



Victorian
Law Reform
Commission

Access to Justice — Litigation Funding and Group Proceedings

CONSULTATION PAPER JULY 2017





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Preface

The Victorian Attorney-General, the Hon. Martin Pakula MP, has asked the Victorian Law Reform Commission to report on specified issues concerning access to justice by litigants who seek to enforce their legal rights using the services of litigation funders or through group proceedings, to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens.

For centuries, financial services of the type offered by litigation funders were illegal. They were proscribed by the old offences of maintenance and champerty, the history and development of which were set out in the classic judgment of Danckwerts J in *Martell v Consett Iron Co Ltd*.¹ The policy underlying those offences, which sounded both in crime and in tort, was to prevent the legal system being subverted by persons who were not parties to proceedings but who had a financial interest in the outcome of the proceedings. Champerty (involving the sharing of the proceeds of litigation) was an aggravated form of maintenance (providing financial assistance to a litigant without lawful justification).

Maintenance and champerty, both as crimes and torts, were abolished in Victoria by the *Abolition of Obsolete Offences Act 1969* and similarly in other Australian jurisdictions. They continue to apply in some other common law jurisdictions.² In Victoria, two residues of the old offences remained unaffected. First, a contract could still be treated as contrary to public policy or illegal on the ground that it was in aid of maintenance or champerty. This put in doubt the legality of any financial agreement between a third-party funder and a litigant to assist the litigation in return for reward. Secondly, lawyers continued to be prohibited from charging contingency fees, as they still are.

Today, litigation funding services are a part of the legal system. They can enable access to justice by reducing financial risk and postponing or removing the cost burden. While initially operating in insolvency law, they have broadened their application and have a significant impact on class actions, particularly for shareholders and investors.

Victoria has had procedures in place for class actions (referred to in the legislation as group proceedings) since 2000, as part 4A of the Victorian *Supreme Court Act 1986*. They were introduced as a means of providing access to justice in cases where many people seek redress and the total amount at issue is significant, but each person's loss is limited and not economically viable to recover in individual actions. Eighty class actions have been conducted under the Victorian regime; 10 involved litigation funders.

The predominant sources of funding for class actions, other than litigation funders, have been law firms with the capacity to offer services on a 'no win, no fee' basis. Unlike litigation funders, law firms are not permitted to charge a percentage of the amount recovered in litigation, known as a contingency fee, for their services.

1 (1955) 1 Ch D 363, 375.

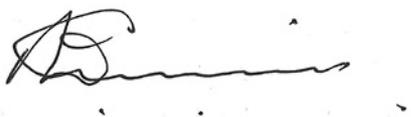
2 The Supreme Court of Ireland recently declined to develop the common law on the tort of champerty, where it remains: *Persona Digital Telephony Limited v Minister for Public Enterprise* [2017] IESC 27. Chief Justice Denham stated that to do so 'would involve complex situations more suited to legislation': [54(v)]. In New Zealand, the torts of maintenance and champerty have not been abolished by statute and still remain: *Saunders v Houghton* [2010] 3 NZLR 331.

The services provided by litigation funders and the introduction of class actions in Victoria have enabled thousands of Victorians to obtain redress when otherwise legal action was beyond their reach. At the same time, there is concern within the judiciary, the legal profession and the wider community about the impact of these developments on the legal system, the role of the court, the interests of plaintiffs and the rights of defendants.

At the core of the concern are the conflicts of interest that arise in proceedings in which a litigation funder is involved. The litigation funder seeks to maximise its return on the investment and closely monitors the process; the lawyer has duties to the court and to the plaintiff but is being paid by the litigation funder; and the plaintiff is unlikely to be in a position to negotiate the terms of the agreement with the funder. In class actions, there is the added dimension of the divergent interests of class members, not all of whom have signed a funding agreement with the litigation funder or a legal retainer with the lawyer.

The reference to the Victorian Law Reform Commission under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* encompasses the conduct of proceedings funded by litigation funders, whether the issues with litigation funding would be mitigated by allowing lawyers to charge contingency fees, and the operation of the class action regime in Victoria. In the review the Commission will take into account individual cases, but the focus of the inquiry is on systematic issues and their productive resolution.

The publication of this consultation paper marks the beginning of the formal consultation period of the reference. I warmly encourage those who wish to do so to respond to the questions it raises by 22 September 2017.



The Hon. P. D. Cummins AM

Chair

Victorian Law Reform Commission

July 2017

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page xiv, that seek to guide submissions.

You do not have to address all of the questions to make a submission.

You may choose to answer some, but not all questions. Alternatively, you may wish to provide a response that does not address individual questions posed throughout the paper, but nonetheless relates to the issues outlined in the terms of reference.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, online through our website, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions, though we prefer them to be in writing, and we encourage you to answer the questions contained in each chapter and set out on page xiv.

Submissions can be made by:

Completing the online form at www.lawreform.vic.gov.au

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the Commission's report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the Commission's report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

Confidential submissions are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

Submission deadline: 22 September 2017

Terms of reference

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 16 December 2016.]

The Victorian Law Reform Commission is asked to report on the following issues to ensure that litigants who are seeking to enforce their rights using the services of litigation funders and/or through group proceedings are not exposed to unfair risks or disproportionate cost burdens.

The Commission is asked to report on:

1. Whether there is scope for the supervisory powers of Victorian courts or Victorian regulatory bodies to be increased in respect of proceedings funded by litigation funders, in particular:
 - a) whether clearer disclosure requirements should be imposed on litigation funders and lawyers representing funded plaintiffs in respect of advice about the progress, costs and possible outcomes of proceedings; and
 - b) whether any limits should be placed on (or approval process required in respect of) the success fees that can be charged by a litigation funder to plaintiffs when a decision or settlement results in a payment to the plaintiffs by a defendant; and
 - c) whether the obligation to disclose funding arrangements in proceedings supported by litigation funders should be extended beyond class action proceedings, and if so, what other types of proceedings should be covered by the obligation.
2. Whether removing the existing prohibition on law firms charging contingency fees (except in areas where contingency fees would be inappropriate, including personal injury, criminal and family law matters) would assist to mitigate the issues presented by the practice of litigation funding.
3. In respect of group proceedings commenced under the provisions of Part 4A of the *Supreme Court Act 1986* (Vic) and similar proceedings that involve a number of disputants being represented by an intermediary, whether there should be further regulation of such proceedings, including the possibility of:
 - a) a certification requirement before such proceedings are allowed to continue, either in respect of all such proceedings, or proceedings that are supported by litigation funders; or
 - b) specified criteria for the Court's approval of a settlement under section 33V, and what such criteria might be.

In preparing its report, the Commission is asked to consider among other matters:

- a) the implications of any reforms for the workload and resource requirements of the Supreme Court; and
- b) relevant provisions and potential reforms in other jurisdictions.

The Commission is asked to provide its final report by 30 March 2018.

NB: The term 'litigation funder' is not intended to apply to an insurer funding the litigation costs of an insured under a pre-existing policy, nor to a solicitor acting on a 'no win, no fee' or conditional basis.

Glossary

Adverse costs order	A court order requiring one party in legal proceedings to pay the other party's reasonable costs.
'After the event' insurance	Insurance taken out for the benefit of one party in legal proceedings against the risk of having to pay the other side's costs if they lose. The policy can be purchased at the commencement of, or during, proceedings and payment of the premium can be postponed until the conclusion of the matter.
Champerty	An old common law crime and civil wrong. A form of maintenance in which something of value (such as a share of the proceeds of the litigation) is given in return for assistance given without lawful justification.
Class action	See group proceedings .
Contingency fee	A fee that is calculated as a share of the amount recovered if the litigation is successful. No fee is charged if the litigation is unsuccessful. Litigation funders charge on this basis, but lawyers are prohibited from doing so. Also called a 'proportionate fee', 'percentage-based contingency fee' and 'damages-based billing'.
Contradictor	A person that is appointed by the court to represent the interests of unrepresented parties, such as class members in class actions .
Conditional fee ('no win, no fee')	A legal fee that is conditional upon a successful outcome. No fee is charged if the litigation is unsuccessful. The fee is calculated by reference to the usual fee for work and may also include an ' uplift fee ' of up to an additional 25 per cent.
Disbursements	Costs incurred by a lawyer on behalf of a client, such as the fees charged by a barrister or expert witness and court fees.
Fiduciary	A relationship of trust and confidence between two people, such as that of trustee and beneficiary, in which one person has a duty to act in good faith for the benefit of the other.
Funded class member	A class member who has entered into a funding agreement with a litigation funder . Under this agreement, the litigation funder will typically meet the costs of bringing the proceedings in return for a percentage of the amount recovered if the class action succeeds.
Funded plaintiff	A plaintiff—either a person or an entity—who has entered into a funding agreement with a litigation funder to finance a claim against a defendant.

Funded proceedings	Proceedings financed, in part or in whole, by a litigation funder .
Funding agreement	The contract between a litigation funder and a plaintiff or, in a class action , a class member.
Funding fee	The fee set out in a litigation funding agreement that a litigation funder will charge a funded plaintiff for financing the litigation if it is successful. It is generally charged as a percentage of any amount recovered for the funded plaintiff.
Group proceedings	Proceedings whereby a single representative brings or conducts a claim on behalf of a group of seven or more members in the same, similar or related circumstances. In Victoria, group proceedings are commenced under part 4A of the <i>Supreme Court Act 1986</i> (Vic). Equivalent Commonwealth and New South Wales legislation refers to proceedings of this type as ‘representative proceedings’. The commonly used term is ‘ class actions ’.
Legal costs	The amounts charged for legal services.
Litigant	A person, company or organisation that is a named party to legal proceedings. A defendant or plaintiff.
Litigation funder	<p>A commercial entity that agrees to meet the costs (including any adverse costs) of the litigation in return for a share of any amount recovered if the litigation is successful. A litigation funder is not a party to the proceedings and does not otherwise have an interest in the litigation.</p> <p>For the purpose of this reference, ‘litigation funder’ does not include an insurer funding the litigation costs of an insured under a pre-existing policy, or a solicitor acting on a ‘no win, no fee’ basis.</p>
Maintenance	An old common law crime and civil wrong of providing financial assistance, directly or indirectly, to a litigant without lawful justification. It was abolished as a common law crime and civil wrong in Victoria in 1969.
‘No win, no fee’	See conditional fee .
Representative plaintiff	A person or entity bringing a class action on behalf of others in the same, similar or related circumstances under part 4A of the <i>Supreme Court Act 1986</i> (Vic).
Security for costs	Application by the defendant under Rule 62.02 of the <i>Supreme Court (General Civil Procedure) Rules 2005</i> that seeks security from the plaintiff where there is reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant if ordered to do so.
Unfunded class member	<p>A class member who has not entered into a funding agreement with a litigation funder that is financing a class action.</p> <p>Unlike a funded class member, an unfunded class member is not contractually obligated to pay the litigation funder a percentage of the amount recovered if the class action is successful, to meet the costs of bringing proceedings.</p>
Unrepresented class member	A class member who does not have legal representation in a class action .
Uplift fee	An amount added to the lawyer’s regular fees for legal services, under a conditional cost agreement, if the litigation is successful. The amount is currently capped at 25 per cent of the regular fees. Also called a ‘success fee’.

Questions

Chapter 3: Current regulation of litigation funders and lawyers

- 1 What changes, if any, need to be made to the class actions regime in Victoria to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?
- 2 What changes, if any, need to be made to the regulation of proceedings in Victoria that are funded by litigation funders to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?
- 3 Should different procedures apply to the supervision and management of class actions financed by litigation funders compared to those that are not?
- 4 How can the Supreme Court be better supported in its role in supervising and managing class actions?
- 5 Is there a need for guidelines for lawyers on their responsibilities to multiple class members in class actions? If so, what form should they take?

Chapter 4: Disclosure to plaintiffs

- 6 In funded class actions, should lawyers be expressly required to inform class members, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?
- 7 In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?
- 8 How could the form and content of notices and other communications with class members about progress, costs and possible outcomes be made clearer and more accessible?
- 9 Is there a need for guidelines for lawyers on how and what they communicate with class members during a settlement distribution scheme? If so, what form should they take?

Chapter 5: Disclosure to the court

- 10 In funded class actions, should the plaintiff be required to disclose the funding agreement to the Court and/or other parties? If so, how should this requirement be conveyed and enforced?
- 11 In funded proceedings other than class actions, should the plaintiff disclose the funding agreement to the Court and/or other parties? If so, should this be at the Court's discretion or required in all proceedings?
- 12 In the absence of Commonwealth regulation relating to capital adequacy, how could the Court ensure a litigation funder can meet its financial obligations under the funding agreement?

Chapter 6: Certification of class actions

- 13 Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate?
 - (a) introduction of a pre-commencement hearing to certify that certain preliminary criteria are met
 - (b) legislative amendment of existing threshold requirements under section 33C of the *Supreme Court Act 1986* (Vic)
 - (c) placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met
 - (d) other reforms.
- 14 Should the onus be placed on the representative plaintiff to prove they can adequately represent class members? If so, how should this be implemented?
- 15 Should a specific legislative power be drafted to set out how the Court should proceed where competing class actions arise? If not, is some other reform necessary in the way competing class actions are addressed?
- 16 Does the involvement of litigation funders in class actions require certain matters (and if so, which) to be addressed at the commencement of, or during, proceedings?

Chapter 7: Settlement

- 17 How could the interests of unrepresented class members be better protected during settlement approval?
- 18 What improvements could be made to the way that legal costs are assessed in class actions?
- 19 Should the following matters be set out either in legislation or Court guidelines?
 - (a) criteria to guide the Court when assessing the reasonableness of a funding fee
 - (b) criteria for the use of caps, limits, sliding scales or other methods when assessing funding fees
 - (c) criteria or 'safeguards' for the use of common fund orders by the Court.
- 20 Is there a need for an independent expert to assist the Court in assessing funding fees? If so, how should the expert undertake this assessment?
- 21 At which stage of proceedings should the Court assess the funding fee? What, if any, conditions should apply to this?

- 22 In class actions, should lawyers and litigation funders be able to request that the total amounts they receive in settlement be kept confidential?
- 23 How could the management of settlement distribution schemes be improved to:
 - (a) ensure that individual compensation reflects the merits of individual claims
 - (b) ensure that it is completed in a manner that minimises costs and delays?
- 24 How could Court-approved notice for opt out and settlement be made clearer and more comprehensible for class members?
- 25 Are there other ways the process for settlement approval and distribution could be improved?

Chapter 8: Contingency fees

- 26 Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?
- 27 If the ban on contingency fees were lifted, what measures should be put in place to ensure:
 - (a) a wide variety of cases are funded by contingency fee arrangements, not merely those that present the highest potential return
 - (b) clients face lower risks and cost burdens than they do now in proceedings funded by litigation funders
 - (c) clients' interests are not subordinated to commercial interests
 - (d) other issues raised by the involvement of litigation funders in proceedings are mitigated?
- 28 Are there any other ways to improve access to justice through funding arrangements?

Scope of the reference

- 2** Referral to the Commission
- 2** Terms of reference
- 5** Previous reviews
- 6** International comparisons
- 7** Summary of key issues

1. Scope of the reference

Referral to the Commission

- 1.1 The Attorney-General, the Hon. Martin Pakula MP, has asked the Victorian Law Reform Commission (the Commission), under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to report on a number of issues concerning access to justice by litigants who seek to enforce their rights using the services of litigation funders and/or through group proceedings.
- 1.2 The terms of reference are set out on page x.
- 1.3 The referral was made by letter dated 16 December 2016 and publicly announced on 16 January 2017.¹
- 1.4 The Chair of the Commission has exercised his powers under section 13(1)(b) of the Victorian Law Reform Commission Act to constitute a Division to guide and oversee the conduct of the reference. Joining him on the Division are: Helen Fatouros; His Honour David Jones AM; Alison O'Brien; and the Hon. Frank Vincent AO QC.

Terms of reference

Access to justice

- 1.5 The full title of the reference is Access to Justice—Litigation Funding and Group Proceedings. The first three words establish the focus of the Commission's approach.
- 1.6 Access to justice is a broad concept that means different things in different contexts. In general terms, it is the extent to which those who seek to enforce their rights are able to use the legal system to obtain an outcome by means of a fair and open process.
- 1.7 For the purposes of this reference, it refers both to access to the legal system and to a fair and just outcome.
- 1.8 A variety of factors can prevent access to justice. They can be features of the way the justice system is designed and how it operates; they can arise from legal procedure; some are caused by the complexity of the law; others reinforce economic, social, cultural and geographic disadvantage within the wider community. Whether in practice they prevent access to justice differs from one individual to the next, though it is clear that, across the community, there are barriers to be overcome.
- 1.9 Often there is a disparity between the resources available to the parties, which manifests as unequal bargaining power. This is particularly evident when one of the parties is a well-resourced and repeat user of the legal system, such as a government agency or large corporation, and the other is a member of the public with no prior experience. Victoria Legal Aid has observed:

For many Victorians, access to justice is illusory. Interactions in the justice system often occur in circumstances where there is a significant power imbalance—be it with the state, powerful corporations or other individuals. Our system is one where a person’s ability to access a fair outcome and due process is often predicated on the financial and personal resources at their disposal.²

- 1.10 The terms of reference concern two features of the legal system that can reduce the cost barrier and financial risk of litigation and offset any imbalance of power between the parties: the services of commercial litigation funders and the legal mechanism of group proceedings.
- 1.11 Litigation funders remove the financial risk by indemnifying plaintiffs for all costs if they lose, in return for a share of the award if they win. Group proceedings enable plaintiffs who have claims arising out of the same, similar or related circumstances to spread the risk and costs—and the award if successful—among the group members.
- 1.12 The types of case covered by the terms of reference commonly attract media attention and public debate. They often concern the actions of a well-known defendant, and the harm caused is shared by many people. Progress in resolving the matter may be seen as too slow. When a case is resolved, the outcome may be seen as inadequate or unfair. Recently, for example, there has been controversy about:
- payment of about \$3 million of a \$23.5 million settlement to thousands of investors in failed plantations group Great Southern, the remainder being used to pay legal fees³
 - an expected tax of about \$20 million on the interest accrued on settlement money for victims of the 2009 bushfires⁴
 - the amount for which the Murrindindi–Marysville fire class action settled, and how it is being distributed among the 5800 claimants⁵
 - the allocation of the full amount that was awarded to pay the entitlements of former employees of Huon Corporation to meet the litigation funder’s fee, legal fees and the administration and other costs of bringing the legal action on their behalf.⁶
- 1.13 While the Commission welcomes comments from people who have participated in group proceedings, whether as group members, parties, or in a professional capacity, individual cases will not be reviewed or assessed. The focus of the terms of reference is on system-wide issues and possible reforms.
- 1.14 The terms of reference ask the Commission to report on three principal matters:
- 1) Whether there is scope for the supervisory powers of Victorian courts or Victorian regulatory bodies to be increased in respect of proceedings funded by litigation funders.
 - 2) Whether removing the existing prohibition on law firms charging contingency fees would assist to mitigate the issues presented by the practice of litigation funding. (If it were removed, lawyers, like litigation funders, could be paid an agreed share of the funds recovered from settlement or judgment if the claim is successful.)
 - 3) Whether there should be further regulation of group proceedings (often called class actions).
- 1.15 In preparing the report, the Commission is asked to consider, among other matters, the implications of any reforms for the workload and requirements of the Supreme Court of Victoria; and relevant provisions and potential reforms in other jurisdictions.

2 Victoria Legal Aid, Submission No 67 to Department of Justice and Regulation, *Access to Justice Review*, March 2016, 2.

3 Sean Smith, ‘\$23m Great Southern Settlement’, *The West Australian* (Perth) 12 December 2014.

4 Pia Akerman, ‘Black Saturday Bushfire Victims Left to Count the High Cost of Class Actions’, *The Australian* (Sydney) 13 December 2016.

5 Pia Akerman, ‘Bushfire Victims Demand Inquiry into Legal Firm’, *The Australian* (Sydney) 22 May 2017.

6 Ben Butler, ‘Victims Get Nothing as Litigation Funder, Lawyers Share the Spoils’, *The Australian* (Sydney) 22 August 2016.

- 1.16 The Commission will not be reviewing the regulation of the litigation funding industry. Rather, it will be examining the impact that the commercial decisions of litigation funders are having on access to justice—and especially on the access that the introduction of group proceedings was intended to provide.

Litigation funding

- 1.17 ‘Litigation funding’, as used in the terms of reference and in this paper, refers to an arrangement between a commercial litigation funder and one or more potential litigants to pay the costs of the litigation in return for a share of the award if the claim succeeds. This type of arrangement is also known as ‘third-party litigation funding’ and ‘third-party financing’ because the litigation funder is a commercial entity that does not represent the litigant and has no other interest in the litigation.
- 1.18 The term does not refer to the financing of legal claims by another third party, such as a government agency or an insurer, or by the plaintiff’s lawyer working pro bono or under a ‘no win, no fee’ cost agreement. Such financing is excluded by the terms of reference.

Contingency fees

- 1.19 The Commission has been asked to report on whether removing the existing prohibition on law firms charging contingency fees would help to mitigate the issues presented by the practice of litigation funding.
- 1.20 ‘Contingency fees’ has a specific meaning in this context. It refers only to the practice of charging clients a percentage of the amount recovered if the claim is successful. While this is standard practice among litigation funders, lawyers are not permitted to charge on this basis.
- 1.21 Legal costs can be contingent on the outcome of legal action, but the amount charged is based on the regular fee (including an additional ‘uplift fee’ that is a percentage of the regular fee) rather than on the amount recovered. This is known as a ‘no win, no fee’—or ‘conditional cost’—agreement. The terms of reference expressly distinguish between a litigation funder and a lawyer acting on a ‘no win, no fee’ basis.

Group proceedings

- 1.22 ‘Group proceedings’ is the procedure in Victoria whereby a single representative can bring or conduct a claim on behalf of others in the same, similar or related circumstances. The term commonly used for all procedures of this type is ‘class action’. In this paper, the term class action is used except when discussing specific legislation.
- 1.23 The first Australian class action regime was established on 4 March 1992, when part IVA of the *Federal Court of Australia Act 1976* (Cth) came into effect.
- 1.24 A similar regime commenced in Victoria from 1 January 2000. It was initially established by Supreme Court rules for a group proceeding.⁷ Previous rules had allowed for a representative action procedure but they had been interpreted narrowly and fallen into disuse.⁸

⁷ *Supreme Court (General Civil Procedure) Rules 1996* (Vic) O 18A (repealed). In 1997, judges of the Supreme Court suggested to the Attorney-General that Victoria introduce legislation along the lines of pt IV of the *Federal Court of Australia Act 1976* (Cth). When this appeared unlikely to occur, the procedure was established by means of rules of court that came into operation on 1 January 2000: *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia* (2000) 1 VR 545, 549 (Brooking J).

⁸ *Supreme Court Act 1958* (Vic) s 62(1C); *Supreme Court Act 1986* (Vic) ss 34, 35. See also Victoria, *Parliamentary Debates*, Legislative Council, 4 October 2000, 431 (Marsha Thomson, Minister for Small Business).

- 1.25 The first case to be initiated under the new Victorian group proceeding rules was *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia*.⁹ Mobil challenged the Supreme Court's powers to make the rules and the Court of Appeal upheld them (by a majority). The Parliament subsequently passed the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), which introduced part 4A into the Supreme Court Act and backdated it to 1 January 2000.
- 1.26 Part 4A of the Supreme Court Act is substantially the same as part IVA of the Federal Court Act. Although the terms of reference concern the operation of Victorian law, and the recommendations of the Commission will relate to Victorian legislation and practice, the Commission is not confining the scope of its research to Victorian cases. Most class action litigation has been conducted in the Federal Court, and some of the most significant decisions have been made under the Commonwealth legislation. As the two regimes are similar, the Commission will be informed by the experience of both jurisdictions in undertaking this reference.

Previous reviews

- 1.27 Group proceedings, litigation funding—especially the funding of group proceedings by litigation funders—and the ban on law firms charging contingency fees have been subjects of protracted debate and various reviews over the past 25 years. Three reviews in particular have stimulated and shaped discussion of the issues and are frequently mentioned in this paper:
- the Australian Law Reform Commission's report *Grouped Proceedings in the Federal Court* (1988)¹⁰
 - the Victorian Law Reform Commission's *Civil Justice Review* (2008)¹¹
 - the Productivity Commission's report *Access to Justice Arrangements* (2014).¹²

Australian Law Reform Commission (1988)

- 1.28 The Australian Law Reform Commission's report on grouped proceedings in the Federal Court put forward recommendations for a class action regime, and included a draft Bill to establish it. Part IVA of the Federal Court Act is broadly based on that report.
- 1.29 Today, the report remains the first point of reference for discussion about the objectives of the Commonwealth's class action regime, the Victorian and other regimes that have been based on it, and the merits or otherwise of proposed reforms.
- 1.30 In a subsequent report on the adversarial system of litigation, published in 2000, the Australian Law Reform Commission discussed the procedural and ethical issues which arise in class actions and made recommendations to improve efficiency, transparency and fairness. It did not support the lifting of the ban on lawyers being able to charge contingency fees.¹³

9 (2000) 1 VR 545. On 24 January 2000, Schutt Flying Academy brought a claim against Mobil Oil on behalf of the owners, operators and pilots of light aircraft that had been grounded in the preceding two months because of what was thought to be contaminated fuel supplied by Mobil.

10 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

11 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

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

13 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [7.87]–[7.128]; Recommendations 78–82.

Victorian Law Reform Commission (2008)

- 1.31 In 2008, the Victorian Law Reform Commission completed a wide-ranging review of the civil justice system. The report contained 177 recommendations to make civil litigation cheaper, simpler and fairer. Many were implemented by the *Civil Procedure Act 2010* (Vic). Among the recommendations were:
- the introduction of new requirements for the disclosure of the identity of litigation funders and insurers exercising control over proceedings¹⁴
 - legislative amendments to improve remedies in class actions¹⁵
 - a call to reconsider the prohibition on lawyers charging contingency fees.¹⁶
- 1.32 The Commission is revisiting some of the issues that it considered at that time, and considering them afresh. Developments in class action procedure, the commercialisation of law practices and the growth of the litigation funding industry have substantially changed the context within which the issues need to be considered.

Productivity Commission (2014)

- 1.33 The Commonwealth has before it recommendations made by the Productivity Commission to strengthen consumer protections. If they are adopted, it will affect the reform options considered during this review.
- 1.34 The recommendations followed a review by the Productivity Commission of Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law. The private funding of litigation was among the comprehensive range of issues addressed by the report. The following recommendations are of particular relevance to the current review:
- establish a licence for litigation funding companies to verify their capital adequacy and properly inform clients of relevant obligations and systems for managing conflicts of interest
 - remove the ban on lawyers being able to charge contingency fees, except in family and criminal law matters, and apply a percentage cap on a sliding scale
 - amend court rules to ensure that the court's discretionary power to award costs against non-parties, and obligations to disclose funding agreements, apply equally to lawyers charging a contingency fee and litigation funders.¹⁷

International comparisons

- 1.35 The challenges and reform options that the terms of reference raise are being addressed internationally. While it is wrong to expect that replicating the policies and laws of another country will create the same results in Victoria, it is prudent to take account of overseas experience when exploring ways to resolve local issues.
- 1.36 The experience of three overseas jurisdictions is particularly relevant to this review:
- **The United States**, because the Australian Law Reform Commission drew from the law and experience of the United States when recommending a class action regime for Australia. The legal profession in the United States has long been able to charge contingency fees and—unlike plaintiffs in Australia, Canada and the United Kingdom—plaintiffs in the United States do not face the risk of paying the other side's costs if the litigation is unsuccessful.¹⁸

14 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 461, 471–2; Recommendation 86.

15 Ibid 521–60; Recommendations 101–7.

16 Ibid 687–8.

17 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 601–37; Recommendations 18.1–18.3.

18 Ibid 606.

- **England and Wales**, which has a national self-regulatory scheme for litigation funders overseen by the Association of Litigation Funders of England and Wales. England and Wales has recently removed the blanket prohibition on lawyers being able to charge contingency fees, to a muted response from the legal profession. In addition, there is extensive use of ‘after the event’ insurance. Comparisons must be made with care, because the litigation funding market is quite different to that in Australia for a number of reasons, and so are the issues.
- **Canada**, which does not have a large litigation funding industry, and now also allows lawyers to charge contingency fees, although the regulations vary between the provinces.¹⁹ Contingency fees are mainly charged in personal injury actions²⁰ but are less common in Canada than in the United States.

1.37 These and other features of the approaches taken by other countries are considered in this paper where relevant to the issues under discussion.

Summary of key issues

The purpose of the reference

- 1.38 The terms of reference make the purpose of the reference clear: to report on specified issues to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens when using the services of litigation funders and/or when participating in class actions. The Commission encourages submissions that discuss the features of litigation funding and class actions which contribute to any such exposure and how they could be addressed. For this reason, some of the questions posed in this paper are broad ranging and invite responses that might address more than one issue.
- 1.39 While it is likely that other issues will be raised in submissions and during consultations, the terms of reference indicate a number of areas where reform may be desirable and specific questions are asked about them in this paper. Although reform options have been identified, the Commission has not drawn conclusions about them and would welcome ideas about other alternatives.

Issues raised in this paper

The tripartite relationship between litigation funders, lawyers and plaintiffs

- 1.40 When a litigation funder is involved in legal proceedings, a tripartite relationship is established between the litigation funder, the plaintiff’s lawyers and the plaintiff. The litigation funder and lawyers are contractually obligated to each other as well as individually to the plaintiff.
- 1.41 Conflicts of interest exist in this relationship. They expose the plaintiff to the risk that the commercial interests of the litigation funder or the lawyers will be given priority over the plaintiff’s interests. In class actions, the lawyers act for all class members, who have competing needs that can give rise to conflicts of interest as well.
- 1.42 The conduct of litigation in class actions and the use of litigation funding are guided by lawyers’ professional responsibilities. Lawyers who act for clients are officers of the court. They have ethical duties to the court and the client. The potential conflict of interest between a lawyer’s duty to the client and the lawyer’s financial interest in the proceedings is frequently raised in public debate, particularly in relation to the ban on lawyers charging contingency fees. In 2016, the Chief Justice of the Federal Court, referring to class actions, stated:

¹⁹ In British Columbia, for example, there is a 40% limit on personal injury cases, while other provinces require fees to be ‘reasonable’ and subject to court approval.

²⁰ Rupert Jackson, *Review of Civil Litigation Costs*, Preliminary Report (The Stationary Office, May 2009) 635.

If commercial interests and commercial returns (as opposed to professional responsibilities) are seen to drive a substantial section of this work then the cost of defending claims and the public cost of providing the infrastructure for them will come to be seen as an impost on Australian business and public infrastructure that will not be seen as acceptable.²¹

- 1.43 The risk arising from conflicts of interest is usually managed through disclosure to the client of the fact that the conflict exists, and how it is being mitigated. The lack of transparency about the relationship between the litigation funder and the lawyers has led to calls for stronger disclosure requirements, as indicated by the terms of reference.
- 1.44 There is a further risk because litigation funders are not subject to any regulation that requires them to hold sufficient capital to meet their obligations. This risk is borne by the plaintiff, who is exposed if the litigation is unsuccessful and the litigation funder does not pay either the plaintiff's legal costs or the other side's costs. It is also borne by the defendant, although the risk can be mitigated by seeking an order for security of costs.

Comparisons between class actions funded by litigation funders and those that are not

- 1.45 As litigation funders have become involved in funding class actions, the contrast between two broad types of class actions appears more pronounced. Litigation funders select class actions that are low risk and profitable, and are notably for the benefit of shareholders and investors. Class actions for the benefit of vulnerable people, or for non-monetary award, or which are complex and likely to be costly and risky to prosecute, are conducted by law firms on a 'no win, no fee' basis or with funding support from government or the community.
- 1.46 Therefore, while litigation funding improves access to justice through the use of class actions, it does so only in narrow circumstances. Class actions are providing access to justice without the assistance of litigation funders, but the cases are resource intensive and few law firms can afford to conduct them on a 'no win, no fee' basis and carry the risk of losing.
- 1.47 The distinction between the two broad types of class actions is reinforced by differences in where they are filed. Litigation funders are involved in about half of the class actions filed under the Commonwealth class action regime and managed by the Federal Court. However, only 10 of the 80 class actions that have been filed under the Victorian class action regime have been funded by litigation funders.
- 1.48 The Supreme Court of Victoria allocates class actions between the Commercial Court, which manages mainly shareholder and investor class actions, and the Common Law Division, which manages class actions arising from natural disasters and personal injury and other mass torts. The supervision and management challenges differ between the two broad types of class actions and this raises questions about whether they should be subject to different procedural rules.

Gateway issues in class actions

- 1.49 A class action can commence if threshold requirements set out in the Supreme Court Act are met. Once it has commenced, the onus is on the defendant to prove that it should not continue as a class action. This has been identified as the reason why class actions are often subject to numerous interlocutory applications and satellite litigation. The alternative view, noted by the Federal Court, is that these applications are used as a tactic to avoid a trial and are not an unavoidable consequence of the current law.²²

21 Chief Justice J Allsop, 'Class Actions 2016 Key Topics' (Speech delivered at Law Council of Australia Forum, Sydney, 13 October 2016) Federal Court of Australia <www.fedcourt.gov.au/digital-law-library/judges-speeches/>.

22 *Bright v Femcare Ltd* (2002) 195 ALR 574, 607 [160].

- 1.50 It is possible that the incidence and impact of numerous interlocutory applications differs between class actions funded by litigation funders and those which are not. If so, different procedural or regulatory responses may be appropriate.

Settlement approval and distribution in class actions

- 1.51 Public debate and media attention about class actions commonly focus on the amounts recovered for class members at settlement compared to the amounts paid to the lawyers and litigation funders for bringing the proceedings. Concern is also expressed about the way the settlement amounts are distributed, and the associated administrative costs and delay.
- 1.52 Under their respective class action regimes, the Federal Court and the Victorian Supreme Court have introduced procedures and mechanisms to protect the interests of all class members when assessing legal costs and funding fees, allocating cost burdens and approving distribution schemes. The resource implications for the court, particularly in large scale class actions, are extensive. These developments raise questions about how in Victoria the Supreme Court can be better supported in this role.

Contingency fees

- 1.53 It is unclear whether lifting the ban on lawyers being able to charge contingency fees would improve access to justice through class actions other than those for the benefit of shareholders and investors. The Commission encourages submissions on this question, particularly from law firms that do not currently conduct class actions.

Structure of this paper

- 1.54 The first three chapters of this paper contain explanatory material. This chapter has described the scope of the review and outlined the issues arising from the terms of reference. Chapter 2 contains information about class actions and the involvement of litigation funders and law firms. Chapter 3 outlines the regulatory framework for litigation funding and the legal profession. Together, Chapters 2 and 3 are intended to assist readers who are unfamiliar with this area of law.
- 1.55 Chapters 4 to 8 address the reform proposals conveyed by the terms of reference. Chapter 4 discusses the adequacy of disclosures by litigation funders and lawyers to plaintiffs. While lawyers are subject to prescriptive disclosure requirements about legal costs and disbursements before and during proceedings, litigation funders are not. Litigation funders are required only to disclose information about conflicts of interest. There are no specific obligations on lawyers to disclose information to plaintiffs about the distribution of the amount recovered in damages or settlement when the litigation is successful.
- 1.56 In Chapter 5, the disclosure of funding agreements to the Court in proceedings supported by litigation funders is examined. There is currently no requirement to disclose litigation funding agreements to the Supreme Court of Victoria in class actions. The Court determines disclosure requirements on a case-by-case basis. In contrast, disclosure is mandatory in insolvency proceedings and class actions in the Federal Court.
- 1.57 Chapter 6 explores whether a certification requirement should be introduced to class actions, either in every case or only when the proceedings are financed by a litigation funder. If certification were required, a class action could not commence until the representative plaintiff proved to the court at a separate hearing that criteria had been met and the case should go forward as a class action. While certification is seen by proponents as a way to improve efficiency by eliminating unsuitable class actions, others have pointed to the risk that it would lead to an increase in appeals at the interlocutory stage and attendant inefficiencies.

- 1.58 The question of whether further criteria for approval of settlement of a class action should be introduced is discussed in Chapter 7. Another key issue is the question of how far the court should intervene in a funding agreement between the litigation funder and funded class members. The court's role in protecting unrepresented class members during settlement is an important consideration when addressing these issues.
- 1.59 Chapter 8 turns to the question of whether permitting lawyers to charge contingency fees would mitigate the issues of litigation funding. The issues discussed include:
- the limited case selection
 - the size of the funding fee
 - the subordination of the client's interests to commercial objectives.
- 1.60 Chapter 9 concludes the paper.
- 1.61 In preparing this consultation paper, the Commission was greatly assisted by preliminary consultations with academics, lawyers, litigation funders, judges of the Supreme Court of Victoria, Victoria Legal Aid and the Legal Services Commissioner. The publication of this paper marks the start of the formal consultation period. The questions posed in the paper are set out on page xiv. You are encouraged to read the relevant chapters which give background to the issues that the questions address.
- 1.62 The Commission invites written submissions in response to the questions by 22 September 2017. Information about how to make a submission is on page viii.

Policy context

- 12** Introduction
- 13** Litigation costs
- 17** Class actions
- 25** Growth in litigation funding
- 31** Entrepreneurialism in legal services

2. Policy context

Introduction

- 2.1 The terms of reference set out a list of specific issues concerning the supervision of proceedings funded by litigation funders and the regulation of class actions. These issues are discussed in Chapters 4–8. This chapter contains an overview of the context in which the issues arise.
- 2.2 It is often said that litigation funders provide access to justice through class actions by enabling class members to participate in legal action that otherwise would be too costly for them to pursue. It is also said that there would be even greater access to justice if lawyers could charge contingency fees as well.¹ The first part of this chapter describes the financial risk of undertaking litigation and how it can be reduced by litigation funders and lawyers and, when appropriate, class action proceedings. The discussion then turns to why lawyers are prohibited from charging contingency fees for their legal services.
- 2.3 Following this discussion is an overview of class action procedures—specifically those for group proceedings under part 4A of the *Supreme Court Act 1986 (Vic)*. Because the Commonwealth scheme that the Victorian legislation replicates has existed since 1992, it is possible to look back over 25 years of class actions to gain a sense of who may be exposed to unfair risks or disproportionate cost burdens and why.
- 2.4 The remainder of the chapter discusses two factors that have changed the way in which legal services are provided and funded, and class actions are conducted, in Australia: the growth of the litigation funding industry and the increased entrepreneurialism of legal services. Although a few major litigation funders and law firms have been at the forefront of these changes, both the litigation funding and legal services markets are evolving constantly and new competitors are having an effect on the balance of competing interests within the Commonwealth and state class action regimes.
- 2.5 Whether this is cause to regulate the litigation funding industry, or justification for not doing so, has been a topic of active debate for many years, and is the subject of a number of government reviews. As will be discussed in Chapter 3, the regulation of the industry is primarily a matter for the Commonwealth Government. It is relevant to the terms of reference of this review, but is not an issue on which the Commission has been asked to report.

Litigation costs

The cost-shifting rule and financial risk

- 2.6 The costs of litigation are typically the lawyer's fee plus the costs incurred by the lawyer in support of the litigation (disbursements).
- 2.7 Under the cost-shifting rule, the court usually orders the unsuccessful party to pay the other side's costs. This is known as an adverse costs order. The principle is generally known as 'costs follow the event'.²
- 2.8 In practice, the costs order covers only the successful party's reasonable legal costs, which are known as party/party costs. These costs are calculated from a standard scale which sets the amount that is recoverable from the losing party for work done.
- 2.9 The scale of costs reflects the level of importance of the matter, so cases in the Supreme Court are remunerated at a higher level than cases in the Magistrates' Court. Actual legal fees in litigation commonly exceed those set out in the scale. The difference is known as solicitor/client costs.
- 2.10 The prospect of paying an adverse costs order as well their own costs if they lose can represent a significant risk to anyone contemplating legal action. Not only might it be necessary to shoulder a greater financial burden, there is no way to determine how much it might be. One party cannot control the legal expenses incurred by the other, which can be substantial when the other party is well resourced.
- 2.11 In addition, in some circumstances the court may order the plaintiff to pay, or prove that they can pay, the defendant's costs before the litigation proceeds any further.³ This is known as a 'security for costs order'.
- 2.12 The advantage of the cost-shifting rule is that it discourages legal action that has no merit or is speculative. It is often identified as a key reason why the amount of litigation in Australia has not reached the levels experienced in the United States, where the rule does not apply.⁴ The disadvantage is that the financial risk and burden deter those with legitimate claims from enforcing their rights.
- 2.13 For some of the most vulnerable members of the community, the financial risk and cost of litigation can be reduced with the assistance of publicly funded and pro bono legal services. In its 2014 report, *Access to Justice Arrangements*, the Productivity Commission estimated that eight per cent of households meet the income and assets tests for legal aid.⁵ The remainder, including most middle- and low-income earners as well as those on higher incomes, and commercial entities, have to find other ways of meeting the costs of taking legal action.
- 2.14 For some, financial arrangements offered by litigation funders and law firms can reduce the financial risk by indemnifying the plaintiff for some or all of the costs of losing. In return, the costs paid by the plaintiff if the litigation succeeds are greater. A litigation funder will take a percentage of the settlement negotiated by the parties or the damages awarded by the court, while the law firm will charge a premium on its usual fees. In class actions, both a litigation funder and a law firm will be involved—and possibly an insurer as well. Their combined share can be as much as, or more than, the plaintiff's. Whether these arrangements should be placed under greater scrutiny and control by the court is discussed in Chapters 5 and 7.

2 The principle applies generally, and not just in litigation, but there are several exceptions. In matters heard by administrative tribunals and in some areas of law, eg family, employment and criminal law, the parties to proceedings usually cover their own costs.

3 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 62.

4 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 612.

5 *Ibid* 20.

Funding agreements with litigation funders

- 2.15 Typically, the litigation funder enters an agreement with the plaintiff to meet the costs of the litigation. Terms vary, but the funder is likely to pay the legal fees and disbursements directly to the plaintiff's lawyers. The funder usually also agrees to provide any security for costs that the court orders the plaintiff to give, and to pay any adverse costs orders if the litigation is unsuccessful.
- 2.16 The plaintiff agrees to reimburse the litigation funder out of any funds recovered by way of damages awarded by the court or settlement negotiated by the parties. Money received from the defendant for the plaintiff's legal costs will be directed to the litigation funder. The funder also receives a percentage of the damages or settlement amount, which is calculated either on the full amount recovered or on the amount remaining after reimbursement. This is known as the 'funding fee'.
- 2.17 The percentage of the recovered funds that litigation funders charge in return for their services varies. The typical range appears to be between 20 and 45 per cent,⁶ although in some insolvency cases it has been 75 per cent.⁷
- 2.18 Although the funding agreement is executed by the plaintiff, the terms are often negotiated between the funder and the plaintiff's law firm. This is seen particularly in class actions, where there is a complex tripartite relationship between the litigation funder, the law firm and the representative plaintiff.⁸
- 2.19 The litigation funding agreement is at the core of the issues raised by the terms of reference not only because it determines the allocation of risks, costs and rewards, but because it provides the framework for the relationship between the funder and the law firm.⁹ The Commission has been told in preliminary discussions with a number of stakeholders that there are serious concerns about conflicts of interest, which are heightened when there is inadequate disclosure to the plaintiff. Disclosures to plaintiffs are discussed in Chapter 4. Questions about the distribution of the amount recovered are raised in Chapter 7.

Conditional costs agreements with law firms

- 2.20 Law firms in Victoria have long been able to charge on a conditional or 'no win, no fee' basis.¹⁰ Under a conditional costs agreement, the plaintiff pays no legal fees if the litigation is unsuccessful. If it is successful, the plaintiff pays the fees plus a premium (or 'uplift fee') of not more than 25 per cent of the legal costs payable (excluding disbursements).¹¹ The plaintiff is usually required to meet all other costs that arise, including for disbursements and any adverse costs order.
- 2.21 The uplift fee compensates the law firm for taking on the risk of not being paid at all if the litigation is unsuccessful. The agreement must identify the basis on which the uplift is to be calculated and an estimate of how much it will be.
- 2.22 If the litigation succeeds, the other party will pay some of the plaintiff's costs, but not the uplift fee.¹² However, Funds in Court, an office of the Supreme Court of Victoria, told the Productivity Commission that lawyers almost invariably charge the full 25 per cent uplift fee regardless of the risk involved, even where the plaintiffs have a strong case with no prospect of losing.¹³ It also appears that law firms are paid an uplift fee even when the proceedings are funded, and the risk shouldered, by a litigation funder.¹⁴

6 Ibid 622.

7 Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper (2006) 4.

8 Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36 *Civil Justice Quarterly* 244, 246–9.

9 Ibid.

10 Currently permitted by *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ('Legal Profession Uniform Law') s 181.

11 Ibid sch 1 *Legal Profession Uniform Law* s 182.

12 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 603.

13 Ibid 605. The Productivity Commission concluded that there needs to be better oversight to ensure that lawyers do not charge the full 25% when this is not warranted: 625.

14 IMF Bentham Ltd, *Funding for Insolvency and Restructuring Professionals* (2017) <www.imf.com.au/practice-areas/funding-for-insolvency>.

- 2.23 The Legal Profession Uniform Law, at schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic), sets out the minimum details that a conditional costs agreement should contain; what the client should be told; and the sanctions for lawyers who do not comply.¹⁵
- 2.24 Conditional costs agreements are sometimes seen as a form of litigation funding because the law firm takes on some of the risk that the plaintiff otherwise would have to bear. The terms of reference specify that the term 'litigation funder' is not intended to apply to lawyers acting on a conditional basis. While the Commission is not reviewing conditional costs agreements, the way in which these agreements are regulated is relevant to any discussion about the regulation of litigation funding agreements.

'After the event' insurance

- 2.25 'After the event' insurance protects the insured against the risk of having to pay the other side's costs if they lose. The cover also typically includes any adverse costs order against the insured and their disbursements, but not legal costs.¹⁶ Unlike standard insurance policies, which are purchased before an event that would trigger payment occurs, after the event insurance is purchased once a dispute has arisen or specific proceedings are contemplated.
- 2.26 The premium is usually payable only if the litigation is successful. The cost is variable. The sooner the case is resolved in the plaintiff's favour, the lower the premium. However, if the other side refuses to settle and the case proceeds to trial, the risk is greater and so is the premium. The cost of after the event insurance tends to be between 20 and 40 per cent of the policy indemnity limit.¹⁷
- 2.27 After the event insurance is prevalent in the United Kingdom. It was encouraged by government as a means of improving access to justice by overcoming the deterrent effect of the cost-shifting rule. It is usually linked to a funding agreement with a litigation funder or a conditional cost agreement with a lawyer. Where there is no litigation funder, after the event insurance can complement a conditional costs agreement with a lawyer, by covering the risk of having to pay an adverse costs order and disbursements. If a litigation funder is involved, after the event insurance can provide security of costs, thereby reducing the funder's exposure and freeing up funds that otherwise would be paid into court.¹⁸ In either case, the plaintiff bears no risk.
- 2.28 The Commission has been told that after the event insurance policies are not widely used in Australia because of the high cost of the premium. In addition, the cost of the premium cannot be recovered from the losing party in an adverse costs order. After the event insurance did not become popular in the United Kingdom until the premium was made recoverable.¹⁹

15 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ('Legal Profession Uniform Law') ss 181–2.

16 Rebecca LeBherz and Justin McDonnell, *ATE Insurance and Implications for Class Actions in Australia* (30 September 2014) King & Wood Mallesons <www.kwm.com/en/au/knowledge/insights/ate-insurance-and-implications-for-class-actions-in-australia-20140930>.

17 Ibid.

18 The Supreme Court in *Australian Property Custodian Holdings Ltd (in liq) v Pitcher Partners* [2015] VSC 513 (24 September 2015) approved a deed of indemnity offered by a foreign insurer as security for a defendant's adverse costs in litigation.

19 Premiums were made recoverable in 1999, which led to significant increases in both the number of providers and the size of the premiums. Since 2013, premiums are recoverable only in certain limited circumstances: Rebecca LeBherz and Justin McDonnell, *ATE Insurance and Implications for Class Actions in Australia* (30 September 2014) King & Wood Mallesons <www.kwm.com/en/au/knowledge/insights/ate-insurance-and-implications-for-class-actions-in-australia-20140930>.

- 2.29 Most policies taken out in Australia are from brokers operating overseas. The Commission was told that there may be only one major insurance broker based in Australia offering a policy of this type.²⁰ However, it does appear that after the event insurance is increasingly being used in conjunction with litigation funding agreements and/or conditional costs agreements. If the litigation is successful, the premium is another cost taken out of any funds recovered (in addition to deductions for the litigation funding fee, legal costs and disbursements) before the plaintiff receives their share.

The ban on contingency fees for legal services

- 2.30 Contingency fees, also referred to as ‘proportionate fees’, ‘damages-based billing’ or ‘percentage-based contingency fees’, are payments calculated as a proportion of the result achieved. Litigation funders charge a contingency fee, expressed as a percentage of the amount recovered by way of damages awarded by the court, or by settlement negotiated by the parties.
- 2.31 In Australia, lawyers are prohibited from charging contingency fees. In Victoria, the Legal Profession Uniform Law states that any contravention of the prohibition will constitute professional misconduct and attract a civil penalty.²¹ However, long before the ban was articulated in legislation, it existed at common law.
- 2.32 Its origins lie in the common law crime and tort of maintenance and champerty. Maintenance is the ‘procurement by direct or indirect financial assistance of another person to institute or carry on or defend civil proceedings without lawful justification’.²² Champerty is a form of maintenance in which a share of the proceeds of the litigation is agreed as the reward for the assistance given.²³ Both seek to prevent litigation processes being subverted by someone who is not a party to the proceedings and has a financial interest in achieving a particular result.
- 2.33 Maintenance and champerty were largely abolished in Victoria many years ago,²⁴ but the prohibition on lawyers being rewarded from the proceeds of litigation has been retained through successive legislation for regulating the profession. The ban is underpinned by public policy concern that contingency fees create perverse incentives for lawyers who have a direct financial interest in decisions affecting the litigation they are involved in.²⁵
- 2.34 The constancy of the ban belies the fact that there has been long and robust debate about whether it should be removed.²⁶ The legal profession is divided. While the Law Institute of Victoria has advocated for the introduction of contingency fees for lawyers since 1988,²⁷ the Legal Services Commissioner opposes the idea,²⁸ as does the Victorian Bar.²⁹ The Law Council of Australia settled on a position in support of the status quo only after thorough reappraisal of the arguments for change.³⁰

20 See, eg, National Insurance Brokers Association, *Australians Can Now Insure Themselves Against Loss at Trial* (25 October 2016) Insurance & Risk </www.insuranceandrisk.com.au/australian-can-now-insure-themselves-against-loss-at-trial/>.

21 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (‘Legal Profession Uniform Law’) s 183.

22 Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty*, Report No 7 (1966) vol 1, [9] cited in G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 58.

23 *Ellis v Torrington* (1920) 1 KB 399, 412 cited in G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 58.

24 For Victoria, see *Abolition of Obsolete Offences Act 1969* (Vic) ss 2, 4. See also the High Court decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

25 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 601.

26 On 1 February 1977 the Attorney-General referred the issue to the Australian Law Reform Commission to report on the adequacy of existing law relating to class actions and included the question on contingency fees. See Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988).

27 Law Institute of Victoria, *Funding Litigation—The Contingency Fee Option* (1988). See also Law Institute of Victoria, *Percentage-Based Contingency Fees*, Position Paper (17 February 2016).

28 Michael McGarvie, Victorian Legal Services Commissioner, *Opinion: Contingency Fees Will Fail Us* (Media Release, 3 March 2016) <www.lsb.c.vic.gov.au/documents/Opinion-Contingency_fees_will_fail_us-2016.pdf>.

29 The Victorian Bar, *Percentage Based Contingency Fee Agreements*, Position Paper (11 November 2015).

30 The Commission has been informed that, in May 2014, the Law Council of Australia Working Group on Contingency Fees was asked to explore the issues of contingency fee agreements and recommended lifting the ban. In April 2016, after reviewing the arguments for and against, the Directors of the Law Council decided not to accept the Working Group’s recommendations.

- 2.35 Since 1988, at least 10 Victorian and Commonwealth parliamentary and government reports—including the Commission’s 2008 Civil Justice Review—have considered contingency fees.³¹ The arguments most often made both for and against the ban are summarised in the Appendix (see page 124).
- 2.36 The key arguments for retaining the ban are that allowing lawyers to charge contingency fees would:
- create conflict of interest between the lawyer’s duties to their client and the court and their own financial interest in the outcome of litigation
 - encourage litigants to pursue unmeritorious cases because it removes a financial impediment to litigation, which may prompt an epidemic of unreasonable litigation against corporate defendants who may be willing to settle to avoid the nuisance of litigation
 - generate fees unrelated to the value of the work performed, whereas fees should properly reflect the nature of the legal services provided.
- 2.37 Advocates for lifting the ban have commonly put forward the following reasons:
- Lifting the ban would increase access to justice by removing or reducing cost disincentives. Contingency fees transfer some of the risk from the client to the lawyer, who is better able to assess the risk.
 - Contingency fees are routinely charged by litigation funders, who are often directly involved in decision making about the progress of the cases they fund. They are now also routinely charged by some accounting firms providing assistance in connection with litigation; liquidators; costs consultants; and other companies providing services in connection with litigation.
 - Consumers of legal services would have an easier way to compare legal services fees and have more choice.
- 2.38 The terms of reference ask whether lifting the ban would assist in mitigating issues presented by the practice of litigation funding; they do not call for the Commission to review whether the ban should be lifted. However, in addressing this question, the pros and cons of removing the ban need to be taken into account. This issue is discussed in more detail in Chapter 8.

Class actions

- 2.39 As discussed in Chapter 1, Victoria’s class action regime was established by part 4A of the Supreme Court Act in 2000. It is closely based on part IVA of the *Federal Court of Australia Act 1976* (Cth) that commenced in 1992.
- 2.40 Both the Victorian and Commonwealth regimes were based on existing representative action procedures in each jurisdiction that had not been widely interpreted.³² They are still available today. In Victoria, representative proceedings may be brought under order 18 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) where ‘numerous persons have the same interest in any proceeding’. Any one or more of those persons may represent some or all of the others.

31 Commonwealth reports include: Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988); Access to Justice Advisory Committee, *Access to Justice an Action Plan* (1994); Law Reform Commission, *Costs Shifting—Who Pays for Litigation*, Report No 75 (1995); and *Managing Justice—A Review of the Federal Civil Justice System*, Report No 89 (2000); Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014). In Victoria: Law Reform Commission of Victoria, *Restrictions on Legal Practice*, Discussion Paper No 23 (1991); Law Reform Commission of Victoria, *Access to the Law: Restrictions on Legal Practice*, Report No 47 (1992); Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

32 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General); Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia’ (2006) 30 *Melbourne University Law Review* 399, 401.

- 2.41 The introduction of class actions increased the scale of proceedings. Hundreds of individual plaintiffs are able to seek compensation for mass wrongs through the legal system for large-scale losses caused by government agencies, corporations or other large defendants. Their losses can be recovered more efficiently and at less individual cost.
- 2.42 With the subsequent introduction of class action regimes in New South Wales³³ and Queensland,³⁴ both largely modelled on the Commonwealth legislation, and the possibility that Western Australia will follow suit,³⁵ large-scale litigation of this type is a well-entrenched feature of Australia’s legal landscape.

Overview of the Victorian scheme

- 2.43 The procedures for class actions in the Supreme Court of Victoria are set out in the Supreme Court Act, the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and the Court’s practice note on the conduct of class actions.³⁶ They are discussed in detail in Chapters 3–7. The following is a brief overview of the Victorian scheme.
- 2.44 A class action—or, to use the language of the legislation, a ‘group proceeding’—can be brought when seven or more persons have related claims against the same defendant. The claims must be ‘in respect of or arise out of the same, similar or related circumstances’. Each must ‘give rise to a substantial common question of law or fact’.³⁷
- 2.45 The proceedings are commenced by a representative of the class, who takes on the role of plaintiff. In this paper, the representative is called the ‘representative plaintiff’.³⁸ The representative plaintiff is typically selected by the group’s lawyers. Only the representative plaintiff is liable for any cost orders. The other members of the class are generally not liable.³⁹
- 2.46 The membership of the class is not confined to the participants in the proceedings. All members are included unless they expressly exclude themselves, or ‘opt out’. In practice, this means that a class action can begin without the express consent of every member.⁴⁰ A member who does not opt out is bound by the outcome of the proceeding.⁴¹
- 2.47 The opt out approach was adopted to promote access to justice. Class members who cannot be identified at the outset, or who are unable to participate due to social or economic barriers, are not excluded from the legal system and a potential remedy.⁴²
- 2.48 Unlike international practice, there is no preliminary approval or certification procedure whereby the representative plaintiff proves to the Court that certain preliminary criteria have been met and that the case should go forward as a class action. Instead, the onus is on the defendant to challenge whether the proceedings should continue as a class action or by some other means.⁴³ The terms of reference raise the question as to whether there should be a certification process. This is discussed in Chapter 6.

33 *Civil Procedure Act 2005* (NSW) pt 10. It commenced on 4 March 2011.

34 *Civil Proceedings Act 2011* (Qld) pt 13A. The new class action regime commenced on 1 March 2017.

35 In 2015, the previous Western Australian Government had supported in principle the Law Reform Commission of Western Australia’s recommendation that a class action regime be established: Western Australia, *Parliamentary Debates*, Legislative Council, 21 October 2015, 7558b (Michael Mischin, Attorney-General). The current Government’s platform included a commitment to introduce class actions: WA Labor, *Comprehensive Evidence-Based Approach to Reduce Crime and Protect Victims* (6 January 2017) <www.markmcgowan.com.au/news/comprehensive-evidence-based-approach-to-reduce-crime-and-protect-victims-1276>. See also Law Reform Commission of Western Australia, *Representative Proceedings*, Final Report Project 103 (2015).

36 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.

37 *Supreme Court Act 1986* (Vic) s 33C(1).

38 The term used in the legislation is ‘plaintiff’: *Supreme Court Act 1986* (Vic) s 33A (definition of ‘plaintiff’). The term ‘representative plaintiff’ is used in this paper to distinguish between the plaintiff in class actions, who is representing the class, and the plaintiff in ordinary litigation.

39 *Supreme Court Act 1986* (Vic) s 33ZD; *Federal Court of Australia Act 1976* (Cth) s 43(1A). Class members who seek a determination of a question as a representative of a sub-group or individually may be liable for costs: *Supreme Court Act 1986* (Vic) ss 33Q, 33R.

40 *Supreme Court Act 1986* (Vic) s 33E.

41 *Ibid* s 33ZB.

42 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 49.

43 *Supreme Court Act 1986* (Vic) ss 33M, 33N(1).

- 2.49 The Court has broad powers to supervise and manage the proceeding. Apart from its powers to determine a range of procedural requirements, it has the power to make any order it thinks appropriate or necessary to ensure that justice is done.⁴⁴ Over time, the degree of judicial scrutiny of class action settlements, litigation funding charges and the distribution of settlement proceeds has been increasing.⁴⁵
- 2.50 A class action may not be settled or discontinued without the Court's approval.⁴⁶ Most are settled.⁴⁷ The Court may make such orders as it thinks fit about the distribution of any money paid under a settlement or paid into court, including interest.⁴⁸ It will also require notice to be given to class members⁴⁹ and a hearing as to whether the settlement is 'fair and reasonable'.⁵⁰ Issues concerning settlement are discussed in Chapter 7.

Impact on access to justice

- 2.51 Class action regimes are expected to improve access to justice by resolving disputes more efficiently and reducing costs for the parties and the courts. When debating legislation to establish the Commonwealth regime under part IVA of the Federal Court Act, the Commonwealth Attorney-General said that the regime was intended to achieve two objectives:

The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action.

The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions.⁵¹

- 2.52 Commenting earlier this year on the 25th anniversary of the class action regime under part IVA of the Federal Court Act, Justice Bernard Murphy of the Federal Court said:

It is important to remember that before the class action regime was introduced, it was either impossible, or at least exceedingly rare for consumers, cartel victims, shareholders, investors and the victims of catastrophe to recover compensation, even when misconduct was plain.⁵²

44 Ibid s 33ZF.

45 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 32–7.

46 *Supreme Court Act 1986* (Vic) s 33V.

47 Data provided by Vince Morabito, 2 June 2017.

48 *Supreme Court Act 1986* (Vic) s 33V.

49 Ibid s 33X(4).

50 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017 [13]. As to whether the terms of the settlement are fair, the Court relies on the plaintiff's lawyers to ensure that it has evidence addressing the requirements in the practice note. In *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012), the Supreme Court expressed a preference for an opinion, akin to that of an expert witness, which candidly evaluated the strengths and weaknesses of a party's case over submissions on the settlement from the lawyer: see Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 599.

51 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

52 Sarah Dankert, 'We Should Worry About Corporate Wrongs, Not Class Actions: Judge', *The Age* (Melbourne), 22 March 2017.

- 2.53 Certainly, the class action regimes in Australia have improved access to the justice system. They have created economies of scale that have made legal action financially viable to recover small losses. They have allowed costs to be spread across a large number of claimants, so that the burden on each is reduced. They have also reduced the cost burden on defendants and the pressure on court resources by avoiding numerous individual claims arising from the same or similar circumstances. Hundreds of claims can be resolved at once by settlement or judgment.⁵³
- 2.54 It has also been observed that class actions help to overcome social and psychological factors, such as ignorance of rights or the fear of action, which can be barriers to justice because they discourage individuals from taking steps to enforce their legal rights.⁵⁴
- 2.55 To gain a clearer sense of how well the objectives are being met by the Victorian class action regime, it is useful to consider more closely the number of class actions that have been filed in the Supreme Court and, for comparison and context, in the Federal Court. Professor Vince Morabito of Monash University has been compiling data about class actions, reaching back to the commencement of the Commonwealth regime in 1992, and the next section draws on some of his key findings.

Number and types of class action claims filed

Australia

- 2.56 The access that class actions provide to the justice system should not be overstated. They account for only about 0.1 per cent of all litigation in Australia.⁵⁵
- 2.57 Although concerns were raised that it would encourage a proliferation of litigation,⁵⁶ the Commonwealth Government expected the introduction of its class action regime to generate only a ‘small number of additional cases’.⁵⁷ Over the 24 years from then to 3 March 2016, 370 class actions were filed in the Federal Court—an average of 15.4 each year.⁵⁸ Use of the class action regimes in Victoria and New South Wales has been even more modest.⁵⁹
- 2.58 Table 1 is drawn from Professor Morabito’s data about the number of class actions filed, and average annual rates of filing, across the three jurisdictions until 3 March 2016. No comparative data is given on Queensland’s class action regime because it did not commence until 1 March 2017.

Table 1: Class actions filed in Australia to 3 March 2016⁶⁰

Jurisdiction	Class action regime commenced	No of class actions filed	Annual average to 3 March 2016
Commonwealth	4 March 1992	370	15.4
Victoria	1 January 2000	78	4.8
New South Wales	4 March 2011	19	3.8
All	-	467	19.4

53 Michael Legg, ‘ADR and Class Actions Compared’ in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012) 180, 187.

54 Ben Phi and Odette Phi, ‘Arming the Courts in Collective Redress—A Move to “Australian-Style” Class Actions in the UK?’ (2017) 36 *Civil Justice Quarterly* 197, 199.

55 Maurice Blackburn, ‘Class Action Myths Exposed: Productivity Commission Submission’ (Media Statement, 15 November 2013) <www.mauriceblackburn.com.au/about/media-centre/media-statements/2013/>.

56 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1991, 3284 (Peter Costello).

57 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

58 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016), 2 <<https://ssrn.com/abstract=2815777>>.

59 Vince Morabito, ‘Empirical Perspectives on 25 Years of Class Actions’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 45.

60 Data drawn from Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016) <<https://ssrn.com/abstract=2815777>>.

- 2.59 While the annual average figures provide a general sense of how many class actions have been filed, it is important to note that:
- The numbers have fluctuated from one year to the next. During the first eight years of operation of the Victorian regime, a total of 22 class actions were filed, at an average of 2.75 per year. During the next eight years, 55 were filed, at an average of 6.8 per year.
 - The 467 class actions shown in Table 1 were brought with respect to a total of 303 legal disputes. Seventy (15 per cent) were competing class actions. While, nationally, an average of 19.4 class actions were filed each year over the period shown on the table, they referred to, on average, 12.6 different legal disputes.⁶¹
- 2.60 The types of claim that have been filed under the various class action regimes in Australia encompass a broad range. Justice Murphy and Professor Morabito have categorised them in the following way:⁶²
- **Disaster class actions.** Notably for the Victorian class action regime, the six class actions on behalf of victims of the ‘Black Saturday’ bushfires in February 2009 fall within this category. The class action brought in relation to the Kilmore East–Kinglake bushfire concerned more than 10,000 claims of loss or damage, and settled after a 12-month trial for almost \$500 million.⁶³ It is Australia’s largest-ever class action settlement. Another class action within this category concerned the two-week shut-down in the supply of gas to most of Victoria after the Longford gas plant explosion in 1998. It settled in 2004 for \$32.5 million for the benefit of businesses that had suffered loss as a result of property damage or other loss related to property damage.⁶⁴
 - **Claims under the Migration Act.** These are claims made on behalf of asylum seekers and others in connection with the operation of Commonwealth migration law. They declined in number after October 2001, when the *Migration Act 1958* (Cth) was amended to prohibit class actions relating to visas, deportations or removal of non-citizens.
 - **Personal injury through food, water or product contamination.** These claims have also declined in number following amendments to tort law in 2002 to limit personal injury claims. A recent Victorian class action concerning soy milk, brought on behalf of 497 claimants, settled for \$25 million.⁶⁵
 - **Personal injury through defective products.** There have been many of these, particularly regarding defective medical devices and medications. Examples of Victorian class actions in this category are those concerning travel sickness pills⁶⁶ and acne medication.⁶⁷
 - **Shareholder class actions.** More than 60 class actions have been brought against listed companies for misleading or deceptive conduct or for breaching continuous disclosure requirements. A major case of this type in Victoria was proceedings by shareholders of the National Australia Bank which settled for \$115 million.⁶⁸
 - **Investor class actions.** More than 90 Commonwealth class actions have been filed on behalf of investors regarding promoters of various investments.

61 Ibid.

62 Justice Bernard Murphy and Vince Morabito, ‘The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 22–8.

63 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014).

64 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 4)* [2004] VSC 466 (8 November 2004).

65 *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (7 May 2015) [7]. After providing for the costs of the proceedings and for the administration of the settlement, about \$16.5 million was available for distribution among the class members.

66 *Reynolds v Key Pharmaceuticals Pty Ltd* (unreported, Supreme Court of Victoria, No 5621 of 2002).

67 *Vlamos v Roche Products Pty Ltd* (unreported, Supreme Court of Victoria, No 8045 of 2012).

68 *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012). Legal and other costs, and the litigation funder’s commission, had to be deducted from this amount before distribution of the balance to class members.

- **Anti-cartel class actions.** There have been only five class actions concerning cartel conduct, all under the Commonwealth regime.
- **Consumer class actions.** These have concerned misrepresentations about goods that were sold, bank fees, and claims against car manufacturers.
- **Environmental class actions.** Class actions in this category in Victoria include a claim by owners of property in Cranbourne whose property values were allegedly reduced by methane gas from a disused landfill. This case settled for \$23.5 million.⁶⁹
- **Human rights class actions.** These class actions in particular have enabled vulnerable members of the community to obtain access to justice. A recent example of a Victorian class action in this category was the claim made on behalf of asylum seekers and refugees about the legality and conditions of their detention at the Manus Island detention centre.⁷⁰
- **Trade union class actions.** Class actions within this category have concerned employment issues such as underpayment claims,⁷¹ disputes about employer conduct in obtaining workplace agreements,⁷² and orders against imminent termination of employment.⁷³
- **Miscellaneous.** Various class actions do not fall within any of the above categories. A Victorian example is a class action by women who were infected with Hepatitis C at a medical clinic.⁷⁴

2.61 Based on their analysis of the cases, Justice Murphy and Professor Morabito have concluded that:

In our view, the number of claimants, the variety of their claims, and the diversity of the types of people and entities who have had access to justice through the class action procedure shows that the regime allows substantial and broad-based access to justice.⁷⁵

Victoria

2.62 Proceedings under part 4A of the Supreme Court Act are allocated between the Common Law Division and Commercial Court.⁷⁶ The Common Law Division manages proceedings founded, or concurrently brought, in tort and in breach of contract or statute. Class actions allocated to this Division tend to fall within the disaster, environmental and personal injury categories above.

2.63 The Commercial Court hears and determines cases of a commercial nature, such as those arising out of ordinary commercial transactions, or which raise a question of importance in trade and commerce, or in which a remedy is sought under the *Corporations Act 2001* (Cth) or the *Australian Securities and Investments Commission Act 2001* (Cth). The class actions it manages are mainly shareholder and investor class actions.

2.64 Figure 1 shows a breakdown by type of the class action proceedings filed under the Victorian regime.

69 *Wheelahlan v City of Casey* [2011] VSC 215 (23 May 2011). Of the settlement amount, \$17.25 million was allocated to the compensation of class members.

70 *Kamasae v Commonwealth of Australia (No 2)* (LPP Ruling) [2016] VSC 404 (20 July 2016) [1].

71 *Construction, Forestry, Mining and Energy Union v Contract Blinds Pty Ltd* [2009] FCA 572 (28 May 2009).

72 *Smith v University of Ballarat* (2006) 229 ALR 343.

73 *Patrick Stevedores No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.

74 *A v Peters* [2011] VSC 478 (23 September 2011).

75 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 28.

76 For a full explanation of the allocation of proceedings between the two divisions, see Supreme Court of Victoria, *Practice Note SC Gen 2—Structure of the Trial Division*, 30 January 2017.

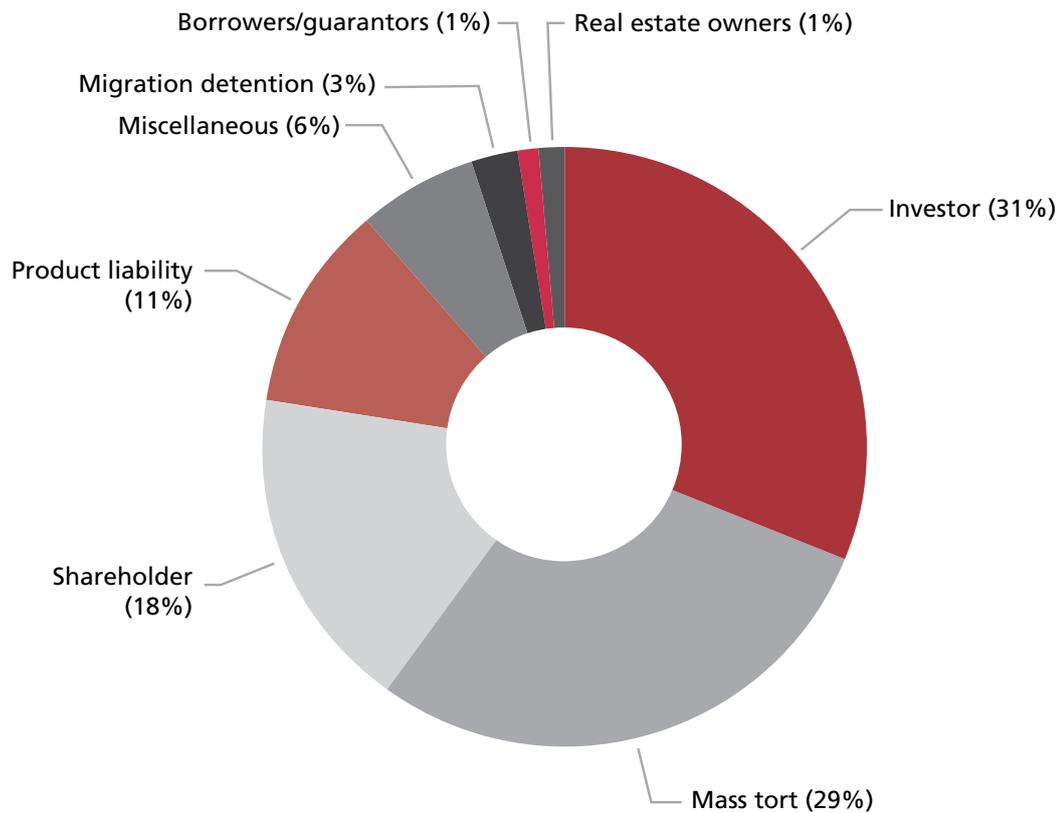


Figure 1: Part 4A proceedings by type 1 January 2000–3 March 2017⁷⁷

- 2.65 The total number of proceedings filed under part 4A of the Supreme Court Act, as at 3 March 2017, is 80. The number managed by each Division is similar: 41 were managed by the Common Law Division and 39 by the Commercial Court. However, the total number of disputes was 57.
- 2.66 A significant contributor to the disparity between the number of disputes and number of proceedings is the legal action arising from the failure of plantations group Great Southern.⁷⁸ Sixteen separate class actions were brought on behalf of the thousands of investors affected. The resultant spike this caused in the Commercial Court’s workload can be seen in Figure 2, which shows the distribution of cases filed between January 2000 and 3 March 2017. The management of competing class actions is discussed in Chapter 7.

⁷⁷ Data provided by Vince Morabito, 2 June 2017 and 27 June 2017. ‘Mass torts’ includes the disaster class actions, and the Cranbourne landfill and Hepatitis C class actions, mentioned in [2.60]. ‘Product liability’ encompasses the two ‘personal injury’ categories mentioned in [2.60]. ‘Migration detention’ includes the Manus Island class action mentioned in [2.60].

⁷⁸ *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 516 (11 December 2014).

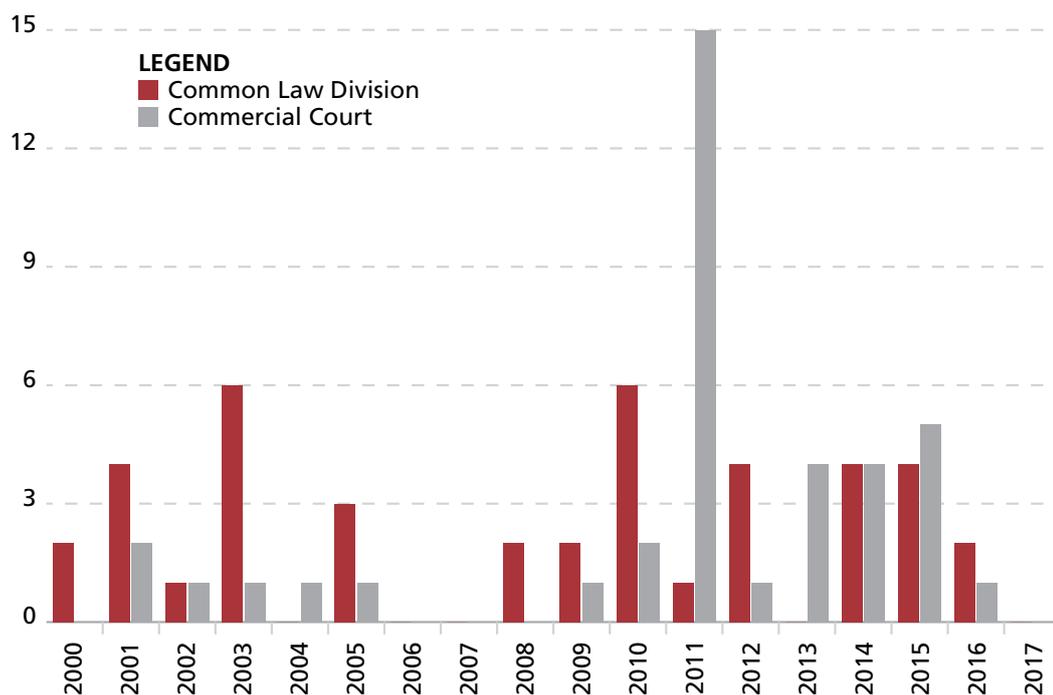


Figure 2: Part 4A proceedings by Supreme Court Division 1 January 2000-3 March 2017⁷⁹

Outcomes of class actions

- 2.67 Sixty-five per cent of all class actions under the Victorian regime have settled. This compares favourably with the rate of 48.7 per cent for all class actions under the Commonwealth regime. However, the proportion of Commonwealth class actions that have settled has increased significantly in the past 12 years, from 39.6 per cent to 62.4 per cent. Nationally, at least \$3.5 billion has been paid by defendants pursuant to judicially approved class action settlements.⁸⁰
- 2.68 Figure 3 shows how class actions resolved under the Victorian regime. A high proportion of cases in both Divisions have settled (69 per cent in the Common Law Division, and 62 per cent in the Commercial Court). Common Law Division class actions have been discontinued by the representative plaintiff more often, and transferred to another court less frequently, than Commercial Court cases.

79

Data drawn from Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016) <<https://ssrn.com/abstract=2815777>>.

80

Data provided by Vince Morabito, 2 June 2017.

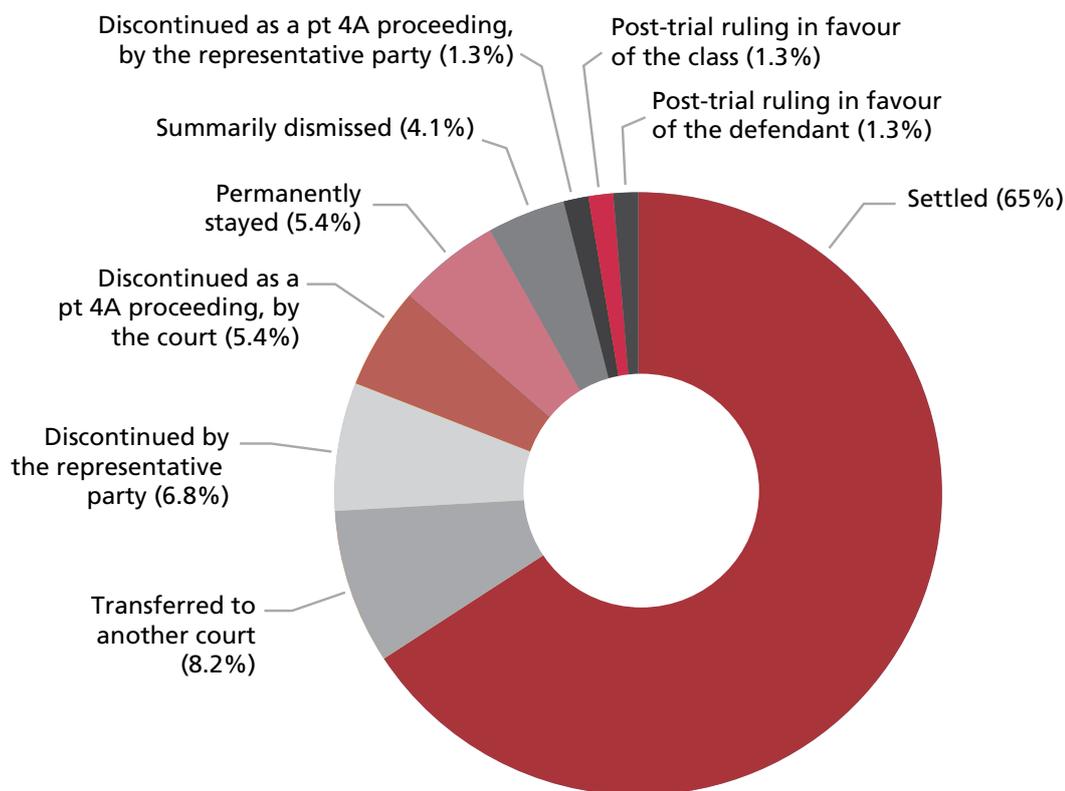


Figure 3: How part 4A proceedings filed since 2000 resolved as at 1 June 2017⁸¹

Growth in litigation funding

- 2.69 The beginning of the litigation funding industry in Australia coincided with the introduction of class actions. Over time, each has contributed to the development of the other. In 1988, when the Australian Law Reform Commission was preparing its recommendations for the introduction of a class action procedure, it could not have foreseen the role that litigation funders have since taken on. None of the class actions filed during the first six years of the Commonwealth regime were supported by litigation funders.
- 2.70 Now, litigation funders finance almost half of the proceedings filed under the Commonwealth regime (49.5 per cent). Over the period March 2010 to March 2016, 53 of the 107 class actions filed in the Commonwealth's regime involved a litigation funder.⁸²

81 Data provided by Vince Morabito, 2 June 2017.

82 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016) <<https://ssrn.com/abstract=2815777>>.

- 2.71 Approximately 19 Australian and international litigation funders are active in Australia, providing a range of financial services, and the number is growing. Those which have been recognised as the most active in supporting class actions are: IMF Bentham Ltd, Comprehensive Legal Funding LLC, International Litigation Funding Partners Pte Ltd, Harbour Litigation Funding Ltd, JustKapital Litigation Partners Ltd, and BSL Litigation Partners Ltd.⁸³
- 2.72 The top four companies were expected to account for almost 70 per cent of industry revenue in 2016–17. It was estimated that IMF Bentham Ltd alone would account for 65.8 per cent of the market, with the next largest operators accounting for less than two per cent.⁸⁴
- 2.73 Industry revenue for 2016–17 was predicted to be \$89.2 million, with profits of \$38.5 million. Revenue has been projected to grow to \$150.6 million within the next five years.⁸⁵ Most is derived from class actions, particularly shareholder class actions.⁸⁶

Development of the market

- 2.74 Commercial litigation funding began as a source of finance for insolvency proceedings. It has expanded to proceedings in other areas of law that typically include:
- commercial and contractual disputes
 - intellectual property
 - estates
 - investor, shareholder, anti-cartel and consumer protection class actions.⁸⁷
- 2.75 The way in which the market has developed is unique to Australia, for a variety of reasons. The Productivity Commission has identified three factors that created a demand for litigation finance:
- the operation of the cost-shifting rule, which creates a financial risk for plaintiffs that litigation funders are able to underwrite
 - the lack of after the event insurance, which in the United Kingdom provides another means of mitigating the financial risk
 - the ban on lawyers being able to charge contingency fees.⁸⁸
- 2.76 The ability of litigation funders to create a viable industry in response to the demand was fostered in particular by two judicial decisions:
- The 1996 Federal Court decision in *Movitor Pty Ltd (rec and mgr apptd) (in liq) v Sims*⁸⁹ where it was found that a third party could fund legal action by a liquidator on behalf of insolvent companies and individuals, notwithstanding the public policy against maintenance and champerty. This decision allowed commercial litigation funders to raise capital to provide funding to insolvency practitioners.⁹⁰

83 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 208.

84 Patrick Windle, *Litigation Funding in Australia—IBIS World Industry Report OD5446* (February 2017) IBISWorld, 17 <www.ibisworld.com.au/industry-trends/specialised-market-research-reports/advisory-financial-services/litigation-funding.html>.

85 Ibid 4.

86 Ibid 13.

87 Wayne J Attrill, 'The Future of Litigation Funding in Australia' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012) 167, 169.

88 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 608.

89 (1996) 54 FCR 380.

90 Susanna Khouri, Wayne Attrill and Clive Bowman, 'Litigation Funding and Class Actions—Idealism, Pragmatism and a New Paradigm' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 229, 235.

- The 2006 High Court decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (*Fostif*)⁹¹ which upheld a third-party funding agreement that gave the litigation funder very broad powers. The Court held by majority decision that there had not been an abuse of process when a litigation funder sought out claimants to participate in representative proceedings under New South Wales Supreme Court Rules, and gave instructions for the conduct of the litigation.
- 2.77 The decision in *Fostif* provided certainty to litigation funders that they have a legitimate role in financing multi-party proceedings, including class actions. A subsequent decision by the Federal Court that class membership in class actions can be limited to those who have signed an agreement with the litigation funder⁹² drove a period of significant growth in funded class actions from 2008.⁹³
- 2.78 Another factor that may have assisted the industry to develop is the lack of regulation. The Commonwealth Government has declined to regulate the industry and has actively excluded it from regulatory requirements that apply to other financial service providers on the basis that increasing the regulatory burden on funders would raise the cost of litigation.⁹⁴ This is discussed further in Chapter 3.
- 2.79 Litigation funders have told the Commission that the industry is changing. Litigation funders and insurers who are based overseas have shown interest in increasing their presence in the Australian market. At the same time, there are more small local enterprises entering the market and industry employment is growing. Although class actions generate most of the revenue within the industry, not all litigation funders are involved in class actions, and they provide a variety of products. In addition, the services of litigation funders are sought by large businesses which could fund their own litigation but prefer to use a funder to manage the process.

Impact on access to justice

- 2.80 Litigation funding facilitates access to justice to the extent that it reduces the financial risks of taking legal action and the funder contains legal costs by supervising the process.
- 2.81 In large class actions, the representative plaintiff will commonly be charged around \$10 million in legal costs, and risks having to pay as much, or more, to the other side if the litigation is unsuccessful. Few legal firms have the financial capacity to provide their services on a 'no win, no fee' basis and in any event the representative plaintiff remains directly liable for any adverse costs order.⁹⁵ Litigation funders are able to fully indemnify the representative plaintiff for their costs if they lose.
- 2.82 The contribution that litigation funders have made in enabling access to justice, particularly through class actions, has been recognised by government and the judiciary. In *Fostif*, for example, Justice Kirby observed that, if litigation funders were not permitted to finance class actions:

very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, [would be] unable to recover upon those claims in accordance with their legal rights.⁹⁶

91 (2006) 229 CLR 386.

92 *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

93 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 207.

94 The Treasury, Australia, *Post-Implementation Review—Litigation Funding—Corporations Amendment Regulations 2012 (No 6)* (October 2015) <<http://ris.pmc.gov.au/2016/03/15/litigation-funding>>.

95 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 28. Non-representative class members are statutorily immune from costs ordered against the representative plaintiff.

96 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 442 (Kirby J).

2.83 The Productivity Commission explored all sides of the debate about the role of litigation funders when reviewing access to justice arrangements. Although it called for greater regulation, it concluded that the litigation funding industry is making a valuable contribution to access to justice:

Overall, litigation funding promotes access to justice, and is particularly important in the context of class actions where, although action could create additional benefits when viewed from a broader or community-wide perspective, (often inexperienced) claimants might not take action given the scale of their personal costs and benefits.⁹⁷

2.84 While the support given to the litigation funding industry has had positive outcomes, from a public policy perspective there are significant limitations to the extent to which access to justice is served by litigation funding. Litigation funders, as commercial operators, invest in claims that are low in risk, and they aim to maximise the returns. The cases they select are confined to distinct areas of commercial activity, and their funding fees are the largest single expense that plaintiffs pay.

Case selection

2.85 Litigation funders make commercial decisions about which claims to support. They fund claims that have strong prospects of recovering a significant financial return. Although access to justice may be provided as a result, this is not the objective of litigation funding.

2.86 Jason Betts and colleagues have identified the following criteria that, broadly, litigation funders use when deciding whether or not to fund a claim:

- the prospects of success
- the amount likely to be recovered if the claim is successful
- the costs and risks in prosecuting the claim
- the complexity of the claim
- the estimated time until the claim will be resolved
- whether there are risks in enforcing a favourable judgment, such as the solvency of a defendant.⁹⁸

2.87 The selection process has become progressively more sophisticated. The claims must be viable, both in terms of the strength of the case and the likely return to the funder. The case must have merit and be likely to be successful. Unless the defendant has the capacity to meet any likely settlement or judgment, including the benefit of any indemnity under an insurance policy, funding is unlikely to be provided.⁹⁹ As a result, over the past 12 years, the settlement rate for Commonwealth class actions that involved a litigation funder is 92 per cent.¹⁰⁰

2.88 The practice of filtering out applications for funding which do not meet stringent legal, process and commercial criteria removes claims that do not have merit (as well as those that do have merit but do not meet other criteria). For example, IMF Bentham Ltd informed the Productivity Commission that fewer than five per cent of the applications it receives are funded.¹⁰¹ The diversion of unmeritorious claims allows the resources of the legal system to be allocated more efficiently.

97 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 624.

98 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 209.

99 John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32 *University of New South Wales Law Journal* 1036, 1043.

100 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016), 13 <<https://ssrn.com/abstract=2815777>>.

101 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 619.

- 2.89 Another outcome of the selection process is that only a narrow variety of cases are funded. Seventy-four per cent of all funded class actions filed since 1992 sought legal redress for investors and shareholders.¹⁰²
- 2.90 Corporate malfeasance is a broad-based harm that affects a large number of people in similar situations, and class actions are an inherently suitable means for the victims to take legal action. Australia has robust mandatory continuous disclosure rules for ASX-listed companies, comprehensive prohibitions on misleading and deceptive conduct and a high rate of share ownership.¹⁰³ Litigation in these areas of the law presents a sound investment opportunity for litigation funders, as explained by John Walker, Suzanna Khouri and Wayne Attrill when working for IMF (Australia) Ltd in 2009:

The statutory causes of action provided in the continuous disclosure, product liability and anti-cartel legislative regimes are generally more straight-forward to establish than the equivalent actions at common law and, in the context of shareholder non-disclosure claims in particular, are determined in large part on publicly-available evidence, including documents filed with the Australian Securities Exchange.¹⁰⁴

- 2.91 Claims aimed at obtaining non-monetary results (such as an injunction or declaration) are not funded.¹⁰⁵ In addition, claims for compensation for personal injury are usually unattractive to litigation funders. They rely on evidence which may give rise to a number of litigation risks and are already well supported by lawyers acting on a 'no win, no fee' basis.¹⁰⁶ As a consequence, the contribution that litigation funding makes to access to justice is limited, as Justice Ronald Sackville observed:

If the social purpose of litigation funding is to enhance access to justice for groups otherwise unable to afford litigation, it is not clear that financing only those groups with demonstrably sound cases will achieve that objective. Groups with more marginal claims must rely on other mechanisms to enforce such rights as they may have.¹⁰⁷

Funded Victorian class actions

- 2.92 In contrast to Commonwealth class actions, almost half of which filed since 2010 received support from litigation funders,¹⁰⁸ only 10 of the 80 proceedings filed under part 4A of the Supreme Court Act have been funded by litigation funders.¹⁰⁹ This difference is a relevant factor when comparing the procedures in the Supreme Court with those in the Federal Court and considering reform options.

Costs

- 2.93 The terms of reference reflect concerns that the costs of funded litigation can appear excessive and not aligned to the risks to the funder or law firm, and that the fee structures for lawyers and the total amount paid to the funder of the litigation are not sufficiently transparent.

102 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 48.

103 Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 207.

104 John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32 *University of New South Wales Law Journal* 1036, 1042.

105 Ibid 1041.

106 Ibid 1047.

107 R Sackville, 'Lawyers and Litigation: A Pathway Out to Wealth and Gain?' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012) 191, 197.

108 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016), 8 <<https://ssrn.com/abstract=2815777>>.

109 Data provided by Vince Morabito, 2 June 2017.

2.94 By drawing their funding fee from the amount awarded in damages or negotiated between the parties, litigation funders are well rewarded for their services. As noted above, the funding fee is usually the largest single deduction from what the claimants manage to recover in funded class actions.¹¹⁰ However, it is not necessarily related to the risk, which is unlikely to be high because of the exacting process that the litigation funder follows before agreeing to provide funding.

2.95 While it may not be directly reflective of the risk undertaken, the funding fee is determined by the structure of the funding agreement, which varies in nearly every case. This was pointed out by Justice Murphy in *Earglow Pty Ltd v Newcrest Mining Ltd*:¹¹¹

It should be kept in mind that it is not enough to consider the funding commission rate on a stand-alone basis. The funding arrangements reached may be structured in a variety of ways which can affect the costs and risk taken on by the funder and therefore affect the reasonableness of the funding commission rate. For example, a funder might agree:

(a) to provide funding to cover adverse costs but not to meet the applicant's legal costs and disbursements, with the case being conducted by the applicant's solicitors on a conditional fee basis to be paid by class members from any settlement conditional on success;

(b) to pay disbursements only, with the case being conducted by the applicant's solicitors on a conditional fee basis;

(c) to only pay costs and disbursements up to a fixed cap or to pay a fixed percentage of the costs and disbursements, with the remainder left to the applicant's solicitors to be paid by class members conditional on success; or

(d) to cover the risk of adverse costs liability through After the Event Insurance with the premium to be paid by class members from the settlement sum upon success.¹¹²

2.96 The Commission has been told that litigation funders and lawyers will sometimes voluntarily come to an arrangement to reduce their costs in order to ensure that the plaintiffs in a class action receive at least 50 per cent of the recovered amount. However, this is a commercially driven activity that need not take account of the plaintiff's needs and, from the plaintiff's perspective, may mean that the outcome is not fair.

2.97 Many class members have a 'limited or non-existent' opportunity to negotiate the funding fee;¹¹³ others have not signed the litigation funding agreement but have a right to a share of the amount recovered. Therefore, the role of the court in supervising the settlement can be crucial to ensuring that plaintiffs are not exposed to disproportionate cost burdens. This issue is discussed in Chapter 7.

Impact on class actions

2.98 Litigation funding affects not only the number and type of class actions filed but also how class action regimes operate. A publication by Allens that looks back over the past 25 years of class actions in Australia describes class action practice today as 'largely unrecognisable' from its early days.¹¹⁴ The reasons identified are, among other things, the acceptance of litigation funding, the emergence of shareholder class actions, and the entrepreneurial behaviour of law firms over the past 10 to 12 years.¹¹⁵

110 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72].

111 [2016] FCA 1433 (28 November 2016).

112 *Ibid* [179].

113 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72].

114 Allens Linklaters, *25 Years of Class Actions: Where are we up to and where are we headed?* <www.allens.com.au/services/class/index.htm>.

115 *Ibid*.

- 2.99 Not all of the changes, even if unpredicted when class action proceedings were first introduced, are contrary to the objectives of the legislation. The financial risk to the representative plaintiff, and to plaintiff law firms if the litigation is unsuccessful, has been identified as the reason why there was a decline in the use of the Commonwealth's class action regime to its lowest levels in 2000–2004. By becoming involved in class actions, litigation funders revived the use of this type of proceeding.¹¹⁶
- 2.100 The most significant impact of litigation funding on the operation of class action regimes in Australia has been the use of closed class actions, where a class action is brought on behalf of a limited or identified number of persons, rather than all those who have suffered loss or damage as a result of the conduct of the defendant. As discussed above, the current regimes were designed for open classes, where the outcome affects all class members unless they opt out of the proceedings.
- 2.101 Funded proceedings that begin as open class actions rarely continue on this basis.¹¹⁷ The open class system enables class members who have not entered a funding agreement with the litigation funder or a retainer with the lawyer to share in the proceeds. These class members are commonly referred to as 'free riders' because they do not need to contribute to the costs of the proceeding.
- 2.102 Closed classes provide an incentive for class members to enter the litigation funding agreement and thereby agree to contribute to the costs if the litigation is successful. Those who do not opt in to the proceedings are excluded from a share of the proceeds. The means by which the courts have protected the rights of all class members, their lawyers and the litigation funders are discussed in Chapter 7.
- 2.103 The use of closed classes has led to the duplication of class actions.¹¹⁸ Multiple claims place additional burdens on the justice system, not only in terms of the number of claims being filed but also in the complexity of managing them, particularly when actions arising out of the same conduct are approached differently in separate proceedings.¹¹⁹ It is also possible that, because the costs are shared across a smaller class, competing claims increase the costs to individual class members.
- 2.104 From the defendant's viewpoint, the class members are easier to identify if the class is closed, and it is easier to calculate how much they would be liable for in damages or how much to offer in settlement. However, a major advantage of an open class is that, by determining the rights of the whole class in one proceeding, there is finality.
- 2.105 For these reasons, it has been observed, the efficiencies that the class action regime was intended to provide are weakened.¹²⁰

Entrepreneurialism in legal services

- 2.106 In the period over which class action regimes have been established in Australia, and third-party commercial litigation funding has become an accepted feature of our legal system, the legal profession has undergone comprehensive regulatory reform and become more commercially oriented.

116 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 29. In designing the model on which the legislation is based, the ALRC recognised that a mechanism was needed to reduce the representative plaintiff's risk of having to pay all or most of the other side's legal costs if the litigation is unsuccessful. Its recommendation that government create a public fund for this purpose was not accepted: Murray Wilcox, 'Class Actions in Australia: Recollections of the Early Days' 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) 5, 7.

117 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 228 [188].

118 For statistical information about competing class actions, see [2.59] above.

119 Allens Linklaters, *25 Years of Class Actions: Where are we up to and where are we headed?* <www.allens.com.au/services/class/index.htm>.

120 Ibid.

- 2.107 Rules governing the structure of legal firms were liberalised, and legal services were made more accessible and affordable through innovative fee structures and technology. Greater competition and efficiency are associated with a focus on generating new business, improving consumer satisfaction and maximising returns.¹²¹
- 2.108 The increase in entrepreneurialism within the legal profession is likely to have fostered the growth of the litigation funding industry. Ben Slade, State Managing Principal of Maurice Blackburn, has commented on the importance of litigation funders to enabling that law firm to take on large cases:
- It took us about 10 years to accept that we had to meet the defendant’s resources if we were going to succeed. Litigation funding has helped enormously because taking on the cashflow impact of a litigation is frightening.¹²²

Impact on access to justice

- 2.109 Entrepreneurialism and collaboration with litigation funders have had a positive effect on access to justice, to the extent that they have provided individuals who otherwise would have been unable to enforce their rights the opportunity to do so.
- 2.110 Two law firms, Maurice Blackburn and Slater and Gordon, account for a third of all class actions brought under part IVA of the Federal Court Act. As at 3 March 2016, each had brought 64 class actions within that jurisdiction.¹²³ While many of these cases were financed by litigation funders, these two firms have the capacity to conduct class actions without them on a ‘no win, no fee’ basis.
- 2.111 Professor Morabito has pointed out that these firms, and several others that are willing to act on a ‘no win, no fee’ basis, have run class actions on social justice issues for clients other than shareholders and investors. In doing so, they have enabled many vulnerable individuals to use the class action regime to enforce their rights.¹²⁴
- 2.112 In an article written in collaboration with Jarrah Ekstein, an Associate in the class actions team at Maurice Blackburn, Professor Morabito has analysed 87 class actions filed in Australia for the benefit of vulnerable people between March 1992 and March 2014.¹²⁵ None involved litigation funders. Among the claimants who have been assisted are:
- Indigenous people
 - refugees and migrants¹²⁶
 - individuals with intellectual disabilities
 - individuals who, as children, suffered systematic abuse at a residential institution or were wrongfully arrested and detained
 - participants in a government home finance scheme
 - short term credit customers
 - residents of a retirement village
 - residents of isolated villages in Papua New Guinea who were affected by pollution from copper mining
 - victims of tobacco-related diseases, harmful prescribed drugs, faulty medical devices, bushfires, medical negligence, legionnaires disease, harmful food and beverages and the collapse of the chairlift at Arthurs Seat.

121 R Sackville, ‘Lawyers and Litigation: A Pathway Out to Wealth and Gain?’ in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012) 191, 196.

122 Misa Han, ‘Defence Domination of Category Criticised’, *Australian Financial Review* (Sydney) 7 April 2017, 34.

123 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016) <<https://ssrn.com/abstract=2815777>>.

124 Ibid.

125 Vince Morabito and Jarrah Ekstein, ‘Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study’ (2016) 35 *Civil Justice Quarterly* 61.

126 Migration-related matters may no longer be brought as class actions. See [2.60].

Impact on class actions

- 2.113 Commercialisation has prompted concerns about the impact of economic imperatives on the selection of class action cases. At the core of the concerns is the belief that claims are being generated at the initiative of the law firms, rather than in response to instructions from clients. It has been suggested that claims are being made that do not appear to have been brought for the primary purpose of seeking a substantive remedy for class members.¹²⁷
- 2.114 The fact that a class action has been initiated by a law firm is not reason alone to suggest that interests of the class members are not given priority. In many of the class actions filed on behalf of vulnerable people, the law firm has expended considerable time and resources to assist the class members to overcome socio-economic, health, age-related and intellectual barriers in order to enforce their rights. This has required the lawyers involved to actively seek out and advise class members, taking additional steps that would not be necessary in other cases.¹²⁸ Although their costs, plus an uplift, are paid if the class action is successful, the risks are higher and the success rate lower compared to shareholder and investor class actions.
- 2.115 The number of class actions being filed by smaller plaintiff law firms is increasing, and this may indicate greater entrepreneurialism within the profession. Social media has made it easier to build a class, and technology has made it easier to share information about, and copy, class action claims that have been litigated in the United States.¹²⁹
- 2.116 Allens has noted that, since 2013, 26 per cent of class actions were filed by 29 firms. Each filed either one or two claims. Nine firms, including Maurice Blackburn and Slater and Gordon, accounted for the remaining 74 per cent. The increase in the number of law firms bringing class actions has been associated with more speculative claims being filed.¹³⁰
- 2.117 The increase in competing class actions has also been attributed to legal entrepreneurialism. Allens has observed that, although the number of filings has increased since 2005, the number of companies facing class actions has fallen. Of these companies, an increasing number face more than one class action in relation to the same conduct.¹³¹ As noted above, competing class actions reduce the efficiency of the legal system and expose the defendant to the cost and uncertainty of responding to multiple actions.
- 2.118 Finally, there are serious concerns about the conflicts of interest that arise for lawyers in class actions, particularly when a litigation funder is involved.¹³² This issue is discussed in Chapter 3.

127 Allens Linklaters, *25 Years of Class Actions: Where Are We Up To and Where Are We Headed?* <www.allens.com.au/services/class/index.htm>.

128 Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study' (2016) 35 *Civil Justice Quarterly* 61.

129 Misa Han 'Defence Domination of Category Criticised', *Australian Financial Review* (Sydney) 7 April 2017, 34.

130 Allens Linklaters, *25 Years of Class Actions: Where are we up to and where are we headed?* <www.allens.com.au/services/class/index.htm>.

131 Ibid.

132 R Sackville, 'Lawyers and Litigation: A Pathway Out to Wealth and Gain?' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012) 191, 196.

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3. Current regulation of litigation funders and lawyers

Introduction

- 3.1 Litigation funders and lawyers play a crucial role in providing access to justice. They enable their clients to have access to the legal system and control how they interact with legal processes. Clients entrust them with the conduct of the litigation, sometimes for a considerable fee, in the expectation that they will work to obtain the best possible outcome. Those clients whose interests are not given priority by the litigation funder or lawyer are more likely to be exposed to unfair risks and disproportionate cost burdens.
- 3.2 Some of the regulatory controls that protect the interests of the clients of litigation funders and lawyers align with obligations that arise from a fiduciary relationship. A fiduciary relationship is one of trust and confidence, where one person (the fiduciary) exercises a discretion on behalf of another person that 'will affect the interests of that other person in a legal or practical sense'.¹
- 3.3 The relationship between lawyers and their clients has long been recognised as a fiduciary relationship. Litigation funders can also have fiduciary obligations to their clients in some circumstances. Simone Degeling and Michael Legg have argued that, in class actions, the fiduciary obligations of litigation funders and lawyers can extend beyond their clients to all class members.²
- 3.4 The obligations that arise from a fiduciary relationship include, among other things, an obligation to act honestly and in the client's best interests and to avoid conflicts of interest. A fiduciary must not promote their personal interests where they conflict, or where there is a real or substantial possibility that they will conflict, with the interests of the person to whom the obligation is owed, unless they have that person's informed consent.³ The person can give informed consent only if they know about the actual or potential conflict and understand the consequences of consenting.
- 3.5 Some of the possible reforms set out in the terms of reference are directed towards improving the disclosure of information by litigation funders and lawyers to clients and the court, and ensuring that they do not take a disproportionate share of any settlement or award of damages. As such, they would reinforce the fiduciary obligation to avoid conflicts of interest. These possible reforms are discussed in Chapters 4, 5 and 7.
- 3.6 This chapter discusses how the conduct of litigation funders and lawyers is directly regulated by a framework of laws and rules. The framework can be viewed from two perspectives: the systemic regulation of the litigation funding industry and legal profession; and the case-by-case regulation of participants in court proceedings.

1 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J).

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

3 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

- 3.7 The terms of reference focus on the latter. Victoria has limited scope to directly regulate the litigation funding industry and the legal profession. The Commonwealth regulates financial services and products, and the legal profession in Victoria and New South Wales is regulated under uniform law that affects the ability of each state to act unilaterally.
- 3.8 However, in considering the regulation of proceedings under Victorian legislation and in Victorian courts, as required by the terms of reference, it is necessary to understand the broader regulatory context in which litigation funders and lawyers operate.
- 3.9 For this reason, the next section provides an overview of the regulation of the litigation funding industry and legal profession. It is followed by a discussion of how the activities of litigation funders and lawyers are supervised and regulated in court proceedings. The final section describes the tripartite relationship between the litigation funder, lawyer and plaintiff in class actions and the conflicts of interest that can arise.

General regulation

Litigation funders

Corporations Act 2001 (Cth)

- 3.10 All incorporated litigation funders are regulated by the *Corporations Act 2001* (Cth) on the same basis as other corporations. Those that are listed on the Australian Securities Exchange (ASX) are also contractually bound to the ASX to comply with Listing Rules that are enforceable under the Corporations Act.⁴
- 3.11 These legal obligations protect the interests of shareholders rather than clients.

Corporations Regulations 2001 (Cth)

- 3.12 The Corporations Act requires providers of financial products generally to hold an Australian Financial Services Licence (AFSL).⁵ The *Corporations Regulations 2001* (Cth) specify that litigation funding schemes and arrangements are financial products but the providers are exempt from the requirement to hold an AFSL as long as they have appropriate processes in place to manage conflicts of interest.⁶
- 3.13 The exemption was made in response to a series of court decisions about whether the activities of litigation funders fell within the scope of the Corporations Act.
- 3.14 In October 2009, the Federal Court had found that the funding arrangements in a shareholder class action constituted a managed investment scheme that was required to be registered under section 9 of the Corporations Act.⁷ This decision was followed in March 2011 by a decision of the New South Wales Court of Appeal that, as litigation funding could be used to manage financial risk, it was a 'financial product' and required the litigation funder to hold an AFSL.⁸ The High Court found on appeal that litigation funders were 'credit facilities' rather than 'financial products'. As such, litigation funders were not required to hold an AFSL, but rather, could be regulated under the *National Consumer Credit Protection Act 2009* (Cth).⁹

4 *Corporations Act 2001* (Cth) ss 793C, 1101B. The Commission has identified four litigation funders listed on the ASX: Hillcrest Litigation Services Ltd; IMF Bentham Ltd; JustKapital Litigation Partners Ltd; and Litigation Capital Management Ltd.

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

6 *Corporations Regulations 2001* (Cth) regs 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB.

7 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.

8 *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138.

9 *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* [2012] HCA 4.

- 3.15 The Commonwealth Government considered that class actions were already subject to sufficient regulation, and that reducing the regulatory costs for litigation funders would ensure greater access to justice for consumers.¹⁰ The post-implementation review of the Corporations Amendment Regulation that created the exemption stated that:
- If not addressed, these decisions would have imposed a considerable additional regulatory burden on litigation funders, in turn raising the cost for consumers of pursuing court proceedings and potentially reducing their capacity to seek justice.¹¹
- 3.16 In exchange for relief from the need to hold an AFSL, litigation funders are required to maintain adequate conflict of interest practices.¹² Failure to do so and follow certain procedures for managing conflicts is an offence.¹³
- 3.17 The Corporation Regulations stipulate that having adequate practices for managing a conflict of interest includes reviewing the terms of the funding agreement to ensure that they are consistent with Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the ASIC Act).¹⁴ These provisions set out the law regarding unconscionable conduct and consumer protection in relation to financial services and are discussed below.
- 3.18 ASIC has supplemented the Corporations Regulations with a regulatory guide to the processes that a litigation funder must implement in order to prevent conflicts of interest.¹⁵

Australian Securities and Investments Commission Act 2001 (Cth)

- 3.19 Litigation funders, as providers of financial services and products, are directly subject to the consumer protections in the ASIC Act¹⁶ (and are required to ensure that the terms of their funding agreements are consistent with them).
- 3.20 Division 2 of Part 2 of the ASIC Act contains protections against unfair contract terms,¹⁷ unconscionable conduct,¹⁸ and misleading and deceptive conduct.¹⁹ It also provides for an implied warranty in financial services contracts that the services will be rendered with due care and skill.²⁰
- 3.21 These provisions address the risks of an unscrupulous litigation funder imposing unfair or extortionate terms in funding agreements, misleading clients about the advantages and disadvantages of litigation or failing to disclose all relevant aspects of the agreement.²¹

Reform proposals for the Commonwealth

- 3.22 In summary, a litigation funder operating in Australia is free from mandatory licensing, financial disclosure requirements, reporting obligations and prudential supervision, unless the choice is made to list on the ASX or hold an AFSL.²²

10 The Treasury, Australia, 'Government Acts to Ensure Access to Justice for Class Action Member' (Media Release, No 039, 4 May 2010).

11 The Treasury, Australia, *Post-Implementation Review—Litigation Funding—Corporations Amendment Regulations 2012 (No 6)* (October 2015) <<http://ris.pmc.gov.au/2016/03/15/litigation-funding>>.

12 *Corporations Regulations 2001* (Cth) reg 7.6.01AB(2).

13 *Ibid* reg 7.6.01AB(3).

14 *Ibid* reg 7.6.01AB(4)(e).

15 Australian Securities and Investments Commission, *Regulatory Guide 248: Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013).

16 *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA (definition of 'financial product'), s 12BAB (definition of 'financial service').

17 *Ibid* ss 12BF–12BM. These provisions apply to a 'consumer contract' which, as defined, would rarely apply to a litigation funding agreement: John Walker, 'Policy and Regulatory Issues in Litigation Funding Revisited' (2014) 55 *Canadian Business Law Journal* 85, 95.

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

19 *Ibid* ss 12DA, 12DB, 12DF.

20 *Ibid* ss 12ED(1).

21 John Walker, 'Policy and Regulatory Issues in Litigation Funding Revisited' (2014) 55 *Canadian Business Law Journal* 85, 94.

22 As noted above, the Commission has identified four litigation funders currently listed on the ASX. No litigation funder holds an AFSL. IMF Bentham Ltd held a AFSL from 4 July 2005 through to 18 April 2013: IMF (Australia) Ltd, 'Australian Financial Services Licence' (Release to Australian Securities Exchange (ASX), 19 April 2013) <www.imf.com.au/docs/default-source/site-documents/australian-financial-services-licence>; Kate Kachor, 'IMF voluntarily cancels AFSL', *Financial Observer* (online), 22 April 2013 <www.financialobserver.com.au/articles/imf-voluntarily-cancels-afsl>.

- 3.23 The Productivity Commission recently called for litigation funders to be licensed to ensure they hold adequate capital to manage their financial obligations.²³ This is seen as a way to protect plaintiffs and defendants from an impecunious litigation funder by ensuring that the funder has adequate capital and liquidity to meet its obligations under the litigation funding agreement.
- 3.24 The Productivity Commission examined the self-regulatory approach maintained in England and Wales. There, litigation funders are subject to capital adequacy requirements (currently a minimum of £5 million). The self-regulatory regime also requires funders to:
- maintain access to the minimum capital required
 - accept a continuous disclosure obligation in relation to capital adequacy
 - arrange annual auditing
 - provide the regulatory body with reasonable evidence that the funder satisfies the minimal capital requirement prevailing at the time of the annual subscription.²⁴
- 3.25 The Productivity Commission considered that the potential barriers to entry created through licensing requirements were justified in order to ensure that only 'reputable and capable funders enter the market'.²⁵ It noted that any form of regulation would only act to reduce rather than eliminate financial risk.²⁶

Lawyers

Uniform Law

- 3.26 Compared to litigation funders, the legal profession is subject to considerable regulation. In Victoria, the principal legislation is *The Legal Profession Uniform Law Application Act 2014* (Vic) (Uniform Law Application Act) which contains at schedule 1 the Legal Profession Uniform Law (the Uniform Law). It is supplemented by Legal Profession Uniform General Rules made by the Legal Services Council. Lawyers in Victoria and New South Wales are subject to the same regulatory framework.
- 3.27 The Uniform Law sets out principles of professional conduct established by the common law, and specific obligations for lawyers in conducting the relationship with their client. The provisions aim to ensure that clients are able to make informed choices about legal options.²⁷
- 3.28 The Legal Services Board and Commissioner are established by the Uniform Law Application Act and provide an avenue for complaints and independent review. The most common complaints concern costs and communication.²⁸ Accordingly, many regulations specify how a lawyer can charge for legal services and the information they must give their clients. The obligations cover legal costs, cost disclosure, cost agreements and cost assessments.

23 See, eg, Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014); Law Council of Australia, Regulation of Third Party Litigation Funding in Australia, Position Paper (June 2011); Wayne Attrill, 'The Regulation of Conflicts of Interest in Australian Litigation Funding' (2013) 2 *Journal of Civil Litigation and Practice* 193; Michael Legg et al, 'The Rise and Regulation of Litigation Funding in Australia' (2011) 38 *Northern Kentucky Law Review* 625; John Walker, 'Policy and Regulatory Issues in Litigation Funding Revisited' (2014) 55 *Canadian Business Law Journal* 85.

24 The Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders*, November 2016 [9.4.1]–[9.4.5]; Rachael Mulheron, 'England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments' [2014] 73 *Cambridge Law Journal* 570, 574–5.

25 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 631.

26 Ibid 632.

27 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ('*Legal Profession Uniform Law*') s 174; *Legal Profession Uniform General Rules 2015* (Vic) r 7.

28 Victorian Legal Services Board, *Annual Report* (2016) 56.

- 3.29 Legal costs must be fair and reasonable, and lawyers must avoid unnecessary delay that results in increased costs. Lawyers must provide an estimate of total legal costs and be satisfied that the client has understood and given consent. Costs information must be provided on an ongoing basis and enable clients to make informed choices about costs and legal options.²⁹
- 3.30 The Uniform Law maintains the prohibition on lawyers charging contingency fees.³⁰ It contains specific requirements for, and restrictions on, the content of cost agreements, including the content and disclosure of conditional, or ‘no win, no fee’, cost agreements. A ‘no win, no fee’ agreement must contain an estimate of total costs and details of disbursements and uplift fees. It must also identify who has responsibility for paying any adverse costs. Any ‘no win, no fee’ agreement must allow for a cooling-off period of at least five clear days.
- 3.31 Failure to comply with the obligations under the Uniform Law may result in civil penalties or disciplinary action, including a finding of unsatisfactory professional conduct or professional misconduct.³¹ Also, if a lawyer fails to comply with the legal costs provisions, the legal costs agreement may be void and the client would not be required to pay.³²
- 3.32 There are some exceptions to the requirements for legal costs disclosure, including to third-party funders and some clients who are considered a ‘commercial or government client’.³³

Court supervision of proceedings

Common law

- 3.33 As discussed in Chapter 2, for centuries the activities now undertaken by litigation funders were prohibited by the common law doctrines of maintenance and champerty. Although the doctrines have been abolished, courts can still invalidate a litigation funding agreement on the ground that it is contrary to public policy.³⁴
- 3.34 Courts, therefore, can intervene to prevent an abuse of process. Although they have endorsed litigation funding as a legitimate feature of the legal system, courts can still be wary, as John Walker has explained:
- Strong objections to litigation funding, which carry more than an echo of the ancient abhorrence of champerty, are still heard. Some courts and regulators also fear that litigation funding may lead to undesirable ‘trafficking’ in litigation, the misuse or overuse of court resources, the exploitation of vulnerable litigants, the exposure of defendants to unfair risks and the creation of unacceptable conflicts of interest and ethical dilemmas for the lawyers who are being paid by funders.³⁵
- 3.35 The leading decision on whether litigation funders have a legitimate influence on litigation is the High Court’s finding in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*.³⁶ The Court endorsed the role of the litigation funder, even though its funding agreement gave it extensive powers over the conduct of the case—including forbidding the lawyer to deal directly with the plaintiffs. The Court held that the judiciary has sufficient powers and processes in place to control any abuse of process or tendency to corrupt justice that

29 Cost disclosure obligations are regulated according to threshold amounts. Estimated costs over \$3000 require comprehensive and ongoing written disclosure: *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (‘Legal Profession Uniform Law’) s 174, sch 4 s 18.

30 A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award: *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (‘Legal Profession Uniform Law’) s 183(1).

31 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (‘Legal Profession Uniform Law’) s 298.

32 *Ibid* sch 1 *Legal Profession Uniform Law* s 178.

33 *Ibid* sch 1 *Legal Profession Uniform Law* s 170.

34 *Wrongs Act 1958* (Vic) s 32(2).

35 John Walker, ‘Policy and Regulatory Issues in Litigation Funding Revisited’ (2014) 55 *Canadian Business Law Journal* 85, 90. (2006) 229 CLR 386.

might arise from the involvement of a litigation funder in class actions.³⁷ However, it rejected the idea that the Court should assess whether a funding agreement is ‘fair’.³⁸

- 3.36 Since then, there has been increasing judicial scrutiny of litigation funding fees. Notably, in *Earglow Pty Ltd v Newcrest Mining Ltd* Justice Murphy held that the court had the power to approve the proposed settlement of a class action but disallow or reduce the funding fee if excessive.³⁹ The greater willingness of the court to intervene, and the policy and statutory basis for doing so, are discussed in Chapter 7.

Civil Procedure Act 2010 (Vic)

- 3.37 Both lawyers and litigation funders are subject to the regulations set out in the *Civil Procedure Act 2010 (Vic)*. The Act specifies a range of ethical and procedural obligations, known as the ‘overarching obligations’, which are subject to judicial oversight. At the commencement of proceedings, lawyers and litigation funders must certify in writing that they have read and understood the overarching obligations.⁴⁰
- 3.38 A lawyer’s fundamental duty is to the court and to the administration of justice.⁴¹ This duty is paramount and prevails to the extent of inconsistency with any other duty.
- 3.39 The lawyer’s second fundamental duty is to the client, and it has contractual, professional and fiduciary dimensions. In a class action, the legal practitioner clearly owes proscriptive fiduciary duties to the representative plaintiff and those class members who have signed a retainer.

Overarching purpose and obligations

- 3.40 The policy intention of introducing the Civil Procedure Act was to ‘redress an imbalance in the civil justice system to achieve essential goals of accessibility, affordability, proportionality, timeliness, and getting to the truth quickly and easily’ through cultural change.⁴² The legislation assists judicial officers to manage cases proactively in order to promote an overarching purpose, and guides litigants to resolve disputes without the intervention of the court, or to narrow the issues that are brought to the court to the real issues in dispute. The principal mechanisms it employs to bring about the desired cultural change are the overarching purpose for the courts, and overarching obligations for participants in civil proceedings.

Overarching purpose

- 3.41 When exercising and interpreting their powers, Victorian courts must aim to give effect to the overarching purpose of the Civil Procedure Act and the rules of court for civil proceedings:⁴³

to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.⁴⁴

- 3.42 In making an order or giving any direction in a civil proceeding, the court must further the overarching purpose by having regard to specific objects that support it⁴⁵ and a range of matters concerning, among other things, the conduct of the parties in undertaking the proceedings and in working to resolve the dispute.⁴⁶

37 Ibid.
 38 Ibid [92].
 39 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [7].
 40 *Civil Procedure Act 2010 (Vic)* s 41(1).
 41 Ibid s 16; *Legal Profession Uniform General Rules 2015 (Vic)* r 3.
 42 Explanatory Memorandum, *Civil Procedure Bill 2010 (Vic)*.
 43 *Civil Procedure Act 2010 (Vic)* s 8.
 44 Ibid s 7(1).
 45 Ibid s 9(1).
 46 Ibid s 9(2).

- 3.43 The court also has a broad power to make any order as to costs it considers appropriate to further the overarching purpose.⁴⁷ This power is in addition to any other power it has in relation to costs and can be made at any time in a proceeding over any aspect of the proceeding.⁴⁸
- 3.44 The power to order costs in all proceedings is a commonly exercised power of the courts over litigation funders. The court's power in relation to costs, including adverse costs and security for costs orders, has been extended to litigation funders where the interests of justice allow a departure from the general rule that only parties to proceedings may be subject to costs orders.⁴⁹

Overarching obligations

- 3.45 Supporting the 'overarching purpose' of the Act are 10 'overarching obligations' that apply to parties, expert witnesses, lawyers and litigation funders involved in civil proceedings.⁵⁰ They must:
- act honestly
 - only make claims that have a proper basis
 - only take steps to resolve or determine the dispute
 - cooperate in the conduct of the civil proceeding
 - not mislead or deceive
 - use reasonable endeavours to resolve the dispute
 - narrow the issues in dispute
 - ensure costs are reasonable and proportionate
 - minimise delay
 - disclose the existence of documents critical to the resolution of the dispute.⁵¹
- 3.46 The Supreme Court has made it clear that compliance with the overarching obligations is mandatory rather than aspirational.⁵² All participants to whom they apply, including litigation funders, must certify that they understand their obligations prior to commencing proceedings.⁵³
- 3.47 The Civil Procedure Act provides the court with broad discretion to impose a cost order or other sanction on a person who contravenes an overarching obligation. If satisfied that a breach has occurred, the court may make 'any order it considers appropriate in the interests of justice'.⁵⁴
- 3.48 In considering whether there has been any breach of the overarching obligations, the court is empowered to initiate its own investigation into the breach,⁵⁵ and is encouraged to do so. In *Yara Australia Pty Ltd v Oswal*, the Court of Appeal stated:

The statutory sanctions provide a valuable tool for improving case management, reducing waste and delay and enhancing the accessibility and proportionality of civil litigation. Judicial officers must actively hold the parties to account.⁵⁶

47 Ibid s 65C(1)
48 Ibid s 65C(1)
49 G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 753–4.
50 *Civil Procedure Act 2010* (Vic) s 10.
51 Ibid ss 17–26.
52 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 308.
53 Ibid s 41.
54 Ibid s 29.
55 Ibid s 29(2)(b).
56 *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302, 311.

Supreme Court Act 1986 (Vic)

Part 4A

- 3.49 Part 4A of the *Supreme Court Act 1986 (Vic)*, which establishes the procedures for class actions in Victoria, provides the Supreme Court with powers over commencement, standing, pleadings, adequacy of representation, determination of issues (including individual issues), notice requirements, discontinuance, opting out, costs, settlement and appeals.
- 3.50 Importantly, the Supreme Court has the very broad power to ‘make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding’.⁵⁷
- 3.51 Courts may also use costs as a case management tool in class actions to address vexatious litigation and non-compliant parties.⁵⁸

Supreme Court rules and practice notes

- 3.52 Supreme Court Rules set out the general practice and procedure of the Court. The *Supreme Court (General Civil Procedure) Rules 2015* apply to the way in which class actions are conducted. The operation of these rules does not raise or affect any issues discussed in this paper.
- 3.53 Particular aspects of the Court’s practice, procedure and organisation are explained in practice notes that operate alongside the rules of court. The practice note that has been issued for class actions is *Practice Note SC GEN 10—Conduct of Group Proceedings (Class Actions)*.
- 3.54 The Federal Court’s practice note for class actions is more detailed and comprehensive than the Victorian equivalent.⁵⁹ This paper identifies the differences where relevant in exploring possible reform options for Victoria’s class action regime.

Reform options

- 3.55 Later chapters in this paper explore specific areas of possible reform. However, the Commission encourages submissions that take a broader approach or which introduce new perspectives on the issues arising from the terms of reference. The following general questions invite such wider ranging discussion.

Questions

- 1 What changes, if any, need to be made to the class actions regime in Victoria to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?
- 2 What changes, if any, need to be made to the regulation of proceedings in Victoria that are funded by litigation funders to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?
- 3 Should different procedures apply to the supervision and management of class actions financed by litigation funders compared to those that are not?
- 4 How can the Supreme Court be better supported in its role in supervising and managing class actions?

57 *Supreme Court Act 1986 (Vic)* s 33ZF.

58 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 1, 454.

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

Conflict of interest

- 3.56 In proceedings involving a litigation funder, a tripartite relationship is established between the litigation funder, the plaintiff's lawyer and the plaintiff. It is widely accepted that conflicts of interest will exist in this relationship. These are discussed in detail below.
- 3.57 In class actions—whether funded or unfunded—lawyers who act for both the representative plaintiff and/or a number of other class members are likely to be exposed to conflicts of interest arising between the competing needs of different class members.
- 3.58 A more nuanced conflict of interest arises where class actions are 'instigated' by law firms. Traditionally, litigation is driven by a client's interest and a lawyer acts as an agent advocating that interest. The lawyer's participation is at the invitation or appointment of the client, with the lawyer providing legal advice and opinion but acting on the instructions of the client. The Commission has been told that some lawyers and litigation funders appear to be 'reverse engineering' claims. That is, they first establish the legal claim, and then identify the class members that fit within this claim.
- 3.59 Set out below are conflicts of interest that arise in funded proceedings due to the tripartite relationship between the litigation funder, the lawyers and the funded plaintiff. The existing obligations for managing conflicts of interest imposed on lawyers in class actions (both funded and unfunded) and litigation funders are then discussed in turn. Options for reform identified by the Commission are included at the conclusion of this section, and the Commission welcomes comments on these options, as well as any other ideas for reform in response to the issues raised.

Conflict of interest in the tripartite relationship

- 3.60 In the tripartite relationship, the litigation funder and the lawyer are contractually obligated to each other, as well as individually to the plaintiff.⁶⁰ This is illustrated in Figure 4.
- 3.61 Conflicts of interest are particularly likely to arise within this relationship where:
- In a class action, the lawyers act for all class members, who have differing claims and needs which may conflict.
 - There is a pre-existing legal or commercial relationship between the litigation funder and lawyers.
 - The funder has the control of, or the ability to control, the conduct of proceedings.⁶¹
- 3.62 The Commission has been told that in class actions it is common for at least one, if not all, of these factors to exist. Conflicts of interest may affect decision making at various stages of proceedings, as illustrated in the following examples:
- **The recruitment of prospective class members.** As the litigation funder has an incentive to maximise the number of class members signing up, advertisements may give 'undue prominence' to the prospects of success of proceedings.⁶² Maximising the number of class members also increases the likely divergence in claims between class members, the expected length and complexity of proceedings, and the potential for lawyers to face conflicts of interest when acting for all class members.

60 Funded class actions may reveal some variations on this tripartite arrangement, depending upon the type of class action commenced. In an open class action, the litigation funder and the lawyer will each enter into agreements with the representative plaintiff and some (but not all) of the class members. In a closed class action, the litigation funder and the lawyers will each enter into agreements with the representative plaintiff as well as all the class members. Litigation funders are generally only prepared to fund closed class actions: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191, 227-8 [185].

61 Australian Securities and Investments Commission, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013) 8.

62 *Ibid* [248.14(a)].

- **The terms of any funding agreement.** The litigation funder has an incentive to maximise the amount recoverable in the event of a successful outcome, and may wish to participate in decisions affecting the outcome of proceedings. The lawyers will have an incentive to receive legal fees, and the class members will wish to minimise all costs and maximise their return.⁶³
- **Determination of strategies employed to pursue the claim.** The lawyers may consider aspects of the case to have legal merit, yet the litigation funder may not wish to finance these aspects of proceedings. Alternatively, where a representative plaintiff has a weak claim, a defendant may make an offer for discontinuance which, if accepted, would be against the interests of class members with stronger claims.⁶⁴
- **Determination of confidential information.** The lawyers acting for a class may feel that the best chance of settlement is achieved through disclosure of due diligence carried out by the litigation funder as to the likely success of the claim. For commercial reasons, the funder may not wish such disclosures to be made.⁶⁵
- **Settlement.** The litigation funder may want to settle, yet class members or lawyers may wish to pursue the legal claim.⁶⁶ The types of settlement, including offers of settlement in kind rather than cash, may also cause a conflict between the wishes of the class members and the litigation funder.⁶⁷
- **Settlement distribution schemes.** While class members have an incentive to receive any amounts from proceedings as soon as possible, the lawyers administering the settlement distribution scheme must assess the merits of individual claims and distribute amounts accordingly. The lawyers continue to incur legal costs during settlement distribution schemes, which will diminish the amounts received by class members.

63 Ibid [248.11], [248.14(b)].

64 Ibid [248.14(c)].

65 Vicki Waye, 'Conflicts of Interest Between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 238.

66 Australian Securities and Investments Commission, *Regulatory Guide 248: Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013) 8 [248.14(b)(d)].

67 Vicki Waye, 'Conflicts of Interest Between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 238.

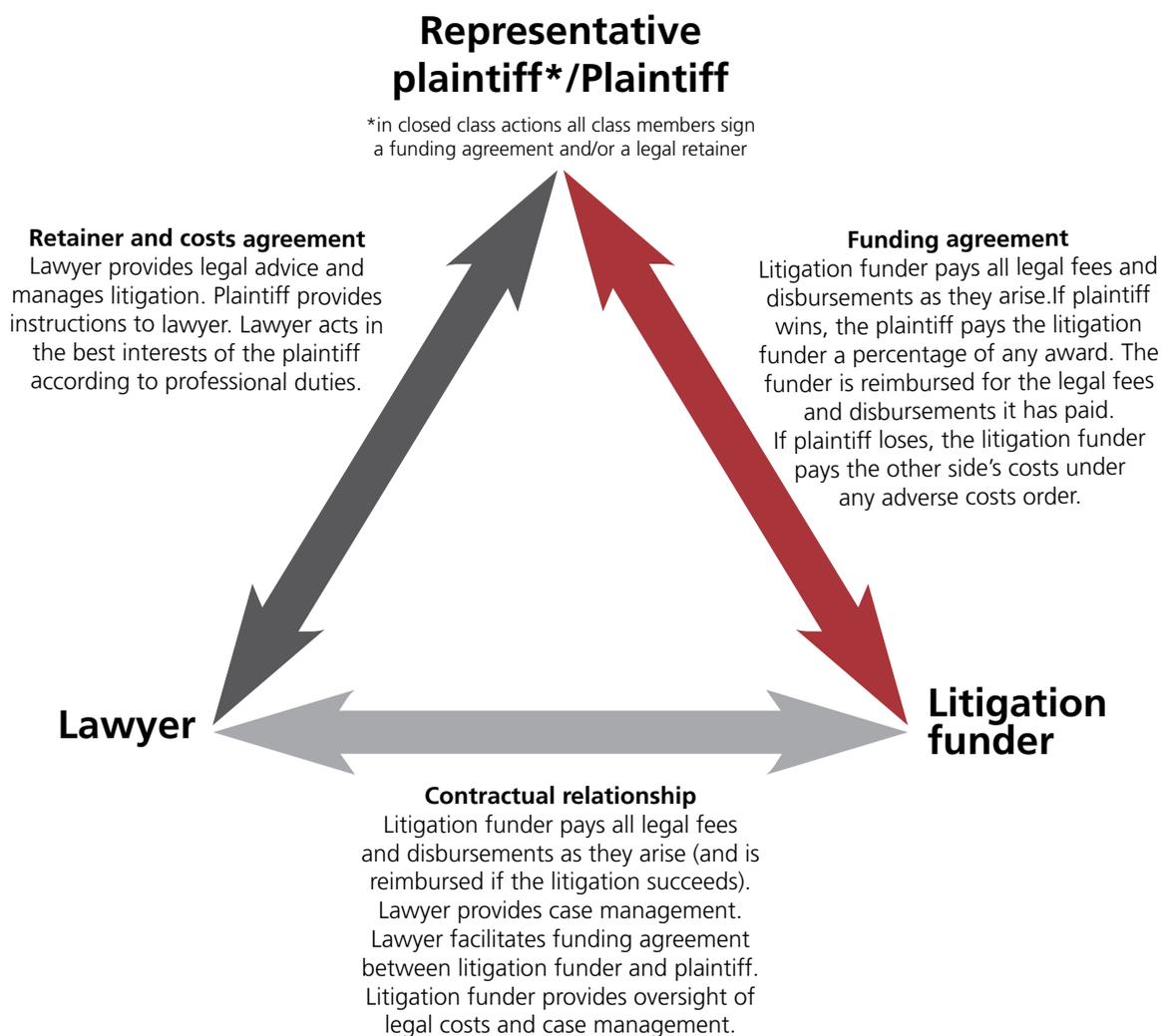


Figure 4: Example of the tripartite relationship

Conflict of interest for lawyers

- 3.63 Without obtaining the client's full and informed consent, a lawyer cannot continue to act for that client where there is a conflict of interest, or a 'real or substantial possibility' of a conflict of interest. The conflict could be between the interests of the lawyer and the client (lawyer/duty conflict) or between the interests of two or more clients (duty/duty conflict).
- 3.64 The obligation on lawyers to avoid conflicts of interest arises under the legislation governing the legal profession,⁶⁸ as well as through the axiomatic lawyer–client fiduciary relationship.⁶⁹
- 3.65 In a class action, it is not only possible but likely that there will be differences between the claims of the representative plaintiff and other class members, as well as between the claims of individual class members.⁷⁰ Their circumstances will not be identical and the harm for which they seek damages will be different in degree and also type. The representative plaintiff has responsibilities that other class members do not share. The interests and expectations of unfunded class members will not be the same as those of funded class members.
- 3.66 In acting for all class members, there is a 'real or substantial possibility' that the lawyer may be exposed to duty/duty conflicts arising between the competing needs of various class members.⁷¹
- 3.67 Furthermore, in funded class actions, while a funding agreement will generally make it clear that the lawyers act for the funded class member and not the litigation funder,⁷² if a litigation funder is paying the legal costs and providing advice about the conduct of proceedings, there is potentially a conflict of interest for the lawyers.⁷³ The lawyers may also have an incentive to please the litigation funder to attract repeat work.⁷⁴
- 3.68 While it is relatively easy for a lawyer to obtain full and informed consent to a conflict of interest when acting for a single client, it is virtually impossible to do so when acting in open class action proceedings.⁷⁵ Rather than relying on disclosure and consent, it is prudent to either remove the risk or reduce it so that it can be managed better.
- 3.69 In its 2000 report on managing justice, the Australian Law Reform Commission (ALRC) made several recommendations to reduce the risk that lawyers involved in class actions would face conflicts of interest. It recommended that:
- the Federal Court consider drafting guidelines addressing the obligations of lawyers to the representative plaintiff and each class member regarding the competing interests of class members and the class
 - the legal profession develop professional practice rules governing lawyers' responsibilities to multiple claimants and in class actions
 - part IVA of the *Federal Court of Australia Act 1976* (Cth) be amended to require class closure at a specified time before judgment.⁷⁶

68 *Legal Profession Uniform General Rules 2015* (Vic) r 11.3.

69 See, eg, *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41.

70 The Victorian class action regime specifically provides for the determination of common as well as individual issues as part of class action proceedings: *Supreme Court Act 1986* (Vic) ss 33Q–33R.

71 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37 *University of New South Wales Law Journal* 914.

72 Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36 *Civil Justice Quarterly* 244, 246.

73 See, eg, Vicki Waye, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225.

74 *Ibid* 237.

75 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37 *University of New South Wales Law Journal* 914.

76 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 551, 553.

- 3.70 The first of these recommendations has been incorporated into the Federal Court Practice Note, which states that any costs agreement should include provisions for managing conflicts of interest (including duty/interest and duty/duty conflicts) between any of the applicant(s), the class members, the lawyers and litigation funders. It also states that lawyers have a continuing obligation to recognise and properly manage any such conflicts throughout proceedings.⁷⁷
- 3.71 While part IVA of the Federal Court Act has not been amended to require class closure at a specified time before judgment, this will typically happen as a matter of process in funded class actions commencing in the Federal Court.⁷⁸ In Victoria, section 33ZG of the Supreme Court Act provides the Court with a specific power to require class members to take specified steps if they wish to benefit from any settlement or judgment amounts recovered.⁷⁹
- 3.72 The ALRC's report did not specifically address the issue of conflict of interest for lawyers in funded class actions, possibly because the report predates substantial activity by litigation funders in this type of proceeding.

Conflict of interest for litigation funders

- 3.73 As discussed earlier in this chapter, litigation funders are not required to hold an Australian Financial Services Licence (AFSL) if they maintain internal processes to manage conflicts of interest that arise in funded proceedings. Failure to maintain adequate practices and follow certain procedures for managing these conflicts is an offence.⁸⁰
- 3.74 The regulatory guide on complying with this requirement, issued by the Australian Securities and Investments Commission (ASIC), states that disclosure of any conflicts of interest should be made prior to entry into a funding agreement so that prospective plaintiffs can make an informed decision about how the conflict of interest may affect the service being provided to them.⁸¹
- 3.75 Disclosure should be 'timely, prominent, specific and meaningful'⁸² and should be ongoing throughout proceedings.⁸³ The method of disclosure (either paper or electronic) may differ according to the method that best suits the plaintiff.⁸⁴
- 3.76 In addition to the disclosure made before entering a funding agreement, a litigation funder is also required to ensure that its funding agreements disclose to members the terms of the agreement between the funder and the lawyer.⁸⁵
- 3.77 The regulatory guide is comprehensive and aligns with the standards required of AFSL holders. However, doubts have been raised about whether the current 'light touch' regulation is sufficient to protect the interests of plaintiffs. The Commonwealth Government's post-implementation review uncovered unfavourable views about the scheme:

77 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 4.

78 See, eg, *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191, 228-9 [189]. Simone Degeling and Michael Legg have also argued that the only way to ensure that the risk of duty/duty conflicts for lawyers is completely excluded is to pursue class actions via a closed class. Alternatively, they have suggested amending part IVA to allow the class to be defined more narrowly, or to allow for greater fragmentation of class members and legal representation: Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37 *University of New South Wales Law Journal* 914.

79 *Supreme Court Act 1986* (Vic) s 33ZG; *Matthews v SPI Electricity Pty Ltd and SPI Electricity Pty Ltd v Utility Services Corporation Ltd* (Ruling No 13) [2013] VSC 17 [63]–[68].

80 *Corporations Amendment Regulation 2012 (No 6)* (Cth). In addition to the statutory requirements to disclose any conflicts of interest, Degeling and Legg argue that a litigation funder may be under an obligation to avoid conflicts of interest with class members under fiduciary obligations. While they note that litigation funders will routinely attempt to exclude the possibility of a fiduciary relationship in the funding agreement, they suggest that the fiduciary relationship arises prior to the entry into the funding agreement. See Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36 *Civil Justice Quarterly* 244.

81 Australian Securities and Investments Commission, *Regulatory Guide 248 – Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013) 18–19 [248.59]–[248.61].

82 *Ibid.*

83 *Ibid* [248.56].

84 *Ibid* 17–18 [248.52]–[248.55].

85 *Ibid* 21 [248.71].

Some stakeholders consider the Regulation merely duplicates existing conflict of interest legislation and has not changed behaviour, while increasing compliance costs. Others have argued that the Regulation does not achieve its objective, in part because of inadequate powers given to ASIC to enforce the provisions.⁸⁶

- 3.78 The utility of conflict of interest disclosures for class members has also been questioned by Professors Vince Morabito and Vicki Waye, who have expressed the view that ‘disclosing conflicts of interest rarely enhances rational consumer decision making and ... disclosure may in fact lull consumers into a false sense of security’.⁸⁷
- 3.79 These criticisms are about how the industry is regulated, a matter that is within the Commonwealth’s jurisdiction. The Commission has not identified any need or scope under Victorian law to augment the conflict of interest guidelines but would welcome comments to the contrary.

Reform options

- 3.80 The Commission has identified from commentary on the subject three possible options for reform to reduce or remove conflicts of interest in funded proceedings and class actions. They are put forward for discussion and the Commission would welcome further reform ideas as well as, or instead of, these options:
- The Supreme Court could draft guidelines addressing the responsibilities of lawyers in class actions.
 - The legal profession could draft guidelines addressing the responsibilities of lawyers in class actions.
 - The Supreme Court could introduce practice requirements for litigation funders involved in class actions in relation to conflicts of interest.

Supreme Court guidelines for lawyers in class actions

- 3.81 The Supreme Court could draft specific guidelines addressing lawyers’ responsibilities to the representative plaintiff and each class member regarding the competing interests of class members and the class. The guidelines could clarify responsibilities in both funded and unfunded class actions. This idea is based on a recommendation by the ALRC in 2000 that the Federal Court draft guidelines of this nature.
- 3.82 Either in addition or alternatively, the Supreme Court could ensure that lawyers in class action proceedings have procedures in place for managing conflicts of interest during the proceedings. This option has been adopted by the Federal Court. The Federal Court Practice Note requires legal retainers and litigation funding agreements to include provisions for managing conflicts of interest. It does not provide detail on how the risk of conflicts of interest can be reduced.

Legal profession guidelines for lawyers in class actions

- 3.83 This option was also recommended by the ALRC in 2000. As Victorian lawyers are now governed under uniform law with the legal profession in New South Wales, it is not solely a matter of Victorian jurisdiction.

⁸⁶ The Treasury, Australia, *Post-Implementation Review—Litigation funding—Corporations Amendment Regulation 2012 (No 6)* (October 2015) 23.

⁸⁷ Vince Morabito and Vicki Waye, ‘Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions’ (2017) 36 *Civil Justice Quarterly* 213, 235.

Supreme Court practice requirements for litigation funders involved in class actions

- 3.84 This option would see the Supreme Court introduce obligations for litigation funders that are involved in proceedings in relation to conflicts of interest. These obligations would apply in addition to the disclosure obligations provided at a Commonwealth level in ASIC's regulatory guidance.
- 3.85 The Federal Court Practice Note states that any litigation funding agreement should include provisions for managing conflicts of interest between the funded class members, the lawyers and the litigation funder. The obligation to recognise and properly manage any conflicts of interest is placed on the lawyers, as opposed to the litigation funder.

Question

- 5 Is there a need for guidelines for lawyers on their responsibilities to multiple class members in class actions? If so, what form should they take?

Disclosure to plaintiffs

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4. Disclosure to plaintiffs

Introduction

- 4.1 Litigation, by its very nature, is risky, uncertain and complex. Disclosure by lawyers to their clients about the costs, likely progress and possible outcomes of litigation ensures that the client is able to make a fully informed decision as to whether pursuing litigation is in their best interests.
- 4.2 In a typical lawyer–client relationship, this information will either be set out in the legal retainer and costs agreement signed between the lawyer and the client, or disclosed to the client prior to the commencement of proceedings. The client will consent to all matters set out in the retainer and will be informed of material changes to them throughout the course of the relationship.
- 4.3 Similar disclosure obligations apply in proceedings financed by a litigation funder (funded proceedings). The lawyer must give the plaintiff an estimate of the legal costs and disclose any conflict of interest. The litigation funder must disclose how conflicts of interest in funded proceedings will be managed.
- 4.4 The problem is that in funded proceedings—and particularly in class actions—disclosures made at the start of proceedings in a litigation funding agreement or legal retainer are unlikely to provide the necessary information that all class members need in order to make a fully informed decision about their participation during the proceedings. This is due to the following factors:
- The way in which costs arise and accrue in funded proceedings is complex. Disclosure of estimated costs at the commencement of proceedings may not accurately reflect the amount that is actually deducted from any judgment or settlement amount. In funded proceedings, costs arise from a number of sources and are unlikely to be standard or consistent for the duration of proceedings. For example, a litigation funder may stipulate a particular funding fee in the funding agreement, but may also hold a contractual entitlement to increase the rate in particular circumstances, such as where the commencement of proceedings is delayed. A litigation funder may also be contractually entitled to additional fees, such as a project management fee, upon crystallisation of certain events or timeframes.
 - In a class action, different legal costs may apply to different sub-groups of the class, depending on the claims to be determined at settlement.¹ Where a settlement distribution scheme is particularly large or difficult, additional legal costs may be incurred which were not expected at the outset. Discretionary court orders at settlement, such as common fund orders, may also mean that class members receive different amounts to those originally disclosed.

- In a class action, disclosures to class members who have entered a funding agreement (funded class members) and legal retainer at the commencement of proceedings will not necessarily reach all of the class members who ultimately participate in the proceedings or contribute to the costs. In an open class action, the class is likely to include members who have not entered a funding agreement (unfunded class members) as well as those who have. As discussed in Chapter 7, if the court makes a common fund order or a funding equalisation order, unfunded class members must pay a proportion of any settlement or judgment amount they receive to cover the costs of bringing proceedings, whether or not they have executed agreements to this effect. Disclosure to both funded and unfunded class members is therefore necessary and appropriate to enable them to make informed decisions about their participation.
- 4.5 The effectiveness of disclosure depends not only on the information being given, but also the form in which it is given. The clarity of language, how widely the information is disseminated, the period provided for response, and the ease or accessibility of response options can all affect how well the information is conveyed.² If information is disclosed in complex and lengthy contracts or notices, it is unlikely to be comprehensible to plaintiffs lacking legal knowledge or legal assistance.³
- 4.6 The Commission has been asked to report on whether clearer disclosure requirements should be imposed on litigation funders and lawyers who represent funded plaintiffs about the progress, costs and possible outcomes of proceedings. The term ‘funded plaintiff’ refers to an individual plaintiff—either a person or an entity—who has entered into a funding agreement with a litigation funder to finance a claim against a defendant. In class actions financed by a litigation funder, the ‘funded plaintiff’ is referred to as the ‘funded class member’.
- 4.7 This chapter discusses funded proceedings at three separate stages: the commencement of proceedings; during proceedings; and after judgment or settlement. For each stage, it assesses the type and form of disclosure necessary to ensure plaintiffs are adequately informed about the evolving progress, costs and possible outcomes of proceedings.
- 4.8 While this chapter focuses on disclosure obligations in class actions, the Commission is also interested in whether clearer disclosure obligations should apply in proceedings other than class actions where a litigation funder is involved. As discussed in Chapter 2, litigation funders finance other types of proceedings, notably insolvency, commercial and contractual disputes, intellectual property and estates.

Commencement of proceedings

- 4.9 By the time funded proceedings commence, the litigation funder and the law firm will have entered into contractual arrangements with each other, as well as individually with the plaintiff. In a class action, notice must be given to class members at various points of proceedings, including at commencement. The form and content of such notices must be approved by the court.⁴
- 4.10 Court-approved notice is also used to inform the public that proceedings have been commenced against the defendant. Eligible persons will generally be invited to either register for the class action or opt out of proceedings in this notice.

2 Simone Degeling and Michael Legg, ‘Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties’ (2014) 37 *University of New South Wales Law Journal* 914, 927–8; Michael Legg, ‘Judge’s Role in Settlement of Representative Proceedings: Lessons from United States Class Actions’ (2004) 78 *Australian Law Journal* 58, 67; Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52, 55.

3 Where court-approved notices are given in class actions, research suggests that class members have difficulty comprehending them: Vince Morabito, ‘Empirical Perspectives on 25 Years of Class Actions’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 65–6.

4 Under the *Supreme Court Act 1986* (Vic), ss 33X(1), 33X(4), 33Y(1).

4.11 Excluding the disclosure of information that is material to the individual proceedings, the information that the litigation funder and lawyers must provide to plaintiffs at this stage, either in the contract or by giving notice, can be classified into two broad categories:

- disclosure of the expected costs of the proceedings
- disclosure about the relationship between the lawyer and the litigation funder.

Expected costs

4.12 At the commencement of any proceeding—including class actions, whether or not they are financed by a litigation funder—lawyers in Victoria are required to tell their clients⁵ what they expect the legal costs to be. Their legal costs must be fair, reasonable and proportionate.⁶

4.13 Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic) (the Uniform Law), sets out the following duties of disclosure:

- Lawyers must provide a written estimate (or range of estimates) of total legal costs and be satisfied that the client has understood and given consent to the proposed costs.⁷
- Costs information must include information about the client’s right to negotiate a costs agreement or billing method, to request an itemised bill, and to seek the assistance of the designated local authority in the event of a dispute.⁸
- Costs information must be provided on an ongoing basis and enable clients to make informed choices about costs and legal options.⁹
- Any conditional costs agreement must be disclosed in plain language, and a ‘no win, no fee’ agreement must disclose an estimate of total costs, as well as details of disbursements, uplift fees, and responsibility for any adverse costs.¹⁰

4.14 Costs information must be given when, or as soon as practicable after, instructions are initially given in a matter. This is an ongoing obligation, which applies to the duration of the retainer.¹¹

4.15 Contract law requires a litigation funder to disclose material terms in a litigation funding agreement, which includes disclosure of the funding fee and any other charges that may accrue during proceedings. Unlike lawyers, however, litigation funders are not under any additional disclosure obligations in relation to these fees, such as disclosure of the basis upon which these fees are charged, or estimated total amounts of charges.

4.16 Lawyers’ disclosure obligations under the Uniform Law are reinforced by the court’s power to require them to give further information to their clients. Under the *Civil Procedure Act 2010* (Vic) the court may, at any time in a proceeding, order a lawyer to disclose certain matters in a memorandum to their client, which may include:

- the actual costs and disbursements incurred in relation to the proceeding or any part of the proceeding
- the estimated costs and disbursements in relation to the proceeding or any part of the proceeding
- the estimated costs that the party would have to pay another party if the claim is unsuccessful at trial
- the estimated length of the proceeding or any part of the proceeding.¹²

5 A client is broadly defined under the legislation as ‘a person to whom or for whom legal services are provided’: *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (*Legal Profession Uniform Law*) s 6.

6 Ibid sch 1 *Legal Profession Uniform Law* s 172.

7 Ibid sch 1 *Legal Profession Uniform Law* s 174.

8 Ibid.

9 Ibid.

10 Ibid sch 1 *Legal Profession Uniform Law* ss 181–2.

11 Ibid sch 1 *Legal Profession Uniform Law* s 174.

12 *Civil Procedure Act 2010* (Vic) s 65B.

- 4.17 Even though the disclosures that are, or may be, required of lawyers are comprehensive, they focus on legal costs and disbursements typically involving a single client. They do not expressly indicate how costs disclosures are to be made to multiple class members in a class action.¹³ Further, in funded proceedings, it is the litigation funding fee that generally represents the largest single amount deducted from the settlement or judgment.¹⁴ The disclosure of isolated legal costs by their lawyer may still leave the plaintiff ill-informed about the cumulative impact of these costs and of the fees and charges that are not included.
- 4.18 Therefore, in Victoria there is a gap in the disclosure obligations with which lawyers must comply, and in the court's express powers to order disclosure to plaintiffs about costs in funded proceedings, and particularly class actions. Lawyers are not expressly required to disclose information to the plaintiff about the funding fee and associated costs at the commencement of funded proceedings.
- 4.19 In contrast, the Federal Court has issued a practice note that requires lawyers to disclose more detailed and comprehensive information, including about the litigation funding charges, in class actions. This is discussed in the next section.

Federal Court practice

- 4.20 In its report *Managing Justice* (2000), the Australian Law Reform Commission recommended that the Federal Court consider drafting guidelines addressing the procedures to be followed to ensure that fair costs agreements exist between class members and lawyers in class actions.¹⁵
- 4.21 The Federal Court's *Class Actions Practice Note* sets out how lawyers should disclose their legal costs and any 'litigation funding charges' to current (and potential) clients in class actions.¹⁶ Litigation funding charges include any funding fee and any other charges (including those estimated) to be charged to class members.
- 4.22 The Federal Court Practice Note specifies a number of requirements for lawyers when discharging these obligations:
- The costs agreement and litigation funding agreement must be in writing.
 - Any notification of the legal costs or litigation funding charges must be in clear terms, and provided as soon as practicable.
 - The obligation is ongoing and applies to any material change to these costs.
 - Failure to notify class members of the legal costs and litigation funding charges may be taken into account by the Court at settlement.
 - The obligation regarding disclosure of litigation funding charges is satisfied if class members have been provided a document that properly discloses those charges.
 - When notifying class members of legal costs, the applicant's lawyers should provide information about the different categories of legal costs in a class action, and the different situations in which class members may be required to meet a share of unrecovered costs under the *Federal Court Act 1976* (Cth).¹⁷
- 4.23 Similar obligations do not appear to apply to other types of proceedings in which litigation funders are involved.

13 See, eg, *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013).

14 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72].

15 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 551.

16 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*—*General Practice Note*, 25 October 2016, 4 [5.3].

17 *Ibid* 3–4 [5].

Disclosure about the litigation funder and lawyer

- 4.24 As outlined in Chapter 3, a tripartite relationship is created in funded proceedings between the funded plaintiff, the lawyers and the litigation funder. It is widely accepted that conflicts of interest can arise within this relationship.
- 4.25 Lawyers and litigation funders are under a duty to disclose these conflicts of interest when entering into contractual arrangements with a plaintiff. It is important that the plaintiff is also kept informed about how actual or potential conflicts of interest are to be managed during proceedings.
- 4.26 These issues, and reform options to reduce or remove the risk that lawyers are exposed to conflicts of interest when involved in funded proceedings, are discussed in Chapter 3.

During proceedings

Expected costs

- 4.27 The obligation on lawyers under the Uniform Law to provide costs information continues to apply during the proceedings and throughout the course of the relationship. In class actions commenced in the Federal Court, the obligation applies to information about litigation funding charges as well as legal costs and disbursements.¹⁸

Progress and outcomes

- 4.28 As discussed in Chapter 3, lawyers and litigation funders involved in proceedings are subject to overarching statutory obligations that aim to facilitate the ‘just, timely and cost effective resolution of the real issues in dispute’.¹⁹ They include obligations to use reasonable endeavours to resolve the dispute, narrow the issues in dispute and minimise delays.²⁰ These obligations reinforce the court’s role in case management.
- 4.29 In class actions, the Supreme Court of Victoria has specified a number of procedural steps that it will use to supervise progress. These steps are set out in a general practice note for class actions (Supreme Court Practice Note) and include: case management conferences; procedures required for interlocutory applications, summary judgment or trial of common questions and settlement.²¹ These procedural steps generate activity and produce information about progress and likely outcomes that is available to both plaintiffs and defendants.
- 4.30 Because of the uncertain and risky nature of litigation, proceedings may not progress at the rate or in the manner expected when they began. It is important to keep plaintiffs informed of the legal progress of the litigation, actual and expected costs and the likely outcomes.
- 4.31 In class actions, keeping class members informed of these matters is particularly important for opt out purposes. The opt out model was adopted in Australian class actions as a means of protecting class members’ interests.²² In order for it to provide meaningful protection, class members must be informed of what they are opting out of. Unless they are adequately informed of the evolving progress, costs and likely outcomes during a class action, their ability to make a fully informed decision in choosing to opt out or remain part of proceedings is reduced.

18 Ibid 4 [5.3].

19 *Civil Procedure Act 2010* (Vic) s 7(1).

20 Ibid ss 22, 23, 25.

21 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.

22 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 63 [147].

- 4.32 In class actions, two methods of notification are typically used to inform class members about the progress of proceedings:
- **Informal notification.** Informal methods of communicating with class members about the progress and outcomes are currently used on a case-by-case basis during proceedings. The Supreme Court Practice Note provides that communication with unrepresented class members should be addressed by parties at the first case management conference or by application as required. Application can also be made for a court order in relation to how communication with class members should be undertaken.²³ Typically, the representative plaintiff's lawyers and the Supreme Court will publish updates and other information about the class action on websites. The representative plaintiff's lawyers will also keep class members updated about the progress of proceedings via other electronic means, or through other methods such as advertisements or media releases. Where class members include vulnerable persons—being those disadvantaged by socio-economic, health, psychological and/or intellectual barriers—lawyers have had to adopt creative methods for making and maintaining contact with them and communicating complex legal concepts in a meaningful way.²⁴
 - **Formal notification via Court-approved notice.** Formal Court-approved notice must be given at various points of proceedings, including at commencement and prior to the opt out date, upon application for dismissal of proceedings or settlement of individual claims by the representative plaintiff and prior to settlement approval.²⁵ The Court has the power to order that notice be given to class members of any matter at any stage of proceedings.²⁶
- 4.33 Both the form and content of formal notices are approved by the Court.²⁷ The Supreme Court Practice Note provides some guidance regarding the content of settlement notices, which are discussed in Chapter 7. The form of the opt out notice is prescribed by the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*.²⁸ The Court must not order that notice be given personally to each class member unless it is satisfied that it is reasonably practicable, and not unduly expensive, to do so.²⁹
- 4.34 Formal notice provisions are important in ensuring all class members (both funded and unfunded) are kept informed of issues which may affect their rights and interests. While informal methods of notification are useful, they may be limited in reach to identified class members, or those who are familiar with the details of proceedings. In attempting to reach all potential class members, it is appropriate and necessary that formal notice be mandatory and that the Court supervise the form and content of these notices.
- 4.35 Although formal notices convey information that the class member needs to know and understand when making a decision that affects their interests, they do not necessarily do this well. Justice Murphy commented on this problem in *Kelly v Willmott Forests Ltd (in liq) (No 4)*:
- The notices are lengthy and not straightforward for a non-lawyer to understand. I mean no criticism of the parties in this regard as the task of combining information about class member registration, security for costs and the right to opt out in one notice was not without difficulty.³⁰

23 Ibid 3 [5.8(i)], 4 [6.2(f)], 5 [8].

24 Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study' (2016) 35 *Civil Justice Quarterly* 61, 87–8.

25 *Supreme Court Act 1986 (Vic)* ss 33X(1), 33X(4).

26 Ibid s 33X(5).

27 Ibid s 33Y(1).

28 *Supreme Court (General Civil Procedure) Rules 2015 (Vic)* reg 18A.04.

29 *Supreme Court Act 1986 (Vic)* s 33Y(4).

30 *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, 476 [182].

- 4.36 Since 2010, the Federal Court has provided a sample opt out notice written in plain English with the Federal Court Practice Note for class actions. The latest version of the practice note explains, in non-technical language, what class actions and opt out mean, the class members' rights and obligations, and what class members must do to either opt out of or remain in proceedings.³¹
- 4.37 Where a class action involves vulnerable persons, the courts have demonstrated a willingness to adopt special practices regarding notification to ensure all class members are provided with notice in an accessible and comprehensible format.³²
- 4.38 For example, in *Gagarimabu v BHP*³³ the Supreme Court of Victoria ordered that opt out notice be communicated to class members in more than one language orally, in writing, in newspapers, by radio broadcast and through village meetings.³⁴
- 4.39 In all cases, the notices to class members need to be clear. Despite the use of sample notices by trial judges in the Federal Court, evidence suggests that class members are still having difficulty comprehending the purpose and content of the notice.³⁵
- 4.40 In *Money Max*, the Federal Court noted that most of the class members who filed an objection seemed to have misunderstood the nature and purpose of the notice.³⁶ Upon assessing class members' comprehension of the meaning and significance of opt out notices under the Commonwealth class action regime, Professor Vince Morabito found a 'total misunderstanding' by some of the essential characteristics of class action litigation and the opt out device.³⁷

After judgment or settlement

- 4.41 Typically, funded proceedings will end in settlement or judgment, which determines both the liability of the defendant and the compensation, if any, to be received by the plaintiff. For the litigation funder, settlement or judgment is the point at which their funding fee is determined. Once this has been settled and paid, they have no further involvement in the action.

Settlement distribution schemes

- 4.42 In class actions, however, settlement or judgment does not represent the end of the lawyers' obligations. The settlement or judgment amount must still be divided up and paid to participating class members. The purpose and mechanics of settlement distribution schemes are discussed in detail in Chapter 7. The present discussion relates only to disclosure of the progress, costs and possible outcomes of settlement distribution schemes to class members.
- 4.43 The disclosures made to class members during settlement distribution schemes have been the subject of recent media criticism in Victoria, particularly in relation to the settlement money for victims of the 2009 bushfires.³⁸ Currently, there is no provision in part 4A or in the Supreme Court Practice Note setting out disclosure requirements during a settlement distribution scheme.

31 Federal Court of Australia, *Sample Opt Out Notice (Schedule A and Schedule B)—Class Actions Practice Note*, 25 October 2016 <www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/sample-opt-out-notice>.

32 Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study' (2016) 35 *Civil Justice Quarterly* 61, 87–8.

33 [2001] VSC 304 (27 August 2001).

34 *Ibid* [12].

35 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 66.

36 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 205 [51].

37 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 66.

38 See, eg, Pia Ackerman, 'Black Saturday Bushfire Victims Left to Count the High Cost of Class Actions', *The Australian* (Sydney) 13 December 2016; Pia Ackerman, 'Bushfire Victims Demand Inquiry into Legal Firm', *The Australian* (Sydney) 22 May 2017.

- 4.44 The Court may play a supervisory role in ensuring that adequate disclosure is made to class members during this stage. During the settlement distribution scheme for the Kilmore East and Kinglake Bushfires trials, the Court had a role in overseeing:
- the progress of the claims assessment process
 - issues raised by the scheme administrator that required court direction or approval
 - keeping class members informed
 - approval of interim payments of the administrators' costs.³⁹
- 4.45 In particular, Justice Forrest observed (extra judicially):
- The other point worth mentioning, and unrelated to those I have just set out, was the need to hold regular CMCs [case management conferences] and publish 'rulings' to keep the process under review and ensure group members were apprised of the progress of the SDS [settlement distribution scheme]. Evidence at the CMCs was given both on affidavit and *viva voce* by the scheme administrator and on one occasion by the special referee. Each of the SDS rulings was published on an easily accessible part of the Court website dedicated to the Black Saturday bushfire cases.⁴⁰
- 4.46 The Federal Court Practice Note has been amended to provide some guidance for Court supervision of settlement distribution schemes. Particularly, the affidavit(s) in support of an application for Court approval of settlement requires a statement of:
- the time at which it is anticipated settlement funds will be received by class members
 - the frequency of any post-approval report(s) to be provided to the Court about the distribution of settlement funds.⁴¹
- 4.47 The Federal Court also requires the scheme administrators (the lawyers) to advise the Court at regular intervals of the performance of the settlement (including any steps in the settlement distribution scheme) and the costs incurred in administering the settlement in order that it may be satisfied that distribution of settlement monies to the applicant and class members occurs as efficiently and promptly as practicable.⁴²

Reform options

- 4.48 This chapter has identified a number of gaps in the information provided to plaintiffs by lawyers and litigation funders about the costs, progress and possible outcomes at various stages of funded proceedings. These gaps mean that plaintiffs involved in funded proceedings may not obtain the information necessary to make a fully informed decision as to whether involvement in litigation is in their best interests. The Commission would welcome suggestions about procedural, regulatory or other reforms that would reduce the risk of this occurring.
- 4.49 A starting point would be to draw on the measures introduced by the Federal Court in class actions. For example, reforms could be introduced to:
- Expressly require lawyers to disclose litigation funding charges at the commencement of, and during, proceedings. This would be in addition to the existing requirement to keep their clients informed about their own legal costs and disbursements. It is unclear whether such a requirement, if introduced, should apply only in funded class actions or in all proceedings financed by a litigation funder.

39 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East / Kinglake Bushfire Trial' 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) 71, 93–4.

40 Ibid.

41 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 13–14 [14.5(e)(f)].

42 Ibid [14.6].

- Improve the informal and formal notice given to class members about progress and outcomes during proceedings by creating standardised examples that lawyers could adapt, or by issuing guidelines on how to communicate with both funded and unrepresented class members.
- Provide guidance for lawyers about disclosures to plaintiffs during settlement distribution schemes, including what information should be provided and in what form.

Questions

- 6 In funded class actions, should lawyers be expressly required to inform class members, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?
- 7 In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?
- 8 How could the form and content of notices and other communications with class members about progress, costs and possible outcomes be made clearer and more accessible?
- 9 Is there a need for guidelines for lawyers on how and what they communicate with class members during a settlement distribution scheme? If so, what form should they take?

Disclosure to the court

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- 66** Current disclosure of funding agreements to the court
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5. Disclosure to the court

Introduction

- 5.1 The Commission has been asked to report on whether the obligation to disclose funding agreements in proceedings supported by litigation funders should be extended beyond class actions and, if so, what other types of proceedings should be covered by the obligation.
- 5.2 As discussed in Chapter 2, litigation funders are involved a variety of commercial claims,¹ and the number operating in Australia is increasing. This includes both nationally based entities and international litigation funders.²
- 5.3 If a litigation funder is involved in funding insolvency proceedings, the liquidator is generally required by the *Corporations Act 2001* (Cth) to obtain court approval for entry into the funding agreement.³ Disclosure of the funding agreement to the Court, and other parties, is also required in funded class actions commencing in the Federal Court. In contrast, there is no standing obligation on the lawyer or litigation funder to disclose funding agreements in class actions under part 4A of the *Supreme Court Act 1986* (Vic), or in other funded proceedings (other than insolvency proceedings) conducted under Victorian law. However, the court retains the power to order disclosure on an ad hoc basis.
- 5.4 This chapter considers the question of whether litigation funding agreements, or related information, should be required to be routinely disclosed to the court and, if so, the circumstances when this would be necessary. A number of reform options are put forward, and the Commission would welcome comments about these or other proposals.
- 5.5 Before turning to the reform options, the chapter sets out the principal reasons why the disclosure of information about litigation funding agreements to the court can be desirable, and gives an overview of current law and practice.

1 See, eg, Chris Merritt, 'Funds Venture Targets Small Claims', *The Australian* (Sydney), 21 April 2017, 27.

2 From March 1992 to September 2016, funded class actions commenced in the Federal Court involved at least 24 litigation funders, 59% of which were incorporated overseas: Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 48.

3 *Corporations Act 2001* (Cth) s 477(2B).

Purposes served by disclosure

- 5.6 Litigation funders are not parties to the proceedings that they fund. They have a financial interest in the outcome but do not conduct the litigation. It is reasonable to ask why the court would need to see the funding agreement. The point has been made in discussions with lawyers and litigation funders that the court does not see the insurance policy that the defendant may have taken out to indemnify it for the costs of responding to the claim. On this view, the funding agreement is simply creating a level playing field for the plaintiff against an insured defendant.⁴
- 5.7 There are cogent reasons, however, why the litigation funding agreement, or information about the arrangement, should be available to the court and to the parties. As discussed in Chapter 3, there are potential conflicts of interest in the tripartite relationship between the litigation funder, lawyer and plaintiff. As discussed in Chapters 4 and 7, disclosure of this information can be important to protect the legitimate interests of the defendant and, in class actions, the unrepresented class members.
- 5.8 Paragraphs [5.9] to [5.22] discuss the purposes served by disclosure, for the court and the defendant, in more detail.

Supervision and management of proceedings

- 5.9 Disclosure of any funding agreement that is supporting a party to proceedings assists the court in supervising and managing the litigation. The degree to which it does so will vary from one case to the next. The ways in which it can assist can be divided into three primary categories.
- **Integrity of process.** Disclosure puts the court on notice that a litigation funder is involved in the proceedings. The ability of the court to control proceedings and any abuse of process that arises from the involvement of a litigation funder (as recognised in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*⁵) depends on this knowledge. For example, in *Bolitho v Banksia Securities Ltd (No 4)*,⁶ disclosure of the funding agreement assisted the Supreme Court in determining that, due to their interests in the litigation funder and the terms of the funding agreement, counsel and lawyers for the representative plaintiff should be prevented from continuing to act.
 - **Protection of the interests of all parties.** Disclosure enables the court to assess the reasonableness of the terms of the agreement and whether they adequately provide for the interests of all parties. For example, in class actions and insolvency proceedings, persons (class members and creditors respectively) who do not appear before the court are directly affected by the terms of any funding agreement. Disclosure enables the court to ensure that the interests of these unrepresented parties are adequately considered under the terms of the funding agreement.
 - **Case management.** Disclosure also plays an important role in case management. It allows any particular issues arising from the funding agreement to be identified, and addressed, at an early stage of proceedings. For example, if the funding agreement enables the litigation funder to terminate funding at any stage of proceedings, the defendant may wish to obtain a security for costs order. Disclosure of the funding agreement allows this issue to be dealt with early in proceedings.

4 In 2008 the Commission recommended that parties should be required to disclose the identity of an insurer or litigation funder who exercises control over the conduct of the insured or funded party, and that the court should have discretion to order disclosure of the insurance policy or funding agreement if disclosure is appropriate: Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 476.

5 (2006) 229 CLR 386.

6 *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582 (26 November 2014).

Capital adequacy

- 5.10 In the absence of regulatory oversight of litigation funders, other than those listed on the Australian Securities Exchange (ASX),⁷ there can be doubt about whether a litigation funder holds, or has access to, adequate capital to meet its financial obligations contained in a funding agreement—particularly if the litigation is unsuccessful.
- 5.11 A substantial proportion of the terms contained in a funding agreement will apply to one of two scenarios: where the litigation is successful, or where it is unsuccessful. Disclosure of the funding agreement enables the court to consider how the interests of all parties are affected by the funding agreement in both scenarios.
- 5.12 If the litigation is unsuccessful, the terms of the funding agreement relating to adverse costs—and whether an indemnity for adverse costs has been provided by the litigation funder—are of particular interest not only to the court, but also to the defendant.
- 5.13 John Emmerig and Michael Legg have argued that the adverse costs arrangements in funded class actions need to be transparent:
- Greater attention needs to be paid to the unsuccessful class actions where the funder is required to honour its obligations in relation to indemnities to representative parties and group members to pay adverse costs orders owed to respondents.⁸
- 5.14 Although litigation funding agreements typically indemnify the plaintiff for the costs of bringing proceedings (including an adverse costs or security for costs order), this cannot be assumed in practice. As outlined by Justice Murphy in *Earglow Pty Ltd v Newcrest Mining Ltd*,⁹ a wide variety of costs arrangements are adopted in funded proceedings. These include structures where the litigation funder pays adverse costs but not legal costs and disbursements, where legal costs and disbursements are covered up to a particular amount, or where adverse costs are covered by after the event insurance.¹⁰
- 5.15 These costs arrangements influence not only the funding fee charged by the litigation funder but also the ability of the defendant to recover its costs in the event that the litigation is unsuccessful. Early disclosure of these arrangements assists in providing certainty to the defendant.¹¹
- 5.16 Even though disclosure is important for this purpose, the Commission notes that it is not a substitute for industry-wide regulation. In its 2014 report on access to justice, the Productivity Commission noted the limitations faced by the courts in verifying the financial status of litigation funders, and particularly, whether a litigation funder is in a sound position to meet all its concurrent financial obligations.¹² Furthermore, disclosure of this type does not provide assurance to the plaintiff, when entering the agreement, that the litigation funder is able to meet its financial obligations.¹³

7 As noted in Chapter 3, some of the large litigation funders operating in Australia are listed on the ASX. They are subject to continuous disclosure requirements under the market listing rules and the relevant provisions of the *Corporations Act 2001* (Cth). These provisions require an entity to make significant financial disclosures, and notify the ASX of specified events or matters as they arise, for the purpose of making that information available to participants in the market.

8 John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 133, 171.

9 [2016] FCA 1433 (28 November 2016).

10 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [179].

11 Michael Legg et al, 'The Rise and Regulation of Litigation Funding in Australia' (2011) 38 *Northern Kentucky Law Review* 625, 655.

12 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 631.

13 Emmerig and Legg have queried the efficacy of current disclosure requirements to the courts in light of the lack of capital adequacy requirements for litigation funders in Australia. While the existence of an indemnity for costs in a litigation funding agreement may satisfy the courts, it provides no guarantee that the litigation funder has sufficient resources to meet these obligations. The plaintiff (or the defendant in the event of an impecunious plaintiff) may be at risk of bearing the costs of defending an action if the litigation funder is unable to meet its obligations: John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 133, 171.

Security for costs

- 5.17 One means of protecting a defendant against an impecunious litigation funder is through a security for costs order.¹⁴ The court may order security for costs either on application by the defendant or at its own discretion.
- 5.18 In class actions, a security for costs order will be made against the representative plaintiff.¹⁵ The Federal Court has indicated some reluctance to do this. Commentary suggests that this is out of concern that class members may be forced to share the financial burden of the order, thereby removing their immunity from costs orders under part IVA of the *Federal Court of Australia Act 1976* (Cth).¹⁶ Where a litigation funder is financing a class action, however, the Federal Court has recognised that the litigation funder, rather than the class members, will bear the financial burden of the order.¹⁷ Accordingly, it may be more willing to award security for costs against the representative plaintiff in funded class actions.
- 5.19 Similarly, in *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd*,¹⁸ the New South Wales Court of Appeal indicated that the involvement of a litigation funder in proceedings increased the likelihood of an order of this type being made:
- a court should be readier to order security for costs where the non-party who stands to benefit from the proceedings is not a person interested in having rights vindicated, as would be a shareholder or creditor of a plaintiff corporation, but rather is a person whose interest is solely to make a commercial profit from funding the litigation. Although litigation funding is not against public policy, the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made; and in my opinion, courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs if the litigation fails.¹⁹
- 5.20 The defendant may wish to obtain a security for cost award if there is doubt about the funder's financial capacity to pay costs orders in a number of circumstances, such as where:
- information about the litigation funder's financial capacity may not be publicly available
 - the litigation funder may be based offshore
 - the funding arrangement may not provide an indemnity for costs
 - the litigation funder may have retained the right under the funding agreement to terminate the funding at any stage of proceedings.²⁰

Terms of settlement

- 5.21 In the event that the funded proceedings are successful, disclosure of the funding agreement will ensure that the court is aware of the terms relating to settlement or judgment, such as the fee to be paid to the litigation funder.

14 The ability of a security for costs order to provide comfort from an impecunious litigation funder is affected by the size of the order. Commentary has noted that even if security for costs is ordered, the amount of security a court requires to be posted is often substantially lower than the costs the defendant actually incurs: John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 133, 171. The matters which the Court may take into account in determining the size of a security for costs order in a class action, and what costs may be covered in such an order, are outlined in *Pathway Investments Pty Ltd v National Australia Bank Ltd* [2012] VSC 97 (21 March 2012).

15 The general rule is that only parties to proceedings may be subject to costs orders, but courts have the discretion to order security for costs where the interests of justice allow a departure from this: G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 753–4.

16 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 30–1.

17 *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317.

18 (2008) 67 ACSR 105.

19 *Ibid*, 120–1 [51].

20 Vince Morabito and Vicki Waye, 'Reining in Litigation Entrepreneurs: A New Zealand Proposal' [2011] *New Zealand Law Review* 323, 353; New South Wales Law Reform Commission, *Security for Costs and Associated Orders*, Report No 137, December 2012, 50–1.

- 5.22 As discussed in Chapter 5, disclosure of these terms to the Court in class actions is important in protecting the interests of all class members. This includes unrepresented class members, who do not appear before the Court.

Current disclosure of funding agreements to the court

Class actions

- 5.23 In 2010, the Supreme Court Practice Note for class actions was amended to require the disclosure of litigation funding agreements at, or prior to, the initial case management conference.²¹ However, this obligation does not appear in the most recent version of the practice note, issued on 30 January 2017.²²
- 5.24 The Commission has been told that the Court prefers to deal with the disclosure of funding agreements on a case-by-case basis rather than having a standard requirement in the Supreme Court Practice Note. This provides the Court with flexibility where different degrees of disclosure are sought.²³
- 5.25 In contrast, in all funded class actions commencing in the Federal Court, the relevant practice note (Federal Court Practice Note) requires funding agreements to be disclosed to the Court.²⁴ Disclosure may be limited to a standard form agreement, and need not include individual variations to the standard form that might be negotiated with different class members.²⁵
- 5.26 In addition, the applicant’s lawyers are required to update the Federal Court about any revised costs or funding agreements when:
- (a) there is a change to the standard form of litigation funding agreement or costs agreement which significantly alters the agreement;
 - (b) a proceeding not previously subject to a litigation funding agreement becomes subject to such an agreement;
 - (c) there is a change of the litigation funder funding the proceeding; or
 - (d) the litigation funder becomes insolvent or otherwise unable or unwilling to continue to provide funding for the proceeding.²⁶
- 5.27 The Federal Court Practice Note also requires disclosure of the funding agreement to other parties no later than seven days before the first case management conference. Again, disclosure may be limited to a standard form agreement.²⁷
- 5.28 Provision is also made for the redaction of any information which might be expected to confer a tactical advantage on another party, including information relating to the budget or estimate of costs for the litigation or the funds available, which might reasonably be expected to indicate an assessment of the risks or merits of the proceeding.²⁸

Insolvency proceedings

- 5.29 Where a litigation funder is involved in insolvency proceedings, a liquidator will generally be required to obtain court approval prior to entering into an agreement with the litigation funder.

21 Supreme Court of Victoria, *Practice Note No 9 of 2010—Conduct of Group Proceedings*, 29 November 2010 [3.6].
22 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.
23 Email from Supreme Court to the Commission, 5 June 2017.
24 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 5 [6].
25 Ibid [6.1], [6.2].
26 Ibid [6.3].
27 Ibid [6.4].
28 Ibid.

- 5.30 This obligation arises under section 477(2B) of the *Corporations Act 2001* (Cth), which states that a liquidator should seek court approval before entering into a long-term agreement. As litigation funding agreements typically last for longer than three months, they are classified as long-term agreements and require court approval.²⁹
- 5.31 Assessment of the funding agreement in insolvency litigations is left to the discretion of the court. A non-exhaustive list of factors to be considered by the court under section 477(2B) was set out by the New South Wales Supreme Court in *Re ACN 076 673 875 Ltd (rec and mgr apptd) (in liq)*³⁰ as follows:
- the nature and complexity of the cause of action
 - the amount of costs likely to be incurred and the extent to which the funder is to contribute to these costs
 - the extent to which the funder is to contribute to adverse costs or any security for costs
 - the extent to which the liquidator has canvassed other funding options
 - the funding fee
 - the risks involved in the claim
 - the liquidator's consultations with the creditors.³¹
- 5.32 The Federal Court has noted that approval under section 477(2B) of the *Corporations Act 2001* (Cth) is not an endorsement of the proposed agreement but is merely a permission for the liquidator to exercise his or her own commercial judgment in the matter.³² While the Court will not simply 'rubber stamp' whatever is put forward by a liquidator, nor will it approve an agreement if its terms are unclear, it is not the duty of the Court to determine the merits or commerciality of the proposed funding agreement.³³
- 5.33 However, the Federal Court has noted that it is important to ensure, among other things, that the entity or person providing the funding is not given a benefit 'disproportionate to the risk' undertaken or a 'grossly excessive profit'.³⁴

Reform options

- 5.34 In identifying reform options about the disclosure of funding agreements in proceedings supported by litigation funders, four options are apparent to the Commission and are discussed in turn below:
- 1) Retain the status quo.
 - 2) Require disclosure of funding agreements in all funded class actions.
 - 3) Require disclosure of funding agreements in all funded proceedings.
 - 4) Require disclosure of funding agreements in all funded proceedings except in certain circumstances.
- 5.35 **Retain the status quo.** The Supreme Court could continue to deal with the disclosure of funding agreements on a case-by-case basis. The Court has the power to obtain a copy of the funding agreement, or any other information it needs about the litigation funder in order to perform its functions. Lawyers have observed in discussions with the Commission that, when there was a standard disclosure requirement, the common practice was to redact most information, or provide only a standard form of the agreement, which is of limited use.

29 *Corporations Act 2001* (Cth) s 477(2B).

30 (2002) 42 ACSR 296.

31 *Ibid*, 302-5 [28]-[40].

32 *Stewart, in the matter of Newtronics Pty Ltd* [2007] FCA 1375 (28 August 2007) [26(4)].

33 *Ibid* [26(1)]-[26(2)].

34 *Ibid* [26(5)].

- 5.36 The alternative view, which has been put to the Commission during informal discussions, is that specifying a standard disclosure requirement would give a clear indication to the parties of what the Court will want to know about the litigation funder's involvement in the proceedings. The point has been made that, in the absence of a mandatory disclosure requirement, the onus is on the defendant to apply for the funding agreement to be provided. This creates delays and increases costs.
- 5.37 **Require disclosure of funding agreements in all funded class actions.** The Supreme Court could require funding agreements to be disclosed at, or before, the first case management hearing or directions hearing in all funded class actions. The defendant would not have the onus of applying for the disclosure, which in turn should reduce pre-trial procedural steps.
- 5.38 **Require disclosure of funding agreements in all funded proceedings.** In view of the evolving scope and size of the litigation funding industry in Australia, it is likely that litigation funding agreements will be used in an increasing number and type of proceedings, such as commercial arbitration or small claim commercial disputes.
- 5.39 Whether the disclosure of funding agreements in these proceedings is desirable has not, to date, been addressed in legislation or court guidelines.
- 5.40 Unlike litigation funders involved in class actions—which are typically large litigation funders listed on the ASX—litigation funders involved in other claims, particularly small commercial claims, are likely to be smaller operators with lower capital reserves. If they are not listed on the ASX, or are internationally based, financial disclosure statements are not likely to be publicly available.
- 5.41 Conversely, if a litigation funder is involved in a small commercial dispute, in which no third party is affected by the terms of the funding agreement other than the plaintiff who appears before the court, it is arguable that there may be a reduced need for court supervision of the funding agreement.
- 5.42 **Require disclosure of funding agreements in all funded proceedings except in certain circumstances.** The litigation funding agreement could be disclosed as a matter of course in all funded proceedings, except in certain circumstances. Exceptions could include:
- where the litigation funder is funding a sophisticated client, and so court protection of their interests is less necessary
 - where the litigation funder is funding a single plaintiff, who is represented before the court and whose interests are promoted by lawyers.
- 5.43 The onus could fall on either the plaintiff or the defendants to prove that disclosure is not necessary in the circumstances.

Questions

- 10 In funded class actions, should the plaintiff be required to disclose the funding agreement to the Court and/or other parties? If so, how should this requirement be conveyed and enforced?
- 11 In funded proceedings other than class actions, should the plaintiff disclose the funding agreement to the Court and/or other parties? If so, should this be at the Court's discretion or required in all proceedings?
- 12 In the absence of Commonwealth regulation relating to capital adequacy, how could the Court ensure a litigation funder can meet its financial obligations under the funding agreement?

Certification of class actions

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6. Certification of class actions

Introduction

- 6.1 In a class action, ‘certification’ refers to the process of obtaining court approval for proceedings to commence as a class action. In jurisdictions that require certification, a class action cannot commence until a certification hearing has occurred. At that hearing, the representative plaintiff must prove to the court that certain preliminary criteria have been met and that the case should go forward as a class action.
- 6.2 Certification is not required for class actions in Australia. It was rejected as an option by the Australian Law Reform Commission (ALRC) in its report on grouped proceedings in 1988,¹ and has not been incorporated into the class action regimes created in Australia since 1992.
- 6.3 Instead, class actions commence in Victoria without Supreme Court approval, provided that threshold requirements are met. Once they have commenced, the onus falls on the defendant to prove that the litigation should not continue as a class action. This arrangement is commonly called a ‘decertification’ device² and is a reason why Australian class actions are described as ‘plaintiff friendly’.³
- 6.4 The ALRC concluded that certification does not always protect class members’ interests. As class actions are often the only chance that individually non-recoverable cases have to obtain legal redress, failure to certify proceedings on the basis that the interests of the class are not being adequately protected is an ‘empty gesture’.⁴
- 6.5 In Australian class actions, the primary means of protecting class members’ interests in ensuring that individually non-recoverable cases are able to be brought are the low threshold requirements and the notification and opt out provisions.⁵ The ALRC expected that the court’s powers to strike out abusive, frivolous or vexatious proceedings, and the operation of the decertification provisions for class actions, would be sufficient to avoid the need for certification.⁶
- 6.6 Certification is used in every other international jurisdiction that has a contemporary class action regime, except Sweden.⁷ The Commission has been asked to consider whether a certification requirement should be introduced into part 4A of the *Supreme Court Act 1986* (Vic) either for all class actions, or for those supported by litigation funders.

1 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 62–4.

2 Vince Morabito, ‘Empirical Perspectives on 25 Years of Class Actions’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 53.

3 Stuart Clark and Christina Harris, ‘Class Actions in Australia: (Still) a Work in Progress’ (2008) 31 *Australian Bar Review* 63, 67.

4 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 63 [147].

5 *Ibid.*

6 *Ibid* 64–6 [148]–[151].

7 Vince Morabito and Jane Caruana, ‘Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia’ (2013) 61 *American Journal of Comparative Law* 579, 582.

- 6.7 This chapter sets out the current provisions for the commencement of class actions in Victoria and compares them with certification requirements in the United States and Canada. In exploring whether a pre-commencement process such as certification should be introduced for class actions, the chapter addresses issues that are typically dealt with by certification:
- cohesion and commonality
 - decertification
 - adequacy of representation
 - competing class actions
 - the involvement of litigation funders
 - other procedural matters.
- 6.8 While the Commission's terms of reference focus particularly on plaintiffs who seek to enforce their rights through class action proceedings, reference is also made to 'similar proceedings that involve a number of disputants being represented by an intermediary'. Similar proceedings could include, for example, insolvency proceedings brought by a liquidator on behalf of creditors, and the Commission would welcome any comments and reform options that could be introduced in relation to these proceedings.

Commencement under current law and practice

Part 4A of the *Supreme Court Act 1986 (Vic)*

Threshold requirements

- 6.9 In Victoria, section 33C(1) of the *Supreme Court Act* sets out the threshold requirements for class actions. Proceedings may be commenced by a representative plaintiff as representing some or all of the class where:
- (a) seven or more persons have claims against the same person; and
 - (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
 - (c) the claims of all those persons give rise to a substantial common question of law or fact.⁸

Decertification provisions

- 6.10 Sections 33L, 33M and 33N are commonly known as the decertification provisions. They allow the Court to order that proceedings no longer continue as a class action. Orders may be made on application by the defendant or, in some cases, on the Court's own motion.
- 6.11 Section 33L gives the Court power to order that proceedings no longer continue as a class action where it appears likely that there are fewer than seven members making up the class.⁹
- 6.12 Section 33M provides that, upon application by the defendant, the Court may order that proceedings no longer continue as a class action where, if judgment were to be given in favour of the representative plaintiff, the cost to the defendant of identifying the class members and distributing amounts would be excessive having regard to the likely total of those amounts.¹⁰

⁸ *Supreme Court Act 1986 (Vic)* s 33C(1).

⁹ *Ibid* s 33L.

¹⁰ *Ibid* s 33M.

- 6.13 Section 33N empowers the Court, upon application by the defendant,¹¹ to order that proceedings no longer continue as a class action if it is in the interests of justice to do so because:
- Costs would be likely to exceed those that would be incurred in separate proceedings.
 - The relief sought can be obtained without resort to a class action.
 - The class action is not an efficient and effective means of dealing with the claims.
 - It is otherwise inappropriate that the claims be pursued by means of a class action.¹²

Civil Procedure Act 2010 (Vic)

- 6.14 As noted in Chapter 3, the overarching purpose of the *Civil Procedure Act 2010 (Vic)* and the rules of court in relation to civil proceedings is:
- to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.¹³
- 6.15 The court has express power to make any order or give any direction it considers appropriate to further the overarching purpose in relation to pre-trial procedures.¹⁴ This may include (but is not limited to) directions or orders concerning:
- the conduct of proceedings
 - timetables or timelines
 - appropriate dispute resolution
 - attendance of lawyers and parties at a case management conference
 - definition of issues
 - attendance before a judicial officer
 - any other matters specified in the rules of court.¹⁵
- 6.16 Lawyers and litigation funders are also subject to obligations under this legislation to use reasonable endeavours to act promptly and minimise delay,¹⁶ to narrow the issues in dispute,¹⁷ to only take steps necessary to facilitate resolution or determination of proceedings,¹⁸ and to avoid claims or steps that do not have a proper basis or are frivolous, vexatious or an abuse of process.¹⁹

Class actions practice note

- 6.17 The management and conduct of class actions filed in either the Common Law Division or the Commercial Court of the Supreme Court is explained in the Supreme Court Practice Note for class actions.²⁰
- 6.18 Within six weeks of filing, there must be a case management conference (in the Common Law Division) or first directions hearing (in the Commercial Court) at which the parties outline the issues and facts that appear to be in dispute and deal with other key matters.²¹ The parties are encouraged to file a joint position paper beforehand, listing the major points that they anticipate raising and outlining their respective positions on each issue in one to three sentences.²²

11 While the Victorian legislation provides that application to discontinue under s 33N must be made by the defendant, under the Federal Court equivalent, application may be made by the respondent, or by the Court of its own motion: *Federal Court of Australia Act 1976 (Cth)* s 33N.

12 *Supreme Court Act 1986 (Vic)* s 33N.

13 *Civil Procedure Act 2010 (Vic)* s 7(1).

14 *Ibid* s 48.

15 *Ibid*.

16 *Ibid* s 25.

17 *Ibid* s 23.

18 *Ibid* s 19.

19 *Ibid* s 18.

20 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.

21 *Ibid* 2 [5].

22 *Ibid* 4 [5.10].

- 6.19 At the case management conference or directions hearing, parties need to be in a position to address a wide range of matters, including:
- any issues regarding the description of class members
 - any pleading issues
 - discovery
 - evidence
 - the joinder of additional parties
 - the appropriateness of a split trial and the issues to be determined
 - whether an order for security for costs will be sought
 - the timetabling of any applications for resolving interlocutory matters
 - methods of communicating with unrepresented class members
 - any need to relist or continue the case management hearing or directions hearing.²³
- 6.20 The case management conference or directions hearing is conducted along relatively informal lines where appropriate. Rather than following a fixed sequence where counsel make submissions in turn, the emphasis is on an exchange between counsel and the case management judge.²⁴
- 6.21 Additional case management conferences or directions hearings are convened as required throughout the proceedings to address issues such as class closure, opt out notices, discovery, the use of experts, and the utility of sample class members.²⁵
- 6.22 Before making any interlocutory application, the parties' representatives must confer and attempt in good faith to resolve the dispute.²⁶

Certification as practised overseas

- 6.23 Certification, as practised overseas, deals with certain matters relating to class actions—such as construction of the class—at a pre-commencement hearing.
- 6.24 Although characterised as preliminary or procedural in nature, it can be difficult to distinguish between some of these matters and the threshold requirements for commencement under Victoria's class action regime. Some of the other matters addressed by certification are covered in Victoria by the relevant provisions of the Civil Procedure Act and the procedures set out in the Supreme Court Practice Note.
- 6.25 However, certification is a narrower and more formal gateway to class action proceedings than that followed in Victoria.
- 6.26 In the United States, rule 23 of the *Federal Rules of Civil Procedure* provides that, when a person sues or is sued as a representative of a class, the court must, at an early practicable time, determine by order whether to certify the action as a class action.²⁷
- 6.27 In order to be certified, rule 23 requires the following procedural criteria to be met:
- The class is so numerous that joinder of all members is impracticable.
 - There are questions of law or fact common to the class.
 - The claims or defences of the representative parties are typical of the claims or defences of the class.
 - The representative parties will fairly and adequately protect the interests of the class.²⁸

23 Ibid 3 [5.8].

24 Ibid 3 [5.5].

25 Ibid 3 [5.9].

26 Ibid 4 [6.1].

27 *United States Federal Rules of Civil Procedure* 23(c)(1)(A) (1 December 2016).

28 Ibid 23(a) (1 December 2016).

- 6.28 Similarly, eight of the 10 Canadian jurisdictions that have formal class action regimes use certification.²⁹ Under these regimes (other than Quebec), certification is dependent on the representative plaintiff satisfying the following criteria:
- The pleadings disclose a cause of action.
 - There is an identifiable class.
 - The proposed representative is appropriate.
 - There are common issues between class members.
 - The class action is the preferable procedure.³⁰
- 6.29 In both the United States and Canadian regimes, if the class action is not certified, the representative plaintiff may continue the proceedings as an individual claim but not as a class action. In addition, at any stage of proceedings where the court is of the view that a class action no longer adheres to one or more of the certification criteria, a decertification order may be issued.³¹

Issues

- 6.30 Public debate about the real and perceived problems of class action regimes in Australia often raises certification as a solution. It is not always clear what the cause of the problems is considered to be—whether it is one of procedure or law, or both. The cause is variously identified as the lack of a preliminary hearing, the content of the threshold criteria, and how the criteria have been interpreted.
- 6.31 Vince Morabito and Jane Caruana have observed that, in jurisdictions that have a certification process, there is a firm belief that certification is fundamentally necessary in opt out class action regimes. They cite the following comments from Edward Cooper, a United States academic, who considers that Australia’s class regimes do not give the court a sufficient measure of control:
- At least one country—Australia—has apparently devised a class procedure that does not require court certification of the class. It is difficult to believe, however, that a group action can be maintained on any basis other than pure opt-in without some measure of court control. The risks of sloppy class definition are too great, including fundamental conflicts of interest and indeterminate *res judicata* consequences. The risks of indifferent or incompetent representation both by named class member parties and by class counsel are too great.³²
- 6.32 Care must be taken not to define the problem as the absence of the preferred solution. The fact that Victoria’s class action regime does not include a preliminary certification stage is not sufficient reason to recommend it. For this reason, the remainder of this chapter discusses issues that have arisen in the operation of the existing regime and the extent to which they would be addressed if certification were introduced. They include:
- efficiency and costs
 - common questions of law and fact
 - decertification
 - adequacy of representation
 - competing class actions

29 Vince Morabito and Jane Caruana, ‘Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia’ (2013) 61 *American Journal of Comparative Law* 579, 589.

30 W A Bogart, Jasminka Kalajdzic and Ian Matthews, ‘Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?’ (Report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007) 6.

31 See, eg, *United States Federal Rules of Civil Procedure* 23(c)(1)(c) (1 December 2016).

32 Vince Morabito and Jane Caruana, ‘Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia’ (2013) 61 *American Journal of Comparative Law* 579, 581 citing Edward H Cooper, ‘Class Action Advice in the Form of Questions’ (2001) 11 *Duke Journal of Comparative and International Law* 215, 231–2.

- involvement of litigation funders in proceedings
- other procedural issues.

6.33 Possible solutions to these issues other than, or in addition to, certification are discussed below. However, the issues and reform proposals in this chapter are not complete. The Commission would welcome submissions that discuss the advantages and disadvantages of certification and other reform ideas, and put forward any further proposals for reform.

Efficiency and costs

6.34 One line of reasoning in favour of certification is that the procedural step of holding a certification hearing saves time and money. Judicial determination—at the earliest possible stage—of whether the potential action is procedurally suited to the class action vehicle is a way of increasing efficiency. It is argued that requiring the representative plaintiff to prove that the action should be brought as a class action reduces the risk that defendants are caused unnecessary expense and inconvenience by proceedings being commenced that are not suited to class action litigation.³³

6.35 A preliminary certification process is seen as an efficient way to filter out litigation that is not suited to class actions. Rachel Mulheron, for example, supports this view:

Of all the significant class action regimes around the world, Australia's federal class action opted for the path of 'no certification' ... As an experiment, it has been singularly unsuccessful. Litigation under Pt IVA has been mired in numerous interlocutory applications about issues that could better have been addressed at a certification hearing. ... The omission of a certification hearing has hardly achieved the cost-efficient and streamlined process that the ALRC hoped for when it recommended against certification.³⁴

6.36 Class actions in Australia, including in Victoria, are characterised by numerous interlocutory applications. It has been suggested that certification would reduce the need for later interlocutory applications and responding amendments to determine the contours of the class.³⁵ However, the Hon. Kevin Lindgren commented that interlocutory applications for this purpose can be necessary and constructive:

It should be acknowledged that, generally speaking, there are proper reasons why there are more interlocutory challenges by respondents in representative proceedings than in ordinary proceedings ... Respondents are often criticised on account of their interlocutory challenges in group proceedings. It is important, however, from their viewpoint and from that of the Court, not only that the issues for decision be clearly defined, but also that class related questions be identified early.³⁶

6.37 Interlocutory applications may be made for many reasons, apart from decertification, such as for orders for discovery, communication with class members and security for costs.³⁷ The amount of 'satellite litigation' and the frequency with which it is being brought in class actions cannot be attributed to the absence of a certification procedure alone. In *Bright v Femcare*,³⁸ Justice Finkelstein of the Federal Court noted:

There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications, including interlocutory appeals that occur in such proceedings. ... This is an intolerable situation, and one which the court is under a duty to prevent, if at all possible. ... it is not unknown for respondents in class actions to do whatever is necessary to avoid a trial,

33 Ibid 593.

34 Rachael Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550, 568.

35 John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 164, 169.

36 Kevin Lindgren, 'Some Current Practical Issues in Class Action Litigation' (2009) 32 *University of New South Wales Law Journal* 900, 902.

37 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 4 [6].

38 (2002) 195 ALR 574.

usually by causing the applicants to incur prohibitive costs. The court should be astute to ensure that such tactics are not successful.³⁹

- 6.38 Tactics such as those identified by Justice Finkelstein are not unique to Australia's class action regimes. Introducing preliminary certification in Australia to reduce satellite litigation could instead provide merely another process for the parties to appeal. Among the reasons why the ALRC decided against including certification in its recommended model for class action procedures in the Federal Court were the costs and delays generated by the certification process in the United States and Quebec:

In class actions in the United States and Quebec, the preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.⁴⁰

Reform options

- 6.39 The issue to be considered in the present review is whether the introduction of certification in class actions would reduce costs and be more efficient than the current combination of law, practice and case management procedures. Certification may be a solution to real or perceived inefficiencies but the evidence in support of introducing it would need to be stronger.
- 6.40 The Commission has been told during informal consultations that class actions in the Federal Court proceed more quickly than in Victoria. While this may be a reflection of the types of case filed in each jurisdiction, or the resources available to manage them, it may also reflect a difference in procedure that could potentially be replicated in Victoria.
- 6.41 The Federal Court Practice Note for class actions is more prescriptive in setting out the procedural steps to be satisfied in class actions than the equivalent practice note used in the Supreme Court and it has been suggested that the Federal Court is informally moving towards a 'quasi-certification' format in class action proceedings.⁴¹
- 6.42 An alternative option is legislative reform, for example, by revising the threshold test for commencing a class action under section 33C of the Supreme Court Act. This option is discussed in the next section.

Common questions of law and fact

- 6.43 The effective aggregation of individual claims is a central element of any class action regime. In jurisdictions employing a certification regime, court certification requires the representative plaintiff to prove, prior to commencement of proceedings, that there are questions of law or fact common to the class. This is known as the requirement of commonality.
- 6.44 Compared to the preliminary criteria used in those jurisdictions, the threshold criteria under section 33C of the Supreme Court Act, and its equivalent provision under the Commonwealth class action regime, have been interpreted liberally. The High Court has recognised the difficulty of determining significant issues relating to merits at the commencement of proceedings.⁴²

39 Ibid, 607-8 [160]. See also *Bray v Hoffmann-La Roche Ltd* (2003) 130 FCR 317, 374-5.

40 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 63 [146].

41 John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 164, 169.

42 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 266.

6.45 Paragraphs [6.46] to [6.65] provide an overview of how the law has been interpreted and reform options.

Section 33C threshold requirements

6.46 Section 33C(1) of the Supreme Court Act sets out three requirements, each of which has been interpreted judicially, that must be met for proceedings to commence as a class action in Victoria:

- Seven or more persons have claims ‘against the same person’—section 33C(1)(a).
- Their claims are connected through ‘same, similar or related circumstances’—section 33C(1)(b).
- Those claims give rise to ‘a substantial common issue of law or fact’—section 33C(1)(c).

6.47 An identical provision in the Federal Court Act applies to the commencement of proceedings in the Commonwealth’s jurisdiction.⁴³

Claims ‘against the same person’

6.48 There has been some uncertainty about whether the requirement that claims must be ‘against the same person’ means that all class members must have a claim against *all* defendants in multi-defendant proceedings, or whether it is sufficient if one person has claims against all defendants.

6.49 In *Philip Morris (Australia) Ltd v Nixon*,⁴⁴ the Full Federal Court held that a multi-defendant proceeding could not be commenced as a class action unless each class member had an individual claim against each of the defendants. Under this interpretation, the requirements of section 33C(1)(a) are satisfied where each class member makes a claim against each defendant.

6.50 However, a differently constituted Full Federal Court suggested that there is no need for each class member to have a claim against each defendant in order for section 33C(1)(a) to be satisfied.⁴⁵ This approach has since been approved in *Cash Converters International Ltd v Gray*.⁴⁶

‘Same, similar or related circumstances’

6.51 The requirement that the same, similar or related circumstances exist in a class action has been described as ‘three sufficient relationships of widening ambit’,⁴⁷ or ‘three concentric circles with “same” at the centre, “related” at the periphery, and “similar” in-between the other two’.⁴⁸

6.52 It requires that some relationship between the claims of each of the class members must be present, but differences in time, place and circumstances will generally be tolerated.

6.53 In *Zhang v Minister for Immigration, Local Government and Ethnic Affairs*, the Federal Court noted that the outer limits of eligibility for class actions are defined by reference to claims in respect of, or arising out of, related circumstances, with the word ‘related’ suggesting a connection wider than identity or similarity.⁴⁹

6.54 The Federal Court considered that, in each case, a threshold judgment will be required as to whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a class action:

43 *Federal Court of Australia Act 1976* (Cth) s 33C(1).

44 (2000) 170 ALR 487.

45 *Bray v Hoffman-La Roche Ltd* (2003) 130 FCR 317.

46 (2014) 223 FCR 139.

47 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 404.

48 John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36 *Civil Justice Quarterly* 164, 165.

49 *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 404.

At some point along the spectrum of possible classes of claim, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of the legislation.⁵⁰

- 6.55 It has been noted that care must be exercised when interpreting the word ‘related’ to ensure that satisfying the bare minimum of relatedness does not end the inquiry. If ‘related’ simply introduces a requirement to identify some type of relationship, then it has been suggested that the word be deleted from the legislation in the interests of cohesion of the class.⁵¹

‘Substantial common issue of law or fact’

- 6.56 The requirement that there be a ‘substantial common issue of law or fact’ has also been interpreted liberally. While it requires that there be at least one common issue of law or fact which is real and of substance in class actions, the High Court has held that it is not necessary to demonstrate that the issue is large or of special significance.⁵² It is not necessary that the common issue would be likely to resolve, wholly or to a significant degree, the claims of all class members.⁵³
- 6.57 Australian class actions expressly enable the determination of sub-group or individual issues as part of proceedings.⁵⁴ This can be contrasted with jurisdictions that employ certification. In the United States and Canada, certification criteria require that the issues common to the class members ‘predominate’ over any individual differences.⁵⁵ In these jurisdictions, courts are reluctant to allow class actions that involve unique issues of causation for each class member, such as pharmaceutical or medical device class actions.⁵⁶
- 6.58 The Supreme Court Practice Note states that the first case management conference or directions hearing should address the filing of evidence early in proceedings to enable proper identification of individual and common questions. The practice note also provides for the Court to assist in the determination of common issues:
- To narrow the scope of the dispute, at the earliest practicable date the Court may consider the utility of either:
- (a) determining any common question in the proceeding as a preliminary question; or
 - (b) giving summary judgment on any common question in the proceeding.⁵⁷
- 6.59 Further provision is made, in appropriate cases, for a split trial so that common issues together with non-common issues concerning liability may be determined first. The Supreme Court Practice Note states that lawyers should consider whether there are issues common to sub-groups of the class which also might efficiently be addressed at an initial trial.⁵⁸

Reform options

- 6.60 The Commission has been told during informal consultations that the low threshold for commencing a class action has resulted in class actions that are not properly constituted or suited to the class action mechanism. This introduces inefficiencies, delays and costs into the class action regime that are borne by defendants and the courts.

50 Ibid 405.

51 John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36(2) *Civil Justice Quarterly* 164, 166.

52 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 267.

53 Ibid 267–8.

54 In Victoria, this is enabled under the *Supreme Court Act 1986* (Vic) ss 33Q–33R. In the Commonwealth jurisdiction, this is enabled under the *Federal Court of Australia Act 1976* (Cth) ss 33Q–33R.

55 W A Bogart, Jasminka Kalajdzic and Ian Matthews, ‘Class Actions in Canada: A National Procedure in a Multi-jurisdictional Society?’ (Report prepared for the Globalization of Class Actions Conference, Oxford University, December 2007) 6–7; Nicholas Pace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature* (Rand Institute for Civil Justice, 2007) 37–8.

56 Stuart Clark and Christina Harris, ‘Class Actions in Australia: (Still) A Work in Progress’ (2008) 31 *Australian Bar Review* 63, 68.

57 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 6 [10.1].

58 Ibid [11].

- 6.61 In particular, it is suggested that the requirements under section 33C allow proceedings to be commenced where there is little cohesion or commonality among the claims of class members. In this situation, costs and delays to proceedings are increased, as more steps are required to solve the individual issues. Any savings in terms of time and cost attempted by allowing broadly classified class actions to commence are therefore ‘illusory’, as the class action definition may eventually break down into numerous individual cases, but only after incurring the significant costs associated with class actions.⁵⁹
- 6.62 The Commission has identified three possible approaches to reform in response to these criticisms of section 33C.
- 6.63 The first is to introduce a pre-commencement hearing to certify that certain preliminary criteria are met and that the class action should commence. This would involve drafting new criteria for the commencement of a class action under part 4A, which the representative plaintiff would be required to prove to the court. The criteria used in certification hearings in the United States and Canada could provide guidance as to the types of matters addressed at such a hearing.
- 6.64 The second approach could be to retain the current commencement criteria under section 33C, but shift the onus for proving that the class action should continue from the defendant to the plaintiff. For example, the Supreme Court Practice Note could require the plaintiff to establish—at the first case management conference or directions hearing—that the threshold requirements under section 33C are met, and that the proceedings should continue as a class action.
- 6.65 The third approach could be to amend the existing commencement criteria under section 33C to increase the threshold for a plaintiff commencing a class action. The following suggestions have been made by commentators:
- Amend section 33C(1)(b) to remove the word ‘related’ and only permit class members with ‘same or similar’ circumstances to be included in the class.⁶⁰
 - Amend section 33C(1)(c) to require that resolution of common issues in class actions substantially advance the determination of all class members’ claims. This would require the class action to make a meaningful impact on advancing the resolution of class members’ claims.⁶¹

Decertification

- 6.66 The ALRC’s decision not to recommend certification in its 1988 report on grouped proceedings was based in part on the conclusion that the proposed regime would contain sufficient safeguards, including the defendant’s right to challenge the validity of the class action.⁶² The Federal Court would have powers to order that proceedings no longer continue as a class action, even where threshold requirements were met. This was considered an important means of protecting the interests of class members and defendants.⁶³
- 6.67 Under a certification regime, the court’s discretion to order that proceedings no longer continue as a class action is limited to where the certification criteria no longer exist.

59 John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36 *Civil Justice Quarterly* 164, 165–7.

60 John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36 *Civil Justice Quarterly* 164, 166.

61 Ibid 167.

62 Stuart Clark and Christina Harris, ‘The Push to Reform Class Action Procedure in Australia: Evolution or Revolution’ (2008) 32 *Melbourne University Law Review* 775, 782.

63 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 64–5 [140], [148]–[151].

- 6.68 This is not the case under part 4A of the Supreme Court Act.⁶⁴ In addition to the broad decertification provisions available under sections 33L, 33M and 33N, the Supreme Court retains the discretion, of its own motion or by application of a party, to make any order it sees fit to ensure justice is done in the proceedings.⁶⁵
- 6.69 It has been said that these decertification provisions, in combination with the ability to challenge the threshold requirements under section 33C, have essentially created de facto certification in Australia.⁶⁶
- 6.70 The High Court has considered section 33N a necessary counterweight to the liberal construction of section 33C.⁶⁷ If a class action satisfies the low procedural threshold requirements of section 33C, it may still be discontinued (for a range of reasons) if continuing in class form is not appropriate. The High Court has considered it desirable that the option for discontinuance be available later in proceedings when courts are armed with more complete information about the merits of the proceedings.⁶⁸
- 6.71 Much has been said about these decertification provisions and, in particular, whether the availability of these provisions has contributed to ‘satellite litigation’ being brought by defendants in class actions.
- 6.72 There have been proceedings that were terminated as class actions, under the decertification provisions, long after they commenced and had used significant resources. It is likely that some of these could have been excluded by a certification process. One example is the decision of the Federal Court in *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11)*,⁶⁹ in which the decertification provisions were used as a basis for ruling that the proceedings should no longer continue as a class action, but only after it had already been running for four years.
- 6.73 However, empirical data collected by Morabito and Caruana about Federal Court class actions filed between March 1992 and March 2009 reveal that the existing law and procedures do not appear to encourage lawyers to file cases that are not suited to class actions:
- In fact, we found no evidence of claimants taking advantage of the absence of a compulsory certification device by regularly filing class actions with respect to claims that could not possibly be advanced fairly or efficiently through the class action device.⁷⁰
- 6.74 If implemented, the reform ideas identified above—requiring satisfaction of preliminary criteria through a pre-commencement hearing, or putting the onus on the plaintiff to establish that a class action should continue as such—could affect the use of decertification provisions in class actions.

64 Vince Morabito, ‘Group Litigation in Australia—“Desperately Seeking” Effective Class Action Regimes, National Report for Australia’ (Paper prepared for Globalization of Class Actions Conference, Oxford University, December 2007) 29.

65 *Supreme Court Act 1986* (Vic) s 33ZF.

66 Rachael Mulheron, ‘Justice Enhanced: Framing an Opt-Out Class Action for England’ (2007) 70 *Modern Law Review* 550, 568.

67 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 267.

68 *Ibid* 266.

69 [2013] FCA 241 (19 March 2013).

70 Vince Morabito and Jane Caruana, ‘Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia’ (2013) 61 *American Journal of Comparative Law* 579, 614.

Question

- 13 Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate?
- introduction of a pre-commencement hearing to certify that certain preliminary criteria are met
 - legislative amendment of existing threshold requirements under section 33C of the *Supreme Court Act 1986* (Vic)
 - placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met
 - other reforms.

Adequacy of representation

- 6.75 Under part 4A of the Supreme Court Act, a representative plaintiff brings the class action on behalf of some or all of the class members. However, there is no requirement for the representative plaintiff to be adequate for the task, or to meet any test of adequacy before commencing a class action under section 33C.
- 6.76 Instead, section 33D requires only that the representative plaintiff have a sufficient interest to be able to commence the proceedings on their own behalf. If a person has commenced a class action as a representative plaintiff, they will retain a sufficient interest to continue the proceedings and bring an appeal from a judgment even if they cease to have a claim against the defendant.⁷¹ Section 33D does not require the representative plaintiff to demonstrate that they are able to adequately represent class members.
- 6.77 The Supreme Court Practice Note provides little further guidance on the choice of representative plaintiff, only stating that, in commencing class actions, the statement of claim 'should be drawn so that the plaintiff's personal claim can be used as the vehicle for determining the common questions in the action'.⁷²
- 6.78 The High Court addressed the issue of adequacy of representation in *Carnie v Esanda Finance Corporation Ltd*.⁷³ While it held that it is not critical for a representative plaintiff to have identical claims to those of other class members, an adequate representative plaintiff must have the same interests as other class members. That means the representative plaintiff should not have a conflict of interest with other class members, and 'the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf'.⁷⁴
- 6.79 Although the Supreme Court has the power to replace a representative plaintiff who is inadequate,⁷⁵ this is at the request of class members. Neither the Court nor defendants are able to initiate such substitution, although the Court could possibly use its broad powers under sections 33N or 33ZF to ensure adequate representation.⁷⁶ In New South Wales, the Court has explicit power. The *Civil Procedure Act 2005* (NSW) includes the provision that where a representative plaintiff is not able to adequately represent the interests of class members, the Court may discontinue a proceeding.⁷⁷

71 *Supreme Court Act 1986* (Vic) s 33D(2).

72 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 2 [4.2].

73 (1995) 182 CLR 398.

74 *Ibid.*, 408.

75 *Supreme Court Act 1986* (Vic) s 33T.

76 John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 164, 168.

77 *Civil Procedure Act 2005* (NSW) s 166(1)(d).

Reform options

- 6.80 A possible reform is to make adequacy of representation a threshold requirement for class actions. This could be achieved by introducing a pre-commencement hearing. This approach is adopted in the United States and Canada, where a representative plaintiff is required to prove to the court at a certification hearing that they are able to adequately represent the interests of class members.⁷⁸
- 6.81 Alternatively, it may be desirable to maintain existing legislative requirements, but amend the Supreme Court Practice Note to require adequacy of representation to be addressed by the representative plaintiff early in proceedings, most likely at the first case management conference or directions hearing. The representative plaintiff would establish that they are able to adequately represent the class as part of case management procedures. The practice note could include criteria for adequacy of representation, or this could be dealt with on a case-by-case basis.
- 6.82 A similar option was recommended by the ALRC in its 2000 report on managing justice. It recommended that the Federal Court draft guidelines or a practice note relating to the choice of the representative plaintiff, who should not be chosen as a ‘person of straw’.⁷⁹
- 6.83 A third possible reform is to amend the legislation to include an requirement that the representative plaintiff is able to adequately represent the parties. John Emmerig and Michael Legg have suggested that section 33D should be amended to this effect.⁸⁰ Under this option, while adequacy of representation would not be a threshold requirement for commencement of a class action, it would require the representative plaintiff to affirmatively establish adequacy of representation as part of proceedings.

Question

- 14 Should the onus be placed on the representative plaintiff to prove they can adequately represent class members? If so, how should this be implemented?

Competing class actions

- 6.84 Under any class action regime, it is possible that multiple class actions will arise from the same set of circumstances. They are known as ‘competing class actions’. The Federal Court has stated that competing class actions can cause ‘increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents, particularly when they are commenced in different courts (such as in both the Federal Court and a State Supreme Court)’.⁸¹
- 6.85 Professor Morabito has found that approximately 15 per cent of all class actions filed in Australia since the introduction of part IVA of the Federal Court Act have been competing class actions.⁸² Since the introduction of Victoria’s class action regime in 2000, 38 per cent of the instances of competing class actions were filed in more than one jurisdiction. Forty-three per cent of all instances of competing class actions in Australia occurred after

78 Vince Morabito and Jane Caruana, ‘Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia’ (2013) 61 *American Journal of Comparative Law* 579, 592.

79 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 551.

80 John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36 *Civil Justice Quarterly* 164, 168.

81 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 230 [196].

82 Vince Morabito, ‘Empirical Perspectives on 25 Years of Class Actions’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 56.

the decision of *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*⁸³ (which ruled that class actions could commence on a closed basis).⁸⁴

- 6.86 Competing class actions may be filed for a number of reasons, including the availability of different jurisdictions, different funding mechanisms or litigation funders, and differently structured groups (open or closed classes).
- 6.87 While Australian courts have a number of mechanisms through which they currently address competing class actions—for example, stay, joinder or consolidation⁸⁵—they have preferred to hear cases together rather than electing a single class action to continue.⁸⁶

Reform options

- 6.88 Three main options for reform have been identified by the Commission to address the inefficiencies and delays introduced by competing class actions. These options are:
- Introduce a pre-commencement hearing, at which the court would be required, if appropriate, to nominate a particular class action to proceed where multiple class actions arise from the same set of circumstances. This is the approach adopted in the United States, where a certification hearing may involve a judge nominating the class action that is to continue, as well as the lawyers chosen to run it from a number of competing bids. When choosing the lawyers, the court will consider factors such as estimated legal costs and experience in running class actions.
 - Amend the Supreme Court Practice Note, to set out how and when competing class actions are to be addressed by the Court during proceedings.
 - Create a specific power for the court to address competing class actions through legislative amendment. While the courts currently have the discretionary power to use procedural tools such as stay, joinder and consolidation to address competing class actions, it has been argued that these ‘were not devised with litigation funders and the contractual arrangements between funders, lawyers and claimants in mind’.⁸⁷ Instead, a legislative power could be given to the court to create a single class action and to select a team to run the class action, including the representative plaintiff, lawyers, and litigation funder. This legislative power could specify criteria for the court to take into account when selecting a team, or it could provide the court with discretion over selection.⁸⁸
- 6.89 In *Kirby v Centro Properties Ltd*,⁸⁹ Justice Finkelstein expressed a preference for an ‘auction’ process for lawyers where competing class actions arise. Under such a process, he proposed that lawyers would submit a sealed bid to run the class action. The successful lawyer would then be chosen by a judge or a litigation committee, or by the judge who takes into account the opinion of a litigation committee.⁹⁰
- 6.90 An alternative option for reform is to retain the status quo, and allow court practice to develop on a case-by-case basis to deal with competing class actions. The Federal Court has suggested, for example, that competing class actions may be reduced through the use of common fund orders. As the jurisprudence surrounding the use of these orders develops, the courts are likely to develop appropriate means of dealing with competing class actions on a case-by-case basis.

83 (2007) 164 FCR 275.

84 Vince Morabito, ‘Empirical Perspectives on 25 Years of Class Actions’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 57.

85 See, eg, *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 73 [34].

86 John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36 *Civil Justice Quarterly* 164, 170.

87 Ibid.

88 Ibid.

89 (2008) 253 ALR 65.

90 Ibid, 73 [34].

Question

- 15 Should a specific legislative power be drafted to set out how the Court should proceed where competing class actions arise? If not, is some other reform necessary in the way competing class actions are addressed?

Involvement of litigation funders in proceedings

- 6.91 In exploring issues relating to certification, the terms of reference make specific reference to litigation funders and, in particular, whether funded class actions should be subject to certification requirements.
- 6.92 The involvement of litigation funders in class action proceedings introduces issues that are not present in unfunded proceedings. Some of these require addressing by the court and/or the parties at an early stage. Examples include the disclosure of costs information to class members, disclosure of the funding agreement to the court, or court orders for payment of a funding fee (such as a common fund order). These issues are discussed in detail in Chapters 4, 5, and 7.
- 6.93 Emmerig and Legg argue that the involvement of litigation funders in proceedings increases the desirability of certification in class action proceedings. They state that it may be more efficient to place the onus on the entities with the best knowledge of the proposed class action to come forward and demonstrate that it complies with the requirements for cohesion and adequacy of representation, as well as seeking orders for other key steps aimed at determining the shape of the class action.⁹¹
- 6.94 The Federal Court Practice Note specifically addresses some of the issues raised by the involvement of litigation funders in class actions. In particular, it requires:
- notification to class members of litigation funding fees and legal costs in proceedings
 - disclosure of litigation funding agreements to the courts and the other parties
 - court supervision of the deductions of litigation funding fees from settlement, including the appointment of an independent expert to assess their reasonableness in relation to the terms of the funding agreement
 - evidence relating to the terms of any litigation funding agreement in approving settlement.⁹²
- 6.95 Whether similar provisions are necessary in Victorian class actions is less clear. Morabito has stated that only 10 of the 80 class actions commenced in Victoria since the introduction of part 4A in 2000 have been supported by a litigation funder.⁹³

Reform options

- 6.96 As above, the introduction of a pre-commencement hearing where the representative plaintiff is required to meet preliminary criteria could include a requirement that the representative plaintiff address matters concerning the litigation funder's involvement in the proceedings.
- 6.97 An alternative option is for the Supreme Court to specify how and when issues relating to litigation funders are to be addressed in class action proceedings.

91 John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions—Time for Reform' (2017) 36 *Civil Justice Quarterly* 164, 169-70.

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

93 Data provided by Vince Morabito, 2 June 2017.

Question

- 16 Does the involvement of litigation funders in class actions require certain matters (and if so, which) to be addressed at the commencement of, or during, proceedings?

Other procedural issues

- 6.98 Two additional procedural issues—pleadings and costs budgeting—are identified in the commentary as being more efficiently or fairly addressed through a pre-commencement hearing than under existing legislative provisions.

Pleadings

- 6.99 Failure to plead a case properly is regularly identified as an issue causing additional delays and inefficiencies in class actions. Stuart Clark and Christina Harris have observed that, while the courts will generally grant a representative plaintiff leave to re-plead in that event, this creates further delays and provides opportunities for the defendant to have the class action discontinued under section 33N.⁹⁴
- 6.100 Accordingly, in recommending certification, they claim it would ensure that pleadings are appropriate at the commencement of proceedings, thereby avoiding the process whereby the pleadings are ‘refined’ in a series of expensive and time-consuming applications by defendants.⁹⁵
- 6.101 Currently, guidance for pleadings is provided by section 33H(2), which states that a class action must commence by writ, which must:
- (a) describe or otherwise identify the group members to whom the proceeding relates;
 - (b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
 - (c) specify the questions of law or fact common to the claims of the group members.⁹⁶
- 6.102 While it is not necessary to name or specify the number of class members in pleadings,⁹⁷ the basis of the class members’ case must be adequately disclosed. This means that the causes of action on which the representative plaintiff and class members rely must be set out. This can create difficulty where claims rely on different factual circumstances and where there are numerous individual issues to be addressed. In such a case, the courts have held that the representative plaintiff may plead the case of each class member at a ‘reasonably high level of generality’.⁹⁸
- 6.103 The Supreme Court Practice Note currently provides for any pleadings issues arising in class actions to be dealt with at the first case management conference or directions hearing.⁹⁹

94 Stuart Clark and Christina Harris, ‘The Push to Reform Class Action Procedure in Australia: Evolution or Revolution’ (2008) 32 *Melbourne University Law Review* 775, 785, 800–1.

95 *Ibid* 800–1.

96 *Supreme Court Act 1986* (Vic) s 33H(2).

97 *Ibid* s 33H(3).

98 Stuart Clark and Christina Harris, ‘Multi-Plaintiff Litigation in Australia: A Comparative Perspective’ (2001) 11 *Duke Journal of Comparative & International Law* 289, 313–14.

99 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 3 [5.8(b)].

Costs budgeting

- 6.104 Estimates of costs in class actions, and the disclosure of these estimates to class members, are discussed in Chapter 4. Whether these estimates should be assessed by the Court at the commencement of class action proceedings was raised with the Commission during information consultations.
- 6.105 In the United States, costs budgeting methods are sometimes included in the certification process. That is, certification may require lawyers to submit sealed bids to the judge outlining the estimated legal costs of running the case. The judge, in choosing the lawyers to run the case, will generally choose the lawyers with the lowest estimated costs (although other factors are considered).¹⁰⁰
- 6.106 In England and Wales, costs budgets are now required to be submitted to the court and other parties prior to the first case management conference in some class action proceedings. These cost budgeting provisions are extensive, and allow the court to limit the costs recovered by the successful party to the costs estimated in the budget.¹⁰¹
- 6.107 There are no specific provisions in Victoria which require costs budgets to be submitted to the Court at the commencement of a class action proceeding. Under the Civil Procedure Act, however, the Supreme Court is empowered to direct a lawyer, at any time in a proceeding, to disclose to the Court, other party, or both, information about:
- the estimated length of the trial
 - the estimated costs and disbursements
 - the estimated costs that the party would have to pay to another party if the party were unsuccessful at trial.¹⁰²
- 6.108 The requirements apply only to estimates of legal costs in relation to the trial, rather than estimates of legal costs for the entire proceedings. Further, it appears that only high-level estimates are required, and the opposing party has the opportunity to comment on any claim which it considers unreasonable.¹⁰³
- 6.109 These provisions of the Civil Procedure Act do not appear to be regularly used in class action proceedings. Considering that the majority of class actions commencing in the Supreme Court settle,¹⁰⁴ an estimate of legal costs for the trial only may be of limited utility. Settlement distribution schemes, which arise after trial, can incur significant additional costs, an estimate of which may be of particular use in class actions.

100 Nicholas Pace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature* (Rand Institute for Civil Justice, 2007) 65.

101 United Kingdom Civil Procedure Rules, Costs Management, 3E PD 3.12–3.18; Elizabeth Harris, 'Let's Keep it Real: Judicial Management of Civil Costs' (2013) 87(6) *Law Institute Journal* 45, 46.

102 *Civil Procedure Act 2010* (Vic) s 65A.

103 Elizabeth Harris, 'Let's Keep it Real: Judicial Management of Civil Costs' (2013) 87(6) *Law Institute Journal* 45.

104 Information received from Vince Morabito, 31 May 2017.

Settlement of class actions

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7. Settlement of class actions

Introduction

- 7.1 In a class action, settlement represents the point at which the liability of the defendant and the compensation of the class members are agreed upon. While class actions may proceed to judgment, settlement is the most common way of resolving class actions in Australia. As at 1 June 2017, 65 per cent of all class actions commenced in Victoria since the introduction of part 4A of the *Supreme Court Act 1986* (Vic) have settled.¹
- 7.2 Despite the high settlement rates, the representative nature of class actions creates challenges not present in other litigation. For example, unrepresented class members are bound by the outcome of the proceedings, yet they do not appear before the court. The interests of class members may not directly align with those of the representative plaintiff. Further differences may exist between the individual claims of class members, requiring settlement of common issues as well as individual ones.
- 7.3 Much of the controversy surrounding class actions has been focused on the amounts recovered by class members at settlement, when compared to the amounts received by lawyers and litigation funders. The way the settlement amount has been distributed, particularly the timeframe for distributing it, has also been criticised.
- 7.4 In Victoria, approval from the Supreme Court is required for settlement to have legal effect. While this is stipulated under section 33V of the *Supreme Court Act*, the factors that the Court must take into account are not included in the legislation. The Commission has been asked to consider whether specified criteria for the Court's approval of a settlement under section 33V should be drafted, and if so, what they might be.
- 7.5 The Commission recognises that the courts, in particular the Federal Court, have been active in responding to the challenges of class action settlement. Recent innovations such as the use of common fund orders reveal a trend toward increased judicial supervision of settlement. The options outlined in this chapter seek to reinforce these innovations.
- 7.6 The Commission recognises that each class action's settlement will involve different considerations, challenges and possible outcomes. It is therefore important to ensure that the court maintains a strong role in supervising settlement, has access to the appropriate resources and support, and the flexibility to respond appropriately.
- 7.7 This chapter provides an overview of the guidelines that the Supreme Court has issued for approval of settlements and discusses whether these guidelines, or other guidance material, should set out the approval criteria. The chapter then turns to the issues and challenges presented by, and during, settlement:

- the interests of unrepresented class members
- assessment of legal costs
- assessment of funding fees
- sharing the cost burdens
- settlement distribution schemes
- notice of settlement and registration.

Court approval of settlement

7.8 The powers of the Supreme Court in relation to settlement are contained in part 4A of the Supreme Court Act. Guidance as to what matters the Court takes into account during settlement is provided in the practice note for class actions (Supreme Court Practice Note).² The overarching obligations contained in the *Civil Procedure Act 2010* (Vic) set out the broad duties of parties in attempting to resolve a dispute.

Part 4A of the *Supreme Court Act 1986* (Vic)

- 7.9 Under part 4A, approval by the Court is required for settlement of class actions to have legal effect. The Court's power is provided by section 33V, which states that:
- (1) A group proceeding may not be settled or discontinued without the approval of the Court.
 - (2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court.
- 7.10 Section 33ZF gives the Court the power to make any order it thinks appropriate or necessary to ensure that justice is done. The broad power provided under section 33ZF is the basis for some of the Court's innovations, discussed later in this chapter.
- 7.11 The draft legislation proposed by the Australian Law Reform Commission (ALRC) in its 1988 report on grouped proceedings set out factors for the court to take into account when approving a settlement:
- (a) the nature and likely cost and duration of the proceedings if approval or leave were not given;
 - (b) the amount offered and the likelihood of success in the proceeding;
 - (c) whether the discontinuance, compromise, settlement or acceptance of money is in the interests of the group member having regard to the views, if they are made known to the court, of the group member; and
 - (d) whether satisfactory arrangements have been made for the distribution of money to be paid to the group members.³
- 7.12 These draft provisions were not incorporated into part IV of the *Federal Court of Australia Act 1976* (Cth). Consequently, they do not appear in part 4A of the Supreme Court Act and section 33V does not specify the factors that the Court should take into account when approving a settlement.

² Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.
³ Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 163 cl 28(3).

Class action practice note

- 7.13 The criteria that the courts consider relevant to settlement approval have developed through case law.⁴ In Victoria, they have been consolidated into the Supreme Court Practice Note.⁵
- 7.14 When applying for Court approval, the parties will usually need to persuade the Court that:
- The proposed settlement is fair and reasonable having regard to the claims made on behalf of the class members.
 - Settlement has been undertaken in the interests of class members as well as those of the representative plaintiff, and not just in the interests of the representative plaintiff and the defendant.⁶
- 7.15 The Supreme Court Practice Note contains a list of specific factors that the parties are usually required to address when making application for approval:
- the complexity and likely duration of the litigation
 - the reaction of the group to the settlement
 - the stage of the proceedings
 - the likelihood of establishing liability
 - the likelihood of establishing loss or damage
 - the risks of maintaining a class action
 - the ability of the defendant to withstand a greater judgment
 - the range of reasonableness of the settlement in light of the best recovery
 - the range of reasonableness of the settlement in light of all the attendant risks of litigation
 - the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.⁷
- 7.16 The courts have noted that there is rarely one single or obvious way in which settlement of a class action should be framed, whether between the representative plaintiff/class members and the defendant (*inter partes*) or in relation to sharing the proceeds among class members (*inter se*). Reasonableness is considered a range, and the appropriate question is whether the proposed settlement falls within the range.⁸
- 7.17 Further, it is not the task of the court to guess or interpret the tactical or other decisions made by the lawyers, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to the circumstances and risks.⁹

4 See, eg, *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 (12 August 2013) [6]–[8]; *City of Swan v McGraw-Hill Companies Inc* (2016) 112 ACSR 65, 71 [32]–[35]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 (25 March 2011) [19]–[27]; *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 449, 465–6.

5 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017.

6 *Ibid* 6–7 [13.1].

7 *Ibid* 7 [13.3].

8 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [82]; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, 339 [50].

9 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [83]; *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, 339 [50]; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013) [12]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 (25 March 2011) [22].

Civil Procedure Act 2010 (Vic)

- 7.18 In addition to the criteria set out in the Supreme Court Practice Note, litigation funders and lawyers involved in class actions are subject to the obligations contained in the Civil Procedure Act. In facilitating the ‘just, efficient, timely and cost-effective resolution of the real issues in dispute’,¹⁰ parties are under the obligation to use reasonable endeavours to resolve a dispute by agreement.¹¹

Interests of unrepresented class members

- 7.19 Under Australia’s opt out regime, where a class action is commenced on an open basis, all persons who have suffered damage of the type specified in the claim are considered to be participants in proceedings, even if they have not identified themselves as class members or consented to participation.¹² Unless they choose to opt out, class members are bound by the outcome of proceedings, which means that they cannot pursue litigation on the same issue at a later stage.
- 7.20 Class members who remain in proceedings will not necessarily have their interests presented to the Court at settlement. While the representative plaintiff will have their interests advanced by lawyers, this is not the case for all class members. Some class members will not have entered into a legal retainer, or have legal representation. It is unlikely that they will appear before the Court. If they do, they are unlikely to possess the legal knowledge to enable them to adequately communicate their interests. It is therefore important that their interests are protected during settlement.
- 7.21 In exercising its power under section 33V of the Supreme Court Act to approve settlement, the Court assesses whether the settlement is fair and reasonable. In doing so, the Court ensures that the interests of the representative plaintiff and the class members who have signed a retainer with the lawyers and/or a funding agreement are not being preferred over the interests of other class members, ‘absent strong and compelling reason(s) for any such preferential treatment’.¹³
- 7.22 In the Federal Court decision of *Lopez v Star World Enterprises Pty Ltd*,¹⁴ Justice Finkelstein explained the Court’s role in safeguarding the interests of unrepresented class members:
- With regard to the application under s 33V, my principal task is to assess whether the compromise is a fair and reasonable compromise of the claims made on behalf of the group members. I am not so much concerned with the position of Mr Lopez [the representative plaintiff] who, after all, has solicitors and counsel to advise him as to how his interests will best be served in the litigation. The group members are not protected in this way.¹⁵
- 7.23 The difficulty of the court’s task in protecting class members’ interests in settlement is heightened by the non-adversarial format of settlement approval. By the time that court approval is sought, the representative plaintiff and defendant have generally negotiated and consented to the terms of the settlement.
- 7.24 An application for settlement approval is a joint application by the representative plaintiff and defendant, with the court having to rely on the evidence of the representative plaintiff’s lawyers. Active opposition to, or dissatisfaction with, the terms of settlement is not usually provided. There is no stipulated means by which the evidence is subjected to

10 *Civil Procedure Act 2010 (Vic)* s 7(1).

11 *Ibid* s 22.

12 As detailed later in the chapter, class actions that are commenced on an open class basis in Australia do not generally continue as such: *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 228-9 [189].

13 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [85].

14 (1999) 1 ATPR 41-678.

15 *Ibid* 42 670.

an adversarial process.¹⁶ For the court, its role in assessing the settlement can be exacting, as Justice Finkelstein has described:

the task of the court in considering an application under s 33V is indeed an onerous one especially where the application is not opposed. It is a task in which the court inevitably must rely heavily on the solicitor retained by, and counsel who appears for, the applicant to put before it all matters relevant to the court's consideration of the matter.¹⁷

- 7.25 The risk that all class members' interests are not represented by the representative plaintiff's lawyers is reduced by the requirement that the lawyers submit an affidavit including evidence, to the extent relevant, of the following matters:
- how settlement complies with the criteria for approval
 - why the proceedings have been settled on particular terms
 - the effect of the terms on class members (the amount of damages they are to receive and whether class members are treated the same or differently and why)
 - how the settlement process will be administered, supervised, monitored or audited
 - the terms of fee and retainer agreements including the reasonableness of legal costs
 - a response to any arguments against approval raised by class members
 - any issues that the court directs be addressed
 - a hearing of the application for settlement approval, including consideration of any class members' objections and an order dealing with costs.¹⁸
- 7.26 One way for the court to assess the desirability of settlement for all class members is to consider any objections they have made to settlement and how many have opted out. If a number of class members 'vote with their feet' and opt out, it may be an indication that settlement is not fair or reasonable for all class members.¹⁹ A lack of objection to a particular proposition or a low opt out rate, however, does not necessarily represent class members' assent and may carry little weight.²⁰ Whether it is a relevant indicator will depend, among other factors, whether timely and comprehensible notice has been given to class members, and whether there is evidence that they actually understand the notice.²¹ This issue is discussed in Chapter 4.

Reform options

- 7.27 The Commission has identified two main options to assist the Court in ensuring that the interests of unrepresented class members are protected:
- the appointment of a third-party guardian or contradictor
 - the increased involvement of defendants in the settlement hearing.

Court appointment of a third-party guardian or contradictor

- 7.28 Under this option, a third-party guardian or contradictor would be appointed by the Court in class actions to assess the strengths and weaknesses of the settlement from the perspective of unrepresented class members.

16 See generally, Ray Finkelstein, 'Class Actions: The Good, The Bad, and The Ugly' 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) 415; Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58; Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590.

17 *Lopez v Star World Enterprises Pty Ltd* (1999) ¶ ATPR 41-678, 42 670.

18 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 7–8 [13.5].

19 Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 71–2.

20 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 204-5 [50].

21 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 204 [46]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [85(a)].

- 7.29 There is currently no specific provision for this in legislation or the Supreme Court Practice Note. However, the courts have used a third-party guardian or contradictor on a case-by-case basis, and the Supreme Court has expressed a preference for this approach over the existing practice where lawyers submit affidavit evidence.²²
- 7.30 Michael Legg has also expressed support for this proposal as a means of assisting the Court:
- This reform deserves to be reiterated because it allows for the Court to create an adversary contest which would otherwise be lacking, for representation of the interests of absent group members, monitoring of the parties, and assistance to the Court in understanding the mechanics and ramifications of the settlement.²³
- 7.31 Although this practice has already been followed in some class actions, its case-by-case use does not resolve the practical questions of who pays for the guardian, who instructs the guardian, and how confidential information is made available to the guardian.²⁴ These issues could be set out in Court guidelines.

Increased involvement of defendants in settlement

- 7.32 A second option is for the Court to require the defendant's lawyers to submit evidence relating to the strengths and weaknesses of the terms of settlement. While this does not directly promote the interests of the unrepresented class members, it may provide a useful means of cross-checking the affidavit evidence submitted by the representative plaintiff's lawyers.
- 7.33 As defendants rarely make submissions in relation to settlement, the evidence contained in the representative plaintiff's lawyer's affidavit may be 'untested and uncontradicted'.²⁵ The Federal Court has noted that it is desirable, and in some cases may be necessary, for the defendant to adduce evidence regarding strengths and weaknesses of settlement.²⁶

Question

- 17 How could the interests of unrepresented class members be better protected during settlement approval?

Assessment of legal costs

- 7.34 Where settlement is reached in a class action, the settlement amount may be expressed as an amount inclusive or exclusive of costs. Where it is expressed as an amount inclusive of costs, the legal costs incurred by the class in bringing the proceedings will be deducted from any settlement amount. Where it is exclusive of legal costs, the defendant separately pays these legal costs under the cost-shifting rule.
- 7.35 Generally, if a litigation funder is involved, it will have paid the lawyers during the proceedings, and the funder will be reimbursed upon settlement. Otherwise, legal costs are recovered directly by the lawyers.

22 *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012) [3], [6]. In the Federal Court cases of *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569 and *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420 (5 December 2003), a contradictor was appointed to represent absent class members who were not registered members of the class action.

23 Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 611.

24 *Ibid* 613.

25 *Ibid* 597–8.

26 *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 (21 September 2010) [4]; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 (25 March 2011) [49].

- 7.36 Legal costs that are not recoverable from the defendant under the cost-shifting rule, such as any costs charged above the court scale, are deducted from the settlement amount.

Independent costs expert

- 7.37 Because the lawyers for the class action seek costs for themselves (with no contradictor), the amount they are to be paid, including disbursements, must be approved by the court.²⁷ The Supreme Court of Victoria has a general power to oversee legal costs in class actions, which arises from section 33ZF of the Supreme Court Act.
- 7.38 In overseeing legal costs, the Court is assisted by an independent costs expert, who provides expertise on the reasonableness of the legal costs incurred during the class action. The involvement of a costs expert in class action proceedings raises two issues that may affect the fairness of the outcome:
- how the reasonableness of legal costs is assessed
 - how the independence of the costs expert is ensured.

Reasonableness of legal costs

- 7.39 Evidence relating to the terms of fee and retainer agreements must be submitted at settlement, including evidence of reasonableness.²⁸ It is common practice for a costs expert to provide an affidavit establishing whether, in their opinion, the costs are reasonable.
- 7.40 The Supreme Court Practice Note is silent as to how the costs expert is to assess the reasonableness of legal costs in a class action. In comparison, the Federal Court Practice Note states that it will usually be sufficient that an independent expert:
- has examined a sufficient sample of the legal work recorded to clarify whether the work was properly costed in accordance with applicable costs agreements
 - expresses an expert opinion, by reference to the sample and the expert's experience of comparable litigation, as to whether the total legal costs claimed are fair and reasonable.²⁹
- 7.41 In Federal Court class actions, a more extensive sampling of legal costs may be required where:
- (a) the class members include persons who are not clients of the applicant's lawyers or of the litigation funder;
 - (b) the deduction per class member constitutes a significant proportion of the settlement amount otherwise payable to each class member; or
 - (c) the litigation funder imposes charges beyond the percentage commission set out in the litigation funding agreement (e.g. project management fees).³⁰
- 7.42 In considering whether the legal costs incurred on behalf of the class members are reasonable, the Federal Court may have regard to the corresponding legal costs incurred by the defendant, and make such orders for the confidentiality of legal costs as may be appropriate.³¹

27 Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 601.
28 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 7 [13.5(e)].
29 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 14 [15.2].
30 *Ibid* 15 [15.3].
31 *Ibid* [15.4].

Independence of the expert

- 7.43 The Federal Court Practice Note requires that the reasonableness of the lawyers' costs be determined by an 'independent expert'. It does not specify whether this is to be a court-appointed expert, or someone appointed by the parties. It is common practice for the lawyers seeking the fees to appoint the costs expert.
- 7.44 Legg has observed that there is a risk of adversarial bias in such a situation.³² Where the lawyers seeking the fees appoint the costs expert (and give repeat work to the costs expert) the expert may be less likely to reduce the legal costs charged by the lawyers.
- 7.45 A preferred situation may be one in which the costs expert is appointed by the court. However, the Commission has been told that only a limited number of costs experts are experienced in class actions. This means that, in practice, court appointment would not necessarily increase the size of the pool from which the costs expert is appointed.

Question

- 18 What improvements could be made to the way that legal costs are assessed in class actions?

Assessment of funding fees

- 7.46 The fee charged by litigation funders to class members for financing the class action (funding fee) is usually the largest single deduction from any settlement or judgment amount.³³ The reasonableness of the funding fee is therefore an important consideration for the court during settlement. Indeed, in *Money Max Int Pty Ltd v QBE Insurance Group Ltd (Money Max)*, the Federal Court stated that the 'central benefit' to class members of the proposed common fund order was court approval of a reasonable funding fee.³⁴
- 7.47 Until recently, courts have been willing to reject settlement under section 33V where an unreasonable funding fee has been charged, but reluctant to intervene further and state what a reasonable funding fee would be in the circumstances.³⁵
- 7.48 The courts have generally considered they should not express a view about the amount paid to the litigation funder in situations where the class member is aware of the fee and has agreed to pay.³⁶
- 7.49 In *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,³⁷ the High Court noted:
- to ask whether the bargain struck between a funder and intended litigant is 'fair' assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity.³⁸

32 Michael Legg, 'Class Action Settlement in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 601–2.

33 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72].

34 *Ibid* [79].

35 Michael Legg, 'Class Action Settlement in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 603.

36 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 434–5; *City of Swan v McGraw-Hill Companies, Inc* (2016) 112 ACSR 65, 73; *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012) [20].

37 (2006) 229 CLR 386.

38 *Ibid*, 434–5 [92].

7.50 In recent judgments, however, the Federal Court has stated that the Court has the power, in certain circumstances, to set or modify the rate of the funding fee agreed to by the parties in the litigation funding agreement. The Court may also order all class members to pay this amount, regardless of whether they have executed a funding agreement.³⁹

Greater scrutiny by the Federal Court

7.51 Recent decisions from the Federal Court reveal that the Court has changed its views on the role it plays in assessing a litigation funding fee. This is particularly evident in the judgment of *Money Max*, as well as the later decisions of *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3) (Allco)*⁴⁰ and *Earglow Pty Ltd v Newcrest Mining Ltd (Earglow)*.⁴¹

7.52 These judgments indicate a trend towards a greater degree of judicial scrutiny of litigation funding fees during settlement. They also reveal a reform in the scope of this supervision. The use of common fund orders, which requires all class members sharing in settlement to pay a proportion of a court-determined funding fee regardless of whether they have executed a funding agreement, represents a fundamental reform in settlement approval.

7.53 The Federal Court has provided a number of reasons for this changed role. In *Money Max*, it expressed the view that class actions give rise to a unique set of issues that mean court supervision of the funding fee—including the ability to set or modify a contractually agreed funding fee—will be justified in certain circumstances because:

- the largest single deduction from the recoveries of class members in funded class actions is usually the funding fee (or an equivalent amount under a funding equalisation order)
- there is often a significant information asymmetry between the funder and the class members in relation to the costs and risks associated with the action
- at least for some claimants the only opportunity they have to recover losses suffered through alleged breaches of the law is through the funded class action
- for small shareholders the opportunity for negotiation of the funding fee is limited or non-existent.⁴²

7.54 In *Money Max*, the applicant had requested a common fund order with the litigation funder's consent. It was in this context that the decision to modify the funding fee was made. The discretion to modify the funding fee has since been extended by the Federal Court beyond these circumstances.⁴³ For example, in *Earglow*, Justice Murphy found that court modification of the funding fee would be appropriate, even though orders to this effect were not sought.⁴⁴

7.55 In addition to the interests of justice, the Federal Court has considered the following policy considerations favouring an increased degree and scope of court supervision:

- The changing landscape of class action proceedings since the introduction of class actions under part IVA of the *Federal Court of Australia Act 1976* (Cth), and particularly the entry of litigation funders. The Federal Court has stated that the only reason part IVA does not provide for court supervision of funding fees is because there is 'no sign' that the drafters of the 1988 ALRC report or Parliament foresaw the inception and development of litigation funding.⁴⁵

39 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016); *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

40 [2017] FCA 330 (31 March 2017).

41 [2016] FCA 1433 (28 November 2016).

42 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72]. These considerations were approved in *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [138].

43 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [7]–[8].

44 *Ibid.*

45 *Ibid* [143]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [76].

- The frequent involvement of litigation funders in class actions has meant that funding fees have become a ‘standard’ cost of such proceedings and are analogous to legal costs.⁴⁶ The Federal Court has stated that, as courts have the power to set legal costs, the setting of funding fees is a suitable issue for the exercise of judicial power.⁴⁷
- The ability of the courts to assess funding fees on a case-by-case basis may place the courts in a better position to regulate funding fees than other forms of regulation. In *Allco*, Justice Beach noted that courts are able to bring ‘flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with, say, regulation under idiosyncratic State legislation’.⁴⁸
- The Federal Court has observed that, by rejecting a settlement under section 33V because a funding fee is unreasonable but refusing to proactively set a reasonable fee, courts are nurturing form over substance, which is undesirable.⁴⁹

Statutory sources of power for setting the funding fee

7.56 In setting a funding fee, either at a similar rate to that agreed in the funding agreement or another rate, the Federal Court has relied on several statutory sources of power. In *Earglow*, Justice Murphy stated that the Federal Court’s power to do so arose from four statutory sources: sections 23, 33V, 33Z and 33ZF of the Federal Court Act.⁵⁰ Sections 33V, 33Z and 33ZF are mirrored in the Victorian Supreme Court Act.⁵¹

Criteria for court assessment of a ‘fair and reasonable’ fee

- 7.57 The Federal Court has articulated criteria that it is likely to consider in assessing, and potentially modifying, a fair and reasonable funding fee. In doing so, the Court has recognised that it ‘cannot predetermine’ relevant considerations for approval of a reasonable fee, which will depend upon the circumstances of the individual case.⁵²
- 7.58 The Court has noted that such an assessment should involve wider considerations than merely whether the funding fee is ‘so disproportionate’ to the funder’s risk and expenses in undertaking the litigation.⁵³
- 7.59 While the Court has abstained from providing a comprehensive list of criteria, relevant factors were listed in *Money Max*, including:
- the rate agreed by sophisticated class members and the number of such class members who agreed
 - the information provided to class members regarding the funding fee
 - a comparison of the funding fee with other class actions and/or what is available in the market
 - the litigation risks of providing funding
 - the amount of adverse costs exposure that the funder assumed
 - the legal costs expended and the security for costs provided by the funder
 - any amount of settlement or judgment
 - any substantial objections made by class members in relation to any litigation funding charges
 - class members’ likely recovery ‘in hand’ under any pre-existing funding agreements.⁵⁴

46 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* [2017] FCA 330 (31 March 2017) [120]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [75], 227 [184].

47 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [120].

48 *Ibid* [142].

49 *Ibid* [123].

50 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [21], [133]–[142].

51 *Supreme Court Act 1986* (Vic) ss 33V, 33Z, 33ZF.

52 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [80].

53 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [118].

54 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [80].

- 7.60 The Federal Court also set three ‘safeguards’ in *Money Max* that were critical to its decision to modify the funding fee as part of a common fund order.
- 7.61 The first safeguard was that the approval of a reasonable funding fee was to be left to a later stage of proceedings when more probative and complete information would be available to the Court (likely at settlement or distribution of damages).⁵⁵
- 7.62 The second safeguard was a ‘floor condition’ that no class member (funded or unfunded) could be worse off under the order than he or she would be if the order were not made.⁵⁶
- 7.63 The third safeguard was the notice provided to class members. Before the deadline by which they were required to decide whether or not to opt out, class members were to be adequately informed of the proposed orders and the fact that a court-approved funding fee would be deducted from any settlement or judgment.⁵⁷

Total amount received by a litigation funder

- 7.64 The percentage of any settlement amount paid to the litigation funder by each class member is an important consideration for the courts in determining reasonableness of a funding fee and fairness to class members.
- 7.65 Equally important is the total amount received by a litigation funder. The Court must determine whether this amount is fair and reasonable in light of the risks and obligations taken on, and the settlement amount.
- 7.66 The terms of reference ask whether any limits should be placed on the funding fees that a litigation funder can charge. The use of a cap or sliding scale may provide a useful check to ensure that the total amount is not disproportionate.

Caps and sliding scales

- 7.67 In *Money Max*, the Federal Court considered that setting a cap on the total amount received by the litigation funder may be useful in certain circumstances, including where:
- there is no cap on the aggregate dollar amount receivable under the litigation funding agreement
 - a larger than expected settlement is received, which does not result in increased risk to the litigation funder.⁵⁸
- 7.68 While the Court did not comprehensively examine the structures that could be adopted in limiting the total amount recoverable by a litigation funder, it noted that setting a funding fee by a sliding scale is one way of doing so.⁵⁹
- 7.69 In *Allco*, Justice Beach discussed the use of a sliding scale as a device to ensure that litigation funders receive a share of settlement proportionate with the risk and investment.⁶⁰ He observed that if the settlement amount had been ‘substantially higher’, he would have set a lower funding fee rate to ensure that the amount paid to the litigation funder remained proportionate to the investment and risk.⁶¹
- 7.70 In relation to possible amounts for sliding scales, Justice Beach observed:
- I venture to suggest that a 30% rate would be difficult to justify on a net settlement sum above \$50 million. But valuable services such as that which a funder provides have a commercial cost and if it can be justified, so be it.⁶²

55 Ibid [11].

56 Ibid [12]. While the funding agreements provided for a funding fee to be paid at a rate of either 32.5 or 35 %, the orders sought provided for all class members to pay a funding agreement of 30%. This resulted in a lower rate being paid by all class members.

57 Ibid [13].

58 Ibid [11], [86].

59 Ibid [147].

60 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [157]–[160].

61 Ibid.

62 Ibid [160].

- 7.71 Justice Beach further observed that courts are adept at setting legal costs by ‘scales, rates, individual amounts and total or capped amounts, whether ex ante or ex post’, and that a funding fee could be viewed as a relevant analogue.⁶³
- 7.72 In the United States, lawyers can charge contingency fees (similar to the approach taken in Australia to litigation funding fees). These fees are determined by a common fund approach, where court-approved amounts are determined by the judge at settlement or judgment.⁶⁴ In determining the amount to be paid to lawyers, the courts often specify that fees are to be paid according to a percentage of the amount received, but with a ‘lodestar cross check’ to prevent the overcompensation of lawyers.⁶⁵ Under this approach, the court assesses the percentage amount awarded by reference to the number of hours that the lawyers should reasonably have spent on the case, calculated according to a reasonable hourly rate, and adjusted up or down to ensure proportionality with the amount available under the common fund order.
- 7.73 The difficulty of developing firm principles in relation to capped or predetermined amounts has been noted in commentary, particularly given the case-by-case analysis of funding fees adopted by the Federal Court to date, and the unique risks, costs and fee structures associated with each case.⁶⁶

Assistance for the court

- 7.74 If funding fees are considered analogous to legal costs in class actions, the court’s ability to assess reasonableness may be assisted by the appointment of a costs expert.
- 7.75 In Federal Court class actions, provision is now made for independent expert assessment of the funding fee in a similar manner to legal costs.
- 7.76 In determining whether a funding fee is reasonable, the Federal Court Practice Note states it will usually be sufficient that an independent expert has examined the records and can provide assurance that the litigation funding charges are appropriate, having regard to the terms of the funding agreement.⁶⁷
- 7.77 As with legal costs, the Federal Court Practice Note states that more extensive examination of the litigation funding agreement may be required in certain circumstances.⁶⁸
- 7.78 Under these guidelines, the determination of reasonableness of the funding fee by the expert is dependent on the contractual arrangements entered into by the parties. The recent decisions discussed above indicate that, when assessing a funding fee, the Federal Court may be placing less reliance on these contractual arrangements.
- 7.79 The details of the appointment of the independent expert (whether court-appointed or party-appointed) is not addressed in the Federal Court Practice Note; nor is the question of which party should bear the costs of engaging an independent expert.

Assessment of fee prior to settlement

- 7.80 When assessing a funding fee, the Federal Court has deferred consideration until settlement, or at distribution of settlement amounts. For example, in *Money Max*, although a common fund order was made at the commencement of proceedings, the determination of the size of the fee was delayed until a later stage, to enable the Federal Court to gather the relevant information.⁶⁹

63 Ibid [120].

64 The common fund approach to legal fees originally arose in the equity jurisdiction of American courts: *Trustees v Greenough* 105 US 527 (1882). It was applied to lawyers’ fees in *Central Railroad & Banking Co v Pettus* 113 US 116 (1885).

65 Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52, 65.

66 Stefanie Wilkins, ‘Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*’ (2017) 36 *Civil Justice Quarterly* 133, 144.

67 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 14 [15.2].

68 Ibid 15 [15.3].

69 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [79], 221 [147].

- 7.81 Such an approach enables the courts to gather the necessary information to properly assess whether the fee is fair and reasonable.⁷⁰
- 7.82 The Federal Court, however, has observed the danger of hindsight bias in assessing the risk adopted by the litigation funder at the end of proceedings (when the risk may appear certain) as compared to assessing the risk at the commencement of proceedings (when risks are uncertain). It is considered desirable that the risks posed by the litigation be assessed at the commencement of proceedings.⁷¹
- 7.83 The Federal Court in *Money Max* also recognised that litigation funders may be ‘discomforted’ by the obligation to fund proceedings even though the funding fee is uncertain and subject to court approval.⁷² The Court considered that this uncertainty would diminish as the jurisprudence develops.⁷³ It was stated that there is ‘little sign’ that the requirement to obtain court approval of contingency fees in the United States has so reduced these fees that lawyers are reluctant to bring class actions.⁷⁴

Transparency of funding fee

- 7.84 As part of settlement approval, orders may be sought requesting that the legal costs and/or the amount received by the litigation funder remain confidential. Accordingly, most settlement approval judgments do not reveal the funding fee. It is therefore difficult for the court, or any other party, to assess the fees typically charged by litigation funders.
- 7.85 As noted by Justice Murphy in *Earglow*:
- It is difficult to see why the funding commission rate and quantum should be treated as confidential when the funding commission is a standard cost and in funded class proceedings it is usually the single largest deduction from the settlement.⁷⁵
- 7.86 Justice Murphy observed that while class members may be aware of the different funding fee rates in a proceeding, they will have limited insight into the aggregate amount charged. He expressed the view that disclosure would assist the Court in deciding whether the funding fee is fair and reasonable, including by allowing comparison with rates charged in other cases.⁷⁶

Questions

- 19 Should the following matters be set out either in legislation or Court guidelines?
- (a) criteria to guide the Court when assessing the reasonableness of a funding fee
 - (b) criteria for the use of caps, limits, sliding scales or other methods when assessing funding fees
 - (c) criteria or ‘safeguards’ for the use of common fund orders by the Court.
- 20 Is there a need for an independent expert to assist the Court in assessing funding fees? If so, how should the expert undertake this assessment?

70 *Blairstown Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* (2015) 325 ALR 539, 551-2 [55]–[58], 574 [189]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [79], 221 [147].

71 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [80].

72 *Ibid* [81].

73 *Ibid* [82].

74 *Ibid* [83].

75 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [176].

76 *Ibid*.

Questions

- 21 At which stage of proceedings should the Court assess the funding fee? What, if any, conditions should apply to this?
- 22 In class actions, should lawyers and litigation funders be able to request that the total amounts they receive in settlement be kept confidential?

Sharing the cost burdens

- 7.87 Australia's class action regimes are designed on the basis that proceedings are undertaken on an open basis. This means that unless class members opt out of proceedings, they are considered part of the class for the purposes of sharing in settlement. In this way, class members may be 'passive beneficiaries of the action brought on their behalf'.⁷⁷
- 7.88 In practice, funded class actions commenced on an open basis rarely continue as such.⁷⁸ Open classes are commonly converted to what is, in effect, a closed class, as class members are required to either opt out or register by a particular date.⁷⁹ Only class members who register are entitled to any benefit under settlement (although all class members, including those who neither register nor opt out, will be bound by settlement or judgment).⁸⁰
- 7.89 Closed classes are a means of ensuring that only class members who contribute to the costs of proceedings share in the settlement. While closed classes have been used in proceedings that do not involve litigation funders,⁸¹ they are particularly prevalent in class actions involving a litigation funder, where the funder wishes to limit the number of 'free riders' who do not contribute to the costs of litigation but who receive proceeds of the settlement.
- 7.90 Free riders create economic disincentives for litigation funders.⁸² A litigation funder has an interest in maximising the number of class members who execute a funding agreement and agree to pay a percentage of any settlement to the litigation funder if they win. If class members choose not to execute funding agreements yet can still share in settlement, the size of the class from which the litigation funder can obtain a funding fee becomes smaller or less certain, making pursuit of proceedings a less attractive investment.⁸³
- 7.91 Accordingly, litigation funders are generally only prepared to fund class actions that exclude free riders.⁸⁴

77 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damien Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 67 citing *American Pipe and Construction Co v Utah* 414 US 538, 552 (1974).

78 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 228-9 [189].

79 *Ibid.*

80 The term 'closed class' should be distinguished from 'class closure', which is a related but different concept. A closed class refers to a class action brought on behalf of a limited or identified number of persons who have suffered the loss or damage specified in the claim. For example, those persons who have signed a legal retainer or a litigation funding agreement. Class closure is where a court requires class members to take positive steps to identify themselves as having an interest in any judgment or settlement. It is often done to encourage the settlement of proceedings.

81 See, eg, Peter Cashman, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80 *Australian Law Journal* 738; Vince Morabito, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29 *Sydney Law Review* 5.

82 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 228 [186].

83 John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32 *University of New South Wales Law Journal* 1036.

84 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 227-8 [185]; Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 616; Vicki Waye and Vince Morabito, 'The Dawning of the Age of the Litigation Entrepreneur' (2009) 28 *Civil Justice Quarterly* 389, 421.

7.92 The advantages of giving class members an incentive to contribute to costs⁸⁵ and the benefits provided through funded class actions⁸⁶ has resulted in three main approaches being adopted by Australian courts to limit the number of class members who share the proceeds of settlement:

- closed classes
- funding equalisation orders
- common fund orders.

Closed classes

7.93 In a closed class,⁸⁷ the class is not open to all persons who have suffered loss of the type sought to be recovered in the proceedings. Instead, it is limited to those who have suffered loss *and* who meet additional criteria.⁸⁸ For present purposes, the additional criterion is the execution of a litigation funding agreement.

7.94 Closed classes may reduce the inequality introduced by free riders, as all class members who wish to benefit from the recovery must register with the litigation funder and agree to contribute to the costs. Similarly, in reducing the different categories of class members (those who have signed funding agreements and legal retainers and those who have not), the potential conflicts of interest faced by lawyers may be reduced.⁸⁹

7.95 From the perspective of the litigation funder, a closed class also has the advantage of certainty in that the number of class members paying the funding fee is quantifiable.⁹⁰ It has also been suggested that greater finality is provided to the defendant, as all class members are identified and any settlement amount is capped by reference to a precise number of potential claimants.⁹¹

7.96 Yet closed class actions have also been held to give rise to a number of problems.⁹²

7.97 It is widely considered that the use of closed classes is inconsistent with the policy underpinning the Australian opt out regime.⁹³ In requiring class members to take affirmative steps in recognising and pursuing a cause of action, closed classes may subvert the access to justice principle intended by Parliament.⁹⁴ In referring to a closed class proceeding, Justice Jacobson observed in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd and Another (Multiplex)*:⁹⁵

It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.⁹⁶

85 *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111, 123 [48].

86 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 229 [192].

87 Under pt 4A of the Supreme Court Act, a class action may be brought on or behalf of 'some or all' of the class, thereby allowing class actions to commence which exclude some potential class members. The Supreme Court is also authorised at any stage of proceedings upon application by the representative plaintiff to give leave to amend the application commencing the class action so as to alter the description of the group: *Supreme Court Act 1986* (Vic) ss 33C, 33K.

88 See generally, Peter Cashman, 'Class Actions on Behalf of Clients: Is This Permissible?' (2006) 80 *Australian Law Journal* 738; Vince Morabito, 'Class Actions Instituted only for the Benefit of the Clients of the Class Representative's Solicitors' (2007) 29 *Sydney Law Review* 5.

89 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37 *University of New South Wales Law Journal* 914, 921, 938.

90 Stefanie Wilkins, 'Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*' (2017) 36 *Civil Justice Quarterly* 133, 134–5.

91 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 229 [190] citing Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Lawbook Co, 2nd ed, 2012) [14.410].

92 These were highlighted by the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 229–30 [192]–[200].

93 Jarrah Hoffmann-Ekstein, 'Funding Open Classes through Common Fund Applications' (2013) 87 *Australian Law Journal* 331; Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52, 59.

94 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 616.

95 (2007) 164 FCR 275.

96 *Ibid* [117].

- 7.98 Further, while the risk of competing class actions exists under any opt out regime, closed class proceedings may exacerbate their incidence.⁹⁷ If a class action is successful, potential claimants who did not register may bring subsequent proceedings. This can potentially result in increased legal costs, wastage of court resources, delay, and unfairness to defendants, particularly where proceedings are commenced in different courts.⁹⁸

Funding equalisation orders

- 7.99 Where class actions include both funded and unfunded class members, a funding equalisation order may be made by the court at settlement.
- 7.100 This orders deductions to be made from the amounts recovered by unfunded class members, which are then distributed back pro rata across the funded class members. Essentially, it means that the costs of funding are shared equally by every class member, but it does not affect the quantum of a litigation funder's return, if involved.⁹⁹
- 7.101 While the Supreme Court Practice Note does not address funding equalisation orders, provision has been made in the Federal Court Practice Note, which states that notice of proposed settlement should include, among other things:
- Information as to any 'funding equalisation payment' which affects the ultimate settlement amount received by class members who have not entered into a litigation funding agreement.¹⁰⁰
- 7.102 It appears that funding equalisation orders are generally made in the Federal Court at the applicant's request and without opposition by the respondent or a contradictor.¹⁰¹ As such, they may represent an ad hoc innovation agreed to by the parties as opposed to an overarching court solution.¹⁰² The Federal Court has also stated that use of a funding equalisation order assumes that the powers of the Court in approving settlement do not extend to modifying or setting a reasonable rate for the funding fee.¹⁰³ As discussed above, the Federal Court has recently considered such an assumption questionable.
- 7.103 It has been noted that litigation funders may assert that they are contractually entitled to a percentage of the incremental amount added to class members' recoveries under a funding equalisation order.¹⁰⁴ Accordingly, such an order may result in the litigation funder actually receiving a higher amount than that agreed to under the funding agreement.

Common fund orders

- 7.104 A common fund order is one in which the class remains open, yet the court at a set point requires all class members to contribute an equal percentage of any judgment or settlement amount to the party covering the costs, regardless of whether they have signed an agreement or retainer. In Australia, the party covering the costs is often, but not always, a litigation funder.
- 7.105 In making a common fund order, a court may order that class members pay a comparable amount to the amount agreed to in the funding agreement. Alternatively, the Federal Court has also held that a common fund order may set a different rate to that agreed.¹⁰⁵

97 Prior to the Federal Court decision in *Multiplex* in December 2007 (which approved the commencement of class actions limited to persons who had executed a funding agreement), instances of competing class actions in the Federal Court occurred on average once every 14 months. In the five years following *Multiplex*, competing class actions in the Federal Court occurred approximately once every 9.6 months: Vince Morabito, 'Clashing Classes Down Under—Evaluating Australia's Competing Class Actions Through Empirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 205, 274; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 228 [196].

98 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 230 [196].

99 *Ibid* [5].

100 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 12 [14.2(h)].

101 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 318 [132].

102 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [102].

103 *Ibid* [99].

104 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* [2017] FCA 330 (31 March 2017) [99]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

105 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* [2017] FCA 330 (31 March 2017); *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

7.106 Unlike a funding equalisation order, the court is not merely redistributing the funding fee set under the funding agreement, but assessing the reasonableness of the funding fee under the contractual arrangement. Thus, the funding fee set by the court under a common fund order may not necessarily be comparable to that under a funding equalisation order or funding agreement.¹⁰⁶

Use of common fund orders

7.107 The use of common fund orders in class actions has been addressed by the ALRC¹⁰⁷ and the Commission,¹⁰⁸ and has also been extensively discussed in commentary.¹⁰⁹

7.108 Until recently, common fund orders have only been made at a late stage of proceedings, either at settlement or with a view to promoting settlement.¹¹⁰ Common fund orders have been refused where insufficient notice has been given to class members, not affording them sufficient opportunity to opt out.¹¹¹

7.109 Similarly, until recently, the amounts that the courts have ordered unregistered class members to pay under common fund orders have been comparable to those agreed to under the funding agreements.

7.110 However, in *Money Max*, the Federal Court held that it had the discretion to make a common fund order at the start of proceedings (although the specific funding rate would be set at a later stage of proceedings), which would impose the terms of the litigation funding agreement on all class members. The Court also determined it had the power, when ordering a common fund, to vary the funding fee and impose a lower rate for all class members.

7.111 The approach of the Federal Court in *Money Max* and subsequent decisions reflects the advantages of common fund orders, which are said to include the following:

- Common fund orders encourage the use of open class proceedings over closed classes, thereby being more consistent with the legislative opt out regime recommended by the ALRC and created as part IVA of the Federal Court Act.¹¹²
- Common fund orders contribute to the aims of efficiency and certainty intended by part IVA of the Federal Court Act by increasing the speed with which class actions can be commenced (as litigation funders are not required to sign up numerous class members before instituting proceedings).¹¹³

106 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* [2017] FCA 330 (31 March 2017) [105]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 213 [103].

107 In its 1988 report on grouped proceedings, the ALRC (in discussing solicitor–client costs) approved the US common fund approach to legal fees and its premise: Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 119–20 [289].

108 A common fund approach for litigation funders was considered by the Commission in 2008. It was noted that a legal mechanism could be adopted to allow a litigation funder to claim a share of the total amount recovered on behalf of an opt out class, without necessarily requiring each of the class members to enter into separate contractual arrangements with the litigation funder: Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 615–23.

109 See, eg, Justice Jonathan Beach, ‘Some Current Issues in Securities Class Actions’ (2017) 36 *Civil Justice Quarterly* 146; Stuart Clark and Christina Harris, ‘The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?’ (2008) 32 *Melbourne University Law Review* 775; Jarrah Hoffmann-Ekstein, ‘Funding Open Classes through Common Fund Applications’ (2013) 87 *Australian Law Journal* 331; Michael Legg, ‘Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation’ (2007) 81 *Australian Law Journal* 478; Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52; Stefanie Wilkins, ‘Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*’ (2017) 36 *Civil Justice Quarterly* 133.

110 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* (2015) 325 ALR 539, 551–2 [55]–[58], 574 [189]; *Farey v National Australia Bank Ltd* [2014] FCA 1242 (18 November 2014); *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012).

111 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013).

112 Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52; Stefanie Wilkins, ‘Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*’ (2017) 36 *Civil Justice Quarterly* 133.

113 Stefanie Wilkins, ‘Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*’ (2017) 36 *Civil Justice Quarterly* 133, 149.

- Common fund orders reduce conflicts of interest faced by lawyers in class actions. Conflicts of interest are introduced by the practice of opening and closing classes and creating various categories of class members. Making a common fund order that all members are to pay a funding fee means there will be less need to encourage class members to enter a funding agreement or sign a legal retainer.¹¹⁴
 - Common fund orders provide greater protection to class members by allowing judicial supervision of fees.¹¹⁵
- 7.112 Concerns raised in relation to the use of common fund orders include that they may create a ‘race to the courts’, as litigation funders will no longer be required to sign up numerous class members before instituting proceedings.¹¹⁶
- 7.113 The Federal Court in *Money Max* noted that uncertainty may be created for litigation funders under a common fund order.¹¹⁷ Even if it is made at the commencement of proceedings, the determination of the funding fee—under the current approach of the Federal Court—will be left until a later stage of proceedings. This means that the expected rate of return will not be certain until settlement, and the litigation funder may face the risk that a lower fee (or a capped amount) will be set by the court.¹¹⁸ The Federal Court considered that this concern on the part of litigation funders would diminish as the jurisprudence develops.¹¹⁹

Statutory sources of power for common fund orders

- 7.114 In *Money Max*, the Federal Court stated that its powers to make a common fund order modifying the funding fee arose pursuant to sections 23 and 33ZF of the Federal Court Act. Section 33ZF is replicated in the Supreme Court Act.
- 7.115 In *Allco*, Justice Beach did not consider recourse to section 33ZF necessary. Rather, he considered that section 33V(2) provides the Federal Court with sufficient power to modify any contractual arrangement dealing with the funding fee payable out of any settlement amounts.¹²⁰
- 7.116 Legg has argued that, while the legislation enables courts to make common fund orders, the basis for the power is very broad and therefore introduces an element of uncertainty as to how and when common fund orders should be made. He proposes that a specific legislative mandate be created to provide some certainty, rather than have common fund orders dealt with piecemeal by judicial decisions.¹²¹

Settlement distribution schemes

- 7.117 In considering the fairness and reasonableness of a settlement, courts are required to consider not just the overall settlement sum, but also the structure and workings of the scheme by which that sum is proposed to be distributed among class members.¹²²
- 7.118 The means by which the settlement amount is distributed among class members is known as a settlement distribution scheme. Typically, it involves five steps, set out by the Federal Court in *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd*:

114 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 230 [197]–[199].

115 *Ibid* [11], [79], [167].

116 Jenny Campbell and Jerome Entwisle, ‘The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?’ (2017) 36 *Civil Justice Quarterly* 177, 191; Stefanie Wilkins, ‘Common Fund Orders in Australia: A New Step in Court Regulation of Litigation Funding: *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*’ (2017) 36 *Civil Justice Quarterly* 133, 149.

117 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210 [81].

118 Michael Legg, ‘Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation’ (2007) 81 *Australian Law Journal* 478, 488; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210 [81].

119 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210 [82].

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

121 Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52.

122 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, 336 [41].

There are five critical features of the [Settlement Distribution] Scheme. The first is the appointment of MBC [the applicant's lawyers] as Court appointed administrator. The second is the establishment of a procedure for the identification and verification of Group Members who are entitled to participate in the Settlement. The third is the assessment of claims by Participating Group Members and the identification of the formula by which claims are to be assessed and determined. The Fourth is the establishment of a dispute resolution mechanism. The fifth is the provision for supervision of the Scheme by the Court.¹²³

- 7.119 Legg has identified two competing objectives of settlement distribution schemes:
- Individual compensation reflects the merits of each individual claim.
 - The distribution process is completed in a manner that minimises cost and delay.¹²⁴
- 7.120 Settlement distribution should attempt to 'achieve a broadly fair division of the proceeds, treating like group members alike, as cost effectively as possible'.¹²⁵
- 7.121 The Supreme Court sets out the procedure to be followed when making an application for settlement. It states that the application should include orders approving any scheme for distribution of any settlement payment.¹²⁶
- 7.122 Evidence addressing how the settlement process will be administered, supervised, monitored or audited is required to be included in the affidavit(s) in support of settlement.¹²⁷

Merits of individual claims

Inter se fairness

- 7.123 Approval of the settlement distribution scheme requires the Court to consider the fairness and reasonableness of the settlement *inter se*, that is, between class members.¹²⁸
- 7.124 Evidence of the effect of the settlement on class members is required as part of court approval of settlement.¹²⁹ This includes evidence of the amount of damages and whether class members are to be treated the same or differently, and why.¹³⁰
- 7.125 In considering the amount received by class members under a settlement distribution scheme, the Court will compare the amount individual class members will recover under settlement to the amount they might have recovered after a trial. Such a comparison will, by necessity, be broad.¹³¹
- 7.126 In considering *inter se* fairness, the interests of the representative plaintiff or registered class members should not be preferred over the interests of other class members.¹³²

123 *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671 (15 June 2011) [23].

124 Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89.

125 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [5].

126 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 7 [13.4].

127 *Ibid* [13.5(d)].

128 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [5].

129 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 7 [13.4] [13.5].

130 *Ibid* [13.5(e)].

131 *A v Schulberg (No 2)* [2014] VSC 258 (5 June 2014) [12].

132 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [5].

Individual claims

- 7.127 In addition to the differences between class members arising from their registration status, differences will also arise from individual claims. Under section 33C, a class is likely to contain class members with marked differences between claims, in terms of both strength of claim and factual basis. Specific provision is made for determination of these individual claims under part 4A of the Supreme Court Act.¹³³ These differences may be particularly evident where the class is very large, or where the subject matter lends itself to unique damage or loss (such as medical or pharmaceutical class actions).
- 7.128 While settlement distribution schemes operate according to broad rules of thumb, they should not ignore material differences in class members' claims. Any differentiation in distribution of proceeds must reflect substantive differences, such as the strength of the claim, rather than arbitrary differences.¹³⁴
- 7.129 Australian courts have determined that strong and weak claims should not be treated alike; rather, the courts should aim to achieve vertical equity (more deserving claimants should receive more than less deserving claimants) and horizontal equity (similarly situated claimants should receive similar awards).¹³⁵

Efficiency and cost

- 7.130 The Supreme Court Practice Note requires evidence relating to the administration, supervision, monitoring and auditing of the settlement process to be provided to the Court.¹³⁶ This is required when applying for Court approval of settlement.
- 7.131 The approach recently taken by the Supreme Court in the settlement of the Kilmore East and Kinglake Bushfire trials illustrates that the Court may use a range of methods, including:
- requiring the administrator to appear at case management conferences and file reports through affidavit and *viva voce* evidence
 - publication of the settlement distribution scheme rulings online
 - allowing class members to raise concerns directly with the Court
 - appointment of an independent costs assessor as special referee.¹³⁷
- 7.132 The level of court supervision of settlement distribution schemes remains discretionary. The Supreme Court Practice Note does not provide detail about how court supervision is to be undertaken. In comparison, the Federal Court Practice Note requires evidence to be submitted to the Court detailing the expected time for payment of settlement amounts to class members, and the frequency of any post-approval report(s) to be provided to the Court regarding the distribution of settlement funds.¹³⁸
- 7.133 Further provision is made in the Federal Court Practice Note for the Court to be notified about the performance of the settlement distribution scheme:
- The Court will require to be advised at regular intervals of the performance of the settlement (including any steps in the settlement distribution scheme) and the costs incurred in administering the settlement in order that it may be satisfied that distribution of settlement monies to the applicant and class members occurs as efficiently and expeditiously as practicable.¹³⁹

133 *Supreme Court Act 1986* (Vic) ss 33R–33Q.

134 Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89, 93.

135 *Ibid.*

136 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 7 [13.5(d)].

137 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial' 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) 71, 94; Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 36–7.

138 Federal Court of Australia, *Class Actions Practice Note (GPN–CA)—General Practice Note*, 25 October 2016, 13–14 [14.5].

139 *Ibid* 14 [14.6].

- 7.134 Justice Forrest has indicated support for the appointment of a contradictor or *amicus curiae* to assist the Supreme Court in identifying any issues that may arise during settlement distribution schemes. In discussing the administration of the settlement distribution scheme in the Kilmore East and Kinglake Bushfire class actions, he noted:
- upon reflection, I think it would have been best to have engaged the services of either a contradictor or a friend of the court to appear at the approval hearing, as has been done in some class action approvals since KEK [Kilmore East–Kinglake] ... Usually, the contradictor’s primary role is to ensure that there is no unfair discrimination between group members but, given the growing experience of class action administration, it may extend further. A contradictor should be able to identify issues that may arise in the course of the administration of the scheme.¹⁴⁰
- 7.135 Justice Forrest has also commented on the legal and administrative costs of administering settlement distribution schemes. He observed that much of the administration work in the Bushfire trials was done by paralegals and the cost of this work was based on the Supreme Court scale. While it was quite proper for paralegals to perform administrative work of this type, Justice Forrest queried whether there is scope to apply a different scale or measure for such costs.¹⁴¹
- 7.136 He also observed that, while the Court does not have the capacity to monitor the settlement distribution process closely, and nor would it want to be involved in reviewing individual assessments, it could have played a limited role in reviewing decisions by the administrator. The review role could have covered matters such as:
- late registration
 - a final assessment where the result was legally wrong
 - where necessary, in considering an interim distribution of funds.¹⁴²

Question

- 23 How could the management of settlement distribution schemes be improved to:
- ensure that individual compensation reflects the merits of individual claims
 - ensure that it is completed in a manner that minimises costs and delays?

Notice of settlement and registration

- 7.137 Under section 33X, notices must be given at particular points of proceedings, including settlement.¹⁴³ Notice may be given by media advertisement or by any other means.¹⁴⁴
- 7.138 Unless the Court is satisfied that it is just to do so, settlement of a class action will not proceed unless a notice of settlement, approved by the Court, has been given to the class members.¹⁴⁵ This provides class members with the ability to opt out should they wish to do so.

140 Justice Jack Forrest, ‘Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial’ 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) 71, 93.

141 Ibid 93–4.

142 Ibid 71, 94.

143 *Supreme Court Act 1986* (Vic) s 33X.

144 Ibid s 33Y(3).

145 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 6 [12.2].

- 7.139 In addition to notifying class members of the ability to opt out of settlement, it is now common practice for a notice of settlement to require class members to take a positive step to share in any amount recovered.¹⁴⁶ This will typically involve electronic registration with the representative plaintiff's lawyers, which involves entering into a legal retainer and, if proceedings involve a litigation funder, a litigation funding agreement.¹⁴⁷
- 7.140 The Supreme Court Practice Note sets out a list of matters to be included in the notice of settlement to class members, as follows:
- (a) a statement that the group members have legal rights that may be affected by the proposed settlement;
 - (b) a statement that an individual group member may be affected by a decision whether or not to remain as a group member (where the opt out date has not already passed or where there is a further opportunity to opt out);
 - (c) a brief description of the factual circumstances giving rise to the litigation;
 - (d) a description of the legal basis of the claims made in the proceedings and the nature of relief sought;
 - (e) a description of the group on whose behalf the proceedings were commenced;
 - (f) information on how a copy of the statement of claim and other legal documents may be obtained;
 - (g) a summary of the terms of the proposed settlement;
 - (h) information on how to obtain a copy of the settlement agreement;
 - (i) an explanation of who will benefit from the settlement;
 - (j) where all group members are not eligible for settlement benefits—an explanation of who will not be eligible and the reasons for such ineligibility;
 - (k) an explanation of the Court settlement approval process;
 - (l) details of when and where the Court hearing will be and a statement that the group member may attend the Court hearing;
 - (m) an outline of how objections or expressions of support may be communicated, either in writing or by appearing in person or through a legal representative at the hearing;
 - (n) an outline of any steps required to be taken by persons who wish to participate in the settlement (in the event that affirmative steps are required);
 - (o) an outline of the steps required to be taken by persons wishing to opt out of the settlement if that is possible under the terms of the settlement; and
 - (p) information on how to obtain legal advice and assistance.¹⁴⁸
- 7.141 The Federal Court Practice Note also requires a settlement notice issued under the Commonwealth class action regime to include information about any funding equalisation payment which affects the ultimate settlement amount received by class members who have not entered into a litigation funding agreement to be included in settlement notice.¹⁴⁹

146 Orders may specify a date by which class members must take a step: *Supreme Court Act 1986* (Vic) s 33ZG.

147 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damien Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 67–8.

148 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, 8 [13.6].

149 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, 12 [14.2(h)].

- 7.142 In addition, where a proposed settlement contemplates that any part of the settlement amount will be used to cover unrecovered legal costs or for litigation funding charges, the Federal Court will usually require evidence at settlement approval that indicates:
- (a) that reasonable steps were taken to alert class members to the likelihood of such deductions as soon as practicable after that became apparent, so that class members were, at the relevant time, able to take such steps as may have been practicably available to them to negotiate as to legal costs or as to litigation funding charges as applicable, or to remove themselves from the class action; and
 - (b) that the amounts to be deducted have been calculated in accordance with the terms of the costs agreement and any litigation funding agreement.¹⁵⁰
- 7.143 As outlined in Chapter 4, the Federal Court also provides a sample opt out notice in non-technical language for use by the parties during proceedings.

Comprehension of notice

- 7.144 It is accepted that the effectiveness of notice depends on class members' ability to understand the obligations contained in the notice. Notice must be accurate¹⁵¹ and expressed in as plain and simple language as is consistent with the information sought to be communicated.¹⁵² Factors such as the clarity of language used, how widely notice is sent, and the ease or accessibility of response options can all affect how effective the notice is.¹⁵³
- 7.145 For example, in reviewing the opt out forms sent to class members in Federal Court class actions, Morabito noted that many class members evidently did not understand them:
- I found that the opt out decision, made by a not insignificant number of those class members who wrote comments on their opt out forms, was most likely the product of a total misunderstanding, on their part, regarding the essential characteristics of class action litigation and/or the opt out device. In fact, some class members felt that the fact that the lawyers made them parties to the litigation, without seeking their prior permission, meant that they, and/or the legal system, could not be trusted.¹⁵⁴
- 7.146 The comprehension of court-approved notices by class members, and possible reforms for improving this, are discussed in detail in Chapter 4.

Questions

- 24 How could Court-approved notice for opt out and settlement be made clearer and more comprehensible for class members?
- 25 Are there other ways the process for settlement approval and distribution could be improved?

150 Ibid 14 [15.1(a)].

151 *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438 (13 October 2000) [24].

152 *Courtney v Medtel Pty Ltd* [2001] FCA 1037 (2 August 2001) [10]–[11].

153 Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37 *University of New South Wales Law Journal* 914, 927–28; Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 67; Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions—The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52, 55.

154 Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damien Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 66.

Contingency fees

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8. Contingency fees

Introduction

- 8.1 The Commission has been asked to report on whether removing the prohibition on law firms charging contingency fees would mitigate the issues presented by litigation funding.
- 8.2 There has been extensive debate about whether lawyers should be able to charge contingency fees and it remains a live issue. While the terms of reference do not require the Commission to canvass all the arguments for and against the idea, the broader context is relevant when considering the issues that are within the scope of the review. For this reason, a summary of the key arguments is set out in the Appendix.
- 8.3 In this chapter, three broad issues presented by litigation funding are discussed. They encapsulate the limitations of litigation funding as a means of providing access to justice—both in the sense of enabling a person to use the legal system to enforce their rights, and with regard to the person’s exposure to a fair process and outcome. There may be other issues that should be included and the Commission would welcome comments about possible additions to the list.
- 8.4 The three issues discussed in this chapter are:
- case selection—the limited range of cases selected for funding
 - costs—the actual amount of the funding fee
 - client interests—the subordination of the client’s interests to commercial objectives.

Case selection

The issue

- 8.5 The decision by a litigation funder to finance a particular claim is a commercial decision, based on the expected return on investment. As discussed in Chapter 2, the selection process is rigorous and the success rate of funded claims is very high. The Commission was told during informal consultations that as few as one in 20 claims considered for funding may be selected.
- 8.6 IMF (Australia) Ltd (now IMF Bentham Ltd), for example, has said that it funds claims that:
- have strong prospects of success
 - are against defendants with a verifiable capacity to pay a judgment
 - can be proved primarily by reference to objective written evidence rather than potentially contested oral evidence
 - are likely to resolve for an amount in excess of \$5 million (for a single claim) and \$30 million (for a class action).¹

- 8.7 Funded individual claims tend to be about insolvency, commercial and contractual disputes, intellectual property and estates. Funded class actions are weighted towards investor and shareholder claims. Litigation funders do not fund high-risk claims or claims aimed at obtaining non-monetary results such as an injunction or declaration. Social justice litigation, claims for compensation for personal injury and other claims that involve vulnerable people are generally excluded.

Effect of lifting the ban

- 8.8 The question for the Commission to consider is: Would permitting lawyers to charge contingency fees broaden the types of claim that would be funded, thereby enabling greater access to justice?
- 8.9 An answer in the affirmative would need to be based on evidence that there is an unmet demand for access to justice that would be met by law firms if they could charge contingency fees (excluding the areas of family law, personal injury and criminal law, as noted in the terms of reference).

Unmet demand

- 8.10 The suggestion has been made to the Commission that there is an unmet demand among small-to-medium enterprises for business-to-business litigation services, and that this demand could be met if lawyers were able to charge contingency fees. In contrast, the demand for legal assistance for personal injury claims is well met by firms being able to charge conditional costs, and large corporate claims are financed by litigation funders.
- 8.11 Then again, if business-to-business litigation does not already provide a monetary outcome that is financially attractive for law firms under conditional cost agreements, it is unclear how it would be economically viable under a contingency fee arrangement.
- 8.12 In its review of access to justice arrangements, the Productivity Commission concluded that lifting the ban on lawyers charging contingency fees would create a significant source of new funding over and above that provided by litigation funders.² It proposed that lawyers may be better placed to assess risk and fund a broader range of meritorious claims than those that fall within a litigation funder's commercial parameters.
- 8.13 Through pro bono work and by charging on a conditional or 'no win, no fee' basis, law firms already take on cases that carry a high risk of being unsuccessful, or do not promise a large monetary award for the plaintiff. Several law firms have conducted large 'social justice' type class actions on this basis without the support or indemnity of a litigation funder³ and were doing so long before litigation funders became involved in class actions.
- 8.14 As noted in Chapter 2, of the 87 class actions filed in Australia for the benefit of vulnerable people to March 2014, none were financed by litigation funders. Legal services were usually provided on a 'no win, no fee' basis, although some cases proceeded only with the support of government agencies or the community or because the lawyers were prepared to work for free:
- Some class representatives were either unable to secure legal representation or secured representation only as a result of the financial support provided by legal aid commissions or similar entities, the class members, donors, or lawyers acting on a pro bono basis.⁴
- 8.15 It has been suggested that large law firms such as Maurice Blackburn and Slater and Gordon have been able to allocate resources to class actions for vulnerable people from the profits they have made on other types of class actions, such as investor class actions.⁵

² Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 625.

³ For example, Slater and Gordon conducted a class action on behalf of persons detained on Manus Island: *Kamassee v Commonwealth of Australia* (2014) 5 CI 6770.

⁴ Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study' (2016) 35 *Civil Justice Quarterly* 61, 88.

⁵ *Ibid.*

On this view, by increasing the financial return for other types of class actions by charging contingency fees, law firms could afford to provide legal representation for meritorious cases that otherwise would not be pursued for lack of finance. As a result, the class action regime would be used more extensively to provide access to justice for vulnerable people.

- 8.16 Maurice Blackburn has argued that current conditional costs arrangements constrain lawyers' rewards and do not adequately address the risk in a given case, and this in turn limits the number of cases that can be undertaken on this basis.⁶ It follows that being able to charge contingency fees would provide another way to finance social justice cases and be compensated for the risk.
- 8.17 However, the Legal Services Commissioner, Michael McGarvie, has called for the ban on lawyers charging contingency fees to remain. In his view, the Productivity Commission did not identify a gap that lawyers charging contingency fees would successfully fill.⁷ He contends that litigation funding, together with lawyers acting on a conditional fee basis, already provide an adequate framework for access to justice.⁸ Put another way, lawyers charging contingency fees and funding fees are mutually exclusive—there is no need for one where the other already exists.⁹ He has observed:

In Australia, we have generally good opportunities for access to justice and we have fair and proportionate fees. We should not adopt a flawed and cynical device for over-charging as an excuse for giving people access to the courts. Contingency fees are not good for any of us.¹⁰

Economic imperatives

- 8.18 A decision by a litigation funder to finance a particular case is reached after a careful assessment of all the factors that may affect whether the case is likely to produce a sound return on the investment. If law firms, like litigation funders, were permitted to charge contingency fees, it is reasonable to expect that they will do so in each case only after conducting a cost/risk analysis—even if the criteria they use differ from those used by litigation funders.
- 8.19 One key factor would be whether charging a contingency fee would be preferable to charging on a conditional basis, or under some other type of costs agreement. It may not be feasible for many law firms to charge for large and complicated proceedings on a contingency basis, especially where damages are likely to be limited. They may not have the structure, capital adequacy or risk appetite. It may be prudent to continue to be paid on the basis of work done rather than to receive a percentage of a small award.
- 8.20 It appears that only large law firms with significant capital reserves would have the financial capacity to conduct large-scale litigation on a contingency fee basis. Even then, they may be unable to conduct multiple class actions at a time on this basis, because of the high risk and cost involved. For this reason, law firms charging contingency fees could still need litigation funders to underwrite large-scale litigation,¹¹ in which case the litigation funder's selection criteria would determine whether the litigation is funded.

6 Maurice Blackburn, Submission No 59 to Productivity Commission, *Access to Justice Arrangements*, 8 November 2013, 14.
7 Michael McGarvie, Victorian Legal Services Commission, *Opinion: Contingency Fees Will Fail Us* (Media Release, 3 March 2016) 1 <www.lsbcc.vic.gov.au/documents/Opinion-Contingency_fees_will_fail_us-2016.pdf>.
8 Allens Linklaters, *Class Action Insights Client Update* (August 2014) 4 <www.allens.com.au/pubs/ldr/insight-CA-aug14.htm>.
9 *Ibid* 5.
10 Michael McGarvie, Victorian Legal Services Commission, *Opinion: Contingency Fees Will Fail Us* (Media Release, 3 March 2016) 1 <www.lsbcc.vic.gov.au/documents/Opinion-Contingency_fees_will_fail_us-2016.pdf>.
11 Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia*, Position Paper (June 2011) 11.

- 8.21 In England and Wales, lawyers have been able to charge contingency fees since 2013.¹² The response by the legal profession to this change indicates that contingency fees are charged only where doing so provides a clear financial advantage for lawyers equal to the risk taken. Otherwise, the clients are charged another way. To date, there has been very little evidence of contingency fees being used. They were recently described as a ‘damp squib’ and compared to a yeti in that ‘they are believed to exist in practice but hardly any sightings have been made’.¹³
- 8.22 It is possible that the reluctance to charge contingency fees in England and Wales is due to confusion about regulation and the impact of cost shifting.¹⁴ However, there does appear to be resistance within the legal profession. In reflecting on the lack of enthusiasm for contingency fees, John Peysner has concluded:
- Whilst the image of litigators might be that of aggressive risk takers in fact in relation to changes in the procedural and financing environment, they tend to be quite conservative. It is unsurprising that when faced with an alternative between, say, a true and tried method of financing and a new method, many will adhere to the old method when given the choice.¹⁵
- 8.23 However, the conditions in which the ban on lawyers charging contingency fees was lifted in England and Wales are very different to those in Victoria, and so direct comparisons should be made with care. The Commission would welcome submissions that focus on the local market for legal services.

Costs

The issue

- 8.24 Through its funding fee, a litigation funder will seek to obtain a return on investment that justifies absorbing the many risks of the litigation,¹⁶ which are often uncertain or unknown at the commencement of proceedings. They include the risk of an adverse costs order if the litigation is unsuccessful.
- 8.25 The size of the funding fee, both in absolute terms and as a share of the amount recovered in damages or from settlement, is the subject of consistent controversy. As noted in Chapter 2, regularly cited figures suggest a range of between 20 and 45 per cent of the settlement or judgment amount.¹⁷ In addition, legal costs already paid by the litigation funder that are not met by the other side at settlement are recovered from the plaintiff. As most settlement approval judgments do not reveal the rate of the funding fee, it is difficult to determine the accuracy of these figures. The fee structures are very different in each case.¹⁸

12 Rupert Jackson, *Review of Civil Litigation Costs*, Final Report (The Stationary Office, December 2009) (i).

13 John Peysner, ‘Impact of the Jackson Reforms on Costs and Case Management: Some Emerging Themes’ (Paper presented at the Civil Justice Council Conference, 21 March 2014) 10.

14 Law Society of England and Wales, ‘Impact of the Jackson Reforms on Costs and Case Management’ (Paper prepared for Civil Justice Council Conference, 21 March 2014) 4.

15 John Peysner, ‘Impact of the Jackson Reforms on Costs and Case Management: Some Emerging Themes’ (Paper presented at the Civil Justice Council Conference, 21 March 2014) 6.

16 See generally, John Walker, Susanna Khouri and Wayne Attrill, ‘Funding Criteria for Class Actions’ (2009) 32 *University of New South Wales Law Journal* 1036.

17 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 622.

18 *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [177].

Effect of lifting the ban

Direct impact on total costs

- 8.26 Maurice Blackburn has put the view that, if lawyers were able to charge contingency fees, the overall cost to clients would be substantially less than the current combined fees of lawyers and litigation funders.¹⁹ A litigation funder would not be involved and would not need to be paid. In these cases, by charging contingency fees rather than entering a conditional costs agreement, the law firm could increase the amount it is paid in recognition of the risk it carries. At the same time, the plaintiff would receive a greater share of the settlement amount or award of damages.
- 8.27 As noted above, this scenario would apply only to the few law firms with the capital and risk appetite to fund the litigation alone, without the backing of a litigation funder or an insurer.
- 8.28 The Commission would welcome submissions about other scenarios where costs to the client would be directly reduced, particularly in proceedings other than class actions.

Indirect impact of increased competition

- 8.29 A rationale commonly given for the view that the costs to clients would decrease if law firms charged contingency fees is that there would be greater competition in the litigation funding market, which would put downward pressure on funding fees.²⁰ The Commission is interested in receiving any empirical data to suggest that the increased number of litigation funders operating in Australia in recent years is placing any downward pressure on funding fees.
- 8.30 It is possible that increased competition from lawyers charging contingency fees would lead to an increase in the volume of claims. If this occurred, Michael Legg has suggested that it would be more likely to reduce the quality and merit of new claims than the funding fee.²¹
- 8.31 In the United States, where lawyers commonly charge contingency fees, there is some evidence that they modify the percentage they deduct, in the client's favour, to prevent damage to their reputations.²² There is, however, very little evidence that litigants shop around and make decisions on the basis of the actual contingency fee percentage proposed.²³
- 8.32 Another consideration is that lifting the ban on lawyers charging contingency fees would not necessarily create competition for the same services that litigation funders currently provide. Litigation funders provide a project management service whereby they monitor the progress of the litigation and manage the associated legal costs. They have told the Commission that there would be a continuing need for their services in conjunction with legal services even if the ban were lifted.
- 8.33 A further important distinction is that, unlike law firms, litigation funders cover any security for costs orders or adverse costs orders. The risk of paying adverse costs is the largest risk taken on by the litigation funder and is reflected in the funding fee. Currently, law firms acting under a 'no win, no fee' agreement do not provide an indemnity for any adverse costs.²⁴ Law firms argue that the risks of providing an indemnity are not well met by conditional cost agreements, even with an uplift.²⁵

19 Maurice Blackburn, Submission No 59 to Productivity Commission, *Access to Justice Arrangements*, 8 November 2013, 14.

20 Ibid.

21 Michael Legg, *New Funders and Law Firms Drive Shareholder Class Actions* (7 November 2014) Centre for Law Markets and Regulation <<https://clmr.unsw.edu.au/article/market-conduct-regulation/new-funders-and-law-firms-drive-shareholder-class-actions>>.

22 Richard Moorhead, *"Improving Access to Justice" Contingency Fees: A Study of their Operation in the United States of America* (Civil Justice Council, 2008) 8.

23 American Bar Association, *When You Need a Lawyer—Legal Fees and Expenses* (2017) <www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html>.

24 Andrew Watson and Michael Donnelly, 'Financing Access to Justice: Third Party Litigation Funding and Class Actions in Australia' (2014) 55 *Canadian Business Law Journal* 17, 3.

25 Maurice Blackburn, Submission No 59 to Productivity Commission, *Access to Justice Arrangements*, 8 November 2013, 14.

- 8.34 As discussed in Chapter 7, market forces alone do not determine the legal costs of class actions. In approving a class action settlement, the court considers the reasonableness of any legal costs charged. In this process, the court is concerned with the aggregate amount of legal costs charged rather than the actual billing method. This supervisory role would continue. For example, in Canada the Ontario Superior Court of Justice found a contingency fee agreement void for not being fair and reasonable, as there was no evidence that the lawyers had indemnified the client for an adverse costs order or their own legal expenses if the proceedings were unsuccessful.²⁶ While the matter was ultimately successful and a valid signed contingency fee agreement in place, the Court reduced the percentage of the contingency fee allowable.²⁷

Client interests

The issue

- 8.35 A litigation funder's aim of obtaining a sufficient return on its investment may not align with the interests of the funded plaintiff. For example, in keeping legal costs and disbursements within budget so that its returns are as projected, the litigation funder may press for early settlement rather than allowing negotiations or court proceedings to continue.
- 8.36 The relationship between a litigation funder and a funded plaintiff depends on the type of claim being funded. The Commission has been informed that, in a funded commercial claim, the litigation funder may negotiate the commercial terms of the funding agreement directly with the plaintiff.
- 8.37 In comparison, in a funded class action, the litigation funder has very little, if any, interaction with the representative plaintiff. The lawyer acts as an intermediary between the litigation funder and the client. Even in class actions, however, the litigation funder is likely to give instructions to the lawyer on the progress of the case, particularly at settlement. The lawyer—who has an ethical obligation to protect the interest of their client—is required to give priority to the instructions and interest of the client over those of the litigation funder. The complex conflicts of interest that arise in the tripartite relationship between the litigation funder, lawyer and plaintiff are discussed in Chapter 3.

Effect of lifting the ban

- 8.38 Lifting the ban on lawyers being able to charge contingency fees could reduce the risk of a conflict of interest between the litigation funder and the client, and assuage concerns about the relationship between the litigation funder and the lawyer.
- 8.39 However, while lifting the ban may mitigate the risk of a conflict of interest between the litigation funder and the client, it may increase the risk that the lawyer is in a position of conflict. Lawyers' ethical and professional obligations prohibit them from acting for a client where there is a conflict—whether real or apparent—between their duty to serve the best interest of the client and their own interest, except as permitted by law.²⁸ They must also avoid any compromise to their integrity and professional independence.²⁹
- 8.40 It is widely argued that being able to charge contingency fees would directly affect lawyers' duties to their clients and undermine their professional independence, creating a conflict of interest not otherwise there when charging a fee for service.³⁰ When a lawyer takes on the role of the funder, the interests that receive priority can become opaque.

26 *Edwards v Camp Kennebec (Frontenac)* (1979) 2016 ONSC 2501.

27 *Ibid* [31].

28 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 12.1.

29 *Ibid* r 4.1.4.

30 Law Reform Commission of Victoria, *Restrictions on Legal Practice*, Discussion Paper (1992) 19–21.

- 8.41 Opponents of the Productivity Commission’s recommendation that the ban be lifted have said that it did not address the importance of maintaining lawyers’ independence from litigation funding in order to separately manage conflicts of interest and protect the interest of the client.³¹ On this view, each party in the tripartite relationship should maintain a distinct role and relationship to the others.³²
- 8.42 The High Court noted in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*³³ that the role of each party in funded litigation is separate and distinct. It has been argued that, if litigation funding is to be managed appropriately, lawyers need to remain independent from it.³⁴ If the ban on contingency fees were lifted and the services of litigation funders not used, proceedings would be ‘lawyer funded, lawyer managed and lawyer settled’.³⁵ The plaintiff’s only source of information and advice about the conduct of the litigation would be from a party with a direct financial interest in the outcome.³⁶
- 8.43 Two recent cases in the Supreme Court have reinforced the importance of lawyers remaining independent of contingency fees charged for litigation.³⁷ In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 3)*,³⁸ the acting lawyer financed the litigation through a separate entity. He attempted to negotiate a contingency fee agreement as the litigation funder, claiming both the legal costs as well as the funding fee. The Supreme Court rejected the strategy as an abuse of process.³⁹
- 8.44 Similar funding arrangements applied in *Bolitho v Banksia Securities Ltd (No 4)*.⁴⁰ The Court noted the importance of the public’s perception of the lawyer as independent and fulfilling their obligation to the court. Justice Ferguson noted:
- The court relies upon practitioners to apply an independent and objective mind when conducting a case on behalf of the client ... the more that is at stake, the greater the risk that the lawyer will not bring or will not be seen to be bringing to bear the requisite degree of objectivity that the role of lawyer demands.⁴¹
- 8.45 Opponents of lifting the ban often identify conflict of interest as the most concerning aspect of the introduction of contingency fees. The principle that a lawyer advocates for a client’s cause independently of that cause, is essential to ensure compliance with duties to the court and to the administration of justice.⁴²
- 8.46 Supporters of lifting the ban have argued that, theoretically, any form of legal billing will present a conflict of interest. In addition, the current billing methods have disadvantages. Time-based billing may result in unclear legal fees, or even an incentive for inefficiency and over-servicing.⁴³ In *Armstrong Scalisi Holdings Pty Ltd v Piscopo (Trustee)*,⁴⁴ for example, Justice Rares noted that access to justice was difficult where a client was expected to pay for four lawyers charging for the same repetitive work. In that case, the charges were considered an inappropriate and inefficient use of the client’s resources, and contrary to a lawyer’s fiduciary duty to their client to ensure cases are prepared reasonably and economically.⁴⁵

31 Allens Linklaters, *Focus: Productivity Commission—Third Party Litigation and Contingency Fees* (Litigation and Dispute Resolution Publications, 17 April 2014) <www.allens.com.au/pubs/ldr/foldr17apr14.htm>.

32 Peter O’Donahoo and Tim Maxwell, ‘Contingency Fees and Access to Justice in Australia’ (2014) 81 *Defence Counsel Journal* 272, 275.

33 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

34 Peter O’Donahoo and Tim Maxwell, ‘Contingency Fees and Access to Justice in Australia’ (2014) 81 *Defence Counsel Journal* 272, 275.

35 John C Coffee Jr, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press, 2015) 5.

36 *Ibid.*

37 *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582 (26 November 2014); *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 3)* [2014] VSC 340 (23 July 2014).

38 [2014] VSC 340 (23 July 2014).

39 Roger Gamble, ‘Jostling for a Larger Piece of the (Class) Action: Litigation Funders and Entrepreneurial Lawyers Stake their Claims’ (2017) 46(1) *Common Law World Review* 3, 10.

40 [2014] VSC 582 (26 November 2014).

41 *Ibid* [53].

42 Michael Wheelahan, ‘Not Just a Business: The Debate around Contingency Fees’ [2016] (137) *Precedent* 46, 48.

43 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 686.

44 *In the matter of Collins* [2017] FCA 423 (21 March 2017).

45 *Ibid* [22].

- 8.47 It has also been suggested that the conflict of interest that would arise if lawyers charged contingency fees is already evident under a conditional costs agreement, where the lawyers are paid only if the case is successful, and their fees are deducted from the proceeds of the litigation.⁴⁶ This arrangement already allows lawyers to share in the risk of litigation with the client.
- 8.48 Conversely, critics of contingency fees note there is a fundamental difference between a 'no win, no fee' agreement and a contingency fee. While a 'no win, no fee' agreement is charged in reference to the work done, a contingency fee effectively purchases the lawyer a share in the litigation.⁴⁷ Arguably, contingency fees give rise to a very different and substantial conflict of interest for lawyers that does not arise with litigation funders.

Other options

- 8.49 If lifting the ban on lawyers being able to charge contingency fees is unlikely to broaden the access to justice that the class action regime was intended to provide, the Commission is interested in receiving submissions that propose other funding arrangements that could be more effective. They could be alternatives to lifting the ban, or measures that could be introduced in addition to lifting the ban.
- 8.50 The difficulty in overcoming financial barriers was recognised by the Australian Law Reform Commission (ALRC) when developing the model on which the Victorian class action regime is based. It recommended a special fund be established that would underwrite the risk for meritorious claims and pay costs awarded against representative parties.⁴⁸ The Victorian Law Reform Commission proposed a similar class action funding mechanism in its Civil Justice Review in 2008.⁴⁹
- 8.51 Since then, changes in the way in which legal services are provided and financed potentially present novel ways of addressing the problem. For example, the use of technology to deliver legal services more efficiently is extending to the financing of legal claims. International tech start-up companies are providing a platform that brings crowdsourced funding (or crowdfunding) to public interest litigation.⁵⁰ Litigants can access funds raised either by donations or investment models from any person in the world who wishes to donate or invest. By seeking community donations, litigants can get finance for legal cases that would not attract funding from commercial sources. The litigant is able to control the rate of return to be paid to investors when the court case is settled. These models are still relatively new and remain largely untested in relation to the ability to raise funds for large scale litigation such as class actions.
- 8.52 The Commission encourages submissions that explore other ways of improving access to justice through Victoria's class action regime.

46 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 685.

47 Peter O'Donahoo and Tim Maxwell, 'Contingency Fees and Access to Justice in Australia' (2014) 81 *Defence Counsel Journal* 272, 275.

48 Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), 126-7 [308]-[309].

49 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 614.

50 For example, companies such as Crowdjustice in the United States or Lawfunder in Australia:< www.crowdjustice.com>, <www.lawfunder.org>.

Questions

- 26 Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?
- 27 If the ban on contingency fees were lifted, what measures should be put in place to ensure:
 - (a) a wide variety of cases are funded by contingency fee arrangements, not merely those that present the highest potential return
 - (b) clients face lower risks and cost burdens than they do now in proceedings funded by litigation funders
 - (c) clients' interests are not subordinated to commercial interests
 - (d) other issues raised by the involvement of litigation funders in proceedings are mitigated?
- 28 Are there any other ways to improve access to justice through funding arrangements?

Conclusion

9. Conclusion

- 9.1 The aim of this consultation paper is to encourage discussion about the need for reform to address issues arising from the terms of reference, and generate ideas about the form any such reform should take. Some reform options have been put forward and more are welcome. The Commission will carefully consider submissions made to it on this important matter and will then formulate its recommendations to government.
- 9.2 The recommendations that can be made must be confined to the powers of the State of Victoria, yet perhaps the most far-reaching reform needed falls within the jurisdiction of the Commonwealth. Following an extensive review of access to justice arrangements, the Productivity Commission has recommended that litigation funders be licensed under a Commonwealth scheme. It has proposed that direct regulation would reduce the risks that: a funding agreement is unfair; the litigation funder exercises too much control over proceedings; potential conflicts of interest are not managed; and that the funder does not hold adequate capital relative to its financial obligations. Its recommendation proposes a systemic response to many of the issues being considered in this review.
- 9.3 The terms of reference of this review are necessarily directed to the court's supervision and management of proceedings that are financed by litigation funders, and class actions. By imposing procedural and evidentiary requirements on the parties, the court can improve transparency and certainty about the role of litigation funders and their arrangements with plaintiff lawyers as well as with the plaintiff. Other methods of supervision may also be appropriate.
- 9.4 In class actions, the Supreme Court has gained extensive experience and knowledge since the regime was established in Victoria in 2000. The law firms and litigation funders that have been involved in class actions have also developed expertise in selecting and conducting proceedings of this type. This review provides an opportunity to reflect on how past problems in individual cases can be avoided in future through procedural or other reform.
- 9.5 This review is also timely. The number of law firms that are filing class actions is growing, as is the number of litigation funders that are offering a variety of services under different terms and conditions. In addition, the relationships between litigation funders and law firms are becoming more complex.
- 9.6 The reform ideas in this paper would increase transparency about the litigation funder's role and its implications for the court and the parties to the litigation. With transparency, accountability should be strengthened as well, to seek to ensure that the interests of the litigation funder and lawyer are not eclipsing those of their clients or undermining the objective of improving access to justice.

Appendix

Appendix: Lifting the ban on law firms charging contingency fees: arguments for and against

Arguments for lifting the ban	Arguments for retaining the ban
Contingency fees can open the doors of the legal system to persons who do not have sufficient resources to finance their legal rights. ¹	The financial interests of lawyers in the outcome of litigation may detract from their ability to give dispassionate and disinterested advice on the proceedings. ²
Contingency fees transfer some of the risk from the client to the lawyer, who is better able to assess the risk. ³	Lawyers acting under a contingency fee may have an incentive to settle early in order to generate the greatest return for the least work or be tempted to engage in unprofessional conduct in the pursuit of a successful outcome. ⁴
Access to justice is enhanced if a variety of funding schemes are available to persons wishing to pursue arguable claims through the legal system. ⁵	Contingency fees can have a negative impact on community perceptions of the professional role of lawyers. This can reduce public confidence in lawyers' fiduciary obligations to clients and expectations about lawyers' duties to the court. ⁶
Contingency fees are routinely charged by litigation funders, some accounting firms, liquidators and companies providing services in connection with litigation. Contingency fees would allow lawyers to offer terms comparable to third-party funders. ⁷	Removing a financial impediment to litigation may prompt an epidemic of unreasonable litigation against corporate defendants who may be willing to settle to avoid the nuisance of litigation. ⁸
'No win, no fee' conditional agreements already exist and allow risk sharing between the lawyer and client, so contingency fees are a logical extension. ⁹	If lawyers are entitled to a proportionate share of the outcome this may drive up the value of settlements or judgments and reduce incentives to use alternative dispute resolution. ¹⁰

1 Law Institute of Victoria, *Percentage-Based Contingency Fees*, Position Paper (17 February 2016) 7.
 2 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994) 184.
 3 Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Costs' (1995) 21 *Monash University Law Review* 231, 245.
 4 G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 58.
 5 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994) 186.
 6 Peter O'Donahoo and Tim Maxwell, 'Contingency Fees and Access to Justice in Australia' (2014) 81 *Defence Counsel Journal* 272, 276.
 7 Law Council of Australia, *Percentage Based Contingency Fee Agreements*, Final Report of the Working Group (May 2014) 26.
 8 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994) 185.
 9 Memorandum from Stuart M Anderson and Caryn Van Proctor to Members of the Executive Committee of Combar, 27 June 2014, 2 <www.commbar.com.au/law-reform>.
 10 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 685.

Arguments for lifting the ban	Arguments for retaining the ban
There is currently no prohibition on charging contingency fees in the form of a fixed lump-sum fee for the provision of legal services. Any such fee can be a proportion of the amount in dispute or the amount recovered. ¹¹	Contingency fees treat litigation as a financial transaction rather than the discharge of higher duties to the court based on skill and proper advice. ¹²
Contingency fees provide unsophisticated clients with greater certainty and clarity regarding the amount of fees they will be liable to pay. They are less complex and more concise than fee agreements based on time billing. ¹³	It is a feature of a profession for remuneration to be based on a fee for service. Fees should properly reflect the nature and extent of the legal services provided. ¹⁴
Contingency fees offer an alternative and transparent billing method, allowing consumers to compare legal services fees and choose the most appropriate arrangement. ¹⁵	Contingency fees as a proportion of the damages may generate large fees unrelated to the value of the work performed. ¹⁶
The present 'open-ended' fee for service can result in fees which are disproportionate to the amount in dispute, and provide an incentive for inefficiency, over-servicing and a disincentive to early resolution of the dispute. ¹⁷	The prospect of large proportionate fees may encourage lawyers to engage in more extensive and inappropriate advertising and only focus on high-value cases. ¹⁸

11 Ibid 686.

12 Michael Wheelahan, 'Not Just a Business: The Debate around Contingency Fees' [2016] (137) *Precedent* 46.

13 Law Council of Australia, *Percentage Based Contingency Fee Agreements*, Final Report of the Working Group (May 2014) 26.

14 Michael McGarvie, Victorian Legal Services Commissioner, *Opinion: Contingency Fees Will Fail Us* (Media Release, 3 March 2016) <www.lsb.vic.gov.au/documents/Opinion-Contingency_fees_will_fail_us-2016.pdf>.

15 Law Institute of Victoria, *Percentage-Based Contingency Fees*, Position Paper (17 February 2016) 8.

16 Law Council of Australia, *Percentage Based Contingency Fee Agreements*, Final Report of the Working Group (May 2014) 21.

17 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 685.

18 Ibid.



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