Slater Gordon
Lawyers

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

Submitted by
Slater and Gordon
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Slater and Gordon submissions to the Victorian Law Reform Commission's 'Access to Justice — Litigation Funding and Group Proceedings' Review

1. Introduction and scope of submissions

1.1. Slater and Gordon welcomes the opportunity to make these submissions with respect to the Victorian Law Reform Commission's 'Access to Justice – Litigation Funding and Group Proceedings' Consultation Paper.

1.2. Slater and Gordon has an established track record of successfully representing group members in complex multi-party and large-scale group proceedings, and continues to deliver strong results to group members.

1.3. We have acted for claimants in a broad range of class action litigation, and have done so both on a 'no-win no-fee' conditional fee basis, and with the financial backing of third party litigation funding.

1.4. Our submissions are informed by our extensive experience in conducting class action litigation under the group proceeding frameworks in Victoria, other states and the Federal jurisdiction. Our responses to the issues raised in the Consultation Paper are made in contemplation of our continuing commitment to increase access to justice.

1.5. At a headline level, it is our experience that the funding arrangements applicable to a group proceeding do not dictate the day-to-day conduct of these matters – the lawyers undertaking the work on such cases are committed to achieving the best result possible for group members, and it is this consideration which drives the decision-making in respect of all class action litigation. To the extent that concerns around funding mechanisms and arrangements have arisen in other group proceedings previously, in our view those occasions are relatively rare, and moreover they have demonstrated that the present suite of powers available to the courts to address such issues are sufficient to respond to them in a manner that is well-suited to the circumstances of the particular case at hand.

1.6. We set out briefly below a non-exhaustive list of the representative proceedings and multi-party actions in which we have acted for group members and clients, and which have concluded in recent years:

a) *Kamasaee v Commonwealth of Australia* (S CI 2014 6770) - a proceeding brought in the Supreme Court of Victoria against the Commonwealth of Australia and two service provider companies – G4S and Broadspectrum (formerly Transfield) – which at various times operated the Manus Island Regional Processing Centre on Manus Island in Papua New Guinea. This class action recently settled, securing $70 million for group members (exclusive of legal costs);

b) *Newstart 123 Pty v Billabong International Ltd* (VID 143 of 2015) - a Part IVA Federal Court proceeding brought on behalf of shareholders in Billabong International Ltd, which was settled more than six months prior to the scheduled commencement of trial for $45 million inclusive of legal costs (which totalled ~$6.3 million in approved costs, with settlement administration costs capped at ~$540,000);

c) *Earglow Pty Ltd v Newcrest Mining Ltd* (VID 406 of 2014) - a Part IVA Federal Court proceeding brought on behalf of shareholders in Newcrest Mining Ltd in 2014, and settled in 2016 just prior to the commencement of trial for $36 million inclusive of legal costs (which totalled ~$9.9 million in approved costs, with settlement administration costs of ~$429,000);

d) *Giles v Commonwealth of Australia* (S CI 2009/00329777) – a claim brought in the Supreme Court of NSW against the Fairbridge Foundation, the State of New South Wales, and the Commonwealth of Australia, which was settled for $24 million in 2014, and compensated victims of child abuse at the Fairbridge Farm School in Molong (with total legal costs approved of ~$3.6 million);

e) *A v Peters* (S CI 2012/02791) – a Part 4A proceeding issued in the Supreme Court of Victoria in May 2012, which was settled for $13.75 million in 2014, prior to the commencement of trial, to resolve the claims of 60 women who contracted Hepatitis C at the Croydon Day Surgery between January 2008 and December 2009 (with total legal costs of ~$3 million approved);

f) *Earglow Pty Ltd v Sigma Pharmaceutical Ltd* (VID 933 of 2010) - a Part IVA Federal Court proceeding brought on behalf of shareholders in Sigma Pharmaceuticals in 2010, and settled in 2012 at a relatively early stage of proceedings for $57.5 million inclusive of costs (the legal costs approved totalled ~$3.1 million, with settlement administration costs of $87,000);

g) *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* (VID 1408 of 2011) - a Part IVA Federal Court proceeding which settled for $75 million in 2013 (the legal costs approved totalled ~$8.5 million, with settlement administration costs of ~$492,000);

h) *Hadchiti v Nufarm Ltd* (NSD 1847 of 2010) - a Part IVA Federal Court proceeding (acting jointly with Maurice Blackburn Lawyers) brought on behalf of shareholders in Nufarm which was ultimately settled for $46.6 million in 2012 (the legal costs of Slater and Gordon in respect of professional fees and disbursements totalled ~$2.5 million).

i) *Vlachos v Centro Properties Ltd* (VID 366 of 2008 and other related proceedings) - a Part IVA Federal Court proceeding brought on behalf of shareholders in Centro which was settled for $200 million in total in 2012, $50 million of which was payable to group members in the Vlachos (Slater and Gordon) proceeding (the legal costs approved in respect of Slater and Gordon's professional fees and disbursements totalled $10.6 million, with settlement administration costs of ~$1 million);

j) *Wheelahan v City of Casey* (No 9776 of 2008) - a Part 4A proceeding in the Supreme Court of Victoria brought on behalf of property owners who suffered economic loss as a consequence of the escape of landfill gas in the estate where they lived, which was settled for $23.5 million in 2011.

1.7. Our views in relation to the proposed reforms contained in the Consultation Paper are also informed by our experience in these matters, and our advocacy for group members in respect of a number of ongoing matters including:

a) *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* (VID 163 of 2017) - a Part IVA Federal Court proceeding brought on behalf of shareholders against Bellamy's Australia Ltd, in which the issue of multiple proceedings was recently agitated and resolved by the Court;

b) *Court v Spotless Group Holdings Ltd* (VID 561 of 2017) - a Part IVA Federal Court proceeding brought on behalf of shareholders against Spotless Group Holdings Ltd;

c) *Whittenbury v Vocation Ltd* (VID 434 of 2015) - a Part IVA Federal Court proceeding (acting jointly with Maurice Blackburn Lawyers), brought on behalf of shareholders in Vocation Ltd;

d) *Herridge v Electricity Networks Corporation* (CIV 2259 of 2015) - multi-party proceedings issued in the Supreme Court of Western Australia against a number of parties in respect of the Parkerville bushfires in Western Australia; and

e) *Creighton v Australian Executor Trustees Ltd* (2015/306222) - a Part 4A claim on behalf of debenture holders in Provident Capital Ltd against Australian Executor Trustees, which was issued in the Federal Court and then transferred on application of the respondent to the NSW Supreme Court. This claim is also attended by the existence of multiple proceedings.

1.8. Our experience renders us well placed to comment on the regulation and potential reform of proceedings initiated under the Victorian Part 4A provisions, having regard to the established role of litigation funders in class action proceedings, and other developments in the class action litigation space which have changed the landscape considerably since the regime's inception.

2. Executive Summary and Policy Context

2.1. As is thoroughly canvassed in the VLRC's Consultation Paper, the class actions landscape has changed considerably since its advent in 1992 through the enactment of Part IVA of the Federal Court of Australia Act 1976 (Cth).

2.2. Frequently, developments in respect of the practice and regulation of class action litigation have occurred as a consequence of judicial intervention – courts have been required as a result of a range of unique interlocutory applications to determine how Part IVA and Part 4A will operate in practice. Courts have regularly responded in a flexible and coherent manner to the range of novel and complex questions that have arisen in class action proceedings over the course of the last 25 years, with the result that the regulation of class actions in Australia is now attended by a wealth of judicial authority which informs the conduct of group litigation at both a Federal and State level.

2.3. In any policy reform context, we suggest that some of the critical threshold considerations must be whether the 'status quo' has been shown to be unsatisfactory or suboptimal in any respects, and if so, why that is the case and how those problems manifest themselves in practice. It is only with an understanding of those matters that options for reform can be reliably assessed, to ascertain whether and how any proposed changes might address or improve the concerns identified.

2.4. For the majority of the issues addressed by the Commission's Consultation Paper, we consider that the concerns or issues raised are often not systemic in nature, but rather relate to isolated instances of problematic outcomes or conduct, which we consider courts already have sufficient power to deal with. Others have been potential issues identified at a hypothetical level but for which scant evidence has been identified to establish that these are actual problems that have arisen, which could not similarly be addressed by the existing powers available. In either case, we consider that the justification for many of the more substantial changes that have been proposed has not been established, and that by far the preferable course is to continue to permit courts to address issues and concerns as they actually arise, to suit the needs and circumstances of each particular case.

2.5. In the context of a long-standing and relatively stable set of processes such as Part 4A of the *Supreme Court act 1986* (Vic) and Part IVA of the *Federal Court of Australia Act 1976* (1976), there is particular importance in exercising considerable caution before making substantial changes – businesses and the community derive value from there being certainty surrounding the legal regime in which they operate, which would undoubtedly be affected by substantive changes to the legislative provisions governing the class action regimes. In addition, there is by now a well-developed body of case law interpreting and applying the provisions of those Parts; self-evidently, significant legislative amendments carry some risk of undermining the ongoing applicability or utility of those decisions, re-opening or casting doubt upon some aspects of the class actions regime that had previously been considered relatively settled. We suggest this would be an undesirable outcome, and that care should be exercised in approaching changes to the legislation.

2.6. That said, there are areas in which existing common practices and other developments designed to safeguard group members could be usefully codified in the applicable Practice Notes, to better promote compliance and provide courts and parties with a clearer and more precise statement of principles on these issues. We suggest that in this regard a useful aim may be to seek to harmonise the requirements of the Supreme Court[1] and Federal Court Practice Notes[2] (respectively, **Supreme Court Practice Note**, and **Federal Court Practice Note)** in terms of disclosure obligations and other group member protections.

Litigation funding

2.7. The entry of commercial litigation funders into the class actions space has played an influential role in its development, particularly in relation to the prevalence of particular types of group litigation. As is acknowledged in the Consultation Paper, litigation brought on behalf of shareholders and investors has historically attracted a higher proportion of third party litigation funding than other types of claims.

2.8. It is an oft-recited claim that litigation funding facilitates access to justice, although this assertion is at times disputed by those who would seek to diminish the ability of victims of corporate or other wrongdoing to access the financial support necessary to pursue their claims. It has been suggested that the fact that litigation funders have principally selected claims which do not advance the causes of more vulnerable members of our community indicates that the access to justice facilitated by these commercial entities is overstated. In response to this, it ought be noted that most plaintiff firms have a finite amount of capital available to invest in self-funded cases at any point in time, and the use of third-party funding by such firms provides a much greater opportunity for them to devote their own resources towards self-funding other such proceedings.

2.9. We are of the view that the historical tendency of litigation funding to invest in shareholder and investor claims is a product of the relative infancy of both the class actions regime, and more relevantly, the acceptance in Australian law of third party litigation funding. We expect that the trend towards diversification of matters which attract funding – evidenced by both the Australian 'bank fees' litigation[3], and more recently the stolen wages claims against the State of Queensland[4] – will continue to develop, affording a more diverse range of claimants access to cost-effective and efficient means of dispute resolution through class action processes.

[1] Supreme Court of Victoria, Practice Note SC Gen 10 - Conduct of Group Proceedings (Class Actions), 30 January 2017.
[2] Federal Court of Australia, Class Actions Practice Note GPN-CA, 25 October 2016.
[3] The suite of 'bank fees' proceedings was brought on behalf of customers of a number of financial institutions seeking relief from fees charged on commercial and consumer accounts on the basis that they could be characterised as 'penalties' at common law or equity, and/or the product of unjust or unconscionable conduct - Paciocco v Australia and New Zealand Banking Group Ltd (VID196 of 2013), and other closed class proceedings issued against BankSA, BankWest, Commonwealth Bank, NAB, Westpac, Citibank and St George (the solicitors for the applicants in all cases were Maurice Blackburn Lawyers, and the class actions were funded by IMF Bentham Ltd).
[4] Pearson v State of Queensland (QUD 714 of 2016) (the solicitors for the applicant are Bottoms English Lawyers, and the proceeding is funded by Litigation Lending Services Ltd).

2.10. It has also been suggested that shareholder litigation in particular is inherently attended by a lower level of risk than other types of class action litigation. We disagree with this contention – as in any litigation, the degree of risk is a product of the facts involved. As many claims brought to date have settled, there remain critical matters of legal principle which are yet to be resolved or considered by a court. That such a claim may proceed to judgment following the trial of common issues, means that litigation funders assume considerable risk in funding matters of this type, particularly given that the cost of conducting same can exceed $10 million.[5]

2.11. Despite these apparent criticisms of the role of litigation funding in shareholder class actions, we consider that there is an important social value in the prosecution of shareholder class actions, which is often overlooked. We refer to the following observation of Finklestein J in the Centro litigation, which encapsulates this argument:

While there are problems with securities class actions, it must, I think be accepted that they serve a useful function. It is often said that these actions promote investor confidence in the integrity of the securities market. They enable investors to recover past losses caused by the wrongful conduct of companies and deter future securities laws violations. According to the US Supreme Court, they provide 'a most effective weapon in enforcement of the securities laws and are a 'necessary supplement to [Securities Exchange] Commission action.[6]

2.12. It is nevertheless the case that by virtue of their experience in shareholder claims, funders and parties alike have developed a clearer appreciation for the risks and areas of uncertainty which exist in respect of these matters.[7] In comparison to areas of law which have not received any, or more limited judicial consideration, the familiarity with and expertise in shareholder litigation necessarily means that where corporate wrongdoing of this nature is identified, litigation funders are in a superior position than may otherwise be the case to assess the risks of funding such claims.

2.13. This has not meant, however, that other claims have been entirely disregarded by litigation funders – the bank fees litigation in our view provides an example of the manner in which we expect the funding of class action claims to develop. A favourable decision for the class members in that proceeding was likely to have had more extensive ramifications for the legality of similar terms found in a range of consumer contracts.

2.14. It is on this basis that we would encourage the Commission to recognise that the diversification of matters attracting litigation funding is likely to develop as a result of the agitation of novel questions of law – this is a process which will necessarily take time.

2.15. We also agree with the prediction that competition in the litigation funding market will result in a more diverse range of class actions being pursued, including product liability and environmental claims which rely on the evidence and decisions in similar litigation in the US.[8] In this way, the access to justice afforded by litigation funding will be expanded, with the result that a broader range of claimants will have the ability to prosecute wrongdoing through representative proceedings.

2.16. The class action regime provides a mechanism by which victims of wrongdoing can prosecute their claims, in circumstances where it would often not be possible for them to pursue a claim individually. We acknowledge that the resolution of a large volume of claims by way of a group proceeding does not always produce perfect results – but it is our strong view that genuine access to justice has been and continues to be obtained for claimants, in circumstances where it is highly unlikely that their losses would otherwise have been compensated in the absence of the collective Part 4A regime.

2.17. We agree with the recent observation of Justice Bernard Murphy and Professor Vince Morabito, that:

the access to justice provided under the Part IVA regime is not perfect and financial and technical barriers mean that there are many cases that cannot be brought. However, the procedure provides real, practical and broad-based access to justice, which must be seen as a substantial improvement, and it has proved flexible in meeting challenges to the utility of the regime as they appear. The regime seems appropriately balanced. We can see few signs of systemic problems in its operation and there are reasons to be confident that the courts will deal with any serious problems that may later emerge.[9]

[5] See, eg, Vlachos v Centro Properties Ltd (VID 366 of 2008) and related proceedings.
[6] Kirby v Centro Properties Ltd (2008) 253 ALR 65, 67 – 68 [8].
[7] Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions' (2017) 91 Australian Law Journal 655.
[8] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 205, 212.
[9] The Hon. Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 13, 14.

2.18. Our submissions are, admittedly, influenced by our own approach to conducting group litigation, and our strong interest in ensuring that the ability of claimants to initiate and vigorously pursue proceedings in response to unlawful activity is not diminished by the imposition of unnecessary regulatory barriers.

2.19. Conversely, we also acknowledge that as the class actions landscape has changed, there have been concerns expressed that not all participants may have conducted themselves in accordance with the standards expected of members of the profession – this reality necessitates ongoing monitoring of the state of the regulatory framework, and intervention where appropriate to mitigate the risk to the public of those who would seek to take advantage of the Part 4A regime at the expense of group members. In this context, we welcome the Commission's consideration of the issues raised in its Consultation Paper.

2.20. Such review and intervention must have regard to the existing mechanisms for addressing these issues, however, and the broader policy questions which have arisen and been answered through interlocutory disputes since the inception of the Part 4A regime. Courts at both the Federal and State level have demonstrated that the judiciary is very well placed to use the powers conferred on them under Part IVA and Part 4A respectively, and in particular sections 33V and 33ZF, to ensure that class members' interests are protected from any risks that might arise from their involvement in a group proceeding. We discuss the courts' supervisory role and intervention on behalf of group members in more detail in the balance of our submissions.

3. Current Regulation of litigation funders and lawyers

3.1. The Consultation Paper explores the current regulation of the litigation funding industry and legal profession in some depth, such that we do not propose to re-traverse the legislation and regulatory guidelines governing the sector. As the Commission has noted, Victoria has limited scope to directly regulate the litigation funding industry and the legal profession. For this reason, we limit our submissions in this area to the questions posed by the Commission to the extent that they are relevant in the Victorian context.

3.2. At the outset, it is important to emphasise that, in our experience, the vast majority of lawyers and funders involved in litigation of this nature take their obligations under the relevant legislative frameworks extremely seriously. This includes compliance with professional obligations, disclosure requirements, and statutory overarching obligations, combined with the recognition that courts rightly take a great interest in ensuring compliance with same.

3.3. Against such a background, judicial discretion to impose costs orders and sanctions is well understood by funders and lawyers alike. The Victorian Supreme Court has considered whether it ought exercise this power in relation to the conduct of lawyers in group proceedings on at least three occasions.[10]

3.4. Further, the regulations governing the conduct of litigation funders in this space, particularly pursuant to ASIC Regulatory Guide 248, impose serious obligations on litigation funding entities to maintain adequate practices and conflict management procedures – that it is an offence to fail to maintain such practices should not be underestimated in terms of facilitating compliance.

3.5. It is within this context that we offer our views in response to Questions 1 and 2 of the Consultation Paper. As noted below, there are aspects of the Federal Court Practice Note in relation to the disclosure of information to group members which we consider might be usefully adopted in Victoria, which will ensure that in addition to the existing safeguards, litigants are offered further protection from unfair risks in a manner that is consistent across jurisdictions.

3.6. In Chapter 3, the Commission has identified two ways in which group members may be exposed to unfair risks or disproportionate cost burdens:

a) The first arises from the conflict of interest said to exist as a result of the tripartite relationship between the litigation funder, the plaintiff's lawyer and the plaintiff;

b) The second arises from a concern that litigation funders are not subject to any requirement to hold sufficient capital to meet their obligations

[10] See Matthews v SPI Electricity Pty Ltd (No 2) [2013] VSC 86; A S Minister for Immigration (Ruling No 7) [2017] VSC 137; Woodcroft-Brown v Timbercorp Securities Ltd (in liq) (No 2) [2011] VSC 526.

Capital Adequacy

3.7. We agree with the observation that any concerns in relation to capital adequacy are a matter to be addressed by the Commonwealth Government. We note however that the prevalence of security for costs applications and orders in funded group litigation has the practical effect of identifying whether a funder has the capacity to meet an adverse costs order at an early stage of the litigation. It has become commonplace for defendants in such proceedings to seek security for costs orders - funders have in turn tended to provide such security by way of bank guarantee, payment of funds into court, or more recently by way of provision of a deed of indemnity in the defendant's favour.

3.8. We note that courts have displayed a willingness to intervene to ensure that the form of security provided is acceptable – principally for the purpose of protecting defendants from the risk that any adverse costs order will not be recoverable, but with the indirect effect that representative plaintiffs are equally protected from the possibility that the funder may not have adequate capital and liquidity to meet its obligations under the funding agreement, at least in respect of the payment of the defendant's legal costs.

3.9. In *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd*,[11] Yates J of the Federal Court of Australia considered an interlocutory application for security for costs, and rejected provision of security offered by the Applicant by way of an 'After-the-Event' insurance policy from AmTrust Europe. The decision was principally concerned with some of the specific terms contained in the policy in question, and contemplated that there would be circumstances in which an appropriately worded ATE policy might be capable of providing sufficient security. Further, the provision of a deed of indemnity from the insurer in favour of the Respondent in appropriate terms was also likely to cure the defective form of security.

3.10. The prevalence of security for costs orders in class action litigation, and courts' willingness to intervene to ensure that litigation funders can meet any order for adverse costs, is a key feature of the class actions landscape which mitigates the risk posed to group members by the absence of a capital adequacy requirement.

3.11. Lawyers also have a case-by-case duty to consider the ability of the funder to meet an adverse costs liability incurred by the representative, and to advise their clients accordingly, in accordance with their professional and fiduciary obligations.

3.12. As a consequence of the existing security for costs environment, and lawyers' duties to consider the capital adequacy of litigation funders on a case-by-case basis, we consider that it is unclear what practical benefit might be gained by the implementation of substantive new capital-adequacy rules. We are unaware of any specific instances of the existing obligations and procedures having proved to be inadequate. Conversely, though, we note that we are concerned that the introduction of substantial new capital adequacy requirements may have the effect of creating additional regulatory burdens, closing off the market and reducing competition amongst funders – in circumstances where the existing protections are adequate to manage the risk posed to representative plaintiffs.

3.13. Given the role that third-party litigation funding plays in facilitating class actions to be commenced, as well as permitting plaintiff firms to allocate resources such that other types of class actions can be self-funded, as described above, we would be concerned that such a development would have an adverse impact on access to justice more broadly. In circumstances where existing processes and protections have not been shown to be inadequate, we suggest that the introduction of new capital adequacy requirements may be undesirable.

Conflict of interest

3.14. As to the first issue – that is, the conflict of interest said to exist as a result of the tripartite relationship, we note that the Consultation Paper identifies a number of specific ways in which a conflict of interest may manifest itself, having regard to lawyers' obligations to their client existing alongside a contractual arrangement with a litigation funder in funded proceedings.

3.15. We note at the outset that there is little empirical evidence of conflicts causing detriment to consumers of litigation funding,[12] and that participants in the sector have observed that 'while risks of conflict in funded class actions are possible, they are likely overstated as a practical matter for the following reasons:

a) Group members are always represented by a lawyer who is required to act in their best interests;

[11] [2017] FCA 699.
[12] Wayne Attrill, 'The Regulation of Conflicts of Interest in Australian Litigation Funding' (Paper prepared for the UNSW Class Actions: Securities and Investor Cases Seminar, Sydney, 29 August 2013) 2.

b) Pursuant to s 33V of the *Federal Court Act 1976* (Cth), any settlement must be approved by the Court;

c) There are limited instances where a settlement has been rejected by group members on the ground of substantive unfairness that could be reasonably linked with any perceived conflict of interest between the funder and group members. Similarly, there is limited empirical evidence as to the performance or position of conflict of their funders;

d) Recent regulations have introduced a requirement that all funders maintain a management of conflicts policy.'[13]

3.16. Further, the views expressed by the High Court in *Campbells Cash and Carry v Fostif*[14] are consistent with our experience of the manner in which the existing legal framework protects group members:

Why is that fear not sufficiently addressed by the existing doctrines of abuse of process and other procedural and substantive elements of the court's processes? And if lawyers undertake obligations that may give rise to conflicting duties there is no reason proffered for concluding that the present rules regulating lawyers' duties to the court and to clients are insufficient to meet the difficulties that are suggested might arise.[15]

3.17. The hypothetical examples of conflict contemplated by the Consultation Paper in our view do not reflect the actual position, as experienced by our firm, and other practitioners who act on behalf of plaintiff groups in representative proceedings. In considering the justification for proposed law reform, we consider that it is important to have regard to the source of the issues raised in this context, and note that the experiences of practitioners who conduct this litigation on a day-to-day basis ought principally inform any considerations of whether law reform is required.

3.18. It is suggested in the Consultation Paper that lawyers who have an interest in fostering an ongoing relationship with a funder for the purpose of attracting future work may feel compromised when the funder wishes to pursue one course, which the lawyers consider is not in the best interests of their clients. In our experience, such a situation rarely if ever arises in practice. We acknowledge that the maintenance of professional relationships with litigation funders is important for some firms, but it is our strong view that this outcome is best achieved by the provision of robust and frank advocacy on behalf of the client group.

3.19. In our experience, funders looking for 'repeat business' would be poorly served by working with lawyers who do not act independently and in their clients' interests, and sophisticated funders would almost invariably recognise that doing business with lawyers who were exposed to a conflict of interest in this way would place their own investment in a case at risk, and would avoid doing so.

3.20. In a similar vein, in our experience lawyers conducting class actions are conscious that controversies surrounding any key strategic decisions in this regard are highly likely to have to come to the attention of the Court in any event in the course of a confidential counsel opinion or affidavit evidence from a solicitor filed in support of any eventual application for approval of a settlement or discontinuance of a class action. This indirectly provides a further, strong incentive against allowing any such conflicts to arise.

3.21. In the event that a disagreement exists between the lawyers conducting the litigation and a funder, in our experience this is generally resolved by way of vigorous discussion between both groups – in many respects, the ultimate decision made benefits from the involvement of a broader range of individuals with different perspectives and experience. Further to this, the role of counsel on the rare occasions where these differences of opinion arise cannot be understated. Counsel provide a further independent perspective and are often the ultimate arbiter in situations like this.

3.22. It should also be noted that in general, the interests of a plaintiff, a funder, group members and the plaintiff's lawyers are generally well aligned: it is only through the successful prosecution of the litigation and the achievement of the best outcome possible for group members (having regard to the circumstances of a particular case) that lawyers secure the confidence of litigation funders. Although the possibility of conflicts arising cannot be excluded entirely, it is incorrect in our view to overstate the likelihood of them arising in this regard. Cameron Hanson relevantly notes in this regard that:

Given the usual form of litigation funding agreement involves the funder being paid a proportion of the proceeds of any judgment or settlement, the funder's and group members' interests are aligned in maximising the settlement sum.[16]

[13] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 205, 223.
[14] (2006) 229 CLR 386.
[15] Campbells Cash and Carry v Fostif (2006) 229 CLR 386, 435 [93], cited in Susanna Khouri, Wayne Attril and Clive Bowman, 'Litigation Funding and Class Actions – Idealism, Pragmatism and a New Paradigm' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 229, 243.
[16] Cameron Hanson, 'Weighing the Bird in the Hand: Settlement of Class Actions' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 259, 265.

3.23. We also note that the Consultation Paper makes reference to a hypothetical situation in which a conflict may exist between lawyers' advice that a particular aspect of a case has legal merit, and a litigation funder's refusal to finance these aspects of proceedings. Aside from observing that we are unaware of any specific instances of this situation having arisen to date, we would note that in our experience it is consistently the preference of litigation funders to advance all claims which in the opinion of the lawyers and counsel have legal merit and which result in an improved outcome for group members. The inclusion of additional claims or lines of argument in this way can significantly increase the prospects of a proceeding being successful, and often would not add dramatically to the cost of pursuing a proceeding if similar arguments or evidence will already be involved in the claim, so from a funder's perspective such action has obvious benefits in lowering the risk of their investment.

3.24. Further, it is often the case that the ability to seek counsel's advice about such points, or otherwise interrogate the viability of such a claim by, for example, obtaining early expert evidence, is significantly enhanced by the presence of a well-resourced funder willing and able to provide the necessary capital to make these investments. In this way, the presence of a funder and a party's ability to take advantage of all arguments available to them in a proceeding may be seen as mutually reinforcing factors, rather than necessarily being at odds with one another.

3.25. We also tend to agree with the position expressed by Wayne Attrill, Senior Investment Manager at IMF Bentham that, on the flip side:

while a conflict (in the sense of a disagreement) might arise if the lawyers or the claimant wished to plead more causes of action than the funder was willing to fund, it is difficult to see how the claimant's interests could be detrimentally affected by a funder's insistence that only the most promising causes of action be run in the interests of minimising the costs and risks of the proceedings and maximising their potential outcome.[17]

3.26. The Consultation Paper also raises the possibility that the funders' incentive to maximise the number of class members signing up may result in advertisements giving undue prominence to the prospects of success of proceedings. In our experience this could not be further from reality – lawyers and funders are careful to ensure that any material provided to group members provides the necessary information for them to consider their options with respect to participation in the proceeding, with an acknowledgment of the risks which exist in relation to the likely success of the claims. Lawyers and litigation funders are, in our experience, acutely aware of the fact that their communications with group members in this regard may attract the scrutiny of the Court, and that as with any contract, misstatements or inaccuracies in any such explanatory material may jeopardise the enforceability of a funding agreement.

3.27. Upon request, it is our practice to provide our clients with a detailed letter of advice setting out the basis for the claims advanced – we do not make this publicly available, and require group members to enter into a solicitor-client relationship and agree to keep this information confidential for obvious reasons. Group members are informed that they remain free to obtain their own independent legal advice about their participation in a class action or engagement with a funder, and are encouraged not to sign any documentation unless they understand and agree with it.

3.28. Having regard to all of the above, we acknowledge that there is a need to ensure that as new entrants become involved in the class actions space, some level of guidance as to the specific expectations for managing conflict is useful.

3.29. We consider that the Federal Court's Class Actions Practice Note, which requires that any costs agreement should include provisions for managing conflicts of interest between any of the applicant(s), the class members, the lawyers and the litigation funders, is an appropriate mechanism by which to set the standard for conflict identification and management.

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?

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?

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?

[17] Wayne Attrill, 'The Regulation of Conflicts of Interest in Australian Litigation Funding' (Paper prepared for the UNSW Class Actions: Securities and Investor Cases Seminar, Sydney, 29 August 2013) 5.

Proposed Reforms

3.30. We acknowledge that it is desirable to ensure that as new entrants become involved in the class actions space, some level of guidance as to the specific expectations for managing conflict is provided.

3.31. We consider that the Federal Court Practice Note, which requires that any costs agreement should include provisions for managing conflicts of interest between any of the applicant(s), the class members, the lawyers and the litigation funders, is an appropriate mechanism by which to set the standard for conflict identification and management.

3.32. The Federal Court Practice Note also states that any litigation funding agreement should include provisions for managing conflict of interest between the funded class members, the lawyers and the litigation funder. As noted in the Consultation Paper, the obligation to recognise and properly manage any conflicts of interest is placed on the lawyers.

3.33. Equivalent standards could be included in the Victorian Supreme Court Practice Note *SC GEN 10: Conduct of Group Proceedings (Class Actions)*. Disclosure not only of the risk of a conflict to group members, but information as to the way in which such conflicts will be managed and resolved, is essential to ensuring that all parties understand their obligations in the event that a conflict arises. Although in our view such a disclosure requirement should properly already be considered to form part of a lawyer's professional obligations to their client, the inclusion of an explicit requirement in the Practice Note would provide a useful external standard for all such agreements to meet, and also provides additional flexibility in permitting the Court to vary or dispense with compliance with such requirements in appropriate cases.

3.34. As to Question 5, we do not consider that there is any need to implement the proposal that the Supreme Court or legal profession draft guidelines addressing the responsibilities of lawyers in class actions. As noted above, the existing regulatory framework governing lawyers' conduct in respect of litigation more broadly, coupled with the inclusion of the aforementioned directions in the Practice Note, are in our view sufficient to protect litigants from unfair risks.

3.35. Further, given the variety of cases and different groups represented in class action proceedings, it would not be appropriate to impose a one-size-fits all set of guidelines to regulate lawyers' conduct in this field.

3.36. In our experience, it is not common for a conflict as between the representative plaintiff as compared to the balance of the class, or a section of same, to arise. In the event that such a conflict was identified, lawyers for the group have a range of appropriate responses available to them, including briefing counsel to advise in respect of the management of same, disclosing the existence of the conflict to group members, and where necessary, advising group members to seek independent legal advice.

3.37. The imposition of guidelines would create an unnecessary additional layer of compliance which would have little practical effect on the current day-to-day conduct of the already heavily regulated legal profession.

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?

4.1. As a plaintiff law firm, we strongly support measures designed to improve the disclosure and provision of relevant information to group members, to allow them to make informed decisions about their participation in class actions and their engagement with litigation funders. The disclosure of information about class actions to group members which is relevant to their decision-making in this regard is an essential mechanism for the achievement of the aims of Part 4A. We submit that in funded class actions, lawyers should be expressly required to inform class members, and keep them informed, about litigation funding charges or rates, in addition to lawyers' existing obligations to disclose information to clients (including potential clients).

4.2. At a preliminary level, it is important to note that disclosure to all group members covered by a representative proceeding can be a logistically difficult exercise. In most class actions, the identity of all group members is unknown to both plaintiffs and defendants alike. In most mass torts, there is rarely a central registry of relevant individuals who have suffered the harm complained about. In shareholder litigation, the share registry is a helpful but quite imperfect guide to those that may have claims in the action; its key deficiency arises from the prevalence of nominee or custodian holders of securities who appear on the register but do not hold the beneficial interest in the shares. Newspaper adverts have become

increasingly ineffective at reaching the population at-large. In most cases, plaintiffs need the assistance of court orders to gain access to the relevant lists identifying potential group members or for notices to be sent to relevant lists identifying potential group members.[18]

4.3. The Commission has discussed disclosure in funded proceedings at three separate stages: the commencement of proceedings; during proceedings; and after judgment or settlement. We address each of these stages in turn.

4.4. In our view, the factors affecting the need for disclosure to group members prior to the commencement of a proceeding and after commencement but before an opt-out date are relevantly identical: group members should be provided as much information as possible that is relevant to their decision whether to participate in the proceeding, the provision of which (in a necessarily non-confidential manner) would not harm the interests of the group as a whole by undermining the plaintiff's ability to pursue the claim, or by providing a strategic advantage to the defendants to any litigation. Such information should be disclosed to group members in clear terms and as soon as is practicable (consistent with the position set out in clause 5.3 of the Federal Court Practice Note).

4.5. We consider that funding-related information, such as the rate or commission to be charged by a funder to group members, should be disclosed in all circumstances, regardless of whether a group member is a client of the lawyers involved. As the nature of modern funding arrangements in class actions is such that typically some form of 'equalisation' process will be applied to ensure a 'funded' subgroup is not disadvantaged compared to an 'unfunded' subgroup, an identification of the proportion (even approximately) by which a group member's eventual damages is likely to be reduced is clearly of direct relevance to their decision about whether to participate in a class action or whether to seek to opt out and pursue their claim elsewhere. We consider that the approach proposed in the Federal Court Practice Note in this regard is the appropriate model to be adopted in all jurisdictions: the disclosure should be clear and timely and is an ongoing obligation, and Courts should be empowered to consider any failure to comply with this obligation as a factor relevant to settlement approval decisions (and in particular the approval of legal costs amounts).

4.6. For reasons developed below, and contrary to one reading of the question posed in the Commission's Consultation Paper, we do not consider that the disclosure principles concerning group members generally extend to ongoing obligations concerning legal costs and disbursements. Those are matters which are already provided for (for example, under the Legal Profession Act) in respect of clients of lawyers acting in a class action, however their communication to a wider audience, including to group members who are not clients, has the potential to harm the interests of the group as a whole in pursuing the litigation effectively.

4.7. In our view, the representative plaintiff is the party to whom lawyers' existing obligations in terms of costs disclosure must principally apply concerning the provision of information as to the costs (to date, and expected in future), funding arrangements and prospects of a representative proceeding. These obligations should not be diminished or undermined in any reforms contemplated within the remit of the Commission's reference. Similarly, disclosure of information about the legal costs and disbursements in a class action more broadly (as opposed to in relation to a group member's personal claim within a class action) will likely be appropriate to be made to clients who are not representative plaintiffs upon request, and subject to any conditions or arrangements as are required in the circumstances of the particular case.

4.8. The provision of all such information to all group members (especially non-client group members) later in a proceeding, and on an ongoing basis, has some additional complexities, however. Plainly, information about the financial and legal context in which a case is proceeding will be relevant to a group member when considering whether to participate in a class action, both at the outset if offered a funding agreement and subsequently when determining whether to opt out of a proceeding. As above, funding-related information being provided at both of these stages may be particularly meaningful to group members where it would permit them to assess potential 'true' returns they might receive from a successful resolution of the proceeding, should it be resolved on the basis that costs and a funding commission would be reduced from any settlement distribution to which they are entitled before funds are paid to them (as is often the case). In our experience, fee- and disbursement-related information is not typically relevant to group members' decisions (rather than those of the representative party) at these junctures, as there is not sufficient information available then to permit an assessment of whether or how they would affect the eventual outcome for them – for instance, group members could not meaningfully assess whether a settlement might subsequently be structured on a 'plus-costs' or 'all-inclusive' basis, whether higher or lower costs would mean that a case would be more or less likely to be successful, or what proportion of those fees and disbursements will be recoverable or approved by the Court.

[18] Pearson v State of Queensland [2017] FCA 1096, 14 [48] – [52].

4.9. While we are strongly of the view group members must be provided sufficient information to be able to make an informed decision about their rights in this regard (and, as above, disclosure of funding rates should unquestionably be considered a key component of such information), this imperative ought be balanced against a recognition of the fact that the role of the group member is inherently less active than a traditional plaintiff (and that, on one view, they take the benefit of having a proceeding run on their behalf at the cost of a reduced level of control over and transparency surrounding some aspects of the way the proceeding is run), and some such information may in fact be harmful to the interests of the plaintiff and group members as a whole if distributed more broadly.

4.10. In particular, the distribution of advice (otherwise than in a Court-approved notice) concerning legal costs incurred to date and advice as to prospects would confer a strategic advantage on the defendant in the proceeding. As a practical matter, it should also be recognised that if such information is distributed to all group members in the course of a proceeding, the prospects of it retaining a confidential or privileged status are diminished significantly – the chances of an accidental disclosure increase substantially with the size of the class of recipients, and in addition it is not uncommon for there to be a small contingent of a class that is unhappy with the conduct or outcome of a class action (but who have not opted out of the proceeding), in whose hands significant strategic information of this nature may create additional risks. We suggest that the provision of sensitive information which could sway the outcome or course of a class action of this nature is somewhat inconsistent with the essentially passive role played by group members in class actions (and contrary to the confined circumstances under Part 4A and Part IVA in which group members may play a direct role in influencing a class action), and as such caution should be exercised before expanding disclosure requirements of this nature.

4.11. Under the typical model in a funded claim, in which group members are offered the ability to retain Slater and Gordon and enter into an agreement with a funder at the outset of a piece of litigation, a suite of documentation is made available to group members, containing a Legal Costs Agreement, the Litigation Funding Agreement, and a Disclosure Statement. These documents provide information about the anticipated legal costs and litigation funding charges involved in the proceeding, and explain how conflicts will be managed as between the funder, the representative plaintiff and group members. The disclosure statements in particular are expressed in extremely clear and accessible language, to ensure that all clients understand the nature of the obligations they will assume as a result of executing the relevant agreements. As a consequence, at the time of considering whether to retain Slater and Gordon and enter into a litigation funding agreement, a group member is equipped with all documentation necessary to understand the costs involved in participating in the claim.

4.12. As to disclosures during the litigation, in compliance with our obligations under Schedule 1 of the *Legal Profession Uniform Law Application Act 2014* (Vic), we regularly provide updates to group members who are our clients throughout the course of the proceeding.

4.13. Such updates are an opportunity not only to provide group members with any updated estimate in relation to legal costs, but are also the key mechanism by which we keep group members informed of the progress of the proceeding, and any significant issues which have arisen which affect the prospects of success, or potential for timely resolution of the proceeding.

4.14. As noted in the Consultation Paper, because of the uncertain and risky nature of litigation, proceedings might not progress at the rate or in the manner expected when they began, and it is important to keep clients informed of the legal progress of the litigation, in addition to the actual and expected costs and the likely outcome.

4.15. In our experience, regular updates of this nature are welcomed by clients, who appreciate being kept in the loop about the status of their claims. Whilst for the most part group members tend not to actively respond to such correspondence, we expect that a failure to provide an update as to the progress of the proceeding in particular would lead to inevitable uncertainty and frustration amongst our clients. We therefore have a strong interest in ensuring that these updates are provided on an appropriately regular basis.

4.16. Where such updates and information are provided to clients on an ongoing basis, they maintain a privileged status, and can be disclosed more freely without the risk of disadvantaging the group as a whole or the conduct of the proceeding. Disclosure of such potentially-important strategic information to non-client group members cannot readily be achieved with anywhere near the same degree of confidence or assurance, and therefore has the potential to run counter to the group's interests. Particularly after an opt-out date has passed, however, such information is also relevantly less useful to such group members, as they have no further opportunity to take a step in the proceeding save for the specific (and limited) opportunities provided to advance their individual interests under Part 4A or IVA.

4.17. As such, we support the expansion of disclosure requirements to group members to include financial and practical information which does not confer a strategic advantage on defendants, where such information is reasonably considered to be likely to be relevant to a group member's decision as to whether to participate in the proceeding or not. We suggest that the precise formulation of such disclosures, and the kinds of information to be disclosed, are most appropriately determined by the court in the context of a particular case, rather than being prescribed in advance in a Practice Note or any amendment to the legislation. Outside of such information that is relevant to group members' decisions concerning participation in the proceeding, or the assertion of any individual rights or powers in the limited circumstances provided by the legislation governing the class action regimes, we consider that disclosure obligations are most appropriately addressed to clients of lawyers, consistent with the existing statutory, regulatory and professional rules.

4.18. The desire to promote effective disclosure to group members may also be addressed indirectly, by an expansion of the role of the factors to be considered by a court in approving a proposed settlement, and the matters to be addressed in affidavit evidence in support of a settlement approval application, as is already provided for by the relevant Practice Notes. The Supreme Court Practice Note, for instance, already requires that evidence be put on concerning the 'terms of fee and retainer agreements including the reasonableness of legal costs' – it would be consistent with the Court's role in supervising costs generally, and its 'protective' role in relation to group members' interests, for consideration to be given to expanding such requirements to also incorporate the disclosure of funding arrangements, in considering whether it is appropriate for fees to be approved. Such a change would be likely to provide a stronger incentive towards clearer disclosures to group members (tailored as necessary to the circumstances of the particular case), but would also not appear to greatly change the existing and well-established notification procedures for group proceedings or substantially increase the disclosure burden on the vast majority of practitioners and funders who, in our experience, act professionally in relation to plaintiffs and group members, and who take their disclosure obligations seriously. Aspects of sections 5 and 15 of the Federal Court's Practice Note may provide a useful model to consider, in this regard.

4.19. Finally, to address the question of disclosure of such information at the conclusion of a proceeding, in the ordinary course it will be appropriate for all affected group members to have access to a broader range of otherwise-sensitive information, including in relation to funding and legal costs, in order for them to consider their own response to any proposed settlement. In some circumstances it may be appropriate for non-client group members to agree to certain conditions of confidentiality in order to prevent information becoming available to defendant parties in the event that a proposed settlement is not approved, however the ordinary course of settlement approval processes clearly envisages that group members should be afforded sufficient information to be able to formulate an informed response to any proposal. Disclosure in such a context will often occur through the use of a Court-approved notice, the contents of which will often be developed with specific input from the Court. In our view, this is an appropriate practice and one which permits the Court to tailor the subject-matter of the disclosures as appropriate on a case-by-case basis.

4.20. We also submit that it may be appropriate for the Supreme Court Practice Note to be amended in line with the Federal Court Practice Note, to state that in appropriate cases evidence filed in support of an application for Court approval of settlement may include discussion of:

a) The time at which it is anticipated settlement funds will be received by class members; and

b) The frequency of any post-approval report(s) to be provided to the Court about the distribution of settlement funds.

4.21. We expect that the frequency of post-approval reports will differ from case to case. The distribution of settlement funds in securities class actions tends to be a relatively quick process, with the bulk of the funds generally distributed within six months following settlement approval. This reflects the relatively straightforward approach to assessment of group member entitlements, which are calculated in accordance with a Court-approved formula.

4.22. Where more complex loss assessments are required, particularly where personal injury claims are concerned, lawyers proposing a settlement distribution scheme incorporating such a process would be expected to have an appreciation of the likely time and complexity involved in such assessments ahead of the settlement approval hearing, and should therefore properly be expected to inform the Court – and group members – at an early opportunity of the expected distribution timetable. Doing so avoids creating uncertainties and/or unrealistic expectations amongst group members, and also may of itself be relevant to the Court's consideration as to whether to approve the proposed settlement.

4.23. We note Justice Jack Forrest's comments in respect of the Kilmore bushfires settlement distribution, which in our view demonstrate that courts have a willingness to supervise the distribution of the class action settlement funds after settlement approval has been granted:

Once the SDS had been approved, the task of assessing the claims and determining individual payments was that of the scheme administrator. The Court's role was supervisory, so we held regular CMCs directed to several issues:

(a) the progress of the claims assessment process;

(b) issues raised by the scheme administrator that required Court direction or approval;

(c) keeping group members informed; and

(d) approval of interim payments and the administrator's costs.[19]

4.24. In the context of complex settlement distribution schemes, it is appropriate for the Court to maintain close supervision of the progress of the distribution with a view to ensuring that group members are informed, and that issues can be resolved expeditiously.

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?

4.25. We note that best efforts are made by courts and lawyers to ensure that notices to group members are clear and accessible.

4.26. However, we acknowledge that the form and content of formal and informal notices can present a number of issues whichcan be an impediment to the ability of group members to participate in class actions.

4.27. These issues are particularly acute within the context of vulnerable plaintiffs. Examples of difficulties in relation to disclosures to group members by lawyers can include:

a) The use of complex legal terminology;

b) The failure to produce translated notices where needed;

c) The failure to provide interpreters where needed;

d) Short time-frames for responses;

e) A limited capacity to engage with all group members; and/or

f) Limited mechanisms by which group members can respond.

4.28. Following a review of class actions involving vulnerable clients,[20] Professor Morabito determined that lawyers for these groups typically had to use creative methods for establishing and maintaining contact with the class, and for communicating legal concepts simply but meaningfully.

[19] The Hon. Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements – Kilmore East / Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 71, 93 - 94.
[20] Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study' (2016) 35 Civil Justice Quarterly 61, 88

4.29. Examples of group proceedings where the Federal Court has taken an innovative approach to ensuring notifications to group members are appropriate include:

a) The Palm Island class action, where Justice Mortimer made orders which approved the use of social media as a means to communicate with class members;[21] and

b) The Kilmore bushfires litigation, where Justice Forrest made the following observations:

After considerable discussions with the parties, and particularly counsel for Mrs Matthews, I determined that it is necessary that notice be given not only through "old media" but also as extensively as possible through the internet and social media. I am particularly conscious of the need to utilise different digital forms of communication given the likely spread of demographics of group members – in particular those under the age of 35. Accordingly, the orders provide for distribution of the notices to group members in the following ways:

(a) through traditional media sources such as newspapers (and especially local newspapers) and radio stations – and in particular, if practicable, ABC Radio (metropolitan and regional), which is a designated bushfire alert station during the bushfire season.[22]

c) The pacemakers litigation,[23] in which Justice Sackville was concerned to avoid causing unnecessary panic amongst potential group members, whose characteristics were such that they were likely to be particularly prone to anxiety and distress,[24] and which therefore resulted in the Court dispensing with its proposal that it might be appropriate to order that the notice be advertised in the press.[25]

Proposal

4.30. We submit that it is appropriate for the Court to continue to consider and approve formal notes on a case-by-case basis, having regard to the particular circumstances of each represented group and the facts and circumstances present in each case. That said, there is likely value to be gained from having such notices take an increasingly standardised and recognisable form, so that decisions made and consideration undertaken by the Court in assessing any single proposed Notice may be of benefit to subsequent proceedings as well. In this regard, we suggest that given its role in approving formal notices, the Supreme Court would be well placed to expand its current practice of publicising approved notices for current proceedings on its own website, by maintaining a resource of all approved opt-out and proposed-settlement notices used in Part 4A proceedings (either online or within the Supreme Court Library), to facilitate the adoption of approved forms of notice as 'standards'. In this regard, it may be worth the Court considering the development of a policy concerning the desirability of publishing brief reasons concerning the approval of any notice that has non-standard or controversial elements, or for which the proposed terms were contested between the parties, to provide greater guidance to parties in developing future notices.

4.31. In a similar vein, it may also be appropriate for the Supreme Court to consider the development of a template or sample form of certain notices (for instance, opt-out notices and notices of proposed settlements), as has been included within the Federal Court Practice Note.

4.32. In addition, in relation to the communication and distribution of notices, we suggest that it may also be desirable to work towards standardising particular steps that must be taken when vulnerable group members, such as non-English speaking or geographically remote individuals, are known to be involved in a proceeding.

4.33. Matters that could be contemplated in this regard include:

a) Stipulating that formal notices such as Opt Out Notices and Settlement Notices also be provided in "easy English"[26] translations, consisting of short and simple sentences together with explanatory diagrams, for class actions involving particularly vulnerable persons;

b) Stipulating requirements regarding publishing or distributing translated versions of notices to group members where it is known that the group speaks languages other than English as their first language;

[21] Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia', (20 July 2017), 21.
[22] Matthews v SPI Electricity (Ruling No 13) [2013] VSC 17 [100].
[23] Courtney v Medtel Pty Ltd (No 4) [2004] FCA 1233.
[24] Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study' (2016) 35 Civil Justice Quarterly 61, 83.
[25] Courtney v Medtel Pty Ltd (No 4) [2004] FCA 1233, 3 [13].
[26] See, eg, the 'Proposed Settlement Notice' published in Tyson Duval-Comrie (by his Litigation Representative Kairstien Wilson) v Commonwealth of Australia [2016] FCA 1523.

c) Providing additional guidance on methods of communication to be used with group members, particularly where the group is geographically dispersed, and particularly by promoting electronic means like Facebook and mobile messaging applications such as WhatsApp and Viber.

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?

5.1. In our submission, in many cases, it is appropriate to require the plaintiff to disclose funding agreements to the Court and other parties, in the latter case where appropriate steps are taken to protect confidential information, or material that would otherwise confer an unfair advantage on a defendant.

5.2. There can be benefit to group members in disclosing funding agreements to the Court. Further, the disclosure of funding agreements usually poses minimal risk to the representative plaintiff, provided appropriate restrictions are in place.

Benefit to group members in disclosing funding agreements to the Court

5.3. In our view, there is value to group members in requiring the plaintiff to disclose funding agreements to the Court. Disclosing a funding agreement can help ensure the integrity of the litigation process by putting the Court on notice that a litigation funder is involved in the proceedings.

5.4. In exceptional circumstances, the Court can be alerted to possible conflicts of interest between lawyers and the litigation funder. In Bolitho v Banksia Securities Ltd (No 4),[27] a publically available funding agreement assisted the Supreme Court of Victoria to determine that lawyers for the plaintiff should be prevented from acting due to their commercial interests in the litigation funder.

The Federal Court regime

5.5. Practice Note SC Gen 10 issued by the Supreme Court of Victoria on 30 January 2017 does not currently contain provisions dealing with the disclosure of litigation funding agreements. We understand from the Consultation Paper that this reflects the fact that the Court prefers to deal with the disclosure of funding agreements on a case-by-case basis.

5.6. The Federal Court Practice Note however requires funding agreements to be disclosed for all funded class actions commenced in the Federal Court.

5.7. Section 6 of the GPN-CA includes the following relevant provisions:

a) Section 6.1 provides that subject to any objection, and prior to the first case management hearing, the applicant's lawyers shall provide a copy of the litigation funding agreement to the Court.

b) Section 6.2 provides that any funding agreement provided can be limited to an example of the standard form of each agreement, and need not include individual variations to the standard forms.

c) Section 6.3 requires the applicant's lawyers to provide the Court with any updated version of the funding agreement.

d) Section 6.4 provides that subject to any objection, the applicant's lawyers shall serve a 'Notice of Disclosure' which includes a copy of the litigation funding agreement. Accordingly, the funding agreement will be accessible to the defendant and other parties.

5.8. Section 6.4 provides that any copy of the litigation funding agreement can be redacted to conceal any information which might confer a tactical advantage to the defendants, including:

a) Information as to the budget for the litigation or the funds available to the applicant; and/or

b) Information which might indicate an assessment of the risks or merits of the claim.

[27] Bolitho v Banksia Securities Ltd (No 4) [2014] VSC 582.

5.9. Section 6.4 is necessary to mitigate any harm to the plaintiff's case that might occur from disclosing a funding agreement to the Court and other parties. The Federal Court in *Coffs Harbour City Council v ANZ*,[28] confirmed that information in a funding agreement that might confer a tactical advantage in litigation also included:

a) Specified percentage amounts and other potential rewards to which the funder might be entitled;[29]

b) Details of an agreed settlement mechanism that may be able to be exploited for tactical advantage;[30] and

c) Provisions dealing with termination and the consequences of termination of the funding agreement.[31]

5.10. We suggest that this may be an appropriate practice to incorporate in all funded class actions, and therefore suggest that the Supreme Court of Victoria consider adopting practices that align with those of the Federal Court Practice Note in this regard (whether or not this takes the form of an amendment to the Supreme Court Practice Note or merely reflects a presumption to be applied in the course of the Court's ordinary case-by-case consideration of disclosure requirements in funded class actions).

6. Certification of class actions

Should the existing threshold criteria for commencing a class action be increased?

6.1. In our view, it is neither necessary nor appropriate to increase the threshold criteria for commencing a class action, or to introduce a fixed pre-commencement hearing or interlocutory process regarding whether a matter is appropriate to proceed as a class action. We address these matters in turn below.

Undesirability of increasing threshold criteria in s 33C

6.2. In our submission, it is not necessary to increase the threshold requirements under s 33C of the *Supreme Court Act 1958* (Vic) in circumstances where, if a claim is inapt to proceed as a class action, the courts have ample discretionary power under ss 33L, 33M, and 33N to 'declass' it. Section 33N, in particular, is a broad and flexible power which a court may apply on the motion of the defendant. It allows the courts to give broad consideration to the purpose the class action might serve,[32] and the discretion may be exercised notwithstanding that the threshold requirements in s 33C have been met.[33]

6.3. A key distinction between the Australian legal system and other jurisdictions such as the U.S. in which certification requirements play a significant role in class actions beyond those provided by ss33C and 33N of the relevant local legislation, is the presence of the adverse-costs rule. This is, in our submission, the substantive answer to the vice sought to be addressed by proponents of a certification procedure: to the extent that proceedings are drafted in an imprecise or impermissible way, the risks or costs of any such failure will ordinarily be borne by the party bringing the proceeding or making those mistakes. This provides an inherent and effective disincentive to parties, lawyers and funders (in addition to their overarching obligations) against commencing or pursuing proceedings that should not properly be brought as class actions. It is notable in this regard that there is a distinct lack of evidence to point to of cases commenced under Part 4A or Part IVA that were inappropriate to proceed as group proceedings, but which could not be adequately dealt with by ss33C or 33N. We suggest that the presence of the adverse-costs rule is an effective factor in promoting restraint and appropriate conduct, in this regard.

6.4. In practice in the Australian context, the relative framing of ss 33C and 33N enables the class action procedure to be used in a flexible and innovative manner to resolve particular issues in multiple claims efficiently. For instance, in a given case it might be desirable to use the class actions procedure to determine a threshold question or a limited issue in relation to claims by a large number of people, but there might be no purpose to continuing a matter as a class action thereafter,[34] and it might then be discontinued under s 33N. It is a virtue of the class action procedure that it need not be used to resolve the complete cause of action of every group member.[35]

[28] [2016] FCA 306.
[29] Ibid 8 [27].
[30] Ibid 8 [28].
[31] Ibid 8 [30].
[32] Bright v Femcare Ltd (2002) 195 ALR 574, 601 [130] (Kiefel J).
[33] Wong v Silkfield Pty Ltd (1999) 199 CLR 255, 267 [29] (the Court).
[34] Bright v Femcare Ltd (2002) 195 ALR 574, 601 [128] – [129] (Kiefel J).
[35] Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27, 7 [42] (Gillard J).

6.5. An example is provided by *Zhang De Young v Minister for Immigration*, Local Government and Ethnic Affairs, which was a class action on behalf of individuals who had been refused refugee status after a particular date, and who had again been unsuccessful on review of the decision. The claim alleged that group members had not received natural justice because they had not been given an oral hearing. The Court decided the issue of whether the practice of not providing an oral hearing, of itself, established a failure to afford natural justice, and then applied s 33N. While individual group members had many individual circumstances, this key issue was determined efficiently for a very large group.

6.6. In our experience, entities that are typically involved with the defendant side of group proceedings have called for the introduction of a certification stage or requirement in the Australian class actions regime for many years now. In the Australian context, however, considering the powers already available to and used by courts to dispense with class actions, we submit that these suggestions are really a solution in search of a problem. There has been no epidemic of improperly-commenced class action proceedings across now several decades of Australian class action experience, and to the extent that some proceedings have been commenced or continued in problematic circumstances, the Australian experience has been that courts' existing powers have been adequate to address such issues, and the costs of those proceedings have been borne by the unsuccessful parties.

6.7. The imposition of an additional certification requirement to the current Australian class action process would not therefore serve to remove or reduce improper class actions – those are already able to be dealt with – but rather would impose an additional barrier and burden on plaintiffs, making class actions more difficult to pursue overall, as discussed below. We submit that it would therefore be a net detriment to the aim of enhancing access to justice, without any commensurate benefit.

Pre-commencement hearings and initial proof of threshold requirements

6.8. It is undesirable to introduce a mandatory pre-commencement hearing or interlocutory process involving an assessment of whether a matter is appropriate to proceed as a class action for the following reasons:

a) First, it would likely increase interlocutory disputes and legal costs without offering a clear benefit;

b) Second, there are already sufficient laws and procedures to ensure such issues are brought forward and addressed at the appropriate time; and

c) Finally, if Victoria alone introduces such procedures, matters which would otherwise have been commenced in Victoria may be commenced in other jurisdictions, resulting in those proceedings being framed sub-optimally under, for instance, federal laws.

6.9. We address these reasons in turn below.

Increase in interlocutory disputes and costs

6.10. Introducing an additional compulsory interlocutory hearing or process dealing with class action procedural issues, including those which might not otherwise be live issues in the proceeding, is very likely to increase, rather than reduce, interlocutory disputes and costs without a corresponding benefit.

6.11. First, there is unlikely to be a benefit because, to the extent that there are issues as to the suitability of a proceeding to continue as a class action, the present laws and court procedures already provide for those issues to be addressed promptly.

6.12. Section 33H of the Act provides for a description of the group members, their claims, and common questions of fact or law to be indorsed on the writ, allowing any issues relating to common questions or proper constitution of the group to readily be identified. The proactive case management processes employed by the Supreme Court then ensure such matters are brought forward promptly. As identified in the Consultation Paper, the Supreme Court Practice Note provides a number of procedures to identify and resolve such issues at an early stage, including:

a) An early directions hearing or case management conference at which the parties are expected to be able to address matters including any issues regarding the description of group and any pleadings issues;[37]

[37] Supreme Court of Victoria, Practice Note SC Gen 10: Conduct of Group Proceedings (Class Actions), 30 January 2017, s 5.8(a) and (b).

b) The Court is to fix dates as early as practicable for any applications, including applications 'challenging the commencement of the proceeding as a group proceeding', or 'seeking an order modifying or removing the group character of the action';[38] and

c) The Court may consider, at the earliest practicable date, the utility of determining any common question as a preliminary question, or giving summary judgment on a common question, so as to narrow the scope of the dispute.[39]

6.13. Further, in our experience, representatives of defendants to class actions are almost invariably experienced litigators with eminent counsel briefed. They are sophisticated, well-resourced, and make full use of interlocutory options which might assist their clients. In practice, issues around the appropriateness of a matter proceeding as a class action are inevitably raised where they have merit.

6.14. Second, a pre-commencement hearing or process is likely to increase disputation and costs, not only in cases where threshold issues might not otherwise be in dispute, but also where a court is unable at a preliminary stage to make a final determination of whether a proceeding should go forward as a class action. This is often the case, and means that mandatory pre-commencement determinations on threshold issues may often be succeeded by later applications on the same threshold issues.

6.15. This occurs because the efficiency and appropriateness of a proceeding going forward as a class action is frequently driven by the findings a court might make which will generalise to the represented group.[40] An understanding of the findings which might be made requires an understanding of the evidence the parties will adduce in support of their cases.

6.16. By way of illustration, a representative plaintiff will often plead that a defendant breached a duty by reason of a systemic practice, which is alleged to have adversely affected the represented group. The defendant might deny the allegation and later put on evidence that, in fact, a different systemic practice was followed. A finding by the court on this fact in issue might then be generalised across the group. Alternatively, the defendant might allege that the practice was not truly systemic, and different conduct occurred in relation to different group members. The latter evidence (but not the former) might raise a question about whether the matter can efficiently proceed as a class action.

6.17. Even after pleadings have closed and even if the parties are required to foreshadow the evidence they intend to lead, the evidence as finally adduced may differ from that which is originally anticipated, particularly where, as is common in the area, extensive expert evidence is involved. Alternatively, the defendant may make admissions at or prior to trial which have the effect of eliminating common issues which would otherwise arise.[41] Either might then lead to an application under s 33N.

6.18. The difficulty in assessing at an early stage whether a matter should proceed as a class action can readily be observed in the case law. For instance, the decision referenced in the Consultation Paper at 6.72, by which a class action was discontinued as such after running for four years,[43] came some three years after an earlier application under s 33N was resolved in favour of the applicant.[44] It only became clear that the proceeding would not have substantial utility for other group members having regard to the specific nature of the judge's findings after the trial.[45]

6.19. It is for reasons such as these that the courts have noted that applications under s 33N made at an early stage of proceedings are often premature.[46] For these same reasons, there would be limited utility in mandating such a process pre-commencement.

[38] Ibid s 6.2(a) and (b).
[39] Ibid s 10.1.
[40] Batten v Container Terminal Management Services Ltd [2001] FCA 1493, [17] (Kiefel J).
[41] AS v Minister for Immigration (Ruling No 7) [2017] VSC 137, 31 – 33 [97] – [103] (Forrest J).
[42] See, eg, Bright v Femcare Ltd (2002) 195 ALR 574, 581 – 582 [27] – [28], 584 [44], 587 [65] (Lindgren J), 592 [93], 605 [149] (Kiefel J).
[43] Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11) [2013] FCA 241.
[44] Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 6) [2010] FCA 295.
[45] Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11) [2013] FCA 241, 18 [64] – [66] (Mansfield J).
[46] Wong v Silkfield (1999) 199 CLR 255, 268 (the Court); Bright v Femcare Ltd (2002) 195 ALR 574, 580 [18] (Lindgren J), 605 [149] (Kiefel J); Guglielmin v Trescowthick (No 2) (2005) 220 ALR 515, 532 - 533 [76] (Mansfield J).
[47] Guglielmin v Trescowthick (No 2) (2005) 220 ALR 515, 532 – 533 [76] (Mansfield J).
[48] Kamasaee v Commonwealth of Australia (No 10) [2017] VSC 272, 29 – 31 [74] – [78] (McDonald J); Dillon v RBS Group (Australia) Pty Ltd [2017] FCA 896 17 – 20 [62] – [75] (Lee J).

Broad powers to remedy commonality issues and adequacy of representation issues

6.20. Further, in our view, issues relating to deficiencies in group composition and adequacy of representation are adequately addressed in the current system. Under the current regime, these issues are readily resolved under the courts' extensive powers.[47] In addition, nuanced considerations are permitted under s 33N, s33Q and s33R, providing wide powers to the courts to address such issues insofar as they relate to commonality of issues. Further, the practical approach taken by the courts may, in appropriate cases, permit findings extending beyond the strict limits of the representative plaintiff's claim.[48]

6.21. To the extent that representation of group members is inadequate due to conflicts between duties owed to different group members, it is apparent that the courts are willing and able to address this issue using powers they already possess.[49] As such, it is not clear what problem is actually sought to be addressed by the introduction of any certification requirements.

6.22. Professor Morabito has also undertaken research which demonstrates that any legislative change in respect of adequacy of representation would be a response to a non-existent issue – he found that a high proportion of professionals and managers were among the representative parties in class actions filed over the past 25 years, despite the proposition from some that representative parties are chosen for their unsophistication.[50]

Risk of jurisdiction shifting

6.23. Finally, we are concerned that, if burdensome substantive pre-commencement requirements were to be introduced in Victoria, some applicants will issue proceedings interstate (if possible), or in the Federal Court of Australia.

6.24. This practice was common prior to the introduction of Part 4A of the Supreme Court Act 1986 (Vic) and often led to drawn-out disputes over jurisdiction,[51] and no doubt strike-out applications, at considerable expense to both representative plaintiffs and defendants. We consider that such incentives ought not be created, particularly in circumstances where, for the reasons set out above, they are unlikely to bring any benefit. As a firm that does substantive work in this area on behalf of plaintiffs and group members, we would need to carefully consider any legislative changes that might make commencing litigation in Victoria more complex, to ensure that any jurisdictional issues do not unjustifiably render proceedings more cumbersome for our clients.

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?

6.25. In practical terms, we do not consider that any statutory amendment is necessary or appropriate in relation to competing class actions. Competing class actions can raise difficult issues, however recent experience establishes that courts are alert to them and, in our submission, have sufficient powers to address them.

6.26. In our experience, competing class actions commenced in different courts are promptly transferred to a single court on the application of the defendant. For instance, in the context of competing class actions brought against Australian Executor Trustees, the proceeding commenced in the Federal Court was transferred to the New South Wales Supreme Court to be heard together with the other proceeding some 3 months after a competing action was commenced.[52] The existence and use of these powers is uncontroversial.

6.27. Once competing class actions are in the same jurisdiction, the courts have developed a practical approach to managing them. The most common options include staying one of the proceedings, consolidating them, hearing them jointly and/or taking measures to prevent group members from participating in multiple proceedings simultaneously.[53] The courts have identified a practical set of criteria which they apply to determine which, if any, class action ought to be stayed and in otherwise adjudicating between competing class actions.[54] The courts, appropriately in our view, consider these matters having regard first to the interests of group members, with consideration also for the interests of the defendant.[55]

[49] Hassid v Queensland Bulk Water Supply Authority trading as Seqwater [2017] NSWSC 599, [35–44], [58] – [64] (Beech-Jones J).
[50] Cameron Hanson, 'Weighing the Bird in the Hand: Settlement of Class Actions' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 259, 264.
[51] Damian Grave, Ken Adams and Jason Betts, Class Actions in Australia (Thomson Reuters, 2nd ed, 2012), 103 - 107.
[52] Smith v Australian Executor Trustees Ltd [2016] NSWSC 17 (Smith Case).
[53] McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd [2017] FCA 947, 3 [9] (Beach J) (Bellamy's Case).
[54] Smith Case, [20] (Ball J); Bellamy's Case, 17 – 18 [53] – [54], 26 [71] (Beach J).
[55] Bellamy's Case, 13 [40] (Beach J).
[56] Smith Case [21] (Ball J)

6.28. One of the proposals sometimes raised is for the right to pursue a class action to be allocated through a tender process by the respective representative plaintiffs' lawyers. However, as identified by Justice Ball in the Smith Case, it is not appropriate to apply a fixed rule that no more than one class action can be permitted to continue and that the court should determine which one that is.[56] There are a range of circumstances in which competing class actions arise, and different approaches may be appropriate in each.

6.29. For instance, competing class actions may sometimes provide genuine alternatives to group members in terms of factors such as case theory and funding method. In some cases, competing class actions against the same defendant may be brought on behalf of different groups. In these circumstances, it may be appropriate, and in the interest of group members, for the courts to permit both class actions to proceed. After all, it is not improper for multiple proceedings which are not class actions, or one class action and a non-class action, to run against the same defendant in relation to related matters.[57]

6.30. A court permitting two class actions with commonalities to proceed has a range of powers at their disposal to limit duplication of work and facilitate resolution. For instance, a court may:

a) Order that competing class actions be heard together, with evidence in one to be evidence in the other;[58]

b) Where competing class actions are being heard together, require the respective applicants to brief a common counsel team, and to use reasonable endeavours to work together in relation to their evidence, progress their respective proceedings in a similar manner, and cooperate in relation to interlocutory applications;

c) Appoint an independent lawyer to monitor at a high level legal work undertaken and to assist in limiting duplication of work by the representative plaintiffs' lawyers, if cost effective and where the court is unable to undertake such monitoring;[59]

d) Make orders having the effect of ensuring that no group member is a member of both proceedings, so that defendants may settle the proceedings independently;[60]

e) Under s 33ZF, appoint a litigation committee to oversee actions, and potentially auction the right to bring a class action if appropriate;[61]

f) Require the competing representative plaintiffs to agree a protocol for joint analysis of discovery;[62] and

g) Limit the representative plaintiffs' ability to recover legal costs for duplicated work.[63]

6.31. In our experience, it is not uncommon for representative plaintiffs in competing class actions to establish communication quickly and negotiate a cooperative arrangement to assist in identifying any issues that need to be put to the court. For instance, in Hadchiti v Nufarm Ltd (Federal Court of Australia proceeding no NSD1847/2010), an agreement was reached that the competing class actions be consolidated and the matter conducted jointly by the applicants' solicitors with a single team of counsel. A similar process was followed in Johnson Tiles Pty Ltd v Esso Australia Ltd (1999) ATPR 41-679.

6.32. Importantly, it is likely that fewer class actions will be commenced with similar claims on behalf of different groups. This is due to the courts' recent adoption of common fund orders, which encourage 'open class' class actions, and therefore are likely to avoid a common competing class action scenario, where a 'closed class' class action is commenced with funding from a litigation funder, followed by an 'open class' class action (or a separate 'closed class' class action) making similar claims.[64]

6.33. The issue of competing class actions has most recently been addressed by Beach J in relation to the duplicate proceedings issued against Bellamy's Australia Ltd in the Federal Court. In response to interlocutory applications advanced by the Respondent in relation to those claims, which sought a stay of one of the proceedings, Beach J determined that both ought be allowed to proceed, one as a closed class action and the other on an open basis.

[57] Ibid [23], [47]; Bellamy's Case, 11 - 13 [33] – [39] (Beach J).
[58] Smith Case, [22] (Ball J).
[59] Bellamy's Case, 39 [116] – [117] (Beach J).
[60] Ibid [37] – [45], [60]; Hassid v Queensland Bulk Water Supply Authority trading as Seqwater [2017] NSWSC 599.
[61] Kirby v Centro Properties Ltd (2008) 253 ALR 65, 72 [31], 73 [34] (Finkelstein J).
[62] Ibid 74 [39] (Finkelstein J).
[63] Smith Case, [23] (Ball J).
[64] Money Max Int Pty Ltd v QBE Insurance Group Ltd (2016) 245 FCR 191, 196 – 197 [14].
[65] Bellamy's Case, 34 [96] (Beach J).

6.34. Justice Beach did however acknowledge that there were circumstances in which it would have been appropriate to stay one of the proceedings, including:

if I had been faced with the scenario of two open class proceedings which substantially overlapped as to both class membership and causes of action, with neither involving a substantial number of group members signed up to litigation funding and retainer agreements.[65]

6.35. His Honour also noted that if he had been faced with the above scenario but with one of the proceedings involving a very substantial number of group members signed up to funding agreements and the other not, he would have:

ceteris paribus in terms of the quality of legal representation and the availability of resources been inclined to stay the proceedings that did not have such a substantial number of signed up group members.[66]

6.36. This observation was not however to be seen as an incentive to sign up group members before issuing.

6.37. In our submission, Beach J's approach to the competing class actions in the Bellamy's Case demonstrates that it is not necessary for Part 4A to include a mechanism to deal with this issue. Courts are well equipped to apply appropriate considerations and principles on a case-by-case basis, and have indicated that in the right circumstances, courts will stay one of multiple proceedings where doing so is necessary to ensure justice is achieved.

7. Settlement

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

Existing safeguards – Court approval of settlements

Exercising the power not to approve settlements

7.1. In our view, the requirement that the Court approve any settlement reached between the parties to a representative proceeding provides an essential protection for group members, both unrepresented and otherwise.

7.2. Courts already have at their disposal appropriate powers to direct and facilitate the settlement approval process, and they regularly exercise those powers to ensure that sufficient information is available to enable full consideration to be given to any proposed settlement, in part in order to safeguard the interests of unrepresented group members in the context of such applications.

7.3. The interests of group members are generally protected by way of a dual layer of procedural requirements, the first being the ordinary provision of a Court-approved 'notice' procedure, designed to provide class members with sufficient detail and knowledge as to allow them to make an informed decision as to how to respond to a proposed settlement. The second protective mechanism requires the Court being satisfied that the proposed settlement is both fair and reasonable and in the interests of group members as a whole.

7.4. Both mechanisms involve judicial supervision with a view to ensuring that all group members, and not just those who have retained a legal representative and/or funding entity, are afforded an opportunity to have their interests considered in the context of the settlement approval application, to enable the Court to satisfy itself that proceedings will only be resolved on terms that are fair and reasonable and in the interests of group members.

7.5. A number of cases have recently contemplated the protection of the interests of unrepresented group members in the context of a Court refusing, at first instance, to approve a proposed settlement.

7.6. In *Kelly v Willmott Forests Ltd* (in liq)[67] for instance, a representative proceeding concerning a failed managed investment scheme, Murphy J refused to approve a proposed settlement on the basis that its terms would likely impose significant detriment on some group members and confer minimal benefit.

[66] Bellamy's Case, 35 [97] (Beach J).
[67] (No 4) [2016] FCA 323 (Willmott).
[68] Willmott, [97].

7.7. Justice Murphy held that under the proposed settlement:

The binding loan enforceability admissions will constitute a significant detriment for some registered class members and some non-participating class members. For some registered class members the detriment of the admissions will outweigh the benefits of the other terms of settlement. For non-participating class members the detriment will not be balanced by any benefit.[68]

7.8. In this case, Murphy J considered the terms of the opt out notice and determined that some group members were not notified that if they did not opt out, they may lose the right to bring individual claims or defences regarding their loans.[69]

7.9. Further, His Honour expressed some concern about the adequacy of the case preparation, noting that funding problems had compromised the proper preparation of the group members' case and highlighted 'shortcomings' in counsel's submission as to the likely success of the action, indicating that 'these matters must be addressed if (revised) settlements come before the Court for approval.'[70]

7.10. In addition, Murphy J highlighted a number of concerns which effectively compromised the approval, including that:[71]

a) Participating group members fared better under its terms, and were generally clients of the firm acting for the Applicants;

b) Non-participating group members stood to gain no benefit from the settlement and were not clients of that firm;[72]

c) It represented an unresolved conflict of interest between client and non-client group members – in circumstances in which a duty is owed to achieve the best outcome for all group members to the extent possible;[73] and

d) Potential conflict between the interests of the lawyers in receiving legal costs and the interests of group members in minimising legal costs.[74]

7.11. On this basis, Murphy J held that the proposed settlement terms were not 'fair and reasonable' and refused the settlement approval application.

7.12. Similarly, in the 'Bonsoy'[75] class action Forrest J of the Supreme Court of Victoria specified that because the costs represented such a significant proportion (more than 20%) of the proposed settlement sum in this case, close examination was required, noting that:

It is not enough, in the distribution of a settlement sum of such magnitude to such a large number of claimants, and in the absence of a contradictor regarding taxation, for a bill of costs of nearly $7 million simply to be presented to the Court and then approved.[76]

7.13. Justice Forrest ordered a review of those costs and the preparation of a costs report, with any outstanding issues thereafter to be referred to the Costs Court or an Associate Justice of the Supreme Court.

7.14. Justice Murphy's judgment in Willmott in the Federal Court of Australia, and Justice Forrest's decision in the Supreme Court of Victoria in Bonsoy demonstrate not only the high bar set by the existing settlement approval requirements in each jurisdiction, but also the effective and important role of the courts in protecting the interests of unrepresented class members. In our view, the outcome in the dispute between Huon Corporation and CBL Insurance – where all the proceeds of the litigation were allocated to legal costs and the funder's commission – is highly unlikely to have eventuated if that case had been a Part IVA Proceeding.

Criteria for assessing whether to approve a settlement

7.15. The existing regime for settlement approval requires at least the representative plaintiff in a proceeding to put on considerable evidence in support of the submission that a settlement is fair, reasonable and in the interest of group members.[77]

[69] Ibid [126].
[70] Ibid [12].
[71] Ibid [127] – [132].
[72] Ibid [10].
[73] Ibid [315] – [323].
[74] Ibid [323].
[75] Downie v Spiral Foods Pty Ltd [2015] VSC 190.
[76] Ibid [199].
[77] Supreme Court of Victoria, Practice Note SC Gen 10: Conduct of Group Proceedings (Class Actions), 30 January 2017, s 13; Federal Court of Australia, Class Actions Practice Note (GPN-CA) – General Practice Note, 25 October 2016, s 14.3.

7.16. Lawyers for the representative plaintiff are well placed to draft such material, having a considerable appreciation for both the strengths and risks involved in the case, the costs involved in prosecuting the claims to date and the further cost likely to be incurred if a settlement was not reached. A decision to advise a representative plaintiff to make or accept a settlement offer would typically be made (in any case of more than moderate size) with the benefit of advice of counsel, and is invariably made with the knowledge that it must be possible to demonstrate to the court that the settlement is in fact fair and reasonable.

7.17. The Commission has been asked to consider whether specified criteria for the Court's approval of a settlement under section 33V should be drafted, and if so what they might be. In our view, this is an unnecessary step to take in circumstances where there now exists considerable judicial authority (which is in part codified in the Supreme Court Practice Note) establishing a range of relevant factors which the Court should consider in approving a settlement.

7.18. Parties applying to the Court for approval of a proposed settlement must persuade the Court of two things:

a) First, that it is fair and reasonable having regard to the claims made on behalf of the class members who would be bound by the settlement; and

b) Secondly, that it has been 'undertaken in the interests of both class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent'.[78]

7.19. The approval of a proposed settlement is a necessarily complex exercise – each proceeding brought before the Court for settlement approval involves facts and issues which are particular to each matter. The reasons why lawyers and counsel may determine that a proposed settlement is a fair outcome and in the best interests of group members depend not only on the strengths and weaknesses of the legal arguments and evidence involved in the case, but also on broader considerations such as the costs and delays involved for group members in continuing to prosecute the claims – particularly where any unfavourable decision in respect of a point of contested law will likely be the subject of an appeal, and the particular circumstances of group members (particularly in personal-injury actions) which might give rise to some urgency surrounding the timing of any payments to be made to them.

7.20. A court's consideration of this material, and its assessment of whether the settlement should be approved, is informed by the consistent application of established principles. The factors relevant to the court's assessment have been developed through the case law, such that there now exists a comprehensive set of matters which courts take into account in considering whether to approve a settlement. These include:

a) The complexity and likely duration of the litigation;

b) The reaction of the group to the settlement;

c) The stage of the proceedings;

d) The likelihood of establishing liability;

e) The likelihood of establishing loss or damage;

f) The risks of maintaining a class action;

g) The ability of the defendant to withstand a greater judgment;

h) The range of reasonableness of the settlement in light of the best recovery;

i) The range of reasonableness of the settlement in light of all the attendant risks of the litigation;

j) The terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

[78] Supreme Court of Victoria, Practice Note SC Gen 10: Conduct of Group Proceedings (Class Actions), 30 January 2017, s 13.1; Federal Court of Australia, Class Actions Practice Note (GPN-CA) – General Practice Note, 25 October 2016, s 14.3.

7.21. In our submission, the development of relevant factors through the case law (and currently codified in the Practice Notes) is a superior mechanism by which specified criteria for the Court's approval of a settlement has and should continue to be developed. Courts have the benefit of receiving the confidential advice of counsel in respect of the fairness and reasonableness of proposed settlements, and can articulate through the publication of reasons for decisions the factors that were relevant to the approval of particular applications. Where novel factors are relevant and identified in an authority, courts then have the capacity to refer to and include such matters in their consideration of future approval applications.

7.22. In this way, as new factors which are relevant to the court's assessments arise – for example, the advent of litigation funding (with, as one example, the attendant consequence that the risk of an representative plaintiff being personally exposed to an adverse costs order is no longer a feature of all group proceeding litigation) – courts in future decisions can adopt an approach to considering whether to approve a settlement which reflect such changes in the class action landscape.

7.23. We consider that the present list of factors developed through judicial authority and included in the Practice Note provide an appropriate and effective framework to ensure courts are addressed on and provided with evidence concerning the fairness and reasonableness of any proposed settlement.

Third party guardian or contradictor

7.24. The Consultation Paper has also proposed a reform which would see the appointment of a third party guardian or contradictor to represent group members in settlement approval context. We are of the view that this should not be a requirement in all cases, but we agree that courts should continue to adopt this approach where it is considered appropriate in the circumstances.

7.25. In the *Kamasaee v Commonwealth of Australia*[79] case, the Court appointed an amicus curiae and an independent law firm to act on behalf of group members and to provide the Court their submission on whether or not the proposed settlement was fair and reasonable.[80]

7.26. This was appropriate in circumstances where the group members in that proceeding were for the most part located remotely and thus not necessarily able to appear before the Court – and also having regard to the familiarity of group members in that proceeding with the Australian legal system.

7.27. We would submit however that it is unlikely to be necessary in most shareholder class action settlement approval hearings to appoint a third party guardian or contradictor. In our experience, group members involved in this type of litigation have a good level of understanding of the Australian legal system, and are either able to resolve their questions about the proposed settlement by way of contact with the lawyers acting in the proceeding, or otherwise by lodging an objection with the Court.

7.28. It is therefore preferable to maintain the current approach, which leaves the discretion as to whether such an appointment is appropriate to the Court, having regard to the costs involved, the circumstances of the case and the needs of group members.

7.29. This is consistent with Justice Jack Forrest's view following his experience in the Kilmore bushfires litigation – he noted that:

the use of a contradictor is dependent upon the size of the asset pool, and the issues that the judge may perceive arising out of the settlement. It will not be necessary in all cases particularly if there is no differentiation between the group members or where the cost is disproportionate to the benefit to the group having regard to the funds available to the class.[81]

7.30. The same principles extend to the proposed requirement for defendants to put on evidence in support of a proposed settlement. In our experience it is not common for defendants to do so, however such an approach is not unheard of.

[79] [2017] VSC 537.
[80] On 16 August 2017, in Kamasaee v Commonwealth of Australia (Approval of settlement) [2017] VSC 537 at [6] [18]-[19]; [23], Macaulay J ordered for Mr Michael Rush of counsel and for the law firm of Holding Redlich to be appointed as amicus curiae and independent law firm respectively to provide advice and act representation for group members as part of the settlement approval application.
[81] The Hon. Justice Jack Forrest 'Issues in Case Management of Class Actions and Administration of Settlements – Kilmore East / Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 71, 93.

7.31. In our view a requirement for defendant parties to adduce evidence in relation to a proposed settlement may be of limited utility – given the matter would have settled, by definition, it is highly unlikely that a defendant would file material that would not be supportive of the proposed settlement, and as such its evidence or submissions seems highly likely to be duplicative or redundant. In our submission, the Court has the power to require a defendant to take a more active role in the settlement approval process under s 33ZF, and it ought be left to the discretion of the Court to make such orders in appropriate cases.

Should the following matters be set out either in legislation or guidelines:

a) criteria to guide the Court when assessing the reasonableness of a funding fee;

b) criteria for the use of caps, limits, sliding scales or other methods when assessing funding fees;

c) criteria or 'safeguards' for the use of common fund orders by the Court.

20. Is there a need for an independent expert to assist the Court in assessing funding fees? If so, how should the expert undertake this assessment?

Assessing the reasonableness of funding fees

7.32. We make the following observations regarding the question of whether courts either have the power to interfere with a litigation funder's contractual entitlement to a particular commission rate agreed with a funded group member, or whether in the event that it does have said power it should exercise it.

7.33. As noted in the Consultation Paper, recent settlement approval decisions delivered in the Federal Court have included comments to the effect that the Court considers that it has power to intervene to change the commission rate agreed to by funded group members at the time of approving a settlement.

7.34. We note that the view that s 33ZF confers this power as advanced by *Murphy J in Earglow Pty Ltd v Newcrest Mining Ltd*[82] is not unanimous – in the recent settlement approval hearing and decision in respect of the *Mitic v Oz Minerals Ltd*[83] litigation, Middleton J expressed the following view:

Sections 33Z and 33ZF(1) of the Act, while expressed in broad terms, as is s 23, are not specifically directed to settlement approvals, but relate generally to the power of the Court in representative proceedings and proceedings generally. Once the Court is dealing with a settlement approval application, the focus is upon s 33V. A power to effectively vary the contractual rights of a litigation funder in the course of a settlement approval is to be found in s 33V, specifically subs (2). I would not readily adopt the view that the very general broad powers found in ss 23, 33Z(1)(g) and 33ZF(1), which are not specifically directed to settlement approvals, would provide the power to vary or effectively vary the funding agreement, or otherwise interfere with the contractual rights and obligations of a litigation funder and class members.

7.35. It is evidently the case following the decision of the Full Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group*[84] that the Court intends to take the same approach to assessing the reasonableness of litigation funding fees as it presently does in respect of legal costs.

7.36. In the context of a common fund application, and arguably in circumstances where a funding equalisation mechanism is to be applied, we consider that it is appropriate and within the Court's power to assess the reasonableness of the funding fee, given that the entitlements of group members who have not executed funding agreements are reduced. We note however that in the case of a funding equalisation mechanism, the underlying principle for the imposition of that deduction from non-funded group members' entitlements is to equalise their contribution to the cost and funding of the litigation to avoid the 'free-rider' problem. Given that, although it is likely to be the case that the Court has power pursuant to section 33V to order that non-funded group members pay a lower commission rate than what funded group members have agreed to pay, at a level of principle this would undermine the effect of such a mechanism.

[82] [2016] FCA 1433 (Newcrest).
[83] [2017] FCA 409, [28].
[84] (2016) 245 FCR 191.
[85] (2006) 229 CLR 386.
[86] Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec & mgr apptd) (in liq) (No 3) [2017] FCA 330.

7.37. Although the class actions landscape has changed considerably since the decision was handed down, the High Court's decision in *Campbells Cash and Carry Fostif*[85] stood for the contrary proposition – that is, where group members had freely agreed to terms pursuant to a binding contract, the Court ought not interfere with those agreements.

7.38. We respectfully acknowledge the views of the judiciary as expressed in Newcrest and in *Blairgowrie Trading Ltd v Allco Finance Group Ltd*[86] – we expect that the issue of whether the Court has power to disallow a funding fee agreed between a funder and group members pursuant to contract is likely to be the subject of considerable contest when a decision is handed down applying the obiter of those judgments.

7.39. In the event that the Court is found to hold the requisite power to take this step, our view is that there exist adequate protections which render any perceived need to exercise the power nugatory. There is a high level of self-regulation by litigation funders, particularly following the approval of common fund orders in Australian law and the entry of new competitors into the funding market. In circumstances where the number of competing class actions has increased, funders have a vested interest in ensuring their funding fee is competitive.

7.40. We are also concerned that a move to intervene and reduce the certainty surrounding litigation funders' contracts may stifle participation of existing and new entrants in the funding market – some level of certainty with respect to the commercial return expected from funding litigation is important in encouraging funders to take on the risk involved in providing the financial support for group proceedings. In circumstances where the Commission has noted that the absence of litigation funding in non-shareholder and investor class actions means that access to justice may be limited outside of these spaces, it seems to us counterintuitive to create disincentives for funders to accept the risk involved in funding claims.

7.41. We are also concerned about the proposal to impose a cap on the funding fee payable to a funder upon resolution of a proceeding. The Commission has noted that high risk cases tend not to attract litigation funding at the same rate as shareholder or investor litigation which is considered less risky. We are of the view that the entry of new participants into the litigation funding market will result in the diversification of matters which attract funding, but that the prosecution of high risk or novel claims are likely to require a commensurately higher level of return to the funder upon successful resolution. As above, it seems likely that the commercial landscape in which funders operate will mean that competitive factors would be expected to apply downwards pressure to funders' rates, in any event. We would therefore suggest that if any cap is proposed to be introduced, it should not be at or below the broad levels currently charged by typical funders (e.g. in the range of 25%-40%).

7.42. As noted by Justice Murphy and Professor Morabito, 'funders that assume the substantial costs and risks of a class action must be allowed a commercially realistic return.'[87] The imposition of a statutory cap would likely stifle the potential funding of such cases.

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

7.43. The Consultation Paper makes reference to Justice Murphy's observation in *Newcrest*, that there did not appear to be good reason in principle for the legal costs and return to the litigation funder to remain confidential.

7.44. The rationale against such disclosure presumably arises from a concern that defendants in future proceedings would be advantaged by the knowledge of the legal costs involved in prosecuting claims of this nature. We also expect that litigation funders may consider that where the commission is paid pursuant to contractual agreements with group members, it is arguable that the information is commercial in confidence.

7.45. As noted throughout our submission, it is our preference that as much information be disclosed to group members as is appropriate, having regard to any strategic advantages that may arise for defendants in future litigation. Our view is that the legal costs and aggregate funding commission payable to the litigation funder should be disclosed both to the Court, and in a Court's settlement approval judgment, and that transparency in this regard can only enhance the accountability of parties operating in this space.

[87] The Hon. Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), 25 Years of Class Actions in Australia: 1997-2017 (Ross Parsons Centre of Commercial, Corporate and Taxation Law) 13, 29.

7.46. In this regard, we also suggest that in appropriate cases some broader context should be provided surrounding the costs total that is approved (for example, some description of the total amount of work performed, or a somewhat more expansive description of any costs expert's opinion). In our experience, given the size of the costs totals typically involved in class actions, the inclusion of a bare figure without any further explanation can sometimes by seized upon by members of the public and commentators as a target for criticism, without having any real understanding of what factors contributed to a court's decision to approve that amount of legal costs. We suggest that the provision of some additional contextual information may assist in retaining public confidence in courts' decisions concerning such approvals, in this regard.

8. Contingency Fees

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

8.1. As noted in Section 2 above, we are of the view that the limitation of litigation funding to date to shareholder and investor claims is a product of time, rather than an inherent feature of funding class actions through this vehicle.

8.2. We re-iterate that we consider that the range of matters which attract litigation funding is likely to increase in future, both as a result of the entry of new competitors into the market, and as new areas of law are explored through test cases.

8.3. We therefore do not consider that lifting the ban on contingency fees is necessary to mitigate any issues that might be suggested to arise as a result of the practice of litigation funding – rather, the legalisation of contingency fees would be a positive development towards increasing the opportunities for plaintiffs to advance their claims, in circumstances where they otherwise may not be able to do so. Ultimately, we consider that having this mechanism available would increase the ability of lawyers to take on cases (on a self-funded basis in particular) and increase numbers of claims that are able to be determined on their own merits, rather than being abandoned or considered unviable due to a lack of funding. As such, it is our view that an acceptance of a contingency-fee model within the legal sector, governed by a similar degree of regulation and oversight as applies to existing lawyer-client relationships, will meaningfully contribute towards the goal of access to justice, while also enhancing transparency and autonomy for clients, and better aligning the interests of lawyers and their clients.

8.4. At a time when public funding for legal aid is seriously constrained, and in a market in which a significant proportion of people seeking legal advice are unable to pursue claims due to cost, the availability of contingent fee arrangements would provide an additional avenue for the funding of legal claims, which we believe would be adopted enthusiastically within the sector. On balance, we do not consider that the arguments against the introduction of such arrangements are any less capable of being appropriately regulated and overseen than are those concerning conditional-fee or upfront fee-for-service costs arrangements.

8.5. Slater and Gordon has made a number of submissions in relation to the ban on contingency fees to previous law reform reviews which have considered this issue, which we repeat and develop below where appropriate and relevant to the questions posed by the Commission.

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?

8.6. As noted above, it is not necessary to lift the ban on contingency fees to ameliorate a supposed harm presented by litigation funding – rather, such a regime would provide an additional pathway for the funding of legal claims.

8.7. Our responses to the above questions are based on our view that contingency fee arrangements offer benefits to potential litigants, not relative to those they would receive if a litigation funder were involved, but rather in absolute terms, having regard to a number of features inherent in such a regime.

8.8. We explore the benefits in the following sections, in the context of the above questions, for the purpose of demonstrating that there are limited measures required to be put in place to ensure the identified outcomes are achieved.

8.9. We do however make two proposals in relation to general protections which the Commission may consider introducing in the event that a decision is made to lift the ban on contingency fees. These proposals are intended to mitigate what we consider to be some of the particular, practical risks which attend the introduction of such a regime, beyond those already addressed by the existing legal and regulatory framework.

Diversity of cases

8.10. We would expect that the types of claims which would be funded on a contingency fee basis are those which do not attract the backing of a litigation funder. As canvassed above, matters which are likely to involve a relatively low return to a funder have historically failed to attract third-party litigation funding. Practically, based on our experience we would expect that such claims are likely to be more readily identifiable by lawyers in the first instance in any event, and are equally more likely to be considered less justifiable for third-party funders to invest significant time and resources in investigating and assessing at the outset, relative to larger claims.

8.11. We consider that an inherent benefit of the introduction of contingency fees may be that lower-value claims are more readily able to be pursued. In the context of a firm acting in representative proceedings in particular, the diversity of funding used in different cases may have the result that firms are more willing to bear the risk of prosecting a low-value claim, in circumstances where exposure to risk is spread across a number of differently-funded matters.

8.12. We do not believe it is necessarily correct to assume that firms would only fund cases that present the highest potential return in the event that contingency fees were lifted, as this assumes that the firm would cease funding matters on a conditional basis, or with the backing of a litigation funder. It is more likely in our experience that all models will continue to be used, and the appropriateness of a contingency-fee arrangement assessed on a case-by-case basis.

8.13. As explored above in relation to the increasing competition in the litigation funding market, we also view contingency fee arrangements as a new funding entrant – the effect of which is likely to be that law firms and funders will extend the ambit of matters they are willing and able to consider running. This may itself be a partial answer to the criticism levelled at third-party litigation funding discussed above, to the effect that such funders may not have increased access to justice for more deserving claimants as opposed to higher-value commercial claims.

8.14. We therefore do not consider that it is necessary for specific measures to be put in place to ensure that a wide variety of cases are funded by contingency fee arrangements, as in our view it is likely that this result will be achieved as a natural consequence of lifting the ban.

Reducing client risk and cost burdens

8.15. One of the key ways in which contingency fee arrangements may reduce the cost burden and risks faced by clients is that the use of contingency fee agreements provides a significant benefit in terms of the clarity and comprehensibility of legal costs agreements. We would expect that reductions in the complexity of written agreements stand to be achieved by moving to a simpler percentage-based model. In our experience, reductions in length and legalese such as this can have a significant effect on individual clients' abilities to understand and negotiate terms of legal costs agreements.

8.16. This is a particularly relevant consideration in the case of less sophisticated clients, who are usually the subject of concerns raised by opponents of contingency fees, on the basis that they would require additional protection from exploitation or abuse. Institutional, corporate or more sophisticated clients, by contrast, can generally be taken to be able to more readily protect their own interests. Assuming that pre-existing protections remain in place for clients who are party to a contingency fee agreement, we would contend that the effects of those protections would in fact be enhanced by the greater clarity and comprehension afforded by the ability to simplify the written contracts involved: a client is much more likely to be able and willing to enforce rights and protections available to them under an agreement where they feel confident they understand those rights (and the agreement in full).

8.17. A further consequence of this simplification is that prospective clients would be much better-placed to compare the contingent fee arrangements offered by various legal services providers, to ensure that they are able to obtain the best rates possible. In contrast, comparing complex systems of time-units, hourly rates, success conditions and uplift fees may be expected to be significantly more difficult. As a consumer- and plaintiff-oriented law firm, we strongly support any change that empowers clients in this regard.

8.18. The ease of comparisons afforded by simpler costs agreements is clearly in clients' interests, and should also promote competitiveness within the legal services sector. In such circumstances, we expect that this would contribute to an overall trend of downwards pressure on contingency rates.

8.19. In addition, the likely benefits of contingency fee arrangements in enhancing transparency for clients, and promoting competitiveness in contingency rates amongst lawyers, would also be expected to apply downward pressure on overall rates charged. For these reasons, we do not believe the availability of a contingency-based model would inherently lead to an increase in rates charged.

8.20. Despite the above, we do suggest that the Commission might consider adopting a 'cap' on contingency fees below, to ensure that clients do not face higher cost burdens than they do now. As discussed above, we also strongly suggest that the existing rights and protections (including disclosure obligations applying to lawyers) afforded to clients in relation to legal costs agreements should continue to apply in full in relation to any contingency-fee arrangements, and should not be weakened in any respect.

Ensuring clients' interests are not subordinated to commercial interests

8.21. The availability of contingency fees would not prove to be a marked departure from the status quo.

8.22. In practice, we do not consider that contingency fee arrangements are dramatically different in character to existing conditional fee arrangements: both involve the potential for lawyers to be placed in a position of conflict, and under both models lawyers retain a financial interest in the outcome of litigation.

8.23. The availability and widespread use of conditional costs agreements in Australia means that in many cases, lawyers already often have a financial interest in their clients' litigation, and the experience of this regime has been that lawyers' professional obligations to the court and clients have been maintained despite the presence of these agreements.

8.24. In either case, we consider that the combination of lawyers' professional and fiduciary obligations and the existing regulatory regime provides appropriate safeguards against abuse or undesirable outcomes. We believe that any potential for risk is guarded against by these protections, and is outweighed by the benefits to be gained from the availability of a contingency fee model in Australian jurisdictions.

8.25. The protections afforded by the existing legal framework are sufficient to ensure that clients' interests are not subordinated to commercial interests. Lawyers' clients will have contractual and common law rights in the event of negligence or breaches of contract, and may also avail themselves of equitable remedies should there be any suggestion of unconscionability or undue influence affecting their entry into a costs agreement. Courts also retain an inherent jurisdiction to review and intervene in costs agreements if required.

8.26. Additional protections are enlivened in cases where interested parties to a piece of litigation are recognised to be at some disadvantage – for instance, cases involving incapacitated plaintiffs and litigation guardians, and the resolution of representative proceedings.

8.27. The cumulative effect of these arrangements is to provide a significant suite of safeguards against the risk that clients' interests will be subordinated to commercial interests. Their operation in the context of conditional fee agreements has proven to be effective; we suggest that there is nothing inherent in the nature of a contingency fee approach to suggest that these protections would be any less effective in that context.

8.28. We also note the concern that contingency fee arrangements would increase the risk that lawyers may seek to resolve cases unnecessarily early to obtain the highest possible fees for the least amount of work.

8.29. In light of the value placed on flexibility and innovation within the legal services sector, we would not expect that the introduction of a contingency fee regime would automatically lead to a simplistic 'flat-fee' approach that may give rise to the risk of 'windfall fees'. As is common in other existing forms of legal costs agreements, we would expect that in many cases a staged or stepped model to rates would be adopted – for instance, a low rate if a matter resolves prior to trial, a moderate rate if it resolves during trial, and a higher rate if a case is required to be taken to appellate stages.

8.30. In terms of the economic incentives involved in contingency fee arrangements, it is self-evident that lawyers have an interest in maximising the fees they can recover. This is tempered, however, by lawyers' fiduciary obligations to clients, and their overarching obligations to the Court. Moreover, this interest is not created by the availability of contingency arrangements – it is a feature of any lawyer-client relationship.

8.31. A conditional-fee arrangement based on time-billing currently presents very similar concerns: the economic incentive for a lawyer in this scenario is to maximise recoverable fees by performing more work (providing of course that the work can't be considered wholly unnecessary to the claim concerned) – this leads to the inverse of the 'windfall fees' risk, in that lawyers may be motivated to over-service their clients, charging fees for work beyond the minimum necessary to secure the result obtained. It is unclear as a matter of logic or public policy why this risk is regarded as permissible while the risks associated with contingency fees are seen to be fundamentally undesirable. On one view, the contingency-fee model in fact produces a preferable incentive from a policy perspective, in that it would at least appear to inherently favour outcomes that are consistent with parties' overarching obligations as to proportionality.

8.32. The answer, we believe, is that neither risk is necessarily acceptable or preferable, but that both are able to be appropriately guarded against by lawyers' professional and fiduciary obligations, and the regulatory regimes in which they operate. Lawyers' and clients' interests are never perfectly aligned (indeed, the categorisation of this relationship as fiduciary can be viewed as a recognition of this fact as well as a mechanism by which this is sought to be remedied), but the risks of any misalignment are adequately mitigated by professional obligations and the existing regulatory protections, and in our view a contingency-fee approach actually provides for a better alignment than many existing models of legal costs.

Protections

8.33. As discussed above, we consider that permitting the use of contingency-fee arrangements would overall be beneficial to clients and would promote access to justice. This would appear to particularly be the case in civil claims seeking compensatory damages, and we would therefore suggest that such claims represent an appropriate field within which to introduce such a model. As is the case in other jurisdictions, it is likely that there are some kinds of matters for which contingency-fee agreements will never be appropriate – for instance, family law proceedings or criminal matters (depending on how an 'outcome' is conceived of in such proceedings) – we would encourage consideration to be given to the appropriate boundaries for such arrangements, based on input from participants in those fields of the legal sector.

8.34. Although, as discussed above, we believe that competitive forces within the legal services market will ultimately tend to apply downwards pressure on contingency rates, we acknowledge that it is critical to maintain public confidence in the integrity of the regulatory and practical processes governing the disclosure and assessment of legal costs.

8.35. We believe the concerns expressed about the introduction of a contingency fee model can be addressed through appropriate regulations. Specifically, we believe that the existing obligations of lawyers in terms of costs disclosure, conflicts of interest, and acting in clients' interests should be retained and not weakened by any proposed reforms. Indeed, we would welcome consideration of how to strengthen such safeguards.

8.36. In this regard, we note that substantive protections already exist to safeguard against abuses or inappropriate outcomes concerning legal costs agreements:

a) Courts have an inherent jurisdiction to intervene in matters concerning legal costs agreements;

b) Clients retain the ability to challenge or complain about costs arrangements and agreements, informally and directly to their lawyers, to professional regulatory bodies, and to the Courts;

c) Clients retain the ability to sue in contract and at common law in the event that they believe they have been overcharged or that their representatives have acted negligently; and

d) In recognised categories of cases where plaintiffs or claimants may be at some special disadvantage or vulnerability, Courts have an even more prominent role to play to ensure that justice is done – for instance, in circumstances where Court approval of actions affecting claimants' rights is required for claimants under a disability or represented by a litigation guardian, and for group members in representative proceedings.

8.37. In practice, we believe that over the longer term these existing safeguards, which have been proven over a lengthy period of time to be effective, will work well to protect the interests of parties to all forms of legal costs agreements. That said, given the concern expressed in some areas of the community and the legal industry about the potential for a move to recognise contingency fee agreements in Australia, and the critical importance of maintaining public confidence in the integrity of lawyers' regulatory arrangements, we believe there is some merit to initially applying some additional safeguards to contingency fee agreements if they are introduced in Australian jurisdictions.

8.38. For this reason, we would propose that two additional protections be implemented for a transitional period after any such reform:

a) A maximum 'cap' should be prescribed for the commission rates that may be applied in any contingency fee agreement;

b) A procedure should be established through which parties seeking to enter into a contingency fee arrangement at a rate higher than the prescribed cap may seek the Court's leave to do so.

8.39. The combination of these safeguards would be intended to establish an initial expected range for contingency rates to fall within, while norms and standards of rates are ascertained within the sector, and provide scope for flexibility in rates proposed to be charged. In cases where a lawyer and a client willingly seek to enter into an agreement at a rate higher than the prescribed cap, a Court may permit such an arrangement if it is satisfied it is, for example, fair and reasonable to do so.

8.40. We do not believe these additional restrictions should be permanent: while we accept the value of having them in place initially in order to ensure confidence in the integrity of the reforms, we believe that natural market forces within the legal services sector will render them largely unnecessary. As such, we consider that it would be appropriate for these restrictions to remain in place for a transitional period of perhaps 3-5 years after the introduction of contingency fees, after which the need for their continued operation should be assessed. We would expect, however, that it will be necessary for a cap, or at least some form of external guidance concerning appropriate contingency rates, to remain in place for civil claims, in order to allow parties to negotiate effectively in order that all parties can reasonably understand the likely total ranges of a 'plus-costs' settlement in any particular matter.

The prescribed cap

8.41. We believe that any prescribed cap should have regard to the experience of introduction of contingency fees, while still affording flexibility for rates to be set in order to appropriately price in variations in risk and complexity.

8.42. Based on the most recent research conducted by our office into the international adoption of contingency-fee approaches, we understand that the approaches adopted by similar foreign jurisdictions in this area are as follows:

Jurisdiction	Availability of contingency fees	Limits or ranges of rates
USA	Prohibited for matters concerning domestic relations and criminal proceedings.	Fees must be 'reasonable'; average fees are typically considered to be around 33%.
UK	Available for personal injury, commercial and employment litigation.	25% cap for personal injury claims. 35% cap for employment claims. 50% for commercial claims.
Canada (Ontario)	Prohibited in criminal and family law matters.	No caps.
Canada (Quebec)	Available.	30% cap.
Canada (Manitoba)	Available.	No caps. Average rates 10-45%.
Canada (Saskatchewan)	Available.	Average rates of 20-25% (for pre- and post-trial resolutions).
Canada (Alberta)	Available.	No caps.
Canada (New Brunswick)	Prohibited in criminal matters.	25-30% cap.
Canada (Nova Scotia)	Available.	No caps.
Canada (British Columbia)	Prohibited in family law cases involving child custody.	33% cap for motor vehicle accident claims. 40% cap for all other personal injury claims.

8.43. Foreign jurisdictions have, broadly speaking, imposed caps in the order of 10-50% on contingency fee rates. In order to provide sufficient scope for lawyers and clients to reach contingency-based agreements that are appropriately responsive to the peculiar circumstances of the litigation at hand (and also to permit lawyers to take on a greater range of cases), we would suggest that any cap applied in Australian jurisdictions should be towards the higher end of this range. We suggest 35-40% is an appropriate maximum.

8.44. The imposition of a cap at such a level would appear to position contingency-fee arrangements as, in one respect, a direct competitor to third-party litigation funders, as discussed above. For the reasons provided earlier in this submission, we consider that such an outcome is desirable: we believe it is likely to promote competition and apply downward pressure on rates overall, and will permit a greater range of cases to be taken on by plaintiff lawyers, thereby enhancing access to justice.

Seeking a Court's leave to exceed the cap

8.45. In the ordinary course we would suggest that the law's reluctance to interfere in contractual relations ought to apply equally to legal costs agreements, however in the case of a novel approach to legal costs in Australia such as a contingency fee model, we recognise that consumer protection and public confidence are aided by imposing some initial limits, such as the prescribed cap detailed above. To ensure that this protection isn't unnecessarily limiting to properly-informed and consenting clients, however, we suggest that there should also be a mechanism by which lawyers and clients can operate beyond the prescribed cap by agreement. We therefore suggest that parties to a costs agreement should have the right to seek a Court's leave, on an ex parte basis, to charge legal costs at a rate higher than the prescribed cap.

8.46. On the basis that requiring parties to publicly seek a Court's permission in relation to a higher-than-usual contingency rate costs agreement may present a competitive disadvantage to lawyers in commencing litigation, and may amount to an unwanted disclosure about a party's conception of the risks, costs and complexities of litigation, we consider that the appropriate format for such an application is as a separate application or proceeding to the proceeding in which the client proposes to retain the lawyer to act, and that rules should be adopted to prevent confidential evidence or other material used in support of such an application from being available to non-parties.

8.47. In order that clients and lawyers have certainty about the basis of their relationship, and particularly so that clients are able to understand the practical financial consequences of any settlement negotiations they are involved in, we suggest that any such application to exceed the cap should be made prior to the commencement of the substantive proceedings in question, or otherwise as early as possible during their conduct. In order to prevent costs arrangements being altered retrospectively, such applications should not be permitted after settlement of a proceeding, and it may be appropriate for a presumption against such an application to apply if it is brought after a set stage in a proceeding (for instance, after the close of pleadings). Specific disclosure requirements should be imposed on lawyers in offering a costs agreement that is premised on a contingency rate that exceeds the prescribed cap, requiring (for instance) that the client be clearly informed that the rate proposed is above the prescribed cap, that they be informed of the specific reasons why a higher rate is justified in their matter (in terms of risk or complexity, etc.), and that they be informed that other lawyers may charge a lower rate or act on a conditional-fee basis.

8.48. In determining such an application, we believe a court should primarily have regard to whether the lawyer's client understands the effect of the variation sought, and has willingly and knowingly consented to the higher rate. A court should also have regard, in the course of exercising its ordinary jurisdiction in relation to legal costs, to whether the costs proposed to be charged are otherwise unreasonable or unfair. In circumstances where a client consents to a rate above the prescribed cap but a court does not approve such an application, the applicable rule should be that the rate of the prescribed cap will apply to the costs agreement unless otherwise ordered.

8.49. We believe that these two additional protections will provide an appropriate combination of public assurance and commercial flexibility to make the introduction of a contingency fee regime successful and effective.

9. Conclusion - Summary of Proposals

Slater and Gordon makes the following submissions in relation to proposals for reform and the matters raised in the Consultation Paper:

POLICY CONTEXT

9.1. In any policy reform context, we suggest that some of the critical threshold considerations must be whether the 'status quo' has been shown to be unsatisfactory or suboptimal in any respects, and if so, why that is the case and how those problems manifest themselves in practice. It is only with an understanding of those matters that options for reform can be reliably assessed, to ascertain whether and how any proposed changes might address or improve the concerns identified.

9.2. For the majority of the issues addressed by the Commission's Consultation Paper, we consider that the concerns or issues raised are often not systemic in nature, but rather relate to isolated instances of problematic outcomes or conduct, which we consider courts already have sufficient power to deal with. Others have been potential issues identified at a hypothetical level but for which scant evidence has been identified to establish that these are actual problems that have arisen, which could not similarly be addressed by the existing powers available. In either case, we consider that the justification for many of the more substantial changes that have been proposed has not been established, and that by far the preferable course is to continue to permit courts to address issues and concerns as they arise, to suit the needs and circumstances of each particular case.

9.3. There are areas in which existing common practices and other developments designed to safeguard group members could be usefully codified in the applicable Practice Notes, to better promote compliance and provide courts and parties with a clearer and more precise statement of principles on these issues. We suggest that in this regard a useful aim may be to seek to harmonise the requirements of the Supreme Court Practice Note and Federal Court Practice Note in terms of disclosure obligations and other group member protections.

CURRENT REGULATION OF LITIGATION FUNDERS AND LAWYERS

Questions 1 and 2

9.4. We consider that the Federal Court's Practice Note requirement that any costs agreement should include provisions for managing conflicts of interest between any of the applicant(s), the class members, the lawyers and the litigation funders is an appropriate mechanism by which to set the standard for conflict identification and management.

9.5. Equivalent standards could be included in the Victorian Supreme Court Practice Note SC GEN 10: Conduct of Group Proceedings (Class Actions). Although in our view such a disclosure requirement should properly already be considered to form part of a lawyer's professional obligations to their client, the inclusion of an explicit requirement in the Practice Note would provide a useful external standard for all such agreements to meet, and also provides additional flexibility in permitting the Court to vary or dispense with compliance with such requirements in appropriate cases.

Question 5

9.6. We do not consider that there is any need to implement the proposal that the Supreme Court or legal profession draft guidelines addressing the responsibilities of lawyers in class actions. The existing regulatory framework governing lawyers' conduct in respect of litigation more broadly, coupled with the inclusion of the aforementioned directions in the Practice Note, are in our view sufficient to protect litigants from unfair risks.

DISCLOSURE TO PLAINTIFFS

Question 6

9.7. We consider that funding-related information, such as the rate or commission to be charged by a funder to group members, should be disclosed in all circumstances, regardless of whether a group member is a client of the lawyers involved. The approach proposed in the Federal Court Practice Note in this regard is the appropriate model to be adopted in all jurisdictions: the disclosure should be clear and timely and is an ongoing obligation, and Courts should be empowered to consider any failure to comply with this obligation as a factor relevant to settlement approval decisions (and in particular the approval of legal costs amounts).

9.8. Contrary to one reading of the question posed in the Commission's Consultation Paper, we do not consider that the disclosure principles concerning group members generally extend to ongoing obligations concerning legal costs and disbursements. Those are matters which are already provided for (for example, under the Legal Profession Act) in respect of clients of lawyers acting in a class action, however their communication to a wider audience, including to group members who are not clients, has the potential to harm the interests of the group as a whole in pursuing the litigation effectively.

9.9. In our view, the representative plaintiff is the party to whom lawyers' existing obligations in terms of costs disclosure must principally apply concerning the provision of information as to the costs (to date, and expected in future), funding arrangements and prospects of a representative proceeding. These obligations should not be diminished or undermined in any reforms contemplated within the remit of the Commission's reference. Similarly, disclosure of information about the legal costs and disbursements in a class action more broadly (as opposed to in relation to a group member's personal claim within a class action) will likely be appropriate to be made to clients who are not representative plaintiffs upon request, and subject to any conditions or arrangements as are required in the circumstances of the particular case.

9.10. We support the expansion of disclosure requirements to group members to include financial and practical information which does not confer a strategic advantage on defendants, where such information is reasonably considered to be likely to be relevant to a group member's decision as to whether to participate in the proceeding or not. We suggest that the precise formulation of such disclosures, and the kinds of information to be disclosed, are most appropriately determined by the court in the context of a particular case, rather than being prescribed in advance in a Practice Note or any amendment to the legislation. Outside of such information that is relevant to group members' decisions concerning participation in the proceeding, or the assertion of any individual rights or powers in the limited circumstances provided by the legislation governing the class action regimes, we consider that disclosure obligations are most appropriately addressed to clients of lawyers, consistent with the existing statutory, regulatory and professional rules.

9.11. At the conclusion of a proceeding, in the ordinary course it will be appropriate for all affected group members to have access to a broader range of otherwise-sensitive information, including in relation to funding and legal costs, in order for them to consider their own response to any proposed settlement.

9.12. We also submit that it may be appropriate for the Supreme Court Practice Note to be amended in line with the Federal Court Practice Note, to state that in appropriate cases evidence filed in support of an application for Court approval of settlement may include discussion of:

a) The time at which it is anticipated settlement funds will be received by class members; and

b) The frequency of any post-approval report(s) to be provided to the Court about the distribution of settlement funds.

Question 8

9.13. We believe it is appropriate for the Court to continue to develop formal notices on a case-by-case basis, having regard to the particular circumstances of each represented group and the facts and circumstances present in each case.

9.14. We suggest that given its role in approving formal notices, the Supreme Court would be well placed to expand its current practice of publicising approved notices for current proceedings on its own website, by maintaining a resource of all approved opt-out and proposed-settlement notices used in Part 4A proceedings (either online or within the Supreme Court Library), to facilitate the adoption of approved forms of notice as 'standards'.

9.15. In this regard, it may be worth the Court considering the development of a policy concerning the desirability of publishing brief reasons concerning the approval of any notice that has non-standard or controversial elements, or for which the proposed terms were contested between the parties, to provide greater guidance to parties in developing future notices.

9.16. It may also be appropriate for the Supreme Court to consider the development of a template or example form of certain notices (for instance, opt-out notices and notices of proposed settlements), as has been included within the Federal Court Practice Note.

DISCLOSURE TO THE COURT

Question 10

9.17. We suggest that the requirement that funding agreements be may be an appropriate practice to incorporate in all funded class actions, and therefore suggest that the Supreme Court of Victoria consider adopting practices that align with those of the Federal Court Practice Note in this regard (whether or not this takes the form of an amendment to the Supreme Court Practice Note or merely reflects a presumption to be applied in the course of the Court's ordinary case-by-case consideration of disclosure requirements in funded class actions).

CERTIFICATION OF CLASS ACTIONS

Question 13

9.18. In our view, it is neither necessary nor appropriate to increase the threshold criteria for commencing a class action, or to introduce a fixed pre-commencement hearing or interlocutory process regarding whether a matter is appropriate to proceed as a class action.

Question 15

9.19. In practical terms, we do not consider that any statutory amendment is necessary or appropriate in relation to competing class actions. Competing class actions can raise difficult issues, however recent experience establishes that courts are alert to them and, in our submission, have sufficient powers to address them.

SETTLEMENT OF CLASS ACTIONS

Question 17

9.20. The Commission has been asked to consider whether specified criteria for the Court's approval of a settlement under section 33V should be drafted, and if so what they might be. In our view, this is an unnecessary step to take, in circumstances where there now exists considerable judicial authority (which is in part codified in the Supreme Court Practice Note) establishing a range of relevant factors which the Court should consider in approving a settlement.

9.21. We are of the view that the proposal raised in the Consultation Paper for a third party guardian or contradictor to represent group members in the settlement approval context should not be a requirement in all cases, however we agree that courts should continue to adopt this approach where it is considered appropriate in the circumstances.

Question 22

9.22. The legal costs and aggregate funding commission payable to the litigation funder should be disclosed both to the Court, and in a Court's settlement approval judgment, and transparency in this regard can only enhance the accountability of parties operating in this space.

9.23. In this regard, we also suggest that in appropriate cases some broader context should be provided surrounding the costs total that is approved (for example, some description of the total amount of work performed, or a somewhat more expansive description of any costs expert's opinion).

CONTINGENCY FEES

Question 26

9.24. The legalisation of contingency fees would be a positive development towards increasing the opportunities for plaintiffs to advance their claims, in circumstances where they otherwise may not be able to do so. Ultimately, we consider that having this mechanism available would increase the ability of lawyers to take on cases (on a self-funded basis in particular) and increase numbers of claims that are able to be determined on their own merits, rather than being abandoned or considered unviable due to a lack of funding.

9.25. As such, it is our view that an acceptance of a contingency-fee model within the legal sector, governed by a similar degree of regulation and oversight as applies to existing lawyer-client relationships, will meaningfully contribute towards the goal of access to justice, while also enhancing transparency and autonomy for clients, and better aligning the interests of lawyers and their clients.

Question 27

9.26. We make two proposals in relation to general protections which the Commission may consider introducing in the event that a decision is made to lift the ban on contingency fees. These proposals are intended to mitigate what we consider to be some of the particular, practical risks which attend the introduction of such a regime, beyond those already addressed by the existing legal and regulatory framework:

a) A maximum 'cap' should be prescribed for the commission rates that may be applied in any contingency fee agreement;

b) A procedure should be established through which parties seeking to enter into a contingency fee arrangement at a rate higher than the prescribed cap may seek the Court's leave to do so.

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