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Submission to the Victorian Law Reform Commission:
Access to Justice – Litigation Funding and Group Proceedings

Background

1. This is a submission by Phi Finney McDonald in response to the Victorian Law Reform Commission's Consultation Paper, *Access to Justice – Litigation Funding and Group Proceedings*, issued in July 2017. The Consultation Paper contemplates potential changes to the legislative and procedural mechanisms which, together, regulate the conduct of class actions or representative proceedings conducted in Victorian courts.

2. Phi Finney McDonald is a boutique law firm based in Melbourne, Australia. We specialise in complex and large-scale litigation, with a focus on class actions. Our founding principals previously led the project litigation practice at one of Australia's largest plaintiff firms. With over forty years' combined litigation experience and twenty-five years of specialist class actions experience, together we have achieved almost half a billion dollars in class action settlements.

3. Phi Finney McDonald's principals and senior lawyers have substantial experience in class action litigation in the Supreme Court of Victoria, as well as the Supreme Court of New South Wales and the Federal Court of Australia. We are experienced in conducting class actions under a variety of funding models, including third party funded litigation, "No Win, No Fee" litigation and client-funded litigation under a variety of payment arrangements. We have conducted a broad variety of class actions by subject matter and type – including securities class actions, product liability claims, financial products and services cases, institutional abuse cases and claims against government.

4. The Commission's Consultation Paper poses 28 questions for consideration in respect of potential amendments to the class actions regime in Victoria. We have addressed each of these questions in turn below.

5. As set out in our responses to those questions, our general position is that the Victorian class actions regime does not require radical overhaul, but rather ongoing incremental improvements designed to achieve the following central aims:

   a. alignment and consistency with other key jurisdictions, in particular the Federal jurisdiction;

   b. high-level guidance for the Court and litigants, with a focus on disclosure, that allows the Court maximal flexibility and discretion in managing class action litigation; and

   c. an avoidance of overly prescriptive, "one size fits all" legislation or regulations which are likely to have perverse consequences and, in some cases, may impede access to justice.

6. In broad terms, we consider that the legislative mechanisms are already in place to achieve the effective and efficient management of class action proceedings in the interests of the litigants and group members in the proceeding. Our primary recommendation is for more detailed guidance for the Court and litigants to be provided by way of an expanded Supreme Court Practice Note to apply to class actions commenced in Victoria.

Responses to Consultation Paper 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 costs burdens?

1.1. We do not consider that any substantive changes are required. The Part 4A regime in the *Supreme Court Act* 1986 (Vic) (**Part 4A**) has been in place for 18 years (including its previous life in Order 18A of the *Supreme Court (General Civil Procedure) Rules* 1996). It is based on Federal legislation that has been in place now for 25 years. This scheme has worked well, and has not required substantial tinkering since its establishment in any jurisdiction.

1.2. That the scheme works well is reflected in the vote of confidence it has been given in other jurisdictions. Most obviously in Victoria, which was the first state to enact a scheme modelled on Part IVA of the *Federal Court of Australia Act* 1976 (Cth) (**Part IVA**). More recently, that scheme has received endorsement in New South Wales (in 2011 as Part 10 of the *Civil Procedure Act* 2005) and in Queensland (in 2016 as Part 13A of the *Civil Proceedings Act* 2011). The Law Reform Commission of Western Australia recommended the adoption of a scheme based on Part IVA in its June 2015 report titled *Representative Proceedings*. We understand the current ALP State Government in Western Australia included as part of its campaign platform prior to the most recent state election the introduction of a scheme for representative proceedings, which would likely reflect the Law Reform Commission's recommendation.

1.3. By contrast, in South Australia group proceedings are dealt with by rules 80 and 81 of the *Supreme Court Civil Rules* 2006. Those rules provide for the only certification process for group proceedings in Australia of which we are aware. As the Law Reform Commission of Western Australia noted in its *Representative Proceedings* final report[1], the provisions have "rarely been utilised" and indeed that report points to examples of proceedings connected with South Australia that have been brought under the Federal jurisdiction.

1.4. This then points to an additional reason why substantial changes to Part 4A might be unwise. That the four largest states have or will soon have substantially the same regime means that there is little incentive for litigants to issue proceedings in 'favourable' forums, and will allow for the development of a national jurisprudence on the important substantive and procedural issues that arise for determination under the regime.

1.5. Those advantages would be lost if Victoria goes its own way in an attempt to find legislative solutions to problems and complexities which the Courts have demonstrated themselves well-placed and well-equipped to manage. The body of relevant recent judicial exposition demonstrates that the Courts have adapted the legislative regime to the requirements of particular situations, often in reliance on the broad power contained in s 33ZF of the *Supreme Court Act* (and its cognate provision in the *Federal Court of Australia Act* 1976).

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[1] *Representative Proceedings, Project 103 – Final Report* (http://www.lrc.justice.wa.gov.au/_files/P103_FR.pdf) at [4.14] and fn 188

1.6. Generally, it is desirable for the parties to class action litigation to take such steps and make sufficient disclosure as to enable the Court to exercise this litigation management function effectively and efficiently. In this regard, the Court and litigants might be assisted by a somewhat more prescriptive practice note than currently applies to class actions in the Supreme Court[2], similar to that which currently applies in the Federal Court.[3] We have identified specific matters appropriate to be the subject of guidance in the practice note in our specific answers below.

1.7. In respect of the costs burdens imposed on other parties by class action litigation (which typically is time consuming and complex, and consequently costly), it is important to note that the costs-shifting regime in Victoria (and all other state and Federal jurisdictions) already has a *de facto* regulatory impact on the conduct of representative proceedings, in that representative plaintiffs and their lawyers are encouraged to take steps that will minimise the incurrence by other parties of unnecessary costs in the course of the litigation that might then be the subject of an adverse costs order in favour of those parties. The costs-shifting regime (combined with the principles that apply to security for costs) also heavily discourages the bringing of unmeritorious claims, in our experience much more effectively than any certification process could.

1.8. For instance, if a plaintiff were to issue a representative proceeding that was plainly unsuitable to be conducted a class action, the plaintiff could expect the defendant to successfully apply for orders declassing or staying the proceeding *and* for orders that the plaintiffs pay the defendants costs of that application. The costs-shifting regime is the primary mechanism for the encouragement of efficient litigation practice in private litigation, and it works in precisely the same manner, and with the same results, in class action litigation.

1.9. Respondents and their advocates may point out that the costs-shifting regime still places the onus on them to seek the recovery of such costs, and typically even if successful such a party will not recover all of the costs the subject of the application. However, respondents and their advocates have not been able to identify any basis on which they ought be afforded some special or heightened protection from the

[2] *Practice Note SC GEN 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017
[3] *Class Actions Practice Note (GPN-CA)*, 25 October 2016

incurrence of costs in the context of class action litigation relative to other forms of litigation, and this needs to be considered against the substantial impediments to access to justice that would arise from any imposition of a series of legislative or regulatory hurdles for a representative plaintiff to "clear" in commencing class action litigation.

1.10. As is developed below, any such hurdles will increase the costs of class action litigation, which costs will in many cases end up being borne by the defendants in any event. Front-ending the determination of a variety of aspects of a class action proceeding in the early stages of a proceeding (whether pursuant to a "certification" process or otherwise) is likely to substantially increase interlocutory dispute and hence the incurrence of costs, as defendants use the newly introduced procedural hurdles to put plaintiffs "to the test", at a preliminary stage, in respect of matters normally reserved for determination at trial.

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 costs burdens?

2.1. The "bargain" at the heart of litigation funding, typically, is that in return for payment of a portion of the proceeds from the successful resolution of the claim to the litigation funder, the litigant obtains protection from exposure to adverse costs, and payment of some or all of the legal costs incurred directly by the litigant.

2.2. We generally support the Federal Court Practice Note's requirement that, in funded proceedings, the litigation funder should be obliged to lodge with the Court, confidentially, an unredacted form of funding agreement.[4] However, we note that the Supreme Court Practice Note was amended in January 2017 so as to remove an equivalent requirement of disclosure. We understand this was done on the basis that the Supreme Court's judiciary preferred to maintain a discretion to determine whether such disclosure was required (and, if so, in what form) on a case by case basis.[5] While we consider that, in practice, it would be rare for such disclosure of a relevant funding agreement to be inappropriate, we broadly support the maintenance of judicial discretion to manage such issues as the Court sees fit.

[4] See section 6.1
[5] See [5.24] of the Commission's Consultation Paper

2.3. Funders should be encouraged to disclose to group members on a confidential basis information relating to their capital adequacy, as evidence of their capacity to fulfil their obligations under the funding agreement to fund the proceeding and to meet any adverse costs order made against the plaintiff. We consider it unnecessary for such disclosure to be made to the Court in ordinary circumstances, and note that this topic is not addressed in the Federal Court Practice Note, however, an expanded Supreme Court Practice Note potentially could further direct the funder to confidentially disclose to group members relevant information such as recent financial statements and/or the terms of any insurance policy the funder has obtained in respect of its obligations to meet any adverse costs order against the plaintiff. In the context of a competing class action scenario, we would expect this additional material to be disclosed to the Court as well as group members in any event, on account of being centrally relevant to the determination of how the competition between the proceedings is to be resolved or managed.[6]

2.4. Additionally, we note that ASIC Regulatory Guide 248, 'Litigation Schemes and proof of debt schemes: Managing conflicts of interest' (**ASIC RG 248**) already requires funders to have procedures for the disclosure of actual or potential conflicts of interest to group members and prospective group members, such as any connections between the funder and the plaintiff or group members, and between the funder and the solicitors or counsel for the plaintiff or group members.

2.5. So far as other parties to the litigation are concerned, the prescribed level of disclosure made by the funder (or by the representative plaintiff on their behalf) should be restricted to a redacted copy of the funding agreement, and subject to the same rights of objection as provided for in the Federal Court Practice Note.[7]

2.6. If other parties have concerns about the funder's capacity to meet any adverse costs order, then that is a matter for negotiation between the parties which, if they are unable to resolve it successfully, will likely result in an application to the court for an order for security for costs. The threat of an order that the representative plaintiff pay the applying party's costs of that application should be sufficient to ensure that representative plaintiffs and their funders make sufficient disclosure to that party, or

[6] As was the case in *McKay*
[7] See section 6.6

other arrangements, as to satisfy any concerns as to security for costs. Again, the question of the adequacy of security applies to all litigation, and we do not consider that there is a compelling basis for any proposition that defendants in class action litigation ought to be afforded any special protection or right of disclosure in respect of a plaintiff's funding arrangements than they would enjoy in other litigation.

2.7. Disclosure of the funding agreement to the Court allows the Court to intervene if it considers that the terms of the bargain as between the funder and funded group members are unfair, in reliance on its powers under s 33ZF (of the *Supreme Court Act* and *Federal Court of Australia Act*). As reflected in recent jurisprudence derived from Federal Court cases, the Court is well-placed to manage this issue, whether at the outset of a proceeding, at the time of hearing any application for a common fund order, or at the time of hearing an application for the approval of a proposed settlement of the proceeding.[8]

2.8. It is important to preserve the right to redact the version of the funding agreement disclosed to the other parties in the litigation, so as to avoid conferring an unfair strategic advantage on other parties. For instance, if there are terms pursuant to which the funding provided under the agreement is capped at a particular amount (such that the funder may elect not to continue funding the proceeding if costs exceed a certain amount), then a counterparty in the litigation might deliberately engage in interlocutory tactics intended to increase the costs incurred by the representative plaintiff beyond the relevant funding cap threshold, in an attempt to stymie the litigation.

2.9. Broadly, so long as proper disclosure is made to the Court and to group members, and so long as other parties are able to obtain adequate security for their costs, then those parties have no proper interest in the terms on which a funder has agreed to fund the plaintiff in the proceeding. It is notable that there is no suggestion that defendants be required to disclose to representative plaintiffs the terms on which their lawyers have agreed to represent them, the amount or likely amount of their legal costs, or the details of any right of indemnity in respect of those costs they may assert pursuant to an applicable insurance policy. Given the costs-shifting regime, such information is as relevant to plaintiffs as it is to defendants.

[8] See for instance *McKay*; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330

3. Should different procedures apply to the supervision and management of class actions financed by litigation funders compared to those that are not?

3.1. We consider it unhelpful to artificially distinguish between class actions financed by litigation funders and other forms of class actions in a way that would result in a different set of rules or procedures applying to each. Relevantly, some of the most prominent recent cases where the arrangements for the financing of the conduct of class action proceedings have resulted in potential conflicts of interest as between the lawyers for the representative plaintiff and certain group members, and as between group members, did not involve litigation funders at all.[9] As these cases demonstrate, an undue focus on the involvement and role of litigation funders in class action proceedings can obscure the essential fact that representative proceedings by their nature raise complex questions around the role and the interests of various stakeholders, and the diversity of types of class action (including by subject matter and by form of financing) necessitates a flexible approach to judicial oversight which affords the Courts maximum flexibility.

3.2. Class actions funded by litigation funders tend to raise a specific sub-set of such questions, in particular in respect of the form and extent of disclosure of funding arrangements to the Court and group members. Below, we make recommendations regarding the appropriate level of procedural guidance in respect of such issues. However, beyond that, we see no compelling case for creating a separate set of procedures that would specifically apply to litigation funder financed class actions.

4. How can the Supreme Court be better supported in its role in supervising and managing class actions?

4.1. We refer to and repeat our comments at paragraphs 2.1 to 2.9 above. Providing for adequate disclosure of financial arrangements in funded class actions will enable the Court to fulfil its supervisory and protective role in respect of the interests of group members, particularly as to the approval of the funding commission payment on settlement.

[9] See for instance *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; 335 ALR 439; and *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89

4.2. Courts are likely to be slow to approve the payment of a substantial funding commission where the funder, for example, obtains adverse costs insurance and proposes to on-charge the cost of that premium to group members in addition to charging an undiscounted commission. In those circumstances, a Court might, if it considered it appropriate in light of the evidence before it, discount the premium payable to the funder under the settlement (relative to that which might be charged by a funder that funded its liabilities off its own balance sheet, the cost of which is not separately on-charged to group members).[10]

4.3. This is but one of many questions which may be relevant to the Court's assessment of the reasonableness of any proposed funding commission payment. Enhanced disclosure of the funder's financial arrangements and proposed recoveries under any funding agreement also will allow more informed comparison to be made between the position of funders when the Court is dealing with the complexities caused by competing class actions. For instance, a review of the terms of any adverse costs insurance policy taken out or proposed to be taken out by one or both funders in the context of a competing class action situation will assist the Court to determine the orders that ought to be made in respect of the case management of the two proceedings, such orders potentially including to stay one of the proceedings or to "close" the class of one of the proceedings.[11]

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?

5.1. At the outset, it is important to stress that lawyers for a lead plaintiff already owe fiduciary obligations to all group members, regardless of whether those group members have entered into legal costs agreements with the lawyers or funding agreements with an involved third party funder.[12]

[10] In reliance on its powers under section 33ZF of the *Supreme Court Act*, as to which see *Earglow Pty Ltd v Newcrest Mining Limited* 2016] FCA 1433
[11] As occurred in *McKay*
[12] See the examination of the existence, scope and contents of this fiduciary duty, including a review of the applicable jurisprudence, in Simone Degeling & Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties', UNSW Law Journal, Volume 37(3)

5.2. Against that backdrop, our view is that no additional guidelines are required, other than possible incorporation into the Supreme Court Practice Note of the relevant matters addressed in the Federal Court Practice Note.[13]

5.3. We consider that it is highly unusual for lawyers acting for several group members of a representative proceeding to find that their obligations to those group members conflict. That is to be expected, since group members will, in most cases and on most issues, have the same or similar interests given the nature of a properly constituted Part 4A proceeding.

5.4. In situations where such conflict may be expected to arise – for instance, in the distribution of settlement proceeds to group members with non-identical claims – the conflict is already addressed in legislation and its judicial exposition (e.g., the Court's power to approve class action settlements and the establishment of settlement schemes under s 33V of the *Supreme Court Act*). The Court also retains its broad power under s 33ZF of the Act, and can expect any conflict issues to be raised with it by the parties as part of regular case management hearings that are customary in such proceedings.

5.5. We note further the guidance contained in ASIC RG 248 which sets out in detail the obligations of lawyers to institute and regularly monitor procedures for the identification, disclosure and management of conflicts of interest and the potential for such conflicts to emerge.[14] There is a risk, therefore, that any detailed guidelines instituted for proceedings issued in the Supreme Court of Victoria will result in lawyers being placed in the position of being required to meet two sets of applicable standards, with possibly confusing or overlapping obligations or directives – this risk is particularly acute in the area of mandated disclosure to group members, which is a primary focus of ASIC RG 248 and the regulations the subject of that regulatory guide.

5.6. In light of the above, we consider that a more detailed practice note dealing with some of the matters raised above, consistent with their treatment in the Federal Court Practice Note[15], in conjunction with the observation by practitioners of their fiduciary

[13] See sections 5.3, 5.9, 5.10, 10.2, 11.2, 14.2, 14.3, 14.5 and 15.2
[14] See in particular section B of ASIC RG 248
[15] Refer to fn 13 above

obligations, should suffice to ensure potential conflicts of interest are managed, and practitioners' responsibilities to group members are properly discharged.

5.7. Should additional guidance be considered necessary, we would strongly advocate that it be made consistent with the obligations contained in ASIC RG 248. Whilst this Regulatory Guide only applies to class actions funded by a third party litigation funder, we consider the practices it prescribes are largely of general application to the conduct of class actions regardless of whether the proceeding involves a third party funder.

6. In funded class actions, should lawyers be expressly required to inform class members, and keep them informed, about litigation funders in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?

6.1. In addressing this question, it is important to distinguish between closed and open classes, and, in open classes, between funded and unfunded group members. Those group members who have entered into litigation funding agreements have received 'disclosure' of the terms of funding by receipt of the funding agreement, in the same way that they normally also will have received disclosure in relation to legal costs under the legal costs agreement. The unfunded group members may be in a different position, as they have no necessary relationship or line of communication with the lawyers for the representative plaintiff or the relevant funder (although, in practice, the plaintiff's lawyers ordinarily will make arrangements for regular and appropriate communication with unfunded group members as far as is practicably feasible; further, in many instances unfunded group members may have obtained or otherwise received a copy of the relevant funding agreement).

6.2. Consequently, it is preferable that the plaintiff's solicitor and/or the funder be obliged by the Practice Note to inform group members of the matters identified above (including, for the benefit of funded group members, material changes in any of those matters), as is the case under the Federal Court Practice Note.[16]

7. In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding

[16] See sections 5.3 and 5.4

charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?

7.1. The distinction identified in paragraph 6.1 is relevant here. In 'traditional' litigation, there are no group members; that is, there is no one for whom the Court is obliged to perform an equivalent special protective and supervisory function. Any plaintiff is, then, in the position of a funded group member who has received the relevant disclosure. The funder's entitlement to recover any costs or fee only arises insofar as that entitlement is set out in a contract between the funder and the plaintiff. Further, there is not even the prospect of variation or novation of the funding agreement as between the lead plaintiff and funder, which might not be disclosed to a funder group member. In 'traditional' litigation, *keeping* the plaintiff informed of funding agreements is a trivial matter, since those arrangements cannot be changed without the plaintiff's consent. Existing legislation and ethical rules governing the lawyer-client relationship should provide sufficient protection for plaintiffs in this regard.

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?

8.1. The Court should encourage the use of 'short form' notices, which provide a dot point summary of key matters and direct recipients to a website where a more traditional form of notice is available. This approach is particularly desirable for situations where the Court considers it appropriate for notice to be given by way of advertisement in newspapers, where such an approach has the advantage not only of being clearer and more accessible to lay people, but also of saving costs, since a short form notice need not (by reason of only its length) be placed as a full page advertisement.

8.2. Further, it would be useful to have template notices annexed to any updated Practice Note which address the "key" notifications to group members ordinarily anticipated to be made in the course of a class action proceeding (such as notification of the group member's right to opt out or register participation in the proceeding, or notification of a proposed settlement).

8.3. However, the flexibility of parties and the Court should not be unduly constrained in this regard, because cases can vary substantially in subject matter, form and class

composition, and the form and contents of necessary group member notifications must be able to be adapted to the precise circumstances of the specific case. A "one size fits all" approach is to be avoided.

8.4. Court approval of important notices remains desirable and should be preserved, and we endorse a procedural approach that facilitates the Court's approval process being as informed as possible. For this reason, we propose that the Practice Note stipulate that the parties are to explain where, how and why their proposed important notices deviate from the standard form annexures to the Practice Note, as well as addressing how the proposed notices otherwise meet the high-level requirements set under an expanded Practice Note. The Court would then be in a position to take this evidence into account (if it so chose) in the exercise of its jurisdiction to approve the notices, or not.

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?

9.1. We do not think there is a pressing need for reform here. It would be desirable for the Practice Note to provide that the Court is to approve a form of notice, on approval of a settlement which establishes a settlement distribution scheme (**Scheme**), which explains the procedure of the Scheme to group members and provides an indicative timeline in respect of key steps (such as the preliminary determination of settlement entitlements, any approval process and the ultimate payment of final settlement entitlements).

9.2. The Court should supervise that process on a case management basis according to the indicative timeline. The Court should encourage expedients like truncated or even (in rare cases where it is appropriate and will not cause substantial injustice) eliminated review rights,[17] and the 'fast track' determination of relatively simple claims,[18] so as to encourage the swift and cost effective finalisation of settlement schemes, particularly where the sum to be distributed is relatively small or the number of group members is relatively large.

[17] Such as in *Williams v AusNet Electricity Services Pty L*td [2017] VSC 474 at [63] to [65], and *Johnston v Endeavour Energy* [2016] NSWSC 1132 at [60]
[18] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 at [141]

9.3. Allowing the Court tasked with approval of a proposed settlement to consider and approve, or otherwise vary, the group member communication arrangements under a Scheme is preferable to a heavily prescriptive general guideline. This is because the question of the appropriateness of any proposed communication arrangements will be heavily shaped by the nature of the claims the subject of settlement, the identity (or typical identity) of participating group members, the terms of the settlement itself, and the proposed procedures under the Scheme to facilitate and ensure a fair and reasonable distribution of settlement amounts to group members.

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?

10.1. See paragraphs 2.2 to 2.9, above.

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?

11.1. No. As set out in paragraph 7.1, the Court has a specific supervisory and protective jurisdiction as to group members, which does not arise in 'traditional' litigation. In the latter context, the Court does not need to be apprised of the plaintiff's funding arrangements, as there are no group members to protect, and hence no question of conflict as between the plaintiff and those he or she represents may arise.

11.2. We also repeat our observations in paragraphs 2.5 to 2.9 as to the limits of the legitimate interests of other parties to a proceeding in respect of the plaintiff's funding arrangements, which should only extend to whether security for costs is required and is adequate (in respect of which the defendant will be able to call for the production of any funding agreement if that is a relevant consideration).

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?

12.1. We repeat paragraph 2.4, and note further that the lawyers for the representative plaintiff in a funded class action have ongoing obligations of disclosure to group members of any issue that poses a real risk in respect of the funder's ability to meet its obligations, pursuant to ASIC RG 248.[19]

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

13.1. Any requirement for certification should be avoided. It is desirable that the different state and federal regimes remain consistent with each other, so as to not encourage forum shopping and the making of borderline claims for the primary purpose of attracting a particular jurisdiction, and also so as to encourage the development of a uniform national jurisprudence as to the important procedural and other issues that arise in class actions. Against that consideration, the case for certification would need to be overwhelming.

13.2. On the contrary, certification seems to us a solution in search of a problem. It is not a coincidence that representative proceedings are extremely rare in the one jurisdiction in Australia with a certification regime, as such regimes make the commencement of class action proceedings substantially more onerous without delivering a meaningful benefit to group members.[20]

[19] See regulation 7.6.01AB(4)(d)(ii) of the Corporations Amendment Regulation 2012 (No. 6), as amended by the Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1) (Corporations Amendment Regulations), together with section C of ASIC RG 248

[20] It is notable that the Depuy hip implant class actions commenced in South Australia under that regime were transferred to the Federal Court (*Webb v Depuy International Ltd & Anor* (Supreme Court of SA proceeding no. 1581/2011) and *Beentjes v Depuy International Ltd & Anor* (Supreme Court of SA proceeding no. 1496/2011))

13.3. Already, section 33H of the *Supreme Court Act* requires plaintiffs commencing representative proceedings to describe in the relevant Originating Process how it is proposed that the proceeding will determine the common questions applicable to group members (as reflected in section 4 of the existing Practice Note). Further, any plaintiff who fails to do so runs a risk of an application under s 33N for a declassing order (see paragraph 14.1 below).

13.4. There are already a variety of procedural mechanisms to address situations where representative proceedings are improperly constituted or difficult to maintain coherently – including strike-out applications, the establishment of sub-groups and appointment of sub-group representatives, and declassing orders (see paragraph 14 below). The current Supreme Court Practice Note already contemplates that such disputes may arise in the course of the proceeding (see sections 5.8, 5.9 and 6.2). Imposing a certification process would likely create additional areas of disputation as between the parties where none previously would have existed, as defendants seek to challenge the plaintiff's proof of the matters required to be established under the mandated process.

13.5. True it is that the ordinary procedural mechanisms identified above may not always be well suited to addressing specific problems that emerge in novel situations. However, unique to class actions, the Court retains broad power and flexibility in responding to such situations in reliance on s 33ZF. Given the rarity of such situations, and the costs-shifting regime in Australia, there is no good justification for pushing the onus of proof from the defendant to the plaintiff.

13.6. In some instances, the Court may have recourse to powers beyond those in Part 4A. By way of example, in *Melbourne City Investments Pt Ltd v UGL Limited*[21], Robson J found that certain allegations contained in a securities class action proceeding in the Supreme Court, made in part for the purpose of establishing and maintaining the representative plaintiff's capacity properly to represent group members, ought be struck out.[22] His Honour further raised the prospect that the proceeding may be liable to be stayed as an abuse of process, and invited the parties to address the Court on this issue. In response, the defendant applied to the Court for an order that the proceeding be stayed. Ultimately, on 3 August 2017, Robson J permanently stayed the relevant

[21] [2015] VSC 540
[22] Pursuant to *Supreme Court (General Civil Procedure) Rules* 2015, Reg 23.02

proceeding[23], and made orders (by consent) that the plaintiff pay 85% of the defendant's costs.

13.7. This is an example of the Supreme Court effectively dealing with questions regarding and relating to the adequacy and appropriateness of the plaintiff's representation of a class, and supports the conclusion that the current legislative and procedural mechanisms are appropriate to allow the Court to exercise the necessary power to manage improperly constituted class action proceedings where it becomes necessary to do so.

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?

14.1. No. We refer to paragraphs 13.1 to 13.6. Further, where questions as to the adequacy of representation arise, the parties, group members and the Courts already have various powers available to them to address this situation. Such powers include (but are not limited to) the following:

a. where the defendant is concerned that the composition of the class (and the scope of the claims the subject of the proceeding) is unclear or incoherent, or otherwise constitutes an abuse of process, the defendant may apply for orders striking out the plaintiff's statement of claim in part or in whole;

b. the Court may, of its own motion or on application by a party to the proceeding, make orders that a representative proceeding not continue as a representative proceeding (i.e. a declassing order) pursuant to s 33N of the *Supreme Court Act*, for reasons including that the proceeding will not provide an efficient and effective means of dealing with the claims of group members;

c. the Court may, of its own motion or on application by a party to the proceeding, make orders for the establishment of sub-groups and sub-group representatives for the purpose of determining questions specific to that sub-group under s 33Q;

[23] Pursuant to *Supreme Court (General Civil Procedure) Rules* 2015, Reg 23.01

d. a group member may apply to the Court for an order under s 33T that the current plaintiff be substituted as representative plaintiff by that or another group member; and

e. where it is appropriate or necessary to ensure that justice is done in the proceeding, the Court may (of its own motion or on application by a party) make any other order pursuant to section 33ZF that will address any perceived defect in the adequacy of representation, such as for the plaintiff to file and serve "sample group member" evidence, being evidence in respect of the claims of certain "sample" group members relevant to matters that do not arise (or do not arise in the same manner) in respect of the plaintiff's own claim. Where a plaintiff or their legal representatives identify that the plaintiff's claim may not be adequate to determine the claims of group members, it is common for the plaintiff voluntarily to apply for orders allowing for the filing of sample group member evidence to address this issue.[24]

14.2. In some cases, it may transpire that the plaintiff's claim ultimately fails in circumstances where the claims of certain group members, if tried, might have succeeded. A commonly cited example is that of *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson*[25] (**Vioxx proceeding**). In that case, the Full Court of the Federal Court, *inter alia*, overturned on appeal a first instance finding that the myocardial infarction (**MI**) suffered by the plaintiff was caused by consuming the drug Vioxx, which was manufactured by the defendant. Whereas Justice Jessup at first instance found that causation was established based on epidemiological evidence which showed that Vioxx substantially increased the risk of MI, the Full Court of the Federal Court on appeal found that the plaintiff had not established that his MI was caused by Vioxx and not other risk factors which were associated with his claim. The Full Court found that other group members may have been able to establish causation owing to the absence of these other risk factors in their cases.

14.3. In considering examples such as the above, it is important not to engage in hindsight bias: in the case of the Vioxx proceeding, Jessup J found at first instance that the plaintiff's claim satisfied the question of causation, hence, by implication, was adequate

[24] See for example *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)* [2001] VSC 372; *Wheelahan v City of Casey & Ors* [2011] VSC 15; *Matthews v SPI Electricity Pty Ltd (Ruling No 5)* [2012] VSC 66

[25] [2011] FCAFC 128

to represent the claims of other group members on that issue. Further, the proposition that the plaintiff's claim was inadequate to represent the claims of group members due to the presence of particular risk factors can readily be cast the other way: if the plaintiff had lacked those risk factors, then the determination of his claim arguably would have been inadequate to determine the claims of group members where those risk factors were present. Consequently, at most it can be said that, with the benefit of the judgment of the Full Court, the judicial determination of the Vioxx proceeding resolved some questions favourably to the plaintiff and group members, and some unfavourably.

14.4. The issue as to whether and to what extent (and in what direction) it is desirable and allowable for the essential features of the representative plaintiff's claim to deviate from the essential features of the claims of certain group members is a frequent tension within representative proceedings, however, in all but the most obvious cases (where one could expect the Court, a party or a group member to make use of one of the avenues identified at paragraph 14.1 above), it is not an issue that is apt to be resolved easily at an early interlocutory stage.

14.5. In this particular case, in order for a certification process undertaken shortly following the commencement of proceedings to address this issue, the parties and the Court would effectively have had to participate in a 'mini-trial' of a highly complicated and involved question of fact at the outset (presumably prior to discovery or the preparation of highly technical expert evidence, including epidemiological evidence). It is difficult to understand how this question could properly have been determined at an early, interlocutory stage in the proceeding or, if somehow it had been, how it could have avoided being the subject of an appeal to a superior court (as the ultimate trial decision was). One can readily see the additional cost that such a process would have entailed.

14.6. In retrospect, the claims of group members in the Vioxx proceeding may have been assisted by the establishment of sub-groups and sub-group representatives, or the provision of sample group member evidence, so as to address in advance the *potential* for varying outcomes as amongst group members or categories thereof on the question of causation, but both such procedural steps are available to the parties (and, in the case of the former, non-party group members) to initiate in an appropriate proceeding under the current Part 4A. The Federal Court Practice Note identifies each

of these options as steps the potential appropriateness of which is to be considered in the course of case management of class action proceedings.[26]

14.7. In the case of competing class actions, adequacy of representation is a matter that can and almost certainly will be taken into account by the presiding Judge in considering what orders ought to be made (including, where the adequacy of representation is in doubt in respect of one proceeding and not the other, the potential stay of the former proceeding, or a declassing order pursuant to section 33N of the Act in respect of that proceeding).[27]

14.8. We therefore do not consider that there is any persuasive argument for the introduction of a certification scheme in order to address the question of adequacy of representation (or, indeed, for any other reason).

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?

15.1. The difficulty with a formal legislative process for resolving competing class actions is the frequent difficulty, at the outset, of identifying which proceeding may provide a better vehicle for prosecuting group members' claims, or the basis on which that process of identification ought be taken, having regard to the fact that proceedings may not just have different representative parties, lawyers, funder and funding structures, but also different group member definitions and/or different (and in some cases inconsistent) factual or legal allegations.

15.2. The current suite of powers available to the Court allows the Court the flexibility to choose from a range of different potential responses, including staying one or more proceedings, consolidation of the proceedings into a single proceeding, declassing one of the proceedings, or making appropriate case management orders for their dual-track continuation in as efficient a manner as possible.[28] The two (or more) plaintiff 'camps' are also incentivized under current arrangements to voluntarily consolidate or otherwise cooperate, given the risk they both face that their proceeding might be

[26] See sections 8.2(e) and (h)
[27] This question arose in *McKay*, however, in that instance no questions of adequacy of representation arose
[28] See *McKay*

stayed, or that the Court (if it allows both cases to go forward) may make proportionate reductions to party-party costs recoverable.[29] The risk of legislation is that it will not allow the Courts the flexibility to deal with unanticipated issues that arise or to craft responses which are best suited to the situations before them.

15.3. It is also important to note that, given plaintiffs usually will have the option of commencing proceedings in more than one jurisdiction, legislation that applies to the Victorian jurisdiction alone would in many instances not solve or address problems occasioned by competing class actions (for instance, it would not address the problem of competing class actions issued in the Supreme Court of Victoria and in the Federal Court of Australia, unless the Federal Court ordered the latter proceeding to be cross-vested to the Supreme Court).

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?

16.1. Yes, being the matters of disclosure identified in paragraphs 2.2 to 2.4, above.

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

17.1. We repeat our observation in paragraphs 5.1 to 5.4, regarding the fiduciary obligations which lawyers for a representative plaintiff have to "unrepresented" group members (being group members who have not formally retained those lawyers to act for them in the relevant proceeding). Whilst it remains appropriate for the Court to exercise a particular protective oversight role in respect of the interests of group members, it is important to stress that the lawyers for a representative plaintiff are already required to have regard to those interests in the conduct of the proceeding, including in respect of any proposed settlement.

17.2. Insofar as such judicial oversight remains necessary, we consider that the process of Court approval of settlement, as provided for in section 33V of the *Supreme Court Act* (and cognate provisions in other jurisdictions) and its judicial exposition, is sufficient to

[29] By way of example, see *Cheryl Whittenbury & Anor v Vocation Ltd (in liquidation) & Anor* (VID434/2015), and the orders made in that proceeding on 17 March 2017 by Middleton J

protect unrepresented group members, particularly bearing in mind the notice requirements that form part of that process.

17.3. The jurisprudence on s 33V has emphasised that approval will not be granted to settlements where the settlement is not fair and reasonable as between class members, and that the Court is likely to approach skeptically the approval of settlements which purport to discriminate based on whether group members have entered into funding agreements or have otherwise made or agreed to make a contribution towards the cost of the proceeding, and/or are represented by the same lawyers as the representative plaintiff. Indeed, in most of the rare cases where a settlement has not been approved – such as *Kelly v Willmott Forests Ltd (in liquidation) (No 4)*[30] and *Australian Securities and Investments Commission v Richards*[31] – that was the very reason.

17.4. As observed in paragraph 3.1, it is notable that both of these cases related to situations where the proceeding was neither funded by a third party litigation funder nor conducted by the plaintiff's lawyers pursuant to a conditional fee arrangement. Rather, in each case, the lawyers for the plaintiff received payment of legal costs from certain group members and not from others, and the primary unfairness that caused the Federal Court to reject the proposed settlements was the unequal treatment of those two categories of group member *vis a vis* one another under the proposed settlement.

17.5. This in itself strongly suggests that questions of the fairness and reasonableness of a proposed settlement ought not be narrowly construed as only being enlivened in proceedings involving a litigation funder, and also demonstrates the difficulty in formulating and adopting overly prescriptive regulations or guidelines to protect the interests of group members, given that it would reduce the Court's flexibility to respond to unusual or novel circumstances.

17.6. The policy of the law is, and should be, to encourage the settlement of disputes. We should be cautious of erecting impediments or costs in the way of that policy goal, unless there is a clear reason to do so. Given the way Courts have exercised the s 33V approval power, so as to protect one class of group members from arbitrary

[30] [2016] FCA 323
[31] [2013] FCAFC 89

disadvantage relative to another class of group members, there does not appear to be any compelling need for erecting an impediment here.

17.7. That said, it might assist litigants in negotiating the terms of settlement and then applying for the approval of that settlement, and the Court in considering any such application, for the Supreme Court Practice Note to include an explicit list of factors to be addressed by the applicant and assessed by the Court, as is the case in the Federal Court Practice Note.[32]

17.8. There is, in our view, no practical benefit in seeking submissions from the defendant on the fairness or reasonableness of the settlement. Primarily, this is because the defendant's primary interest is in denying that the claims of the plaintiff and group members have either merit or substantial value, and, once it has agreed to a proposed settlement, certainly will have no interest in suggesting that the terms of this settlement *undervalue* the claims of group members or certain of them. Consequently, we do not see how such submissions would assist the Court in identifying any matters that might cause it *not* to approve the proposed settlement.

17.9. The circumstances in which a contradictor or Court expert may be of assistance to the Court in considering whether to approve a proposed settlement are sufficiently rare that they should only be ordered on a case by case basis and at the Judge's own discretion. In most cases, the involvement of such a party would be both unnecessary and unjustifiable due to the cost. That cost presumably would need to be financed out of the proposed settlement sum, and hence would reduce the "in pocket" return to group members. Consequently, in most cases, and unless the Court would be unable to assess the reasonableness of the terms of the proposed settlement or Scheme without the aid of a contradictor or Court expert, it is overwhelmingly likely that such an appointment would not be in the interests of group members.

17.10. In particular, we consider that the appointment of a contradictor ordinarily will only be appropriate in the most flagrant of cases (such as that faced by the Court in *Kelly v Willmott Forests Ltd (in liquidation) (No 4)*[33]). We are confident that Courts hearing settlement approval applications are well-placed to identify any such exceptions, as was the Federal Court in the above case.

[32] See sections 14.3, 14.4 and 14.5
[33] [2016] FCA 323

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

18.1. The current system works well in our opinion. The Court takes a robust approach to costs assessment, and has developed a substantial jurisprudence for dealing with such matters. Ordinarily, a report from an accredited and experienced independent costs assessor engaged by the plaintiff's lawyers will be sufficient to satisfy the Court as to the appropriateness or otherwise of any orders sought in respect of the payment of legal costs. In the rare instances where the Court has concerns about the independence of the assessor or the adequacy of the report furnished, the Court has sufficient power to make such orders as it sees fit (such as for a Court-appointed costs assessor or for a taxation of the plaintiff's lawyer's file).[34]

18.2. In the vast majority of cases, such additional steps would do no more than impose a substantial and unnecessary additional cost, which cost inevitably would reduce the actual return to group members participating in the settlement. It is therefore important that the availability of such additional steps be a matter of discretion for the Court. Even in circumstances where the Court considers it may be assisted by such additional steps being taken, it will need to weigh that prospective benefit against the resulting cost to group members in determining whether, and if so what, further steps are appropriate to be taken in that instance. This is particularly the case in circumstances where the settlement sum is not so large as to easily absorb the cost of extensive judicial or extra-judicial scrutiny beyond that ordinarily (and properly) applied.

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

[34] E.g., *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, where a discrete question about the uplifts proposed to be charged was referred to the Costs Court

19.1. We think legislation addressing the above matters is inadvisable. Class actions vary substantially in both subject matter and form, and are usually complex and idiosyncratic. Funding fee arrangements under litigation funding agreements reflect this. What will be reasonable in one kind of class action may be unreasonable in another. Legislation would struggle to provide the necessary flexibility which the Courts require, bearing in mind the kinds of factors that will need to be considered, such as the complexity of the issues, the level of take up by the group of the funder's offer, whether there are competing proceedings, whether otherwise reasonable terms might result in an unjustified windfall in the particular circumstances of the case, and so on.

19.2. Conversely, we consider it potentially desirable to incorporate the matters identified at sub-paragraphs (a) – (c) to question 19 into the Supreme Court Practice Note. However, the Note should keep these matters broadly defined so as to avoid an unnecessarily prescriptive (and proscriptive) approach.

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?

20.1. Currently the Federal Court Practice Note encourages the plaintiff's engagement of a costs assessor to consider whether the amounts charged by the Funder are allowable under the terms of the Funding Agreement.[35] The balance of questions ultimately come down to the risk of the litigation as compared to the reasonableness of the commission rate; this is a matter which judges are better placed to assess, as it will closely tie in with their assessment of the reasonableness of the proposed settlement *vis a vis* the merits of the case.

20.2. Whilst judges will be assisted with historical information on other settlements and fee arrangements, this can be provided by statistical material which, thanks to the work of specialist academics such as Vince Morabito of Monash University, is readily available.

20.3. A court expert would, in most cases, simply increase costs while not providing any additional benefit. Of course, the Court can always order the appointment of a Court expert of its own motion in specific (in particular, large and complex) cases.

[35] See section 15.2

21. At which stage of proceedings should the Court assess the funding fee? What, if any, conditions should apply to this?

21.1. It would in most cases be undesirable to set or assess the funding fee in advance, particularly given that an important purpose of Court supervision of funding fees is to ensure that the fee, applied to the settlement, does not represent an unjustified windfall.

21.2. It is notable that, as was the case in the Federal Court decision of *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*[36], the Court may take any proposed funding fee into account at an earlier stage of the proceeding, in scenarios of competing class actions, however, even in that case, the Court maintained its discretion to set the ultimate fee at the time of the proceeding's resolution.

21.3. If the Court considers that any proposed funding fee (such as that proposed to be charged under a funding agreement filed with the Court at the outset of the proceeding) is so problematic that it needs to do or say something about it at the outset, then it can make orders regarding this of its own motion under s 33ZF.

22. In class actions, should lawyers and litigation funders be able to request that the total amounts they receive in settlement be kept confidential?

22.1. The primary reason the plaintiffs may seek confidentiality orders as to the quantum of settlement is that often defendants will only agree to settle the class action on the basis that the quantum is kept confidential from the public. Presumably, this stipulation is motivated by a desire to protect the commercial or public reputation of the defendant, who may be concerned that a large settlement sum will be treated by the public as a *de facto* admission of liability.

22.2. Orders for the general confidentiality of components of the settlement sum to be distributed are primarily intended to prevent the public or journalists from reverse engineering the quantum of the settlement sum, and thus undermining any agreement to keep that amount confidential. Insofar as such an order is sought, the plaintiff ought to inform the Court as to the basis for the proposed order.

[36] [2017] FCA 947 (***McKay***)

22.3. We agree that the relevant commission rates and the aggregate amounts of proposed payments to funders from the settlement should not be kept confidential from group members without very good reason. That is, group members should have full access to this information, subject to any necessary requirement to keep the information 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 is completed in a manner that minimizes costs and delays?

23.1. In designing and implementing a settlement distribution scheme (**Scheme**), there is often a tension between the objectives set out at (a) and (b) above. The question of where the balance ought to be struck between these objectives is neither straightforward nor easily cross-applied from one case to another. It is difficult to be prescriptive on this point, since such Schemes vary substantially in their design, usually for good reason.

23.2. It would be undesirable, for example, to require precise and excessively individualised assessments where the global settlement sum is heavily compromised. Even in cases where the settlement sum could 'bear' the costs of individualisation, that may be unnecessary since the claims admit to relatively precise quantification based on financial data (as is typically the case with shareholder claims). Conversely, a settlement scheme for an institutional abuse class action, for example, might need to build in specific safeguards unique to that circumstance, and also be undertaken in a less formal manner, given the particular difficulties which would otherwise face Scheme participants.

23.3. That said, it would be desirable for the Court to consider including in its Practice Note the ordinary factors that it will usually consider when asked to approve a Scheme.

24. How could Court-approved notice for opt out and settlement be made clearer and more comprehensible for class members?

24.1. We repeat our recommendations contained in paragraphs 8.1 to 8.4. In particular, we emphasise that short-form documents should be encouraged.

24.2. Short of having group members individually taken through the terms of notices by the lawyers – which in many if not most class actions would constitute a disproportionately intensive and costly exercise – the risk of misunderstanding is difficult to avoid. By way of example, a standard Legal Costs Agreement used by lawyers with retail clients every day will regularly give rise to the same problems, and the detailed obligations of disclosure can in some instances add to client confusion as much as they mitigate it, as many clients will struggle to absorb and fully appreciate both the volume and granularity of disclosures. The same dynamics apply to group member notices in class actions: the more details required to be disclosed, and the more extensive and detailed the level of disclosure, the greater the risk that group members will misunderstand (or disregard) the notice or parts thereof.

24.3. That said, a high-level guide as to the required contents of key notices, together with some standard form notices annexed to the Practice Note, would be sensible. We suggest that the Practice Note stipulate that the plaintiff's lawyers, in applying for approval of such notices, should address for the Court's benefit how and why the proposed notice conforms with or deviates substantially from any standard-form notice, as well as how it meets the requirements of the Practice Note otherwise.

25. Are there other ways the process for settlement approval and distribution could be improved?

25.1. We have no particular suggestions to make in this regard, beyond what we have otherwise proposed.

26. Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?

26.1. We consider that many of the potential issues identified in connection with litigation funding would still be present in class actions conducted on a contingency fee basis.

26.2. For instance, the same issues of capital adequacy (particularly in the context of the plaintiff's capacity to provide security for costs or meet any adverse costs order) would

apply to circumstances where the plaintiff's lawyers, rather than a third party, offered to meet these costs as part of the "bargain" in exchange for the right to charge a contingency fee – only now it would be the capital adequacy of the relevant law firm which would be under scrutiny. This may also give rise to potential conflicts of interest issues similar to those which exist in funded class actions, as the lawyers would need to balance the objective of conducting the proceeding in the best interests of group members with a desire to avoid an adverse costs order for which the firm (and potentially its individual partners, jointly and severally) would be liable.

26.3. Similarly, questions of potential conflict of interest in respect of the charging of fees would continue to require management in much the same manner as they do in respect of funded class actions. For instance, Courts would be required to consider whether the contingency fee proposed to be charged by the lawyers constituted an inappropriate "windfall" relative to the cost and risk associated with conducting the proceeding, analogous to the considerations which apply to the making of a common fund order. Conversely, if the right to charge a contingency fee was procedurally constrained by some legislated or regulated requirement of proportionality to the amount of work performed by the lawyers (most likely on an "hours of work performed" basis), then in some instances this might incentivise the lawyers to "overwork" the case in order to maximize their eventual fee entitlement.

26.4. Against the above considerations, in cases where the plaintiff's lawyers were able to fund cases in full on a contingency fee basis, then (assuming the fee arrangement was fair and reasonable) this may have the substantial benefit of removing a costs layer associated with the litigation, and hence probably substantially increase the net return to group members in many instances.

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?

27.1. In respect of the above sub-questions (a) through (d):

a. The rise of common fund orders alters the traditional understanding of this question. There is no in principle reason why contingency fee arrangements would result in a broader range of funded cases than litigation funded cases under a common fund order. It is really the removal of the need to sign up group members to funding agreements (as is, at least theoretically, achieved by the introduction of common fund orders as a means for guaranteeing investment certainty for funders) which opens up a broader range of cases as being economically viable to be funded by a litigation funder or a law firm charging contingency fees. Similarly, a contingency fee arrangement would have the same advantage of not requiring lawyers to secure retainers from a substantial proportion of the relevant class on an individual basis.

b. Clients will probably face lower costs burdens, but the same or similar risks – as discussed in paragraphs 26.1 to 26.4. Those risks would need to be managed by concomitant arrangements for disclosure and Court supervision as is being proposed in respect of funded class actions. Those arrangements would be likely to differ in detail, but otherwise accord in substance, owing to the similarity of questions of disclosure, capital adequacy, case management and the identification and management of conflicts of interest.

c. See our answer to (b) above.

d. See our answer to (b) above.

28. Are there any other ways to improve access to justice through funding arrangements?

28.1. As raised in paragraph 27.1(a), the introduction and growing use of common fund orders should also increase access to justice, by making it easier for litigation funders to “invest” in cases where the economic value of claims as a whole is fairly clear but where it would be difficult or economically unviable to conduct a claim-by-claim

bookbuild (such as where individual claims are small in value, or in institutional abuse claims where claimants may be reluctant to come forward, at least initially), and/or where it would be too difficult or costly to conduct a reliable assessment of the potential economic value of individual claims at the outset.

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