



Law Council
OF AUSTRALIA

Inquiry into Class Action Proceedings and Third- Party Litigation Funders (DP 85)

Australian Law Reform Commission

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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 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, 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 of the Federal Litigation and Dispute Resolution Section;
- Corporations Committee of the Business Law Section;
- The Victorian Bar;
- New South Wales Bar Association;
- Law Society of South Australia;
- Law Society of Western Australia; and
- Law Firms Australia.

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission regarding the issues raised in the Australian Law Reform Commission's (**ALRC**) *Inquiry into Class Action Proceedings and Third-Party Litigation Funders Discussion Paper (Discussion Paper)*.
2. Following the introduction of the federal class actions regime in Australia in 1992 (followed by the introduction of several state regimes), class actions have been established as an effective, reliable, and in some circumstances, essential, procedure to deal with multiple claims. The number of class actions has grown steadily throughout this time and has been accompanied by the establishment and growth of the litigation funding market.
3. Australia's continuous disclosure laws and the prohibition on misleading and deceptive conduct aim to protect market integrity and investors. The Law Council supports the proposal to establish a review to ensure that these laws optimally achieve their objectives.
4. The Law Council recognises that litigation funding can promote access to justice, spread the risk of complex litigation and improve the efficiency of litigation by introducing commercial considerations that will aim to reduce costs. However, the Law Council supports the introduction of a comprehensive licensing regime for litigation funders to protect users of third party litigation funding and maintain the integrity of the legal system. Options for licencing are discussed below.
5. Conflicts of interest are inherent in some aspects of the Australian class action regime. When these conflicts are not adequately managed they can undermine the integrity of class actions and the civil justice system. The view of the Law Council is that conflicts are best managed by early and comprehensive disclosure.
6. The ALRC has proposed that the Law Council could administer an accreditation program for class action lawyers. As a matter of policy, the Law Council does not operate or administer accreditation programs for any area of law. Rather, the operation and administration of accreditation programs is a matter that is generally handled by state and territory law societies, who are better placed to deal with such matters. That said, the Law Council would be pleased to play a leadership role in facilitating ongoing education for legal practitioners in class action law and practice – including by assisting its constituent bodies to develop specialist accreditation courses and training programs for practitioners practising in class action litigation. Although it is desirable for specialist training to be provided in class action law and practice, the Law Council does not support any proposal to the effect that it be mandatory for practitioners to hold specialist accreditation before they are able to practise in this area. The Law Council considers that such a step would impose unnecessary barriers to entry and, on balance, be likely to result in reduced efficiencies, an increase in the cost of undertaking this type of litigation activity and reduced returns to class members.
7. The Law Council does not comment on the issue of 'contingency fees'. However, the views of several Law Council constituent bodies and committees are included below. The ALRC's proposal for the charging of contingency fees to be permitted only for class actions, has resulted in differing views within the legal profession. The Law Council has included in this submission the views of several Law Council constituent bodies and committees on this issue, should it assist the ALRC's deliberations.

8. The Law Council agrees that a number of complex issues and concerns arise from competing class actions including as to cost, efficiency, delay, decisions on choice of lawyer, and the potential impact on returns to class members, among others. However, the Law Council does not support the proposal that all class actions should be initiated as open class actions or that, where there are two or more 'competing' class actions, the Court must determine which one of those proceedings will progress and stay the competing proceedings. The Law Council suggests that the decision on how to address competing class actions is a matter that should be left in each case to the discretion of the court and is best addressed through active judicial management of 'competing' claims. The Law Council recognises that within the legal profession there are a number of differing opinions about how competing claims are best managed.
9. The Law Council supports the proposal that the Federal Court should have available to it a range of mechanisms to ensure that legal costs paid by the Applicant and class in a class action are fair, reasonable and proportionate. Referring to the use of the referees in the Court's Class Actions Practice Note is generally supported. The Law Council notes that there is merit to the suggestions that some administration tasks could be more efficiently performed by service providers other than lawyers, and that there should be flexibility for Courts to make orders facilitating such arrangements. However, the Law Council does not support a 'one-size-fits all' approach whereby a tender process would be required in every class action as there may be situations where the costs and delays in conducting the tender process would outweigh any savings.
10. The Law Council acknowledges that the proposal that the Australian Government consider establishing a federal collective redress scheme raises important issues that require consideration and suggests that the appropriate way in which these issues should be considered is through a comprehensive review process.

Part 1: Introduction

11. The Law Council agrees that:

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'.¹

12. After 26 years of jurisprudence in which Part IVA of the *Federal Court of Australia Act 1976 (Cth)* (**Part IVA of the Federal Court Act**)² has been reviewed and analysed by numerous judges both, at first instance and on appeal, it is considered that the class actions regime is reliable and one that gives users of it certainty in most aspects of its implementation.
13. This submission addresses a number of the discussion questions identified in the Discussion Paper which are of most importance to the Law Council.
14. Please note, that submissions expressly provided by Law Council committees or constituent bodies below, are the submissions of those bodies and do not necessarily represent the views of the Law Council. In these instances the Law Council requests that the submissions be attributed to those bodies in the ALRC's final report.

Shareholder Class Actions

Proposal 1–1

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

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

¹ 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.

² References to provisions in legislation are references to provisions in Part IVA of the *Federal Court of Australia Act 1976 (Cth)* unless otherwise stated.

15. 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 participate in a review into whether the current laws achieve these objectives in an optimal manner.
16. 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 (Discussion Paper at [1.74]).³ The Law Council would expect that same approach to apply to interest groups arguing against a review. Class actions can be a very divisive issue with arguments driven by 'selfish and partisan motivations'.⁴ 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.
17. The Class Actions Committee of the Law Council's Federal Litigation Section (**Class Actions Committee**) queries whether, when Australians are absorbing the revelations of the *Royal Commission into Misconduct in Banking, Superannuation and Financial Services* and after 24 years of compulsory superannuation contributions which has led to the creation of some \$2.6 trillion in superannuation assets,⁵ much of it invested in the share market, it is the right time to review shareholder protections in the *Corporations Act 2001* (Cth) (**Corporations Act**).
18. The Corporations Committee of the Law Council's Business Law Section (**the Corporations Committee**) suggests that there are a number of legal uncertainties around the class action phenomena that also require review. These include:
 - whether the recoveries that are made by class members and litigation funders are reasonable in the context of the risks associated with this kind of litigation;
 - the effective recovery achieved by investors, net of litigation funding costs and legal fees;
 - the impact of litigation of this sort on corporations and classes of investors (for example, former shareholder class members versus current shareholders who are not class members);
 - the practical impact of securities class actions on corporate conduct;
 - the recent proliferation of multiple class actions based on the same facts and the impact on resolution mechanisms;
 - the uncertainty around loss causation and its impact on settlements and legal certainty;
 - the appropriateness of liability for innocent misrepresentation in this area;
 - the appropriateness of open and closed classes and the free rider issue;

³ 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 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>>.

⁴ Chief Justice Allsop, *Class Actions, Keynote address at Law Council of Australia Forum* (Class Actions 2016 Key Topics, Sydney, 13 October 2016) 3.

⁵ Association of Superannuation Funds of Australia, *Superannuation Statistics* (June 2018) <<https://www.superannuation.asn.au/resources/superannuation-statistics>>.

- the impact of securities class actions on the Directors and Officers (D&O) insurance market; and
 - the possible use of other venues or procedures outside the judicial system to resolve claims of this nature – especially the benefit of building a body of precedent that market participants can use to inform their decision making.
19. The Corporations Committee suggests that any review could usefully compare different approaches to regulation of this issue in other markets (for example, the USA, which has no private enforcement right for breach of continuous disclosure, requires scienter (i.e. deliberate or reckless wrongdoing) for liability under section 10(b) of the *US Securities Exchange Act* and recognises ‘fraud on the market’ causation).

Part 2: Incidence

20. The statement in the Discussion Paper at [2.9] that ‘the proportion of filed class action proceedings that receive funding from third-party litigation funders has increased over time’ is clearly correct. The Class Actions Committee notes that this proportion may not continue to increase and may significantly reduce if developments flowing from *Perera v GetSwift* cause funders to depart the Australian market.⁶
21. It should also be noted that while it is true that most shareholder class actions have resolved in a settlement (as stated in the Discussion Paper at [2.19]), the Class Actions Committee suggests that the reasons for this may be that the parties are represented by lawyers who are able to give their clients an assessment of the risks and rewards that a trial and eventual judgment may bring. If the advice as to the range of outcomes given to each of the plaintiffs and the defendants is accurate then a settlement before judgment is likely to be achieved as a settlement delivers certainty.

Part 3: Regulating Litigation Funders

Proposal 3–1

The *Corporations Act 2001* (Cth) should be amended to require third-party litigation funders to obtain and maintain a ‘litigation funding licence’ to operate in Australia.

22. 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

23. On a positive note, it is clear that many meritorious claims would not be made without a litigation funder’s involvement. As well, funders tend to guarantee the payment of a defendant’s costs and funders may add value by engaging in the

⁶ *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018) (Lee J) (*‘Perera v GetSwift’*).

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].

litigation process and introducing efficiencies. Funders often also bring a commercial sense to expenditure and settlement decisions.

24. On the other hand, funders generally expect substantial returns, may interfere in the litigation, may encroach on the provision of legal services and may go directly to the defendant (bypassing the class' lawyers) to make a deal.
25. Most of these concerns can be addressed by the Court through active case management, by the imposition of practice requirements through a practice note, and by the active engagement of the Court in approving settlements.
26. Regulation 7.6.01AB of the *Corporations Regulations 2001* (Cth) requires funders to have in place arrangements to manage conflicts of interest. The Australian Securities and Investments Commission's (**ASIC**) Regulatory Guide 248 gives funders and class action lawyers clarity about their obligations to class members.⁸
27. While the Class Actions Committee agrees that licensing of litigation funding providers is required, it suggests that the only steps needed to protect users of third party litigation funding is to require funders to hold an Australian Financial Services licence (**AFSL**) and to be subject to greater ASIC oversight than at present.
28. The Class Actions Committee 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.⁹
 - 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 given by a representative plaintiff. This risk can be ameliorated if ASIC's regulatory guide 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. Recent decisions of the Federal Court suggest that the Court might either close one funded class and allow the other (open) class to proceed in tandem with the closed class,¹⁰ or alternatively, the court might

⁸ Australian Securities and Investments Commission, *Litigation schemes and proof of debt schemes: Managing conflicts of interest* (Regulatory Guide 248, April 2013).

⁹ This concept is further developed in response to Question 3-2 below.

¹⁰ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017).

choose one open class to proceed while permanently staying the competing claims.¹¹ This issue is addressed further below.

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

*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.*¹²

30. It is noted that since that submission, the Federal Court has introduced its Class Actions Practice Note which takes steps to address concerns about disclosure of the existence of litigation funding and its terms.¹³ Whether the circumstances of any settlement lends itself to the appointment of an *amici curiae* to be heard at a settlement approval hearing should be left to the Court.
31. When the current safeguards are balanced against the enhanced consumer protections that would result from funders being required to obtain a licence, the Class Actions Committee considers that to require funders to obtain an AFSL would be in the best interests of consumers of litigation funding services.
32. The Corporations Committee supports Proposal 3-1 and agrees with the comments made by the ALRC concerning a bespoke licensing regime that sits outside the AFSL and that the appropriate regulatory body for any such scheme is ASIC. The Corporations Committee support the analysis of the policy basis for regulation at [3.21]-[3.33] of the Discussion Paper.
33. Law Firms Australia (**LFA**) also supports the proposition that funders should be licensed, either under the AFSL regime or, in the alternative, under a new regime with similar oversight and protections to the AFSL regime.
34. The Victorian Bar Association (**Victorian Bar**) notes that:
- it is not aware of any case in which a criticism of the funding arrangement or outcome could be attributed to a deficiency in the existing regulatory framework; and
 - there is little evidence of failure within the litigation funding market.
35. While the Victorian Bar agrees with the theoretical soundness of the Commission's suggestion at [3.23] of the Discussion Paper that licensing tends to encourage compliance, it submits that licensing is not required because:

¹¹ *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018).

¹² Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements*, 13 November 2013, 128.

¹³ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (25 October 2016).

- it would likely increase the barriers to entry to this young market; and
 - the close and ongoing supervision that courts apply to funding agreements (and costs generally) is more immediate and at least as effective as any anterior licensing requirement.
36. The Victorian Bar notes that the main issue of concern for the ALRC appears to be capital adequacy which, it says, echoes the AFSL ‘sufficiency of assets’ test. The Victorian Bar considers that this would be an unwieldy alternative to a solution that is already well-established and effectively the default position in class actions, namely early orders for security for costs.
37. The New South Wales Bar Association (**NSW Bar**) notes that although the concept of a litigation funding licence might appear benign in theory, and although the Commonwealth Attorney-General and litigation funder IMF-Bentham are reported to be supportive of licensing,¹⁴ it has reservations about the concept.
38. The NSW Bar notes that the key questions of capital adequacy and managing conflicts of interest are already provided for; in the former case via the Court’s extensive powers in relation to security for costs and controlling process generally, and in the latter case via, for example, regulation 7.6.01AB of the *Corporations Regulations 2001* (Cth). The NSW Bar also notes that there are other laws and regulations, as well as the Court’s wide powers of supervision, which apply to litigation funders (as noted in the Discussion Paper at [3.14]-[3.20]).
39. The NSW Bar suggests that the concept of a litigation funding licence raises at least the following three key questions:
- (a) Who would police this new regime? As the Discussion Paper notes, ‘the effectiveness of a licensing regime depends on strong oversight and enforcement by the regulator’ ([3.29]). Unless the licensing regime is accompanied by an appropriate increase of resources to the relevant regulator, it could end up being just an impost on conscientious funders, with any unscrupulous ones avoiding both the cost of compliance and penalty.
 - (b) Who exactly is a third-party litigation funder? In the modern context of the so-called ‘gig economy’, with crowd funding in particular, one needs to ask who it is that should be licensed. With businesses such as *GoFundMe* and *LexShares*, is the funder an entity that will need to be licensed or do each of the individual contributors or investors need a licence? If an individual or corporate entity borrows from a bank to fund litigation, does this mean the bank must fall under the proposed regulatory regime?¹⁵
 - (c) Is there any reason to think that the licensing regime would work?
40. Regarding the last question, the NSW Bar notes that the stated objectives of the licensing regime are:

¹⁴ Michael Pelly, ‘Litigation funding licences “sensible”: Attorney-General Christian Porter’, *Australian Financial Review*, 17 June 2018, 7.

¹⁵ 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 ‘fundings’ may be difficult to identify, thus imposing a compliance burden in circumstances where no discernible benefit has been identified.

- 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
- potentially enhancing the reputation of litigation funders.¹⁶

41. The NSW Bar questions how the licensing scheme – beyond existing regulation – would help achieve those objectives.
42. One example the NSW Bar suggests, appears at [3.32] of the Discussion Paper, about a funder which voluntarily withdrew its membership of the self-regulation model operating in England and Wales, after the Association of Litigation Funders made ‘enquiries about concerning media reports’. The NSW Bar suggests that it is unclear how either a voluntary or mandatory regime would be any better than the status quo, including in the example given from the United Kingdom where the relevant funder only withdrew after the Association’s enquiry which arose from ‘concerning media reports’ (i.e. not from the compliance regime itself). The key driver of change in that example was the *media*, not the Association, and, in the opinion of the NSW Bar, there is no reason to suspect that a mandatory regime would have been any better, at least in the absence of a strong regulatory presence as discussed above.
43. Accordingly, while the NSW Bar would not oppose the licensing regime *per se*, it queries the need for it, and submits that if it is to be introduced, there must be adequate funding for the relevant regulator.

Proposal 3–2

A litigation funding licence should require third-party litigation funders to:

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

44. The Class Actions Committee is concerned that some of the suggested requirements (identified below) may impose unreasonably difficult barriers to entry, and, as competition between funders benefits class members, any requirements must be relatively simple to meet.
45. The greater the burden imposed on litigation funders the lower will be the supply of funding. A reduction in supply will decrease competition and increase costs to consumers. While requirements to be honest, efficient, accurate and fair can often be easily met (as can managing conflicts), prudential requirements and the imposition of complicated business systems may see a number of funders, notably

¹⁶ Discussion Paper, [3.22]-[3.23].

special purpose vehicles and some overseas funders, excluded from the Australian market.

46. The Class Actions Committee agrees that a general 'fit and proper person' test would be appropriate for this kind of licence, coupled with a knowledge and skills assessment along the lines foreshadowed at [3.36]-[3.39] of the Discussion Paper.
47. The Class Actions Committee considers that the requirements of ASIC Regulatory Guide 248 are sufficient to deal with potential conflicts of interest and the AFSL does not need to further impose such requirements.
48. As noted below, it is the Class Actions Committee's view that defendants are adequately protected by obtaining security for their costs and that a 'sufficient resources' requirement to grant an AFSL, may impose an unnecessary burden.
49. The Class Actions Committee also notes the ALRC's concern, expressed at [3.49] of the Discussion Paper, that security for costs provides an inadequate (indeed no) protection for a representative applicant from the unpaid legal fees of its own solicitor where the funder withdraws funding. The Class Actions Committee considers it necessary to first ensure that the problem is more than a merely theoretical one, before imposing a capital adequacy requirement on funders in order to address this concern. The Class Actions Committee questions how commonly, in funded litigation, representative applicants are made directly liable for their own solicitors' costs under their retainer agreements.
50. Moreover, as previously noted, funding agreements typically provide that the funder is liable for adverse costs up to the date of termination of the agreement and it would be up to a representative applicant left to determine whether to continue the case without funding and incur liability for ongoing legal costs in its own name.
51. The Class Actions Committee notes that it is unaware of any instances in which representative applicants have been left to meet their solicitor costs unfunded, which suggests that problem is not so serious as to warrant and so some review of how common this is may be warranted.
52. The Class Actions Committee also notes in this context the undesirability of unintentionally hindering the contribution of appropriate charitable funders. One such funder exists in South Australia, the Litigation Assistance Fund, for which Law Society of South Australia (**LSSA**) acts as trustee.
53. The LSSA has considered the direct submission made by the Litigation Assistance Fund to the ALRC, and broadly supports that submission, which in summary is that any regulation which results from the inquiry should not unintentionally hinder that Fund's ability to continue its charitable operations (more detail in that regard is contained in the Fund's submission).
54. Please note, however, that the Corporations Committee and LFA agree with this proposal and agree that the duties enumerated by the ALRC are an appropriate summary of the relevant obligations that should be imposed on licensees and their representatives.
55. LFA further submits that the licensing regime should contain the following features:
 - (a) prudential oversight, including the application of the Australian Prudential Regulation Authority's capital adequacy requirements;

- (b) a duty of good faith;
- (c) no exemption of foreign litigation funders; and
- (d) breach notification obligations.

Question 3–1

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

56. 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: – the ALRC envisages (at [3.39] of the Discussion Paper) a requirement that financial skills be required 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.
57. There have been well-publicised examples of particular funding models (or in the most prominent cases, a funder’s entire ‘business model’) being roundly criticised by courts. These examples demonstrate the capacity of existing procedures for identifying, terminating and sanctioning (via costs orders) funding arrangements that infringe either existing regulations or rules, or are contrary to public policy.
58. As the ALRC has noted, the existing system involves numerous constraints on inappropriate or unreliable funding arrangements. The funded lawyers have an interest in ensuring reliable arrangements to secure their own fees. The respondents have an interest, which they protect via security for costs. The courts have demonstrated both capacity and preparedness either to block inappropriate arrangements or reduce inappropriate commission rates.
59. The Law Council would be concerned that attempts to impose more codified regulatory requirements in these respects could have unintended adverse effects, by limiting the courts’ discretion and indeed by stultifying continued innovation in the funding market.
60. While the Corporations Committee supports principles-based minimum character checks and qualifications systems, requiring that ASIC be satisfied as to the general good fame and character of an applicant to own or operate a litigation funding business, it does not support the imposition of prescriptive skills and qualifications. The Corporation Committee argues that the business of litigation funding does not easily lend itself to prescriptive skills-based criteria. In particular, the Committee does not believe that a licensee needs to be a qualified lawyer, because litigation funding is more akin to the business of finance or insurance than legal practice. The Committee also notes that many litigation funders are based outside Australia and there is no policy reason to exclude them from the Australian market or require them to have Australian skills or qualifications.
61. In adopting principles-based minimum character checks and qualifications, there will be scope for the regulator to specify prescriptive disentitling factors- for example prior serious criminality, being banned from acting as an officer of a company, etc.

62. The Corporations Committee also suggests that there should be an appropriate appeals mechanism for adverse licensing determinations by the regulator (e.g. an appeal to the Administrative Appeals Tribunal).

Question 3–2

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

63. The ability to meet adverse costs orders and the fluctuating scale and nature of litigation funding do not lend themselves to periodic balance sheet style tests of capital adequacy.
64. Concerns about capital adequacy go to the funder's ability to continue to fund a claim as promised and to meet any order for costs in a defendant's favour.
65. Class action defendants will be on notice as the existence of third party funding must be disclosed. It is the Law Council's view that defendants are adequately protected by obtaining security for their costs, albeit that security for costs may not be a complete protection. This is adequate because security for costs is just that, security. It is not meant to be a guarantee of absolute indemnity in the same way that neither party-party costs nor solicitor and own client costs are an absolute indemnity.
66. Funding agreements promise to fund class members to the date of termination of an agreement. Prior to termination, a funder will usually have given security for costs and that security will remain in place to meet most of the adverse costs obligation of the representative applicant that might be incurred up to the date of the termination. If a funding agreement is terminated and the class members cannot continue without funding, the representative applicant can disclose this fact to the court and leave to discontinue under section 33V will be given. The defendant's entitlement to costs will be satisfied, if not in whole then at least in part, by the security that has been given.
67. As for the suggestion in the Discussion Paper that funders be required to hold capital equivalent to that required of AFSL holders, any such requirement (limited as it is to 5.5 per cent of liabilities) would again be an unwieldy mechanism for protecting representative applicants from the risk that a funder will not be able to meet the applicant's own legal costs. Moreover, the applicant's lawyers will have had their own interest in ensuring their fees would be paid. The Law Council is not aware of any case in which a funder, either by its own collapse or by decision, left its client litigant exposed directly to their own-side legal costs.
68. The Law Council considers that a principles-based initial minimum licensee and ongoing operating obligations, based on requirements that the licensee have sufficient resources to undertake its activities and meet potential adverse costs orders, would be a better approach from a policy perspective.
69. The NSW Bar provides an alternative response Question 3–2. The NSW Bar is of the view that because funders, and funding arrangements, can vary so considerably, the approach of ASIC, as noted in the Discussion Paper at [3.52]-[3.56], is appropriate.
70. The NSW Bar submits that an amount calculated as a percentage of potential exposure to liability is preferable to a flat amount, such as £5 million in England and

Wales or S\$5 million in Singapore (Discussion Paper at [3.57]-[3.59]), on the basis that those latter, fixed amounts are too arbitrary and that they might be excessive in respect of some funding arrangements, and completely inadequate in respect of others.

Question 3–3

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

71. The Law Council is of the view that the court's supervisory role in funded class actions, the disclosure obligations on funders and the potential oversight from ASIC, is sufficient to protect consumers from funders that behave unconscionably. The Class Actions Committee has a significant concern that requiring litigation funders to join the Australian Financial Complaints Authority (**AFCA**) scheme will cause funders and funded class members to be subject to a level of review that could cause the conduct and settlement of class actions to be unduly burdened and possibly undermined.
72. It should also be noted that in addition to the intermediary role performed by lawyers in class actions, funding agreements entered into by group members typically include comprehensive dispute resolution procedures. Moreover, in class actions the section 33ZF power is adequate to subject their relations to supervision by the Court, and the eventual costs, and commission-sharing outcomes, depend on Court approval. The Law Council does not consider that group members' interests are any better protected by the imposition of a further layer of dispute resolution.
73. On that basis, the Law Council's answer to Question 3-3 is 'no'.
74. Conversely, the Corporations Committee agrees with this suggestion for the reasons set out in the Discussion Paper. The Corporations Committee notes the issue, discussed at [3.68] of the Discussion Paper, needs to be addressed and suggests that this is an issue best resolved by AFCA and the Courts.

Part 4: Conflicts of Interest

75. The Law Council agrees that conflicts are inherent in some aspects of the Australian class action regime and that, if they are not adequately managed, conflicts can undermine the integrity of class actions and the civil justice system.
76. The view of the Law Council is that conflicts are best managed by early and comprehensive disclosure. For that reason, the Law Council supports Proposals 4-1, 4-2, 4-4, 4-5 and 4-6 in the Discussion Paper. Please note the opposing views of the Corporations Committee regarding Proposals 4-1 and 4-2, below. The Law Council (including the Corporations Committee) does not support mandatory accreditation if that is what is suggested by Proposal 4-3. If specialist accreditation is not mandatory, but merely beneficial, then the Law Council will, as noted below, assist its constituent bodies to develop a course for solicitors.
77. ASIC Regulatory Guide 248, together with the *Legal Profession Uniform Law* and each lawyer's duty to the Court and clients, are quite sufficient to guide lawyers on their responsibilities to class members.
78. For example, lawyers are obliged under sections 174 and 177 of the *Legal Profession Uniform Law* to inform their clients of many aspects of their retainer including providing a reasonable estimate of the amount of legal costs payable by

the client and reasonable estimate of any contributions towards those costs likely to be received from another party. If these sums change over the course of the litigation, lawyers are obliged to so inform their clients.

79. The manner in which a funding agreement discloses the commission should be clear. The Law Council is of the view that plaintiff class action lawyers have a responsibility to their clients to be confident that the funding agreements are clear and understood by their clients. This responsibility does not need to be imposed by further regulation as it is inherent in the lawyer's obligation to the client to act in the clients' best interests.
80. The Federal Court of Australia's Class Action Practice Note requires disclosure of litigation funding charges to class members in a class action. It requires that the plaintiff lawyer be 'satisfied [that] class members have been provided a document that properly discloses those charges'.¹⁷ This requirement is sufficient.
81. Furthermore, in class actions, it is open to the Court, when exercising its power to approve a settlement under section 33V to resist settlement approval if it finds that a litigation funder's commission and all associated fees were not adequately and properly disclosed to all funded class members from the outset. Such a power not only exists but, in so far as the commission and fees charged may be found to be excessive, the Federal Court has expressed a willingness to either refuse a settlement or impose fair terms.¹⁸
82. In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (No 3)*, Beach J noted:

*... I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF... If I make an order that out of monies paid by a respondent, a lesser percentage than that set out in a funding agreement is to be paid to a funder, that is an exercise of statutory power which overrides the otherwise contractual entitlement.*¹⁹
83. The Law Council also highlights the role that counsel play in assisting solicitors, law firms and funders to manage conflicts. For example, under ASIC Regulatory Guide 248, where a matter has settled prior to the issue of proceedings, the terms of the settlement must be approved by counsel, who must be mindful of procedures and policies to protect the interests of class members. Similarly, where a matter settles after proceedings have been commenced, counsel usually provide a confidential opinion as to the fairness and reasonableness of the proposed settlement.

¹⁷ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (25 October 2016) [5.5].

¹⁸ *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [7]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and admin apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [101]; *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [26]-[31]; *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in liquidation) (No 3)* [2017] FCA 650 (13 June 2017) [105]; *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018) [365] (Lee J).

¹⁹ *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and admin apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [101].

Proposal 4–1

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

84. The Law Council agrees that ASIC Regulatory Guide 248 provides extensive guidance and imposes appropriately designed obligations on litigation funders. Consistent with the view expressed above that there should not be further regulation of litigation funders, the Law Council supports the proposal that litigation funders remain subject to ASIC Regulatory Guide 248. Further, the Law Council agrees that, assuming funders are already compliant, reporting would impose only a small additional burden, and therefore supports the proposal to require annual reporting.
85. Conversely, the Corporations Committee and LFA consider that the proposal set out in Proposal 3–1 to be a better solution from the policy perspective. If that approach were not adopted, the Corporations Committee and LFA would support an annual reporting obligation.

Proposal 4–2

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

86. The Law Council supports the proposal to expand the definition of ‘litigation scheme’ in the *Corporations Regulations 2001* (Cth).
87. The Law Council observes that, as the litigation funding market matures, more diverse and varied funding models are likely to emerge. This is particularly so as competition between law firms and funders intensifies.²⁰ In the Law Council’s view, the definition of ‘litigation scheme’ should be reasonably adapted so as to capture every possible permutation of a third-party litigation funding arrangement, although care will need to be taken so that the definition does not capture a law firm’s banking facility.
88. Again, the Corporations Committee considers Proposal 3-1 to be a better solution from a policy perspective. If that approach were not adopted, the Corporations Committee would support law firm financing and portfolio funding being included in the definition of litigation scheme, as these activities should properly be characterised as species of litigation funding.

Proposal 4–3

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

89. The Law Council is willing to assist its constituent bodies develop specialist accreditation courses for solicitors who commonly practice in class actions. The Law Council does not develop such courses or schemes itself.

²⁰ See, e.g., *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018).

90. As noted above, if there is any suggestion in the proposal that only accredited specialists would be entitled to conduct class actions, that suggestion is rejected by the Law Council. While the Law Council appreciates that it would be desirable for specialist training to be provided in class action law and practice, it does not support mandatory accreditation. Mandatory specialist accreditation would simply impose unnecessary barriers to entry, potentially reducing the efficiency and raising the cost of undertaking this type of litigation activity.
91. The Law Council is also willing to facilitate ongoing education for legal practitioners in identifying and managing actual or perceived conflicts of interest and duties in class action proceedings, settlement schemes and the rights and duties which arise in the context of administering a scheme for the distribution of proceeds to group members. The Law Council suggests that such educations should be delivered by the Law Council's constituent bodies.

Proposal 4-4

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

92. The Law Council supports the proposal to prohibit solicitors and law firms, and indeed, barristers, from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm (or barrister) is acting.
93. A solicitor or law firm which has a financial or other interest in a litigation funder that is funding the same matter (or matters) in which the solicitor or law firm is acting would be in an intractable position of conflict. That solicitor or law firm would have great difficulty, for example, in advising group members on the terms of the funding agreement. In the view of the Law Council, this is not a conflict that could be resolved by appropriate disclosure. Further, if the ban on contingency fees is not lifted, a solicitor or law firm with a financial or other interest in a litigation funder that is funding a matter in which that law firm or solicitor acts may effectively circumvent the ban.²¹
94. For the view of the Corporations Committee, please see its response to Proposal 5-1 below.

Proposal 4-5

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

95. The Law Council supports Proposal 4-5. A fundamental policy underpinning of the regulation of litigation funding should be absolute transparency of the existence and terms of all litigation funding arrangements. Knowledge of the existence and terms of litigation funding is needed to guard against an abuse of process and conflicts of interest. However, care needs to be taken that such disclosure does not give defendants an unfair advantage.
96. The Federal Court's Class Actions Practice Note provides an example of a regime that seeks to achieve the correct balance. The Practice Note requires disclosure of

²¹ Of course, if the ban on contingency fees is lifted then the proposed prohibition would need to take this into account.

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:

- (a) 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
- (b) any assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.

Proposal 4–6

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

97. The Law Council supports this Proposal. A fundamental policy underpinning the regulation of litigation funding should be the management of conflicts of interest between legal representatives and litigation funders. The system should clearly identify those matters that might incentivise participants to make choices that are not in the best interest of class members and establish processes to ensure the conflicts are managed, for example, that a settlement proposal be signed-off by senior lawyers.
98. However, the Law Council suggests that the proposal to amend the Class Actions Practice Note as suggested might be adequately satisfied by the notice making reference to the obligation to avoid and manage conflicts of interest and that the details of the obligations should be provided in an attachment to the primary notice or by reference to a website. This is because most notices are sent to convey core messages about the litigation and the class members' rights. There is a concern that too much information in one place can be overwhelming.
99. As noted in the Discussion Paper at [4.68], conflicts are already required to be disclosed. However, given that an opt-out notice is often the first communication received by a potential group member, the Law Council agrees that the opt-out notice is the ideal occasion to disclose potential or actual conflicts and how they are to be managed.

Part 5: Commission Rates and Legal Fees

100. The issue of the prohibition on percentage-based contingency fee arrangements was most recently considered by the Law Council's Directors on 19 March 2016. The Law Council's Directors acknowledged a divergence of views amongst the Law Council's constituent bodies based on ethical and regulatory grounds and agreed to return to a further consideration of on percentage-based contingency fee arrangements if the Australian Government announces an intention to introduce damages-based billing. Therefore, the Law Council does not seek to comment on the ALRC's proposal to allow contingency to be charged only for class actions. This proposal has resulted in differing views within the legal profession. The Law Council has included in this submission the views of several Law Council constituent bodies and committees on this issue, should it assist the ALRC's deliberations. The Law Council requests that the following comments regarding Proposals 5-1 and 5-2 and

Question 5-1 be attributed to those committees or organisations from which input has been received by the Law Council.

Proposal 5-1

Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements.

This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:

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

Corporations Committee of the Business Law Section

101. The Corporations Committee supports the availability of contingency fees for the reasons given by the Productivity Commission. The Committee does not support the limitations specified in this proposal.
102. Proposal 5-1 includes three proposed limitations on the conduct by solicitors of class actions pursuant to contingency fee arrangements. Those limitations are:
 - (a) where there is a contingency fee arrangement, there cannot also be any other funding sourced from a litigation funder or any other person on a contingent basis;
 - (b) a contingent fee cannot be recovered as well as professional fees for legal services charged on a time-cost basis; and
 - (c) solicitors acting under contingent fee arrangements must advance the cost of any disbursements and indemnify the representative member against any adverse costs order.
103. In the Corporations Committee's opinion, these three limitations are unnecessary and are likely to work against the best interests of class members. The basic principle is that the various permissible litigation funding arrangements should encourage as much open and transparent competition as possible between contingent fee lawyers and other potential funders. Competition for funding will lower the cost of class action litigation, increase the proportion of settlement or judgment recoveries that are returned to class members and improve the quality of legal and funding services which are provided. These objectives are more likely to be advanced if maximum flexibility is preserved in respect of funding options so as to promote competition.
104. To that end, representative plaintiffs should be able to enter into the most efficient and economical funding terms which they can negotiate, whether they be by contingency fees alone, or by arrangements involving a mixture of contingency fees, outside funding sources (including insurance) and/or time-cost charges. Provided all of the terms and conditions of the legal costs (including disbursements) and the

litigation funding are transparent to the court and the class members, there is no reason of principle to impose limitations 1 or 2 as suggested in the proposal.

105. Similarly, there is no reason of principle why lawyers operating on contingency fee arrangements should always be required to advance the cost of all disbursements (for example, if barristers or other service providers also agree to act on a contingent fee basis, this may be a better deal for the class members) or to indemnify the representative class member against any adverse costs order, if more efficient or economical means of indemnity can be found (e.g. through other sources of litigation funding or insurance) to obtain those benefits.
106. The Corporations Committee's main concern is that a fixed legal obligation on solicitors to indemnify will cause many law firms not to participate in contingent fee arrangements and is likely to lead to higher contingent fee rates offered by the firms which do participate, due to the risk-averse nature of lawyers, when compared with litigation funders or insurers, whose businesses involve managing and pricing risks in competitive and open markets. That said, it is worth exploring what 'gates' might be available to limit the scope for with unmeritorious litigation entering the system with cases being brought on a contingency basis using plaintiffs of straw.
107. For these reasons, the Corporations Committee submits that the new regime should permit any lawful form of funding, alone or in combination, and promote the transparency of funding mechanisms pursuant to court supervision and competition between contingency fee lawyers and litigation funders, in the best interests of class members.

The Victorian Bar

108. The Victorian Bar broadly supports the proposal to lift the prohibition on solicitors charging contingency fees in certain categories of class actions, on the basis that it is likely that a contingency fee incorporating costs will involve a lesser impost on group members than the current arrangement of 'costs plus funder's commission'.
109. However, the Victorian Bar does make two general preliminary observations:
 - (a) first, allowing contingency fees is not obviously likely to reduce the current problem of 'competing' class actions. The 'beauty parade' between funders would be replaced by the 'beauty parade' between lawyers (and the after-the-event (ATE) insurance arrangements that would be likely to sit behind them, for the purpose of providing security for costs or indemnifying the representative applicant or the lawyers against adverse costs risks); and
 - (b) second, there is a risk of unintended consequences, in that the large firms best placed to offer contingency fee arrangements might be able to 'undercut' smaller firms who depend more on ATE insurance to protect them and their proposed representative applicants against security orders or adverse costs orders. That undercutting could dissuade new law firms from the class action 'market' and, by concentrating litigation experience in the hands of the few large plaintiff firms, give them still further advantages in later 'beauty parades'.

Law Society of South Australia

110. The LSSA notes that third party litigation funding in Australia is essentially unregulated. The lack of regulation around these arrangements is a matter for serious consideration, particularly, when contrasted to the highly regulated legal

profession, who are prohibited from charging a contingency fee based on a percentage of the damages that a plaintiff receives.

111. The LSSA considers that if contingency fee billing is permitted, the influence of litigation funders would be substantially reduced. This may, it is said, result in better outcomes for plaintiffs, in that contingency agreements may enable them to recover a greater percentage of damages. The LSSA states that it is aware that in some third-party funding agreements, plaintiffs may pay up to 40 per cent of their damages to the litigation funder.
112. Additionally, as the legal profession is by far the more regulated industry, as a matter of consumer protection it is preferable to have the legal profession engaged in this way.
113. The LSSA agrees with the limitation suggested in Proposal 5-1 of the Discussion Paper, that actions funded by contingency fee arrangements should not also be directly funded by a litigation funder or another funding entity which is also charging on a contingency basis.
114. The LSSA further submits that any rules and limitations on charging on a contingency basis should equally apply to litigation funders and solicitors.
115. The LSSA does not support the proposal that solicitors should be made to indemnify representative class members for adverse cost orders as this would impose too much risk on the solicitor and may reduce access to justice even if there is a meritorious class action. Such an indemnity would also seem to conflict with the Australian Solicitor Conduct Rules, in that a conflict of interest may arise in encouraging matters to settle.
116. The LSSA considers that there is sufficient oversight in South Australia for fee arrangements, however, if an indemnity provision were to be introduced, there should also be capital adequacy requirements put in place.

Law Society of Western Australia

117. The Law Society of Western Australia (**LSWA**) makes the following general comments.
 - (a) the LSWA is broadly supportive of taking action to improve access to justice, and recognises that class action proceedings play an important role in that regard. Such litigation can be out of reach for many people without the assistance of litigation funders, and the LSWA therefore supports a properly regulated, ethical litigation funding industry; and
 - (b) however, the LSWA is also of the view that there needs to be an even playing field for lawyers and litigation funders. Given that litigation funders are permitted to utilise contingency fees, the same allowance should be made for legal practitioners, provided that the fee arrangement is consistent with all existing ethical and legal obligations.

NSW Bar Association

118. The NSW Bar opposes contingency fees. It considers that:

- (a) the proposal may seriously undermine the identity of the legal profession as a profession, with resultant diminution in respect for legal practitioners and their status as members of a profession;
- (b) the practice of law should be a profession and not a business;
- (c) this distinction is profound and important and is not one that should be undermined or eroded, even inadvertently;
- (d) the proposal, in giving legal practitioners a direct and potentially substantial financial interest in the outcome of any given case, runs a serious risk of compromising the legal practitioner's fundamental duty to the court, the overriding duty of candour and potentially also the duty to a client;
- (e) to extend entrepreneurial litigation to the persons responsible for (and in some cases arguing) the case is inconsistent with important notions of professional detachment and impartial indifference to the outcome of a case;
- (f) access to justice is already enhanced by existing no win, no fee arrangements as well as litigation funding; and
- (g) the proposal is likely to expose the entire legal profession to serious and sustained criticism as being driven by venal motivation, which in turn might be used for undesirable law reforms which restrict access to justice and are detrimental to the profession generally.

Law Firms Australia

119. There are differences of opinion amongst LFA member firms as to whether the ban on contingency fees should be lifted for class action proceedings (or at all), and if so, what limitations should be imposed. However, if contingency fees are to be permitted, LFA supports the Inquiry's proposal that the following limitations should apply:
- (a) an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis; and
 - (b) a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis.
120. Consistent with the risk-reward justification for contingency fees, LFA supports the ALRC's proposal that under a contingency fee agreement, lawyers must advance the costs of disbursements.
121. For a similar reason, LFA considers that the representative plaintiff's exposure to security for costs and adverse costs orders must also be addressed, and could be addressed in one or more of the following ways:
- (a) the plaintiff law firm could be required to indemnify the representative plaintiff;
 - (b) the plaintiff law firm could be required to enter into an appropriate after the event insurance policy; or
 - (c) amending the rules of the Court so that the discretionary power to award costs against non-parties in the interests of justice also applies to lawyers charging contingency fees.

Proposal 5–2

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

122. The Corporations Committee, consistent with the points raised above regarding Proposal 5-1, does not consider that this restriction is necessary or desirable. The Corporations Committee instead suggests that, like litigation funding agreements, contingent fee arrangements should be disclosed to the court and thereby made subject to court supervision.
123. The Victorian Bar supports the proposition in the Discussion Paper at [5.41] that the existing regulatory framework of the legal profession provides sufficient oversight of fee arrangements. While that is the case, the Victorian Bar strongly endorses any recommendation that any contingency fee arrangements should be subject to, and open to variation at the discretion of, the Court.
124. If contingency fees are permitted for class actions, LFA supports Proposals 5-2.

Question 5–1

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

125. The Corporations Committee agrees with the recommendation of the Productivity Commission that there should be some prohibitions in those special areas of law where recoveries and legal costs are already regulated.
126. The experience of the Victorian Bar has been that firms contemplating ‘personal injury’ class actions do not seek commercial funding. They are prepared to conduct the actions on a similar basis to non-representative personal injury actions, namely a ‘no win, no fee, with uplift on costs’ basis. Anecdotally, the Victorian Bar understands that there is a perception among practitioners that it would not be appropriate to expose personal injury claimants – for instance, bushfire victims – to the cost of funder commissions.
127. While the Victorian Bar’s experience is that commercial funding is not sought for personal injury class actions, it does not consider that an exception to the rule *against* contingency fees should be established for this category of claim. There is no demonstrated need for the exception, the future possibilities for class actions might in due course throw up situations where contingency fees are appropriate, and they would be, in any event, closely supervised by the court. The Victorian Bar recommends against reforms that might fetter the courts’ broad, and thus-far effective, discretions in the supervision of funding arrangements.
128. The NSW Bar states that if, contrary to its general objection, the prohibition on contingency fees were to be lifted generally, then the NSW Bar would agree that the prohibition should remain for those types of class actions which have been identified, such as personal injury matters.

Proposal 5–3

The Federal Court should be given an express statutory power in Part IVA of the *Federal Court of Australia Act 1976* (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements.

If Proposal 5–2 is adopted, this power should also apply to contingency fee agreements.

129. The Law Council is of the view that it would be useful for Parliament to give the Federal Court an express statutory power to reject, vary or set the commission rate in third-party litigation funding agreements, and if Proposal 5-2 is adopted, then to do the same for contingency fee arrangements.²² This is because there is some lingering doubt that the Court has the power although the Federal Court appears to have concluded on a number of occasions that it does have the power.²³
130. On the other hand, it is because the Court has concluded that it has the power that the Victorian Bar does not support Proposal 5-3. The basis upon which the Court does so, the Victorian Bar says, is that it is necessary or desirable for the just resolution of the dispute, or in the context of an application for approval of a proposed settlement, that it is just with respect to the distribution of any money paid under a settlement. It effects equity across the group.
131. With respect, the Victorian Bar considers that such an approach is appropriate when what is sought is an order imposing funding terms on a group that has, at least in part, not agreed to those terms. There will, however, be cases in which a common fund order is not sought. In those instances, the Victorian Bar suggests that there is no justification for an express power to intervene to upset or otherwise scrutinise private agreements between funders and group members.
132. If contingency fees are permitted for class actions, LFA supports Proposal 5-3. In order it to be workable, LFA submits that:
- (a) approval for any contingency fee agreement should be sought at the commencement of the proceeding, and
 - (b) any contingency fee agreement should be subject to further consideration by the Court at the time of settlement approval or judgment, having regard to the relevant circumstances known at that time.

Question 5–2

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

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

²² It should be noted that if the Court is found not to have the power as to exercise it, and is in breach of s 51(xxxi) of the Constitution, then the granting of that power may not be sufficient.

²³ Either under ss 33V or 33ZF of the *Federal Court of Australia Act 1976* (Cth). See, e.g., *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [26]-[31] and *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) (Beach J).

133. The Law Council does not support statutory limitations on the basis that court supervision and approval should be sufficient. Statutory caps are likely to be a blunt instrument that will not work in practice and will have unintended consequences. One possible limiting consequence may be that the cap becomes legitimate percentage below which few will venture.²⁴
134. Statutory limitations would be a form of merit legislation. It should largely be left to the market to determine rates, subject to judicial oversight to protect the interests of class members. As recent cases have demonstrated, increasing competition amongst law firms and funders (both established and new entrants) has had the effect of reducing funders' commissions without the need for regulatory intervention.²⁵
135. Further, it would be difficult to know where the limitation should be set. It is also likely that one size would not fit all, with rates likely to reasonably vary, depending in large part on the size and complexity of the litigation and the risks being assumed by the funder and the competitive environment existing in relation to the matter.

Question 5–3

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

136. As noted, the Law Council is opposed to the imposition of statutory caps.
137. However, if caps are imposed on considers that it is appropriate that any such restrictions imposed on solicitors operating on a contingency fee basis, the Law Council agrees that the same caps should also be imposed on litigation funders.
138. The Law Council supports the proposition that any proposed contingency fee should be subject to supervision and where appropriate variation by the Court. It does not consider that there need be any legislative cap on the contingency fee rate. Similarly, it does not consider that there is any justification for the imposition of a legislative cap on the rates charged by litigation funders.

Question 5–4

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

139. The Law Council does not wish to put forward any other funding options at this time. It may be, in the case that the review proposed in Part 1 (Proposal 1-1) occurs, the Law Council (or its Committees) supports other venues or procedures for continuous disclosure actions.
140. The Victorian Bar agrees that consideration could be given to the establishment of a special public fund. Such a fund, the Victorian Bar notes, has been established in Ontario, Canada called the 'Class Proceedings Fund'.²⁶ In that jurisdiction, a

²⁴ For example, the 25 per cent uplift in the s 182(2)(b) of the *Uniform Legal Profession Law* allowed for conditional fees is routinely charged by plaintiff law firms.

²⁵ See, e.g., *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018).

²⁶ The class proceeding fund was established in 1992 following amendment to the *Law Society Act*, RSO 1990.

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 financial support in respect of disbursements related to the proceeding. In 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.²⁷

141. The Victorian Bar notes that 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.²⁸
142. The Class Proceedings Fund, which received initial funding from a \$500,000 grant from the Law Foundation of Ontario, now 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.²⁹ 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 \$19,861,537.³⁰
143. In the event that a similar scheme was to be considered for Australia, the Victorian Bar has offered to participate in any further review or enquiry.
144. The NSW Bar, on the contrary, has some hesitation about requiring the enforced cross-subsidisation of different classes of group members, particularly when (due to the high cost of running and funding such claims, and the high level of risk and associated settlement pressure) returns to group members often only represent a limited portion of their losses as alleged.
145. The NSW Bar recognises, however, the argument that those who receive a benefit through the application of scarce judicial resources may justifiably be required to make a small contribution to improving access to justice for other groups with meritorious claims who might not otherwise qualify for funding.

²⁷ *Law Society Act*, RSO 1990, c 8, s 59.3(4).

²⁸ *Ibid* s 59.4(1).

²⁹ See The Law Foundation of Ontario, *Class Proceedings Fund*, <<http://www.lawfoundation.on.ca/class-proceedings-fund/>>.

³⁰ The Law Foundation of Ontario, *Annual Report* (2016) 27-32.

146. It may be, the NSW Bar suggests, that a less controversial approach (which does not subject unwilling group members to contribute to such a scheme) would be to require unclaimed funds in any settlement distribution scheme to be contributed to such a fund. Such a scheme should be subject to the development of an appropriate process for identifying meritorious claims which do not meet the funding criteria of commercial funders.
147. As for other funding options, the NSW Bar notes that crowdfunding appears to be a possible source of funds.

Part 6: Competing Class Actions

148. The issue of 'competing class actions' has been the subject of three recent Federal Court decisions:
- *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) (Beach J) (**Bellamy's**);
 - *Cantor v Audi Australia Pty Limited (No 2)* [2017] FCA 1042 (1 September 2017) (Foster J); and
 - *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018) (Lee J).
149. The approaches of each judge are remarkably different. It is noted that the latter decision is on appeal and before any legislative step is taken the Law Council recommends that the appeal decisions be carefully considered.
150. The Class Actions Committee notes that the Discussion Paper appears to proceed on the assumption that competing class actions are a problem that must be dealt with and one that can be dealt with by one solution. The Class Actions Committee is of the view that the issue of competing class actions is not necessarily a problem and, if problematic, not always one that can be simply resolved by a single rule.
151. It may be that two or more class actions making the same claims against the same defendant can be seen as 'competing' with each other to the extent that each class claim may be seen as 'covering the field' or 'competing for the sole right' to sue. But the Class Actions Committee suggests that there may be circumstances in which such claims may be seen as complementary in so far as they are pursuing similar outcomes for different groups of persons in response to the similar allegations of wrongdoing and that they are complementary because the two claims may enable the pooling of the resources of two law firms to pursue large and complex class actions.
152. The resolution of the perceived problem of the 'competing class action' is compounded when one considers that there are many different examples of competing or complementary class actions. These are identified in the *Federal Court Case Management Handbook* at [13.119].³¹ There may be two open classes, one closed and one open, different claims made or different claim periods, differing class membership definitions, a different range of common issues, different defendants and the claims may even be filed in different jurisdictions.³²

³¹ Law Council of Australia and Federal Court of Australia, *Federal Court Case Management Handbook* (2014).

³² See, e.g., *Wileypark Pty Ltd v AMP Ltd* [2018] FCA 1052 (11 July 2018).

153. The Class Actions Committee does not accept that similar class actions against the same company are necessarily competing with each other. It will depend on the nature of the claims, the class definition and the circumstances of the filing of the actions. While it is agreed that a single defendant should not be burdened by a multiplicity of actions, responding to two or three similar claims may be preferable to responding to one consolidated claim that incorporates all aspects of each case. One can imagine the circumstance in which a shareholder class claim is commenced that pleads many causes of action over an exaggerated claim period whereas another is filed pleading one cause of action for shareholders who bought during a confined period. If the actions are not consolidated, the defendant may be completely successful as against the first action. The defendant will be better off with sensible case management and the courts' powers being used to manage the overlapping classes rather than determining that both actions must proceed as one.
154. The Class Actions Committee argues that the resolution is to encourage the courts to deal with the issue by active case management.
155. Justice Beach, in the first of the decisions mentioned above, identified five realistic options available to deal with two competing class actions:
- consolidating them into a single proceeding;
 - permanently staying one of the proceedings;
 - declassing one of the proceedings under section 33N;
 - closing one class, leaving the other open, and trying the two proceedings together; and
 - trying both proceedings as overlapping open class actions.³³
156. Given that each class in *Bellamy's* was, in part, formed by class members actively choosing one firm and litigation funder over another, Beach J accepted that it was not open to him to accede to the defendant's request that he stay one claim and allow the other to proceed. He determined to allow both proceedings to remain on foot and to close one class while allowing the other to remain open. His Honour held that active case management would mitigate the risk of the defendant facing an unfair duplication of costs and that in any case staying one of the proceedings could itself lead to multiple proceedings with duplicative costs.³⁴ Justice Beach did this even though he recognised that there were inevitably additional costs arising from two competing claims.³⁵
157. In the class actions against Volkswagen, Audi and Skoda, Foster J took an alternative view.³⁶ He held that it was inappropriate to impose a 'one size fits all' approach to Part IVA proceedings and he determined that permitting the two proceedings to run in parallel had not resulted in undue cost, confusion or delay.³⁷ His Honour declined to close or stay either proceeding, permitting both to continue in parallel, although it is noted that Foster J's decision on a class closure order in relation to one of these actions is awaited.

³³ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [9]. Note also that in addition to the options catalogued by Beach J, there may be power, under the Rules, to order a temporary stay of a competing action.

³⁴ *Ibid* [46].

³⁵ *Ibid* [43]-[44] and Discussion Paper, [6.8].

³⁶ *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042 (1 September 2017).

³⁷ *Ibid* [74]-[75].

158. Justice Lee in *Perera v GetSwift* took a firm line when faced with three shareholder class actions.³⁸ In that matter, in circumstances where each class was open, with similar claim periods and each with funders who were looking forward to common fund orders, the Court allowed only one to proceed and permanently stayed the others. On one view, the proceedings were brought by significant numbers of people and informed entities who instructed lawyers of their choice with a funding deal that they opted into, yet their proceedings are permanently stayed because there is a similar claim brought by a group using different lawyers and funded by an entity with a different fee structure.³⁹
159. It may be argued that the rights of informed persons who elect to contract with a litigation funder and a lawyer should not be so easily undermined by judicial election. If the Court was to determine to stay one proceeding in favour of another and to allow those who are class members of the stayed proceeding to opt-out of it, and, without obligation to the former funder, remain in or opt-in to the other, the Court will be, in effect, making unprecedented inroads into the rights of citizens to contract freely.
160. Justice Lee has previously noted, extra judicially, that ‘it seems to me quite plain that a Court can make orders creating or modifying rights or liabilities in the exercise of discretionary power, provided the power is exercised according to legal principle and by reference to an objective standard’.⁴⁰ His Honour went on to say:

First, as I have pointed out, the starting point is that, according to the Full Court in Brookfield Multiplex, the promises given by funded group members were part of a pooling of contributions and the provision of their individual promises for the purposes of an integrated scheme and the benefit of scheme members and, ultimately, for funder's benefit. If the litigation funding arrangement is seen as a common enterprise with a shared economic purpose, any interference or tinkering with funding arrangements can arguably be characterised as a readjustment of the scheme to the benefit of one scheme participant and to the detriment of another.

Secondly, no doubt regard must be had to the foundational and elementary matter well expressed in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 at 182-3, where Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said:

... where a man signs a document knowing that it is a legal document relating to an interest in *property*, he is in general bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.

³⁸ *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018).

³⁹ On one view, Lee J's decision stripped class members of autonomy and choice (as to funder, funding proposal and lawyers). The decision may encourage creative funders or lawyers to promote closed classes. This may increase costs. The decision may discourage funders from investigating or developing open claims which may stifle competition. The decision may encourage gaming – the drafting of overly broad claims, the addition of unnecessary respondents.

⁴⁰ Justice M B J Lee, ‘Varying Funding Agreements and Freedom of Contract: Some Observations’ (Speech delivered to IMF Bentham Class Actions Research Initiative with UNSW Law's Resolving Class Actions Effectively and Fairly conference, Sydney, 1 June 2017).

A Canadian-style carriage motion, that is to permanent stay of one proceeding regardless of the circumstances of an individual case, would offend our principles of freedom of contract it will deny group members their choice of representation.

161. Another view is that the class action is designed on the basis that a group member can be included in the class action without their consent. The group member does not choose a lawyer. If anything, the lawyer chooses group members through the manner in which they define the group. Consent has only become a major issue with the advent of litigation funding and the 'book build' process where funders sought to sign up group members in an attempt to prevent free-riding and ensure that there were sufficient claims to make the funder's investment worthwhile. Moreover, even when a client chooses a lawyer/funder in a class action they are not the only recipient of their services, all other group members are also utilising the same lawyer/funder. Indeed, even group members who have not retained the lawyer/funder are likely to be owed some duties by them. Consequently, the idea that the client is choosing someone they think can best promote their interests must give way to the aggregative and representative nature of the class action. In short, the public interest that supports minimising cost and delay is argued to trump the public interest in a client choosing their own lawyer in the context of multiple class actions.⁴¹
162. The Class Actions Committee is split as to its view of the best approach to addressing competing class actions, which speaks to the difficulty of the issue. On one hand there is a preference for 'competing' claims to be case managed together, that is, whether case management orders will adequately minimise duplication and the burden faced by the defendant. Options available to the Court include the imposition of joint discovery orders, requiring the joint briefing of experts, the use of one counsel team and the Court determining that the claims made for each class are of such similarity that they can be conducted in parallel. The Court may find that the law firms and funders of each claim are willing and able to reach agreement on the manner in which they will cooperate in the conduct of the class actions, in which case the Court should be more than willing to have each action proceed.
163. An alternative view is that the court should seek to proceed as it did in *Perera v GetSwift* and permanently stay competing claims, or combine class actions through consolidation and case management powers, unless it is antithetical to the interests of justice.
164. To illustrate the concerns in relation to a stay, take for example, when the competing claims plead different claim periods (e.g. some of the class actions plead a claim period of 5 years whereas other claims plead a much shorter period against the same defendant). For a court to order that only one of the claims go forward and to permanently stay the others in those circumstances would be inimical to the proper exercise of justice.
165. The conclusion in the previous paragraph is reached because it can be validly assumed that those who framed the class actions with shorter claim periods did so only after conducting a careful analysis of the merit of so pleading. The same may be said of those who have settled the other action with a much longer claim period.

⁴¹ Michael Legg, 'Competing Class Actions: A Suggested Solution through Certification' (2018) 7(1) *Journal of Civil Litigation and Practice* 38, 44-45.

166. What is a court to do when faced with such conflicting yet competing actions? It cannot be fair or proper to those who have thought their causes of action through carefully to permanently stay those claims in favour of the class with the longer claim period. It is not fair or proper to stay the longer claim in favour of the shorter period claim without an analysis of the competing merits of that longer claim. If the court was to come to the view that the longer period may have some merit but the law firm and litigation funder behind it should not conduct it, would it be reasonable for a court to impose a longer period on the class members, firm and funder who had previously proposed a shorter period? The Class Actions Committee's response to this question is 'no'.
167. This problem will likely be exacerbated where one class action seeks orders against only one defendant while another raising similar wrongs seeks compensation from a number of related defendants.
168. One solution, in the Class Actions Committee's view, is to enable to the claims that are not similar to go forward together. Case management orders can be imposed on the parties so as to reduce the burden faced by the defendant of costs duplication and orders can be made that enable the open classes to be managed so to reduce or remove overlap. This may be an example of the use of the stay being antithetical to the interests of justice. Another option is to propose consolidation of the class actions, joinder of claims or amendment of the pleadings and inquire as to whether there is a funder and lawyer willing to proceed with that case, and on what terms. Alternatively, a non-permanent stay may be used to select one case to proceed, most likely the narrower case, with a view to resolving the common issues in that case. The objective is to aim for one class action and empower the court to aim for that outcome but recognise that it may not be appropriate in all circumstances.
169. It should be noted that the Full Court of the Federal Court will be handing down decisions in two matters in due course that will impact on the ALRC's recommendations in this area. That is, the appeals against Justice Lee's decision in *Perera v GetSwift* and the soon to be heard application by AMP Ltd for the court to order the transfer of four class actions against AMP to the NSW Supreme Court.⁴² It is the Law Council's view that the ALRC should not make any recommendations concerning competing class actions and how to deal with them until those decisions have been handed down and carefully considered.

Proposal 6–1

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

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

⁴² As referred to in *Wileypark Pty Ltd v AMP Ltd* [2018] FCA 1052 (11 July 2018).

170. Part of the Class Actions Committee and the Victorian Bar do not support these proposals. The proposals, if adopted, will in effect introduce a first stage quasi-certification procedure as occurs in Canada, in which firms are required to demonstrate the suitability and benefits in their proceeding compared to competing firms. As noted in the Discussion Paper, Perell J in *Smith v Sino-Forest Corporation*, after explaining the first step in a carriage motion went on to note:

*No doubt to the delight of the defendants ... the second step also involves rivals hardheartedly and toughly reviewing and criticising each other's work and pointing out flaws, disadvantages, and weaknesses in their rivals' plans for suing the defendants.*⁴³

171. While the Class Actions Committee and the Victorian Bar agree with the ALRC that a number of concerns arise from competing class actions (including costs and delay), the Class Actions Committee and the Victorian Bar consider that the focus on addressing competing class actions should be on judicial management of the competing claims rather than deciding which class action should proceed and to stay all others.

172. The Court has significant powers which it can exercise to balance the rights of representatives, group members and defendants, having regard to the objectives of Part IVA and the law more generally. Included powers are: ordinary case management powers; the very broad power under section 33ZF(1) (which enables it to control funding commissions and to close classes); the power under section 33N; a power (arguably) to temporarily stay one proceeding (under rule 30.11); a power to consolidate; the power under section 33V (which enables it to control costs); the power to appoint independent experts; and, other general case management powers. There are many levers are the Court's disposal. Each case ought to be decided on its own facts.

173. The Victorian Bar agrees with the ALRC at [6.11] of the Discussion Paper that the introduction of closed classes is one of the reasons why there has been an increase in the number of competing class actions. However, it must be emphasised that it is not a major reason. Closed classes were first recognised as permissible under Part IVA in December 2007 in the *Multiplex* class action, yet by 2013 Justice Murphy, writing extra-judicially, observed that empirical research had concluded that "*Closed*" or *opt in* classes has not led to any significant increase in competing class actions'.⁴⁴ That aligns with the experience of the Class Actions Committee.

174. In the Victorian Bar's view, the principal reason for the current trend toward 'competing' class actions is the allowance of common fund orders in and following *Money Max Int Pty Ltd v QBE Insurance Group Ltd (Money Max)*.⁴⁵

175. The Law Council agrees that some action is required to address the unacceptable wastage of costs that will be occasioned by major commercial class actions if they are allowed to proceed unchecked.

176. The Victorian Bar considers that common fund orders have encouraged this spike in competing class actions for two reasons:

⁴³ *Smith v Sino-Forest Corporation* (2012) ONSC 24 [3] as discussed at [6.24] of the Discussion Paper.

⁴⁴ Justice Bernard Murphy, 'The Operation of the Australian Class Action Regime' (Speech delivered at the Bar Association of Queensland's The Changing Face of Practice Conference, Gold Coast, March 2013) <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy-j-20130309>>.

⁴⁵ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 338 ALR 188.

- (a) first, common fund orders remove the necessity for funders, or the claimants' lawyers, to take the time and incur the cost of book building extensively prior to issue; and
 - (b) second, and consequently, common fund orders remove the necessity to ensure that a sufficient 'book' of loss has been 'built' to ensure that the likely commission to the funder will justify the expense and risk of the litigation even absent a common fund order (i.e. if the funder is confined to its contractual rights, or at least gains no more than a funding equalisation order).
177. The pre-*Money Max* need for a funder to build a book acted as a natural brake on competing actions. Funders had to 'go to the market' with their funding proposals. If there was insufficient interest for a given funder, that funder did not proceed. There was 'natural selection' before any action was commenced.
178. Certainly, there were occasions when more than one funder built a sufficient book, resulting in competing actions. But there were rarely more than two competitors. Some of those cases resolved by the funders agreeing on a co-funding arrangement for a single set of applicant lawyers. Some were resolved by orders for consolidation. Some were simply case-managed together, on the basis that each funder had attracted enough interest from its clients that the different client groups ought to retain the right to have their own funder and lawyers run their claims. Whatever the approach, it was a less common, and less difficult problem than is now arising in the *Perera v GetSwift* situation.
179. The Victorian Bar considers that judicial management of competing class actions should include consideration of a 'funding equalisation order' regime rather than a 'common fund order', as, in some circumstances, it will present a better mechanism for sharing the (reasonable) costs of funding between 'signed-up' and other group members. It does not appear that any of the concerns expressed in *Money Max* are beyond remedy under a funding equalisation order regime. That is:
- (a) as for the 'transparency' of the mechanism by which unsigned group members come to bear a portion of the funder's commission, the method of calculation will necessarily be specific in the funding agreement and can be explained by the Court. The formulae used in funding equalisation orders are not complicated;
 - (b) as for the 'transaction costs' of bookbuild, the Victorian Bar considers that this ought to be regarded as funder's costs and absorbed by the funder's commission; and
 - (c) there is no reason, of which the Victorian Bar is aware, as to why 'funding equalisation' must necessarily be '100 per cent equal'. If the Court were to conclude that the contracted commission rates were unreasonable in a given case, then even if the Court did not vary the contract rate payable by the signed-up clients, it could refuse to include the unreasonable component in its funding equalisation orders. This would protect the unfunded group members, who would share only the reasonable portion, while leaving the funded group to bear the consequences of the contracts they made. The funded group members would still have benefited from having been able to share the reasonable portion with the unfunded group.
180. The obvious challenge to that suggestion of partial equalisation is that, if ever it happened, it would discourage informed claimants from signing funding agreements in future proceedings, lest they end up bearing a higher net commission rate than

the unfunded group. The obvious solution, that we can imagine funders would promptly identify, would be for future funding agreements themselves to fix a commission rate at X per cent 'or such lower rate as the Court considers reasonable'.

181. The Victorian Bar considers that a return to the funding equalisation order regime might, in some circumstances, provide a better check on the problem of competing class actions, than either contingency fees or the certification procedure that the Commission has contemplated.
182. The Victorian Bar is equally concerned that a certification procedure would produce unintended and unseemly consequences. The Victorian Bar opposes the insertion of any procedural step as part of the class action framework, such as certification, which increases the cost and complexity of class action litigation more generally. There is a risk that certification would simply become a 'trial before the trial'.
183. The ALRC's observation at [6.19] of the Discussion Paper that the Court is likely to be mindful of wasted costs associated with book building as a factor weighing in favour of common fund orders is noted, but the Victorian Bar disagrees. This is because it would be a simple task for the Court to identify those costs as unrecoverable by the funder separately to any funding commission.
184. Another part of the Class Actions Committee and LFA has an alternative view. Multiple claims, with similar classes and issues, being brought against a common defendant is an increasingly common feature of the Australian class actions market. Due to the overlapping nature of such claims, defendants incur significant cost in undertaking repetitious work responding to each claim. They also often result in substantial confusion, delay, and unnecessary costs for the Court.
185. This part of the Class Actions Committee and LFA support the proposal for the mandatory consolidation of competing class actions by the Court. It is important that the Court has the flexibility and power to deal with multiple overlapping claims, given the substantial confusion, delay, and unnecessary costs they incur. It is also important that the issue be addressed through legislative reform in order to provide greater certainty and consistency of approach.
186. LFA considers that a consolidation hearing is preferable, whereby multiple claims can be considered and case managed to a point where only one proceeding, representing all concerned parties, continues. The consolidation hearing would also serve the purpose of ensuring that the lead plaintiff has a meaningful role in proceedings and is suitable for the role.
187. LFA argues that a consolidation hearing process should include the following key features:
 - (a) proceedings should all be filed as 'open' classes, and should be assigned to a case management judge. This will ensure that, from the outset, all potential group members are involved and that proceedings are run as efficiently as possible;
 - (b) shortly after proceedings are filed, the parties should have to return before the Court for the case management judge to consider a form of order, a Notice of Filing, for distribution to group members. The notice would set out the criteria for membership, and the key allegations to be pleaded. Further, given the importance of ensuring the lead plaintiff is given a meaningful role in

proceedings and is suitable for such a role, it is advisable that all potential group members be given the opportunity to apply for the position;

- (c) as soon as practicable after notification occurs, the Court should hold a consolidation hearing to resolve the questions raised by the Notice of Filing and further consider how best to proceed. The consolidation hearing would occur without prejudice to cross-vesting rights and at this point, claims that wish to proceed in alternative jurisdictions should also be heard; and
- (d) in addition to considering whether more than one proceeding is appropriately positioned to remain on foot, the Court should determine the identify of a lead plaintiff, consider whether to make orders regarding a common fund, and approve a Notice of Participation to group members which effectively operates as an early class closure mechanism. The Court should also keep a record of the details of all proceedings on a national register.

188. As part of determining the suitability of the lead plaintiff, LFA suggests that there should be presumption of unsuitability if a person has served as lead plaintiff in multiple shareholder class actions within five years. Such restrictions are necessary due to vexatious litigants and claimants repeatedly being involved in abuse of process applications. Further, the Court should also have regard for the quantum of individual loss suffered by the potential lead plaintiff, and whether they are a retail or institutional shareholder.

Specific matters

189. Some of the specific matters set out in Proposal 6-1 are addressed below.

Open class actions

190. Part of the Class Actions Committee and the Victorian Bar do not agree that Part IVA should be amended such that all class actions are initiated as open class actions. Such a change would unduly restrict the scope and operation of the regime.

191. The Part IVA regime permits class actions to be initiated on behalf of as few as seven group members or many thousands. While typically class actions have a large number of group members, the potential utility of the class action regime may be reduced by restricting the scope of the regime to proceedings initiated by way of open class group definitions only. By way of one example, small groups may wish to elect to issue a class action proceeding on the basis of a closed class and the regime in its present form would facilitate that. Mandating that all class actions must be commenced as open classes would prevent any such claim from being brought.

Stay of competing actions

192. Even if common fund orders endure, part of the Class Actions Committee and the Victorian Bar do not support the ALRC's proposal that all but one competing class action be stayed as the default position. The Class Actions Committee and the Victorian Bar consider that it is preferable for the Court to retain a general discretion to determine the appropriate course in the circumstances of each case.

193. While the Class Actions Committee and the Victorian Bar recognise that the Court is accustomed to making difficult decisions such as these, they nonetheless considers that it may be more appropriate for the Court to retain broader flexibility in how multiplicity is to be addressed. The solutions adopted or contemplated by the courts to date, aside from ordering stays, have included:

- (a) consolidation of proceedings;⁴⁶
- (b) allowing the proceedings to run in parallel;⁴⁷ and
- (c) making orders closing the class in one proceeding but leaving the other proceedings as open proceedings with a joint trial of both.⁴⁸

194. Staying proceedings will remain one option, and whether that is appropriate in any given case will no doubt, and should, be informed by factors such as those set out in *Perera v GetSwift*. The Class Actions Committee and the Victorian Bar stress that an order made to permanently stay proceedings should be made only when it is antithetical to justice not to do so.

195. The Class Actions Committee and the Victorian Bar are concerned that to require a Court to allow only one proceeding to progress while permanently staying any competing proceedings, will all too often be antithetical to the interests of justice and may unduly distort the market. To permanently stay a proceeding that has been brought by, possibly, hundreds of claimants using a lawyer and funder of their choice is a very serious step that should only be taken if there is an abuse of process. It is difficult to see how such a claim can be considered an abuse. To stay such a claim should not be the default position for case management convenience. As was submitted by senior counsel in the Full Court of the Federal Court appeal hearing against the *Perera v GetSwift* decision:

... the winner-takes-all solution created by Lee J in this case runs the risk, just looking at it economically, as it were, runs the risk of significantly distorting the behaviour of participants in the market so as to produce outcomes that his Honour didn't intend and, if he foresaw them, would not want. I'm leaving altogether out of consideration the possibility of forum shopping. One of the other things it might encourage, and predictably, is overbroad pleadings on the part of the first mover to try and create the competitive advantage in class size and claimed scope.⁴⁹

Approval of litigation funding agreements

196. The Law Council refers to the comments above in respect of approval of litigation funding agreements. The Law Council does not agree that third party funding, or if accepted, contingency fee agreements, should be enforceable only with the approval of the Court.

Approval of funding agreement and costs on basis of common fund order

197. The Law Council does not agree that approval of funding agreements and legal costs should always be ordered on the basis of a common fund order. The observations above are referred to. It is noted that the settlement of class actions cannot and should not be assumed to neatly fit into one model. There have already

⁴⁶ *Stanford v DePuy International Ltd (No 7)* [2017] FCA 748 (28 June 2018) that was consolidated with *Dunsmore v DePuy International Ltd*, *Beentjees v DePuy International Ltd* and *Webb v DePuy International Ltd*, the latter two of which were commenced in the Supreme Court of South Australia.

⁴⁷ See, eg, *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 (1 July 2011) (which ran in parallel with *Scott and Taws v Oz Minerals Ltd* in the Federal Court).

⁴⁸ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) and *Smith v Australian Executor Trustees Ltd*; *Creighton v Australian Executor Trustees Ltd* [2016] NSWSC 17 (5 February 2016).

⁴⁹ Transcript of Proceedings, *Perera and others v GetSwift Ltd and others*, 6 August 2018.

been an array of class action settlements that do not fit a common mould and for which a common fund order would not be appropriate. It may be that a funding equalisation formula is deemed to be in the best interests of group members in one matter whereas for another it may be that the best interests of group members is to be achieved in a regime that requires individual assessments with part of the costs payable by each group member to be paid when they receive their compensation.⁵⁰

198. The Corporations Committee does not wish to comment on this proposal other than to note that this proposal raises important issues that require consideration and that, in its view, the appropriate way in which these issues should be considered is through a comprehensive review process. It may be that the review the subject of Proposal 1-1 results in the Corporations Committee supporting changes to one or more of the issues noted in this proposal.
199. The NSW Bar agrees with Proposals 6-1 and 6-2. The NSW Bar submits that the proposals are consistent with the emerging approach of the Federal Court adopted in *Perera v GetSwift* and that they resolve the developing problem of multiplicity. The NSW Bar states that the proposed carve-out is appropriate, as there may be instances where multiple overlapping claims are appropriate (such as where the strength of a claim varies for different claim periods and there is a potential conflict for group members in those claim periods). As such, the NSW Bar suggests that a degree of judicial flexibility should be retained.

Proposal 6–2

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

200. In light of the position of part of the Class Actions Committee and the Victorian Bar position regarding the Proposal 6-1, it is suggested that it is not necessary that the Practice Note to be amended to provide a case management procedure for competing class actions. There are a number of case management orders that can be made and the Court can take a range of considerations into account to ensure that justice is done. If amendments to the Practice Note are to be considered those amendments should be to guide judges and not to fetter the exercise of discretion.
201. The other part of the Class Actions Committee and the Corporations Committee support this Proposal. It appears to the Corporations Committee that there is an accelerating trend towards competing class actions. This, the Corporations Committee submits, is a more pressing issue than the other issues noted in Proposal 6-1. From the defendant's perspective it is unacceptable that an efficient and uniform mechanism to deal with competing class actions has not been developed.
202. In the Corporations Committee's view, a resolution of these issues should be developed with some urgency, at least on an interim case management basis, pending a fuller and more comprehensive review of the overall regime. In that context principles to deal with case management of claims commenced in different forums (State versus Federal courts) also need to be developed.
203. The Corporations Committee consider that it will be desirable that the procedures that are developed are general and flexible, as one size will not fit all in the case

⁵⁰ See, eg, *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370 (4 December 2012).

management of competing claims. The desirability of flexibility is illustrated by the outcome of decisions such as *Perera v GetSwift*, *Cantor v Audi Australia* and *Bellamy's*. The Corporations Committee suggests that a coherent guiding framework to manage competing claims based on principles of efficiency and cost economy is required.

204. LFA supports Proposal 6-2, however, it notes that providing further case management procedures in the practice note should not be adopted as an alternative to the legislative amendments at Proposal 6-1.

Question 6–1

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

205. The Class Actions Committee and the Victorian Bar do not agree that the Federal Court should be granted exclusive jurisdiction to determine class actions brought under Part 9.6A of the *Corporations Act* and section 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).
206. Australia is a federation and the state courts have a valuable role to play in this country. The Class Actions Committee and the Victorian Bar would be most concerned if steps were to be taken to permanently close off options to 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 court.
207. The Corporations Committee 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.
208. The Law Council recognises the potential for complications in case management where there are multiple proceedings in different forums⁵¹ 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.⁵²
209. 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 *Federal Court Act* and State cognates are likely to be adequate to deal with problems associated with overlapping class actions in mixed forums. In

⁵¹ See generally *Wigmans v AMP Ltd* [2018] NSWSC 1045 (9 July 2018).

⁵² 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 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.

particular, there should be a strong incentive for State courts to transfer proceedings to the Federal Court on the grounds that it would be 'more appropriate' or in the interests of justice⁵³ to do so where one or more overlapping proceedings had been (or were likely to be) commenced in the latter Court.

210. Difficulties of having started in one court and then being unable to cure the problem within the existing proceeding are similar to what was encountered with the old strict rules relating to courts of common law and equity. We know of no reason or pressing need which would justify risking introducing similar difficulties in a new area.
211. The Victorian Bar, on the other hand, considers that amendments should be made to Part 9.6A of the Corporations Act section 12GJ of the ASIC to confer exclusive jurisdiction on the Federal Court of Australia with respect to class actions arising under that legislation.
212. The Victorian Bar's view is influenced by the recent *AMP* proceedings which demonstrate the complexities that arise from competing class actions being issued across multiple jurisdictions: four proceedings have been issued in the Federal Court and one in the Supreme Court of New South Wales.⁵⁴ Multiple transfer applications have been issued in each of the Federal Court proceedings and the NSW Supreme Court proceedings. An anti-suit injunction has also been foreshadowed in the NSW Supreme Court seeking to restrain the applicants in the Federal Court proceedings from taking any step in those proceedings. Significant delay and cost will inevitably result while these matters are resolved. The various proceedings and applications made therein also raise difficult issues of comity.

Part 7: Settlement Approval and Distribution

213. The Discussion Paper at [7.6] states the ALRC considers that 'legislative reform is unnecessary as extensive jurisprudence exists which provides guidance as to the criteria judges are to take into account in approving class action settlements'.
214. The Law Council agrees and offers the following additional observations.
215. First, the jurisprudence identifying relevant considerations from case-to-case, and their proper application in any given case, is likely the single most detailed aspect of class action law in Australia. The leading authorities as to the essential principles likewise demonstrate their application across a wide variety of cases.
216. Second, one of the most important and demanding features of class action settlements is also the one that is hardest to examine or test. It concerns the 'confidential opinions' provided by the representative applicant's lawyers in support of the application for Court approval of a proposed settlement.
217. The requirement for these opinions was established from the earliest class actions.⁵⁵ It is firmly established but the confidentiality of the opinions means that their

⁵³ 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'.

⁵⁴ See *Wigmans v AMP Ltd* [2018] NSWSC 1045 (9 July 2018) and *Wileypark Pty Ltd v AMP Ltd* [2018] FCA 1052 (11 July 2018).

⁵⁵ *Lopez v Star World Enterprises* [1999] FCA 104 (28 January 1999) [16]-[17].

significance can be underestimated by persons not privy to their content. The confidentiality is imperative, because, in the experience of the Law Council, these opinions involve highly detailed analyses candidly reporting to the Court the applicant's lawyers' personal assessments of the strengths and weakness of their case, and the merits and flaws in the proposed settlement (both as to its *inter partes* aspects and its *inter se* aspects).

218. These opinions are explicitly not submissions. They are acknowledged as reporting the lawyers' personal assessments. They frequently run to some dozens of pages. They focus on the 'crux' issues, but they address those issues in very frank terms.
219. The importance and usefulness of these opinions has frequently been commended by the judges handling the relevant approval application. For present purposes, the important observation is that the confidential opinions, in candidly drawing the judge's attention to relevant 'cons' as well as the 'pros' of a settlement, are likely materially to reduce the likelihood of a judge failing to consider either the considerations listed in the Practice Note, or any other consideration relevant to the particular case or settlement.

Application of settlement principles

220. The Law Council agrees that the application of relevant considerations to a given case can be difficult (Discussion Paper at [7.7]) but submits that the difficulty would not be resolved by legislative reform. The main relevant considerations are reiterated in the Practice Note. They are drawn from and continue to be applied in a wide variety of cases. There are no signs of 'rubber stamping' or any 'cookie cutter' approach. The authorities on class action settlements demonstrate, unambiguously, how assiduously practitioners and courts have approached the question of 'fairness and reasonableness', on both an *inter partes* and *inter se* basis, in respect of proposed class action settlements.
221. The particular issue mentioned by the ALRC, namely 'anchoring' in respect of funders' commissions, has itself been the subject of considerable development over the past 18 months. In *Money Max*, the Full Court ruled that 'common fund orders' were available but were likely to be made upon terms that the eventual common fund orders rate would be fixed by the trial judge at the conclusion of the proceeding, at a rate that was 'reasonable and proportionate' having regard to a range of enumerated considerations. Those considerations were elaborated in *Blairgowrie (No 3)*,⁵⁶ and then applied in *Carson Investments Pty Ltd v Cao* (which is significant as the first case that approved a common fund order outcome that increased the return to the funder, relative to the return it would have obtained under a 'funding equalisation order').⁵⁷ Different judges have held that the Court's powers of supervision over the imposts on group members extends to reducing funders' recoveries even under funding equalisation orders, in appropriate circumstances.⁵⁸

⁵⁶ *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017).

⁵⁷ *Carson Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 (16 April 2018).

⁵⁸ See *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) (Murphy J); *Blairgowrie (No 3)* [2017] FCA 330 (31 March 2017) (Beach J); and *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) (Middleton J), cited in *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018) [365].

Settlements should be fair for all group members

222. The Law Council agrees that further legislative intervention does not seem warranted.

Statutory power to review and set funding fees

223. The Law Council refers to the various submissions provided in respect of Chapter 5 above.

Proposal 7–1

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

224. The Law Council is of the view that the Court should have available to it a range of mechanisms to ensure that costs are fair, reasonable and proportionate. Referring to the use of the referees in the Practice Note is supported. The referee would need to have costs assessment expertise, which the Court could consider as appropriate. A referee may be of particular assistance to the Court in protecting unrepresented group member interests in ‘open class’ proceedings.

225. The Law Council notes that the Federal Court has recently signalled a strong presumption against the continued use of ‘party-appointed’ costs assessors and a preference for the adoption of court-appointed costs referees.⁵⁹ One feature of the proposal eventually adopted by Lee J in *Perera v GetSwift* was the relevant applicant’s commitment to submit its legal cost bills to a court-appointed expert on an ongoing basis, rather than just at the conclusion of the proceeding. Given the rapidity of recent innovations in respect of common fund orders and costs scrutiny, it can be expected that the *Perera v GetSwift* model of ongoing costs approval will be seen more frequently in future cases. Care must be taken to ensure that ongoing costs approval does not increase the costs at the end of the day as compared to the cost of the appointment of an independent expert at settlement approval time.

226. The Law Council suggests that the ALRC also consider how a Federal Court judge would find an appropriate referee. A possible approach would be for the Federal Court to maintain a panel of persons who are suitably qualified to act as a referee in relation to costs charged in a class action. The Law Council is prepared to assist in such a process if that would be of utility to the Court.

227. In determining the process for administering class actions, the Class Actions Committee is keen to see the *Federal Court Rules* clearly separate the role of judges being involved in administration and the judge who is involved in hearing the substantive claim.

⁵⁹ *Perera v GetSwift Ltd* [2018] FCA 732 (23 May 2018).

Question 7–1

Should settlement administration be the subject of a tender process? If so:

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

228. The introduction of competition into the settlement distribution process through permitting the appointment of an administrator other than the solicitor who ran the class action holds out the prospect of reduced costs. The Law Council notes that there is merit to the suggestions that some administration tasks could be more efficiently performed by service providers other than lawyers, and that there should be flexibility for Courts to make orders facilitating such arrangements.
229. However, the Law Council does not support a ‘one-size-fits all’ approach whereby a tender process would be required in every class action. There may be situations where the cost and delay in conducting the tender process would be greater than any savings achieved.
230. In the QBE Insurance class action, Murphy J recounted the settlement distribution costs from a number of shareholder class actions:⁶⁰
- *Camping Warehouse v Downer EDI*,⁶¹ in which an amount of \$25,000 per calendar month and a further amount of \$22 per month for each class member for a maximum of approximately 12 months was approved. If a similar calculation was applied to the present proceeding, assuming a timeline of six months to distribution, it would amount to \$480,132.
 - *Earglow Pty Ltd v Newcrest Mining Ltd*,⁶² in which an amount of \$429,706.25 (including the costs of the settlement approval hearing) was approved.
 - *Dillon v RBS Group (Australia) Pty Ltd (No 2)*,⁶³ in which an amount of \$250,000 was approved in circumstances where there are only 130 participating class members.
 - *Clarke v Sandhurst Trustees Ltd (No 2)*,⁶⁴ in which an amount of \$260,000 was approved.
 - *Carson Investments Pty Limited v Cao*,⁶⁵ in which an amount of \$551,270 was approved for administration costs, with a possible additional allowance of up to \$181,000 for reviews that were conducted.

The quote in the QBE Insurance class action was \$251,202.

231. This may be contrasted with the Kilmore-East Kinglake and Murrindindi bushfire class action settlements, involving personal injury and economic loss/property damage where the distribution costs were many millions of dollars.⁶⁶ In the Bonsoy

⁶⁰ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030, [149].

⁶¹ *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016) [177], [181].

⁶² *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [111].

⁶³ *Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395 (20 March 2018) (Dillon) [81].

⁶⁴ *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511 (11 April 2018) [3], [36].

⁶⁵ *Carson Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 (16 April 2018) [273].

⁶⁶ Mr John David White, Special Referee’s Report, 20 June 2016; Mr John David White, Special Referee’s Report, 21 November 2016; Mr John David White, Special Referee’s Report, 1 March 2017; *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731 (7 December 2016) [35].

class action the settlement administration cost \$3,425,816.13.⁶⁷ The ongoing DePuy ASR Implants (hips) class action had approved administration costs of \$3,671,716.66 as at 28 June 2017.⁶⁸

232. But even when the costs of administration may be high, the Law Council queries whether the tender process may impose a burden on the law firm that conducted the class action and one that will cause delay and have a counterproductive impact on costs. While the administration of the bushfires⁶⁹ and hips⁷⁰ class actions settlements were expensive, the fact that the schemes required individual assessment of many class member's personal injury claims made that inevitable. The hips scheme, when ultimately concluded, will see almost \$200m distributed to over 2,000 class members. It is difficult to imagine that a tender process would offer much benefit to the class members given that over 2,000 client records would have to be sorted through, not only by the law firm conducting the class action, but also by any the tenderer so that the tenderer could understand the task that was to be tendered for.
233. If a tender process is to occur, it could involve the judge who conducts the settlement approval hearing making a selection or, if preferred, a registrar, court-appointed expert or referee conducting the tender and providing the judge with a recommendation. Another option would be to have the tender process run by the Attorney-General's department with the complying tenders then provided to the Court for a decision to be made.
234. The Court could issue a request for tender as part of the notices given for settlement approval which would invite tenderers to submit a proposal to administer the settlement. The key question would be 'what is it that is being put out for tender?' A number of options arise:
- (a) the solicitor on the record as part of seeking settlement approval could still be required to put forward a settlement distribution scheme (**SDS**) for court approval, which would be what the tenderers offered to administer;
 - (b) the tenderers could be asked to put forward their own SDS, including costs and timeline, for distributing the funds from the class action; and
 - (c) the tenderers could have the option of submitting a tender for the existing SDS and/or putting forward their own SDS for distributing the funds from the class action.
235. Option 1 would mean that competition could only really occur as to the cost and efficiency of administering the same SDS. Option 2 would allow for more innovative approaches to the structuring of an SDS to be put forward. However, choosing between different types of SDS may make arriving at a choice more difficult. Option 3 would seek to obtain the best of both options 1 and 2, although making a choice may be more complicated.
236. The tender process may also require that participating group member information be provided to tenderers, especially under options 2 and 3. This would necessitate steps to protect confidentiality, privilege and privacy.

⁶⁷ *Downie v Spiral Foods Pty Ltd* [2017] VSC 7 (24 January 2017) [8].

⁶⁸ *Stanford v DePuy International Ltd (No 7)* [2017] FCA 748 (28 June 2017).

⁶⁹ *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731.

⁷⁰ *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (1 December 2016).

237. The NSW Bar notes that settlement administration is usually performed by the solicitors for the applicant and group members. As there has been very little criticism by the courts of these administrations, the NSW Bar is of the view that a tender process would be both undesirable and unnecessary.
238. It would be undesirable, the NSW Bar says, because it would take responsibility away from persons who are familiar with the proceeding and the group members, and who owe group members fiduciary and other professional duties, and place that work in the hands of ‘an accounting firm, share registry service or a claims administration company’,⁷¹ which has no such familiarity or duties. Anecdotal experience of accounting firms, share registry services, and claims administration companies is that they should by no means be assumed to be cheaper or better than solicitors in respect of this kind of work.
239. The NSW Bar submits that it is unnecessary to outsource settlement administration because the Court presently has extensive powers of review, to ensure that settlement administration occurs in an efficient manner consistent with the overarching purpose.

Question 7–2

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

240. In the main, the Law Council agrees that class action settlements should be made public. The Law Council supports the disclosure of the matters enumerated at [7.39] of the Discussion Paper. As noted in the Discussion Paper, class actions frequently perform a public function. As such, transparency is an important policy underpinning many class actions. Orders being granted to render the amount of a settlement, the legal fees or the litigation funder’s fee confidential should be kept to a minimum because class actions have a public interest element.
241. The class action settlement cannot be treated like other litigation where the persons affected are present and wish to have the resolution of their dispute kept confidential. Class actions have a representative capacity and resolve numerous persons’ claims, primarily the claims of group members who are not before the court. Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals. Class actions are not simply disputes between private parties about private rights. A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings.
242. However, the existing regime for suppression and non-publication orders in Part VAA of the Federal Court Act should continue to apply.
243. The NSW Bar does not think that the terms of class action settlements should be made public. It is the view of the NSW Bar that, like any other legal proceeding, there may be perfectly good and proper reasons for the parties to want confidential settlements.

⁷¹ Discussion Paper, 126 [7.29].

244. One of the key concerns here is that respondents will usually seek to settle proceedings on the basis of there being no admission as to fault or liability. If the terms of the settlement are published, it might be that those terms are used in the media or elsewhere to suggest that fault or liability has, in substance, been admitted, even though there might be perfectly valid reasons why that is not the case. The prospect of this would, in turn, run the risk of a chilling effect on settlements, thus undermining the overarching purpose.
245. LFA submits that the Court's decision in a settlement approval hearing should include sufficient information to allow the reader to ascertain:
- (a) the fees and charges paid to the litigation funder; and
 - (b) the percentage of the compensation or damages received by the class that has been deducted to pay:
 - (i) the litigation funder's commission, fees and charges however described; and
 - (ii) legal costs and disbursements.
246. However, as a general rule, LFA supports the confidentiality of settlements because:
- (a) maintaining confidentiality of settlements assists in the early resolution of claims; and
 - (b) defendants settle proceedings for a variety of reasons that extend well beyond questions of legal liability, and if confidentiality cannot be maintained, there will be greater pressure on corporations to simply leave the determination to the Court.

Part 8: Regulatory redress

Proposal 8–1

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

247. The Law Council agrees that this proposal raises important issues that require consideration and suggests that the appropriate way in which these issues should be considered is through a comprehensive review process.
248. The Class Actions Committee is generally supportive of the idea of the Government establishing a federal collective redress scheme on the condition that it not be an avenue for wrongdoers to shut down exposure to those wronged. Such a scheme, if properly administered, could see those who have suffered loss at the hands of another compensated when they may otherwise have no access to redress.
249. Such a scheme is potentially attractive as it would be without limitation to parties' legal rights, and freedom to pursue those rights, while also providing a means (at least to try) to reduce litigation and facilitate redress.

250. The scheme warrants further inquiry, having regard to developments with the models that are in place in the United Kingdom,⁷² and other European countries (such as the Netherlands⁷³ and Latvia⁷⁴).
251. LFA supports the ALRC's observation that the time and expense associated with class action litigation warrants consideration of alternative means of collective redress that may achieve swifter and more effective outcomes for both claimants and potential defendants.
252. It is important that potential defendants' interests be given appropriate consideration in the design of any such scheme. In particular, a scheme must provide certainty and finality for the potential defendant by addressing all potential claims on a 'once and for all' basis. In those circumstances, while LFA supports Proposal 8-1 to the extent that it recommends consideration of a federal collective redress scheme, LFA is of the view that any such scheme should operate on an opt-out (rather than opt-in) basis.

Question 8–1

What principles should guide the design of a federal collective redress scheme?

253. Regulatory redress schemes are an alternative to the class action or litigation approach to dealing with mass harm. Put another way, regulatory redress schemes are mass alternative dispute resolution procedures. As a result, they tend to have many of the advantages of alternative dispute resolution, that is, voluntary, cheaper and faster. Equally, concerns going to procedural fairness and the determination of appropriate outcomes must be addressed. The participation of a regulator can assist with this.⁷⁵
254. A federal collective redress scheme could formalise voluntary resolution schemes such as those used in the Storm financial collapse,⁷⁶ or in relation to bad financial advice,⁷⁷ or the refund programs for fees-for-no-service in relation to financial advisers.⁷⁸
255. Criticisms levelled at this type of scheme include that the administrator lacked independence and was too closely aligned with the corporation's view of the conduct

⁷² As referred to in the Discussion Paper, [8.9]-[8.14].

⁷³ Collective Settlement of Mass Damages Act 2005 (NL) ('Wet Collectieve Afwikkeling Massaschade').

⁷⁴ Consumer Rights Protection Act 1999 (LV) ('Patērētāju tiesību aizsardzības likums'), translated Consumer Rights Protection Act 1999 (LV)

⁷⁵ See Michael Legg, 'ADR and Class Actions Compared' in Michael Legg (ed), *The Future of Dispute Resolution* (Lexis Nexis, 2013) Ch 17; Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311.

⁷⁶ Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38(3) *Sydney Law Review* 311.

⁷⁷ Australian Securities and Investments Commission, 'Update on Advice Compliance Report: Additional \$21.4 million compensation paid to customers' (Media Release, 18-049MR, 20 February 2018) <<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-049mr-update-on-advice-compliance-report-additional-214-million-compensation-paid-to-customers/>>.

⁷⁸ Australian Securities and Investments Commission, 'Update on financial advice institutions fees-for-no-service refund programs' (Media Release, 17-438MR, 15 December 2017) <<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-438mr-update-on-financial-advice-institutions-fees-for-no-service-refund-programs/>>.

or approach to quantification of loss.⁷⁹ This can mean that compensation claims are rejected, or 'low-ball' offers are made. As a result, there needs to be oversight of the scheme and representation for participants.

256. Guidance for the conduct of a federal collective redress scheme may be obtained from ASIC's Regulatory Guide 256 - Client review and remediation conducted by advice licensees,⁸⁰ and the UK Competition and Markets Authority's guidance on approval of voluntary redress schemes for infringements of competition law.⁸¹
257. The Law Council supports further investigation into the adoption and design of a federal collective redress scheme. Consideration needs to be given to whether such schemes should be sector specific and made part of a regulator's governing statute or adopting a broader approach that all regulators could employ in conjunction with a willing corporation.
258. LFA considers that, for a collective redress scheme to provide a viable alternative to class action litigation and properly balance the interests of claimants and potential defendants, it should:
 - (a) provide finality and certainty for the potential defendant implementing the scheme;
 - (b) be voluntary for the potential defendant;
 - (c) not require the potential defendant to make an admission of liability (or any other admissions);
 - (d) allow communications with the regulator to remain confidential; and
 - (e) give rise to the potential for lower regulatory penalties in recognition of the potential defendant's willingness to voluntarily provide redress.

⁷⁹ See, e.g., Maurice Blackburn Lawyers, 'NAB remediation scheme for financial planning could deny compensation to affected customers' (Media Statement, 23 October 2015) <<https://www.mauriceblackburn.com.au/about/media-centre/media-statements/2015/nab-remediation-scheme-for-financial-planning-could-deny-compensation-to-affected-customers/>>.

⁸⁰ Australian Securities and Investments Commission, *Client review and remediation conducted by advice licensees* (Regulatory Guide 256, September 2016) <<https://asic.gov.au/media/4009895/rg256-published-15-september-2016.pdf>>.

⁸¹ Competition and Markets Authority (UK), *Guidance on approval of voluntary redress schemes for infringements of competition law* (14 August 2015) <<https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>>.