NEW SOUTH WALES SOCIETY OF
LABOR LAWYERS

SUBMISSION TO THE **AUSTRALIAN LAW REFORM COMMISSION** INQUIRY INTO **CLASS ACTION PROCEEDINGS AND THIRD-PARTY LITIGATION FUNDING**

Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: class-actions@alrc.gov.au

Dear Commission,

NSW Society of Labor Lawyers Submission
Inquiry into Class Action Proceedings and Third-Party Litigation

The New South Wales Society of Labor Lawyers ('the Society') welcomes to the opportunity to make a submission to the Inquiry into Class Action Proceedings and Third-Party Litigation Funders conducted by the Australian Law Reform Commission ('the Commission').

The Society aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education. The Society's chief and overriding concern for law reform in the litigation space is ensuring that claimants with legitimate and meritorious claims are capable of recovering compensation to an amount reflecting the extent of any wrong done upon them. The success of any adjustment to the class action regime in Australia should be measured against that benchmark.

The Society responds below using the numbering adopted in Discussion Paper 85.

Section 1

Proposal 1-1

The Commission has suggested that the Australian Government commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges. For the reasons that follow, the Society does not see that review as necessary in the current corporate environment.

First, the empirical evidence does not appear to support the proposition that there is a problem with the current number of shareholder class actions being filed in state and federal jurisdictions. In recent analysis conducted by Professor Vince Morabito of the Monash Business School, it was found that only 34.9% of class actions brought since 1 June 1992, in any jurisdiction, have been brought on behalf of shareholders and investors.[1] Of course, fewer of these have been brought specifically in relation to breaches of the continuous disclosure requirements under the *Corporations Act 2001* (Cth) ('Corporations Act'), and a further discount must be applied to account for competing actions brought in relation to the same alleged breaches.[2] Further possible influences on the rise of shareholder and investor class actions, particularly in the period from 2010 to 2015[3], may be directly or indirectly

[1] Vince Morabito, 'An Empirical Study of Australia's Class Actions Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia' (July 2017), 27.
[2] Ibid, 29.
[3] Allens Linklaters, *Shareholder class actions in Australia* (February 2017) <https://www.allens.com.au/pubs/pdf/class/papclassfeb17-02.pdf>

attributable to the Global Financial Crisis.[4] Various contributors to this debate appear to connect a moderate increase in the number of shareholder and investor class actions with allegations that the procedure is being misused, when on the contrary it is more likely that the increase is attributable to an interplay of factors, including the heightened access to litigation funding, greater media exposure around disclosures by corporate entities and a heightened awareness (possibly as a consequence of that media exposure) to the right to collective redress under the Corporations Act.

Second, the Commission refers at [1.74] of the Discussion Paper to positions put by the Insurance Council of Australia ('ICA') to the Victorian Law Reform Commission ('VLRC') to the effect that the cost of D&O insurance has increased by more than 200% in the past 12 to 18 months. The Society notes that in the decade leading into 2017 premiums for D&O insurance had not increased significantly despite an overall increase in the number of securities class actions being filed in state and federal courts.[5] As the Commission notes, various contributors have identified that the premium pool for D&O insurance is inadequate to meet the current and projected levels of insured securities class action losses.[6] It appears, then, that premiums in recent years have not been properly priced to reflect the risk associated with increased awareness of securities class actions and that the recent increase in the costs of D&O insurance represent a market correction. In that context and without any clear problem for the proposed review to address, it is appropriate that any review be delayed until such time as the market has adjusted to recent price movements; only then will it be possible to hypothesise about the viability of the D&O market.

Third, the current corporate environment, with an ongoing Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and a series of corporate scandals in recent years, does not lend itself to a proposal to review aspects of legislation intended to increase the transparency of corporate entities. In the Society's view, such a review is not warranted in the current environment in circumstances where, as above, there is no clear empirical evidence that there is a problem to be addressed.

Section 3

Proposal 3-1

The Society supports further regulation of the litigation funding market, which presently lacks any comprehensive regulatory regime.[7] This further regulation may take the form of a requirement that litigation funders obtain a 'litigation funding license'. This follows similar proposals by the Productivity Commission in 2014 in its final report on the Inquiry into Access to Justice Arrangements[8] and the Victorian Law Reform Commission which recommended that the Victorian Government advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding market.[9] The Productivity Commission wrote in 2014 that:[10]

> *Overall, while the Commission judges that third party litigation funders can provide important benefits for access to justice, consumers need to be adequately protected and have some assurance that funders will follow through on financial promises. Therefore, in addition to oversight by courts, funders need to be licensed in order to ensure they have adequate capital to manage their financial obligations. Licensing of litigation funders was broadly supported.*

[4] Morabito, above n 1, 29.
[5] Guy Narburgh and Sally-Anne Ivimey, 'Side by Side (A, B and C): Securities Class Actions and D&O Insurance' in Damian Grave and Helen Mould, *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017), 391.
[6] Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Discussion Paper No 85 (2018), [1.74].
[7] Wayne Attrill, 'The Regulation of Conflicts of Interest in Australian Litigation Funding', (Paper presented at the UNSW Class Actions: Securities and Investor Cases Seminar Sydney, 29 August 2013), 1.
[8] Productivity Commission, *Access to Justice Arrangements*, Report No 72 (September 2014) 61.
[9] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Report (March 2018), xix.
[10] Productivity Commission, above n 8, 22.

In the Society's view, the position has not changed since 2014 – indeed, arguably the need for further regulation has become more acute – and a 'litigation funding license' should be introduced into the Corporations Act without further delay.

Proposal 3-2

As a matter of principle the Society supports all requirements for a 'litigation funding license' as proposed by the Commission, however careful thought should be directed by the Commission to the capital requirements in a license so as to allow for new market entrants and not restrict competition in the litigation funding market (in particular, see the Society's response to Question 3-2).

The Commission has drawn attention to the Code of Conduct for Litigation Funders issued by the Association of Litigation Funders of England & Wales.[11] Rule 9.4.3 of that Code says that a Funder (as defined) has "a continuous disclosure obligation in respect of its capital adequacy" including an obligation to *"notify…if the Funder believes that its representations in respect of capital adequacy under the Code are no longer valid because of changed circumstances"*.[12] In the Society's view, if capital adequacy requirements are recommended, the Commission should give further thought to the disclosure requirements around capital adequacy, including whether there is merit in requiring a litigation funder to continuously disclose any change in their capital adequacy requirements to ASIC, particularly where that change poses a possible risk to its payment of future liabilities across its portfolio of cases. The Commission should also give thought to requiring a litigation funder to provide a disclosure statement alongside a litigation funding agreement outlining the capital adequacy of the fund.

Question 3-1

The Society submits that the responsible officer of a litigation fund be required to hold relevant qualifications in either commerce or law, and undertake a short course in the regulatory regime. A minimum standard of training should be offered by the Australian Securities and Investment Commission in a similar vein to that provided for financial product advisers.[13] That training should include, amongst other things, information about compliance requirements under a 'litigation funding license' (as proposed by the Commission), the unique conflict of interest issues that arise in a funded proceeding, and an overview of practice, procedure and legal cost issues in Australian courts, including the principles governing adverse costs and security for costs.

Question 3-2

As above, the Society in principle supports capital adequacy requirements in the sector. There remains a risk, however, that any capital requirements act as a barrier for new market entrants in the sector. The unintended consequence of this market barrier may be reduced competition in the sector and a corresponding increase in commission fees. The litigation funding market is already limited to approximately 19 funders in Australia, with fewer active in the class actions space.[14] Capital adequacy requirements would need to be carefully applied so as not to reinforce the currently limited competition in the market. In order to avoid locking out new entrants, capital adequacy requirements would need to be tailored to the ongoing liabilities (to the extent that these are ascertainable) arising from the litigation funder's portfolio of cases.

[11] Australian Law Reform Commission, above n 6, [1.62].
[12] Code of Conduct for Litigation Funders issued by the Association of Litigation Funders of England & Wales, 9.4.3.
[13] Australian Securities and Investments Commission, ASIC Regulatory Guide 146, 'Licensing: Training of financial product advisers', July 2012.
[14] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould, *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

Another issue which the Society raises for the Commission's attention is the difficulty in setting appropriate levels of capital adequacy in a litigation environment where the claim value and cost liability of any one case may be uncertain, whether due to the claim value being the subject of debate between competing experts or the cost liability being unknown until such time as a defendant provides evidence of costs accrued. Value-setting these two areas is not a precise art and this can create difficulty when setting appropriate levels of capital adequacy. At a minimum, a litigation funder should be required to have adequate capital to meet any potential adverse costs orders in its portfolio of cases such that any litigant which the litigation fund stands behind, who the litigation funder has indemnified, is protected from liability to the extent of their contractual indemnity. It is suggested that in order to determine potential cost liability, an independent costs expert should be utilised for the purpose of any annual audit by ASIC in order to properly assess cost liability.

Question 3-3

The Society sees no reason why litigation funders should not be required to join the Australian Financial Complaints Authority ('AFCA') scheme. Litigation funders, in their day-to-day operations and across their portfolio of cases, particularly in class action proceedings, carry a significant amount of legal and financial risk on behalf of parties, class members, and solicitors (jointly, the consumers of litigation funding) in a proceeding. Where that risk exists, it has the potential, if it materialises, to cause significant financial problems to the consumers of litigation funding as a product. In the Society's view, the myriad of possible financial consequences from litigation funding failing necessitate dispute resolution procedures both within and external to the litigation fund to avoid disputes proceeding directly to litigation.

There are a number of areas of dispute that could fall within the remit of the AFCA. Those disputes could arise as between law firm and litigation funder, client and litigation funder or group member or litigation funder. Such areas of disputation could include:

1 *For the client*, disputes in respect to the failure by the litigation funder to comply with the terms of the litigation funding agreement, including any failure to provide security for costs and refusal to provide indemnity to the lead applicant and class members where an adverse costs order had been made against them;

2 *For the law firm*, disputes relating to unpaid bills for legal services provided to the client and the funder, and disputes whereby a litigation funder requires settlement of a proceeding against the interests or express instructions of a client, for instance by threatening to withdraw funding should unfair settlement terms not be agreed; and

3 *For the funder*, disputes relating to the amount of a settlement sum owing to the funder, or a breach of the terms of a litigation funding agreement adverse to the funder.

These areas of disputation would, for the most part, benefit from a non-adversarial process in the ACFA, especially considering that in many cases, clients who bring disputes are unlikely to have significant financial and legal means vis-à-vis a funder or law firm, and the complaints-management process within ACFA would assist the client in the cost-effective resolution of the dispute.

We note that, were Proposal 5-1 to be adopted, clients would have recourse to the designated local regulatory authority for relevant breaches of a contingency costs agreement.

Section 4

Proposal 4-1

The Society agrees that if the 'litigation funding license' regime at Proposal 3-1 is not adopted, litigation funders should continue to be subject to the requirements of ASIC Regulatory Guide 248. The Society suggests that a better mechanism than reporting annually on compliance with the requirement to implement adequate practices and procedures for managing conflicts of interest, which can be arbitrary, would be for ASIC to be empowered to perform *ad hoc* audits, subject to a one month notice period.

Proposal 4-2

The Society supports the inclusion of 'law firm financing' and 'portfolio funding' in the definition of a 'litigation scheme' in the *Corporations Regulations 2001* (Cth).

Proposal 4-3

The Society agrees that the Law Council of Australia should provide specialist accreditation for solicitors working in class action law and practice. The specialist accreditation should provide training in the regulatory regime for litigation funders, the complexity of conflicts of interest by reference to class action proceedings, and the procedural requirements of Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('FCA Act') and state counterparts.

Proposal 4-4

A myriad of rules in the Australian Solicitors Conduct Rules ('ASCR') (as at 24 August 2015)[15] arguably capture the nature of the misconduct outlined in this proposal. The interrelationship between these rules is sufficient to support a possible breach where a solicitor with an interest in a litigation funder in the proceeding provides legal services to a party in that same proceeding.

As the Commission has already identified, the conflicts arising from litigation funding have been considered by previous regulatory reform. This stands as one of the few areas where the government has intervened in the litigation funding market.[16] Regulatory Guide 248, which provides guidance to a person providing financial services for 'litigation schemes', to an extent mitigates the possible manifestations of the conflict identified by the Commission. It does so by requiring the person to establish arrangements to minimise conflicts within the organisation, which would undoubtedly require steps to ensure that conflicts are minimised where a person acts as both solicitor and funder. Likewise, the Court's power to approve a settlement under section 33V operates as a regulatory oversight over any conflicts that may arise as between the interests of an applicant, represented by a solicitor and litigation funder, and class members: the settlement should not be approved in circumstances where it is 'just in the interests of the applicant and the respondent'[17]. The Court's consideration of settlements and the requirement for approval in effect act as a safeguard against conflicts of interest.[18]

Nevertheless, the Society is of the view that the conflicts that arise for a person taking a dual role as both solicitor and funder are more severe than would otherwise be the case for an ordinary contingency fee arrangement. This is essentially due to the financial reality of this litigation funding scenario; upon settlement or judgment, a litigation funder will generally make *two deductions* from the settlement sum.

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[15] See, for example, r 4.1 ("A solicitor must also…4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client"); r 12.1 ("A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule."); and r 12.2 ("A solicitor must not exercise any undue influence to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services").
[16] Attrill, above n 7, 1.
[17] *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258.
[18] Cameron Hanson, 'Weighing the Bird in the Hand: Settlement of Class Actions', in Damian Grave and Helen Mould, *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

First, they will deduct the share of legal fees accrued by the funder in paying the lead applicant's legal representation. Second, they will deduct the commission fees agreed between funder and class members. This is a contract separate from the costs agreement. Where a person acts as *both* the solicitor and funder, the costs agreement and the litigation funding agreement become near interchangeable. The result is that the person stands to gain both commission rates and legal costs in the proceeding, creating significant potential for conflict arising from the financial incentive to settle the proceeding. For this reason, the Society supports the expansion of the ASCR to include specific interests held by solicitors in litigation funders.

In supporting this reform, we note possible areas of ambiguity that may arise in the practice of any new rule in the ASCR. One area of ambiguity that may arise is where, under a legal practice, there may be a number of member firms, incorporated or otherwise, that are associated with the practice but act in different practice areas. Take for example a situation where a law practice is composed of two member firms, Practice A and Practice B. An equity partner of Practice A sits on the board of a litigation funder that decides to fund a proceeding in which Practice B acts as solicitor. The Commission should consider whether, in such a case, the equity partner of Practice A would stand in breach of the ASCR for his indirect association with Practice B or whether the indirect financial benefit is too remote to establish a breach.

Proposal 4-5

The Society is not opposed to the ASCR being amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings. In the interests of fairness to the party required to disclose, any amendment to the ASCR should be tailored similarly to the current position in under Federal Court Practice Note GPN-CA ('GPN-CA'). That is, the disclosing party should be permitted to redact parts of the litigation funding agreement which, if disclosed, would reasonably be expected to confer a tactical advantage on another party to the dispute resolution.[19]

Proposal 4-6

The Society supports an amendment to GPN-CA to provide that the first notice to class members state what, if any, conflicts may exist in the litigation, and the obligations of solicitors to avoid and manage those conflicts. However, it is not apparent from the Commission's proposal what types of conflicts require addressing, as much would depend on the particular proceeding in question and the type of arrangement as between the lead applicant, class members, the solicitors and any litigation funder. It is also not clear whether the Commission is suggesting that first notices include court-mandated notices (such as the opt-out requirement described in [4.69]) or litigation funding agreements and costs agreements usually issued to class members at an early stage of the proceeding. For example, where the proceeding is commenced as a closed class proceeding (that is, all class members are identifiable and enter agreements directly with the solicitors and any litigation funder), would the requirement extend to initial contact with class members? In many proceedings where the class is closed it is not unusual for the first court-mandated notices to be issued late in the timeline of the proceeding, sometimes a number of years following commencement and well after significant legal costs have been accrued and litigation decisions have been made.

In any case, it is suggested that the Federal Court of Australia develop a comprehensive set of "Conflict Disclosures" which can be provided in different types of proceedings. It is suggested that tailored documents be created for the following types of costs arrangements: (1) standard cost agreements; (2) conditional costs agreements; (3) part-conditional cost agreements; (4) costs agreements operating under a litigation funding agreement; and (5) if the Commission's Proposal 5-1 is adopted and contingency fees are introduced, for contingency fee agreements. Subject to those templates being

[19] See, for example, GPN-CA, cl 6.4(b).

issued by the Court, it should be the case that the first formal correspondence purporting to engage a lead applicant or class member in a class action proceeding contain the relevant standard-form disclosure. The relevance of the correspondence "purporting to engage" a lead applicant or class member is that, where such a person has not been formally engaged as a client or class member in the proceeding, there should be no need for correspondence to contain disclosure of conflicts because there is no guarantee that the person will proceed to be a class member in the litigation.

Section 5

Proposal 5-1

The Society supports the removal of the prohibition of contingency fees only in respect to class action proceedings as an alternative to third party litigation funding. The arguments for this change have been well ventilated and helpfully explained by both the Commission and the VLRC in its recent report. In essence, the weight of evidence appears to suggest contingency fees would be a less costly alternative to current litigation funding rates, with consequent flow-on benefits to lead applicants and class members in a proceeding.

The Society agrees with the limitations proposed by the Commission save for noting that, where a contingency fee arrangement requires the law practice to indemnify the lead applicant for adverse costs and disbursements, this arrangement could, like capital adequacy requirements in the litigation funding market, create a situation where new entrants are unable to enter into contingency fee agreements, restricting competition in the market. This should be carefully considered by the Commission when drafting its final recommendations as it appears that, on the face of the proposal, contingency fee arrangements would not be permissible to new entrants. Nevertheless, it is the Society's view that these limitations, being also recommendations of the VLRC,[20] are necessary to provide a sufficient alternative to the indemnification that is provided with third party litigation funding.

Proposal 5-2

The Society notes that following the removal of the prohibition on contingency fees, the Court would arguably have the power to reject, vary or set contingency fee rates as it has with commission rates under litigation funding agreements using the broad case management powers found in section 33ZF of the FCA Act.[21] The power could be invoked at settlement approval as was ordered by Beach J in *Bairgowrie* in respect to commission rates.[22] There is nothing to suggest that the reasoning adopted by the Full Court in *Money Max* and Beach J in *Bairgowrie* would not apply in an analogous situation where a law practice proposes to charge a contingency fee to be deducted from a settlement sum. Put simply, it is extremely likely that the Court would have the power, pursuant to section 33ZF, to adjust contingency fee rates in the interests of class members, obviating the need for a particular statutory provision to that effect. This position aligns with the Court's historical approach to section 33ZF which has been to focus on the position of class members and exercise power in the interests of those who are absent but on whose behalf the litigation is being conducted.[23] For that reason, the Society is of the view that the current wording of section 33ZF is sufficient to empower the Court to set rates of contingency no statutory provision is required to provide this power. Statutory change in this area is only likely to create further satellite litigation on the issue.

[20] Victorian Law Reform Commission, above n 9, recommendation 8.
[21] *Money Max Int Pty Ltd* (Trustee) *v QBE Insurance Group Limited* (2016) 245 FCR 191; *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330; *Earglow Pty Ltd v Newcrest Miniing Ltd* [2016] FCA 1433.
[22] *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330.
[23] See *Allco* (2015) 325 ALR 539, [115] citing *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 408; see also *Muswellbrook Shire Council v Royal Bank of Scotland NV* [2013] FCA 616, [24].

Question 5-1

The Society sees no particular justification for prohibiting contingency fees in respect to one particular category of class action; indeed, as the Commission has identified,[24] the continued prohibition of contingency fees in respect to personal injury matters could act as a further disincentive to funding such proceedings. The concern which the Commission identifies is that in an area such as personal injury, which is subject to stringent regulation of damages, the costs in a contingency fee arrangement could significantly outweigh the compensation due to statutory caps on damages. This problem is averted when one considers the Court's inherent oversight role and case management powers in sections 33ZF and 33V, described above, which would allow it to reject, vary or set contingency fee rates in cost agreements (as it has in respect to commission rates in litigation funding agreements).

Proposal 5-3, Questions 5-2 and 5-3

As above, the Society is of the view that the Court already has the power to reject, vary or set contingency fee rates in costs agreements at the time of settlement, and that otherwise the matter should be left to commercial negotiation between clients and their solicitors.

Question 5-4

The Commission has asked whether there are other funding options for meritorious claims that are unable to attract third-party litigation funding. Currently under the costs arrangements in the *Fair Work Act 2009* (Cth) ('FW Act'), it is less economical to commence a representative proceeding for a cause of action arising under the FW Act because section 570 prevents costs of a proceeding being recovered by the lead applicant and class members unless the proceeding was instituted vexatiously, without reasonable cause, or in another special circumstance. Section 43 of the FCA Act carries this provision into effect under the Federal Court of Australia's general discretion as to costs. The application of this provision to representative proceedings has recently been reserved for submissions by the parties in the matter *Bywater v Appco Group Australia Pty Ltd.*[25] In effect the cost-neutral provisions in the FW Act discourage mass underpayment claims and other causes of action under the legislation from being considered viable representative proceedings. The purpose of the provision, of course, is to protect individual employees from adverse costs order in proceedings brought under the FW Act. The same purpose is not applicable where the proceeding is brought under Part IVA of the FCA Act given the unique adverse costs setting in class action litigation and because, in a large number of proceedings brought under Part IVA, the lead applicant is indemnified.

Consequently, the Society is of the view that for class action proceedings the relevant cost-neutrality provisions of the FW Act should be amended such that costs can be recovered in the ordinary manner where an action is brought under the FW Act as a class action. This change would make claims arising under the FW Act viable proceedings by enabling individuals with small claims to bring action against the relevant company, and create economies of scale for employment-related mass wrongs. It would go some way to addressing the concerns raised by the Commission that some meritorious claims, which are unable to address litigation funding, are being overlooked. For avoidance of doubt, the Society supports cost-neutral provisions under section 570 of the FW Act continuing to apply to individual proceedings.

[24] Australian Law Reform Commission, above n 6, [5.44].
[25] [2018] FCA 707. His Honour Justice Wigney noted at [147] that "[s]hould it be necessary to resolve the question of costs, the parties will, in any event, need to make further submissions on that issue having regard to the potential application of the provisions to the Fair Work Act concerning costs."

Section 6

The Society does not respond to this section of Discussion Paper 85.

Section 7

Proposal 7-1

The Society supports the introduction of a clause in Part 15 of GPN-CA that provides a discretion for the Court to appoint a referee to assess the reasonableness of costs charged prior to settlement approval, but we raise the following considerations for the Commission before any formal recommendation is made.

First, if it is the case that the referee is required to examine whether the legal services were rendered in the most efficient manner, that referee should also be required to assess costs by reference to a number of other relevant considerations that have a material impact on the legal costs in a class action proceeding, including but not limited to:

1 the strategy employed by the respondent in the proceeding in defending the claim;
2 the approach to case management adopted by the judge presiding;
3 the complexity of the substantive and procedural law considered, including the number of novel interlocutory issues that arose;
4 the extent to which the parties to the proceeding joined issue; and
5 the number of class members in the proceeding.

Second, it is important that the appointment of a costs referee be a discretionary exercise. A referee is not likely to be needed in all cases, as the Commission has acknowledged.[26] This is particularly so for proceedings that settle in early stages, but it may also be that on the face of a settlement it becomes apparent to the Court that the settlement amount is proportionate to the legal fees incurred and reasonable in the circumstances. In such cases, it would be a waste of resources to appoint a referee and may delay the distribution of settlement proceeds to the lead applicant and class members.

Third, possible delay of the settlement distribution is a matter that should be a consideration when appointing an independent referee. Class actions are acknowledged to be lengthy and costly proceedings, in most cases. The public policy reason for class actions is that, while individually it can take longer for a class member to receive compensation vis-à-vis the commencement of a private action, collectively fewer resources and time are required. For individual class members, however, the time to obtain compensation may be longer than had they commenced individual action, a sacrifice needed to achieve the overarching public policy goals of the regime. Class members in many actions may be in financially precarious situations due to past misconduct the subject of the proceeding, and there is an impetus in all cases to have a settlement, once agreed, distributed as quickly as possible (subject to the need for precision). Appointment of independent cost referees could have the unintended consequence of delaying distribution if the independent cost referee takes a considerable time to assess the costs in the proceeding. In such circumstances, the solicitors acting for the lead applicant and class members are unlikely to have recourse to a method of expediting the costs assessment.

Question 7-1

The Court currently has the power to approve or reject a class action settlement under section 33V of the FCA Act. In doing so, the Court may consider the settlement scheme agreed between the parties to the proceeding. The Court has discretion to reject a settlement scheme if it is not considered 'fair and

[26] Australian Law Reform Commission, above n 6, [7.22].

reasonable' – this is the central question relevant to the Court's consideration of any proposed settlement.[27] The Commission would be aware that, in applying section 33V, the Court has discretion to assess the 'structure and workings' of any proposed settlement scheme.[28] This is seen as fundamental to the Court's role in assessing the fairness and reasonableness of any proposed settlement.[29] The Court has, under this power, the authority to reject a settlement where it does not comply with the criteria in section 33V, which may include circumstances in which the distribution mechanism proposed for the settlement is clearly not in the interests of class members and risks inflating costs.

The Society notes that, in most circumstances, the solicitors for the lead applicant in the proceeding are in the best position to oversee a settlement distribution because of previous contact with the lead applicant and class members and their institutional knowledge of the legal issues[30], causes of action, composition of class membership and heads of damage claimed in the proceeding.

Rather than the proposed course adopted by the Commission, the Society suggests that clause 14.4 of GPN-CA be amended such that the Court be required to address whether the solicitors for the lead applicant and class members have considered alternative means of distributing the settlement, taking into account the likely costs of the distribution proposed and whether, in the Court's view, there is a less expensive means of distribution. This would also necessitate an amendment to the affidavit requirements in clause 16.5, and we would propose that the solicitor acting for the lead applicant in the proceeding be required to depose as to other alternative distribution mechanisms that have been considered, and the basis for their consideration.

Question 7-2

In the Society's view, this proposal should be rejected for the primary reason that implementing such a proposal would be contrary to the recent focus of case management on the overarching purpose of civil litigation, being to resolve disputes as "quickly, inexpensively and efficiently" as possible.[31] Resolution of disputes is dependent on a variety of risk factors, a primary factor being the possible reputational risk posed to the respondent and, in some cases, the lead applicant and class members in the proceeding. In requiring that the terms of a settlement be made publicly available, the risk of reputational damage could be increased and there could be a corresponding decrease in the likelihood that a party will settle at an early stage of proceedings. In the Society's view, there is no ill to remedy in this space. This is largely because the opt-out procedure and settlement approval process in the current class action regime, combined with a duty of disclosure for publicly-listed entities, already has the effect of distributing relevant market and public interest information when a class action settles.

Section 8

Proposal 8-1

The Society neither supports nor rejects this proposal, but we note certain issues which could influence the final recommendation by the Commission.

First, in Australia a mechanism already exists through which companies can undertake to ASIC and the ACCC to compensate individuals affected by alleged breaches of the relevant statutes. The first enforceable undertaking was introduced in 1993 to the *Trade Practices Act 1974* (Cth), and subsequently continued under section 87B of the *Competition and Consumer Act 2010* (Cth). The

[27] *Australian Competition and Consumer Commission v Chats House Investments Pty Limited* [1996] FCA 1119; see also *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468.
[28] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (1 December 2016), [118].
[29] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, 336 (Jessup J).
[30] Law Council of Australia, *Understanding Class Action Settlements* (March 2017) < https://www.lawcouncil.asn.au/docs/573d0b71-125a-e711-93fb-005056be13b5/Class%20Actions%20Settlements%20March%202017.pdf>.
[31] *Federal Court of Australia Act 1976* (Cth), s 37M.

purpose of the undertaking is to, *inter alia*, correct the effect of the contravention.[32] Due to the perceived success of the competition law model, in 1998 a provision was introduced into the *Australian Securities and Investments Commission Act 2001* (Cth) which allowed a company to accept an undertaking which could be enforced in court.[33] Such undertakings have been capable of providing redress, for example, to customers who received negligent financial advice.[34]

Given the operative duration of these powers (extending back for over two decades), and the continued need for private litigation despite the powers conferred on ASIC and the ACCC, the Society considers it unlikely that a federal collective redress scheme will obviate the need for private litigation. Indeed, where private litigation has occurred in Australia by way of class action, it has been long-fought, with the average duration of class action proceedings being approximately three years.[35] The consequence of this is that it is unlikely that the implementation of a federal collective redress scheme will lead to significant early admissions of liability and a corresponding decline in private litigation. Such a redress scheme may, however, improve the process for negotiating and implementing these types of arrangements by providing a standardised procedure where the current ACCC and ASIC arrangements do not.[36] A redress scheme also has the potential to venture into other areas not presently covered by the current ACCC and ASIC undertaking powers.

Second, in certain situations it may be appropriate for applicants within a scheme to have access to independent legal advocates in order to navigate the legal complexities of a scheme and provide advice concerning appropriate settlement offers. The need for such advocacy should be assessed on a case-by-case basis. Factors that might influence the need for this independent advocacy might include the categorisation of damages within the scheme. For low-damages schemes relating to basic retail goods it may be sufficient for the applicant to proceed without an independent advocate. Where the assessment of damages is more complex – particularly in respect to breaches that have caused property damage or personal injury – the need for an independent advocate may become more acute.

Question 8-2

The Society does not respond to this question.

Should the Commission require any further submissions please contact the undersigned.

[redacted]

NSW Society of Labor Lawyers

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The Society is not affiliated to the Australian Labor Party. The views expressed in this submission are not those of the Australian Labor Party, its members, or the Federal Parliamentary Labor Party.

[32] Marina Nehme, 'Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law' (2007) 11 *University of Western Sydney Law Review* 104, 118.
[33] *Australian Securities and Investments Commission Act 2001* (Cth), ss 93A and 93AA.
[34] Carol Taing, '*A Report on Enforceable Undertakings Accepted by ASIC from 1998 to 2008*' (PhD Thesis, The University of Melbourne, 2009) 27 and 54.
[35] Morabito, above n 1, 30.
[36] Marina Nehme, 'Enforceable Undertakings: Are they procedurally fair?' (2010) 32 *Sydney Law Review* 471, 473.