Law Council
OF AUSTRALIA

Litigation funding and the regulation of the class action industry

Parliamentary Joint Committee on Corporations and Financial Services

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the following Committees and Constituent Bodies for their assistance with the preparation of this submission:

- Class Actions Committee, Federal Litigation and Dispute Resolution Section;
- Corporations Committee, Business Law Section;
- Insolvency and Restructuring Committee, Business Law Section;
- Australian Consumer Law Committee, Legal Practice Section;
- Australian Environment and Planning Law Group, Legal Practice Section;
- Professional Ethics Committee;
- Law Society of New South Wales;
- Law Institute of Victoria; and
- Law Society of South Australia.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) regarding the inquiry into litigation funding and the regulation of the class action industry (**Inquiry**).

2. The Law Council considers that the class action regime in Australia has been reliable and has given users certainty in most aspects of its implementation. However, as discussed throughout this submission, the Law Council suggests that there is opportunity for improvement.

3. To assist the Committee, the Law Council has developed a table providing a broad overview of class action settlements in the 2001-2020 period (see **Attachment A**). This table demonstrates that of the class actions identified, costs and disbursements to lawyers have averaged approximately 15 per cent of the settlement amount, while commissions charged by third-party funders have averaged approximately 27 per cent. In many cases these costs are arguably reasonable. However, incidences of excessive fees or commissions suggest that there is a case for greater court oversight. The Law Council suggests several steps that could be taken to place downward pressure on costs to class members.

4. The Law Council recognises that there are varying arguments in favour of, and against, permitting lawyers to charge on a contingency fee basis. The Law Council has concluded that, on balance, contingency fees arrangements should not be supported.

5. The Law Council maintains the position that the relationship between lawyers and funders should be one at arm's length to ensure that the potential for conflicts of interest is minimised. The Law Council repeats its position that some level of additional regulation of third-party funders is needed and suggests that the appropriate mechanism is to require funders to obtain an Australian Financial Services Licence (**AFSL**). However, the Law Council is concerned that the proposal that funded class actions would be treated as managed investment schemes (**MIS**) will introduce unintended consequences that may have a negative impact on the lawyers conducting or defending class actions and on the conduct of recovery litigation in the insolvency industry in general.[1]

6. To encourage competition in the class actions market, the Law Council suggests that the courts should be authorised to make common fund orders. Experience during the period in which common fund orders were permissible was that the competitive pressure introduced by the common fund order regime had a positive downward impact on commissions charged and increased the transparency of litigation funding arrangements.

7. The Law Council also supports the recommendation by the Victorian Law Reform Commission (**VLRC**) in its 2008 *Civil Justice Review* to establish a 'justice fund' to assist in the funding of some class actions and to contribute to downward pressure on commissions.[2]

[1] Hon Josh Frydenberg MP, Treasurer (Cth) 'Litigation funders to be regulated under the Corporations Act' (Media Release, 22 May 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/litigation-funders-be-regulated-under-corporations>.
[2] Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 28 May 2008).

Introduction

8. The Law Council notes, at the outset, that the primary focus of the Inquiry should be on third-party litigation funders and the impact that litigation funding has on class members.

9. As the Law Council said in its August 2018 submission to the Australian Law Reform Commission's (**ALRC**) Inquiry into Class Action Proceedings and Third-Party Litigation Funders,[3] following the introduction of the federal class actions regime in Australia in 1992, and the introduction of several state regimes, class actions have been established as an effective, reliable, and, in many circumstances, essential, procedure to deal with multiple claims.[4] The number of class actions commenced in Australia has grown steadily throughout this time and has been accompanied by the establishment and growth of the litigation funding market.

10. The Law Council noted in its submission to the ALRC that after 26 years of jurisprudence in which Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA**)[5] has been reviewed and analysed by numerous judges, both at first instance and on appeal, it is considered that the class action regime is reliable and one that gives users certainty in most aspects of its implementation.[6]

11. As the Law Council recognised in its Position Paper entitled *Regulation of Third Party Litigation Funding in Australia*, published in June 2011:

> *… litigation funding promotes access to justice, spreads the risk of complex litigation and improves the efficiency of litigation by introducing commercial considerations that will aim to reduce costs.*[7]

[3] Law Council of Australia, Submission No 62 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (17 August 2018). The ALRC's Final Report was provided to the Attorney-General, the Hon Christian Porter MP on 21 December 2018: Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018).

[4] 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: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 281: 'Over the past 25 years, class actions, after a slow start, have served Australian society well. Any reasonable analysis of the actions commenced and resolved since 1992 in the Federal, Victorian and New South Wales Supreme Courts will conclude that the actions, in the main, have produced valuable outcomes for society. That is, most class actions have properly aired a dispute that concerns many complainants, and the resolution of the dispute has achieved finality, not only for them, but also for the defendants. Whether settled, won, struck out or dismissed, most class actions have performed the role that was intended. They have been, in the words of the second reading speech introducing the federal legislation in 1991, an "effective procedure to deal with multiple claims".'

[5] References to provisions in legislation are references to provisions in Part IVA of the *Federal Court of Australia Act 1976* (Cth) unless otherwise stated.

[6] Cf the uncertainty created by the decision of the High Court of Australia in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 ('*Brewster*').

[7] Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia* (June 2011) 4. See also *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, [100]; *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1, [54].

Responses to the Terms of Reference

1. What evidence is available regarding the quantum of fees, costs and commission that is earned by litigation funders and the treatment of that income?

12. Litigation funding typically involves a third-party funder agreeing to cover the costs of litigation while indemnifying the applicants against the risk of paying the costs incurred by the respondent if the case fails.[8] In most circumstances, if the case is successful, the funder is reimbursed for the costs of the litigation and for bearing the financial risk of the case being unsuccessful through an agreed percentage of the sum recovered by the applicants. This percentage may vary depending on the stage at which a matter resolves, with a lower percentage received if the matter resolves at an earlier stage and a higher percentage if it resolves later. Fees are sometimes set (wholly or in part) as a multiple of costs incurred or are limited by reference to such a multiple of costs. Some funding agreements will differentiate the commission payable with reference to the size of a class member's loss, for example, a small retail investor may be required to pay a higher commission than a large financial institution.

13. At **Attachment A**, the Law Council provides a summary of most of the Australian class action proceedings resolved in the period from 2001-2020 and the distribution of settlement amounts among class members, legal representatives, and third-party funders.[9]

14. The evidence reveals that:

    (a) of all the matters identified (and for which the amount of approved legal fees is known), the total settlement sum over the period is $4.489 billion, inclusive of costs;[10]

    (b) the approved legal costs and disbursements for those matters totals $679.86 million being 15.14 per cent of the gross settlement amount;

    (c) of the funded matters identified (and for which funding commissions are known), the total settlement sum over the period is $2.389 billion, inclusive of costs;

[8] Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia* (June 2011) 4. See also Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 49.

[9] The Law Council notes that it has not been possible to capture all class action settlements in Australia with all the required information during the timeframe provided. However, the table is of value because it identifies most settlement sums, legal costs and funding commissions paid unless the action has proceeded on a conditional fee basis where the law firm has covered the costs of the proceeding. The percentage results ignore those cases in which the parties agreed to settle for no compensation and each party paying their own costs and those claims that lost, such as the Myer class action. The data was compiled by members of the Class Actions Committee of the Law Council's Federal Litigation Section based on a review of published judgements and other sources, including in particular, Michael Legg and Ross McInnes, *Australian Annotated Class Actions Legislation* (LexisNexis Butterworths, 2nd ed, 2017). The work is not intended to be scientifically rigorous. The Law Council encourages the Committee to look at the variety of outcomes achieved in class actions in **Attachment A** so as to appreciate that class actions are not homogenous. The cost to bring a class action (both legal fees and funder's fees) is impacted by a number of matters: the type of claim, causes of action pleaded, novelty of claims, number of group members, approach of the respondents, interlocutory disputes, and length of the proceeding (including if a settlement is achieved at an early stage or the matter proceeds to trial and possibly appeal). As a result, a class action can require more or less work and involve more or less risk.

[10] This sum necessarily misses some settlement amounts that have not been disclosed and does not count those settlements for which the amount approved for legal fees is not available.

(d) commissions earned by funders totalled $642.63 million, being 26.9 per cent of the gross settlement sum as referred to at (c) above;[11]

(e) of the funded matters identified the proportion of approved legal fees plus commission paid to the funders to the approved gross settlement sum is 41.4 per cent; and

(f) there are indications that there was a significant reduction in commission rates over the period in which common fund orders were being made, reflecting the increased level of competition between funders and the greater involvement of the courts in setting rates when common fund orders were available.[12]

15. The above results are consistent with those in Professor Vince Morabito's study covering the period to the end of 2018:

- 26.87 per cent of all the settlement proceeds generated in all funded class actions were applied towards the funding fees of the funder supporting the litigation; and
- median percentage of settlement funds 'consumed' by funding fees in all funded cases settled during the review period was approximately 25 per cent.[13]

16. Whether or not such percentages are reasonable is open to debate. Until common fund orders were widely applied,[14] competition in the litigation funding market was limited because there were few participants and commission rates were unchallenged because the courts would not interfere in private contracts between funders and the signed-up class members. There was little transparency in rate settling and the amount of commission paid from a settlement sum was often not revealed. Classes were often closed (i.e. they comprised only those who agreed to the funder's terms) and therefore the cost and commission were spread only across a subset of the class which had similar claims.

17. However, after the decision of the Federal Court that permitted common fund orders in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*,[15] and before that decision was overruled in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* (***Brewster***),[16] competitors entered the funding market and open class claims became the norm. Commission rates plummeted under the combined pressure of increased competition and court involvement in setting commission rates when making common fund orders. Rates fell to levels that most would agree were reasonable considering the substantial costs and risks faced by funders and the fact that the classes were open (that is, all persons with similar claims were included, not just a sub-set who had made agreements with the funder) meant that costs and the funder's commission were spread, equitably, across the whole class of beneficiaries.

[11] The percentages quoted here are by their nature averages. The Law Council would encourage the Committee to look at the variety of outcomes achieved in class actions in Attachment A so as to appreciate that class actions are not homogenous.
[12] See, eg, Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments' (31 January 2019) 14.
[13] Ibid 11-2.
[14] Following *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191 ('*Money Max*').
[15] Ibid.
[16] [2019] HCA 45.

18. There are of course cases in which third-party litigation funders have sought, and the court has authorised the funder to be paid, a commission that is, by any standards, a large amount of money.[17] However, even large fees can be justified in particular cases.

19. The stakes generally involved in class actions are high. This tends to mean that there is a commensurate level of expenditure by both sides of the dispute. In short:

    (a) plaintiff lawyers employ expensive teams who work laboriously to prepare and conduct the factually and legally complex claims and who will typically plead every available cause of action; and

    (b) defendants employ similar teams, and tend to take every point, whether procedural or substantive. Plaintiffs expect this response and so they (and their legal teams) prepare accordingly.

20. The expectation of high costs and significant risk defines the burden taken on by the funder – to fund the case for the applicants, to provide security for costs and to satisfy any adverse costs order. It therefore feeds into the measure of a reasonable fee for these services.

21. In this context, it is worth considering steps that might be taken to facilitate such claims while reducing the tendency to greater expense. Obviously, the topic of the costs of litigation generally is a very large one and beyond the scope of this reference. However, some measures specific to class actions warrant consideration, namely:

    (a) the imposition of obligations on funders and insurers as per Part 2 of the *Civil Procedure Act 2010* (Vic), under which those whose conduct breaches the overarching purpose are exposed to costs consequences;

    (b) giving the court power to require the parties to take steps early in the proceeding to identify claim value. This may require both parties to share information. This can be done by way of orders ancillary to those ordering the parties to mediate;

    (c) giving the court the power in appropriate cases to require the parties to provide the court with estimates of the costs likely to be incurred in the prosecution and defence of the proceedings with a view to the court managing the litigation so that costs are proportionate to what is at stake;

    (d) amending the rules of court so that in appropriate cases the court can require the parties to share information that may have an impact on settlement, such as budgets and the existence and value of responsive insurance;

[17] For example, see the $60 million commission paid to Omni Bridgeway in *Kirby v Centro (No. 6)* [2011] FCA 650. However, it must be noted that it was 40 per cent of the settlement sum and paid in a period when there was almost no competition in the class action funding market and it was a class action that was particularly complex and hard fought. More recently, $92 million, or 43 per cent of the $215m settlement sum was paid to Litigation Capital Partners LLP Pty Ltd and International Litigation Partners (No 5) Ltd in *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)* [2018] FCA 1289. Note the comment by Lee J at paragraph [54] when approving the settlement in that case: '[t]he percentage amount charged by the funder, although at the higher end of prevailing funding rates (particularly as it is augmented by what is described as a "management fee"), is not outside the bounds of what would be expected to be a percentage rate in complex litigation ***at the time the present funding agreements were executed***. Indeed, the level of funding commission charged (leaving to one side the "management fee") was a not at a rate markedly different to that charged in what might be described as the usual form of securities class action. Certainly, when these cases were commenced, they raised complex issues as to liability, including difficult questions as to limitations, which meant it was a more hazardous endeavour than many other large-scale funded cases, including most securities class actions' (emphasis added).

(e) modifying the power of the court to make an aggregate award of damages under subsection 33Z(3) of Part IVA of the FCA so that it is clear that a reasonably accurate assessment of the total amount to which group members will be entitled under a judgment can be arrived at other than on a case by case basis, for example, by a reasonable sample; and

(f) granting the power to set a funder's commission for the funding of a class action exclusively to the court. This latter suggestion is developed further below at paragraphs 100-105.

2. The impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders.

22. Data addressing this question is summarised in the response to Issue 1.

23. It is inevitable that litigation funding has an impact on the amount of damages or compensation available to class members in funded class actions that are funded by them. This would be true of any method of litigation funding, including a simple borrowing from a bank. The cost of finance reduces the net return. The distinctive features of litigation funding are that it is non-recourse (that is, the 'borrower' has no personal obligation to repay), and the funder is prepared to accept as its only security an interest in an unresolved legal claim. This is not something banks will do.

24. In those circumstances, it is not surprising that a litigation funder requires a much higher return than a commercial interest rate. It is also not surprising that litigants are prepared to agree to their terms. This includes highly sophisticated and well-advised litigants such as superannuation and investment funds, corporations and insolvency practitioners.

25. As the ALRC noted in its Final Report to its inquiry, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (**Final Report**):

> *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 actions landscape. Litigation funding has largely filled the lacuna created by the absence of a satisfactory mechanism to protect principal applicants from adverse costs orders.*[18]

26. In short, litigation funding is a natural market response to a real demand or need. Absent third-party funding, many claims which have been successful and resulted in substantial recompense for Australian businesses and families would never have been brought.[19] What this means is that apart from issues of probity (which are

[18] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [2.9].

[19] Note the following comments reported to be made by Justice Michael Lee regarding the settlement of environmental claims against the Commonwealth: 'That without litigation funding, the claims of group members would not have been litigate in an adversarial way, but rather group members would likely have been placed in a situation of being supplicants requesting compensation in circumstances where they would have the subject of a significant inequality of arms': A significant inequality of arms': Ashley Eveleigh, 'Funding let to better outcome in PFAS class action, judge says', *Lawyerly* (online, 2020) <https://www.lawyerly.com.au/a-significant-inequality-of-arms-funding-led-tobetter-outcome-in-pfas-class-action-judge-says>.

addressed elsewhere in this response), the only question is whether the transaction cost involved in litigation funding is excessive.

27. In considering the real 'net' cost of litigation funding, it should be kept in mind that the whole reason for class actions is that they are a solution for the excessive transaction costs of litigating relatively small, multiple claims. The class action mechanism substantially reduces that problem but leaves unsolved the need for capital to secure the applicant from exposure to crippling expense and risk. Litigation funding addresses those problems. It involves a different kind of transaction cost. However, it is a transaction cost that is *enabling*. It is typically small compared with the transaction costs of multiple individual claims and it involves no waste, so long as it is reasonable.

28. It should not be assumed that law firms would be prepared to bring all such claims on a speculative basis. Firms that typically act for corporates may be prevented by their clients' attitudes (perceived or real) to 'commercial' conflicts from acting against major institutions or the government. Only a very few firms that generally undertake work for plaintiffs have the capital and resources to take on such claims on a speculative basis and these firms cannot take on more than a few claims at any one time without external capital. Those funds will not be provided by the banks.

29. It follows that what is critical is that a balance is struck between ensuring that it remains viable for litigation funders to bear the risk of supporting otherwise impracticable litigation, and ensuring that the members of the class receive an appropriate level of the sum awarded or the settlement amount. The Law Council suggests below some mechanisms to achieve this.

30. The Law Council considers that a measure of additional regulation is appropriate. However, the main reforms that will reduce excessive funding costs and the risk of abuses are to be found in steps which increase competition, transparency, and court oversight. In other words, a market-based solution, facilitated by court powers and oversight, should produce the best outcome.

3. The potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs.

11. The consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement.

31. The Law Council responds to Terms of Reference 3 and 11 together as both deal with potential issues regarding contingency fee agreements.

32. Contingency fee agreements, also known as 'percentage-based contingency fee agreements' and 'damages-based billing', are a form of speculative or no win no fee cost agreement. A key difference between contingency fee agreements and conditional costs agreements with uplift (e.g. normal costs plus 25 per cent of those costs) lies in how the amount payable for legal costs is calculated. In contingency fee agreements, legal costs are determined by reference to the value of the damages awarded or the settlement amount.

33. Contingency fee agreements are commonly propounded as a method for funding class actions. However, lawyers in all Australian jurisdictions are currently prohibited from charging on a contingency fee basis.[20]

34. A number of recent reviews, including by the Productivity Commission,[21] Victorian Law Reform Commission,[22] and ALRC,[23] have supported permitting contingency fees in various forms, combined with various consumer protections, as a potential method for increasing access to justice and the return to class members.

35. However, following consideration of the arguments outlined below, in March 2020, the Law Council resolved that it was opposed to permitting lawyers to charge on a contingency fee basis.[24] The Law Council considers the potential benefits of removing the prohibition on contingency fees are outweighed by the potential impact on the ethical obligations of members of the legal profession.

36. The Law Council considers that enabling lawyers to hold a direct financial interest in the outcome of their client's case creates a significant additional risk of compromising a practitioner's ethical obligations to the court and clients. The Law Council considers that it has not been shown that the risk of compromising the ethical obligations of members of the legal profession, and the impact that this can have for clients, can be satisfactorily overcome through regulation or court supervision. The Law Council notes in this respect the emphasis placed on the harmful effects of conflicted remuneration in the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*.

37. While the Law Council remains a strong advocate for increasing access to justice, it is not convinced that access to contingency fee arrangements will significantly improve access to justice. In the Law Council's view, solicitors who are able to charge on a percentage basis are not likely to take on difficult or risky cases. They would be no more likely to do so than third party funders. They might be less likely to do so by virtue of lower access to capital, and less ability to defray risk across a portfolio of claims.

38. Should any government in Australia propose any contingency fee arrangements, the Law Council of Australia will carefully consider that proposal as against the fundamental ethical obligations of members of the legal profession.

Arguments for and against permitting contingency fee agreements

39. Noting that the agreed position of the Law Council is to oppose contingency fees, the Law Council provides the following discussion regarding several of the key arguments in favour of, and against, permitting contingency fees.[25]

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[20] See, eg, *Legal Profession Uniform Law* (NSW) s 183.
[21] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, September 2014).
[22] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018).
[23] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018).
[24] Law Council of Australia, 'Contingency fees opposed by Law Council' (Media Release, 13 March 2020) <https://www.lawcouncil.asn.au/media/media-releases/contingency-fees-opposed-by-law-council>.
[25] See also Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 28 May 2008) 684-87; Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, September 2014) 612-6; Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) ch 3; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 199-204.

Potential impact on the fundamental ethical obligations of members of the legal profession

40. Solicitors are bound by their fundamental ethical obligations to avoid any compromise to their professional independence and to avoid conflicts of interest, as set out in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.[26]

41. A common argument propounded in opposition to permitting contingency fee agreements is that allowing lawyers to have a financial interest in the outcome of a case creates a serious risk of compromising the practitioner's fundamental duty to the court, the overriding duty of candour and potentially the duty to their client. This concern particularly arises due to the increased potential for conflicts of interest between lawyers and their clients when the lawyer charges on a contingency fee basis.[27] Key risks include:

    - lawyers seeking to influence when a matter settles in order to maximise fees and/or minimise their risk, even if such timing may not be consistent with the client's best interests; and
    - temptation to compromise their duty to act in the best interests of their client by having a personal financial interest In the conduct and outcome of the matter.[28]

42. As the ALRC noted in its Final Report:

> *It is argued that the possibility of a large payout will only augment existing conflicts of interest, magnifying the likelihood of solicitors recommending that representative plaintiffs accept offers to settle for the commercial purposes of the solicitor/firm, rather than for the benefit of the client/s.*[29]

43. If a scheme such as that proposed in Victoria is introduced,[30] solicitors will be expected to run the risk of adverse costs orders and security for costs. There is a significant likelihood that there will be matters where this will create a conflict of interest between the solicitor and the client in the sense that the client may have a claim with merit but about which the solicitor forms a view that the risks of adverse costs or security for costs outweigh the solicitor's interest in taking on the matter.

44. Lawyers are the key source of information and advice for their clients in deciding whether to continue or settle a claim a claim, go to hearing and so on. It is critical that the potential for this role to be clouded by the financial interests of the lawyer be minimised.

> *The ALRC noted a possible counterargument to the conflicts of interest concern, being that contingency fees may actually align the lawyer's*

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[26] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* <https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf>

[27] See, eg, Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, September 2014), 613.

[28] Percentage-Based Contingency Fee Working Group, Law Council of Australia, *Percentage Based Contingency Fee Agreements* (Final Report, May 2014) 22, citing Gino Dal Pont, *Lawyers Professional Responsibilities*, (Thomson Reuters, 5th ed, 2012) [14.120].

[29] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [6.67].

[30] See Justice Legislation Miscellaneous Amendments Bill 2019 (Vic).

> *interests with their client's interests in respect of achieving the highest value recovery, and discourage unmeritorious claims.*[31]

45. While the VLRC acknowledged that concerns about the imbalance of power and information as between the lawyer and client and the possibility of intensifying the risks of conflicts of interest are valid, it also stated that such concerns 'would not be unique to circumstances where contingency fees are charged'.[32] The VLRC concluded that the risks of conflicts of interest could be mitigated to a large degree through legislation which 'establishes boundaries specifically to protect clients from excessive legal costs or unfair contractual arrangements'.[33]

46. The Law Council is persuaded that contingency fees should not be permitted due to the risk of affecting the fundamental ethical obligations of members of the legal profession (see paragraph 35 above).

Potential to improve access to justice

47. The Productivity Commission in its *Access to Justice Arrangements* report suggested that one of the key advantages of allowing contingency fee agreements could be that doing so might promote access to justice by increasing 'access to legal advice where lawyers take on claims they would not have accepted under other forms of billing' and by creating greater competition for litigation funders.[34]

48. If introducing contingency fees to class action proceedings results in a greater number of meritorious cases being heard, it could be argued that there has been an improvement in access to justice. The VLRC considered that introducing contingency fees to class action proceedings could see large law firms competing with litigation funders to fund high value claims and smaller law firms pursuing a greater number of lower value claims.[35] The ALRC noted that permitting contingency fee agreements may increase access to justice by encouraging small-to-medium sized class actions to proceed where otherwise neither the solicitors nor representative plaintiffs would be able to fund disbursement costs or run the risk of adverse costs orders. The ALRC suggested that contingency fee agreements 'may 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'.[36]

49. However, the ALRC noted two key arguments made by submitters to its Inquiry questioning the potential access to justice benefits of permitting contingency fee agreements:

> *First, solicitors charging on a percentage-based 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. As noted by the US Chamber Institute for Legal Reform, law firms will only back cases they can win. There are few law*

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[31] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 203, citing Dr Warren Mundy, Submission No 4 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Discussion Paper)*.
[32] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) 61.
[33] Ibid.
[34] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, September 2014) 625.
[35] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) 55.
[36] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 199.

> *firms that could take on the risk of an adverse costs order, provide security for costs, and finance these types of actions. Accordingly, percentage-based fee agreements would only benefit large law firms that are already billing via conditional fee arrangements—generating a higher premium with no commensurate increase in risk.*
>
> *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 percentage-based fee agreements, and neither would low income matters. As noted by Risks and Insurance Management Society (RIMS), the 'financial imperatives which operate upon funders are the same financial pressures that would operate on law firms considering offering contingency fee arrangements'.*[37]

50. As noted above at paragraph 35, the Law Council is not persuaded that potential marginal gains in access to justice are outweighed by the risks to the ethical duties of lawyers and the potential affect that compromise of these duties could have in respect of the interests of class members.

Potential impact on returns to class members

51. The current prohibition on contingency fees partly exists to ensure that plaintiffs do not see the returns from their claim consumed by excessive legal fees. An example of this risk is *Fitzgerald v CBL Insurance Ltd (No.* 2) (***Huon***),[38] considered by the VLRC. In *Huon*, the former trustees of Huon Corporation, suing CBL Insurance Ltd, would have been unable to bring the action without funding. However, the high rates of commission charged and significant legal fees meant that the trustees 'ultimately received nothing from the amount awarded'.[39] (It should be noted that *Huon* was not a class action so the settlement did not require court approval).

52. The VLRC identified the possibility that for claims which would *not* require third-party funding, percentage-based fees could mean that the return to class members is reduced due to increased legal fees.[40] The VLRC went on to say:

> *However, a comparison with current costs when a litigation funder is not involved may not be as favourable: contingency fees could be greater than what is presently charged through time-based billing alone. In these cases, the clients would be worse off than now.*
>
> *Current billing methods are likely to be retained if they would result in a higher payment to the law firm than a contingency fee. Lawyers in England and Wales have been able to charge contingency fees since 2013 but there is little evidence they are doing so. It appears that contingency fees are charged only where there is a clear financial advantage for lawyers equal to the risk taken. Otherwise, the clients are charged another way.*
>
> *The extent to which charging a contingency fee would increase or decrease the costs to the client in a particular case, compared to*

[37] Ibid 204.
[38] *Fitzgerald v CBL Insurance Ltd (No.* 2) [2015] VSC 176.
[39] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) [2.40].
[40] Ibid 56-7. See also the discussion of the VLRC's findings by the ALRC: Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 201.

existing cost arrangements, would depend on the terms of the costs agreement.[41]

53. In its Final Report, the ALRC contended that although the introduction of contingency fee arrangements in the context of class action proceedings could increase payments to legal representatives, it may also increase returns for group members compared with returns in cases involving litigation funders. The ALRC suggested that as only one 'success fee' would be deducted from the recovered amount' and the number of entities paid by reference to a percentage of the recovered amount would be reduced contingency fee agreements could also increase returns to class members.[42]

54. Whether the introduction of contingency fee arrangements would result in overall reduced costs to litigants in class action matters, or excessive payments to lawyers, could only be determined on a case by case basis.

55. In recommending that contingency fees should be permitted, the Productivity Commission, ALRC and VLRC have recommended various forms of safeguards and carve-outs to limit 'windfall' payments and increase returns to members. Potential safeguards include statutory caps on fees, prohibitions on hybrid billing methods and strict court oversight. It is the view of the Law Council that such safeguards cannot satisfactorily remove the risk of compromising the ethical obligations of members of the legal profession, and the impact that this can have for clients.

Potential for competition between funders and law firms

56. The Law Council notes the argument that the introduction of contingency fee arrangements may lead to an increase in the number of class actions. If so, it will be largely because it increases competition and so tends to lower costs, both as it regards lawyers (and their rates) and funders (and their commissions and other contractual terms).[43]

57. At present only a very small pool of law firms which act for plaintiffs has the financial and other resources to compete with litigation funders. It is unclear whether allowing contingency fees will encourage significant competition from smaller firms. Of course, if Victoria permits contingency fees, the results will be able to be observed over time.

Law Institute of Victoria position

58. The Law Council notes that the Law Institute of Victoria (**LIV**), a Constituent Body of the Law Council, strongly supports permitting contingency fee arrangements. The Law Council notes that the LIV has provided a separate submission to the Inquiry in which it sets out its alternative view.

[41] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) 56-7.
[42] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 200-1.
[43] Ibid 200.

4. The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients.

59. Regulation 7.6.01AB of the *Corporations Regulations 2001* (Cth) (**Corporations Regulations**) requires funders to have in place arrangements to manage conflicts of interest. The Australian Securities and Investments Commission (**ASIC**) Regulatory Guide 248 gives funders and class action lawyers clarity about their obligations to class members.[44]

60. A relationship between a litigation funder and a lawyer that is purely contractual is conventional and, on the terms generally used in the market, acceptable. The lawyer's fiduciary obligations to members of the class can be met by taking steps to prevent conflicts of interest. The contracts between client, law firm and funder will typically make provision for day to day and overall control of the litigation, and for independent resolution of differences as to critical decisions such as settlement or discontinuance. In such a framework, the lawyers' fiduciary duties to the client are unimpaired, as are their common law duties always to exercise reasonable skill care and diligence in attending to the interests of their client.

61. However, it has been observed in some cases that the litigation funder and law firm, or the law firm and the client, have a relationship which is not merely contractual; for example, they may co-exist within a single entity and/or under the direction of a single director. Where such relationships exist, there is a greater risk of a conflict of interest or abuse of process occurring. The courts have been careful to prevent such relationships creating an abuse of process, or an injury to group members.[45]

62. A fundamental goal of the regulation of litigation funding should be the management of conflicts of interest between legal representatives and litigation funders.

63. Accordingly, the Law Council supports prohibiting solicitors, law firms and barristers from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting. Appropriate exceptions to such rules should exist, such as when the litigation funder is a publicly listed company, and the lawyer's interest is immaterial.

64. A solicitor or law firm with a financial or other interest in a litigation funder that is funding the same matter in which the solicitor or law firm is acting would be in a position of conflict. That solicitor or law firm would have difficulty, for example, in advising group members dispassionately on the terms of the funding agreement. In the view of the Law Council, this is not a conflict that could be adequately resolved by appropriate disclosure.

65. The Law Council opposes any further incursion into the regulation of Australian legal practitioners. Legal practitioners are already among the most regulated professionals in the country. Class action litigation lawyers, whether they be solicitors in firms or barristers, are subject to more than usually intensive court oversight of their conduct. The great majority of all civil claims, class action or otherwise, settle before judgment.

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[44] Australian Securities and Investments Commission, *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

[45] See, eg *Melbourne City Investments Pty Ltd v Myer Holdings* Ltd (2017) 53 VR 709; *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653; *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2016) 243 FCR 474.

However, *all* class action settlements require court approval. The court approval process requires demonstration that the:

- settlement is fair and reasonable as between the class and the respondent, and as between class members;
- the legal fees claimed are proper and reasonable; and,
- in cases where the court has exercised such a power (i.e., under a common fund order regime) the funding fees are reasonable.

66. The court's scrutiny is careful and thorough.[46] Save as mentioned above, there no need for further regulation of the profession.

5. The Australian financial services regulatory regime and its application to litigation funding.

6. The regulation and oversight of the litigation funding industry and litigation funding agreements.

67. Terms of Reference 5 and 6 regarding regulation of litigation funding are dealt with jointly.

68. It is noted that the Treasurer announced on 22 May 2020 that he would be introducing regulations that would result in litigation funders being required to obtain an AFSL and that funded class actions would be treated as MIS.[47]

69. In 2009, the Federal Court found that the litigation funding arrangements in a 'closed' class action constituted a 'managed investment scheme'.[48] In 2011 the NSW Court of Appeal found that a litigation funding arrangement in a case that was not a class action was a 'financial product' under section 763A of the *Corporations Act 2001* (Cth) (**Corporations Act**).[49] On appeal, the High Court of Australia (**High Court**) held that the funder in that case was providing a 'credit facility', not a 'financial product' and so was not required to hold an AFSL.[50]

70. In response to these decisions, the Australian Government in 2012 exempted funded class actions from the definition of 'managed investment scheme', but only on the condition that litigation funders had necessary processes in place to manage conflicts of interest. Exempt litigation funders are subject to ASIC Regulatory Guide 248.

71. The Law Council has, since 2012, resolved that third-party litigation funders should be subject to ASIC's oversight through the mechanism of requiring an AFSL.[51] It is the

[46] See, eg, A*ustralian Securities and Investments Commission v Richards* [2013] FCAFC 89*; Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 63*; Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653; *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452.
[47] Hon Josh Frydenberg MP, Treasurer (Cth) 'Litigation funders to be regulated under the Corporations Act' (Media Release, 22 May 2020) <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/litigation-funders-be-regulated-under-corporations>. The definition of 'funder' in regulation 5C.11.01(1)(b)(5) of the *Corporations Regulations 2001* (Cth) is a person who 'provides funds, indemnities or both under a funding agreement … to enable the general members of the scheme to seek remedies'. The particular funding rights and obligations will vary from case to case, and from one funding arrangement to the next. Depending on the idiosyncratic contractual and financial arrangements in place, the relevant 'funders' may be difficult to identify.
[48] *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.
[49] *International Litigation Partners Pty Ltd v Chameleon Mining NL* (2011) 276 ALR 138.
[50] *International Litigation Partners Pty Ltd v Chameleon Mining NL (Receivers and Managers appointed)* (2012) 246 CLR 455; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [4.15].
[51] Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia* (June 2011).

Law Council's view that the only regulatory steps needed to protect users of third-party litigation funding are to require funders to hold an AFSL and to be subject to a measure of greater ASIC oversight than at present.

72. In class actions most of the concerns regarding excessive fees and possible abuse of position by litigation funders can be addressed by the court though active case management, by the imposition of practice requirements, in approving settlements, and by oversight of funding commissions (if the power to do so is confirmed or restored) and lawyers' fees. However, considering the significant financial incentives for litigation funders the Law Council is of the view that some regulation is necessary.

73. A number of arguments against introducing further regulation of litigation funders are based on concerns with 'over-regulation' and the imposition of unnecessary restrictions in the market and competition.[52] It is accepted that regulation may have an impact on litigation funding competition and create a barrier to entry into the market for litigation funders. If there are fewer litigation funders, it may follow that smaller value class actions may not receive funding, and with less competition, commissions in litigation funding agreements may rise.

74. This tension was acknowledged by the ALRC in its Final Report:

> *Tension exists between the perceived need for a licensing regime to ensure that litigation funders have the ability to meet their financial obligations (to indemnify the plaintiff in the event of an adverse costs order and to meet their commitment to fund the plaintiff's lawyer) and manage the conflicts that are inherent in any funding agreement, and the risk that a licensing regime may unnecessarily stifle competition amongst funders and thus artificially inflate the cost of funding.*[53]

75. These risks are, in the view of the Law Council, outweighed by the risks and consequences of unmanaged conflicts of interest. The Law Council believes that a licensing regime can be a powerful regulatory tool due to the possibility of a licence being revoked, its terms being modified, or of an investigation being commenced in the event that a licence holder fails to meet or adequately satisfy ongoing conditions of a licence. However, it is critical that any increased regulatory burden does not lead to increased cost to consumers of legal services, without distinct gains.

76. The Law Council notes that potential benefits of a licensing regime are:

- ensuring that only reputable and capable funders enter the market;
- reducing the risk of financial loss to the parties by reducing the risk that funders will be unable to meet their liabilities;
- encouraging compliance by litigation funders with their obligations; and
- enhancing the reputation of litigation funders.[54]

77. It is important therefore that the licensing scheme help achieve those objectives. In a licensing regime, both the conditions of the licence and the form of the regime require careful consideration and conditions should only be imposed to the extent necessary. It is important to ensure that any regulatory scheme protects class members and the

[52] Ibid 5.
[53] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [1.41].
[54] Ibid [6.17].

integrity of the judicial system but does not overly burden potential litigation funders or prevent potential class members from bringing an action.

78. There is very little detail in the Treasurer's media release save to say that the new regime will commence in three months and that litigation funding of class actions will be treated as a MIS. The Law Council notes that the following issues need to be considered:

    (a) Whether the licence requirement will affect current funded class actions?

    (b) If yes to (a), what happens to those class actions for which the funder is unwilling or unable to obtain an AFSL?

    (c) If no to (a), what happens in the transitional period?

    (d) If treated as an MIS, will litigation funders need, for each proposed class action, to:

        (i) be a public company?

        (ii) register each class actions as a scheme under section 601EA of the Corporations Act?

        (iii) be the responsible entity of the MIS?

        (iv) have a constitution that complies with sections 601GA and 601G of the Corporations Act?

        (v) have a compliance plan that complies with section 601HA of the Corporations Act?

        (vi) convince ASIC, before book build, that the criteria in section 601EB of the Corporations Act are satisfied?

        (vii) ensure that the 'value' of the class action is valued at regular intervals as per subsection 601FC(j) of the Corporations Act?

        (viii) open their 'books' to ASIC and if so, what are their books?

79. It is important that the changes do not have a negative impact on the lawyers conducting class actions or on the conduct of recovery litigation in the insolvency industry in general. The Treasurer's announcement, on one reading, could result in the removal of all litigation funding exemptions in regulation 5C.11.01(1) of the Corporations Regulations. The current exemptions are broader than just dealing with 'class actions' in the traditional sense. Note, in particular:

    - subparagraph (b) which deals with class actions (where several claims arise out of similar circumstances);

    - subparagraph (c) which deals with creditors or members of a Chapter 5 body corporate (i.e. a company under external administration) funding investigations and recovery of claims by the company liquidator; and

    - subparagraph (d) which is referred to as a litigation funding arrangement (rather than a scheme) which may deal with funding an individual claim either by litigation or prosecuting a proof of debt.

80. The following questions arise:

(a) Will law firms that conduct the class action be in breach of the *Uniform Legal Profession Act* proscriptions against conducting a MIS or will they receive legislative protection?

(b) Will the Corporations Regulations cause lawyers or law firms to be in breach of sections 992A or 992AA of the Corporations Act relating to the prohibition on hawking financial products (as per regulation 7.8.26) when assisting a litigation funder in its book building activities?

(c) Are the exemptions in subparagraphs (c) and (d) of regulation 5C.11.01(1) of the Corporations Regulations to be removed? If so, that will be a major policy change which will have significant adverse implications for corporate insolvency administrations where many voidable transaction recoveries and essential investigative functions are carried out with creditor funding. Such funding must continue to be available without undue restrictions.

81. A fundamental policy underpinning the regulation of litigation funding should be absolute transparency in relation to the existence and terms of all litigation funding arrangements. Knowledge of the existence and terms of litigation funding is needed to guard against any abuse of process and conflict of interest. However, care needs to be taken that such disclosure does not give defendants an unfair advantage.

82. The Federal Court's *Class Actions Practice Note (GPN-CA)* (**Practice Note**) provides an example of a regime that seeks to achieve the correct balance.[55] The Practice Note requires disclosure of any funding agreement to the court on a confidential basis and the provision of a redacted version to the other parties. The Practice Note states that the funding agreement may 'be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding'. Two examples of such information are given:

- the budget or estimate of costs for the litigation or the funds available to the applicants, in total or for any step or stage in the proceeding; and
- any assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.

83. The Law Council notes that the most serious risks faced by class members who have signed a funding agreement are:

- Prudential: There is a risk that a funder's promise to pay for the litigation and meet any costs order made against the representative plaintiff is not honoured because the funder goes under when funds must be paid. The prudential risk may be resolved to some degree, first by the defendant's right to obtain an order securing its costs and, secondly, by the representative plaintiff's right to discontinue the suit if a funder stops paying the lawyers or it gives notice that it is going to stop paying. In these circumstances, the security previously given may pay for the costs to the date of discontinuance. However, the security may be inadequate and not cover all the costs that could be claimed by a defendant faced with a sudden discontinuance.
- Conflicting instructions: While litigation funders may contractually obtain the right from funded group members to give day to day instructions to the lawyers conducting a class action, those instructions may come into conflict with those

[55] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 20 December 2019 <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca>.

given by a representative plaintiff. This risk can be ameliorated if the ASIC Regulatory Guide 248 is followed (i.e. the representative plaintiff is given priority and the funding agreement adopts a sensible dispute resolution regime).

- Competition: This issue arises where two or more funded class actions in relation to the same alleged wrong by the same defendant(s) are commenced by different classes funded by different litigation funders and conducted by different lawyers. A number of recent decisions of the Federal Court and Supreme Court of New South Wales suggest that the courts might encourage the competing claimants to work together,[56] close one funded class and allow the other (open) class to proceed in tandem with the closed class,[57] or, alternatively, choose one open class to proceed while permanently staying the competing claims.[58]

84. The Law Council stated the following in its submission to the Productivity Commission's *Inquiry into Access to Justice Arrangements*:

> *The court rules governing class action procedures in Australia presently include a number of safeguards directed to ensuring the procedure is not abused so as to procure settlements which are inconsistent with the broader interests of the class being represented. The most prominent of these safeguards is the requirement for court approval of class action settlements. Experience suggests that while court approval is a critical safeguard and must be maintained, there are some further refinements to current procedures that may enhance their effectiveness. One reform which could be considered is promoting the wider use of powers to appoint amici curiae to provide a contradictor at the hearing of applications for class action settlements. This could most appropriately be achieved through a practice note or guidelines issued on a court-by-court basis.*[59]

85. It is noted that since that submission, the Federal Court has introduced a Practice Note which takes steps to address concerns about disclosure of the existence of litigation funding and its terms.[60] Whether the circumstances of any settlement lend themselves to the appointment of an *amicus curiae* for a settlement approval hearing should be left to the court.

86. The Law Council recommends that the minimum requirements for character and qualifications should include:

- character requirements – such as those that apply to AFSL holders – for example, ASIC considers any convictions for serious fraud, whether the person previously had an AFSL suspended or cancelled, and whether the person was previously banned or disqualified from serving as a director; and
- qualifications – a requirement for financial skills so that a licenced funder can demonstrate that it can operate a funding business and will have adequate legal skills to understand civil litigation, including court rules and processes.

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[56] *Klemweb Nominees Pty Ltd v BHP Group Ltd* [2019] FCAFC 107.
[57] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017).
[58] *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018); *Wigmans v AMP Ltd* [2019] NSWCA 243.
[59] Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements* (13 November 2013) 128.
[60] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (20 December 2019).

87. The Law Council's recommendations for the courts to be empowered with increased oversight of litigation funding agreements and a supervisory role in funded class actions are made above and in the section which follows. With the potential additional oversight from ASIC, the Law Council contends that this should be sufficient to protect consumers from funders behaving unconscionably.

88. The Law Council acknowledges the importance of ensuring that any regulatory scheme is consistent across all jurisdictions and subject to national oversight. Class actions can and do span various jurisdictions, and if different regulatory frameworks are in place there will be operational challenges for the profession and potentially duplicated costs and expenses.

89. In its Final Report, the ALRC recommended that the existing ASIC Regulatory Guide 248 be amended to require third-party litigation funders to report to ASIC to show compliance with the requirements to meet certain obligations to avoid or mitigate conflicts of interest.[61] However, the ALRC further noted that the current definition for exemption does not capture the increasingly broad range of litigation funding models that are appearing in the Australian market, meaning that whether a third-party litigation funder is in fact exempt, or is already required to comply with *Regulatory Guide 248* may be unclear. The ALRC noted that it received competing submissions as to whether the ASIC Regulatory Guide 248 is sufficient to regulate litigation funders,[62] and has previously observed that there is little oversight or action from ASIC in this context.[63]

7. The application of common fund orders and similar arrangements in class actions.

90. Absent the ability to make a common fund order, the courts' ability to exercise oversight and control of funding fees is limited. A court can refuse an application to approve the terms of settlement of a class action if the commission and fees are excessive. Such an order may serve to drive the funder to renegotiate its fee. But at the end of the day it can insist on the case going ahead to judgment to claim its contractual entitlement. Some judges have suggested the court already has a power on a settlement approval application to override the funder's contractual rights. Other judges have disagreed.[64] Even those who assert the power exists are understandably reluctant to vary settlement terms to make them more beneficial to class members.

91. This is an undesirable state of affairs. The court should have a significant degree of control over fees charged by parties who bring proceedings before it. To give the court control over commissions to be paid to funders is no more radical that the court assuming control over the fees charged by class lawyers. Conferring a power to make common fund orders would be an important step in this direction.

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[61] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [6.108].
[62] Ibid [6.106].
[63] Ibid [6.109].
[64] *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)* [2018] FCA 1289, [47] (Lee J): 'For my part, I very much doubt power does presently exist for the Court to interfere and vary funding agreements in the context of a settlement by altering the contractual promises of group members to pay commission …'. For the alternative view, see: *Earglow Pty Ltd v Newcrest Mining Limited* [2006] FCA 1433; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq) (No 3)* [2017] FCA 330; *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409.

92. As Justice Beach recently said in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* (***McKay v Bellamy's***), the adoption of the common fund order did much to reduce the cost of funding through efficiencies and enhanced competition:

> *First, one advantage of early common fund orders was that it assisted to resolve the problem of competing class actions … If one action was to be the winner, the associated funder had to accept the rate to be ultimately struck by the Court under a common fund order … Control of the commission rate was ceded to the Court as the price of success.*
>
> *Second, and flowing from BMW Australia Ltd v Brewster, I now have less flexibility to deal with commission rates. In my respectful view, this is something that the legislature should address sooner rather than later, informed by Professor Vince Morabito's impressive empirical research. Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play.* [65]

93. The ALRC recommended that the power to make common fund orders should be available to the court. With enhanced court oversight of funding terms and commissions, there can be no reasonable concern that the making of an order that all participating members of a class contribute to the funding of a successfully concluded action results in inequitable treatment.

94. The Law Council suggests below some additional express powers that might be conferred on a court to oversee and regulate a funder's fees. It should be emphasised that such measures are incomplete, and likely to be ineffective, if common fund orders are not available.

95. Discussion of common fund orders is often made difficult by a perception that they are *about and for the interests of funders.* This is a misleading frame of reference. It confuses the motives and interests of one affected party with the objectives of the measure in question. It is like saying that reducing tariffs on imported cars is just a measure to help motor dealers. It is of course a measure to benefit consumers, and motor dealers are assisted by the way.

96. Similarly, common fund orders are in the interests of those with claims because they reduce barriers to entry to the funding market (by eliminating the need to engage in costly book build processes before commencing proceedings), increase competition, increase transparency and reduce funding costs.

97. In addition, common fund orders eliminate the problem of 'free riding'[66] and promote open class actions. The last matter is significant. It ensures that all affected persons are compensated, and for defendants, it ensures that the determination of the claim

[65] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [33]-[34] ('*McKay v Bellamy's*').

[66] Funding equalisation orders (which spread the contracted funder's fee across all group members) is also a solution to this problem, but only where there has been a substantial book build in the context of an open class action – which is a significant challenge.

will bring a complete end to the dispute.[67] It makes viable some mass consumer claims that would be unviable if a book build were required.[68]

98. There is a further reason why the idea that common fund orders are for the benefit of funders is simplistic. Some funders like them. Some do not. This is a reflection of their tendency to increase competition. Prior to their availability, the funding market was much smaller and more oligopolistic. The result was higher fees and less transparency.

99. It should be noted that if the Victorian proposal for a group costs order becomes law, the unavailability of common fund orders in the Federal Court will inevitably lead to a rush to the Supreme Court of Victoria by law firms who have the wherewithal to make the most of the new arrangements.

100. In addition to a power to make common fund orders, the ALRC recommended that 'a statutory power to vary the terms of a litigation funding agreement should be coupled with a requirement that funding agreements with respect to a class action require court approval to be enforceable'. [69] The Law Council suggests consideration of whether the statutory power go even further: that the fee be set by the court, rather than agreed by the parties and approved by the court.

101. To set an appropriate fee, the court should be required to take into account, without limitation, a number of factors to ensure it is fair and reasonable in all the circumstances.[70] Some suggested factors are: [71]

    (a) the amount likely to be advanced (and then ultimately advanced) by the funder to cover the costs of the claim;

    (b) the amount, if any, that the funder is required to provide as security for the defendant's costs;

    (c) whether the funder obtained adverse costs insurance ('after the event' insurance) and whether or not it is intended to recover the premium from the compensation pool;

    (d) the period of time until recovery;

    (e) the level of risk that the claim may be unsuccessful;

    (f) the likelihood of the case settling or going to trial;

    (g) whether the funding agreement is non-recourse;

    (h) whether the fee is over the common fund or only with respect to those who have committed to a funding agreement;

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[67] Subject to the theoretical possibility of persons who have opted out of the class action commencing a fresh proceeding. However, the Law Council is not aware of an example in the case of an open class action.
[68] See **Attachment B**.
[69] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [6.84]
[70] Part IIIA of the *Competition and Consumer Act 2010* (Cth) provides such guidelines for the Australian Competition Tribunal.
[71] See also Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) *91 Australian Law Journal* 655, 666-669 which sets out the factors that have and could be used to assess the fee that a funder could be permitted to charge.

(i) whether a funding equalisation formula is to be used;

(j) whether the funding agreement allows the funder to discontinue funding at any point;

(k) the state of competition in the litigation funding market; and

(l) the proportion of the claim recovered by each claimant.[72]

102. These factors suggest that the fee should be set when the litigation is completed. That, however, is undesirable from the perspective of the litigation funder, which would need some certainty regarding its fees before it embarks upon expensive litigation. As such, orders should be made as interlocutory orders soon after pleadings are closed. The nature of such orders, not being final orders, is that they can be revisited at any time before the conclusion of a proceeding.

103. When the litigation is concluded the court can then adjust the fee upwards or downwards, if that would produce a fair result.

104. The power granted to the court to set the funder's fee should be accompanied by a power to make a common fund order soon after the close of pleadings for the reasons explained above.

105. It is considered that to give the courts such a power, appropriately framed, will not offend Constitutional constraints on acquisition of property. With appropriately framed legislation the court would be granting a right, not taking away from a previously formed contractual right, since any litigation funding agreement would necessarily be subject to the power of the court to approve the amount sought by the litigation funder.[73] However, it will need to be appreciated that in the case of a publicly listed litigation funder, providing profit guidance to the market will involve additional complexity for its directors when such an additional variable on profitability can be triggered well after shareholders have invested.

A 'Justice Fund'

106. The Law Council suggests that consideration could also be given to the establishment of a special public fund, which the VLRC's 2008 *Civil Justice Review* called the 'Justice Fund'.[74] Such a fund was first proposed by the ALRC in its 1988 Report, *Group Proceedings in the Federal Court* which preceded the introduction of class action regimes in Australia.[75] The ALRC recommended that a 'special fund should be established to provide for the costs of parties involved in grouped proceedings'.[76]

107. A fund of this type has been established in Ontario, Canada, under the name of the 'Class Proceedings Fund'.[77] In that jurisdiction, a legislatively established Class Proceedings Committee, which has responsibility for overseeing the administration of the fund, decides whether a person who is a plaintiff to a class action is to receive

[72] This factor can only be considered once the result of the litigation is known. Hence, it would only be a factor to be assessed when the terms of litigation funding are reconsidered later in proceedings.
[73] This is to avoid the risk that the grant is in breach of s 51(xxxi) of the *Australian Constitution*.
[74] Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 28 May 2008) ch 10.
[75] Australian Law Reform Commission, *Group Proceedings in the Federal Court* (Report 46, 1988).
[76] Ibid 309.
[77] The Class Proceeding Fund was established in 1992 following amendment to the *Law Society Act*, RSO 1990.

financial support in respect of disbursements related to the proceeding. In so deciding, the Class Proceedings Committee may have regard to the following factors:

(a) the merits of the plaintiff's case;

(b) whether the plaintiff has made reasonable efforts to raise funds from other sources;

(c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded;

(d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and

(e) any other matter that the Committee considers relevant.[78]

108. It is understood that the Class Proceedings Fund has introduced a layer of competition into the litigation funding market in that jurisdiction putting downward pressure on commissions charged by private litigation funders.

109. Defendants in Ontario can also apply to the Class Proceedings Fund in respect of a costs award made in their favour against a plaintiff who has received financial support from the Class Proceedings Fund.[79]

110. In the event that a similar scheme was to be considered in Australia, the Law Council would participate in any further review or inquiry. It should be noted that unlike the initial proposal by the ALRC in 1988, the Justice Fund proposed by the VLRC is intended to be self-funded, from recoveries in successful cases, after an initial seeding grant is provided.[80]

8. Factors driving the increasing prevalence of class action proceedings in Australia.

111. The ALRC noted in its Final Report that '[o]ver the course of the two and a half decades since the introduction of the class action regime in Australia, the number of class actions has grown steadily, but not exponentially'.[81]

112. It is not clear that there has been such an increase in class actions that gives reason for concern.[82] Professor Morabito's empirical studies show certain trends but there is

[78] *Law Society Act*, RSO 1990, c 8, s 59.3(4).
[79] Law Foundation of Ontario, *Annual Report* (2016) 27-32: The Class Proceedings Fund, which received initial funding from a $500,000 grant from the Law Foundation of Ontario, receives its funding through a levy of 10 per cent of any awards or settlements in favour of the plaintiffs in funded proceedings, plus a return on any funded disbursements. The Class Proceedings Committee has five members, one appointed by each of the Law Foundation of Ontario and the Attorney-General of Ontario, and three appointed jointly. In 2016, the Class Proceedings Committee held 22 hearings and funded 17 new applications. It received levies of $5,961,678 and paid cost awards in favour of defendants in the amount of $528,767. The balance in the Class Proceedings Fund at the end of 2016 was $19,861,537.
[80] Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 28 May 2008) ch 10.
[81] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 28.
[82] Vince Morabito, 'Shareholder Class Actions in Australia – Myths v Facts' (11 November 2019); Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould, (eds), *25 Years of Class Actions in Australia, 1992 – 2017* ((Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017); Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia' (Fifth Report, An Empirical Study of Australia's Class Action Regimes, July 2017); Vince Morabito and Vicki Waye, 'Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions' (2017) 36 *Civil Justice Quarterly*

no evidence of a substantial increase in class actions although there was a growth of particular types of class action proceedings in Australia. For example, over the past 25 years shareholder class actions have increased from 12 per cent to 52 per cent of all class action claims.[83]

113. Insofar as there has been growth, the Law Council notes that class actions are a relatively 'new' form of litigation. As the market for class actions matures, growth is to be expected: knowledge and awareness is developed; successful actions encourage others to proceed; manifold legal issues concerning the procedure are gradually resolved so that costs and risks are gradually reduced; and the market for funding has become more mature and transparent. In addition, there has been no reduction in the tendency of Parliaments to create new bases for making claims or extending old ones (extending the range of statutory unconscionability claims is a notable example). The increased activity of regulators in recent times also naturally feeds into an increase in class actions, which may 'piggy-back' off regulatory enforcement.

114. An example of natural but unexpected growth is the current spate of class actions in the employment area. Most are class actions to recover underpaid wages and benefits. The real question to be asked here though is why these have not been around for years. The answer is simply that it can take some time for clients and legal advisers to consider the application of the class action procedure to areas that are familiarly dealt with in another way.

115. Seen in context, it is doubtful that there has been any remarkable increase in class actions at all.

116. In the Law Council's view, the issue of most concern is not the growth in class actions in and of itself but, rather, whether unmeritorious or speculative class actions are being pursued. On an analysis of the class actions identified in the table at **Attachment A**, it appears that there is little reason for concern. The significant size of most settlements should be considered indicative of the underlying merit of these claims. They are much more than 'nuisance' money. The defendants' expert legal advisers would be highly unlikely to recommend such settlement amounts without good reason.

117. If there is any reason for concern about the number and type of class actions being prosecuted, it should not be that entrepreneurial lawyers and litigation funders are identifying actions to conduct but that corporations and public bodies are conducting themselves in a manner that gives rise to seriously arguable claims and that attract the attention of lawyers and funders.

118. With specific reference to investor class actions, Professor Morabito's November 2019 report suggests that, in the period from 4 March 1992 to 30 June 2019, 82.8 per cent of shareholder class actions filed were supported by litigation funders.[84] Of these class actions, at least $888.6 million was paid to almost 100,000 shareholders. That is approximately $9,400 was paid to each class member.[85] Professor Morabito suggests that in the absence of litigation funding, these actions would not have been commenced.[86]

213; Vince Morabito, 'Facts and Figures on Twenty-Four Years of Class Actions in Australia', (Fourth Report, An Empirical Study of Australia's Class Action Regimes, August 2016).

[83] Jason Betts, 'Why class action regime should be regulated', *The Australian* (11 May 2018).

[84] Vince Morabito, 'Shareholder Class Actions in Australia – Myths v Facts' (11 November 2019) 20.

[85] Ibid 21. Noting that this data covers only 84 per cent of all shareholder class actions covered.

[86] Ibid 20.

9. What evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy?

119. No comment.

10. The effect of unilateral legislative and regulatory changes to class action procedure and litigation funding.

Forum shopping issue

120. The Law Council has concerns that the Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) (**the Bill**) will, if passed, encourage forum shopping as law firms seeking a group costs order will commence class action proceedings in the Victorian Supreme Court to take advantage of the new regime.

121. In this context, the Law Council notes the recent decision of the High Court in *Brewster*; where it determined that common fund orders were not permitted by section 33ZF of the FCA or section 183 of the *Civil Procedure Act 2005* (NSW).[87] Given the uncertainty around whether common fund orders are available under section 33V of the FCA, it is very likely that the Bill, if enacted, will create a 'forum shopping' effect on class action litigation across Australia by encouraging the commencement of class actions in Victoria.

Exclusive jurisdiction issue

122. The Law Council would oppose any proposal that the Federal Court be granted exclusive jurisdiction to determine class actions brought under Part 9.6A of the Corporations Act or the *Australian Securities and Investments Commission Act 2001* (Cth).

123. Australia is a federation and the state and territory courts have a valuable role to play in this country. The Law Council would be most concerned if steps were taken to permanently close off options for Australians to access justice. Although it is not known what the future will look like, what is known is that change is a constant and that change may mean that in future, Australians may be better served by an ability to access a state or territory court.

124. The Law Council notes that the referral of the Corporations Power to the Commonwealth and the concurrent jurisdiction of the federal and state courts have proven beneficial to the administration of justice in corporations and securities law.

125. The Law Council recognises the potential for complications in case management where there are multiple proceedings in different forums[88] and it is accepted that there may be a practical benefit in having all proceedings in the one, national court, so that the competing class actions can be dealt with by one judge.[89]

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[87] *Brewster* [2019] HCA 45.
[88] See generally *Wigmans v AMP Ltd* [2018] NSWSC 1045 (9 July 2018).
[89] Another issue is limitation periods: there is an open question whether state laws for the suspension of limitation periods during class actions (see, eg, s 182 of the *Civil Procedure Act 2005* (NSW)) would apply in respect of rights arising under federal laws. Perhaps they would do so under s 79 of the *Judiciary Act 1903* (Cth) but the position is not entirely clear: *Wigmans v AMP Ltd* [2018] NSWSC 1045 (9 July 2018) [26] (Stevenson J). At the time of writing this issue was due for consideration by the Full Court of the Federal Court

126. However, against this is that parties in our federal system are entitled to pursue their rights in the forum of their choice, which forum will exercise jurisdiction subject to various settled principles relating to cross-vesting of jurisdiction and the appropriateness of the given forum. In the Law Council's view, the existing cross-vesting regime and the broad case management powers afforded to the courts by section 33ZF of the FCA and state and territory cognates are likely to be adequate to deal with problems associated with overlapping class actions in mixed forums. In particular, there should be a strong incentive for state and territory courts to transfer proceedings to the Federal Court on the grounds that it would be 'more appropriate' or in the interests of justice[90] to do so where one or more overlapping proceedings has been (or are likely to be) commenced in the latter court.

127. The difficulties associated with starting a proceeding in one court and being unable to cure any problems that may arise in relation to overlapping class actions proceedings within that proceeding are similar to what was encountered with the historic, strict rules relating to courts of common law and equity. The Law Council knows no reason or pressing need which would justify risking the introduction of similar difficulties in a new area.

128. The Law Council notes that the Commonwealth experimented with conferring exclusive jurisdiction on the Federal Court in relation to proceedings under the Part VI of the *Trade Practices Act 1974* (Cth). The result was years of arid and costly jurisdictional disputation. The experiment was ultimately abandoned.[91]

129. The Law Council also notes that any proposal to confer exclusive jurisdiction on the Federal Court must thoroughly consider the funding implications. It is the experience of members of the legal profession that that delays in the Federal Court are already significant. These delays would likely worsen if the jurisdiction were to be exclusive.

12. The potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic

130. The Law Council notes the recent announcement from the Federal Government that it has modified the continuous disclosure provisions of the Corporations Act in an effort to provide temporary relief to companies and officers for a six-month period to protect against 'opportunistic' class action lawsuits during the COVID-19 pandemic.[92]

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in relation to a further application for transfer in the four Federal Court AMP class actions. The Law Council notes that in the event that s 182 of the *Civil Procedure Act 2005* (NSW) is held not to be effective to suspend certain federal limitation periods, this would be a factor weighing heavily in favour of the Supreme Court transferring a matter to the Federal Court under existing cross vesting arrangements if this issue were to arise again in the future.

[90] See, eg, *Corporations Act 2001* (Cth) s 1337H(2); *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth) s 5. See also *Civil Procedure Act 2005* (NSW) s 183 (and equivalents in other states), which enables the Court 'of its own motion or on application by a party of a group member' to make such orders that are 'appropriate or necessary to ensure that justice is done in the proceeding'.

[91] See eg *Stack v Coast Securities (No 9) Pty Ltd*; *Bargal Pty Ltd v Force* (1983) 154 CLR 261; *Dorotea Pty Ltd v Vancleve Pty Ltd* (1987) 75 ALR 629.

[92] Hon Josh Frydenberg MP, Treasurer (Cth) 'Litigation funders to be regulated under the Corporations Act' (Media Release, 22 May 2020); *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth) sch 1 ss 5-9. The intention of the amendment was that companies and directors would only be liable for sharing inaccurate information because of 'knowledge, recklessness or negligence'. However, there is some debate over whether the temporary test which still preserves liability in the event of 'knowledge, recklessness or negligence' in fact provides the temporary relief as presumably intended in the Treasurer's announcement. The exemption of 'negligence' arguably does not change the existing standards for liability.

131. If investor class actions are put to one side, there is no reason to think new or ongoing class actions will impose an inappropriate burden on Australian businesses in the current period. Claims based on mass torts (e.g product liability, fires and floods) and breaches of consumer laws are complex. They usually take a considerable time to get to the stage of commencement, and a considerable time to be resolved. This means that claims that will be determined in the next 12 months will typically have arisen from events many years earlier. Firms, if well managed, should have made provision for them, to the extent they are not covered by insurance.

132. The second thing to note is that most such claims are against corporations of undoubted soundness (banks, multi-national product suppliers) or governments. If anything, 'vulnerable' firms are more likely to be burdened by regulatory proceedings brought by Commonwealth agencies than by class actions. Some firms will be members of the class of claimants in such matters (the Queensland floods class action being a notable example).

133. The COVID-19 pandemic has had a detrimental effect on many businesses, including an effect on their capacity to meet their liabilities. However, there is no reason why their capacity to meet their liability to members of a class affected by their wrongful conduct should be distinguished from their capacity to meet their liability to an injured employee or their landlord.

13. Evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders

134. The most notable development has been the decision of the High Court in *Brewster* concerning common fund orders, discussed above, a decision based simply on a point of statutory construction. For reasons developed above, the Law Council believes the effect of this decision should be reversed by statute. That position is consistent with the recommendations of the ALRC.

14. Any matters related to these terms of reference

Continuous disclosure

135. The objectives of the continuous disclosure laws and the prohibition on misleading and deceptive conduct are protecting market integrity and investors. The Law Council would be willing to participate in a review into whether the current laws achieve these objectives in an optimal manner.

136. The Law Council notes that the ALRC received mixed feedback as to the impact of class actions on the availability of directors and officers insurance.[93] However, the members of the Corporations Committee of the Law Council's Business Law Section anecdotally report that class actions are having a significant impact.

137. If a review is to be commissioned, it should be careful to verify concerns expressed by any interest groups, including, for example, directors' and officers' liability insurers and companies supposedly contemplating relocation from Australia.[94] The Law

[93] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 281-4.
[94] It should be noted that not all insurers object to class actions. It was reported in a recent article that '[r]ecommendations from the reform commissions may lead to some changes, but Gen Re says all

Council would expect that the same approach should apply to interest groups arguing against a review. Class actions can be a very divisive issue with arguments driven by 'selfish and partisan motivations'.[95] In short, the economic incentives that may drive various interest groups' positions on shareholder class actions must be acknowledged. Equally, those incentives do not automatically mean that arguments or positions are without merit.

138. The Law Council queries whether, when Australians are absorbing the revelations of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* and after 24 years of compulsory superannuation contributions which has led to the creation of some $3 trillion in superannuation assets,[96] much of it invested in the share market, it is the right time to review shareholder protections in the Corporations Act.

The value of class actions to consumers

139. The Australian Consumer Law Committee (**ACLC**) of the Law Council's Legal Practice Section provides **Attachment B** with a view to conveying the real-world outcomes flowing for everyday Australian consumers from the operation of the current class action regime.

140. In Australia there is a broad diversity of class actions conducted on behalf of myriad claimants each year. Some of those types of representative proceedings include:

- consumer protection claims;
- securities and investor proceedings;
- common law, personal injury and human rights claims;
- systemic abuse claims;
- anti-discrimination or employment class actions;
- medical negligence or defective pharmaceutical products;
- claims in respect of environmental destruction;
- cartel conduct; and
- natural disaster proceedings.

141. These claims are not frivolous or speculative. They go to the heart of real issues that exist in Australian society. These are claims that are often left untouched by resource-constrained regulatory bodies, and some, but not all, would not be able to be commenced without third party litigation funder support.

142. The ACLC is of the view that there is a consistent track record of hundreds of millions of dollars of losses being restored to class members which would not have happened but for the availability of class actions – claims which would not have been viable to bring on an individual basis.

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stakeholders consider class actions a valuable tool in the legal environment, with no group seeing any reason to abandon a regime that has served the community well since its inception. "Insurers and reinsurers that write policies that would respond to class actions should price for the fact class actions are here to stay and will continue to be a feature of the Australian litigation landscape," the reinsurer says': 'Class actions: no reprieve for D&O insurers', *Insurance News* (online), 18 June 2018 <http://www.insurancenews.com.au/analysis/class-actions-no-reprieve-for-do-insurers>.

[95] Chief Justice Allsop, *Class Actions, Keynote address at Law Council of Australia Forum* (Class Actions 2016 Key Topics, Sydney, 13 October 2016) 3.

[96] Association of Superannuation Funds of Australia, *Superannuation Statistics* (June 2018) <https://www.superannuation.asn.au/resources/superannuation-statistics>.

143. The ACLC is concerned that the substantive focus of the present inquiry on third party funded litigation may lose sight of a significant sector of the class actions regime which is delivering outcomes for thousands of everyday Australian consumers who otherwise would not have a vehicle by which to vindicate their rights. It is important that any contemplated reforms do not have unintended negative impacts on the rights of consumers.

144. In summary:

- Class actions are a mechanism by which everyday Australians can access justice and the justice system, which is often inaccessible by reason of resourcing imbalances, lack of access to legal aid funding, cultural, linguistic or geographic barriers.
- Consumer class actions have measurable, real-world benefits for everyday Australians living with the consequences of often systemic wrongdoing and misconduct on a grand scale. Beyond enhancing individual access to the justice system, these proceedings balance the scales in terms of litigation resourcing and provide clear economies of scale in the broad administration of justice.
- It is not possible for law firms to 'self-fund' all meritorious consumer class actions without the availability of third-party litigation funding. Indeed, third party funding is a fundamental and necessary element of the class actions regime – without this funding mechanism, many claims would go unprosecuted, and hundreds of thousands of Australians would be unable to seek redress where they are subjected to wrongdoing or misconduct, often by entities in a position of substantial power.
- Regulatory agencies have neither the resources nor the litigious capacity to pursue the totality of these claims. Private enforcement plays a vital role in ensuring both access to, and the efficient administration of, justice in Australia.

South Australian Litigation Assistance Fund

145. On behalf of the Law Society of South Australia (**LSSA**), the Law Council raises several concerns particular to the South Australian Litigation Assistance Fund (**LAF**). LAF is a charity registered with the Australian Charities and Not-for-profits Commission which has operated since 1992 for the sole purpose of providing funding assistance to claimants pursuing meritorious civil claims. The LSSA is the trustee of LAF.

146. On average, each year, LAF agrees to grant some funding to approximately 40 new claimants/plaintiffs (LAF receives approximately 70 funding applications from new claimants/plaintiffs each year). In the majority of cases, the funding provided by LAF is solely for one or more of the disbursements required to run the case (excluding counsel fees). On average, in an individual case, LAF will provide funding of approximately $10,000, usually for one or more expert reports. LAF does not provide funding for a class actions.

147. The LSSA and LAF are keen to ensure that any regulation which results from the Inquiry does not unintentionally hamper LAF's ability to continue its charitable operations.

Sufficient Resources

148. It is noted that it the ALRC has recommended that litigation funders ought to indemnify the representative plaintiff against adverse costs in order for the funding agreement

to be valid.[97] There has also been recent consideration of capital adequacy requirements for third-party funders, including by the ALRC.[98]

149. However, given that LAF:

(a) only funds disbursements (in the overwhelming majority of cases) – and often only a select one or few of the disbursements in a case;

(b) does not provide funding in class actions; and

(c) has a solely charitable purpose;

it is respectfully submitted that any regulation ought not to have the effect of requiring a funder with LAF's characteristics to cover adverse costs orders or meet capital adequacy requirements. Any regulation having that effect would likely threaten LAF's ability to continue operation which, particularly given point (a) immediately above, would be an unintended outcome.

150. The recent announcement by the Australian Government that litigation funders will be made subject to the AFSL regime is noted. The AFLS regime provides ASIC the power to exempt an organisation from compliance or to modify the obligations. The LSSA and LAF submit that this may be an appropriate approach in respect of LAF.

Adequate arrangements for managing conflicts of interest

151. LAF already has in place a Conflicts Management Policy which was created in order to ensure (scaled) compliance with ASIC Regulatory Guide 248. In particular, LAF notes that:

- LAF's practice is to withdraw support for ongoing litigation only where the case's prospects of success have fundamentally fallen away (and this occurs extremely rarely); and
- aside from the above potential to withdraw/vary support, in the overwhelming majority of cases LAF has a negligible ability to influence the litigation.

152. It is noted that some of the legal practitioners who sit on LAF's Board and Assessment Panels also on occasion make funding applications to LAF on behalf of clients. When this occurs, that legal practitioner plays no role in LAF's assessment of the application (having been excluded from doing so pursuant to LAF's Conflicts Management Policy).

153. However, recommendation 21 of the ALRC's Final Report regarding conflicts of interest provides that:

> *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 matter in which the solicitor or law firm is acting.*[99]

154. The ALRC further expands upon Recommendation 21:

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[97] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) recommendation 14.
[98] Ibid 21.
[99] Ibid recommendation 21.

> *The ALRC considers that the Conduct 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 the litigation funder. 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.*[100]

155. Given that the legal practitioners who sit on the LAF Board and Assessment Panels do so in a voluntary capacity, LAF anticipates that this arrangement would not be caught by the above proposal. It would be difficult for LAF to continue to operate if a condition of Board or Panel membership was a promise to never make an application for LAF funding on behalf of a client – particularly given that the *Legal Practitioners Act 1981* (SA) requires solicitors to inform their clients of LAF in certain circumstances, and also given a solicitor's duty to act in their client's best interests at all times.

156. The Law Council, guided by its Constituent Bodies, is responsible for the oversight and review of the Australian Solicitors' Conduct Rules. Rule 12 has been slated for potential review in the future to ensure that it responds to the realities of modern business practices. Consideration of the recommendation 21 of the ALRC and the concerns of LAF may form part of that process.

Cap on commissions to funders

157. It is noted that statutory caps on funding commissions have been considered as a potential method for increase returns to plaintiffs/claimants.[101] Currently, LAF requires a 100 per cent uplift on disbursement expenditure (in successful cases only). However, this is a reflection of:

    (a) the following circumstances of a typical LAF-funded case:

        (i) the case has potentially good merit but is at a relatively early stage and accordingly involves not insignificant risk;

        (ii) the claimant/plaintiff needs to pay for a disbursement (usually an expert report) but cannot identify any other acceptable means of funding (i.e. can't borrow from family or friends, can't borrow from a bank, etc); and

        (iii) while LAF can see some risk that the case will not be successful, overall an assessment is made that there is sufficient potential merit to fund the disbursement/s;

    (b) the fact that all revenue is used solely for the ongoing operation of the charity, (i.e. funding further cases);

    (c) on average LAF will provide funding of only approximately $10,000; and

    (d) where funded cases are unsuccessful, LAF does not make any recovery at all.

158. Given these factors, LAF submits that any cap on funding commissions should not apply to it so as not to hinder its ability to continue its charitable operations.

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[100] Ibid 227.
[101] Ibid 21.

Minimum requirements for character and qualifications of responsible officers

159. The ALRC has considered whether requirements for character and qualifications of responsible officers be introduced for litigation funders.[102]

160. Given the following factors, the LSSA and LAF submit that any added regulation of this type ought to deem LAF's arrangements to be compliant:

    (a) Due to its self-sustaining financial model, it is important for LAF to only fund cases with sufficient potential merit – otherwise its capital will become depleted. Critically, LAF ensures this through the following assessment process for funding applications received:

        (i) a brief is prepared by LAF's manager, who is a legal practitioner; and

        (ii) that brief is considered by one of LAF's panels of three legal practitioners (working in a voluntary capacity), who are also experienced in civil litigation, who make a decision on the application;

    (b) LAF is overseen by a Board constituted of eleven lawyers experienced in civil litigation and one financial expert. Again, all contribute to LAF in a voluntary capacity. The financial expert plays a particular role in overseeing, capital and cash flow requirements, and also works directly with the investment advisers LAF engages to advise on the investment of the uncommitted capital in term deposits and on the share market; and

    (c) as mentioned above, the LSSA is LAF's trustee. The day-to-day operations of LAF have been set up so that the LAF manager has the benefit of the sophisticated facilities and infrastructure of the LSSA, including a finance manager and a chief executive with accounting qualifications.

Compliant and dispute resolution system

161. There has been some recent discussion regarding the resolution of complaints and disputes, and the provision of a forum to resolve a dispute in a no-cost and informal manner that is binding on the funder – including potentially granting consumers of litigation funding services access to the Australian Financial Complaints Authority.[103]

162. The LSSA and LAF submit that any such requirement ought to permit a scaled approach akin to ASIC Regulatory Guide 248 – particularly given that LAF's charitable success is due in part to its ability to keep its administrative costs at a relatively low level. However, it is note that is concern must be balanced with the need to treat the funded claimants/plaintiffs appropriately at all times.

Conclusion

163. The LSSA and LAF understand and respects the focus on ensuring appropriate behaviour by funders. At the same time, the LSSA and LAF are keen to ensure that LAF's charitable contribution to the community, which is built upon a solid foundation of expertise and care, does not become unintentionally hampered by these efforts.

164. While the Inquiry appears to be primarily focused on the funding of class actions, which LAF is not involved in, broader consideration of funders may also be provided. In this context, the LSSA and LAF submit that there is a distinction to be made

[102] Ibid 6, 15, 21, 292.
[103] Ibid 236-42.

between LAF's status as a charity and the status of other litigation funders which are for profit.

Attachment A – Settlement distribution for class actions 2001-2020

1. The information provided below was compiled by members of the Class Actions Committee of the Law Council's Federal Litigation Section based on a review of published judgments and other sources including, in particular, Michael Legg and Ross McInnes' book, *Australian Annotated Class Actions Legislation*.[1]

2. The table below is intended to provide a broad overview of class actions settlements in the 2001-2020 period. Significantly, the table provides information on a number of class actions settlements since the publication of a similar table by the Australian Law Reform Commission at Appendix E of its Report entitled 'Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders'.[2]

Case	**Type of class action**	**Settlement amount[3]**	**Legal Fees (% of settlement)[4]**	**Litigation Funding Fees (% of settlement)[5]**
2001-14				
Johnson Tiles Pty Ltd v Esso Australia Ltd [2001] FCA 458	Gas explosion	$32.5m	$6m (18.5%)	No funder
King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd) [2003] FCA 980	Shareholder	$112m	$15.8m (14%)	No funder
Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [2006] FCA 915	Price fixing cartel	$41.1m	$11.1m (27%)	No funder
Guglielmin v Trescowthick (No	Shareholder	$3m	$1.55m (52%)	No funder

[1] LexisNexis Butterworths, 2nd ed, 2017.
[2] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) Appendix E.
[3] Except where otherwise indicated, this table does not include payments made to lead applicants for their time and expenses in addition to any damages or compensation paid to them. Further, unless otherwise stated, the settlement amounts include costs and amounts, if any, payable as a commission to a litigation funder.
[4] In a number of instances, additional fees were paid for settlement administration costs, usually to the firm acting for the applicant(s) in the proceeding but in a number of instances to an independent firm of accountants.
[5] Calculated on the gross settlement sum, that is, compensation plus approved costs. In some instances, additional amounts may have been paid to a litigation funder by way of management expenses or fees.

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
5) [2006] FCA 1385				
Taylor v Telstra Corporation Ltd [2007] FCA 2008	Shareholder	$5m	$1.25m (25%)	No funder
Dorajay Pty Ltd v Aristocrat Leisure Ltd [2009] FCA 19	Shareholder	$144.5m	$8.5m (6%)	$35m (24%)
P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) [2010] FCA 1029	Shareholder	$110m	$11m (10%)	38.5m (35%)
Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd [2011] FCA 801	Shareholder	$60m	$4.9m (8%)	$15m (25%)
Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd [2011] FCA 671	Price fixing cartel	$120m	$25m (21%)	No funder
Kirby v Centro Properties Ltd (No 6) [2012] FCA 650	Shareholder	$200m	$31.1m (16%)	$60m (40%)
Casey v DePuy International Ltd (No 2) [2012] FCA 1370	Product liability – hip implants	$20m	$1.12m (5.6%)	No funder
Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3) [2012] VSC 625	Shareholder	$115m	$11.8m (10%)	34.5 (30%)
Hadchiti v Nufarm Ltd [2012] FCA 1524	Shareholder	$46.6m	$4.5m (10%)	$2.2m (5%)

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
Earglow Pty Ltd v Sigma Pharmaceuticals Ltd [2012] FCA 1496	Shareholder	$57.5m	Unknown	Unknown
Konneh v State of NSW (No.3) [2013] NSWSC 1424	Human Rights	$4m	$2m (50%)	No funder
Wheelahan v City of Casey & Ors (No 3) [2013] VSC 316	Gas migration	$23.5m	$6.25m (27%)	No funder
Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No. 3) [2014] FCA 680	Shareholder	$75m	$8.5m (11%)	18.75m (25%)
Wepar Nominees Pty Ltd v Schofield (No 2) [2014] FCA 225	Disclosure to market and in a prospectus	$3.25m	$1.04m (32%)	$1.08m (33%)
Inabu Pty Ltd v Leighton Holdings Ltd [2014] FCA 622	Shareholder	$69.45m	$3.9m (6%)	$19.5m (28%)
Matthews v AusNet Electricity Services Pty Ltd [2014] VSC 663	Personal injury and property damage - bushfire	$494m	$60m (12%)	No funder
A v Dr Mark Schulberg (No 2) [2014] VSC 258	Personal injury	$13.75m	Unknown	No funder
Giles v Commonwealth of Australia [2014] NSWSC 83	Human Rights	$24m	$4.1m (17.3%)	No funder

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
2015-16				
Downie v Spiral Foods Pty Ltd [2015] VSC 190	Product liability	$69.45m	$3.9m (5.6%)	No funder
Camilleri v The Trust Co (Nominees) Ltd [2015] FCA 1468	Shareholder	$25m	$4.9m	No funder
Rowe v AusNet Electricity Services Pty Ltd [2015] VSC 232	Personal injury and property damage - bushfire	$300m	20m (7%)	No funder
Newstart 123 Pty Ltd v Billabong International Ltd [2016] FCA 1194	Shareholder	$45m	$6.2m (14%)	Not disclosed
Hopkins v AECOM Australia Pty Ltd (No 8) [2016] FCA 1096	Investors in tunnel	$121m	$19m (16%)	$31.8m (26%)
Earglow Pty Ltd v Newcrest Mining Ltd [2016] FCA 1433	Shareholder	$36m	$10.3m (29%)	$6.78m (19%)
Clasul Pty Ltd v Commonwealth [2016] FCA 1119	Equine influenza outbreak	No compensation	Each party bore its own costs	Funded at commencement but funder withdrew
Stanford v DePuy International Ltd (No 6) [2016] FCA 1452	Product liability - hip implants	$250m	$36m (14%)	No funder
2017				
Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3) [2017] FCA 330	Shareholder	$40m	$10.5m (26%)	$8.85m (22%)

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
Kelly v Willmott Forests Ltd (in liq) (No 5) [2017] FCA 689	Financial product	No compensation but contribution towards legal costs and for some group members a 30%–50% reduction in outstanding loans, depending on the speed of loan repayments	$8.6 m	No funder
McAlister v New South Wales (No 2) [2017] FCA 93; *McAlister v New South Wales (No 3)* [2018] FCA 636	Human rights	$11m	$6.95m[6] (63%)	No funder
Muswellbrook Shire Council v The Royal Bank of Scotland NV [2017] FCA 414	Financial product	Not available	Not available	Not available
Mitic v OZ Minerals Ltd (No 2) [2017] FCA 409	Shareholder	$32.5m	$12.6m (39%)	$8.9m (27%)
HFPS Pty Ltd (Trustee) v Tamaya Resources ltd (in Liq) (No 3) [2017] FCA 650	Shareholder	$6.75m	$3.42m (51%)	$1.2m (17%)
Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3) [2017] FCA 1165	Consumer	$5.5m	$1.5m[7] (27%)	No funder
Lee v Westpac Banking Corporation [2017] FCA 1553	Financial product	$7.5m	$2.5m (33%)	No funder

[6] Costs agreed to be paid by State separate to compensation and after $4.05m compensation distributed to 50 class members.
[7] Costs agreed to be paid separate to compensation.

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
Jones v Treasury Wine Estates Ltd (No 2) [2017] FCA 296	Shareholder	$49m	$11.5m (24%)	$11.7m (24%)
Kamasaee v Commonwealth [2017] VSC 537; *Kamasaee v Commonwealth* [2018] VSC 138	Human rights – asylum seekers	$90m	$20m (22%)	No funder
2018				
Lifeplan Australia Friendly Society Ltd v S&P Global Inc [2018] FCA 379	Financial product	Confidential due to related class actions	$4.9m	No funder
Dillon v RBS Group (Australia) Pty Ltd (No 2) [2018] FCA 395	Financial product	$12.58m	$4.5m (36%)	No funder
Clarke v Sandhurst Trustees Ltd (No 2) [2018] FCA 511	Financial product	$16.85m	$5m (30%)	$5.055m (30%)
Caason Investments Pty Ltd v Cao (No 2) [2018] FCA 527	Shareholder	$19.25m	$7.5m (39%)	5.75m (30%)
Wotton v State of Queensland (No 10) [2018] FCA 915	Human rights	$30m	$7.1m (23%)	No funder
Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd [2018] FCA 1030	Shareholder	$132.5m	$21.8m (16.5%)	$30.75m (23.2%)
Hodges v Sandhurst Trustees Ltd [2018] FCA 1346	Financial product	$78.16m	$11.23m (14%)	$22.4m (29%)

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc) [2018] FCA 1289	Financial product	$215m	$20m (9%)	$92m (43%)
Santa Trade Concerns Pty Ltd v Robinson (No 2) [2018] FCA 1491	Shareholder	$3m	$1.5m (50%)	$500,000 (16%)
Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3) [2018] FCA 1842	Financial product	$12m	$1.75m (14.5%)	$5.98m (50%)
Hopkins as Trustee of the David Hopkins Super Fund v Macmahon Holdings Ltd [2018] FCA 2061	Shareholder	$6.7m	$3m (45%)	$1.295m (19%)
Hall v Slater & Gordon Ltd [2018] FCA 2071	Shareholder	$36.5m	$5.4m (15%)	$8m (22%)
Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4) [2018] NSWSC 1584	Financial product	$28.5m	$12.8m (45%)	$4.3m (15%)
2019				
McKenzie v Cash Converters International Ltd (No 4) [2019] FCA 166	Consumer claims arising out of 'pay-day' loan agreements	$16.5m	$5.8m (35%)	No funder
Bradgate (Trustee) v Ashley Services Group	Shareholder	$14.6m	$3.57m (24%)	$4.84m (33%)

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
Ltd (No 2) [2019] FCA 1210				
Gibson v Malaysian Airline System Berhad (Settlement Approval) [2019] FCA 1007	Malaysian Airlines flight MH17 disaster	Settlement is confidential	Not specified	No funder
Mid-Coast Council v Fitch Ratings Inc [2019] FCA 1261	CDO	$27m	Not available	Not available
Adams v Navra Group Pty Ltd [2019] FCA 1157	Margin loans	Each side to bear its own costs, no compensation	Not applicable	Not applicable
Hawker v Powercor Australia Ltd [2019] VSC 521	Terang bushfire	Each side to bear its own costs, no compensation	Not applicable	Not applicable
Kuterba v Sirtex Medical Ltd (No 3) [2019] FCA 1374	Shareholder	$40m	$9.3m (23%)	$10.2m (25%)
Bolitho v Banksia Securities Ltd (No 6) [2019] VSC 653	Investor class action	$64m	$5m (8%)	$13.3m (21%)[8]
Murillo v SKM Services Pty Ltd [2019] VSC 663	Fire at a re-cycling plant	$1.2m	$725,000 (60%)	No funder
Perazzoli v Bank SA, a division of Westpac Banking Corporation Ltd [2019] FCA 1707	Ponzi scheme	$13.25m	$4m (30%)	$4m (30%)
Endeavour River Pty Ltd v MG Responsible Entity Ltd [2019] FCA 1719	Investors in Unit Trusts	$42m	$2.66m (6%)	$13.47m (32%)

[8] $22m is being held in pending resolution of ongoing dispute as to costs and commission.

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
AUB19 v Commonwealth of Australia [2019] FCA 1722	Offshore detention	Discontinuance of proceedings with no order as to costs	Not applicable	Not applicable
Andrews v Australia & New Zealand Banking Group Ltd [2019] FCA 2216	Exception fees	$763,901	$3.7m (Costs on top)	$500,000 (66%)
Rushleigh Services Pty Ltd v Forge Group Ltd (in liq) [2019] FCA 2113	Shareholder	$16.5m	$4.2 million (25%)	$3.95m (24%)
Calinoiu v Qld Law Group – A New Direction Pty Ltd [2019] FCA 2019	Unlawful costs agreements in personal injury actions	Settled for undertaking	Unknown	No funder
Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5) [2019] FCA 2196	Consumer	$29m	$9.16m (32%)	No funder
2020				
Pearson v State of Queensland (No 2) [2020] FCA 619	Stolen wages for Aboriginal and Torres Strait islanders	$190m	$13.6 (7%)	$38m (20%)
Clime Capital Ltd v UGL Pty Ltd [2020] FCA 66	Shareholder	$18m	$5.95m (33%)	$4.05m (23%)
Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory of Australia (No 2) [2020] FCA 215	Juveniles in NT youth detention centres	Resolved on the basis of NT promise of various initiatives and policy revisions, with no order as to costs	Not applicable	No funder
Lenehan v Powercor Australia Ltd [2020] VSC 82	Bushfire	$17.5 m	$3.68 (21%)	No funder

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3) [2020] FCA 461	Shareholder	$49.7m	$7.5m (15%)	$14.4m (29%)
Lynch v Cash Converters Personal Finance Pty Ltd (No 5) [2020] FCA 389	Consumer claims arising out of 'pay-day' loan agreements	$67.4m	$12.44m (19%)	No funder
Banksia Securities Ltd v Insurance House Pty Ltd (Settlement Approval) [2020] VSC 123	Claim by debenture holders	$5.5 million	Not available	Not available
Cantor v Audi Australia Pty Ltd (No 5) [2020] FCA 637	Consumer *dieselgate* claims	$171m	$51m[9] (30%)	No funder[10]
Lenehan v Powercor Australia Ltd (No 2) [2020] VSC 159	Bushfire	$17.5	Not available	Not available
Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd [2020] FCA 510	Shareholder	$32.4m	$10.8m (33.3%)	$8.4 (25.8%)
Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2) [2020] FCA 579	Shareholder	$35m	$2.4m (6.8%)	$3.9 (11.1%)

[9] Costs determined after agreement on compensation amount

[10] Application for a common fund order by funder of 2 small claims rejected; funder only entitled to recover from the relatively small number of class members who signed funding agreements. The remaining 3 claims on a no win no fee basis without a funder

Case	Type of class action	Settlement amount[3]	Legal Fees (% of settlement)[4]	Litigation Funding Fees (% of settlement)[5]
Clark v National Australia Bank Ltd (No 2) [2020] FCA 652	Consumer credit insurance	$49.5 million	$3.8m (7.6%)	No funder
Uren v RMBL Investments Ltd (No 2) [2020] FCA 647	Investor MIS	$3m	$950,000 (32%)	$750,000 (25%)
RK Doudney Pty Ltd, as Trustee for the RK Doudney Superannuation Fund v IOOF Holdings Ltd	Shareholder class action	Discontinued	No payment	Each party to bear its own costs
Bartlett v Commonwealth (NSD1388/2018);	Toxic foam property damage	$92.5m	$12.4m (13%)	$23.13m (25%)
Hudson v Commonwealth (NSD1155/2017);		$34m	$7.93m (23%)	$8.45m (24%)
Smith v Commonwealth (Department of Defence) (NSD1908/2016)		$86m	$9.04m (11%)	$21.5m (25%)

Attachment B – Australian Consumer Law Committee examples of the class action regime in practice

1. This Australian Consumer Law Committee (**ACLC**) of the Law Council's Legal Practice Section has prepared this annexure with a view to conveying the real-world outcomes flowing for everyday Australian consumers from the operation of the current class action regime.

Real-world examples – the regime in practice

Consumer class actions

Superannuation class actions

2. For many Australians, the money in their superannuation accounts is their largest asset. Deposits made by customers go on to be invested by superannuation funds, but fund members often do not think of themselves as 'investors' and are generally passive consumers who are content in their understanding that their fund is obligated to manage their money in their best interests.

3. Superannuation funds, as trustees, have the same common law responsibilities as any trustee, which have been codified by the *Superannuation Industry (Supervision) Act 1993* (Cth). Given the nature of the deposits they are holding and investing, they are effectively responsible for the security and comfort of their customers' retirement. The *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* revealed that many of Australia's major superannuation funds had been making investment decisions that were not in the best interests of their customers. In light of these revelations, a number of class actions have been launched with a view to compensating members of bank-run retail superannuation funds.

4. Class action lawyers are grappling with the claims of hundreds of thousands of superannuation customers whose retirement savings have been depleted by excessive fees, or whose savings never saw the growth they should have. Without the availability of funded class action mechanisms, these people would be unlikely to see any meaningful redress for the mishandling of superannuation deposits. Funded class actions have stepped in to provide a potential path to compensation and a strong deterrent against future misconduct.

Colonial First State superannuation customers

5. Since the Royal Commission, at least seven class actions relating to alleged breaches of duty by retail superannuation funds have been commenced. The first of these cases to be filed was against Colonial First State Limited (**Colonial**), and its parent bank, the Commonwealth Bank of Australia (**CBA**). These cases are supported by litigation funding.

6. The impugned misconduct in the Colonial/CBA proceeding concerns the treatment of members' money invested in cash 'investment options'. The cash investment options in question involve Colonial depositing funds in terms deposits as well as in 'at-call' accounts (i.e. accounts where the funds are withdrawable at any time). Rather than 'shopping around', it is alleged that Colonial instead chose to deposit cash investment option funds into accounts with CBA, through dealings the proceeding alleges were not at arm's length and were not in the best interests of

members. The result has been low interest rates and poor returns, ultimately diminishing the funds with which members will enter retirement.

Consumer Credit Insurance class actions

7. In September 2018, a class action was commenced against National Australia Bank (**NAB**) and its subsidiary, MLC Limited, on behalf of consumers who were sold consumer credit insurance (**CCI**) when given a NAB credit card or personal loan (**the NAB CCI Class Action**).

8. It was alleged that in the course of offering these CCI products, NAB engaged in misleading and deceptive conduct, implemented a system of unconscionable conduct and provided advice which was not in the best interests of their customers.

9. The class included people who were not aware they were sold the CCI policy, believed they were required to take out the policy, or otherwise thought that the policy was free.

10. Samantha Clark, the lead applicant, was sold CCI when given a credit card in 2012. Ms Clark is a widowed single mother of four children. She was a NAB customer for more than 20 years yet following the death of her husband, when unemployed, she was sold CCI that supposedly met her credit card repayment obligations and responded if she lost a job that she did not have. It was alleged that for Samantha and many other class members, the insurance was not appropriate for their needs, was a waste of money and should never have been sold to them.

11. The NAB CCI Class Action settled for $49.5 million. Settlement was approved by the Federal Court on 8 May 2020 and more than 45,000 people will receive compensation for the alleged worthless insurance premiums. The compensation will make a significant difference to the lives of many people who participated in the class action, including pensioners, students and unemployed persons.

12. As the group members had relatively modest claims, it would not have been cost-effective for them to commence separate proceedings as individuals. The class action regime presented a valuable mechanism for the class to seek financial redress in a way that was both cost-effective and efficient.

13. NAB no longer offers these types of CCI products.

14. A second action of a similar nature was commenced against CBA on 10 June 2020 on behalf of hundreds of thousands of consumers who were, it is alleged, sold worthless credit card and personal loan insurance.

Radio Rentals class action

15. Casey Simpson, an Aboriginal single mother of 5 children, commenced a class action against Thorn Australia Pty Ltd, trading as Radio Rentals, in March of 2017. She alleged that Radio Rentals had systematically deprived her and almost 100,000 customers of many millions of dollars by the adoption of a business model that:

    - avoided the National Consumer Credit Code by the crafty use of a misleading model in which consumers were told that rental goods could be theirs to keep after 18 months as ‘Rent Try $1 Buy’, when this was not true;
    - imposed charges for an insurance product that was rarely, if ever, responsive to claims; and

- profited by a direct debit arrangement with Centrepay that continued long after the term of lease had expired, in reliance on the disadvantaged customer base not actively instructing Centrepay to cease the instalments (what is known in the industry as an 'inertia provision'); and
- engaged in many other trickeries, not the least of which was to set the base 'cost' of rental products at a considerably inflated sum, so that at the end of the day, when a customer finally managed to stop their direct debits for the poor-quality furniture that had long ago been thrown out, the customer would have paid often far more than 100% interest on the loan.

16. After facing up to a vigorous defence and joinder of an insurer and a previous director, each of whom had teams of defendant lawyers and the usual multitude of reasons why they should not be the ones to compensate consumers, a settlement was reached in which the ailing company and its insurer agreed to pay $29m to settle all claims.

17. On approving the settlement, Justice Lee of the Federal Court said:

> *Although there is heterogeneity in class actions, it merits noting that the current case is an exemplar of the type of grouped proceeding sought to be promoted by the beneficial reform instituted by Pt IVA of the Federal Court of Australia Act 1976 (Cth) (**Act**). Persons, including those who might be characterised as vulnerable, commercially unsophisticated, and perhaps even marginalised, have a large number of individually very modest, but collectively significant, claims. The claims are said to arise from unconscionable, even predatory conduct, by an alleged wrongdoer.*
>
> *It is commonplace for cynical comments to be made about the oft-repeated catch-cry that Pt IVA is all about 'facilitating access to justice'. In part, this scepticism might be the result of the way in which some persons (who use Pt IVA as a mode of advancing joint enterprises) occasionally inappropriately fasten upon this phrase, as providing a simplistic justification for their commercial endeavours. But despite the notion of access to justice being a term loosely used by some, it was, and remains, the critical objective of Pt IVA. Although the legal representatives of the applicants will be 'rewarded' by payment of their legal costs and disbursements, it is encouraging to anyone who has an interest in Pt IVA working as it was intended to work, that cases such as the present can be brought by experienced and competent solicitors and barristers, which allow for the resolution of modest claims such as those advanced in this class action.*[1]

18. The first payments from the settlement fund were made to 54,933 class members on 6 April 2020.

19. Radio Rentals changed its business model from June 2018 so that allegations that it was systematically in breach of consumer protection laws would end.

Cash Converters class actions

20. Four class actions have been taken against Cash Converters, a payday lender, that have together paid compensation for over 90,000 Australians. The actions have,

[1] *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196 at [1] and [2].

since 2015, settled for a total of $82 million, the most recent settlement resulting in 68,326 group members being compensated on 27 May 2020.[2]

21. The class actions alleged that Cash Converters, unimpressed with the NSW and Queensland legislative caps on interest rates, created schemes whereby consumers would be required to pay for services that were not provided in order to enable Cash Converters to achieve an adequate return on its lending business.

22. The NSW scheme saw Cash Converters impose a fee creatively known as a DEF (deferred establishment fee) in return for a purported agreement to allow the borrower to reduce the loan term from, in the case of personal loans, two years to seven months. The fee, whether for small cash loans or larger personal loans, was one third of the principal, resulting in the annual percentage rate charged on the small cash loans being over 600%.

23. The Queensland scheme required Cash Converters' franchise businesses to create a second business in order to justify the imposition of a brokerage fee being paid by one entity to the other in consideration of the introduction of the business. The brokerage fee, it was alleged, whether for small cash loans or larger personal loans, was a fee for no service and its imposition should properly have been included in the annual interest charge. If this was done, the annual percentage rate on personal loan contracts was over 145%.

24. Cash Converters has, it is alleged, changed its business model to comply with consumer protection laws.

Product Liability class actions

Pelvic Mesh class action

25. Approximately seven years from the initial filing date, on 21 November 2019, Justice Katzmann of the Federal Court handed down a historic judgment in favour of the plaintiffs in *Gill v Ethicon Sarl* [2019] FCA 1905.

26. 1,000 Australian women are registered group members in the case against Ethicon Sarl and Johnson & Johnson Medical Pty Ltd concerning horrific injuries caused by nine urogynaecological devices made of knitted polypropylene mesh, more commonly known as 'pelvic mesh'.

27. These mesh devices had been designed to treat women suffering from stress urinary incontinence and pelvic organ prolapse. However, women who had the mesh implanted consequently suffered many severe injuries such as constant and excruciating pain, colorectal problems, recurring infections, and, ironically, new or worsened incontinence, which significantly affected their physical and emotional health, quality of life, and financial affairs.

28. The manufacturer's varied contraventions of statutory and common law consumer protection obligations were found to have caused the plaintiffs' injuries. The compensation bill is estimated to run into the hundreds of millions of dollars.

29. It is important to note that the cost to the plaintiffs of proving their claims has been astronomical, and action that has been conducted on a no-win, no-fee basis for many years.

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[2] *Lynch v Cash Converters Personal Finance Pty Limited (No 5)* [2020] FCA 389; *Gray v Cash Converters International Limited and others* (No.2) [2015] FCA 1109.

30. In a recent application for indemnity costs, Justice Katzmann said:

> *In their pleadings, the applicants alleged that each of the Ethicon devices could cause a number of complications about which the respondents should have warned, but failed to do so, either adequately or at all. These allegations underpinned the applicants' case with respect to all the causes of action.*
>
> *In their defence, the respondents merely asserted that 'all surgical procedures present risks' but otherwise denied the applicants' allegations. By their pleading the respondents put in issue the following matters: that the various devices could cause any of the pleaded complications, that those complications were significant or material so as to warrant a warning, that they knew or should have known of them, and that, to the extent that they provided any warnings about them, they were inadequate.*
>
> *Consequently, the applicants were put to the trouble and expense of adducing evidence to establish these matters.*
>
> *With respect to the respondents' denial that the Ethicon devices could cause the pleaded complications, I remarked in the principal judgment (at [188]):*
>
> > *The basis for the respondents' denial was obscure. It did not emerge in evidence and early in the cross-examination of [its first witness], it quickly became clear that the denial was unsustainable.*[3]

31. Johnson & Johnson has appealed Justice Katzmann's decision.

DePuy Hips class action

32. In another 'win' for consumers, Johnson & Johnson, taking responsibility for its subsidiary, DePuy International, agreed to settle a representative proceeding in 2016 for just over $250 million to compensate 1,000 Australians for injuries suffered by allegedly defective hip implants.[4]

33. Like Ethicon, *Sàrl,* the defendant in the hips class action, denied that the implants were defective or that they caused injuries. The 17-week trial required the world's top experts to travel to Australia to give evidence while the injured victims were shown saw powerpoints from internal company records in which the Johnson & Johnson marketing company determined to 'blame the surgeons'. Trials such as this are exhausting and expensive and while one might argue that it was obvious that the implants were defective, it is never that simple when it comes to bring a multinational giant to heel.

34. This action was also conducted on a no-win, no-fee basis.

[3] *Gill v Ethicon Sàrl (No 7)* [2020] FCA 700 [11]-[16].
[4] *Stanford v DePuy International Ltd* (No 6) [2016] FCA 1452.