Inquiry into Class Action Proceedings and Third-Party Litigation Funders
Australian Law Reform Commission
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Sydney NSW 2001

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

17 August 2018

Dear Commissioner

Inquiry into Class Action Proceedings and Third-Party Litigation Funders – Discussion Paper 85, June 2018

Thank you for the opportunity to provide a submission to the Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third-Party Litigation Funders – Discussion Paper 85, dated June 2018 (**Discussion Paper**).

This submission has been prepared by a group of Australian healthcare companies and businesses who have an interest in the matters under consideration by the Commission:

- *Johnson & Johnson Family of Companies* comprises Johnson & Johnson Medical, a medical devices and diagnostics business; Janssen, a leading researched based pharmaceutical company; and Johnson & Johnson Pacific, known for its portfolio of leading consumer health brands;
- *Medtronic* is a global healthcare solutions company committed to improving the lives of people through its medical technology, services and solutions.
- *Smith & Nephew* is a global medical device manufacturer of orthopaedic reconstruction, advanced wound management, sports medicine and trauma & extremities products. Smith & Nephew has around 15,000 employees and a presence in more than 100 countries;
- *Stryker* manufactures medical devices and medical equipment including reconstructive, medical and surgical, and neurotechnology and spine products. Stryker products and services are available in over 100 countries around the world;
- *Zimmer Biomet* designs, manufactures and markets orthopaedic and surgical products, including knee, hip, shoulder, elbow, foot and ankle artificial joints and dental prostheses. The company has operations in more than 40 countries around the world and sells products in more than 100 countries;
- *Zoetis* is the world leader in animal health. Zoetis discovers, develops, manufactures and markets veterinary medicines and vaccines, complemented by diagnostic products, genetic tests, biodevices and technical services.

Due to the size and scope of our respective business activities, we appear (both as applicant and respondent) in the Australian judicial system in a diverse range of matters including contract, employment, consumer protection, product liability and intellectual property. We have been, and are, involved in matters litigated on an individual basis as well as those conducted as representative proceedings. Indeed, collectively we have been involved in 10 representative proceedings in Australia.

We recognise that that legal system should produce fair and just outcomes and we welcome reform that is evidence based and that has evaluated (and mitigated) the risks presented by that reform to the legal system itself, and to other systems within the community – namely, healthcare. We are concerned that some of the proposals being considered by the Commission, if implemented, will have an adverse impact upon the Australian legal system, as well as the provision of healthcare in Australia and the healthcare industry.

The Commission's Inquiry is set against the background of an increased prevalence of class action proceedings and the role of litigation funders in securing access to justice.[1] The Commission summarises its remit as requiring consideration of the integrity of third-party funded class actions, and the efficacy of the class action system.[2] The reference terms from the Attorney-General specifically call for "consideration of whether and to what extent class action proceedings and third party litigation funders should be subject to Commonwealth legislation".[3]

We encourage the Commission to consider such matters in the healthcare spirit of "first, do no harm". The questions of Commonwealth regulation of class action proceedings and third party litigation funders, and consideration of the integrity of third-party funded class actions and the efficacy of the class action system, can be examined within the existing envelope of current practice and procedure. In particular, there is no need to expand the scope of inquiry or make a recommendation in favour of lifting the ban on contingency fees.

We welcome the opportunity to comment on the matters raised by the Discussion Paper and have specifically directed our comments to those proposals and questions we see as affecting healthcare and the healthcare industry, rather than upon the totality of the proposals and questions raised by the Commission.

In this submission, we address our comments to three areas:

1 lifting the ban on contingency fees;
2 the administration of settlements; and
3 collective redress and alternative approaches.

[1] Discussion Paper at [1.17].
[2] Discussion Paper at [1.21].
[3] Terms of Reference, see page 3 of the Discussion Paper.

We have been provided with a copy of the submissions made by the US Chamber Institute for Legal Reform (ILR). We broadly endorse the submissions made by the ILR in relation to Proposals 1-1, 3-1, 3-2, 4-1, 4-2, 4-5, 4-6, 6-1,6-2 and Question 6-1.

1 Lifting the ban on contingency fees

Permitting contingency fees is not warranted or necessary

1.1 Despite the proposal to have a "cautious introduction" of contingency fee billing, there remains insufficient evidence of any benefit to, or need from, either the legal system or access to justice for claimants, to warrant a lifting of the current prohibition. The Commission rightly notes the prime consideration of the matter (and indeed any concerning a change to legal framework) as maintaining the integrity and confidence of the civil justice system. We urge the Commission that in the absence of an imperative to make such a change, and in light of the evidence of detriment that may arise, that the proposal to lift the ban be abandoned.

1.2 Proponents in favour of permitting contingency fees may argue that there is no definitive evidence that shows there will be harm caused to the civil justice system of Australia or other public systems or institutions. We would expect those proponents to suggest that the lack of evidence means those arguing against lifting the ban are "alarmist" or "irrational". Nonetheless, the lack of evidence of benefit must also be seen in the same light.

1.3 If the "benefits" of lifting the ban cannot be substantiated, we should pause and consider the adverse consequences of introducing another party (the law firm) that will face the exact issues the Attorney General intended be considered in relation to third party funders in this inquiry – that is, conflicts of interest, minimum levels of capital, statutory caps, etc. We say that lifting the ban on charging contingency fees will, at best, introduce yet another party who will face exactly those issues as faced by third party litigation funders and, at worst, will see issues those exacerbated: the potential for conflict of interest are sharpened and introduced far earlier; the management of duties to client and the Court are made more complex (and in the case of listed law firms, add to their responsibilities to their shareholders); there are no prudential requirements for law firms; and the costs charged to claimants will increase.

1.4 Expanding the system of funding to permit contingency fees to be charged by solicitors is both unnecessary to facilitate access to justice and may well diminish the robust Australian legal system. If the legal system becomes more incentivised to profit, issues of ethics, conflicts, professional duties and

regulatory compliance will come under pressure. As we identify below, there are real and immediate dangers to the provision of healthcare and to patients that would arise as a consequence of these increased pressures.

1.5 The Commission identifies three key reasons to support its proposal for lifting the prohibition in relation to class actions: (a) that the Court will supervise the proceedings and leave would be required from the Court to pursue this arrangement, (b) that "time-based billing invoices can be 'lengthy and too complex' for some clients… Contingency fee arrangements are likely to be comparatively more straightforward", and (c) it may put downward pressure on commission rates from litigation funders.

1.6 The requirement that contingency fees would need additional supervision, monitoring or regulation by the Court as a consequence of their introduction is not an argument that supports such a change.

1.7 There is no evidence that there will be any downward pressure on commission rates. The Discussion Paper refers to Ontario as a cognate jurisdiction concerning contingency fees. The experience in Ontario does not appear to support the argument that there would be downward pressure on commission rates (or more particularly, downward pressure on the fees charged to claimants).

1.8 Contingency fees have been permitted in Ontario in class actions since 1992 when they were authorised by statute,[4] and in other civil actions from 2002.[5] Third party litigation funding was first approved in 2011.[6]

1.9 In 2012 (that is, near the time third party funding first appeared), it was recognised that "a reasonably standard fee" for contingency fees was 25%.[7] In 2017, the market combined contingency fee and litigation funding fee is reported as being in the order of 29.5%[8] and 30-38%[9]. That is, there appears to have been no downward pressure at all and the overall cost would appear to have ***increased*** as a result of the introduction of the alternative mechanism.

1.10 Finally, it appears that the supervision of the Courts in Ontario has set the benchmark from which contingency fees are set (25%), rather than encouraging any downward pressure.[10]

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[4] *Class Proceedings Act* S.O. 1992, c. 6.
[5] *McIntyre Estate v. Ontario (Attorney General)*, [2002] O.J. No. 3417.
[6] *Dugal v. Manulife Financial Corp*., 2011 ONSC 1785.
[7] *Helm v Toronto Hydro-Electric System Ltd*., 2012 ONSC 2602 (Ont.S.C.J.), at para 22.
[8] *Ironworkers Ontario Pension Fund v. Manulife Financial Corp*., 2017 ONSC 2669.
[9] See *Houle v. St. Jude Medical Inc*., 2017 ONSC 5129.
[10] See also *Eklund v. Goodlife Fitness Centres Inc*., 2018 ONSC 4146 – contingency fee of rate of 25% agreed in the retainer; *Hunt v. Mezentco Solutions Inc*., 2017 ONSC 2140 - contingency fee rate of 25% agreed in the retainer; *Barwin v. IKO*, 2017 ONSC 3520 (Ont. S.C.J.) – contingency fee of 25%.

1.11 We support the arguments against contingency fees noted in paragraphs 5.17-5.20 in the Discussion Paper. We would add that from an economic perspective for a law firm, there is no difference to conducting a matter on a no-win/no-fee basis than upon a contingency fee basis except at the point of settlement or judgment. The capital outlay is exactly the same, the cash flow is the same, the level of risk taken by the law firm is the same – the only difference is the amount of reward, and more particularly, the amount of reward taken from the claimant.

1.12 We do not believe that contingency fees are a "straightforward" way of billing, nor do they provide clarity or certainty. Unless the quantum of damages is guaranteed from the commencement of a matter, there is no way to discern whether contingency fees are better or worse value than other options (if other options were even offered for consideration). Our view is that contingency fees are substantially more opaque and less certain than time-based billing. We have concerns that the Court will not be able to provide any guidance on whether or not the fee arrangements are reasonable or proportionate.

1.13 The following table, which relates to the class action settlement for the case known as the "ASR Hip Implant" case[11], is instructive. The figures under "Actual" are those reported in the approved settlement documents. The figures under "30% contingency fee" and "25% contingency fee" apply the counterfactual scenarios adopting contingency fees in lieu of the actual legal costs.

Actual		**30% contingency fee**		**25% contingency fee**	
Settlement sum	$250m	Settlement sum	$250m	Settlement sum	$250m
Plaintiff law firm costs	$36m	Contingency fee	$75m	Contingency fee	$62.5m
Plaintiff law firm administration costs[12]	$26m	Plaintiff law firm administration costs	$26m	Plaintiff law firm administration costs	$26m
Available to claimants	$188m	Available to claimants	$149m	Available to claimants	$161.5m

[11] *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011)
[12] Current estimate only: affidavit from the administrators in *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011) which can be found at: https://www.mauriceblackburn.com.au/media/4168/18-06-20-affidavit-of-julian-klaus-schimmel-sealed.pdf.

1.14 There was no third party litigation funding for this matter. Under the contingency fee scenarios above, the amount available to claimants is some $39,000,000 less (at 30%) and $26,500,000 less (at 25%) under a contingency fee arrangement.

1.15 Taking this case as an example, at the outset of the matter neither the claimants nor the Court would be in any position to assess if a 30% contingency fee would be a fair or reasonable amount.[13] However, if the claimant could hypothetically look to the future, it is reasonably certain that that claimant would choose to take an additional $39,000,000 as part of the settlement, and accept the "lengthy" and "complex" legal bills that arose from time based billing, rather than cede it to their lawyer.

1.16 Again, using this case as an example, permitting contingency fees would not have increased access to justice: the case was already conducted on a no-win, no fee basis. However, if contingency fees had been permitted from the outset, would time based billing or a no-win, no-fee arrangement ever have been raised as options? Once permitted, there is little incentive for a law firm to offer an alternative structure. In such a situation, the result of introduction of contingency fee based billing has marked potential to: (a) *increase* the rates payable by claimants; and (b) remove lower cost options from the market.

Adverse impacts on healthcare

1.17 In considering lifting the ban on contingency fees, there are significant adverse consequences that will arise from beyond the Australian legal system (namely healthcare) that should be considered.

1.18 To date, the class action regime has resulted in a number of claims in relation to medical devices and pharmaceutical products. These claims, for the large part, have not utilised litigation funding. Contingency fees would, in effect, allow law firms to act as funders of such litigation and make a profit through such fees. Competition (amongst law firms, new entrepreneurial law firm entrants, claims aggregators and other funders) in this area is likely to lead to adverse outcomes for healthcare as such entities generate interest in class actions and seek to increase the size of the class (book build).

[13] How would a group member know whether 10%, 20% or 50% of the damages they receive is a fair outcome? How would the Court know whether this is a case where there is significant litigation risk to warrant a higher fee? Would the Court need to have knowledge of the number of group members (which may not be known) and how would it consider the individualized nature of each group member's circumstances? Will the Court form a view the matter will settle early (which may warrant a lower fee as there is less capital risk), or that it will proceed to a full hearing (which may warrant a higher fee)? What will be the outcome if the Court decides a contingency fee should be set at a lower level, that the law firm then decides not to proceed with the matter at all?

1.19 In order to generate business, law firms (claims aggregators and other funders) will likely engage in significant advertising to promote class action claims (including print media, television and social media). In the context of matters involving medical devices and pharmaceutical products, such advertising is inherently problematic as it tends to focus on potential group members' concern over their health or the health of the end user and a number of consequences can arise.

1.20 There are stringent regulations on manufacturers and distributors of pharmaceuticals and medical devices which restrict what can be "advertised" concerning therapeutic goods[14] as it is recognised that consumers are likely to be vulnerable as a consequence of their medical condition and may not be able to critically evaluate such advertising. There are no such restrictions that apply to law firms or funders as they are not promoting the use or supply of the goods. The problems associated with such matters are as follows below.

1.21 *First,* simply informing patients of potential side effects through advertising can significantly increase the number of patients who will experience and/or report those side effects. If a patient expects an adverse effect, he or she will look for signs of that adverse effect, attribute any such sign to the treatment or device, and may discount information inconsistent with that expectation.[15] In other words, the patient attributes a false causality between the experienced "side effect" and the treatment/device. By way of example, one review of clinical drug trials revealed that approximately one in five healthy volunteers taking placebo medication reported side effects, with approximately one in ten withdrawing from treatment because of those side effects.[16] This is termed a "nocebo effect" – essentially when a patient experiences an adverse effect on account of an expectation that a negative effect would be experienced (and not as a result of the objective effect of the treatment).

1.22 *Secondly,* negative advertising is likely to increase anxiety levels among patients and lead to adverse health outcomes. Literature supports the proposition that a strong correlative link exists between a patient's anxiety levels and their reporting of physical symptoms.[17] Patients with higher anxiety

[14] See the *Therapeutic Goods Act 1989 (Cth)*, *Therapeutic Goods Regulations 1990 (Cth)*, the *Therapeutic Goods Advertising Code* and the AgVet Code in respect of animal health products.
[15] Petrie, K.J., Fontanilla, I., Thomas, M., Booth, R.J., & Pennebaker, J.W. (2004). Effect of written emotional expression on immune functioning in patients with HIV infection. *Psychosomatic Medicine*, 66, 272-275.
[16] Rosenzweig P, Brohier S, Zipfel A. (1993). The placebo effect in healthy volunteers: influence of experimental conditions on the adverse events profile during phase I studies. Clinical Pharmacology and Therapeutics, 54, 578-83.
[17] Costa, P.T., & McCrae, R.R. (1987). Neuroticism, somatic complaints, and disease: Is the bark worse than the bite? Journal of Personality, 55, 299-316; Pennebaker, J. W. (2000). Psychological factors influencing the reporting of physical symptoms. In A. Stone and J. Turkkan (Eds.). The science of self-report: Implications for research and practice. (pp. 299-315).

levels are more inclined to interpret any new symptoms as a sign of illness requiring treatment.[18]

1.23 Accordingly, advertising that suggests potential defects with medical or pharmaceutical products has been shown to lead to greater patient anxiety, and a desire for patients to discontinue treatment or remove an implanted device which is not necessarily in their best interests.[19] A study conducted in 2016 concluded that legal advertising resulted in some patients stopping their therapy and experienced adverse clinical events, such as stroke.[20]

1.24 A further study conducted by the Heart Foundation in response to the Australian Broadcasting Commission's *Catalyst* program in 2013 concerning statins "Heart of the Matter" (which the ABC's Audience and Consumer Affairs Unit acknowledged the program had breached impartiality) found that almost 1 in 10 people stopped taking their prescribed medication because of this program and estimated up to 3,000 additional heart attacks and strokes may be caused as a consequence.[21]

1.25 The prevalence of such advertising in the United States has prompted the American Medical Association, the peak physician organisation in the United States, to adopt a policy position that advocates that such advertising needs to contain a warning for patients:

> "*The onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor. By emphasizing side effects while ignoring the benefits or the fact that medication is FDA approved, these ads jeopardize patient care. For many patients, stopping a prescribed medication is far more dangerous, and we need to be looking out for them.*"[22]

1.26 *Thirdly,* the increased scrutiny of a medical device or pharmaceutical product brought about by such advertising is likely to significantly increase monitoring and surveillance of that product and reporting on adverse events in a way that is not necessarily beneficial to the patient.

1.27 Post-market surveillance of a product is important and the sponsor of a medical device or pharmaceutical product adopts appropriate practices in

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[18] Moss-Morris, R., & Petrie, K.J. (1999). Link between psychiatric dysfunction and dizziness. Lancet, 353, 515-6.
[19] An example arises from the program titled "Heart of the Matter" on ABC's Catalyst - see http://www.abc.net.au/news/2015-06-15/patients-cut-back-on-statins-after-catalyst-story-research/6545026
[20] Burton, P. & Peacock., W.F. (2016) "A Medwatch review of reported events in patients who discontinued rivaroxaban (XARELTO) therapy in response to legal advertising", Heart Rhythm Case Studies, Volume 2, Issue 3, 248-249
[21] See http://www.abc.net.au/news/2013-12-11/heart-foundation-warns-patients-changing-meds-over-catalyst/5148802
[22] AMA Board Member Russell W.H.Kridel, MD

relation to ongoing evaluation of the performance of its products. However, advertising by lawyers and the attendant elevation of patient anxiety is likely to result in (a) patients being more likely to seek consultations; (b) an increase in reporting of negative side effects; and (c) the changing of practitioners' thresholds for advising on treatment (particularly in the wake of litigation that may, in due course, implicate practitioners' decisions).

1.28 Similar conclusions were reached by Justice Andrews in a recent High Court decision in the United Kingdom in the context of a hip implant. It was acknowledged that there were a range of interrelated factors which had an impact on the rate of revision of the hip implant, "chiefly, the impact of the panic engendered by the adverse media reporting on patients and surgeons alike, and the lowering of the threshold for revision" below the relevant guidelines. [23]

1.29 In the context of class action litigation, advertising by law firms will likely extend beyond merely notifying the public of a potential claim and extend to segments on populist current affairs television programs. It will be incumbent upon both the companies and regulators to consider their responses to press of this kind, including investigating the appropriateness of product warnings and recalls (either voluntarily or compulsorily) where the clinical results may not otherwise have warranted such action. With any medical device or pharmaceutical product there are risks and benefits of its use, which are evaluated by practitioners prior to recommending treatment for patients - care must be taken before withdrawing a product from the market.

1.30 The matters raised above will have the benefit of assisting law firms prosecuting the claims in a number of ways. An increase in patient anxiety, surveillance and treatment serves to increase the size of the putative class in the litigation (and, thereby increasing the potential damages and contingency fees for the law firms). Further, any warnings or regulatory action taken as a result of increased press will have a forensic impact (for example, as evidence of an alleged defect or adverse effect of a product).

1.31 In addition, increased reporting that arises from increased advertising causes over-reporting of adverse events (because lay persons assume a false causality between the medication and the event) renders data on adverse event rates incomparable with data arising from unbiased standard spontaneous event reporting regimes. This undermines a regulatory authority's ability to meaningfully compare the incidence of adverse events between otherwise comparable products. The international adverse event reporting guideline for veterinary medicinal product (VICH GL24), for example, is premised on

[23] *Colin Gee and others v DePuy International Limited* [2018] EWHC 1208 at [455]; see also [231] to [238].

spontaneously reported adverse events being utilised for the calculation of adverse event incident rates.

1.32 The differential treatment of such reporting has been expressly addressed by the EMA and US FDA[24] and would need to be considered in the Australian context. In this respect, the overall public good is not served by the recording of "false positives" as it will inevitably undermine confidence in the regulatory regimes in Australia when false correlations are made, resulting in incorrect decisions and, ultimately, reversal of such decisions. Alternatively, a correct assessment may not be made due to the inability of the regulatory authority to compare data sets due to the influence on the data caused by advertising.

1.33 Leaving to one side the results that may arise as a consequence of the advertising itself, experience in other markets demonstrates the development of unscrupulous business models involving lawyers, pseudo law-firms, medical funders and physicians driven by profit through the abuse of the legal system.[25] In one example:

> *…patients are being solicited by cold callers armed with confidential medical information who employ distortion, exaggeration, and outright untruth to pressure these women to sign retention letters. Once signed up, the cases are bundled and sent… to other law firms, and… funneled to faraway surgeons they've never met for revision surgeries their own doctors never recommended (and in some cases, recommended against). The surgeons are paid inflated cash fees (and*

[24] See the EMA Workshop on Patient Support Programmes and Market Research Programmes of 7 June 2013 "Reporting Adverse Events from Solicited Sources to the FDA" available at http://www.ema.europa.eu/docs/en_GB/document_library/Presentation/2013/06/WC500144663.pdf

[25] See, for example, "New breed of investor profits by financing surgeries for desperate women patients". Reuters, 18 August 2015 http://www.reuters.com/investigates/special-report/usa-litigation-mesh/ ; "Surgical funder ordered to turn over information on hip surgeries", Reuters, 14 October 2015 http://mobile.reuters.com/article/idUSKCN0S82F820151014 ; "Citing Latest Bombshell Allegations of Trial-Lawyer Fraud, ATRA Urges Congress, DOJ to Investigate" , http://www.judicialhellholes.org/2015/01/14/citing-latest-bombshell-allegations-of-trial-lawyer-fraud-atra-urges-congress-doj-to-investigate/ ; "Women Asked to Lie To Join Pelvic Mesh MDL, J&J Claims" Law 360, 14 January 2015, http://www.law360.com/articles/611505/women-asked-to-lie-to-join-pelvic-mesh-mdl-j-j-claims

substantial "bonuses" for each explant) – up to ten times the norm – by "funding companies" that insist plaintiffs avoid using insurance and then place exorbitant liens on the plaintiffs' recoveries. By all appearances, a pyramid of businessmen, doctors and lawyers is orchestrating the exploitation of unsophisticated medical and legal consumers[26]

1.34 In this light, consider also the recent reporting in Australia concerning the general practitioner appointment booking service, HealthEngine, and how it has been manipulated to become a revenue generator for lawyers.[27]

1.35 The question of allowing contingency fees is a complex one. The impact on patients' wellbeing, healthcare and the healthcare industry must be considered in this equation.

2 *Settlement administration*

2.1 Question 7-1 of the Discussion Paper is as follows:
"Question 7-1 – Should settlement administration be the subject of a tender process? If so:
* *How would a tender process be implemented?*
* *Who would decide the outcome of the tender process?"*

2.2 In brief, while holding no particular view as to the nature of any tendering or appointment process, our experience is that the current default position where the lawyers for the lead applicant in a class action automatically assume the role of settlement administrator following settlement is unsatisfactory and should be abandoned, including for class actions based on personal injury.

Background

2.3 The Discussion Paper refers to the dicta of Murphy J in *Caason Investments Pty Ltd v Cow (No. 2)* [2018] FCA 527 [158] in which reference is made to views that accounting firms, share registry services or a claims administration companies could undertake settlement administration work as competently and more cheaply than the solicitors who have conducted the litigation.

[26] AMS Memorandum of Law in Opposition to Motion to Quash Subpoenas issued by American Medical Systems, Inc. and for a Protection Order In Re: American Medical Systems, Inc., Pelvic Repair Systems Products Liability Litigation MDL No. 2325, 2016https://www.pharmamedtechbi.com/~/media/Supporting%20Documents/The%20Gray%20Sheet/42/22/AMS0525.pdf

[27] See http://www.abc.net.au/news/2018-06-25/healthengine-sharing-patients-information-with-lawyers/9894114

2.4 The Discussion Paper also refers to Murphy J's further comments that he doubted whether such a tender process would be appropriate for settlement administrations involving personal injury, property damage and economic loss claims on the basis that *"through their interaction with class members over the course of a proceeding, the applicant's solicitors usually obtain a detailed and nuanced understanding of the different categories of claim and of the complexities within each category of claim"*. Murphy J added that "*fairness and efficiency in the settlement administration will be enhanced by such an understanding of the claims*".

Our experience with settlement schemes

2.5 Amongst our group, some have direct experience as a defendant in product liability class actions for personal injury that have given rise to settlement schemes over the last decade.[28] As members of global organisations, we also have insight into resolution schemes arising from mass tort actions in other countries.

2.6 In addition, amongst our group some have direct experience in establishing our own schemes for reimbursement and compensation to patients in circumstances where products distributed have been withdrawn from the market. [29] [30]

2.7 Based on that experience and insight, a process where an entity other than the lawyers for the lead applicant in the class action assumes the role of class action settlement administrator would result in considerable improvements, efficiencies and costs savings which will ultimately benefit the class members. We consider that an alternative process would also reduce the potential for conflict which exists in the current model.

Lower costs

2.8 Our experience is that when lawyers for the lead applicant in a class action assume the role of settlement administrator following a class action settlement, the lawyers will base their fees on the same rates used by them in the litigation. We are aware of an instance where one firm in fact ***increased***

[28] Examples include *Casey v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (ACD 10 of 2010) and *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011)

[29] In 2010 following the withdrawal from the market of the ASR hip replacement DePuy (a Johnson & Johnson company) established a Reimbursement Programme to reimburse patients costs and losses realted to revision surgery.

[30] In November 2012 DePuy established a Compensation Programme which allowed eligible ASR hip patients to receive compensation directly from DePuy for pain and suffering, future costs, out of pocket expenses and loss of earnings related to their ASR hip following revision surgery.

its rates significantly for the settlement administration from the rates charged by that firm in the litigation itself. [31]

2.9 We are also aware from establishment of our own compensation and reimbursement schemes that it is possible to engage specialist claims management firms to perform similar work at rates three to four times lower

[31] The Amended Settlement Scheme for *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011) can be found at https://www.mauriceblackburn.com.au/media/4229/amended-settlement-scheme-approved-by-the-court-on-2-august-2018.pdf.

The joint administrators of the scheme are Maurice Blackburn and Shine Lawyers. Maurice Blackburn and Shine Lawyers had also been the solicitors for the applicants in the litigation. The rates charged by Maurice Blackburn and Shine Lawyers as administrators for the scheme are at clause 13 of the scheme document. The hourly rates of the administrators were approximate to the rates charged by Maurice Blackburn in the litigation detailed in a costs consultant report relied on by the applicants at the settlement approval hearing. However, the rates charged by Shine Lawyers as administrator are significantly higher than the rates which Shine Lawyers had charged as solicitors for the second applicant over the course of the litigation as evidenced in the same costs consultant's report. A comparison is below (for the litigation rates the first figure was the rate under a 2011 costs agreement and the second figure under a 2014 costs agreement):

Rank	**Shine ASR hip litigation hourly rate**	**Shine ASR hip settlement scheme administration hourly rate**
Partner (litigation) Principal or Partner (settlement scheme)	$510 to $650	$790
Special Counsel (litigation) Special Counsel (settlement scheme)	$650	$720
Senior Solicitor/Associate /Accredited Specialist / Branch Manager/Department Manager (litigation) Senior Associate (settlement scheme)	$460 to $550	$610
Solicitor (litigation) Associate (settlement scheme)	$350 to $500	$540
Solicitor (litigation) Lawyer (settlement scheme)	$350 to $500	$440
Law Clerk/ Articled Clerk / Consultant (litigation) Graduate Lawyer / Trainee Lawyer / Articled Clerk (settlement scheme)	$290 to $345	$350
Senior paralegal/ Paralegal (litigation) Paralegal/ Legal Clerk / Law Clerk (settlement scheme)	$240 to $290	$320
Litigation Technology Consultant (settlement scheme)	Not applicable	$240

than rates commonly charged by plaintiff class action firms.[32] In short, there is a significantly less expensive alternative option.

Claims administration firms are more suited to the role

2.10 We consider that this significantly less expensive alternative option is also a better option, even leaving aside costs considerations. We also disagree with the suggestion that use of class action plaintiff firms promotes greater fairness and efficiency in settlement administration of personal injury claims. In particular, we contend that:

- claims administration firms are set up to resolve personal injury claims efficiently – it is their core business, unlike plaintiff class action firms, whose core business is running litigation;
- resolution of claims within a settlement scheme requires a different skill set to the conduct of litigation – it involves processing a large amount of claims (often in the hundreds or thousands) quickly and efficiently rather than presenting detailed evidence of one or two plaintiff's claims to the exacting standards of proof required by the court system;
- class action plaintiff law firms will generally need to establish "from scratch" staffing, processes, systems and technology for the purpose of a settlement administration.[33] Claims administration companies can provide such products and services "off the shelf";
- a large proportion of work involved in a settlement scheme administration is not legal work and requires administration and management expertise rather than legal skills[34]. There is no good reason that this work needs to be performed by lawyers in circumstances where it can be done substantially less expensively if

[32] For the ASR Compensation Programme DePuy engaged Crawford & Company to administer the programme. The rates charged by Crawford & Company were as follows: (a) Team Leader: $140 per hour; (b) Senior Claim Handler: $110 per hour; (c) Claim handler: $90 per hour; (d) Treasury administrator: $80 per hour (e) Claims Manager $260 per hour.

[33] For example an affidavit from the administrators in *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011) detailing the establishment processes for the settlement scheme of that class action can be found at: https://www.mauriceblackburn.com.au/media/3758/affidavit-of-julian-schimmel-dated-8-june-2017.pdf

[34] For example in *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011) of the settlement scheme administration costs which have been approved to date, only approximately 26% or $11.8 million have related to claims preparation with the remainder being for "general administration costs" (approximately 65% or $7.6 million) and disbursements (approximately 9% or $1.05 million). Court documents indicate that the Administrators expect that the total costs of the scheme administration will be in the order of $26 million by the end of the scheme in circumstances where to date 81.3% of scheme registrants have elected a "Fast Track" payment involving the registrant, subject to eligibility, receiving a standardised sum on an expedited basis without an individual assessment of his or her loss.

run by professional claims managers, with lawyers engaged by the claims managers only as and when needed [35];

- lawyers involved in settlement administration work at class action plaintiff firms have not necessarily been involved in the litigation – accordingly any advantage derived from the firm's involvement in the litigation is generally minimal.

Administering settlement creates a potential conflict

2.11 The administration of settlement schemes is undeniably lucrative. Where lawyers for the lead applicant in a class action are poised to assume a settlement administration role, an incentive is created for the firm to recommend and pursue settlements on particular terms, including the terms which will govern the administration of the settlement. This incentive may not always be aligned with the interest of the group members as a whole, and the issue may become particularly acute where the law firm has duties to shareholders.

Costs monitoring

2.12 In circumstances where lawyers for the lead applicant in a class action do become settlement administrators, we are of the view that it is necessary for approval of the administrators costs during the course of the settlement administration to be independently monitored and assessed by a court-appointed costs assessor. Our experience is that currently approval of costs is generally supported only by a report from a costs consultant appointed by the administrators. This also creates potential for conflict.

2.13 We consider that the measures being considered by the ALRC for additional oversight of solicitor's costs in the running of class action litigation, should also be applied to oversight of costs of settlement administration.

Summary

2.14 In summary, we consider that there are reasons related to cost, efficiency and conflicts which favour abandoning the current default position where lawyers for the lead applicant in a class action assume the role of settlement administrator. We consider that there is no reason to exclude personal injury, property damage and economic loss claims from an alternative model of administration, and indeed strong arguments to include them.

3 Other alternative resolution mechanisms

3.1 Proposal 8-1 and Question 8-1 of the Discussion Paper are as follows:

[35] The DePuy ASR Compensation Programme was run on this basis.

Proposal 8–1 *The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.*

Question 8–1 *What principles should guide the design of a federal collective redress scheme?*

3.2 The Discussion Paper considers the position of an alternative to the litigation system, as "*an approach [that]might lead to a more efficient and effective way for consumers and businesses to obtain compensation and reduce the burden on the civil justice system*" and in particular that a collective redress system may "*achieve greater access to justice and at a fraction of the cost of a class action*."

3.3 While consideration of systems of collective redress would be a worthwhile exercise, there is not sufficient information within the Discussion Paper to properly consider the proposal. There is a question of the merit of a system that would add another layer of claim resolution without bringing finality to the matter (being that individuals could opt-out of the scheme and litigate the matter). In our view, the ability to opt-out would undermine some of the benefits of efficiency and cost saving, and cause issues of inequality between claimants.

3.4 We agree with the proposal that the Australian Government should consider establishing a collective redress scheme, and we strongly recommend that such consideration take into account a "whole of system" viewpoint (rather than only through a legal system lens), putting the claimant/patient at the centre of all considerations. In this respect, we draw to the Commission's attention the model of the New Zealand accident compensation scheme (**Scheme**) is established under the New Zealand Accident Compensation Act 2001 (**ACC Act**).

3.5 We do not advocate for a duplication of that Scheme, however, it is instructive of the approach that could be taken when the claimant/patient is put at the centre of the system.

Accident Compensation Scheme

3.6 The Scheme arose from a Royal Commission inquiry into workers compensation known as the "Woodhouse Report".[36] That Royal Commission was briefed to:

[36] Royal Commission to Inquire into and Report upon Workers' Compensation, *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printers, Wellington, 1967) (**Woodhouse Report)**

> *…be a Commission to receive representations upon, inquire into, investigate, and report upon the law relating to compensation and claims for damages and death arising out of the accidents (including diseases) suffered by persons in employment and the medical care, retraining, and rehabilitation of persons so incapacitated, and the administration of said law, and to then recommend such changes therein as the Commission considers desirable…*[37]

3.7 The Woodhouse Report identified concerns arising from establishing fault, the risks associated with litigation and the general uncertainty of the common law as a remedy for an injury and particularly noted:

> *…penetrating criticism of the erratic achievements of the damages action… In our opinion the time has clearly come for the common law action to yield to a more coherent and consistent remedy in the whole area of personal injury*.[38]

3.8 As a consequence, the common law action for compensatory damages for personal injury was abolished on the basis that:

> *(1) The adversary system hinders the rehabilitation of injured persons after accidents and can play no effective party beforehand in preventing them.*
>
> *(2) The fault principle cannot logically be used to justify the common law remedy and is erratic and capricious in operation.*
>
> *(3) The remedy itself produces a complete indemnity for a relatively tiny group of inured persons; something less (often greatly less for a small group of injured persons; and for the rest it can do nothing.*
>
> *(4) As a system it is cumbersome and inefficient; it is extravagant in operation to the point of absorbing for administration and other charges as much as $40 for every $60 paid over to successful claimants.*
>
> *(5) The common law remedy falls far short of the five requirements outlined in paragraph 55 of this Report [community responsibility, comprehensive*

[37] Woodhouse Report at p.11.
[38] Woodhouse Report at para 14.

entitlement, complete rehabilitation, real compensation, administrative efficiency].[39]

3.10 The Scheme was built on the premise that "*the aim should be clarity and certainty and the avoidance of future dispute or disappointment*."[40] The Scheme was universal in scope, and there was no ability to opt-out.

3.11 The Scheme is administered by the Accident Compensation Corporation pursuant to the ACC Act. The purpose of the ACC Act is to:[41]

> *… enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs) …*

3.12 Persons who suffer a personal injury covered by the ACC Act receive a uniform set of entitlements funded by the community; in return they relinquish any right that they may have had to take proceedings (whether in tort or under statute) in respect of such injury.[42]

3.13 We make the following observations:

(a) *First,* any redress scheme needs to start with a clear need and purpose, which is then followed by guiding principles. In this case, the need and purpose was community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency. The Discussion Paper does not propose any frame of reference for consideration of collective redress. As a consequence, the proposal risks being amorphous such that an attempt at "collective redress" becomes an attempt to develop a one-size fits all model. Against that backdrop, there is no reason to presume that an ability to opt-out of a redress scheme is warranted or beneficial.

(b) *Second*, the Scheme (through the ACC Act) takes the bold step of prohibiting personal injury litigation. It was able to take that step because it had the interests of the injured person at the centre of all considerations and provided access to all injured persons.

[39] Woodhouse Report at para 171.
[40] Woodhouse Report at para 289.
[41] ACC Act, s 3
[42] See *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA) at [11].

(c) *Third*, the Scheme (through the ACC Act) does not permit an injured person to choose whether or not to participate, or whether they can separately pursue their claim through other means. To do so undermines the underlying premise of the Scheme – an equitable, reliable and consistent remedy. In this respect, the concern was not to facilitate access to justice, simply equitable access to a remedy.

(d) *Fourth*, the Scheme is operated through a statutory corporation that does not have an enforcement role. There is no interest in being an investigator or in seeking enforcement penalties. There are no deductions of costs of legal counsel or any other funder from the amounts remitted to injured persons.

(e) *Fifth*, the Woodhouse Report stepped outside the self-interested sectional groups that did not have the injured person's interests at the centre, to develop a logical and coherent scheme that entirely replaced the existing system.[43]

3.14 In answer to Proposal 8-1, we support the Australian Government undertaking a focused review at collective redress schemes. Such focus should begin with identification of the need and purpose of such a scheme to act as a full and a final mechanism to resolve disputes. We do not support the proposition that an individual or business should be able to remain outside such a scheme.

****

We would be happy to discuss these matters further if it would be of assistance.

Yours faithfully

Johnson & Johnson Family of Companies, ANZ	**Stryker, ANZ**
Medtronic, ANZ	**Zimmer Biomet, ANZ**
Smith & Nephew, ANZ	**Zoetis, ANZ**

[43] McKenzie, P., (2003). The compensation scheme no one asked for: the origins of the ACC in New Zealand. 34 VUWLR 193-206 at p.206.

Proposal 4–3 *The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings*.

We support the proposal. With solicitors being tertiary educated (and beyond), bound by conduct rules and officers of the Court, it is concerning that yet further training is required as a consequence of the complexity introduced by the presence of third party litigation funding. We urge the Commission to apply restraint in fuelling that complexity (and the attendant risk of dishonesty, incompetence and lack of diligence by solicitors) through the addition of permitting contingency fees.

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

We support the proposal. We note that, conceptually, there is no difference between a solicitor having such a financial or other interest, and the solicitor charging a contingency fee. Indeed, the factors identified by the Commission necessitating the inclusion of such a provision are the very same factors that support maintaining the prohibition on charging contingency fees.

Proposal 5–1 *Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements. This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply*

- *an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;*
- *a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and*
- *under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order*

We do not support this proposal. As identified in our submissions, there is insufficient evidence of any benefit to either the legal system or access to justice for claimants, to warrant such a change. Indeed, there are significant adverse consequences beyond the Australian legal system that should be considered. There should be no displacement of the "loser pays" rule and funders (contingency or otherwise) should provide an indemnity for adverse costs orders.

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

We do not support lifting the prohibition on contingency fees. With respect, at the start of a class action proceeding, the Court will not be in a position to provide any safeguard or supervision to the group members. The Court will not have before it sufficient information (and may not have the expertise) to determine whether or not such an arrangement is in the interests of the group members or if the amount proposed to be charged fairly reflects the litigation risk and cost of capital or if there are alternative sources of funding.

Question 5–1 *Should the prohibition on contingency fees remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated?*

The prohibition should remain with respect to all actions. We do not see how any proposal to excise personal injury matters would apply in mass tort, product liability or other matters where there may be an allegation of psychological harm.

Proposal 5–3 *The Federal Court should be given an express statutory power in Part IVA of the Federal Court of Australia Act 1976 (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements. If Proposal 5–2 is adopted, this power should also apply to contingency fee agreements.*

As noted above, we do not support lifting the prohibition on contingency fees. With respect, at the start of a class action proceeding, the Court will not be in a position to provide any safeguard or supervision to the group members. The Court will not have before it sufficient information (and may not have the expertise) to determine whether or not such an arrangement is in the interests of the group members or if the amount proposed to be charged fairly reflects the litigation risk and cost of capital or if there are alternative sources of funding.

Question 5–2 *In addition to Proposals 5–1 and 5–2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:*

- *Should contingency fee arrangements and commission rates also be subject to statutory caps that limit the proportion of income derived from settlement or judgment sums on a sliding scale, so that the larger the settlement or judgment sum the lower the fee or rate? or*
- *Should there be a statutory provision that provides, unless the Court otherwise orders, that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%?*

As noted above, we do not support lifting the prohibition on contingency fees. We do not see how it is possible to form a view on setting a statutory limit on fees/rates that is referrable to an amount which is unknown and undeterminable. Conceptually, any limit should be referable to the work actually completed. For instance, a two week trial could be capped at $1,000,000, a four week trial could be capped at $4,000,000, etc. For litigation funders, a simple mechanism could be the capital actually outlayed by the funder plus a margin above a benchmark banking rate (such as LIBOR). In both cases, it is not unreasonable to suggest that should a matter settle prior to hearing, that the fee is significantly discounted (given the lack of risk that is taken).

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

As noted above, we do not support lifting the prohibition on contingency fees. However, see our comments to Question 5-2.

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

As a matter of principle, claims that have merit will attract third party litigation funding or will be handled on a no-win/no-fee basis. The Commission identifies the growing number of law firms prepared to take on class actions (albeit that some may require further training). Economically, when a claim fails to have merit it must be due to the lack of prospects of success and such matters should not be pursued.

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

We support this proposal.

Question 7–1 *Should settlement administration be the subject of a tender process? If so:*

- *How would a tender process be implemented?*
- *Who would decide the outcome of the tender process?*

We support this proposal. We note, as described in our submission, that law firms are particularly poorly suited to settlement administration and the costs they incur not only reduce the funds available to claimants, seeking administration costs can create an additional conflict for the solicitors acting for the claimants and can be a barrier to the commercial terms of any settlement.

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

We do not support the terms of class action settlements being made public. However, we do support disclosure of the legal and funding fees being charged to claimants, as well as any administration costs associated with the settlement.

Proposal 8–1 *The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.*

We support the Australian Government undertaking a focused review at collective redress schemes. Such focus should begin with identification of the need and purpose of such schemes to act as a full and a final mechanism to resolve disputes. We do not support the proposition that an individual or business should be able to remain outside such a scheme.

Question 8–1 *What principles should guide the design of a federal collective redress scheme?*

As an alternative structure to litigation, we note the structure and operation of the New Zealand Accident Compensation Corporation as an effective, efficient and thoughtful approach.