mitigating any potential strategic advantage conferred on respondents by knowledge of the applicable contingency fee rates in the context of class actions that are not affected by multiplicity concerns.
- 5.26. The Commission has suggested that a contingency fee should *absorb all costs and disbursements and the arrangement should require the solicitor to indemnify a representative plaintiff against an adverse costs order*.⁵⁶ We agree with the suggestion that lawyers seeking to act on a contingency-fee basis should provide an indemnity to the representative plaintiff in respect of any adverse costs orders in the proceeding.

⁵⁵ [2018] FCA 732, at [321].

⁵⁶ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 90

- 5.27. As the Commission has observed, in some similar jurisdictions, disbursements are generally excluded from the calculation of the contingency fee.⁵⁷ We are conscious that in some contexts, the disbursements involved in litigation are not always solely within a plaintiff's control – particularly where a defendant chooses to conduct its defence in a manner that puts a plaintiff to particular expense. In such circumstances, control over disbursements may confer a similar strategic advantage on defendants who seek to exhaust a plaintiff's lawyer's expected returns from a claim at an early stage by exposing them to increased costs. We therefore suggest that rather than imposing an absolute position in relation to the inclusion of disbursements in a contingency fee, this should be a matter determined by a court when it is asked to initially approve the use of a contingency fee model and, preferably, a range within which the contingency fee rate will be expected to fall. This approach will allow the funding arrangements to be appropriately responsive to the circumstances of each individual case, and will be able to take account equally of claims that are anticipated to be unusually costly or cheap to run.
- 5.28. We note also that the above considerations concerning contingency fees are intended to function well in circumstances where claims are resolved by way of a settlement, however they may not be as well adapted in circumstances where a proceeding runs to trial and succeeds after a judgment (or in the Victorian context possibly a verdict) is delivered, and a specific costs amount is awarded or available in addition to assessed damages. To account for the increased risk borne by lawyers in this scenario, we suggest that consideration may also be given in appropriate circumstances to excluding the 'recovered costs' amount from the sum on which the contingency fee is calculated, and the applicable contingency rate that applies to the awarded damages component may then be considered by the court within the range previously identified so as to avoid any excessive 'windfall' recovery (while still providing an appropriate award of costs that is commensurate with the level of risk assumed by the lawyers).
- 5.29. As to licensing requirements, for the reasons expressed above in relation to the differences between contingency fee arrangements and lawyers having a financial interest in a litigation funding entity, we agree with the Commission that *"the existing regulatory framework of the legal profession provides sufficient oversight of fee arrangements entered into by solicitors, whether that is on a usual time-based bill model, a conditional fee basis, or a contingency fee arrangement"*.⁵⁸

Proposal 5-2: Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

- 5.30. The Commission proposes that Part IVA of the FCA Act should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court. We support this proposal.
- 5.31. The proposal is consistent with the well-established supervisory role that courts play in relation to costs in class actions, and in our opinion would be a powerful factor in maintaining public confidence in the integrity of the class actions regime and the use of contingency-fee arrangements.

⁵⁷ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 87

⁵⁸ *Ibid* at 90

Question 5-1: Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

- 5.32. The Commission has invited submissions on whether the prohibition on contingency fees should remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated.⁵⁹
- 5.33. To our knowledge, the rationale for prohibiting contingency fees in certain types of claim such as personal injury matters relates to the nature of the damages being sought – there are certain heads of damage, such as payment for future medical expenses, that appear incompatible with a fee model that deducts a flat percentage of all compensation paid. We agree with this analysis, and would oppose the use of contingency fees in any manner that detracts from compensation paid to cover future medical expenses and Medicare/insurer repayments, or in other contexts compensation for significant personal assets such as families' primary residences. We do not believe that this necessitates prohibiting the use of such fee arrangements in these matters entirely, however, but believe it will be necessary to put particular rules and safeguards in place to ensure they can be effective.
- 5.34. We would propose that contingency fees be permitted in personal injury (and similar) class actions, subject to the court's approval, with the caveat that any contingency fee to be applied must not detract from the amounts awarded for medical expenses and repayments, attendant care, and future economic loss (that is, the contingency fee can be calculated as a proportion of the total amount of compensation awarded, but cannot exceed the proportion of that compensation that comprises general damages, past economic losses, and interest).
- 5.35. The rationale for this is that while there are components of damages in personal injury claims that should be protected, as they relate to specific future needs an injured claimant will have in order to maintain their livelihood and dignity, there are other components of a damages award that are not assessed on this basis (for example, damages for past pain and suffering) for which there does not appear to be any compelling reason to mandate such protection. If a claimant wishes to have those damages and their legal costs dealt with through the use of a contingency fee model, and if a court approves of such an approach, then we suggest the claimant should be free to do so.
- 5.36. Other examples of matters where contingency fees are unlikely to be suitable may include family law or criminal law proceedings – where it is difficult to determine who 'wins', and which at times might not involve an award of damages. We note that such prohibitions remain in place in other jurisdictions where contingency fee arrangements are otherwise available (see below table).

Jurisdiction	Prohibitions on contingency fee arrangements
UK	Prohibited for matters concerning domestic relations and criminal proceedings
USA	Prohibited for matters that do <i>not</i> concern personal injury, commercial or employment claims
Canada (Ontario)	Prohibited in criminal and family law matters

⁵⁹ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 91

Canada (New Brunswick)	Prohibited in criminal matters
Canada (British Columbia)	Prohibited in family law matters concerning custody of a child

5.37. We note that there may also be better alternative options for fee arrangements in respect of matters like personal injury claims, particularly in the context of class action proceedings. In particular, in order to encourage firms to prosecute higher risk and lower value claims, the Commission may wish to consider whether to allow lawyers and claimants to seek a variation to the 25% uplift cap on conditional fee matters in appropriate cases.

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.

5.38. The Commission has proposed that the Federal Court should be given an express statutory power in Part IVA to reject, vary or set the commission rate in third-party litigation funding arrangements.

5.39. In our submission, it is undoubtedly appropriate in the context of a common fund order for the Court to be able to exercise its protective power by rejecting, varying or setting the commission rate. In the context of third-party litigation funding agreements, however, there remains a live question as to whether the Court presently possesses the power to interfere with contractual bargains struck by independent parties, even where those parties are involved in proceedings before it, and if not, whether it is necessary or appropriate to create such a statutory power.

5.40. The question of the Court's power to modify litigation funding fees was considered in the early case of *City of Swan v McGraw-Hill Companies Inc.*⁶⁰ in which Justice Wigney of the Federal Court held that section 33V confers power on the Court to refuse a settlement in circumstances where the funding commission is excessive:

"...there may come a case where the amount to be paid to a litigation funder consequent to a settlement is so disproportionate to the risk and expense to which the funder was exposed in the proceedings, that it provides a proper basis for the Court to refuse to approve the settlement."

5.41. In *Earglow Pty Ltd v Newcrest Mining Ltd*,⁶¹ Justice Murphy of the Federal Court held that the Court's power to refuse to approve a settlement extends to circumstances where the funding commission is "so disproportionate" to the risk and expense borne by the funder.⁶² His Honour endorsed the view expressed by Justice Flick of the Federal Court in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)*,⁶³ that the Court has power pursuant to s 33ZF to approve a settlement, subject to a limitation of the commission payable to the litigation funder.

5.42. The view expressed by Justice Murphy in respect of the source of the Court's power in this regard has not been unanimously endorsed by other members of the Court. In the settlement approval in *Mitic v Oz Minerals Ltd*,⁶⁴ Justice Middleton of the Federal Court expressed the view

⁶⁰ [2016] FCA 343 (*City of Swan*) at [30].

⁶¹ [2016] FCA 1433

⁶² *Ibid* at [118]

⁶³ [2011] FCA 277

⁶⁴ [2017] FCA 409

that the power to effectively vary the contractual rights of a litigation funder during the settlement process is embodied in s 33V, not s 33ZF. His Honour held that the latter section is not "*specifically directed to settlement approvals*", nor is it the appropriate tool to "*otherwise interfere with the contractual rights and obligations of a litigation funder and class members*".⁶⁵

- 5.43. The Commission has observed that "*there is not a specific statutory power to vary, or reject, commission rates agreed between funders and class members. The ability of the Court to do so in reliance on ss 33V and 33ZF is said to be drawn from its protective and supervisory role. Although it has generally been agreed that the power lies in s 33V(2), there has not been unanimity as to its true source nor as to the circumstances in which the power should be exercised.*"⁶⁶
- 5.44. Following the decision of the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group*⁶⁷ it seems clear that the Court intends to take the same approach to the assessment of the reasonableness of litigation funding fees as it presently does in respect of legal costs, relying at least on the power in s33V for this purpose. In the context of an increasing number of claims in which common fund applications are pursued, we consider that the court's power to assess the reasonableness of the funding fee is sufficiently clear, since the entitlements of *all* group members are reduced pursuant to such an order, and not just those who have executed funding agreements.
- 5.45. In relation to any more active role for the court in varying or rejecting commission rates, however, we believe that some doubt remains not only with respect to the appropriate identification of the source of the power, but also whether the court has the power *at all* pursuant to s 33V or s 33ZF to vary the funding rate where no common fund order is sought. In this regard, the Commission has acknowledged that "*a question still arises as to whether the Court can make orders which 'upset the bargain struck between the funder and group members.'*"⁶⁸ While we note the Commission's comment that this topic has not yet been the subject of determination by the High Court, we also observe that (although the class actions landscape has changed considerably since this time) the High Court's decision in *Campbells Cash and Carry v Fostif*⁶⁹ stood for the proposition that where group members had freely agreed to terms pursuant to a binding contract, the court ought not interfere with those agreements.
- 5.46. We otherwise agree with the Commission's observations in this regard, and consider that there remains an unresolved question as to whether the court does in fact have the power – pursuant either to s 33V or s 33ZF – to interfere with the contractual bargain reached by independent parties in a class action context. While we anticipate this is a matter that is likely to be answered in some form in the years ahead in any event, since questions of this nature will inevitably arise in future proceedings, we also accept that there is merit in having the question resolved in advance, to provide clarity and certainty to all parties.

⁶⁵ *Mitic v Oz Minerals Ltd* [2017] FCA 409 at [28]

⁶⁶ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 93

⁶⁷ [2016] FCAFC 148

⁶⁸ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 93

⁶⁹ [2006] HCA 41

- 5.47. In light of the High Court's previously expressed position, it may be considered to be a significant step for the legislature to empower the court to interfere with a contractual bargain reached between two arms-length parties. This is particularly the case in circumstances where there is already a high level of self-regulation by litigation funders, and lawyers owe obligations to their clients to source the most favorable funding arrangements available. These existing safeguards, coupled with the supervisory role of the court in class action litigation more generally, already provide appropriate protections for funded group members, and therefore may tend against any suggestion that the Court requires an express statutory power to vary the terms agreed pursuant to contract. As noted above in relation to other proposals, it is not clear what particular existing vice would be sought to be addressed by doing so. However, on balance we consider that the certainty that is provided by ensuring the court clearly has the power to vary such terms where it considers it is appropriate to do so, is of greater benefit to group members, and we therefore support this proposal.
- 5.48. Although we are in favour of this proposal to clarify the courts' powers, we also note that we believe it is a power that should be exercised sparingly. The observations of Justice Lee (writing extra-curially) are relevant in this regard – his Honour observed in particular that *"regard must be hard to the foundational and elementary matter expressed in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 at 182-3, where Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said:*
- "Legal instruments of various kinds take their efficacy from signature or execution...it is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief".⁷⁰*
- 5.49. Justice Lee also observed that *"the right of a person of legal capacity to contract with whomever they choose and the right to hold another party to their bargain are bedrock to a modern society governed by the rule of law".⁷¹*
- 5.50. We believe there is significant force in this reasoning. On balance, our view is that in the context of a closed class action, where group members are required to make a contribution to the litigation funder *pursuant to contract* which they have freely entered, the Court should be reluctant to ordinarily seek to vary or otherwise interfere with the terms of that agreement, including the commission rate, unless circumstances are such that the arrangements in place are manifestly inadequate or productive of substantial injustice. In the event that the Court considers that the return to group members is too low or is otherwise unreasonable in the context of a settlement approval application, the preferable approach would ordinarily be for the Court to reject the settlement as a whole, and *"force the parties to make commercial choices which might include a readjustment of their rights inter se."*⁷²
- 5.51. If Proposal 5-2 is adopted, we consider that it should also be made clear that the court has the power to set, reject and/or vary any rates applying to contingency fee agreements. If contingency fee arrangements are intended to be made available only with a court's permission, as proposed, the process of applying for such leave, as well the existing processes surrounding

⁷⁰ Justice M B J Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations', (1 June 2017), Federal Court of Australia < <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-lee/lee-j-2017060>>

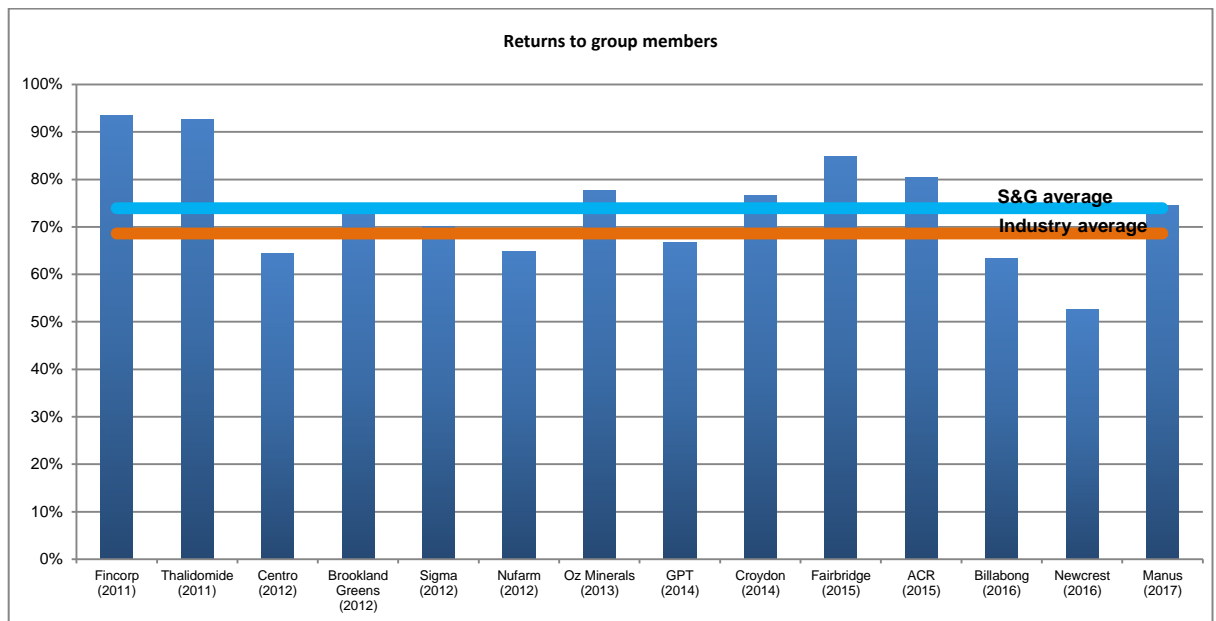
⁷¹ Ibid

⁷² Ibid

applications for approval of settlements, would seem to provide natural opportunities for the court to consider and determine issues concerning the applicable rates.

Question 5-2: In addition to Proposal 5-1 and 5-2, should there be statutory limitations on contingency fee arrangements and commission rates?

- 5.52. The Commission has queried whether there should be statutory limitations on contingency fee arrangements and commission rates.
- 5.53. We consider that, at least in the introductory phases of contingency fees, that a maximum 'cap' should be prescribed for the rates that may be applied in such a fee arrangement.
- 5.54. However, a procedure should also be established through which parties seeking to enter into a contingency fee arrangement at a rate higher than the prescribed cap may seek the Court's leave to do so. Such an approach, which effectively establishes norms of conduct while still affording clients and lawyers wishing to pursue differing arrangements an opportunity to seek permission to do so, seems to us to strike an appropriate balance between ensuring public confidence in the fee arrangements and the need to enable consenting clients and lawyers to explore differing kinds of funding arrangements (which may be of particular value in certain kinds of public interest litigation, for instance, where anticipated damages may be relatively low but where a client is determined to seek vindication of an important right or a determination of a question of public importance).
- 5.55. The Commission has queried whether contingency fee arrangements and commission rates should 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 that would apply, and further, whether there should be a statutory provision that provides, unless the Court otherwise orders, the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%.
- 5.56. In our experience, under existing fee arrangements involving both litigation funders and "No-Win, No-Fee" agreements, claimants generally receive an amount equal to or more than 50% of their claimable losses. In the case of proceedings run by Slater and Gordon in what might be described the 'modern' era of Australian class actions since about 2010, we have regularly achieved results significantly in excess of this, returning an average of 75.3% cents in the dollar of settlement funds to group members. Although precise data about returns to group members across the rest of the industry is difficult to assess due to the differences in how settlement amounts and costs are disclosed or described in settlement approval judgments, based on our analysis of the 103 most recent such decisions in the Victorian Supreme Court and Federal Court over this period, we assess that the returns produced by Slater and Gordon (and, we estimate other experienced class action firms such as Maurice Blackburn) are in the order of about 8% higher than an industry average return to group members of approximately 68.5% cents in the dollar. In this regard, we note that in our observation it appears that below-average returns to group members are occurring more frequently proceedings run by lawyers without such an established history of running class actions, and that the returns produced by established class actions firms such as Slater and Gordon and Maurice Blackburn are in effect pulling up the industry average.



- 5.57. Although an expected return to group members of above 50% should be considered reasonably standard, in our view this should not universally-applied rule: the circumstances of each case are different, and the reasonableness or otherwise of legal costs cannot be assessed by the blunt application of a cut-off threshold such as this. There are a number of instances where lawyers may have good reason to pursue cases where the expected value of the claim is such that group members may be likely to receive a lower return than 50%, but where the proceeding is nonetheless justifiable to pursue. One possible reason may be that a case may be brought as a piece of 'public interest' litigation, involving minimal economic or financial losses but seeking the vindication of important rights, which may incur significant costs to prosecute. Another may be circumstances in which non-monetary relief is sought (such as injunctions or declarations) in addition to compensation, where a significant and meaningful 'win' for claimants may nonetheless correspond with a more modest award of damages. Particularly where the clients involved freely and willingly accept the financial parameters upon which such claims might be pursued, and where the claims themselves are meritorious, it is difficult to see the justification for the use of a blunt 50% costs threshold, which in some circumstances could prevent such claims from being pursued at all.
- 5.58. In addition, it should also be emphasized that the risks and prospects of a claim can vary over the course of a proceeding, meaning that a case assessed as having good prospects at its commencement can weaken as the proceeding matures and result in a lower return to group members, or can otherwise take longer or involve more cost than could have been reasonably anticipated at the outset. The reasonableness of legal costs should principally be assessed prospectively, at the time the costs were incurred – applying a fixed rule such as a 50% cap to questions of legal costs in such arrangements would eliminate the ability of the court to assess appropriate outcomes based on the context and circumstances of individual cases.
- 5.59. To address this issue, rather than imposing a rigid statutory cap, we submit that the preferable approach is to permit the court ought to exercise its discretion in assessing the appropriateness and reasonableness of legal costs, having regard to the particular facts of a case.

- 5.60. We note that courts presently have such a discretionary power in relation to costs and commission, such that it is not clear to us why a statutory presumption of 50.1% is required. In fact, we consider that the use of a presumption could in fact discourage appropriate settlements (for example, if a case has weakened for reasons that could not have been previously foreseen and *should* properly be settled on a close-to-walk-away basis), encouraging plaintiffs and their legal representatives to persist with a claims longer than they should in an effort to avoid not recovering their costs.
- 5.61. In cases of important public interest litigation, a statutory cap imposing a rigid requirement without the ability for the court to consider the individual circumstances of each case, might have the undesirable effect of discouraging higher-risk but important claims from being pursued.
- 5.62. We note the Commission's comments that statutory maximums might be applied by way of rebuttable presumptions, rather than fixed caps. To the extent this is proposed, provided plaintiffs retain the ability to seek approval of arrangements that depart from these presumptions in appropriate cases, we would have no objection to their implementation. However, we consider overall that the preferred approach will be for court to retain their discretion to make appropriate determinations in individual cases based on the circumstances present in each, and that the norms of conduct that develop around such decisions (in terms of expected returns to group members in certain kinds of cases) are likely to be more effective methods of regulating costs than the blunt instrument of a statutory cap would be.

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

- 5.63. The Commission has also queried whether any statutory cap for third-party litigation funders be set at the same proportional rate as for lawyers operating on a contingency fee basis, or if parity would affect the viability of the third-party litigation funding model.
- 5.64. For the reasons set out above, our view is that the use of statutory caps in this context would not be desirable, and that the preferred approach should be to permit courts to approve or disallow funding arrangements and rates based on the context and circumstances of the cases immediately before them.
- 5.65. That said, if a statutory cap is to be introduced, then on the basis that contingency fee arrangements are at least in part intended to be an alternative to the use of third-party litigation funding, we consider that in principle the same cap or threshold should apply to both forms of funding.

Question 5-4: What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a 'class action reinvestment fund' be a viable option?

- 5.66. The Commission has also invited submissions regarding what other funding options there are for meritorious claims that are unable to attract third-party litigation funding, including for example, if a 'class action reinvestment fund' be a viable option.

- 5.67. We note the previous recommendations by the Commission to establish a fund to provide for the costs of parties involved in group proceedings.⁷³ Consistent with our aim of increasing access to justice through the use of class actions, we would welcome the establishment of a 'class action reinvestment fund' to provide funding for meritorious claims that are currently unable to attract third-party litigation funding. Our review of such models in use internationally indicates that a model similar to the Quebecois class actions fund (**'the Fonds'**) would be most efficient and beneficial in broadening access to justice.
- 5.68. The establishment of such a fund could help to increase access to justice through class actions where the cost of litigation may be prohibitive and the resources available to group members are insufficient to pursue a claim without external funding, or otherwise in circumstances where a claim might involve a relatively low return or other features that make it commercially unattractive to a third-party litigation funder.
- 5.69. We also consider that the adoption of a reinvestment fund would enable the pursuit of a greater number higher-risk cases that involve important questions of legal principle or significant and complex factual determinations, but which may be difficult to justify a financial investment in from the perspective of a commercial litigation funder or law firm.
- 5.70. In Ontario, a Class Proceedings Fund provides financial support to approved class action applicants for legal disbursements and indemnifies applicants for costs that may be awarded against them in funded proceedings.⁷⁴ The Class Proceedings Fund was initially set up with a \$500,000 grant⁷⁵ from the Law Foundation of Ontario and receives a 10 per cent levy of any awards or settlements from applicants in funded proceedings plus a return on any funded disbursements.⁷⁶
- 5.71. Considerations for determining if funding will be provided include: the strength of the case, scope of public interest involved, applicant's fund-raising efforts, likelihood of certification as a class proceeding, availability of funds at the time of application and presence of other relevant case-specific factors.⁷⁷ The fund is administered by the Law Foundation of Ontario.
- 5.72. Applications are made at five stages of a proceeding.⁷⁸ In 2016, the Class Proceeding Fund held 22 hearings and funded 17 new applications.⁷⁹ It received levies of \$5,961,678 and paid cost awards in favour of defendants in the amount of \$528,767. The balance in the Fund at the end of 2016 was \$19,861,537.⁸⁰
- 5.73. The Quebecois Fonds provides funding including for legal fees, expert fees, newspaper advertising and court fees.⁸¹ The Fonds has four different sources of funding: government subsidies, subrogation over revenues, percentage recoveries pursuant to the regulations and

⁷³ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report 46 (1988) rec 3.09

⁷⁴ The Law Foundation of Ontario, *Class Actions Proceeding Fund* <<http://www.lawfoundation.on.ca/class-proceedings-fund/>>

⁷⁵ Canadian dollar value of \$500,000 which at today's exchange rate is approximately \$511,000 Australian dollars.

⁷⁶ The Law Foundation of Ontario, *Class Actions Proceeding Fund* <<http://www.lawfoundation.on.ca/class-proceedings-fund/>>

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Fonds d'aide aux actions collectives, *Bienvenue* <<http://www.faac.justice.gouv.qc.ca/>>

interests on investments.⁸² Importantly, it also retains a percentage of any recovery made in every class action, not just those to which funding is provided.⁸³

- 5.74. Only certain representatives can apply for funding from the Fonds,⁸⁴ and in applying, the applicant must describe the basis of their claim and the essential facts involved, as well as the group on whose behalf the claim is brought or intended to be brought.⁸⁵ The application must include the financial circumstances of the members of the group who have made themselves known and set out the purposes for which the assistance is to be used, the amount required and any other revenue or service available to them.⁸⁶
- 5.75. Where funds are granted, the Fonds agrees upon the conditions with the applicant or their lawyer and the agreement must provide for conditions such as the amount and use for the assistance, terms and conditions of the assistance, reports that must be provided to the Fonds and the subrogation of the Fonds in relation to the amounts paid to the applicant or their lawyer.⁸⁷ The types of claims that the Fond receives requests for funding for are diverse including sexual abuse claims, banking claims, consumer claims, health claims, authorship claims, environmental claims, tax claims and transport claims.⁸⁸
- 5.76. In our view, the funding regime for class actions in Quebec provides a better model in terms of promoting access to justice than the Ontarian Class Proceedings Fund, having regard to the broader range of legal costs which attract funding. The effectiveness of the Quebecois model when compared to the Ontarian model is borne out in the numbers of cases receiving funding: in 2016, the Ontarian Class Proceedings Fund funded 17 new applications⁸⁹ while the Quebecois Fund in 2016 received 117 requests for funding and only one was refused.⁹⁰
- 5.77. We therefore encourage the establishment of a class action reinvestment fund and recommend that any such fund:
 - (a) should provide funding for legal fees, expert fees, advertising and notification costs, court fees, and other reasonable costs incidental to the proper running of litigation, like the Quebecois model;
 - (b) should provide adverse costs protection to representative plaintiffs;
 - (c) should be self-sustaining through the recovery of a set percentage of all funded cases and through the ability to exercise a discretionary right of subrogation for the recovery of costs

⁸² Catherine Pinché, "Public Financiers as Overseers of Class Proceedings" (2016) 12 *New York University Journal of Law & Business* 779, 797.

⁸³ *Ibid*

⁸⁴ Loi Sur Le Fonds D'aide Aux Actions Collectives (chapitre F-3.2.0.1.1) s 20. Available at <<http://legisquebec.gouv.qc.ca/fr/ShowDoc/cs/F-3.2.0.1.1/>>

⁸⁵ *Ibid* at s 21

⁸⁶ *Ibid* at s 21

⁸⁷ *Ibid* at s 25

⁸⁸ Fonds d'aide aux actions collectives, *Rapport Annuel 2016-2017*, 12. Available at <<http://www.faac.justice.gouv.qc.ca/doc/RapportAnnuel2016-2017.pdf>> 12-13

⁸⁹ The Law Foundation of Ontario, *Class Proceedings Fund*, <<http://www.lawfoundation.on.ca/wp-content/uploads/Report-on-Class-Proceedings-2016-EN.pdf>> 1

⁹⁰ Fonds d'aide aux actions collectives, *Rapport Annuel 2016-2017* p 12. Available at <<http://www.faac.justice.gouv.qc.ca/doc/RapportAnnuel2016-2017.pdf>> 15

in a funded matter where there is a successful outcome and the subrogation would not reduce the group members' settlement sum by more than, for example, 30 per cent;

- (d) should provide a right of appeal to enable requests for funding that are rejected to be reviewed by a court or tribunal, as per the approach in Quebec;⁹¹
- (e) should be managed by a small administrative body (the 2016 annual report for the Fonds noted that it had four full time employees);⁹²
- (f) should not as a matter of course fund shareholder claims or other commercially-based claims where there is already sufficient funding capacity available through third party commercial litigation funding;
- (g) should receive a reinvestment of one percent of all fees recovered from contingency agreements or litigation funding agreements;
- (h) should be controlled by an independent board whose function in part is to determine which actions are meritorious and would be unable to proceed under any other funding model.⁹³

6. Competing class actions

Overview of position

- 6.1. The challenge of multiple overlapping, coextensive or competing class actions arising from the same circumstances, and, in particular, the appropriate strategies and mechanisms for dealing with them, is one of the most controversial issues presently affecting Australian class actions regimes. Recent decisions of the Federal Court of Australia in the Bellamy's⁹⁴ and Getswift⁹⁵ proceedings, and the five class actions recently launched against AMP in the Federal Court and the New South Wales Supreme Court,⁹⁶ have further brought the issue to the fore.
- 6.2. As a preliminary comment, we note that multiple actions involving the same subject matter arise in several different ways, including:
 - (a) those where the classes or allegations are different but arise from the same circumstances;
 - (b) those where each action covers the same issues, allegations and class of group members;
 - (c) those where one class action commences following the conclusion of an earlier proceeding.

⁹¹ Loi Sur Le Fonds D'aide Aux Actions Collectives (chapitre F-3.2.0.1.1) s 35.

⁹² Fonds d'aide aux actions collectives, *Rapport Annuel 2016-2017* p 12. Available at <<http://www.faac.justice.gouv.qc.ca/doc/RapportAnnuel2016-2017.pdf>> p 5.

⁹³ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 99

⁹⁴ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947

⁹⁵ *Perera v GetSwift Limited* [2018] FCA 732. On 1 June 2018, Squire Patton Boggs appealed Justice Lee's decision. The Full Bench of the Federal Court of Australia will hear and consider the appeal in the coming months.

⁹⁶ *Fernbrook (Aust) Investments Pty Ltd v AMP Limited*; *Wileypark Pty Ltd V AMP Limited*; *Marion Antoinette Wigmans v AMP Limited*; *Komlotex Proprietary Limited as Trustee for Breda Sinclair Industries Superannuation Fund v AMP Limited*.

- 6.3. In our view, the response to the management of each of the types of multiple class actions will differ significantly depending on the circumstances of any given matter. In particular, the question of the most appropriate case management approach where the circumstances in (a) exist may involve complex considerations of the appropriate timing for determination of issues going to the merits of multiple pleaded claims; and of potential conflicts of the duties owed by lawyers to differently constituted classes.
- 6.4. We therefore agree with the comments of Justice Lee in *Getswift*, where his Honour affirmed the approach of The Honourable Justice Foster of the Federal Court in *Cantor v Audi Australia Pty Ltd*,⁹⁷ observing that 'one size does not necessarily fit all', and that the response to the issue of multiple class actions is a 'case management decision informed by considerations peculiar to the circumstances of the cases being managed'.⁹⁸
- 6.5. A similar view was taken by The Honourable Justice Ball of the NSW Supreme Court in respect of the two class actions commenced against Australian Executor Trustees following the collapse of Provident Capital.⁹⁹ His Honour opined that it is not appropriate to apply a fixed rule to the conduct of competing class actions;¹⁰⁰ rather, there are a range of circumstances in which multiple or competing class actions arise, and different case management approaches may be appropriate in each.
- 6.6. We consider that courts to date have adequately resolved questions of multiple class actions, with a view to both protecting the interests of group members, and avoiding oppressive outcomes for defendants.¹⁰¹ We are conscious that the Commission's present inquiry, and the submissions being received in it, are occurring at a time when highly controversial circumstances exist in relation to the *GetSwift* and *AMPL* litigation, which have not yet been finally determined. We are aware of media and other commentary likening these circumstances to a 'crisis' in the conduct of class action or suggesting that these cases highlight substantial deficiencies in courts' powers and procedures concerning class actions, which are productive of undesirable outcomes for group members and defendants. From a law reform perspective, however, we would encourage caution at this time – these are but two claims in a decades-long history of class action proceedings in Australia that has functioned well to date, and in circumstances where these 'multiplicity' matters have not yet been resolved, it is not yet clear what (if any) *actual* gaps in courts' powers or processes might be shown to exist as a result. We suggest that unresolved issues in these claims should not yet provide a basis for significant law reform proposals, unless and until it has been shown that there are inefficiencies or problems that are not already capable of being addressed by courts' existing powers – this may not be known for many more months, at present.
- 6.7. We acknowledge that the issue of multiple class actions is vexed, and there exists great attraction in the possibility of employing clear statutory solutions in pursuit of consistency and predictability for respondents in particular. It is our view, however, that adopting the proposed amendments to the FCA Act will not achieve the desired outcomes.

⁹⁷ [2017] FCA 1042 [74-75]

⁹⁸ *Perera v GetSwift Limited* [2018] FCA 732 at [94]

⁹⁹ *Smith v Australian Executor Trustees Limited* [2016]; *Creighton v Australian Executor Trustees Limited*, [2016] NSWSC 17

¹⁰⁰ In the case before His Honour to allow only one proceeding to continue and for the court to determine which proceeding that is

¹⁰¹ *Perera v GetSwift Limited* [2018] FCA 732 at [98]

- 6.8. The complex questions which arise in the context of the different manifestations of multiple class actions do not lend themselves to resolution by means of the blunt instrument of legislative prescription. As we will explore, we can conceive of several scenarios in which the proposed statutory amendments will produce less favourable outcomes for group members, which could have been avoided if the power to case manage instances of multiplicity was left squarely in the capable hands of the judiciary.

Proposal 6-1: Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended

Restriction to open class actions

- 6.9. The Commission has proposed that Part IVA should be amended so that all class actions are initiated as open class actions.
- 6.10. Competing class actions are said by the Commission to be the "*inevitable consequence of permitting proceedings to be commenced on behalf of only some of the class members, leaving a further, differently funded class action to commence proceedings on behalf of the remaining class members*".¹⁰²
- 6.11. In our view, this phenomenon is not the sole or even principal driver of the existence of competing class actions. It is more frequently the case in our experience that competing class actions arise where two or more proceedings are issued on behalf of the same *open* class of group members.
- 6.12. It is generally the case that each proceeding will, before being commenced, attract the registration of a set of affected group members as a result of the 'book-build' process. It has become common practice however, for proceedings to be issued not only on behalf of a registered group of clients, but on behalf of all affected group members.
- 6.13. We do not consider that it is accurate to suggest that litigation funders have a 'clear preference' for closed class proceedings. As observed by the Commission, following the decision in *Money Max* validating the use of the common fund vehicle, the majority of class actions filed have been issued on an open class basis.¹⁰³
- 6.14. However, despite the dominance of open class proceedings, the complications of competing class actions have not been averted. Rather, it is becoming increasingly clear that multiplicity issues are equally attended by duelling class actions commenced on an 'open' class basis.
- 6.15. Having regard to this, we submit that the 'open' or 'closed' composition of the class is merely one factor to be considered by the Court when determining the appropriate case management approach to multiple proceedings. It should not be a static pre-requisite condition for whether a case is adequately constituted to proceed.
- 6.16. We submit that it is unnecessary to codify a blanket prohibition on closed class proceedings, particularly in circumstances where the concerns arising out of multiple or competing class

¹⁰² Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 32

¹⁰³ Vicki Wayne and Vince Morabito, "When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime" (2018) 19 *Theoretical Inquiries in Law* 303, 328.

actions will not be resolved as a result of the amendment. We further note that it is conceivable that there will be other categories of class action that are appropriate and justifiable to pursue on the basis of a closed class – for example in the context of some claims involving personal injuries or the involvement of insurers where an election on the part of group members may be required (beyond mere passivity in not opting out of a claim). Elimination of closed-class proceedings may therefore have broader impacts on the conduct of class actions than is intended (or, indeed, justifiable) to deal with multiplicity issues.

Presumption of Permanent Stay Orders

- 6.17. The Commission has also proposed that Part IVA should be amended so 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.
- 6.18. We do not consider it appropriate, or in the spirit of the overarching principles of the regime, for the Act to be amended codifying a statutory presumption that no more than one class action can be permitted to continue in circumstances of competing class actions. Justice Lee recently observed that there are various options available to the Court to case manage competing class actions, including:¹⁰⁴
- (a) Consolidation of the proceedings;
 - (b) A permanent stay of one or other of the proceedings;
 - (c) A declassing order pursuant to s33N(1) or s33ZF of the FCA Act;
 - (d) An order closing one or other of the classes;
 - (e) Orders allowing a joint trial of proceedings with each constituted as an open class action proceeding.
- 6.19. These options, which have been alternatively embraced by Finklestein J,¹⁰⁵ Ball J¹⁰⁶ and Beach J,¹⁰⁷ demonstrate that it is not necessary for Part IVA to be amended to provide a proscriptive mechanism to manage multiple or competing proceedings. Notwithstanding the difficulties that can arise as a consequence of multiple class actions, recent experience demonstrates that Courts are alive to these issues, and already hold adequate powers and procedural tools to facilitate tailored approaches to the individual circumstances of each matter.
- 6.20. Moreover, in some cases representative applicants, counsel, funders and respondents have independently resolved (or at least narrowed) the issue of how competing actions are to advance without the need for considerable Court intervention.

¹⁰⁴ Lee J in *Perera v GetSwift Limited* [2018] FCA 732 at paragraph. 105. See also *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [9].

¹⁰⁵ Kirby v Centro Properties Limited [2008] FCA 1505

¹⁰⁶ *Smith v Australian Executor Trustees Limited* [2016]; *Creighton v Australian Executor Trustees Limited*, [2016] NSWSC 17

¹⁰⁷ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947

6.21. Examples of bespoke approaches to case management including:

- (a) *Bellamy's*, where the Court determined that both proceedings ought be allowed to proceed, closing the Basil class while leaving the McKay class to continue on an open basis and to seek orders for a common fund;
- (b) *Smith*, where the Court made orders for the trial of both actions to be heard together, with evidence in one being evidence in the other, and with provision for members of each overlapping class to select which of the two class actions they wished to participate in;
- (c) *Whittenbury*,¹⁰⁸ where the Court consolidated the two competing proceedings and granted leave to the plaintiff firms to jointly represent the group through a Litigation Committee comprised of lawyers from both firms; and, most recently,
- (d) *GetSwift*,¹⁰⁹ where the Court selected one proceeding to agitate the claims of group members, and made orders permanently staying the two competing proceedings.

6.22. We consider that the tailored approaches adopted by courts to date, which utilise the range of case management mechanisms available pursuant to courts' inherent jurisdiction and the applicable legislation, demonstrate that courts are well equipped to case manage competing class actions.

6.23. For this reason, we disagree with the second limb of the Commission's Proposal 6-1, which would create a statutory presumption in favor of one particular case management approach to the detriment of court's discretion to prefer whichever option is most suitable having regard to the individual circumstances of the proceedings at hand.

6.24. Our view in this regard is based on our experience in the prosecution of the claims which have been attended by the different case management options available to courts.

Agreement to consolidate proceedings

6.25. First, in cases against Nufarm,¹¹⁰ Centro and more recently Vocation, we have reached agreement with other parties involved to consolidate the proceedings and run the matters jointly, and have received judicial approval to prosecute the claims on this basis.

6.26. In *Whittenbury v Vocation*, one 'open' and one 'closed' class were commenced by Slater and Gordon and Maurice Blackburn. The applicants filed joint submissions in the action with respect to consolidating the two proceedings – Justice Middleton noted that the combined resources of the two firms would result in the efficient conduct of the proceeding and adequately represent the interests of the combined group members, and made orders as sought for the consolidation of the matters.

6.27. The parties have since established a Litigation Committee comprised of representatives from the two law firms to work collectively in respect of practical matters such as work division,

¹⁰⁸ (in Liquidation) & Anor (No. 434 of 2015) (**Whittenbury**)

¹⁰⁹ *Perera v GetSwift Limited* [2018] FCA 732

¹¹⁰ *Hadchiti v Nufarm Limited* (NSD 1847 of 2010)

discovery and interlocutory issues, mitigating any duplicative work the respondent may be required to undertake with respect to defending multiple proceedings.

Open and closed classes prosecuted in tandem

- 6.28. Second, in relation to the claims against Bellamy's, we have worked with Maurice Blackburn pursuant to court orders to prosecute the claims of differently constituted classes. Our experience in this case has demonstrated to us that there are clear situations where the joint prosecution of class action proceedings can be an efficient option.
- 6.29. In the Bellamy's matter, two class action proceedings were commenced on an 'open' class basis, covering essentially the same claim period and brought on behalf of the same group members. In response to interlocutory applications advanced by the respondent in relation to those claims seeking to stay one of the proceedings, Justice Beach determined that both ought to be allowed to proceed, closing one class while leaving the other to continue on an open-class basis.
- 6.30. In his reasons, Justice Beach considered the type of *potential* duplicated costs and expenses a respondent may be required to incur in the event that both proceedings were to continue, and undertook careful consideration of the case management regime he could employ to ameliorate such duplication.
- 6.31. His Honour stated, *inter alia*, that:
- (a) the two proceedings should be attended by only one counsel team between them;
 - (b) the lawyers for the applicants ought negotiate as 'one' in respect of practical matters such as discovery;
 - (c) the two litigation teams in both proceedings should use reasonable endeavours to progress each of the proceedings in a similar manner and consult with one another before taking any key steps in the proceeding, such as preparing and filing evidence or filing or progressing interlocutory applications;
 - (d) the two proceedings should have a consolidated Statement of Claim between them; and
 - (e) there should be a joint trial.
- 6.32. Based on our experience to date, the working relationship between the law firms for the group members in the claims against Bellamy's has proven to be both efficient and to the benefit of the groups as a whole. Work is allocated between the firms to avoid duplication of tasks and costs, with the pleadings consolidated so that the respondent is only required to file one defence, and communication undertaken on behalf of both applicant parties.
- 6.33. It is therefore our experience that two claims can efficiently be run in tandem, and the mere existence of multiple proceedings does not necessarily result in significant duplicative work and costs for respondents. Therefore, in circumstances where the parties are willing and able to cooperate either by agreement or pursuant to the Court's orders, this case management option ought not be treated as the 'exception' to the permanent stay rule – rather, it should continue to

form one of a range of options available to the Court having regard to the particular circumstances of each set of proceedings.

Costs minimisation should be a factor, not the sole factor

- 6.34. We concede that Professor Legg is likely to be correct in his observation that “*these costs may have been minimised by the effective case management tools that Beach J had at his disposal, but they could not have been eliminated.*”¹¹¹ However, the consideration of additional cost ought be just one factor in a court’s consideration of which case management tools are best employed in any given case – rather than dictating that the outcome must be, unless it is *inefficient* or *antithetical to the interest of justice*, that one or other proceeding is stayed.
- 6.35. It may be the case, for example, that costs can be minimised to such a great extent that the additional expense is negligible – or alternatively, that the increased cost involved is not considered a persuasive reason to stay a proceeding where group member registrations demonstrate an evenly balanced preference for each of the multiple actions (as was the case in Bellamy’s).
- 6.36. In our view, these considerations are unlikely to meet the ‘exclusion’ test as proposed by the Commission – that is, while it may be in the interests of justice to permit two cases to run in tandem, the Court may not consider that it is inefficient or antithetical to the interest of justice to apply the case management option dictated by the statutory presumption.
- 6.37. The mere existence of two or more proceedings being prosecuted in tandem should not attract a presumption that all but one should be stayed, in circumstances where the parties are willing to cooperate. Though admittedly it was a factor that was afforded little weight in the *GetSwift* decision, the autonomy of group members and the desirability of group members pursuing claims through lawyers and funders that they prefer should not be discounted, particularly where a significant number of persons have elected to enter into one of several funding or costs agreements.
- 6.38. We are strongly of the view that group members’ choice of legal representation and funding arrangements should not be dismissed or undervalued. In our experience, class members are not universally passive participants in class action proceedings. In many circumstances, class members are informed and active litigants, with clear preferences as to the way in which their case should be run and as to which law firm and litigation funding model they wish to use as a vehicle for their claim.
- 6.39. We offer these observations in respect of both “shareholder” litigation, where the classes are made up of a mixture of retail and institutional clients with varying levels of sophistication, and those matters where the losses are not purely financial – for example, personal injury or bushfire litigation, where individuals may have strong subjective reasons for choosing the proceeding and law firm they wish to use to pursue their claims.
- 6.40. A statutory presumption in favour of overriding the choices of group members in preference for selecting only one proceeding may also serve to undermine the Court’s ability to protect the interests of group members. This is particularly the case where there are proven examples, such

¹¹¹ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 103

as Bellamy's and Vocation, demonstrating that it can be both efficient and to the overall benefit of group members to prosecute claims in tandem.

- 6.41. In summary, assuming that Justice Lee's judgment in *GetSwift* withstands appeal, it is not clear to us why the existing statutory power to stay proceedings would require augmentation. In our view, any such changes would likely result in less flexible case management powers being available. The history of class actions demonstrates that one cannot always predict precisely how cases will proceed, such that having flexible powers (which presently exist) available to be applied by courts to the specific circumstances of individual claims is the most useful approach.
- 6.42. As the Commission has observed, in the context of codifying the factors to be taken into consideration in deciding whether to approve a settlement, we find that the absence of statutory codification of these factors has worked well in allowing the natural development of case law that is better suited to reality than any inflexible statutory list (or in this case, presumption) would be.

Litigation funding agreements with respect to a class action are enforceable only with the approval of the Court

- 6.43. We refer to our submissions in respect of Proposal 5-3 above, and note that in the context of the prevalence of common fund applications, where the funding terms and commission are subjected to the Court's review and amendment, it is questionable whether such a measure is necessary.

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

- 6.44. We broadly agree with this aspect of Proposal 6-1, as we consider that, in principle, it is only fair that all group members who benefit from the prosecution of their claims bear the expense associated with the same in the event of a successful outcome.
- 6.45. If group members are required to make a contribution to the litigation costs pursuant to contract and *regardless of whether there is a successful outcome*, however, then we consider that no such order ought be imposed. In our view, requiring group members to contribute a portion of any settlement amount or damages award to cover the costs of the proceeding is a different prospect entirely to compelling group members by Court order to impart an *out-of-pocket* contribution, irrespective of whether the proceeding is successful.

Proposal 6-2: In order to implement Proposal 6-1, the Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

- 6.46. In order to implement Proposal 6-1, the Commission has proposed that the Federal Court's Practice Note GPN-CA should be amended to provide a further case management procedure for competing class actions, which would provide for the Court to:
- (a) Approve costs agreements prior to prosecuting the proceedings;
 - (b) Identify any potential competing class actions as soon as practicable; and

- (c) Efficiently resolve which action, which representative applicant, and which lawyer and funder will lead the class action going forward.¹¹²

Approval of costs agreements

- 6.47. As to the first limb of the proposed Practice Note amendment, we accept that in general it may be appropriate for the Court to approve costs agreements prior to the prosecution of proceedings.
- 6.48. We consider that this is especially warranted where the law firm acting proposes to charge a contingency fee (as noted above, we support the proposal that contingency fees only be available in class actions with a court's leave). In some, though not all, circumstances it may also be desirable for a court to be made aware of the legal costs arrangements in place in cases run on a conditional-fee basis, without the presence of a third-party funder. In our view, however, it would not be appropriate for the Court to be required to approve or comment on an estimated litigation budget or costs estimate at the *commencement* of a proceeding. Such an estimate is required to be included in legal costs agreements pursuant to the *Legal Profession Uniform Law*, and is informed by a wide range of factors, not all of which may be immediately apparent to a docket judge in advance of developing some familiarity with the proceeding and how it is proposed to be pursued. Self-evidently, knowledge of proposed litigation budgets may be of strategic advantage to defendant parties as well, which could prejudice the ability of plaintiffs to adequately prosecute claims on behalf of group members – and as such we consider that it would generally be inappropriate for public judicial comments to be made concerning such budgets or estimates at that stage.
- 6.49. The costs of prosecuting a class action proceeding are rightly subjected to the Court's oversight at the conclusion of a matter, when a costs assessor or referee is appointed to interrogate the legal expenses actually incurred. It is near-impossible for a court to determine at the outset of a proceeding whether an *estimate* of legal costs is fair and reasonable – or to impose a cap on the costs permitted to be incurred.¹¹³ The Court at this time does not have the benefit of an independent report canvassing and contextualising the legal work undertaken, to make an assessment of whether these costs were reasonably incurred.
- 6.50. Therefore, while it is not clear whether the Commission intends to capture such cost agreement terms in the scope of this proposal, we note our concerns about this aspect of such a proposal if it is so anticipated.

Identify any potential competing class actions as soon as practicable

- 6.51. In respect of the second limb of the proposal, we do not support the introduction of a defined period of time during which claimants (and their selected litigation teams) can commence competing proceedings.
- 6.52. Such a restriction is plainly contrary to the statutory prescribed time limitations that already exist in relation to the commencement of proceedings. It is antithetical to the interests of justice to require class members and their selected lawyers to hasten their investigation of a potential claim, in order to meet an arbitrary deadline created only by virtue of a similar claim being filed.

¹¹² Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 112

¹¹³ See submissions in Section 5.

- 6.53. Consistent with our view expressed above in relation to creating a statutory presumption in favour of staying competing proceedings, we consider that this approach to identifying potential competing class actions:
- (a) fails to adequately protect group members' interests in preference for securing certainty for alleged wrongdoers;
 - (b) is attended by a number of practical problems, which render it ineffective as a means to resolve the issue of multiple claims.
- 6.54. As to (a), in light of the increasingly competitive space in which class action law firms operate, we consider it is likely that the types of situations described by the Commission in which actions are commenced with 'undue haste' and 'without sufficient research' or 'appropriate assistance from counsel' may arise. In our experience, affected individuals are alive to such concerns and consequently have clear preferences for who they wish to prosecute their matters, and it is clear that courts have sufficient powers (and defendant parties have statutory rights) already in place to appropriately manage or dismiss poorly-prepared claims. While such a risk exists, however, it is unreasonable to subject potential alternative proceedings that are being prepared with appropriate deliberation and consideration to an expedited timeframe that exists only as a result of the improperly hurried conduct of another proceeding. Such an arrangement appears likely to further incentivise a 'race' to issue claims, and to increase the risk of poorly-considered claims being commenced.
- 6.55. Although it might be argued that our resistance to this proposal would leave defendant parties with limited certainty as to the prospect of defending multiple claims within the confines of the relevant limitation periods, it should be noted that this is in fact the orthodox position – where multiple parties have been harmed by a defendant's conduct, each of them retains a right to commence proceedings throughout the entire limitations period, unless and until they are group member in a class action. Even then, group members may yet opt out of a class action to pursue separate proceedings. While we accept that court resources should be used efficiently and duplicative costs should be avoided to the extent possible, such that multiple extant class actions should be managed appropriately, we do not consider that defendants who are alleged to have caused loss or damage to large groups of people have any inherent right to achieve 'certainty' early or to avoid multiple claims: those ends are ultimately intended to be achieved by the resolution of all claims against it, or by the expiry of the statutory limitation period. The existence of any rushed class action proceedings against it should not substantially alter the position in this regard.
- 6.56. In our view, the imposition of a confined timeframe for the pursuit of alternative proceedings wrongly prioritises the protection of respondents from multiple representative claims over the entitlement of group members to opt-out and preserve their right to participate in an alternative claim of their choosing.
- 6.57. As to (b), there is a real question of how 'competing' class actions are to be defined in the proposed Practice Note procedure. We query whether it will be the case that actions which make substantively different allegations, cover different time periods, and involve different group members are required to be identified. If one set of allegations proposed to be made in one proceeding requires the advice of counsel and extensive investigation work, then we query

whether it is the intention that this proceeding would be granted the necessary time to complete these steps before the resolution of which proceeding is to be allowed to proceed. If this is the intended course of action and it is ultimately found that the proceeding does not plead the same substantive allegations as another, the other proceeding will, in effect, have been subject to undue delay.

- 6.58. Further, the Commission proposes that potential claimants and their lawyers be notified that a class action proceeding had commenced. We query how this is to occur in practice. Limiting the notification and requirement to lodge a competing class action to those law firms who have actively canvassed the proposed claim in public forums requires that potential claimants make their intention to investigate a claim known before a final decision in respect of the commencement of litigation have been made. There is a real risk that the publication of investigations in some cases could confer a strategic advantage on a defendant, to the detriment of potential claimants. We refer for example to our experience in cases where evidence is provided by a whistle-blower, and proceedings are deliberately not announced until a pleading is filed.
- 6.59. Having regard to these questions and the many others which arise in respect of the practical effect of this proposal, we struggle to see how the addition of this procedure to the Practice Note addresses the issue of multiple proceedings in any fairer or adequate a manner than has been historically demonstrated by the Courts.

Efficiently resolve which action, which representative applicant, and which lawyer and funder will lead the class action going forward

- 6.60. Noting our submissions immediately above, we are of the view that the question of multiplicity ought be resolved as efficiently as possible – but we consider that this requires the Court (or potentially, a number of Courts) to exercise discretion based on the circumstances of each given matter.
- 6.61. We therefore submit that, in the event that multiple proceedings are *actually* issued, the Court should turn its mind to applying the most appropriate case management tools to minimise costs, maximise the efficient conduct of the proceedings, and deliver outcomes which are consistent with group members' best interests. We can see no reason why such a case management direction ought not be included in the Practice Note, especially in light of an increasing body of jurisprudence available to reach a decision in this regard.
- 6.62. For example, one factor held to be relevant to the appropriate case management approach is the number of registered group members in any given proceeding. In *Bellamy's*, the presence of a large number of registrants in each of the McKay and Basil proceedings led Beach J to the conclusion that it was not in the interests of justice to stay either of the proceedings, whereas the absence of those conditions in *GetSwift* saw Justice Lee conclude that it was appropriate to stay two of the proceedings.
- 6.63. Where the case theories or allegations depart materially, this factor has militated in favour of allowing both proceedings to continue, as questions of the relative strengths and merits of different pleaded cases can realistically only be accurately assessed at trial following the filing of evidence. Further, the willingness and ability of the applicant parties to cooperate is a relevant question.

- 6.64. The circumstances of each case will differ – and the presence or absence of the above factors, or indeed other factors which may arise – will and should result in different case management outcomes. For this reason, we consider that to the extent possible, the Court should resolve which action or *actions* will proceed going forward – but that it is not appropriate or necessary for the Court to presume that only one should proceed in all cases.
- 6.65. In the event that the Court does determine that only one class action should proceed, with competing claims stayed, we note that the Commission 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. The Commission notes that in any such determination, a multifactorial approach will be required.¹¹⁴ We submit that the following considerations are relevant to this determination, reflecting the relevant elements of both the criteria in Canadian jurisprudence and Justice Lee's factors as articulated in *GetSwift*.
- (a) The experience or competence of the legal practitioners;
 - (b) The terms of proposed funding models;
 - (c) The estimated legal costs involved, and the hourly rates of the legal practitioners;
 - (d) The estimated returns to group members;
 - (e) The number of group members who have signalled a preference for a given action through a registration process
 - (f) The claims and suitability of the proposed representative applicants;
 - (g) The preparation or state of preparedness of an action, including whether there has been any operative delay of any applicant;
 - (h) The case theories advanced;
 - (i) The scope of the causes of action used; and
 - (j) The identification of defendants.
- 6.66. We note that the articulation of these factors does not overcome the prospect that courts will weigh and apply the factors in differing fashions. This may be a product of the different circumstances at play – for example, where one case is attended by considerable delay, this may be a more significant factor than where claims were filed within a few weeks' of one another. Further, the question of legal practitioners' qualifications is likely to be given more weight where the respective law firms have materially and demonstrably different levels of competence and experience (which may ultimately be reflected in any specialist accreditation processes sought to be introduced, as noted above).

¹¹⁴ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 114

6.67. It may also be that a proceeding is attended by unusual features not listed above, but which either persuades or dissuades the court from the conclusion that it is the preferable claim to advance group members' claims. As such, although we are not opposed the inclusion of a list of the above factors in the Practice Note, we also query the utility of doing so in circumstances where the jurisprudence in this regard is continually developing, and where it is important for courts to be able to respond to changing circumstances and practices within the class actions space more broadly. For these reasons, we maintain that the court is best placed to apply and assess these factors having regard to the circumstances of each individual case.

Question 6-1: Should Part 9.6A of the Corporations Act and s 12GJ of the ASIC Act 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?

Summary

6.68. We do not consider that Part 9.6A of the *Corporations Act* and section 12GJ of the *ASIC Act* should be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters commenced as class action proceedings arising under the Corporations legislation or Division 2 of Part 2 of the *ASIC Act* ('**Corporations Class Actions**').

6.69. In our view, removing the ability to commence Corporations Class Actions in the Supreme Courts is not necessary to address the problems that arise when competing class actions are commenced in different jurisdictions – an issue that is evidence by the cases issued against AMP Limited. In our view, removing the ability to commence *any* Corporations Class Actions in the Supreme Courts would be a drastic and unnecessary step to resolve the problems of competing class actions proceedings being commenced in different Courts, and would unjustifiably curtail the legitimate rights that claimants have in relation to the identification and selection of a forum.

6.70. Further, removing the ability to commence Corporations Class Actions in the Supreme Courts would not resolve the same problems that can arise when any other kind of competing class actions are commenced in different Courts, – for example, class actions arising from claims under the *Australian Consumer Law*. We find that it would therefore be a drastic step that offers only a partial solution.

6.71. In our view, the proposal of the VLRC to establish a cross-vesting judicial panel is a preferable solution.

6.72. If that proposal is not adopted, we consider there are less drastic reforms that could be made to the statutory provisions regulating transfer of proceedings between the Federal Court and the Supreme Courts that are equally capable of providing a solution without removing entirely the ability to commence *any* Corporations Class Actions in the Supreme Courts.

Cross-vesting judicial panel

6.73. We support the recommendation of the VLRC to establish a cross-vesting judicial panel, noting that the issue of precisely *how* such a panel would operate was not addressed in the VLRC report. We set out below how we consider the panel could operate, but note that this is one amongst a number of possible models.

- 6.74. Given the strictures of Chapter III of the Constitution, important issues that will need to be addressed are whether the panel is a Court exercising judicial power, or an administrative body exercising administrative power. If it is to be a Court, its members, including those from the Supreme Courts, would need to be appointed in conformity with s 72 of the Constitution. This may be problematic for a number of reasons, one of which is that the continuance in office of the panel's members could not be conditioned upon their continuance in office as a judge of the court of which they were a member at the time of their appointment.
- 6.75. We therefore consider it unlikely that the panel could be established as a Court. If the panel is not to be a Court then it obviously cannot exercise judicial power, or at least not the judicial power of the Commonwealth.
- 6.76. We consider there may be constitutional issues with an administrative body making decisions that either, of their own force, effect the transfer of a proceeding from one court exercising federal jurisdiction to another, or that bind a court exercising federal jurisdiction to order that the proceeding be transferred to another court in accordance with the panel's decision. We consider this *might* be a constitutionally impermissible interference by (what for constitutional purposes may be viewed as) the Executive in the processes of the Judiciary. Such matters would need to be considered if it were proposed that the panel make binding decisions.
- 6.77. If, however, the panel instead only makes *recommendations* (albeit highly authoritative ones) to the courts then we consider that it is less likely that this would give rise to constitutional issues. A report of the panel would be of a similar character to the report of a referee, with the court having power to adopt, vary or reject the report where appropriate.
- 6.78. It would still be necessary, however, to ensure that the appointment of serving judges to the panel, perhaps in a *persona designata* capacity, is not incompatible with their judicial office.¹¹⁵ Without having given the matter any detailed consideration, we are inclined to think that there would be no incompatibility.
- 6.79. Before setting out a proposed model for the panel, we should state that we consider the model is capable of operating across all kinds of class actions in federal jurisdiction, and where the competing class actions are in the Federal Court and one or more Supreme Courts, or in two or more Supreme Courts only.

Proposed model

[1] Where it appears to a Court that:

- (a) a class action is pending in the Court;**
- (b) one or more other class actions are pending in another Court or Courts; and**
- (c) it may be in the interests of justice that all of the class actions be in the same Court so that they may be heard or case managed together,**

¹¹⁵ In accordance with the principles laid down in cases such as *Grollo v Palmer* (1995) 184 CLR 348, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

then the Court must, unless it is satisfied there are special reasons for not doing so, refer to the panel the questions whether:

- (d) it is in the interests of justice that the class actions (or any two or more of them) be in the same Court so that they may be heard or case managed together¹¹⁶; and
- (e) if so, which Court (which need not be the Court in which any of the class actions are pending) those class actions should be in, having regard to the interests of justice and all relevant matters.

6.80. The criterion in (c) is deliberately broader than "competing class actions" as defined in the Discussion Paper¹¹⁷. This is because even where there is no possibility of overlap in group members, it can still be in the interests of justice for multiple class actions to be in one court so they can be managed and heard together. For example, there may be one closed class action and one open class action that does not include the closed class. There may be different claim periods or different types of group members (retail investors / institutional investors, shareholders / franchisees) or different respondents in multiple class actions – but they may arise out of the same circumstances such that it is in the interests of justice that they be heard or case managed together.

6.81. The choice of the word may in criterion (c) is to set a low bar for when the court must refer to the panel. The court should not need to first hold a (possibly contested) hearing, at which it would likely need to give an opportunity to be heard to the parties in the other class action(s), to determine whether it is in the interests of justice for all the class actions to be in the same court.

6.82. The words "unless it is satisfied there are special reasons for not doing so" emulate s 6 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ('Cross-Vesting Act') which deals with transfer of "special federal matters". We consider them to be suitable for the present context.

- [2] The Court that makes the reference to the panel should inform the other court(s) in which the other class action(s) is pending and the Chief Justice of the Federal Court, and all the Courts should take no further steps in the class actions (save for urgent relief of an interlocutory nature) until the report of the panel is received, unless satisfied there are special reasons taking further steps.**

6.83. Until the question of forum is resolved, unless there are special reasons for not doing so, we consider that no further steps should be taken in all the class actions the subject of a reference to the panel, save for urgent interlocutory relief.

- [3] A party in a class action who is aware of another class action pending in another Court to which [1] may apply should be under an obligation to inform the Court of this matter.**

6.84. This will assist the court to make a reference to the panel as early as possible and ensure that a party may not seek to obtain any advantage by achieving further progress in their class action.

¹¹⁶ Including for consideration to be given to resolving the multiplicity of proceedings by staying or declassing any of the proceedings etc.

¹¹⁷ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 109

- [4]** After a reference is made to the panel, a Court in which a class action is pending that is not subject of the reference, may, instead of making its own reference to the panel under [1], refer the class action to the panel to be considered as part of the earlier reference.
- 6.85. This is designed to address a situation where a court makes a reference to the panel, and then that court or another court considers that another class action, possibly one that had not been commenced at the time of the reference, should also be considered as part of the same reference.
- [5]** Upon a reference to the panel, the Chief Justice of the Federal Court should appoint one Judge of the Federal Court to the panel, and select two Supreme Courts which have class action regimes, whose Chief Justices shall each appoint one Judge from their Court to the panel. As far as possible, the Chief Justice of the Federal Court should select the Supreme Court(s) in which the class actions the subject of the reference are pending (this would only not be possible if, exceptionally, class actions the subject of the reference were pending in more than two Supreme Courts).
- 6.86. This model envisions the panel as an ad hoc body, rather than having a standing membership. We do not consider this point to be a matter of great significance, but we believe a standing membership may be unnecessary and an ad hoc body provides greater flexibility as there is likely to be lengthy periods where no reference is made to the panel. There may be other times where two (unrelated) references are made to the panel in close succession, so it may be of benefit to allow two different panels with different members to operate.
- 6.87. We think it is likely unnecessary to be prescriptive about which Judges may sit on the panel, other than providing that a Judge may only be appointed to the panel with their consent. Each Chief Justice would be expected to consider relevant matters, such as a Judge's experience with class action proceedings.
- 6.88. However, we think that, as far as possible, the Judges appointed to the panel should have had no previous dealings with the class actions the subject of the reference, i.e. the Judges case managing the class actions should not be appointed to the panel, unless no other Judge is available to be appointed. We consider that there is a benefit to be derived from the panel canvassing the matter anew.
- 6.89. This will also allow the Judge that has been case managing the class action(s) to then be the Judge that considers whether to adopt the recommendations of the panel.
- [6]** The panel should be able to set its own procedures, subject to a requirement to provide procedural fairness to all the parties to the class actions the subject of the reference. The panel should be able to determine a matter on the papers or request oral or written information from relevant parties or practitioners. The panel should be able to receive evidence, including under oath, and submissions. Consideration should be given to specifying that the panel is not bound by the rules of evidence.
- 6.90. We consider the panel should have flexibility as to how it conducts a reference, with a view to a reference being determined as quickly and efficiently as possible while ensuring that procedural fairness is provided to all parties.

[7] The panel's task should be to issue a report giving its recommendation to the courts in which the class actions are pending as to whether:

(a) it is in the interests of justice that the class actions (or any two or more of them) the subject of the reference should be in the same Court so that they may be heard or case managed together; and

(b) if so, which Court (which need not be the Court in which any of the class actions are pending) those class actions should be in, having regard to the interests of justice and all relevant matters.

6.91. This mirrors the questions the court refers to the panel. In most cases we consider question (a) is likely to be quite straightforward. Nevertheless, we think it is appropriate for this to be a question for the panel to consider. As to question (b), we do not consider it is necessary to specify a list of matters that the panel must consider. It can be expected that the factors the panel will consider will include the same factors courts currently consider in determining transfer applications.

[8] The panel should issue a single report with no dissenting opinions and without specifying whether the recommendations are unanimous or by majority.

6.92. This is designed to avoid possible embarrassment when the courts come to consider the report, so that a judge cannot be placed in the position of being asked to reject the recommendations of the majority of the panel in preference to the dissenting recommendations of another judge of the same court.

[9] Consideration should be given to specifying that the report of the panel may be as brief as the nature of the case permits.

6.93. We consider this would support the goal of the panel issuing its report as quickly and efficiently as possible.

[10] There should be a strong presumption in favour of each Court in which the class actions the subject of the reference are pending adopting the recommendations of the panel.

6.94. We consider a strong presumption in favour of each court adopting the recommendations of the panel is necessary for the model to serve its intended purpose. We acknowledge that it may not be necessary to legislate for this presumption, as it may duly be expected that each court adopt the recommendations, absent any noteworthy reason not to.

6.95. The court(s) other than the court which the panel recommended the class actions should be in would therefore be expected in all but the most exceptional of cases to transfer the class action(s) before it to the latter court.

6.96. Naturally, the former court(s) would be expected to hold the 'adoption hearing' first, since once the class action(s) are transferred to the latter court it would be practically unnecessary for the latter court to do anything with the report.

6.97. We propose that there should not be an appeal or a rehearing of the issues considered by the panel, as is the similarly the case where a court receives the report of a referee. To this end, it

may be necessary to specify that, unless it is satisfied there are special reasons for doing so, the court must not consider any matter or evidence raised by a party that was not raised with the panel when determining whether to adopt the recommendations of the panel.

[11] There should be a privative clause preventing the report or the proceedings of the panel from being challenged, called into question or quashed in any collateral proceedings. This would necessarily not exclude judicial review for jurisdictional error in the High Court pursuant to s 75(v) of the Constitution.

- 6.98. As far as possible, we consider that it should not be possible for a party to challenge the proceedings or the report of the panel outside of the 'adoption hearing' that the relevant courts will hold once the report is received.
- 6.99. The jurisdiction of the High Court under s 75(v) of the Constitution obviously cannot be excluded. We do not consider this provides any reason not to pursue this model. First, challenge under s 75(v) would be a most exceptional course for a party to take, and would be available only for jurisdictional error. Second, the grant of relief under s 75(v) is discretionary and the High Court might be expected to refuse relief where no substantive rights are affected (leaving aside a constitutional challenge to the model as a whole).

Conclusion on the proposed model

- 6.100. In our view, the model proposed above, or a model similar to it, is highly likely to be a quick and efficient method of resolving the kinds of problems that can arise when competing or related class actions are commenced in different courts, as has been seen in the cases against AMP Limited.
- 6.101. We consider such a model should be pursued in preference to the drastic step of entirely removing the ability to commence Corporations Class Actions in Supreme Courts.
- 6.102. We also consider the model is capable of operating across class actions in state jurisdictions, although it would likely require state legislation in these cases, and obviously transfer to the Federal Court would not be an option. To our knowledge, subject to the incompatibility doctrine, there is no constitutional issue with a Judge of the Federal Court being appointed, *persona designata*, with his or her consent and the consent of the Commonwealth, to a body established by State legislation.
- 6.103. The panel could therefore be used when competing or related class actions involving no federal matter are commenced in different Supreme Courts.

Alternative reform

- 6.104. If the VLRC proposal of a cross-vesting judicial panel is not adopted, we consider that, rather than preventing Corporations Class Actions from being commenced in Supreme Courts entirely, reforms should be made to the transfer provisions in s 1337H of the Corporations Act and s 5 of the Cross-Vesting Act.
- 6.105. As has been seen in the *AMP* cases, the current provisions regulating transfer of proceedings between the Federal Court and the Supreme Courts are not able to readily resolve situations of competing or related class actions being commenced in different courts.

- 6.106. At present, both the Federal Court and the Supreme Courts can transfer a proceeding to another of those Courts, but cannot order that a proceeding in another of those courts be transferred to it. The outcome of transfer applications can therefore depend upon which court is first to hear a transfer application. We consider this to be undesirable, as it may encourage a race to have one court hear the application first, or otherwise may encourage parties to try to avoid a particular court hearing the application first.
- 6.107. The first court might consider it should transfer its proceedings to the other court to ensure that all claims are heard in the one forum, as was done in *Creighton v Australian Executor Trustees Limited* [2015] FCA 1137, or else the first court might refuse to transfer its proceedings to the other court because it thinks the other court will transfer its proceedings, as was evident in the cases against AMP Limited in *Wigmans*¹¹⁸.
- 6.108. If the first court refused to transfer its proceedings, it is likely that the second court might feel forced into transferring its proceedings, even where in circumstances where it otherwise would not have been inclined to do so. Alternatively, the second court might also refuse to transfer its proceedings, leaving a stalemate-like state of affairs between the two courts.
- 6.109. Further, the status quo has given to rise to anti-suit injunctions being considered. In our view, attempting to resolve the difficulties that can arise under the current transfer system by anti-suit injunctions, as was once again illustrated in the cases against AMP Limited, is undesirable, if not altogether inappropriate.
- 6.110. The authorities state clearly that anti-suit injunctions should be granted sparingly, and in respect of proceedings in multiple courts in Australia, certainly in only the rarest of circumstances. In our view, for a court to come to consider granting an anti-suit injunction in the context of competing or related class actions to resolve the question of forum powerfully indicates that the current transfer system requires reform.
- 6.111. As it has in the cases against AMP Limited, the possibility of anti-suit injunctions can raise the even more unseemly spectre of anti-anti-suit injunctions and anti-anti-anti-suit injunctions. While an anti-suit injunction may be granted to vindicate a court's authority, in our view it cannot but diminish the standing of all the courts and parties involved in the eyes of the public. Anti-suit injunctions in the context of competing class-actions are, in our view, apt to bring the administration of justice into disrepute.
- 6.112. There is, therefore, a clear need for reform of the transfer provisions if the cross-vesting judicial panel proposal is not adopted. However, in our view, there is no clear need for removing the jurisdiction of the Supreme Courts.
- 6.113. We consider two alternative reforms to the transfer provisions are capable of resolving the problems that can arise, and have arisen in the cases against AMP Limited, when competing or related class actions are commenced in different courts.

¹¹⁸ *v AMP Ltd* [2018] NSWSC 1045

Option 1

- 6.114. First, power could be given to the Federal Court, if it considers it is in the interests of justice to do so, to order that a Corporations Class Action pending in a Supreme Court be transferred to the Federal Court, to be case managed or heard together with another class action pending in the Federal Court, provided that the Federal Court has jurisdiction to determine the class action that is pending in the Supreme Court.
- 6.115. If this power were available, it would be unlikely that an application would be made to the Supreme Court to transfer its proceeding. However, were the Supreme Court's power to refuse that transfer removed, and the Federal Court then ordered that it be transferred, then the power of the Supreme Court to transfer a proceeding to the Federal Court could be removed (except where it is by consent of all parties) in cases where there is a related or competing class action pending in the Federal Court.
- 6.116. Alternatively, rather than removing the power, the Supreme Court could be required to refer the transfer application itself to the Federal Court in such cases (again, except where transfer is by consent of all parties).
- 6.117. The Federal Court already has power to direct that a court of a State or Territory other than the Supreme Court transfer certain kinds of proceeding to the Federal Court: see s 138D(1) and (2) of the *Competition and Consumer Act 2010* (Cth) and s 12GK(4) of the ASIC Act. It is not apparent to us why the status of the Supreme Courts as superior courts or their special status under the Constitution poses any constitutional issues with granting power to the Federal Court to order that a proceeding in a Supreme Court in federal jurisdiction be transferred to the Federal Court.
- 6.118. This reform will ensure that where competing or related class actions are pending in the Federal Court as well as in one or more Supreme Courts, there is only one court that can determine which of the proceedings should be transferred (unless all the parties in a Supreme Court class action consent to its transfer to the Federal Court, in which case it is logical to allow the Supreme Court to transfer the proceeding).
- 6.119. This reform would ensure that the highly unsatisfactory possibility of competing transfer applications, as developed recently in the cases against AMP Limited, is eliminated. It would also diminish the need for anti-suit injunctions with respect to transfer applications in class action proceedings. If the Federal Court considered that the class action(s) in the Supreme Court(s) should be case managed or heard together with the class action(s) pending in the Federal Court then it would order it (or they) be transferred to the Federal Court. No anti-suit injunctions would need to be considered.
- 6.120. Further still, it would be inconceivable that a Supreme Court would issue an anti-suit injunction against parties in the Federal Court where the Federal Court has the power to ensure all competing or related class actions are heard in one court, either by transferring its class action(s) to the Supreme Court or ordering that the class action(s) pending in the Supreme Court be transferred to the Federal Court.
- 6.121. If there is good reason why the class actions should be heard in the Supreme Court rather than the Federal Court (excluding the issue of venue, considering the Federal Court is able to sit anywhere in Australia), then the Federal Court can be expected to transfer its case(s) to the

Supreme Court rather than the reverse. For example, there may perhaps be another (non-class action) proceeding pending in the Supreme Court that is not encompassed by the jurisdiction of the Federal Court, and it may be in the interests of justice for the class actions to be heard together with that other proceeding in the Supreme Court.

- 6.122. In circumstances where competing or related class actions are pending in two Supreme Courts (within federal jurisdiction) and not the Federal Court, we also consider it would be suitable to give the Federal Court the sole power to determine transfer applications, again unless all the parties in one court consent to transfer of their proceeding.
- 6.123. The Federal Court should be empowered to order all the class actions be transferred to one of the Supreme Courts, or to the Federal Court, or even to a different Supreme Court. Clearly, no Supreme Court could be given sole power in this respect where there is competition between Supreme Courts. Further, specifying that the Supreme Court in which the first-in-time class action was commenced is to have the sole power is unlikely to be appropriate, as it is likely that this would encourage a 'race to the courthouse'.

Option 2

- 6.124. As an alternative to granting the Federal Court the power to order that a class action pending in a Supreme Court be transferred to the Federal Court, the transfer provisions could be amended to require the Supreme Court to transfer a class action to the Federal Court if the Federal Court has jurisdiction in the matter where there is a competing or related class action pending in the Federal Court. That is, unless the Supreme Court is satisfied that there are special reasons for not doing so in the particular circumstances of the proceeding, similar to the manner in which the Supreme Courts must deal with 'special federal matters' under s 6 of the Cross-Vesting Act.
- 6.125. A provision such as s 6(6)(a) of the Cross-Vesting Act could also be included, directing the Supreme Courts to have regard to the general rule that class actions pending in the Supreme Court should be transferred to the Federal Court if there is a competing or related class action pending in the Federal Court.
- 6.126. The Supreme Court would be able to decide not to transfer a class action where there were special reasons in the particular circumstances of the proceeding for not transferring it. As an example, the class action in the Supreme Court might be very advanced and have a trial date before the Federal Court class action is commenced. In such a case, the Supreme Court might consider that provides a special reason not to transfer the proceeding to the Federal Court.
- 6.127. In that event, the Federal Court could then be expected to transfer its case to the Supreme Court so that it can make the necessary orders to 'catch up'. The Supreme Court could consider whether it should be stayed or declassified or consolidated if appropriate (unless the Federal Court itself determined it should be stayed), or the Federal Court could decide not to transfer it to the Supreme Court – for example if it is related class action rather than a competing one, such that there is less of a need for them to be heard together and if it were unlikely that it could 'catch up'.
- 6.128. Although this option would be an improvement on the current system, we consider Option 1 is to be preferred if the 'judicial panel' is not able to be implemented. Under this option, the possibility of both courts refusing to transfer when the class actions really ought to be in one court would

still remain but would be significantly reduced, particularly if transfer decisions are not subject to appeal as is presently the case.

- 6.129. Although it may still be a factor, any outcome under this option would be less dependent on the order in which transfer applications were heard. If the Federal Court were the first to hear an application, we consider that it would be more inclined to refuse transfer than might presently be the case, given the Supreme Court would need to be satisfied there were 'special reasons' not to transfer. Or conversely, the Federal Court might be inclined to transfer to avoid the need for a second application.
- 6.130. In the event that the Supreme Court were to be the first court to hear an application, it would need to be satisfied there were 'special reasons' not to transfer and might still refuse to transfer in the expectation that the Federal Court would do so.
- 6.131. Therefore, we submit that in circumstances where this option would ensure that only one transfer application be required, Option 1 is to be preferred. Further still, Option 2 also does not provide a solution where there are related or competing class actions pending in two or more Supreme Courts and not the Federal Court. There is no basis on which a legislative 'pecking order' could be set, and favouring the Court in which the first class action is commenced should not be adopted.
- 6.132. While it may be the case that competition between multiple Supreme Courts does not require reform because transfer applications could be resolved by reference to geographic factors, this might not necessarily be a relevant factor in circumstances where geographic factors might be neutral or evenly balanced. As such, the spectre of competing transfer applications and anti-suit injunctions as seen in the AMP cases may therefore be present.

A last resort

- 6.133. If the proposal to make the jurisdiction of the Federal Court exclusive in Corporations Class Actions is adopted, which we consider should only be implemented as a last resort, we consider that the Federal Court should retain the power to transfer a Corporations Class Action to the Supreme Courts, and the Supreme Courts should then have jurisdiction.
- 6.134. At most, to avoid competing or related class actions being *commenced* in different courts, we query whether it would be suitable to require all such class actions to be *commenced* in a single court. However, we consider there is no good reason why that court should not be able to transfer such a class action to another court capable of determining the matter in an appropriate case.
- 6.135. There may, in any given case, be a compelling reason for why a Corporations Class Action should be heard in a Supreme Court. There may, for example, be a related proceeding in a Supreme Court which is not within the jurisdiction of the Federal Court and therefore cannot be transferred to the Federal Court, and it may be in the interests of justice for the Corporations Class Action and the related proceeding to be heard together.

7. Settlement Approval and Distribution

- 7.1. We agree with the approach taken by the Commission in respect of calls to codify the application of s 33V in legislation, including the factors which a court ought take into consideration in determining whether to approve a proposed settlement.
- 7.2. We do not consider that there is any demonstrated need for legislative intervention in this space. Each proceeding brought before the court for settlement approval involves facts and issues which are particular to each matter. A court's consideration of the extensive evidence ordinarily filed in support of a submission that a settlement is fair, reasonable and in the interest of group members, and its assessment of whether the settlement should be approved, is informed by the consistent application of established principles.
- 7.3. As the Commission notes,¹¹⁹ the factors relevant to a court's assessment have been developed through the case law over many years, such that there now exists a comprehensive set of matters which courts take into account in considering whether to approve a settlement. In our view, the development of relevant factors through iterative judicial determinations is a superior mechanism by which specific criteria for the court's approval of a settlement has and should continue to be developed.
- 7.4. We consider this to be the case in light of the risks attended by a legislated approach, namely, legislative intervention would require a court to conform to a rigid approach that may be slow to adapt to new circumstances – whether this be distinct events arising in a particular proceeding or changes to court rules and Practice Notes that affect the conduct of settlement approvals. We also acknowledge the risk of diverging legislative processes in the different class action jurisdictions that may result in the class action regimes falling out of step with one another when considering settlement approval.
- 7.5. We submit that the risk of these unfavourable outcomes further weigh the balance in favour of the courts continuing to consider and apply developments in case law. As new factors which are relevant to the court's assessment arise – for example, the advent of litigation funding (with, as one example, the attendant consequence that the risk of a representative applicant being personally exposed to an adverse costs order is no longer a feature of all group proceeding litigation) – courts in future decisions can adopt an approach to considering whether to approve a settlement which reflect such changes in the class action landscape.

Proposal 7-1: Part 15 of the Federal Court of Australia's Class Action Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.

- 7.6. A key aspect of any settlement approval is the court's consideration of whether to approve the legal costs incurred in prosecuting the claims. The Commission has proposed in this regard that Part 15 of the Federal Court's Class Action Practice Note (GPN-CA) should include a clause that:

¹¹⁹ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 121–122

- (a) the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval; and
 - (b) that the referee is to explicitly examine whether the work completed was done in the most efficient manner.
- 7.7. We have no objection to the first limb of Proposal 7-1 that the Practice Note include a clause that the Court may appoint a referee to assess the reasonableness of costs.
- 7.8. First, we observe that the Court already has the power to refer a question to a referee under s 54A of the *Federal Court Act*, so we query the additional benefit to be derived from amending the Practice Note in this way.
- 7.9. Second, we consider that this Proposal is based on an overstatement of the extent to which concern has been expressed that costs' assessors appointed by an applicant's lawyers are truly independent.
- 7.10. In our experience, independent cost experts retained by the applicant to assess the legal costs and disbursements incurred in a proceeding undertake their role with independence and integrity, in accordance with the expert witness code, and perform their duties with the utmost diligence and care.
- 7.11. Further still, there is a notable lack of settlement approval judgments that impart any negative commentary or marked criticism on the integrity of costs experts. As such, we would caution against impugning an entire sector's independence in the absence of clear evidence that a problem exists with the current approach – this is particularly so having regard to the existence of evidence which militates against an unfavorable conclusion.
- 7.12. Most recently, in *Money Max v QBE Insurance Group*,¹²⁰ the report of the independent costs' consultant engaged by the firm in that case was subjected to review by a Court-appointed referee.¹²¹ The result of the two reports was a reduction in costs by about \$640,000 – representing a reduction of around \$310,000 applied by the costs' consultant initially, and a further reduction of \$348,000 upon review by the referee. This is the most significant instance of a further reduction applied by the courts that we have seen.
- 7.13. In our experience, the overall reductions otherwise applied throughout these processes are low and we query whether, on balance, the costs associated with the extra layer of review can be supported in such circumstances. For example even in the context of *QBE*¹²² with total approved costs of approximately \$21.8m, it is evident that the additional layer of review did not necessarily result in a material departure from the original assessment.
- 7.14. This is an unsurprising outcome from our perspective and having regard to our experience in briefing independent costs' assessors. As Justice Murphy observed in *QBE*, the independent costs expert in that case had been "*engaged in a great many cases including in 11 class*

¹²⁰ *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030

¹²¹ *Ibid* at [5]

¹²² *Ibid*

*actions", and that her "opinion in relation to the reasonableness of costs was accepted in all but one, where her estimate was reduced by only 3.5%".*¹²³

- 7.15. We consider that several benefits arise from the practice of the same firm briefing a costs consultant in respect of multiple matters. Costs experts can develop familiarity with a firm's work practices and systems over time – and in our experience, this can ultimately reduce the time and cost of the assessment process. Further still, costs experts undertake this work whilst continuing to retain their independence and are well regarded by the courts.
- 7.16. Nonetheless, we do not consider that firms acting appropriately in relation to legal costs have anything to be concerned about by the imposition of additional scrutiny or layers of review in this regard. We would be content to subject our costs to a court-appointed expert, to the extent that it is considered that this approach offers a more independent and robust process which increases confidence in the ultimate determinations.
- 7.17. We are mindful of the court's supervisory role in relation to ensuring the costs deducted from group members' recoveries are rigorously scrutinised as part of the settlement approval process. However, we query whether the need for additional scrutiny is more appropriately determined by the judge in the context of the specific claim before the court.
- 7.18. As to the second limb of Proposal 7-1, we consider that it is important to note the standard by which the reasonableness of costs is most appropriately assessed is the current test – that is, whether the costs were *reasonably incurred*, having regard to the nature of the work performed, the time taken to perform the work, the seniority of the persons undertaking that work and the appropriateness of the hourly rates for those individuals.¹²⁴
- 7.19. An assessment of costs should not be solely based on an examination of "*whether the work completed was done in the most efficient manner*" as is proposed. We consider that this approach risks holding lawyers to a standard of perfection, where they are otherwise only able to prospectively make decisions on the conduct of litigation and the strategy to be employed, based on the information and context available to them at the time.
- 7.20. The 'most efficient manner' can only practically be ascertained after the fact, especially in circumstances where class actions are commonly complex and lengthy in nature to run. However, a referee will be considering costs with the benefit of hindsight, but with the absence of a deep appreciation for the issues and complexity of the various steps involved in each individual case.
- 7.21. We further note that the standard imposed by '*most efficient manner*' may have the effect of adversely affecting a lawyer's ability to adequately represent their clients – for example, conducting the litigation in an overly conservative manner that may result in a less favourable outcome than would otherwise have been achievable in order to avoid risks unfavourable assessments of their conduct when it comes to assessing costs. We consider that this may be an unintended consequence of imposing this standard, which would ultimately be contrary to the interests of group members.

¹²³ Ibid at [155]

¹²⁴ See *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 [32]

- 7.22. Proportionality must also be a touchstone because, for example, while the application of technology-assisted discovery review processes might significantly reduce costs and be appropriately adopted in some kinds of claims, in particularly-high value cases lawyers may reasonably form view that it is in group members' interests for the legal team to manually review a greater proportion of discovered documents, since a small difference in the strength of the case can deliver significantly better outcomes to group members. This may not necessarily be the cheapest way to conduct a discovery review exercise, however there may be circumstances in which it is justifiable and in the best interests of the group to do so – particularly where such work increases the recoverable value of the claim by an amount greater than the additional cost of the document-review work.
- 7.23. Further, there are many factors outside of applicant lawyer's control which frequently affect the level of costs incurred, including the conduct of respondents. Although it may not be considered an 'efficient' use of lawyer's time to defend or otherwise respond to each and every issue agitated by a respondent, it is likely that the time expended will meet the threshold of 'reasonably incurred' when regard is had to, for example, the impact of this engagement on the broader direction of the litigation.
- 7.24. Presently, experts are briefed with contextual and background material to understand why and how certain decisions were made and actions taken in the prosecution of a claim. In our experience, there is often also a process of exchange between the expert and the lawyers which allows the expert to assess whether certain costs incurred were reasonable. It is difficult in our view to conceive of how this exchange would be sufficiently detailed (in the absence of significant time and costs expended to provide comprehensive explanations) to allow a referee to reach a view as to whether work completed was done in the most efficient manner.
- 7.25. For these reasons, while we take no issue with the first limb of Proposal 7-1, we submit that the second limb ought not be adopted by way of inclusion in the Practice Note or otherwise. The imposition of a standard which is both higher and more difficult to measure against than the current test is, in our view, unwarranted.

Question 7-1: Should settlement administration be the subject of a tender process?

- 7.26. The proper execution of the settlement administration process in a class action is fundamental to the preservation of public confidence in Part IVA proceedings. In our experience, from a group member's perspective, this process can be equally if not more important than the conduct of the proceeding prior to settlement or judgment. We are proud of Slater and Gordon's track record in administering highly complex settlement processes in a manner that is consistently thorough, efficient and reliable. The settlements we have administered in recent years have been notable for their integrity and effectiveness in distributing settlement funds to group members safely and correctly, and in an efficient manner, with the average costs of our settlement work representing less than 5% of the total costs approved by courts in those matters.
- 7.27. Having regard to the importance of this stage of a proceeding, our view is that any proposal to subject settlement administration to a tender process must be approached with great caution.
- 7.28. As a matter of principle, we consider that the lawyers involved in the conduct of a proceeding are in all cases likely to be best suited to carrying out the administration of its settlement. Litigation, and indeed class action litigation, is specialised work that must be conducted in a skilled

manner. It necessarily follows that the administration of a settlement incidental to the litigation must similarly be conducted so.

- 7.29. In our experience the highest volume of group member contact in a class action occurs during the settlement administration process, as compared to any other stage of a proceeding, including opt-out and registration. We consider that it is important that group members do not develop a perception that the work of distributing the funds obtained through a settlement by the lawyers acting for the class is being 'farmed out', with no further role for those responsible for the settlement upon approval.
- 7.30. Group member enquiries which arise in the course of a settlement administration often include questions, the answers to which fall squarely within the category of legal advice. Examples include questions about the basis for settling the proceeding, the different approaches to calculating loss and their obligations to contribute to the costs of the proceeding.
- 7.31. It is unlikely to be either possible or appropriate for any third party to respond as effectively to such queries – it is more likely group members would no longer be able to obtain answers through a 'one-stop shop', but will rather be required to contact multiple entities to access the full suite of information relevant to their claim. This would lead to worse experiences for group members (and potentially greater risks of confusion and inconsistency), and would also have the effect of adding to the total costs incurred throughout settlement administration.
- 7.32. In *Caason Investments Pty Limited v Cao (No 2)*, Justice Murphy indicated that he doubted that a *"tender process would be appropriate in settlement administrations that require evaluative decisions by the Administrator such as cases involving personal injury, property damage and economic loss claims."*¹²⁵
- 7.33. We agree with this assessment, and note further his Honour's observation that the lawyers with the conduct of the proceeding obtain *"a detailed and nuanced understanding of the different categories of claims and of the complexities within each category of claim"*.¹²⁶
- 7.34. We note that there often exist discrete aspects of the settlement distribution process which require the expertise and assistance of a third party – for instance, taxation advice from accounting firms is almost always obtained. The use of third party experts to provide assistance with discrete aspects of the administration process does not result in any detriment to group members, as it is rarely (if ever) the case that these entities are undertaking work about which claimants are likely to have enquiries.
- 7.35. More recently, in *QBE*,¹²⁷ Justice Murphy considered whether it was appropriate to subject the settlement administration process in that case to a tender process. His Honour noted in this regard that *"there is something to be said for using a limited and inexpensive tender process for settlement administration work in shareholder class actions, as it may be an accounting firm or claims administration company could undertake this work just as well as the applicant's solicitor and do so more cheaply"*.¹²⁸

¹²⁵ *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527

¹²⁶ *Ibid*

¹²⁷ *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030

¹²⁸ *Ibid* at 148

- 7.36. Ultimately, however, his Honour determined that it was not appropriate to subject the settlement administration work to a tender process, and that the plaintiff lawyers firm was in the best position to undertake the administration. The reasons provided by his Honour included that:¹²⁹
- (a) The plaintiff lawyers were highly experienced in acting as administrators of a settlement scheme;
 - (b) The estimated costs involved to run the administration were sufficiently low;
 - (c) The plaintiff lawyers had already undertaken significant work in verifying group members' loss data;
 - (d) The work would be performed by identified junior lawyers with assistance from paralegals as required. It was intended that senior lawyers would only play a limited supervisory role;
 - (e) The estimated costs involved were reasonable by comparison with amounts recently approved for settlement administration work in other shareholder class actions;
 - (f) The plaintiff lawyers' successful conduct of the litigation and experience in administering class action settlement meant it was likely to have the trust of many class members.
- 7.37. It is our view that these factors, as set out by Justice Murphy, are likely to feature in relation to most settlement administration processes. In particular, the costs involved in recent class action settlement administration processes undertaken by Slater and Gordon demonstrate that it is unlikely to be the case that an accounting firm, share registry service or claims administration company could undertake this work as competently as and more cheaply than the plaintiff's lawyers.
- 7.38. Further, as the Commission has noted, "*there is some evidence that fees charged by such law firms for processing settlement sums are, on average, less than 3% of the settlement sum*".¹³⁰ This is consistent with our experience, in which many of the settlement administration processes we have administered have involved costs of between approximately 1.4% and 3.2% of the total settlement sums involved in those claims (although we note that there is no real relationship between the value of a claim and the cost of administering a settlement – the point is merely that these processes are not generally conducted in a highly inefficient manner that unduly reduces the funds available to be returned to group members).
- 7.39. Our view is that a tender process would generally be likely to result in the appointment of the lawyers who had prosecuted the claims to administer the settlement, particularly if those lawyers are experienced in administering settlements, we consider that a tender process would often be likely to needlessly increase the costs and decrease the pace of distributing settlement funds to group members. We submit that cost efficiency is of greater significance in circumstances where there are no further funds available for recovery from either the respondent or other third parties to compensate for losses.

¹²⁹ *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030 at [149]

¹³⁰ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 126

- 7.40. Finally, we note that it is likely (if not already established) that courts have the power, pursuant either to s 33V or s 33ZF and their equivalents, to implement a tender process in any given case. We therefore consider that, if the proposal is to be adopted, it is most appropriately set out in a Practice Note, rather than being codified as a strict legislative requirement.

Question 7-2: In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?

- 7.41. The Commission seeks views on whether the terms of class action settlements should be made public and, if so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties.
- 7.42. We note Professor Legg's assertion that, as class actions frequently perform a public function, there are a number of matters that ought to be disclosed in the event of a class action settlement – namely:
- (a) The aggregate settlement sum;
 - (b) The legal fees;
 - (c) The funder's fee;
 - (d) The settlement distribution costs; and
 - (e) What the claim is thought to be worth and why.
- 7.43. It is our preference that as much information be disclosed to group members as appropriate, as determined at the discretion of the Court. While we note that many of the terms identified by Professor Legg are indeed commonly disclosed in the Court's settlement approval judgment, we do not consider that all such terms should be made public as a matter of standard practice.
- 7.44. We consider that the current approach adopted by courts is an effective means of balancing the need for accountability to group members with the need to appropriately protect the interests of parties seeking to resolve a claim.

Current approach

- 7.45. Pursuant to court orders, group members in a class action proceeding have the right to be notified of a proposed settlement and are afforded the opportunity to object and be heard in relation to it. In the first instance, we consider that the existing process of the publication and dispatch of a court-approved Notice of Settlement is appropriate to inform group members of the principal terms of the settlement, to enable them to understand how the settlement would affect them, and to determine whether they wish to object to any aspect of it.
- 7.46. We further note that the court's settlement approval judgment in any given class action proceeding ordinarily plays a significant role in informing group members and the public alike about matters pertinent to either the approval or rejection of a proposed settlement.

7.47. In assessing whether a settlement outcome is fair and reasonable, the court considers a wide array of matters that include, though are certainly not confined to, the terms suggested by Professor Legg. It is often the case, in our experience, that the matters set out at 7.38(a) – (d) are disclosed by way of the publication of the court's reasons for approving the settlement. We believe this is appropriate, and serves to enhance the confidence of group members and the public in the integrity of settlement processes.

Disclosure regarding costs and fees

7.48. We agree in principle with the suggestion that disclosure of the aggregate settlement sum, the legal fees incurred in the prosecution of the claim and the aggregate funding commission payable to the litigation funder, should be made in the course of a proposed settlement.

7.49. We note, however, that there may exist circumstances in which the disclosure of this information is not appropriate – for example, where an appeal arising out of the settlement is contemplated, or where the defendant may be disadvantaged in future proceedings brought in respect of similar matters by those who have opted out.

7.50. We therefore consider that whilst transparency in respect of these matters will serve to increase the accountability of parties operating in the class actions space, there ought not be a blanket rule requiring the disclosure of this information in every class action settlement. Each case should be able to be considered on its own terms, and courts should be empowered to make appropriate decisions in response to the particular circumstances before them.

7.51. We otherwise maintain the view that the most appropriate 'forum' for disclosure of this information is in the reasons of the relevant court in approving or rejecting a proposed settlement – so that the matters are disclosed in the context of the court's assessment of the factors relevant to the approval of the settlement more broadly.

7.52. The provision of relevant contextual information in respect of legal costs is in our view particularly important. There are a number of relevant factors and considerations arising throughout the course of a claim which will inform the reasonableness or otherwise of the legal costs incurred, which cannot be conveyed by the communication of a 'headline' costs figure alone. In addition to enhancing public confidence in the court's decision, the provision of contextual information in this way is likely to mitigate the risks which may arise where a total figure is disclosed in the absence of appropriate background information, or supplementary commentary from a costs expert (where available).

7.53. A non-contextualised disclosure of this information is prone to invite undue criticism from parties who have a limited appreciation for the factors which contribute to the incurrence of legal costs in any given class action proceeding.

Disclosure regarding assessed value of the claim

7.54. We strongly disagree with the assertion that the disclosure of information regarding "what the claim was thought to be worth and why" would offer any utility to group members or other parties involved in the proceeding – let alone to the general public, beyond the mere satisfaction of curiosity. We submit that such disclosure would be damaging to and undermine the ability of plaintiff lawyers to advocate for clients. We also consider that disclosure of this nature would

have a profound effect on the conduct of litigation more generally, that is not necessarily to the benefit of class members.

- 7.55. As the Commission has observed, it is widely accepted that confidentiality is permissible where the matter does not proceed to trial, in order to incentivise the settlement of disputes. We do not consider that there is sufficient value in disclosure to necessitate a departure from such norms that are integral to the very nature of class action litigation.
- 7.56. Confidentiality of advice is the cornerstone of legal representation and we do not consider that class action proceedings are of such a fundamentally altered nature that the conventions of the legal profession should be duly undone. Here, we use the term 'legal representatives' deliberately to capture both plaintiff and defendant lawyers, who we anticipate would have to make similar disclosures about the value of the claim under this proposal. In our experience, legal representatives can only advocate effectively on behalf of clients where they exercise a degree of control over the flow of information and how they employ litigation strategy to produce the best possible outcome.
- 7.57. Disclosing matters that could be characterised as 'advice', such as the assessed value of a claim, may hinder real prospects of settlement between parties – a hindrance that is not only against the interests of group members, but would essentially be antithetical to the interests of the court in bringing an resolution to claims as efficiently and effectively as possible.
- 7.58. We also acknowledge that parties to a claim may be involved in multiple forms of litigation arising from the circumstances that are the subject of the claim. Disclosure of 'advice' would most likely prejudice the parties in other proceedings and may confer a strategic advantage to one party at the expense of another. We consider that disclosure may also either disadvantage or advantage a class member of the class action proceeding who has opted out to pursue an individual claim. It is evident that this approach would have far-reaching consequences beyond the immediate proceeding concerned.
- 7.59. We consider that the court already exercises a sufficient degree of control and supervision through the lengthy and detailed consideration of any settlement proposal to have appropriate regard to whether or not a proposed settlement is within the range of reasonableness afforded by the actual value of the claim. Presently, the court is typically further assisted by confidential advice provided by counsel that details the factors weighing for and against resolution of the matter, including though not confined to:
- (a) The complexity and likely duration of the litigation;
 - (b) The likelihood of establishing liability;
 - (c) The likelihood of establishing damage;
 - (d) The attendant risk of maintaining the class action;
 - (e) The ability of the defendant to withstand a greater judgment;
 - (f) The proposed settlement sum as compared to the best recovery.

- 7.60. In light of the above and as is the case with any type of litigation, any disclosure constituting legal advice (which squarely includes estimations regarding the value of the claim at any given point in a proceeding) is subject to changes of such a drastic nature that the provision of this information would be essentially redundant, in the context of the factors which ultimately lead to the settlement of the proceeding. We consider that the public interest in receiving this information is not of sufficient value to erode the presumption of confidentiality.
- 7.61. We query the purpose such disclosure would serve, as settlement does not involve any factual or legal findings that would be of utility to the general public. We consider that there is no identifiable reason why a class action settlement should be subject to further scrutiny beyond that which is appropriately employed by the courts in their protective role. This is especially so in circumstances where it is common knowledge in the public sphere that the settlement of a matter, whether it be a class action proceeding or not, is always subject to a degree of compromise between the parties.
- 7.62. Further, we oppose any suggestion that such disclosure is necessary for the benefit of group members. In our experience, where group members have expressed concerns about the prospects of an unfair settlement, these concerns are largely alleviated by way of an explanation of the court's protective role in ensuring that a settlement is approved only in circumstances where it is satisfied that is fair, reasonable and in the interests of all group members. In the event that a group member is particularly interested in the terms of settlement beyond that which is publicly disclosed (which is rarely the case), in our experience they are typically made available following the provision of an adequate confidentiality undertaking.
- 7.63. For these reasons, we consider that the present practice, whereby the court maintains its discretion to fashion orders which protect confidentiality where appropriate in respect of settlement terms information is apt to strike the correct balance between open justice and transparency on the one hand, and the rights and interests of the parties to a specific proceeding on the other.

8. Regulatory redress

- 8.1. We welcome any proposal which aims to fulfill the objectives of the Part IVA scheme – namely the express objective to *'enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources.'* To this end, we would support any collective redress scheme that resolves claims in a timely and cost effective manner. However, in the context of corporate wrongdoing in particular, we are concerned that 'redress scheme' alternatives are attended by numerous problems and risks, including:
- (a) Corporations may consider that the financial benefits of engaging in wrongdoing outweigh the relatively low cost of participating in a redress scheme (as compared to defending regulatory or private enforcement litigation);
 - (b) In our experience, the funds available through a redress scheme are frequently insufficient to compensate all victims of the impugned conduct;
 - (c) Claimants are unlikely to obtain compensation equivalent to what would have been available through vindication of their rights in legal proceedings;

- (d) A properly administered redress scheme requires resources and funding presently beyond the reach of Australia's corporate regulators; and
 - (e) The absence of judicial oversight of compromises is likely to produce less fair and reasonable outcomes than is the case with representative proceedings.
- 8.2. As noted in the Discussion Paper, a single collective redress scheme would require an almost complete reconstruction of our current industry-based regulatory structure¹³¹. This would effectively require changes to industry-specific standards and practice – such as regulatory instruments and complaint handling processes – for the purposes of realigning towards a single-entry scheme designed for redress to claimants.
- 8.3. In addition to structural and operational changes, the Discussion Paper accurately identifies that a collective redress scheme would require regulators to shift their focus away from an 'enforcement mindset' to 'redress mindset'¹³². We are concerned that reduced enforcement action and a focus on 'redress' may weaken deterrence for corporate wrongdoers, who may be conscious of a lenient compensation scheme available to them in the unlikely event the corporation is singled out by a regulator.

Resourcing to establish and administer redress scheme

- 8.4. Significantly, the effectiveness of the proposal is dependent on the resourcing that is available to both establish and administer the scheme. We share the concerns expressed in the Discussion Paper regarding funding options in this regard.
- 8.5. We further acknowledge that establishing and maintaining the redress scheme may inadvertently divert the regulator's limited resources. We consider that this is a significant risk, especially in circumstances where the establishment of a single collective redress scheme necessitates the abandonment of industry-specific regulatory structures.
- 8.6. While we anticipate that the resources allocated to each industry would be redistributed into the funding available for the alternate collective scheme, we also envision that fashioning and implementing redress schemes for such a wide array of claims could be productive of greater inefficiencies and rapidly deplete the scheme's resources. We therefore consider that any benefit to be derived should be contemplated in light of the capacity of a likely burdened regulator to effectively perform this function.

Collective redress schemes in foreign jurisdictions

- 8.7. Our concerns as to the effectiveness of a proposed redress scheme model are informed in part by the shortcomings evident in the financial services industry scheme in the UK. As noted in the Discussion Paper, the scheme permits businesses to submit a voluntary redress scheme for approval to the Competition and Markets Authority ('the CMA') to compensate consumers. However, this model demands a degree of willingness on the part of the wrongdoer. Further still, and perhaps more importantly, this model requires early intervention on the part of the regulator,

¹³¹ Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), 134

¹³² Ibid at 133

as the CMA is required to have issued a case against the party under investigation for infringement of their obligations to consumers.

- 8.8. As a result, the ability to establish and access the redress scheme under the UK model largely relies on the regulator's ability to perform its functions. This is far from assured in the Australian context, where our corporate regulators are underfunded and under resourced. In this regard, we note the recent revelations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which has attracted criticism regarding the ability of ASIC to effectively to perform its regulatory role. Expanding the regulator's remit in this way would therefore require significant additional resources and funding.
- 8.9. We suggest that the Commission consider the possibility of corporations themselves bearing the costs for the administration of a redress scheme where appropriate, and at the direction of the regulator. As Professor Hensler notes, this approach has been implemented in Europe – for example, the Financial Services and Markets Authority as the financial market regulator in Belgium simply ordered the relevant financial institutions to establish a program to compensate the small and medium size enterprises that had suffered financial losses as a result of their conduct.¹³³
- 8.10. Notwithstanding our concerns, we acknowledge the benefit to claimants who would partake in a collective redress scheme as an alternative to litigation – especially with regard to possible reduced costs, a greater certainty of outcome and the timely distribution of compensation. We consider this would particularly suitable for mass personal injury claims, for which collective redress schemes have been implemented in foreign jurisdictions – for example:
- 8.10.1. In Japan, which has a long tradition of administrative compensation schemes for catastrophic injuries, including the scheme for victims of the Fukushima Daiichi Nuclear Accident in 2012;
- 8.10.2. In the United States, which similarly has a long history of administrative compensation schemes for victims of government mistreatment and mass disease, including schemes for victims of radioactive weapons testing and coal miners suffering from black lung disease; and
- 8.10.3. In France and Belgium, where both implemented a compensation scheme for asbestos disease victims.¹³⁴

Risks and problems with redress schemes

- 8.11. However, we also note that the aforementioned benefits under the scheme may have the impact of effectively translating into a greatly discounted or reduced compensation figure. It is unfortunate to note that this is common under most redress schemes, which do not benefit from the protective role that the courts would otherwise employ in approving a proposed settlement distribution scheme.
- 8.12. We refer to Professor Hensler's research in this regard:

¹³³ Deborah Hensler (2017), 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally', 65 *Kansas Law Review*, 981

¹³⁴ Ibid

"Although promoted as more efficient (and perhaps fairer) approaches to delivering compensation to victims of external forces and events, a consistent pattern of complaints across administrative programs established to assist different sorts of victims in different countries suggests that in practice such programs often struggle to serve the purposes for which they are intended. Often the number of eligible recipients who come forward as well as their needs exceed estimates (frequently developed in the absence of comprehensive data on how many people were injured and to what degree). Programs subsidized by government are frequently underfunded and funding problems can increase as programs drag on beyond the expected date of termination. Programs initially funded by private entities may appeal for government assistance when the initial appropriation to support the fund runs out".¹³⁵

- 8.13. We are also concerned that the availability of a collective redress scheme may have the unintended consequence of softening the regime for corporate accountability – such that defendants may be more prepared to engage (or at least less cautious about engaging) in conduct that would ordinarily have attracted regulatory enforcement or a possible class action, with the knowledge that they can participate in an administrative scheme for redress to claimants that would contain their liability, at a significantly lower cost.
- 8.14. In the event that a federal collective redress scheme is established, however, we strongly endorse the Commission's proposal that such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose. A regulatory redress model which produced unfavourable compensation outcomes to affected claimants, while also removing their rights to sue for their losses, would effectively present the worst of all possible arrangements.
- 8.15. We note that this does not provide a complete answer to the question of whether a redress scheme is the appropriate approach to recover compensation in respect of losses arising from corporate wrongdoing. Whilst claimants may choose to litigate their claim by retaining their legal rights to do so outside of the scheme itself, we also note that the availability of a redress scheme may have the effect of diminishing the overall class size that might otherwise participate in a class action – thereby affecting the ability of the remaining claimants to agitate their claim through a class action proceeding. That is, each individual's choice to participate in a redress scheme can have the unintended effect of diminishing the viability and effectiveness of a class action proceeding. These kinds of 'external' consequences of informal redress schemes must be considered in detail: if they are implemented poorly or without due care and consideration, they have the potential to cause significantly greater harm to affected parties on an overall basis than they might be intended to cure.

¹³⁵ Deborah Hensler (2017), 'From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally', 65 *Kansas Law Review*, 982 (E.G. Grunenthal, manufacturer of Contergan i.e. Thalidomide)



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