SUBMISSION TO VICTORIAN LAW REFORM COMMISSION INQUIRY INTO LITIGATION FUNDING AND GROUP PROCEEDINGS

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In response to the questions set out at page xiv of the Victorian Law Reform Commission *Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper*, the submitter makes the following submissions and appends (1) possible draft rules of court/legislative changes to the *Supreme Court Act 1986* (Vic) and (2) questions for consideration for LIV for review and discussion.

General

Access to Justice

Access to justice is an important goal to keep in mind in relation to any legislative or regulatory changes to class actions and litigation funding. Certainly the evidence suggests that the appearance of class actions and litigation funding have increased the number of claims brought by citizens who would otherwise be unable to access the legal system.[2] This would appear to have brought greater balance between the rights and interests of ordinary citizens of modest means and those with comparatively large resources (including both corporations and government).[3] This should not be generally discouraged by regulation that might make such access uneconomic.[4] Further, a reasonable level of access to the courts can be argued to be an antecedent or necessary assumption of the concept the rule of law.

On the other hand, frivolous or vexatious claims[5] are not to be encouraged as these waste the court's time.[6] It is also the case that protection of litigants' interests in tripartite funding contracts may require some additional consideration, especially in particular situations.

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In 2010 the writer consulted to the private profession in relation to class action proceedings and is currently on a team of academics partly funded externally by the private profession in relation to researching access to justice issues.

[2] Hon Justice Murphy and Vince Morabito, 'The first 25 years: Has the class action regime hit the mark on access to justice?' Ch 3 in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (Ross Parsons Centre 2017).

[3] V Morabito and J Eckstein, 'Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study' (2016) 35 *Civil Justice Quarterly* 61.

[4] Information from the funders themselves will be important in relation to assessing what is economic or otherwise.

[5] *Civil Procedure Act 2010* (Vic) s18.

[6] On the other hand again, in some cases, some claims, whilst uncertain under current law, may serve a useful purpose in pushing boundaries and developing the common law The classic example is of course *Donoghue* v *Stevenson* [1932] UKHL 100.

These are all considerations that need to be balanced in a fair manner.

Scope of terms of reference

Some of the matters noted in this submission may fall outside the terms of reference but have been included based on relevance to issues that are within the terms.

Forms of regulation

In any move for further regulation of litigation funding and group proceedings, regulatory avenues may include legislation, rules of court (including practice notes) and other types of softer regulation including for instance, ethics guidelines published by the Law Institute of Victoria. It is necessary to examine the status of these:

Rules of Court

Under s 25 of the *Supreme Court Act 1986* (Vic) (as amended) the Judges of the Supreme Court (not including any reserve Judge) may make Rules of Court for or with respect to various matters set out in s 25(1)(a) through(f).

Under s 25(2) the power to make Rules of Court extends to the repeal and amendment of Rules even if they have been ratified, validated and approved by the Parliament.

Under s 26 the power to make rules of court may be exercised by a majority of the Judges (not including any reserve Judge, Associate Judge or reserve Associate Judge) present at a meeting held for that purpose

Under s 27 such Rules are subject to disallowance by the Parliament.

Practice Notes

Supreme Court Act 1986 (Vic) s 25(1) (f) refers to the power to make Rules of Court in relation to any matter relating to the practice and procedure of the Court.

According to the Supreme Court website, practice notes provide information about particular aspects of the Court's practice, procedure and organisation and 'they sit alongside the Rules of Court to provide guidance in relation to the conduct of proceedings'

The *Oxford Australian Law Dictionary*[7] defines a practice note, inter alia, as

> A statement issue to the profession by a court or tribunal to advise practitioners of the way that a particular court will handle the business brought before it. Practice notes operate alongside the Rues of Court as a refinement of those rules.[8]

[7] Trischa Mann (ed) *Oxford Australian Law Dictionary* (second edition 2013).
[8] Ibid 559.

The *Butterworths Concise Australian Legal Dictionary*[9] defines practice notes as:

> Written notes of practice decisions made by the courts

It defines 'practice decisions' as:

> A rule or direction regarding practice and procedure that is made by the judges of the court under a rule making power that is conferred by statute.

It would appear to follow that Practice Notes are actually either effectively themselves Rules of Court made pursuant to s25 with the force of delegated legislation or, if not made pursuant to s25, have no force in law (but obviously reflect the court's preferred approach to practice issues).

Ethics guidelines published by the Law Institute of Victoria.

As stated on the LIV website, LIV Ethics Guidelines are published with the approval of the LIV Council, after rigorous research, drafting and consultation[10]. As stated on the Guidelines they do not have the force of law. [11]

Choice of regulation

It is noted that Rules of Court have the advantage that judges who are expert in the area can amend these as circumstances change however there are also some issues that may involve policy questions which may need the consideration of the legislature or the certainty of legislation.

Responses to questions posed by VLRC

Chapter 3: Current regulation of litigation funders and lawyers

1 What changes, if any, need to be made to the class actions regime in Victoria to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?

Cost burdens

Group proceedings

In relation to cost burdens, there is judicial authority that the power of courts to approve class action settlements also connotes a power to approve the reasonableness of legal costs.[12] This has recently been extended to approval of the reasonableness of

[9] Peter Nygh and Peter Butt (eds) *Butterworths Concise Australian Legal Dictionary* (Butterworths 1998) 341.
[10] LIV website https://www.liv.asn.au/Professional-Practice/Ethics/Ethics-Guidelines
[11] LIV Conflict of Interest Guidelines https://www.liv.asn.au/LIVPublicWebSite/media/150th-Anniversary-2009/LIV%20Documents/20160915_GDL_ConflictOfInterest_FINAL.pdf
[12] *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 [47] *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311 [42], *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439 ('*Willmott*') [331]

funding fees and commissions and agreements[13]. In *Money Max Int Pty Ltd v QBE Insurance Group Ltd* ('*Money Max'*)[14] the Full Court of the Federal Court set out a list of non-exhaustive considerations to approve a funding fee as follows:

> (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed.
>
> (b) the information provided to class members as to the funding commission.
>
> (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market.
>
> (d) the litigation risks of providing funding in the proceeding.
>
> (e) the quantum of adverse costs exposure that the funder assumed.
>
> (f) the legal costs expended and to be expended, and the security for costs provided, by the funder.
>
> (g) the amount of any settlement or judgment.
>
> (h) any substantial objections made by class members in relation to any litigation funding charges.
>
> (i) class members' likely recovery 'in hand' under any pre-existing funding arrangements.[15]

These appear to be sound principles for review of funding agreements. There is some authority that other considerations might be: appropriateness in general,[16] level of expenditure undertaken by the funder[17] (which may overlap with (f) but might also include expenditures in the nature of borrowing costs), proportionality to risk[18] and level of risk in other proceedings funded by the funder.[19] It is submitted that other relevant matters might be evidence as to cost of capital and reasonable (but not excessive) return on capital and reasonableness in all the circumstances of caps, limits, sliding scales (see VLRC question 19 below). Public interest or social utility of proceedings might be a factor in a few cases though generally the connection between public interest and quantum of lender's remuneration is not clearly apparent.[20] A last

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[332]. And see generally *Woolf v Snipe* (1933) 48 CLR 677, 677-678 ; [1933] ALR 266 (Dixon J) [332] and *In Redfern v Mineral Engineers Pty Ltd [*1987] VR 518 at 52 (Tadgell J) (Cited by Murphy J in Willmott)

[13] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* ('*Money Max'*) (2016) 245 FCR 191. See also *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433; *Camping Warehouse Pty Ltd v Downer EDI Ltd* [2016] VSC 784.

[14] (2016) 245 FCR 191

[15] *Money Max'*) (2016) FCR 191 [80].

[16] Ibid [119] [120]. Murphy J referring to Flick J in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277 at [38] and [42]

[17] Ibid [8]

[18] Ibid [117][118]

[19] Flick J in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277 at [38] and [42]

[20] As to public interest litigation see Damian Grave, Ken Adams, Jason Betts, *Class Actions in Australia* (Thomson Reuters 2nd Edition 2012) 754-761 and Peter Cashman, *Class Action Law and Practice* (Federation Press 2007) 459-461.

general consideration is encouraging access to justice[21] for meritorious (but not unmeritorious [22]) claims.[23]

There might be a case for codifying all or some of the above principles in either Court Rules or appropriate statutory provisions.

Arguments in favour are that the above guidance by the courts is federal rather than Victorian law at this stage. It could be questioned in Victoria or overruled by higher courts which creates uncertainty.

The High Court has not considered these matters but has in the past indicated some possible unwillingness to review funding agreements.[24]

In *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited (No 3)*[25] Gordon J noted that it was not for the Court to express a view about the commercial desirability of the quantum paid to the litigation funder under the arrangements, and there was no reason shown to withhold approval of the settlement in that case because of the proportion of the settlement amount to be received by the litigation funder rather than by the group members themselves. Her Honour noted:

> In other cases it might be necessary for separate justification of the amounts paid to a litigation funder before the Court approves a settlement but that does not appear necessary in this instance. The amounts payable from the distribution to the original group members appear to have been agreed to between sophisticated parties with substantial means and neither they, nor the registered group members, have raised objection[26]

It has also been pointed out by one former judge of the Federal Court that courts may well be able to *value* a service such as litigation funding.[27]

Further, though notions of contractual freedom and certainty deserve respect, the notion of power to vary a contractual term for unfairness has been accepted by the federal legislature in the *Australian Consumer Law*.[28]

Certainly this is a fast moving and evolving area and, whilst some codification of the court's power to vary a fee in some circumstances might be useful, overly detailed legislative guidelines on such issues might be an inflexible tool.

Funded actions by insolvency practitioners

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[21] See Bernard Murphy & Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30 *Melbourne University Law Review* 399.
[22] Victorian Law Reform Commission, *Civil Justice Review* Report (2008) 77, 182.
[23] There may be value judgments to be made about these issues. A meritorious claim might generally be seen as a claim likely to succeed based on the current law but it could be argued that some claims might also be meritorious where they develop existing law.
[24] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 [92].
[25] [2012] VSC 625.
[26] Ibid [20].
[27] Honourable Ray Finkelstein, 'Class actions: The good, the bad and the ugly' Ch 19 in Grave and Mould above n 2, 432. It is notable that valuation cases – of land at least - are sufficiently common that the Supreme Court of Victoria has a special list for such cases: http://www.supremecourt.vic.gov.au/home/law+and+practice/specialist+areas+of+law/valuation+compensation+and+planning
[28] *Australian Consumer Law* ss23-25 (*Competition and Consumer Act 2010* (Cth) - Schedule 2)

In relation to funded claims by companies in liquidation the courts have already taken a supervisory role in relation to liquidators entering funding agreements because under s477(2B) of the *Corporations Act 2001* (Cth) agreements of longer than 3 months duration require court approval. In Re *ACN 076 673 875*[29] Austin J identified the following as a non-exclusive list of considerations relevant to that issue:

> (i) the nature and complexity of the cause of action;
>
> (ii) the amount of costs likely to be incurred in the conduct of the action and the extent to which the financier is to contribute to those costs;
>
> (iii) the extent to which the financier is to contribute towards the costs of the defendant in the event that the action is not successful, or towards any order for security for costs by the Court before which the action is to be heard;
>
> (iv) the extent to which the liquidator has canvassed other funding options;
>
> (v) the level of the financier's "premium";
>
> (vi) the risks involved in the claim; and
>
> (vii) the liquidator's consultations with the creditors of the company[30].

In *Stewart, in the matter of Newtronics Pty Ltd* [31] Gordon J identified a number of key principles relevant to the exercise of the Court's power under s 477(2B) (citations omitted):

> (1) the court does not simply "rubber stamp" whatever is put forward by a liquidator…
>
> (2) a court will not approve an agreement if its terms are unclear.
>
> (3) the role of the Court is to grant or deny approval to the liquidator's proposal. Its role is not to develop some alternative proposal which might seem preferable.
>
> (4) in reviewing the liquidator's proposal, the task of the Court is "[not] to reconsider all of the issues which have been weighed up by the liquidator in developing the proposal, and to substitute its determination for his in … a hearing de novo [but] … simply to review the liquidator's proposal, paying due regard to his or her commercial judgment and knowledge of all of the circumstances of the liquidation, satisfying itself there is no error of law or ground for suspecting bad faith or impropriety, and weighing up whether there is any good reason to intervene in terms of the "expeditious and beneficial administration" of the winding up."
>
> The Court's approval is not an endorsement of the proposed agreement but is merely a permission for the liquidator to exercise his or her own commercial judgment in the matter;
>
> (5) further, in judging whether or not a liquidator should be given permission to enter into a funding agreement (whether retrospective or not), it is important to ensure,

[29] (2002) 42 ACSR 296
[30] Ibid at [28]
[31] [2007] FCA 1375

inter alia, that the entity or person providing the funding is not given a benefit disproportionate to the risk undertaken in light of the funding that is promised or a "grossly excessive profit"

(6) generally, the Court grants approval under s 477(2B) of the Act only where the transaction is the proper realisation of the assets of the company or otherwise assists in the winding up of the company.[32]

Approval of funding agreements has been refused in some cases.[33] In *Fortress Credit Corp (Australia) Pty Ltd v Fletcher and Others*[34] the NSW Supreme Court of Appeal upheld an appeal against the approval of a funding agreement.

There is also authority that liquidators have a heavy duty to disclose to the Court all facts material to an application for funding agreement.[35]

In *Young v Thomson (formerly trustee of the property of Young)*[36] a litigation funding agreement was set aside under s178 of the *Bankruptcy Act 1966* (Cth) (which provides that if a bankrupt, a creditor or any other person is affected by an act, omission or decision of the trustee, he or she may apply to the Court, and the Court may make such order in the matter as it thinks just and equitable).

Media reports suggest that a settlement in a recent funded action has highlighted some issues in relation to fees in litigation funding in claims by companies in liquidation.[37] Certainly litigants need to be clear on what the total cost of funding and legal fees may be (see below).

Summary

There thus appears to be a discretion of the court to review and vary funder's fees in relation to group proceedings whereas, though there is a review as part of approving an agreement, the situation may be somewhat less flexible in insolvency claims. In the latter case however, agreements have been set aside in their entirety[38] so a power to review and vary rather than set aside an agreement might actually provide more flexibility. Though notions of contractual freedom and certainty deserve respect, the notion of discretionary power to vary a contractual term for unfairness has been accepted by the federal legislature in the *Australian Consumer Law*.[39] Courts also clearly have the capacity to value a service. There are common law principles set out above, by reference to which such contracts or terms can be reviewed or assessed and,

[32] Ibid at [26]
[33] *Ascot Vale Self Storage Centre Pty Ltd v Wallace-Smith* [2013] VSC 519
[34] (2015) 318 ALR 597
[35] *CBA Corporate Services (NSW) Pty Ltd Re ZYX Learning Centres Ltd (Recs and Mgrs apptd) (in liq) v Walker* [2013] FCA 243 [8]
[36] [2017] FCAFC 140
[37] Ben Butler, 'Spotlight on legal fees as Huon workers miss out on $5m payout". The Australian 26 August 2016.
[38] Ibid
[39] *Australian Consumer Law* ss23-25 (*Competition and Consumer Act 2010* (Cth) - Schedule 2)

while the power to vary should be confirmed, these should probably be left undisturbed.

It is suggested that Parliament legislate to make it clear that the Court has power to review and, if appropriate, vary a funding fee. This would not mean that court approval is required for settlement of non-group funded proceedings but would give the court more flexibility to intervene on fees if necessary. There is a question about who should have standing to seek a review at what stage in the proceedings. It is not clear that a defendant necessarily has an interest in the issue. Who should have standing and when could perhaps be left to courts to determine

A formulation that restricts the power to vary to existing situations of group proceedings or claims by a liquidator may be:

Review of funding fee

(1) Where a power is given under any act or law to approve a litigation funding agreement (including a power under s33V of this Act or under a law in relation to claims by an insolvent entity or estate), the Court has power by force of this section to review the appropriateness and reasonableness of the funding fee, and if inappropriate and unreasonable, to vary that funding fee, commission or other charge of the third party litigation funder.
(2) In exercising the power in (1), the Court will have regard to any matters that it considers are relevant to the appropriateness and reasonableness of the fee.

It is not entirely clear whether the above provision would raise any constitutional, jurisdictional or conflict of law issues. An alternative may be:

Review of funding fee

(1) In any proceeding funded by a third party litigation funder, the Court has power to review the appropriateness and reasonableness of a funding fee, and if inappropriate and unreasonable, to vary that funding fee, commission or other charge of the third party litigation funder.
(2) The court may make an order in relation to (1) on application by a party or on its own motion.
(3) In exercising the power in (1), the Court will have regard to any matters that it considers are relevant to the appropriateness and reasonableness of the fee.

The second provision would appear to apply to any third party funded litigation (ie not just group and insolvency actions), which is wider than current law.

Contradictors

Another safeguard in relation to both legal fees and funding fees is greater use of contradictors or guardians appointed by the court who can question the fairness of fees and settlements generally.[40] The power to do appears to exist under *Supreme Court 1986* (Vic) s33ZF however that section could perhaps be amended to give some particularity to the sort of orders a court may make (see below and Schedule A).

[40] See Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347, 380 and Michael Legg 'Class Action Settlements in Australia - The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590.

2 What changes, if any, need to be made to the regulation of proceedings in Victoria that are funded by litigation funders to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?

Protection of litigants may require some regulation of the relationship between litigants and funders.

Duty of utmost good faith

To that end the submitter proposes the introduction of a provision for a statutory obligation of good faith in litigation funding contracts (which obligation would be mutual – both funder and litigator to owe the duty to each other).[41] Though ideally this should be done through federal law there may be some uncertainty as to the extent of the Commonwealth constitutional power over litigation funders.[42] A state law is therefore desirable.

Duty of good faith - rationale

Funders are not lawyers so that a fiduciary duty to the litigant is not appropriate. Funders are probably more analogous to insurers.[43] They (a) are third parties who fund a litigant in an action; (b) through their contractual arrangements with the litigant exercise some control over the litigant and the proceedings; (c) may provide an indemnity for adverse costs and (d) have a financial interest in the outcome of proceedings. This 'insurance analogy' has some judicial support[44] though it is not universally accepted.[45]

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[41] In relation to good faith duties Professor Waye has stated: 'The characterization of the relationship between funder and claimholder as non-fiduciary does not exclude the imposition of an implied duty of good faith in respect of the exercise of the funder's powers under the funding agreement either. Although a funder may not be expected to sacrifice its own interests in favour of a claimholder as a fiduciary, because of the high degree of reliance reposed in the funder, it will be appropriate to impose a duty upon the funder to regard the interests of the claimholder as well as its own and to require the funder to act accordingly when exercising particular powers, for example, the power to negotiate settlement.' See Vicki Waye 'Conflicts of Interest Between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 256-257

[42] It is not clear that litigation funding is 'insurance' [Constitution s 51(xiv)] or 'banking' [s 51(xiii)]. The trading and financial corporations power [Constitution s51(xx)] might have some relevance. The most likely power might be Constitution s51 (xxxix) in that regulation of litigation funding could be seen as a matter incidental to the execution of power vested in the federal judicature.

[43] John Walker, 'Policy and Regulatory Issues in Litigation Funding Revisited' (2014) 55 *Canadian Business Law Journal* 85, 86. See also Michael J Duffy, "Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory" (2016) 39(1) *University of New South Wales Law Journal* 165, footnote 189.

[44] Waye notes President Mason's citing of the insurance analogy in *Campbell's Cash and Carry v Fostif NSWCA* (2005) 63 NSWLR 203, 225 [82] and Justice Ipp's approach in *Project 28 Pty Ltd v Barr* [2005] NSWCA 240, [70]–[72]: 'Conflicts of Interests', above n 40, 242. In the latter case, his Honour noted that the law had already countenanced insurers' absolute control over proceedings on the ground that that control was tempered by a duty on the part of the solicitors and the insurers to conduct the proceedings with due regard to the nominal claim holder's interests.

[45] Grave, Adams and Betts point to differences arguing that (a) insurers are usually totally indemnifying or seeking to recover an indemnified loss through subrogation rights so that in general their financial interest in the litigation is greater than a funder; (b) funders typically exercise greater control of litigation than insurers; and (c) funders usually have rights to terminate the agreement at will whereas insurers usually do not: see Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Thomson Reuters, 2nd ed, 2012) 860–1.

Some arrangements between lawyer and funder state that in a situation of conflict the litigant's instructions to the lawyer override the funder's instructions to the lawyer.[46] This however may be subject to the litigant's obligation to act consistently with his/her agreement with the funder which includes the obligation to follow all reasonable legal advice and fully co-operate with the funder and lawyer.[47] There may also be agreement between the lawyer and funder that the lawyer-funder agreement overrides any lawyer-litigant agreement which may cause uncertainty.[48] A lawyer may have incentives or interests in pleasing the funder as the latter may be a source of work.[49] Thus the lawyer may be tempted to act in the funder's interests which though often coincident with the litigant's interest, may occasionally diverge from or conflict with the litigant's interests.

These issues could be partly resolved, and conflicts somewhat harmonised by making funders subject to a statutory duty of good faith in the same manner as insurers are under *Insurance Contracts Act 1984* (Cth) ss 13–14. A statutory duty could not be contracted out of. Such a duty would fall short of a fiduciary duty in that it would not require the funder to prefer the litigant's interests over its own interests, requiring rather, regard to the interests of both parties.[50] In the insurance context this duty has been developed somewhat in Australia to include having regard to the legitimate interests of the litigant (as well as to the insurer's own interests), fairness, decency and honesty and full and frank disclosure.[51] Finkelstein J has noted that the obligation may be incapable of precise definition but that good faith may connote an absence of bad faith.[52]

Such a duty,[53] like the insurance duty, should be mutual so that it would also require the litigant to fully disclose the relevant facts of the dispute, including any weaknesses in the case, to the Funder who in turn has overarching obligations to the court (to further the administration of justice, act honestly and not make frivolous claims

[46] See Duffy above n 42, footnote n 156.
[47] Ibid.
[48] Ibid.
[49] Of course a desire to get repeat work is not to be criticised in itself. It may require an informed consent however.
[50] *Overlook v Foxtel* (2002) Aust Contract Reports 90-143, 91,970
[51] See *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1. For other relevant case law and commentary see Geoffrey R Masel, *Australian Insurance Law* (annotated loose-leaf), 2005-present, LexisNexis Butterworths, [10,305.10]-[1305.20].
[52] See *Pacific Brands Sport & Leisure v Underworks Pty Ltd* (2005) 12 Aust Contract Reports 90-213, para 65. Per Finkelstein J:

> *I appreciate that the standard of conduct imposed by a covenant of good faith is incapable of precise definition. That does not produce an unworkable obligation. There are many instances to be found in the law of contract and elsewhere of obligations that are incapable of clear definition. Reference need only be made to the obligation of reasonableness that pervades so much of our law. Be that as it may, a good starting point in any particular enquiry is to see whether the impugned conduct (in this case a termination) was motivated by bad faith, or was for an ulterior motive or, if it be any different, whether the defendant acted arbitrarily or capriciously. It may also be proper to investigate whether the impugned act was oppressive or unfair in its result. If any of these things can be established then, in all probability, the obligation will be breached and the resultant act (or omission) of no effect.*

[53] See also generally, Geoffrey Kuehne 'Implied Obligations of Good Faith and Reasonableness in the Performance of Contracts: Old Wine in New Bottles?" (2006) 33(1) *University of Western Australia Law Review* 63.

lacking a proper basis[54]) so that it will be less likely that flawed claims will be brought before the courts – which could otherwise waste the court's time and resources.

Appropriate provisions may be:

> **The duty of the utmost good faith** [based partly upon *Insurance Contracts Act 1984* (Cth) s 13
>
> A litigation funding contract is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
>
> **Parties not to rely on provisions except in the utmost good faith** [based partly upon *Insurance Contracts Act 1984* (Cth) - sect 14]
>
> If reliance by a party to a third party litigation funding contract would be to fail to act with the utmost good faith, the party may not rely on the provision.
>
> In deciding whether reliance by a litigation funder on a provision of the third party litigation funding contract would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the litigant.

Duty to court?

A statutory (or even fiduciary) duty of funders to the court has occasionally been advocated. It is noted however that:

(a) unlike lawyers, funders are not officers of the court;
(b) insurers, who are in a similar position vis-à-vis the court (see above) have no such statutory duty and;
(c) in Victoria both funders and insurers already have certain overarching duties to the court set out in the *Civil Procedure Act 2010* (Vic) ss10-27.

Lawyer's duties and control of proceedings

Further, in the UK, the Association of Litigation Funders of England and Wales Code of Conduct[55] provides inter alia that:-

A Funder will:

- not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;
- not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder.

[54] *Civil Procedure Act 2010* (Vic) ss 10, 16-18
[55] Association of Litigation Funders of England and Wales *Code of Conduct*, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Code+of+Conduct+for+Litigation+Funders+(November+2011).pdf

Such provisions could be considered in Australia, however, in relation to the second, some level of overall control of proceedings by the funder[56] may be inevitable just as insurers have some control over proceedings. In *Project 28 Pty Ltd v Barr* [2005] NSWCA 240, [70]–[72] it was said that the law had already countenanced insurers' absolute control over proceedings on the ground that that control was tempered by a duty on the part of the solicitors and the insurers to conduct the proceedings with due regard to the nominal claim holder's interests. The suggested statutory duty of good faith may embed this principle in the litigation funding context.

It is thus not clear the above UK provisions are needed at this time and a duty of utmost good faith may assist in protecting litigant rights in this issue area. The provisions have not been included in the Appendix B draft legislation.

Termination of funding contract

In the UK, the Association of Litigation Funders of England and Wales Code of Conduct[57] provides inter alia that:-

> A Litigation Funding Agreement (LFA) shall state whether (and if so how) the Funder may terminate the LFA in the event that the Funder: (i) reasonably ceases to be satisfied about the merits of the dispute; (ii) reasonably believes that the dispute is no longer commercially viable; or (iii) reasonably believes that there has been a material breach of the LFA by the Litigant and that the LFA **shall not establish a discretionary right** for a Funder to terminate a LFA in the absence of those circumstances.

Such provisions may be useful in Australia though it is unclear whether unfair termination is currently a problem or not. The provisions have not at this stage been included in the Appendix B draft legislation.

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

Only insofar as specific legislative provisions that affect funded actions apply. See Appendix B.

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

See submission above in relation to contradictors or guardians (question 1).

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?

There may be scope for focusing and developing compulsory continuing legal education on the particular conflicts problems that arise in class actions and under third party litigation funding and how these should be dealt with. There is also scope

[56] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions', Ch 10 of Grave and Mould (eds) above n 2 , 211.
[57] Ibid.

for strengthening legal complaints bodies, their disciplinary powers and ability to give redress.[58]

Conflict of Interest Guidelines are published by the Law Institute of Victoria[59] and these could be expanded to set out with more specificity how lawyers should recognise and maintain practices and procedures to manage conflicts of interest in group litigation.

At this point however there is some legal uncertainty as to what the precise duties to non-client group members are. They presumably include the common law duty of care but it is yet to be determined by the courts whether they include a fiduciary duty.[60] This problem will loom larger if the 'common fund' doctrine leads to more open class actions and more unrepresented group members. The Federal Court Class Actions Practice Note[61] requires that

> Any costs agreement or litigation funding agreement should include provisions for managing conflicts of interest (including of "duty and interest" and "duty and duty") between any of the applicant(s), the class members, the applicant's lawyers and any litigation funder.
>
> The applicant's lawyers have a continuing obligation to recognise and properly manage any such conflicts throughout the proceeding.[62]

This is an area that will await decisions by the courts though in the meantime may be an area that requires further research. The ability to deal with conflicts of duties between clients is also complex and may require further research.

Chapter 4: Disclosure to plaintiffs

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

Lawyers should be required to use their best endeavours to do this however unless funders are similarly obligated by law it may be difficult for lawyers to do this (the lawyer has no necessary control over the funder).

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[58] Australian Government Productivity Commission *Access to Justice Arrangements* Inquiry Report Volume 1 No. 72, 5 September 2014, Australian Government Productivity Commission, 187.
[59] See LIV website https://www.liv.asn.au/LIVPublicWebSite/media/150th-Anniversary-2009/LIV%20Documents/20160915_GDL_ConflictOfInterest_FINAL.pdf
[60] Degeling and Legg have argued that there is a fiduciary duty to group members: See Simone Degeling and Michael Legg, 'Fiduciary obligations of lawyers in Australian class actions: conflicts between duties' (2014) 37(3) *UNSW Law Journal* 914, 917.
[61] Federal Court Class Actions Practice Note (GPN-CA) 25 October 2016.
[62] Ibid [5.19], [5.10].

Key Facts Sheet

Legislation mandating a Key Facts standard form disclosure document (analagous to that prescribed for insurance contracts in s 33D of the *Insurance Contracts Act 1984* (Cth)) should be considered for all litigants who contract with the funder. This would need to be supplied before a person contracts with a funder. It would set out litigation funding charges in a simplified form and key conditions. This would protect consumers and enhance competition by reducing asymmetric (unequal) information and allowing different funders' charges to be easily compared.

Given that litigation funding is still developing and the potential problems between funders and litigants have not fully emerged as complaints or cases it may be premature to prescribe all the terms of a Key Facts. Instead this matter could be left partly to later promulgation of regulations.

The issue of keeping a litigant informed of litigation funding charges may be conceptually slightly different to the issue of a lawyer keeping his client informed of likely litigation costs. The latter obligation arises under s174 of the Schedule to the *Legal Profession Uniform Law Application Act 2014* (Vic) and refers to disclosure of any significant change to anything previously disclosed including information about any significant change to the legal costs that will be payable by the client. S190 of that Act also requires a law practice to give a client, on reasonable request, without charge and within a reasonable period, a written report of the legal costs incurred by the client to date, or since the last bill.

In the case of litigation funding however the customary percentage formula may not change over the course of the litigation as it is usually contractually binding. The total dollar amount of the fee payable is unlikely to be known with any certainty until near the end of the litigation when a settlement offer is made or potential liability can be estimated. Thus it may be that there will not be a lot that a funder can add during the proceeding to what is in the costs disclosure at the outset. The focus then in the writer's submission should be on fair and clear pre contractual disclosure at the outset.

Appropriate provisions (modelled partly on 33D of the *Insurance Contracts Act 1984* (Cth)) may be:

Key Facts sheet

(1) In this section a Key Facts sheet for a third party litigation funding contract is a document that contains a clear and simple summary of :
(a) details of the funding commission and any other fees payable to the funder;
(b) clarification of whether legal fees will be in addition to funding charges;

(c) details of any indemnity for adverse costs, any indemnity for security for costs and any excess on these indemnities;

(d) details of circumstances in which the contract may be terminated;

(e) details of a dispute resolution procedure

(f) details of any other information that is required by the regulations.

Third Party Litigation Funder's obligation to provide Key Facts sheet

(1) A third party litigation funder must provide a Key Facts Sheet for a litigation funding contract to a group member in a proceeding under Part IVA of this Act.
(2) The Key Facts sheet must be provided at least 7 days prior to entry into that contract
(3) A court may on application dispense with the requirement for a Key Facts sheet if it is satisfied that a party to be funded is a sophisticated and experienced litigant.

Lawyer's obligation in relation to funding costs

A possible provision in relation to lawyers' obligations might be:

> A lawyer in a third party funded proceeding must use their best endeavours to make the litigant (their client) aware of the third party litigation funding charges and terms and conditions and has an obligation to disclose any information known to the lawyer about such third party litigation funding charges and terms and conditions.

Independent Legal Advice to Representative Party

It is appropriate, that a representative party obtain independent legal advice on that agreement. Ideally this should be from a lawyer who is not a part of the tripartite arrangement. Conflict of interest guidelines for lawyers (possibly supplementing existing guidance from the Law Institute[63]) may assist here. An attempt to summarise some of the issues in the tripartite litigation funding is appended as Schedule C. It might form a basis for discussion for guidelines to the profession though there may be some disagreement about the extent of possible conflict of interests and there is probably an issue about whether the principles apply to insurers as well.

In relation to funders, the Association of Litigation Funders of England and Wales Code of Conduct for Litigation Funders[64] states:

> A Funder will take reasonable steps to ensure that the Litigant shall have received independent advice on the terms of the Litigation Funding Agreement which obligation shall be satisfied if the Litigant confirms in writing to the Funder that the Litigant has taken advice from the solicitor instructed in the dispute;

This raises the issue of whether there are any potential conflicts for the lawyer instructed in the dispute. An alternate wording might be:

> **Independent Legal Advice**
>
> A Funder will take reasonable steps to ensure that a representative party in a funded proceeding shall have received independent advice on the terms of the third party litigation funding agreement prior to executing same.

7 In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?

[63] See LIV above n 58.
[64] The Association of Litigation Funders of England and Wales above n 54.

Funded proceedings other than class actions are generally likely to be large claims, typically in the millions,[65] as these are more economic to run. Though there are exceptions, the litigants in such cases are more likely to be business people, corporations and insolvency professionals. Nevertheless a Key Facts may still assist even if litigants are sophisticated and repeat players.[66] It may be that in an insolvency situation, creditors may ask a liquidator or a trustee for a copy of such Key Facts Sheet.[67] This may be an area for monitoring before changes are made. Certainly however the requirement for independent legal advice (as for representative parties) needs to be considered.

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?

See above in relation to Key Facts Sheets.

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?

In relation to class members who are clients the Australian Solicitors Conduct Rules 2015 made pursuant to the *Uniform Law Application Act 2014* (Vic) Act provide that:

> 7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
>
> 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

There are thus already legal obligations on lawyers in this respect.

Not all class members will be clients however so that some mandating of progress reports to class members generally seems reasonable. If the Common Fund doctrine[68] is to see non client class members effectively contribute to the costs of the funder and/or lawyers then it may be reasonable to require the lawyers to expend time in individually informing class members who are not clients of the progress of their individual cases (as discussed above, the question of lawyers' duties to unrepresented group members may require further research). While this may not be expensive in relation to common issues the problem will be that it becomes more expensive for the

[65] IMF Bentham for instance has typical minimum claim sizes for commercial litigation of $5 million, insolvency claims of $1 million and international commercial arbitration and investment treaty claims of $10 million. See IMF Bentham website http://www.imf.com.au/funding?gclid=CLnCoc6nj9YCFU4KKgodMYsMyw#what-we-fund

[66] Duffy above n 42, footnote 4.

[67] See *Young v Thomson (formerly trustee of the property of Young)* [2017] FCAFC 140 where a funding agreement was set aside, though apparently due mainly to conduct by the bankruptcy trustee rather than by the funder.

[68] See *Money Max* (2016) FCR 191

more numerous sub-group issues and even more expensive for individual issues that affect an individual's case. This then is likely to significantly raise legal costs (see below).

Chapter 5: Disclosure to the court

10 In funded class actions, should the plaintiff be required to disclose the funding agreement to the Court and/or other parties? If so, how should this requirement be conveyed and enforced?

Given that it is said that 'Sunlight is said to be the best of disinfectants'[69], it would seem that funding agreements should be disclosed. The main argument against seems to be an argument based on the insurance analogy (and a consequent argument for equal treatment of insurers and litigation funders) given the fact that insureds, apart from some situations, have no general obligation to disclose their insurance policies.[70] It is also possible that, depending on the circumstances, a funding agreement might attract legal professional privilege.[71]

On this issue the Victorian Law Reform Commission in its 2008 'Civil Justice Review' Report (the 'CJR Report') recommend that there was a need for disclosure of the existence of both litigation funding arrangements and insurance arrangements in litigation given the same potential of insurers and litigation funders to exercise control or influence over the insured or funded party in the course of a proceeding.[72]
The CJR Report recommended:

> (a) that the parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or funded party in the course of the proceeding; and
>
> (b) the court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate.[73]

In Victoria, both funders and insurers now have certain overarching duties to the court set out in the *Civil Procedure Act 2010* (Vic) ss 10–27. Under s26 of the *Civil Procedure Act 2010* (Vic), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control of which the person is aware and which the person considers, or ought reasonably consider, 'are critical to the resolution of the dispute'. An argument may no doubt be mounted that this could in some cases include insurance and funding documentation.

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[69] Louis Brandeis, *Other People's Money-and How Bankers Use It,* Cosimo Classics New York (first ed 1914, 2009).
[70] Michael Duffy, 'Disclosure by defendants of their insurance details: Elephant in the court-room for tort and other claims?' (2010) 18(3) *Torts Law Journal* 257.
[71].The argument for privilege was successful in *Global Medical Imaging Management Ltd (in liq*) [2001] NSWSC 476 but was not successful in *Lorie Najjar & Sons Pty Ltd (in liq) (No 5)* [2013] NSWSC 1336
[72] Victorian Law Reform Commission in its 2008 *Civil Justice Review Report* Pp 471 and 472.
[73] Ibid. Recommendation 86.

In NSW, funders and insurers must not by their conduct cause parties to breach the parties' duty to assist the court to further the overriding purpose of facilitating the just, quick and cheap resolution of the real issues in the proceedings (see *Civil Procedure Act 2005* (NSW) s56). The WA Supreme Court has also introduced rules requiring 'interested non-parties', such as litigation funders, to be identified to the court and parties, and to be subject to duties in relation to the conduct of the case, including a duty to cooperate with the parties and the Court and not engage in misleading or deceptive conduct.[74]

The power to do so appears to already exist under s33ZF however that section could perhaps be amended to give some particularity to the sort of orders a court may make (see Appendix A below).

The Federal Court has a detailed Practice Note on this issue which sets out the way disclosure might occur.[75]

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?

At the court's discretion. Clearly the Court needs a clear power to order this which it can use when necessary.

A possible provision might be:

> In any funded proceeding (including an appeal), if it is in the interests of justice to do so, the Court may, of its own motion or on application by a party, make an order for disclosure to the court or to any party of any third party litigation funding agreements that any party or parties have entered into, on any terms the court deems fit.

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?

Though Commonwealth prudential regulation is desirable, the current law on security for costs is already fairly flexible in dealing with this issue at state level.

Further, there appears to be a case to permit litigation funders to allow a small reasonable nominal 'excess' on their indemnity in the same way as insurers are allowed an excess on indemnity. The latter will have the effect of better aligning funders' and litigants' interests, particularly in relation to settlement discussions.[76] In settlement discussions a representative party and group members may be more likely to want to 'bat on' in court where they have no downside costs risk because they are fully indemnified. A permitted excess would also have the effect of discouraging parties from bringing unmeritorious or frivolous claims.[77] Though the spectre of liability for adverse costs orders as a useful disincentive for frivolous or vexatious

[74] See *Rules of the Supreme Court 1971* (WA) O 9A R1 and R2).
[75] Federal Court *Class Actions Practice Note* 25 October 2016 [6.4], [6.5], [6.6], [6.7]
[76] See generally Duffy above n 42, 189, 200, 204.
[77] As to costs orders being a disincentive against pursuing frivolous claims see VLRC Civil Proicedure 645.

claims or defences is sometimes disputed[78], the writer's experience (in 15 years of commercial litigation practice) is that the spectre is a disincentive to client litigants going to court with unmeritorious claims or defences (indeed this fear is presumably the genesis of the market for indemnities from funders). In this manner, an excess may bring back some of the traditional effects of the traditional *English rule*[79] on cost shifting in discouraging claimant litigants bringing claims with a low probability of success.[80] It may also slightly reduce funding costs.

The permitted excess should be reasonable and subject to court approval to avoid abuses.

A possible provision in relation to this might be:

Excesses

A third party litigation funding agreement may provide for an excess on indemnity provided that:

(a) the excess is reasonable in all the circumstances;

(b) the excess does not substantially reduce the litigant's access to justice;

(c) the excess is approved by the Court

Chapter 6: Certification of class actions

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

The strike out process may perform some of these roles. The submitter has no firm view that certification is required at this time but the issue should be monitored and reviewed in the future.

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?

[78] Australian Government Productivity Commission, Access to Justice Arrangements, 2014 (quoting ALRC Costs Shifting - Who Pays for Litigation (ALRC Report 75) 1995) 443.
[79] I.e. that the loser pays the winner's costs.
[80] Charlotte Wrendenburg 'Legal costs awards and access to justice' Ch 5 in Willem van Boom (ed) *Litigation, Costs, Funding and Behaviour* (Routledge 2017) 87.

This may arise in present circumstances where there are competing class actions.[81] This issue should be monitored but it may be appropriate to see how the law develops in this area first prior to considering a legislative response.

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?

See response to 14 above.

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?

Apart from matters already dealt with, it is not clear that this is required at this time but the issue should be monitored and reviewed in the future.

Chapter 7: Settlement

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

In relation to unrepresented group members, the greater use of contradictors would be one means of dealing with the situation (see above).

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

Amounts and some detail of plaintiff legal costs and of funding commissions should be disclosed in all court approvals of settlements unless the court finds a compelling reason not to do so (see below in relation to the necessity of public disclosure to enhance efficiency in the market for legal services and in the market for litigation funding).[82]

There may of course be a similar argument for disclosure of defendant's legal costs as well. Given however that plaintiff legal costs are usually approved as part of the settlement and are to some extent an involuntary exaction through judicial power while defendant legal costs do not quite have this character and given that disclosure is not the practice in ordinary litigation, it is not suggested that there should be a

[81] See the analysis of Beach J of considerations relevant to establishing which was a preferable class action out of two competing class actions: *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [71]. See also Vince Morabito 'Clashing classes down under - Evaluating Australia's competing class actions through empirical and comparative perspectives' (2012) 27(2) *Connecticut Journal of International Law* 245; Michael J Duffy, 'Class representation: choosing the best lawyer for the case' (2009) 83(05) *Law Institute Journal* 30.

[82] Federal Court Practice Note above n 60 contemplates orders for confidentiality of legal costs if appropriate. See [15.4(b)].

presumption of disclosure of defendant legal costs at this stage though the issue could be monitored.

A possible amendment to *Supreme Court 1986* (Vic) s33V might be to insert s 33V(3) as follows:

> In giving an approval under this section the Court will normally publish in its reasons the amount of any approved third party funding commission or fee and approved plaintiff legal costs unless the Court determines that there are compelling reasons not to do so.

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.

(a) See response to question 1 above; (b) See response to question 1 above; (c) No submission.

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?

See answer to question 1.

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

In class actions, a preliminary assessment could be made early in the proceeding however this should be subject to a final assessment at the time of settlement approval. This is because, as noted in *Money Max*[83] (see response to question 1 above) the amount of the final settlement or judgment is a relevant factor in assessing the (percentage) amount of the funding fee.

In other proceedings, apart from the requirements of s477(2B) of the *Corporations Act 2001* (Cth) as above noted the time for any approval of funding fee would be a matter for the parties or the court. The parties would likely seek early approval

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

There should be a general presumption that these amounts will be published in reasons for settlement approval (see response to question 18).[84] Given the large number of funded class actions which justifiably complain of the evils of nondisclosure to securities markets it would be inconsistent to generally allow nondisclosure of fees to legal and litigation funding markets. Better disclosure will tend to allow for more efficiency in markets for legal services and litigation funding.

[83] (2016) FCR 191 [80].
[84] Brandeis above n 68.

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

These two objectives tend to be in contradistinction. The first objective requires devotion of resources to individual assessment whilst achievement of the second will most likely be through assessment of issues as common, or at least sub-group issues[85]. That is, judicial efficiency will be maximised by common assessment. In relation to securities class actions there is a lively debate on this very issue in relation to market based causation[86] versus reliance based causation.[87] There is not space her to go into the detail of that debate other than to note that reliance based assessment would appear to involve substantially greater cost and delay and a statutory presumption of market based causation has thus been advocated in Australia.[88]

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

Where the format of the Notice is agreed between the parties there may be a role for a contradictor. It is usually the case that the interplay between plaintiff and defendant as adjudicated by the court will produce an informative notice. In a few cases however, depending what stage proceedings are at and depending on the funding arrangement the parties and lawyers on either side may have various incentives to induce potential class members to opt out or not opt out. This might be so in relation to opt out prior to a possible settlement (depending on the nature of such settlement) or other event. A contradictor may thus add value in this regard.

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

The court might in some cases discount legal and funding fees when there is unreasonable delay. This would provide an incentive to expedite matters. Again the power to do appears to exist under *Supreme Court 1986* (Vic) s33ZF however that

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[85] I.e. Where a sub-group of the class has an issue common to the sub group. See *Supreme Court Act 1986* (Vic) s33Q

[86] Known in the United States as causation under the fraud-on-the-market theory. As to the meaning of 'market based' or 'fraud on the market' causation tests see for example Andrew Watson and Jacob Varghese, 'The Case for Market-Based Causation' (2009) 32(3) *UNSW Law Journal* 948 and Michael Duffy, 'Fraud on the market': Judicial approaches to causation and loss from securities nondisclosure in the United States, Canada and Australia (2005) 28(3) *Melbourne University Law Review* 621. There are excellent discussions of these issues in the Australian context in Jonathan Beach 'Class Actions: Some Causation Questions (2011) 85 *Australian Law Journal* 579 and Leah Watterson and Damian Grave 'Causation: Establishing the Critical Link between Misconduct and Loss in Securities Class Actions' in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (Ross Parsons Centre 2017) 141. See also the recent decisions in *In the matter of HIH Insurance Limited (in liquidation) & Ors* [2016] NSWSC 482 and the comments of the Full Court of the Federal Court in *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 where it was held that it is reasonably arguable that a party can rely on market-based causation of loss.

[87] See for example the discussion in Michael Garner and Helen Mould 'Measuring and proving loss in securities class actions' in Grave and Mould (eds) above n 2, 171.

[88] Michael Duffy, 'Investor loss from securities nondisclosure: A statutory presumption of causation on the Canadian Model? (2009) 32(3) *The University of New South Wales Law Journal* 965, 983-987 and John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions – Time for Reform' (2017) 36(2) *Civil Justice Quarterly* 164, 175.

section could perhaps be amended to give some particularity to the sort of orders a court may make (see below and schedule A).

Chapter 8: Contingency fees

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

Increased Competition?

Lifting the ban on contingency fees may bring more competitive pressure on litigation funders leading to greater efficiencies and lower costs. This is subject to the proviso that asymmetric information (i.e. unduly complicated charging agreements which legal consumers do not understand) does not make it difficult to compare costs. The assymetric information issue is the reason a standard form disclosure document or Key Facts Sheet setting out litigation funding charges in a simplified form is suggested (see above). The same disclosure document should be required for any solicitors' contingency fees as for litigation funders charges so that the two could be easily compared.

Problems of different types of billing

In relation to whether contingency fees should be allowed it can be observed that, though there is the potential for abuse with contingency fees, there is also the potential for abuse in most other types of charging arrangements. For instance time charging creates incentives to spend more times on tasks than may be strictly necessary and may create incentives to 'stretch out' proceedings.[89] Fixed fee arrangements may need to be extremely complicated to deal with the exigencies of litigation and may thus be hard for legal consumers to understand. They may in some cases over or under remunerate depending on those exigencies of litigation.

Thus at the end of the day all types of charging may be abused so that whatever fee arrangement is used, reliance will be placed on lawyers' professionalism[90], honesty ethics, reputation and overriding duties to the court.[91] The latter may be the most important given that lawyers tend to face an unavoidable prima facie conflict in relation to their interest in maximising fees and their clients' interest in minimising fees (though the former is no doubt subject to other restraining factors such as competition and reputational issues). To the extent that restraining factors fail then the focus must be on whether the criteria and systems for assessing fitness for admission to and removal from the profession are adequate.

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[89] VLRC above n 21, 686. See also Michael West, 'Corporate undertaker: the new hip career' *The Sydney Morning Herald* (online) 29 October 2012 http://www.smh.com.au/business/corporate-undertaker-the-new-hip-career-20121029-28f1z.html.

[90] See for instance Vivien Holmes, Tony Foley, Stephen Tang and Margie Rowe, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012) 15(1) *Legal Ethics* 29.

[91] Duffy above n 42, 186.

Conflict of interest?

The prohibition on contingency fees seems to be based on the notion that percentage contingency fees may create a conflict between the duty to the court and the duty to the client by which there is a temptation to prefer the obligation to the client over the obligation to the court because of the lawyer's personal interest in the outcome. The danger is said to be that ethical standards in a case may be 'undermined with a view to achieving a favourable outcome.'[92] It can be noted however that this 'outcome incentive' argument logically applies not just to percentage contingency fees but to any contingency fee including (a) a speculative 'no win no pay' fee (involving the payment of normal fee in the event of success and no fee in the event of loss) and (b) an uplift fee (involving the payment of a greater fee on success than on loss). The conflict may of course be less in these cases as the fee is usually less than a percentage contingency fee however the principle remains the same.[93] It is noted that no win no pay fees and uplift fees are legal in Victoria.

Contingent fees for witnesses

Whether or not lawyers contingency fees create a conflict for lawyers representing a party and presenting that party's case to a court, witness contingency fees do appear to create a conflict of interest for persons giving evidence to a court – in that the person's remuneration can be partly dependent on the content of their evidence. Thus a ban on witness fees that are in any way contingent upon outcomes seems overdue (and there is no reason that this should be limited to class actions or funded actions).[94] This issue may have some relevance to the debate over permitting lawyers' contingency fees also as lawyers are often required to give affidavit evidence on minor matters, and in class and major actions, sometimes on more significant matters (e.g. communication with group members,[95] settlement schemes,[96] reasonability of settlement[97] and/or costs[98]). Lawyers giving evidence then, might be a barrier to contingency fees but were they not to do so (which may or may not be practical), one of the arguments against contingency fees may fall away.

Safeguards

If contingency fees were to be introduced, some safeguards should include court approval of all contingent fees[99] by reference to statutory guidelines which should include fairness and reasonableness, some proportionality with work (reasonably)

[92] Victorian Law Reform Commission, *Civil Justice Review Report*, [2008] VLRC 1, 685.
[93] Australian Government Productivity Commission *Access to Justice Arrangements* Inquiry Report Volume 2 No. 72, 5 September 2014, 614.
[94] See discussion in Victorian Law Reform Commission above n 21, 510. At present the a party to a civil proceeding may apply to the court for an order that an expert witness retained by any party to that proceeding disclose all or specified aspects of the arrangements under which the expert witness has been retained to— (a) the court; and (b) all the parties to the proceeding: *Civil Procedure Act 2010* (Vic) s65P.
[95] *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 1560 (16 December 2002)
[96] *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 1420
[97] *Inabu Pty Ltd v Leighton Holdings Limited (No 2)* [2014] FCA 911 (25 August 2014)
[98] *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 (5 April 2016)
[99] Victorian Law Reform Commission above n 21, 642, 686.

performed and a sliding scale of permissible amounts/caps to prevent unreasonable profiteering.[100]

There arguably should also be a ban on remuneration of expert witnesses (and possibly all witnesses) being in any way contingent on case outcome. This issue may require further consultation however as it is somewhat outside the terms of reference.

Indemnities from lawyers

A somewhat complicated issue in a contingency fee scenario may be lawyers indemnifying clients for adverse costs in the same manner as litigation funders do. It is not clear whether lawyers wish to do this or not. To the extent they do this would add to the pressure on lawyers to achieve favourable outcomes raising the conflict issue.

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?

Some of these may be difficult to achieve:

(a) A few firms may engage in some cross subsidisation of small worthy cases however many will not. It is not entirely clear how regulation can get involved in law firm business models. It may be that a level of commitment by a firm to a variety of meritorious cases as well as pro bono work could be a factor to be reasonably taken into account by a court in deciding between competing class actions though some may argue that this is not a relevant factor;

(b) risks of litigation are heavily dependent upon the facts of a case which regulation cannot affect. Allowing contingency fees may lead to greater competition reducing costs (see above) however there are arguments against as has been canvassed.

(c) See suggested safeguards in Victorian Law Reform Commission, *Civil Justice Review Report*,[101]

(d) see answers to questions 1-28 generally above.

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

No submission.

Concluding note

[100] Ibid. A range of other safeguards are also suggested in the VLRC report and should be considered.
[101] [2008] VLRC 1, 686-687

The VLRC referral appears to relate to *third party* litigation funding based upon the definitions section on p xii and xiii. Many ordinary proceedings are funded by the litigants themselves in those proceedings. In class actions it is conceivable that some proceedings may be partly funded by some litigants and not others or by represented group members and not unrepresented group members. These situations may raise somewhat complex issues that are likely to be different in different cases depending on the funding arrangements in those proceedings. These situations may be best left to the courts that are hearing them. They are in any event outside the scope of the review.

Dated: September 2017

Schedule A

Summary of possible provisions referred to in submission

POSSIBLE AMENDMENTS TO PART 4A *SUPREME COURT ACT 1986* (VIC) (FOR DISCUSSION PURPOSES)

SECT 33V

Settlement and discontinuance

(1) A group proceeding may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court

(3) In giving an approval under this section the Court will normally publish in its reasons the amount of any approved third party funding commission or fee and approved plaintiff legal costs unless the Court determines that there are compelling reasons not to do so.

SECT 33ZF

General power of court to make orders

(1) In any proceeding (including an appeal) conducted under this Part the Court may, of its own motion or on application by a party, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

(2) Without limiting the generality of sub section (1) above, such orders may include:

(a) An order for the appointment of a person as contradictor to represent the interests of some or all group members in relation to any issue in the proceeding.

(b) An order that a party or parties to the proceeding pay the reasonable costs of such contradictor or that payment be made from any settlement sum in the proceeding.

(c) An order for disclosure to the court or to any party of any third party litigation funding agreements that any group members have entered into, on such terms as the court deems fit.

(d) An order for disclosure to the court or to any party of any third party litigation funding agreements that any representative party or parties have entered into on such terms as the court deems fit.

Schedule B

Summary of possible provisions referred to in submission

POSSIBLE (INSERTION OF) PART 4B into *SUPREME COURT ACT 1986* (VIC) (FOR DISCUSSION PURPOSES)

Note that some of these provisions might alternately be the subject of Rules of Court however some appear to affect substantive rights and involve possible policy issues. [102]

PART 4B – THIRD PARTY FUNDED LITIGATION

SECT 34A

Definitions

"adverse costs" means legal or other costs ordered against a litigant by a court

"excess on indemnity" means an amount of liability of a plaintiff to a defendant in a funded proceeding arising under an order of the court for costs in that proceeding for which the party is not fully indemnified by the third party litigation funder.

"funded proceeding" means a proceeding where a claimant or claimants are wholly or partly financed by a third party litigation funder.

"funding commission" means a percentage fee to be deducted by a third party litigation funder from any sum obtained by a litigant in a group proceeding

"funding fee" means any fee or charge in a third party litigation funding agreement that a litigation funder will charge a funded plaintiff for financing the litigation if it is successful and includes but is not limited to a funding commission.

"group member" means a member of a group of persons on whose behalf a group proceeding under Part 4A of this Act has been commenced

"group proceeding" means a proceeding commenced under Part 4A

"third party litigation funder" means any business or commercial entity that agrees to fund a claimant litigant's legal costs in a proceeding in return for a funding fee.

"third party litigation funding contract" means any agreement under which a third party litigation funder agrees to fund a claimant litigant's legal costs in a proceeding in return for a funding fee.

[102] It might be suggested that some of the 'litigant protection' measures should be in a different act however it is submitted that same are integrally related to the judicial process and find their proper place in the Supreme Court Act.

SECT 34B

Application

This Part applies to a cause of action whether arising before or on or after…. .

SECT 34C

Duties of utmost good faith[103]

(1) A third party litigation funding contract is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
(2) If reliance by a party to a third party litigation funding contract on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.
(3) In deciding whether reliance by a litigation funder on a provision of the third party litigation funding contract would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the litigant.

SECT 34D

Key Facts sheet[104]

In this section a Key Facts sheet for a third party litigation funding contract is a document that contains a clear and simple summary of:

(a) details of the funding commission and any other funding fee payable to the funder;

(b) clarification of whether legal fees will be in addition to funding charges;

(c) details of any indemnity for adverse costs, any indemnity for security for costs and any excess on these indemnities;

(d) details of circumstances in which the contract may be terminated;

(e) details of a dispute resolution procedure;

(f) details of any other information that is required by the regulations.

SECT 34E

[103] Based partly upon *Insurance Contracts Act 1984* (Cth) s 13.
[104] Based partly upon *Insurance Contracts Act 1984* (Cth) s 33D

Third Party Litigation Funder's obligation to provide Key Facts sheet

(1) A third party litigation funder must provide a Key Facts Sheet for a litigation funding contract to a group member in a proceeding under Part IVA of this Act.
(2) The Key Facts sheet must be provided at least 7 days prior to entry into that contract
(3) A court may on application dispense with the requirement for a Key Facts sheet if it is satisfied that a party to be funded is a sophisticated and experienced litigant.

SECT 34F

Independent Legal Advice[105]

A third party litigation funder will take reasonable steps to ensure that a representative party in a funded proceeding under Part IVA of this Act shall have received independent advice on the terms of the third party litigation funding agreement prior to executing same.

SECT 34G

Excesses

A third party litigation funding agreement may provide for an excess on indemnity of adverse costs or security for costs liability provided that:

(a) the excess is reasonable in all the circumstances;

(b) the excess does not substantially reduce the litigant's access to justice;

(c) the excess is approved by the Court.

SECT 34H

Lawyer's obligation in funded proceeding

A lawyer in a third party funded proceeding must use their best endeavours to make the litigant (their client) aware of all third party litigation funding charges and terms and conditions and has an obligation to disclose any information known to the lawyer about such third party litigation funding charges and terms and conditions.

SECT 34I

Disclosure of funding agreement

[105] An abbreviated form of the provision in The Association of Litigation Funders of England and Wales Voluntary Code of Conduct for Litigation Funders clause 7(a) (see main text).

In any funded proceeding (including an appeal), if it is in the interests of justice to do so, the Court may, of its own motion or on application by a party, make an order for disclosure to the court or to any party, of any third party litigation funding agreements that any party or parties have entered into, on any terms the court deems fit.

SECT 34J

Review of funding fee

(1) Where a Court has power under any act or law to approve a litigation funding agreement (including a power under s33V of this Act or under a law in relation to claims by an insolvent entity or estate), the Court has power, by force of this section, to review the appropriateness and reasonableness of the funding fee, and if inappropriate and unreasonable, to vary that funding fee, commission or other charge of the third party litigation funder.

(2) In exercising the power in (1), the Court will have regard to any matters that it considers are relevant to the appropriateness and reasonableness of the fee.

SCHEDULE C

Some possible conflict of interest issues in litigation funding [and possibly insurance] for research, discussion and eventual guidance from the Victorian Law Institute

1. Does a lawyer who is paid by a litigation funder [or insurer] and has an agreement with the litigation funder [or insurer] under which the latter has the right to give the lawyer instructions in connection with funded proceedings involving a funded [or insured] litigant owe a fiduciary duty to the litigation funder [or insurer]?
2. If that lawyer also acts for a litigant in the funded proceeding does the lawyer have any conflict of interest where the interests of the litigation funder [or insurer] diverge from those of the litigant?
3. Where there is an agreement between the funder [or insurer] and lawyer where it is agreed that the relationship is not that of lawyer/client, do any fiduciary duties of the lawyer to the funder [or insurer] apply?[106]
4. If there is a relationship between the funder [or insurer] and the lawyer in which the lawyer has incentives to secure further work from the funder [or insurer] or there is a financial relationship between lawyer and funder [or insurer] whereby the lawyer is financially incentivised to act in the funder [or insurer]'s interests, does this put the lawyer in a position of potential conflict where the lawyer's interests diverge or conflict with the litigant's interests?
5. Do situations where there may be a divergence of interest between the funder [or insurer] and the litigant causing a possible conflict for the lawyer include:
    a. Different views of the funder [or insurer] and litigant on the reasonableness of terms of a funding [or insurance] agreement and whether the litigant should sign it?
    b. Different views of the funder [or insurer] and litigant on the reasonableness of terms of a settlement proposal in a proceeding?
6. How far, as a fiduciary, is a lawyer is required to avoid conflicts[107] and how far can liability be avoided in equity if the conflict is fully disclosed to the client litigant and a fully informed consent is obtained? [108] and:
    a. What is required for a fully informed consent?

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[106] It is noted a lawyer may not be permitted to contract out of duties of care and diligence if services are provided. See for instance s7.2.11 of the *Legal Profession Act 2004* (Vic) which provides that a lawyer must not make any agreement or arrangement with a client to the effect that the lawyer will not be liable to the client for any loss or damage caused to the client in connection with legal services to the client and that any such agreement is void. .

[107] Rule 8.2 of the Law Council of Australia *Model Rules of Professional Conduct and Practice* provides that a practitioner must avoid conflict of interest between two or more clients of the practitioner or of the practitioner's firm.

[108] *Parker v McKenna* (1874) LR 10 Ch App 69; *Commonwealth Bank of Australia v Smith* (1993) 42 FCR 390. Fiduciary duty may thus be attenuated in equity but it appears that it may be more difficult for the lawyer to contract out of other duties that could still be breached (at least in Victoria - see Section 7.2.11 *Legal Profession Act 2004* (Vic) – there does not appear to be an equivalent provision in NSW).

b. What circumstances are relevant and in what way[109]?
c. Is there a need for independent legal or other advice (ie advice from another lawyer).[110]

7. Does the briefing of Senior Counsel by a lawyer who perceives a conflict in any of the above circumstances relieve a conflict if any of the circumstances above exist? If it does not, what other cost effective and expeditious alternatives might there be?
8. Apart from conflicts is it also necessary for a lawyer to consider, in deciding to act in a matter where a relationship with a funder exists to have regard to whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice requires that the lawyer not act in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice?[111]

[109] See *Maguire v Makaronis* (1997) 188 CLR 449, 466-7. See also *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443; *Chan v Zacharia* (1984) 154 CLR 178.
[110] See *Woods v The Legal Ombudsman* [2004] VSCA 247.
[111] See *Kallinicos v Hunt* (2005) 64 NSWLR 561; *Bolitho v Banksia Securities Limited* (No 4) [2014] VSC 582