RIMS AUSTRALASIA Chapter

Inquiry into Class Action Proceedings and Third Party Litigation Funders

1 Overview of these submissions

This submission is prepared by the Australasian Chapter of the Risk and Insurance Management Society (**RIMS**) in relation to the discussion paper released by the ALRC, *"Inquiry into Class Actions Proceedings and Third Party Litigation Funders*", dated 24 May 2018 (**ALRC Discussion Paper**).

As a regional body focused on enhancing risk leadership across Australasia and as a chapter of the wider global network, RIMS considers the issues raised in the ALRC Discussion Paper to be of paramount importance for the global risk and insurance community. Our Australian membership is composed of representatives from major Australian corporates (many listed), international insurers and other risk professionals with first-hand experience of and exposure to the day-to-day realities of class actions.

RIMS is primarily concerned with the implications of proposed changes to the models of litigation funding and entitlements of plaintiff lawyers, which impact the likelihood of additional and/or unmeritorious class action claims being pursued. RIMS considers this particularly important, having regard for the growing burden of Australia's class action regime on Australian corporations and insurers.

Consistent with RIMS' governing purpose, in this submission RIMS' primary focus is in relation to four key issues:

- Part 1: a review of continuous disclosure laws;
- Part 3: the regulation of litigation funders;
- Part 5: availability of contingency fees; and
- Part 6: competing class actions.

Accordingly, this submission provides comments on the majority of the proposals contained in the ALRC Discussion Paper, but focuses most of its attention on the above topics.

2 Part 1: Review of continuous disclosure and misleading and deceptive conduct provisions

In the current commercial and economic climate, in which shareholder class actions are an increasingly common and prominent feature of the Australian litigation landscape, the existing strict legal requirements upon listed entities to make continuous disclosure of material information are a catalyst for the significant growth in Australian class actions. Indeed, the ALRC Discussion Paper observes that the recent focus in the class actions market has been on shareholder claims based on alleged continuous disclosure breaches, comprising 34% of all class actions filed in the Federal Court in the past five

years.[1] However, beyond this, there is minimal empirical evidence as to the true impact of the current continuous disclosure and misleading and deceptive conduct regimes on the Australian class actions market. What is clear is that Australia appears to be the only jurisdiction in the world to have the unique combination of the following features:

- a strict liability continuous disclosure obligation for listed entities;
- a strict liability prohibition on misleading and deceptive conduct for Australian corporations; and
- an American-style class action mechanism with no certification procedures and minimal threshold requirements for the commencement of class action claims.

The ALRC Discussion Paper questions whether:

> *"the Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities…and those relating to misleading and deceptive conduct contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2011 (Cth)."*[2]

RIMS agrees that a comprehensive review is appropriate. Such a review should consider whether these regimes are effectively serving shareholder and investor interests, as well as the implications for the frequency of class actions, the impact on Australian business and availability of D&O insurance. A review of the compliance burden involved in meeting these continuous disclosure obligations should also have regard for the increasing concern of listed companies with the impact of any disclosure on its share price and the probability of a class action.

Based on the "uncontroversial" facts referred to by the ALRC,[3] RIMS considers the current market disclosure requirements impose a substantial, and potentially unreasonable, burden upon directors and corporations. RIMS agrees it is necessary for companies, particularly publicly listed entities, to give adequate disclosure to markets to facilitate a fair exchange of information and capital, and reduce asymmetries of information. However, RIMS disagrees that this safeguard should take strict liability form, which is a legal standard removed from the practical and commercial realities of good business and disclosure practice.

The problem with the current approach is reflected in the ASX Listing Rules, Guidance Note 8 which observes that "*the test for determining materiality of information in section 677 can give rise to some difficulty in practice for entities in assessing whether or not they have an obligation to disclose information under Listing Rule 3.1. They are effectively required to predict how investors will react to particular information when it is disclosed.*"[4]

Further, the requirement for "immediate disclosure" of any material price drop or price-sensitive information, particularly if given an inflexible interpretation, provides a relatively low threshold for commencing a shareholder class action. In particular, market disclosure rules ignore the practical realities for listed companies which frequently undertake extensive internal reviews and months of preparation to arrive at a suitable budget from which appropriate market guidance is derived. Listed corporations often also face substantial practical obstacles in collecting, understanding and reviewing information as part of these processes, with relevant information often spread throughout various corporate hierarchies.

---

[1] ALRC Discussion Paper, [1.72].

[2] ALRC Discussion Paper, Proposal 1-1, 29.

[3] ALRC Discussion Paper, [1.73].

[4] ASX Listing Rules, Guidance Note 8.

However, when it comes to the continuous disclosure obligation, these same companies are required to “immediately” provide accurate updates and/or corrections to extant guidance based on changes to underlying assumptions which may be based on imperfect information and a limited period for review and reflection.[5] The same careful process of consideration and assessment of price sensitivity is not afforded to companies when considering the maintenance or revision of guidance. The continuous disclosure obligation imposes substantial and impractical burdens on corporations which are not adequately recognised under the current regime – that is, there are limited “real world” defences within the relevant legislation to provide the time necessary for companies to consider the impact of new information and the potential need for further market disclosure.

A possible solution would be to adopt American-style “periodic disclosure” obligations. While Australian corporations are already under periodic obligations (e.g. reporting half-year and full-year results), that burden is significantly more realistic than continuous disclosure. American companies “are required to lodge quarterly rather than six monthly financial reports”. That may be preferable to continuous disclosure for the reasons outlined above.[6] RIMS also observes that the American listing rules are not enshrined in statute and therefore generally not capable of giving a rights to shareholders to bring class actions in relation to disclosure obligations.[7]

Alternatively, the ALRC might re-enliven the debate as to the meaning of “immediately disclose” to more clearly set out expectations consistent with the reality of the Australian business decision-making process, for example, by enshrining concepts of disclosure “as soon as practicable” taking into account a range of factors referable to the nature of the disclosure contemplated, including the need for proper internal reviews and processes to occur before the company is required to make disclosure to the market.[8]

Further, additional consideration might be given to the protections which exist in the UK for directors for forward looking statements. A director is protected from liability where a third party relies on future-looking statements contained in an annual report, unless the director knew them to be misleading or was reckless to the possibility that they could be misleading (*Companies Act 2006* (UK) s 463). America and Canada both, to different extents, incorporate safe harbour provisions for directors as long as any forward looking statement is appropriately disclaimed based on factors which could cause the statement to differ from actual results. RIMS considers that the ALRC should also incorporate a review of the efficacy of these provisions as part of its review of the broader continuous disclosure regime.

A particular challenge with the current regime is that the provisions “focus on consequences so that there is no need to provide a particular state of mind”.[9] This has led to class action ‘promoters’ treating any significant price drop in a corporation’s share price, as indicative of, at least the possibility of, an omission or non-disclosure of price-sensitive information.[10]

---

[5] Chris Merritt, “Class-action shakedown”, *The Australian* (9 June 2018).

[6] Australian Government Treasury, “Part 8 – Continuous Disclosure” (2002) *CLERP Paper No. 9: Proposals for Reform - Corporate disclosure*, s 8.5.1.

[7] Stephen Brown and Chander Shekhar, “Continuous Disclosure in Australia and the United States: A Comparative Analysis” (August 2016).

[8] Law Council of Australia, Letter to ASX Limited, “Continuous Disclosure” (16 December 2011). <http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2400-2499/2495%20Continuous%20Disclosure.pdf>.

[9] Michael Legg, “Shareholder class actions in Australia – the perfect storm?” (2008) 31 *UNSW Law Journal* 669, 706.

[10] 'Structural and Forensic Developments in Securities Litigation', transcript of the speech given by the Honourable Justice Jonathan Beach, delivered at the International Commercial Law Conference (Inner Temple, Inns of Court, London), June 2016.

RIMS considers a review of the continuous disclosure, and misleading and deceptive conduct regimes should also involve a review of whether this approach is in fact best practice, or whether defences to class action litigation should be made available for companies that can demonstrate good faith and/or reasonable inquiries have been made in respect of disclosure decisions.

In relation to the availability of D&O insurance, RIMS is pleased that this forms part of a holistic review of the shareholder class action landscape,[11] but notes that it is a somewhat peripheral issue. It is now reasonably widely known that as a by-product of the increase in shareholder class actions, Australian D&O insurers have been heavily exposed to the costs of defending and settling those claims through their provision of 'Side C' D&O insurance for securities claims against listed entities. The Australian D&O market, particularly for Side C cover, is shifting as a result, with a resulting increase in the cost of listed entities doing business.

If the current trends continue promoters of shareholder class actions may shift focus to claims against directors in order to access insurance proceeds under policies which cover them, which in turn could impact the availability and price of D&O insurance more generally. Given D&O insurance typically forms part of the suite of protections which directors expect in their role, particularly directors of listed entities, there is a risk that Australian companies will be unable to attract and retain the best quality candidates for director roles.

The trends noted above seem unlikely to vary unless there are changes to the underlying class action regime which restore balance and increase clarity and certainty, thereby allowing insurers to assess and price the risks being faced by their policyholders (an issue specifically noted by the ALRC in the Discussion Paper)[12] and continue to offer them insurance products.

3 Part 3: Regulation of third party litigation funders

When litigation funding was first legitimised in *Campbells Cash and Carry Pty Ltd v Fostifs Pty Ltd*,[13] consideration turned immediately to the question of whether funding required regulation and the best means of doing so.[14]

Given their involvement in the flow of substantial sums of wealth within the Australian economy, the Courts initially held that funded class actions met the definition of ‘managed investment schemes’ on the basis that funders provided a ‘financial product’.[15] The natural consequence of such a finding was that the Courts initially required funders to obtain and comply with an Australian Financial Services Licence (**AFSL**).[16] However, due to a variation of the Corporations Regulations in 2013, funded class actions were excluded from this regulatory requirements (leaving funders subject to minimal consumer

[11] ALRC Discussion Paper, [1.73].

[12] ALRC Discussion Paper, [1.74].

[13] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

[14] Guy Narburgh and Sally-Anne Ivimey, “Chapter 17 – Side by Side (A, B and C): Securities Class Actions and D&O Insurance”, in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (The Ross Parsons Centre of Commercial Corporate and Taxation Law, Publication 19), 371, 378.

[15] *Brookfield Multiplex Ltd v International Litigation Partners Pte Ltd* (2009) 180 FCR 11; *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138.

[16] Guy Narburgh and Sally-Anne Ivimey, “Chapter 17 – Side by Side (A, B and C): Securities Class Actions and D&O Insurance”, in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (The Ross Parsons Centre of Commercial Corporate and Taxation Law, Publication 19), 371, 378

protections provisions application to all Australian businesses but with no regulation tailored to funders' unique role in the Australian litigation and risk environments).

RIMS considers the historical position adopted by the Courts, characterising litigation funders as a 'managed investment fund' requiring an AFSL, correctly reflects an understanding that they are vehicles responsible for the transfer of substantial amounts of capital and wealth in the Australia economy, and should justifiably attract careful scrutiny necessitating a licencing regime regulated by ASIC.

Funders operate under a clear commercial and entrepreneurial incentive to participate in and benefit from class actions. In particular, the financial incentives for funders are clearly significant in the context of shareholder and investor claims, with 100% of shareholder claims, and 65% of investor claims brought in the past 5 years being supported by litigation funders.[17] Funders have benefited from a large proportion of the $3.5 billion that has been paid out in Court-approved class action settlements to date.[18]

RIMS considers it imperative that funders be subject to regulatory requirements, having regard for the widely observed[19] likelihood of a conflict between the interests of justice and the funder. Most significant funders' in the Australian class action environment support greater regulation of their activities.

Having regard for the possibility of a conflict of interest between funders and representative class members, RIMS supports Proposal 3-1 contained in the ALRC Discussion Paper to the effect that the "*Corporations Act 2001 (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.*"

The ALRC Discussion Paper also sets out seven possible features of this licencing regime, at Proposal 3-2, which RIMS agrees are appropriate. RIMS' consideration of these factors is set out further at section 3.2 below.

RIMS considers that the most efficient mechanism to adopt in order to regulate funders would be to remove the exemption for litigation funders to hold an AFSL. In doing so, ASIC would be given the power to regulate and review litigation funders' practices in accordance with detailed and transparent licence conditions pursuant to the existing legislative structure of the Corporations Act. A licencing regime would grant ASIC substantially greater powers and flexibility in dealing with litigation funders to ensure that they are held accountable for their conducts to a consistent standard.

3.1 Proposal 3-1: Licencing regime

(a) Prudential requirements

The need for prudential regulation of funders is driven by the uncertainty around some funders' financial position, and increased involvement by overseas litigation funders in the Australian class action market.[20] RIMS supports the ALRC's proposal at paragraphs [3.43] and [3.49] of the ALRC Discussion Paper to the effect that a key requirement of a licencing regime should be a capital adequacy requirement.

---

[17] ALRC Discussion Paper, 38-39.

[18] The Honourable Justice Bernard Murphy and Vince Morabito, "The First 25 years: Has the Class Action Regime hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (The Ross Parsons Centre of Commercial Corporate and Taxation Law, Publication 19), 13, 22.

[19] Vicki Waye, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepeneurs' (2008) 19(1) *Bond Law Review* 225; Michael Duffy, 'Two's Company, Three's a Crow? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39(1) *UNSW Law Journal* 165.

[20] ALRC Discussion Paper [3.61].

RIMS notes that the ALRC Discussion Paper does not directly suggest the resources be held in Australia. However, RIMS considers it essential for capital adequacy requirements to apply to an assessment of Australian assets or capital. Further, RIMS considers that this prudential standard should be regulated by a body with extensive and pre-existing experience in this area, such as ASIC or the Australian Prudential Regulatory Authority (**APRA**). RIMS observes that there is also a risk to the representative plaintiffs and lawyers who incur the significant costs of bringing a claim, and are exposed to substantial cost burdens if the funder was unable to meet its financial obligations.

RIMS considers a possible model for litigation funders would mirror the characteristics of the APRA capital adequacy standards,[21] and/or the ASIC Regulatory Guide regarding financial requirements for an AFSL.[22] RIMS supports the types of measures set out in APS 110, including the requirement for strategies and policies to identify and mitigate financial risk, minimum capital requirements, and breach reporting and notification requirements. For example, ASIC Regulatory Guide 166 provides that certain licence-holders are subject to additional minimum financial requirements, whereby a funder might be required to have certain amounts of capital on trust for its clients (the exact figure being determined based on the funders' exposure).[23] In particular, RIMS considers a possible suggestion to be that litigation funders be required to maintain liquid capital reserves in an appropriate proportion relative to the amount invested in litigation.

In adopting a similar regime, RIMS notes that APS 110 excludes foreign entities subject to similar overseas requirements, and considers that this should be rejected in favour of a single common approach to all funders wherever domiciled (see section 0 below for further discussion).

(b) Duty of good faith

Defendants often obtain financial support during a class action from insurers, through the provision of a range of products, most commonly Side C insurance. RIMS observes that these products are not only carefully monitored by regulatory bodies, but the insurers who provide them are under significant obligations to protect the interests of policyholder companies.

Narburgh and Ivimey note the role performed by litigation funders for the plaintiff is analogous to that of insurers for the defendants in a class action.[24] Most pertinently, insurers are under a duty of good faith to the insureds, requiring them to have regard for, and act in the interests of policyholders. RIMS considers it logical that there should be an equivalent duty for funders towards class members and that the most practical mechanism for ensuring litigation funders abide by a duty of good faith is for that duty to operate as a licence condition.

A duty of utmost good faith imposes higher standards on litigation funders than the current requirement to 'manage conflicts of interest' between funders and representative plaintiffs. Under the insurers' current duty of good faith, which involves a duty to act with 'due regard' to the insured's interests,[25] the market (particularly vulnerable and less sophisticated clients) can take comfort that insurers are required to meet an objective standard of fairness and honesty.[26] RIMS considers it imperative that an analogous

[21] Prudent Standard APS 110 Capital Adequacy (**APS 110**).

[22] ASIC Regulatory Guide 166: Licensing: Financial requirements (**RG-166**).

[23] RG-166, Sections C and D, Surplus Liquid Fund and Adjustment Liquid Fund Requirements.

[24] Guy Narburgh and Sally-Anne Ivimey, "Chapter 17 – Side by Side (A, B and C): Securities Class Actions and D&O Insurance", in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (The Ross Parsons Centre of Commercial Corporate and Taxation Law, Publication 19), 371, 376-377.

[25] *Re Zurich Australian Insurance Ltd* [1998] QSC 209.

[26] Allens Linklaters, "Focus: The Duty of Utmost Good Faith – Is the duty expanding?" (May 2001), Last accessed 28 July 2018, <https://www.allens.com.au/pubs/insur/insmay01a.htm#The>.

objective standard be introduced for litigation funders, particularly given the potential vulnerability of class members. A collateral advantage of this approach is that the Courts' resources and time would not expended on closely monitoring the behaviour of funders, as this role could be taken up by a well-resourced regulatory body.

Alternatively, RIMS is also amenable to the construction of the duty as one of 'best interests', wherein litigation funders are obliged to act in the best interests of the claimants, and prioritise the claimant's interests over their own, or those of a related third party.

(c) Exemption of foreign funders

While RIMS supports the licencing scheme proposed by the ALRC, it notes with concern the ALRC's proposal at paragraph [3.62] of the ALRC Discussion Paper that overseas-based funders be exempted from the licencing regime if they satisfy a "comparable" licencing requirement in their home jurisdiction.

RIMS appreciates the importance of not unfairly deterring the involvement of overseas-based litigation funders in the Australian market, accepting that the influx of foreign funders represents new streams of foreign investment in Australian markets. However, the purpose of a licencing regime is somewhat defeated by an inconsistent requirement for adherence. In particular, RIMS is concerned with the ambiguity surrounding the meaning of "comparable", and the capability of any Australian licencing body to adequately measure whether a particular regime was suitably "comparable". Such a question is likely to be resolved either by a superficial review, in which case some of the safeguards of the Australian licencing scheme may be lost, or involve an extensive and costly undertaking and one rendered unnecessary by a more consistent approach to licencing.

RIMS considers it entirely reasonable to require that any funder, regardless of the prudential requirements in their home jurisdiction, that wishes to participate in the Australian market be obliged to hold an Australian licence with an appropriate Australian prudential requirement. This approach ensures coherency and consistency of the regime, which has the additional benefit of rendering all funders in the Australian market subject to oversight by the same regulatory body – thereby allowing for greater consistency in its enforcement and management of funders. RIMS considers it likely that this approach may also have the ancillary benefit of allowing consumers, particularly unsophisticated class members, to better appreciate the standards to which funders are held and to protect their interests, if necessary.

Further, as a condition of the AFSL, RIMS proposes that foreign litigation funders should be required to expressly agree that Australian law governs their funding agreements, and irrevocably submit to Australian Courts' jurisdiction. This will further ensure that foreign litigation funders are subject to the same regulatory oversight, and that group members are equally protected across the funding market.

(d) Breach reporting obligations

Consistent enforcement of licencing regimes can be difficult to ensure and costly to maintain. One solution often introduced under Australian law is for there to be a positive obligation to report suspected breaches of law or licencing conditions (see for example, the continuous disclosure obligations imposed on corporations – as discussed above). RIMS considers the introduction of an obligation to notify ASIC, or the relevant licencing body if not ASIC, of a possible breach of a funders' licence would be an effective step to ensuring compliance with licencing regimes and assist in policing these conditions. The existence of further penalties for failure to report should create a positive culture of transparency, self-reporting and compliance amongst litigation funders in Australia.

3.2 Proposal 3-2: Additional requirements

The ALRC Discussion Paper contains further considerations that the ALRC considers might be favourable to add as part of the proposed licencing regime. These additional factors are contained in Proposal 3-2. RIMS agrees with the ALRC and considers these to be critical components of the proposed licencing scheme.

(a) Proposal 3-2 (a) and (b)

The ALRC Discussion Paper Proposal 3-2(a) and (b) contain requirements that (a) services be provided honestly, efficiently and fairly, and that (b) all communication with class members be clear, honest and accurate.

Class members are vulnerable and often unsophisticated. RIMS submits that it is essential for a funder to be required to provide services as efficiently and fairly as possible, and to communicate honestly and openly.

(b) Funders to have adequate arrangements for managing conflicts of interest

As outlined at paragraph 3.1(b) above, RIMS considers the current obligation for funders to 'manage conflicts of interest' to be an absolute minimum standard which imposes little regulatory oversight or restricts upon funders. A preferred approach would be for the introduction of an additional requirement for funders to be under a duty of 'good faith', analogous to the current duty insurers are under.

(c) Funders to have sufficient resources (financial, technological, and human resources)

As stated, RIMS strongly supports the prudential requirements suggested by the ALRC to ensure funders are able to meet their financial obligations.

The requirements for adequate human and technological resources is consistent with the requirement for litigation funders to be able to meet their obligations to support the particular requirements of the claim.

(d) Obligation as to adequate risk management systems

Adequate risk management systems are an essential component of suitable financial practice in Australia. Entities operating in the legal and financial services environment should be subject to requirements to have suitable mechanisms by which to identify and manage financial and legal risks.

In particular, RIMS supports a risk management system requirement to reduce the likelihood that funders suddenly abandon a claim owing to legal or financial challenges, resulting in all parties suffering significant prejudice.

(e) Compliant dispute resolution systems

The ALRC Discussion Paper at paragraphs [3.64] to [3.68] contemplates an analogous dispute resolution system which applies to Australia's financial system (under an AFSL). RIMS agrees and emphasises the importance of any dispute resolution mechanism focusing on minimising expense and difficulty for class members.

(f) Annual independent audits

Transparency and accountability are cornerstones of Australia's financial services industry. It seems striking that litigation funders would not be required to be subject to the same annual, independent audit requirements of other financial service providers. Such primary concerns are exacerbated in relation to litigation funders when regard is had to the uncertainty of their financial position.

Accordingly, RIMS not only agrees with the requirement for an annual audit, it submits that this should be conducted by an independent, ASIC-appointed, auditor. The results of that audit should be required to be disclosed to the licencing body to ensure that the

overarching goal of transparency and accountability are achieved. As part of this, the licencing body should be granted sufficient power to demand documents and information from the funders, and associated auditors.

4 Part 5: Commission rates and legal fees

Contingency fees, where lawyers take a percentage of any Court-approved settlement or award instead of recovery by way or more conventional time-based billing, are a common feature of certain foreign jurisdictions such as the United States but have long been prohibited in Australia.

Contingency fees shift the legal service providers' interests from being the provision of specific legal advice, to a more direct financial emphasis upon the quantum of settlement or damages awarded. As a consequence, contingency fees risk class actions being driven by plaintiff lawyers, focused more on financial returns than merits, and thereby undermining access to justice objectives.[27]

Contrary to this view, the ALRC Discussion Paper proposes the introduction of contingency fees for solicitors in class action proceedings. RIMS disagrees with this proposal.

4.1 Proposals 5-1 and 5-2: Introduction of contingency fees

Proposal 5-1 of the ALRC Discussion Paper proposes to permit solicitors "acting for the representative plaintiff in class action proceedings…to enter into contingency fee agreements" on the basis that this would "allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial…and to reward risk".

This is caveated by a number of limitations, which are primarily that:

- where lawyers offer a contingency arrangement, there cannot also be a litigation funder;
- the contingency fee is in place of the professional legal fees, normally charged on a time-cost basis; and
- that the solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.

Proposal 5-2 of the ALRC Discussion Paper further provides that contingency fees should only be permitted where they have leave of the Court.

4.2 Problems with permitting contingency fees

RIMS considers insufficient evidence exists to support the removal of the current prohibition on contingency fees. As the ALRC notes,[28] maintaining the integrity of the civil justice system is paramount in determining whether to introduce contingency fees and unless evidence arises to support legislative change, the proposal to remove the prohibition should be revisited.

The ALRC Discussion Paper identifies 3 key reasons for the removal of the prohibition on contingency fees in respect of class actions:

---

[27] Jason Betts, "Why giving lawyers a profit margin won't help the system's neediest", *ABC News* (29 June 2018).

[28] ALRC Discussion Paper [5.3].

(a) the Courts will supervise the proceedings;

(b) time-based billing can be "lengthy and too complex" and contingency fee arrangements in comparison will be "straightforward"; and

(c) it may put downward pressure on commission rates from litigation funders.[29]

RIMS does not consider the fact that contingency fees can be supervised by the Court to be a sufficient justification for their introduction. Similarly, there has been no indication that the introduction of contingency fees will place downward pressure on commission rates, particularly if the contemplated statutory cap is introduced, as discussed further below at section 4.3. Further, it is difficult to see how the Court will find it straightforward to determine the appropriateness of commission rates, without having reference to any time-based billing. If anything, RIMS considers that such a consideration will be more difficult than currently.

Further, RIMS considers the widely held assumption that the introduction of contingency fees would improve access to justice,[30] particularly by increasing the prosecution of smaller, lower value claims which funders are not currently incentivised to provide, to be incorrect.

First, the financial imperatives which operate upon funders are the same financial pressures that would operate on law firms considering offering contingency fee arrangements under the ALRC's proposal. The fact that funders are not currently financing smaller claims suggests no change to the status quo is likely. Indeed, it is possible fewer claims would be brought as the ALRC's proposal to allow the Courts to review and potentially amend the contingency arrangement creates uncertainty and a possibility that a law firm will not have an appetite to assume that risk and uncertainty for class action litigation. Alternatively, to the extent that contingency fees do increase the number of claims brought, it will be a result of incentivising lawyers to explore claims at the margin of quality and merit, potentially across a portfolio.[31]

Second, as evidenced by the case of former trustees of the Huon Corporation who received none of the court-approved settlement,[32] the claims most at risk of being consumed by substantial legal costs and contingency fees are those smaller claims where the payout is less substantial. RIMS reiterates that the prohibition on contingency fees exists to ensure plaintiffs do not see the returns from their claim consumed by excessive legal fees, which also has the effect of exhausting their legal rights.

Finally, Australia has the second most profitable class action market, after the US, and one of the most sophisticated funding markets of any country. RIMS considers it difficult to conclude that there are a large number of class actions not currently being brought, or that would be brought but for the fact that lawyers cannot presently charge contingency fees. Accordingly, the introduction of contingency fees is not justified on a "demand" basis.

[29] ALRC Discussion Paper [5.32]-[5.34].

[30] See for example Slater and Gordon, Submission No 28 to Victorian Law Reform Commission, "*Access to Justice – Litigation Funding and Group Proceedings*" (March 2018) (**VLRC Inquiry**) (October 2017); Phi Finney McDonald, Submission No 15 to VLRC Inquiry (22 September 2017); Maurice Blackburn, Submission No 13 to VLRC (September 2017).

[31] Jason Betts, "Why giving lawyers a profit motive won't help the system's neediest", *ABC News*, (29 June 2018).

[32] *Fitzgerald & Anor v CLB Insurance Ltd (No 2)* [2015] VSC 493 (**Huon**).

4.3 Commission rates

A key concern with contingency fees is the possible size of the fee charged, and thereby the proportion of any settlement or Court-awarded payment. The ALRC Discussion Paper considers some of these problems.[33]

The proportion of settlement payments absorbed in legal fees and funding commission rates is often very significant.[34] RIMS acknowledges that the ALRC is also aware of such a risk, hence its proposal that there be a statutory cap of 49.9% imposed on contingency fees.

RIMS is specifically concerned with this proposal for two reasons. The first is that RIMS is concerned whether the Court is appropriately equipped to assess what an appropriate proportion of settlement constitutes a 'reasonable and fair' contingency fee. Second, RIMS is aware that, as evidenced in the US legal system, there is an inevitable gravity towards the cap. In contrast, the current regime in Australia is actively promoting funders' commissions to be pushed down due to pressure from competing class actions and the Courts' mandate to maximise claimants' returns.[35]

The ALRC refers to the position taken by the Productivity Commission,[36] and RIMS observes the reasons given by the Productivity Commission in opposition to the use of statutory caps:

- A sliding scale statutory cap may result in payments disproportionate to work or risk (and this could work both ways).
- The maximum cap may become the default amount awarded to solicitors or funders.
- The introduction of statutory caps may affect the viability of pre-existing litigation funders whose business models rely on varying commission rates related to risk and other commercial considerations. This may mean that there are fewer new entrants.
- The introduction of caps may dissuade solicitors from taking on the types of cases that contingency fees might promote – namely, smaller matters with higher risk.[37]

4.4 Federal Court to have express powers to vary or amend

The ALRC raises doubts as to whether the Federal Court can vary the contractual arrangements between a funder and members of a representative proceeding.[38] RIMS considers that, having regard for the asymmetrical bargaining power of funders and group members, were they to be introduced, the Courts should clearly have oversight of these arrangements by virtue of statutory amendment to ensure Courts undoubtedly have this power.

[33] See ALRC Discussion Paper [5.55]-[5.62].

[34] See for example *Clarke v Sandhurst Trustees Limited* (No 2),[2018] FCA 511.

[35] See further, "Maurice Blackburn sparks class action price war", *Australian Financial Review* (15 May 2018).

[36] See ALRC Discussion Paper [5.66]-[5.68].

[37] See at ALRC Discussion Paper [5.70]-[5.73].

[38] ALRC Discussion Paper [5.50]-[5.51]; see also *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs) (in liq) (No 3)* (2017) 343 ALR 476, [110]; *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511, [12], [18].

5 Part 6: Competing class actions

The ALRC Discussion Paper contains a proposed model for the early consolidation of competing class actions. This proposal is a welcome and appropriate foundation for a solution to the increasingly common issue of multiple competing class actions. RIMS considers a 'consolidation hearing' to be desirable given the substantial confusion, delay and waste in costs and the Courts' time created by multiple claims. The claim that multiple competing claims are becoming an increasingly common feature of the Australian class actions landscape is evidenced by the reality that the 98 Federal class actions filed in the last four years were brought against only 73 companies.[39] RIMS considers it critical that the problem, involving unnecessary delay and cost, be resolved at a legislative level, as well as the current approach at a judicial level, to ensure sufficient certainty and clarity regarding the approach to overlapping claims.

A consolidation hearing is a positive suggestion as it provides a forum for case management of multiple overlapping claims to a point where only one proceeds, representative of all concerned parties. The consolidation hearing also provides a forum for ensuring that a suitable lead plaintiff is given a meaningful role in the proceedings.

5.1 Proposal 6-1: Consolidation hearing

The Australian class action landscape is increasingly characterised by multiple claims brought against a common defendant, with similar or the same classes and issues, usually over a similar period. These overlapping claims are a substantial burden upon defendants, who must devote significant resources to responding to each claim. In particular, the inefficiencies of the overlapping claims mean that there is substantial unnecessary work performed. Further, the approval of common fund orders in the recent *Money Max* decision is likely to have substantial effects on the frequency of overlapping claims,[40] as their acceptance is only likely to "further cement the entrepreneurial dynamic" encouraging greater involvement of funders.[41]

RIMS considers a consolidation hearing to be a powerful opportunity for Courts to resolve this situation and remove inefficiencies. RIMS agrees with submissions to the Victorian Law Reform Commission's own inquiry into class actions,[42] that amending legislation to give the Court the power to choose the continuing proceeding would "allow for the realisation of efficiencies and economies of scale that have, to date, been largely illusory."[43] Justice Lee's *GetSwift* judgment, in which he was required to consider "the Court's response to the phenomenon of competing securities class actions",[44] evidences the need for a more complete and agreed resolution mechanism for competing claims. RIMS supports granting the Courts greater powers to consolidate and manage competing claims, including consolidating them in a single jurisdiction (a challenge not considered by Justice Lee in GetSwift).

---

[39] Vince Morabito, "Competing class actions and comparative perspectives on the volume of class actions litigation in Australia", *An Evidence-Based Approach to Class Actions Reform in Australia* (Monash Business School, 6th ed, 11 July 2018), 9.

[40] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 (***Money Max***).

[41]Allens Linklaters, *Submission to the Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings*, (September 2017), 20 at [5.21].

[42] Victorian Law Reform Commission, "*Access to Justice – Litigation Funding and Group Proceedings*" (March 2018) (**VLRC Inquiry**).

[43] Simone Degeling, Michael Legg an d James Metzger, *Submission to Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings Consultation* (22 September 2017) 7.

[44] *Perera v GetSwift Limited* [2018] FCA 732, [1] (Lee J).

5.2 Suggested amendments to regime

The goal of a consolidation hearing is to minimise competing shareholder class action proceedings and to ensure the lead plaintiff has a meaningful role in proceedings. In order for the most efficient resolution of the challenges facing Australia's current class action regime, RIMS proposes that a series of changes should be introduced to support the effectiveness of the consolidation process.

(a) Key concepts

RIMS suggests a consolidation hearing process needs to have the following features, which allow for better case management from the inception of proceedings:

1. Proceeding should be filed as an 'open class'.
2. The proceeding should be assigned to a case management Judge.
3. The first return date should be [14] days after filing, at which time the Court will approve a "Notice of Filing" for distribution to group members.
4. The Notice of Filing should set out:
   - the group definition;
   - the key allegations to be pleaded;
   - that any application to be appointed as 'lead plaintiff' be made within [30] days; and
   - that a registration or consolidation hearing is set down for [45] days after the Notice of Filing is approved.
5. At the Registration Hearing, the Court:
   - determines any lead plaintiff application;
   - in respect of any funder, determines the form of common fund order;
   - approves the form of 'Notice of Participation' to be sent to group members, which identifies:
     - – the period by which they are to register;
     - – the consequence of non-registration (i.e. claim extinguished); and
     - – the right to opt-out to preserve any claim; and
   - enters the proceeding and its details on a National Register.

(b) Matters to be addressed at the consolidation hearing

The consolidation hearing serves two purposes:

- First, to the extent that the Notice of Filing has identified competing claims in relation to substantially similar subject matter, the Court should make an adjudication as to which proceeding or proceedings should continue as the appropriate vehicle to hear the claim, by adopting clear and consistent criteria that is a version of the process and factors analysed by Justice Lee in *GetSwift,* see below.
- [Second, potentially the consolidation is an opportunity for the Court to require the plaintiffs to demonstrate an arguable or meritorious claim. Certification, as practiced in America, requires the Court to be satisfied that the proceedings are

appropriately brought in class form,[45] done by meeting a number of more administrative requirements and also establishing that a claim is "live and not moot".[46] The introduction of a similar requirement into the Australian landscape would ensure that, at an early stage, Courts had the capacity to determine whether a claim had at least a possibility of being successful, rather than being an unmeritorious attempt to draw out money from a defendant, eager to settle to avoid the costs of extensive litigation.] (for discussion)

As part of the first issue above, the consolidation hearing should also be a forum to progress the case management goals of the class actions regime. This involves the Court determining questions regarding the suitability of a lead plaintiff, the form of 'common fund order' (to the extent of funder involvement), and approving "Notice of Participation" to be sent to group members, amounting to an early class closure process. The consolidation hearing would also be an opportunity for parties wishing to make a cross-vesting application to do so.

An assessment of the suitability of the lead plaintiff would include a requirement for the lead plaintiff (or their lawyers) to demonstrate their capacity to adopt the role and an understanding of its responsibilities, including a presumption of unsuitability where they have served as Lead Plaintiff in more than [2] shareholder class actions in previous [5] years. The concern for the history of a lead plaintiff is driven by the realities of vexatious litigants and claimants who have repeatedly been involved in abuse of process applications.[47] Further, the Court should also have regard for the quantum of individual loss suffered by the potential lead plaintiff, and whether they are a retail or institutional shareholder.

(c) Approaches to jurisdiction

The ALRC Discussion Paper considers whether conferring exclusive jurisdiction on the Federal Court is preferable to avoid the expense and delay of cross-vesting applications. RIMS considers this proposal should be resisted as there is no jurisprudential basis for an approach which disregards the possibility that claimants might prefer different jurisdictions, notably Supreme Courts in Australian States which have equivalent legislative class action regimes.

One alternative is that jurisdiction be given to the Court in which the class action is first commenced, while noting this is without prejudice as to parties' cross-vesting rights, so parties would not be precluded from bringing such an applications. RIMS considers an important addition to the ALRC's current proposal would be for the consolidation hearing to be an opportunity for parties to suggest reasons why a particular jurisdiction or claim should be preferred based on jurisdiction. Although a possible challenge to this proposal is that it could contribute to a "race to the court", RIMS considers this risk to be minimal, when considering that the median period between the filing of the first and last (usually the second) claim is 125 days, and the average is presently 254 days.[48]

RIMS also considers that group members who opt-out of one class should not be permitted to commence or participate in subsequent aggregate proceedings, in respect of the same subject matter and defendant. RIMS accepts that a necessary caveat would be

---

[45] Stuart Clark and Christina Harris, "The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?" (2008) 32(3) *Melbourne University Law Reform* 775, 775.

[46] Alon Klement and Robert Klonoff, "Class Actions in the United States and Israel: A Comparative Approach" (2018) 19 *Theoretical Inquiries in Law* 151, 156.

[47] *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (2017) 252 FCR 1; *Walsh v WorleyParsons* [2017] VSC 292; *Melbourne City Investments v UGL Limited* [2017] VSCA 128.

[48] Vince Morabito, "Competing class actions and comparative perspectives on the volume of class actions litigation in Australia", *An Evidence-Based Approach to Class Actions Reform in Australia* (Monash Business School, 6th ed, 11 July 2018), 14.

that this is subject to judicial discretion. The ability of the Courts to grant leave would allow Courts to determine whether a class member honestly sought to vindicate their rights or whether it was more accurately an attempt by a funder to exploit the circumstances in pursuit of some financial return.

5.3 Proposal 6-2: Class Action Practice Note amendment

ALRC Discussion Paper proposes that to achieve Proposal 6-1, the Federal Court of Australia's "Class Action Practice Note (PGN-CA)" (**CA PGN-CA**) be amended, granting the Courts further case management powers to manage competing class actions. RIMS supports this proposal. Granting additional case management powers to the Courts is a necessary aspect of resolving the challenges presented by multiple competing class actions.

However, RIMS maintains that it is essential for Proposal 6-2 to only supplement the broader legislative changes contained in Proposal 6-1. Legislative reform is critical to ensure Courts have sufficient power and flexibility to determine the best approach to multiple competing claims, and also to provide greater certainty to parties, and markets more generally as to the likely outcome.

6 Part 7: Settlement approval and distribution

6.1 Proposal 7-1: Class Action Practice Note amendment

The ALRC Discussion Paper contains a proposal to include a clause in Part 15 of the CA PGN-CA to allow Courts to appoint a referee assessing the reasonableness of costs charged in a class action, prior to settlement.

RIMS supports this suggestion. Minimising inefficiencies and reducing costs, particularly where those costs directly erode the return for successful plaintiffs in a class action. RIMS also considers that such a power will have a positive impact upon the practices of law firms involved in class actions, to promote the adoption of more efficient approaches. Further, it is an inefficient use of the Courts' own resources and a labour intensive exercise to determine whether each piece of legal work performed as part of the claim was performed efficiently.

6.2 ALRC Discussion Paper Questions

The ALRC Discussion Paper asks two further questions:

(a) whether settlement administration should be the subject of a tender process, and how this would be decided and implemented; and

(b) whether the terms of a class action settlement should be made public, in the interests of open justice, and what limits should be permitted to protect parties' interests.[49]

RIMS is supportive of the first proposal. Law firms are ill-suited for settlement administration because their involvement not only increases the costs which reduce the eventual settlement payout, to people to whom they owe a fiduciary obligation, and their involvement also creates further possibility of a conflict with the interests of their clients.

[49] ALRC Discussion Paper, 10.

RIMS supports the disclosure of the legal and funding fees charged, but does not consider it necessary, or indeed desirable, to disclose the full terms of settlement. Such an approach may deter parties from settling, thereby increasing costs for all parties and incurring a greater burden on the resources of the Courts. RIMS considers that the public interest of litigation being settled as quickly as possible demands this confidentiality. However, given the importance of Court oversight in relation to approval of any class action settlement, adequate transparency around the key terms of litigation funding arrangements.

7 Part 8: Regulatory redress

7.1 Proposal 8-1: Federal collective redress scheme

RIMS supports Proposal 8-1, which proposes the introduction of a federal collective redress scheme to enable corporations to provide appropriate redress to those entitled to a remedy. This is perhaps most applicable for so-called product liability class actions, as the replacement of or repairing the product may be preferable to involvement in extensive litigation.

RIMS considers it imperative that the interests of potential defendants be given appropriate consideration. Any such scheme must provide certainty and finality for potential defendants by ensuring that claims are resolved completely. In pursuit of this, RIMS considers one important consideration as being that an opt-out approach might be preferable to an opt-in system.

7.2 Question 8-1: Guiding principles

The New Zealand Accident Compensation Corporation provides an effective alternative model which may be used as a guiding principle.

In particular, RIMS considers a no admission of liability scheme, whereby a potential defendant can determine to implement a redress scheme without being required to make an admission of liability.