Australian Government
Australian Law Reform Commission

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

DISCUSSION PAPER

You are invited to provide a submission or comment on this Discussion Paper

Discussion Paper 85 (DP 85) June 2018

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The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

Postal Address:
GPO Box 3708
Sydney NSW 2001

Telephone: within Australia (02) 8238 6333
International: +61 2 8238 6333
Facsimile: within Australia (02) 8238 6363
International: +61 2 8238 6363

Email: class-actions@alrc.gov.au
Website: www.alrc.gov.au

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Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission (ALRC) seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is **30 July 2018.**

Providing a submission

Pre-prepared submissions may be mailed, emailed or faxed, to:

Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: class-actions@alrc.gov.au
Facsimile: +61 2 8238 6363

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Content

Terms of Reference

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

I, Senator the Hon George Brandis QC, Attorney-General of Australia, having regard to:

- the increased prevalence of class action proceedings in courts throughout Australia, and the important role they play in securing access to justice;
- the importance of ensuring that the costs of such proceedings are appropriate and proportionate;
- the importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards;
- the role that third party funding entities play in enabling the commencement and maintenance of class action proceedings;
- the role of third party funding entities in enabling the commencement of other classes of legal proceedings, including but not limited to arbitral proceedings
- the potential for conflicts of interest between the professional obligations of lawyers and the commercial imperatives of third party funding entities;
- the fact that third party funding entities are not bound by professional ethical obligations, such as a lawyer's duties to the court and the client;
- the absence of a requirement that third party funding entities (or, where the entity is a corporate entity, its officers) satisfy character requirements or meet other antecedent criteria before being permitted to act as third party litigation funders; and
- the absence of comprehensive Commonwealth or State and Territory regulation to address the structure, operation and terms on which third party funding entities participate in the Australian legal system.

REFER to the Australian Law Reform Commission (ALRC), pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), consideration of whether and to what extent class action proceedings and third party litigation funders should be subject to Commonwealth regulation, and in particular whether there is adequate regulation of the following matters:

- conflicts of interest between lawyer and litigation funder;
- conflicts of interest between litigation funder and plaintiffs;
- prudential requirements, including minimum levels of capital;

- distribution of proceeds of litigation including the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;
- character requirements and fitness to be a litigation funder;
- the relationship between a litigation funder and a legal practice;
- the costs charged by solicitors in funded litigation, including but not limited to class action proceedings; and
- any other matters related to these Terms of Reference

I further ask the ALRC to consider what changes, if any, should be made to Commonwealth legislation to implement its recommendations.

Consultation

The ALRC should consult widely with institutions and individuals with experience of the conduct of litigation, class action proceedings and access to justice issues including the legal profession, courts and tribunals, litigation funding entities and the academic community.

Timeframe

The ALRC should provide its report to the Attorney-General by 21 December 2018.

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Participants

Australian Law Reform Commission

President

The Hon Justice Sarah Derrington

Part-time Commissioner

The Hon Justice John Middleton, Federal Court of Australia

Principal Legal Officers

Matt Corrigan

Sallie McLean

Expert Panels

Judicial Experts Panel

The Hon Justice Beach, Federal Court of Australia

The Hon Justice Foster, Federal Court of Australia

The Hon Justice Lee, Federal Court of Australia

The Hon Justice Murphy, Federal Court of Australia

Academic Experts Panel

Professor Camille Cameron, Schulich School of Law, Dalhousie University, Canada

Professor Simone Degeling, Private Law Research & Policy Group, University of New South Wales (UNSW) Law, Australia

Professor Deborah Hensler, Judge John W Ford Professor of Dispute Resolution Stanford Law School, USA

Professor Jasminka Kalajdizic, Faculty of Law, University of Windsor, Canada

Professor Michael Legg, University of New South Wales (UNSW) Law, Australia

Professor Vincent Morabito, Monash Business School, Department of Business Law and Taxation Monash University, Australia

Professor Rachel Mulheron, School of Law, Queen Mary University of London, United Kingdom

Professor Ianika Tzankova, Tilburg Law School, Tilburg University, Netherlands

Professor Vicki Waye, School of Law, University of South Australia, Australia

Legal Interns

Thea Casey
Joshua Clarke
Marcus Dahl
Marcela Malicka
Georgia Roy

Proposals and Questions

1. Introduction to the Inquiry

Proposal 1–1 The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) with regards to:

- the propensity for corporate entities to be the target of funded shareholder class actions in Australia;
- the value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and
- the availability and cost of directors and officers liability cover within the Australian market.

3. Regulating Litigation Funders

Proposal 3–1 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.

Proposal 3–2 A litigation funding licence should require third-party litigation funders to:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interest;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

Question 3–1 What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

Question 3–2 What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

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

4. Conflicts of Interest

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

Proposal 4–2 If the licensing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the *Corporations Regulations 2001* (Cth).

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.

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.

Proposal 4–5 The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.

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

5. Commission Rates and Legal 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.

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.

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?

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.

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%?

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?

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?

6. Competing Class Actions

Proposal 6–1 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that:

- all class actions are initiated as open class actions;
- where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;
- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and
- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.

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

Question 6–1 Should Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under this legislation?

7. Settlement Approval and Distribution

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.

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?

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?

8. Regulatory redress

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?

1. Introduction to the Inquiry

Contents

Background

1.1 In March 1992, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) introduced a federal class action regime within Australia. In the Second Reading Speech, then Attorney-General, the Honourable Michael Duffy said:

> The new procedure will enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources ... Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the Bill is to deal with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and so more cheaply and efficiently than would be the case with individual actions.[1]

1.2 It was not expected that the new regime would have a significant financial impact nor was there expected to be a significant increase in the number of cases brought.[2]

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1 Commonwealth, *Hansard*, Second Reading Speech, 14 November 1991, 3174-3175 (Duffy).
2 Ibid; Explanatory Memorandum, *Federal Court of Australia Amendment Bill 1991* (Cth) [5].

1.3 As has been observed elsewhere,[3] the legislation did not have bipartisan support. There were four principal concerns about the regime: first, it was said to be an attack on the traditional method of exercising legal rights; secondly, there were fears it would foster a litigious culture in Australia; thirdly, it was thought it would change the nature of legal practice by the creation of an entrepreneurial class of lawyer promoting proceedings; fourthly, it was seen to be a misdirected overreaction to the problem of the cost of litigation. Former Attorney-General Senator Durack remarked,

> A number of people would even go so far as to say that [this Bill] is a monstrosity … It really is one of those rather loopy proposals that come up from time to time from commissions like the Law Reform Commission.[4]

1.4 These fears have, in large measure, not materialised. As was intended, the regime has enabled claims to be brought by people with small claims whose number may be such as to make the total amount at issue significant, and to deal efficiently with similar individual claims that are large enough to justify individual actions. To date, the cases that have been brought under the regime reflect a broad range of both commercial and non-commercial causes of action, including shareholder and investor claims, anti-cartel claims, mass tort claims, consumer claims for contravention of consumer protection law, environmental claims, trade union actions, claims under the *Migration Act 1958* (Cth),[5] and human rights claims. One of the more recent examples of the type of matter that, under the Part IVA regime, was expected to enhance access to justice is the formal apology and settlement award of $30 million to 447 residents of Palm Island in their action against the Queensland Government following riots in 2004.

1.5 Despite the concerns that the floodgates of litigation would open as a consequence of Part IVA, the number of class actions has grown steadily, but not exponentially since the introduction of the legislation. In the first 12 months of its operation, eight class actions were filed; seven were filed in the following 12 months; and a further 14 in the subsequent 12 months. Twenty-five class actions were filed in the Federal Court in 2016–2017.[6] This represents 0.53% of the total number of causes of action filed in the Federal Court over the same period. To date, approximately 15.4 class actions have, on average, been filed annually in the Federal Court of Australia since the regime commenced in 1992.[7]

1.6 If a criticism could be levelled at Part IVA regime, as it was introduced, it was that neither the Part IVA, nor any other relevant legislation, dealt with the issue of an

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3 Chief Justice JLB Allsop, 'Class Actions' (Speech, Law Council of Australia, 13 October 206).

4 Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3019.

5 Amendments to the *Migration Act 1958* in 2001(s 486B(4)) prohibited the use of the Part IVA regime in any proceedings relating to visas, deportations or removals of non-citizens.

6 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017) 24.

7 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [4.2]. In the state courts, the average number of class action filings, since the introduction of a class action regime in Victoria, Part 4A *Supreme Court Act 1986* (followed by NSW in 2011, Part 10 *Civil Procedure Act 2005* and Queensland in 2017, Part 13A *Civil Proceeding Act 2011*) is 6; Ibid.

appropriate costs regime—leaving unanswered the difficult question of how to relieve a principal applicant from the brunt of an adverse costs order should the proceeding fail. A recommendation to establish a public fund to protect principal applicants in the face of such an eventuality[8] was not adopted by the government of the day.

1.7 Inevitably, innovation deals with gaps in the law and, as the class action regime has matured, commercial third-party litigation funding has become a particular feature of the Australian class action landscape. Litigation funding has largely filled the lacuna created by the absence of a satisfactory mechanism to protect principal applicants from adverse costs orders. At its simplest,[9] such funding involves a third-party (a litigation funder) with no direct interest in the proceeding agreeing to fund litigation in return for a share of any amount recovered if the case is successful. For the purposes of this Inquiry, a litigation funder does not include an insurer funding the litigation costs under a pre-existing policy, or a solicitor acting on a 'no win, no fee' basis (or under a contingency fee agreement, in jurisdictions where this is permitted).

1.8 The legitimacy of such funding arrangements was established in the 1996 decision of the Federal Court of Australia in *Movitor Pty Ltd (receivers and manager appointed) (in liq) v Sims* (*Re Movitor*).[10] In *Re Movitor*, the liquidator sought approval of a contract of insurance with Lumley General Insurance (Lumley) pursuant to which Lumley would provide a standing facility to the liquidator's firm. This would enable the partners of the firm to request funding from Lumley so that it could pursue actions on behalf of insolvent companies and individuals. If Lumley agreed to provide funding for a claim then, upon a successful recovery, it would be repaid the funds it had advanced plus a 'risk premium' of 12% of the net proceeds.

1.9 The Court held that the arrangement involved both maintenance and champerty—champerty being where a person with no prior interest in a proceeding agrees to fund it in return for a share of the proceeds. The public policy concern underlying the crime and tort was that an unscrupulous funder might encourage the plaintiff to bring an unmeritorious claim or attempt to influence the proceeding for their own end. At the same time, the funder would assume no liability for costs if the claim failed, leaving the defendant with no recourse if the plaintiff is impecunious. Consequently, the arrangement would have been void as contrary to public policy unless it fell within one of the recognised exceptions. One of those exceptions was that a trustee in bankruptcy may lawfully assign any of the bankrupt's bare rights of action. As the liquidator of a company has conferred on him or her by statute the same powers in relation to the company's property, the Court found that there was no reason to deny this exception to Movitor's liquidators.[11]

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8 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) rec 3.09.

9 But see para 1.14 below.

10 (1996) 64 FCR 380.

11 Susanna Khouri, Wayne Attrill and Clive Bowman, 'Litigation Funding and Class Actions – Idealism, Pragmatism and a New Paradigm' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [11.5].

1.10 This decision created the opportunity for commercial litigation funders to develop their business model in Australia as it allowed them to raise capital to provide funding to insolvency practitioners.[12]

1.11 The decision of the High Court of Australia in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*) in 2006 confirmed the legitimacy of the business model. The Court held that third-party litigation funding arrangements did not constitute an abuse of process, even if the arrangements gave predominant control of the litigation to the funder and were prompted by an expectation of profit.[13]

1.12 Since *Fostif*, the number of domestic and international funders operating in the Australian market has grown steadily with approximately 25 funders active in the Australian market. In the period from September 2013–September 2016, approximately 49% of all class actions filed in the Federal Court were funded by third-party litigation funders.[14] From 2013 to 2018, the percentage of funded class actions proceedings grew to 63.9%, with funded class action proceedings filed in the final year of that period constituting 77.7% of all filed class actions.[15]

1.13 The conditions in Australia that are said to have allowed litigation funding to flourish include: the opt-out model; the very high costs involved in conducting large-scale class actions; the lack of a public fund or other mechanism to finance class actions,[16] and the prohibition on lawyers charging contingency fees.[17]

1.14 The relatively straightforward form of litigation funding described in paragraph 1.7 above is no longer the only funding model being used in the litigation funding market. A much wider range of funding models has emerged and they continue to evolve. Portfolio funding or law firm financing is being promoted as an alternative to case-by-case funding. Broadly, there are two types of arrangements: the first involves finance structured around a law firm, or department within a law firm, where the claimants are various clients of the firm; and secondly, finance structured around a corporate claim holder or other entity which is likely to be involved in multiple disputes over a defined period of time.[18] Some types of financing are increasingly a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain control over its investment (in the litigation) through traditional corporate governance.[19] Additionally, some funders now establish Special Purpose Vehicles (SPVs) to receive investment funds from a variety of sources including pension funds and educational trusts.

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12 Ibid.

13 *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*) (2006) 229 CLR 386 [65]–[95] (Gummow, Hayne and Crennan JJ).

14 Morabito, above n 7, [4.3.2].

15 Vince Morabito, Private correspondence (13 March 2018).

16 Khouri, Attrill and Bowman, above n 11, [11.6].

17 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) [10.2.2].

18 ICCA-Queen Mary Task Force, *Report on Third-Party Litigation Funding in International Arbitration*, April 2018, 38–39.

19 Ibid 35.

1.15 Alongside the growth in litigation funders, a number of firms have entered the market offering specialist 'brokerage' services that seek to identify and connect claimants with ligation funders and plaintiff firms.[20] The landscape has been coloured further by the emergence of funders linked to or associated with plaintiff law firms.

1.16 Another developing feature of the litigation funding market in Australia is the growth of 'After the Event' (ATE) insurance. ATE insurance is an arrangement whereby an insurance company provides a client with coverage for legal costs, typically the risk of having to pay an adverse costs order in the event that an action is unsuccessful. Such policies are increasingly offered to satisfy an order for security for costs[21] and may assist funders and/or solicitors to defray the risk of an adverse costs order. At this stage of their development within the Australian market, ATE policies tend to have a limit of $10 million with the premium being set at somewhere between 30-40% depending on whether the premium is paid in full up-front or a portion of it is deferred.

The Inquiry

1.17 On 11 December 2017, the then Attorney-General of Australia, Senator the Honourable George Brandis QC, asked the Australian Law Reform Commission (ALRC) to consider whether and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation. The Inquiry is set against the background of the increased prevalence of class action proceedings in courts throughout Australia, and the important role that litigation funders of class actions and other legal proceedings, including arbitral proceedings, play in securing access to justice.

1.18 The Terms of Reference require the ALRC to consider whether there is **adequate regulation of conflicts of interest** between litigation funder and plaintiffs and between lawyer and litigation funder, including in the relationship between a litigation funder and a legal practice.

1.19 The ALRC was also asked to consider the desirability of imposing **prudential requirements**, including relating to capital adequacy, and also requirements relating to the character and suitability of litigation funders.

1.20 Further, the ALRC was asked to consider the adequacy of regulation around the **costs charged by solicitors in funded litigation** and, in particular, whether there is adequate regulation of the distribution of proceeds of litigation, including a consideration of the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders.

1.21 In short, the terms of reference require the ALRC to consider two overarching issues of the class action regime: the integrity of third-party funded class actions, and the efficacy of the class action system.

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20 See, eg, Litigation Funding Solutions, Investor Claim Partner Pty Ltd and Institutional Shareholder Services Inc, referred to in Betts, Taylor and Tran, above n 17, [10.3].

21 See eg, *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699.

1.22 The Terms of Reference direct the ALRC to advise the Government on necessary and appropriate Commonwealth regulation of class action proceedings and litigation funding. The ALRC has therefore excluded the class action regimes in the states and territories from its current considerations. Nonetheless, issues that might complicate the class action regime and thereby hinder access to justice, through, for example, forum shopping, are considered where appropriate.

Related inquiries

1.23 Over the past two decades, there have been several inquiries into class actions and litigation funding, both within Australia and internationally. This Inquiry does not propose to revisit all of the matters canvassed in those previous inquiries, and publicly available submissions to the previous inquiries mentioned below have been considered in the course of preparing this Discussion Paper. Consequently, this Discussion Paper attempts to identify gaps in previous inquiries and to re-examine questions which, with the benefit of 20 years of litigation funding in Australia, might yield a different answer from that originally given.

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1.24 Three decades have elapsed since the ALRC first considered the desirability of a class action procedure in *Grouped Proceedings in the Federal Court* (ALRC No 46, 1988). The result of that Inquiry was the introduction of Part IVA to the FCA Act. Part IVA built on and reformed existing representative proceeding rules dating back to 19th century procedures. The new Part was articulated as part of the Government's equity and access policies in its social justice program.

1.25 The ALRC acknowledged in that report that there was an increasing trend for litigation to be financed by a variety of groups, including trade unions and special interest groups.[22] It did not, however, consider it appropriate for such agreements to be predicated on receipt of a share in the proceeds of the subject matter of the action, unless the agreement was between solicitors and clients[23] (evincing early support, albeit limited, for the introduction of contingency fee arrangements in Australia).[24]

1.26 The design of the regime encompassed by Part IVA was a matter of careful consideration by the ALRC. Having considered the ALRC's recommendations, the Government determined that an open class system with an opt-out procedure was preferable on grounds both of equity and efficiency. The then Attorney-General said:

> It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding

22 Australian Law Reform Commission, above n 8, [315].

23 Ibid [318]. As noted at para 1.11, the ALRC's view was contradicted by the High Court of Australia in *Fostif*. The Chief Justice of New Zealand has recently expressed a potentially contrary view, albeit in obiter, *Pricewaterhousecoopers v Walker* [2017] NZSC 151.

24 See discussion, Ibid [295-297].

> decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.[25]

1.27 The ALRC had drawn attention to the implications that would arise should the consent of all persons affected be required before proceedings could be commenced, thereby in effect creating a closed class. It noted that any finding as to the liability of the respondent would only be binding on those people whose consent had been obtained and that others might never be informed of the situation. If an affected person later sought a remedy individually, the respondent would not be obliged to accept liability but could recontest it.

1.28 Further, if there was a limited fund from which monetary relief could be obtained, for example an insurance policy, a procedure covering all members of the group would make it more likely that they would all obtain a share of the limited fund. By contrast, if group members were left to pursue individual proceedings, those who obtained judgment first would deplete any fund available, leaving other group members without recourse to the fund. The ALRC also pointed to the reduction in the proportion of costs incurred in pursuing a claim where all persons are involved in the proceeding. It recommended that, subject to appropriate protection of a person's rights where consent is not given, it should be possible to commence a group members' proceeding without first obtaining the consent of that group member.[26]

1.29 At the heart of considerations of both the integrity of third-party funded class actions and the efficacy of the regime through which they are prosecuted, is the vexed issue of costs—hence the focus on costs in this Inquiry. The ALRC made a number of recommendations in its original report in relation to costs in representative proceedings.

1.30 So far as adverse costs orders were concerned, the ALRC recommended that the principal applicant should be liable for any costs ordered to be paid in group members' proceedings of which he or she has had the conduct, and that group members should not be liable to pay the costs of another party except to the extent that they have assumed conduct of their own proceedings.[27]

1.31 In the absence of a third-party funding agreement, the above approach would provide a significant costs disincentive for a person to be the principal applicant in a representative proceeding. The ALRC therefore explored other approaches to costs such as:

- a one-way costs rule, where an applicant may recover its costs if successful but is not liable for costs if unsuccessful;
- a no costs rule, where each party bears its own costs; and
- variations of each of these rules.

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25 Commonwealth, *Hansard*, Second Reading Speech, 14 November 1991, 3174-3175 (Duffy).
26 Australian Law Reform Commission, above n 8, [127].
27 Ibid [261].

1.32 The difficulty of finding the correct balance to strike in respect of costs in representative proceedings was reflected in the ALRC's recommendation that the existing discretion in relation to the awarding of costs be retained given that there are no entirely satisfactory alternatives to the rule that costs follow the event. In relation to security for costs, the ALRC recommended that no order for security should be made against principal applicants on the ground that they are not suing for their own benefit but for the benefit of a group member.[28]

1.33 In order to address the economic disincentive that would confront the representative party, the ALRC considered that conditional fee agreements should be permitted, noting however that the Court would have to be satisfied, before approving an agreement, that the method of calculating any amount in excess of scale to compensate the solicitor for the risk of losing the case is fair and reasonable.[29]

1.34 Conditional fee agreements are no longer novel and indeed are regulated under the various state and territory statutes that regulate the legal profession.[30] However, as foreshadowed by the ALRC, typically they still do not extinguish the representative party's liability for party-party costs in the event that the representative proceeding is unsuccessful. These costs can be significant.

1.35 The ALRC considered alternative methods of calculating a fee agreement including:

- as a lump sum;
- as a percentage of recovery, either at a flat rate or on a decreasing sliding scale according to the amount of recovery or on a scale varying according to the time when the proceedings are resolved;
- as a fraction or multiple increase on scale costs;
- as a top-up on party-party costs if awarded.

1.36 The ALRC recommended that solicitors' fees calculated as a percentage of the amount recovered (contingency fees) should not be permitted. It noted, however, that this recommendation could be reviewed if the law changed to permit contingent fees in civil litigation generally.[31]

1.37 The ALRC also foreshadowed the development of the 'common fund order' in Australia (albeit not with respect to funders' commissions)[32] and considered that, even if a group member had not contracted with the solicitor acting for the representative

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28 Ibid [271].
29 Ibid [293].
30 *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3, cl 27(1); *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 183; *Legal Profession Act 2008* (WA) s 285.
31 Australian Law Reform Commission, above n 8, [297].
32 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148.

party, the group member should have to contribute to the solicitor-client costs when monetary relief is awarded.

1.38 The ALRC considered that the ability to recover costs from group members through a deduction from damages payable to group members adequately addressed those representative proceedings which were successful and resulted in recovery of money. However, significant financial disincentives remained for a person to be a representative party where:

- the proceedings in question were not for monetary relief;
- the amount recovered might not be sufficient to satisfy the difference between the party-party costs recovered from the respondent and the representative party's liability to his or her solicitors; and
- the representative party was unsuccessful in the conduct of the representative proceeding. In this situation, a conditional fee agreement may negate the representative party's liability to its lawyers but would not address the liability of the representative party to a respondent by reason of an adverse costs order.

1.39 Principally to accommodate that exposure, the ALRC recommended the establishment of a special fund to provide for the costs of parties involved in group proceedings.[33] It was envisaged that the fund would apply a merit test to any application for financial assistance and would 'provide support for the applicants' proceedings and … meet the costs of the respondent if the action was unsuccessful.'

1.40 The ALRC observed that the suggestion of a special fund was not (even at that time) a novel one—Quebec had established a Class Action's Assistance Fund in 1978. It recognised that such a fund would be of particular assistance where the amount of the representative party's and group members' claims were small. Enhancing access to justice for this type of claim was one of the key purposes for the establishment of the representative mechanism. The existence of a fund to provide support for the representative party's proceeding and to meet the costs of the respondent if the action was unsuccessful would plainly enhance access to justice. It would also assist in circumstances where the individual claim was economically recoverable but the applicant had to bear the additional costs of being the representative party. In these circumstances, it was said, the fund would assist with the attainment of judicial economy by encouraging the grouping of proceedings. As noted above, this recommendation has never been adopted.

1.41 The ALRC had an opportunity to consider the issue of costs in its 1995 Report, *Costs shifting—who pays for litigation.*[34] The ALRC had been asked to review the impact on the litigation system of the costs allocation rules, in particular the 'loser pays' rule. The ALRC found that the costs allocation rules sometimes operate unfairly and can deny access to justice. In particular, the 'loser pays' rule can deter people from pursuing meritorious claims or defences because of the risk of having to pay a portion

33 Australian Law Reform Commission, above n 8, [309].
34 Australian Law Reform Commission, *Costs shifting—who pays for litigation* (ALRC No 75, 1995).

of the other party's costs if unsuccessful. It acknowledged that litigation in the public interest may be a relevant exception to the usual costs rule. It also recommended that courts and tribunals should continue to be able to order costs, in appropriate cases, against people who are not formally a party to proceedings. Specifically, the ALRC did not propose any changes to the specific costs allocation rules that apply to representative proceedings conducted pursuant to Pt IVA of the FCA Act.[35]

1.42 Representative proceedings were again reviewed by the ALRC in 2000 as part of the Report, *Managing Justice—a review of the federal civil justice system.*[36] As at the date of that Report, only eight years had elapsed since the introduction of Part IVA of the FCA Act and 124 class actions had been filed in the Federal Court.[37] Difficulties had already begun to emerge with competing actions and the ALRC recommended that the Court promulgate rules in relation to criteria for selecting the appropriate representative action.[38] Further, it made recommendations that professional conduct rules should include rules governing lawyers' responsibilities to multiple claimants in representative proceedings,[39] and that Part IVA should be amended to require class closure at a specified time before judgment and enabling the Court to approve fee agreements between the representative party and/or group members and the representative party's lawyer.[40] The ALRC's recommendations were not implemented.

1.43 In that same Report, the ALRC considered briefly the introduction of a system of depositions within representative proceedings. At that time, the ALRC was not minded to make any recommendation in relation to the introduction of depositions, noting that there was sufficient power in the FCA Act and the Rules of Court for a judge to order the taking of depositions in any event.[41]

1.44 Although it is clear that the size and costs of discovery processes in representative proceedings contribute to the significant expense of such proceedings, it is not proposed to revisit the issues around managing discovery in this Inquiry. In its 2011 Report, *Managing Discovery: Discovery of Documents in Federal Courts*, the ALRC made recommendations that the FCA Act should be amended to provide expressly for pre-trial oral examination about discovery.[42] Those recommendations have not been adopted and it appears to the ALRC that no additional powers are presently required to enable the Court to manage the discovery processes in representative proceedings.

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35 Ibid [16.26].
36 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).
37 Morabito, above n 6, 23.
38 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) rec 79.
39 Ibid rec 82.
40 Ibid rec 80.
41 Ibid [7.102].
42 Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts* (ALRC No 115) [10.129].

Productivity Commission

1.45 In 2014, the Productivity Commission provided a report on access to justice arrangements in civil matters—focusing on constraining costs and promoting access to justice and equality before the law.[43] The terms of reference for that Inquiry required the Productivity Commission to analyse, among other things:

- whether the costs charged for accessing justice services and for legal representation were generally proportionate to the issue in dispute; and
- alternative mechanisms to improve equity and access to justice, including litigation funding.

1.46 Volume 2, Chapter 18 of the report dealt with third-party litigation funding. The Productivity Commission differentiated between 'conditional agreements' between lawyers and clients, which permit lawyers to charge clients for some or all of the services if legal action is successful,[44] and 'damage-based/contingent' fee agreements, where the client is billed in relation to the amount recovered, noting that, in Australia, only conditional agreements are permitted in lawyer/client relationships when the client cannot pay for the legal services.[45] By contrast, the Productivity Commission observed that third-party litigation funding companies are able to charge contingent fees—filling the 'gap that lawyers were not permitted to enter'.[46] It also recognised that litigation funders can increase access to justice for the prosecution of 'genuine claims by plaintiffs who would otherwise lack the resources to proceed'.[47] It noted, however, that the matters that are funded are self-selecting: high costs, large payouts and low risk, which was unlikely to improve access to justice in relation to rights-based, non-monetary claims.[48]

1.47 The Productivity Commission addressed three concerns regarding conditional agreements and contingent third-party litigation funders. These included that these types of fee arrangements:

- promote unmeritorious claims—it found that there are sufficient incentives to avoid bringing frivolous claims;[49]
- create conflict of interests between lawyers and clients—it was unconvinced there was any real conflict;[50] and
- lead to excessive profits for lawyers—it found that contingency arrangements could provide for a fee structure that is easier for clients to understand and consent to, and that excessive profits can be avoided by implementing a cap on

43 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014).
44 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 603–605.
45 Ibid 605–606.
46 Ibid 608.
47 Ibid 607.
48 Ibid.
49 Ibid 613.
50 Ibid 614.

damages-based (contingency) fees on a 'sliding scale', where the cap reduces as the claim amount increases.[51]

1.48 The Productivity Commission recommended that governments remove restrictions on damage-based billing, except in criminal and family law matters. The recommendation was contingent on comprehensive disclosure requirements; the percentage recoverable being capped on a sliding scale; and contingency fees being used on their own with no additional fees, such as hourly rates.[52]

1.49 The Productivity Commission observed that permitting lawyers to enter contingency fee arrangements would put them in competition with litigation funders, noting that it would likely be those lawyers who currently offer 'no win/no fee agreements who would operate in the same space (workers' compensation, for example). The Commission recommended an amendment to court rules so that lawyers are required to disclose contingent funding agreements to the Court, as is currently required of litigation funders.[53]

1.50 In relation to the question of the regulation of litigation funders, with which this Inquiry is also concerned, the Productivity Commission observed that, while the courts had regulated them to some extent,[54] the Government should establish a licence for third-party litigation funders. Such a licence should be designed to ensure the funder holds adequate capital relative to its financial obligations and properly informs clients of relevant obligations and systems in place for managing risks and conflicts of interests. [55]

1.51 In formulating this Discussion Paper, the ALRC has had regard to the submissions that were received by the Productivity Commission and to the recommendations made by that Commission.

Victorian Law Reform Commission

1.52 In January 2017, the Victorian Law Reform Commission (VLRC) was asked to inquire into litigation funding and group proceedings. The VLRC was asked to report by March 2018 on matters which overlap with the terms of reference for this Inquiry, including whether:

- courts or regulatory bodies should require clearer disclosure requirements from funders and lawyers, and whether there should be fee limits;
- removing the existing prohibition on law firms charging contingency fees (excluding personal injury, criminal and family law matters) would assist to mitigate the issues; and

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51 Ibid 616–617.
52 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) rec 18.1.
53 Ibid rec 18.3.
54 Ibid 609, citing *Campbells Cash and Carry v Fostif* (2006) 229 CLR 386; *Jeffrey & Katausakas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75; *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11; *International Litigation Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455.
55 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) rec 18.2.

- there should be further regulation of group proceedings, including certification requirements and court approval of settlements (and any impact on the workload of the Supreme Court).

1.53 As at the date of this Discussion Paper, the VLRC has reported to the Victorian Attorney-General but the Final Report has not yet been tabled in the Victorian Parliament.

1.54 In its Consultation Paper dated July 2017,[56] the VLRC noted that the predominant funding for class actions was by law firms with the capacity to offer services on a 'no win/no fee' basis. Law firms are not able to charge a percentage of the amount recovered in litigation (contingency fee) for their services, but are permitted to postpone invoicing a client for the services supplied until the matter is successfully settled. This can also include an 'uplift' fee, attributable to the postponement of payment. Such arrangements facilitate access to justice to those otherwise unable to litigate. The core of the concern about these arrangements revolved around the conflicts of interest that arise in proceedings when a litigation funder is involved. As put by the VLRC:

> The litigation funder seeks to maximise its return on the investment and closely monitors the process; the lawyer has duties to the court and to the plaintiff but is being paid by the litigation funder; and the plaintiff is unlikely to be in a position to negotiate the terms of the agreement with the funder.[57]

1.55 The VLRC asked what changes needed to be made to the statutory class action regime and the regulation of proceedings in Victoria to protect litigants, and to assist the court to supervise and manage class actions. It further asked:

- about ways for further and better disclosure by lawyers to clients in matters funded by litigation funders, and by plaintiffs to the court;
- whether the threshold for commencing proceedings needs to be increased;
- how to better protect the interests of class members during settlement approval, and the role of the court; and
- whether to lift the ban on contingency fees for lawyers, and what limits would then need to be put in place.[58]

1.56 Underpinning these questions was an acknowledgement that better guidelines for lawyers were needed.

1.57 In formulating this Discussion Paper, the ALRC has had regard to the 36 submissions that were received by the VLRC in response to its consultation paper.

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56 Victorian Law Reform Commission, 'Access to Justice—Litigation Funding and Group Proceedings' (Consultation Paper, July 2017).

57 Ibid viii.

58 Ibid xiv–xv.

The Civil Justice Council, United Kingdom

1.58 Some of the issues with which this Inquiry is concerned have also been considered by the Civil Justice Council (CJC) in the United Kingdom (UK). Its 2005 report, *Improved Access to Justice–Funding Options and Proportionate Costs*, followed the English Court of Appeal's decision in *Arkin v Borchard Lines* (*Arkin*),[59] which established that properly structured litigation funding does not infringe the rules against maintenance and champerty. The court said:

> Our approach is designed to cater for the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable.[60]

1.59 The report proposed that 'building on the judgment of the Court of Appeal in *Arkin* further consideration should be given to the use of third-party funding as a last resort means of providing access to justice'.

1.60 In its subsequent report in 2007, *Improved Access to Justice–Funding Options and Proportionate Costs*, the CJC recommended that:

> Properly regulated third-party funding should be recognised as an acceptable option for mainstream litigation. Rules of Court should also be developed to ensure effective controls over the conduct of litigation where third parties provide the funding.[61]

1.61 The question of third-party funding was one of the discrete issues considered by Lord Justice Jackson in his final report on *Review of Civil Litigation Costs* (the Jackson Report).[62] In this report, Jackson LJ concluded:

> I do not consider that full regulation of third-party funding is presently required. I do, however, make the following recommendations:
>
> (i) A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.
>
> (ii) The question whether there should be statutory regulation of third-party funders by the FSA ought to be re-visited if and when the third-party funding market expands.
>
> (iii) Third-party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.[63]

1.62 Subsequent to this report, in 2011, a Code of Conduct for Litigation Funders (the Code) was promulgated along with Rules of the Association for the Association of Litigation Funders of England & Wales (the Rules). Rule 6.1 requires every member of the Association to abide by the Code to the extent that it applies to them. The Code was

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59 [2005] EWCA Civ 655, [2005] 1 WLR 3055.
60 Ibid [40].
61 Civil Justice Council, *Improved Access to Justice—Funding Options and Proportionate Costs* (2007), rec 3.
62 The Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs—Final Report* (December 2009)
63 Ibid 124.

subsequently updated in 2016. Relevantly, the Code makes provision for proper capital adequacy, provides that the funder is not entitled to terminate the funding agreement mid-litigation without good reason, and proscribes the extent of a funder's ability to influence the litigation and any settlement negotiations.

1.63 In formulating this Discussion Paper, the ALRC has had regard to the Jackson Report and the development of the self-regulatory model for litigation funders in England and Wales.

Other concurrent inquiries

1.64 It is noteworthy that comparable jurisdictions are currently involved in similar reviews, driven not least by the global reach of many litigation funders.

1.65 In March 2018, the Law Commission of Ontario (LCO) initiated a class actions project to consider Ontario's experience with class action since the *Class Proceedings Act* (CPA) came into force in 1993.[64] Like Australia, Canada has 25 years' experience with a statutory class action regime. Unlike Australia, no third-party litigation funding industry has yet developed alongside the class action regime in Canada.

1.66 The LCO's mandate is 'to conduct an independent, evidence-based, and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and deterrence.'[65] Four reasons for the class action project are cited as the catalyst for reform. The first is that several important and far-reaching choices underpinned the CPA and there is 25 years of jurisprudence. These choices have not been reviewed systematically since a 1990 report of the Ontario government's Advisory Committee on Class Action Reform. Secondly, class action legislation and proceedings are generally acknowledged to have significant policy and financial implications for both class members and class action defendants. They also have systemic implications for access to justice, court procedures and efficiency, and government and corporate liability. Thirdly, class action discussions are controversial and often influenced by stakeholder interests and perspectives. Finally, there is a need for a firmer empirical foundation for the issues that are raised in the context of class actions.

1.67 The Canadian Consultation Paper is open for submissions until 31 May 2018 and the ALRC will be following this project closely given the significant overlap in the issues being considered by both Commissions.

1.68 On 15 March 2018, the President of the New Zealand Law Commission (NZLC), the Honourable Sir Douglas White QC, announced that the NZLC had received a reference to review class actions and litigation funding. As at the date of this Discussion Paper, the terms of reference had not been finalised but some indication of what those terms might be, and an indication of the scope of the NZLC inquiry, can be gleaned from the paper delivered by Sir Douglas on 15 March 2018, 'Setting the Scene: The Law Reform Project and the current review of Class Actions and Litigation

64 *Class Actions: Objectives, Experiences and Reforms, Law Commission of Ontario, March 2018.*
65 Ibid 1.

Funding' at 'The Future of Class Actions Symposium' at the University of Auckland Business School.

The impetus for reform

1.69 It has been 25 years since Part IVA of the FCA Act introduced a federal class action regime within Australia. As has already been observed, its aims were to enhance access to justice, reduce the costs of proceedings, and promote efficiency in the use of court resources.

1.70 Despite representing a very small proportion of actions commenced annually in the Federal Court, class actions are among the most high-profile and far-reaching procedures within the federal legal system. The social utility of the class action regime is said to be demonstrated through the vindication of just claims through a process characterised by fairness and efficiency to both parties that gives primacy to the interests of litigants. The legitimacy of the consequences of the operation of such a regime is assessed by the vindication of just claims, the encouragement of proper behaviour by putative wrongdoers, and the elimination, without undue expense or delay, of unworthy claims.[66]

1.71 In assessing the social utility and legitimacy of the regime, attention has been drawn to the role of the Court to safeguard its processes and to ensure that the practices and procedures of the Court are informed by considerations, which include:

- the statutory mandate in s 37M(3) of the FCA Act to facilitate the just resolution of disputes (including representative proceedings) according to law, and as quickly, inexpensively, and efficiently as possible; and
- the furtherance of the Court's supervisory and protective role in relation to group members.[67]

1.72 The focus of this attention is directed primarily, although not exclusively, at shareholder (or securities) class actions. Shareholder claims are the most commonly filed class actions in the Federal Court, representing 34% (37) of all class actions filed in the last five years.[68] Such claims are usually based on breach of the continuous disclosure and misleading and deceptive conduct provisions of the *Corporations Act 2001* (Cth),[69] which were introduced in 2002. Since the introduction of these provisions, 66 shareholder class actions have been filed in the Federal Court.[70] None has proceeded to judgment and there has been relatively little judicial consideration of

66 Chief Justice JLB Allsop, 'Class Actions' (Speech, Law Council of Australia, 13 October 2016).
67 *Perera v GetSwift Limited* [2018] FCA 732 [3].
68 Vince Morabito, private correspondence, 13 March 2018.
69 See, eg, *Corporations Act* 2001 (Cth), ss 674, 728, 1041E, 1041H.
70 Vince Morabito, private correspondence, 13 March 2018.

the provisions, including the validity of the 'market-based causation' theory[71] in the context of those provisions, beyond the class action context.[72]

Shareholder class actions

Proposal 1–1 The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) with regards to:

- the propensity for corporate entities to be the target of funded shareholder class actions in Australia;
- the value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and
- the availability and cost of directors and officers liability cover within the Australian market.

1.73 The proportion of class actions represented by shareholder claims is uncontroversial on its own. However, there is growing evidence of unintended adverse consequences caused by the existing framework of the Australian class action regime, coupled with the peculiar characteristics of the Australian statutory provisions concerning continuous disclosure obligations (as compared with some other cognate common law jurisdictions)[73] and those relating to misleading and deceptive conduct. Those consequences include the impact on the value of the investments of those shareholders (including the investments of the class members themselves) of the company at the time the company is the subject of the class action,[74] and the impact on

71 Market-based causation theory refers to proof of loss that does not rely on any direct reliance of the unlawful conduct: *HIH Insurance Limited (in liq)* [2016] NSWSC 482 (20 April 2016).

72 But see *Forrest v ASIC* [2012] HCA 39, (2012) 247 CLR 486; *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) FCR 402, [2016] FCAFC 60; *ASIC v Southcorp Ltd (No 2)* (2003) 130 FCR 406 [2003] FCA 1369; *ASIC v Narain* (2008) 169 FCR 211, [2008] FCAFC 120; *ASIC v Chemeq Ltd* [2006] FCA 936, [2006] FCA 936; *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2014] VSC 357; *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322, [2015] FCAFC 94; *Melbourne City Investments Pty Ltd v UGL Ltd* [2015] VSC 540; *Re HIH Insurance Ltd (in liq)* [2016] NSWSC 482.

73 See, eg, *Financial Services and Markets Act* 2000 (UK)(FMSA), ss 90 and 90A and *Securities Act*, RSO 1990, c. S-5, s 138 and equivalent provisions in other Canadian provinces.

74 See Paul Miller, 'Shareholder class actions: Are they good for shareholders?' (2012) 86 *Australian Law Journal* 633; Michael Legg, 'Shareholder class actions in Australia—the perfect storm?' (2008) 31 *UNSW Law Journal* 669, 709; and see Travis Souza, 'Freedom to Defraud: Stoneridge, Primary Liability and the Need to Properly Define Section 10(B)' (2008) 57 *Duke Law Journal* 1179; and contra, Jill E Fish, 'Confronting the Circularity Problem in Private Securities Litigation' (2009) *Wisconsin Law Review* 333; Thomas A Dubbs, 'A Scotch Verdict on "Circularity" and Other Issues' (2009) *Wisconsin Law Review* 455.

the availability of directors and officers insurance (D&O insurance) within the Australian market.

1.74 The ALRC has heard there has been chronic under-pricing of D&O business by insurers since at least 2011 and that the indications are that the current D&O market premium pool is thoroughly inadequate to meet the current and projected levels of insured securities class action losses. The cost of D&O insurance has increased more than 200% in the last 12 to18 months.[75] At least one significant insurer has recently left the Australian D&O market and there is some (anecdotal at this stage) evidence that the hardening of the market environment for D&O insurance is leading some Australian companies to contemplate relocation offshore where conditions are more favourable.

1.75 In the not dissimilar US context, Professor Thomas Dubbs has commented that further research is needed on the extent to which class action settlements increase premiums paid by settling defendants, a matter which requires a structural analysis of the D&O insurance market.[76] Similar research is required in Australia but is beyond the scope of the ALRC's current remit.

1.76 One of the first Australian securities class actions, which exemplifies the characteristics of the modern Australian securities class action, was *Dorajay Pty Ltd v Aristocrat Leisure Limited* (Aristocrat).[77] In that case, a senior executive of Aristocrat had brought an action for wrongful dismissal. In its defence, the listed company advanced a case that it was entitled to dismiss the executive for a number of reasons, including for failing to disclose material information to the market of investors in Aristocrat shares—thereby foreshadowing the possibility of civil liability to investors for a breach of a continuous disclosure obligation.[78]

1.77 Subsequent to Aristocrat, a standard approach to the development of securities class actions, including a common form of proceedings, emerged. Litigation funders and/or plaintiff law firms (or their hired experts) identify a significant drop in the value of securities. This is analysed to determine whether it is likely that the relevant drop had been occasioned by the late revelation of material information. Typically, the analysis determines whether or not it is likely that there is a sufficient basis for assuming the existence of contravening conduct during a period prior to the eventual announcement of the material information. The litigation funders and/or plaintiff law firms then determine the size of the potential loss that may have been occasioned by the suspected period of contravening conduct.[79] The duration of that period may extend back for a considerable period, as in the recently announced class actions against AMP where a period of five years has been identified.

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75 Insurance Council of Australia, 'Submission No 29 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017).)

76 Thomas A Dubbs, 'A Scotch Verdict on "Circularity" and Other Issues' (2009) *Wisconsin Law Review* 455, 463.

77 NSD362 of 2004.

78 See discussion of the development of the securities class action per Lee J, *Perera v GetSwift Limited* [2018] FCA 732 [10]–[29].

79 Ibid [11].

1.78 Once the funders and/or lawyers are satisfied that there is a sufficient basis for assuming the existence of contravening conduct, funding terms are discussed and (at least prior to the advent of the common fund order)[80] there is an effort to sign up institutional and other group members (complex questions relating to issues of privacy and data sets are likely to arise in this context). During this developmental stage, an announcement might be made of a potential class action, attracting media attention which may augment the number of affected shareholders who wish to participate in the proposed class action, but which may also precipitate a further decline in the price of the securities.[81]

1.79 Coupled with the development of the 'common form' of securities class action was the development of the understanding of how a class could be defined. Initially, it was considered that closed class actions, where the class action is limited to those who have signed up with the funder or law firm, were impermissible.[82] It was not until the decision of the Full Court in *Multiplex Funds Management Limited v P Dawson Nominees Pty Limited*[83] that a class defined by reference to a funding agreement, or similar criteria, was accepted.

1.80 As a consequence of this decision, classes could be made up of persons who had signed funding agreements with an individual funder, thus eliminating the difficulty of so-called 'free riders'; that is, persons who had not signed funding agreements but who would be part of an open class. A further problem then emerged. If closed classes were allowed, how did a respondent obtain certainty from additional claims by settling only a closed class? A further procedural expedient resulted, allowing the 'opening up' and then 'closing down' of a class.[84] This allowed certainty to be delivered to a respondent (at least at the stage of a mediation) in settling what had originally been commenced as a closed class proceeding. The threat of 're-opening' the class if the matter does not settle at mediation looms large with respondents.

1.81 The funding 'schemes' constituted by the funding agreements which allow class actions to be funded and maintained were characterised by the Full Federal Court in *Brookfield Multiplex Limited v International Litigation Funding Pte Ltd*,[85] in essence, as representing a common enterprise of a commercial character which uses the Court's processes to obtain mutual benefits for each of the group members, the funder and the solicitors. The use of the Court's processes in this way, although clearly legitimate, explains to some extent, why attention has been focused on securities class actions in calls for reform of the class action regime.

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

81 *Perera v GetSwift Limited* [2018] FCA 732 [12].

82 *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2005) 147 FCR 394; and see *Rod Investments (Vic) Pty Limited v Clark* [2005] VSC 449 and *Jameson v Professional Investment Services Pty Limited* (2007) 215 FLR 377, [2007] NSWSC 1437.

83 (2007) 164 FCR 275. It was accepted because the text of s 33C of the FCA Act expressly provides that a proceeding can be commenced by only some of the persons who had claimed against a respondent.

84 *Perera v GetSwift Limited* [2018] FCA 732 [16].

85 (2009) 180 FCR 11.

1.82 Specifically, it is a matter of some note that Chapter III[86] judicial power is being invoked regularly without the controversy, in respect of which jurisdiction is invoked, ever being resolved by final determination of contested common issues between the parties.[87] There might be many reasons for this, including the cost of running a matter to final determination, the risk of litigating unsettled legal principles (such as the market-based causation theory), and the difficulty of disproving contravening conduct in the face of the low statutory threshold. The Productivity Commission suggested that 'public debate' about the underlying law was more appropriate than changing the mechanism by which class actions were prosecuted.[88] The ALRC agrees with the Productivity Commission. Such a review is, however, beyond the scope of the ALRC's current terms of reference.

Emerging issues

1.83 The success of the common form securities class action has led to new entrants to the funding (and solicitors')[89] market and a more diverse and competitive market for the funding of litigation. The result has been the emergence of the competing class action. Competing class actions are the inevitable consequence of permitting proceedings to be commenced on behalf of only some of the class members, leaving a further, differently funded, class action to commence proceedings on behalf of the remaining class members. Since 1992, 513 class actions have been commenced in relation to 335 legal disputes.[90] In 2015-16, 25% of class action proceedings were related class actions.[91] It is a matter of public knowledge that three competing class actions have been commenced against GetSwift Ltd since February of this year and that five competing class actions against AMP have recently been commenced or announced.

1.84 It is unlikely that, in 1988, the ALRC could have foreseen the developments in the law relating to class actions that have occurred since then. It certainly would not have foreseen the growth in the involvement of litigation funders. It is therefore timely to revisit whether, and if so to what extent, the second purpose of the initiating Bill (the ability to obtain redress more cheaply and efficiently) continues to be achieved, particularly in respect of investor and shareholder claims, and having regard to the expressed aim of reducing the costs of proceedings and promoting efficiency in the use of court resources. These are matters that need to be considered both in terms of the integrity of third-party funded class actions, and the efficacy of the regime through which they are prosecuted.

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86 *The Constitution*, Chapter III.
87 *Perera v GetSwift Limited* [2018] FCA 732 [18].
88 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 621.
89 Twenty-two different firms of solicitors were involved in commencing class actions in 2015-16, King & Wood Mallesons, 'The Review: Class Actions In Australia 2016/2017' 4.
90 Morabito, above n 6.
91 King & Wood Mallesons, above n 83.

1.85 This Inquiry will examine whether and to what extent Commonwealth regulation of class action proceedings and third-party litigation funders is necessary to assure the social utility of the class action regime.

Process of reform

Consultation

1.86 The ALRC was asked to consult widely with institutions and individuals with experience of the conduct of litigation, class action proceedings and access to justice issues, including the legal profession, courts and tribunals, litigation funding entities and the academic community.

1.87 To date, consultations for this Inquiry have been held with a number of government agencies, academics, judges, members of the legal profession, insurers and industry stakeholders both within Australia and, where relevant, internationally. Any individual or organisation with an interest in meeting with the ALRC in relation to matters raised in this Discussion Paper is encouraged to contact the ALRC. A list of consultations is included at Appendix 1.

1.88 The ALRC has been assisted greatly in the preparation of this Discussion Paper by the numerous individuals and institutional representatives who have shared their experience of the class action regime and their considerable insights. The ALRC has also derived significant assistance from the two expert panels that were established at the outset of this Inquiry: the Academic Expert Panel and the Judicial Expert Panel.

Submissions

1.89 The ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions contained in this Discussion Paper to assist with the reform process in this Inquiry.

How to make a submission

1.90 There is no required format for submissions and they may be marked 'confidential' if desired. The ALRC prefers electronic communications and submissions. Submissions will be published on the ALRC website unless marked 'confidential'.

1.91 The ALRC appreciates that tight deadlines for making submissions places considerable pressure upon those who wish to participate in ALRC inquiries. Given that the deadline for delivering the Final Report to the Attorney-General is 21 December 2018, and the need to fully consider the submissions received in response to this Discussion Paper, the ALRC has set a deadline for submissions of **5pm AEST on Monday 30 July 2018**.

1.92 **Submissions may be emailed to: class-actions@alrc.gov.au.**

2. Incidence

Contents

Introduction

2.1 In this chapter, the ALRC summarises the available data regarding the number, operation, key participants and outcomes of class action proceedings that have been filed in the Federal Court of Australia.

2.2 The data indicates that class action proceedings constituted a small proportion of proceedings that were filed with the Federal Court, although class actions tended to be in litigation for two or more years. Shareholder and investor matters made up the majority of class action proceedings filed in the Federal Court from 2013 to 2018.

2.3 Funded matters are more likely than unfunded proceedings to resolve in judicially approved settlement agreements. Of the matters filed in the Federal Court in the last five years, up to 67% received funding from a third party litigation funder—with all shareholder class action proceedings having received funding.

2.4 The ALRC is grateful to Professor Vince Morabito, author of the 'Fifth Report: the First Twenty-Five Years of Class Actions in Australia' (2017)[1] ('the Fifth Report'), who assisted the ALRC by providing further data on request. The ALRC also uses data published by the Federal Court of Australia, and has reviewed data published by law firms King & Wood Mallesons[2] and Allens.[3]

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

2 King &Wood Mallesons, 'The Review: Class Actions in Australia 2015/2016'; King & Wood Mallesons, 'The Review: Class Actions in Australia 2016/2017'.

3 Allens, 'Class Action Risk 2016'.

Class action proceedings in the Federal Court

2.5 Class action proceedings constitute only a small number of the proceedings filed in the Federal Court of Australia annually. For example, up to 4650 proceedings were filed in the Court in the 2016–17 financial year,[4] with 25 of these being class action proceedings.[5] This amounted to 0.5% of the Court's filings—a percentage that has only slightly increased since 2013–14. These figures are presented in table 2.1 below.

Table 2.1: Annual number of causes of actions filed in the Federal Court of Australia, annual number of corporation matters and annual number of class action proceedings filed (2012/13–2016/17)

Filings	2012–13	2013–14	2014–15	2015–16	2016–17	TOTAL
Number of causes of actions filed in the Federal Court (FC)	5169	4281	3445	5008	4650	22,553
Number of causes of actions filed in the FC in 'Corporations' category	3849	2876	2185	3652	3194	15,756
Number of class actions filed in the FC	17	15	20	24	28	104
% of causes of actions filed in the FC that were class actions	0.33%	0.35%	0.58%	0.47%	0.60%	0.46%

Source: Federal Court Annual Report (2016–17) Table A5.2; Vince Morabito, Private correspondence (16 April 2018).

2.6 The number of class action proceedings that are filed may not accurately represent the effect that class action proceedings have on justice outcomes and the workload of the Court. Class action proceedings involve multiple parties engaged in complex litigation, and require detailed case management and oversight by the Court. Class action proceedings take around two and a half years to resolve,[6] with many lasting significantly longer, meaning the accumulated number of class actions before the Court at any one time would be higher than the number filed.

2.7 It is not possible to know the number of group members represented in class action proceedings. These may range from seven group members to thousands of group members, depending on the action. This means that, although few are filed, class action proceedings may have a vast impact on the operation and workload of the Court and on civil justice outcomes.

2.8 Class action proceedings also have the potential to result in orders for the payment of significant sums by way of damages or the approval of very large

4 Federal Court of Australia, 'Annual Report 2016–2017' (20 September 2017) table A5.2.
5 Morabito, above n 1, table 2.
6 Ibid 32.

settlement sums.[7] For example, in 2016–17 approved settlements in shareholder class actions ranged from $32.5 million to $121 million.[8]

The proportion of funded class actions is rising

2.9 The proportion of filed class action proceedings that receive funding from third-party litigation funders has increased over time.[9] For example, in the period from March 1992 to March 2013, 14.7% of class action proceedings filed in the Federal Court were funded. From 2013 to 2018, the percentage of funded class actions proceedings grew to 63.9%, with funded class action proceedings filed in the final year of that period constituting 77.7% of all filed class actions.[10]

2.10 These figures are presented in table 2.2 below.

Table 2.2: Total number of class action proceedings filed in the Federal Court of Australia and the percentage that were funded (1992–2018)

Time period	Total number of class action proceedings filed in the FC	Total number of filed class action proceedings that were funded	% of filed class action proceedings that were funded
March 1992—March 2013	311	46	14.7%
March 2013—March 2018	111	71	63.9%
March 2017—March 2018	27	21	77.7%
TOTAL filed on/before March 2018	**422**	**117**	**27.7%**

Source: Vince Morabito, Private correspondence (13 March 2018)

2.11 The growth in the funding of class actions can be clearly seen in figure 2.1 below, which uses different time periods to show similar growth as table 2.2 above.

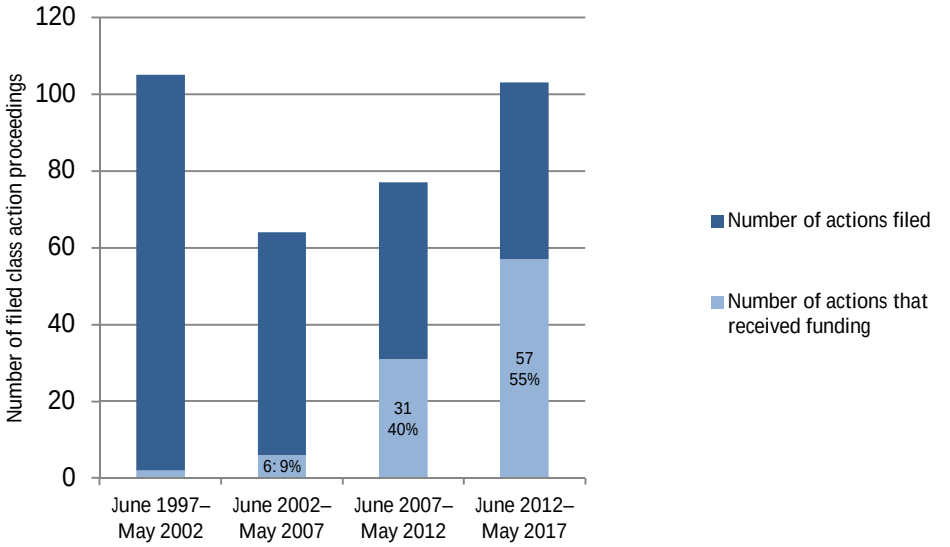
7 See, eg, Chapter 5 and Chapter 7.

8 King & Wood Mallesons, above n 2, 3. Referring to settlements in *RiverCity* and *OZ Minerals*: *Mitic v OZ Minerals Limited* (No 2) [2017] FCA 409.

9 King & Wood Mallesons, above n 2, 3 Mallesons report that funded class actions grew from 45% in 2014–15 to 58% in 2016–17, with 66% funded in the 2017–18 year to date.

10 Vince Morabito, Private correspondence (13 March 2018).

Figure 2.1: number of filed class action proceedings and the number of those that were funded (1997 to 2017)



Source: Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017) 33.

The majority of funded claims are shareholder claims

2.12 The majority of funded class action proceedings that were filed in the Federal Court in the last five years were claims by shareholders and investors. Of the 71 funded claims filed in the Federal Court from 2013 to 2018 (table 2.2 above), 52.1% (37) were claims by shareholders, and 23.9% (17) were claims by investors.

2.13 This compares with 5.6% (4) consumer protection and product liability class actions that were funded, and 4.2% (3) mass tort claims.

Table 2.3: Types of claims filed in the Federal Court of Australia that received funding from litigation funders (March 2013–March 2018)

Type of claim	Number of funded class actions	% of all funded class actions
Claims by shareholders	37	52.1%
Claims by investors	17	23.9%
Consumer protection claims	4	5.6%
Product liability claims	4	5.6%
Mass tort claims	3	4.2%

Type of claim	Number of funded class actions	% of all funded class actions
Claims by employees/workers	2	2.8%
Claims by franchisees, agents &/or distributors	2	2.8%
Claims by real estate owners	1	1.4%
Claims by alleged victims of racial discrimination in non-migration proceedings	1	0.8%
Total	**71**	**100%**

Source: Vince Morabito, Private correspondence (13 March 2018).

All shareholder claims are funded

2.14 Table 2.4 below illustrates the type of class actions claims that were funded. For example, in the last five years all shareholder claims were funded, while only 30.7% (4) of all consumer protection claims were funded.

Table 2.4: Types of class action claims filed in the Federal Court that were funded by litigation funders (March 2013–March 2018)

Type of claim	Number of claim-type filed from 2013—2018	Number of that claim-type that received funding	% of that claim-type that was funded
Claims by shareholders	37	37	100%
Claims by investors	26	17	65%
Consumer protection claims	13	4	30.7%
Product liability claims	8	4	50%
Mass tort claims	8	3	37.5%
Claims by employees/workers	5	2	40%
Claims by franchisees, agents &/or distributors	3	2	66.6%
Claims by real estate owners	5	1	20%
Claims by alleged victims of racial discrimination in non-migration proceedings	3	1	33.3%
Total	**108**	**71**	**65.7%**

Source: Vince Morabito, Private correspondence (15 March, 2018).

The proportion of shareholder class action claims is increasing

2.15 Shareholder and investor class action filings have been steadily increasing.[11] From the time periods 1992–2004 to 2005–2017, shareholder class actions went from representing 5% (15) to 23.4% (70) of all filed class action proceedings.[12] In the last five years, shareholder actions have grown even more to represent 34.2% (37) of all filed class actions.[13]

2.16 Similarly, investor class action proceedings increased from representing 7% (15) of all class actions filed from 1992–2004 to representing 28% (84) in 2005–2017.[14] They currently represent 24% (26) of all filed class actions, having been superseded by shareholder class actions in the last five years.[15]

2.17 Most other categories of filed class actions decreased between the above time periods. For example, product liability claims decreased from 22.4% (48) of all filed class actions to 7.3% (22) of all class actions in the 2005–2017 time period, and claims by employees decreased from 21% (45) to 3.6% (11) of all filed class action proceedings. Mass tort claims and consumer protection claims increased from 7% (15) to 13% (39) and from 6.5% (14) to 11% (33) of claims respectively.[16]

Drivers of increasing shareholder matters

2.18 It is instructive that shareholder class actions are most commonly filed and that, in the last five years, all of the shareholder class actions that were filed in the Federal Court received funding.[17] Shareholder class action proceedings rarely proceed to trial, and have never resulted in judgment. The drivers of shareholder class actions are discussed further in Chapter 1.

Class actions are likely to resolve in settlement

2.19 Most class action proceedings filed in the Federal Court eventually settle.[18] The Fifth Report states that 60% of all class action proceedings filed in the Federal Court from 1 December 2004 to 31 May 2017 settled pursuant to a judicially approved settlement agreement. The top five methods of finalisation for class action proceedings in the Federal Court are presented in table 2.5 below.

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11 Morabito, above n 1, 28, 29; Jenny Campbell and Jerome Entwisle, 'The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?' (2017) 36(2) *Civil Justice Quarterly* 177, 182.

12 Morabito, above n 1, table 7.

13 Table 2.4.

14 Morabito, above n 1, table 7.

15 See table 2.4 above; ibid 29.

16 Ibid table 7.

17 See also Campbell and Entwisle, above n 11, 183.

18 Morabito, above n 1, 32 The average number of days from filing to settlement was 848 for Federal Court matters from 2012 to 2017.

Table 2.5: Top five methods of finalisation of class action proceedings in the Federal Court of Australia (2004–2007)

% of class action matters resolved	Method of finalisation
60%	Judicially approved settlement agreement
10.6%	Proceedings dismissed (excluding for want of prosecution or lack of jurisdiction)
9.2%	Proceedings discontinued by the class representative
7%	Proceedings discontinued as a class action by the class representative
4.8%	Proceedings discontinued as a class action by the Court

Source: Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017), table 10.

2.20 Only 4.2% of class action proceedings resolved in a ruling (for or against the plaintiff) following trial.[19]

2.21 Despite their prevalence, no shareholder class action has been finalised with a judgment of the Federal Court,[20] although this does not mean that every shareholder class action resolves with a judicially approved settlement agreement. Of matters filed before June 2017, 64% of all shareholder matters settled (with 73% of investor class actions and 70% of mass tort actions settling).[21]

2.22 The Fifth Report notes that the settlement rate of funded actions filed in the Federal Court is higher (79%) than unfunded class actions (43%)[22] and that this gap decreased due to the funded unsuccessful finance class actions against the banks. Prior to those actions, 92% of funded class actions settled.[23]

The number of plaintiff lawyer firms is increasing

2.23 Class action proceedings are generally run by a small pool of firms and funded by a small number of litigation funders. There are five plaintiff firms identified in the Fifth Report, including Maurice Blackburn and Slater & Gordon,[24] and IMF Bentham is noted as the leading litigation funder.[25]

2.24 The number of known legal representatives that act for class representatives has grown over time.[26] For example, in the period from 2005 to 2008, there were 11 legal

19 Ibid table 10.
20 Campbell and Entwisle, above n 11, 183.
21 Morabito, above n 1, 30.
22 Ibid 34.
23 Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia' (29 July 2016).
24 Morabito, above n 1, 35.
25 Ibid 34.
26 Mallesons, above n 2, 19.

representatives for filed class actions. In the period from 2014 to 2017, there were 43. This growth has been described as the 'defining feature of the class action landscape in recent years'.[27]

2.25 Since 2005, between 51% and 70% of legal representatives acting for class representatives had no prior experience in class actions. The highest number, but lowest proportion, of inexperienced plaintiff lawyers was shown to be from 2014 to 2017, when 51% (22) of legal representatives in class action proceedings had no prior experience in running class actions. Of this inexperienced group, Professor Morabito noted that 27% (6) 'were able to make their debut in Australia's class actions space thanks to the support of litigation funders'.[28]

27 Allens, above n 3, 5.
28 Morabito, above n 1, 34.

3. Regulating Litigation Funders

Contents

Introduction

3.1 Litigation funders are not required to hold a licence to operate in Australia. Litigation funders were specifically exempted by regulation in July 2013 from the requirement to hold an Australian Financial Services Licence (AFSL), provided that the litigation funder has appropriate processes for managing conflicts of interest (see Chapter 4: Conflicts of Interest).[1] The regulation also exempted litigation funding from the requirements of the Consumer Credit Code[2] and the definition of managed investment scheme (MIS) under the *Corporations Act 2001* (Cth) (Corporations Act).[3]

3.2 A licensing regime would provide ongoing scrutiny of litigation funders and the possibility of losing a licence to operate would incentivise compliance. Licensing litigation funders would help protect the consumers of litigation funding, as well as the other parties to the litigation, who rely on the capital backing of the funder to meet promises made by the funder during the litigation. A licensing regime need not be so onerous as to discourage litigation funders from conducting business in Australia and thus reduce access to justice.

1 *Corporations Amendment Regulation 2012* (No. 6) (Cth) Item 6.
2 Ibid Item 1B.
3 Ibid Item 1.

Licence scheme

Proposal 3–1 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.

Proposal 3–2 A litigation funding licence should require third-party litigation funders to:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interest;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a compliant dispute resolution system; and
- be audited annually.

3.3 Financial service providers in relation to a financial product are required to have an AFSL. The key policy rationale for the AFSL regime was the need to protect consumers:

> ...due to the complexity of financial products, the adverse consequences of breaching financial promises and the need for low-cost means to resolve disputes.[4]

3.4 The ALRC considers that there is a similar need to provide protection to consumers and other litigants through a licensing regime for litigation funders. This proposal is for a unique litigation funding licence that would sit outside the AFSL regime but impose comparable obligations. A unique litigation funding licence would enable a bespoke regulatory regime to be designed and implemented to address the risks associated with litigation funding.

3.5 This proposal is for obligations comparable to the AFSL regime—the ALRC considers that there is little evidence to warrant a more onerous regime than that which applies more broadly to Australian financial service licensees (AFS licensees). The litigation funding licence would be subject to the same general obligations as those set out in Chapter 7 of the Corporations Act. The licensing regime would add to the obligations to which litigation funders are already subject, which include statutory

4 Stan Wallis et al *Financial System Inquiry Final Report* (March 1997) 175.

obligations, and contractual obligations and equitable obligations under the general law.

3.6 The ALRC considered, as an alternative, whether it would be appropriate to require litigation funders to hold an AFSL. Leaving aside technical arguments as to whether litigation funding is a financial product within the meaning of the Corporations Act,[5] most of the obligations imposed on AFS licensees under section 912A of the Corporations Act are appropriate for litigation funders. However, ASIC has developed, through a suite of regulatory guides, a comprehensive compliance regime and, at this level of detail, a fit for purpose compliance regime for litigation funders would appear more appropriate. While it would potentially be possible to require litigation funders to hold an AFSL and adapt the compliance obligations to fit the business of litigation funder, this is less straightforward and would potentially create confusion and uncertainty for existing AFS licensees.

3.7 Licensing regimes require a regulator to administer them. At this stage, the ALRC considers that ASIC, as the regulator of the AFSL regime, is the appropriate regulator.[6] Legal profession regulators might also be appropriate regulators of litigation funders, however they do not currently have regulatory oversight of sophisticated financial arrangements and there are difficulties of uniformity given that the legal profession is not regulated nationally.[7]

3.8 The appropriate character and qualification requirements for this new litigation funding licence need to be determined and the ALRC seeks further information in this regard (see Question 3-1). Similarly, the ALRC considers that the appropriate financial requirements in order to hold and maintain a litigation funding licence, including the capital backing of funders, need to be determined and the ALRC seeks further information in this regard (see Question 3-2).

3.9 The requirements upon litigation funders to manage conflicts of interests should start with ASIC Regulatory Guide 248, with which litigation funders must already comply as a condition of their exemption from an AFSL.[8] More information regarding the management of conflicts of interest is set out in Chapter 4.

3.10 A key part of the proposed licence regime for litigation funders is an annual audit. That audit will not only provide an independent assessment of the funder's finances but would include a compliance audit to assess whether the funder has met,

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5 See *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455. The High Court found that litigation funding agreements were a 'credit facility' within the meaning of reg 7.1.06 of the *Corporations Regulations 2001* (Cth) and therefore fell within an exemption that removes litigation funding from the definition of 'financial product' under Chapter 7 of the *Corporations Act 2001 (Cth)*.

6 An application for an AFSL must be made to ASIC. See *Corporations Act 2001* (Cth) s 913A.

7 The Office of the Legal Services Commissioner (NSW) has previously expressed the view that given litigation funders are involved in litigation in the courts they should be regulated by the Legal Services Commissioner in a manner similar to an incorporated legal practice. See: The Office of the Legal Services Commissioner, *The Regulation of Third-party Litigation Funding in Australia*, Discussion Paper (March 2012), 10.

8 Australian Securities and Investments Commission, 'Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest'.

and continues to meet, the conditions of its licence. This will provide oversight of the litigation funder's compliance and provide a key plank of the licensing scheme's integrity.[9]

3.11 AFS licensees are required to have in place a dispute resolution process for retail clients[10] that includes:

- internal dispute resolution (IDR) procedures that meet ASIC's standards,[11] and
- external dispute resolution (EDR) provided by the Financial Ombudsman Service (FOS) or Credit and Investments Ombudsman (CIO).

3.12 Both of these EDR schemes will transition to the Australian Financial Complaints Authority later this year.[12] Whether or not litigation funders should be members of the Australian Financial Complaints Authority's dispute resolution scheme as part of the litigation funding licensing regime is discussed below.

Existing regulatory requirements

3.13 Litigation funders are subject to regulatory requirements under the Corporations Act, the consumer protection provisions of the *Australian Securities and Investment Commission Act 2001* (Cth) (ASIC Act), and the general law, including equity.

General legal requirements

3.14 Consistent with all other corporations in Australia, incorporated litigation funders must comply with the Corporations Act, which provides minimum standards for corporate governance, constitutions and shareholding. Special purpose vehicles established to manage litigation funding businesses may be subject to particular investment regulations under the Corporations Act.[13] Those litigation funders operating under a trust structure must comply with state and territory trust laws as well as the common law generally.[14] Those funders that are listed on the Australian Securities Exchange (ASX) are contractually bound to comply with the ASX Listing Rules and

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9 Under the AFSL regime an auditor must report any identified breach of a licensee's obligations under the AFSL. See *Corporations Act 2001* (Cth) s 990k.

10 Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* Regulatory Guide 165 (February 2018). 'Retail Client' is defined in sections 761G and 761GA of the *Corporations Act 2001* (Cth). A person is a retail client unless they fall within an exception that means that they are a wholesale client such as: A person or entity that has obtained a qualified accountant's certificate stating they have net assets of at least $2.5 million, or a gross income for each of the last two financial years of at least $250,000.

11 ASIC must take into account Australian Standards ISO 10002–2006 *Customer satisfaction— Guidelines for complaints handling in organizations* (ISO 10002:2004 MOD) when considering whether to make or approve standards or requirements relating to IDR—see *Corporations Regulations 2001* (Cth) r 7.6.02(1) and r 7.9.77.

12 *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth).

13 See, e.g., *Corporations Act 2001* (Cth) ch 2L, ch 5C, 5D.

14 See, e.g,. *Trust Act 1973* (Qld).

these are also enforceable under the Corporations Act.[15] There may also be specific obligations that apply as a matter of equity including fiduciary duties.[16]

3.15 All entities, including litigation funders, providing financial services with respect to a financial product must comply with requirements under the ASIC Act, which seek to provide protections for consumers of financial services. These protections include requirements that entities must not:

- engage in unconscionable conduct;[17]
- engage in conduct that is misleading or deceptive, or is likely to mislead or deceive; and [18]
- make false or misleading representations.[19]

3.16 In addition, where the financial services are provided to an individual for personal or domestic purposes, there is an implied warranty in contracts for the supply of financial services that:

- the services will be rendered with due care and skill;[20] and
- the contract for services will be without any unfair terms.[21]

3.17 In addition, the Corporations Act creates the ASFL, a single licensing regime for financial sales, advice and dealings in relation to financial products, which includes securities, derivatives, general and life insurance, superannuation, margin lending, carbon units, deposit accounts and means of payment facilities.[22] Unless specifically exempted (as is the case with litigation funders), entities providing financial services in relation to financial products must hold a licence in order to operate lawfully.[23]

3.18 AFS licensees have a statutory obligation to do all things necessary to ensure that they provide financial services efficiently, honestly and fairly. AFS licensees have specific obligations relating to:

- conduct and disclosure;
- the provision of financial services;
- the competence, knowledge and skills of responsible managers, as well as their good fame and character;

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15 *Corporations Act 2001* (Cth) ss 793C, 1101B.

16 Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244, 250.

17 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA-12CC.

18 Ibid s 12DA.

19 Ibid s 12DF.

20 Ibid s 12ED.

21 Ibid ss 12BF-12BM. A contract term is defined to be unfair when it would cause a significant imbalance in rights and obligations and is not reasonably necessary to protect legitimate interests – see s 12BG.

22 *Corporations Act 2001* (Cth) s 911A.

23 Alongside this regime, credit facilities provided to consumers are subject to the *National Consumer Credit Protection Act 2009* (Cth) and the *National Credit Code*.

- ensuring representatives comply with the financial services laws;
- the training and competence of representatives and authorised representatives;
- compliance, managing conflicts of interest and risk management;
- the adequacy of financial, technological and human resources; and
- dispute resolution and compensation arrangements (if clients include retail clients).[24]

3.19 These statutory obligations are supported by detailed Regulatory Guides published by ASIC, which explain how financial service providers can comply with their statutory obligations.[25] These compliance obligations are a mixture of general requirements, and requirements related to the provision of particular types of financial product. In relation to licensing (and more broadly), ASIC has power under the Corporations Act to exempt a person or a class of persons from particular provisions and to modify the application of particular provisions to a person or class of persons.[26]

3.20 For litigation funders, additional regulatory oversight is provided by the courts on a case by case basis. The Federal Court requires litigation funding arrangements in class actions to be disclosed to the court, together with the solicitors' costs agreement, at the commencement of litigation.[27] The courts do scrutinise the funding agreement in detail. It is routine in class actions for the Federal Court to require the litigation funder to provide security of costs. It is at that point the capital adequacy of the litigation funder becomes important, not only to the class members and their solicitors, but also to the defendant.

Policy basis for regulating litigation funders

3.21 In 2014, the Productivity Commission recommended that litigation funders should be licensed to ensure that they 'hold adequate capital to manage their financial obligations'. The Commission explained that:

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24 *Corporations Act 2001* (Cth) s 912A.

25 See, e.g., Australian Securities and Investments Commission, *Licensing: Administrative Action against Financial Service Providers* Regulatory Guide 98 (July 2013); Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* Regulatory Guide 165 (February 2018); Australian Securities and Investments Commission, *Licensing: Discretionary Powers* Regulatory Guide 167 (December 2016); Australian Securities and Investments Commission, *Licensing: Financial Requirements* Regulatory Guide 166 (September 2017); Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* Regulatory Guide 165 (February 2018); Australian Securities and Investments Commission, *Licensing: Managing Conflicts of Interest* Regulatory Guide 181 (August 2004); Australian Securities and Investments Commission, *Licensing: Meeting the General Obligations* Regulatory Guide 104 (July 2015); Australian Securities and Investments Commission, *Licensing: Organisational Competence* Regulatory Guide 105 (December 2016).

26 See e.g., *ASIC Corporations (Foreign Financial Service Providers—Limited Connection) Instrument 2017* (Cth).

27 Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' cl 5.

> [w]hile the Commission supports litigation funding, it recognises that consumers need to be adequately protected—in particular to provide some assurance that funders will follow through on financial promises.[28]

3.22 The Productivity Commission also explained that:

> While the Commission understands that licensing and capital requirements could create some barriers to entry and advantage incumbents in the market, it nevertheless considers these are justified to ensure that only reputable and capable funders enter the market. Moreover, given the case-by-case nature of court ordered security for costs (and that these only cover defendant legal costs), the Commission remains in favour of a licence regime to verify the capital adequacy of litigation funders in addition to court oversight.[29]

3.23 The ALRC agrees with the Productivity Commission's assessment and considers that a licence regime for litigation funders:

- has the potential to reduce the risk of financial loss to plaintiffs and defendants by reducing the risk that funders will be unable to meet their liabilities when due;
- can encourage compliance by litigation funders with their obligations given the risk of losing the right to participate in the market as litigation funders in the event of a breach of those obligations; and
- can potentially enhance the reputation of litigation funders and protect the integrity of the class action system by reducing any disreputable conduct.

3.24 As litigation funders are not required to be licensed, there are no minimum standards required for persons to hold themselves out to the market as a litigation funder.[30] Further, as set out above, there are broad statutory requirements that funders must meet, however there is limited ongoing supervision of the conduct of litigation funders outside the court room.[31]

3.25 There is limited evidence of failure of a litigation funder in Australia (but see *Clasul Pty Ltd v Commonwealth* [2016] FCA 119). Notwithstanding this fortuitous circumstance, the financial viability of litigation funders to meet their promises is valuable to both defendants (in terms of security for costs) and applicants (in terms of the prompt payment of legal fees and the indemnity for adverse costs orders).

3.26 In addition, the litigation funding market is broadly analogous with insurance arrangements and managed investment schemes in terms of the pooling of claims through the class action regime and the funding of that pool to manage risk.[32] These

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28 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014).

29 Ibid.

30 For a theoretical explanation of the value of licensing regimes see Hayne Leland, 'Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards' (1979) 87(6) *Journal of Political Economy* 1328.

31 The key regulatory oversight by ASIC for litigation funders is typically reactive—responding to any complaints made about a litigation funder's compliance with its statutory obligations under the *ASIC Act*.

32 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009)180 FCR 11. It is for this reason that the ALRC has chosen the AFSL as a model rather than considering credit licensing models.

regimes are covered by the requirements for an AFSL.[33] Moreover, the information that ought to be provided to class members when considering signing a litigation funding agreement is as much about the likely financial return as the process of litigation itself. Given the existence of a broad licensing regime for financial sales, advice and dealings in relation to financial products, there does not appear to be a sound policy basis for exempting litigation funding from a comparable licensing requirement. This is particularly so given that the ability of litigation funders to meet their obligations is dependent on their access to capital. At the time of granting litigation funders an exemption from the AFSL, the Government argued that such an exemption would improve access to justice. The ALRC considers that a licensing regime can be implemented without reducing access to justice,[34] particularly given the profitability of the market in Australia.

3.27 Litigation funding is involved in the justice system, which is a public good, and yet the character and behaviour of funders is not subject to ongoing routine oversight, nor even a requirement to meet certain minimum standards before conducting a litigation funding business. The conduct of litigation funders, while mediated by the role of solicitors as officers of the courts, has a direct bearing on the reputation of the civil justice system. A licensing regime can assist to protect that reputation by imposing qualifications and standards of conduct appropriate to the operation of a litigation funding enterprise.

3.28 The Federal Court plays an essential role in the regulation of litigation funders.[35] However, courts are adjudicators and not investigators. The courts are regulating the funder through the prism of the funder's impact on the particular litigation before the court. The courts have limited capacity to view the totality of a funder's commitments to litigants at any given time and much less so over time. The courts cannot directly supervise litigation funders for the proper adherence to good governance and legal compliance more generally. The licensing regime can do this, particularly through the auditing requirement.

3.29 A licensing regime, in and of itself, cannot guarantee compliance with the law. As the early evidence before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry shows, the effectiveness of a licensing regime depends on strong oversight and enforcement by the regulator.[36] Given the ongoing interaction between the courts and litigation funders, information sharing between the courts and the regulator will be required to ensure that any licensing regime is appropriately enforced. Evidence of misconduct, or unsatisfactory conduct,

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33 See *Corporations Act 2001* (Cth) ch 7. In contrast to the lack of oversight for litigation funders, insurers who meet the costs of litigation defence are regulated and supervised by the Australian Prudential Regulation Authority (APRA) as well as ASIC—see *Insurance Act 1973* (Cth) and *Australian Prudential Regulation Authority Act 1998* (Cth).

34 Australian Government, Treasury, 'Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)' (October 2015).

35 See, Federal Court of Australia, above n 27, cl 5.

36 See, Evidence by Marianne Perkovic (Commonwealth Bank) to Commonwealth Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Transcript of Hearing*, Thursday 19 April 2018 P-1327 P-1351.

by a litigation funder that comes to the attention of the court during litigation should be rigorously investigated by the regulator.

3.30 The litigation funding market is very small when compared with the financial services and credit markets in Australia. There are approximately 25 litigation funders operating in Australia. The size of the market could be an argument for less regulation. Self-regulation was the model adopted in the United Kingdom (UK). In 2010, the Civil Litigation Costs Review (UK), proposed self-regulation, as opposed to statutory regulation, for the litigation funding industry. Lord Justice Jackson took the view that the third-party funding industry was still 'nascent' in the UK and parties involved were generally commercial and therefore had access to full legal advice before making such funding arrangements. Lord Justice Jackson noted that the question of whether there should be statutory regulation of third-party funders ought to be re-visited if the third-party funding market expands.[37]

3.31 The Association of Litigation Funders of England and Wales has published a Code of Conduct for Litigation Funders that acts as an industry regulation for members who, by becoming members of the Association, agree to abide by the code.[38] The Code sets out requirements relating to the conduct of funders, including: ensuring promotional literature is clear and not misleading; not seeking to influence the client's lawyer; and capital adequacy requirements.[39] Under clause 9.4 the funder must also maintain financial resources to meet its obligations to finance all the disputes it has agreed to fund, and be audited annually.[40] As part of that requirement, the funder must maintain access to a minimum of £5 million of capital or such other amount as stipulated by the Association.[41]

3.32 In 2014, the Productivity Commission examined the self-regulation model operating in England and Wales but considered a statutory regulatory model more effective:

> The Code does not have regulatory force, but can have some effect, provided the members voluntarily comply. For example, Argentum Capital offered to withdraw its membership from this scheme subsequent to the Association making enquiries about concerning media reports.
>
> While such requirements are important, the Commission considers they are more appropriately set out explicitly in court rules and through licensing under enforceable legislation (in relation to capital adequacy), rather than by a self–regulatory industry code (references omitted).[42]

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37 Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) 119.

38 Association of Litigation Funders (UK), *Code of Conduct for Litigation Funders* (January 2018). There are currently nine members of the ALF: Augusta Ventures, Balance Capital, Burford Capital, Calunius Capital, Harbour Litigation Funding, Redress Solutions, Therium Capital, Vannin Capital and Woodsford Litigation Funding.

39 Ibid cl 6 and cl 9.

40 Ibid cl 9.4.1-9.4.4.

41 Ibid cl 9.4.1-9.4.2. For a discussion of the code see Leslie Perrin, 'Chapter 5: England and Wales', in Leslie Perrin *The Third Party Litigation Funding Law Review* December 2017, Gideon Roberton, London, 41.

42 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014).

3.33 The ALRC agrees with the Productivity Commission's assessment that a self-regulatory model may be insufficient in the Australian context.

Qualifications for licensees

Question 3–1 What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

3.34 A key value of a licensing regime is its ability to provide a minimum threshold for entry into the industry.[43] It provides a mechanism for assessing the character and qualification of those who seek to enter the business of litigation funding. Given the role litigation funders play in litigation and their provision of a financial service, the ALRC has considered the existing requirements for entry into the legal profession and the requirements for AFS licensees. In this regard, the ALRC notes that many litigation funding businesses are run by those with an extensive background in civil litigation, often as partners or principals of large legal firms, and that being able to assess the legal merits of a case is essential for the success of any litigation funding business, which requires a high success rate in funded litigation to be sustainable.[44] Similarly, expert management of capital and cash flow is required to ensure a sustainable and competitive business model.

3.35 While lawyers and AFS licensees provide useful potential models, the ALRC seeks more information from stakeholders as to the appropriate character and skill requirements for litigation funders in order to protect consumers of litigation funding services and other litigants who may rely on promises made by a litigation funder during the course of litigation.

Australian Financial Services Licence

3.36 The Corporations Act imposes both character and qualification requirements on AFSL holders. In terms of character, an AFSL applicant must satisfy ASIC that they are of good fame or character or, if the applicant is a body corporate, that the body corporate's responsible managers are of good fame or character. When assessing good fame or character, ASIC is required to consider: any convictions a person may have had in the previous 10 years for serious fraud; whether a person has previously had an AFSL suspended or cancelled; and whether a person has previously been banned or disqualified from serving as a director.[45]

3.37 In terms of qualifications, Regulatory Guide 105 sets out the requirements for 'organisational competence' which is assessed by reference to the knowledge and skills

43 Leland, above n 30.
44 See, eg, IMF Bentham, *Annual Report 2016-17*.
45 *Corporations Act 2001* (Cth) s 913B.

of an organisation's responsible managers.[46] Where an ASF licensee runs a particular financial service business, such as a registered scheme, that licensee is required to have:

(a) a responsible manager with knowledge and skills in relation to the operation of a registered scheme; and

(b) a responsible manager with knowledge and skills in relation to investment in financial assets (i.e. the asset under management).[47]

3.38 ASIC provides five options for demonstrating that the responsible managers of a body corporate have the necessary skills and qualifications to provide the services and products under the licence.[48] The five options are different combinations of training, qualifications and experience for demonstrating that responsible managers have knowledge and skills appropriate to their role. See table 1.

Table 1: The five options

Option	Knowledge Component	Skills Component
1	Meet widely adopted and relevant industry standard or relevant standard set by APRA	3 years relevant experience over past 5 years
2	Be individually assessed by an authorised assessor as having relevant knowledge equivalent to a diploma	5 years relevant experience over past 8 years
3	Be individually assessed by an authorised assessor as having relevant knowledge equivalent to a diploma	3 years relevant experience over past 5 years
4	Be individually assessed by an authorised assessor as having relevant knowledge equivalent to a diploma	3 years relevant experience over past 5 years
5	Provide a written submission that satisfies ASIC that the responsible manager has appropriate knowledge and skills for their role.	

Source: ASIC, Licensing: Organisational Competence, Regulatory Guide 105 (December 2016).

3.39 The ALRC envisages that the skills and knowledge requirements of a litigation funding licensee would cover both the financial skills required to operate a funding business and the legal skills to understand civil litigation, including an understanding of court rules and processes.

46 Australian Securities and Investments Commission, *Licensing: Organisational Competence* Regulatory Guide 105 (December 2016).
47 Ibid.
48 Ibid.

Legal profession

3.40 Under the *Legal Professional Uniform Law* (NSW), to become a legal practitioner, a person must have completed an approved 3-year bachelor of laws degree and either a course of practical legal training or 12 months supervised work experience, and be a fit and proper person to be admitted to the Australian legal profession.[49] In order to demonstrate that an applicant is a a fit and proper person, an applicant must:

- provide two statutory declarations as to the applicant's character made by persons who are not related to the applicant;
- disclose any academic and general misconduct during the course of the applicant's academic studies;
- disclose any convictions, including spent convictions;
- disclose whether the applicant has been the subject of disciplinary action, howsoever expressed, in another profession or occupation that involved a finding adverse to the applicant;
- disclose whether the applicant is or has been a bankrupt or has been an officer of a corporation that has been wound up in insolvency or under external administration; and
- disclose any other matters that might be relevant.[50]

3.41 The requirements for entering into the legal profession are considerably more onerous than those for obtaining an AFSL. This reflects that that admission to the legal profession involves being admitted as an officer of the court. As officers of the court, legal professionals owe particular duties to the court that enable the court to deal with legal professionals on the basis that they will act with appropriate candour and integrity.

3.42 It has been suggested that litigation funders should be regulated similarly to legal practitioners given their involvement in court litigation. The ALRC considers that this is not necessary as the litigation funder's involvement in the court process is mediated by the legal practitioners who act for the class members. It remains the primary responsibility of the legal practitioners to ensure that the litigation is run competently and in a manner befitting the practitioner's role as an officer of the court (see Chapter 4 for more information on conflicts of interest).

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49 *Legal Profession Uniform Admission Rules 2015* rr 5, 6, 15-19; and see comparable provisions in the other States and Territories.

50 *Legal Profession Uniform Admission Rules* 2015 rr 15-19.

Minimum financial resources

Question 3–2 What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

3.43 A key requirement of the licensing regime set out at Proposal 3-2 is that litigation funders would be required to have sufficient financial resources in order to conduct their business. The ALRC has not yet determined the appropriate financial requirements for a litigation funding licence. In this section, potential models such as the requirements under APRA, AFSL licence holders, the model from England and Wales, and some examples that have been suggested to previous inquiries are discussed.

The role of security for costs

3.44 There has been mixed support for a licensing regime for litigation funders in Australia, particularly a regime that imposes capital adequacy requirements. Many have expressed the view that a capital adequacy requirement for litigation funders is unnecessary, highlighting the existing protection provided by the security of costs regime.[51] That regime enables defendants to seek the provision of some form of security from the plaintiff (or litigation funder in the case of funded actions) to avoid a situation where the defendant is successful in the litigation but is unable to recover costs because the plaintiff is impecunious.[52] Maurice Blackburn submitted to the VLRC inquiry that

> the most efficacious and straightforward way of ensuring that funders are able to meet their financial obligations to pay adverse costs is by means of an order for security for costs.[53]

3.45 This view was supported by the Victorian Bar, Ashurst, and Slater and Gordon in submissions to the VLRC.[54] In particular, Slater and Gordon noted

> that courts have displayed a willingness to intervene to ensure that the form of security provided is acceptable – principally for the purpose of protecting defendants from the risk that any adverse costs order will not be recoverable, but with the indirect effect that representative plaintiffs are equally protected from the possibility that the

51 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* [2017] FCA 699 provides a useful summary of the current law on security of costs.

52 *Federal Court of Australia Act 1976* (Cth) s 56.

53 Maurice Blackburn, 'Submission No 13 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017).

54 Victorian Bar, 'Submission No 33 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017); Ashurst, 'Submission No 27 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017); Slater and Gordon Lawyers, 'Submission No 28 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017).

> funder may not have adequate capital and liquidity to meet its obligations under the funding agreement, at least in respect of the payment of the defendant's legal costs.[55]

3.46 The Australian Institute of Company Directors (AICD) noted in its submission to the VLRC that:

> If a security for costs order is made, courts commonly take a conservative approach to the amount awarded and the security will rarely cover all the defendant's costs in the proceeding.[56]

3.47 The AICD also raised that:

> A court, when determining whether to grant security for costs orders, is unlikely to be in a position to undertake an inquiry into the extent to which a third-party funder has made funding commitments to multiple parties across multiple jurisdictions.[57]

3.48 These views have been supported by a number of law firms that act regularly for defendants in class actions. Funders, such as IMF Bentham, have also supported the 'need for greater regulation, in particular relating to capital adequacy'.[58]

3.49 The ALRC is of the view that the mechanism for providing security for costs, while important, does not negate the need for a capital adequacy requirement as part of the licensing regime. The security for costs regime cannot protect, for example, the representative plaintiff from unpaid legal fees of its own solicitors in the event that a funder fails. The ALRC agrees with the Productivity Commission's assessment that a licensing regime to verify the capital adequacy of litigation funders is required. The appropriate capital adequacy standard for litigation funders needs careful consideration to ensure that it is sufficient but not so burdensome that it undermines access to justice.

APRA prudential regulation

3.50 The most stringent form of financial regulation in Australia is prudential regulation, which is administered by APRA.[59] APRA's prudential regulatory regime is designed to regulate entities that are critical to the ongoing health and viability of the Australian economy. These include authorised deposit-taking institutions (banks), life and general insurance and reinsurance companies, friendly societies and superannuation funds.[60] APRA establishes and enforces prudential standards and practices designed to ensure that, under all reasonable circumstances, financial promises made by the institutions it supervises are met within a stable, efficient and competitive financial system. APRA promotes financial stability by requiring institutions it supervises to manage risk prudently so as to minimise the likelihood of financial losses to those who use the services of regulated entities.[61]

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55 Slater and Gordon Lawyers, above n 56.
56 Australian Institute of Company Directors, 'Submission No 26 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017).
57 Ibid.
58 IMF Bentham, 'Submission No 25 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017).
59 *Australian Prudential Regulation Authority Act 1998* (Cth)
60 APRA, *Annual Report 2016-217*.
61 Ibid.

3.51 Prudential regulation of litigation funders would appear inappropriate for litigation funders given the small size of the litigation funding market in Australia and the limited risk of a contagion effect on the broader economy if a litigation funder failed. This was also the view that the Productivity Commission came to as part of its Access to Justice inquiry:

> a number of other considerations—including the size of the litigation funding market, that it is not integral to the overall stability of the financial system, and the intensity of promises made—together all suggest that litigation funding does not warrant full-scale prudential supervision by APRA (references omitted).[62]

ASIC regulation of AFS Licensees

3.52 AFSL holders, apart from those supervised by APRA, must have available adequate financial resources to provide the financial services covered by their licence.[63] In order to comply with this obligation, ASIC has provided additional guidance in Regulatory Guide 166 *Licensing Financial Requirements.* The guide provides a mixture of general requirements for all licensees and specific regimes for providers of particular financial products and services.

3.53 The base level financial requirements include a solvency, a net assets[64] requirement, a cash needs requirement and an audit requirement.[65] Additional tailored financial requirements apply to market and clearing participants, responsible entities, investor directed portfolio services, custodial or depository services, trustee companies, issuers of margin lending facilities, foreign exchange dealers, retail over-the-counter derivative issuers and crowd sourced funding intermediaries. AFS licensees that incur actual contingent liability to a client in the course of providing a financial service, must:

> hold at least the sum of:
>
> (a) $50,000; plus
>
> (b) 5% of adjusted liabilities between $1 million and $100 million; plus
>
> (c) 0.5% of adjusted liabilities for any amount of adjusted liabilities exceeding $100 million.
>
> There is a maximum requirement of $100 million ASLF.[66]

3.54 Thus if the AFSL requirements were adopted for litigation funders they would be required to provision (that is, hold in reserve) approximately 5.5% of their liabilities as a buffer.

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62 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 633.

63 *Corporations Act 2001* (Cth) s 912A(1)(d).

64 The ALRC acknowledges that litigation funding businesses are complex and there are different ways of valuing assets, particularly work in progress.

65 Australian Securities and Investments Commission, *Licensing: Financial Requirements* Regulatory Guide 166 (September 2017) RG 166.29 to RG 166.68.

66 Ibid RG 166.75.

3.55 The ASIC regulations are much less stringent than the APRA prudential requirements in that they are not designed to eliminate the risk of failure. They are focused on minimum requirements for asset backing and cash flow. As the Productivity Commission noted:

> Importantly, as with other financial regulation, it would only be practical for capital adequacy conditions to require management of the financial risk, not its elimination. For instance, the purpose of the current AFSL is to ensure that:
>
> - licensees hold sufficient financial resources to conduct their financial services business in compliance with the Corporations Act
> - there is a financial buffer that decreases the risk of disorderly or non–compliant wind-up if the business fails
> - there are incentives for owners to comply with the Corporations Act through risk of financial loss.
>
> An AFSL is not intended to prevent companies failing or becoming insolvent, nor does it guarantee compensation to consumers who suffer a loss. Nonetheless, the presence of the licence itself may provide adequate regulatory oversight to address the risk of disreputable operators (references omitted).[67]

3.56 The ALRC considers that the requirements for AFS licensees are a useful starting point for considering the types of financial requirements that may be appropriate as part of a litigation funding license. A modified version of the AFS licensee requirements was proposed by the US Chamber Institute for Law Reform to the VLRC inquiry into litigation funding. It proposed that litigation funders:

> (a) satisfy the 'Base Level Financial Requirements' set out in ASIC Regulatory Guide 166;
>
> (b) comply with the minimum financial requirements that apply to specific classes of AFSL holders. For example, a litigation funder will be subject to adjusted surplus liquid fund and liquid fund requirements in circumstances where the arrangement under which it conducts business means it is obliged as principal to claimants for an amount in excess of $1,000,000, or where the litigation funder otherwise holds property on trust for the claimants in the sum of $100,000 or more;
>
> (c) satisfy ASIC that it has sufficient assets to cover the potential liabilities associated with an unsuccessful case; and
>
> (d) maintain liquid capital reserves equal to at least twice the amount of its investments in litigation. ASIC should conduct an annual audit of the funder to ensure its financial soundness. This would ensure that a litigation funder is capable of paying legal fees, disbursements and any adverse costs order.[68]

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67 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 632.

68 US Chamber Institute for Law Reform, Submission No 19 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings* (22 September 2017).

Other approaches

3.57 In England and Wales, under the self-regulatory model managed by the Association of Litigation Funders of England and Wales, members of the association are required to hold £5 million in capital and have the capacity to cover aggregate funding liabilities under all of their litigation funding agreements for a minimum period of 36 months.[69]

3.58 In Singapore, recent amendments to the *Civil Law Act* and the *Civil Law (Third-Party Funding) Regulations* 2017 provide a new framework to allow funding in certain cases. To 'qualify' as a litigation funder under the *Civil Law Act*, the third-party funder must carry on the principal business, in Singapore or elsewhere, of the funding of the costs of dispute resolution proceedings to which the third-party funder is not a party; and have a paid-up share capital of not less than S$5 million or not less than S$5 million in managed assets.

3.59 A flat capital amount appears inconsistent with the ASIC approach to regulating AFSL holders who are required to hold capital reserves as a percentage of potential exposure to liability.

3.60 IMF Bentham discloses in its latest annual report that it has made a $14.5 million provision in its accounts to cover potential adverse costs.[70] How that amount compares to the company's total potential exposure to adverse costs, or the assessed risk of that exposure being realised, is not required to be set out in the accounts. How this compares with the ASIC standard is thus not clear as IMF Bentham no longer holds an AFSL. Moreover, that provision in the accounts only relates to adverse costs; a financial resources test for a litigation funding licence would potentially need to cover a litigation funder's ability to meet the costs of litigation as well. Nevertheless, the approach taken by IMF Bentham in including a contingent liability for adverse costs as a percentage of its total potential exposure may be a useful model.

Overseas funders

3.61 One of the concerns raised during early consultations was that many funders were based overseas and would be unwilling to bring capital to Australia to satisfy the licence requirement. Consistent with that view, Litigation Funding Solutions submitted to the VLRC that it:

> believes that a capital adequacy requirement or ratio would not be conducive to a competitive market place. The Funders who are based offshore have most of their assets overseas even though they are heavily involved in Australian matters. They hold little or no capital here in Australia. Imposing a minimum capital requirement for litigation funders to operate in Australia could remove a large quantity of funding

69 Association of Litigation Funders (UK), *Code of Conduct for Litigation Funders* (January 2018) cl 9.4.1-9.4.4.

70 IMF Bentham, *Annual Report 2016-17*, 63.

> from Australia. If this occurred, the access to justice would be adversely impacted for many people. This would not help improve access to justice for potential Plaintiffs.[71]

3.62 The existing AFSL regime allows companies and entities that are prudentially regulated overseas to apply for exemption from the financial regulatory requirements in Australia and this exemption is ordinarily given provided the foreign prudential requirements are comparable to Australia's requirements.[72] The ALRC considers that a comparable exemption should apply to the litigation funding licence. Accordingly, there would be no need for foreign litigation funders to meet the specific Australian requirements provided they meet comparable requirements in their home jurisdiction.

3.63 The ALRC acknowledges that not all overseas funders would be regulated in a comparable manner to that proposed and as such would need to meet a capital adequacy standard in Australia.

Australian Financial Complaints Authority

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

3.64 A key requirement of the licensing regime set out at Proposal 3-2 is that litigation funders would be required have a complaint dispute resolution system, as is the case currently for AFS licensees and credit licensees under the *National Consumer Credit Protection Act 2009 (Cth)*.[73] These existing dispute resolution forums are designed to protect consumers of financial and credit services by:

- ensuring that service providers have the necessary processes in place and are able to resolve complaints and disputes internally; and
- where internal dispute resolution is not possible, providing a forum to resolve a dispute in a no-cost and informal manner that is binding on the service provider.[74]

3.65 The ALRC considers that licensed litigation funders should provide consumers with commensurate protection through the appropriate resolution of disputes but has not yet determined the best model.

3.66 The Australian Financial Complaints Authority (AFCA) will replace the Superannuation Complaints Tribunal (SCT), the Financial Ombudsman Service (FOS),

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71 Litigation Funding Solutions, Submission No 11 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings* (22 September 2017).

72 Australian Securities and Investments Commission, *Licensing: Financial Requirements* Regulatory Guide 166 (September 2017) RG 166.18.

73 Australian Securities and Investments Commission, *Licensing: Internal and External Dispute Resolution* Regulatory Guide 165 (February 2018).

74 Ibid.

and the Credit and Investments Ombudsman (CIO) from November 2018.[75] The AFCA will be established in accordance with the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*, which passed through parliament in February 2018.

3.67 AFS licensees, unlicensed product issuers, unlicensed secondary sellers, Australian credit licensees and credit representatives, regulated superannuation funds (other than self-managed superannuation funds), approved deposit funds, retirement savings account (RSA) providers, annuity providers, and life policy funds and insurers will all be required to be members of AFCA.[76]

3.68 If access to AFCA was granted to consumers of litigation funding services, it would be necessary to determine in what circumstances access to AFCA would be appropriate. How the mandate of the AFCA would complement and not overlap with the primary role of the courts in supervising the class action regime needs to be determined. Nevertheless, the ALRC notes that those litigation funders (like IMF Bentham) that did hold an AFSL were subject to the jurisdiction of the AFCA's predecessor, the FOS, and the ALRC is not aware of any jurisdictional hurdles this created.

75 Explanatory Memorandum, *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth).

76 *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) pt 3.

4. Conflicts of Interest

Contents

Introduction

4.1 Class action proceedings, especially those that are funded by third-party litigation funders, give rise to particular circumstances likely to result in actual or perceived conflicts of interests and duties for funders and for solicitors who represent class members. While funding agreements generally make clear that solicitors act for the class members, funders, at least in the Australian context, are often intimately involved in proceedings. Solicitors may be influenced by the commercial needs of funders with whom they have established a relationship, and may face further conflicts when there are multiple classes within the one action.

4.2 Conflicts are inherent in some aspects of the Australian class action regime. Nonetheless, if not adequately addressed, conflicts can result in outcomes that benefit funders and/or solicitors, and which are detrimental to some or all class members. In short, unmanaged conflicts can undermine the integrity of class actions and the civil justice system.

4.3 In this chapter, the ALRC identifies multiple potential conflicts for solicitors acting in class action proceedings, and suggests that these, and the distinct nature of class actions, support the proposal that solicitors practising in class actions should be able to receive accreditation through a continuing education program. Accreditation

will also assist in the appointment of appropriate legal representation by class members.

4.4 It is also proposed that prospective class members should receive information regarding actual and perceived conflicts of interest that may affect the conduct and management of their claim at the first available opportunity.

4.5 If the licensing regime for litigation funders proposed in Chapter 3 is not adopted, further action may be required by litigation funders to avoid and manage conflicts of interest. It is proposed that reporting requirements be incorporated into the existing ASIC Regulatory Guide 248, requiring demonstrable compliance with the guide.

4.6 The ALRC recognises that not all conflicts can be managed, and proposes prohibiting solicitors/law firms from having an interest in litigation funding entities that are funding the very proceedings being conducted by the solicitors/law firms. This approach has already been taken by the courts.

Conflicts of interest that may arise in class action proceedings

4.7 Even though the objective of class members, solicitors and third-party litigation funders is often aligned—to resolve the matter favourably for the class—class action proceedings produce situations of actual or perceived conflict for solicitors and participating third-party litigation funders.[1] For example, litigation funders have an interest in minimising the legal and administrative costs associated with the proceeding and in maximising their return.[2] As observed by Professor Michael Legg:

> Litigation funders are profit-oriented entities that fund a portfolio of cases to further their own commercial interests, including the interests of their investors, which may conflict with the interests of group members.[3]

4.8 It may be in the commercial interests of a litigation funder to accept a settlement offer,[4] even when the representative plaintiff may wish to negotiate further to produce a better settlement outcome, or to proceed to trial, where there is a risk of losing.[5]

4.9 In its consultation paper on litigation funding and group proceedings, the Victorian Law Reform Commission (VLRC) identified other scenarios in which

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1 Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in Tripartite Contract, and the Lens of Theory' (2016) 39(1) *UNSW Law Journal* 165.

2 Australian Government, Treasury, 'Post-Implementation Review: Litigation Funding Corporations Amendment Regulation 2012 (No 6)' (October 2015) 6.

3 Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 593.

4 Australian Securities & Investments Commission, 'Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest' [248.14].

5 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 613; Law Council of Australia, 'Submission 21 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (4 October 2017) 8.

conflicts of interests and duties may occur in the tripartite relationship formed in funded class action matters, including:

> **The recruitment of prospective class members.** As the litigation funder has an incentive to maximise the number of class members signing up, advertisements may give 'undue prominence' to the prospects of success of proceedings. Maximising the number of class members also increases the likely divergence in claims between class members, the expected length and complexity of proceedings, and the potential for lawyers to face conflicts of interest when acting for all class members.
>
> **The terms of any funding agreement.** The litigation funder has an incentive to maximise the amount recoverable in the event of a successful outcome, and may wish to participate in decisions affecting the outcome of proceedings. The lawyers will have an incentive to receive legal fees, and the class members will wish to minimise all costs and maximise their return.
>
> **Determination of strategies employed to pursue the claim.** The lawyers may consider aspects of the case to have legal merit, yet the litigation funder may not wish to finance these aspects of proceedings. Alternatively, where a representative plaintiff has a weak claim, a defendant may make an offer for discontinuance which, if accepted, would be against the interests of class members with stronger claims.
>
> **Determination of confidential information**. The lawyers acting for a class may feel that the best chance of settlement is achieved through disclosure of due diligence carried out by the litigation funder as to the likely success of the claim. For commercial reasons, the funder may not wish such disclosures to be made.
>
> **Settlement.** The litigation funder may want to settle, yet class members or lawyers may wish to pursue the legal claim. The types of settlement, including offers of settlement in kind rather than cash, may also cause a conflict between the wishes of the class members and the litigation funder.
>
> **Settlement distribution schemes.** While class members have an incentive to receive any amounts from proceedings as soon as possible, the lawyers administering the settlement distribution scheme must assess the merits of individual claims and distribute amounts accordingly. The lawyers continue to incur legal costs during settlement distribution schemes, which will diminish the amounts received by class members.[6]

4.10 Other actual or perceived conflicts of interests and duties that may arise for solicitors acting for plaintiffs in class action proceedings include particular conflicts of duty and duty. For example, solicitors acting for the representative plaintiff owe a fiduciary duty to the representative plaintiff, while owing the same duty to the entire class.[7] This is the case even in open class actions, where the group members can number in the thousands and many may remain unidentified.[8] Class members may not have suffered the same damage and may not be seeking the same remedy. This can give rise to a conflict between the duties owed by a solicitor to the representative plaintiff and those owed to the rest of the group, or between different categories of

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6 Victorian Law Reform Commission, 'Access to Justice—Litigation Funding and Group Proceedings' (Consultation Paper, July 2017) 44.

7 Allens, 'Submission 12 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017) 8.

8 See, eg, *Kelly v Willmott Forests Ltd (in liq)* (No 4) (2016) 335 ALR 439 [220], [308].

members within the group. As observed by law firm Allens, it may be difficult for plaintiff solicitors to 'act in the best interests of all group members when these interests may not necessarily align, and may in fact compete with each other'.[9]

4.11 It has been suggested that, to discharge the fiduciary obligation owed to the class by solicitors, the class must be narrowly defined so that all class members are asserting the same damage and loss. This would, however, undermine the 'very object' of the statutory class action regime to 'promote access to justice by allowing for groups with varying degrees of difference in the claims to band together so as to achieve economies of scale and share costs'—an object that is 'arguably fundamentally at odds with the requirements of fiduciary law'.[10]

4.12 Duty-duty conflicts may also arise when a solicitor acts for both a funder and the members. There may be an actual or perceived conflict for solicitors when funders retain solicitors to represent class members. This may be a frequent occurrence: as observed by the Australian Securities and Investment Commission (ASIC), members in funded matters do not usually engage their own solicitors.[11]

4.13 If not adequately identified and managed, conflicts of interest may benefit some class action participants rather than (or in advance of) all or some of the class members.[12] This provides for poor civil justice outcomes, and runs counter to the objectives of the class action regime.

Regulating conflicts of interests for litigation funders

4.14 The most appropriate framework by which to regulate litigation funders has long been a point of contention. In the case of *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd*,[13] the Full Federal Court of Australia found that the litigation funding arrangements under consideration in that matter constituted a 'managed investment scheme' (MIS). A consequence of this decision was that, unless otherwise exempted, litigation funders would need to comply with the obligations pertaining to a MIS under the *Corporations Act 2001* (Cth) (Corporations Act)—which included requirements to manage conflicts of interest under an Australian Financial Services Licence (AFSL).[14]

4.15 In 2011, the NSW Court of Appeal held that a litigation funding agreement was a 'financial product' under s 763A of the Corporations Act because it was a facility

9 Allens, above n 7, 8.
10 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *UNSW Law Journal* 914, 917.
11 Australian Securities & Investments Commission, above n 4, [248.13].
12 Victorian Legal Services Board and Commissioner (Vic), 'Submission 10 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2016) 3.
13 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (2009) 180 FCR 11*.
14 The requirements of an AFSL are discussed in Chapter 3.

through which financial risk was managed.[15] On appeal, the High Court determined that the funder in this case was a 'credit facility'.[16]

4.16 In response to these findings, the Government determined to exempt litigation funders from the definition of an MIS[17] on the condition that funders had necessary processes in place to manage conflicts of interest.[18] The explanatory statement to the relevant regulation said:

> The Federal Court's decision would have imposed a wide range of requirements that apply to MIS, such as registration, licensing, conduct and disclosure requirements on litigation funders and their arrangements with their clients. The Government considers that these requirements are not appropriate for litigation funding schemes. The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. The Government's main objective is therefore to ensure that consumers do not lose this important means of obtaining access to the justice system.[19]

4.17 Exempt litigation funders are required to manage conflicts of interest, and are subject to the ASIC Regulatory Guide 248. Obligations set out in Regulatory Guide 248 are further discussed below.

4.18 Conflicts of interest are also managed and regulated through other means. Litigation funders remain subject to their contractual obligations.[20] They are subject to the unconscionable conduct and consumer protection provisions in the *Australian Securities and Investment Commission Act 2001* (Cth) (ASIC Act).[21] This includes misleading representations;[22] unfair contract terms;[23] unconscionable conduct;[24] and consumer protection, including misleading or deceptive conduct and false or misleading representations.[25] Fines are attached to misconduct under these provisions,[26] and an action for damages may be taken for unconscionable conduct or consumer protection contraventions.[27] They are also subject to equitable obligations under the general law.[28] As noted by the VLRC, these provisions:

> address the risks of an unscrupulous litigation funder imposing unfair or extortionate terms in funding agreements, misleading clients about the advantages and

15 *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50.
16 *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455.
17 *Corporations Amendment Regulation 2012* (No. 6), which amended the *Corporations Regulation 2001* (Cth).
18 *Corporations Regulations 2001* (Cth) reg 7.6.01AB.
19 Explanatory Statement, Select Legislative Instrument 2012 No 172.
20 As set out in Chapter 3.
21 *Australian Securities and Investments Commission Act 2001* (Cth) pt 2, div 6.
22 Ibid s 12BB.
23 Ibid sub div BA.
24 Ibid sub div C.
25 Ibid sub div D.
26 Ibid sub div G.
27 Ibid s 12GF(1).
28 See, eg, Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244.

> disadvantages of litigation or failing to disclose all relevant aspects of the agreement.[29]

4.19 Conflicts are also managed by the Court. The Federal Court Class Action Practice Note (GPN-CA) states that any litigation funding agreement should include provisions for managing conflicts of interest between funded class members, the solicitor and litigation funder.[30]

ASIC Regulatory Guide 248

4.20 Litigation funders are in a unique position. They fund litigation and can give directions to the plaintiff's solicitors, but they are not the client.[31] This can create numerous situations of conflicts not addressed by the regulatory mechanisms that aim to manage conflicts mentioned above. These are instead included in Regulatory Guide 248, a comprehensive document requiring funders to have in place, and follow, continual 'robust arrangements for addressing potential, actual or perceived conflicts of interest'.[32] Failure to maintain adequate practices and follow certain procedures for managing these conflicts is an offence.[33]

Identified conflicts affecting litigation funders

4.21 Regulatory Guide 248 identifies that conflicts can arise for litigation funders when: a solicitor acts for both funder and class members; there is a pre-existing legal or commercial relationship between a funder, solicitors and/or members; and a funder has control of, or has the ability to control, the conduct of proceedings.[34] It further notes:

> The nature of the arrangements between the parties involved in a litigation scheme ... has the potential to lead to a divergence between the interests of the members and the interests of the funder and lawyers because:
>
> - The funder has an interest in minimising the legal and administrative costs associated with the scheme, and maximising their return;
> - Lawyers have an interest in receiving fees and costs associated with the provision of legal services; and
> - The members have an interest in minimising the legal and administrative costs associated with the scheme, minimising the remuneration paid to the funder and maximising the amounts recovered from the defendant.[35]

4.22 These identified conflicts could affect: the recruitment of prospective members; the terms of any funding agreement; and any decision to settle or discontinue the action.

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29 Victorian Law Reform Commission, above n 6, [3.21].
30 Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' [5.9].
31 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.
32 Australian Securities & Investments Commission, above n 4, [248.18].
33 *Corporations Regulations 2001* (Cth) reg 7.6.01AB(3).
34 Australian Securities & Investments Commission, above n 4, [248.13].
35 Ibid [248.11].

Adequate protection of members

4.23 Regulatory Guide 248 aims to give practical guidance to litigation funders on how they may decide to meet their obligations concerning conflicts of interest.[36] It prescribes that the commercial interests of funders need to be 'pursued in a manner that ensures adequate protection of members' interests'.[37]

4.24 Protecting the interests of members is expected to be done through effective disclosure, which is considered to be a 'key mechanism' to manage potential and actual conflicts of interest.[38] Disclosure should include, for example, clearly disclosing when certain members of the scheme are likely to receive a greater proportion of any settlement because they have helped fund the claim.[39]

4.25 The funding agreement must also protect the interests of members. As Regulatory Guide 248 notes:

> Members do not always have legal knowledge, and may not be well placed to negotiate a funding agreement or have the ability to assess the terms they agree to. This can create an asymmetry of bargaining power between the funder and the members.[40]

4.26 Certain terms must be included in the funding agreement,[41] including a cooling-off period so that members may seek legal advice, and an obligation for solicitors to give priority to the instructions given by a member over those of a funder.[42]

4.27 Regulatory Guide 248 requires further that, when a matter has settled prior to the claim being filed with the court, the terms of the settlement must be approved by counsel, who must be mindful of procedures and policies to protect the interests of class members.[43] Counsel must be satisfied that the settlement is 'fair and reasonable', taking into account, among other things: the amount offered to each member; the prospects of success in the proceeding; the likelihood of members obtaining judgment for an amount significantly in excess of the settlement sum; the cost of proceedings if continued to judgment; whether the funder may refuse to fund further proceedings if the settlement is not approved; and whether settlement involved any unfairness to any members for the benefit of others.[44]

Adequate practices

4.28 To demonstrate the implementation of and adherence to adequate practices, litigation funders must have documentation to show that: a review has been conducted

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36 Ibid 2.
37 Ibid [248.49].
38 Ibid [248.51].
39 Ibid [248.54].
40 Ibid [248.69].
41 In addition to providing that the funding agreement must be consistent with the unconscionable conduct and consumer protection provisions of the ASIC Act.
42 Australian Securities & Investments Commission, above n 4, [248.71].
43 Ibid [248.88].
44 Ibid [248.94]–[248.95]. This approach aligns with the test applied by the Federal Court in approving the settlement of a representative proceeding under the *Federal Court of Australia Act 1976:* See Chapter 7.

to identify and assess potential conflicting interests; procedures have been written to identify and manage conflicts of interest; and these procedures have been implemented. The written procedures are required to be reviewed regularly, 'at least every 12 months', and must include procedures that are monitored and managed by senior management or partners about protecting the interests of members and prospective members.[45]

4.29 Regulatory Guide 248 also includes procedures dealing specifically with situations where:

- **The solicitor acts for both the funder and member, or there is a pre-existing relationship between any of the parties:** If there is a relationship between funder, solicitors and members, the relationship needs to be 'prominently' disclosed to members,[46] with enough detail to allow members to make informed decisions about how the relationship may affect the service being provided to them.[47]

- **There is no direct contractual relationship between the solicitor and the members:** If there is no direct contractual relationship between the solicitor and the members, any funder is to engage the solicitor on terms that make clear that if there is a divergence of interests between the funder and members, the solicitor ensures that the interests of the members are adequately protected.[48]

- **The solicitor acts solely for members yet receives instructions from the funder:** Regulatory Guide 248 does not consider that the solicitor-client relationship (when the solicitor acts solely for the members) impedes the solicitor from receiving instructions from the funder, or the ability of the solicitor to 'consider these instructions in light of their obligation of the members'.[49]

4.30 The obligations set by Regulatory Guide 248 are scalable—what is required to meet them will vary depending on the nature, scale and complexity of the litigation scheme.[50] 'Nature, scale and complexity' include factors such as: the number of members of the litigation scheme; the potential for conflicts of interest to arise; identity of the group members; legal representation of the group members; and the structure of the litigation scheme. It is noted that, for small and simple scheme arrangements, management of conflicts could include meetings with affected members and periodic reviews of files and records. Large, complex schemes may require detailed policy manuals, dedicated staff, internal structures and reporting lines, and comprehensive disclosure of potential and actual conflicts of interest.[51]

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45 Ibid table 1, p 11.
46 Ibid [248.81].
47 Ibid [248.85].
48 Ibid [248.77].
49 Ibid [248.79].
50 Ibid 12.
51 Ibid [248.32].

Reviews of Regulatory Guide 248

4.31 A post-implementation review of *Corporations Amendment Regulation 2012* (No 6) was published by the Department of the Treasury (Cth) in October 2015.[52] This review suggested that the approach taken by Government and ASIC had been successful in maintaining access to justice—evidenced by an increase in filings of class actions and the number of litigation funders active in the market. It also reported that the cost of compliance with Regulatory Guide 248 was low.[53]

4.32 Stakeholders who made submissions to that inquiry were divided in their support for Regulatory Guide 248. Some suggested that the conflict of interest regulation and guidelines had not provided any additional benefit to consumers. They had instead duplicated pre-existing constraints on solicitors, and had unnecessarily increased the cost of litigation funding. Other stakeholders suggested that Regulatory Guide 248 did not provide a mechanism to enforce the requirement to have procedures in place to address conflicts of interest, and that the existing regulations remained insufficient to deal with all potential conflicts of interests arising out of the complex relationships entered into in funded class actions.[54]

4.33 This concern was mirrored by the VLRC in its consultation paper on litigation funding and group proceedings, which questioned whether the 'light touch' regulation was enough to protect the interests of class members.[55]

Introduce annual reporting to the regulator

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

4.34 Regulatory Guide 248 provides extensive guidance and imposes appropriately designed obligations on litigation funders, yet there is no way to determine if funders are following it, and to what extent. Regulatory Guide 248 requires litigation funders to

52 Australian Government, Treasury, above n 2.

53 Ibid [85]. Treasury reviewed the 'compliance impact for litigation funders' by assessing the savings in compliance costs for litigation funders from not having to comply with the licensing and disclosure requirements applicable to MIS and financial product providers under the Corporations Act with the increase in compliance costs due to the requirement of having conflict of interest management arrangements in place. It found the regulatory cost saving of not having to hold an AFSL was around $581,000 on an average annual basis and not having to develop a product disclosure statement as required for a MIS was $1.4 million on an average annual basis. The conflict of interest management arrangement costs was estimated at $181,500 on an average annual basis, amounting to a net regulatory cost saving for litigation funders of $1.8 million: [68], [77].

54 Ibid 18.

55 Victorian Law Reform Commission, above n 6, [3.77].

review their written procedures every 12 months.[56] This is an internal obligation, currently undertaken without review by the regulator.

4.35 It is possible that some litigation funders may not be meeting their obligations under Regulatory Guide 248. The ALRC has heard of pressure being placed on solicitors for representative plaintiffs by litigation funders to settle class action proceedings prematurely. Settlement in these circumstances was said to advance the commercial needs of the funder, but may not have been in the best interest of the class—a clear breach of Regulatory Guide 248.[57] The ALRC has also heard of funders withholding confidential settlement offers from the representative plaintiff and solicitors, and of 'shopping' for counsel to give a favourable opinion to the Court as to the appropriateness of the proposed settlement.

4.36 There is little oversight or action from ASIC. There is no record of ASIC, either proactively or in response to a complaint, investigating or initiating an action against a litigation funder for breach of the obligations in Regulatory Guide 248. This may indicate that there are few, if any, issues that have arisen involving conflicts of interest between litigation funders, solicitors, and/or class members. It may also be the consequence of the structural features of funded class actions where the most likely complainants (class members) remain unaware of any breach because they are not directly involved in the day-to-day management of the matter, nor typically party to the funding agreement or retainer.

4.37 The ALRC recognises that, in isolation, the requirement to report may not be an effective tool against misconduct, particularly where that misconduct might consist of almost undetectable behaviours, such as subtle (but inappropriate) pressure to settle. The ALRC also recognises that the imposition of a reporting requirement will require extra resources for the regulator and may increase costs for litigation funders that may be passed on to class members in terms of larger commission rates. However, assuming funders are already compliant, reporting should impose only a small additional burden.

4.38 An annual reporting requirement may:

- **Promote investigation by the regulator when required:** Inadequate reporting, or failure to report, may bring any wayward litigation funders to the attention of the regulator.
- **Create a compliance-focused culture:** A proposal for litigation funders to report to the regulator on compliance with the requirements of Regulatory Guide 248 may assist funders to position themselves within a compliance-based profession.

56 Australian Securities & Investments Commission, above n 4, [248.43].
57 Ibid [248.11]–[248.15], [248.48].

New methods of litigation funding

4.39 Since the amendments to the *Corporations Regulations 2001* (Cth) (Corporations Regulations) exempting litigation funders from existing schemes in 2013, a much wider range of funding models has emerged, and they continue to evolve.

4.40 Portfolio funding or law firm financing is increasing as an alternative to case-by-case funding. Broadly, there are two types of arrangements: the first involves finance structured around a law firm, or department within a law firm, where the claimants are various clients of the firm; or, secondly, finance structured around a corporate claim holder or other entity which is likely to be involved in multiple legal disputes over a defined period of time. Structuring finance around multiple claims under either model usually involves some form of cross-collateralisation.

4.41 It is also possible that funding may manifest as a form of private equity, where third-party funders take an equity position in the claimant entity and, as such, gain control over its investment (in the litigation) through traditional corporate governance,[58] although the ALRC has not heard of this occurring in Australia.

4.42 Accordingly, litigation funding may also occur through the funder:

- taking control of a potential claimant in order to control the litigation;
- investing in a law firm to support multiple actions (portfolio approach); or
- investing in a law firm to support one client with multiple actions.

4.43 The ALRC has also heard of funders securitising their interest in a particular piece of litigation; in effect, the selling of shares in the prospective proceeds of a class action.

4.44 These arrangements have the potential to create additional conflicts of interest issues.[59] They are not the types of funding arrangements that were contemplated by the amendments to the Corporations Regulations.

Ensure that new funding arrangements are subject to Regulatory Guide 248

Proposal 4–2 If the licensing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the *Corporations Regulations 2001* (Cth).

4.45 There is concern that some litigation funding schemes may not fall within the ambit of reg 5C.11.01 of the Corporations Regulations, which defines litigation funding schemes for the purpose of excluding them from MIS. There is a lack of clarity

58 ICCA-Queen Mary Task Force Report on Third-Party Litigation Funding in International Arbitration (The ICCA Reports No. 4), April 2018, 35.
59 Ibid 38-39.

as to whether evolving forms of litigation funding, including portfolio funding and law firm funding, are exempt from the definition of MIS and the consequences that flow from such a conclusion.

4.46 For reasons of certainty, the ALRC considers it necessary that the scope of reg 5C.11.01 be clarified. Otherwise, it is possible that a lacuna in the scope of schemes to which reg 5C.11.01 applies, and in the scope of the correlative obligation imposed by reg 7.6.01AB (obligations to manage conflicts), exists. There may be schemes which are not captured by reg 5C.11.01 and which may be entirely unregulated.

4.47 It is also possible that reg 5C.11.01 is an inadequate statutory framework for prescribing the obligations of disparate funding schemes. The existing statutory framework exempted what might be called traditional litigation funding schemes. As litigation funding models have evolved in the ensuing six years, the ALRC seeks views on whether the solution adopted remains fit for purpose.

Accreditation for solicitors

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.

Existing obligation to avoid conflicts of interest

4.48 Solicitors have existing obligations to their clients to avoid conflicts of interest. For example, solicitors are subject to fiduciary duties to their client, ethical duties to the court, statutory duties under the state or territory's legal profession statute and professional codes of conduct and practice rules.[60]

4.49 The Australian Solicitors' Conduct Rules provide a framework for ethical and professional conduct and specifically include rules that establish the fundamental duties of legal practitioners, including their paramount duty to the court and the administration of justice, as well as duties to act in the best interests of their client and avoid any compromise to their integrity and professional independence.[61] Solicitors in class action proceedings are also subject to oversight by the Court.[62]

4.50 The existing framework prescribing solicitors' obligations may not adequately address certain circumstances that solicitors acting in class action proceedings are likely to face. For example, as mentioned above, solicitors for the representative plaintiff also owe duties to the entire class. There is little guidance for, and oversight of, solicitors who act in class actions regarding their duties to class members: this can

60 Australian Securities & Investments Commission, above n 4, [248.10].
61 Law Council of Australia, *Australian Solicitors Conduct Rules* (2015) rr 3–5, 11.
62 See, eg, Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' [5.9], [5.4].

affect a solicitor's ability to assess, disclose, and receive informed consent regarding conflicts.

4.51 The existing framework prescribing solicitors' obligations may also be inadequate to assist solicitors to manage the range of potential conflicts of interests and duties that arise when a third-party litigation funder is involved in the proceedings. The majority of class action proceedings also involve a litigation funder who remunerates the solicitor—and may even give instructions—but who is not the solicitor's client. Different conflicts arise when the funder is also a client.

4.52 Some solicitors may commence class actions (whether funded or not) without a complete understanding of their legal and ethical obligations. The Victorian Legal Services Board and Commissioner (VLSBC) submitted to the VLRC that, while the 'vast majority of lawyers comply with their ethical obligations and act with honesty, competence and diligence' in class action proceedings, this is not always the case. The VLSBC provided an example of a practitioner in a small firm who filed class action proceedings in the Victorian Supreme Court with 'undue haste' without 'sufficient research' or 'appropriate assistance from counsel'. Further, the solicitor in question had not obtained proper instructions, did not properly supervise junior staff and did not properly advise the representative plaintiffs of the risks, namely of the potential for costs orders to be made against them.[63] The VLSBC recommended to that inquiry that a specialist accreditation course in class actions be developed.[64]

More solicitors are entering into class action proceedings

4.53 The number of known legal representatives who act predominantly for plaintiffs in class action proceedings has grown over time.[65] For example, in the period from 2005 to 2008 there were 11 firms representing plaintiffs in filed class actions. In the period from 2014 to 2017, this number had grown to 43.[66] This growth has been described as the 'defining feature of the class actions landscape in recent years'.[67] As the number of class actions has grown, so too has the involvement of a larger range of defendant firms, many of whom have had limited experience to date in class actions.

4.54 There is a risk that new entrants may file or defend class actions without any experience or knowledge regarding the complexities of proceedings. From 2014 to 2017, 51% (22) of legal representatives in class action proceedings had no prior experience in running class actions. Of this inexperienced group, Professor Morabito noted that 27% (6) 'were able to make their debut in Australia's class actions space thanks to the support of litigation funders'.[68]

63 Victorian Legal Services Board and Commissioner (Vic), above n 12, 3.
64 Ibid 4, 5.
65 King &Wood Mallesons, 'The Review: Class Actions In Australia 2015/2016' 19.
66 See Chapter 2.
67 Allens, 'Class Action Risk 2016' 5.
68 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017) 34.

Introduce voluntary accreditation for class action proceedings

4.55 Accreditation is common in legal fields. A solicitor can become an accredited specialist in family law, immigration law, personal injury, dispute resolution and other areas of law.[69] Accreditation can be recognised across states and territories.[70] While solicitors without accreditation are not precluded from acting in these areas, specialist accreditation aims to provide the profession and the public with a reliable means of identifying practitioners with proven expertise in a particular area of law and practice.

4.56 Accredited class action solicitors would be better trained in all aspects of procedural law relevant to class actions, including in the identification and management of conflicts of interests and duties. This would be particularly valuable for new entrants.

4.57 For accreditation to be most useful, it should be consistent across jurisdictions. As most class action proceedings are filed in the Federal Court of Australia,[71] uniformity across jurisdictions is especially important. The ALRC suggests that the Law Council of Australia takes a leadership role in this regard.

Amendments to the Australian Solicitors' Conduct Rules

4.58 As mentioned above, the Australian Solicitors' Conduct Rules provide a common set of professional obligations and ethical principles for Australian solicitors. The rules have been adopted in the majority of states and territories.[72] In NSW and Victoria they have been adopted under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

Prohibit financial interests in litigation funders who are funding proceedings

> **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.

4.59 As mentioned above, the relationship between solicitor and client is a fiduciary relationship, meaning that a solicitor must not 'engage in situations where his or her interests do or may conflict with the duty owed to the client' or 'profit from the position of solicitor', except with fully informed consent.[73]

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69 See, eg, https://www.lawsociety.com.au/learning-and-events/specialist-accreditation/program-areas.

70 Law Society of NSW, Policy on Mutual Recognition of Accredited Specialists—Framework for National Policy (2009).

71 Morabito, above n 68.

72 ACT, NSW, Queensland, SA and Victoria.

73 Law Council of Australia, 'Australian Solicitors' Conduct Rules 2011 and Commentary—August 2013' 21.

4.60 Rule 12.1 of the Australian Solicitors' Conduct Rules provides that a solicitor must not act for client where there is a 'conflict between the duty to serve the best interests of a client and the interests of the solicitor'. Rule 12.4 notes that a solicitor will not have breached this rule merely by:

> 12.4.3 receiving a financial benefit from a third party in relation to any dealing where the solicitor represents a client, or from another service provider to whom a client has been referred by the solicitor, provided the solicitor advises the client:
>
> (i) that a commission or benefit is or may be payable to the solicitor in respect of the dealing or referral and the nature of that commission or benefit;
>
> (ii) that the client may refuse any referral, and
>
> the client has given informed consent to the commission or benefit received or which may be received.
>
> 12.4.4 acting for a client in any dealing in which a financial benefit may be payable to a third party for referring the client, provided the solicitor has first disclosed the payment or financial benefit to the client.

4.61 The commentary to the Australian Solicitors' Conduct Rules directs solicitors who operate other concurrent businesses to 'be mindful of the possibility of conflicts arising because of the different business activities'. It notes that solicitors should ensure that a person can 'distinguish between the non-legal services provided in respect of which the protections of the solicitor-client relationship do not apply'.

4.62 These duties and rules may mean that, in the situation where a solicitor is representing class members in a class action and is also invested in the entity that is funding that matter, the solicitor must disclose this to the class and receive informed consent to proceed. This may be complicated by several factors. First, due to the constitution of the class, it may not be possible to receive the fully informed consent of each member of the class, although informed consent may be given by the representative plaintiff. Secondly, for so long as contingency fees remain prohibited, permitting solicitors to fund a matter may facilitate an informal contingency fee arrangement.[74] Thirdly, the potential for unmanageable conflicts of interest issues to arise is heightened if a solicitor or law firm has a financial interest in a litigation funder.

4.63 This issue is not theoretical: there have been attempts by lawyers to fund actions in which they are representing the plaintiff. For example, in 2014, law firm Maurice Blackburn withdrew its application for court approval to have a related entity (Claims Funding Australia) fund a class action.[75] Following this, the Victorian Supreme Court found that it was improper for the legal representatives of a lead plaintiff to have an indirect financial interest in the outcome of a class action by way of a litigation funding company.[76] The Court concluded that informed consent was not enough to prevent this arrangement from affecting the 'proper administration of justice, including the

74 See Chapter 5.
75 In the matter of *Clasul Pty Ltd v Commonwealth of Australia*.
76 *Bolitho v Banksia Securities Limited* [2014] VSC 582.

appearance of justice', and the legal representatives were prohibited from acting in the matter.[77]

4.64 The Australian Solicitors' Conduct Rules are currently under review.[78] As part of the review, the Law Council of Australia has asked whether the Rules should require a solicitor to cease acting for a client in a matter involving a third party from whom the solicitor may receive a fee or other benefit.[79] The ALRC considers that the Rules should expressly prohibit solicitors from being invested in the outcome of a funded matter in which they are acting through having an interest in that litigation funder.[80] Accordingly, rule 12 should be expanded to provide that a solicitor (or law firm) must not directly or indirectly hold any share or ownership interest in a litigation funder which has a funding agreement with a client of the solicitor or the law firm in respect of a matter in which the solicitor or the law firm is currently acting.

Require disclosure of funding in arbitration

Proposal 4–5 The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.

4.65 The Terms of Reference to this Inquiry ask the ALRC to, among other things, consider the role of third-party funding entities in enabling the commencement of other classes of legal proceedings, including arbitral proceedings. The ALRC has not had any issues relating to arbitral proceedings and third-party funding brought to its attention, and understands that few arbitral matters in this jurisdiction are funded. Nonetheless, it is preferable that the obligations on solicitors in relation to the disclosure of third-party funding in all forms of dispute resolution should be aligned.

4.66 The Federal Court of Australia's Practice Note requires disclosure of litigation funding agreements to the Court and other parties.[81] There is no comparable obligation for solicitors to disclose the existence of litigation funding agreements in any other forms of dispute resolution proceedings that do not have court supervision. A broader obligation to disclose the existence of such agreements is particularly important in ensuring that conflicts do not emerge that might embarrass a mediator, arbitrator or judicial officer. Although the ACICA Rules (2016)[82] do not impose any rule in relation

77 Ibid [67].
78 Law Council of Australia, 'Review of the Australian Solicitors' Conduct Rules' (1 February 2018).
79 Ibid 71.
80 Singapore has recently enacted such a prohibition: *Legal Profession (Professional Conduct) Rules* 2015, s 49B.
81 Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' pt 6.
82 Australian Centre for International Commercial Arbitration.

to the disclosure of third-party funding arrangements, the international trend is to require such disclosure.[83]

4.67 Clear rules relating to disclosure of litigation funding in all forms of dispute resolution will provide greater transparency around funding arrangements and, in turn, enhance confidence in the legal profession and the civil justice system.

Inform class members at the earliest possible opportunity

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

4.68 Disclosure of conflicts of interest to class members is required by existing legal frameworks. For example:

- Regulatory Guide 248 requires litigation funders to have written procedures dealing with how to disclose conflicts of interest effectively to prospective members, including procedures that provide prospective members with information to assist them to understand the different interests of the funder, solicitors and members, and the specific situations where conflicts may arise in that matter.[84] It is expected that disclosure would happen at the recruitment of prospective members, in the terms of any funding agreement, and be ongoing.[85]
- Solicitors are required to disclose conflicts of interest and receive informed consent to continue to act for those whose interests are might be affected by such conflicts.

4.69 Legal representatives are required to provide class members in open class proceedings with notices, including opt-out notices.[86] Opt-out notices are sent to the entire class (where possible) and may be the first communication class members receive. These opt-out notices are in a prescribed form (Form 21) and are to be filled out and returned to the Court should a member wish to opt out. Opt-out notices are provided to class members with a covering letter that outlines the details of the action.

4.70 The Federal Court provides a sample best-practice opt-out notice cover letter for use by legal representatives. The sample letter includes an explanation of what a class action is; who the action involves (applicant/respondent); what an opt-out is; an

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83 International Bar Association (IBA), Guidelines on Conflicts of Interest in International Arbitration (2014); and see the *Principles Regarding Disclosure and Conflicts of Interest*, ICCA-Queen Mary Task Force Principles on Third-Party Funding (April 2018).

84 Australian Securities & Investments Commission, above n 4, [248.52].

85 Ibid 20–23.

86 *Federal Court of Australia Act* (1976) s 33J; *Federal Court Rules 2011* (Cth) r 9.34.

explanation of costs in class actions; what to do to stay or leave the class; and how to obtain further documentation. It does not provide for information regarding conflicts of interest.[87]

4.71 Disclosing potential or actual conflicts, and how they are to be managed, at the earliest possible opportunity would promote transparency and may inform a class member's decision to opt out. The ALRC proposes that the very first notice, be it an opt-out or general notice, should include information (or a link to information) regarding any actual or potential conflicts of interest, and the proposed management of those conflicts.

87 Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' Schedule A.

5. Commission Rates and Legal Fees

Contents

Introduction

5.1 Funding class action proceedings has been viewed as a way to facilitate access to justice. This is especially so when the individual quantum to be recovered is low but the total aggregate quantum is high. Funding for class action proceedings is typically provided by litigation funders in exchange for a percentage of the proceeds. In cognate jurisdictions, solicitors are also able to fund matters through contingency fee arrangements.

5.2 In this chapter, it is proposed that contingency fee arrangements for solicitors should be permitted in Australian class action proceedings, with some limitations. Contingency fee arrangements in class action proceedings may enable medium-sized class action matters to proceed and, as class actions are strictly supervised by the Court, the proposal offers a cautious introduction to this method of billing.

5.3 It is critical that the introduction of contingency fee arrangements, and the ongoing provision of funding through litigation funders, does not damage the integrity of, and confidence in, the civil justice system. For this reason, it is proposed that the Court should be required to approve contingency fee agreements at the earliest opportunity, and that the Court be given specific statutory powers to reject, set or amend contingency fees and commission rates of litigation funding agreements—a

practice currently supported by general provisions of the *Federal Court of Australia Act 1976* (Cth)[1] (FCA Act).

5.4 The ALRC also asks whether further statutory interventions, in the form of statutory caps or statutory maximums, are necessary and appropriate.

Contingency fee agreements for solicitors

Current billing arrangements

5.5 Australian solicitors are not permitted to bill clients on a contingency fee basis—that is, to provide their services in exchange for a percentage of the amount recovered by the litigation.[2] This is a blanket prohibition covering all types of legal services for all legal actions.

5.6 Solicitors who act for the representative plaintiff in class actions may structure their fee arrangements in numerous other ways. For example, solicitors can bill the representative plaintiff or the third-party litigation funder (when the matter is funded) through the issuing of monthly invoices. It is common for solicitors representing a plaintiff in unfunded class action proceedings to bill the representative plaintiff using a conditional fee agreement, comprising a 'no win/no fee' arrangement.[3] Under these arrangements, the representative plaintiff is usually liable for disbursements, security for costs, and any adverse costs order, although payment for the solicitors' time and output is dependent on a successful outcome. Conditional agreements usually include an uplift fee of not more than 25% of the billed amount, intended to compensate solicitors for carrying some risk and considered as a form of interest for deferred payment of fees over the course of the proceedings.

5.7 Solicitors who are paid by third-party litigation funders may choose to 'share the risk' with the funder and invoice the funder for a percentage of the amount due for legal services—recouping the remainder on a successful outcome. In all of these arrangements, solicitors bill exclusively for disbursements and pursuant to a scale of costs or time-based services (excepting any uplift fee).

5.8 Legal costs agreements between solicitors and representative plaintiffs in class action matters are required to be: in writing; provided to class members who are clients; and disclosed to the Court at the start of proceedings.[4] Legal fees can be

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1 *Federal Court of Australia Act 1976* (Cth) ss 23, 33V, 33ZF.

2 *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3, cl 27(1); *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 183; *Legal Profession Act 2008* (WA) s 285.

3 *Legal Profession Act 2006* (ACT) s 284; *Legal Profession Uniform Law* (NSW) s 182; *Legal Profession Act* (NT) s 319; *Legal Profession Act 2007* (Qld) s 324; *Legal Practitioners Act 1981* (SA) sch 3, cl 26; *Legal Profession Act 2007* (Tas) s 308; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1, cl 182; *Legal Profession Act 2008* (WA) s 284.

4 Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' [5.2], [5.3], [6.1]–[6.3].

reviewed and assessed by the Court when approving settlement[5] and it is not unusual for the Court to appoint a referee to assess the reasonableness of the fees.[6]

Arguments for and against the introduction of contingency fees

5.9 The discussion regarding the introduction of contingency fees to Australia is not new. Whether contingency fee arrangements should be permitted in Australia was most recently considered by the Productivity Commission in 2014, which recommended lifting the prohibition on contingency fees with limitations—including that contingency fees be capped and be the only applicable legal fee charged.[7] In 2017, the Victorian Law Reform Commission (VLRC) asked whether lifting the ban on contingency fees in Victoria would 'mitigate the issues presented by the practice of litigation funding'.[8]

5.10 A common argument in favour of contingency fees suggests that introducing contingency fees will increase access to justice for prospective class members of medium-sized actions[9]—those where the return to the class is between $30 million and $60 million. Litigation funders rarely fund mid-sized class action proceedings. These are often conducted by solicitors through 'no win/no fee' arrangements, but neither solicitors nor representative plaintiffs are likely to be able to fund disbursement costs or run the risk of adverse costs orders.[10] This creates a gap in services and is a key limitation of the current class action system. Lifting the prohibition on contingency fee arrangements might enable solicitors (at least in the larger firms) to be compensated for costs and for carrying the risk of adverse costs orders, enabling these smaller matters to proceed.

5.11 It is also argued that this expansion of the funding market would promote competition and eventually lower commission rates set by litigation funders, creating a more level playing field.[11] The absence of contingency fee billing has been a selling point for litigation funding in Australia: that is, there is limited competition.[12]

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5 *Federal Court of Australia Act 1976* (Cth) s 33V. See also Chapter 7.

6 Ibid s 54A; *Federal Court Rules 2011* (Cth) div 28.67; See, eg, *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527. See also Chapter 7.

7 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) rec 18.1; See also Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) [7.8]. See below for a discussion on statutory caps.

8 Victorian Law Reform Commission, 'Access to Justice—Litigation Funding and Group Proceedings' (Consultation Paper, July 2017) question 26.

9 Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 20, 21; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 625–626; Victorian Law Reform Commission, above n 8, [8.15]; Vince Morabito, 'Submission 35 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (29 November 2017) 25.

10 Victorian Law Reform Commission, above n 8, [8.33].

11 Contingency Fee Working Group, Law Council of Australia, above n 9, 20; Also see Morabito, above n 9, 25; Vicki Waye, 'Submission 2 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (18 July 2017) 6.

12 See, eg, JustKapital, 'An Emerging Leader in Litigation Financing: Annual Report Update' (September 2015) 7: the organisation notes that the Australian market has been facilitated by the prohibition on contingency-based legal fees.

5.12 Fees and costs deducted from sums recovered in a funded class action currently include legal fees, calculated on time-based billing models, *and* the funder's commission. In some circumstances, such an arrangement can result in class members receiving less than 50% of the recovered amount,[13] although the ALRC has been told by one significant funding entity and one large plaintiff law firm that the historic average return to class members across their portfolio of class actions to date is in the order of 62%. It is argued that, as only one 'success fee' would be deducted from the recovered amount, the introduction of contingency fees would also 'drive down the cost of claim funding' by reducing the number of entities paid by reference to a percentage of the recovered amount.[14]

5.13 It has also been suggested that the existing regulation of solicitors would be adequate to prevent misconduct in contingency fee arrangements.[15] It has been suggested further that the introduction of contingency fees could mitigate conflicts of interest and promote best-practice conduct. Contingency fees align the interests of the solicitor with those of the client/class[16] such that there is a greater incentive to maximise the return to the class at the earliest possible time. Such an incentive is missing in time-based billing, which can be used to obfuscate and operates in a way which 'reward[s] the dull and the slow'.[17] A contingency fees arrangement, without a coexisting third-party funding agreement, might also remove the tension that currently exists in the tri-partite arrangement between funder, solicitors and representative plaintiff because of the commercial imperatives for the funder.

5.14 The same self-interest would prevent solicitors from supporting and acting in unmeritorious claims, as their remuneration relies on a successful outcome.

5.15 The opposing view suggests that, not only is this type of billing arrangement inappropriate for the legal profession, but that the use of contingency fees could foster an environment of greed that could result in the bringing of unmeritorious claims. For example, solicitors may encourage vulnerable plaintiffs to agree to contingency fees that do not reflect the amount of work required to resolve the claim or the risk that it is not successful.[18] Strong concern about the bringing of unmeritorious class action proceedings in England and Wales resulted in the prohibition of contingency fee arrangements in collective actions for breaches of consumer law conducted in the Competition Appeals Tribunal (CAT).[19]

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13 See, eg, *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527.

14 Waye, above n 11, 6.

15 Contingency Fee Working Group, Law Council of Australia, above n 9, 21.

16 Michael Legg, 'Contingency Fees—Antidote or Poison for Australian Civil Justice?' (2015) 39 *Australian Bar Review* 244, 250. For a discussion on conflicts of interest see Chapter 4.

17 Ibid 251; See also Michael Duffy, 'Submission 22 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (5 October 2017) 23.

18 Contingency Fee Working Group, Law Council of Australia, above n 9, 20, 21; Legg, above n 16, 253; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 613.

19 Department for Business, 'Innovation and Skills (UK) Private Actions in Competition Law: A consultation on Options for Reform—Government response' (January 2013) 26; *Consumer Rights Act 2015* (UK) sch 8; *Competition Act 1998* (UK) s 47C(8); *Courts and Legal Services Act 1990* (UK) ss 58AA(11).

5.16 It is also argued that the possibility of a large payout will only augment existing conflicts of interest,[20] magnifying the likelihood of solicitors recommending that representative plaintiffs accept offers to settle for the commercial purposes of the solicitor/firm, rather than for the benefit of the client/s.

5.17 Those opposed to the introduction of contingency fees suggest that the key inter-related rationales in support of contingency fees—increasing access to justice and competition—are erroneous. Three primary reasons are advanced as to why the introduction of contingency fees would be unlikely to have any practical effect on access to justice and competition.[21]

5.18 First, solicitors charging on a contingency fee basis would not take on difficult or risky cases. As solicitors will only be paid on successful outcomes, high risk matters would not be funded through a contingency fee arrangement. Low risks, or the types of matters currently billed pursuant to 'no win/no fee' arrangements, would be more likely to be billed on contingency—generating a higher premium with no commensurate increase in risk.[22]

5.19 Secondly, solicitors are unlikely to take on matters that will not generate a significant monetary return, meaning 'public interest' cases would not benefit from the introduction of contingency fees. These two concerns prompted the VLRC's inquiry into litigation funding and group proceedings to ask what measures should be put in place to ensure that a wide variety of cases would be funded by contingency fee arrangements.[23]

5.20 Thirdly, solicitors and funders are unlikely to compete for the same type of matters. Litigation funders generally fund matters with high minimum returns in which the exposure to adverse costs, should the defendant succeed, is also significant. Exposure to the risk of adverse costs may price out law firms funding solely on a contingency basis. Accordingly, there would be little need for, or pressure on, litigation funders to lower their commission rates.

Contingency fees in cognate jurisdictions

5.21 Contingency fees have featured in the United States since around 1786.[24] They have been introduced to some Commonwealth jurisdictions more recently. For example, contingency fees are permitted in Canadian provinces, including Ontario, where they were first introduced, for class actions only, in 1992,[25] and more broadly in

20 Victorian Law Reform Commission, above n 8, [8.38]–[8.48].
21 See also Ibid ch 8.
22 Legg, above n 16, 253; See also Simone Degeling, Michael Legg and James Metzger, 'Submission 9 to Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (22 September 2017) 19; US Chamber Institute for Legal Reform, 'Submission 19 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (29 July 2017) 43.
23 Victorian Law Reform Commission, above n 8, question 27.
24 Contingency Fee Working Group, Law Council of Australia, above n 9, 4.
25 *Class Proceedings Act*, 1992 (Ontario) § 33.

2004.[26] In 2013, contingency fees, termed 'damage-based fees', were permitted generally in England and Wales, having previously been restricted to employment matters.[27]

England and Wales

5.22 In England and Wales, rules and regulations regarding contingency fee agreements apply only to legal representatives (they do not cover litigation funding agreements between funders and clients).[28] Contingency fees are permitted in employment, personal injury and commercial litigation, but are not permitted in criminal and family law matters.[29]

5.23 Contingency fees are also prohibited in opt-out collective actions for infringements of competition law heard by CAT.[30] This collective action regime was introduced in 2015, and there was concern that the availability of an opt-out action would move the English system closer to that of the US. Excluding the use of contingency fees in this jurisdiction was part of a safeguarding package aimed at preventing the incursion of US-style litigation and the bringing of unmeritorious claims.[31] Contingency fees are not prohibited in class actions that run as 'representative proceedings' or under Group Litigation Orders, which are both opt-in actions filed in the High Court of England and Wales.[32]

5.24 In permitted matters, the proportion of settlement that can be comprised of contingency fees in England and Wales is capped by legislation—with the proportion varying depending on the type of matter. When acting in an employment matter, the maximum percentage of damages or settlement monies recovered available on contingency is 35%.[33] At first instance,[34] contingency fees in personal injury matters are capped at 25%[35] and all other civil litigation matters are capped at 50%.[36] All caps

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26 Bill 178, An Act to amend the *Solicitors Act* to permit and to regulate contingency fee agreements (2002); *Solicitors Act* R.S.O 1990 c.S.15; *Rules of Professional Conduct*, rule 2.08(3).

27 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s 45; *Courts and Legal Services Act 1990* (UK) s 58AA.

28 Civil Justice Council (UK), 'The Damages-Based Agreements Reform Project: Drafting and Policy Issues' (August 2015) 33.

29 *Courts and Legal Services Act 1990* (UK) s 58AA; s 58AA(4)(aa).

30 *Consumer Rights Act 2015* (UK) sch 8; *Competition Act 1998* (UK) s 47C(8); *Courts and Legal Services Act 1990* (UK) s 58AA(11).

31 Department for Business, Innovations and Skills (UK), 'Private Actions in Competition Law: A Consultation on Options for Reform—Government Response' (January 2013) 26. See also Quinn Emanuel Trial Lawyers, 'Opt-out Collective Actions for Competition Damages Actions—A New Dawn for Litigation in the UK': <www.quinnemanuel.com/the-firm/news-events/article-may-2015-opt-out-collective-actions-for-competition-damages-actions-a-new-dawn-for-litigation-in-the-uk/>.

32 *Civil Procedure Rules* (UK) rules 19.6, 19.10.

33 *Damages-Based Agreements Regulations 2013* (UK) reg 7.

34 Caps do not apply to appeal proceedings, where parties are free to negotiate, reflecting the additional risk: Explanatory Memorandum to the Damage-based Agreements Regulations 2013, No 609 (UK) [7.14].

35 Excluding damages for future care and loss: *Damages-Based Agreements Regulations 2013* (UK) reg 4(2)(a)(ii).

36 *Courts and Legal Services Act 1990* (UK) ss 58AA(4)(b); *Damages-Based Agreements Regulations 2013* (UK) regs 4(2)(b), 4(3), 4(4).

include VAT.[37] A sliding scale, which depends on the point at which the case concludes or the level of recovery, can be included in the contingency fee agreement in England and Wales, so long as the maximum percentage does not exceed the statutory cap.[38]

5.25 The contingency amount includes recoverable costs and counsels' fees, but excludes other expenses incurred by legal representatives.[39] Otherwise, solicitors acting under contingency fee agreements in England and Wales are not able to recover more than the contingency amount.[40]

5.26 Court-ordered costs cannot exceed the contingency fee amount,[41] and are recoverable on a conventional hourly rate basis rather than by reference to the contingency fee.[42] The inclusion of recoverable costs in the cap means that the legal representative for a successful plaintiff can only ever receive the agreed contingency fee, which can be made up of the recoverable costs, with any shortfall coming from the client's damages.[43] For example, if damages are awarded at £10,000, and the contingency fee is set at 50%, the solicitor will receive £5,000. If costs are awarded to the applicant at £2,500, the solicitor receives those costs plus £2,500 of the award, leaving the client with £7,500.

5.27 The regulations are silent as to whether solicitors are to be liable for adverse costs when acting under contingency fee agreements.[44]

5.28 The ALRC has been told that contingency fees are rarely used in England and Wales. The Civil Justice Council provided advice to Government regarding proposed amendments to the regulations in 2015 to reduce obstacles to use. The advice included excising counsel's fees from the capped contingency fee amount and providing for recoverable costs to be paid to the solicitor on top of the contingency fee amount.[45]

Ontario

5.29 The same restriction in regards to the types of matters that can attract a contingency fee applies in Ontario. This means that criminal and family law matters are excluded.[46] Even though there is statutory support for the introduction of statutory caps,[47] they are yet to be adopted in Ontario. Contingency fees generally range from

37 *Damages-Based Agreements Regulations 2013* (UK) regs 4(2)(b), 4(3), 7.
38 Civil Justice Council (UK), above n 28.
39 *Damages-Based Agreements Regulations 2013* (UK) reg 4(1)(a). This excludes personal injury matters: *Damages-Based Agreements Regulations 2013* (UK) reg 4(2).
40 Explanatory Memorandum to the Damage-Based Agreements Regulations 2013, No 609 (UK) [4.5].
41 Ibid [7.11].
42 Legg, above n 16, 267.
43 Explanatory Memorandum to the Damage-Based Agreements Regulations 2013, No 609 (UK) [7.10]–[7.14].
44 Herbert Smith Freehills, 'Litigation Notes: Contingency Fees or Damages-based Agreements'<https://hsfnotes.com/litigation/jackson-reforms/contingency-fees-or-damages-based-agreements-dbas/>.
45 Civil Justice Council (UK), above n 28.
46 *Solicitors Act* R.S.O 1990 c.S.15, s. 28.1; *Rules of Professional Conduct*, rule 2.08(3).
47 *Solicitors Act* R.S.O 1990 c.S.15, s. 28.1(12).

20% to 45% of the amount received in the proceeding.[48] Where in this range the fee falls will depend on: the difficulty of the matter; the risks; the costs of bringing the action; and the likelihood of success.[49] Courts may review contingency fee agreements and endorse fees above the standard when it is fair to do so. For class actions, the percentage payable is subject to approval from the Court,[50] and the Court must only approve a 'reasonable' fee.[51]

5.30 In Ontario, solicitors acting on a contingency fee basis are not permitted to collect both the pre-arranged contingency fee as well as the legal costs paid by the other party, unless approved by a judge.[52]

5.31 Contingency fees are commonly used in Ontario, and were recently described as the 'engine that drives class actions'.[53] Fee arrangements in general are under review as part of the Law Commission of Ontario's current class actions inquiry.[54]

Lift the ban on contingency fee arrangements, with limitations

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.

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.

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48 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] 330 FCA [134].

49 *Rules of Professional Conduct*, rule 2.08(3).

50 *Class Proceedings Act SO* 1992 s. 32(2).

51 *Class Proceedings Act SO* 1992 s. 33(8). For a discussion on 'reasonableness' see Jasminka Kalajdzic, *Class Actions in Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) ch 6.

52 *Solicitors Act* R.S.O 1990 c.S.15, s. 28.1(8).

53 Kalajdzic, above n 51, ch 6.

54 Law Commission of Ontario, 'Class Actions: Objectives, Experiences and Reforms' (March 2018).

5.32 The ALRC proposes that contingency fee arrangements should be permitted in class action proceedings that are filed in Australian courts.[55] There are three key reasons for the proposed restriction to class action matters only. First, class action proceedings are strictly supervised by the Court, and the proposal is predicated on the grant of leave by the Court to enter into such a fee arrangement.[56] This would provide an extra safeguard to ensure contingency fee arrangements are reasonable and proportionate.

5.33 Secondly, contingency fees may be particularly useful in class action proceedings, providing a level of clarity and certainty for class members. Time-based billing invoices can be 'lengthy and too complex' for some clients,[57] and may not receive the same scrutiny in class actions as other matters, as most class members are not actively involved in the matter. Contingency fee arrangements are likely to be comparatively more straightforward.

5.34 Thirdly, litigation funders are active participants in the Australian class action system. Commission rates are usually charged at about 30% of the settlement sum.[58] While lifting the prohibition on contingency fees in class actions does not guarantee direct competition, it may put downward pressure on commission rates. There is also the possibility that introducing contingency fees will broaden access to justice for mid-sized class action claims.

5.35 The other safeguards of Proposal 5–1 aim to limit the possibility of misuse by solicitors or avoid further confusion for class members (through such things as blending funding and contingency fees or legal service fees and contingency fees). Under the proposal, a representative plaintiff can be charged either a contingency fee by its solicitors, or can enter into a funding agreement with a third-party litigation funder, pursuant to which the funder will take a commission calculated as a percentage of the sum recovered—but not both.[59] Current tripartite arrangements can leave class members with less than 50% of the recovered amount. The proposed safeguard protects class members from having to pay a percentage of the recovered amount both to the litigation funder and to the solicitor,[60] and adopts the principle that the contingency fee (or the funder's commission) reflects the risk of the litigation.

5.36 This safeguard also prevents solicitors billing on an hourly basis and then charging an additional contingency fee if the matter is successful. This mirrors the approach in England and Wales, although the ALRC has been told that the prohibition on blending billing types has been partially responsible for its low use in that jurisdiction.

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55 This includes the Federal Court of Australia and the Supreme Courts of any state or territory.
56 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 686–687.
57 Contingency Fee Working Group, Law Council of Australia, above n 9, 10.
58 See below.
59 This concern has been raised in previous reviews. See, eg, US Chamber Institute for Legal Reform, above n 22, 42.
60 Victorian Law Reform Commission, above n 8, [8.26], citing Maurice Blackburn.

5.37 The proposed model would not exclude all 'hybrid' models of funding. The safeguards aim to protect class members from the possibility of paying out a percentage of settlement to both solicitors and funders. It does not prohibit moneys being returned to litigation funders from solicitors when funding is on a portfolio basis—that is where the funding sits behind the solicitor, as opposed to alongside the solicitor.[61] The ALRC proposes that this 'hybrid' model of litigation funding be included in the statutory definition of third-party litigation funding and be subject to disclosure requirements.[62]

5.38 As contingency fees have been introduced in cognate jurisdictions, there are existing models that may provide guidance on such issues as determining party/party costs when contingency fees are used; the constitution of the fee (that is, does it include counsel's fees); exclusions; the use of the common fund/funding equalisation order in respect of contingency fee agreements; and the potential interaction between contingency fee agreements and 'After the Event' insurance.

5.39 The ALRC suggests that a contingency fee should absorb all costs and disbursements, and the arrangement should require the solicitor to indemnify a representative plaintiff against an adverse costs order. This provides a further safeguard against unmeritorious claims. The requirement to provide such an indemnity goes further than the recommendations of the Productivity Commission, which specifically did not recommend that solicitors or funders should be required by statute to indemnify for adverse costs. The Commission instead recommended that the Court rules be amended so that the Court is able to treat the solicitor acting on a contingency fee basis as a funder for the purposes of ordering security for costs.[63] The ALRC seeks further views on this issue.

5.40 The Productivity Commission also considered that the differences in the business models of litigation funders and solicitors meant that solicitors who entered into contingency fee arrangements as a means of funding their clients' litigation need not be licensed,[64] stating:

> Such simplification ignores the relative risks presented by their business models. Litigation funders focus their portfolios on higher value claims, while law firms will have a combination of income sources, encompassing both normal and damages-based billing, across a range of matters including complex litigation and simple transactions. As such, the Commission considers that case-by-case security for costs should be sufficient for law firms.[65]

5.41 The ALRC considers that the existing regulatory framework of the legal profession provides sufficient oversight of fee arrangements entered into by solicitors, whether that is on a usual time-based billing model, a conditional fee basis, or a contingency fee arrangement. Nevertheless, the ALRC seeks further views on this

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61 For an example of this approach see Civil Justice Council (UK), above n 28, 31.
62 See Proposal 4–2.
63 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 636, rec 18.3.
64 See Chapter 3.
65 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 636.

issue, particularly in relation to whether there might need to be oversight of the capital adequacy requirements of law firms should the above proposal be accepted.[66]

Exceptions

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?

5.42 It has been suggested to the ALRC that contingency fee arrangements may not be suited to all types of class action matters. For example, it has been posited that there should remain a prohibition on contingency fees in personal injury matters. The rationale for retaining the prohibition is based on the limitations on the quantum of damages that can be recovered in personal injury matters, and the underlying purpose of the heads of damages recoverable in personal injuries claims, particularly those relating to future care and future loss of earnings. Legal fees in these types of matters are also regulated.[67]

5.43 Alternatively, should there be no prohibition on contingency fees in personal injury claims, it has been suggested that such matters should attract a lower statutory cap.[68] This approach has been adopted in England and Wales.

5.44 Few personal injury matters are currently funded.[69] It may act as a further disincentive to fund these matters if lower caps were to apply, or if they were precluded from being funded on a contingency basis.

5.45 England and Wales prohibited contingency fee arrangements for competition law class actions heard by CAT. This prohibition was introduced because it was thought that opt-out class actions of this type would generate large settlements. For example, one of the first actions filed sought £14 billion in damages, although that matter was stayed by CAT.[70] There was concern that the prospect of such large settlements would promote unmeritorious claims and result in US-style litigation.

5.46 The ALRC seeks further comment.

66 See Chapter 3.
67 See, eg, *Legal Profession Uniform Law* (NSW) sch 1.
68 Contingency Fee Working Group, Law Council of Australia, above n 9.
69 See Chapter 2, table 2.3.
70 *Walter Hugh Merricks v MasterCard Incorporated & Others* (*Case No. 1266/7/7/16*).

Commission rates in litigation funding agreements

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.

Court oversight

5.47 Funding agreements between litigation funders and class members must be disclosed to the Federal Court.[71] Such agreements receive further scrutiny by the Court on an application for settlement approval pursuant to s33V of the FCA Act, which provides the legislative basis for the settlement and discontinuance of class action litigation. This provision, together with s 33ZF of the FCA Act, has grounded the Court's decisions concerning commissions payable out of the settlement sum, including its power to refuse to approve funding agreements at settlement (and to supervise costs agreements with solicitors),[72] and in support of its setting a commission rate at the time of settlement under a common fund order.[73]

5.48 Section 33V reads:

> Settlement and discontinuance—representative proceeding
>
> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

5.49 Section 33ZF provides:

> General power of Court to make orders
>
> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.
>
> (2) Subsection (1) does not limit the operation of section 22.

Provide a statutory power for the Court to deal with commission rates

5.50 There is not a specific statutory power to vary, or reject, commission rates agreed between funders and class members. The ability of the Court to do so in reliance on ss 33V and 33ZF is said to be drawn from its protective and supervisory

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71 Federal Court of Australia, 'Class Actions Practice Note (GPN-CA)' [6.1]–[6.2].

72 See, eg, *Pharm-a-care Laboratories Pty Ltd v Commonwealth* [No 6] [2011] FCA 227.

73 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] 330 FCA [119]; See also *Federal Court of Australia Act 1976* (Cth) s 23.

role.[74] Although it has generally been agreed that the power lies in s 33V(2),[75] there has not been unanimity as to its true source nor as to the circumstances in which the power should be exercised. In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs) (in liq) (No 3)*, Beach J noted:

> I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargains dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF. I am empowered to make 'such orders as are just with respect to the distribution of any money paid under a settlement'.[76]

5.51 Nonetheless, a question still arises as to whether the Court can make orders which 'upset the bargain struck between the funder and group members'.[77] For example, in a recent settlement approval the funder argued, albeit unsuccessfully, that the Court did not have the power to vary the funding agreement, suggesting that the previous commentary of the Court was dicta that 'ought not to be followed'.[78] The Court's ability to vary funding agreements has not been the subject of an appeal to the High Court of Australia.

5.52 The unique role of litigation funders in civil justice necessitates the Court's involvement in funding agreements for class action proceedings. The ALRC suggests that the administration of justice would benefit from certainty regarding the scope of the Court's power in this regard.

Contingency fee agreements

5.53 The power of the Court to review legal costs agreements prior to settlement in uncontroversial. Nonetheless, if the proposal to adopt contingency fees is implemented, for reasons of consistency and certainty, the proposed specific power regarding commission rates should include the power to set, reject or vary contingency fee agreements.

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74 See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148 [7]–[14]; Michael Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (1 June 2017).

75 See, eg, *Mitic v OZ Minerals Limited* (No 2) [2017] FCA 409 [28], [29]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 [110].

76 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 [110].

77 Lee, above n 74; *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511 [12]. Also see the defence arguments regarding the scope of the Court's power in, eg, *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476; *Mitic v OZ Minerals Limited* (No 2) [2017] FCA 409.

78 *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511 [18].

The need for statutory intervention

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%?

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

5.54 The ALRC has proposed that contingency fees be introduced on a limited basis, and that the Court be given a specific statutory power to reject, amend or set commission rates, and contingency fees if introduced. The supervisory and protective role of the Court in class actions is well known and accepted.[79] The Court can only do so much, however, and in this section the ALRC asks whether further statutory intervention is needed. Two options are put forward for consideration. First, that statutory caps for funding arrangements may be needed; and second, that there should be a rebuttable statutory presumption that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%.

5.55 It is instructive to consider two recent settlement approvals by the Federal Court pursuant to s 33V of the Act to test the proposition that it might be desirable to set a maximum proportion that is recoverable by way of fees and commission from a settlement or judgment sum. In *Clarke v Sandhurst Trustees Limited (No 2)*,[80] Lee J approved settlement of an investor claim for the sum of $16.85 million, of which the funder received 30% and solicitors received 31%, leaving group members with only 39% of the final settlement sum.

5.56 The Court was alive to the proposition that it is difficult to justify a settlement as 'fair from the perspective of group members, when the lawyers, experts and the funders get more out of it than the people who have allegedly suffered a wrong'.[81] Nevertheless, it is clear that there are some cases, this being an example, where the

79 See, eg, ibid [7].
80 *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511.
81 Ibid [29].

proportion returned to class members is less than 50% for a variety of reasons. The Court observed that the funding fee of 30% could be regarded as 'within the range of comparable amounts charged in similar proceedings', noting that the funder had already agreed to lower its commission rate from 40% and to waive the $5,500 per month management fee, as articulated in the original funding agreement.[82] Similarly, the Court held that, in and of themselves, the legal costs were fair and reasonable. As well as being very large in absolute terms, the litigation was highly complex.[83]

5.57 Ultimately, Lee J was prepared to approve the settlement in circumstances where the risk of litigation and the likelihood of delay meant that, although a 'very borderline case', it was in the best interests of the group members.[84] The factors considered by Lee J in *Clarke v Sandhurst Trustees Limited (No 2)* relevant to the exercise of the discretion to approve the settlement would be equally relevant to a consideration of the rebuttable presumption as to the minimum percentage return to class members (see below).

5.58 Similarly, in *Caason Investments Pty Limited v Cao (No 2)*,[85] the Court approved a settlement where the solicitors received 43% of the $19.25 million total (inclusive of costs) and the funder received 30% via a common fund—leaving group members with 27% of the final settlement sum.

5.59 In this matter, the Court had made prior orders appointing an independent costs referee, and the approved settlement had consequently reduced the costs for solicitors by $220,000. The percentage commission rate for funders was reduced in the common fund order, and the final settlement included a substantially reduced reimbursement for the representative plaintiffs,[86] yet the return to the class remained low.

5.60 The Court undertook a detailed consideration of the amount of the legal costs in the context of what was described as the 'difficulties and complexities of the proceedings, the vigour with which the respondents defended it, and the fact that the parties were unable to reach a settlement until about two months before trial'.[87] While observing that class actions are to be conducted 'for the benefit of the applicants and class members rather than for service providers such as lawyers (or funders) and the costs should be proportionate',[88] Murphy J observed that:

> the proper question in relation to proportionality of legal costs is what settlement or judgment amount was reasonable for the applicant's solicitors to expect would be achieved by class members, not what they actually achieved.[89]

5.61 Similarly, the Court undertook a detailed examination of the factors relevant to the reasonableness of the funding, noting that the 30% commission rate was:

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82 Ibid [3], [11].
83 Ibid [24].
84 Ibid [21].
85 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527.
86 Ibid [6].
87 Ibid [52], [68]–[82].
88 Ibid [148].
89 Ibid [152].

- below that agreed by sophisticated class members at the outset of the proceedings;
- below that disclosed to class members in the Notice of Proposed Settlement; and
- within the range of rates common in the class action litigation funding market.

5.62 The Court noted further that:

- the risks of providing funding were significant;
- there was a substantial adverse costs exposure to four separate groups of respondents;
- more than $7.56 million in legal fees had been advanced together with $2.4 million in security for costs over several years;
- the settlement was not large; and
- there was only one objection to settlement approval and it did not indicate that a 30% funding rate was unreasonable.[90]

5.63 Again, it is likely that similar factors would be equally relevant to a consideration of the rebuttable presumption as to the minimum percentage return to class members in the event that a statutory cap were to be imposed. The relative utility of imposing any such cap needs careful consideration. This is discussed below.

5.64 There may, however, be a policy imperative to give the Court more tools to ensure that the proportion of settlements returned to the class is reasonable and appropriate. The ALRC is aware that this would require funders and solicitors to adapt their operations accordingly.

Statutory caps

5.65 There is a risk that the introduction of contingency fees, or the ongoing rate of commissions by litigation funders, may be viewed as facilitating a 'windfall' for solicitors and funders to the detriment of class members. This perception can affect confidence in the civil justice system. One way to address this would be to subject contingency fees and commission rates to statutory caps.

5.66 Statutory caps for contingency fees (set on a sliding scale) formed part of the recommendation in support of contingency fees made by the Productivity Commission in 2014.[91] The Productivity Commission provided an example of statutory caps from California for medical liability and malpractice claims, which started at 40% for the first $50,000 and decreased to 15% for any amount exceeding $600,000.[92]

90 Ibid [159]–[174].
91 Also see Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) [7.8.3].
92 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 1, 2014) 627.

5.67 The Commission suggested that caps were necessary to protect 'retail' consumers only and were not recommended for 'sophisticated' clients.[93] This division may be problematic for class action proceedings: for example, class members in shareholder class actions often constitute a mix of retail and sophisticated clients.

5.68 The Productivity Commission did not consider that statutory caps on contingency fees should apply to commission rates set in litigation funding agreements. It distinguished the services to be provided by solicitors acting on a contingency fee basis and the services provided by litigation funders. Litigation funders provide funding and manage claims on behalf of the client—they do not provide legal advice. As litigation funders are not officers of the court, the Commission considered that any limitation on solicitors need not automatically apply to funders.[94] The ALRC is interested in further views.

5.69 Statutory caps in England and Wales treat the type of litigation (rather than the type of class members) differently. Personal injury matters are capped at 25% of recovery and non-personal injury matters are capped at 50%.[95] A sliding scale, which depends on at what point the case concludes or the level of recovery, can be included in the agreement as long as the maximum percentage does not exceed the statutory cap.

5.70 There are four key arguments advanced in opposition to the use of statutory caps. First, it may be that sliding scale statutory caps result in payments disproportionate to work or risk. This risk could run both ways—limitations on income may not accurately reflect the true extent of the work or risk, leading to solicitors/funders being under or overpaid. In this way, caps may be too blunt an approach that does not allow for differences of risk in individual cases.[96]

5.71 Secondly, the maximum cap would likely become the default amount awarded to solicitors or funders. This has been the experience with uplift fees for solicitors. However, it is not envisaged by the ALRC that any imposition of statutory caps in Australia would decrease the need for court oversight—considered critical to ensure that each commission/contingency fee is set appropriately, and not just at the top of the cap.

5.72 Thirdly, 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. If the industry is seen as being less profitable, there may be fewer new entrants, which may result in all active litigation funders setting their commission rates at the maximum cap. Relatively low caps may also discourage the funding of riskier proceedings.[97]

5.73 Fourthly, the introduction of statutory caps may dissuade solicitors from taking on the very cases the introduction of contingency fees might be thought to promote:

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93 Ibid. It was recommended that the caps be reviewed after a three-year period.
94 Ibid 635.
95 *Damages-Based Agreements Regulations 2013* (UK) reg 4.
96 Legg, above n 16.
97 Ibid 266.

namely, smaller matters with higher risk, such that there will be no demonstrable improvement in access to justice.

5.74 Statutory caps may, however, protect group members and provide clear expectations regarding the costs of running a matter. Regulating the income that can be made from civil justice actions by third parties would also provide for greater confidence in the system.

5.75 The ALRC welcomes submissions on whether statutory caps should be introduced; what limitations should apply; and whether the same caps should apply to solicitors and funders.

Statutory maximum

5.76 The ALRC asks whether, instead of statutory caps, there should be a statutory rebuttable presumption that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%. This would mean that class members must receive at least 50.1% of any settlement or judgment sum, unless the Court otherwise orders.

5.77 This option gives greater discretion to the Court than a statutory cap. It would enable the Court to determine whether the risk/work requires a larger proportion in payment than the statutory cap would allow, while ensuring that, in the majority of cases, claimants receive the greater proportion of a settlement or judgment sum.

Alternative funding

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

5.78 The ALRC is interested in submissions regarding other ways in which small or mid-sized meritorious class action claims may be funded. For example, the ALRC has previously recommended the establishment of a class action fund—intended to be available to plaintiffs and defendants.[98] The ALRC noted that Quebec established such a fund following the introduction of class action procedures in 1978.[99] That fund was financed by Government.

5.79 In 2008, the VLRC recommended the establishment of a fund to be financed through funding agreements. The fund would receive a percentage of the amount recovered by the plaintiff, subject to approval of the Court, in class action matters.[100] It was proposed that the fund would be co-located with Victoria Legal Aid and audited

98 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) [308]–[309].
99 Ibid [307].
100 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) recs 133, 136.

by the Civil Justice Council.[101] The VLRC again asked whether funds of this type were needed in its 2017 review of class actions and third-party funding.[102]

5.80 The ALRC is interested in whether any other self-funding models are operating. An appropriate model may include the following characteristics:

- one percent of fees recovered from contingency agreements or litigation funding agreements are reinvested into the fund
- the fund is used to provide financial assistance and indemnify representative plaintiffs in certain class actions
- the fund is controlled by a board that determines which actions are meritorious and are unable to proceed under any other funding model

101 Ibid recs 134, 140.
102 Victorian Law Reform Commission, above n 8, [8.49]–[8.52].

6. Competing Class Actions

Contents

Introduction

6.1 Multiple class actions with respect to the same legal dispute increase cost and delay for both plaintiff class members and respondents. In order to address this, the ALRC makes proposals that seek to ensure that, wherever possible, there is a single class action in order to litigate a claim. In this chapter, the rationale for a single class action policy is explained and a procedure for implementing that policy is identified.

6.2 Aspects of the proposed procedure that warrant further examination and consideration are explored. In particular, whether statutory amendments are required to reduce the risk of forum shopping to avoid the proposed consolidation process for competing class actions.

Background

6.3 In 1988, the ALRC noted that the main objectives of the class action regime were to:

> secure a single decision on issues common to all and to reduce the cost of determining all related issues arising from the wrongdoing. To achieve maximum economy in the

> use of resources and to reduce the cost of proceedings, everyone with related claims should be involved in the proceedings and should be bound by the result.[1]

6.4 Competing class actions, where there is more than one class action with respect to the same matter or related matters, undermines this objective. Competing class actions are a regular occurrence in Australia—since 1992 there have been 513 class actions commenced in relation to 335 legal disputes.[2] According to information published by law firm King & Wood Mallesons, 25% of class action proceedings running in 2015–16 were related actions.[3] The majority of competing class actions over the last five years have been shareholder matters. Nearly all competing class actions in the Federal Court involve shareholder disputes or product liability.[4]

Costs and delay

6.5 A key concern with competing class actions is the increased cost and delay for both plaintiffs and respondents. As Waye and Morabito have argued:

> ...economies of scale are clearly one of the major benefits of class actions. On the face of it, these scale efficiencies are undercut where multiple class actions proliferate.[5]

6.6 From a respondent's perspective, costs are increased because of the very nature of the competing claims which involve multiple legal teams, with different case theories and different expectations in terms of settlement.[6]

6.7 In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd (Money Max)*,[7] the Full Court of the Federal Court of Australia observed that competing class actions:

> cause increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents, particularly when they are commenced in different courts (such as in the Federal Court of Australia and a State Supreme Court).[8]

6.8 In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*, Beach J identified the additional costs arising from the two competing claims:

> (a) Ongoing non-stage specific costs associated with the respondent's lawyers communicating with two sets of lawyers and counsel for the different applicants throughout the course of the proceedings.
>
> (b) Duplicated case management costs, including preparing and defending separate interlocutory issues in separate proceedings, proposing and negotiating case management timetables with two sets of legal representatives for the different applicants and otherwise having to prepare for issues that would not arise if only one proceeding were to continue.

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1 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) [90].
2 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017).
3 King &Wood Mallesons, 'The Review: Class Actions In Australia 2015/2016'.
4 Jenny Campbell (Allens), Private correspondence (17 May 2018).
5 Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Inquiries in Law* 303, 309.
6 Allens, 'Class Action Risk 2016'.
7 [2016] FCAFC 148.
8 Ibid [196].

> (c) Duplicated procedural costs, such as preparing two defences in response to the allegations raised in the separate statements of claim (even if the issues raised in both pleadings are the same) and preparing for two common fund applications.
>
> (d) Duplicated discovery costs, including as to the preparation and negotiation of proposed categories of discovery and protocols for document exchange as well as costs associated with ensuring compliance with the respondent's continuing obligation to give discovery.
>
> (e) Duplicated costs associated with evidence preparation, including reviewing and responding to two sets of lay witness evidence, reviewing and engaging experts to address two sets of expert evidence and preparing for expert witness conclaves if ordered.
>
> (f) Duplicated costs associated with preparing for and attending a mediation involving two different applicants represented by two different firms of solicitors and counsel as well as two different litigation funders.
>
> (g) Duplicated costs associated with preparing for and attending the trial of two proceedings, including preparing witnesses for cross-examination called by two different applicants and their counsel, identifying evidentiary objections to two sets of lay and expert witness evidence, reviewing and preparing either two sets of written submissions and oral submissions or one set of submissions which address the issues raised in both proceedings and attending to the preparation of court books, tender bundles and lists of authorities relevant to each of the proceedings.
>
> (h) Duplicated costs associated with dealing with notices to be issued to group members in two different proceedings, rather than one set of proceedings.
>
> (i) Duplicated costs associated with negotiating and finalising settlement (if required) for each of the proceedings and seeking court approval.
>
> The potential duplicated costs that the respondent may incur if both proceedings are allowed to continue (whether separately or case managed together), and absent any steps I might take to ameliorate such duplication, has been estimated by the respondent to run into "tens of thousands of dollars, or many hundreds of thousands of dollars".[9]

6.9 As Legg points out, these costs may have been minimised by the effective case management tools that Beach J had at his disposal, but they could not have been eliminated.[10]

6.10 It is not only respondents that are disadvantaged by competing class actions. In the matter of *DSHE Holdings Ltd (recs and mgrs apptd) (in liq)*,[11] two overlapping class actions were competing (with two other actions) for a defined pool of funds, being insurance policies. The increased costs of both the respondents and plaintiffs, as

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9 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 [43]–[44].

10 Michael Legg, 'Competing class actions: A suggested solution through certification competing class actions' (Paper presented at UNSW Law CLE, Class Actions—*A close examination of the key issues that determine the conduct of a case*, Sydney, 22 March 2018), 2.

11 Supreme Court of New South Wales, 9 February 2018.

a result of two separate class actions, will ultimately diminish the available funds to the group members in the event that their actions are successful. As Black J observed:

> I have no doubt that the costs incurred in the defence of the proceedings will be substantial where ... five legal firms and at least seven Counsel are already engaged across the NAB Proceedings, the Receivers' Proceedings and the Findlay Proceedings [the first class action] to represent DSH [*DSHE Holdings Ltd*] ... Presumably, the additional costs incurred in the defence of the Mastoris Proceedings [the second class action] will further erode the relevant insurance cover.[12]

Closed class actions

6.11 One reason cited for the number of competing class actions in Australia is the rise of commercial litigation funding after the establishment of the class action regime, together with the clear preference of litigation funders for closed class proceedings.[13] The advent of closed class actions appears contrary to the regime that was envisaged by the ALRC and the drafters of Part IVA, who had determined that an open class system with an opt-out procedure was preferable on grounds of both equity and efficiency.[14] In referring to closed class proceedings in his judgment in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*, Jacobson J said:

> It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.[15]

6.12 Justice Lee highlighted the undesirability of closed class actions from the perspective of respondents in the following terms:

> However, like a 'Whac-A-Mole' game, where one mole is whacked by a mallet but another pops up, a further problem then emerged – if closed classes were allowed, how did a respondent obtain certainty against additional claims by settling only a closed class?[16]

6.13 The Victorian Law Reform Commission (VLRC) has observed that closed classes may reduce the inequality introduced by 'free riders', as all class members who wish to benefit from the recovery must register with the litigation funder and agree to contribute to the costs.[17] Similarly, in reducing the different categories of class members (those who have signed the funding agreement and those who have not), the potential conflicts of interest faced by lawyers and funders may be reduced (see Chapter 4).[18] Litigation funders also have greater certainty in relation to the funding fee

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12 *DSHE Holdings Ltd (Recs and Mgrs Apptd) (In Liq)*, Supreme Court of New South Wales, 9 February 2018.

13 Vince Morabito, 'Lessons from Australia on Class Action Reform in New Zealand', (Paper presented at the *Future of Class Actions Symposium*, University of Auckland, March 2018) 20.

14 Australian Law Reform Commission, above n 1, [127]; *Federal Court of Australia Amendment Bill 1991*, Second Reading, 13 November 1991.

15 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275 [117].

16 *Perera v GetSwift Limited* [2018] FCA 732 [16].

17 Victorian Law Reform Commission, 'Access to Justice—Litigation Funding and Group Proceedings' (Consultation Paper, July 2017) [DP 7.94-98].

18 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *UNSW Law Journal* 914; Simone Degeling and Michael Legg,

that might ultimately be recoverable and defendants have greater certainty as to the size of the class and thus their potential financial exposure.

6.14 The VLRC also drew attention to the heightened risk of competing class actions when closed classes are utilised. If a class action is successful, potential claimants who did not register may bring subsequent proceedings. This can potentially result in increased legal costs, wastage of court resources, delay and unfairness to defendants, particularly where proceedings are commenced in different courts.

Common fund

6.15 More recently, the ground has shifted with the decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* in which the Court made orders on an interlocutory application allowing the litigation funder to charge a (reduced) funding commission to the whole class, not just to those class members who had signed the funding agreement[19]—a common fund order.

6.16 The Court observed that:

> The proposed orders have the additional benefit that they will enhance access to justice by encouraging open class representative proceedings. If litigation funders are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class it is less likely that funders will seek to bring class actions limited to those persons who have signed a funding agreement. The encouragement of open class representative proceedings should reduce the potential for conflicts of interest between funded registered class members and unfunded class members and between the solicitors for the applicant and unfunded non-client class members. Open class proceedings will also act to inhibit competing class actions and avoid the multiplicity of actions which they represent.[20]

6.17 Although the Court made the common fund order, it declined to fix the appropriate commission rate, preferring to wait until it was armed with better information, including as to the quantum or likely quantum of the settlement or judgment.[21] While a common fund has clear potential financial advantages for funders, deferral of a determination as to the commission rate could be a significant commercial risk for funders. The Court did not suggest, however, that it would always be necessary or appropriate to decline to set the funding commission rate until settlement approval as it will depend on the circumstances in every case.[22]

6.18 There is some evidence that the decision in *Money Max* has encouraged greater use of open class proceedings: 86% of the funded Part IVA proceedings filed since the

'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36(2) *Civil Justice Quarterly* 244.

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

20 Ibid [205].

21 Ibid [79].

22 Ibid [148].

decision have been open class proceedings.[23] There is little evidence that it has prompted a reduction in the instances of competing class actions.[24]

6.19 It is important to note that, in addition to having had the consequence of serving the policy objectives of Part IVA by encouraging open classes, there is a correlative consequence: namely, that there is no longer a significant benefit to funders in early book building, nor in the subsequent creation of the funding agreements. This is of particular note when there are competing class actions where the Court is likely to be mindful of wasted costs associated with the book building process.

6.20 Commentators have expressed the view that it is unfortunate that Part IVA does not provide a mechanism to deal with competing class actions, particularly in light of judicial reluctance to choose between competing cases.[25] As is discussed below, Canada adopted a certification process,[26] as did the United States.[27] Such a process was expressly rejected by the ALRC on the basis that there was 'no value in imposing an additional costly procedure, with a strong risk of appeals involving delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency'.[28] That is not to say, however, that no mechanism at all was provided to safeguard against inappropriate use of the representative proceeding regime. The regime incorporates a number of protections and safeguards, including the specific protection for group members to opt-out,[29] seek substitution,[30] to be notified,[31] and the overriding power of the Court, either on application or of its own motion, to order that a proceeding no longer continue as a representative proceeding.[32] The precise operation of these provisions, particularly the latter, is still being developed through the jurisprudence.[33]

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23 Vince Morabito, 'Lessons from Australia on Class Action Reform in New Zealand', (Paper presented at the *Future of Class Actions Symposium*, University of Auckland, March 2018) 29.

24 Ibid.

25 The Hon 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*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (Publication 19, 2017), 41; Vince Morabito, 'Lessons from Australia on Class Action Reform in New Zealand', (Paper presented at the *Future of Class Actions Symposium*, University of Auckland, March 2018) 30; Michael Legg, 'Class Actions, Litigation Funding and Access to Justice', (Public lecture addressing the Victorian Law Reform Commission Consultation Paper, 'Access to Justice – Litigation Funding and Group Proceedings' [2017] *University of New South Wales Law Research Series* 57, 3-6; Ben Slade and Jarrah Ekstein, 'Class Actions and Social Justice: Achievements and Barriers', in Damian Grave and Helen Mould (Eds), *25 Years of Class Actions in Australia*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (Publication 19, 2017), Damian Grave and Helen Mould (Eds), *25 Years of Class Actions in Australia*, Ross Parsons Centre of Commercial, Corporate and Taxation Law (Publication 19, 2017), 297-301.

26 See, eg, *Class Proceedings Act*, SO 1992, s 2.

27 *Federal Rules of Civil Procedure*, r 23.

28 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) [147].

29 *Federal Court of Australia Act 1976* (Cth) s 33J.

30 Ibid s 33T.

31 Ibid s 33Y.

32 Ibid s 33N.

33 See, eg, *Johnson Tiles Pty Ltd v Esso Australia Limited* [1999] FCA 56, (1999) ATPR 41-679; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers appointed) (in liq)* [2015] FCA 811, (2015) 325 ALR 539; *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947.

6.21 Justice Lee's decision in *GetSwift* demonstrates a new willingness by the Court to address competing class actions.[34] In this case, faced with three open class actions by individuals who had purchased shares in Getswift Ltd, Justice Lee stayed two of the proceedings and allowed one to continue. Justice Lee explained the decision was focused on:

> how the Court deals with competing commercial enterprises which seek to use the processes of the Court to make money and the role of the Court in ensuring the use of those processes for their proper purpose and informed by considerations including: (a) the statutory mandate (s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) (Act)) to facilitate the just resolution of disputed claims according to law and as quickly, inexpensively and efficiently as possible; and (b) the furtherance of the Court's supervisory and protective role in relation to group members.[35]

Canadian approach

6.22 There is no such reticence in Canada to deal with competing class actions. The class action procedures are contained in the provincial statutes. In Ontario, the carriage motion is the mechanism for determining which lawyer will have 'carriage' of the plaintiff class action. The result of a successful carriage motion is to stay all other class proceedings with respect to the same legal claim. The power to decide the carriage motion comes from sections 12 and 13 of the Ontario *Class Proceedings Act*, SO 1992. Section 12 provides that:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

6.23 Section 13 provides that:

> The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

6.24 Perell J, in Smith v Sino-Forest Corporation, explained that:

> Practically speaking, carriage motions involve two steps. First, the rival law firms that are seeking carriage of a class action extoll their own merits as class counsel and the merits of their client as the representative plaintiff. During this step, the law firms explain their tactical and strategic plans for the class action, and, thus, a carriage motion has aspects of being a casting call or rehearsal for the certification motion.
>
> Second, the rival law firms submit that with their talent and their litigation plan, their class action is the better way to serve the best interests of the class members, and, thus, the court should choose their action as the one to go forward. No doubt to the delight of the defendants and the defendants' lawyers, which have a watching brief, the second step also involves the rivals hardheartedly and toughly reviewing and

34 *Perera v GetSwift Limited* [2018] FCA 732.
35 Ibid [3].

> criticizing each other's work and pointing out flaws, disadvantages, and weaknesses in their rivals' plans for suing the defendants.[36]

6.25 In *Mancinelli v Barrick Gold Corporation*, Chief Justice Strathy confirmed the three criteria for determination of a carriage motion were access to justice, the best interests of all class members, and fairness to defendants.[37] Unsurprisingly, the best interests of the class is the dominant criterion.[38] In order to apply these criteria the courts have developed 16 factors that should be considered:

(1) The quality of the proposed representative plaintiffs

(2) Funding

(3) Fee and consortium agreements

(4) The quality of proposed class counsel

(5) Disqualifying conflicts of interest

(6) Preparation and readiness of the action

(7) Relative priority of commencement of the action

(8) Case theory

(9) Scope of causes of action

(10) Selection of defendants

(11) Correlation of plaintiffs and defendants

(12) Class definition

(13) Class period

(14) Prospect of success: (leave and) certification

(15) Prospect of success against the defendants

(16) Interrelationship of class actions in more than one jurisdiction.[39]

6.26 The ALRC considers that the Canadian carriage motion may provide a useful model for Australia, provided the mechanism is appropriately tailored to the Australian judicial process and Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) (see Proposal 6-2 below).

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36 *Smith v Sino-Forest Corporation* (2012) ONSC 24 [2]-[3].
37 *Mancinelli v Barrick Gold Corporation* (2016) ONCA 571 [13].
38 *Mignacca v Merck Frosst Canada Ltd* (2009) 95 OR (3d) 269 (Div Ct) [8], [26].
39 *David v Loblaw; Breckon v Loblaw*, 2018 ONSC 1298.

Single class action—policy

Proposal 6–1 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that:

- all class actions are initiated as open class actions;
- where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;
- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and
- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.

6.27 The ALRC proposes that, as a matter of policy, all class actions should be open (at their initiation) as it is only through an open class regime that it is possible to have a single binding decision that applies to all claimants and not just those who have taken active steps to join the class action.

6.28 Where there are two or more competing class actions, the Court should ordinarily permit only one proceeding to progress and should permanently stay the competing proceeding(s), subject to the overriding discretion to do otherwise if the interests of justice so require. The procedural mechanism to give effect to this proposal is set out below in Proposal 6-2. While this proposal is largely consistent with the most recent decision of the Federal Court in *GetSwift*, the ALRC considers that the policy should be implemented by statutory amendment. These statutory powers would augment the existing case management powers of the Federal Court.

6.29 The Court already has the necessary powers to order class closure immediately prior to mediation so as to facilitate a settlement and provide finality.[40] The ALRC considers that there is merit in providing for class closure at mediation to be final so that the potential for the class to re-open is not used for tactical advantage.

Definition of competing class

6.30 For the purposes of these proposals, the ALRC defines competing class actions as two or more class actions where there is a non-theoretical possibility that a person may be a class member of more than one class action and, as a result, would be seeking relief from the respondents for the same claim in multiple proceedings.[41] This

40 *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296.

41 'It is well established that, prima facie, it is vexatious and oppressive for a second or subsequent action to be commenced in a court in Australia if an action between the same parties is already pending with

definition is designed to give the Court the broadest remit to address class actions that overlap. It is also designed to eliminate, to the fullest extent possible, the tactical drafting of statements of claim and pleadings to foster the multiplicity of proceedings.

Exceptions to a presumption of a single class action

6.31 Notwithstanding the desire for a class action regime that only allows one class action in respect of a given matter, given the breadth of this proposed power to routinely stay multiple proceedings, the ALRC considers that the Court should continue to have an overarching discretion to permit multiple proceedings. It is expected that the discretion would typically be exercised where:

- the overlap is small;
- there are multiple issues in dispute in relation to one or more defendants which cannot be dealt with by sub classes; or
- other complexities arise so that it would not be efficient or desirable from the point of view of justice to stay one or more of the proceedings.

6.32 In such cases, the Court would rely on its existing case management tools to manage the multiple class actions together in the most efficient manner.

Litigation funding agreements and lawyers costs

6.33 The proposal includes a provision that litigation funding agreements with respect to a class action are enforceable only with the approval of the Court. As a result, book building processes would change so that the contracts signed between potential class members and the funder are not binding absent court approval. This ensures that litigation funding in the context of class action litigation only occurs with the approval of the Court and that binding contractual entitlements are only created following Court approval. Court approval would include reviewing, amending or setting the commission rates (in accordance with Proposal 5-3) and determining that the funding agreement applies as a common fund. This proposal is limited to class actions and is reflective of the unique role the Court has under Part IVA to protect the interests of all class members.

6.34 This aspect of the proposal will also address judicial concern about altering contractual rights. In *Bellamy's*, Beech J explained:

> I am loathe to permanently stay one of the proceedings, as to do so would substantially affect the contractual funding and retainer arrangements of over 1000 group members in whichever proceedings I stayed.[42]

6.35 Resolving the funding rate at the beginning of litigation gives both funders and class members certainty as to the costs they will have to pay in the event litigation is successful. A similar approach is proposed with respect to lawyers' fees. This gives

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respect to the same subject matter in an Australian court.' See *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 [11].

42 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 [43]–[44].

effect to Proposal 5-2, which requires court approval of any proposed contingency fee to be charged by a lawyer.

Choice of lawyer

6.36 In consultations, it was put to the ALRC that any restriction on multiple class actions with respect to a legal claim would undermine a party's choice of lawyer and funder. Historically, this rationale has also been highlighted by judges when declining to strike out or consolidate a competing class action in the absence of an express statutory power.[43]

6.37 It was also explained in consultations that often where there are two competing class actions, those class actions have irreconcilable case theories that would prohibit both being run in a single action, even as alternatives. Any decision to abandon a particular case theory may be disadvantageous to particular class members.

6.38 In order to provide access to justice, and to provide a mechanism for redress where otherwise a claim would be uneconomic to pursue, the class action regime necessarily involves compromises. Each class member is not identified at the time a claim is initiated, let alone involved in the choice of lawyer and funder. As a practical matter, often a funder will choose a lawyer. For example, the IMF Product Disclosure Statement explains:

> We will appoint the solicitors to provide the relevant legal work to you on the terms of an agreement, referred to as the Standard Lawyers Terms. This is an agreement between us and the solicitors. The solicitors will also wish to have a retainer agreement directly with you.[44]

6.39 Lee J, writing extra judicially, explained that Part IVA has inbuilt protections that reflect the absence of consent from class members:

> Given no consent is required to be obtained from a group member and little might be known of the details of individual group member claims, it is unsurprising that specific protections were afforded to group members. These protections are threefold: a right to opt out, a right that must be provided by the Court (s 33J); the group member's right to make an application seeking substitution or related orders in the event of inadequate representation (s 33T); and the right to be notified in certain circumstances, for example, proposed settlement, want of prosecution or the proposed withdrawal of an applicant (s 33Y). Importantly, no provision requires group members to make any application or do anything with their claim against their will or oblige them to take any active step prior to an initial trial.[45]

6.40 This proposal retains these three protections.[46] In addition, having law firms and funders compete to run a class action may reduce costs as firms compete to convince the courts that theirs is the better offer. Early indications are that competition to run a

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43 Ibid.

44 IMF (Australia) Ltd, *Combined Financial Services Guide and Product Disclosure Statement*, (18 January 2010).

45 Justice Lee, 'Certification of Class Actions: A "Solution" in Search of a Problem?' (Paper presented to the Commercial Law Association Seminar *Class Actions—Different Perspectives*, 20 October 2017).

46 However, individual actions would be stayed until the conclusion of the class action as per Proposal 6-2.

class action against AMP, following adverse evidence at the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, has reduced commission rates significantly.[47] This competition may, in part, be a response to recent indications of a greater judicial willingness to require competing class actions to be stayed (for example, *GetSwift*).[48]

6.41 The class action regime was built on the premise that everyone with related claims should be involved in the proceedings and should be bound by the result unless they actively choose to opt out. Multiple class actions undermine the economy and certainty that the class action regime was designed to provide. The ALRC considers that reducing costs and complexity outweighs any loss of choice that Proposal 6-1 entails.

Single class action—implementation

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

6.42 A process is required to implement Proposal 6-1, including to:

- approve costs agreements prior to prosecuting the proceedings;
- identify any potential competing class actions as soon as practicable; and
- efficiently resolve which action, which representative applicant, and which lawyer and funder will lead the class action going forward.

6.43 Given the 'Whac A Mole' problem identified by Justice Lee,[49] the procedure for dealing with competing class actions should be set out in the practice note as it has the greatest flexibility to deal with developments in class action litigation.

6.44 The underlying premise of the proposal is that front-loaded case management of class action proceedings to resolve any competing class actions would generate efficiencies, as has been demonstrated by the existing case management practices of the Federal Court. The proposal is designed to resolve competing class actions as early as possible so that the substantive merits can then be litigated in the ordinary course as part of a single class action proceeding.

6.45 The Court should have the discretion to omit these steps where, at the initial interlocutory hearing, the Court is satisfied that the likelihood of a competing class action being initiated is remote. For example, the ALRC expects that public interest

47 See, eg, Emma Ryan 'No win-no fee: Maurice Blackburn slashes AMP class action commission', *Lawyers Weekly*, 16 May 2018.
48 *Perera v GetSwift Limited* [2018] FCA 732
49 Ibid [16].

litigation and litigation for a remedy other than for damages would be unlikely to be subject to a competing class action.

Key interlocutory steps

6.46 Under this proposal, the initiation of a class action under s33 of the FCA Act would lead to a sequence of interlocutory steps, which would:

- notify potential claimants and their lawyers and funders that a class action had commenced. The notification process and procedures would be settled at an initial interlocutory hearing;
- require potential claimants (and their lawyers/funders) to consider and lodge a competing class action within a defined period of time. No class actions with respect to the issues in dispute would be able to be initiated after this time. Individuals would still be able to opt out, with any individual actions stayed until the class action is resolved;
- require representative applicants to disclose on a confidential basis to the Court the terms of any costs agreement and funding agreement entered into by the representative applicant and the number of group members who have signed up to those agreements.

6.47 At the end of this defined period of time for lodging a competing class action there would be two eventualities: either no competing claims are lodged or one or more competing claims are lodged:

- if there are no competing class actions, [as per Proposal 6-1] the Court will need to approve the funding agreement and legal fees and this should be done at the 'early case management hearing' prior to the first case management conference set out in the existing Class Action Practice Note.
- if there are competing class actions there would be a 'selection hearing', at the conclusion of which the Court would determine the shape of the action going forward, the representative applicant, the lawyer/funder, and approve any funding agreement and costs agreement on a common fund basis. Following this, there would be the first case management conference as set out in the existing Class Action Practice Note.

6.48 In order to implement this procedure effectively, timelines need to be carefully considered. If the time allowed for competing class actions is too short there is a risk of haste leading to errors that disadvantage class members and potential class members. If the time allowed is too long, this delays the resolution of the matters in dispute. At this stage, the ALRC has not yet determined whether the time limits for this process should be set out in statute or otherwise left to the discretion of the Court. The ALRC seeks the views of stakeholders on the appropriate timelines to give effect to the process.

6.49 In order to reduce the likelihood of a 'race to the court' with claims initiated before being thoroughly investigated, there should be no 'first mover advantage' given to the law firm and funder that initiates the first class action. This is to avoid problems with poorly thought-out pleadings which require multiple revisions.

6.50 Given this proposal would require those investigating a potential class action to respond within an agreed timeframe following the initiating of a competing claim, a hasty initial class action also has the potential to disadvantage those who are moving in a more careful and considered manner. This was explicitly addressed by Justice Lee in *GetSwift* under the heading 'State of Preparation.'[50]

6.51 The ALRC also seeks the views of stakeholders as to the criteria the Court should apply when determining the lawyer and funder that will have carriage of the class action, noting that in any such determination, a multifactorial approach will be required. The ALRC draws stakeholders attention to the criteria applied in Canada and set out above at paragraph 6.25 for consideration. The ALRC also notes the following matters that Lee J considered in *GetSwift*,[51] including whether:

- there are any significant differences in the scope, causes of action or the case theories proposed to be advanced such that the claims of group members cannot be vindicated in one open class proceeding;
- allowing group members claims to be advanced in more than one open class proceeding would be conducive to increasing costs and inefficiencies, contrary to the case management objectives of Part VB of the FCA Act;
- allowing more than one open class proceeding to proceed would involve an element of vexation to be occasioned to the respondent when there is no justifiable reason why it should face more than one open class proceeding;
- to allow more than one open class proceeding to proceed is likely to mean additional costs will need to be recovered in any settlement and potentially increased amounts by way of funding commissions will need to be paid;
- each of the proceedings are at a comparable state of preparation and there is no reason to suggest that anything about any one of the proceedings which will mean that one is likely to proceed to a mediation or trial any earlier than another;
- there has been any operative delay or dilatoriness of any applicant;
- there is any difference in experience or competence of the legal practitioners;
- there is anything about any individual claim made by an applicant that would render any of the proceedings unsuitable to be the vehicle pursuant to which common issues and issues of commonality could be determined at an initial trial;
- there is anything about the existence of funding agreements or the number of group members who have signed funding agreements that should weigh significantly in the balance, particularly as no incentive should be given to encourage pre-action book building;

50 Ibid [174]-[175].
51 Ibid [306]-[324].

- there is anything about the terms, or lack thereof, within a funding agreement which should be a source for concern when any funding agreement must be approved by Court order, which will make clear the terms on which funding of the proceedings is to take place;
- proposals have been made by any party in relation to the appointment of experts that are likely to reduce costs;
- one proposed funding model is better than another having regard to whether it produces a more direct correlation between the amount ventured and the likely return and avoiding the potential for a windfall return;
- proposals have been made by any party for processes to control costs during the course of proceedings;
- by conducting a comparative analysis of the most likely returns to group members in a range of different scenarios, one proceeding is likely to produce a better return for group members in most scenarios and at all stages of the proceedings;
- funders would nonetheless enforce obligations to pay amounts recovered irrespective of a funded group member's claim being recovered in other proceedings.

Role of the respondent in selection hearing

6.52 A key issue for consideration in implementing this proposal is the role that the respondent plays in these interlocutory steps. Currently, the respondent is able to receive copies of any litigation funding agreement on the basis that any material that would give the respondent a tactical advantage is redacted. The respondent is also central in any application for security of costs and makes submissions as to both the quantum and the suitability or otherwise of the form of security proposed. In Ontario, the respondent is involved in the carriage motion hearing and its interest is a consideration for the court in deciding which firm will have carriage of the class action on behalf of the plaintiff class members.

6.53 If the respondent is precluded from participating in the proposed selection hearing, there will nevertheless be an adversarial process. The representatives of each competing class actions would put their case as to why their class action should be selected to proceed and the other class actions stayed. Some of the information revealed in the selection hearing might provide a tactical advantage to the respondent if it were disclosed publicly.

6.54 Accordingly, the ALRC considers at this stage that the respondent should not be involved in any selection hearing, and that technology should be used to provide class members with access to the selection hearing that does not permit the respondent access. Existing statutory provisions protect the respondent adequately, including the ability to seek summary dismissal (s 31A) and to seek a declassing of the action (s 33N).

Forum shopping

Question 6–1 Should Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under this legislation?

6.55 In the event that proposals are adopted that permit issues of competing class actions to be resolved quickly and efficiently by the Court, in accordance with the overarching objective of the class action regime, it would be undesirable if some form of procedural 'arbitrage' were to emerge whereby parties sought to commence competing class actions in the same matter in different courts. As Beech-Jones J explained when discussing the NSW representative proceeding and the class action regime under Part IVA:

> In its idealised form the Australian legal system should ensure that, within jurisdictional limits, there should be the same outcome for the same matter irrespective of which forum determines it.[52]

6.56 Currently, under s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (and under corresponding state legislation), the state Supreme Courts have the power to transfer a class action to the Federal Court where there is a related action already in the Federal Court and it is the interests of just to make the transfer. Morabito has previously argued that existing cross-vesting provisions are not adequate.[53]

6.57 The ALRC is considering whether the existing framework is sufficient to eliminate 'forum shopping' as a means to avoid the class action management process proposed in this chapter. In the context of securities class actions, the ALRC asks whether Part 9.6A of the *Corporations Act 2001* (Cth) should be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters arising under the corporations legislation that are commenced as representative proceedings. It also asks whether s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) should be similarly amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to representative proceedings commenced in relation to any matter arising under Division 2 of Part 2. The ALRC welcomes submissions from stakeholders on this question.

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52 Beech-Jones J, 'Representative Actions in NSW Courts' (Speech delivered at the *Class Actions—Current issues after 25 years of Part IVA Seminar*, University of New South Wales, 23 March 2017).

53 Vince Morabito, 'Clashing Classes Down Under—Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 245, 307-313.

7. Settlement Approval and Distribution

Contents

Introduction

7.1 This chapter examines issues related to the approval and distribution of settlements in class action proceedings. Specifically, this chapter considers:

- whether the court should have specific statutory power to appoint an independent referee to review solicitors' costs;
- whether there is a need to set out in legislation the criteria by which a court is to assess any proposed settlement or discontinuance of class action litigation;
- how best to reduce the costs associated with settlement distribution; and
- whether or not settlement agreements should be permitted to remain confidential.

A need to legislate the application of s 33V?

7.2 Section 33V of the *Federal Court of Australia Act* 1976 (the FCA Act) provides:

> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

7.3 Thus, unlike other forms of commercial litigation, an agreement to settle class action litigation has no legal effect unless and until it is approved by the Court.[1] The Full Federal Court has explained:

> ...the role of the court [in a settlement approval application] is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises.[2]

7.4 Section 33V does not provide the Court with criteria by which to determine whether a settlement or discontinuance should be approved.[3] Nevertheless, the Court has developed the principles by which a settlement assessment should be conducted by the Courts. Moshinsky J in *Camilleri v The Trust Company (Nominees) Ltd* explained (references omitted):

> (a) the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole;
>
> (b) there will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the defendants (inter partes aspects) or in relation to sharing the compensation among claimants (the inter se aspects)—reasonableness is a range, and the question is whether the proposed settlement falls within that range;
>
> (c) it is not the task of the Court to 'second-guess' or go behind the tactical or other decisions made by the plaintiff's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to: the circumstances which are 'knowable' to the plaintiffs and their representatives; and a reasonable assessment of risks, based on those circumstances;
>
> (d) the list of factors typically relevant to an assessment of the reasonableness of a proposed settlement…is a useful guide but is neither mandatory nor necessarily exhaustive—it is just a guide (and additional consideration needs to be given to factors relevant to the fairness of the settlement inter se;
>
> (e) in relation to the inter se fairness, a particular concern of the Court is to confirm that the interests of the lead plaintiff, or signed-up clients of a given firm of solicitors, are not being preferred over the interests of other group members. The arrangement should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible;
>
> (f) an important consideration will be whether group members were given timely notice of the critical elements, so that they had an opportunity to take steps to protect their own position if they wished. Once appropriate notice is given, the absence of objections or other response action from group members is a highly relevant consideration in support of a settlement, and all its elements;

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1 Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart, 2004) 309; Vince Morabito, 'Lessons from Australia in Class Action Reform in New Zealand' in *Future of Class Actions Symposium* (2018).

2 *ASIC v Richards* [2013] FCAFC 89 [8].

3 Morabito, above n 1, 3.

(g) where a group member does object to the settlement, an important further question is whether the objector is prepared to assume the role—and risks—of being lead plaintiff;

(h) in relation to provisions for costs-sharing among the successful group members, again an important consideration is where the group members were alerted at an early stage to the potential costs-sharing consequences of subsequent participation in the action. It is not, thereafter, the role of the Court to go behind the costs agreements, but rather to satisfy itself that the agreements have been applied reasonably according to their terms;

(i) further, the level of detail which the Court will require in order to be satisfied that costs have been calculated in accordance with the applicable agreements will vary, depending on factors such as whether the group members are all clients, or include non-client claimants, and the proportion of the settlement funds to be applied to costs.[4]

7.5 Despite the well-established body of precedent that has applied to these principles in numerous cases, it has been suggested that legislation is needed, not just to guide the judges, but to ensure that the factors are given due consideration.[5] If the 'legislation requires that certain criteria be considered, and one or some are not considered, then the judge's discretion will have miscarried.'[6] The contrary view holds that multi-factorial lists of legislative criteria fetter judicial discretion and stifle the evolution of principles as factual contexts change over time.

7.6 In two earlier reports, *Grouped proceedings in the Federal Court* in 1988 and *Managing Justice: A review of the federal civil justice system* in 2000,[7] the ALRC supported a statutory basis for the criteria judges were to take into account in approving settlement. Examples can be seen in sentencing regimes and in the family law system. At the time of those reports (some 30 and almost 20 years ago), the jurisprudence in this area was entirely undeveloped. The ALRC now considers that legislative reform is unnecessary as extensive jurisprudence exists which provides guidance as to the criteria judges are to take into account in approving class action settlements.

Application of settlement principles

7.7 Nevertheless, while the principles are well settled, their application to individual cases is less straightforward. A recent example is *Clarke v Sandhurst Trustees Ltd (No 2)*,[8] in which the Court was asked to approve a settlement sum of $16.85 million,

4 [2015] FCA 1468 [5].

5 Victoria has consolidated the criteria that have developed through the case law into the Supreme Court Practice Note: *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.

6 Michael Legg, 'Class Actions, Litigation Funding and Access to Justice' in *Public Lecture addressing the Victorian Law Reform Commission Consultation Paper, Access to Justice – Litigation Funding and Group Proceedings* (2017) 7.

7 Australian Law Reform Commission, 'Grouped Proceedings in the Federal Court, Report 46' (December 1988) 163; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.108].

8 *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511.

against the starting point for the 'best case' recovery for the plaintiffs and group members of $29.8 million, and with legal costs of approximately $4.9 million and the funder's commission amounting to $5.055 million. Although he considered it 'a very borderline' case, and 'not without some misgivings',[9] Lee J approved the settlement in light of his conclusions that the 'headline' settlement sum (of $16.85 million) was fair, having regard to the reasons for settlement deposed to by the plaintiffs' solicitor; the amount of legal fees being charged was fair, having regard to the complexity of the litigation; and the funding fee was within the 'prevailing market parameters'.[10]

7.8 Lee J observed, however, that, although the amounts proposed to be charged by the funder could have been within the range of comparable amounts charged in similar proceedings, expressed as a pure percentage, that did not address what he regarded as the structural difficulty occasioned by litigation of this complexity and cost when the damages sought to be recovered, on a best-case scenario, were relatively modest.[11] Lee J went on to observe that:

> This proceeding brings into focus a problem which bedevils representative proceedings of a certain type. The type to which I refer are those class actions which are commenced to recover what, in absolute terms, might be thought to be a considerable sum, but, when judged against the relative costs of litigation and the amount required to be paid to a funder in order to allow the proceedings, is not large…in these types of cases, it is necessary to be alive to the prospect that the settlement may be in the interests of the funders and sometimes the solicitors, but not in the interests of group members. [12]

7.9 The reasoning outlined in the above case raises the problem of 'anchoring', as described by Professor Legg: 'a cognitive psychology term that refers to a particular heuristic or rule of thumb used by humans to consciously or subconsciously simplify complex decisions'.[13] Legg observes that:

> In determining the fee that a litigation funder should receive there is a danger that a judge may place too greater [sic] weight on either the fee that the funder has used in a particular case, or the fees that have been charged in other class actions. Instead of engaging in the complex exercise of seeking to determine what is the return that compensates for the risk actually undertaken in the particular case, it may be tempting to use the source of the fees referred to above as a guide.[14]

7.10 The same author has criticised the decision in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* (*Allco*), in which the Court approved a funding commission of 30% of the settlement sum after the judge had reviewed the financial accounts of the funder, and other funders, and determined that standard commission rates were not producing rates of return so outside a reasonable range as to cast doubt on whether standard commission rates should be used as a

9 Ibid [34].
10 Ibid [27].
11 Ibid [26].
12 Ibid [6]–[7].
13 Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, 15.
14 Ibid.

benchmark for at least a 'contextual check'.[15] Professor Legg has suggested that, despite those findings, the state of the current litigation funding market is not clear and is continuing to change with further funders entering the market. He observes that 'the continued entry of new funders may suggest that above normal returns are being earned' and that, consequently, 'the current approach to determining a litigation funder's fee may create concern'.[16]

7.11 So far as the problem of anchoring is concerned, it is difficult to legislate in relation to a cognitive process. In any event, it is apparent that as class action litigation has increased, courts are becoming more attuned to the problem. Indeed, in *Clarke v Sandhurst Trustees Ltd (No 2)*,[17] Lee J was concerned to assess the risk the funder had agreed to take (having paid only a proportion of the legal costs incurred by the plaintiffs and having defrayed the risk of an adverse costs order through an After the Event insurance policy) and did not rely merely on comparable amounts charged in similar proceedings. Similarly, in *Allco*, Beach J said expressly that, 'a judge might put to one side standard or putative market rates as a benchmark and set a rate based only on evidence in the case before him'.[18]

Settlements should be fair for all groups of class members

7.12 *Allco* is also illustrative of the challenges that can arise for the Court in ensuring that any proposed settlement is fair and reasonable and in the interests of group members *inter se*. The settlement that was approved by the Court provided $30 million for group members who had signed up with the litigation funder and lawyer, and $10 million for the unknown group members who had not signed up. Professor Legg has criticised the approval in this case on the ground that, by discriminating between group members, it was not consistent with the requirements for the approval of a class action settlement.[19] Such criticism should not, however, lead inevitably to the conclusion that legislative intervention is required.

7.13 The factors to be taken into account by a Court in assessing whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole are also well established, and include whether:

- the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;
- the assessment methodology, to the extent that it reflects 'judgment calls' is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;

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15 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] 330 FCA [122].

16 Michael Legg, 'A Critical Assessment of the Shareholder Class Action Settlements—The Allco Class Action' (2018) 46 *Australian Business Law Review* 46, 54–64.

17 *Clarke v Sandhurst Trustees Ltd (No.2)* [2018] FCA 511.

18 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] 330 FCA [122].

19 Legg, 'A Critical Assessment of the Shareholder Class Action Settlements—The Allco Class Action', above n 16, 66.

- the assessment methodology is likely to deliver a broadly fair assessment (where settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);
- the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution; and
- to the extent that the scheme involves any special treatment of the applicants or some group members, for instance via 'reimbursement' payments—whether the special treatment is justifiable and, whether as a matter of fairness, a group member ought to be entitled to complain.[20]

7.14 In *Allco*, it is clear that Beach J had regard to the factors relevant to his assessment of the fairness of the settlement to the group members *inter se*. Having set out those factors he said:

> …in relation to the fairness of the settlement as between the group members, it must be ensured that the interests of the representative party, the signed-up clients of the solicitors, and any litigation funder are not being preferred over the interests of other group members, absent strong and compelling reason(s) for any such preferential treatment.[21]

7.15 Here, a discretion has been legitimately exercised by the Court, albeit in a manner with which some would disagree. Accordingly, there appears little to be gained by amending the statute to spell out those criteria, which the courts are already applying as a matter of common law.

7.16 Some have suggested that the Court should routinely appoint a third-party guardian or contradictor to assess the strengths and weaknesses of a settlement proposal from the perspective of the unrepresented class members.[22] There are instances of the Court having appointed contradictors or third-party guardians in appropriate cases, which they are already empowered to do.[23] Further legislative intervention does not seem warranted as it hard to discern what difference that would make to existing Court practice.

Statutory power to review and set funding fees

7.17 In addition to calls for settlement assessment criteria to be embodied in statute, it has been suggested that legislation to remove uncertainty and give the Court a clear

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20 *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 [43].

21 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs appt) (in liq) (No 3)* [2017] 330 FCA [85].

22 Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 611; Morabito, above n 1, 32–33; See also Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, [7.13]–[7.33].

23 *Kelly v Willmott Forests Ltd (in liq)(No 4)* [2016] FCA 323; *Dorojay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ASCR 569; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420.

power to review and set litigation funding fees is necessary.[24] This issue is discussed generally in Chapter 5.

7.18 The ALRC is persuaded that the scope of the Court's power to review litigation funding fees should be clarified. Chapter 5 discusses this issue in detail and proposes additional regulation in relation to litigation funders' commissions. It is also persuaded that existing mechanisms for the supervision of solicitors' costs should be used more routinely.

Additional oversight of solicitors' costs

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

7.19 It is common for the Court to be asked to approve the plaintiff's legal costs to be paid out of the settlement sum prior to any distribution on the basis that such costs are 'fair and reasonable'. It is common practice for the plaintiff's solicitors to rely on an affidavit prepared by a costs consultant which purports to set out a commercial and reasonable methodology consistent with the terms of any retainer.

7.20 Concern is often expressed as to whether such costs consultants are truly independent or whether they are likely to suffer from bias.[25] Competing expert reports increase the overall costs, which in turn reduces the ultimate return to the class members. The independence of experts must be assured. Thus, this Proposal would establish a panel of competent and reputable independent costs consultants from which the Court can select a referee. The Proposal seeks to reduce:

- conscious or unconscious bias in the preparation of reports as to the reasonableness of the costs charged;[26]
- the costs incurred in relation to applications for Court approval of settlement by obviating the need for competing expert reports and/or the appointment of a contradictor; and
- reduce costs overall through enhanced scrutiny of costs incurred in class actions.

7.21 The use of referees in appropriate cases is consistent with the requirement that the Court apply any civil practice and procedure provision in a way that promotes the

24 Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, 16.

25 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [113]–[116]; The Hon Justice GL Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (20th AIJA Annual Conference, 12 July 2002); NSW Law Reform Commission, *Expert Witnesses*, Report 109 (2005) [5.14].

26 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [123].

quick, inexpensive and efficient resolution of proceedings in the Court consistent with the overarching purpose in s 37M of the FCA Act.

7.22 It is acknowledged that the appointment of a referee will not always be appropriate.[27] Additional costs, which ultimately come out of the settlement fund, may be incurred unnecessarily if the Court routinely appoints a referee without appropriate regard to the circumstances of the case. The appointment of a referee should remain a discretionary power.

Settlement procedures

7.23 Parts 14 and 15 of the Federal Court's Class Actions Practice Note provide guidance in relation to settlement procedure and in relation to Court supervision of deductions for legal costs or litigation funding charges. The guidance is reflective of recent developments in the Court's jurisprudence, which have been identified by the Hon Justice Bernard Murphy (writing extra-judicially) and Professor Vince Morabito as including:[28]

- a greater judicial willingness to seek the assistance of a contradictor where the Court has concerns with aspects of the settlement in question;
- an increased judicial recognition of the fact that no or few objections from class members to a settlement may not, generally speaking, be regarded as reliable evidence that all or most of the class members who will be bound by it are happy with it; and
- signs of an increased judicial preparedness to allow objecting class members to recoup some of the costs they incurred in objecting to a proposed settlement where their objection assisted the Court.

7.24 Concern is often expressed as to whether such costs consultants appointed by the litigants' solicitors are truly independent or whether they are likely to suffer from bias.[29] As Murphy J has noted:

> The possibility of expert witness bias is amplified when an independent costs expert provides an opinion in a settlement approval application because: (a) the expert is engaged by a firm of solicitors which is, in reality, acting for itself in seeking that its costs be approved; (b) there is no opposing expert's report; and (c) there is usually no contradictor in the application.[30]

7.25 Further, it is often the case that the affidavit prepared by the cost consultant is provided only on the day of the hearing without affording representatives for the defendant or the court an opportunity to test the affidavit evidence.[31] In any event, it is

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27 See, eg, *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511 [24].

28 The Hon 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* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

29 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [113]–[116]; Davies, above n 25; NSW Law Reform Commission, *Expert Witnesses*, Report 109 (2005) [5.14].

30 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [116].

31 *Lee v Westpac Banking Corporation* [2017] FCA 1553 [32].

unlikely that the representatives for the defendant would seek to challenge such evidence given that, by this stage of the proceedings:

> ...the interests of the applicant and respondent have merged in the settlement and neither side seeks to critique the settlement from the perspective of class members. Both sides have become "friends of the deal".[32]

7.26 Such concerns notwithstanding, it is not the role of the Court to reject unchallenged evidence in whole or in part, nor to apply its own subjective view of what the legal work is 'really worth'.[33] If a Court is concerned about the level of legal costs claimed for the work undertaken, it can of course direct that a further affidavit be provided by a different costs assessor or that a contradictor be appointed.[34] Additional costs are incurred with either course and it is not apparent from the adoption of these practices that significant amounts are shaved from the original amounts claimed.[35] Nevertheless, the view has been expressed that 'it may be that the time has come for the Court to establish a regular practice of appointing a referee to inquire and provide a report to the Court'.[36] Section 54A of the FCA Act contains a power to appoint a referee.[37]

7.27 The Court will, however, need to ensure that the cost of the appointment of a referee in any given case is proportionate to the costs claimed and the amount that might potentially be saved.[38]

Administration of settlement distribution

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?

7.28 The process of settlement distribution needs to be both accurate in terms of the payment to individual group members and the lowest (and quickest) cost method of

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32 *Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323 [63]; *Kidd v Canada Life Assurance Co* [2013] OJ No 1468 [118], [121]; *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250, 258; *Mercedes Holdings Pty Ltd v Waters (No 1)* [2010] FCA 124 [9]; *Wotton v State of Queensland* [2009] FCA 758 [40].

33 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs) (in liq) (No 3)* [2017] FCA 330 [180]; *HFSP Pty Ltd (Trustee) v Tamaya Resources Ltd (in liq) (No 3)* [2017] FCA 650 [111].

34 *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689 [108].

35 In *Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689, following the appointment of the contradictor, costs of $8.562m were found to be $156,000 less than the estimated reasonable costs

36 *Lifeplan Australia Friendly Society Limited v S & P Global Inc (Formerly McGraw Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 [40]–[41]; See also Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, 17.

37 See *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 [35]–[62] for the principles relevant to the exercise of the power to appoint a referee.

38 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [124]; *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511 [24].

distributing those proceeds.[39] Judicial scrutiny of proposed settlement agreements is concerned to balance these two competing objectives. The objective of minimising costs and delay has been in the spotlight as a result of press commentary on the manner in which a number of high-profile administrations have been managed. As a consequence, attention has also turned to the law firms acting for lead applicants, who in the vast majority of cases have administered the class action settlements. There is some evidence that fees charged by such law firms for processing settlement sums are, on average, less than 3% of the settlement sum.

7.29 Nevertheless, some have expressed the view that, particularly in shareholder class actions, an accounting firm, share registry service or a claims administration company could undertake such work as competently as and more cheaply than the plaintiff's solicitors. The work involved in the distribution of a shareholder or investor claim is not, however, entirely straightforward, at least until the final payment stage, and law firms tend to have invested significant intellectual property in developing their process. The process typically involves:

- the development of a 'loss assessment formula', based on the evidence, which is approved on settlement;
- a 'data integrity exercise', which involves interrogating overlapping claims (such as those between beneficial owner vs custodian, custodian vs fund manager, claims aggregator vs fund manager);
- ensuring that beneficial owners' claims are properly valued and paid;
- applying the loss assessment formula to exceptional claims (such as options and warrants, contracts for difference, short sales);
- explaining the application of the loss assessment formula to class members; and
- the mechanical distribution of final payments.

7.30 There are additional complexities in cases involving personal injury, property damage and economic loss claims where, 'through their interaction with class members over the course of a proceeding, the plaintiff's solicitors usually obtain a detailed and nuanced understanding of the different categories of claim and of the complexities within each category of claim'.[40] Murphy J posited that, 'fairness and efficiency in the settlement of administration will be enhanced by such an understanding of the claims'.[41]

7.31 Clause 14.6 of Part 14 of the Federal Court of Australia's Class Action Practice Note provides that:

> The Court will require to be advised at regular intervals of the performance of the settlement (including any steps in the settlement distribution scheme) and the costs

39 Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89.
40 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [158].
41 Ibid.

> incurred in administering the settlement in order that it may be satisfied that the distribution of settlement monies to the applicant and class members occurs as efficiently and expeditiously as practicable.

7.32 Further, clause 14.5(d) provides for the affidavit in support of the application for Court approval to state 'the means of distributing settlement funds' but makes no reference to disclosure of the additional costs that may be incurred in that process, nor does it require any statement that the means of distributing the funds is the most efficient or otherwise in the best interests of the class members.

7.33 A limited, inexpensive tender process may assist in reducing the costs charged in the settlement administration process and may improve the overall efficiency of administration processes into the future as firms interested in tendering for such work refine their practices in response to a competitive tendering system. There is, however, a risk that any gains achieved through a competitive tender may be offset by increased costs should the Court be required to involve itself in the assessment of the tenders. The ALRC seeks more information from stakeholders to assess the merits of a such a tender process.

Settlement confidentiality

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

7.34 In civil litigation, protecting the terms of settlement under the veil of confidentiality often has value to one or more of the parties and can incentivise settlement of a dispute. One example of that value is the protection that confidentiality affords the reputation of the defendant corporation and its directors and officers. It is also generally accepted that confidentiality is permissible where matters do not proceed to trial.

7.35 Nevertheless, class action settlements are different from other settlements principally because the law requires the Court to approve any settlement.[42] That approval is designed to protect the interests of class members who have not been active participants in the litigation. Court orders and judgments are ordinarily public—supporting transparency and open judgment. There is often a conflict between these principles and the desire for the parties to conclude a settlement on a confidential basis. A reasoned judgment can only be delivered if the terms of the settlement are entirely, or at least in large part, public.

7.36 As Professor Legg has noted:

> Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals. Class actions are not simply

42 *Federal Court of Australia Act 1976* (Cth) s 33V.

> disputes between private parties about private rights. A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings [footnotes omitted].[43]

7.37 There are practical challenges in allowing greater transparency including whether:

- there are certain matters that could be canvassed in a judgment on the settlement that may disadvantage a party in the event of an appeal arising out of the settlement; and
- there are certain matters that could be canvassed in a judgment on the settlement that would disadvantage the defendant in defending any subsequent proceeding by those who opted out (or who were not in the closed class).

7.38 Nevertheless, the Court is able to fashion orders that protect confidentiality only to the extent required by the circumstances of the particular case, including the relevant limitation period.[44]

7.39 Professor Legg asserts that what should be disclosed is:

- the aggregate settlement sum
- legal fees
- funder's fee
- settlement distribution scheme costs
- ideally, what the claim was thought to be worth and why.[45]

7.40 The ALRC seeks views on whether the terms of class action settlements should be made public, and, if so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties.

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43 Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, 18.

44 *Foley v Gay* [2016] FCA 273; *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468; *De Brett Seafood Pty Ltd v Qantas Airways Limited (No 7)* [2015] FCA 979.

45 Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, 18.

8. Regulatory collective redress

Contents

Introduction

8.1 There has been an increasing trend internationally towards a means, alternative to class action litigation, of securing collective redress. This trend is driven by the time and cost involved in pursuing adversarial litigation and the view that private actions unnecessarily duplicate public enforcement in follow-on compensation claims.[1] It is also said to be influenced by renewed emphasis on access to justice and holding corporate wrongdoers to account.

8.2 As has been observed in earlier chapters, the main objective of the class action regime is to secure a single decision on issues common to all and to reduce the cost of determining all related issues arising from the wrongdoing. It was an express objective of the new Part IVA to 'enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources'.[2] There is no doubt that the class action regime has enabled many people to pursue claims as a member of a group that they would otherwise have been unable to pursue, and that recoveries have been achieved in a wide variety of types of claims. Nevertheless, it is also true that class action litigation is expensive, and the transaction costs involved in securing relatively modest returns to individual class members, even when the overall sum recovered is relatively large, remains of concern to many.[3]

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1 Christopher Hodges, 'Delivering Competition Damages in the UK' (Oxford Legal Studies Research Paper No 66/2012, 17 September 2012) 42. See, eg, the Nurofen litigation: *GlaxoSmithKlein Australia Pty Ltd v Reckitt Benckiser (Australia) Pty* Ltd (No 2) [2018] FCA 1.

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991 3174–3175 (Duffy).

3 See, eg, *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511. In this case, transaction costs (excluding any consideration of the indirect costs incurred by the Federal Court) were $10 million to secure a return to class members of $6.85 million.

8.3 An examination of the relatively new collective redress mechanisms in the United Kingdom (UK) suggests that:

- such schemes are a quicker and more cost-effective alternative to litigation;
- the duplication of effort and costs in separate, sequential public and private enforcement actions may be avoided;
- suitably empowered regulators are likely to be able to deliver compensation swiftly and cost-effectively through the ability to resolve the *combination* of public and private consequences;[4]
- defendants may avoid the reputational loss and costs involved in defending a class action; and
- defendants may incur lower statutory penalties if compensation is paid early and before any fine is imposed.

8.4 The ALRC considers that the potential benefits of an enhanced regulatory redress mechanism within Australia warrant the consideration of the establishment of an enhanced single federal collective redress scheme that would enable corporations to provide appropriate redress to those 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 would nevertheless permit an individual person or business to choose not to participate in the scheme and to pursue litigation should they so choose.

Background

8.5 There is a range of regulators in Australia that have powers to provide collective redress. For example, the Australian Competition and Consumer Commission (ACCC) can accept enforceable undertakings from companies that the ACCC alleges have breached the law. Those enforceable undertakings can include providing refunds to affected customers.[5]

8.6 The ACCC's mandate may be limited where there is an existing industry specific regulator. Industry specific regulators cover a large number of industries, including telecommunications, energy and utilities, and financial services. Moreover, there are differences in the powers of and approaches to regulation adopted by each of these regulators: some regulators focus on complaint handling, while others focus on enforcement. Commonwealth organisations that currently provide for redress schemes are industry-specific, which may result in inconsistent approaches and consequences arising out of similar conduct. In addition there are regulators who may provide forms of redress in relation to specific conduct such as breaches of privacy and discrimination laws.

8.7 An example of a recent attempt to consolidate disparate schemes is the establishment of the Australian Financial Complaints Authority (AFCA) in accordance

4 Hodges, above n 1, 25.
5 *Competition and Consumer Act 2010* (Cth) s 87B.

with the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth).[6] From November 2018, the AFCA will replace the Superannuation Complaints Tribunal, the Financial Ombudsman Service (FSO) and the Credit and Investment Ombudsman. The AFCA dispute resolution model is focused primarily on individual disputes. This is notwithstanding that one of the AFCA's predecessors, the FSO, recommended that consideration be given to putting in place a consumer redress scheme.[7] The FSO considered that such a scheme would respond to the current situation, where there are large numbers of disputes arising from failings in a financial services provider or financial product (or service) which requires a substantial number of customers' claims of loss to be assessed. Such an approach would be consistent with that adopted in the UK where the regulator (the Financial Conduct Authority) has explicit power to put in place a consumer redress scheme for particular financial service providers.[8]

8.8 In addition to the regime created in the UK with respect to the financial service industry by the *Financial Services and Markets Act 2000* (UK), the *Consumer Rights Act 2015* (UK) (CRA) permits businesses to submit a voluntary redress scheme to the Competition and Markets Authority for approval as a mechanism to compensate consumers. The *Competition Act 1988 (Redress Scheme) Regulations 2015* describe how the Competition and Markets Authority (CMA) will consider applications for the approval of redress schemes.

The mechanism of the scheme in the United Kingdom

8.9 Section 49C of the CRA allows a person to apply to the CMA for approval of a redress scheme. Such an application can be made before a decision has been made by the CMA that there has indeed been an infringement, but can only be approved and made public at the same time as (or after) the decision.[9]

8.10 An application can be made by a single entity or on a group basis. An outline scheme can be submitted to the CMA at any time during the investigation, although in practice it would be challenging to do so before the CMA issues the statement of objection, in which it sets out its case against the parties under investigation. The CMA has made clear that it does not view an application for a compensation scheme as an admission of liability or in any way inconsistent with the applicant continuing to exercise its rights of defence.

8.11 The first stage of the process involves the presentation of an outline scheme to the CMA. The CMA then considers the scheme and decides whether it will prioritise assessment of the application. If the scheme is prioritised, the applicant is required to provide details of:

6 Which passed both houses of Parliament on 14 February 2018.
7 Financial Ombudsman Service, 'Submission to Financial System Inquiry' (April 2014) [8.1].
8 Ibid; *Financial Services and Markets Act 2000* (UK) s 404.
9 Norton Rose Fulbright, 'UK Voluntary Redress Scheme—An Alternative to Litigation' (October 2015).

- the start date, term and duration of the redress scheme (which must be at least nine months);
- persons entitled to claim compensation under the scheme;
- the scope and level of compensation to be offered under the scheme;
- the process of applying for compensation under the scheme (including the estimated time it will take to determine applications for compensation) together with: (i) the evidence applicants will be asked to submit in connection with their application for compensation; (ii) how the scheme is to be advertised; (iii) the complaints procedure; and (iv) the consequences of accepting compensation under the scheme.

8.12 An applicant will be required to appoint a chairperson (who must be a senior lawyer or judge) who will assist in devising the terms of the scheme and deciding whether to recommend the scheme to the CMA. The chairperson is then responsible for appointing board members which must include: (i) and economist; (ii) an industry expert; and (ii) a person to represent the victims of the infringement who will be entitled to claim compensation under the scheme. The chairperson and the board must determine the methodology for assessing the levels of compensation payable to each applicant. In addition to the compensation payable under the scheme, the parties seeking to set up the redress scheme are responsible for the fees of the chairperson, the board members and the costs of the CMA.

8.13 Once the scheme is formally approved by the CMA, the infringing party has a statutory duty to comply with it. The CMA has the power to offer a reduction in the level of fine of up to 20% to reflect the infringing party's voluntary provision of redress.

8.14 Under the UK models, individuals (or businesses) are not obliged to accept redress under the relevant scheme and are free to pursue private enforcement action through the courts if they do not believe the scheme to be satisfactory. Claimants must actively opt-in to the settlement. Nevertheless, the speed, cost effectiveness and relative certainty of receiving some compensation can make litigation less attractive.

Possible benefits of a regulatory redress scheme for Australia

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?

8.15 The implementation of a public restorative power, or powers, affords an opportunity to deliver compensation and other forms of redress without the need to litigate. Such an approach 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. It would be a recognition that alternative methods of redress often have very high transaction costs. For example, a class action settlement sum can, in some cases, seem disproportionate to the fees paid to lawyers, funders and experts by both plaintiffs and respondents. By contrast, a collective redress scheme can be relative low-cost to establish and manage.

8.16 This will require a shift by regulators away from an enforcement mindset to one that is focused on providing appropriate redress. A collective redress scheme, which includes a power to include agreements on damages in any settlement procedure, would be a better, more cost-effective, alternative to running the case again as follow-on litigation. Where regulators do not have such a power, and in the absence of a voluntary scheme, compensatory remedies must be pursued through follow-on litigation. This results in duplication of enforcement efforts and consequent delay and expense. Suitably empowered regulators are likely to be able to deliver compensation swiftly and cost-effectively through the ability to resolve the combination of public and private consequences.[10]

8.17 A collective redress scheme is likely to be advantageous to consumers who typically have small individual claims. In cases where a class action is likely to yield a very small return to affected class members, even though the overall damage to the aggregate is large, the motivation of individuals to come forward to claim a share of the fund is likely to be very weak. In such circumstances, a compensatory collective redress scheme, in addition to any fine, would likely achieve greater access to justice and at a fraction of the cost of a class action.

10 Hodges, above n 1, 25.

8.18 A collective redress scheme is also likely to be advantageous to defendants who can avoid, or at least minimise, reputational loss and costs involved in litigation, and allow the company to present the scheme as indicative of a new culture of compliance within the organisation. The potential of incurring a lower penalty in recognition of the company's willingness to enter into a voluntary redress scheme is also a powerful incentive.

Some challenges

8.19 A single federal collective redress scheme that can be adapted to a wide variety of industries will involve reconfiguring the current industry-based structure of regulators and their role (redress-focused rather than enforcement-focused). This will be a complex reform requiring the regulator, and those who are regulated, to support it. Of particular importance is how such a regulator would be funded, as industry-based regulators are usually funded by the industry not the taxpayer. There is a risk that the regulator's limited resources might be seen to be diverted from its principal role.

8.20 There are also risks for potential defendants. An application for a redress scheme crystallises the company's liability in circumstances where there is a chance that no claim will be brought. There is a risk that not all potential claims would be captured within the particular redress scheme, exposing the company to litigation in any event. Further, claimants must choose to opt in to the settlement scheme. Those who do not do so may choose instead to issue follow-on proceedings.

Consultations

Name	Location
Allens	Sydney
Allianz Insurance	Sydney
Arnold Bloch Leibler (ABL)	Melbourne
Australian Institute of Company Directors	Sydney
Australian Securities and Investment Commission	Sydney
Australian Shareholders Association	Sydney
Burford Capital	Sydney
Colin Biggers & Paisley	Sydney
Federal Court of Australia	Melbourne
Federal Court of Australia—Class Action User Group	Sydney/Melbourne
The Hon Raymond Finkelstein AO QC	Melbourne
Professor Ian Harper	Melbourne
Ms Wendy Harris QC	Melbourne
Harbour Litigation Funding	Melbourne
Professor Deborah Hensler	Melbourne
Herbert Smith Freehills (Melbourne)	Melbourne
Herbert Smith Freehills (Sydney)	Sydney
Professor Christopher Hodge	Sydney
IMF Bentham (Melbourne)	Melbourne

IMF Bentham (Perth)	Melbourne
IMF Bentham (Brisbane)	Brisbane
Investor Claim Partner Pty Ltd	Sydney
Johnson Winter and Slattery	Sydney
King & Wood Mallesons	Sydney
Lander and Rogers	Melbourne
Law Council of Australia	Sydney
Law Society of NSW—Costs Committee	Sydney
Law Society of NSW—Ethics Committee	Sydney
Professor Legg, Professor Degeling and Dr Metzger	Sydney
Litigation Lending	Sydney
LMC Finance	Sydney
Maurice Blackburn (Melbourne)	Melbourne
Maurice Blackburn (Sydney)	Sydney
Dr Warren Mundy	Sydney
Phi Finney McDonald	Melbourne
Justin McDonnell	Sydney
Professor Vince Morabito	Melbourne
Slater and Gordon	Melbourne
Squire Patton Boggs	Sydney
US Chamber Institute for Legal Reform	Sydney
Victorian Law Reform Commission	Melbourne
Victorian Legal Services Commissioner	Sydney
Zurich Insurance	Sydney