levitt robinson

Our Ref: SAL:DMK:180403

9 August 2018

The Hon. Justice S C Derrington, President
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: class-actions@alrc.gov.au [redacted]

Dear Commissioner

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Thank you for the opportunity to make a submission to the above inquiry, and for granting an extension of time for our submission. Our submission is as follows.

Contents

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1. Who we are

1.1 Levitt Robinson is a boutique law firm based in Sydney which specialises in commercial litigation. Since about 2010 a significant portion of Levitt Robinson's case load has consisted of acting for the class representatives in class actions, using a variety of funding models, including:

(a) commercial third party funding;

(b) acting on a "speculative" or "no-win-no-fee" basis; and

(c) voluntary contributions from a large number but not all group members in the class action.

1.2 Our legal team consists of two partners and ten other solicitors of varying experience, and we are therefore a significantly smaller operation than the vast majority of firms active in the class actions space.

1.3 We are currently administering two settlement schemes in relation to class actions which we ran the Federal Court,[1] and acting in three ongoing class

[1] Approved in *Lee v Westpac Banking Corporation* [2017] FCA 1553; and *Wotton v State of Queensland (No 10)* [2018] FCA 915.

actions in the Federal Court[2] and another two in the Supreme Court of NSW.[3] Of the two actions in relation to which we are administering the settlement scheme, one was run on a speculative ("no win no fee") basis and the other was funded by voluntary contributions from many but not all of the group members. Of the ongoing actions, three are funded by commercial funders and one is funded by voluntary contributions from group members.

1.4 We also act and have acted on various matters which are funded by commercial litigation funders but are not class actions.

2. Conceptual basis for policy regarding litigation funding and legal fees

2.1 Before making substantive submissions, we wish to establish the conceptual basis on which we submit the Commission's analysis should proceed. In doing so, we note that the objects of the class actions regime are:

> enhancing access to justice by reducing the cost of court proceedings to the individual and improving the individual's ability to access legal remedies ... [and] to promote efficiency in the use of Court resources, increase consistency in the determination of common issues, and make the substantive law more enforceable and effective[4]

Obstacles to meritorious claims

2.2 As the Discussion Paper identifies, the policy basis for the class action regime and for permitting commercial litigation funders to operate is to promote access to justice by allowing meritorious claims to be brought in circumstances where they would not or could not otherwise have been brought. Accordingly, an appropriate policy approach must address the reasons why meritorious claims are not brought without these mechanisms.

2.3 We submit that there are four main reasons why a person with a meritorious claim may not bring the claim.[5] These are:

(a) first, a lack of funds;

(b) second, an aversion to risk;

(c) third, a lack of awareness of his or her right to bring a claim; and

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[2] *Luke & Anor v Aveo Group Ltd* (VID 996 of 2017); *Davaria Pty Limited v 7-Eleven Stores Pty Ltd & Ors* (VID 180 of 2018); and *Davaria & Anor v 7-Eleven Stores Pty Ltd & Anor* (VID 182 of 2018).
[3] *O'Dea & Anor v Westpac Banking Corporation* (Case No. 2016/35575); and *Searle v Commonwealth of Australia* (Case No. 2016/4502).
[4] The Hon Justice Bernard Murphy, 'The Operation of the Australian Class Action Regime' (speech to the Bar Association of Queensland, 8-10 March 2013).
[5] See, Daniel Chen and David Abrams, 'A Market for Justice: A First Empirical Look at Third Party Litigation Funding' (January 2012) at 2-4.

(d) fourth, a "collective action problem" (as explained below).

2.4 In relation to lack of funds and aversion to risk, note that the costs of litigation are generally prohibitive for most individuals, and this is particularly so in a class actions context—where the claims being made are often novel and complex and the defendants are generally large companies or government bodies with effectively unlimited resources to defend the litigation.

2.5 In our experience, class actions are unlikely to settle at least until after discovery has been provided, given the informational asymmetry between the parties up until that stage. Often, settlements will require evidence to have been filed or even for a trial to have been partly or fully completed. In some cases, the case will not settle until after judgment has been delivered on the representative's claim. In our experience, the cost of reaching the stage where settlement becomes a viable possibility will be a minimum of about $2 million, and can often be upwards of $5 million. It is a rare individual who has the means to fund such a case, or the appetite to risk an adverse costs order in that amount. It will probably exclude consumers who have already suffered substantial losses as a result of the conduct the subject of their claims.

2.6 Similarly, the lack of awareness of a claim is associated with a lack of funds and commercial sophistication. The investigation of a class action is an expensive exercise—and in our experience, generally costs hundreds of thousands to millions of dollars. Sometimes costly preliminary discovery applications will be required.[6] Such requirements and costs put the investigation of a claim beyond the reach of most people who would be lead applicants or group members in a class action.

2.7 The final issue mentioned above is a "collective action problem". This refers to situations where, while it may be in the interests of a group of people as a whole to take a particular course of action, individual actors may not have a similar interest in isolation.[7]

2.8 A large number of collective action problems arise as result of the representative action procedure. In particular, while the collective value of the claim may be worthwhile pursuing, individual claims often will not. As Judge Posner said in *Carnegie v Household Intern., Inc.*, 376 F. 3d 656 (2004) at 661: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."

[6] See, eg, *Erutuf Pty Limited -v- Westpac Banking Corporation Limited* [2014] NSWSC 1679.
[7] See, Christopher Leslie, 'The Significance of Silence: Collective Action Problems and Class Action Settlements' (2007) 59 *Florida Law Review* 71 at 74.

2.9 Judge Posner's logic does not only apply where there are 17 million $30 claims, but also to class actions more broadly. For example, after the trial of the lead applicants' claims in the Palm Island class action, the three lead applicants were collectively awarded over $400,000 in damages, including interest.[8] However, the applicants' costs up to and including the 22-day trial and the subsequent costs and interest argument were in the order of $3 million. Whilst the matter was conducted on a "no win no fee" basis, presumably an adverse costs order would have resulted in the lead applicants being liable for a comparable amount. Even a large and fully-funded corporation would be unlikely to bring a claim for $500,000 if doing so would require the payment of $3 million in costs and the risk of an adverse costs order of a similar magnitude.

2.10 However, using the class action regime, the total value of the 447 group member claims plus the lead applicants was approximately $26.5 million, and the total costs of recovery plus the estimated costs of the settlement distribution are just over $7 million.[9] This means, notionally, that the average group member had a claim for about $59,000 which cost about $16,000 to realise. Accordingly, while the lead applicants were required to assume extremely unpalatable risks and costs, it was in the interest of the group as a whole for the action to be brought. This leads to the perverse situation where there is a strong disincentive for any individual in the group to bring an action, but it is in the group's collective interests to bring one.

2.11 Another example of individual and group perceptions of interest diverging, is where, as in the 7-Eleven class action,[10] which is currently funded, the individual group members crave anonymity and fear recriminations from the respondent franchisor. This means that they could only bring claims in a class action, which allows them to join the claim without being identified individually.

Costs and funding of litigation

2.12 Given the significance of costs in deterring meritorious claims from being brought, it is necessary to examine in more detail how costs are generated and how they can be met.

2.13 In order to litigate a claim, a claimant will need to incur the following categories of costs:

[8] See, *Wotton v State of Queensland (No 5)* [2016] FCA 1457; *Wotton v State of Queensland (No 6)* [2017] FCA 245.
[9] *Wotton v State of Queensland (No 10)* [2018] FCA 915.
[10] *Davaria Pty Limited v 7-Eleven Stores Pry Ltd & Ors* (Federal Court of Australia Case No. VID 180 of 2018) and *Davaria & Anor v 7-Eleven Stores Pry Ltd & Anor* (Federal Court of Australia Case No. VID 182 of 2018).

(a) *legal fees*—consisting of solicitors' fees and counsel fees (as to which see below);

(b) *other disbursements*—including printing/photocopying, couriers, other sundry expenses, costs of document management (including electronic document review platforms), expert fees, court fees (including filing fees and hearing allocation fees), costs of travel, conduct money for subpoenas, etc;

(c) *the prospect of an adverse costs order*—which can include the requirement to provide security for costs, the premium for adverse costs order insurance, or simply the potential liability (priced at the amount of the liability multiplied by the probability of an unsuccessful outcome); and

(d) *intangible costs*—including the cost of the time and effort required of a claimant conducting litigation, such as lost productivity, stress and discomfort, and the opportunity cost of sacrificing time that could be spent pursuing other activities. While these costs are more difficult to quantify than the other categories, they are no less real, and have a significant impact both on individuals' decisions to pursue claims and on the individuals conducting the claims.[11]

2.14 Where a claimant has a meritorious claim, there are a number of ways in which these costs can be funded. The common options include:

(a) payment out of the claimant's existing cashflow or assets;

(b) payment by finance or debt arrangements, either through a specific litigation finance facility or by drawing on more conventional sources of finance, such as credit cards or home loans;

(c) payment by an insurer or third party indemnifier, either through a preexisting insurance package or through an "after-the-event" ("**ATE**") insurance package;

(d) speculative billing by lawyers (as explained below, this is effectively the lawyers financing the litigation);

(e) public funding, eg through legal aid grants or through funding by public regulatory bodies such as ASIC, the ACCC, and the ATO;

[11] For this reason representative parties in class action are often compensated out of settlements for their intangible costs: see, eg, *Milfull v Terranora Lakes Country Club Ltd* [2006] FCA 801 at [8] and [10]-[12] (Dowsett J); *Darwalla Milling Co Pty Ltd & Ors v F Hoffman–La Roche Ltd & Ors (No 2)* [2006] FCA 1388; 236 ALR 322 at [18(a)] and at [74]-[76] (Jessup J).

(f) third party funding by a person with no interest in the litigation (usually a close relative or business associate); and

(g) commercial third party litigation funding.

2.15 We now address each of these options in turn.

2.16 *Existing cashflow or assets:* this is the most common means of funding litigation, and is the most convenient way to do so for those who have the necessary resources. However, given the expense of litigation, particularly for large and complex claims, this option is generally unavailable for natural persons or small businesses, who rarely have the millions of dollars in liquidity that is required. It is possible that a group of claimants in a class action would collectively have the means to fund the action, but this leads to a collective action problem, as discussed above.

2.17 *Finance or debt arrangements:* individuals with sufficient assets can fund the costs of litigation by borrowing money against those assets. However, most individuals are in general very reluctant to risk their assets (most often the family home) in pursuit of a claim, particularly where they have already suffered substantial losses as a result of the matters giving rise to the claim. There are also "litigation lending" packages available from commercial litigation funders, however such funding is generally offered only for smaller individual claims, and not for class actions, and is also generally unattractive to the legal profession because of the repayment obligations.

2.18 *Insurance packages:* these are obviously convenient if a claimant has a preexisting package, but that is rarely if ever the case for claimants in a class action context. As for ATE insurance, this ordinarily does not cover all of the costs of the action and can be difficult to obtain.

2.19 *Speculative billing:* this is effectively the financing of the litigation by the lawyer, in that the costs of running the action are shifted from the client to the lawyer (although the risk of adverse costs order and the intangible costs currently remain with the client). This is the approach which Levitt Robinson has adopted in human rights litigation (such as the Palm Island matter discussed above), where the firm outlays disbursements and counsel also work on a speculative basis. Levitt Robinson has risked the exposure of all out-of-pocket expenses which it has met, running into several hundred thousand dollars in a typical class action. Speculative billing is discussed in more detail below.

2.20 *Public funding:* this option is ideal where it is available, but there is a clear problem due to lack of public resources. It is not feasible for all meritorious

claims to be publicly funded, and there is also a risk of claims being funded to suit a political agenda rather than because of their merits.[12]

2.21 *Non-commercial third party funding:* in our experience, this can occur where a claimant lacks the resources to fund a case, but a sympathetic relative or friend with substantial means will agree to fund it instead, even without receiving a benefit (effectively as an interest-free loan). This is unlikely to occur in a class actions context, as a result of the considerable costs required and because of the collective action problem. There is also the interesting, but difficult, option of "crowdfunding" cases of particular public interest.[13]

2.22 *Commercial third party funding:* this is effectively an arrangement whereby the claimant assigns a portion of the proceeds of the claim to the funder in return for the funder assuming all of the costs of the claim. The arrangement can be seen as a form of equity funding—in that the claimant's chose in action is an asset and the funder is purchasing a portion of that asset in return for assuming the risks of realising the asset.

Conclusion: the role of class actions, contingency fees, and litigation funding

2.23 It follows from the above that both litigation funding and speculative fee arrangements have the effect of alleviating the obstacles to meritorious claims being brought. This is for the following reasons:

(a) the lack of funds problem is alleviated by providing funding to the claimants—either through payments or in kind, through the provision of services without charge;

(b) the aversion to risk problem is solved by transferring some or all of the claimants' risk to another person (ie either the liability for legal fees or the liability for fees and the potential liability for an adverse costs order);

(c) the lack of awareness problem is solved by litigation funders and plaintiff lawyers investigating claims and then conducting work to inform the group members of the existence of the claims, as well as through the notice procedures required under legislation and court rules; and

[12] *Cf,* Samuel Issacharoff, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' (2104) 63(2) *Depaul Law Review* 561, at 581-582.
[13] See generally, Ronen Perry, 'Crowdfunding Civil Justice' (2018) 59(4) *Boston College Law Review* 1357.

(d) the collective action problem is solved by a litigation funder assuming all of the risks and expense of the litigation, and is substantially alleviated by lawyers acting on a speculative basis and therefore eliminating the upfront costs of the action, if not the risk of an adverse costs order. The fact that the lead applicants are the only identified parties also addresses anonymity and intimidation issues, to a large extent.

2.24 Further, given the cost to claimants of obtaining litigation funding, it is unlikely that the claims that are commercially funded would be brought unless there was funding available. This can be seen, for example, by the scarcity of securities class actions before commercial litigation funding became a possibility, as well as by the cases where class actions have been commenced and then discontinued as a result of failure to secure funding or funding having been withdrawn.[14] Similarly, given the cost and risk to lawyers of providing services on a speculative basis, lawyers will not readily agree to such arrangements where an alternative is possible.

2.25 Nevertheless, there are some obvious limitations to litigation funding. As it is a commercial venture, the funder will fund actions based on commercial considerations—that is, the funder will weigh the costs and risks involved relative to the potential payoff. Accordingly, the model favours the funding of large actions with low costs, low risks, and high potential damages. Further, funders prefer actions where damages are easily quantifiable, with securities class actions being the obvious example.. Matters where the relief being sought is non-monetary are very unlikely to be commercially funded.

2.26 In conclusion, we submit that the class actions regime and the litigation funding industry exist in order to promote a public good: that is, to provide access to justice by providing a means by which individuals who have been wronged can bring claims which they would not otherwise be able to bring as a result of a lack of means, a lack of sophistication, and collective action problems. In other words, to paraphrase Judge Posner, the alternative to funded litigation is not unfunded litigation, it is no litigation. No doubt there are concerns in relation to the manner in which the funding regime operates. However, we submit that the overarching purpose must be borne in mind when considering the matters in the Commission's terms of reference.

2.27 We now turn to the Commission's proposals in the Discussion Paper.

[14] See, eg, *Tutton v Chubb Insurance Australia Limited* [2017] FCA 1113; *Simonetta v Spotless Group Holdings Limited* [2017] FCA 1071.

3. Proposed regulation of litigation funders

3.1 The Commission has proposed a licensing and regulatory regime for litigation funding. We will address following questions and proposals:

(a) litigation funders should be required to obtain licenses through a scheme regulated by ASIC and similar to the Australian Financial Services License ("**AFSL**") scheme applicable to the finance industry, and should be subject to a "fit and proper person" test and associated qualification requirements (Proposals 3-1 and 3-2, and Question 3-1);

(b) litigation funders should be subject to ongoing financial standards, including cashflow buffers and minimum capital requirements (Question 3-2); and

(c) litigation funders should be required to report annually to ASIC on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest (Proposal 4-1).

3.2 In our respectful submission, the regulatory regime that the Commission proposes to introduce to the litigation funding industry, when viewed holistically, is unduly onerous and likely to result in a substantial diminution in access to justice in Australia, without providing significant identifiable benefits.

Reasons for regulation

3.3 At [3.26] of the Discussion Paper, the Commission states that "the litigation funding market is broadly analogous with insurance arrangements and managed investment schemes in terms of the pooling of claims through the class action regime and the funding of that pool to manage risk". The Commission continues, "Given the existence of a broad licensing regime for financial sales, advice and dealings in relation to financial products, there does not appear to be a sound policy basis for exempting litigation funding from a comparable licensing requirement."

3.4 With respect, we submit that the Commission is making the wrong inquiry: The question should not be whether there is a sound policy basis for *exempting* litigation funding from a comparable licensing requirement. Rather, the question should be whether there is a sound policy basis for *imposing* a comparable licensing requirement on litigation funding. In other words, regulation should not be presumed to be suitable unless proven otherwise. Rather, regulation should be imposed only if it is proven to be necessary or to serve the objective of optimising public benefit while containing public risk.

3.5 We further submit that the appropriate inquires that would indicate that such a regime is necessary are the following:

(a) First, what is the basis for the current AFSL regime?

(b) Second, are the risks that the current AFSL regime is intended to address also present in relation to litigation funders?

(c) Third, if the second question is answered in the affirmative, would the imposition of a comparable regime on litigation funders successfully address the identified risks?

3.6 We accept that there are some analogies between litigation funders and financial service providers who require AFSLs. However, *analogous* is not the same as *equivalent*. In our submission, litigation funding is qualitatively different from insurance and other financial services, and the issues that arise in relation to the latter are not necessarily present in the former.

3.7 For example, insurance providers promise to reimburse their customers if the customers suffer a substantial loss. This necessarily requires access to substantial amounts of capital. The effect of an insurance firm failing is that customers are left much worse off—both because they have paid the premium, but had no benefit from it, and also because they have suffered a loss for which they should have been covered, but they have not been covered. Another result of the arrangement is that it is in an insurer's interest to charge premiums while avoiding making payments pursuant to the policy.

3.8 Similarly, the effect of providing misleading financial advice or unscrupulously selling risky investments is that money is taken from consumers which should not have been taken, meaning that the financial advisors or fund managers have the benefit of the consumers' money, whilst the consumers lose that money and are left worse off. A similar comment can be made in relation to imprudent lending—the consumers become liable for interest and charges for which they should not be liable, and they risk losing securitised assets that they should not have to lose.

3.9 For the following reasons, these situations are qualitatively different from the position of a claimant relative to a litigation funder.

3.10 First, unlike a defaulting insurer, financial advisor, fund manager, or lender, a litigation funder who cannot meet its obligations gains no benefit from having a funding agreement with claimants in a class action. That is, unlike the analogous financial service providers, the claimants do not have to pay anything to the funder if it fails to fund the action, and the funder not only

derives no benefit from the exercise, it forfeits all the funding that it has provided up to that time, resulting in a net loss. In other words, since a litigation funder only benefits from funding the action if it is funded to conclusion, the funder's interests are much more closely aligned with the interests of its "clients" than the interests of financial service providers are with theirs, and the conflicts arising in the latter do not arise in the former.

3.11 Second, unlike in the AFSL analogies, if a funder fails to meet its obligations then there is the possibility of another funder stepping into its shoes, or of the balance of the proceeding to be funded through some other method. In contrast, a client of an insurance firm who has suffered an insurable loss will not be able to substitute another insurer for one that has failed, a client who has lost an investment as a result of misleading investment advice will not be able to recover the investment and put it elsewhere, and a client who has taken out a loan that should not have been granted will be very unlikely to be able to refinance that loan to another lender on better terms.

3.12 Third, unlike in the analogous examples, the funder is assisting its clients in accessing and exercising their legal rights. People who have been wronged have a right to bring claims in accordance with the law of which, without a funder, they may be deprived. Litigation funders facilitate the exercise of those rights. So while the alternative to an indemnity insurance policy is risking the loss but saving the premium, the alternative to an imprudent investment is keeping the money that was invested or investing it elsewhere, and the alternative to an imprudent loan is to not take the loan advance or incur the debt, the alternative to litigation funding is either finding another way to fund the case or to bring no claim at all. In other words, the alternative to litigation funding will often be to suffer in silence.

3.13 Fourth, as in the case of a risky investment or an insurance package that the insurer may not be able to afford, there is no issue with a consumer accepting litigation funding on a risky basis, provided that the consumer goes into the transaction with his or her eyes open. In that regard, we support the Commission's proposal in relation to disclosure requirements being imposed on litigation funders, and we consider that they are far preferable to licensing or capital adequacy requirements. Rather than requiring litigation funders to obtain a particular license or to hold a particular amount of capital, we submit that, as in the UK, it would be preferable for there to be a voluntary scheme permitting litigation funders to be accredited if they so choose but allowing them to continue to operate if they do not choose to participate.

3.14 Fifth, unlike in the case of services requiring an AFSL, where the consumers often have no independent legal advice, all litigation funders and funding agreements must necessarily be vetted by the lead applicants' solicitors. The lead applicants' solicitors are ordinarily commercially sophisticated, with the means and capacity at least to assess the funder's ability to meet its commitments, and with a clear interest in doing so, given that the failure of the funder would result in their own fees not being paid, and could result in the reputational damage associated with a failed class action. Accordingly, there is already a reputational and pecuniary interest in ensuring the credibility of the funder which obviates the role of a regulatory agency.

3.15 It follows that many of the policy bases underlying the AFSL regime are not present in relation to litigation funders. A similar regime for litigation funders would therefore risk achieving little more than imposing unnecessary burdens and expenses on litigation funders, leading to a reduction in their appetite to fund access to justice, while using public resources that could be better deployed elsewhere.

Jurisdictional difficulties in the proposed regulation regime

3.16 The Commission notes at [3.61]-[3.63] of the Discussion Paper that issues may arise in relation to the proposed regulatory regime where litigation funders are based overseas. We submit that this is a serious issue militating against the adoption of the proposed regime.

3.17 In our experience, consumers of litigation funding are sometimes concerned that a local funder will yield to local pressures to sell them out, arising from the fear of collusion with the "big end of town" or with government. Often there is an apprehension that domestic funders will be pressured or influenced by local relationships to sell out the clients and not act disinterestedly and independently in the face of powerful local opponents. Access to overseas funders therefore increases confidence and gives comfort to clients.

3.18 As the Commission notes, many of the funders active in the Australian market are not Australian corporations but are overseas registered companies. This means that the funds used to fund the action are kept overseas and come from overseas sources. Further, the funder or, depending on its structure, the parent company or the group of companies comprising the funding group, likely has a portfolio of cases across multiple jurisdictions. This raises the following regulatory difficulties.

3.19 First, it is not clear that ASIC has jurisdiction under the existing corporations legislation to regulate an overseas funder in any capacity. It has been queried

whether an overseas funder is necessarily an entity which "carries on business in Australia" and is therefore required to be registered under s 601CD of the *Corporations Act* 2001 (Cth).[15] Even if it is required to be so registered, ASIC's powers under the corporations legislation are necessarily limited.[16] Similar considerations would apply to whether funders would be "carrying on a business of providing financial services" and therefore require an AFSL.[17] There is a real question as to the extent to which a litigation funder may be caught by this legislation.

3.20 Second, it is not clear that ASIC can or should be in a position to require a company which is domiciled overseas to hold a particular sum of money as a contingency for potential liabilities. Such a condition would be extremely difficult to monitor and enforce, given that the money would likely be held in an overseas bank account and ASIC would have no direct power to ensure that the money remains there. On the other hand, it would be unduly onerous to require a foreign company to maintain a liquid sum in Australia for such purposes, as this could foreseeably impose substantial tax liabilities and regulatory hurdles, both in Australia and in the entity's home country.

3.21 Third, it is not clear that ASIC can or should be permitted to regulate the portfolio of cases that an overseas funderunderwrites. In particular, while it may be possible (if difficult) for ASIC to estimate with some accuracy the extent of the funder's liabilities to other parties in Australia, assessing the extent of the funder's liability to parties in other jurisdictions would require a reach that ASIC does not possess and which would doubtless be difficult and expensive to resource.

Models of litigation funding

3.22 A further reason why we submit that the proposed AFSL-like regime for litigation funders is not desirable is that it risks prohibiting the legitimate business models on which some litigation funders currently operate.

3.23 As the Commission notes in the Discussion Paper, it is common for litigation funders to form special purpose vehicles ("**SPVs**") in order to raise funds for a particular action.[18] This has been the case in our experience—in almost all of the actions in which Levitt Robinson has been funded by a commercial funder, the

[15] *Brookfield Multiplex Limited v International Litigation Funding Partners PTE Ltd* [2008] FCA 1769 at [6]; but *cf Anchorage Capital Partners Pty Limited v ACPA Pty Ltd* [2018] FCAFC 6; 351 ALR 436 at [95]-[99]; *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224; 351 ALR 584 at [142]-[149].
[16] *Cf, In the matter of Featherston Resources Limited* [2014] NSWSC 1139.
[17] See, *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (No 1)* [2012] FCA 1519; 92 ACSR 614 at [43]-[59].
[18] At [1.14] and [3.14].

funder has been an SPV.[19] There are a variety of legitimate reasons for funders to adopt such a model, including so that funds can be raised from investors in relation to particular actions rather than across the entire portfolio, so that ATE insurance can be obtained by the entity responsible for the particular action, and for other corporate governance, taxation, and accounting reasons.

3.24 Further, in our experience, not all litigation funders hold substantial cash reserves in order to facilitate the funding of the litigation. In particular, where the funder is an SVP, it is unlikely that the SPV will hold large amounts of cash reserves. Rather, the SPV will be backed by an entity with sufficient assets to fund the litigation.[20] However, even the entity backing the funder may not hold large amounts of cash but rather may have investments in higher yielding assets. Accordingly, it is common for the funds used to fund the litigation to be raised by the persons backing the funding entity as and when required, including by conducting capital raisings, drawing on finance facilities, and liquidating other non-cash assets.

3.25 In these circumstances, we submit that the proposed requirements for litigation funders to each be licensed and to each hold large cash reserves would likely have the effect of destroying the business model we describe. This would necessarily have an impact on access to justice, considering the role of litigation funders described in section 2 of this submission.

Argentum Capital Limited case study

3.26 The Commission's Discussion Paper identifies the example of Argentum Capital Limited ("**Argentum**") in the equine influenza class action as an instance of a funder failing to meet its obligations.[21] We submit that the example of Argentum is instructive in relation to the likely impact of the Commission's proposals, and warrants examination.

3.27 The following observations should be made in relation to Argentum:

[19] This also seems to have been the model adopted by all of the funders discussed in *Perera v GetSwift Limited* [2018] FCA 732: eg at [68], [71], and [73].
[20] Again, this seems to have been the case in *Perera v GetSwift Limited* [2018] FCA 732—one proceeding was funded by an International Litigation Partners No 18 Pte Ltd, a "$1 company, based in Sigapore", which was backed by related entitied: see at [178]; and one proceeding was funded by Therium Capital Management Limited, a "$2 company" which was "supported by other companies within the Therium group": at [180]-[182].
[21] *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119.

(a) Argentum was, until about February 2014, a member of the UK Association of Litigation Funders, and subject to the Association's self-regulation regime;[22]

(b) Argentum was listed on the Channel Islands Securities Exchange and, until its collapse, complied with its obligations as a listed entity, including filing financial reports and providing annual reports to investors;

(c) Argentum's accounts were audited annually by a reputable accounting firm and in compliance with the relevant listing rules;

(d) Argentum was chaired by the Hon. Sir David Keene, a retired judge of the UK Court of Appeal, and the other directors included:

(i) Carl Andrew Pollard, the Managing Director of Place Partnership, a British public sector asset management body;

(ii) Peter Rioda, an experience funds management executive who sits on the boards of a number of private equity firms; and

(iii) John Wetherall, former Chief Executive Officer for HSBC Investments (International) Limited and also an experienced funds manager; and

(e) Argentum's audited financial statements indicate that as at 31 March 2013 (the last published statements before its collapse), the company held £8,519,183 GBP in cash or cash equivalents and had a net equity position of £14,182,837 GBP. [23]

3.28 Accordingly, under the regulatory regime that the Commission proposes, it appears that Argentum would have been duly licensed as a litigation funder.

3.29 The circumstances ultimately leading to Argentum's collapse were the exposure of Centaur Litigation SPC, an entity which functioned as a "feeder fund" into Argentum, as a "Ponzi scheme".[24] We submit that this would not have been detected by the Commission's proposed regulations. Levitt Robinson has acted in a number of cases involving alleged Ponzi schemes, including a current class action in the Supreme Court of NSW relating to a scheme run by

[22] See, http://associationoflitigationfunders.com/2014/04/notice-regarding-argentum-capital-limited/.
[23] See 2013 financial statements here: http://www.tisegroup.com/umbraco/surface/proxyapi/getnewspdf?id=204534&name=Argentum%20Capital%20Ltd
[24] See: https://www.offshorealert.com/brendan-terrill-argentum-litigation-fund-buttonwood-legal-capital-suspected-ponzi-scheme.aspx

the late Anthony Famularo. An unfortunate reality is that, as a result of the fraudulent practices of their promoters, such schemes are often very difficult to detect before their inevitable collapse.

3.30 Another relevant aspect of the Argentum case is the impact of Argentum's failure on the equine influenza action. As is apparent from Foster J's judgment in *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, after Argentum collapsed, the applicants' solicitors, Maurice Blackburn, sought but were unable to obtain alternative funding for the action. This appears to be a result of weaknesses that had emerged in the applicants' case. The applicants therefore agreed with the respondent to discontinue the proceeding with no order as to costs, and liberty to apply in relation to the existing security that Argentum had provided for the respondent's costs.[25]

3.31 The outcome in the equine influenza case was therefore comparable to cases such as *Simonetta v Spotless Group Holdings Limited* [2017] FCA 1071, in which a funder (in that case IMF Bentham) which is well able to meet its obligations elects not to continue funding the action as a result of weaknesses which emerge in the applicants' case.

3.32 In those circumstances, we submit that the Argentum case study establishes the following propositions:

(a) If there is a healthy market for litigation funders and a particular litigation funder fails to meet its obligations, meritorious claims will be able to obtain alternative litigation funding;

(b) If the funder was funding a claim which had insufficient prospects of success to be attractive to another funder, then it is likely that the claim will have to be discontinued for want of funding. However, if the funder has, to date, provided security for costs, then the representative applicant will be mostly protected;

(c) The situation of a funder being unable to meet its obligations is not too different from a funder being able but not willing to continue funding an action; and

(d) The Court has sufficient powers, including by making orders such as extending the period in which group members can opt out of a class

[25] This liberty to apply seems to have been exercised: see, the orders made by Jagot J in that proceeding on 6 December 2016 and 23 February 2017; and see also the related proceeding of *Clasul Pty Ltd ACN 010 173 029 & Anor v Argentum Centaur EI Funding Private Ltd* (NSD368 of 2013). We are not aware of the outcome of these applications.

action, or by appointing a new representative plaintiff, to protect the interests of group members in the event that a funder fails.

Conclusion and policy recommendations

3.33 For the reasons outlined above, we respectfully submit that the Commission's proposed licensing regime for litigation funding is not necessary or desirable to protect the interests of people who use litigation funding services. However, the Commission's proposal that litigation funders be subjected to reporting and disclosure requirements is an appropriate step to protect group member interests and to ensure adequate corporate governance. We accept that ASIC may be the appropriate body to regulate such matters, and we submit that the framework could be similar to the reporting requirements applicable to large proprietary companies or unlisted public companies.

3.34 Alternatively, if the Commission nevertheless forms the view that some sort of licensing regime is required and that some form of capital adequacy requirements should be included in the regime, we submit that the regime should have the following characteristics.

3.35 First, rather than to require a litigation funder to hold the relevant licences, the requirement should be that the litigation funder is managed by persons who hold the relevant licences—ie the funder should have a certain number of directors or executive officers who have obtained the necessary approvals. This achieves the same level of safeguard as the Commission's proposed regime, but would allow funding to be provided by SPVs without requiring each SPV to obtain licensing approval (which, we submit, would be unduly onerous).

3.36 Second, if there is to be a requirement imposed in relation to capital adequacy, it should be sufficient that the funding agreement is guaranteed by an entity with sufficient assets (not necessarily cash reserves) to meet the funder's obligations, rather than that the funder hold sufficient cash reserves to meet those obligations.

3.37 Third, the licenses and capital adequacy requirements should not apply outside of a class actions context. Alternatively, there should be exemptions for cases where funding is provided to commercially sophisticated entities, such as insolvency practitioners or sophisticated investors.

3.38 Fourth, as with the US-based litigation funders from whom Levitt Robinson have procured funding for its clients, they should consent to the exclusive jurisdiction of an Australian court in matters concerning their own performance and to the enforcement of a judgment of an Australian court as if it were the judgment of a US court in their own state jurisdiction.

4. Contingency fees

4.1 Within Levitt Robinson, the authors differ as to whether to support the Commission's Proposal 5-1 to lift the ban on contingency fee arrangements in relation to solicitors acting in class action proceedings, with Mr Meyerowitz-Katz in favour and Mr Levitt opposed.Nevertheless, for the reasons given below, we submit that the conditions proposed by the Commission are not desirable.

4.2 In this submission, we first address a particular policy aspect in relation to contingency fees, being the cost to plaintiff lawyers of adopting such a model. We then consider a number of the common arguments against the introduction of contingency fees and, finally, we turn to the specific proposals in relation to the regulatory framework for contingency fees.

Contingency fees as a form of billing for legal services

4.3 Before delving into other policy considerations, we wish to establish the proposition that contingency fees are no more than one of a number of potential ways in which lawyers can charge for their services.

4.4 There are generally three types of fee arrangements between lawyers and their clients:[26]

(a) first, *input based* fee arrangements, in which the lawyer is paid in accordance with the amount of work performed. This encompasses time-based billing, which is currently the most common form of fee arrangement;

(b) second, *output based* fee arrangements, in which the lawyer is paid based on results that are achieved, which is not generally acceptable in Australia; and

(c) third, *fixed* fee arrangements, in which the lawyer and client agree on a fee prior to the work being performed and that fee is paid regardless of all other variables (note that *pro bono* arrangements are essentially fixed fee arrangements where the fee is fixed at zero).

4.5 In addition to the manner of charging fees, there are generally three arrangements by which the fees are billed to clients:

[26] See generally, Neil Rickman, 'The Economics of Contingency Fees in Personal Injury Litigation' (1994) 10(1) *Oxford Review of Economic Policy* 34 at 36; Ronald Rotunda, 'Moving from Billable Hours to Fixed Fees: Task-Based Fees and Legal Ethics' (1999) 47 *Kansas Law Review* 819; Nuno Garoupa and Fernando Gomez-Pomar, Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees Over Contingent Fees (July 2002);

(a) first, *upfront billing*, where the lawyer will not perform work without having been paid in advance;

(b) second, *ongoing billing*, where the lawyer periodically bills the client for work performed and the client then pays the bill; and

(c) third, *speculative billing*, where the lawyer is not paid unless and until a successful outcome is achieved.

4.6 Each retainer agreement between a lawyer and a client must have a particular fee arrangement and a particular billing arrangement. For example, the most common form of retainer is an *input based* fee arrangement (lawyers charge by the hour, divided into 10 x 6 minute units) and an *ongoing billing* arrangement (lawyers bill periodically for work performed).

4.7 This analysis is useful in order to appreciate the distinction between "conditional" fee arrangements and "contingency fee" arrangements. Both involve a *speculative* billing model, in that the lawyer is only paid on the achievement of a successful outcome. However, conditional fees adopt an *input based* fee arrangement, as the lawyer is paid for hours of work performed, whereas contingency fees adopt an *output based* fee arrangement, in that the lawyer is paid based on the results achieved.

4.8 In other words, in Australia, lawyers are permitted to bill on an upfront, ongoing or speculative basis, and are permitted to enter into input-based or fixed fee billing arrangements. However, output-based billing arrangements are currently prohibited, save to the extent that it is permitted to charge a 25% uplift on input-based fee agreements in the event of a successful outcome other than in prescribed circumstances. Such uplifts are the only compensation that lawyers are currently entitled to receive in return for foregoing fees until the outcome of a matter.

4.9 Given that output based fees can be seen as compensating lawyers for doing without ongoing fees, we consider it necessary to address the costs to lawyers of billing on a speculative basis in more detail. In our submission, these costs are often overlooked in the debate on policy regarding the fee arrangements that lawyers can enter into.

4.10 The costs that plaintiff lawyers must bear when billing on a speculative basis include the following:

4.11 First, there is a significant opportunity cost. Any time spent working on a speculative matter is time that could have been spent working on a funded matter. Further, in a speculative matter, an hour of WIP (work in progress) is

less valuable than in a funded matter due to the chance that it will never be recovered.[27]

4.12 Second, there is the cost of paying overheads while foregoing cashflow. For solicitors, this means paying office costs, salaries, equipment hire, and all other costs associated with running a law firm. For counsel, this means paying floor fees, rent, and other expenses. This results in significant out-of-pocket expenses in addition to the opportunity cost.

4.13 Third, lawyers are often required to incur third party disbursements when acting on a speculative basis. This can include travel costs, expert fees, court fees, sundry expenses, and other miscellaneous expenses.

4.14 In summary, in order to act on a speculative basis, plaintiff lawyers must make payments to third parties and keep the lights on while foregoing their ordinary cashflow, in return for a payoff at the end.[28] The way that ordinary commercial enterprises would fund investments of that type is through either debt or equity, however the structures of most law firms (with the exception of listed law firms) make equity raising impossible and debt very expensive. A partnership or limited liability firm cannot sell shares to third parties, and has no security to provide to lenders other than the principals' personal assets.[29]

4.15 For these reasons, speculative billing arrangements in large class actions are extremely costly for lawyers, especially for counsel and for solicitors in smaller firms, who have less ability to absorb the lack of cashflow than large firms would. Accordingly, speculative billing arrangements are only adopted in exceptional cases—either because there is a near-certainty of recovery, or because of the public interest in bringing the case.[30]

Incentives to bring unmeritorious claims

4.16 At [5.15] of the Discussion Paper, the Commission notes the view that lawyers acting on a contingent basis would bring unmeritorious claims. This is an argument commonly made against the introduction of contingency fees.

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[27] See, eg, the difficulties faced by Slater & Gordon and Shine Lawyers in pricing WIP: https://www.afr.com/business/legal/shine-and-slater--gordon-put-the-listed-law-firm-model-in-the-dock-20160131-gmhwyt

[28] Samuel Issacharoff, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' (2014) 63(2) *Depaul Law Review* 561, at 569.

[29] Samuel Issacharoff, 'Litigation Funding and the Problem of Agency Cost in Representative Actions' (2014) 63(2) *Depaul Law Review* 561, at 569.

[30] For example, Levitt Robinson ran the *Wotton v Queensland* class action on a speculative basis because of the public interest considerations.

4.17 We submit that the risk of contingency fees leading to an explosion of unmeritorious claims is significantly overstated, and the argument against contingency fees ignores the very real cost to lawyers of acting on that basis. Further, there are at least three other significant disincentives to bringing unmeritorious claims.

4.18 First, lawyers have professional obligations not to bring meritless claims,[31] which are enforceable by personal costs orders against the lawyers,[32] as well as disciplinary measures such as fines, reprimands, and being struck off the roll of practitioners.[33]

4.19 Second, there is a serious risk of reputational damage attending the bringing of unmeritorious claims. Plaintiff class action firms are even more reliant on their public image and reputation to obtain clients than other firms, as their business model relies on attracting large numbers of members of the general public as clients. Failed class actions are widely reported and can cause substantial reputational damage.

4.20 Third, the idea that well-funded defendants would agree to settle meritless claims as a matter of course is, in our submission, without foundation. In class action litigation, even the most meritorious claims are strenuously defended by top-tier law firms and leading commercial counsel. Unmeritorious claims would not settle: they would go to trial and lose.

4.21 In those circumstances, we submit that while contingency fees may increase the number of actions brought, the chances of those actions being meritless are negligible. We note that similar arguments were made in relation to the introduction of the class action regime and in relation to the legalisation of litigation funding, however in neither case was there an explosion of unmeritorious claims. Rather, both the introduction of class actions and the legalisation of litigation funding resulted in an increase in *meritorious* claims being brought; or, in other words, in increased access to justice for people who would not otherwise have been able to bring claims.

Encouraging avoidable interlocutory applications

4.22 Another common argument against contingency fees is that they may encourage lawyers not to undertake avoidable work such as interlocutory

[31] See, eg, *Legal Profession Uniform Law Application Act* 2014 (NSW) Sch 2; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 r 21; *Legal Profession Uniform Conduct (Barristers) Rules* 2015 rr 60, 64-66;
[32] See, eg, *Legal Profession Uniform Law Application Act* 2014 (NSW) Sch 2 cl 5; *Civil Procedure Act* 2005 (NSW) s 99; *Federal Court Rules* 2011 (Cth)r 40.07.
[33] See, eg, *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.

applications in order to minimise their costs, even though such work could result in the client achieving a better outcome.

4.23 To illustrate how this might apply, say that while a lawyer is acting in a class action on a contingency basis, there is an opportunity to bring an interlocutory application, such as an application to strike out certain paragraphs of the respondent's defence, or to broaden the scope of the respondent's discovery. The lawyer does an analysis and concludes that the application may result in a benefit to the client, but is avoidable (which is to say, the application may have a benefit but is not absolutely necessary). As the lawyer has an interest in saving costs, the lawyer determines not to bring the application, and thereby foregoes the potential benefit but saves the inevitable costs.

4.24 The argument being put is that, in those circumstances, the lawyer is acting in conflict with the client's interests by foregoing the potential benefit of the interlocutory application. We submit that the argument is misconceived as it is based on the false premise that parties should be encouraged to bring avoidable interlocutory applications without regard to cost-benefit analysis.

4.25 The starting point for such considerations should be the overarching purpose of the civil practice and procedure provisions in the *Federal Court of Australia Act* 1976 (Cth) ("**FCA Act**"), namely "to facilitate the just resolution of disputes … as quickly, inexpensively and efficiently as possible."[34] Under this framework, "[s]peed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings."[35]

4.26 The proposition that, as a matter of policy, lawyers should be encouraged to bring avoidable interlocutory applications is peculiar to the argument against contingency fees. In all other contexts, there is a widespread belief that interlocutory disputes cause unnecessary expense and delay, and should not be brought if at all avoidable. This is particularly so in relation to class actions—to the extent where one of the two stated objectives of the Federal Court's *Class Actions Practice Note (GPN-CA)* is to:

> facilitate the efficient and expeditious conduct of class actions, in particular by ensuring that the issues that are in contest are exposed early in the proceeding **and that class actions are not unnecessarily delayed by interlocutory disputes.**

4.27 Accordingly, we submit that if contingency fees have the effect of reducing the number of avoidable interlocutory applications in class actions, that could be

[34] *Federal Court of Australia Act* 1976 (Cth) s 37M.
[35] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [98] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

positive as promoting the achievement of the just resolution of disputes "as quickly, inexpensively and efficiently as possible".[36]

Settlement of claims and conflict of interest

4.28 The final argument against contingency fees that we propose to address is the concern that solicitors might recommend that a client settle claims instead of continuing to prosecute them, because of a conflict of interest and commercial imperatives. For example, the Commission notes at [5.16] of the Discussion Paper:

> It is also argued that the possibility of a large payout will only augment existing conflicts of interest, magnifying the likelihood of solicitors recommending that representative plaintiffs accept offers to settle for the commercial purposes of the solicitor/firm, rather than for the benefit of the client/s.

4.29 We note that a similar argument is often made in relation to litigation funders, albeit that funding agreements are required to incorporate mechanisms for the independent determination of any dispute between clients or lawyers and funders over how and when to settle.

4.30 The duty for parties to act consistently with the overarching purpose of civil procedure was introduced into the FCA Act in part to encourage early settlement of disputes, such that "if a party is refusing to accept a reasonable offer of settlement, a lawyer will have to explain that it is in their interest to accept the offer and that failing to do so may be regarded by the Court as acting inconsistently with the overarching purpose."[37] In accordance with this policy objective, a number of measures have been introduced in recent decades to facilitate the early settlement of disputes. For example, the Federal Court's annual report states that "cases [are] now almost routinely referred to some form of ADR", and "mediation is an integral part of the Court's case management."[38] Further, the Court's individual docket system was introduced to "promote more active and effective judicial case management in order to streamline processing, *encourage early settlement* and, overall, to dispose of cases more efficiently."[39]

4.31 The Federal Court has also adopted further procedures to encourage the early settlement of disputes in class actions in particular. The Court's website page regarding its class actions procedure states:[40]

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[36] *Federal Court of Australia Act* 1976 (Cth) s 37N(1)(b).
[37] Explanatory Memorandum, *Access to Justice (Civil Litigation Reforms) Amendment Bill* 2009 (Cth) at [22]-[29].
[38] Federal Court of Australia Annual Report 2016-17, p30.
[39] The Hon. Chief Justice James Allsop AO, *Judicial Case Management and the Problem of Costs* (Lord Dyson lecture on "The Jackson Reforms to Civil Justice in the UK", 9 September 2014).
[40] http://www.fedcourt.gov.au/law-and-practice/class-actions

> A large number of Class Actions will settle before trial. The Court expects that parties will, at the appropriate stage of the proceeding, mediate or utilise other appropriate ADR processes. After the close of pleadings, the Court will generally hold a case management hearing to investigate suitable steps for the settlement of the class action – including appropriate ADR processes.

4.32 Against that backdrop, it seems incongruous that the high rate of settlement in class actions is viewed with suspicion. It is in fact a common myth that class actions are more likely to settle than other cases. Approximately 62% of class action claims are settled, and 10% of class actions are finalised by judgment.[41] There is not a great deal of publicly available information in relation to the settlement rates of non-class actions, however the information that is available suggests that class actions therefore have a comparable or lower rate of settlement than most other civil claims:

(a) In the Supreme Court of Western Australia, as at 2008, less than 3% of civil lodgements were resolved by trial.[42]

(b) In the District Court of NSW, as at 2009, about 15% of civil lodgements were disposed of by trial.[43]

(c) According to the Federal Court's annual reports, over the past five years there have been an average of 1,104 first instance judgments delivered and 4,505 matters finalised each year. Even if only 50% of the judgments were interlocutory (the proportion is not stated in the report), that would mean that about 12.5% of matters were finalised by judgment.

(d) In the United States, about 2% of matters in federal courts and 1% of matters in state courts are finalised by trial.[44]

4.33 Having outlined these policy considerations, we now address the situation of concern which gives rise to the argument against contingency fees: that is, a case has been brought and an offer of settlement has been made. The solicitor is acting on a contingent basis. The solicitor conducts an analysis and concludes that it would be uncommercial to continue acting instead of accepting the settlement, as the likely further returns to the solicitor are outweighed by the amount of additional work that would need to be performed and the risk of an unsuccessful outcome. The solicitor therefore advises the client to accept the settlement, and perhaps indicates an unwillingness to continue acting if the client refuses the settlement.

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[41] Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Fifth Report' (July 2017).
[42] The Hon Wayne Martin CJ, 'Australian Justice System in 2020' (paper to the National Judicial College of Australia Conference, 25 October 2008).
[43] David Spender, 'The Decline of the Trial in Australia', available at http://ssrn.com/abstract=2060754.
[44] John Langbein, 'The Disappearance of Civil Trial in the United States (2012) 122 *Yale Law Journal* 522.

4.34 Mr Levitt accepts that this is an insuperable conflict which, when it arises, as it often does, undermines the solicitor-client relationship and destroys the confidence of the client in the practitioner. Mr Meyerowitz-Katz diverges here and offers the following contentions:

4.35 The argument being made is that in such circumstances the solicitor is acting in conflict with the client's interests, and it would be preferable for the client to continue prosecuting the action at the solicitor's expense, rather than to settle.

4.36 When solicitors are acting on a conditional basis or where a matter has litigation funding, it will often be the case that a client will want to continue prosecuting the action and will be convinced to settle as a result of the solicitors not being willing to continue to act if the settlement is rejected. Such situations typically arise as a result of:

(a) the client's inflated expectations, including a reluctance to accept that the client's case has a risk of failure, or a refusal to accept any resolution other than compensation for the full amount of the client's loss, no matter the risks of an unsuccessful outcome;

(b) an unduly cavalier attitude on behalf of the client, whereby the client views the litigation through the lens of a "vendetta" against the respondent, and is not able to make commercially-minded decisions; and

(c) the fact that, in conditional fee arrangements or litigation funding arrangements, the client is not being required to pay anything upfront and is therefore immune to the ongoing cost of the litigation. This means that one of the principal commercial considerations encouraging paying clients to settle a claim is absent.

4.37 In other words, under arrangements where the salient costs of the action are shifted from the claimant to another entity (either solicitors or a funder), it will be inevitable that the entity paying those costs is more cognisant of the ongoing impact of the costs than the claimant. The same applies *mutatis mutandis* to the risks of an adverse outcome being shifted to another entity. Such circumstances often have the effect of fostering an unduly gung-ho attitude in the claimants. The fact that the entity that is exposed to the costs may therefore encourage settlements in order to avoid further costs being incurred could can be seen to be in accordance with the objectives of s 37N of the FCA Act (or comparable provisions).

Conditions applying to contingency fees

4.38 Having addressed the threshold issue of whether or not to introduce contingency fees, we now turn to the proposed model for their implementation. The Commission proposes that the following conditions should apply to contingency fee arrangements:

(a) an action funded by a contingency fee agreement cannot also be funded by a third party which is also charging on a commission basis;

(b) a contingency fee cannot be recovered in addition to professional fees charged on a time-cost basis;

(c) solicitors acting under a contingency fee arrangement should advance the costs of disbursements; and

(d) solicitors acting under a contingency fee arrangement should indemnify the plaintiff against an adverse costs order (in effect, they should provide security for the opposing party's costs).

4.39 In other words, the Commission effectively proposes that solicitors acting on a contingency basis be subject to the same costs and risks as a litigation funder, while receiving less reward than a funder receives. Further, the Commission proposes to prohibit "risk sharing" arrangements, whereby the solicitors and the funder share the risks and the rewards, as well as blended fee arrangements, whereby solicitors charge some ongoing fees on a time-billing basis and other fees on a contingent basis.

4.40 To the extent that the Commission proposes to place solicitors in the same position as a commercial litigation funder, we submit that there is no policy basis to do so. As was stated by Allsop CJ and Middleton J in *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1 at [47]:

> There are principled reasons to distinguish between a commercial litigation funder and solicitors ... under these [conditional costs] agreements. The former take a percentage of the judgment; the latter earn professional fees. ... **Solicitors are entitled to charge professional fees for undertaking the professional responsibilities of running the case, as officers of the Court, with all the attendant responsibilities (including duties to the Court) that that entails.** No one, the solicitors included, should ever lose sight of those responsibilities. **The expected or contingent receipt of proper professional fees ... is not a basis for requiring an officer of the Court to contribute to a fund for the costs of the other side of the litigation.** Looking at the matter from the point of view of the solicitors, it could not be considered reasonable for them to be required to fund on an ongoing basis the litigation brought under Pt IVA. [emphasis added]

4.41 In relation to their Honours' comment that litigation funders charge a percentage of the judgment whereas solicitors "earn professional fees", we

submit that this statement would be no less true if the solicitors were charging on a contingent basis rather than on a time-billing basis.

4.42 The tension between the role of solicitors acting on a contingency basis and the role of litigation funders is illustrated by the Commission's proposal that a contingency fee cannot be recovered in addition to professional fees charged on a time-cost basis. This is in direct contrast to the situation of a litigation funder, in which both a funding premium is extracted *and* the funder is reimbursed for all legal fees expended, including solicitors' fees and counsel's fees.

4.43 The Commission's proposal is no doubt rooted in the sound policy basis that solicitors should not "double-charge" for the same service; however, the role contemplated for solicitors by the Commission's proposal is one where they provide not only their usual service—that is, charging professional fees "for undertaking the professional responsibilities of running the case, as officers of the Court"—but also the services provided by litigation funders of advancing all costs and disbursements and providing an indemnity for costs. However, the Commission proposes that, whilst solicitors will be compelled to provide both services, they will only be permitted to charge for the latter.

4.44 We submit that this is not a desirable approach. Contingency fees represent an alternative means by which solicitors charge for their ordinary services, taking into account the fact that the day-to-day costs of funding the action are shifted to the solicitor, and the solicitor is risking those costs not being recovered.

4.45 If the policy is approached from that perspective, it follows that it should be open to solicitors to charge part of the fees upfront or on an ongoing basis, and part of the fees on a contingent basis. That means that the solicitors would not necessarily have to risk receiving no fees at all for their work over the course of the matter.

4.46 It may be appropriate in such an arrangement not to permit the amount that the solicitor receives to exceed the contingency fee, so that solicitors are not charging the contingency fee in addition to their hourly fees. However, it should nevertheless be permissible to charge both a limited ongoing fee and a success fee.

4.47 Further, solicitors should be allowed to act on a contingency basis whilst making arrangements for other parties to fund the disbursements of the action, such as by procuring a commercial funder or by briefing counsel who also act on a conditional or contingent basis. Appropriate court supervision could ensure that the commission charged by the funder in such cases is reduced in order to account for the risk being assumed by the solicitor.

4.48 Finally, as a practical matter, we submit that the requirements to provide security for costs and fund all disbursements would be a strong disincentive to solicitors providing fees on a contingent basis. As noted above, it is difficult for law practices to raise equity or credit. Accordingly, the security and disbursements would need to be provided out of the lawyers' personal assets or cashflow. With the exception of a handful of large law firms, it is highly unlikely that lawyers would have the resources to provide security for the costs of a class action or to pay all associated disbursements. Accordingly, we submit that this requirement would defeat the purpose of the introduction of contingency fees.

Conclusion and policy recommendations

4.49 In view of the above, Mr Meyerowitz-Katz submits that the ban on contingency fees should be lifted, subject to the following conditions:

(a) first, solicitors should be permitted to charge on a contingent basis and also on another basis, provided that the total fees do not exceed the amount of the contingent fee in the event of a successful outcome;

(b) second, where there is more than one entity receiving a portion of any damages recovered in a proceeding, the aggregate amount deducted should not exceed the amount that would have been fair and reasonable had there been a single commercial funder; and

(c) third, all contingency fees charged in a class action proceeding should be disclosed to the Court and to the class members, and the Court should have the power, on the application of a class member or on its own motion, to disallow a contingency fee where doing so would be in the interests of justice.

5. Self-funded litigation schemes

5.1 The Commission has invited submissions for alternative ways of funding class actions to commercial litigation funding or contingency fee arrangements. One such alternative commonly used by Levitt Robinson has been referred to above—that is, where the case has been funded by contributions made by group members to the costs of the proceeding. This is a solution to the collective action problem that arises in relation to class actions. By enlisting and coordinating members of the group, and soliciting contributions to costs, Levitt Robinson has been able to raise sufficient funds to allow the actions to proceed.

5.2 We submit that self-funded class actions are a desirable model and ought to be encouraged as a matter of policy. The model allows lawyers to bring class

actions without the costs and risk associated with speculative fee arrangements, and the lack of a need for a commercial funder means that the group members see a substantially higher return than they otherwise would. The model has also allowed us to bring claims that would not have been attractive to commercial funders, either because the potential damages were too low, or because the relief being sought was non-pecuniary (eg we have settled two matters on behalf of debtors where the settlement included a generous hardship relief scheme).

5.3 As explained below, there are currently a number of legal and regulatory hurdles that make it difficult to fund actions using this model. We submit that, as a matter of policy, these hurdles should be removed in order to encourage self-funding of class actions.

MIS Exemption

5.4 As a result of the decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, it is generally accepted that litigation funding schemes fall under the definition of "managed investment scheme" ("**MIS**") in s 9 of the *Corporations Act*. In this context, a self-funded class action may be one form of such scheme: the class members contribute money to acquire interests to benefits produced by the scheme, the contributions are pooled to produce financial benefits (through the payment of legal fees), and the members of the scheme do not have day-to-day control over the operation of the scheme (as this is controlled by the representative party and the solicitors).

5.5 Accordingly, where more than 20 people are funding a self-funded class action, or the scheme is promoted by a professional promoter in certain circumstances, it is arguably required to be registered under s 601ED of the Act, and it becomes subject to various other provisions, including:

(a) s 601MB, which provides that contracts for interests in the MIS are voidable where s 601ED or Div 2 of Pt 7.9 have not been complied with;

(b) the requirement in ss 911A and 911B for the operator of the MIS to hold an AFSL and for authorised representatives to comply with certain conditions;

(c) the prohibition of selling financial products in ss 992A and 992AA; and

(d) the disclosure obligations in Pt 7.9.

5.6 Litigation funding schemes are currently excluded from the definition of an MIS by reg 5C.11.01 of the *Corporations Regulations* 2001 (Cth). However, this only applies to schemes where there is a litigation funder, and not to self-funded schemes. Rather, self-funded schemes are exempt from the MIS provisions under ASIC Class Order [CO 13/898].

5.7 There are a number of issues with the exemption being applied in this manner.

5.8 First, unlike the exemption in the Regulations for litigation funders, the Class Order has a sunset date—currently 12 July 2019. ASIC has been regularly extending this sunset date as it expires, but the fact that the Class Order has a sunset date is still extremely troubling to practitioners who are relying on it in order to avoid falling foul of the requirements of the *Corporations Act*. It would be an extremely unfortunate situation if the Class Order were to expire without being renewed, and the manner in which ongoing class actions were being funded were to suddenly and without warning become illegal.

5.9 Second, the Class Order requires the scheme to be funded using conditional costs agreements, as defined under the *Legal Profession Act* 2004 (Vic) as at 11 July 2013. Section 3.4.27(1) of that Act defined "conditional costs agreement" as follows:

> A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, and a costs agreement containing a provision of that kind is referred to in this Act as a "**conditional costs agreement**".

5.10 The Act also set out a number of requirements for conditional costs agreements. It is not clear whether the Class Order requires conditional costs agreements to comply with all of those requirements, or if it is only adopting the definition. If the requirements of the Act must be complied with, this would be a curious result, given that the Act has now been superseded by the *Legal Profession Uniform Law*, and so it would have no application anywhere outside of this context. If the Class Order is simply borrowing the definition in the Act, then it is not clear why the definition cannot be reproduced in the Class Order rather than being incorporated by reference.

5.11 Further, we do not understand the policy basis for restricting such funding models to *conditional* costs agreements, and not permitting conventional costs agreements. As solicitors, we are providing services for a fee. The effect of the litigation funding scheme is that rather than each client paying the full amount of our fees, each client pays a proportion of our fees. We do not understand why the clients' liability must be conditional on the successful outcome of the matter. This reduces the effectiveness of the model, as we are required to rely

on voluntary contributions from group members paid from time to time, and group members cannot be contractually bound to make contributions. Accordingly, we tend to find that as the matterproceeds, some group members stop providing funding, meaning that the burden of funding the matter is shifted unfairly onto a smaller group.

5.12 In view of the above, we submit that:

(a) the exemption for self-funded litigation schemes should be introduced into the Regulations rather than being applied by way of Class Order; and

(b) the requirement for conditional costs agreements should be removed from the exemption.

Prohibition on premiums to funding group members

5.13 In addition to the issues concerning the Class Order, the self-funding model is discouraged as there is effectively a prohibition on group members being incentivised to contribute funding to the claims, rather than "freeriding" on those who are willing to fund the action, by giving funding group members priority to receive a portion of any settlement of the class action.

5.14 The first time a settlement was reached in a self-funded class action that we were running, Levitt Robinson attempted to obtain a "premium" for the funding group members. The proposal was that 35% of the settlement sum would be paid only to the group members who had made contributions to the funding of the matter. Whilst expressed as a "funders' premium", this arrangement was not a true funders' premium, in that it did not involve money being paid from the settlement pool to a third party, but rather recognised "self-funders" as funders, particularly as the funders comprised only roughly one third of the group members in the class. The effect of the proposed arrangement was to alter the distribution of the settlement fund, such that those group members who had contributed funding and therefore allowed the action to be brought and maintained would be compensated for approximately 50% of their estimated losses, and those who had not contributed funding would be compensated for approximately 20% of their losses. In other words, it carved-out a portion of the settlement sum (35%) and gave the funding group members priority to that amount.

5.15 The settlement was approved at first instance by Logan J;[45] however the approval judgment was then appealed by ASIC, and overturned by the Full Federal Court.[46] To our knowledge, this is the only time that ASIC has appealed a settlement approval, or that a settlement approval has been overturned on appeal.

5.16 The Full Court's reasons for rejecting the proposal included:[47]

(a) first, that the prospect of a funders' premium was not mentioned until two years into the litigation;

(b) second, "unlike a commercial litigation funder, the Funding Group Members funded the litigation in the hope, but without any expectation, that they would receive full reimbursement of their funding contributions and without any expectation that they would receive a premium";

(c) third, the Court considered that the effect of the premium was "disproportionate", as it reflected a 525% "return" on the funding group members' "investment" (ie the funding they had contributed to the action), and the "return" was not proportionate as between the funding group members in accordance with the amounts they had contributed;

(d) fourth, 13 group members had been included as funding group members even though they had only provided funding after the settlement had been announced; and

(e) fifth, the 35% premium was not proportionate to the costs expended by the funding group members. In that regard, the Court left open the possibility of funding group members being allowed to recover interest on funding contributions to compensate them for being kept out of funds, but found that they should not be permitted to charge a "premium" in the same way as a litigation funder.

5.17 The applicant, Ms Richards, did not seek special leave to appeal the Full Court's judgment, and we accept that it accurately reflects the current state of the law. However, we submit that, from a policy perspective, the current state of the law is undesirable.

[45] *Richards v Macquarie Bank Limited (No 4)* [2013] FCA 438.

[46] *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89.

[47] See at [46]-[57].

5.18 Whilst we accept the Full Court's criticisms in relation to the fact that the group members were only notified of the proposed premium two years after the case had commenced, and in relation to the inclusion of group members who had not provided any funding prior to the settlement being announced, we consider that the policy considerations underlying the balance of the findings are problematic, and do not take into account the financial burden and, at times, hardship which funding the action imposes on funding group members, and which the "free-loaders" do not share.

5.19 We respectfully submit that, from a policy perspective, it is undesirable to take the view that the funding group members were "investing" in the action, and that the "premium" was a "return" on those "investments". The funding group members should not be seen as people investing in a commercial venture for reward, in the same position as a commercial third party funder. They are aggrieved persons who are paying legal fees in return for legal services, seeking to enforce their legal rights to redress the wrongs that were done to them. Their funding of the litigation is not an "investment"; it is their seeking to enforce what they believe to be their legal rights.

5.20 Further, the effect of denying a premium to funding group members is to exacerbate the collective action problem. If there is no benefit to providing funding except, in the event of a successful outcome, being compensated by interest on the contributions made, there is not much of an incentive for any individual to fund a claim when they could instead "freeload" on the people who are willing to do so. The Court recognised in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 that freeloading should be discouraged in relation to third party funders, and we submit that the same principle should apply to funding group members.

Requirement to provide security for costs

5.21 The final hurdle to self-funding group members bringing proceedings is the judgment of the Full Court in *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1. The case involved two related class actions which were both being partially self-funded by group members (but were mostly being run on a speculative basis). The respondents applied for an order that the applicants should provide security for costs, on the basis that the other group members were "standing behind" the applicants' claims.

5.22 The applicants were found to have been impecunious, even though they each owned net assets worth several hundreds of thousands of dollars, and had a household income of over $110,000 per year after tax, as they did not have sufficient resources to meet the adverse costs exposure of about $8.2 million.

5.23 At first instance, Murphy J found that it was contrary to the policy of the FCA Act to require group members to provide security for costs. His Honour's decision was substantially influenced by s 43(1A) of the FCA Act, which provides that, in a class action, the Court may not order costs against any person who is not a party to the proceeding, unless otherwise authorised to do so—in effect shielding group members from adverse costs orders: see *Kelly v Willmott Forests Ltd (in liquidation)* [2012] FCA 1446; 300 ALR 675.

5.24 On appeal, the Full Court found, consistent with the judgment of a differently constituted Full Court in *Bray v F Hoffmann-La Roche Ltd* [2003] FCAFC 153; 130 FCR 317, that it was able to order that the group members provide security for costs, despite the operation of s 43(1A). Their Honour's overturned Murphy J's first instance judgment, and remitted the matter for Murphy J to consider the manner in which appropriate security should be calculated.

5.25 The matters that bore on the majority decision of Allsop CJ and Middleton J included that there was no evidence whether commercial litigation funding had been sought: at [77]; and, as their Honours stated at [99]:

> the applicants and group members entered commercial transactions for their own reasons. They had sufficient assets or income to warrant the decision to enter the arrangements and receive the hoped for commercial and fiscal advantages. The commercial or other advantages of the investments have not materialised. The applicants on behalf of themselves and the group members wish to engage in commercial litigation to repair the position they find themselves in. Some of those group members are persons of significant means. Some invested a lot; some invested little. All made a choice of a commercial character to enter arrangements to advance their asset or income position. It seems entirely fair that those standing to benefit from such litigation make a real, but not oppressive, contribution to a fund to secure the costs of the respondents. The most obviously fair and appropriate approach would be rateable by reference to the investments. There would be a need, in setting the amount, not to risk stifling the action. Given, however, the nature of the underlying claims and proved ability of at least a not insignificant number of group members to contribute, an order for some security is appropriate.

5.26 Relevantly, there were 409 "known group members", being clients of the applicants' solicitors, in an open class action. The balance of the group consisted of unknown persons. The result of the Full Court's judgment was that the known group members were requested to provide information as to their financial means, which was then placed in evidence. The applicants were then given an opportunity to approach all group members and ascertain their willingness to provide security, after the respondents provided to the

applicants a register of investors that would allow the identification of the unknown group members.[48]

5.27 After that approach had been made by the applicants' solicitors, the security for costs application was considered again. This time, the applicants adduced evidence that they had unsuccessfully approached litigation funders and ATE insurance providers.[49] Further, they proffered $1,730,379 in security, which is the amount that had been offered by the low proportion of group members who had responded to the requests to provide security according to a proportion of the amount they claimed to have lost (up to 15% of that amount). Of the class as a whole, 93% had not responded to any requests for information.

5.28 Murphy J held that he was bound by the Full Court's decision to take into account the circumstances even of the non-responding group members.[50] His Honour considered that if he were to do so, it was inevitable that he would make an order for security that would stultify the proceedings. He therefore held that the better approach would be to "winnow the class down" by first allowing group members to opt out, and second "closing the class", such that group members would not be permitted to bring a claim unless they either proffered security for costs, or established that they were unable or reasonably unwilling to do so.[51]

5.29 A proposed settlement of the class action was later rejected on a number of grounds. It is apparent from Murphy J's reasons for the rejection of the settlement that the security for costs orders and the consequent class closure regime had a substantial bearing on the unjustness of the settlement.[52] In particular, his Honour noted at [8] that "there were substantial difficulties in funding the proceedings which resulted in significant gaps in the preparation of the cases." A revised settlement was subsequently approved.[53]

5.30 The following comments can be made in relation to the course that these cases took.

5.31 First, in our submission, the defects in the preparation of the cases that led, in part, to the refusal of the first settlement—and presumably resulted in the settlement that was ultimately approved being less favourable than it would have been had the case been adequately prepared—was the inevitable result of

[48] *Kelly v Willmott Forests Ltd (in liquidation) (No 2)* [2013] FCA 732.
[49] *Kelly v Willmott Forests Ltd (in liquidation) (No 3)* [2014] FCA 78 at [30]-[34] (***Kelly (No 3)***).
[50] *Kelly (No 3)* at [81]-[84].
[51] *Kelly (No 3)* at [85]-[96].
[52] See, *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; 335 ALR 439 at [1]-[12].
[53] *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689.

the orders that the class members provide security for costs. When proceedings are being funded by group member contributions, there is a limit to the amount of money that can be raised from each group member. As occurred in that case, most group members are unable or unwilling to contribute at all to the funding of the case. Of those who are, there is a limited amount that they are able or willing to contribute. If they are required to pay that amount to secure the respondents' costs, it will accordingly not be paid to fund the applicants' costs.

5.32 In those circumstances, while the provision of security does not "stultify" the proceedings per se, it does have the effect of significantly damaging the applicants' ability to prepare their case. Or in other words, had Murphy J's initial judgment not been overturned on appeal, the $1,730,379 paid as security for the respondents' costs would likely have instead gone to the applicants' legal fees, and the applicants' case would therefore not have been deficiently prepared.

5.33 Second, the requirement for the applicants to provide security must itself have been a hugely expensive exercise. Even putting to one side the appeal to the Full Court, based on our experience the exercise of sending circulars to thousands of group members and then collating the responses would cost some tens of thousands of dollars in legal fees at the very least. Added to this must be the costs of several contested interlocutory applications. While we did not act on the case and so are unable to confirm this suspicion, it seems to us that compelling the applicants to devote their limited resources to the security for costs skirmish must have further detracted from their ability to adequately prepare their case.

5.34 In those circumstances, we submit that the state of the law as it stands makes it much more difficult than it otherwise would be for class actions to be self-funded. Further, it appears that the current policy is to encourage litigation funding to be obtained rather than actions being self-funded, on the basis that this protects the respondents from being unable to recover the full amount of any costs order in their favour, even though this comes at the expense of the group members.

Conclusion and policy recommendations

5.35 For the reasons we have given above, we submit that self-funded class actions are desirable and in the interest of justice. However, the current regulatory regime creates a number of significant impediments to such actions being brought.

5.36 In order to address this issue, we submit that the following amendments should be made:

(a) first, the definition of "litigation funding scheme" in reg 5C.11.01 of the *Corporations Regulations* 2001 (Cth) should be amended to include schemes of the type that are currently exempted under ASIC Class Order [CO 13/898], save that the requirement that costs agreements be "conditional costs agreements" should be removed, and conventional costs agreements should be permitted;

(b) second, s 33V of the FCA Act should be amended to include a provision permitting the Court to make an order that group members who have contributed to the funding of the proceeding receive a greater portion of any settlement than those who have not done so;

(c) third, s 56 of the FCA Act should be amended to include a carve-out in similar terms to s 43(1A) of the Act, in order to prevent group members being required to provide security for the representative applicants' costs;

(d) fourth, the *Class Actions Practice Note (GPN-CA)* should be amended to provide that:

(i) the financial circumstances of any group members who are contributing to the funding of the proceeding, and the availability of commercial litigation funding, are not relevant to the consideration of whether the applicant is required to provide security for the respondent's costs; and

(ii) save in exceptional circumstances, group members will not be required to provide security for the applicant's costs.

6. Notice to group members

6.1 The Commission's Proposal 4-6 is that the Federal Court's *Class Action Practice Note (GPN-CA)* should be amended so that the first notices provided to potential group members by legal representatives are required clearly to describe the obligations 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.

6.2 We are not opposed to such information being provided to group members; however, we make the following submissions in relation to the proposal and the notice regime more broadly:

6.3 The Court makes available a sample opt out notice on its website. In practice, most if not all notices to group members (both in the Federal Court and in other jurisdictions) are substantially modelled on this precedent notice. However, in recent times, notices have become increasingly complex, as they have also contained information in relation to funding arrangements and, on occasion, competing class actions.

6.4 A study of opt out notices by Professor Morabito made the following observations:[54]

> An important dimension of this project has entailed the review of the opt out forms that class members are required to complete, sign and file in order not to be bound by the class action proceeding. The purpose of this review was to ascertain, from any comments that class members chose to write on the forms themselves, or on documents attached to the forms, whether they fully understood the information, regarding the class action proceeding in question and their right to opt out, that is contained in the court-approved opt out notices. These notices are usually sent directly to class members, posted on the web or published in various newspapers, magazines or other publications.
>
> This review provided the most depressing and, at the same time, amusing aspect of this study. ... The sad aspect of the review of opt out forms was the discovery that the opt out decision, made by a not insignificant number of those class members who wrote comments on their opt out forms, was most likely the product of a total misunderstanding, on their part, regarding the essential characteristics of class action litigation and/or the opt out device. In fact, some class members felt that the fact that the lawyers made them parties to the litigation, without seeking their prior permission, meant that they, and/or the legal system, could not be trusted.
>
> The comments of some class members also exhibited a failure to understand that the filing of the opt out form deprived them of the opportunity to receive a share of any monetary benefits that the class action litigation might produce. Other comments revealed a belief on the part of the class members in question that they would be liable for the costs of the litigation because they were parties to the proceeding. Even more depressing was our conclusion that if someone, whether a member of the Court's Registry staff or the relevant solicitors, had contacted the class members in question to briefly discuss with them their concerns, most of them would have probably revoked their opt out forms.

6.5 Those observations accord with our own experience in providing notice to group members in accordance with the ordinary procedure adopted by the Court. That is, many group members do not understand the notices that are sent to them, and it is apparent from notices that are filed and from queries made by group members that the notices often do not adequately advise group members of their rights.

[54] Vince Morabito, "An Empirical Study of Australia's Class Action Regimes: Second Report" (September 2010), p33.

6.6 In the Palm Island class action, we were required to give notice to a large number of group members, most of whom were unsophisticated people from extremely disadvantaged backgrounds. In order to assist in preparing the notice, we retained Dr Diana Eades, a socio-linguist with particular expertise in Aboriginal communication in the legal system,[55] and we also retained a professional graphic designer. The notice was approved by Mortimer J in *Wotton v State of Queensland (No 7)* [2017] FCA 406. The final form of the notice consisted of a brightly coloured booklet with the forms that could be filled out on detachable perforated sheets.

6.7 The changes that Dr Eades made to the notice were instructive. To take one example, an original paragraph read as follows:

> The applicants, the group members, and the respondents are all "bound" by the findings in the judgment. The claims of the applicants have been finally determined, and the Court has ordered that the first respondent (the State of Queensland) pay compensation to them for the acts of unlawful racial discrimination by the police. Some group members now have the opportunity to bring their own claims against the first respondent (the State of Queensland) for compensation or other redress.

6.8 After Dr Eades's suggestions, the paragraph read as follows:

> The applicants, the group members, and the respondents are all "bound" by the findings in the judgment. This means that all of these people have to follow what the judgment has set down about who can make a claim and what they can claim for. The Court has ordered that the first respondent (the State of Queensland) pay compensation to the applicants (Lex, Agnes and Cecilia Wotton) for the acts of unlawful racial discrimination by the police. Some group members now have the opportunity to bring their own claims against the first respondent (the State of Queensland) for compensation or other redress (which means things like an apology from the government, or being given medical assistance or counselling).

6.9 In our submission, Plain English explanations of legal concepts such as those introduced by Dr Eades are lacking in most notices that are distributed in class actions, and the notices tend to assume a level of legal sophistication that would be lacking in most group members.

6.10 Most notices also use other legal conventions that can be confusing to lay people, such as:

(a) placing defined terms in parentheses and indicating them with capital letters (eg "A class action is an action that is brought by one person ("**Applicant**");

(b) use of passive instead of active verbs;

[55] See, *Wotton v State of Queensland (No 5)* [2016] FCA 1457 at [459]-[450].

(c) long and complicated sentences, including multiple subordinate clauses; and

(d) inconsistent use of capital letters—sometimes indicating a defined term, other times indicating something important (eg "Judge" or "Order"), and other times indicating a proper noun in accordance with conventional English.

6.11 Further, the notices are generally designed as formal legal documents, are all in black and white text, and are on A4-size pages. The resulting notice is generally lengthy, unattractive, and confusing for most group members without formal legal training.

6.12 Similarly, the forms that group members are required to complete mirror court forms, rather than the kinds of forms that lay people would be used to filling out. Again using the Palm Island class action as an example, appended to this letter are two versions of the Registration of Intention to Claim form that the group members were required to fill out, as originally envisaged and as they appeared after they had been edited by the graphic designer.

6.13 In the above circumstances, we submit that, if further complexity is to be added to the notices that are to be provided to group members, this should be done carefully and in a way that is designed to be as accessible as possible to an unsophisticated audience. More generally, we submit that the Court's precedent notice should be reviewed, and a new precedent should be designed which:

(a) is as brief as possible;

(b) omits "legalese" and other jargon where possible, uses Plain English and is drafted by experts in Plain English and not by lawyers;

(c) is designed to be accessible to unsophisticated class members, including through use of colour, images, and graphic information;

(d) is designed not by lawyers but by media, communications and design experts; and

(e) is tested in order to ensure its effectiveness.

Thank you for considering our submission. Please do not hesitate to contact us should any questions arise.

Yours faithfully,
LEVITT ROBINSON

[redacted]

Stewart A Levitt
Senior Partner

Daniel Meyerowitz-Katz
Senior Associate

Appendix: Registration Forms

Federal Court of Australia
District Registry: Queensland
Division: General

No. **QUD 535 of 2013**

Lex Patrick WOTTON and others
(Applicants)

State of QUEENSLAND and another
(Respondents)

Registration of Intention to Claim

To: The Registrar
Federal Court of Australia
Queensland District Registry
Level 6, Harry Gibbs Commonwealth Law Courts Building
119 North Quay
Brisbane QLD 4000

Name (please print):_____a group member in this class action, gives notice that he/she intends to make a claim.

Date:
Signed:

_____
Name (please print):

Capacity (delete as appropriate): group member/legal representative of group member

Filed on behalf of		
Prepared by		
Law firm (if applicable)		
Tel		Fax
Email		
Address for service		

Federal Court of Australia
No. QUD 535 of 2013
Division: General

No. QUD 535 of 2013

Lex Patrick WOTTON and others
(Applicants)

State of QUEENSLAND and another
(Respondents)

Palm Island Residents
Queensland Police Class Action
Registration of Intention to Claim

To: The Registrar
Federal Court of Australia
Queensland District Registry
Level 6, Harry Gibbs Commonwealth Law Courts Building
119 North Quay
Brisbane QLD 4000

Name (please print):	a group member in this class action, gives notice that he/she intends to make a claim.
Date:	
Your Address:	
Your phone number:	
Your email (if any):	
Signed:	

Capacity (delete as appropriate): group member/legal representative of group member

26