



Law Council
OF AUSTRALIA

Litigation Funding and Group Proceedings: Consultation Paper

Victorian Law Reform Commission

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About the Law Council of Australia

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

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

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

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

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

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

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

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

Acknowledgement

The Law Council is grateful for the assistance of the Class Actions Committee of the Federal Litigation and Dispute Resolution Section and the Law Institute of Victoria, in the preparation of this submission.

Introductory Comments

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission regarding the issues in the Commission's *Access to Justice – Litigation Funding and Group Proceedings: Consultation Paper (Consultation Paper)*.
2. This submission addresses a number of the discussion questions identified in the Consultation Paper which are of most importance to the Law Council.
3. The Law Council agrees that:

'Over the past 25 years, class actions, after a slow start, have served Australian society well. Any reasonable analysis of the actions commenced and resolved since 1992 in the Federal, Victorian and New South Wales Supreme Courts¹ will conclude that the actions, in the main, have produced valuable outcomes for society. That is, most class actions have properly aired a dispute that concerns many complainants, and the resolution of the dispute has achieved finality, not only for them, but also for the defendants. Whether settled, won, struck out or dismissed, most class actions have performed the role that was intended. They have been, in the words of the second reading speech introducing the federal legislation in 1991, an 'effective procedure to deal with multiple claims'.¹

4. The Law Council would be most concerned if action was to be taken by the Victorian Government to amend Part 4A of the *Supreme Court Act 1986 (Vic)* (**Part 4A**) in a manner that caused the class action regime to differ markedly from the regime in Part IVA of the *Federal Court of Australia Act 1976 (Cth)* (**Part IVA of the Federal Court Act**). The Law Council will be equally concerned if an attempt was made to regulate third party litigation funding in Victoria that was inconsistent with the regulation of third party funding in the Federal jurisdiction. Any Victorian change should not be progressed in the absence of Federal reforms as national consistency is very important in legal service delivery. Many companies are national entities. If not, many of those trade across borders. Members of class actions are, in the main, from all Australian jurisdictions. For the legal system to be seen as enabling access to justice and for the community to be confident in the justice system, we should have consistent regimes throughout Australia as much as is possible.

Chapter 3: Current regulation of litigation funders and lawyers

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?

5. After 25 years of jurisprudence in Part IVA of the Federal Court Act has been reviewed and analysed by numerous judges both, at first instance and on appeal, it is considered that the class actions regime is reliable and one that gives users of it certainty in most aspects of its implementation.

¹ Ben Slade and Jarrah Ekstein, 'Class Actions and Social Justice: Achievements and Barriers' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017).

6. Part 4A of the Supreme Court Act mirrors Part IVA of the Federal Court Act. Federal Court and Victorian Supreme Court decisions have assisted users to understand and conduct class actions in these courts in ways that have improved markedly over time.²
7. There are very few areas of potential disputation between the courts, lawyers, funders and parties that could be assisted by legislative change. Any change, unless very carefully thought through, risks introducing uncertainty, provoking interlocutory disputation and, unless harmonised with the Federal Court Act, risks encouraging forum shopping.
8. It may be, for example, that it is considered that the current uncertainty expressed by the courts in how to manage competing class actions could be addressed by amendments to Part 4A.³ But what would those amendments be and would they be fair to the court's users? This issue is discussed below at pages 15-17 below.

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?

9. The Law Council recognises that there may have been occasions when the activities of third party litigation funders have exposed their customers, or class members, to unfair risks or disproportionate cost burdens. But the statistics⁴ and anecdotal evidence suggests that it is rare for litigation funders who behave badly to get away with it. The proscriptions against unfair contracts, the court's supervisory power in class actions, the determination of defendants to identify improper conduct and the plaintiff's lawyer's duty to the court all come into play to put a break on poor conduct in class actions. See for example, *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187.
10. The Corporation Regulations require funders to have in place arrangements to manage conflicts of interest. ASIC's regulatory guide gives funders and class action lawyers clarity about their obligations to class members. If the obligations are not met, class members can turn to ASIC or their own advisers to enforce ASIC Act proscriptions against unfair terms, unconscionable conduct and misleading or deceptive conduct.
11. The Law Council's position is that the only other step needed to protect users of third party litigation funding that should be introduced, is to require funding companies to hold an AFSL and be subject to greater ASIC oversight than at present.
12. But it goes without saying that it is not within the power of the Victorian Government to amend the Corporations Act to require litigation funders to hold an AFSL. The Law Council would be most concerned if action was to be taken by the Victorian Government to regulate proceedings in Victoria that was inconsistent with the regulation of third party funded class actions in the Federal jurisdiction. National consistency is very important in legal service delivery. Many companies are national entities. If not, many of those trade across borders. Members of class actions are, in the main, from all Australian jurisdictions. For the legal system to be seen as enabling

² Part 4A of the *Supreme Court Act 1986* (Vic) is almost identical to Part IVA of the *Federal Court of Australia Act 1976* (Cth). References to sections in legislation in this submission are references to sections in Part 4A and references to a 'Court' are references to the Supreme Court of Victoria unless the context suggests otherwise.

³ See, eg, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947.

⁴ 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).

access to justice and for the community to be confident in the justice system, we should have consistent regimes throughout Australia as much as is possible.

13. If the Victorian Government is concerned that funded litigants in class actions are exposed to unfair risks or disproportionate costs, it is suggested that the Court be encouraged to exercise its supervisory powers and to enhance those powers with a practice note that is similar to that recently introduced in the Federal Court.
14. The Court has the power, either when it is asked to approve a settlement of a class action under s 33V or by exercising its general power to make any order it thinks appropriate under s 33ZF, to ensure that the conduct of a class action does not expose litigants to unfair risks or disproportionate cost burdens.
15. The Federal Court's class actions practice note (GPN-CA) (**Class Actions Practice Note**) has provisions that prescribe disclosure of funding and costs agreements at an early stage of an action. Disclosure must be made of all those terms of a litigation funding agreement that do not give the defendant a strategic advantage.
16. The most serious risks faced by class members who have signed a funding agreement fall into the following categories:
 - **Prudential:** There is a risk that a funder's promise to pay for the litigation and meet any costs order made against the representative plaintiff is not honoured because the funder goes under when funds must be paid. This risk appears at first glance to be of great importance but on reflection, perhaps not. The prudential risk is resolved to a great degree first, by the defendant's right to obtain an order securing its costs and secondly, by the representative plaintiff's right to discontinue the suit if a funder stops paying the lawyers or it gives notice that it is going to stop paying. In these circumstances, the security previously given should pay for the costs to the date of discontinuance, albeit that the security may not cover all the costs that could be claimed by a defendant faced with a sudden discontinuance. This point is made at section 12 below.
 - **Conflicting instructions:** While litigation funders can give day to day instructions to the lawyers conducting a class action, those instructions may come into conflict with those given by a representative plaintiff. This risk appears to be very important but in reality, it is not. As long as ASIC's regulatory guide is followed and the representative plaintiff is given priority and there are dispute resolution regimes agreed to at the outset, this potential risk is minimised.
 - **Competition:** This issue arises where two funded class actions in relation to the same alleged wrong by the same defendant(s) are commenced by different classes funded by different litigation funders and conducted by different lawyers. A recent decision of the Federal Court⁵ suggests that the Court has the power to allow funded group members to opt out of one class action and to opt in to the other. This issue is addressed at pages 15-17 below.

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

17. The presence of a litigation funder adds a layer to the management of a class action that is not present when it is conducted by a law firm for its clients on a conditional fee basis. The funder's presence can have both positives and negatives.

⁵ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947.

18. As the Law Council recognised in its position paper published in June 2011 entitled '*Regulation of Third Party Litigation Funding in Australia*':

*It is argued that litigation funding promotes access to justice, spreads the risk of complex litigation and improves the efficiency of litigation by introducing commercial considerations that will aim to reduce costs.*⁶

19. The positives include the fact that many meritorious claims would not be made without a litigation funder's involvement. As well, funders tend to guarantee the payment of a defendant's costs if ordered and funders may add value by engaging in the litigation process and introducing efficiencies. Funders also tend to bring a commercial sense to expenditure and settlement decisions.
20. On the other hand, funders expect substantial returns, they may interfere in the litigation, their activities may encroach on the provision of legal services and they may try to go behind the class lawyers to cut side deals with the defendant. It has been suggested that they may encourage early, low, settlements that might not be in the interest of the class members.
21. As noted in the previous section, most of these concerns can be addressed by the Court by active case management, by the imposition of practice requirements through a practice note and by the active engagement of the Court in approving settlements.
22. Also, as noted above, it is recommended that the Victorian Supreme Court adopt the Federal Court's *Class Actions Practice Note* that requires disclosure, not only of the fact that a funder is involved, but the terms of any funding agreement, subject to identified limits, soon after the commencement of a proceeding. In this way, the Court and the parties will have ample opportunity to turn their minds to any potential abuse that the arrangements might suggest.
23. As well, the Court's task under s 33V to approve a settlement of a class action should, with respect, be exercised with great care. As has often been stated, the task is an 'onerous' one, whether a funder is involved or not:

Before granting approval, it is appropriate for the Court to be satisfied that any settlement has been undertaken in the interests not merely of the lead plaintiff and the defendant, who will ordinarily be represented by solicitors and counsel, but also of the other group members, many of whom will not be so represented. The Court must determine whether the proposed settlement or compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement. The Court must take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of group members obtaining judgment for an amount significantly in excess of the proposed compromise amount, the terms of any advice received from counsel and solicitors in relation to the issues that might arise in the proceeding, the likely duration and cost of the proceeding, and the attitude of the group members to the proposed settlement or compromise.

One approach for the Court is to identify any features of the proposed settlement or compromise that are obviously unreasonable or unfair. Where some group members object to a settlement or compromise and state their reasons for doing so, it is appropriate for the Court to have regard to those

⁶ See also *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, [100]; *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1, [54].

reasons as a point of reference by which to determine matters of fairness and reasonableness. Thus the Court's task is to determine whether the settlement or compromise involves any actual or potential unfairness to any group member, or any category of group members, having regard to all of the relevant matters that I have outlined. So long as the proposed settlement or compromise falls within the range of fair and reasonable outcomes, it should be regarded as qualifying for approval under s 33V.⁷

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

The court rules governing class action procedures in Australia presently include a number of safeguards directed to ensuring the procedure is not abused so as to procure settlements which are inconsistent with the broader interests of the class being represented. The most prominent of these safeguards is the requirement for court approval of class action settlements. Experience suggests that while court approval is a critical safeguard and must be maintained, there are some further refinements to current procedures that may enhance their effectiveness. One reform which could be considered is promoting the wider use of powers to appoint amici curiae to provide a contradictor at the hearing of applications for class action settlements. This could most appropriately be achieved through a practice note or guidelines issued on a court-by-court basis.⁸

25. It is noted that, since this submission, the Federal Court has introduced its *Class Actions Practice Note* that takes steps to address concerns about disclosure of litigation funding. Whether the circumstances of any settlement suggest the appointment of an *amici curiae* to be heard at a settlement approval hearing should be left to the Court.

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

26. The management of class actions can be difficult. The stakes are high and the issues complex. High stakes make for a high impact when concessions are made or corners are cut. Even the most willing participants can find it almost impossible to reach agreement on a issues ranging from pleadings to security for costs, from class member definitions to discovery experts and lay evidence, from agreement on the common issues to settling on the content of a joint tender bundles. A Court supervising a class action will find that it is called upon to determine many aspects of the case that would not be worth agitating in a smaller claim.
27. It is sensible for a court to have a class actions list with judges who specialise in the management of class actions and whose role is to oversee the conduct of the claim until it is ready for a trial of common issues, when the case can be referred to another judge. A class actions list judge should actively case manage all interlocutory stages and ensure that the parties to a class action agree to mediated before the trial.
28. Again, the Federal Court has recently seen significant success in this method of class action management.

⁷ *Hobbs Anderson Investments Pty Ltd v Oz Mineral Limited* [2011] FCA 801, [3]-[4].

⁸ Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements*, 13 November 2013, 128.

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?

29. At [3.79] of the Consultation Paper the VLRC notes that it '*has not identified any need or scope under Victorian law to augment the conflict of interest guidelines*'.
30. ASIC's Regulatory Guide 248: *Litigation schemes and proof of debt schemes: Managing conflicts of interest*, together with the *Legal Profession Uniform Law* and each lawyer's duty to the Court and clients are quite sufficient to guide lawyers on their responsibilities to class members.
31. The Supreme Court could, as previously noted, adopt the Federal Court's *Class Actions Practice Note* in so far as it requires plaintiff lawyers to disclose costs agreements to the presiding judge.

Chapter 4: Disclosure to plaintiffs

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?

32. Lawyers are obliged under ss 174 and 177 of the *Legal Profession Uniform Law* to inform their clients of many aspects of their retainer including providing a reasonable estimate of the amount of legal costs payable by the client and reasonable estimate of any contributions towards those costs likely to be received from another party. If these sums change over the course of the litigations, lawyers are obliged to so inform their clients.
33. Paragraph 4.15 of the Consultation Paper is right to identify that contract law requires disclosure of the material terms in a litigation funding agreement. Litigation funding charges imposed by the contract between the funder and the client are generally percentage based. The percentage relates to the 'resolution sum' being the pro-rated entitlement of a class member to damages. The sum may include costs and the percentage may vary depending on the particular individual's claim size or the time of the settlement, if any.
34. Some funding agreements may add a 'project management fee' or some other fee that relates to the funder's contribution.
35. It is accepted that the manner in which a funding agreement discloses the commission due should be clear and that plaintiff class action lawyers have a responsibility to their clients to be confident that the funding agreements are clear and understood by their clients. This responsibility does not need to be imposed by further regulation as it is inherent in the lawyer's obligation to the client to act in the clients' best interests.
36. The Federal Court of Australia's *Class Actions Practice Note* requires disclosure of litigation funding charges to class members in a class action. It requires that the plaintiff lawyer be 'satisfied [that] class members have been provided a document that properly discloses those charges'.⁹ This requirement is sufficient.
37. As well, in class actions, it is open to the Court, when exercising its power to approve a settlement under s 33V to resist settlement approval if it finds that a litigation funder's commission and all associated fees were not adequately and properly disclosed to all

⁹ See paragraph 5.5 of the Class Actions Practice Note.

funded class members from the outset. Such a power not only exists but, in so far as the commission and fees charged may be found to be excessive, the Federal Court has expressed a willingness to either refuse a settlement or impose fair terms.

38. In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 at [101] Beach J noted:

... I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF....

If I make an order that out of monies paid by a respondent, a lesser percentage than that set out in a funding agreement is to be paid to a funder, that is an exercise of statutory power which overrides the otherwise contractual entitlement'

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?

39. The sentiments in the above paragraphs are repeated and, to the extent that there are special requirements for class actions, it is suggested that the Supreme Court might introduce disclosure requirements in commercial cases that mirror the requirements to disclose the fact of there being third party funding and the terms of the funding agreement, at least on a confidential basis to the presiding judge.
40. It is also repeated that it is not necessary to impose a further disclosure burden on the lawyers who act for a funded client except to require that they have confidence that the funding agreement is clear and understood. This responsibility does not need to be imposed by further regulation as it is inherent in the lawyer's obligation to the client to act in the client's best interests.

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?

41. While it is important that class members are informed on both the progress of a case and any issues that impact on their rights and interests it is considered that given the broad range of class actions,¹⁰ the great variation in the demographics of class members and the difference between closed and open classes, that the representative plaintiff's lawyers and the Court should be left to determine the times and methods of communication.
42. The Court's power and discretion to determine the form, content and manner of distribution of formal notices to class members under ss 33X and 33Y should not be changed or interfered with. It is important for the Court to retain its discretion so that notices are custom made to suit the nature of the claim and the demographics of class members taking into account whether they can be easily located or not.

¹⁰ Law Council of Australia, *Federal Court Case Management Handbook*, December 2014, 94 [13.13]; Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: Fifth Report* (July 2017), 27-28 and Tables 6 and 7 evidencing many types of class action including for shareholders, product liability victims, mass tort claims, consumer protection, cartel and human rights claims

43. The suggestion in [4.30] of the Consultation Paper that plaintiffs be informed of the 'likely outcomes' presents some concerns as information of this nature is often sensitive. If it requires disclosure of possible compromises then one must ask how it is thought that this information can be prevented from being disclosed to the defendant. Any suggestion that such communications be required must consider that any communication with significant numbers of persons, some of whom may be clients of the plaintiff's lawyers and some of whom will be unrepresented group members, will risk disclosures that are not in the collective's best interests.

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?

44. There is no need for guidelines for lawyers on how and what they communicate with class members during a settlement distribution scheme.
45. As stated in support of leaving bespoke solutions available to meet the needs of each case, it is considered that because settlement distribution schemes vary so much from case to case,¹¹ that guidelines will need to be so broad as to be of little value.

Chapter 5: Disclosure to the Court

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?

46. The Law Council submits that funding agreements should be disclosed to the Court and the fact of there being a funder and the terms of a funding agreement that do not give a strategic advantage to a defendant, should also be disclosed. Disclosure should be early in the proceeding.
47. It is suggested that in the interests of uniformity that the disclosure requirements be modelled on those in the Federal Court's *Class Actions Practice Note*.

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?

48. The Law Council can see a reason to distinguish between class actions and other proceedings on this issue because the mere fact of the disclosure of the existence of third party funding will give the defendant a strategic advantage in the same way that the disclosure of a defendant's insurance position might.

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?

49. Concerns about capital adequacy go to the funder's ability to continue to fund a claim as promised and to meet any order for costs in a defendant's favour.

¹¹ See R Gilson and M Legg, 'Australian Class Action Settlement Distribution Scheme Design', IMF Bentham Class Action Research Initiative Research Report No. 1, 1 June 2017.

50. Class action defendants will be on notice if the existence of third party funding must be disclosed. Defendants are adequately protected by obtaining security for their costs under rule 62 of the *Supreme Court (General Civil Procedure) Rules 2015*.
51. Funding agreements promise to fund class members to the date of termination of an agreement with the funder retaining an ongoing obligation to meet the adverse costs obligation. This is met by having met the security for costs obligation. If a funding agreement is terminated and the class members cannot continue without funding, they can disclose this fact to the court and they will be given leave to discontinue under s 33V. The defendant's entitlement to costs will be satisfied, if not in whole then, by the security that has been given.
52. There is no need for law reform to ensure that funders are capable of meeting their obligations to pay adverse costs.

Chapter 6: Certification of Class Actions

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.**
53. Empirical data suggests that a certification requirement rather than the ability of a defendant to make and have heard an early challenge a class action for pleadings failure or any one of the rights given under ss 33C, 33D, 33H, 33KA, 33L, 33M, 33N and 33T, will not achieve efficiencies.¹²
 54. In Victoria, the risk of and the need to meet substantial adverse makes any comparison to the United States, where such a risk does not exist, irrelevant.
 55. There is a very real concern that to impose a certification process will impose additional costs and introduce inefficiencies that will cause both plaintiffs and defendants much grief. It is likely to significantly impede access to justice for plaintiffs and increase costs for defendants.
 56. The certification process in the US is problematic. The evidence is that the US certification process has descended into a trial of substance with much of the associated trappings of such an undertaking including discovery and expert evidence.¹³
 57. The Law Council is very concerned with the suggestion that the threshold requirements in s 33C be reviewed in Victoria. It is extremely important that the class action regimes in those jurisdictions that have class actions are as similar as possible. To do otherwise

¹² 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(3) *American Journal of Comparative Law* 579, 594. See also, Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes – Fifth Report' (July 2017), 24.

¹³ Steig Olson, 'Chipping away': the Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus' (2009) 43(4) *University of San Francisco Law Review* 935, 937.

will create uncertainties and inequalities over borders. It will encourage forum shopping.

58. As previously noted, 25 years of jurisprudence has resolved most issues and the scope of Part 4A is clear to those who use it and who advise on it. The Law Council does not accept that there is any reason to review s 33C.
59. There is no longer any doubt that sub-section 33C(1)(a) does not require that each class member have a claim against each defendant.¹⁴
60. The requirement that class members have claims arising from the same, similar or related circumstances extends only to those claims with relationships which 'sufficient to merit their grouping as a representative proceeding.'¹⁵ Removing the 'related' criterion will spark off another decade of interlocutory disputation.
61. What is a 'substantial common issue' has been long established and there is no reason to change it. High Court in *Wong v Silkfield*¹⁶ held that the common issues are issues which are 'real or of substance'.
62. Cost savings in mass tort claims, such as in *Stanford v DePuy*¹⁷ are not 'illusory' when common issues are resolved. Class actions allow the Court to resolve common questions of law and fact. Once this is done, remaining individual issues can be resolved between the parties who have the benefit of that decision. That approach promotes both access to justice and judicial economy.¹⁸

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

63. The Court has an express power to replace an inadequate representative plaintiff at the request of class members under s 33T of the Act. The Law Council does not know of any example in which an inadequate representative has caused a class action to fail.¹⁹ It is not for the defendant to complain for the class and if a class representative appears unwilling or unable to continue, or is able to settle his or her own claim, a procedure under s 33W is available to offer other class members the opportunity to take over. Alternatively, the Court may of its own motion under s 33ZF take action where it is necessary or appropriate to ensure that justice is done in the proceeding.
64. The Law Council notes that any suggestion that representative parties are 'persons of straw' is contradicted by evidence.²⁰
65. The onus should not be placed on the representative plaintiff to prove they can adequately represent class members. If a defendant thinks that this might be the case, the defendant can take up this challenge a trial. The alternative will merely fuel expensive and wasteful interlocutory disputes.

¹⁴ *Cash Converters International Ltd v Gray* (2014) 223 FCR 139.

¹⁵ *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 404-405.

¹⁶ (1999) 199 CLR 255, 267.

¹⁷ *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452.

¹⁸ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27 (20 February 2003), [41] - [42].

¹⁹ Finkelstein J expressed concerns about the adequacy of representation in *Kirby v Centro Properties Limited* [2008] FCA 1505 but these concerns were not borne out in practice, the claim having eventually settled for \$150m.

²⁰ Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes – Second Report' (Australian Research Council, September 2010), 46-49.

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?

66. The issue of ‘competing class actions’ has been the subject of two recent Federal Court decisions: *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 per Beach J and *Cantor v Audi Australia Pty Limited (No 2)* 2017] FCA 1042 per Foster J. The approaches of each judge are remarkably different. This may arise because of a different characterisation of the issue.
67. First, two or more class actions making the same claims against the same defendant can be seen as ‘competing’ with each other to the extent that each class claim may be seen as ‘covering the field’ or ‘competing for the sole right’ to sue. Alternatively, such claims may be seen as complementary in so far as they are pursuing similar outcomes for similar persons in response to the same allegations of wrongdoing.
68. The resolution of the perceived problem of the ‘competing class action’ is compounded when one considers that there are many different examples of competing or complementary class actions. These are identified in the *Federal Court Case Management Handbook* at [13.119].²¹ There may be two open classes, one closed and one open, different claims made or different claim periods, differing class membership definitions, a different range of common issues, different defendants or the claims may even be filed in different jurisdictions.
69. The Law Council does not accept that similar class actions against the same company are necessarily competing with each other. It will depend on the nature of the claims, the class definition and the circumstances of the filing of the actions. While a single defendant should not be burdened by a multiplicity of actions, two or three similar claims must be better than facing all those that might flow if the class action facility was not available.
70. The resolution is, yet again, to encourage the courts to deal with the issue by active case management.
71. Justice Beach, in the first of the decisions mentioned above, identified five realistic options available to deal with two competing class actions:
- consolidating them into a single proceeding;
 - permanently staying one of the proceedings;
 - declassing one of the proceedings under s 33N;
 - closing one class, leaving the other open, and trying the two proceedings together; and
 - trying both proceedings as overlapping open class actions.²²
72. Given that each class in Bellamy’s was, in part, formed by class members actively choosing one firm and litigation funder over another, Justice Beach accepted that it was not open to him to accede to the defendant’s request that he stay one claim and allow the other to proceed. He determined to allow both proceedings to remain on foot and to close one class while allowing the other to remain open. His Honour held that active case management would mitigate the risk of the defendant facing an unfair

²¹ Law Council of Australia, *Federal Court Case Management Handbook*, December 2014.

²² *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017), [9].

duplication of costs and that in any case staying one of the proceedings could itself lead to multiple proceedings with duplicative costs.²³

73. In the class actions against Volkswagen, Audi and Skoda, Justice Foster took an alternative view. He held that it was inappropriate to impose a 'one size fits all' approach to Part IVA proceedings and he determined that permitting the two proceedings to run in parallel had not resulted in undue cost, confusion or delay.²⁴ His Honour declined to close or stay either proceeding, permitting both to continue in parallel.
74. The Court should be left to determine whether two or more proceedings can reasonably be conducted parallel or not.
75. To suggest that it is acceptable stay or close a proceeding that is not an abuse of process and that has been brought by significant numbers of people and informed entities because there is a similar claim brought by a group using different lawyers and funded by an entity with a different fee structure to the claim filed second in time, does not sit well with the Law Council.
76. The Law Council is also concerned that the rights of informed persons who elect to contract with a litigation funder should not be so easily undermined by judicial election. If the court was to determine to stay one proceeding in favour of another and to allow those who are class members of the stayed proceeding to opt out of it, and, without obligation to the former funder, remain in or opt in to the other, the court will be, in effect, making unprecedented inroads into the rights of citizens to contract freely. Such a decision will undermine the ambitions of the class whose claim is stayed as their collective pooling of effort will be gutted.
77. Justice Lee of the Federal Court has recently noted, extra judicially, that '*it seems to me quite plain that a Court can make orders creating or modifying rights or liabilities in the exercise of discretionary power, provided the power is exercised according to legal principle and by reference to an objective standard.*'²⁵ He went on to say:
78. First, as I have pointed out, the starting point is that, according to the Full Court in *Brookfield Multiplex*, the promises given by funded group members were part of a pooling of contributions and the provision of their individual promises for the purposes of an integrated scheme and the benefit of scheme members and, ultimately, for funder's benefit. If the litigation funding arrangement is seen as a common enterprise with a shared economic purpose, any interference or tinkering with funding arrangements can arguably be characterised as a readjustment of the scheme to the benefit of one scheme participant and to the detriment of another.
79. Secondly, no doubt regard must be had to the foundational and elementary matter well expressed in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 182-3, where Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said:

... where a man signs a document knowing that it is a legal document relating to an interest in property, he is in general bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms

²³ *Ibid* [46].

²⁴ *Cantor v Audi Australia Pty Limited (No 2)* [2017] FCA 1042 (1 September 2017), [74]-[75].

²⁵ Justice M B J Lee, *Varying Funding Agreements and Freedom of Contract: Some Observations*, speech delivered on 1 June 2017 to a conference, IMF Bentham Class Actions Research Initiative with UNSW Law: Resolving Class Actions Effectively and Fairly.

by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.

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

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?

81. Apart from disclosure, as previously discussed, the Law Council can see no reason why the involvement of a litigation funder should impact on any aspect of a class action. It is the same for the settlement approval process.

Chapter 7: Settlement

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

Court appointment of a third-party guardian or contradictor

82. In *Kelly v Wilmott Forests Ltd*²⁶ Murphy J exercised his discretion to appoint independent counsel as a contradictor because the settlement proposal before him appeared to be of dubious benefit for some group members. Similarly, in the Victorian Supreme Court case of *Re Banksia Securities Limited (Rec & Mgr Apptd)*²⁷ Robson J made orders to appoint a contradictor as part of the settlement approval process.
83. The power to appoint contradictors is already available. The Law Council expect that the Court will exercise its discretion when sensible to do so. It is not a power that should be imposed.

Requirement for defendant's lawyers to submit evidence as part of the settlement approval process

84. Requiring defendants to make submissions may just duplicate the work undertaken by the plaintiff's lawyers. If a judge, in all the circumstances, considers it necessary to have the defendant's lawyers submit evidence, then the judge can exercise his/her discretion to make orders to this effect. This should be left as a matter for the judge.

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

85. The Law Council is of the view that a review of legal costs by an independent expert, particularly where the legal costs are substantial, should be part of a settlement approval. While there is no evidence that experts in costs have been biased, the Law Council suggests that the Court give weight to any concern that the plaintiff firm briefing the expert appeared to be using a particular expert on costs with regularity.
86. The Law Council is concerned about excessive fees being charged by funders. The courts are encouraged to take steps to understand the risks faced by funders. It is important to note that the risk must be assessed at the outset and evidence concerning

²⁶ *Kelly v Wilmott Forests Ltd (No 4)* (2016) 335 ALR 439.

²⁷ *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148.

risk, the time value of money and the competitive market be given by an expert in risk. The obvious problem is that such evidence will be expensive and its value must be assessed on a case by case basis.

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

87. The amount of legal costs and funding fees should publicly be available.

Merits of individual claims

88. The Law Council does not have any evidence that settlement distribution schemes have been managed.

Court supervision of settlement distribution schemes

89. The Law Council notes the favourable comments made by the Courts when supervising settlement distribution schemes, including:

- *Downie v Spiral Foods Pty Ltd & Ors* [2017] VSC 7, [11];
- *Downie v Spiral Foods Pty Ltd & Ors* [2016] VSC 411, [14], [18];
- *Matthews v Ausnet Electricity Services Pty Ltd (Formerly SPI Electricity Pty Ltd) (Ruling No 42)* [2016] VSC 394, [19] – [22];
- *Matthews v AusNet Electricity Services Pty Ltd (Ruling No 41)* [2016] VSC 171, [37]-[38];
- *Stanford v DePuy International Ltd (No 7)* [2017] FCA 748, [20] –[24],[26],[28].

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

90. The Law Council makes no comment on this issue.

Chapter 8: Contingency fees

91. The Law Council makes no comment on this topic.

Contact

92. The Committee would welcome the opportunity to discuss the submission further. Please contact Mr John Farrell, Policy Lawyer, of the Law Council of Australia on john.farrell@lawcouncil.asn.au or (02) 6246 3714 in the first instance.