



Victorian
Law Reform
Commission

Access to Justice — Litigation Funding and Group Proceedings

REPORT MARCH 2018



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* *Commissioners working on this reference*

♦ *His Honour's term of appointment to the Commission ended on 28 February 2018*

CHIEF EXECUTIVE OFFICER

Merrin Mason

REFERENCE TEAM

Lindy Smith (team leader)
Madeleine Roberts (policy and research officer)
Michelle Whyte (policy and research officer)

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Victorian
Law Reform
Commission

Victorian Law
Reform Commission
GPO Box 4637
Melbourne
Victoria 3001
Australia
DX 144, Melbourne

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800
Freecall
1300 666 555
(within Victoria)
Fax
+61 3 8608 7888

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

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Preface

Access to justice is a proper and continuing concern for governments, the courts, the legal profession, litigants and the community. On 16 December 2016, the Victorian Attorney-General, the Hon. Martin Pakula MP, referred to the Commission for inquiry and report three issues under the heading 'Access to Justice'. Significantly, at the outset of the terms of reference their purpose was stated to be 'to ensure that litigants who are seeking to enforce their rights using the services of litigation funders and/or through group proceedings are not exposed to unfair risks or disproportionate cost burdens'.

The three issues were:

1. Whether there is scope for the supervisory powers of Victorian courts or Victorian regulatory bodies to be increased in respect of litigation funders.
2. Whether removing the existing prohibition on law firms charging contingency fees (except in areas where contingency fees would be inappropriate, including personal injury, criminal and family law matters) would assist to mitigate the issues presented by the practice of litigation funding.
3. In respect of group proceedings commenced under the provisions of Part 4A of the *Supreme Court Act 1986* (Vic) and similar proceedings, whether there should be further regulation of such proceedings.

Each of the three components—litigation funding, contingency fees, and class actions (group proceedings)—does, or has the potential to, contribute to access to justice. Litigation funding reduces the risks to litigants of taking proceedings; removing the ban on contingency fees could introduce another means of doing so; and class actions take advantage of economies of scale.

This report, informed by the overarching issue of access to justice and the aim that litigants are not exposed to unfair risks or disproportionate cost burdens, examines the specified issues in the terms of reference, and makes recommendations in respect of each of them.

In relation to litigation funding, the Commission makes recommendations for national regulation of the industry and greater transparency when a litigation funder is involved in proceedings. The Commission does not recommend fixed caps or limits on funding costs; rather, it encourages appropriate court control.

In relation to the prohibition on law firms charging contingency fees, the Commission recommends that, in principle and in appropriate areas of law, lawyers should be allowed to charge contingency fees. This is also a matter which should be developed nationally, in the interests of consistency.

In relation to class actions, the Commission's recommendations seek to strengthen the Court's powers, particularly in ensuring that a successful outcome is not unduly eroded by legal and funding fees. The Commission also makes recommendations to improve efficiency and accountability, which should reduce delays and associated costs, but has concluded that the introduction of a pre-commencement certification requirement is neither desirable nor necessary.

The Supreme Court of Victoria has a crucial role in ensuring the just, efficient, timely and cost-effective resolution of the real issues in dispute. In class actions, it has additional broad powers that can be used to protect the interests of class members. Appropriately, the terms of reference, and the Commission's recommendations, focus on the powers and practices of the Court.

On 15 December 2017, the Commonwealth Attorney-General announced that he had asked the Australian Law Reform Commission (ALRC) to inquire into class action proceedings and third-party litigation funders. The terms of reference for that inquiry embrace a number of issues that are considered in this report and reflect the Commonwealth's broader jurisdiction to regulate the litigation funding industry. The inquiry is to be completed by 21 December 2018.

While the Victorian Law Reform Commission has been asked to report on the question of whether lifting the ban on law firms charging contingency fees would assist to mitigate the issues presented by litigation funding, the ALRC has been asked to report on legal costs more extensively, namely 'the costs charged by solicitors in funded litigation, including but not limited to class action proceedings'.¹

Appropriately, the Victorian Law Reform Commission's terms of reference focus on the powers and practices of the Supreme Court of Victoria. However, in considering reforms, the Commission has taken into account a number of matters that are also specified in the ALRC's terms of reference, notably conflicts of interest and cost controls, but necessarily has done so from the perspective of Victoria's jurisdiction.

The common procedural form of Australian class action regimes is a valuable basis on which to ensure they evolve in a broadly consistent way. Consistency provides greater certainty for stakeholders, reduces the likelihood of 'forum shopping' and encourages national jurisprudence as to important procedural and other issues that arise.

However, uniformity is not a necessary end in itself; nor is uniformity necessary if there is national consistency. It is important to recognise that there are differences in the degree to which litigation funders are involved in class actions, and the types of class action being filed in each jurisdiction, particularly as between the Supreme Court of Victoria and the Federal Court. While litigation funders are actively involved in class actions in the Federal Court, they have been involved in only 10 of the 85 class actions filed in the Supreme Court of Victoria since their institution in Victoria on 1 January 2000. While mass tort claims, with their onerous logistical requirements and profound human impacts, have been a significant part of the civil jurisdiction in Victoria, the Federal Court receives a preponderance of shareholder class actions.

In this report, the Commission proposes a pathway—one that should improve access to justice; provide appropriate regulation of litigation funders; maintain proper ethical conduct by lawyers; and not involve unfair or disproportionate burdens on litigants.

I acknowledge and warmly thank the many judges, legal practitioners, litigation funders, academics and others who contributed to this review by making submissions and by participating in the Commission's extensive consultations and roundtables. The reference made to the Commission by the Victorian Attorney-General was not only apposite but timely, as it coincided with the 25th anniversary of the Commonwealth regime of class actions.

As always, I thank my fellow Commissioners who oversaw the inquiry and have authorised this report.

Finally, I especially thank the research team, led by senior Team Leader Lindy Smith and supported by Policy and Research Officers Madeleine Roberts and Michelle Whyte, whose commitment and work were admirable.



The Hon. P.D. Cummins AM

Chair

Victorian Law Reform Commission

March 2018

Terms of reference

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

Access to Justice—Litigation Funding and Group Proceedings

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

The Commission is asked to report on:

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

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

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

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

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

Glossary

Adverse costs order	A court order requiring one party in legal proceedings to pay the other party's reasonable costs.
'After the event' insurance	Insurance taken out for the benefit of one party in legal proceedings against the risk of having to pay the other side's costs if they lose. The policy can be purchased at the commencement of, or during, proceedings and payment of the premium can be postponed until the conclusion of the matter.
Book build	The pre-commencement process undertaken by law firms and litigation funders, in which class members are identified, contacted, and signed-up to a proposed class action. As a means of gauging interest prior to filing proceedings, the process ensures that there is a sufficient number of class members willing to contribute to the costs of bringing proceedings to ensure a commercially realistic return for the law firm and/or the litigation funder.
Champerty	A form of maintenance in which something of value (such as a share of the proceeds of the litigation) is given in return for assistance given without lawful justification.
Class action	See group proceedings .
Common fund order	A court order that the costs of bringing proceedings be determined as a share of the settlement or judgment amount, at a court-approved rate.
Contingency fee	A fee for legal services that is calculated as a share of the amount recovered if the litigation is successful. No fee is charged if the litigation is unsuccessful. Litigation funders charge on this basis, but lawyers are prohibited from doing so. Also called a 'proportionate fee', 'percentage-based contingency fee' and 'damages-based billing'.
Contradictor	A person appointed by the court to represent the interests of unrepresented parties, such as class members in class actions. Sometimes referred to as a 'third-party guardian'.
Conditional fee	See 'no win, no fee' .
Disbursements	Costs incurred by a lawyer on behalf of a client, such as the fees charged by a barrister or expert witness and court fees.

Fiduciary	A relationship of trust and confidence between two people, such as that of trustee and beneficiary, in which one person has a duty to act in good faith for the benefit of the other.
Funded class member	A class member who has entered into a funding agreement with a litigation funder . Under this agreement, the litigation funder will typically meet the costs of bringing the proceedings in return for a percentage of the amount recovered if the class action succeeds.
Funded plaintiff	A plaintiff—either a person or an entity—who has entered into a funding agreement with a litigation funder to finance a claim against a defendant.
Funded proceedings	Proceedings financed, in part or in whole, by a litigation funder .
Funding agreement	The contract between a litigation funder and a plaintiff or, in a class action , a class member.
Funding fee	The fee set out in a litigation funding agreement that a litigation funder will charge a funded plaintiff for financing the litigation if it is successful. It is generally charged as a percentage of any amount recovered for the funded plaintiff.
Group proceedings	Procedures whereby a single representative brings or conducts a claim on behalf of a group of seven or more members in the same, similar or related circumstances. In Victoria, group proceedings are commenced under part 4A of the <i>Supreme Court Act 1986</i> (Vic). Equivalent Commonwealth and New South Wales legislation refers to proceedings of this type as ‘representative proceedings’. The commonly used term is ‘class actions’.
Legal costs	The amounts charged by lawyers for legal services.
Litigant	A person, company or organisation that is a named party to legal proceedings. A defendant or plaintiff.
Litigation funder	A commercial entity that agrees to meet the costs (including any adverse costs) of the litigation in return for a share of any amount recovered if the litigation is successful. A litigation funder is not a party to the proceedings and does not otherwise have an interest in the litigation. For the purpose of this reference, an insurer funding the litigation costs of an insured under a pre-existing policy, or a solicitor acting on a ‘no win, no fee’ basis, is not a litigation funder.
Maintenance	An old common law crime and civil wrong of providing financial assistance, directly or indirectly, to a litigant without lawful justification. It was abolished as a common law crime and civil wrong in Victoria in 1969.
‘No win, no fee’	A legal fee that is conditional upon a successful outcome. No fee is charged for professional legal services if the litigation is unsuccessful, although there are often substantial disbursements and other costs payable by the plaintiff. The fee is calculated by reference to the usual fee for work done and cannot be charged by reference to the value of the claim. The fee may also include an uplift fee of up to an additional 25 per cent.

Representative plaintiff	A person or entity bringing a class action on behalf of others in the same, similar or related circumstances under part 4A of the <i>Supreme Court Act 1986 (Vic)</i> .
Security for costs	Application by the defendant under rule 62.02 of the <i>Supreme Court (General Civil Procedure) Rules 2005 (Vic)</i> that seeks security from the plaintiff where there is reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant if ordered to do so.
Unrepresented class member	A class member who does not have legal representation in a class action .
Uplift fee	An amount added to the lawyer's regular fees for legal services, under a ' no win, no fee ' costs agreement, if the litigation is successful. The amount is currently capped at 25 per cent of the regular fees. Also called a 'success fee'.

Executive summary

Terms of reference

- 1 On 16 December 2016, the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission to report on ways to ensure that litigants who use the services of litigation funders or participate in group proceedings (class actions) are not exposed to unfair risks or disproportionate cost burdens.
- 2 In accordance with the full title of the terms of reference, Access to Justice—Litigation Funding and Group Proceedings, the overarching theme of this report is access to justice. Litigation funding and class actions help plaintiffs overcome two impediments to accessing justice: the cost of bringing proceedings; and the risk that, if the litigation is unsuccessful, the plaintiff will be required to pay the other side’s costs (adverse costs).
- 3 The potential for litigants to be exposed to unfair risks and disproportionate cost burdens arises from the conditions under which litigation funding is provided, the manner in which class actions operate, and how these two factors affect each other.
- 4 Litigation funders commonly agree to pay the costs of bringing proceedings and adverse costs if the plaintiff loses, in return for a share of the settlement or judgment amount if the plaintiff wins. In this way, the financial risks and costs are shifted from the plaintiff to the funder.
- 5 If the litigation is successful, the litigation funder is reimbursed the costs of the proceedings, and receives a share of the recovered amount. The plaintiff must also pay any outstanding costs, such as legal costs that the litigation funder did not pay. The funding fee is usually the largest single cost and the typical range appears to be between 20 and 45 per cent of the recovered amount, although in some insolvency cases it has been 75 per cent.
- 6 Class actions create economies of scale that make it cost-effective for individual claimants to take legal action against a well-resourced defendant to recover a small loss. By grouping individual claims from the same, similar or related circumstances, the cost of bringing proceedings can be spread across many claimants. If unsuccessful, the representative plaintiff is liable for both the cost of bringing the proceedings and adverse costs. If successful, the cost of bringing the proceedings, as well as the settlement or judgement amount, is shared among the class members.
- 7 Large class actions can cost around \$10 million to bring, with an adverse costs risk of a similar amount. This is a significant financial burden on the representative plaintiff that is far greater than the value of their individual claim. The disparity has created a demand for litigation funding that, in turn, has fostered an industry. At the same time, class action law and practice in Australia have developed in response to the influence of litigation funders.

- 8 The Commission has not been asked to investigate whether litigants are being treated unfairly or charged excessively; rather, the report focuses on how to prevent this happening. The terms of reference set out possible reforms to funded proceedings and class actions, and raise the question of whether the existing prohibition on lawyers being able to charge contingency fees should be removed.
- 9 The Commission’s recommendations are summarised below and set out at page xix. While this report is about funded proceedings and class actions in Victoria, these issues are the subject of ongoing discussion nationally and current review by the Australian Law Reform Commission (ALRC). The recommendations have been informed by the experience of other Australian jurisdictions, but grounded in the context of Victorian circumstances.

Litigation funding and class actions in Victoria

- 10 Class actions may be brought in the Supreme Court of Victoria under a regime set out in part 4A of the *Supreme Court Act 1986* (Vic). Related rules and procedures are set out in the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) and the Court’s practice note on the conduct of class actions.
- 11 Victoria’s class action regime commenced on 1 January 2000. It is based on Australia’s first class action regime, which was established in 1992 within the jurisdiction of the Federal Court of Australia. The model generally follows the recommendations of the ALRC in its seminal 1988 report *Grouped Proceedings in the Federal Court*. Similar regimes were introduced in New South Wales in 2011 and Queensland in 2017.
- 12 As at 10 November 2017, 85 class actions had been filed in the Supreme Court of Victoria. The number each year has fluctuated between zero and 16; the annual average is between four and five. Five were filed in 2017.
- 13 Approximately two-thirds of the class actions commenced in Victoria settled before trial, leading to the distribution of at least one billion dollars to more than 28,300 class members. The two largest class action settlements in Australia were secured under Victoria’s class action regime. Neither involved a litigation funder.
- 14 While actively involved in class actions in the Federal Court, litigation funders have invested in only 10 class actions in Victoria. Eight were claims by shareholders or investors, and half of these were transferred to the Federal Court.
- 15 It is not known how many types of civil proceeding in Victoria, other than class actions, have involved litigation funders. The plaintiff’s financial arrangements and costs in these cases are not subject to the same degree of court supervision and public scrutiny as class actions.
- 16 One funded case that has attracted public attention is a funded claim by trustees for former employees of Huon Corporation Limited against CBL Insurance Ltd (*Huon Corporation*). The Court found in the trustees’ favour following a protracted dispute between the parties but, once the costs were paid from the amount awarded, the former employees ultimately received nothing. This case was discussed in submissions and consultations and the Commission has used it as an example in the report.

Role of the Court

- 17 The Commission’s recommendations reinforce the role of the Supreme Court of Victoria in safeguarding litigants from exposure to unfair risks and disproportionate costs burdens, and in improving efficiency.
- 18 In all litigation, the Court has broad powers to give effect to the overarching purpose of the *Civil Procedure Act 2010* (Vic): to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

-
- 19 In class actions, where the outcome affects class members who have not directly participated in the proceedings, the Court has additional supervisory responsibilities to protect the interests of class members. It also has case management powers to ensure that the class actions are conducted efficiently, which reduces costs and delay for all parties.
- 20 These responsibilities are heightened in funded class actions. The involvement of a litigation funder creates conflicts of interest and can affect the rights of all class members. Significantly, litigation funding was instrumental in the introduction of closed class actions, which enable class membership to be limited only to class members who have signed funding agreements. It also led to the introduction of common fund orders for litigation funding costs, which allow a funder to obtain a funding fee from every registered class member even if they have not signed a funding agreement.
- 21 Developments such as these increase the need to ensure that the terms on which funders are involved in class actions, and the relationship they have with the lawyers for the representative plaintiff, are transparent both to the Court and to class members.
- 22 Similarly, in other funded proceedings where the outcome affects persons who do not directly participate in the proceedings, as occurred in *Huon Corporation*, there is a need for greater transparency.
- 23 The Commission's recommendations affect the Court's role and powers in protecting the interests of class members in the following ways:
- **Stronger case management:** The Commission recommends own motion powers by the Court to order that a proceeding no longer continue as a class action and to substitute the representative plaintiff with another class member; clearer procedures for managing competing class actions; and a proposal for a cross-vesting judicial panel to manage class actions filed in different jurisdictions. The Commission does not recommend certification because it is unnecessary, would impede access to justice, and had little support in submissions to this review.
 - **Certainty of powers to control costs:** The Commission makes recommendations to clarify the Court's powers to review and vary costs and make common fund orders, in which the Court approves the funder's percentage share of the settlement or judgment amount. The Commission does not consider that funding fees should be subject to statutory caps.
 - **Better information and support for the Court's protective role:** The Commission recommends statutory principles for settlement approval. Recommendations are made for the Court to consider amending its practice note on class actions to include guidance for the appointment of a contradictor to assess the terms of settlement, or the settlement distribution scheme, on behalf of class members, and to specify the supporting information that must be provided to the Court when settlement approval is sought. The Commission recommends disclosure of the funding agreement to the Court and other parties (after redaction as necessary) in all funded class actions, and to the Court in other funded litigation where a number of disputants are represented by an intermediary.
 - **Better information for class members:** The Commission recommends that the Court, in upgrading its website, consider publishing clear information about class actions generally and specific information about proceedings before the Court, including summary statements on each class action, prepared by the representative plaintiff's lawyers. The Commission also recommends that the Court consider drafting standard opt-out and settlement notices in Plain English and publishing them on its website.

Responsibilities of plaintiff lawyers

- 24 In all litigation, lawyers have a fundamental duty to their clients that has contractual, professional and fiduciary dimensions. It applies whether or not a litigation funder is involved.
- 25 The duty includes responsibilities to avoid or manage conflicts of interest. In class actions, the conflicts of interest that lawyers encounter are more complex than in single-party litigation. For example, there may be differences between the interests of the representative plaintiff when compared to class members or between the class members themselves. These differences may arise due to the different nature of the claim or the harm suffered; they may arise from the different categories of class member (for example, whether funded or unfunded); or they may exist because of the structure of the class action mechanism, in which the representative plaintiff has responsibilities that class members do not share. They can be exacerbated when a litigation funder is involved, particularly if the funder actively participates in decisions about how the class action is conducted.
- 26 The Commission does not consider further regulation of the legal profession necessary, as the existing regulation is sufficient to prevent, detect or sanction unprofessional conduct. However, there is no formal recognition of lawyers' responsibilities when acting for multiple class members or guidance on how to manage the conflicts that arise in class actions. The Commission recommends that professional guidelines be produced for lawyers on their duties and responsibilities to all class members in class actions.
- 27 Additional measures do not need to be introduced to protect the interests of plaintiffs in other proceedings in which a litigation funder is involved. The plaintiff in single-party cases has direct and ongoing contact with their lawyer, who should advise the plaintiff about the terms of the funding agreement. Unlike class actions, where the funding agreement establishes a tripartite relationship between the funder, lawyer and representative plaintiff, in single-party proceedings the agreement may be bilateral, between the funder and plaintiff. If a plaintiff in other funded proceedings brings the action on behalf of a number of disputants, the lawyer's only client will be the plaintiff.

Regulation of litigation funders

- 28 The courts can supervise the involvement of litigation funders in legal proceedings only on a case-by-case basis, but state regulation of litigation funding is not a viable option because a national response is required.
- 29 While litigation funding has become integral to Australia's legal system, the litigation funding industry is not regulated. Apart from those listed on the Australian Securities Exchange (ASX), litigation funders in Australia are free from mandatory licensing, financial disclosure requirements, reporting obligations or prudential supervision. A systemic risk for clients of litigation funders is that the funder may not meet its obligations under the funding agreement.
- 30 The Productivity Commission has recommended that litigation funders be licensed, to ensure that they hold adequate capital to meet their financial obligations. Many contributors to this review endorsed the Productivity Commission's recommendation and called for stronger regulation by the Commonwealth.
- 31 In December 2017, the Australian Law Reform Commission commenced an inquiry into whether, and to what extent, litigation funders should be subject to Commonwealth regulation. The report is to be completed by 21 December 2018. In the meantime, Victoria should press for regulation at a future meeting of the Council of Australian Governments.

Contingency fees

- 32 While it is standard practice for litigation funders to charge clients a percentage of the amount recovered if the claim is successful, lawyers are not permitted to charge on this basis. The Commission was asked to report on whether lifting the ban (except in personal injury, criminal and family law matters and other areas in which contingency fees would be inappropriate) would mitigate the issues presented by the practices of litigation funding.
- 33 As a matter of principle, the Commission considers that lawyers should be able to charge contingency fees, as it provides another avenue of funding for clients who may be otherwise unable to pursue proceedings due to the cost. While their use should be subject to certain conditions, the need for regulatory controls is not sufficient reason to prevent the ban being lifted. The matter requires national consideration, and the Commission recommends that this be pursued.
- 34 Notwithstanding the need for national consideration of the issue, the Commission believes there is scope for lawyers to be paid a percentage of the recovered amount in Victorian class actions, where costs are already borne, and paid, in a different manner to other litigation. This would increase competition with litigation funders, which may reduce costs in some cases, and enable claims that are not financially viable investments for litigation funders to be pursued.

Implementation

National dimensions to class action issues

- 35 The common procedural form of Australian class action regimes is a valuable basis on which to ensure they evolve in a broadly consistent way. Consistency provides greater certainty for stakeholders, reduces the likelihood of forum shopping and encourages national jurisprudence as to important procedural and other issues that arise.
- 36 However, uniformity is not a necessary end in itself; nor is uniformity necessary if there is national consistency. It is important to recognise that there are differences in the types of class action being filed in each jurisdiction, particularly as between the Supreme Court of Victoria and the Federal Court:
- The Supreme Court has dealt with more mass tort class actions than the Federal Court, and continues to do so. This is the type of claim that the ALRC expected (in its 1988 report) would be brought as a class action.
 - Large commercial claims, particularly shareholder class actions, which usually attract litigation funding, are more prevalent in the Federal Court.
 - Litigation funders are far more active in the Federal Court. Over the past five years, the number of funded class actions brought in the Federal Court outnumbered the unfunded class actions.
- 37 These differences may change over time and it is desirable that innovations continue to develop in a consistent manner across jurisdictions rather than creating, or appearing to create, arbitrary distinctions. The Commission's recommendations are not intended to entrench current practices, but they are intended to underpin best practice as it is perceived now and may develop in the future. If implemented, they would:
- establish express statutory powers for the Court in place of reliance on its discretionary powers
 - introduce more prescriptive requirements to provide funding information to the Court and class members
 - align practices and powers with those in the other jurisdictions with class action regimes to support national consistency.

- 38 The Commission proposes that the recommendations made in this report be implemented with a view to reinforcing a nationally consistent approach.

Court resources

- 39 The Supreme Court will need to allocate staff to assist in developing and introducing the changes, and implementing them into the future as the Court's protective role strengthens and it raises its profile as a source of information about class actions generally. The Class Action Coordinators for the Common Law Division and the Commercial Court have responsibilities that are affected by many of the recommendations and may need assistance for their part in responding to them. The Commission recommends that the Court consider appointing legally qualified staff to assist them in implementing the recommendations.
- 40 All of the changes will benefit from consultation with stakeholders about their introduction. The Commission recommends that the Court consider expanding its class action user group to include individuals with experience in class actions, and consult the group about the recommended amendments to the practice note on class actions, or the production of materials for class members, or any of the other changes that affect the way in which class actions are conducted and managed.

Recommendations

[Recommendations in relation to the Supreme Court of Victoria are expressed with the words ‘The Supreme Court should consider,’ rather than as a direct recommendation to act, to acknowledge and signify the independence and standing of the Court.]

- 1 The recommendations in this report to amend the *Supreme Court Act 1986* (Vic) and the Supreme Court of Victoria’s practice note on class actions¹ should be implemented with the aim of advancing the nationally consistent regulation and conduct of class actions.
- 2 The Victorian Government should advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry.
- 3 The Supreme Court should consider amending its practice note on class actions to require the disclosure of litigation funding agreements to the Court and other parties to class actions in similar terms to paragraph [6] of the Federal Court of Australia’s practice note on class actions.²
- 4 In addition to the introduction of disclosure obligations in class actions, the Supreme Court should consider requiring the plaintiff’s lawyers to provide the Court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary. Any funding agreement disclosed to the other party should be able to be redacted to conceal information which might reasonably be expected to confer a tactical advantage on that party.
- 5 The Supreme Court should consider amending its practice note on class actions to provide that, if a class action is funded by a litigation funder:
 - (a) the representative plaintiff’s lawyers should notify class members (whether they are actual or potential clients), in clear terms and as soon as practicable, of any applicable litigation funding charges and any material changes to those charges
 - (b) the obligation to notify is satisfied if class members have been provided with a document that properly discloses those charges
 - (c) failure to meet the obligation to notify may be taken into account by the Court in relation to settlement approval under section 33V of the *Supreme Court Act 1986* (Vic).

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)—General Practice Note*, 25 October 2016.

- 6 The Supreme Court should consider amending its class action practice note to require the representative plaintiff's lawyers in funded class actions to provide to the Court, when the writ for the proceeding is filed, a brief Funding Information Summary Statement that accurately sets out litigation funding charges and key conditions in a simplified form, for publication on the Supreme Court's website.
- 7 The Attorney-General should propose to the Council of Attorneys-General that the Council:
 - (a) agree, in principle, that legal practitioners should be permitted to charge contingency fees subject to exceptions and regulation
 - (b) agree to a strategy to introduce the reform, including the preparation of draft model legislation that regulates the conditions on which contingency fees may be charged and maintains the current ban in areas where contingency fees would be inappropriate.
- 8 Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to provide the Court with the power to order a common fund for a litigation services fee, on application by a representative plaintiff, whereby the fee is calculated as a percentage of any recovered amount and liability for payment is shared by all class members if the litigation is successful.

Approval of a common fund of this type should be subject to the following conditions, set out in legislation or the Supreme Court's practice note on class actions, as appropriate:

 - (a) An application for the order would be sought from the Court at the commencement of proceedings.
 - (b) The percentage allocated for the fee would be indicated when the application is made but approved by the Court at an appropriate time, most likely at settlement approval.
 - (c) The litigation services for which the fee is charged should include: all services provided by the law firm; provision for security for costs if required; disbursements; and an indemnity for adverse costs.
- 9 A certification requirement should not be introduced in Victorian class actions.
- 10 Section 33N of the *Supreme Court Act 1986* (Vic) should be amended to provide the Supreme Court with the power of its own motion to order that a proceeding no longer continue under part 4A.
- 11 The Supreme Court should consider amending its practice note on class actions to include guidance for the Court and parties on managing competing class actions. The guidance should reflect current practice, as it has developed over time, and allow for the Court to respond flexibly in the circumstances of each case.
- 12 The Attorney-General of Victoria should propose to the Council of Attorneys-General that a cross-vesting judicial panel for class actions be established. The judicial panel would make decisions regarding the cross-vesting of class actions, where multiple class actions relating to the same subject matter or cause of action are filed in different jurisdictions.
- 13 The Attorney-General of Victoria should seek the agreement of the Attorney-General of New South Wales that:
 - (a) guidelines should be issued to legal practitioners on their duties and responsibilities to all class members in class actions, providing specific direction on the recognition, avoidance and management of conflicts of interest

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- (b) the Standing Committee under the Legal Profession Uniform Law should ask the Legal Services Council to ensure that such guidelines are produced and promulgated.
- 14 Section 33T of the *Supreme Court Act 1986* (Vic) should be amended to empower the Court, of its own motion, to substitute another class member as representative plaintiff, and make other such orders as it thinks fit, if it appears that the representative plaintiff is unable to adequately represent the interests of class members.
- 15 Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to include the principles that govern the exercise of the Court's power to approve a proposed settlement, currently contained in paragraph [13.1] of the Supreme Court's practice note on class actions.
- 16 The Supreme Court should consider amending its practice note on class actions to include guidance for the appointment of an independent representative (commonly known as a contradictor) to assess the terms of settlement, or the terms of the settlement distribution scheme, on behalf of class members.
- 17 The Supreme Court should consider amending paragraph [13.5] of its practice note on class actions to require the affidavit(s) in support of settlement approval to include the following additional matters:
- (a) the time at which settlement funds will be received by class members
 - (b) a mechanism for Court review of disputed decisions of the scheme administrator where the settlement involves complex individual assessments
 - (c) the application of the terms of any litigation funding agreement to the settlement, if approved
 - (d) how class members will be kept informed of the settlement distribution scheme, including measures to ensure the ease of accessibility of these communications for class members
 - (e) the proposed measures that are being taken, in the settlement distribution scheme, to ensure a just, efficient, timely and cost-effective outcome for class members.
- 18 The Supreme Court should consider specifying in its practice note on class actions that scheme administrators report to the Court:
- (a) on a six-monthly basis, or other period as determined by the Court, regarding the performance of the settlement distribution scheme, including the costs involved and the distributions made
 - (b) at the completion of the settlement distribution scheme, outlining the distributions made to class members, the time taken for such distributions, the amounts charged each class member for distribution, and any outstanding amounts that were unclaimed by class members, including what was done with these outstanding amounts.
- 19 Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court has the discretion to make any orders in relation to the distribution of money remaining after settlement distribution.

- 20 In revising the pages on its website about class actions, the Supreme Court should consider ensuring that they contain the following:
 - (a) current and clear information on class actions generally as well as on proceedings before the Court
 - (b) links to the Class Action Summary Statement (Recommendation 23) and, if applicable, the Funding Information Summary Statement (Recommendation 6) for each class action
 - (c) standard form opt-out and settlement notices (Recommendation 21).
- 21 The Supreme Court should consider drafting Plain English standard form opt-out and settlement notices, in consultation with the Victoria Law Foundation, and publish these on the Court website.
- 22 The Supreme Court should consider amending its practice note on class actions to:
 - (a) specify that opt-out notices and settlement notices should, where possible, follow the standard form notices published on the Supreme Court’s website
 - (b) incorporate guidelines for preparing opt-out notices consistently with those contained in the Federal Court practice note on class actions.
- 23 The Supreme Court should consider amending its practice note on class actions to require the representative plaintiff’s lawyers:
 - (a) to provide the Court, when the writ for the proceeding is filed, with a brief Class Action Summary Statement for publication on its website
 - (b) at the same time, or before, make the Class Action Summary Statement available to class members (whether they are actual or potential clients) through, for example, publication on the representative plaintiff’s lawyers website.
- 24 Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to provide the Court with specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to be deducted from settlement amounts to ensure that they are fair and reasonable.
- 25 The Supreme Court should consider amending its practice note on class actions to provide guidance for the appointment of an independent costs expert by the Court to assist in the assessment of legal costs and litigation funding fees. This should take into account the guidelines contained in the Federal Court practice note on class actions relating to the use of costs experts.
- 26 The Supreme Court should consider amending its practice note on class actions to specify that, at the first case management conference, the Court, in exercising its powers under section 65A of the *Civil Procedure Act 2010* (Vic), may ask the representative plaintiff’s lawyers to provide a memorandum of estimated legal costs and disbursements of proceedings to the Court.
- 27 Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court has the power to approve a common fund order, on application by a representative plaintiff, whereby all costs of proceedings are shared by all class members if the litigation is successful.
- 28 Section 33ZD of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court may not order a class member to provide security for costs.

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- 29 Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that in making an adverse costs order, or a security for costs order in class actions, the Court may take into account, among other factors:
 - (a) the function of class actions in providing access to justice
 - (b) whether the case is a ‘test’ case or involves a novel area of law
 - (c) whether the class action involves a matter of public interest.
 - 30 The Supreme Court should consider expanding the class action user group to include individuals with experience in class actions, either as a class member or a representative plaintiff, particularly to consult on the implementation of the Commission’s recommendations on Court powers, procedures and services.
 - 31 The Supreme Court should consider providing additional legally qualified staff to support the role of Class Actions Coordinator in the Common Law Division and the Commercial Court in implementing the Commission’s recommendations and managing the ongoing responsibilities arising from them for the Court.

Introduction

- 2** This reference
- 5** Other reviews
- 7** International comparisons
- 7** National context for reform
- 10** Structure of this report

1. Introduction

This reference

Referral to the Commission

- 1.1 By letter dated 16 December 2016, the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission (the Commission), under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic), to report on access to justice by litigants who seek to enforce their rights using the services of litigation funders and/or through group proceedings. The referral was publicly announced on 16 January 2017.¹
- 1.2 The terms of reference are set out on page viii.

Scope of the reference

Access to justice

- 1.3 The overarching theme of the terms of reference, and this report, is access to justice. Access to justice is a broad concept that means different things in different contexts. In general terms, it refers to the ability of those who seek to enforce their rights to use the legal system to obtain an outcome by means of a fair and open process. Further significant themes of this report are:
 - the appropriate regulation of litigation funders
 - maintaining the proper ethical conduct of lawyers
 - not imposing unfair or disproportionate burdens on litigants.
- 1.4 The services provided by litigation funders and the introduction of the class action regime in Victoria have enabled more Victorians to obtain redress where legal action may otherwise have been beyond their reach. At the same time, there is concern about the wider impact on the legal system and the rights and interests of people on whose behalf funded litigation and class actions are conducted.
- 1.5 The terms of reference identify in particular the need to ensure that litigants who use the services of litigation funders and/or participate in group proceedings are not exposed to unfair risks and disproportionate cost burdens. To this end, the Commission is asked to report on three possible strategies:
 - increasing the supervisory powers of Victorian courts or regulatory agencies in respect of proceedings funded by litigation funders
 - removing the existing prohibition on law firms charging contingency fees

- further regulating group proceedings under part 4A of the *Supreme Court Act 1986* (Vic) and similar proceedings that involve a number of disputants being represented by an intermediary.

Litigation funding

- 1.6 'Litigation funding', as used in the terms of reference and in this report, refers to an arrangement between a commercial litigation funder and one or more potential litigants to pay the costs of the litigation in return for a share of the award if the claim succeeds. Arrangements of this type are also known as 'third-party litigation funding' and 'third-party financing' because the litigation funder is not a party before the court—it is a commercial entity that does not represent the litigant and has no other interest in the litigation.
- 1.7 Over the past 20 years, litigation funders have become an accepted feature of the legal system. They enhance access to justice by reducing financial risk and postponing or removing the cost barrier to participation.²
- 1.8 In this report, 'litigation funding' does not refer to the financing of legal claims by a party that does not hold itself out in the marketplace as a litigation funder. Private loans to a plaintiff to assist in meeting the costs of bringing proceedings, or other private financial undertakings, are not included. In addition, 'litigation funder' does not refer to a government agency or an insurer, or a lawyer working pro bono or under a 'no win, no fee' costs agreement.³

Contingency fees

- 1.9 The Commission has been asked to report on whether removing the existing prohibition on law firms charging contingency fees (except in personal injury, criminal and family law matters and other areas in which contingency fees would be inappropriate) would help to mitigate the issues presented by the practice of litigation funding. These issues have been identified during the reference as:
- the selection of cases to fund
 - the amount charged
 - the priority given to the funder's commercial interests over the plaintiff's or class members' interests.
- 1.10 'Contingency fees' has a specific meaning in this context. It refers only to the practice of charging clients a percentage of the amount recovered if the claim is successful. While this is standard practice among litigation funders, lawyers are not permitted to charge on this basis. It has been suggested that contingency fees may improve access to justice by providing a means of financing legal claims that are not viable investments for litigation funders.
- 1.11 Currently, legal costs can depend on the outcome of the litigation, but the amount that may be charged is based on the lawyer's regular fee, not on the amount recovered on the client's behalf. If the claim succeeds, a lawyer acting under a 'no win, no fee' or 'conditional' cost agreement charges an amount based on their regular fee for the work done, plus an 'uplift fee' of up to an additional 25 per cent of the regular fee. Law firms commonly charge on a 'no win, no fee' basis in class actions, including when a litigation funder is involved.

² *Movitor Pty Ltd (rec and mgr apptd) (in liq) v Sims* (1996) 54 FCR 380; *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.
³ The narrow definition is determined by the terms of reference and is effectively confined to commercially available funding for plaintiffs. As noted in the submission by LCM, in some contexts the distinction between this and other sources of funding, such as funding available to defendants under an insurance policy, can be somewhat artificial: Submission 14.

Group proceedings (class actions)

- 1.12 In Victoria, a ‘group proceeding’ is the procedure whereby a single representative can bring or conduct a claim on behalf of others in the same, similar or related circumstances. Procedures of this type are commonly called ‘class actions’, so this report refers to group proceedings as class actions except when discussing specific provisions in legislation.
- 1.13 Class actions provide access to justice for class members by allowing them to share the costs of taking legal action, each paying less than the cost of bringing separate proceedings. Combining multiple claims into a single class action also reduces the defendant’s costs and the court’s caseload.
- 1.14 Australia’s first class action regime was established on 4 March 1992, when part IVA of the *Federal Court of Australia Act 1976* (Cth) came into effect. It applies to class actions brought under the jurisdiction of the Federal Court of Australia and is based on the recommendations of the Australian Law Reform Commission in its seminal 1988 report *Grouped Proceedings in the Federal Court*.⁴
- 1.15 A similar regime has operated in Victoria since 1 January 2000, enabling class actions to be conducted under the jurisdiction of the Supreme Court of Victoria. It was initially established by Supreme Court rules.⁵ Previous rules had allowed for a representative action procedure but had been interpreted narrowly and fell into disuse.⁶ The Victorian Parliament subsequently passed the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic), which introduced part 4A into the Supreme Court Act.⁷
- 1.16 Part 4A of the Supreme Court Act is substantially the same as part IVA of the Federal Court Act. Although the terms of reference concern the operation of Victorian law, most class action litigation has been conducted in the Federal Court, and some of the most significant decisions have been made under the Commonwealth legislation. As the two regimes are similar, the Commission has drawn from the experience of both jurisdictions in preparing this report.
- 1.17 The Commission has also taken into account the class action regimes that were introduced in New South Wales⁸ in 2011 and in Queensland⁹ in 2017. They are also modelled on the Commonwealth legislation.

The Commission’s process

Division

- 1.18 The Commission Chair exercised his powers under section 13(1)(b) of the Victorian Law Reform Commission Act to constitute a Division to guide and oversee the conduct of the reference. The Commissioners who joined him on the Division were: Helen Fatouros; His Honour David Jones AM; Alison O’Brien; and the Hon. Frank Vincent AO QC. All Commissioners considered and approved this report.

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

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

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

7 Although the amending legislation was passed and received Royal Assent in November 2000, it was deemed to have come into operation on 1 January 2000: *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic) s 2(2).

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

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

Consultation paper

- 1.19 The Commission published a consultation paper on 17 July 2017 which posed a series of questions and invited written submissions by 22 September 2017. On request, submissions continued to be accepted after this date until 10 December 2017.
- 1.20 In preparing the consultation paper, the Commission was greatly assisted by the insights given by lawyers, litigation funders, judicial officers, academics and regulators during informal discussions held in May and June 2017. The paper was otherwise based on an examination of case law, relevant literature and the reports of earlier reviews.

Submissions

- 1.21 The Commission received 36 submissions, and they are listed at Appendix A.

Consultations

- 1.22 The publication of the consultation paper marked the beginning of formal consultations. Lawyers, litigation funders, academics and regulators were invited to participate in a series of roundtables in September and October 2017. Class members and others who could discuss the issues from a client's perspective attended a roundtable on 31 October 2017 to share their experience of the class action process and their views on the need for reform.
- 1.23 In addition, separate discussions were held with judges and other contributors throughout the reference. The consultations are listed at Appendix B.

Other reviews

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

Australian Law Reform Commission (1988)

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

10 Law Reform Commission (now the Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988).
 11 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).
 12 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014).
 13 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 527–553; Recommendations 78–82.

Victorian Law Reform Commission (2008)

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

Productivity Commission (2014)

- 1.30 The Commonwealth Government has before it recommendations made by the Productivity Commission in its report *Access to Justice Arrangements*. The report discussed dispute resolution in Australia, with a focus on constraining costs and promoting access to justice and equality before the law. Private funding of litigation was among the comprehensive range of issues addressed by the report.
- 1.31 The following recommendations of the Productivity Commission are of particular relevance to the current review:
- establish a licence for litigation funding companies to verify their capital adequacy and properly inform clients of relevant obligations and systems for managing conflicts of interest
 - remove the ban on lawyers being able to charge contingency fees, except in family and criminal law matters, and apply a percentage cap on a sliding scale
 - amend court rules to ensure that the court’s discretionary power to award costs against non-parties, and obligations to disclose funding agreements, apply equally to lawyers charging a contingency fee and litigation funders.¹⁷

Australian Law Reform Commission (2017)

- 1.32 On 15 December 2017, the Commonwealth Attorney-General announced that he had asked the ALRC to inquire into class action proceedings and third-party litigation funders. The terms of reference for the inquiry embrace a number of issues that are discussed in this report and reflect the Commonwealth’s broader jurisdiction to regulate the litigation funding industry. The inquiry is to be completed by 21 December 2018.
- 1.33 Appropriately, the Victorian Law Reform Commission’s terms of reference focus on the powers and practices of the Supreme Court of Victoria. In considering reforms, the Commission has taken into account a number of matters that are also specified in the ALRC’s terms of reference, notably conflicts of interest and cost controls, but is necessarily doing so from the perspective of Victoria’s jurisdiction.

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

15 Ibid 521–60; Recommendations 101–7.

16 Ibid 687–8.

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

- 1.34 While the Commission has been asked to report on the question of whether lifting the ban on law firms charging contingency fees would assist to mitigate the issues presented by litigation funding, the ALRC has been asked to report on legal costs more extensively, namely ‘the costs charged by solicitors in funded litigation, including but not limited to class action proceedings’.¹⁸
- 1.35 The Commission met with the President of the ALRC and staff following the institution of the ALRC inquiry.

International comparisons

- 1.36 The challenges and reform options that the terms of reference raise are being addressed internationally. While it is wrong to expect that replicating the policies and laws of another country will create the same results in Victoria, it is prudent to take account of overseas experience when exploring ways to resolve local issues.
- 1.37 The experience of three overseas jurisdictions is particularly relevant to this review:
- **The United States**, because the Australian Law Reform Commission drew from the law and experience of the United States when recommending a class action regime for Australia. The legal profession in the United States has long been able to charge contingency fees and—unlike plaintiffs in Australia, Canada and the United Kingdom—plaintiffs in the United States do not face the risk of paying the other side’s costs if the litigation is unsuccessful.
 - **England and Wales**, which has a national self-regulatory scheme for litigation funders overseen by the Association of Litigation Funders of England and Wales. England and Wales has recently removed the blanket prohibition on lawyers being able to charge contingency fees, to a muted response from the legal profession. In addition, there is extensive use of ‘after the event’ insurance. Comparisons must be made with care, because the litigation funding market is quite different to that in Australia for a number of reasons, and so are the issues.
 - **Canada**, which does not have a large litigation funding industry, and now also allows lawyers to charge contingency fees, although the regulations vary between the provinces.¹⁹ Contingency fees are mainly charged in personal injury actions²⁰ but are less common in Canada than the United States. In Ontario, a public fund provides funding for certain class actions.
- 1.38 These and other features of the approaches taken by other countries are considered in this report where relevant to the issues under discussion.

National context for reform

The need for a nationally consistent approach

- 1.39 Although the terms of reference properly concern proceedings in Victorian courts, decisions about whether to introduce reforms, and which are most suitable, need to take national implications into account. The Commission agrees with the Law Council of Australia’s observation that:

18 Australian Law Reform Commission, *Australian Law Reform Commission Terms of Reference—Inquiry into Class Action Proceedings and Third Party Litigation Funders* (15 December 2017) <<https://www.alrc.gov.au>>.

19 Law societies across Canada regulate the amount, or percentage, a lawyer can charge to a client under a contingency fee agreement. For example, the British Columbia *Law Society Rules 2015* state that, unless a court otherwise orders a higher remuneration, a lawyer cannot claim more than 33⅓% of the amount received for any personal injury or wrongful death arising out of a motor vehicle accident, and no more than 40% in any other claim for personal injury or wrongful death: pt 8, r 8–2(1).

20 Law Society of Ontario, *Seventh Report of the Advertising & Fee Arrangements Issues Working Group*, Contingency Fee Recommendation Report (November 2017) 12 <<http://www.lsuc.on.ca/advertising-fee-arrangements>>.

For the legal system to be seen as enabling access to justice and for the community to be confident in the justice system, we should have consistent regimes throughout Australia as much as possible.²¹

1.40 The reasons are well established and uncontroversial yet bound to be revisited whenever reforms to state and territory law are proposed. Without exception, the views expressed in submissions and during consultations for this report either called for, or implied there should be, a nationally consistent approach to proceedings funded by litigation funders and class actions.

1.41 While views differed about whether regulation of litigation funders is necessary, it was made clear that Victoria should not act unilaterally. Most submissions called for the national regulation of the litigation funding industry, and the Commission agrees.²²

1.42 With regard to class actions, stakeholders observed that consistency:

- provides greater certainty, of benefit to all stakeholders²³
- reduces the likelihood of forum shopping and the making of borderline claims to attract a particular jurisdiction²⁴
- encourages the development of national jurisprudence as to the important procedural and other issues that arise.²⁵

1.43 Clearly, the class action regimes in Australia are intended to operate in a nationally consistent way because they have been established by similar legislation, first enacted in 1992 as part IVA of the Federal Court Act. This has enabled national jurisprudence to develop, as noted by the Supreme Court of Victoria:

Sensibly, State legislation mirrors (almost entirely) the federal model, allowing learnings in the federal sphere to be translated to the State sphere and vice versa. There is a constant cross-pollination of decisions and principles derived from those decisions.²⁶

1.44 Having nationally consistent class action regimes, with a common procedural form, does not mean a prescriptive approach should be taken to case management. One of the strengths of Australia's class action regimes is the court's ability to respond flexibly in response to the circumstances of each case. In Victoria, the Supreme Court has a broad power under section 33ZF of the Supreme Court Act to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'. The Court has deliberately maintained significant flexibility in its class actions practice:

Each case requires individual management adapted to its peculiar features, such as proceedings involving:

- A large class where the identity of each individual is at the time of commencement unknown or a small class of clearly identifiable individuals
- A single defendant or multiple defendants
- A complicated factual basis or relatively straightforward proceeding
- A class of individuals with litigation and commercial experience seeking redress in relation to commercial dealings or a class of individuals with personal injuries who have never previously engaged with the court system
- A litigation funder or where the plaintiff's lawyers are acting on a [no win, no fee] basis.²⁷

21 Submission 21 (Law Council of Australia).

22 See, eg, Submissions 19 (US Chamber Institute for Legal Reform), 26 (Australian Institute of Company Directors). See also Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, Consultation Paper (2017) Ch 2. Some suggestions were made that Victoria should regulate unilaterally, but only in the absence of action by the Commonwealth.

23 Submission 12 (Allens).

24 Submissions 15 (Phi Finney McDonald), 30 (Supreme Court of Victoria).

25 Submission 15 (Phi Finney McDonald).

26 Submission 30 (Supreme Court of Victoria).

27 Ibid.

- 1.45 The Federal Court judges with whom the Commission consulted also stressed the importance of being able to respond flexibly and of avoiding overly prescriptive legislative amendments and procedural guidance.²⁸
- 1.46 Although the legislation underpinning class actions in Australia today is substantially unchanged since the Commonwealth regime was introduced in 1992, the types of proceedings that are now brought before the courts, and the way they are financed and structured, are not as envisaged at that time.²⁹ Justice Jack Forrest reflected on the difference at a recent panel discussion:
- If you're ever minded to read the Law Reform Commission Report of 1988 which preceded the introduction of Part IVA of the Federal Court Act, you'll think it was drafted by someone living on Mars. It has no resemblance now to how we conduct class action litigation in this country at all. It envisaged open classes, and it envisaged mass tort claims, and really no more than that.³⁰
- 1.47 Courts have been able to rely on broad statutory powers, and their inherent powers, to adapt to changing conditions arising from the growth of the litigation funding industry, legal entrepreneurialism, technological change and government policy decisions. There is strong support among stakeholders for the courts to continue to be able to respond flexibly on a case-by-case basis—while also supporting a nationally consistent approach where possible.

The Commission's approach

- 1.48 The Commission does not recommend major reform to the Supreme Court's powers, procedures and practices in funded proceedings and class actions. The Court does not seek it and few contributors to the review have called for it.
- 1.49 Over time, the management of class actions has improved. Courts, law firms and litigation funders have learnt through experience, legal procedures have become well established and the body of case law has grown. Issues that were problematic a decade ago have been resolved; many challenges to the fair conduct of class actions have been overcome.
- 1.50 The Commission's recommendations support the role of the Supreme Court in class actions as it has evolved, especially in ensuring that the interests of unrepresented class members are taken into account throughout the proceedings. Further recommendations are made regarding other types of proceedings in which funders may be involved.
- 1.51 The recommendations are not intended to entrench current practices at the expense of innovation, but to underpin best practice as it is perceived now and may develop in the future. If implemented, they would:
- establish express statutory powers for the Court in place of reliance on its discretionary powers
 - introduce more prescriptive requirements to provide funding information to the Court and class members
 - align practices and powers with those in the other jurisdictions with class action regimes to support national consistency.
- 1.52 The need for each recommendation is discussed later in the report, yet the following recurring themes will be apparent in the reasons for reform:

²⁸ Consultation 2 (Judges of the Federal Court of Australia).

²⁹ For example, while the Australian Law Reform Commission (ALRC) envisaged mass tort class actions being run on an open basis, the most prevalent types of class action filed in the Federal Court since the introduction of the regime have been investor and shareholder class actions: Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 39–40. Closed class actions, although declining in use since October 2013, have also been common in Federal Court proceedings. Unlike open class proceedings (which were envisaged by the ALRC), closed class actions allow participation in proceedings to be restricted by reference to funding criteria, for example, that the class member has executed a funding agreement.

³⁰ Panel discussion 'Achieving Finality to Class Action Litigation' (IMF Bentham and UNSW Class Action Conference, Sydney, 1 June 2017) <<http://www.imf.com.au/newsroom/class-action-centre/full-post/class-action-centre/2017/06/24/panel-discussion-achieving-finality-to-class-action-litigation>>.

- The number of law firms and litigation funders involved in class actions is increasing. Clear statutory powers and more comprehensive court procedures are likely to assist newcomers to understand the court's role, what is expected of them, and the differences between class actions and other forms of litigation.
- While the ability to rely on broad discretionary powers enables the court to respond flexibly, it also creates opportunities for legal dispute about the matters for decision, adding to the legal costs borne by the parties. Further, some important developments in court practices do not have express statutory footing and could be open to legal challenge.
- A nationally consistent approach to class actions should be transparently so, especially with the growth in the number of jurisdictions with class action regimes. Otherwise, importance will be attached to real or apparent differences, which could encourage forum shopping.

1.53 Before turning to the substantive recommendations, the Commission wishes to make clear that, even though it is essential that the Court is able to respond flexibly to the circumstances of each class action proceeding, a nationally consistent approach remains desirable.

Recommendation

- 1** The recommendations in this report to amend the *Supreme Court Act 1986* (Vic) and the Supreme Court of Victoria's practice note on class actions³¹ should be implemented with the aim of advancing the nationally consistent regulation and conduct of class actions.

Structure of this report

- 1.54 The report examines the regulation of proceedings funded by litigation funders, followed by a discussion of whether contingency fees would mitigate litigation funding issues. It then turns to the regulation of class actions. Court resources are discussed at the conclusion of the report.
- 1.55 Chapter 2 discusses the effect that litigation funders have had on improving access to justice and the regulatory challenges presented by the growth of the litigation funding industry. The introduction of a participant who is not a party to the proceeding, but has a financial stake in how it is conducted and the result achieved, changes the dynamics of the proceeding and raises the risk that it will not be a fair process or produce a fair outcome. Calls for national regulation, and proposals concerning disclosures to the court and the parties, and cost controls, are discussed in this context.
- 1.56 Whether allowing lawyers to charge contingency fees would mitigate issues with litigation funding practices is examined in Chapter 3. The Commission concludes that, in principle, lawyers should be able to charge contingency fees, subject to regulation, because it would provide another funding option for clients who are unable to bring proceedings without financial assistance. The ban has been the subject of debate for many years and is a national issue which involves broader considerations than the impact on litigation funding. However, there is scope for Victoria to introduce contingency fees for lawyers within class actions to enable a broader range of claims to be brought, without lifting the ban unilaterally, and a proposal for doing so is set out in the second part of the chapter.

- 1.57 Chapters 4 and 5 discuss class actions in Victoria. Chapter 4 considers improving procedural efficiencies to ensure that litigants are not exposed to disproportionate cost burdens. Proposals regarding certification and the management of multiple class actions and settlement distribution are discussed. Because of the representative nature of class action proceedings, it is also important that the parties running the proceedings on behalf of class members are accountable to them. The chapter examines the role of the representative plaintiff's lawyers, the litigation funder, the representative plaintiff and the court in class actions, and discusses ways to improve accountability. It concludes with proposals to improve communication with class members to ensure that they are aware of any risks or costs involved in proceedings, and can protect their interests accordingly.
- 1.58 Chapter 5 responds directly to the issue of disproportionate cost burdens for litigants raised in the terms of reference. It discusses how the risks of losing and the costs of winning, inherent in litigation, are structured in class actions. As class members have little ability to negotiate these costs, the supervisory role of the court is important in ensuring that costs are fair and reasonable. The Commission makes recommendations to strengthen the court's role.
- 1.59 In preparing this report, the Commission was asked to consider the implications of any reforms for the workload and resource requirements of the Supreme Court of Victoria. Court resources are discussed in Chapter 6, along with an overview of how technology is changing the way civil litigation is managed and funded.
- 1.60 Chapter 7 concludes the report.

Litigation funding and access to justice

- 14** Introduction
- 16** National regulation of litigation funders
- 20** Litigation funding in Victoria
- 21** Issues presented by litigation funding
- 35** Reform proposals

2. Litigation funding and access to justice

Introduction

- 2.1 The entry of litigation funding into Australia’s legal system, and the growth over the past 20 years in the number of providers and diversity of services they offer, have improved access to justice. Litigation funders have enabled plaintiffs to bring legal action that they would not have otherwise contemplated because of the financial risks of losing.
- 2.2 Under the costs-shifting rule, the losing party is usually ordered to pay the other side’s reasonable legal costs (an adverse costs order). The prospect of being burdened with an adverse costs order if the litigation is unsuccessful, in addition to their own legal costs, is particularly daunting in class actions, where the representative plaintiff alone is liable and the costs are significant.
- 2.3 In large class actions, the representative plaintiff will commonly be charged around \$10 million in legal costs, plus disbursements, even though their individual claim may be for a few thousand dollars. They could also have to pay as much again, or more, in adverse costs if the litigation is unsuccessful. Few legal firms have the financial capacity to provide their services on a ‘no win, no fee’ basis in a class action. Where they do, the representative plaintiff will be relieved of paying their own legal costs if they lose but will remain liable for adverse costs and possibly disbursements.¹
- 2.4 The costs-shifting rule creates a financial risk that litigation funders are able to underwrite, and fosters demand for the financial assistance they provide. The funder reduces the risk for the plaintiff by covering their legal costs and indemnifying them against an adverse costs order, in return for a share of the recovered amount if the claim succeeds. The market for litigation funders in Australia has grown in the absence of local competition from forms of financial assistance that are employed overseas to mitigate the risk of losing: ‘after the event’ insurance, and lawyers charging contingency fees.²
- 2.5 Litigation funders are providing services which were illegal until 1967 and have expanded incrementally since then. They have been permitted to fund insolvency proceedings since 1996 and were first seen in class actions in 2001. They were not recognised by the High Court as a legitimate means of funding multi-party proceedings until 2006.³ Over the five-year period from 1 June 2012 to 31 May 2017, they funded 46.2 per cent of all class actions nationally.⁴

1 Justice Bernard Murphy and Vince Morabito, ‘The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 28. Non-representative class members are statutorily immune from costs orders, except as authorised by s 33Q or s 33R: *Supreme Court Act 1986* (Vic) s 33ZD.

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

3 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

4 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 33.

- 2.6 Procedural developments in response to the involvement of litigation funders in class actions have also encouraged the litigation funding market to grow. For example, judicial acceptance of closed class actions,⁵ which allow class membership to be limited to class members who have signed funding agreements, contributed to a surge in the number of funded class actions filed in the Federal Court from 2008.⁶ It has also been suggested that the approval of common fund orders for litigation funding costs, which allow a litigation funder to obtain a funding fee from every registered class member even if they have not signed a funding agreement, will encourage continued growth in the market.⁷
- 2.7 Although much of the discussion about litigation funding in this report focuses on class actions, this is only one aspect of the industry. Litigation funders continue to invest in insolvency proceedings, as well as in other areas of law such as commercial and contractual disputes, intellectual property and estates.
- 2.8 In addition, sophisticated and diverse products for a broader range of markets have been emerging. For example, funding is now offered to law firms against a portfolio of different cases, where the funder's return depends on the overall net financial performance of the portfolio as opposed to the outcome of any particular claim.⁸ Litigation funders also offer finance for specific risks and costs, such as compliance with an order to provide security for costs, or the payment of disbursements. Some funders provide 'after the event' insurance, which may be taken out at the beginning of, or during, proceedings to protect against the risk of having to pay adverse costs.
- 2.9 Another trend has been for litigation funders to provide funds direct to companies, rather than through an arrangement with a law firm. The company uses its litigation as collateral to secure the finance in order to pursue or defend a claim (by, for example, its in-house legal team) or for other corporate purposes.
- 2.10 As companies increasingly operate globally, there has been an upsurge in international disputes that the parties seek to resolve through international commercial arbitration. The value of the claims can be very high. Large established international litigation funders are actively pursuing the opportunity to fund these disputes and provide additional services, such as enforcing arbitral awards. In Hong Kong and Singapore, where traditional restrictions on litigation funding remain in place, exceptions have been made to permit litigation funding in international commercial arbitration.⁹
- 2.11 Perhaps not surprisingly, hedge funds and private equity houses are seeing investment in litigation as an attractive 'alternative asset class' with returns that are uncorrelated to movements in the stock market or bond returns.¹⁰
- 2.12 In Australia, even though there has been an increase in the predominance and impact of litigation funders in civil proceedings, the industry is only lightly regulated.¹¹ The Productivity Commission has recommended strengthening the existing Commonwealth regulation. Concern about the continued lack of national oversight of the industry was expressed in several submissions and during consultations. While this is not a topic within the terms of reference, the absence of robust Commonwealth regulation means that parties to funded litigation need to rely more on the courts, and court processes, to

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

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

7 Ibid 226–7; Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Inquiries in Law* 303.

8 Patrick Moloney, 'One Size Doesn't Fit All' (2016) 26(3) *The Australian Corporate Lawyer* 36, 37.

9 Marc Krestin and Rebecca Mulder, 'Third-Party Funding in International Arbitration: to Regulate or Not to Regulate?' on Wolters Kluwer, *Kluwer Arbitration Blog*, (12 December 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate>>. See also International Council for Commercial Arbitration, *Draft Report for Public Discussion of The ICCA—Queen Mary Task Force on Third-Party Funding in International Arbitration* (1 September 2017) ICCA <http://www.arbitration-icca.org/projects/Third_Party_Funding.html>.

10 Submission 19 (US Chamber Institute for Legal Reform). The Institute is an affiliate of the US Chamber of Commerce.

11 The 'light touch' approach to regulating litigation funders has also been adopted internationally. In England and Wales, there is voluntary self-regulation; in Hong Kong and Singapore, litigation funders are self-regulated but may operate only in international commercial arbitration; in the United States of America, regulation varies between the states.

safeguard their interests. For this reason, the chapter begins with a discussion of the need for national regulation.

- 2.13 In Victoria, there is scant reference to litigation funders in legislation and court procedures. The terms of reference ask the Commission to report on whether there is scope for the supervisory powers of Victorian courts or Victorian regulatory bodies to be increased in respect of proceedings funded by litigation funders, in particular by increasing disclosure obligations or controlling fees.
- 2.14 The initiatives suggested in the terms of reference, and raised during the Commission's review, need to be considered in the context of the problems they are intended to address. This chapter provides an overview of litigation funding practices and the issues they raise. It then discusses proposals concerning disclosure and the control of funding fees in funded litigation generally. Cost controls in funded class actions is discussed in Chapter 5.
- 2.15 The question of whether the issues presented by litigation funding would be mitigated by removing the existing prohibition on law firms charging contingency fees is examined in Chapter 3.

National regulation of litigation funders

Maintenance and champerty

- 2.16 For centuries, financial services of the type offered by litigation funders were illegal. They were proscribed by the torts and offences of maintenance (providing financial assistance to a litigant without lawful justification) and champerty (a form of maintenance involving the sharing of the proceeds of litigation). The policy underlying the offences was to prevent the legal system from being subverted by persons who were not parties to proceedings but had a financial interest in the outcome.
- 2.17 Criminal and civil liability for maintenance and champerty was abolished in Victoria by the *Abolition of Obsolete Offences Act 1969* (Vic) and similarly in other Australian jurisdictions.¹² However, the underlying policy of the law was retained: a contract can still be treated as contrary to public policy or illegal if it is found to be in aid of maintenance or champerty.¹³
- 2.18 Uncertainty about the legality of any financial agreement between a third-party funder and a litigant to assist the litigation in return for reward was overcome by two judicial decisions:
- The 1996 Federal Court decision in *Movitor Pty Ltd (rec and mgr apptd) (in liq) v Sims*¹⁴ allowed for commercial litigation funders to raise capital to provide funding to insolvency practitioners.¹⁵
 - The 2006 High Court decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*¹⁶ (*Fostif*) provided certainty that litigation funders have a legitimate role in financing multi-party proceedings, including class actions, and can exercise broad influence over how they are conducted.
- 2.19 While endorsing the funder's role in *Fostif*, the High Court acknowledged that the involvement of a third-party litigation funder can corrupt court processes. However, it concluded that the court could rely on its inherent powers if necessary to address

12 They have been abolished in New South Wales, South Australia and the Australian Capital Territory: *Crimes Act 1900* (NSW) sch 3; *Civil Liability Act 2002* (NSW) sch 2; *Criminal Law Consolidation Act 1935* (SA), sch 11; *Civil Law (Wrongs) Act 2002* (ACT) s 221. Queensland, Western Australia, Tasmania and the Northern Territory have not yet abolished them.

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

14 (1996) 54 FCR 380.

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

16 (2006) 229 CLR 386.

any difficulties that arise, on a case-by-case basis. Any particular problems found in proceedings financed by a litigation funder, including class actions, could be solved through court procedures for that type of proceeding. Any associated conflict of interest issues for lawyers could be addressed by their duties to the court and professional rules.¹⁷

- 2.20 One of the strongest messages emerging from the Commission’s consultations is how well the judicial system has responded to issues that have arisen in individual cases as the litigation funding industry has grown and the number and types of class actions have changed. As noted in Chapter 1, there is broad support for the courts continuing to be able to exercise broad discretion in managing class action proceedings. This support is distinct from, and accompanied by, calls for stronger systemic regulation of the industry itself.

Calls for stronger regulation

- 2.21 The courts can supervise the involvement of litigation funders in legal proceedings only on a case-by-case basis. Systemic protection from the risk of the legal system being subverted by the activities of third-party litigation funders calls for industry-wide regulation. Moreover, legislation—rather than court procedure—is the appropriate vehicle for reform where policy issues are involved.
- 2.22 In a series of decisions between 2009 and 2012, the courts found that litigation funding should be regulated under existing legislation variously as a financial product,¹⁸ a managed investment scheme,¹⁹ and a credit facility.²⁰ The Commonwealth Government’s response to the decisions was to legislate to minimise consequential regulatory burdens. It declined to regulate litigation funders to the same degree or in the same way as providers of other financial, investment or credit services. There was concern that if they were subject to stronger regulation, they would pass on the costs to consumers and thereby reduce access to justice.²¹
- 2.23 Litigation funders operating in Australia are free from mandatory licensing, financial disclosure requirements, reporting obligations and prudential supervision, unless they are listed on the Australian Securities Exchange.²² Unlike other providers of financial products and services, litigation funders are not required to hold an Australian Financial Services Licence (AFSL). They are exempt from the requirement as long as they have adequate practices in place to manage conflicts of interest.²³ Failure to have such practices in place and follow certain procedures for managing conflicts is an offence.²⁴
- 2.24 The exemption is provided by the Corporations Regulations.²⁵ The Australian Securities and Investments Commission (ASIC) has issued a regulatory guide which sets out ASIC’s expectations for compliance with the obligation to maintain adequate practices to manage conflicts of interest.²⁶ ASIC has not undertaken a specific program to obtain information from litigation funding scheme operators to monitor compliance with the guide. However ASIC continues to monitor compliance through its other detection means such as reports from members of the public and others. As at August 2017, there had not been significant or widespread issues with industry compliance with the regulatory guide that had been brought to ASIC’s attention.

17 Ibid 435 (Gummow, Hayne and Crennan JJ).

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

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

20 *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* (2012) 246 CLR 455.

21 The Australian Government, The Treasury, *Post-Implementation Review—Litigation Funding—Corporations Amendment Regulations 2012 (No 6)* (October 2015) 5, 9 <<http://ris.pmc.gov.au/2016/03/15/litigation-funding>>.

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

23 *Corporations Act 2001* (Cth) s 911A(2)(k); *Corporations Regulations 2001* (Cth) regs 5C.11.01, 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB.

24 *Corporations Regulations 2001* (Cth) reg 7.6.01AB(3).

25 Ibid regs 5C.11.01, 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB.

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

2.25 The Commonwealth Government is under pressure to strengthen the regulation of the litigation funding industry. In particular, there have been calls for litigation funders to be licensed to ensure that they hold adequate capital to manage their financial obligations.²⁷ This is seen as a way to protect plaintiffs and defendants from an impecunious litigation funder by ensuring that the funder has adequate capital and liquidity to meet its obligations under the litigation funding agreement.

2.26 In its 2014 report *Access to Justice Arrangements*, the Productivity Commission concluded that the potential barriers to entry created through licensing requirements were justified in order to ensure that only ‘reputable and capable funders enter the market’.²⁸ It recommended that:

The Australian Government should establish a license for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest.

- Regulation of the ethical conduct of litigation funders should remain a function of the courts.
- The licence should require litigation funders to be members of the Financial Ombudsman Scheme.
- Where there are any remaining concerns relating to categories of funded actions, such as securities class actions, these should be addressed directly, through amendments to underlying laws, rather than through any further restrictions on litigation funding.²⁹

2.27 Many submissions conveyed unease about the limited regulation of the industry and expressed support for the Productivity Commission’s recommendations. Chartered Accountants Australia and New Zealand, for example, called for greater regulatory controls:

While we support the role that third party litigation funders can play we are concerned that in the current unregulated environment, the rise of funders utilising litigation as an investment vehicle has been largely unchecked. This has introduced potential for misuse and unintended impacts on the productivity and cost of doing business. The continuing evolution of funding participants and models has the potential to extend the impact of such funding. We believe that regulation is required to protect the validity of the legal process and the legitimate interests of plaintiffs and defendants. The recommendations of the Victorian Law Reform Commission from 2008 and the Productivity Commission from 2014 remain valid, particularly in relation to licencing and capital adequacy.³⁰

2.28 The Australian Institute of Company Directors observed that courts do not have the time or expertise to properly assess the prudential position of litigation funders. It identified uncertainty, in the absence of any form of licensing, about whether:

- only fit and proper persons may provide funding services
- adequate conflict management processes are in place
- the terms of litigation funding agreements can be enforced against foreign litigation funders.³¹

27 See, eg, Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014); Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia*, Position Paper (June 2011); Wayne Attrill, ‘The Regulation of Conflicts of Interest in Australian Litigation Funding’ (2013) 2 *Journal of Civil Law Procedure* 193; Michael Legg et al, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 36 *Northern Kentucky Law Review* 625; John Walker, ‘Policy and Regulatory Issues in Litigation Funding Revisited’ (2014) 55 *Canadian Business Law Journal* 85.

28 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 632.

29 Ibid 633; Recommendation 18.2.

30 Submission 4 (Chartered Accountants Australia and New Zealand).

31 Submission 26 (Australian Institute of Company Directors).

- 2.29 Allens also endorsed the Productivity Commission's recommendations. It proposed that minimum content standards for all litigation funding agreements be mandated by legislation, adding that regulation at the state level might be necessary if Commonwealth legislation is not introduced.³² Additional comments in support of a licensing scheme for litigation funders, or other prudential regulation by the Commonwealth, were made in submissions from Ashleigh Leake and colleagues;³³ Michael Duffy;³⁴ the US Chamber Institute for Legal Reform;³⁵ the Law Council of Australia;³⁶ and IMF Bentham.³⁷
- 2.30 The views expressed were not unanimous. Other submissions argued that the existing powers of the Court are adequate to manage the risks. Julie-Anne Tarr cautioned against unnecessary regulation.³⁸ Slater and Gordon maintained that introducing substantial capital adequacy requirements could create regulatory burdens that would close off the market and reduce competition among funders.³⁹ Litigation Funding Solutions also argued that a capital adequacy requirement would not be conducive to a competitive market place:
- The Funders who are based offshore have most of their assets overseas even though they are heavily involved in Australian matters. They hold little or no capital here in Australia. Imposing a minimum capital requirement for litigation funders to operate in Australia could remove a large quantity of funding from Australia. If this occurred, the access to justice would be adversely impacted for many people.⁴⁰
- 2.31 The courts have responded to the challenges arising from the involvement of litigation funders in individual proceedings, and need to continue to do so, but court procedures cannot, and should not, be seen as a substitute for industry-wide regulation. The Commission considers that industry-wide issues require national responses, and the responsibility for regulating the litigation funding industry rests squarely with the Commonwealth Government.

Review by Australian Law Reform Commission

- 2.32 On 15 December 2017, the Commonwealth Attorney-General referred to the Australian Law Reform Commission (ALRC), for report by 21 December 2018, consideration of:
- whether, and to what extent, class action proceedings and third-party litigation funders should be subject to Commonwealth regulation, and in particular, whether there is adequate regulation of the following matters:
- conflicts of interest between lawyer and litigation funder;
 - conflicts of interest between litigation funder and plaintiffs;
 - prudential requirements, including minimum levels of capital;
 - distribution of proceeds of litigation, including the desirability of statutory caps on the proportion of settlements or damages awards that may be retained by lawyers and litigation funders;
 - character requirements and fitness to be a litigation funder;
 - the relationship between a litigation funder and a legal practice;

32 Submission 12 (Allens).
 33 Submission 1 (Ashleigh Leake, Josephine Vernon, Bruce Efron).
 34 Submission 22 (Dr Michael Duffy).
 35 Submission 19 (US Chamber Institute for Legal Reform).
 36 Submission 21 (Law Council of Australia).
 37 Submission 25 (IMF Bentham Ltd).
 38 Submission 3 (Professor Julie-Anne Tarr).
 39 Submission 28 (Slater and Gordon Lawyers).
 40 Submission 11 (Litigation Funding Solutions).

- the costs charged by solicitors in funded litigation, including but not limited to class action proceedings; and
- any other matters related to these Terms of Reference.⁴¹

2.33 The Attorney-General further asked the ALRC to consider what changes, if any, should be made to Commonwealth legislation to implement its recommendations. The results of the inquiry will be awaited with interest. In the meantime, this issue should not be confined to jurisdictions with class action regimes: it should be raised at the national forum of the Council of Australian Governments.

Recommendation

- 2** The Victorian Government should advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry.

Litigation funding in Victoria

Funded class actions

- 2.34 The growth of the litigation funding industry has had national consequences for the management of class actions, but the impact varies from one jurisdiction to the next. Vince Morabito has concluded from his extensive research that the Victorian class action regime ‘has not been particularly attractive to litigation funders’.⁴²
- 2.35 There have been 85 class actions filed in the Supreme Court of Victoria since part 4A of the *Supreme Court Act 1986* (Vic) commenced.⁴³ Litigation funders have funded only 10 of them; four of these were transferred to the Federal Court.⁴⁴
- 2.36 Litigation funders are more active in the three other class action jurisdictions in Australia, particularly the Federal Court. As at 31 May 2017, 96 (82.7 per cent) of the 116 funded class actions ever filed in Australia were brought in the Federal Court.⁴⁵ The last Victorian class action supported by a litigation funder was filed on 16 May 2016. Since then, more than 34 funded class actions have been filed in the Federal Court and in the Supreme Courts of New South Wales and Queensland.⁴⁶
- 2.37 Of the 10 funded class actions that have been filed in Victoria, six were shareholder class actions⁴⁷ and two were investor class actions.⁴⁸ The predominance of funded class actions of this type in Victoria is consistent with experience in other jurisdictions.

41 Australian Law Reform Commission, *Australian Law Reform Commission Terms of Reference—Inquiry into Class Action Proceedings and Third Party Litigation Funders* (15 December 2017) <<https://www.alrc.gov.au>>.

42 Submission 35 (Professor Vince Morabito).

43 Ibid. The figures are correct as at 29 November 2017.

44 The four transferred cases were shareholder and investor claims where other law firms had also filed class actions, or the federal regulator had commenced proceedings, regarding the same events: *Webster (as Trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-operative Co Ltd* [2017] VSC 249 (12 May 2017); *John William Cruse Webster (as Trustee for the Elcar Pty Ltd Super Fund Trust) v Vocation Ltd* S CI 2014 06270; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (Matter 8983 of 2003); *Karageorgiou v Vocation Ltd* (2015) S CI 2015 00856.

45 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 33.

46 Submission 35 (Professor Vince Morabito). Data as at 29 November 2017.

47 *John William Cruse Webster (as Trustee for the Elcar Pty Ltd Super Fund Trust) v Vocation Ltd* S CI 2014 06270; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (Matter 8983 of 2003); *Karageorgiou v Vocation Ltd* S CI 2015 00856; *Walsh v WorleyParsons Limited (No 4)* [2017] VSC 292 (26 May 2017); *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016); *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012).

48 *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582 (26 November 2014); *Webster (as Trustee for the Elcar Pty Ltd Super Fund Trust) v Murray Goulburn Co-operative Co Ltd* [2017] VSC 249 (12 May 2017).

- 2.38 Only two other types of funded class action have been filed in Victoria. The litigation funder in each case is based offshore:
- A class action, funded by Omni Bridgeway, where the holders of abalone fishery licences alleged that the State of Victoria and Southern Ocean Mariculture negligently allowed the release of a herpes-like virus from an abalone aquaculture farm operated by Southern Ocean Mariculture to the wild abalone population, causing loss and damage to the class members.⁴⁹
 - A claim by companies which manufacture, install and distribute home insulation for loss and damages suffered because of the early termination of the Commonwealth Government's national home insulation scheme. It is funded by Harbour Litigation Funding.⁵⁰

Other funded proceedings

- 2.39 It is not known how many other types of civil proceedings in Victoria have involved litigation funders. The plaintiff's financial arrangements and costs in these cases are not subject to the same degree of court supervision and public scrutiny as class actions. Generally, apart from class actions, commercial litigation funders support insolvency proceedings and commercial litigation with large claims. It is reasonable to conclude that they are involved in cases with these characteristics in Victoria.
- 2.40 One funded case is reportedly a catalyst for this reference: a claim made by trustees for former employees of Huon Corporation Limited against CBL Insurance Ltd⁵¹ (*Huon Corporation*). The trustees would have been unable to proceed with the claim without the financial support of a litigation funder. After a protracted dispute between the parties, the Supreme Court found in the trustees' favour. The outcome attracted public attention because the former employees on whose behalf the litigation was conducted ultimately received nothing from the amount awarded. The Commission has received submissions from the National Union of Workers and Litigation Capital Management, who were directly involved in the case.
- 2.41 Clearly, although the outcome of *Huon Corporation* was a result of particular circumstances, it illustrates the importance to funded plaintiffs (and to anyone on whose behalf litigation is conducted) of clear communication from their legal representatives about the progress and costs of the proceedings. Because of the public interest in the case, as well as the insight it provides into some of the issues arising from the terms of reference, it is further discussed at [2.75]–[2.87].

Issues presented by litigation funding

- 2.42 The Commission has identified three core issues that have affected, or could affect, the extent to which litigation funders make access to justice possible:
- case selection—the types of case selected for funding
 - costs—the size of the funding fee and any other funding costs
 - client interests—the juxtaposition of the commercial interests of the funder and the interests of the plaintiff.

49 *Regent Holdings v State of Victoria* [2013] VSC 601 (7 November 2013).

50 *Roo Roofing Pty Ltd v Commonwealth of Australia* S CI 2015 03382.

51 *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493 (2 October 2014). The view that this was the catalyst for the reference was reported in: Ben Butler, 'Victims Get Nothing as Litigation Funder, Lawyers Share the Spoils', *The Australian* 22 August 2016; Sol Dolor, 'Vic AG Launches Review of Litigation Funder Rules', *Australasian Lawyer* 17 January 2017. It was repeated in Submission 14 (LCM).

- 2.43 These issues are inherent in the commercial nature of litigation funding: litigation funders invest in litigation to make a profit. They invest in claims that are low risk and aim to maximise their returns. The cases they select are confined to distinct areas of commercial activity and their funding fee is the largest single expense that a plaintiff pays. Although they have supported claims for altruistic reasons,⁵² it would be unsustainable for them to give priority to public benefit over commercial considerations.
- 2.44 In addition, the entry of a participant who is not a party to litigation, but has a financial stake in how it is conducted and the result achieved, changes the dynamics of the proceeding. It introduces the risk of a conflict of interest that could produce an unfair process or outcome.
- 2.45 Disclosure obligations and cost controls for litigation funding are discussed below against the background of these issues.

Case selection

- 2.46 Litigation funders invest in claims that have strong prospects of recovering a significant financial return, and the selection process has become more sophisticated as the industry has matured. Broadly, litigation funders consider the following criteria when deciding whether or not to fund a claim:
- the prospects of success
 - the amount likely to be recovered if the claim is successful
 - the costs and risks in prosecuting the claim
 - the complexity of the claim
 - the estimated time until the claim will be resolved
 - whether there are risks in enforcing a favourable judgment, such as the solvency of a defendant.⁵³
- 2.47 The cases that tend to meet these criteria are high value, low-risk commercial claims for damages or compensation, often involving liquidators, bankruptcy trustees, shareholders and investors. More recently, funders have been investing in international arbitration as well. Claims aimed at obtaining non-monetary results (such as an injunction or declaration) are not funded, and nor are claims that rely on evidence which may give rise to a number of litigation risks, including claims for personal injury or workers' compensation, family law cases and defamation cases.
- 2.48 Although there will be exceptions, a claim for less than \$1 million is unlikely to be funded by a commercial litigation funder. The reasoning is apparent from the following explanation by Litigation Funding Solutions:

It is important that the damages which are capable of being recovered justify the cost of litigation. Legal claims often involve layers of potential damages. For a legal claim to be successful it must have a strong inner core of liability.

Many claims can potentially be stretched to increase quantum. However, generally speaking, the further you move from the centre of a claim the more risky and expensive the claim becomes to litigate. There are often much greater costs involved to establish 'outer boundary' recovery levels. A funder looks for an action that has a solid core. Once a funding decision is taken the potential of greater recovery becomes icing on the cake and can be used to pressure the defendant to settle.

52 IMF Bentham Ltd submitted that it has provided pro bono assistance in matters: 'Although IMF is a for-profit company and has an obligation to its shareholders, it has, for example, provided financial assistance and adverse cost indemnities for individuals who have made discrimination claims, such as racial and disability discrimination claims.': Submission 25.

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

As a rule of thumb, [the] ‘inner core’ quantum of a claim needs to be \$1,000,000 or more to warrant a funder’s interest and make the cost of funding justifiable for the claimant and its stakeholders. One reason for this is that the cost and expenses to run a \$1,000,000 damages case often involves comparable costs to cases for much bigger amounts.⁵⁴

- 2.49 The minimum claim value for funding multi-party claims is generally higher than for single-party claims. IMF Bentham, for example, usually funds single-party claims above \$5 million in value, and multi-party claims above \$20 million in value.⁵⁵ Maurice Blackburn commented that it is almost impossible to secure litigation funding for a class action involving claims of less than \$30 million.⁵⁶
- 2.50 The practice of filtering out applications for funding that do not meet stringent legal, process and commercial criteria removes claims that do not have merit (as well as those that do have merit but do not meet other criteria). For example, IMF Bentham informed the Productivity Commission that fewer than five per cent of the applications it receives are funded.⁵⁷ The diversion of unmeritorious claims allows the resources of the legal system to be allocated more efficiently.
- 2.51 Careful selection processes are also likely to have contributed to the success rate of funded proceedings, although data compiled by Vince Morabito about the settlement rates of all class actions has revealed that there is no direct correlation between funding arrangements and results.
- 2.52 In the Federal Court, where most funded cases are filed, 79 per cent of funded class actions have settled, compared to 43 per cent of unfunded class actions. In state jurisdictions, the settlement rate for funded class actions is much lower than for unfunded class actions. Only 30 per cent of funded class actions in state jurisdictions have settled, compared to 70 per cent of unfunded class actions.⁵⁸
- 2.53 The results indicate that the involvement of a litigation funder does not necessarily increase the prospects of a successful outcome; nor does it reduce them. The involvement of litigation funders in the legal system does not cause an upsurge in speculative and insubstantial claims.
- 2.54 Clearly, litigation funding creates opportunities for claimants to seek compensation or damages for meritorious claims and supports them usually to a successful conclusion. The extent to which funders enable access to justice in this way is determined by the criteria they use for selecting the cases they fund. The next two sections discuss, in turn, the significance for class action litigation and other litigation.

Funded class actions

- 2.55 Most revenue generated by the litigation funding industry is derived from class actions, particularly shareholder class actions.⁵⁹ The first class action in Australia—and the world—to involve a litigation funder was in 2001.⁶⁰ By 31 May 2017, 116 funded class actions had been filed across all jurisdictions. Of these, 74 (63 per cent) were filed after 1 June 2012.⁶¹

54 Litigation Funding Solutions, ‘Characteristics of a good case’ (2018) Litigation Funding Solutions <<http://www.litigationfundingsolutions.com.au/characteristics-of-a-good-case-page/>>.

55 IMF Bentham, ‘Commercial litigation’ (2018) IMF Bentham <<https://www.imf.com.au/practice-areas/>>.

56 Submission 13 (Maurice Blackburn Lawyers).

57 Submission 12 (Allens); Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 619.

58 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 34.

59 Patrick Windle, *Litigation Funding in Australia—IBIS World Industry Report OD5446* (February 2017) IBISWorld, 13 <www.ibisworld.com.au/industry-trends/specialised-market-research-reports/advisory-financial-services/litigation-funding.html>.

60 The funding by Insolvency Litigation Fund Pty Ltd (a subsidiary of Bentham IMF) of two class actions that had been filed in the Federal Court in 1998 and 2000 regarding the termination of waterside worker contracts: *Batten v CTMS Ltd* [1999] FCA 1576 (12 November 1999); *Batten v CTMS Ltd* [2000] FCA 915 (7 July 2000); Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 13.

61 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 34.

- 2.56 A relatively narrow variety of class actions attract the most attention of litigation funders, reflecting the focus on low-risk claims that are likely to generate a return on the funder’s investment. The range is shown in Table 1.

Table 1: Class actions funded by litigation funders: types filed to 31 May 2017⁶²

Type of claim	Australia-wide		Supreme Court of Victoria	
	Number	Percentage of total	Number	Percentage of total
Shareholders	58	50.0%	6	60.0%
Investors	27	23.2%	2	20.0%
Consumer protection	14	12.0%	0	0
Other ⁶³	17	14.6%	2	20.0%
TOTAL	116	98.8%	10	100%

- 2.57 Australia has robust mandatory continuous disclosure rules for ASX-listed companies, comprehensive prohibitions on misleading and deceptive conduct, and a high rate of share ownership.⁶⁴ A failure to comply with these laws affects a large number of people in similar situations, and class actions are an inherently suitable means of seeking damages or compensation for broad-based harm. Litigation in these areas of the law presents a sound investment opportunity for litigation funders, as explained by John Walker, Suzanna Khouri and Wayne Attrill when working for IMF (Australia) Ltd in 2009:

The statutory causes of action provided in the continuous disclosure, product liability and anti-cartel legislative regimes are generally more straight-forward to establish than the equivalent actions at common law and, in the context of shareholder non-disclosure claims in particular, are determined in large part on publicly-available evidence, including documents filed with the Australian Securities Exchange.⁶⁵

- 2.58 Seventy-one per cent of all shareholder class actions filed in Australia on or before 31 May 2017 were supported by litigation funders.⁶⁶ However, as IMF Bentham submitted, litigation funders have funded many types of class action besides shareholder and investor cases.⁶⁷
- 2.59 Nevertheless, none of the 87 non-investor class actions that had been filed nationally for the benefit of vulnerable people as at March 2014 were financed by litigation funders.⁶⁸ Legal services in these cases were usually provided on a ‘no win, no fee’ basis, although some proceeded only with the support of government agencies or the community or because the lawyers were prepared to work without charge.⁶⁹

62 Ibid.
63 Mass torts; products; employees; franchisees; agents and/or distributors; cartels; racial discrimination in non-migration litigation and miscellaneous claims.
64 Jason Betts, David Taylor and Christine Tran, ‘Litigation Funding for Class Actions’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 207.
65 John Walker, Susanna Khouri and Wayne Attrill, ‘Funding Criteria for Class Actions’ (2009) 32 *University of New South Wales Law Journal* 1036, 1042.
66 Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 30.
67 Submission 25 (IMF Bentham Ltd). Examples given were: cartel claims, consumer protection claims, mass tort claims including actions for property damage, actions on behalf of employees, franchisees, agents and/or distributors, and racial discrimination claims.
68 Vince Morabito and Jarrah Ekstein, ‘Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study’ (2016) 35 *Civil Justice Quarterly* 61, 87. However, in 2015 IMF Bentham reportedly provided pro bono litigation funding for vulnerable people: Human Rights Law Centre, ‘High Court Action Against Northern Territory Government to Challenge Police Powers which will Disproportionately Impact Aboriginal People’ (Media Release, 31 March 2015).
69 Vince Morabito and Jarrah Ekstein, ‘Class Actions Filed for the Benefit of Vulnerable Persons—An Australian Study’ (2016) 35 *Civil Justice Quarterly* 61, 88.

- 2.60 The largest class actions conducted under the Victorian class action regime have been underwritten by law firms acting on a ‘no win, no fee’ basis.⁷⁰

Other funded proceedings

- 2.61 Commercial litigation funding began as a source of finance for insolvency proceedings. Claims arising out of insolvent companies about preferences, insolvent trading, and other claims brought by liquidators continue to be an important area of activity for funders.
- 2.62 Litigation funding has expanded into proceedings in other areas of law, notably commercial claims about breach of contract, misrepresentation and negligence. Funding is also commercially available for intellectual property and estates matters. Proceedings that involve a major litigation funder are likely to be large claims as they are more economic to run.
- 2.63 Although the commercial funding of claims valued at less than \$1 million is generally not viable for litigation funders, the number of litigation funders is growing. A funder observed during informal consultations that newer entrants are focusing on claims valued at less than \$5 million. In addition, litigation funders are offering an increasing variety of products, such as limited funding only for adverse costs or disbursements, which may be more viable than providing full funding services for smaller claims. IMF Bentham gave, as an example, a funding solution called ‘Cost-certain access to business litigation’, offered by a firm that provides services to small-to-medium-sized businesses. Under this arrangement, for claims over \$500,000, a ‘no win, no fee’ fee agreement can be combined with litigation funding.⁷¹
- 2.64 The access to justice that litigation funding provides is necessarily determined by the commercial nature of the activity. It is reasonable to expect that litigation funders will continue to expand the market for their services. It is also inevitable that some meritorious claims will not be funded if—because of the value of the claim, the complexity of the matter, the likelihood of success or other factors caught by the selection criteria—they will not generate an adequate return on the funder’s investment.
- 2.65 Measures to generate financial support for meritorious class actions that are not perceived as commercially viable by litigation funders, or law firms operating on a ‘no win, no fee’ basis, are discussed in Chapters 3 and 5.

Costs

Components of funding costs

- 2.66 Litigation funders reduce the cost barrier of litigation for plaintiffs by underwriting the cost of bringing proceedings and indemnifying them against adverse costs. They monitor and influence the legal costs to different degrees, and some may charge a project management fee for doing so, but they do not determine the lawyer’s share of any recovered amount. The terms on which the funding is provided are set out in a funding agreement with the plaintiff.
- 2.67 Normally, the litigation funder agrees to pay the plaintiff’s legal costs and disbursements and, if the litigation is resolved in the defendant’s favour, any adverse costs order. It will also pay any security for costs if ordered by the court. The plaintiff is obligated to pay the funder only if the proceedings resolve in the plaintiff’s favour.

70 \$500 million on behalf of victims of the Kilmore East/Kinglake Black Saturday bushfire, and \$300 million on behalf of victims of the Murrindindi/Marysville bushfire: *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014); *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232 (27 May 2015).

71 Submission 25 (IMF Bentham Ltd).

- 2.68 If the plaintiff wins, the litigation funder’s costs are deducted from the amount awarded by the court or negotiated between the parties. These typically include:
- a funding fee, expressed as a percentage of the settlement or judgment amount
 - reimbursement of the legal costs and disbursements that the litigation funder paid during the proceeding (less any contribution from the defendant in the form of adverse costs)
 - court fees
 - a project management fee, calculated as a percentage of the legal costs, for monitoring the progress of the litigation and managing the associated legal costs and disbursements.⁷²
- 2.69 The amount of the funding fee is determined by the structure of the funding agreement, which varies in nearly every case. This was pointed out by Justice Murphy in *Earglow Pty Ltd v Newcrest Mining Ltd*:⁷³
- It should be kept in mind that it is not enough to consider the funding commission rate on a stand-alone basis. The funding arrangements reached may be structured in a variety of ways which can affect the costs and risk taken on by the funder and therefore affect the reasonableness of the funding commission rate. For example, a funder might agree:
- (a) to provide funding to cover adverse costs but not to meet the applicant’s legal costs and disbursements, with the case being conducted by the applicant’s solicitors on a conditional fee basis to be paid by class members from any settlement conditional on success;
 - (b) to pay disbursements only, with the case being conducted by the applicant’s solicitors on a conditional fee basis;
 - (c) to only pay costs and disbursements up to a fixed cap or to pay a fixed percentage of the costs and disbursements, with the remainder left to the applicant’s solicitors to be paid by class members conditional on success; or
 - (d) to cover the risk of adverse costs liability through After the Event Insurance with the premium to be paid by class members from the settlement sum upon success.⁷⁴
- 2.70 The percentage of the recovered amount that litigation funders charge in return for their services varies. The typical range appears to be between 20 and 45 per cent.⁷⁵ In federal class actions, the average proportion left for distribution to class members has been found to be approximately 58 per cent.⁷⁶ The funding fee is usually the largest single deduction.⁷⁷

Funding fees in Victoria

- 2.71 Unlike legal fees, which are based on the amount of work done and are subject to regulation and review, the funding fee reflects the litigation funder’s assessment of the risk, its own costs and its profit margins. The examples discussed below show that the funder’s share of the recovered amount can be much less than, similar to or greater than the share allocated to legal costs and disbursements. They also show that, while engaging a funder enables the proceedings to be conducted, it does not guarantee that those for whom they are conducted will receive a share of the proceeds.

72 The Commission was told, anecdotally, that litigation funders have charged project management fees in class actions in the past but they are less likely to be charged in recent proceedings.

73 [2016] FCA 1433 (28 November 2016).

74 Ibid [179].

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

76 Vince Morabito and Vicki Waye, ‘Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions’ (2017) 36 *Civil Justice Quarterly* 213, 242.

77 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 (Murphy, Gleeson and Beach JJ).

Funded class actions

- 2.72 The Supreme Court of Victoria has reviewed the settlement agreements of four class actions involving a litigation funder.
- *Pathway Investments Pty Ltd v National Australia Bank Limited*, a shareholder class action funded by International Litigation Funding Partners Pte Ltd. The settlement amount was \$115 million, including interest and costs. Class members received just over 57 per cent (\$65.55 million) plus interest; legal costs and disbursements were 10.4 per cent (\$11.9 million). The litigation funder received 40 per cent of the proceeds of class members who held fewer than one million shares; 35 per cent if they held between one million and ten million shares; and 30 per cent if they held more than 10 million shares.⁷⁸
 - *Bolitho v Banksia Securities Limited*, an investor class action. In a partial settlement, approved in August 2016, the settling defendants paid \$5.2 million. Class members were entitled to approximately 34.5 per cent of this amount, minus half of the fees payable for a contradictor who was appointed by the Court to review the settlement agreement. Legal costs and disbursements accounted for 49 per cent (\$2.55 million) and the litigation funder, BSL Litigation Partners Limited, received about 16.5 per cent (\$858,000).⁷⁹
 - In a further partial settlement, approved in January 2018, the settling defendants paid \$64 million. Of this amount, approximately 69.7 per cent (\$44.62 million) was distributed to class members, and 8.2 per cent (\$5.225 million) was directed to legal costs and disbursements. The litigation funders received 22 per cent (\$14.08 million).⁸⁰
 - *Regent Holdings v State of Victoria and Southern Ocean Mariculture*, a class action brought on behalf of 88 holders of abalone fishery access licences. The action was not successful against the first defendant, the State of Victoria.⁸¹ The second defendant, Southern Ocean Mariculture, had previously settled and \$2.57 million of the proceeds were paid towards the State of Victoria's costs. The class members received no monetary compensation from the settlement. The lawyers wrote off substantial professional fees. The litigation funder, Omni Bridgeway, received undisclosed payments from the settlement but did not recover the costs it had incurred or compensation for its involvement.⁸²
 - *Camping Warehouse v Downer EDI*, a shareholder class action that settled for \$8.25 million plus legal costs of \$2.85 million, a total of \$11.1 million. The class members received 88 per cent of the settlement fund (\$7.25 million), or about 63 per cent of the total. The litigation funder, BSL Litigation Partners Limited, received 10 per cent of the settlement fund (\$825,000), less than 8 per cent of the total paid by the defendants.⁸³

78 *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012) [13], [15] (Pagone J). After the legal costs were deducted, \$103 million was available for distribution to class members and to pay the litigation funder: Submission 35 (Professor Vince Morabito).

79 *Re Banksia Securities Ltd (rec and mgr apptd)* [2017] VSC 148 (31 March 2017) [11] (Robson J). BSL Litigation Partners is now Australian Funding Partners Limited.

80 *Re Banksia Securities Ltd (rec and mgr apptd) (in liq) (No 2)* [2018] VSC 47 (16 February 2018) [42] (Croft J).

81 *Regent Holdings v State of Victoria* [2013] VSC 601 (7 November 2013).

82 *Regent Holdings v State of Victoria* [2015] VSC 422 (18 August 2015).

83 *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016).

Other funded proceedings

- 2.73 Publicly available information about the amounts received by litigation funders in other proceedings is harder to find. Funding for these proceedings can be obtained from a wider range of sources and the question of whether a litigation funder is involved may not be raised during court proceedings at all. Even where the court is aware that a commercial funding arrangement is in place, the terms may be kept confidential. Funding agreements with litigation funders who invest directly into litigation portfolios, rather than individual cases, would be even more opaque.
- 2.74 Nevertheless, the existence of a funding arrangement is most likely to be revealed where litigation funders have been most active: insolvency proceedings. Under section 477(2B) of the *Corporations Act 2001* (Cth), before entering a long-term agreement on the company's behalf, a liquidator must seek court approval, or the approval of the committee of inspection or the majority of creditors. Although litigation funding agreements were unlikely to have been contemplated when the section was drafted, liquidators seeking to enter them to conduct insolvency proceedings and meet any obligations to provide security for costs commonly apply to the court for approval under this provision. The funding fee in insolvency cases can exceed 50 per cent, and has been as high as 75 per cent.⁸⁴

The Huon Corporation case

- 2.75 As noted above, the outcome of the *Huon Corporation* case⁸⁵ attracted public attention when the company's former employees, on whose behalf the litigation was conducted, received none of the payments ordered by the court. Safeguards that exist in insolvency proceedings and class actions did not apply in this case.
- 2.76 The claim was for payment under a financial insurance policy for a shortfall in employee entitlements when Huon Corporation became insolvent in 2006. The policy, procured from New Zealand insurer CBL Insurance Ltd, named two trustees for the employees as 'the insured'.
- 2.77 The trustees commenced legal action against CBL Insurance, ultimately on behalf of 336 former employees, in October 2011. The trial concluded in October 2013, and judgment was handed down in October 2014. Final orders were made in May 2015. The defendant filed an appeal but, before it was heard, the claims were resolved and finally discontinued in February 2016.
- 2.78 The amount received from CBL Insurance was \$5,107,259, comprising:
- \$4,132,232 as the principal sum, based on employee entitlements
 - \$500,027 in interest
 - \$475,000 as a contribution to the plaintiff's costs.⁸⁶

84 Standing Committee of Attorneys-General, *Litigation Funding in Australia*, Discussion Paper (2006) 4. The gross fee has been higher but it is important to consider the terms under which it has been paid. For example, the funding agreement in *Robinson, re Reed Constructions Australia Pty Ltd (in liq)* [2017] FCA 594 (1 May 2017) [18] entitled the litigation funder to 85% of the settlement amount (less costs incurred in pursuing the claim), but the funder was required by the funding agreement to pay a number of creditors, leaving a final net share of no more than 55%.

85 *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493 (2 October 2014).

86 Submission 16 (National Union of Workers).

2.79 The distribution of the amount is shown in Table 2.

Table 2: Distribution of amount recovered in Huon Corporation⁸⁷

Recipient	Amount	Share
LCM (litigation funder)	\$1,848,259	36.2%
Piper Alderman (lawyers from Sep 2012)	\$1,792,000	35.1%
Barristers	\$885,000	17.3%
Holding Redlich (lawyers to Sept 2012)	\$235,000	4.6%
Grant Thornton (accounting and administrative assistance to trustees)	\$211,000	4.1%
PPB, liquidator (access to employee records)	\$50,000	1.0%
Other lawyers (non-litigation advice including the arbitration process)	\$86,000	1.7%
Total	\$5,107,259	100%

2.80 Discussion about *Huon Corporation* in submissions and consultations raised two areas of concern: the cost of the proceedings and the distribution of the recovered amount.

2.81 The cost of the proceedings was clearly disproportionate to the size of the claim. Excluding the litigation funding fee, it was \$3,259,000. According to the trustees, the initial legal costs estimates were 'hopelessly inadequate' because of the long trial time and legal process and disputes.⁸⁸ The litigation was conducted over almost five years and, 'from the beginning, CBL maintained an obtuse approach in dealing with the trustees' demands and subsequent litigation'.⁸⁹

2.82 The delays and disruptions to the proceedings were caused by both parties, causing the Court to note that: 'With the benefit of hindsight, it is clear that both parties could have conducted this litigation in a more efficient way.'⁹⁰ The Court concluded that, in order to do justice between the parties, it was not appropriate to apply the usual rule as to costs. Instead, CBL Insurance was ordered to pay only 70 per cent of the plaintiff's costs of the proceeding.⁹¹

2.83 In its submission, LCM stressed that it did not control the costs of the proceeding:

it is not LCM's role, nor is it properly LCM's prerogative, to assume a plaintiff's right and responsibility to conduct the plaintiff's proceedings, instruct its legal representatives and, by extension, drive and regulate the quantum of incurred legal costs or adverse costs.

It is, however, LCM's role to continue to make payment of the legal costs that eventuate and to bear the full risk of the action. It is important to note that had the Huon Corporation action (and the same can be said for most funded actions) resolved for less than its ultimate outcome, or had the defendant been successful at first instance or on appeal, it is LCM who would have been liable to make payment of the full sum of the plaintiff's legal costs and, in addition, to meet the very considerable burden of adverse costs orders.⁹²

87
88
89
90
91
92

Ibid.
Ibid.
Ibid.
Fitzgerald v CBL Insurance Ltd (No 2) [2015] VSC 176 (1 May 2015) [43] (Sloss J).
Ibid [44] (Sloss J).
Submission 14 (LCM).

- 2.84 The involvement of the litigation funder is at the heart of the second issue: how the recovered amount was distributed. As required by the funding agreement, LCM met the costs of the proceedings and was reimbursed from the proceeds. It was then entitled to its funding fee, for which it received about 36 per cent of the recovered amount. This is within the range that litigation funders are commonly paid and reportedly less than the full amount to which LCM was entitled under the agreement.⁹³
- 2.85 The decision by the trustees to use the services of a litigation funder was not an easy one. They felt they had no option but to approach third parties for funding after extensive discussions with the liquidator failed to reach agreement. After the outcome of the litigation was known, the trustees initiated a dispute with the litigation funder to force a dividend for the employees. They later abandoned it on legal advice.⁹⁴
- 2.86 The National Union of Workers described the experience of the former Huon Corporation employees as ‘one of complete despair’:⁹⁵
- We believe that this is not a good public policy outcome. Those who were clearly wronged decided to prosecute their claim in spite of all of the various tactical legal barriers put before them and won an outcome that should have meant a disbursement to them after 11 years. Our Victorian system of justice however did not produce this outcome. It is clear to us that some form of market regulation needs to occur to prevent this result from occurring again.⁹⁶
- 2.87 Because of the lack of data about how many funded proceedings, other than class actions and insolvency cases, are likely to be conducted for disputants who are unaware of the involvement and cost of the litigation funder, it is difficult to gauge the scale of the problem encountered by the former Huon employees. Nevertheless, there is scope for reform to ensure that the court knows that a litigation funder is involved and the terms of its involvement. Recommendations for reform are discussed later in this chapter.

Client interests

- 2.88 In the consultation paper, the Commission discussed the tripartite relationship between the litigation funder, lawyer and plaintiff and the conflicts of interest within this relationship.⁹⁷ The tripartite model is a useful means of identifying, conceptually, how conflicts of interest may affect decision making at various stages of proceedings, though in practice the way in which the parties interact and their relative influence vary.
- 2.89 Factors such as the size and type of proceeding, how the funder and lawyers approach their roles, and whether there is a pre-existing relationship between any of the parties will affect the way in which they interact. In class actions, there are additional distinctions between the representative plaintiff and other class members; between class members who are clients of the lawyers and those who are not; between class members who have entered a funding agreement with the litigation funder and those who have not.
- 2.90 The discussion below only concerns conflicts of interest for litigation funders. Conflicts of interest for lawyers in both funded and unfunded class actions are discussed in Chapter 4.

93 Submission 16 (National Union of Workers).

94 Ibid.

95 Ibid.

96 Ibid.

97 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, Consultation Paper (2017) 44–9.

Conflict of interest for litigation funders

- 2.91 Because litigation funders seek to profit from the litigation in which they invest, there is recurring debate about the priority given to the funder's commercial interests over the plaintiff's interests. The debate has three broad themes:
- the risk that the litigation funder will fail to meet its obligations under the funding agreement
 - the risk of abuse of process, where the process of the court is used for an improper purpose
 - the risk that the litigation funder will exercise influence over the conduct of proceedings to the plaintiff's detriment.
- 2.92 These themes are expressed as 'risks' because they arise from the inherent conflicts of interest between the funder and the plaintiff. The Commission has been told about a small number of cases that have been clouded by conflicts of interest, but acknowledges that there is little empirical evidence that conflicts of interest are producing unfair outcomes. This does not mean that the risks are hypothetical or exaggerated. They have long been recognised, as evident in the old torts and offences of maintenance and champerty.
- 2.93 The low incidence of reported problems may indicate that the risks are being well managed under existing laws, as submitted by Slater and Gordon:
- 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.⁹⁸
- 2.94 The Commission also notes that the litigation funder's commercial interests do not inevitably conflict with the plaintiff's interests. IMF Bentham, which actively supervises the litigation in which it invests, pointed out that they may align:
- In funded proceedings some of the potential conflicts are mitigated by the involvement of the funder. For example, IMF's objectives are closely aligned with those of the class members that it funds: namely to achieve the just, quick, inexpensive and efficient resolution of claims through appropriate use of the civil justice system and for the largest settlement or damages award possible having regard to the risks of the litigation. The funder's involvement provides an important check and ensures there is oversight of the costs of the litigation which is for the benefit of all class members. The funder brings a commercial approach to the conduct and resolution of class actions that aligns closely with the interests of class members.⁹⁹

Funding agreement obligations

- 2.95 In the absence of stronger national regulation of the industry, there is a risk that a funder will avoid meeting its obligations to indemnify the plaintiff for the cost of the proceeding and any adverse costs.
- 2.96 Concern about this risk is evident in calls for the introduction of capital adequacy requirements in conjunction with more robust industry regulation, and the Commission recommends above that the Victorian Government advocate for stronger supervision and regulation of the industry nationally.

⁹⁸ Submission 28 (Slater and Gordon Lawyers).
⁹⁹ Submission 25 (IMF Bentham Ltd).

Abuse of process

- 2.97 While upholding an arrangement that gave the funder significant control over the conduct of the proceedings in *Fostif*, the High Court recognised that this level of influence could corrupt court processes. It considered that the court could rely on its inherent powers to address any problems.
- 2.98 All courts have inherent powers to take any steps that are necessary to prevent abuse of process and ensure a fair trial. If a proceeding is brought for an improper purpose, a stay may be the appropriate remedy. However, the power to stay a proceeding is used only in exceptional circumstances.¹⁰⁰ Where there is an unacceptable legal or commercial relationship between the lawyers and the litigation funder, the court is likely to use its inherent jurisdiction to restrain the lawyers from acting to ensure due administration of justice and to protect the integrity of the judicial process.¹⁰¹
- 2.99 The Commission notes that the Court would be supported in its role if it were always made aware when a litigation funder is involved in a proceeding. Recommendations concerning disclosure are discussed later in this chapter.¹⁰²

Excessive influence

- 2.100 Although the litigation funder and plaintiff are parties to a funding agreement they have little, if any, direct contact. Whether supervising and making day-to-day decisions about the proceedings, or taking a less active role, litigation funders work with the lawyers, not the plaintiffs.
- 2.101 There is a risk that the litigation funder's influence over the conduct of the litigation will subordinate the plaintiff's interests to the funder's interests. However, it is common for funding agreements to specify that, if there is a disagreement, the lawyer's and plaintiff's view will prevail over that of the litigation funder.¹⁰³
- 2.102 The High Court's decision in *Fostif* established the right of a funder to exercise influence and some degree of control over the day-to-day conduct of a funded action. The point at which the control is excessive is not clear, including to litigation funders who have expressed difficulty in seeing where their interests could conflict with those of the plaintiff. IMF Bentham said in its submission:

it is difficult to see how claimants' interests could be detrimentally affected by a funder recommending that only the most promising causes of action are run in the interest of minimising the costs and risks of the proceedings and maximising the potential outcome.¹⁰⁴

- 2.103 Decisions at settlement have raised the greatest concerns. In their submission, Ashleigh Leake, Josephine Vernon and Bruce Efron described how conflicts of interest could produce unfair outcomes if not managed:

As a purely financially-driven party, litigation funders comparatively perceive the 'best settlement' as one with the greatest return and the least expense. In seeking to achieve this goal, a litigation funder will be more inclined to aggressively seek return on investment over legal justice. The nature of these commercial interests can result in striving for awards that have greater commercial benefit with the sacrifice of integrity, as the dignity lost is not necessarily their own but the class members'. Litigation funders are more inclined to settle out of court if the settlement offer exceeds the perceived commercial award of the court; this does not always guarantee a conclusion in the best

100 *Barton v The Queen* (1980) 147 CLR 75, 96 (Gibbs ACJ and Mason J). See also *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd; re Treasury Wine Estates Ltd* [2016] FCA 787 (5 July 2016); *Treasury Wines Estates Ltd v MCI Pty Ltd* (2014) 318 ALR 121.

101 Submission 25 (IMF Bentham Ltd). See *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582 (26 November 2014).

102 [2.140]–[2.208].

103 This is consistent with ASIC's expectation that funders consider including in funding agreements an obligation for the lawyer to give priority to the plaintiff's instructions over those of the funder: Australian Securities and Investments Commission, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013) RG 248.59.

104 Submission 25 (IMF Bentham Ltd).

interest of the class members. Inclination for settlement can be increased if the litigation funder perceives the expenses (eg Court costs, solicitor's fees, etc.) to be approaching their maximum limit of expenses budgeted for; similarly, if they perceive the proceedings to be 'drawn out', litigation funders are inclined to settle.¹⁰⁵

Regulation of litigation funders' conduct

- 2.104 It has been often observed that, unlike lawyers, litigation funders are not officers of the court, nor are they subject to the same ethical obligations.¹⁰⁶ While it is possible for a fiduciary relationship to arise from the funding arrangement, in class actions, most funding agreements seek to contractually exclude any fiduciary duties arising between the funder and class members.¹⁰⁷
- 2.105 However, obligations to the court have been imposed on litigation funders under the *Civil Procedure Act 2010* (Vic) and ASIC has issued a regulatory guide on how litigation funders should manage conflicts of interest.

Civil Procedure Act 2010 (Vic)

- 2.106 The *Civil Procedure Act* specifies a range of ethical and procedural obligations, known as the 'overarching obligations', which apply to participants in litigation, including litigation funders.¹⁰⁸
- 2.107 There are 10 overarching obligations, which require participants to:
- act honestly
 - only make claims that have a proper basis
 - only take steps to resolve or determine the dispute
 - cooperate in the conduct of the civil proceeding
 - not mislead or deceive
 - use reasonable endeavours to resolve the dispute
 - narrow the issues in dispute
 - ensure costs are reasonable and proportionate
 - minimise delay
 - disclose the existence of documents critical to the resolution of the dispute.¹⁰⁹
- 2.108 The US Chamber Institute for Legal Reform proposed that litigation funders have a statutory obligation to comply with their overarching obligations and be held to account should they fail to do so, and 'At the very least, they should be obliged to certify to the Court that they have complied with those obligations when funded proceedings are commenced'.¹¹⁰
- 2.109 The Commission considers that the existing obligations are clear and that the Court has adequate powers to address problems that may arise during proceedings as a result of a participant's failure to comply. The Court has broad discretion to impose a costs order or other sanction on a person who contravenes an overarching obligation. If satisfied that a breach has occurred, the court may make 'any order it considers appropriate in the interests of justice'.¹¹¹ Judges of the Supreme Court told the Commission that the codification of the overarching obligations has been a useful means of conveying expected standards of behaviour.¹¹²

105 Submission 1 (Ashleigh Leake, Josephine Vernon, Bruce Efron). References omitted.
 106 See, eg, Submissions 19 (US Chamber Institute for Legal Reform), 22 (Dr Michael Duffy); Roundtable 1 (professional stakeholders).
 107 Roundtable 1 (professional stakeholders).
 108 *Civil Procedure Act 2010* (Vic) s 10(1). They also apply to the parties, expert witnesses, lawyers and insurers.
 109 Ibid ss 17–26.
 110 Submission 19 (US Chamber Institute for Legal Reform).
 111 *Civil Procedure Act 2010* (Vic) s 29.
 112 Consultation 4 (Judges of the Supreme Court of Victoria).

ASIC conflict of interest regulatory guide

- 2.110 As noted at [2.23], litigation funders are not required to hold an Australian Financial Services Licence (AFSL) as long as they have adequate practices in place to manage conflicts of interest.¹¹³ ASIC has issued a regulatory guide which sets out ASIC's expectations for compliance with the obligation to maintain adequate practices and follow certain procedures for managing conflicts of interest.¹¹⁴
- 2.111 The guide is comprehensive and aligns with the standards required of AFSL holders. It states that litigation funders should have written procedures for dealing with a range of situations in which conflicts of interest can arise.¹¹⁵ Any conflicts of interest should be disclosed prior to entry into a funding agreement so that prospective plaintiffs can make an informed decision about how a conflict may affect the service being provided to them.¹¹⁶ In addition, the funding agreement should disclose the terms of the agreement between the funder and the lawyer.¹¹⁷
- 2.112 Disclosure about conflicts of interest should be 'timely, prominent, specific and meaningful'¹¹⁸ and ongoing throughout the course of the litigation scheme.¹¹⁹ The method of disclosure (either paper or electronic) may differ according to the method that best suits the members of the scheme.¹²⁰
- 2.113 The level of compliance monitoring to date has contributed to concern that there is no effective oversight of industry practices or prevention of unethical conduct.
- 2.114 A number of submissions suggested that the potential for conflicts of interest could be reduced by stronger regulation of conduct. Proposals included the following:
- A legal practitioner or class action law firm could be prohibited from directly or indirectly holding any share or other ownership in the litigation funder or class representative involved in the proceeding. The regulation would be similar to regulation recently introduced in Singapore and Hong Kong in relation to litigation funding of arbitration proceedings.¹²¹
 - Litigation funders could have a fiduciary duty to their client imposed on them, on the basis that they tend to deny such a relationship exists and exclude the possibility by contract.¹²²
 - Litigation funders could be subject to a statutory duty of good faith in the same manner as insurers are under sections 13–14 of the *Insurance Contracts Act 1984* (Cth). It would not be possible to contract out of the statutory duty. Unlike a fiduciary duty, the statutory duty would not require the funder to prefer their client's interests over its own interests; rather, it would require the funder to have regard to the interests of both parties.¹²³
 - Costs agreements and funding agreements could include provisions for managing conflicts of interest and state that plaintiff lawyers have a continuing obligation to manage potential conflicts of interest.¹²⁴
- 2.115 Consistent with its view that national regulation of the litigation funding industry is necessary, the Commission considers that the imposition of any stronger rules to prevent or manage conflicts of interest for litigation funders should be under Commonwealth law.

113 *Corporations Act 2001* (Cth) s 911A; *Corporations Regulations 2001* (Cth) regs 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB.
114 Australian Securities and Investments Commission, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013).
115 *Corporations Regulations 2001* (Cth) reg 7.6.01AB.
116 Australian Securities and Investments Commission, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013) RG 248.59–RG 248.61.
117 *Ibid* RG 248.71.
118 *Ibid* RG 246.85.
119 *Ibid* RG 248.56.
120 *Ibid* RG 248.62–RG 248.63.
121 Submission 2 (Professor Vicki Waye).
122 Submission 19 (US Chamber Institute for Legal Reform).
123 Submission 22 (Dr Michael Duffy).
124 Submission 13 (Maurice Blackburn Lawyers).

- 2.116 Within Victoria, the Commission does not consider that the Supreme Court of Victoria requires additional statutory powers to enforce compliance with the overarching obligations in the Civil Procedure Act. Where instances of unethical conduct have arisen in funded litigation, the Court has exercised its inherent powers to stay the proceedings.¹²⁵
- 2.117 On a case-by-case basis, the risk arising from conflicts of interest is usually managed through disclosure to the client of the fact that the conflict exists, and how it is being mitigated. The lack of transparency about the relationship between litigation funders and the lawyers has led to calls for stronger disclosure requirements, as indicated by the terms of reference.
- 2.118 By increasing transparency, accountability improves. The client is better informed about the conditions under which the funding is provided and the implications for the way the litigation is conducted. The court is better able to identify any impact that a conflict of interest may be having on the proceedings and the terms of any settlement. In her submission, Vicki Wayne drew attention to the importance of disclosure in enabling the court to ensure that justice is done:
- The capacity of the courts to bring flexibility and nuance to their supervisory or oversight role in an individual case (including supervising funding terms generally and confirming capital adequacy) is contingent upon full information provided as early as possible.¹²⁶
- 2.119 Proposals to improve disclosure about funding arrangements to clients and the court are discussed at [2.140]–[2.208].

Reform proposals

- 2.120 The terms of reference ask the Commission to report on whether there is scope for the supervisory powers of Victorian courts or Victorian regulatory bodies to be increased in respect of proceedings funded by litigation funders. Three possible reforms are suggested:
- placing limits on funding fees, or requiring them to be subject to an approval process
 - imposing clearer disclosure requirements on litigation funders and lawyers to advise plaintiffs about the progress, costs and possible outcomes of proceedings supported by litigation funders
 - requiring disclosure of funding arrangements in proceedings supported by litigation funders.
- 2.121 These proposals are directed at protecting the plaintiff’s interests, by controlling the amount of the funding fee and improving transparency about the proceedings and the terms on which the litigation funder is providing financial support. The US Chamber Institute for Legal Reform has argued that any solution must address all funded proceedings because the same funding issues arise in every type of proceeding in which a litigation funder is involved.¹²⁷ The Commission agrees that the litigation funding industry should be regulated nationally, but the protective measures suggested in the terms of reference would not be necessary in every funded case.
- 2.122 In the large commercial cases that litigation funders often finance, the plaintiff is likely to have a sophisticated understanding of contractual obligations and financial undertakings, and direct access to legal advice in entering the funding agreement. Plaintiffs in this category can be expected to have the resources and bargaining power to look after their interests without further protection.

125 See, eg, *Walsh v WorleyParsons Limited (No 4)* [2017] VSC 292 (26 May 2017) (Cameron J).
 126 Submission 3 (Professor Julie-Anne Tarr).
 127 Submission 19 (US Chamber Institute for Legal Reform).

- 2.123 Similarly, additional measures appear unnecessary to safeguard the interests of plaintiffs who have less experience and influence but instruct the lawyers who are conducting the litigation and directly participate in funded proceedings. Plaintiffs in this category are not at a discernible disadvantage compared to plaintiffs who receive financial support by other means, such as a bank loan or private funding agreement. Their lawyers have a fiduciary duty to act in their interests and can advise them about funding options, the conditions under which any financial support is provided, and the progress of the litigation.
- 2.124 The need for greater protection is more likely to arise when funded litigation is conducted by an intermediary on behalf of multiple disputants. In these cases, the ultimate recipients of any recovered amount may not be clients of either the litigation funder or the lawyer and may not know about or understand the funding agreement. They may be relying on the intermediary to ensure that their interests are taken into account during proceedings or settlement negotiations.
- 2.125 The imbalances of information and power in litigation of this type have been recognised in class actions and insolvency proceedings, where the court has a particular role in protecting the interests of people who are not parties to the litigation but are affected by the outcome. However, safeguards that apply in these proceedings did not apply in *Huon Corporation*.
- 2.126 For these reasons, the discussion in this chapter about the reforms suggested by the terms of reference concerns funded litigation that is conducted by an intermediary on behalf of multiple disputants, including class actions, rather than all litigation in which a funder may be involved.

Regulation of funding fees

- 2.127 Courts, litigation funders and lawyers frequently observe that, if not for the financial support of a litigation funder, the plaintiff would have been unable to bring the proceedings at all. The point was made by LCM when commenting on *Huon Corporation*:

It is an unfortunate reality that commercial litigation is unpredictable and risky, and that the cost of advancing a claim, particularly against an adversarial defendant, can have a very significant impact on the action's ultimate proceeds. This is true of both funded and unfunded proceedings. However, LCM submits that the services of a litigation funder allow the rights of a litigant to be enforced with that litigant facing no risk or cost, while retaining the majority of the interest in any net upside.¹²⁸

- 2.128 Similar sentiments were expressed in a recent decision by the Supreme Court of New South Wales approving a litigation funding agreement to fund insolvency proceedings:

Even if the funder receives more than 50 per cent of any judgment, 40 per cent of such if any judgment as might be obtained is a better result for the company's creditors than nothing. Because of the terms of the funding agreement, there is no downside for creditors in the prosecution of the litigation in question. There is no risk of the liquidators or creditors having to bear an adverse costs order, as it will be borne by the funder. In those circumstances, it does not take extensive reasoning or explanation to realise that there is benefit for the company in funding this litigation to an end.

That benefit—of an agreeing to an arrangement that will permit the litigation to be funded to an end—is that the company may get 50 (or some lesser percentage) of something, for distribution amongst creditors; against the position that there will plainly be nothing if the litigation is not funded and does not proceed. Against that potential benefit, no downside or detriment to the company from protracting an administration that would otherwise generate nothing for creditors has been identified.¹²⁹

- 2.129 Observations such as these do not necessarily mean that, even if the litigation would not have proceeded but for the financial support of the funder, the court will always consider the funding fee to be reasonable. This is particularly evident in class actions, and the court's approach to the assessment of funding fees in class actions is discussed in detail in Chapter 5.
- 2.130 The scope for limits to be placed on, or approval processes required for, funding fees in proceedings other than class actions is discussed below.

Limits on funding fees

- 2.131 In class actions, the court has a crucial role in supervising the proceedings. It fixes the date by which class members may opt out; it approves the formal notices that are sent to them; and its approval is required before a proposed settlement can have legal effect.¹³⁰ The settlement approval process ensures that the court considers whether the settlement is fair and reasonable as between the parties and in the interests of class members as a whole. It also provides class members with the opportunity to object.¹³¹
- 2.132 Should the court determine that the litigation funding fee, as set out in the funding agreement, is not fair and reasonable, it may refuse a settlement. Although the possibility has not been considered in decisions of the Supreme Court, the Federal Court has indicated that, in certain circumstances, it may modify the fee as part of settlement approval. In Chapter 5, the Commission recommends that the Supreme Court be given specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs in class actions, to ensure that they are fair and reasonable.
- 2.133 The Supreme Court also considers the funder's remuneration in insolvency proceedings, if the liquidator seeking to enter the funding agreement asks the court for approval.¹³² When considering an application for approval, the size of the funding fee is a relevant consideration and the court will ensure that the funder is not given a 'grossly excessive profit'.¹³³ However, the court generally will not interfere with the liquidator's commercial judgment in seeking to enter the agreement unless there is error of law or principle or grounds for suspecting bad faith. Court approval is not an endorsement of the agreement, but merely permission for the liquidator to exercise their own commercial judgment.¹³⁴
- 2.134 The National Union of Workers proposed that the court be given the power to vary the litigation funder's remuneration in funded proceedings other than class actions by adjusting the distribution of the judgment amount. It suggested that the court could use a formula that would ensure that the disputants on whose behalf the litigation was conducted would receive a share. This would have enabled the former employees in *Huon Corporation* to receive a dividend.¹³⁵
- 2.135 It is possible that, had *Huon Corporation* been conducted as a class action, the outcome for the former employees would have been better. The class action procedure, and the court's supervisory role and associated powers, are designed to provide for the interests of all class members to be taken into account even though they are not parties to the proceedings. Unlike other litigation conducted on behalf of others, the outcome of class actions directly affects the rights of all class members unless they opt out of the proceedings, including those who were unaware they had commenced. For this reason, the court has more onerous responsibilities than in other civil litigation. This is seen not only in the formal exercise of its power but in case management practices throughout the proceedings.

130 *Supreme Court Act 1986* (Vic) ss 33J, 33Y, 33V.

131 Roundtable 3 (professional stakeholders).

132 *Corporations Act 2001* (Cth) s 477(2B). See also [2.74].

133 *Anstella Nominees Pty Ltd v St George Motor Finance Ltd* [2003] FCA 466 (14 May 2003) [11] (Finkelstein J).

134 *Stewart, re Newtronics Pty Ltd* [2007] FCA 1375 (28 August 2007) [26] (Gordon J).

135 Submission 16 (National Union of Workers).

- 2.136 Moreover, in class actions, the representative plaintiff is not appointed by the class members; nor are they an intermediary or an agent of the class members. In contrast, in other litigation where a party to the proceeding participates on behalf of other people, it is reasonable to expect there to be communication between them, and with the lawyer, about the progress of the litigation and issues in dispute. The relationship in these cases between the lawyer, the client, and anyone on whose behalf the litigation is brought, does not, of itself, require the court to intervene in the arrangements they make. This includes arrangements with a litigation funder established by a funding agreement that the parties entered freely and with independent legal advice.
- 2.137 In the absence of an inherent need to do so, the Commission considers that the court's powers to vary funding fees and associated costs should not be extended beyond the context of class actions. The court has extensive capacity, within the boundaries of its traditional role, to respond to issues that may arise during the course of funded proceedings that unfairly affect any person connected with the litigation.¹³⁶ For example, the Civil Procedure Act requires litigation funders—and lawyers—to ensure that costs are reasonable and proportionate,¹³⁷ and provides the court with broad discretion to impose a costs order or other sanction in the event that this obligation is not met.¹³⁸ The court's power in relation to costs has been extended to litigation funders where the interests of justice allow a departure from the general rule that only parties to proceedings may be subject to costs orders.¹³⁹
- 2.138 A further consideration is the impact on the viability of the industry if the court were empowered to vary funding fees generally, rather than only in class actions where it has a protective role. It would undermine the basis on which commercial decisions to invest in litigation are made if funders were unable to rely on their contractual rights. The National Union of Workers has suggested that the market would adapt to any such reform, but the Commission is concerned that the response would reduce the availability of funding for litigation and the access to justice that it enables. If the reform were confined to proceedings in Victoria, it would create a disincentive for litigation funders to invest in proceedings within this jurisdiction.
- 2.139 The Commission's conclusion that it is unnecessary to extend the court's powers in this way is predicated on the condition that all affected parties, and the court, know that the litigation is funded and are aware of the terms of the funding agreement. *Huon Corporation* illustrates that this is not always so, and why stronger disclosure requirements should be introduced. Proposals to improve disclosure practices are discussed below.

Disclosure to the court

- 2.140 The terms of reference raise the question of whether there should be an obligation to disclose funding arrangements not only in funded class actions but also in other funded proceedings—and, if so, which proceedings.
- 2.141 In its report on the civil justice system, released in 2008, the Commission recommended that parties to civil litigation be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the insured or assisted party in the course of civil proceedings. The recommendation flowed from the requirement that insurers and funders comply with the overarching obligations, which are now contained in the Civil Procedure Act.¹⁴⁰ The Commission further recommended that the court have discretion to order disclosure of a party's insurance policy or funding arrangement if appropriate.¹⁴¹

136 *Civil Procedure Act 2010* (Vic) ss 7(1), 8, 65C(1).

137 *Ibid* s 24.

138 *Ibid* s 29.

139 *Carter v Caason Investments Pty Ltd* [2016] VSCA 236 (7 October 2016).

140 *Civil Procedure Act 2010* (Vic) ss 17, 26.

141 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 471–2, 476; Recommendation 86.

These recommendations were not implemented.¹⁴²

- 2.142 While the Court does not have a specific power to require disclosure of litigation funding arrangements, it has a broad case management power to give any direction or make any order it considers appropriate in the interests of the administration of justice or in the public interest.¹⁴³ In class actions, it also has a general power to make any order it thinks necessary or appropriate to ensure that justice is done in the proceeding.¹⁴⁴

Disclosure that a litigation funder is involved

- 2.143 The court may not be aware when a litigation funder has an interest in the proceedings. It is not apparent, for example, that the Court knew that a litigation funder was involved in *Huon Corporation*. In the judgment handed down on 2 October 2014, the Supreme Court noted a conversation in which a trustee mentioned that the liquidator had agreed to fund the litigation and would be seeking the Court's sanction to do so.¹⁴⁵ In fact, a litigation funder had been funding the proceedings since September 2011, after the trustees and the liquidator had failed to make a funding arrangement.¹⁴⁶ Neither the funder, nor the funding fee, were mentioned in the final judgment on 1 May 2015. In that decision, the Court was critical of the way in which the litigation was conducted, attributing responsibility to both parties for wasted costs and delays, and it reduced the adverse costs that the defendant would normally be required to pay.
- 2.144 Reflecting on the outcome, the National Union of Workers submitted that:
- there should be a mechanism that informs the court that a litigation funder is a private partner to the proceedings, to assist the court in any determinations it may make in the administrative proceedings of the trial and ultimately the administration of justice.¹⁴⁷
- 2.145 The proposal is not controversial. No opposition was expressed to the court being informed when a litigation funder is involved. However, the court does not need to be informed in every funded case. The fact that a litigation funder is involved in proceedings is not in itself an issue if there is only a single plaintiff (although it may affect the defendant's decision about whether to seek an order for security for costs), but it can be significant in class actions and other proceedings brought by a plaintiff on behalf of other people whose interests will be affected by the outcome. The Commission considers that, in these cases, the court should not only be informed of the litigation funder's involvement but be given a copy of the funding agreement.

Disclosure of funding agreement

- 2.146 The significance of the funder's involvement will be apparent to the court from the funding agreement. The agreement is at the core of the issues raised by litigation funding practices, not only because it determines the allocation of risks, costs and rewards, but because it provides the framework for the relationship between the funder and the lawyer. Its disclosure to the court would assist in managing the proceedings and protecting the integrity of the legal process. The court could assess whether the terms are reasonable and adequately provide for the interests of people on whose behalf the litigation has been brought. It could also identify actual or potential conflicts of interest.¹⁴⁸

142 However, if the effect of a contract of insurance is that the party has no meaningful control over the conduct of proceedings, the insurer may, instead of the party, comply with the requirement on each party to certify, at the commencement of proceedings, that it has read and understood the overarching obligations and paramount duty. This provision was introduced in 2012 to provide flexibility when, for example, the party does not consider it appropriate to sign the certification or cannot be found. *Civil Procedure Act 2010* (Vic) s 41(4); Explanatory Memorandum, Civil Procedure Amendment Bill 2012.

143 *Civil Procedure Act 2010* (Vic) s 47.

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

145 *Fitzgerald v CBL Insurance Ltd* [2014] VSC 493 (2 October 2014) [73] (Sloss J).

146 Submission 16 (National Union of Workers).

147 *Ibid.*

148 Submission 1 (Ashleigh Leake, Josephine Vernon, Bruce Efron). For example, in *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582 (26 November 2014) (Ferguson JA), disclosure of the funding agreement assisted the Supreme Court in determining that, due to their interests in the litigation funder and the terms of the funding agreement, counsel and lawyers for the representative plaintiff should be prevented from continuing to act.

- 2.147 Judges of the Supreme Court noted during consultations that litigation funding arrangements can be very opaque. It can be difficult for the court to be aware of the impact of the litigation funder on proceedings, or the extent of its control.¹⁴⁹ While the degree to which disclosure is likely to be useful in each case would vary, disclosure of the funding agreement would assist the court more than simply being notified that a funder is involved.
- 2.148 A further consequence of disclosing the funding agreement to the court is that it would protect the legitimate interests of the defendant.¹⁵⁰ The defendant may wish to seek security for costs, particularly if there is doubt about the funder's financial capacity to meet its obligations under the agreement;¹⁵¹ conversely, disclosure may lead the defendant to decide not to apply for a security for costs order.¹⁵²
- 2.149 The Commission invited comments on whether disclosure of the funding agreement to the court should be mandatory in all funded proceedings.¹⁵³ The proposal received almost universal support. Julie-Anne Tarr, for example, called for disclosure because:
- The capacity of the courts to bring flexibility and nuance to their supervisory or oversight role in an individual case (including supervising funding terms generally and confirming capital adequacy) is contingent upon full information provided as early as possible.¹⁵⁴
- 2.150 Vicki Waye submitted that the key terms of the funding agreement should be disclosed in all cases to support settlement and any application for security for costs, and to ensure that all parties are apprised of the nature of the financial arrangements for the proceedings:
- There appears to be little justification for lack of transparency at least insofar as key terms are concerned, such as the extent of the indemnity provided for adverse costs, the percentage of recoveries that the funder is entitled to receive and the extent of any other substantial fees.¹⁵⁵
- 2.151 Any requirement to disclose the agreement to the defendant should provide for information that is privileged, or might confer an unfair advantage on the defendant, to be redacted first.¹⁵⁶ Phi Finney McDonald provided an example of why this is necessary:
- For instance, if there are terms pursuant to which the funding provided under the agreement is capped at a particular amount (such that the funder may elect not to continue funding the proceeding if costs exceed a certain amount), then a counterparty in the litigation might deliberately engage in interlocutory tactics intended to increase the costs incurred by the representative plaintiff beyond the relevant funding cap threshold, in an attempt to stymie the litigation.¹⁵⁷
- 2.152 The Commission agrees that the funding agreement should be disclosed, although it recommends different disclosure requirements in funded class actions, compared to other funded proceedings, for reasons discussed below.

149 Consultation 3 (Judges of the Supreme Court of Victoria).

150 Submission 4 (Chartered Accountants Australia and New Zealand).

151 Submission 2 (Professor Vicki Waye).

152 Submission 11 (Litigation Funding Solutions).

153 Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, Consultation Paper (2017) 68.

154 Submission 3 (Professor Julie-Anne Tarr).

155 Submission 2 (Professor Vicki Waye).

156 Submissions 11 (Litigation Funding Solutions), 12 (Allens), 13 (Maurice Blackburn Lawyers), 14 (LCM), 15 (Phi Finney McDonald), 21 (Law Council of Australia).

157 Submission 15 (Phi Finney McDonald).

Disclosure in class actions

- 2.153 In 2010, the Supreme Court practice note for class actions was amended to require the disclosure of litigation funding agreements at, or prior to, the initial case management conference.¹⁵⁸ However, this obligation does not appear in the current version of the practice note, issued on 30 January 2017 (Supreme Court Practice Note).¹⁵⁹ The practice note was most recently revised in conjunction with steps by the Supreme Court to modernise and streamline its procedures, leading to a reduction in the number of practice notes from more than 150 to 48.
- 2.154 In contrast, the Federal Court and the Supreme Courts of New South Wales and Queensland require the disclosure of the funding agreement to the court in all funded class actions, at or prior to the first case management conference.¹⁶⁰ The relevant provisions for class actions in New South Wales and Queensland replicate the provision that has since been withdrawn in Victoria:
- At or prior to the initial [case management conference] or directions hearing, each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order. Any funding agreement disclosed may be redacted to conceal information which might reasonably be expected to confer a tactical advantage on the other party.¹⁶¹
- 2.155 The requirement to disclose is set out in greater detail in the Federal Court practice note on class actions (Federal Court Practice Note). Disclosure of the full agreement to the Court is on a confidential basis. It may be a standard form agreement, and individual variations to the standard form that might be negotiated with different class members need not be disclosed.¹⁶²
- 2.156 The funding agreement must also be disclosed to other parties at least a week before the first case management conference. Information which might be expected to confer a tactical advantage on another party, may be redacted.¹⁶³
- 2.157 In addition, the plaintiff's lawyers are required to update the Federal Court about any revised costs or funding agreements when:
- (a) there is a change to the standard form of litigation funding agreement or costs agreement which significantly alters the agreement;
 - (b) a proceeding not previously subject to a litigation funding agreement becomes subject to such an agreement;
 - (c) there is a change of the litigation funder funding the proceeding; or
 - (d) the litigation funder becomes insolvent or otherwise unable or unwilling to continue to provide funding for the proceeding.¹⁶⁴
- 2.158 There is broad agreement that the Supreme Court Practice Note should contain similar disclosure requirements.¹⁶⁵

158 Supreme Court of Victoria, *Practice Note No 9 of 2010—Conduct of Group Proceedings*, 29 November 2010, [3.6].

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

160 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, [6]; Supreme Court of New South Wales, *Practice Note SC Gen 17—Supreme Court Representative Proceedings*, 12 August 2014, [7.2]; Supreme Court of Queensland, *Practice Direction Number 2 of 2017—Representative Proceedings*, 27 February 2017, [8.2].

161 Supreme Court of Victoria, *Practice Note No 9 of 2010—Conduct of Group Proceedings*, 29 November 2010, [3.6].

162 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, [6.1]–[6.2].

163 *Ibid* [6.4].

164 *Ibid* [6.3].

165 Submissions 3 (Professor Julie-Anne Tarr), 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 11 (Litigation Funding Solutions), 12 (Allens), 13 (Maurice Blackburn Lawyers), 14 (LCM), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 26 (Australian Institute of Company Directors).

- 2.159 The US Chamber Institute for Legal Reform proposed that the obligation to disclose should be placed on the funder, rather than on the plaintiff’s lawyer.¹⁶⁶ However, the Commission considers that the obligation should rest with the lawyer, who in any event is accountable for ensuring that all necessary documentation for the proceeding is provided to the court. It is also likely that the litigation funder could be based overseas.
- 2.160 Some stakeholders proposed the introduction of an obligation on the court to review funding agreements.¹⁶⁷ Allens proposed that the court review them at the first case management meeting, to ensure that they meet minimum content standards and are fair:
- Courts should be given the express power to stay the proceeding, or make other orders considered to be appropriate, in circumstances where funding agreements do not meet the minimum content requirements or are otherwise unfair. The onus will then be on the funder to address those concerns to the satisfaction of the Court.¹⁶⁸
- 2.161 The Commission has reservations about proposals for state-based regulation of litigation funders, and notes that the proponents would prefer the industry to be regulated nationally. Should national regulation be introduced, compliance with required standards should be a matter for lawyers to consider when advising their clients about entering a funding agreement, and for an industry regulator to monitor across the industry. It would not be appropriate for the courts to be given a regulatory role beyond their proper supervisory role.
- 2.162 The Commission has been told that the Supreme Court of Victoria prefers to deal with the disclosure of funding agreements in class actions on a case-by-case basis rather than having a standard requirement. This provides the Court with flexibility where different degrees of disclosure are sought.¹⁶⁹
- 2.163 While this is a reasonable approach to take in view of the small number of funded class actions in Victoria, the Commission is concerned that, unless funding agreements are routinely disclosed, the Court may not become aware of issues that have affected how the proceedings have been conducted until the settlement approval stage. By then, there is little scope to address costs and delays that could have been avoided, or options for settlement that could have been explored.
- 2.164 Moreover, if the representative plaintiff applies for a common fund order for the payment of the funding fee, disclosure of the funding agreement to the Court is critical. A common fund order enables the Court, at an appropriate point of proceedings, to approve the funding fee to be paid by all class members, not just those who have signed a litigation funding agreement. In order to determine the appropriate fee, the Court must have oversight of the terms upon which the funding has been provided.
- 2.165 The Supreme Court could consider reinstating the provision that was removed from the practice note on class actions in January 2017. This would align its practices with those in other state-based class action regimes. However, the Commission recommends that consideration be given to adopting the more prescriptive requirements of the Federal Court. As Allens highlighted in its submission, an increasing number of class actions are being brought by law firms with no prior experience in this form of litigation.¹⁷⁰ Clearer procedures would reduce costs and delays in establishing for newcomers the form and content of the required disclosures and the need to inform the Court promptly when any substantive changes occur. The more experienced law firms tend to file class actions in the Federal Court as well, and the obligations introduced by the recommended reform would not be novel for them. The Court would retain the discretion to depart from the standard requirements when appropriate.

166 Submission 19 (US Chamber Institute for Legal Reform).
167 Submissions 1 (Ashleigh Leake, Josephine Vernon, Bruce Efron), 12 (Allens).
168 Submission 12 (Allens).
169 Correspondence from the Supreme Court of Victoria to the Commission, 5 June 2017.
170 Submission 12 (Allens).

Recommendation

- 3** The Supreme Court should consider amending its practice note on class actions to require the disclosure of litigation funding agreements to the Court and other parties to class actions in similar terms to paragraph [6] of the Federal Court of Australia’s practice note on class actions.¹⁷¹

Disclosure in other funded proceedings

- 2.166 Submissions that commented on the issue indicated that the requirement to disclose funding agreements should not be confined to class actions.¹⁷² The Commission agrees in principle but does not consider that the Court needs to be as prescriptive in requiring disclosure in other funded proceedings, or that disclosure of the agreement is necessary whenever a litigation funder is involved.
- 2.167 There are three reasons for this view.
- 1) Unlike its role in class actions, the Court does not supervise the settlement of other proceedings. It does not have the power to review the terms of the agreement.
 - 2) In non-representative funded proceedings, the terms of the agreement will not apply to anyone who is not a participant in the proceedings. The plaintiff will have entered the agreement on the advice of their lawyer, who has a fiduciary duty to their client and a paramount duty to the court and the administration of justice. These duties apply in all proceedings, whether or not a litigation funder is involved.
 - 3) It is not clear how many proceedings, other than insolvency proceedings (where disclosure is already likely under Commonwealth law), are conducted by an intermediary with the financial support of a litigation funder in Victoria, rather than by another funding arrangement. Where other forms of financial assistance are used, there would be no requirement to disclose.
- 2.168 The Commission is concerned to ensure that, in funded cases such as *Huon Corporation*, where the outcome and costs affect the interests of persons who do not directly participate in the proceedings, the Court is made aware that a litigation funder is involved and the nature of its involvement. These persons are not clients of the lawyer and have not signed the funding agreement. They may be well aware of the terms of the agreement and able to protect their interests, but it is possible that they are not. The Court should be able to dispense with the requirement to disclose, if appropriate, such as when the disputants are knowledgeable and experienced in litigation of that type.
- 2.169 A requirement to disclose the funding agreement in these proceedings could be introduced by amendments to the practice notes to proceedings in the Commercial Court¹⁷³ and relevant lists in the Common Law Division.¹⁷⁴ The requirement could be couched in the same terms as the provision that was removed from the practice note in class actions.

¹⁷¹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*—General Practice Note, 25 October 2016.

¹⁷² See, eg, Submission 3 (Professor Julie-Anne Tarr). Professor Tarr proposed that funding agreements be disclosed at or before the first case management hearing or directions hearing in all funded proceedings.

¹⁷³ Supreme Court of Victoria, *Practice Note SC CC1 (revised)*, 21 December 2017.

¹⁷⁴ For example, the Major Torts List: Supreme Court of Victoria, *Practice Note SC CL4*, 30 January 2017.

Recommendation

- 4 In addition to the introduction of disclosure obligations in class actions, the Supreme Court should consider requiring the plaintiff's lawyers to provide the Court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary. Any funding agreement disclosed to the other party should be able to be redacted to conceal information which might reasonably be expected to confer a tactical advantage on that party.

Disclosure of other sources of external funding

- 2.170 Some stakeholders suggested that the requirement to disclose should extend to the disclosure by both plaintiffs and defendants of any source of external funding, including from an insurer, employer or union.¹⁷⁵ It was argued that information about the terms on which the defendant's lawyers are acting, their likely costs, and any indemnity available under an applicable insurance policy is as relevant to the plaintiff as information about the plaintiff's funding arrangements is to the defendant.¹⁷⁶
- 2.171 The Commission does not consider that disclosure of other sources of external funding, whether or not they exercise effective control, should be introduced in funded proceedings. The fact that the plaintiff has entered an agreement with a litigation funder is not sufficient basis to impose additional disclosure requirements of this nature on both the plaintiff and the defendant in these proceedings, as distinct from unfunded proceedings.

Disclosure to class members or other represented disputants

- 2.172 The terms of reference raise the question of whether clearer requirements should be imposed on litigation funders and lawyers to advise funded plaintiffs about the progress, costs and possible outcomes of proceedings.

Disclosure by litigation funders

- 2.173 The funding agreement is the primary means by which litigation funders disclose information about the funding arrangements. The terms can be complicated, and how much the funder is entitled to receive if the litigation is successful may not be clear until the resolution of the proceedings. The US Chamber Institute for Legal Reform noted that funding agreements are not readily understood by non-lawyers and it is critical that clients understand the terms of the arrangement they are entering into, the costs they will incur and the ultimate return they may receive from the litigation.¹⁷⁷ While lawyers have a duty to inform their clients about the costs of the litigation and should explain the terms of the funding agreement to them, the litigation funder is the source of the information and needs to ensure that it is accurately and clearly expressed.
- 2.174 IMF Bentham, for example, indicated that it has a comprehensive approach to disclosure:

IMF's practice in the class actions it funds is for prospective class members to be made aware of the litigation funding fees before they sign a funding agreement with IMF. IMF sends to these class members a copy of the proposed retainer agreement, the litigation funding agreement, a list of frequently asked questions and a disclosure document (which explains, among other things, the services IMF provides and identifies risks to

175 Submissions 14 (IMF Bentham Ltd), 15 (Phi Finney McDonald).
176 Submission 15 (Phi Finney McDonald).
177 Submission 19 (US Chamber Institute for Legal Reform).

claimants in funded litigation). These documents contain information about the likely legal costs and disbursements that are anticipated to be incurred and information about the funding fee, reimbursement of costs and any other charges that are payable to IMF in the event of success.¹⁷⁸

- 2.175 Of greatest importance is that the potential client receives the information they need, in a form that they understand, to enable them to decide whether to enter the funding agreement. What is not provided directly by the funder should be provided by the lawyer.
- 2.176 Although the content of litigation funding agreements is not regulated, litigation funders have significant responsibilities to disclose information that reveals actual or potential conflicts of interest, and how they will be managed, before the client enters the funding agreement. In addition, the funding agreement should disclose the terms of the agreement between the funder and the lawyer. These and other requirements regarding managing conflicts of interest are set out in a regulatory guide issued by ASIC, discussed at [2.110]–[2.113]. The Commission considers that any additional obligations on litigation funders to disclose information about funding arrangements should be imposed by national regulation.
- 2.177 Once the funding agreement is in place, both the funder and the client rely on the lawyer for advice about the progress, costs and possible outcomes of the litigation. There would be little utility in requiring funders to advise the client about these things.

Disclosure by lawyers

Legal costs and disbursements

- 2.178 At the commencement of any proceeding—including class actions, whether or not they are financed by a litigation funder—lawyers in Victoria are required to inform their clients of what they expect the legal costs to be.¹⁷⁹ Their legal costs must be fair, reasonable and proportionate.¹⁸⁰
- 2.179 The Legal Profession Uniform Law sets out duties of disclosure regarding costs.¹⁸¹ These are reinforced by the courts' power to require lawyers to give their clients written information about accrued and estimated costs and the expected length of the proceedings.¹⁸² Not only must lawyers disclose the information, they must satisfy themselves that the client, or potential client, understands what they have been told.¹⁸³
- 2.180 The requirements to disclose information about legal costs are well established and do not appear to raise particular issues in funded proceedings. Clients, and potential clients, in funded proceedings are entitled to the same information about costs as they would receive in other proceedings. The information provided should be sufficient to inform their decision about whether to enter a legal retainer, and they will also be informed of any significant changes during the proceedings.
- 2.181 In class actions, not all class members will necessarily be clients, yet all contribute to legal costs. The Commission recommends in Chapter 4 that law firms provide the Supreme Court, and all class members, with a summary statement about the class action, including how legal costs and disbursements will be charged; see [4.235]–[4.241].

178 Submission 25 (IMF Bentham Ltd).

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

180 *Legal Profession Uniform Law* s 172.

181 *Ibid* ss 174, 181–2.

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

183 Submission 10 (Victorian Legal Services Board and Commissioner).

Litigation funding costs

- 2.182 As the Victorian Legal Services Board and Commissioner pointed out, litigation funding fees do not fall within the definition of legal costs.¹⁸⁴
- 2.183 Even though lawyers are not expressly required to disclose information about the funding fee and associated costs in funded proceedings, their clients should normally receive this information under current regulatory requirements. Lawyers would need to disclose the terms of the litigation funding agreement to their clients when explaining the estimated costs of the litigation. In addition, disclosure of the funding fee will always occur when a lawyer advises a client who is considering whether to enter a litigation funding agreement.
- 2.184 In contrast, in funded class actions there is ambiguity about the lawyer's duty to disclose information about funding costs to class members who are not clients. The Federal Court has addressed the issue by requiring lawyers to disclose comprehensive information about litigation funding charges in class actions. This is discussed below.

Disclosure to class members

Information about the funding agreement

- 2.185 By the time a funded class action commences, the funder and the lawyer will have entered into contractual arrangements with each other, as well as individually with the representative plaintiff. Disclosures to the representative plaintiff, and other class members who enter the funding agreement and legal retainer at the commencement of proceedings, will not necessarily reach all of the class members who ultimately participate in the proceedings or contribute to the costs.
- 2.186 In an open class action, the class is likely to include members who have not entered a funding agreement as well as those who have. If the court makes a common fund order or a funding equalisation order, all class members must pay a proportion of any settlement or judgment amount they receive to cover the costs of bringing proceedings, whether or not they have executed agreements to this effect. Disclosure about the funding arrangement in these circumstances is even more important to enable them to make informed decisions about their participation.¹⁸⁵
- 2.187 Stakeholders generally agreed that lawyers should be expressly required to disclose funding costs to class members. This is important not only to ensure that all class members can make informed choices, but also to manage the risk of conflicts of interest. It was observed, for example, that there is no evidence that lawyers 'shop around' for the best funding arrangement for class members and that increasing transparency would improve accountability.¹⁸⁶
- 2.188 As the lawyer is a party to the funding agreement in class actions, the client should have the opportunity to obtain independent legal advice.¹⁸⁷ This is a matter that could be addressed in professional guidelines for lawyers on managing conflicts of interest, but the Commission does not consider that independent legal advice should be mandatory. Whether to seek additional legal or financial advice, from whom, and at what cost, is a matter for the client to decide.
- 2.189 The task of disclosing funding costs clearly and simply is not easy. Costs arise from a number of sources and are unlikely to be standard or consistent for the duration of proceedings. For example, a litigation funder may stipulate a particular funding fee in the funding agreement, but also hold a contractual entitlement to increase the rate in particular circumstances, such as when the commencement of proceedings is delayed.

184

Ibid.

185 Submission 28 (Slater and Gordon Lawyers).

186 Roundtable 1 (professional stakeholders).

187 Submissions 19 (US Chamber Institute for Legal Reform), 25 (Dr Michael Duffy), 28 (Slater and Gordon Lawyers).

A litigation funder may also be contractually entitled to additional fees, such as a project management fee, upon crystallisation of certain events or timeframes.

2.190 Maurice Blackburn pointed out that funding agreements invariably specify the basis on which the fee is charged but that it is impractical to disclose estimated total amounts because they are not known until settlement. It noted that the Federal Court's requirement to disclose information about litigation funding costs is satisfied if class members have been given a document that properly discloses these charges, and this is likely to be the funding agreement.¹⁸⁸

2.191 IMF Bentham pointed out that compliance with a disclosure requirement would be difficult when the law firm does not hold the precise identity and contact details of all class members.¹⁸⁹ Slater and Gordon agreed:

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.¹⁹⁰

2.192 The Commission considers that an obligation to disclose information about the funding agreement should nevertheless be introduced. While logistical difficulties in contacting class members may be increasing, so too are the options for overcoming them. Experienced class action law firms are developing innovative methods of communicating effectively with large numbers of people.¹⁹¹ As the primary aim of class actions is to enable access to justice, it is essential to continue to give priority to reaching class members.

Obligation to disclose funding information

2.193 A number of submissions supported the introduction of a requirement, in the Supreme Court Practice Note, for lawyers to disclose litigation funding costs to class members on terms similar to those that apply in the Federal Court.¹⁹²

2.194 The Federal Court Practice Note sets out how lawyers should disclose legal costs and any 'litigation funding charges' to current (and potential) clients in class actions, both at commencement and during the proceedings. Litigation funding charges include any funding fee and any other charges (including those estimated) to be charged to class members.

2.195 The requirements regarding litigation funding charges include the following:

- The litigation funding agreement must be in writing.
- Any notification of litigation funding charges must be in clear terms, and provided as soon as practicable.
- The obligation is ongoing and applies to any material change to the charges.
- Failure to notify class members of the litigation funding charges may be taken into account by the Court at settlement.

188 Submission 13 (Maurice Blackburn Lawyers).

189 Submission 25 (IMF Bentham Ltd).

190 Submission 28 (Slater and Gordon Lawyers).

191 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 28 (Slater and Gordon Lawyers).

192 Submissions 10 (Victorian Legal Services Board and Commissioner), 11 (Litigation Funding Solutions), 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 28 (Slater and Gordon Lawyers).

- The obligation regarding disclosure of litigation funding charges is satisfied if class members have been provided with a document that properly discloses those charges.¹⁹³
- 2.196 The Commission agrees that the Federal Court Practice Note provides a useful approach to the disclosure of funding costs and considers there would be benefit in introducing similar provisions into the equivalent practice note issued by the Supreme Court. However, the Commission does not propose that the accompanying provisions regarding disclosure of legal costs should be incorporated because existing legal costs disclosure rules in Victoria are adequate.
- 2.197 Lawyers could be encouraged to disclose funding costs in conjunction with the disclosure of legal costs, which would ensure that class members are better placed to understand the cumulative effect.
- 2.198 The disclosure requirement should not be a significant burden on law firms. It would be similar to existing obligations, as explained by the Victorian Legal Services Board and Commissioner:
- Many plaintiff lawyers are already used to advising of other deductions from settlement monies, like Medicare and Centrelink repayments. The lawyers are in possession of the information and can reasonably be expected to be in a position to explain and disclose this information to class members, particularly its relationship to legal costs. Lawyers need to consider their duty to act in the best interest of their clients in the context of disclosure about features of the litigation funding agreement, the fee in its various scenarios and other matters such as opt out provisions for the litigation funder.
- The litigation funding fees are intricately related to the conduct of the litigation in class actions so the burden imposed by a Practice Note requirement does not appear significant.¹⁹⁴

Recommendation

- 5** The Supreme Court should consider amending its practice note on class actions to provide that, if a class action is funded by a litigation funder:
- (a) the representative plaintiff’s lawyers should notify class members (whether they are actual or potential clients), in clear terms and as soon as practicable, of any applicable litigation funding charges and any material changes to those charges
 - (b) the obligation to notify is satisfied if class members have been provided with a document that properly discloses those charges
 - (c) failure to meet the obligation to notify may be taken into account by the Court in relation to settlement approval under section 33V of the *Supreme Court Act 1986* (Vic).

Funding Information Summary Statements

- 2.199 The effectiveness of disclosure depends not only on the information being given, but also the form in which it is given. A number of submissions proposed that class members be provided with simplified information. In Chapter 4, the Commission makes recommendations to simplify and standardise, where possible, formal notices

provided to class members and to enhance the information about class actions that the Supreme Court publishes on its website. Recommendations are also made to simplify the information that lawyers provide about the proceedings.

- 2.200 With regard to information about funding costs, Allens proposed that class members should not only be provided with a copy of the funding agreement but also an accompanying notice which explains the material terms of the agreement and associated risks in Plain English.¹⁹⁵ Chartered Accountants Australia and New Zealand highlighted the need to set parameters around disclosure so that it provides ‘relevant, comparable and understandable’ information about the terms of the funding, charges and additional fees or arrangements, including any indemnities given to the representative plaintiff by the funder.¹⁹⁶ Michael Duffy proposed that, before entering a funding agreement, the litigation funder should be subject to a statutory requirement to provide clients with a Key Facts disclosure document that sets out key conditions and litigation funding charges in a standard and simplified form.¹⁹⁷
- 2.201 Some litigation funders already provide simple summary information to potential clients. This practice should be encouraged under any national regulatory scheme. Some law firms publish useful information for class members on their websites, written in a simple style. Funders and lawyers with less experience in class actions or involved in smaller claims tend to provide fewer details than those with a more established presence in the market.
- 2.202 The Commission considers that there would be benefit in publishing standard key facts about the funding arrangements of class actions on the Supreme Court’s website. It would be published in conjunction with a summary statement about the class action (recommended in Chapter 4). This measure would provide a supplementary means of contacting class members who are not known to the lawyers conducting the class action. It would also ensure that class members in all funded proceedings are aware that a litigation funder is involved and the implications for them generally.
- 2.203 The standard information would be drawn from a Funding Information Summary Statement that the lawyers would provide to the Supreme Court. The key facts to be provided should be identified by the Supreme Court in consultation with stakeholders. They should be brief and not provide a tactical advantage to the defendant. They could include, for example, the identity of the litigation funder, the basic terms of the agreement, the basis on which the funding fee is calculated, whether the funding fee adds to or replaces other costs if the litigation is successful, and where to obtain more information.

Recommendation

- 6** The Supreme Court should consider amending its class action practice note to require the representative plaintiff’s lawyers in funded class actions to provide to the Court, when the writ for the proceeding is filed, a brief Funding Information Summary Statement that accurately sets out litigation funding charges and key conditions in a simplified form, for publication on the Supreme Court’s website.

195 Submission 12 (Allens).

196 Submission 4 (Chartered Accountants Australia and New Zealand).

197 Submission 22 (Dr Michael Duffy). The standard form document would be analogous to that prescribed for insurance contracts in s 33D of the *Insurance Contracts Act 1984* (Cth). While endorsing the provision of standard key facts, the Commission considers that any statutory requirement to disclose should be imposed under a national regulatory scheme.

Disclosure to other represented disputants

2.204 The Commission does not recommend imposing obligations on lawyers in funded proceedings other than class actions to disclose information to any represented disputants. It is reasonable for the lawyer concerned to expect a client who brings proceedings on behalf of others to be conveying to them information about the progress of the proceedings and be directly answerable to them. This is unlike the position of the representative plaintiff in class actions, who is not appointed by the class members and is not their agent or intermediary.

2.205 The client would be advised about the litigation funding agreement when deciding whether to enter it. In addition, the need to disclose and explain the costs of the proceedings is well established in current regulations, and keeping the client informed of progress is inherent to the responsibilities of legal practice.

2.206 In funded proceedings other than class actions, the client may also be directly informed by the litigation funder about the terms of the agreement, as observed by Litigation Funding Solutions:

It is important to note that every case involving litigation funding is different. In many cases the funder has no relationship with the lawyer at all. From LFS' experience however, when a litigation funder agrees to fund a case on a bi-lateral basis, they do so by entering into a litigation funding agreement with the plaintiff. This means that the plaintiff and the funder are, usually, the only two parties to the contract. Consequently, this means that the plaintiff is aware of the cost structure and is up to date with any changes to the funding agreement. Therefore, the lawyer is not in a position to withhold any funding charges, or some such, in the first place.¹⁹⁸

2.207 IMF Bentham, while not objecting to it, submitted that it would not be necessary to introduce a specific obligation on lawyers to disclose funding information in funded proceedings other than class actions:

When IMF funds proceedings other than class actions, it enters into a litigation funding agreement with the plaintiff client. The litigation funding agreement discloses information about the litigation funding fee (or commission) and reimbursement of costs and any other charges that may be payable to IMF in the event of success. IMF and the plaintiff enter into a litigation funding agreement after IMF has performed due diligence on the proposed claim and has made a funding proposal to the plaintiff. In all cases, IMF recommends that its prospective funded plaintiffs obtain independent legal advice as to the meaning and effect of its litigation funding agreements before entering into the litigation funding agreement. It is difficult to conceive of a situation in which a plaintiff would enter into a litigation funding agreement with a commercial funder without being aware of the litigation funding commission, the reimbursement of costs and other charges payable to the litigation funder.¹⁹⁹

2.208 All but one submission that commented on the issue agreed that an additional disclosure obligation on the lawyer is not warranted.²⁰⁰ The Commission agrees.

198 Submission 11 (Litigation Funding Solutions).

199 Submission 25 (IMF Bentham Ltd).

200 Submissions 11 (Litigation Funding Solutions), 13 (Maurice Blackburn Lawyers), 14 (LCM), 15 (Phi Finney McDonald), 17 (Adley Burstyner), 21 (Law Council of Australia), 22 (Dr Michael Duffy). The US Chamber Institute for Legal Reform proposed disclosure requirements as part of a comprehensive regulatory regime for the litigation funding industry: Submission 19.

Litigation funding and contingency fees

- 52** Introduction
- 52** Whether lifting the ban on contingency fees would mitigate issues with litigation funding practices
- 63** The introduction of contingency fees in class actions

3. Litigation funding and contingency fees

Introduction

- 3.1 While it is standard practice for litigation funders to be paid a percentage of the amount recovered if the claim is successful, lawyers are not permitted to charge on this basis. The practice is prohibited nationally, under state and territory legislation.¹
- 3.2 The Commission has been asked to report on whether removing the prohibition on law firms charging contingency fees would mitigate the issues presented by litigation funding (except in personal injury, criminal and family law matters and other areas in which contingency fees would be inappropriate). Three core issues have been identified, as discussed in Chapter 2: case selection, costs and client interests. They encapsulate the limitations of litigation funding as a means of providing access to justice, in the sense of enabling a person to use the legal system to enforce their rights, and ensuring a fair process and outcome.
- 3.3 There has been debate for many years about whether lawyers should be able to charge contingency fees, and it remains unresolved. It is a national issue—any changes should be introduced across all jurisdictions and be based on far broader considerations than the impact on the practice of litigation funding. However, responding to the terms of reference has provided an opportunity to consider the scope for market forces to improve access to justice, and the safeguards that would need to be put in place to avoid unintended consequences if the ban were lifted. The first part of this chapter sets out the Commission’s consideration of each of the three issues.
- 3.4 The second part of this chapter puts forward a reform proposal for lawyers to receive a percentage share of the proceeds of a class action, under a common fund order made by the Court and subject to conditions that address concerns about costs and conflict of interest when contingency fees are charged. It would provide a means of reducing the costs and risks to representative plaintiffs in class actions that do not involve a litigation funder, in confined and controlled circumstances, without lifting the general ban on contingency fees.

Whether lifting the ban on contingency fees would mitigate issues with litigation funding practices

- 3.5 To mitigate issues with litigation funding practices, lifting the ban on lawyers being able to charge contingency fees would need to:
 - expand the availability of funding to cases that are uneconomic for litigation funders to support

- reduce costs to plaintiffs
- ensure that client interests are not sidelined in favour of the funder's financial interests.

3.6 In theory, enabling lawyers to charge contingency fees would foster competition to fund the types of claim that litigation funders currently invest in, and make funding available to claims that do not presently attract funding. Stakeholders acknowledge that there would be greater competition, but disagree about how much, in which part of the market, and with what consequences.

Case selection

3.7 The first issue is whether lifting the ban would broaden the range of meritorious cases that attract funding. Would permitting lawyers to charge contingency fees enable greater access to justice generally by making funding available for small claims, or by broadening the types of claim that are brought as class actions?

3.8 Many submissions advanced the view that lifting the ban would lead to a wider range of cases being funded, although they identified a variety of reasons for this and drew different conclusions about whether or not it would be desirable.

Smaller claims

3.9 It is widely thought that lifting the ban would result in smaller and lower-value claims being funded. This prospect was welcomed by stakeholders who supported the introduction of contingency fees.

- Maurice Blackburn argued in its submission that lifting the ban would increase market competition and put downward pressure on the costs of litigation. Cases that would not be funded by a litigation funder in the current market could proceed largely because they would not need to generate the high returns that litigation funders usually require.²
- Slater and Gordon suggested that law firms would be more willing to bear the risk of prosecuting lower-value claims if exposure to the risk could be spread across a number of differently funded cases, including cases for which contingency fees are charged but also cases that are charged on a 'no win, no fee' basis or financed by a litigation funder.³
- Warren Mundy also considered it likely that many small and isolated litigants who are currently overlooked due to the economies of scale inherent in the businesses of litigation funders could proceed if the ban were lifted. He suggested this would especially occur if legal practices were able to specialise and build up a client portfolio that diversified the firm's risk exposure without needing recourse to the capital required by third-party funders.⁴
- The Consumer Action Law Centre endorsed the recommendations of the Productivity Commission, which found that lifting the ban would provide access to justice for people who do not qualify for free or low-cost legal assistance services but cannot afford a private lawyer (known as the 'missing middle').⁵
- The Australian Shareholders' Association said that lifting the ban would allow smaller-scale class actions of merit to be tested.⁶

2 Submission 13 (Maurice Blackburn Lawyers).

3 Submission 28 (Slater and Gordon Lawyers).

4 Submission 8 (Dr Warren Mundy).

5 Submission 24 (Consumer Action Law Centre).

6 Submission 23 (Australian Shareholders' Association).

- 3.10 Maurice Blackburn operates a litigation funding business, Claims Funding Australia Pty Ltd, that funds other law firms in general commercial litigation. It routinely sees cases which are uneconomic to fund or would be run more favourably to clients under a contingency fee basis. The following is an example of how contingency fees would enable smaller claims to be pursued:

Consider a case for a small business claiming \$2 million with a litigation budget of \$250,000. If the small business cannot afford to pay the legal fees (and many could not) then no matter how meritorious the claim, it is unlikely under current legislative restrictions that it will be run: litigation funding is unlikely to be available (and if it is, it will likely see more than half the recovered sum paid in legal fees and commission) and experience suggests a case like this is unlikely to be run on a conditional fee basis. However, the case could be run on a 25% or 30% contingency fee.⁷

- 3.11 Not all submissions welcomed the prospect of a greater number of lower-value claims being funded. The US Chamber Institute for Legal Reform warned that lifting the ban would open the Australian legal system to some of the excesses experienced in the United States:

Many small firms will, for the first time, have the opportunity to ‘take a punt’—not just for their normal fee plus an uplift but rather for what some will see as a significant windfall profit. However, as Associate Professor Michael Legg and his colleagues have observed in the context of the class action market, an increase in the overall number of claims is likely to see a reduction in the quality and merit of new claims. In other words, more marginal claims are likely to be accepted and commenced. ... even in Australia with the risk of an adverse costs order, there would likely be an increase in unmeritorious claims with the introduction of contingency fees, as there is in the United States, because most cases settle.⁸

- 3.12 Comparisons with jurisdictions that have experience with contingency fees are instructive in identifying possible unwanted consequences, even though they are poor predictors of what will happen in Australia in different circumstances and at a different time. The Commission notes the concern that lifting the ban could encourage unmeritorious litigation, as has occurred in the United States, but considers the risk to be manageable. This is in part due to the operation of the costs-shifting rule in Australia, which, by requiring an unsuccessful party to pay adverse costs, acts as a disincentive to commencing unmeritorious litigation.

- 3.13 The introduction of contingency fees for legal services in Canada, where the costs-shifting rule applies, does not appear to have replicated the experience of the United States. Jasminka Kalajdzik, an Associate Professor at the University of Windsor and a co-leader of a current project by the Law Commission of Ontario on class actions, has conducted research into the factors that determined the selection decisions of members of the class action plaintiff bar in Canada. The results show that the risk of adverse costs acts as a disincentive to lawyers commencing unmeritorious litigation.⁹

- 3.14 A different approach has been taken in England and Wales, where lawyers have been permitted to charge contingency fees, or damages-based agreements (DBAs), for litigation and arbitration proceedings since 1 April 2013. The introduction of DBAs was part of a package of reforms to control costs and promote access to justice. Contingency fees may be charged in all areas of litigation, including personal injury claims, subject to different caps. However they may not be charged in the class action procedures introduced in October 2015 for competition law claims.¹⁰ This exception was intended to reduce the risk that the opt-out nature of class actions would give rise to a ‘litigation

7 Submission 13 (Maurice Blackburn Lawyers).

8 Submission 19 (US Chamber Institute for Legal Reform).

9 Consultation 5 (Associate Professor Jasminka Kalajdzik). The research will be discussed in a book to be published by UBC Press in 2018: *Class Actions in Canada—The Promise and Reality of Access to Justice*.

10 *Competition Act 1998 (UK) s 47C(8)*.

culture'.¹¹ The DBA regulations do not specify whether lawyers who charge contingency fees are liable for any adverse costs.¹² There has been limited uptake of DBAs in litigation, possibly due to the nature and complexity of the regulatory controls and the impact of costs-shifting.¹³

Higher value claims

3.15 Allens predicted that, rather than funding more lower-value claims, lifting the ban would increase competition for the high-value/lower-risk claims that are already well serviced by litigation funders or lawyers charging on a 'no win, no fee' basis. This was expected because they would apply the same selection criteria as litigation funders.

3.16 The increased competition could drive down the fee charged for funding those types of claim, but not direct funding to new areas.

the areas of the greatest unmet legal need of which we are aware are clients using homeless persons' legal clinics, people with mental illnesses, impecunious litigants and remote Aboriginal and Torres Strait Islander communities. The claims relating to these groups typically relate to consumer, government and housing matters which are less likely to result in large awards of damages.

In our view, lifting the prohibition on contingency fees is unlikely to address this unmet legal need. As contingency fees are charged by reference to the value of the claim, lawyers will likely replicate the commercial approach taken by third party litigation funders when selecting which cases to fund. Further, if the areas of unmet legal need identified above are not already assisted by lawyers acting pro bono or charging on a conditional fee basis, it is difficult to see how lawyers charging contingency fees would address this gap.¹⁴

3.17 Similarly, IMF Bentham said that there is no evidence to show that lawyers charging contingency fees would fund a greater range of cases than litigation funders, including social justice cases.¹⁵

Conclusion

3.18 It is possible that lifting the ban would affect the litigation funding market in all of the ways predicted. Large law firms that can raise the necessary capital could compete with litigation funders to fund high value claims; smaller law firms could pursue a greater number of lower value claims.

3.19 An increase in the availability of funding for lower-value claims would accelerate a trend that is already evident within the litigation funding industry. There is some confidence that litigation funders will fund a more diverse selection of claims, whether or not the ban on contingency fees is lifted. Slater and Gordon said that the present tendency of litigation funders to invest in shareholder and investor class actions is a product of the relative infancy of the class actions regime and acceptance of third-party litigation funding. It submitted that the trend towards diversification of the matters which attract funding will continue.¹⁶ IMF Bentham also maintained that the market is changing. It said that funders, and particularly some new entrants to the market, are increasingly looking at funding smaller claims.¹⁷

11 House of Commons Business Innovation and Skills Committee, *Draft Consumer Rights Bill (2013)* vol 1, 68.

12 Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (2015) 108–112.

13 Peter Sharp and Morgan Lewis, *UK Contingency Fees: A User's Guide for the In-House Lawyer* (January 2015) Financial Worldwide <<http://www.financierworldwide.com>>; James Delaney, *Sharing the DBA Fee Risk* (25 May 2017) <<http://www.thelawyer.com>>; Law Society of England and Wales, 'Impact of the Jackson Reforms on Costs and Case Management' (Paper prepared for Civil Justice Council Conference, 21 March 2014) 4; Civil Justice Council, *The Law and Practicalities of 'Before the Event' (BTE) Insurance: An Informational Study* (November 2017) 14. Proposals to amend the DBA regulations to clarify and extend the use of contingency fees were made in 2015 but have not been introduced: see Civil Justice Council, *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (August 2015).

14 Submission 12 (Allens).

15 Submission 25 (IMF Bentham Ltd).

16 Submission 28 (Slater and Gordon Lawyers).

17 Submission 25 (IMF Bentham Ltd).

- 3.20 Case selection decisions may also be affected by procedural decisions of the court. According to Phi Finney McDonald, a broader range of cases is likely to be funded in the future because of the rise of the common fund order, which removes the need to sign up class members to funding agreements. If the ban on contingency fees were lifted, common fund orders would offer the advantage of not requiring lawyers to secure retainers from a substantial proportion of class members individually.¹⁸
- 3.21 Although the likely impact that lifting the ban would have on the number of unmeritorious claims needs to be considered, it appears to pose no greater risk than that arising from new litigation funders investing in smaller claims. Both the lawyers and the litigation funders would be making commercial decisions that limit potential losses. However, this is not to say that they would select the same cases. The fact that most class actions in Victoria, including the largest, have been conducted without the support of a litigation funder, indicates that law firms are prepared to carry commercial risk to support meritorious claims that do not meet the selection criteria that litigation funders normally apply.

Costs

- 3.22 The second issue is whether lifting the ban would reduce the costs of bringing proceedings. Views differ on whether contingency fees would result in lower costs compared to current billing methods, and whether, if they were lower, the client would receive the same level of protection against the risks and upfront costs of the litigation.

Comparative costs

- 3.23 Simply removing the need to pay a third-party funder suggests that the costs would be less. The Australian Shareholders' Association pointed out that lifting the ban could improve the returns to class members because the costs overall would be substantially lower than the combined costs of a third-party funder and lawyer.¹⁹
- 3.24 This view is supported by analysis conducted by Maurice Blackburn. Maurice Blackburn has compared the distribution of the total settlement amount of the 14 funded class actions it has settled since 2006, with the likely outcome if a funder had not been involved and the firm had been able to charge a contingency fee. Whereas 60 per cent of the total settlement amount in these cases was returned to the claimants, 75 per cent would have been returned if a contingency fee of 25 per cent had been charged.²⁰
- 3.25 The outcome of these cases is similar to results reported by IMF Bentham. The cases funded by IMF Bentham have returned approximately 62 per cent of the settlement value to the claimants, after a share of 38 per cent was paid in legal and funding costs.²¹
- 3.26 Maurice Blackburn and IMF Bentham act in larger cases where there are economies of scale. In smaller settlements, the proportion allocated for costs and funding charges is generally higher and the return to the claimants lower.²²
- 3.27 Based on the calculations by Maurice Blackburn, clients would be better off than under existing third-party litigation funding arrangements if the contingency fee is less than 37 per cent. However, a comparison with current costs when a litigation funder is not involved may not be as favourable: contingency fees could be greater than what is presently charged through time-based billing alone.²³ In these cases, the clients would be worse off than now.

18 Submission 15 (Phi Finney McDonald).

19 Submission 23 (Australian Shareholders' Association).

20 Submission 13 (Maurice Blackburn Lawyers).

21 Submission 25 (IMF Bentham Ltd).

22 Submission 13 (Maurice Blackburn Lawyers).

23 For example, in Victorian Supreme Court personal injury cases in 2009 and 2010 with recoveries over \$1 million dollars, legal fees equated to about 5% of the recovered amount: Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger). The terms of reference exclude personal injury cases from the litigation for which contingency fees could possibly be charged.

- 3.28 Current billing methods are likely to be retained if they would result in a higher payment to the law firm than a contingency fee. Lawyers in England and Wales have been able to charge contingency fees since 2013 but there is little evidence they are doing so. It appears that contingency fees are charged only where there is a clear financial advantage for lawyers equal to the risk taken. Otherwise, the clients are charged another way.²⁴
- 3.29 The extent to which charging a contingency fee would increase or decrease the costs to the client in a particular case, compared to existing cost arrangements, would depend on the terms of the costs agreement. Slater and Gordon noted that the fee could be stepped:

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.²⁵

Comparative risk

- 3.30 When comparing contingency fees charged by lawyers and funding fees charged by litigation funders, it is important that they cover the same risks. Currently, lawyers who act on a ‘no win, no fee’ basis bear the risk of not being paid for their legal work, but the client remains liable for all other costs in the event of an unsuccessful outcome. This risk is reflected in the uplift fee that lawyers can charge in addition to the fees for the work performed if the litigation is successful. To match the standard risk coverage that litigation funders provide, law firms charging contingency fees would also need to cover the client for any security for costs order and, if the litigation is unsuccessful, for disbursements and adverse costs.
- 3.31 This appears to have been provided for in the comparative analysis by Maurice Blackburn, which compared a single deduction for ‘funding charges and legal costs’ with a single contingency fee of 25 per cent.²⁶ However, while a large firm such as Maurice Blackburn could match the risk coverage that litigation funders provide, smaller firms would be unable to do so.
- 3.32 For this reason, IMF Bentham argued that lifting the ban on contingency fees would not reduce costs, adding that too much pressure to do so could cause litigation funders to withdraw from the market:

there are very few law firms that would have the capital and risk appetite to fund class actions, including disbursements and provide adverse costs cover. It is likely that law firms will still look to third party litigation funders to help finance some of the proceedings and/or costs cover. There is also a risk that any changes that put too much downward pressure on funding fees could end up causing less competition in the litigation funding market if funders’ return on investment became too low to absorb the risks they are required to undertake, particularly adverse costs risks.²⁷

24 John Peysner, ‘Impact of the Jackson Reforms on Costs and Case Management: Some Emerging Themes’ (Paper presented at the Civil Justice Council Conference, 21 March 2014) 6, 10. The reasons for the reluctance to charge contingency fees are unclear and may include confusion about regulation and the impact of costs shifting, and the conservatism of the legal profession. See also: Law Society of England and Wales, ‘Impact of the Jackson Reforms on Costs and Case Management’ (Paper prepared for the Civil Justice Council Conference, 21 March 2014) 4.

25 Submission 28 (Slater and Gordon Lawyers).

26 Submission 13 (Maurice Blackburn Lawyers).

27 Submission 25 (IMF Bentham Ltd).

- 3.33 Litigation Capital Management said that the cost of litigation funding is unlikely to be mitigated because funding fees are not determined by the level of competition.

Funding Costs charged by funders are a reflection of the considerable risks and costs involved in financing a third party's litigation.

Despite there being significant competition in the litigation funding market, the funding fees offered by Australian litigation funders are not greatly varied, and LCM submits that over the life of the litigation funding industry, the economics of funding have driven funders' pricing to their present rates.... it's unrealistic to expect that the lawyers' financial considerations would not drive their contingency fee rates into a similar range to that of litigation funding commissions.

Consequently, LCM submits that it is 'far from given' that lifting the ban would mitigate the cost of litigation funding.²⁸

- 3.34 These observations by litigation funders underscore the fact that the rate charged for a contingency fee, like that charged for litigation funding fee, is a commercial decision. Decisions of this type can assist in achieving public interest goals but may need to be harnessed to them by regulation. Many submissions suggested control measures that could be put in place if the ban were lifted. They are discussed later in this chapter at [3.77]–[3.93].

Conclusion

- 3.35 Whether lifting the ban on contingency fees would reduce the costs to litigants would depend on the size of the law firm and the size of the claim. A law firm that has access to the considerable amount of capital required could compete with litigation funders to invest in large commercial claims and high value class actions. Even if the contingency fee it charged were no less than the funding fee of its competitors, the cost to the client would be lower because there would be only a single deduction from the settlement amount. In proceedings funded by a litigation funder, the client is charged for legal costs in addition to the funding fee. For Victoria's class action regime, where litigation funders infrequently participate, the impact of greater competition at this end of the market would be less than in class actions at the federal level.
- 3.36 The potential impact on smaller claims is unclear. The primary benefit of lifting the ban is that it would provide a funding option that enables pursuit of claims that are not suitable for litigation funding or charging on a 'no win, no fee' basis. However, law firms would not confine the claims for which contingency fees are charged to those within this category. It is reasonable to expect contingency fees to be charged for some types of claim that previously would have been pursued, at less cost to the client, on a 'no win, no fee' basis.
- 3.37 For the client, the payment of a contingency fee should provide the same or similar protection from the financial risks and cost burdens of pursuing the claim as is currently provided by litigation funders. Moreover, the overall costs to the client should not increase as a result. These requirements indicate that any introduction of contingency fees for legal services would need to be carefully regulated.

Client interests

- 3.38 The third issue concerns the risk that the financial interests of the funder will prevail over those of the plaintiff in decisions about the way in which the litigation is conducted and resolved. If lawyers were also permitted to charge a fee that is determined by the financial outcome of the litigation, the risk would shift to them. The question for consideration is whether lawyers charging a contingency fee would manage the risk as effectively as, or better than, litigation funders.

- 3.39 The comments made in submissions and during consultations put forward arguments about the possible impact of the ban on the independence of lawyers and their ability to manage the conflict between their interests and those of their clients.

The independence of lawyers

- 3.40 The prohibition on lawyers being able to charge contingency fees arises from the need to avoid perverse incentives. Lawyers have fundamental duties, first to the court and the administration of justice, and, secondly, to their clients. Their ethical and professional obligations pervade all aspects of the legal services they provide. Stakeholders argued that lifting the ban on contingency fees could potentially compromise the independence of lawyers and fundamentally change their relationship with their clients, because the lawyer would have a direct financial interest in the outcome.²⁹
- 3.41 Several submissions contended that not only would the conflict of interest issues that arise when a litigation funder is involved in litigation shift to lawyers who charge contingency fees, the issues would get worse.³⁰ The Victorian Legal Services Board and Commissioner expressed concern that lawyers would be unable to manage the risk:
- In the class action context, allowing lawyers to charge contingency fees does not remove the conflict of interest inherent in accessing a separate litigation funder, it only shifts the conflict directly onto the shoulders of the lawyer, a burden that in our view will be too much to bear for some.³¹
- 3.42 The Victorian Legal Services Board and Commissioner indicated that some lawyers would be less inclined to act in family law, criminal and personal injury matters, for which contingency fees could not be charged.³² Comments from the healthcare sector raised the possibility that lifting of the ban on contingency fees would lead to predatory and harmful advertising, where lawyers deliberately focus on a person's concern about their health and that of family and friends to generate business.³³
- 3.43 It was further suggested that the change to the power balance between lawyers and clients if the lawyer were also the financier would weaken the client's ability to negotiate the fee and could lead to an increase in unmeritorious litigation.³⁴ The lawyer would have complete control over the litigation due to the asymmetry of information.³⁵
- 3.44 This unequal balance of power and information was contrasted with the relationship that currently arises between the litigation funder, lawyer and client in funded class actions. Although the tripartite structure itself creates conflicts of interest, it is a means of providing checks and balances, sharing power and ensuring that conflicts of interest are managed.³⁶
- 3.45 Allens argued that lifting the ban would threaten the balance that the High Court sought to achieve in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd*³⁷ when it permitted third-party litigation funding because the independent lawyer was a bulwark for the client against the funder's commercial interests.³⁸ Litigation Capital Management said that it is impossible to see how the conflict issues that arise in a tripartite funding arrangement could be mitigated by merging the interests of two of the three parties:³⁹

29 See, eg, Submissions 11 (Litigation Funding Solutions), 25 (IMF Bentham Ltd), 27 (Ashurst).

30 Submissions 25 (IMF Bentham Ltd), 20 (Healthcare companies and businesses).

31 Submission 10 (Victorian Legal Services Board and Commissioner).

32 Ibid.

33 Submission 20 (Healthcare companies and businesses).

34 Submission 27 (Ashurst).

35 Submission 25 (IMF Bentham Ltd).

36 Ibid; Submission 27 (Ashurst).

37 (2006) 229 CLR 386.

38 Submission 12 (Allens).

39 Submission 14 (LCM).

in practice, the separation between the funder and the lawyers, the funder's limited ability to take steps without the lawyers' involvement and the litigant's approval, and the lawyers' overriding duty to act in the interest of the litigant, all serve as effective safeguards for that litigant's interests.

Presently, the lawyers can advise a litigant to take a course that may be contrary to the interests of the funder. However, if the lawyers are the funder, they will be constantly faced with decisions on how and when to disclose specific conflicts to clients, and how and when to advise clients against the lawyers' own interests. The resulting minefield is unlikely to be entirely transparent and cannot be said to mitigate any issue said to be presented by the practice of litigation funding.⁴⁰

Ability to manage conflicts of interest

3.46 Supporters of lifting the ban on contingency fees argued that it would not fundamentally change the relationship between lawyers and their clients. Managing conflict of interest issues that arise would be well within the experience and competence of lawyers.

3.47 Charging a contingency fee has elements in common with the existing practice of charging on a 'no win, no fee' basis. In both instances lawyers have a financial interest in the outcome of litigation and could be placed in a position of conflict.⁴¹ The extent to which lawyers already have a significant financial interest in both funded and unfunded litigation was explained in the submission from Simone Degeling, Michael Legg and James Metzger:

Lawyers acting without litigation funding will typically act on a conditional fee basis, giving them a keen interest in the outcome. Indeed, with an uplift fee they have a clear interest in increasing the work they undertake. Where lawyers are paid by a litigation funder, so that they are not exposed to the risk of no recovery if the claim is unsuccessful, this still involves the lawyers investing their time and resources in the class action in the hope that they can carry out the necessary work so as to earn a fee. Moreover, even when the lawyers are being paid on a time basis by a funder, they may receive a success fee, or agree to part of their fee being held back until a successful outcome is achieved.⁴²

3.48 It is possible that lifting the ban would align the interests of lawyers and their clients. Billing for work performed carries an inherent conflict of interest because the lawyers stand to benefit from maximising the number of hours worked. When a contingency fee is charged, there is an incentive to resolve the litigation without inefficiencies and avoidable delays.⁴³

3.49 Finally, Slater and Gordon argued that if lifting the ban were to intensify conflicts of interest, the combination of lawyers' professional and fiduciary obligations and the existing regulatory regime provides appropriate safeguards against abuse or undesirable outcomes. Widespread problems have not emerged in the management of conflicts of interest when legal costs have been charged on a 'no win, no fee' basis. The Victorian Legal Services Board and Commissioner noted that there have been very few complaints about 'no win, no fee' arrangements and expressed the view that these arrangements operate well, providing 'substantial access to justice for many consumers of legal services in a manner that is proportionate and reasonable'.⁴⁴

40 Ibid.

41 Submissions 8 (Dr Warren Mundy), 28 (Slater and Gordon Lawyers).

42 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).

43 Submissions 8 (Dr Warren Mundy), 24 (Consumer Action Law Centre). Warren Mundy also suggested that resolving litigation more efficiently could reduce the demand on court resources.

44 Submission 10 (Victorian Legal Services Board and Commissioner).

Conclusion

- 3.50 Lifting the ban on contingency fees would not mitigate the conflict of interest issues arising from the practices of litigation funding. It would shift the burden of managing them to lawyers who charge contingency fees. In doing so, it would not relieve litigation funders of their need to manage conflicts of interest; nor would it cause the demise of the tripartite relationship in funded proceedings.
- 3.51 The Commission is not persuaded that there would be a fundamental change to the lawyer/client relationship if the ban were lifted. Charging contingency fees would be only one option among other billing methods. Among those methods is the ability to charge on a 'no win, no fee' basis, which already gives lawyers a financial interest, sometimes very significant, in the outcome of the litigation.
- 3.52 Concerns about the imbalance of power and information as between the lawyer and client, in the absence of a litigation funder, are valid but also would not be unique to circumstances where contingency fees are charged. The imbalance is the foundation of the lawyer's fiduciary duty to their client, which flows through the legal and ethical obligations of the legal profession. In contrast, the Commission notes that litigation funders tend to contract out of any fiduciary duty they may have to their clients.
- 3.53 While lifting the ban might not introduce new conflicts of interest for lawyers, it would intensify the risks. The financial incentives presented by charging contingency fees would be stronger than the prospect of receiving an uplift fee under a 'no win, no fee' arrangement if the litigation is successful. The risks borne by the lawyers in the event of an unfavourable outcome would be greater as well.
- 3.54 The existing rules and guidelines for the legal profession in managing conflicts of interest are comprehensive and more robust than those that apply to litigation funders. Nevertheless, any decision to lift the ban on contingency fees should impose limits, such as on the types of litigation for which contingency fees may be charged.
- 3.55 Although the professional obligations on lawyers discourage them from being excessively entrepreneurial, it is appropriate that legislation establishes boundaries specifically to protect clients from excessive legal costs or unfair contractual arrangements. This would seek to ensure that the onus is on lawyers not to cross the line, rather than on the client to seek redress when they do.

Response to the terms of reference question

- 3.56 Removing the prohibition on lawyers charging contingency fees might mitigate issues that arise with litigation funding practices but would not necessarily be a solution to access to justice and costs issues. The pressure of competition could reduce the costs in large commercial claims and class actions, although not many law firms would have access to sufficient capital to carry the risks of financing litigation at this end of the market. Claims that are too small or risky to be a viable investment for a litigation funder, and where the claimant is unable or unwilling to carry the risk of losing (even if reduced by a law firm charging on a 'no win, no fee' basis), may be able to be pursued.
- 3.57 The conflicts of interest that exist when a third party is involved in litigation would not be reduced. Rather, lifting the ban on contingency fees would intensify the risk that the lawyer's financial interest in the outcome of litigation will prevail over their duty to their client. However, lawyers are experienced in managing conflicts of interest and, compared to litigation funders, are subject to more extensive rules and obligations and stronger accountability mechanisms.

- 3.58 The likely impact of lifting the ban on lawyers charging contingency fees is uncertain because it would shift the basis on which commercial decisions are made in a changing market. The combination of the ban, the costs-shifting rule and the relatively rare use of ‘after the event’ insurance has facilitated the growth of the litigation funding industry in Australia.⁴⁵ Lifting the ban would affect the other two features of the legal landscape within which lawyers, litigation funders and insurers make commercial decisions.
- 3.59 While the result could improve access to justice and reduce costs, there is a need to ensure that the community, and the legal system, are protected against the potential downside. For example, the cost of litigation could increase overall if contingency fees became the default billing method; vulnerable people could be drawn into pursuing low-value claims for a minor share of any recovered amount; clients who are charged a contingency fee, on the basis that it transfers the financial risk to the lawyer, could also be charged for ‘after the event’ insurance that in practice transferred some or all of the risk to an insurer.
- 3.60 Problems such as these may not emerge, but whether they will should not be left in doubt if access to justice may be impeded. Where existing regulation does not provide adequate protection, further regulation should be introduced.
- 3.61 The Commission considers that the mitigation of issues with litigation funding practices is not, of itself, a sufficient reason to remove the prohibition on lawyers being able to charge contingency fees. The market is still small and litigation funders are likely to keep expanding and changing the services they provide and how they are delivered. Unmet demand for financial assistance in pursuing low-value claims is not the result of litigation funding practices.
- 3.62 The policy response to the unmet demand needs to be developed in a wider context and have broader goals. Lifting the ban on contingency fees could be part of that comprehensive policy response, as most recently recommended by the Productivity Commission following its wide-ranging review of access to justice arrangements. The regulatory controls introduced in this context would focus on the impact on the community and the justice system generally.
- 3.63 The need for regulatory controls should not prevent the ban being lifted. As a matter of principle, the Commission considers that lawyers should be able to charge contingency fees because it would provide another funding option for clients who are unable to bring proceedings without financial assistance. In the next section, the Commission recommends that lawyers be able to apply to the court to receive a percentage share of any recovered amount, subject to conditions. Victoria could introduce this reform at its own pace, as it would be confined to class actions under part 4A of the *Supreme Court Act 1986* (Vic). It would not remove the ban.
- 3.64 At the same time, the challenge of how to improve access to justice by permitting lawyers to charge contingency fees, with appropriate regulation, should continue to be pursued nationally. This could be achieved only with the coordinated leadership of law ministers, and an appropriate forum would be the Council of Attorneys-General, which operates under the auspices of the Council of Australian Governments.
- 3.65 The first task would be to develop an agreed strategy to draft model legislation for the Council’s consideration. This work could be undertaken, for example, jointly by Victoria and New South Wales in view of their shared regulation of the legal profession, or by the Commonwealth in connection with its response to the Productivity Commission’s recommendation on lifting the ban on contingency fees.

Recommendation

- 7 The Attorney-General should propose to the Council of Attorneys-General that the Council:
- (a) agree, in principle, that legal practitioners should be permitted to charge contingency fees subject to exceptions and regulation
 - (b) agree to a strategy to introduce the reform, including the preparation of draft model legislation that regulates the conditions on which contingency fees may be charged and maintains the current ban in areas where contingency fees would be inappropriate.

The introduction of contingency fees in class actions

- 3.66 Independently of any decision to remove the prohibition on lawyers charging contingency fees nationally, there is scope to improve access to justice by permitting lawyers to be paid a contingency fee in class actions, subject to certain conditions being met and the supervision of the court.
- 3.67 Class actions are an appropriate forum for lawyers to absorb the risks of litigation and be rewarded for this, because the representative plaintiff has a disproportionate exposure to the financial risk of an unfavourable outcome, compared to both the value of their own claim and the exposure of other class members. The risk is a significant disincentive to taking on the role and is only partly mitigated when lawyers act on a ‘no win, no fee’ basis.
- 3.68 In addition, the court has a strong supervisory role in class actions, particularly at the settlement approval stage, which ensures that all class members’ interests are taken into account and includes the power to approve, and in some circumstances modify, contractually determined costs.⁴⁶ The circumstances in which lawyers may be permitted a percentage share of any recovered amount can be controlled and contained.
- 3.69 A further reason to allow for contingency fees for lawyers in class actions is that it would introduce competition for litigation funders. As discussed above, costs to class members could be reduced by paying a single contingency fee to a law firm rather than a funding fee to a litigation funder plus legal costs. However, this is not a relevant consideration in Victoria because litigation funders tend not to participate in class actions in this jurisdiction.
- 3.70 Some guidance about the introduction and control of contingency fees in class actions may be found in Canadian experience. When the class action regime in Ontario was established, contingency fees were introduced to overcome the financial risks of losing a class action. Before then, contingency fees were prohibited. The ban on contingency fees in other areas of practice was subsequently lifted, except in family and criminal law matters (where the ban remains). However the distinction between class actions and other litigation continues to be recognised.

⁴⁶ As part of settlement approval, the Court may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court: *Supreme Court Act 1986* (Vic) s 33ZV(2). The Federal Court has indicated that under the equivalent section in the Commonwealth legislation it has the power, for example, to effectively modify ‘any contractual bargain dealing with the funding commission payable out of any settlement proceeds’ in the course of a settlement approval: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 504 (Beach J). See also *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [133]–[134], [157] (Murphy J); *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [26]–[31] (Middleton J).

- 3.71 The Law Society of Ontario has been reviewing the operation of contingency fees since February 2016 and has recommended a series of reforms in litigation other than class actions. It chose not to review contingency fees in class actions because of the very different context in which they are charged, notably the judicial review of legal fees and related third-party funding.⁴⁷ A contingency fee cannot be charged in a class action in Ontario without court approval, and it will cover all costs: legal costs, adverse costs risks and disbursements. Increasingly, judges in Canada prefer to determine the fee by reference to a percentage of the common fund.⁴⁸
- 3.72 While noting that the terms of reference specify that it would be inappropriate to permit contingency fees to be charged in personal injury matters, and agreeing that the ban should continue for individual personal injury claims, the Commission does not propose that personal injury claims should be excluded from the class actions for which contingency fees may be charged. To do so would prevent this funding option from being made available in meritorious mass tort class actions.

Common fund orders

- 3.73 The proposed mechanism by which contingency fees would be approved and supervised by the court in class actions in Australia is a common fund order. Common fund orders have been made by the Federal Court to allow litigation funding costs to be shared among all class members, including those who have not entered an agreement with the funder. The percentage amount that the funder receives is subject to approval or variation by the court. Common fund orders are discussed in Chapter 5.
- 3.74 The Commission proposes that the representative plaintiff be permitted to make an application to the court for a common fund for a 'litigation services' fee, whereby a court-approved fee is calculated as a percentage of any recovered amount and liability for payment is shared among all class members if the litigation is successful.⁴⁹ The litigation services for which the fee is payable would include legal costs, disbursements and all costs in connection with indemnifying the representative plaintiff against adverse costs and responding to a security for costs order if necessary.
- 3.75 Generally, all class members already contribute to the payment of legal costs, whether or not they have entered a costs agreement with the lawyers. When an 'all in' settlement is reached (as opposed to when a separate amount for legal costs is negotiated), legal costs, calculated on the basis of the work done in support of the litigation, are deducted from the settlement amount before the class members receive their share.
- 3.76 The notion that contingency fees should be able to be charged in class actions, with the approval of the court in each case, was raised with the Commission by legal stakeholders and judges. The use of common fund orders for litigation funding costs in Federal Court class actions appears to have enlivened discussion about permitting contingency fees in a similar way.⁵⁰ Michael Legg raised the possibility in 2015:

the adoption of a common fund approach for class actions does not have to coincide with the legalisation of contingency fees more generally. The class action is subject to close judicial management and requires court approval of key steps such as the provision of notices and approval of settlements. Extending that approach to lawyers and/or litigation funders' fees would (a) facilitate the class action in achieving its original goals of access to justice and efficiency while (b) providing essential oversight of a key

47 Law Society of Ontario, *Seventh Report of the Advertising & Fee Arrangements Issues Working Group* (November 2017) 12. <<http://www.lsuc.on.ca/advertising-fee-arrangements>>.

48 Consultation 5 (Associate Professor Jasminka Kalajdzic).

49 In practice, an application would be made for the lawyers to be appointed the funder of the class action, and then orders would be sought that all class members are liable to pay the lawyer's fee for legal services. The lawyer should not be required to have a costs agreement in place, to allow an open class.

50 See, eg, Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 227.

component of the class action regime that impacts the compensation achieved for group members.⁵¹

Conditions of approval

3.77 Approval of a common fund for a ‘litigation services’ fee would be subject to conditions that protect the representative plaintiff, and other class members, from excessive costs. In consulting about whether lifting the ban on contingency fees would mitigate issues with litigation funding practices, the Commission asked stakeholders to identify the measures that should be taken, if the ban were lifted, to ensure that the issues were in fact mitigated. There was a general agreement, from both supporters and opponents of lifting the ban, about what should be required. The most commonly suggested measures are summarised below.

Adverse costs and security for costs

- 3.78 A minimum requirement that lawyers who charge contingency fees should indemnify the representative plaintiff for adverse costs was widely identified. Litigation funders argued that the lawyers should be subject to the same potential liability to pay adverse costs as they are.⁵²
- 3.79 The US Chamber Institute for Legal Reform suggested a more flexible approach, in which the lawyer would be required either to indemnify the clients against any adverse costs or ensure that the client can meet any adverse costs order.⁵³ As the aim of permitting lawyers to charge contingency fees in class actions would be to enable the representative plaintiff to overcome the barrier caused by adverse costs, the Commission considers that it should be mandatory that the lawyer provide this indemnity.
- 3.80 Maurice Blackburn stated in its submission that it would support, if necessary, a requirement that lawyers charging contingency fees should provide security for costs if ordered by the court.⁵⁴ Security for costs is generally ordered in class actions involving a litigation funder and the Commission considers that lawyers should similarly relieve the representative plaintiff of this risk if they stand to receive a percentage share of the settlement or judgment amount.
- 3.81 In Chapter 5 the Commission recommends that the Court have an express statutory discretion to make a security for costs order or an order for adverse costs, taking into account, among other things, factors relevant to access to justice and the public interest.

Disbursements

- 3.82 The Commission considers that the contingency fee should cover the costs of disbursements. These can be significant amounts and including them in the fee would ensure that they are closely monitored and contained. As noted above, in comparing the costs of class actions funded by litigation funders to what the outcome would have been if they had been funded by lawyers on a contingency fee basis, Maurice Blackburn included the costs of disbursements within the contingency fee. This is the practice in Canada when contingency fees are charged.
- 3.83 If the litigation is successful, the other party is likely to contribute to the representative plaintiff’s costs of the proceedings (calculated on the basis of the work done, as at present). This contribution could be directed to the lawyers.

51 Michael Legg, ‘Contingency Fees—Antidote or Poison for Australian Civil Justice?’ (2015) 39 *Australian Bar Review* 244, 273. See also John Emmerig and Michael Legg, ‘Twenty Five Years of Australian Class Actions—Time for Reform’ (2017) 36 *Civil Justice Quarterly* 164, 172.

52 Submissions 11 (Litigation Funding Solutions), 25 (IMF Bentham Ltd). Dr Michael Duffy also submitted that lawyers should indemnify clients for adverse costs: Submission 22.

53 Submission 19 (US Chamber Institute for Legal Reform).

54 Submission 13 (Maurice Blackburn Lawyers).

Court determination of fee

- 3.84 The role of the court in determining the amount of the contingency fee is crucial in controlling costs and the risks of conflicts of interest. As Simone Degeling, Michael Legg and James Metzger observed, ‘the main issue is not embracing contingency fees but instead the more difficult issue of how to ensure that fees are charged in an appropriate manner that is fair to both lawyer and client’.⁵⁵ The court would need to consider whether a contingency fee is an appropriate billing method in the circumstances, and would have the discretion to refuse to approve an application on this basis.
- 3.85 As has been the practice with common fund applications in the Federal Court, the applicants would propose a percentage share, but this would be subject to review at a later stage of proceedings, most likely at settlement approval.⁵⁶ Delaying determination of the fee until the size of the class is more certain protects against the lawyers obtaining a windfall profit if the size of the class grows beyond expectations.⁵⁷
- 3.86 Some submissions called for a cap on the amount of an award that could be retained by a lawyer, to ensure that a significant proportion of compensation awards are paid to class members. The Consumer Action Law Centre suggested that a cap is necessary because cost disclosure alone would be unlikely to prevent exploitation. Class members may not understand the information they are given, or may accept an unreasonably high percentage fee because they feel that they have no choice.⁵⁸
- 3.87 In proposing that the ban on contingency fees be lifted, the Productivity Commission recommended that the percentages should be capped on a sliding scale for retail clients, with no percentage restrictions for sophisticated clients.⁵⁹ It did not recommend what the cap should be. Maurice Blackburn indicated that a cap of 30 to 35 per cent would be appropriate, reflecting its view that the introduction of contingency fees would reduce costs.⁶⁰ Slater and Gordon suggested 35 to 40 per cent, noting that this would position contingency fees in direct competition with litigation funders.⁶¹
- 3.88 The Commission considers that, as the court would determine the amount of the fee, a statutory cap is not necessary. It is preferable for the fee to be based on the features of the particular class action. If a statutory cap were imposed, lawyers would be likely to routinely seek the maximum amount, as they currently do when they act on a ‘no win, no fee’ basis and claim the full 25 per cent uplift. For similar reasons, the Commission does not consider that caps should be imposed on litigation funding fees.

Transparency

- 3.89 An advantage of charging a contingency fee is that it is simpler for class members to understand how the recovered amount will be apportioned and, as a result, might provide greater certainty about costs.⁶² This does not mean that there would be less need to be transparent about the terms of the contingency fee arrangement, the progress of the proceedings, and the likelihood of costs arising from the settlement distribution scheme. The Commission’s recommendations to improve clarity of communication with class members are discussed in Chapter 4.

55 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).
56 In *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, the Federal Court observed that it may not always be necessary or appropriate to decline to set the funding fee until settlement approval; it will depend on the circumstances: 195, 209, 221 (Murphy, Gleeson and Beach JJ).
57 Submission 27 (Ashurst).
58 Submission 24 (Consumer Action Law Centre).
59 Submission 8 (Dr Warren Mundy); Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 629; Recommendation 18.1.
60 Submission 13 (Maurice Blackburn Lawyers).
61 Submission 28 (Slater and Gordon Lawyers).
62 Roundtable 5 (consumers and clients).

- 3.90 The need for comprehensive disclosure requirements was raised as an important issue in submissions and discussions⁶³ and was recognised by the Productivity Commission in its recommendation that the ban on contingency fees be lifted.⁶⁴

No other fees or costs of the proceeding

- 3.91 Stakeholders endorsed the recommendation of the Productivity Commission that lawyers not be permitted to charge other fees, in addition to the contingency fee, in connection with the proceedings.⁶⁵ For example, they would be unable to charge an hourly rate for any services they provide in support of the litigation.
- 3.92 The Commission agrees and also considers that class members should not be charged any costs incurred by the lawyers to mitigate the financial risk of the litigation. For example, class members should not be required to pay for the premium on any ‘after the event’ insurance that the lawyers take out to cover the adverse costs risk.
- 3.93 However, settlement distribution costs would be payable separately, in accordance with the approved settlement distribution scheme. As there is no risk involved in the distribution process, legal costs incurred during settlement distribution would continue to be charged on the basis of the work completed. Chapter 5 contains recommendations to strengthen the Court’s ability to supervise these costs.

Common fund orders for litigation services in Victoria

- 3.94 Although regulated under state and territory legislation, the legal profession is progressively being brought under nationally consistent law. Lawyers in Victoria and New South Wales are regulated under the same Legal Profession Uniform Law. Clearly, a decision that would alter the regulation of the profession is not one for Victoria alone.
- 3.95 The provision concerning contingency fees in Victoria is section 183 of the Legal Profession Uniform Law, set out in full below. It does not directly prohibit lawyers from being paid a contingency fee. Rather, it prevents a law practice from entering a costs agreement under which a contingency fee is payable.
- (1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.
- Civil penalty: 100 penalty units.
- (2) Subsection (1) does not apply to the extent that the costs agreement adopts an applicable fixed costs legislative provision.
 - (3) A contravention of subsection (1) by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.
- 3.96 The Commission considers that this provision does not prevent lawyers from being paid a contingency fee in class actions in the Supreme Court, subject to the conditions outlined above. This is because:
- The Court may make such orders as it thinks fit about how settlement money is distributed when approving a settlement.⁶⁶

63 See, eg, Submissions 8 (Dr Warren Mundy), 23 (Australian Shareholders’ Association).

64 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 629; Recommendation 18.1.

65 Submissions 8 (Dr Warren Mundy), 23 (Australian Shareholders’ Association). Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 629; Recommendation 18.1.

66 *Supreme Court Act 1986 (Vic)* s 33V(2). Outside settlement approval, the Court has the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceedings: *Supreme Court Act 1986 (Vic)* s 33ZF.

- The ability to charge a ‘litigation services’ fee under a common fund order would not be dependent upon, or require class members to enter into, a legal costs agreement specifying a contingency fee. Rather, it would be determined by, and remain under the supervision of, the Court.
 - Already in Victorian class actions, the payment of legal costs does not depend upon execution of a legal costs agreement. If an ‘all in’ settlement is reached, class members will generally contribute to legal costs whether or not they have signed a legal costs agreement.
 - The legal costs agreement (executed by the representative plaintiff) would continue to provide for legal costs to be billed in accordance with the work performed. It would state that the amount that the lawyers would be paid would be subject to Court approval of an application for a ‘litigation services’ fee.
- 3.97 The Commission recommends that the Supreme Court Act be amended to provide the Court with the power to make a common fund order for the lawyers who are acting for the plaintiff to be paid a percentage of the recovered amount. Although the Commission does not consider it necessary to do so, the *Legal Profession Uniform Law Application Act 2014* (Vic) could also be amended to put beyond doubt that the amendments to the Supreme Court Act are not inconsistent with the operation of the Legal Profession Uniform Law regarding contingency fees.
- 3.98 The class action regime in Victoria has proved to be an effective means of providing access to justice but appears to be underutilised. On average, only five proceedings have been filed each year.⁶⁷ The Commission considers that permitting lawyers to receive a contingency fee, subject to the conditions discussed above, is a measured and contained means of ensuring that the class action regime in Victoria is meeting the objectives for which it was established.

Recommendation

- 8** Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to provide the Court with the power to order a common fund for a litigation services fee, on application by a representative plaintiff, whereby the fee is calculated as a percentage of any recovered amount and liability for payment is shared by all class members if the litigation is successful.

Approval of a common fund of this type should be subject to the following conditions, set out in legislation or the Supreme Court’s practice note on class actions, as appropriate:

- (a) An application for the order would be sought from the Court at the commencement of proceedings.
- (b) The percentage allocated for the fee would be indicated when the application is made but approved by the Court at an appropriate time, most likely at settlement approval.
- (c) The litigation services for which the fee is charged should include: all services provided by the law firm; provision for security for costs if required; disbursements; and an indemnity for adverse costs.

Class actions and access to justice

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4. Class actions and access to justice

Introduction

- 4.1 Class actions create economies of scale that make it financially viable to take legal action against a well-resourced defendant, such as a government agency or large corporation, to recover a small loss. By grouping individual claims from the same, similar or related circumstances, the cost of bringing proceedings can be spread across many claimants.
- 4.2 In this way, class actions have provided access to justice to thousands of Australians who otherwise would not have pursued a legal remedy because of the cost. For claimants who could have taken separate legal action, class actions have offered cost savings.
- 4.3 Class actions also reduce costs to defendants and the courts. Defendants are able to respond to multiple claims in one proceeding, saving the cost of separate proceedings. The burden on court resources is reduced by having fewer proceedings filed, although the intensive case management often required, and the court's role in supervising settlement approval, can be onerous.
- 4.4 In short, the fundamental advantage of class actions, compared to separate proceedings, is that they are more efficient. A disadvantage is that most class members have limited contact with the lawyers acting in proceedings and incomplete information about the cost, progress and likely outcome of the proceedings. This is inevitable because the lawyers cannot establish and maintain with all class members the degree of contact that they have with the representative plaintiff.
- 4.5 The terms of reference ask the Commission to report on a number of reform options to ensure that class members are not exposed to unfair risks and disproportionate cost burdens. The Commission's task is not to investigate whether class members are being treated unfairly or overcharged but to consider how to prevent these problems occurring. In doing so, the Commission has identified reforms that contribute to three broad objectives.
- 1) **Improving efficiency.** Measures that reduce delay and complexity also reduce costs. Although flexibility should be retained, there is a need for guidance and parameters that avoid, where possible, procedural and legal uncertainties that take time to resolve and add to the cost burdens borne by both defendants and plaintiffs. Proposals to improve efficiency by making the Supreme Court of Victoria's powers and expectations clearer are discussed in this chapter.
 - 2) **Strengthening accountability.** Class action lawyers have duties to all class members, not just those that have signed a legal retainer. The Court ensures that the interests of the whole class are taken into account in approving settlement or concluding a trial. Improving the means by which lawyers (and, through them,

litigation funders) are accountable to class members and the court reduces the risk of an unfair outcome. In this chapter, particular attention is given to greater transparency and better reporting obligations.

- 3) **Controlling costs.** Proposals to directly control legal and funding costs, and how they are shared, to protect class members from disproportionate cost burdens, are discussed in Chapter 5.
- 4.6 As noted in Chapter 1, the consensus conveyed to the Commission in submissions and during consultations is that Australia's class action regimes are generally working well, and that a particular strength that they have in common is the flexibility available to the courts in how they manage proceedings. The reforms suggested by the terms of reference, and by contributors to the review, have been considered in that context.
- 4.7 Some reforms discussed in this chapter recommend legislative amendments to give the Court power, or specify its existing discretionary power, in relation to certain matters. In making these recommendations, the Commission recognises that the Court, under part 4A of the *Supreme Court Act 1986* (Vic) and the *Civil Procedure Act 2010* (Vic), already has broad powers in class actions. However, recognising a specific power in legislation is desirable in some circumstances to underpin best practice and provide a clear source of power where this may not yet be determined.
- 4.8 While a number of its recommendations aim to ensure that Victorian class action law and practice are consistent with other Australian class action regimes, the Commission is mindful that the types of class action filed in each jurisdiction differ, as does the extent to which they involve litigation funders. These differences have influenced the practices and jurisprudence arising from each jurisdiction, and are important when considering reform options in Victoria. They are discussed in the next section.

Class actions in Victoria

- 4.9 The 85 class actions filed in the Supreme Court since the class actions regime commenced under part 4A of the *Supreme Court Act 1986* (Vic) represent an average of between four and five each year, though the numbers have fluctuated between zero and 16. Five were filed in 2017.¹
- 4.10 Approximately two-thirds of Victorian class actions have settled, resulting in the distribution of at least one billion dollars to more than 28,300 class members.² The two largest-ever class action settlements in Australia were secured under Victoria's class action regime.³
- 4.11 In terms of the number and variety of cases managed, Victoria's class action regime is second only to the Commonwealth's. The Federal Court manages the most active class action regime in Australia and, having been established in 1992, it is also the longest established. By 31 May 2017, 402 class actions had been filed in the Federal Court,⁴ and at least \$3.5 billion had been paid by defendants pursuant to judicially approved settlements.⁵

1 For more information, see Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2017) Ch 2.

2 Submission 35 (Professor Vince Morabito). Data as at 10 November 2017.

3 Both were brought on behalf of some of the victims of the 2009 'Black Saturday' bushfires. The class action brought on behalf of victims of the Kilmore East/Kinglake bushfire settled for almost \$500 million after a 16-month trial. The proceeding brought on behalf of victims of the Murrindindi/Marysville bushfires settled, on the first day of the trial, for \$300 million: Submission 13 (Maurice Blackburn Lawyers).

4 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 24.

5 This amount refers to the amount paid by respondents in settlements, not the amount received by class members: Vince Morabito, 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43, 55.

4.12 The range of class actions filed in the two jurisdictions are compared in Table 3.

Table 3: Number of class actions ever filed

Type of class action	Supreme Court of Victoria ⁶		Federal Court of Australia ⁷	
Mass tort	25	(29.4%)	15	(3.7%)
Investor	25	(29.4%)	69	(17.2%)
Shareholders	14	(16.5%)	66	(16.4%)
Product liability	9	(10.6%)	60	(14.9%)
Real estate owners	3	(3.5%)	13	(3.2%)
Persons wishing to reside in Australia	2	(2.4%)	31	(7.7%)
Borrowers/guarantors	1	(1.2%)	8	(1.9%)
Employees	0		55	(13.7%)
Consumer protection	0		39	(9.7%)
Franchisees, agents and/or distributors	0		13	(3.2%)
Other	6	(7.0%)	33	(8.2%)
Total	85	100%	402	99.8%

4.13 The differences in the types of class actions filed are significant. The Supreme Court has dealt with far more mass tort claims than the Federal Court, and continues to do so. The proportion of shareholder class actions filed in each jurisdiction is similar, but the last one filed in the Supreme Court was in April 2015.

4.14 Meanwhile, there has been a marked increase over the past five years in the number of shareholder claims being filed nationally, mainly in the Federal Court.

4.15 Although 25 investor claims have been filed in the Supreme Court—equal to the number of mass tort claims—16 of them were filed in response to the collapse of plantations group Great Southern.⁸ An investor class action has not been filed in the Supreme Court since May 2016. There was a surge in the number of class actions of this type being filed in the Federal Court after the global financial crisis of 2008. The number is now falling.⁹

4.16 A further point of difference between the two jurisdictions is in the way proceedings are funded. As discussed in Chapter 2, litigation funders have been involved in only 10 class actions filed in the Supreme Court—11 per cent of the total. Four of them were transferred to the Federal Court.¹⁰

4.17 Litigation funders are far more frequently involved in class actions in the Federal Court, where they have been involved in 26 per cent of all class actions. In the last five years, more than half of all Federal Court class actions have been financed by a litigation funder.¹¹

4.18 These differences are reflected in the procedural and legal developments in each of the regimes.

⁶ Data as at 10 November 2017, based on information provided by Vince Morabito.

⁷ Data as at 31 May 2017: Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 27.

⁸ *Clarke v Great Southern Finance Pty Ltd (in liq)* [2014] VSC 516 (11 December 2014).

⁹ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 29.

¹⁰ Submission 35 (Prof Vince Morabito).

¹¹ Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 33.

- 4.19 In Victoria, class actions are allocated between the Commercial Court and the Common Law Division of the Supreme Court. The Common Law Division manages proceedings founded, or concurrently run, in tort and breach of contract or statute. The Commercial Court hears cases of a commercial nature. In the Federal Court, class actions are allocated to a Docket Judge within the appropriate National Practice Area.
- 4.20 The Federal Court practice note on class actions provides detailed procedural guidance regarding the involvement of litigation funders; the equivalent Supreme Court practice note on class actions does not refer to litigation funders at all.
- 4.21 Compared to the Federal Court Practice Note, the Supreme Court Practice Note is less prescriptive, which allows for the flexibility needed in mass tort claims. Mass tort claims are complex to manage and the harm suffered by claimants is unique to the circumstances of the case and difficult to assess. Procedural guidelines that can be applied across all mass tort proceedings need to be more adaptable to the particular features of the claims than, for example, investor and shareholder class actions, where there is greater comparability of type and cause of loss (financial) between proceedings.
- 4.22 Because of the relative prevalence of funded litigation in its jurisdiction, the Federal Court has been at the forefront in developing law and procedure around the court's role in supervising litigation funding fees. An example is the Federal Court's approval of common fund orders, which allow litigation funders to obtain a court-approved funding fee from every registered class member, regardless of contractual arrangement.¹²
- 4.23 In the Supreme Court, settlement distribution, which is the process by which class members' individual claims are assessed and distributed, has presented a greater challenge. Settlement distribution in mass tort class actions is likely to be lengthy, and can account for approximately half the duration of proceedings. In comparison, it is likely to account for approximately a fifth of the duration of proceedings in shareholder class actions.¹³
- 4.24 While it is important to recognise the differences between jurisdictions, the Commission considers that the operation of each class action regime benefits from sharing a common procedural form. As discussed in Chapter 1, it is desirable that innovations continue to develop in a consistent manner across jurisdictions rather than creating, or appearing to create, arbitrary distinctions. Many of the reforms discussed in this chapter respond to innovations by the Federal Court that have not yet been applicable to class actions in the Supreme Court. However, they may be relevant in the future, not only to the management of class actions in Victoria but to the decisions made by lawyers about the jurisdiction in which they bring proceedings.

Improving efficiency in class actions

- 4.25 The efficiencies that can be achieved by class actions, as compared to multiple individual claims, were highlighted in the 1988 Australian Law Reform Commission (ALRC) report on grouped proceedings, which led to the introduction of class actions in the Federal Court: economies in the use of Court and legal resources; greater fairness for defendants; and time and cost savings for class members.¹⁴ At the same time, the ALRC acknowledged that these efficiencies would not be realised if the procedure was used inappropriately, and it considered that enabling the Court to take an active role in case management would help prevent this possibility:

12 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

13 Rebecca Gilson and Michael Legg, 'Settlement Distribution Schemes' (Speech delivered at the IMF Bentham and UNSW Class Action Conference, Sydney, 1 June 2017).

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

Grouped proceedings will sometimes be more complex and difficult to manage than other forms of litigation. The Court’s ability to control proceedings through directions hearings and taking a more active role in the management of the case will help to ensure that the costs incurred by the parties are less than the cost which would be incurred if the proceedings were all conducted as individual proceedings.¹⁵

- 4.26 Since the introduction of the Victorian regime in 2000, the Supreme Court of Victoria has demonstrated its willingness to actively supervise class actions to ensure not only that they are run efficiently, but also that the class action mechanism is not abused or used improperly.¹⁶ Many of the case management techniques adopted by the Court to enhance efficiencies are set out in the Supreme Court Practice Note.
- 4.27 While the Supreme Court Practice Note preserves the Court’s flexibility in managing different types of class actions efficiently, differential case management is a reactive process that is time- and resource-intensive for both the courts and the parties. Ultimately, parties pay the increased legal costs that arise from this more intensive management of proceedings.
- 4.28 Some types of class action may benefit from a more standardised, structured process. Comments were made in consultations and submissions about four areas of possible reform:
- **Certification.** It has been suggested that Victoria adopt certification requirements such as those that apply in class actions overseas. As a pre-trial process, certification requires the court, and the parties, to turn their minds to procedural issues, including questions of efficiency, before a class action is commenced. Certification is identified in the Commission’s terms of reference as a possible reform.¹⁷
 - **Powers of the Court under section 33N.** Instead of providing for a certification process, Victoria’s class action regime empowers the Court to discontinue a class action in a range of circumstances under section 33N of the Supreme Court Act. An expansion of the Court’s powers under this section may give greater support to achieving the regime’s efficiency aims.
 - **Multiple class actions.** Multiple class actions reduce efficiencies by increasing the burden on Court and defendant resources. A more formal approach to managing multiple class actions that are filed about the same subject matter has been proposed.
 - **Settlement distribution.** Settlement distribution can be a lengthy and expensive process, yet it has been given little attention in research to date.¹⁸ An increased emphasis on efficiency during settlement distribution, particularly in mass tort class actions, is considered desirable.
- 4.29 These issues are discussed in the sections that follow. In considering the need for reform, it is important to acknowledge that improving efficiency in class actions is not only a matter of court procedure. Innovations in technology allow courts, and parties, to streamline processes and significantly enhance efficiencies in large and complex litigations. Some of these innovations, such as electronic settlement distribution, have already been adopted in overseas jurisdictions, and may be relevant in Australian class actions in the future. The impact of new technology on class actions is discussed in Chapter 6.

15 Ibid 65.

16 See, eg, *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187 (20 July 2017).

17 The terms of reference direct the Commission to examine whether a certification requirement should be introduced in respect of class actions ‘and similar proceedings that involve a number of disputants being represented by an intermediary’. As discussed in Ch 2, there are important differences between class actions, where the representative plaintiff is not appointed by the class members and is not an agent or an intermediary for them, and other representative proceedings, where the intermediary is appointed on behalf of the participants, and is directly answerable to them. In the latter case, issues that certification aims to address, such as the adequacy of the representative plaintiff and the satisfaction of threshold issues, are not relevant. The Commission considers there is no need to investigate the introduction of certification in these proceedings.

18 Rebecca Gilson and Michael Legg, *Australian Class Action Settlement Distribution Scheme Design*, IMF Bentham Class Action Research Initiative Research Report No 1 (University of New South Wales, 2017) 2.

Certification

Current law

- 4.30 The certification of class actions is a formal process of obtaining court approval for a class action to commence. It requires a representative plaintiff to prove to the court, at a pre-commencement hearing, that certain preliminary criteria have been met and that the proceeding should commence as a class action.
- 4.31 Class actions in Australia do not include a certification process¹⁹ because the ALRC concluded, after considered deliberations, that certification does not protect parties or ensure efficiency:
- Class actions, like all litigation, are open to abuse. Because of the potential numbers involved and the fact that many group members may be absent, specific safeguards have been built into the Commission's recommended procedure to protect the interests of both group members and respondents. In the light of the recommended safeguards, the Commission sees no value in imposing an additional costly procedure [certification], with a strong risk of appeals involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency.²⁰
- 4.32 Instead of certification, a number of procedural factors influence how, and when, a class action is commenced.²¹
- 4.33 In Victoria, the claim must satisfy threshold requirements contained in section 33C of the Supreme Court Act, which must be set out in a writ in accordance with section 33H. Parties must also comply with the overarching obligations set out in the *Civil Procedure Act 2010* (Vic), which stipulate, among other things, that claims must have a proper basis and not be frivolous, vexatious or an abuse of process.²²
- 4.34 If the class action is properly constituted according to the threshold requirements, the Court still has the ability to prevent it from continuing as a class action under section 33N of the Supreme Court Act. Section 33N gives the Court the power to order that a proceeding no longer continue as a class action in a range of circumstances where that is in the interests of justice.²³
- 4.35 The Supreme Court also has access to traditional remedies to terminate a proceeding, such as those provided under the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
- 4.36 As reiterated throughout the Commission's consultations, a nationally consistent approach to class actions is desirable. Any changes to the way that class actions are commenced in Victoria, including the introduction of certification, could create an incentive to 'forum shop' if not introduced on a national basis.²⁴ Several submissions highlighted the importance of national consistency in class action practice, including those calling for certification. Ashurst observed that introducing certification in only one class action jurisdiction is unlikely to promote efficiency or access to justice; the US Chamber Institute submitted that it is critical that any proposed reform options are ultimately considered for implementation at a national level; Litigation Lending put the view that, without compelling reasons to do otherwise in a particular jurisdiction, harmonisation of laws across Australia should be encouraged.²⁵

19 While South Australia does not have a statutory class action regime, its rules for representative proceedings require that representative parties apply to the Supreme Court for an order authorising the action to be maintained as a representative action within a specified time: *Supreme Court Civil Rules 2006* (SA) rr 80–1.

20 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 63–4.

21 See further Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings*, Consultation Paper (2017) Ch 6.

22 *Civil Procedure Act 2010* (Vic) ss 10, 18. The overarching obligations apply to lawyers, or law firms acting on behalf of a party, as well as litigation funders: s 10.

23 The Court also has the power to order that a class action not continue where there are fewer than seven class members, where the distribution costs would be excessive, and the Court can make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding: *Supreme Court Act 1986* (Vic) ss 33L, 33M, 33ZF.

24 Submissions 5 (Andrew Roman), 19 (US Chamber Institute for Legal Reform), 30 (Supreme Court of Victoria), 35 (Professor Vince Morabito).

25 Submissions 11 (Litigation Funding Solutions), 19 (US Chamber Institute for Legal Reform), 27 (Ashurst).

- 4.37 The Commission notes that reviews of the civil justice system since the 1988 ALRC report have not called for a certification procedure in class actions. These reviews include the ALRC’s review of the federal civil justice system in 2000,²⁶ the VLRC’s review of the Victorian civil justice system in 2008,²⁷ the report by the Access to Justice Taskforce of the Commonwealth Attorney-General’s Department in 2009,²⁸ and the report of the Australian Productivity Commission on access to justice arrangements in 2014.²⁹

Proposal to introduce certification

- 4.38 Supporters of certification consider that pre-commencement judicial approval of class actions promotes efficiencies and reduces unmeritorious class actions. The US Chamber Institute for Legal Reform submitted that the absence of some form of initial certification by Australian courts has led to vague and imprecise class definitions, the filing of unsuitable class actions, and the existence of competing class actions.³⁰
- 4.39 Simone Degeling, Michael Legg and James Metzger submitted that a certification process should be introduced in Victorian class actions. They identified several advantages:
- The representative plaintiff, who has the best knowledge of the proposed action, would be required to justify the proceedings, thereby enhancing efficiency.
 - By requiring certain procedural matters to be addressed upfront, it would ensure that problems are identified early, avoiding the costs and delays associated with interlocutory challenges and responding amendments.
 - It would provide a dedicated forum for addressing the adequacy of the representative plaintiff, the claims of competing class actions, and issues associated with litigation funding that need to be determined at an early stage of proceedings.³¹
- 4.40 Similarly, the Insurance Council of Australia supported certification as a means of addressing threshold criteria and efficiency issues, including the suitability of representative plaintiffs, poorly pleaded class actions, competing class actions, and the use of closed class actions.³² Ashurst indicated that it could also be a useful mechanism to consider the capital adequacy of the funder of the class action.³³
- 4.41 The substantial majority of submissions did not support the introduction of a formal certification process, or higher threshold requirements, into Victoria’s class action regime.³⁴ They identified the following primary reasons for opposing certification: the lack of evidence that the current provisions of part 4A are insufficient in preventing unsuitable claims being filed; the costs and delay evident in overseas jurisdictions which have implemented certification; and the barriers it creates to accessing justice. These issues are discussed in turn below.

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

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

28 Attorney-General’s Department, Commonwealth Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009).

29 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014). Also, in 2015 the Law Reform Commission of Western Australia published a report recommending the introduction in Western Australia of a class action regime based on part IVA of the *Federal Court Act 1976* (Cth). It did not recommend certification be introduced as part of this: Law Reform Commission of Western Australia, *Representative Proceedings*, Final Report Project 103 (2015).

30 Submission 19 (US Chamber Institute for Legal Reform).

31 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).

32 Submission 29.

33 Submission 27 (Ashurst).

34 Submissions 5 (Andrew Roman), 8 (Dr Warren Mundy), 12 (Allens), 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 17, 18 (Adley Burstyner), 21 (Law Council of Australia), 24 (Consumer Action Law Centre), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria), 33 (Victorian Bar), 35 (Professor Vince Morabito). This was also supported by the majority of stakeholders in roundtable discussions: Roundtable 2 (professional stakeholders). Not all stakeholders agreed: Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 19 (US Chamber Institute for Legal Reform), 20 (Healthcare companies and businesses), 27 (Ashurst), 29 (Insurance Council of Australia). Certification for funded proceedings was supported by Submission 1 (Ashleigh Leake, Josephine Vernon, Bruce Efron), and there was some support for amendment of the threshold of section 33C: Submissions 26 (Australian Institute of Company Directors), 29 (Insurance Council of Australia). Submission 4 (Chartered Accountants Australia and New Zealand) indicated support for certification from some members. Submission 22 (Dr Michael Duffy) suggested that the issue should be monitored and reviewed in the future. Submission 12 (Allens) did not support a formal certification regime, however, it supported greater upfront scrutiny of the appropriateness of class actions.

Risk of unsuitable claims

- 4.42 Proponents of certification view it as an effective means of reducing the number of unsuitable class actions filed in Australia.³⁵ Vince Morabito submitted that there is a lack of evidence, empirical or otherwise, to indicate that the current provisions of part 4A of the Supreme Court Act operate unfairly for defendants or are open to abuse by plaintiffs:
- Only a handful of class actions has been put forward as evidence of systematic abuse and, with all due respect, all that these cases provide is evidence that the type of certification device that is being advocated is one pursuant to which a mini-trial, with respect to the merits of the substantive claims, is to take place.³⁶
- 4.43 The Supreme Court submitted that none of the judges who have regularly handled class actions believe there is any need for amending the commencement criteria contained in part 4A of the Supreme Court Act.³⁷
- 4.44 Moreover, the legal and procedural devices that are already available to the Court give it sufficient power to maximise procedural efficiencies and prevent unmeritorious claims from progressing.³⁸ Vince Morabito observed that the powers under part 4A provide the Court with greater powers to determine which proceedings should be conducted as class actions than courts which have the power to withhold certification orders.³⁹
- 4.45 Within part 4A, these powers include the power to discontinue proceedings as a class action (section 33N); the power to order that individual issues or issues not common to the class be addressed through the use of sub-groups or by individual determination (sections 33Q and 33R); and the power to make any order necessary to ensure that justice is done in proceedings (section 33ZF). Proceedings must also meet specific threshold criteria (sections 33C and 33H), and a representative plaintiff must satisfy certain criteria and can be substituted upon application by class members if inadequate (sections 33D and 33T).
- 4.46 Outside part 4A, the Court has the power under the Supreme Court Rules and the Civil Procedure Act to dismiss a proceeding, or make any other order it considers appropriate in the interests of justice where there is an abuse of process or no proper basis for the proceeding.⁴⁰ Judicial case management ensures that proceedings are closely supervised and monitored. Moreover, the operation of the costs-shifting rule acts as a deterrent to commencing frivolous, vexatious or otherwise inappropriate proceedings.⁴¹
- 4.47 Finally, as Vince Morabito has observed, the fact that not many class actions have been filed in the Supreme Court in the last five years suggests the need to explore why the regime is so little used rather than how to make class actions more difficult to commence.⁴²

Costs and delay

- 4.48 Although none of the proponents of certification suggested that Victoria fully replicate overseas practice (which, as noted in one submission, may be evolving and improving),⁴³ the experience of jurisdictions that have adopted certification is informative.

35 Submissions 19 (US Chamber Institute for Legal Reform), 27 (Ashurst), 29 (Insurance Council of Australia).

36 Submission 35 (Professor Vince Morabito). See also Submissions 8 (Dr Warren Mundy), 13 (Maurice Blackburn Lawyers), 25 (IMF Bentham Ltd), 30 (Supreme Court of Victoria), 33 (Victorian Bar).

37 Submission 30 (Supreme Court of Victoria).

38 Submissions 8 (Dr Warren Mundy), 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia) 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria), 35 (Professor Vince Morabito); Roundtable 2 (professional stakeholders).

39 Submission 35 (Professor Vince Morabito).

40 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 23; *Civil Procedure Act 2010* (Vic) ss 18, 29.

41 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 28 (Slater and Gordon Lawyers); Roundtable 2 (professional stakeholders). The involvement in class actions of litigation funders whose strict funding criteria naturally minimise the risk that vexatious, frivolous, abusive, or improperly constituted class actions are commenced was also noted: Submission 14 (LCM).

42 Submission 35 (Professor Vince Morabito).

43 Submission 20 (Healthcare companies and businesses).

4.49 The Commission was told that, rather than reducing cost and delay, certification increases it.⁴⁴ An example from Canada, which has adopted certification in class actions, was provided by Andrew Roman, a lawyer consulted as part of the ALRC’s 1988 report on grouped proceedings. He highlighted the huge costs and delays involved in certification, which often mean that the law firm or funder will run out of time and money and class members will be left without a remedy:

If an opinion polling company was to ask class members whether they would prefer their interest to be protected in this manner [through certification], increasing the risk that they get nothing at all, I would think that most of them would say ‘No thank you, I risk nothing by being a member of the class, so don’t protect me by destroying the economics of those who are prepared to assume that risk’.⁴⁵

4.50 Preparation for a certification hearing (which is often converted into a mini-trial) requires parties to undertake discovery and gather evidence. This is a time-consuming procedure which can result in millions of dollars being spent in legal costs and the creation of a financial barrier to access to justice at the very outset.⁴⁶ In the United States, significant class action resources are used in the certification process, as certification is primarily used for the purposes of implementing, on a class wide basis, the settlement agreement reached between the parties.⁴⁷

4.51 The Commission considers that there is a risk that the introduction of a certification requirement would cause significant complexity, cost and delay in the conduct of litigation.

4.52 Increasing the time and financial barriers faced by the class when commencing a class action not only makes justice less accessible and more costly,⁴⁸ but also goes against the trend of recent judicial reform to reduce pre-trial complexity.⁴⁹

Barriers to justice

4.53 Because of the costs and delay, it was argued in submissions that certification creates an uphill battle for class members and the representative plaintiff when commencing a class action, while providing no discernible benefit to them.⁵⁰ It was also suggested that introducing certification would reduce the types of class action commenced in Victoria.

4.54 It was submitted that, in Canada, class actions with an aggregate value of less than \$20 million are unlikely to be brought, due to the significant costs of certification.⁵¹ In the United States, certification criteria such as predominance (requiring that questions of law or fact common to class members predominate over any individual questions) are less likely to be satisfied in class actions where highly individualised damage has been suffered. This means that individuals with product liability and mass tort claims who have suffered personal injury, for example, may be left without a remedy.⁵²

44 Submissions 8 (Dr Warren Mundy), 13 (Maurice Blackburn Lawyers), 21 (Law Council of Australia), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 33 (Victorian Bar).

45 Submission 5.

46 Submission 8 (Dr Warren Mundy); Roundtable 2 (professional stakeholders).

47 Submission 35 (Professor Vince Morabito). See generally John C Coffee Jr, *Entrepreneurial Litigation: its Rise, Fall, and Future* (Harvard University Press, 2015).

48 Submissions 5 (Andrew Roman), 8 (Dr Warren Mundy), 18 (Adley Burstyn), 24 (Consumer Action Law Centre), 30 (Supreme Court of Victoria).

49 Submission 8 (Dr Warren Mundy).

50 Submissions 5 (Andrew Roman), 8 (Dr Warren Mundy), 35 (Professor Vince Morabito).

51 Submission 5 (Andrew Roman).

52 Submission 13 (Maurice Blackburn Lawyers); Roundtable 2 (professional stakeholders).

Other ways of improving efficiency at the early stages of proceedings

- 4.55 Although strongly opposing certification, participants in consultations during the review expressed support for greater ‘upfront’ supervision by the Court of issues relevant to the conduct of class actions: conflicts of interest, funding arrangements, and adequacy of representation.⁵³ To the extent that these issues can usefully be addressed early in proceedings, the Commission supports reforms that ensure this occurs.⁵⁴
- 4.56 Proposals to strengthen the Supreme Court of Victoria’s powers to address issues about the conduct of class actions, from the earliest stages and throughout the proceedings, are made in this report. Recommendations to improve the information given to the Court at the commencement of proceedings are discussed in Chapter 2. Recommendations to increase the Court’s power to discontinue a class action, remove a representative plaintiff of its own motion, and manage competing class actions are discussed later in this chapter.

Conclusion

- 4.57 Although certification may appear to be a simple means of ensuring that only appropriate claims are conducted as class actions, there is no need to introduce it to Victoria’s class action regime, and many reasons not to do so.
- 4.58 It would not improve access to justice; rather, it would inhibit it by exacerbating pre-trial complexities and increasing costs and delays. The Court has sufficient powers to manage class actions efficiently and prevent unmeritorious or otherwise unsuitable class actions from progressing.
- 4.59 The Commission does not support its introduction in Victoria.

Recommendation

- 9** A certification requirement should not be introduced in Victorian class actions.

Court’s own motion power under section 33N

- 4.60 The ALRC recognised that the class action regime it proposed in 1988 would need to contain safeguards that allow a proceeding to be discontinued as a class action, where appropriate. It identified the importance of a defendant having the right to challenge the validity of a class action, and the Federal Court’s own motion power in certain circumstances, including the power to discontinue proceedings as a class action where it is not cost-effective to run the proceedings on this basis.⁵⁵
- 4.61 Section 33N of the *Federal Court Act 1976* (Cth) gives broad effect to the ALRC’s intention. It empowers the Federal Court, upon application by the defendant or of its own motion, to order that proceedings no longer continue as a class action if it is in the interests of justice to do so because:
- costs would be likely to exceed those that would be incurred in separate proceedings

53 Roundtables 2, 3 (professional stakeholders).

54 While the Commission considers it desirable that issues relevant to the conduct of class actions be addressed early in proceedings, this is not always possible. For example, the Commission was told that it is uncommon for conflicts of interest to become evident, or crystallise, until settlement approval. It is at settlement approval that financial interests, and any conflicts between the competing financial interests of the class members, the lawyers and the litigation funders, will become evident. Prior to this, it is difficult to identify or address these or other conflicts which may only emerge only after detailed exchange of evidence or commencement of settlement discussions: Consultation 2 (Judges of the Federal Court of Australia).

55 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 62–6, 70.

- the relief sought can be obtained without resort to a class action
 - the class action is not an efficient and effective means of dealing with the claims
 - it is otherwise inappropriate that the claims be pursued by means of a class action.⁵⁶
- 4.62 While section 33N of the Supreme Court Act is very similar to the Federal Court equivalent, it does not expressly give the Court an own motion power to discontinue a class action in the specified circumstances. Rather, the defendant has to make an application. In the interests of consistency across jurisdictions, to strengthen the powers of the Court, and to give full effect to recommendations of the ALRC in its 1988 report, the Commission recommends that section 33N be amended to make the power available on the Court's own motion.
- 4.63 Most submissions indicated that, if an own motion power were introduced in Victorian class actions, the circumstances in which the Court can discontinue a class action under section 33N are sufficient to prevent inefficient, unsuitable, or inappropriate claims from continuing.⁵⁷ Developments in case law have largely resolved concerns expressed in older commentary about the excessive use of section 33N by defendants.⁵⁸ Commentators who raised concerns about section 33N 10 years ago, and used this as a basis for recommending certification, told the Commission that the low use of section 33N in contemporary class actions has changed their view.
- 4.64 Under section 33N, a proceeding can be discontinued as a class action if it is not 'an efficient and effective means' of dealing with class members' claims. Allens suggested that amending the legislation to allow a class action to be discontinued if it is not the 'most efficient and effective means' of dealing with the claims would give better effect to the regime's efficiency aims:
- Currently, a class action will be allowed to proceed if it is an efficient or effective means of dealing with the claim of group members. This means that an action may be allowed to continue despite the existence of a compensation scheme, appropriate low cost or no cost tribunals or other mechanisms available to effectively deal with group members' claims.⁵⁹
- 4.65 While a class action may not be the most efficient method of resolving the claims of class members, it provides access to justice for individuals who would otherwise be unable to pursue a remedy. Accordingly, the Commission considers the existing efficiency threshold contained in section 33N to be appropriate.

Recommendation

- 10** Section 33N of the *Supreme Court Act 1986* (Vic) should be amended to provide the Supreme Court with the power of its own motion to order that a proceeding no longer continue under part 4A.

⁵⁶ *Federal Court Act 1976* (Cth) s 33N (1)(a)–(d).

⁵⁷ Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria), 33 (Victorian Bar).

⁵⁸ Submissions 13 (Maurice Blackburn Lawyers), 21 (Law Council of Australia).

⁵⁹ Submission 12 (Allens). This suggestion was also supported by some stakeholders at the Commission's roundtable discussions: Roundtable 2 (professional stakeholders).

Efficiency and multiple class actions

- 4.66 The risk that multiple actions will be commenced against a defendant in respect of the same subject matter is inherent to Australia's opt-out class action regimes: class members have the freedom to opt out of a class action and bring a separate individual proceeding or another class action against the defendant, should they wish.⁶⁰
- 4.67 The filing of multiple class actions relating to the same subject matter appears to be an increasing trend in Australia.⁶¹ Commonly cited reasons for this trend include: increased legal entrepreneurialism; the establishment of class action regimes in more jurisdictions; and the use of closed classes, which restrict proceedings to a particular category of class members.
- 4.68 It is not yet clear how common fund orders will affect the number and type of class actions that are filed relating to the same subject matter. Data collected by Vince Morabito indicates that fewer closed class actions have been filed since the Federal Court approved common fund orders for litigation funding costs.⁶²
- 4.69 Multiple class actions can be filed for a range of reasons and in a range of circumstances, and may involve proceedings in which:
- there is an overlap in class membership
 - the classes are different but the subject matter of the litigation is the same
 - the subject matter of the litigation is the same, but one commences after an earlier one has concluded.⁶³
- 4.70 Courts actively case-manage the proceedings when multiple class actions are filed, and may make a range of orders to enhance efficiencies and minimise duplication of work. For example, the court may direct the proceedings to be heard before the same judge, make orders that the respondent is only exposed to one set of legal costs, or appoint an independent lawyer to monitor the work done and resources deployed in proceedings and report to the court on a regular basis.⁶⁴
- 4.71 Class actions that involve overlapping class membership, or the same or substantially similar subject matter, are particularly problematic for courts to manage and have been the focus of proposed reforms. They are referred to as competing class actions in the following discussion.

Competing class actions

- 4.72 The Federal Court has observed that competing class actions increase legal costs and delays, waste court resources, and are unfair to defendants.⁶⁵ Ultimately, the additional legal costs incurred as a result of intensive case management, lengthy negotiation between competing proceedings, and achieving a more difficult settlement are borne by class members.

60 An individual's ability to bring another class action against the defendant depends on satisfaction of threshold criteria under part 4A, including the requirement that there be seven or more persons in the subsequent class action with the same, similar or related claims. The extent to which class members, who do not opt out, will be estopped from pursuing claims not pleaded in the class action has been the subject of recent litigation: see, eg, *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 259 CLR 212.

61 Submission 12 (Allens).

62 In the five years preceding the decision in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 (*Money Max*) (26 October 2011 to 25 October 2016), 48% of funded Federal Court class actions used a closed class mechanism. In the seven months after *Money Max*, 23% of the funded class actions employed closed classes: Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 39–41. This trend, however, cannot be attributed to the approval of common fund orders alone; a downward trend in the use of closed classes by litigation funders was evident in Federal Court class actions prior to the decision in *Money Max*: Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Inquiries in Law* 303, 328.

63 See, eg, Emma White and Justin McDonnell, *Developments in Competing Class Actions* (4 April 2016) King and Wood Mallesons <<http://www.kwm.com/en/au/knowledge/insights/developments-competing-class-actions-australia-20160404>>; Submission 13 (Maurice Blackburn Lawyers).

64 See, eg, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [7] (Beach J).

65 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 230 (Murphy, Gleeson and Beach JJ).

- 4.73 Although the courts may not allow competing class actions to proceed in that form as long as there continues to be an overlap in class membership, there is no fixed rule as to how the issue should be addressed. In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (Bellamy's)*, Justice Jonathan Beach held that there were five realistic options available to him where two open class actions with almost a complete overlap in class membership were filed:
- order the competing class actions be consolidated
 - order a permanent stay of one proceeding
 - declass one or more proceedings under section 33N
 - order that one class be closed, and the other proceeding remain open, with a joint trial of both
 - allow both proceedings to remain constituted as open class proceedings and order a joint trial of both.⁶⁶
- 4.74 Other options available for addressing competing class actions may include ordering sequential hearings, or selecting one proceeding to continue as a 'test case', with a temporary stay of the other proceedings until the test case is resolved.⁶⁷
- 4.75 Although it appears that courts have the power to permanently stay one or more proceedings, they are reluctant to 'pick a winner' or set a fixed rule that no more than one class action can proceed in these circumstances.
- 4.76 The reasons for this reluctance are twofold. First, if the threshold requirements for commencing a class action are met, a class action has *prima facie* the right to proceed (unless a declassing or decertification order is made). Preventing one class action from continuing under part 4A because another proceeding involving the same claim or cause of action is commenced may interfere with this right, and there must be a powerful and significant reason for this.⁶⁸
- 4.77 Secondly, the right of class members to choose their desired litigation funder and law firm, and not have this choice determined through judicial election, enhances freedom of contract.⁶⁹ As observed by Vicki Waye, this view is held despite scant evidence that competing class actions have driven down the cost of funding or led to significant improvements in funding terms.⁷⁰
- 4.78 To date, competing class actions have not been a problem in Victoria.⁷¹ It is reasonable to suggest, however, that factors contributing to the filing of multiple class actions will continue to develop, and may lead to competing class actions in Victoria in future. It is desirable that Victoria examine the issue in conjunction with the Commonwealth and the other states which have a class action regime.
- 4.79 The consultation paper asked whether reform is necessary to assist the Court in addressing competing class actions. Responses considered whether legislative or procedural guidance should be introduced in the Victorian scheme, which is discussed below.

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

67 Law Council of Australia and Federal Court of Australia, *Case Management Handbook* (2014) 119–20.

68 See, eg, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [23], [54] (Beach J). The situation is different in jurisdictions that have adopted certification in class actions, such as Canada, where class actions cannot be issued of right and continue. Accordingly, while the Canadian experience, which allows a representative plaintiff to apply for a 'carriage motion' seeking a stay of all other class actions relating to the same subject matter, is informative in Australia, it is not a direct analogue: [54]. It has also been observed that the Canadian carriage motion does not deal with competing class actions filed in different provinces: Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 41–2.

69 See, eg, *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [56] (Beach J).

70 Submission 2 (Professor Vicki Waye).

71 Submissions 30 (Supreme Court of Victoria), 35 (Professor Vince Morabito).

New guidance for the Court to address competing class actions

- 4.80 Although the Federal Court has found it has the requisite power to permanently stay one or more competing class actions and allow one to continue, the source of the power has not yet been determined by an appellate court. Certainty could be created through introducing a legislative power to appoint one class action.
- 4.81 Submissions expressed different views as to whether a legislative power is necessary, or desirable. Some supported the idea, although they differed as to whether this power should be mandated or discretionary, and whether it should be part of a certification requirement in Victoria or introduced under existing provisions.⁷² Other submissions did not consider legislative reform necessary; rather, they thought it might hinder the flexibility of the Supreme Court to craft responses best suited to the circumstances of the case.⁷³
- 4.82 A related suggestion was that some form of non-exhaustive guidance for the Court when dealing with competing class actions would provide certainty and promote efficiency, provided it is not overly prescriptive.⁷⁴ Several submissions highlighted issues that should be considered in preparing any guidance or checklist: Maurice Blackburn submitted that it should respect class members' choice of legal representation and funding arrangements;⁷⁵ Litigation Funding Solutions submitted that it should avoid promoting judicial consideration of some factors, such as lowest cost, over others;⁷⁶ and Ashurst suggested that it should state that the timing of filing is not a relevant factor, except in certain circumstances.⁷⁷
- 4.83 The Federal Court, in two recent decisions, has reiterated the importance of a tailored approach to competing class actions. In *Bellamy's*, Justice Beach determined that the appropriate course of action where two competing open class actions had arisen was to close one class, and try the cases together. He indicated, however, that had the facts been different and significant numbers of class members not signed agreements with litigation funders and law firms in each proceeding, it would have been appropriate to permanently stay one proceeding.⁷⁸
- 4.84 A different approach was taken by Justice Foster in *Cantor v Audi Australia (No 2)*, where two proceedings were filed by different law firms. There was some overlap in class definition between the proceedings. Justice Foster determined that they should be allowed to continue in parallel and tried together.⁷⁹
- 4.85 Given the case-dependent approach adopted by the courts to date,⁸⁰ the Commission does not consider it necessary to give the Court express legislative power to choose one class action when competing proceedings are filed. It would be unlikely to provide any real change to practice, and may risk a 'one size fits all' approach being adopted, which the Federal Court has cautioned against.⁸¹

72 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 12 (Allens), 19 (US Chamber Institute for Legal Reform), 20 (Healthcare companies and businesses), 26 (Australian Institute of Company Directors), 27 (Ashurst), 29 (Insurance Council of Australia). Submissions 12 (Allens) and 26 (Australian Institute of Company Directors) supported the introduction of an express power to appoint one class action in the absence of certification.

73 Submissions 13 (Maurice Blackburn Lawyers), 14 (LCM), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 22 (Dr Michael Duffy), 25 (IMF Bentham Ltd), 33 (Victorian Bar).

74 Submission 12 (Allens).

75 Submission 13.

76 Submission 11.

77 Submission 27.

78 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [7]–[8] (Beach J).

79 [2017] FCA 1042 (1 September 2017). Justice Forster indicated that, in the future, some further action may need to be taken in order to address problems caused by the continued maintenance of the separate proceedings, which would be kept under constant review as the litigation progressed: [75].

80 See also *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17 (5 February 2016); *Kirby v Centro Properties Ltd* (2008) 253 ALR 65; *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 (5 February 1999).

81 *Cantor v Audi Australia (No 2)* [2017] FCA 1042 (1 September 2017) [74] (Foster J).

- 4.86 It is desirable, however, that there is consistency in judicial approaches to competing class actions.⁸² The Commission believes that it would be useful for the Supreme Court Practice Note to include a non-exhaustive list of factors that the Court may consider where competing class actions are filed. This guidance should reflect current practice, while also allowing the Court to respond flexibly in the circumstances of each case.
- 4.87 In *Bellamy's*, Justice Beach set out a range of non-exhaustive factors that were relevant to his choice as to which proceeding should be closed, and which should remain open. These factors could provide a framework for any guidance included in the Supreme Court Practice Note. They include:
- the experience of the lawyers bringing the class actions
 - the costs the lawyers expect to charge for the work performed
 - the funding terms in each of the proceedings, including funding terms and conditions and percentages
 - the resources made available by each law firm, and their accessibility to clients
 - the state of preparation of the proceedings (relevant but not determinative if both proceedings will be ready for trial at the same time)
 - the number of class members signed up to each of the proceedings
 - whether each of the proceedings would proceed without a common fund order, and the terms of any proposed common fund order that might be sought
 - the position adopted by each funder on the question of security for costs and generally their resources to meet any adverse costs order.⁸³
- 4.88 In the interests of promoting flexibility in the Supreme Court of Victoria's approach to competing class actions, the Commission considers that any guidance should stipulate that the Court may take into account any other matter as it considers relevant.

Recommendation

- 11** The Supreme Court should consider amending its practice note on class actions to include guidance for the Court and parties on managing competing class actions. The guidance should reflect current practice, as it has developed over time, and allow for the Court to respond flexibly in the circumstances of each case.

Cross-vesting of multiple class actions

- 4.89 Although the consultation paper did not seek responses on the issue, the Commission's consultations revealed that reform is necessary to improve the cross-vesting capabilities of Australian courts where multiple class actions are filed in different jurisdictions.⁸⁴

⁸² See, eg, *Cantor v Audi Australia (No 2)* [2017] FCA 1042 (1 September 2017) [74] (Foster J).

⁸³ *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [71]. A similar list of non-exhaustive criteria is contained in the Federal Court's case management handbook: Law Council of Australia and Federal Court of Australia, *Case Management Handbook* (2014) 120–21. Submission 12 (Allens) also set out a list of factors that could be considered by the courts when faced with competing class actions.

⁸⁴ Roundtable 2 (professional stakeholders); Consultation 2 (Judges of the Federal Court of Australia). The issue has also been raised in commentary. See, eg, Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 41–2.

- 4.90 Under the *Jurisdiction of Courts (Cross Vesting) Act 1987* (Vic), the Supreme Court has the power to cross-vest proceedings between jurisdictions. There was agreement among stakeholders, however, that existing cross-vesting powers, both in Victoria and nationally, are not adequate to ensure efficient cooperation between state and federal jurisdictions where multiple class actions arise.⁸⁵ The consensus view was summarised by Vince Morabito:
- competing class actions are rapidly becoming a ‘national’ problem and cannot therefore be adequately addressed by the legislatures or courts of class action jurisdictions acting on their own.⁸⁶
- 4.91 The decision to cross-vest a case is made by the court.⁸⁷ Judges are able to ‘push’ cases to another court, but are unable to ‘pull’ cases to their own court. This prevents the undesirable situation in which large class actions are pulled to the court with the most resources. However, it also restricts the courts’ powers to enhance efficiencies and minimise duplication of work and expense.⁸⁸
- 4.92 Allens expressed concern that, as a matter of practice, the onus is generally placed on the defendant to pursue cross-vesting orders, which increases cost and time burdens.⁸⁹ It also increases the risk that the defendant will ‘forum shop’ and choose a jurisdiction, or court, that is to their advantage in the proceedings.⁹⁰
- 4.93 Allens thought it preferable that the courts instead be required to proactively consider and determine which action should be transferred to another jurisdiction for, at the very least, case management of the proceedings by the same judge.⁹¹
- 4.94 There was widespread support, including among judges of the Federal Court, for the establishment of a cross-vesting judicial panel to address the concerns relating to class actions.⁹² The role of this panel would be to make cross-vesting decisions where multiple class actions relating to the same subject matter are filed in different jurisdictions. It was envisaged that it would prevent one court having ultimate authority on cross-vesting decisions, while at the same time ensuring that the appointed court had the expertise and resources to be able to hear the multiple proceedings.

United States Judicial Panel on Multidistrict Litigation

- 4.95 The Judicial Panel on Multidistrict Litigation (MDL Panel), which transfers cases between federal districts in the United States, was put forward as a possible model upon which to base a cross-vesting panel in Australia.⁹³ The MDL Panel is a statutory body that considers motions for coordinated or consolidated pre-trial proceedings in federal cases.⁹⁴ While the MDL Panel has no power over cases pending in state courts, it facilitates coordination by transferring federal cases to a district where related cases are pending in the state courts.⁹⁵
- 4.96 The purpose of the MDL Panel is twofold: it considers whether common questions of fact exist between proceedings filed in different federal districts, such that centralisation of the pre-trial process will promote the just and efficient conduct of the proceedings; and it determines which federal district and judge are best situated to handle the transferred matters.⁹⁶

85 Roundtable 2 (professional stakeholders); Consultation 2 (Judges of the Federal Court of Australia).

86 Submission 35 (Professor Vince Morabito).

87 Consultation 3 (Judges of the Supreme Court of Victoria).

88 Consultation 2 (Judges of the Federal Court of Australia).

89 Submission 12 (Allens).

90 Consultation 2 (Judges of the Federal Court of Australia).

91 Submission 12 (Allens).

92 Consultation 2 (Judges of the Federal Court of Australia); Roundtable 2 (professional stakeholders).

93 Roundtable 2 (professional stakeholders).

94 The first multidistrict litigation statute was passed by Congress in 1968: 28 USC § 1407 (1968).

95 Federal Judicial Center, *Manual for Complex Litigation*, Fourth (2004) 231.

96 United States Judicial Panel on Multidistrict Litigation, *Overview of Panel* <<http://www.jpml.uscourts.gov/overview-panel-0>>.

- 4.97 The MDL Panel exercises considerable and largely unfettered discretion in its decisions to coordinate or consolidate pre-trial proceedings. Decisions are made by the seven sitting federal judges who are appointed to the panel (no two panel members being from the same federal circuit), and it convenes hearings in various locations around the country to facilitate the participation of parties and their counsel.⁹⁷
- 4.98 The Commission recommends further investigation into the operation of the MDL Panel and the viability of establishing a similar panel in Australia, with the ability to cross-vest class actions between federal and state jurisdictions. The Commission considers that such a panel, consisting of a senior judge from each jurisdiction with a statutory class action regime, would be of significant value in mitigating the existing cross-vesting difficulties and in strengthening a nationally consistent approach to class actions. Legislation would need to be developed, to establish the panel, determine its powers and how they should be exercised, and clarify how it would operate. The appropriate forum to undertake this task is the Council of Attorneys-General, which will doubtless consult with the Council of Chief Justices of Australia and New Zealand in relation to any proposals.

Recommendation

- 12** The Attorney-General of Victoria should propose to the Council of Attorneys-General that a cross-vesting judicial panel for class actions be established. The judicial panel would make decisions regarding the cross-vesting of class actions, where multiple class actions relating to the same subject matter or cause of action are filed in different jurisdictions.

Efficiency during settlement distribution

- 4.99 Settlement of a class action involves two phases. The first is the approval of the settlement by the Court under section 33V of the Supreme Court Act, and the second is the distribution of settlement amounts to class members.
- 4.100 While settlement approval under section 33V is guided by well-established principles, the way that settlement distribution is carried out will differ in every class action. As part of settlement approval, the Court will approve the process by which class members' settlement payments are to be assessed and distributed (known as the settlement distribution scheme). The representative plaintiff's lawyers are required to submit evidence to the Court explaining the broad contours of the settlement distribution scheme, including how it will be administered, supervised, monitored or audited.⁹⁸
- 4.101 Settlement distribution can account for a significant part of proceedings, particularly in large mass tort class actions. Although unique in size and scale, the Kilmore East/Kinglake bushfires class action provides an example of the possible complexity of settlement distribution: the trial lasted 16 months, followed by a settlement distribution process of close to two years.⁹⁹ Ensuring that the settlement distribution process is carried out as efficiently and effectively as possible is critical in ensuring class members obtain a fair outcome, and are not unduly delayed in obtaining compensation for their damage or loss.

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Ibid.
Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.5].
The settlement distribution process for personal injury claims was just under two years; for property claims, it took two years and two months: Rebecca Gilsehan and Michael Legg, 'Settlement Distribution Schemes' (Speech delivered at the IMF Bentham and UNSW Class Action Conference, Sydney, 1 June 2017).

- 4.102 The Commission asked in the consultation paper how the management of settlement distribution schemes could be improved. The responses observed that the best approach depends on the type of class action, the complexities of the claims involved, and the capabilities of the appointed scheme administrator. These issues are discussed in the section below.
- 4.103 The accountability of the scheme administrator to the Court was also raised as an important issue during the Commission’s consultations, and is discussed at [4.191]–[4.217]. For ease of reference, all the Commission’s recommendations relating to settlement distribution, including those relating to efficiency, are included at the end of those paragraphs.

Trade-off between precision of assessment and efficiency

- 4.104 As set out in the consultation paper and recognised in submissions, there are two objectives of settlement distribution schemes. First, individual compensation in a class action should reflect the merits of each individual claim; and secondly, the distribution process should be completed in a manner that minimises cost and delay.¹⁰⁰
- 4.105 The type of class action and the damage being assessed during settlement distribution will determine whether a trade-off is required between the two objectives. In a product liability, personal injury, or mass tort class action, for example, the damage is likely to be highly complex, both in itself, and in comparison with the claims of others. The need to assess each class member’s claim individually will result in higher costs and a longer distribution process. Essentially, a trade-off is required between the first objective (the precision of individual assessment) and the second objective (minimisation of costs and delays).
- 4.106 In a shareholder class action, the tension between the precision of individual assessment and efficiency is not as keenly felt. As class members’ loss is of the same kind—financial—it can often be assessed according to a formulaic loss assessment. Settlement distribution can generally be completed within three to six months.¹⁰¹
- 4.107 Even where the damages are diverse and complex, highly individualised assessments are unlikely to be desirable because of the detrimental effect of the cost on the settlement amount as a whole, and the time required. This was observed by Maurice Blackburn:
- in the context of a class action settlement scheme, it will almost never be appropriate to obtain this full suite of expert evidence because it will not only add significantly (and unreasonably) to the costs of administering the settlement, thereby detracting from the overall amount that is available for distribution to group members, but will also add substantially to the time that it takes to assess all claims under the settlement scheme.¹⁰²
- 4.108 Where settlement distribution is unreasonably delayed, Allens suggested that, upon application by the legal profession’s regulator, sanctions should be imposed against persons responsible.¹⁰³
- 4.109 While the Commission recognises the expertise of the Victorian Legal Services Commissioner in handling complaints regarding lawyers, introducing another avenue for complaint may simply prolong settlement distribution for class members. Instead, allowing the Court to be involved in serious disputes arising from settlement distribution is a more efficient option. Recommendation 17 seeks to strengthen the role of the Court in resolving these disputes.

100 Submissions 13 (Maurice Blackburn Lawyers) 15 (Phi Finney McDonald), 28 (Slater and Gordon Lawyers), 25 (IMF Bentham Ltd). See generally Michael Legg, ‘Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?’ (2016) 16 *Macquarie Law Journal* 89.

101 Submission 13 (Maurice Blackburn Lawyers), 28 (Slater and Gordon Lawyers).

102 Submission 13 (Maurice Blackburn Lawyers).

103 Submission 12.

4.110 How the balance is achieved between precision of individual assessment and the minimisation of cost and delay is ultimately a factor for the Court to consider when approving a settlement,¹⁰⁴ and it is important that it is provided with the necessary information to undertake this assessment. To assist the Court, the Commission recommends that information about the proposed measures being taken during settlement distribution to minimise costs and ensure a fair outcome, be provided to the Court at settlement approval (Recommendation 17).

Innovations developed during settlement distribution

4.111 Where settlement distribution requires highly individualised damages to be assessed, scheme administrators have been innovative in improving the efficiency of distribution. Examples of these innovations include:

- The use of interim distributions as part of global sum settlements. In some class actions, the settlement distribution scheme may provide the scheme administrator with the discretion to make interim distributions to class members whose claims have been completed, once a certain proportion of claims have been assessed. This may be desirable where the settlement distribution is likely to be lengthy. For example, in the Kilmore East/Kinglake bushfires class action, the settlement distribution scheme provided for interim distributions after 30 per cent of the personal injury and dependency claims or 40 per cent of the economic loss and property damage claims had been made.¹⁰⁵ The risk of interim distributions is that they may further delay the settlement distribution,¹⁰⁶ or may be too high, in which case the funds available for later payments will be diminished.
- The use of hardship payments, which allow for partial payment of settlement money where class members are facing financial hardship. Again, this may be useful where the settlement distribution is likely to be long and complex.
- The use of fast-track payments, where class members can elect to accept a fixed sum of compensation (at the lower end of the scale) in order to avoid a slower, more detailed and more expensive individualised assessment.¹⁰⁷ Although the class member waives the right to a more rigorous individual assessment of the merits of their claim, they are able to obtain prompt (and certain) payment and avoid a potentially invasive and time-consuming individual assessment process. A fast-track payment system may be most attractive to class members who have not suffered significant loss or damage.¹⁰⁸
- The use of matrix or grid settlements, which ascribe certain sums to different experiences, based on a matrix of criteria. A matrix settlement involves use of a general formula, whereby a base payment is provided for each class member, with additional pre-set amounts deducted depending upon the number of criteria met. Although used in the United States, matrix settlement distributions do not appear to be widely used in Australia.¹⁰⁹ While they provide certainty for class members during settlement distribution, individual loss or damage may not be fully compensated due to the formulaic nature of assessment.¹¹⁰

104 Submission 13 (Maurice Blackburn Lawyers).

105 *Matthews v Ausnet (Ruling No 41)* [2016] VSC 171 (19 April 2016) [5], [39] (Forrest J).

106 See, eg, *Matthews v Ausnet (Ruling No 42)* [2016] VSC 394 (15 July 2016) [23]–[28] (Forrest J).

107 Roundtable 3 (professional stakeholders). The fast-track payment mechanism was proposed for use in *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (1 December 2016).

108 See, eg, *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (1 December 2016) [140]–[143] (Wigney J).

109 Rebecca Gilsenan and Michael Legg, *Australian Class Action Settlement Distribution Scheme Design*, IMF Bentham Class Action Research Initiative Research Report No 1 (University of New South Wales, 2017) 31.

110 See, eg, *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (1 December 2016) [99]–[109] (Wigney J).

4.112 Several of the Commission’s recommendations are expected to encourage scheme administrators to be innovative in distributing settlements efficiently as well as fairly. For example, the Commission recommends below that they be required to inform the Court about when class members are expected to receive settlement amounts. This may encourage consideration, from the outset, about how to address, and implement, efficiencies during settlement distribution.

Appointing third-party administrators for settlement distribution

4.113 The law firm acting for the representative plaintiff will generally, but not always, be appointed as the scheme administrator for the settlement distribution. As the lawyers involved in the case generally know the most about class members’ claims, this appointment makes sense on the grounds of efficiency. If experienced in class action litigation, the lawyers will be able to draw on expertise and knowledge in this area, and apply the most efficient method for assessment and distribution of claims.

4.114 However, Allens, IMF Bentham and healthcare companies and businesses proposed that, in some circumstances, it would be preferable to appoint a third-party scheme administrator.¹¹¹ IMF Bentham suggested that the courts should consider appointing an administrator rather than the lawyers who conducted the action when:

- the settlement distribution would be likely to be conducted at less cost and more quickly
- it is unnecessary to have lawyers, at lawyers’ rates, undertake an administrative function
- the lawyers are likely to be less efficient than an administrator with more relevant expertise
- all that is required is the application of the court-approved scheme and there is little merit in having lawyers with the factual and legal knowledge implement the scheme
- the lawyers are likely to largely outsource the calculation or determination of merits in any event
- the lawyers do not have any particular expertise in the application of formulas or claim assessment used in the settlement distribution scheme.¹¹²

4.115 Actual, and perceived, objectivity during settlement distribution is important. Settlement distribution is a separate part of proceedings that does not always require legal expertise. Class members may perceive a decision to appoint the representative plaintiff’s lawyers to administer the settlement as an opportunity for the lawyers to ‘double dip’.¹¹³

4.116 The expertise that a third-party scheme administrator would need to bring would depend upon the circumstances of the case. In the Kilmore East/Kinglake bushfires class action, some class members suggested that a firm of accountants should be appointed as scheme administrator. Justice Forrest observed (extra-judicially) that it was unlikely that such a firm would have been able to carry out the task at a lower cost than the representative plaintiff’s lawyers.¹¹⁴

4.117 Subject to the availability of resources, an option for administering settlement distributions in smaller, less complex class actions could be to utilise the expertise of Funds in Court. Funds in Court is an office of the Supreme Court which administers all funds paid into court in civil proceedings. As such, it has significant expertise in managing and distributing funds in accordance with Court orders. During the 2016–17 financial year, Funds in Court was responsible for \$1.7 billion of funds under management.¹¹⁵

111 Submissions 12 (Allens), 20 (Healthcare companies and businesses), 25 (IMF Bentham Ltd).

112 Submission 25 (IMF Bentham Ltd).

113 Roundtable 5 (clients and consumers).

114 Justice Jack Forrest, ‘Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71, 94.

115 Supreme Court of Victoria, *Annual Report 2016–17* (2017) 57.

4.118 As discussed in Chapter 6, settlement administration services in support of class actions and other litigation are prevalent in the United States, and services offered through online technology enable law firms to interact with large client groups efficiently. The Commission considers that its recommendations to improve the information given to the Court about the settlement distribution scheme will reinforce the need for the representative plaintiff's lawyers to assess alternative service delivery methods when identifying the appropriate scheme administrator.

Strengthening accountability in class actions

4.119 The extent to which class members' interests can be affected when a class action is brought has altered since Australia's first class action regime commenced in the Federal Court in 1992. In designing the model, the ALRC envisaged a largely passive role for class members, where they were not required to do anything if they wished to participate in proceedings. The ALRC recommended that a class member be required to take active steps only if they wished to exclude themselves from proceedings.¹¹⁶

4.120 Thirty years later, class members' interests can be adversely affected by remaining passive in a class action. As a consequence of the class member registration process, now typically included as part of opt-out, class members who fail to register by the stipulated date may be bound by the outcome of proceedings but excluded from obtaining a share of any money recovered. If a common fund order is made for the payment of a litigation funding fee, registered class members who have not signed a funding agreement may nonetheless be required to pay the fee. In one class action, the representative plaintiff's application for a common fund order proposed that class members who had not signed the funding agreement would pay the funder a higher percentage of their share than those who had signed the agreement.¹¹⁷ In another, class members who did not pay security for costs, or who did not provide a reasonable reason for failing to do so, were excluded from obtaining any benefit in the proceeding or under any settlement.¹¹⁸

4.121 These developments, combined with the representative nature of class actions, make it crucial that the lawyers acting for the representative plaintiff, the litigation funder (if involved) and the representative plaintiff are accountable to the court and class members for the impact that the conduct and funding of proceedings has on class members' interests. The supervisory role of the court at settlement approval, which ensures that all class members' interests are taken into account, also reduces the risk of unfair outcomes for class members.

4.122 Reform options were put forward during the Commission's consultations and in submissions to reduce the risk that class members' interests are exposed to unfair outcomes in class actions. They included:

- improving the accountability of the representative plaintiff's lawyers to class members
- ensuring the representative plaintiff adequately represents class members, and that they are supported in the role
- strengthening the role of the Supreme Court at settlement approval
- enhancing the ability of the Court to supervise settlement distribution, where necessary
- improving communication with class members.

4.123 These reform options, and the recommendations made by the Commission in relation to them, are discussed in turn below.

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

117 *Capic v Ford Motor Company of Australia Ltd*, Federal Court Proceedings NSD 724 of 2016.

118 They remained class members and were bound by the outcome of proceedings, but were precluded from claiming compensation, including in separate proceedings: *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, 449–50 (Murphy J).

Lawyers' obligations to class members

Conflict of interest

- 4.124 In a class action, the law firm acting for the representative plaintiff will generally run proceedings on behalf of the entire class. The representative plaintiff will sign a legal retainer and costs agreement with the law firm, although many class members will not. Regardless, class action lawyers have responsibilities to the class that do not depend on contractual agreement, and that apply in both funded and unfunded proceedings.
- 4.125 These wide-ranging responsibilities are not specific to class actions, but arise from the broader obligations imposed upon lawyers. They include fiduciary responsibilities owing to the nature of the solicitor–client relationship, and professional obligations under the Legal Profession Uniform Law. Lawyers have fundamental duties to the Court and the administration of justice, and must comply with the overarching obligations contained in the *Civil Procedure Act 2010 (Vic)*.¹¹⁹ They also have significant responsibilities that relate to the disclosure, and charging, of legal costs, which are discussed in Chapters 2 and 3.
- 4.126 The complexities of class action litigation create particular challenges for lawyers when there is conflict of class members' interests. There may be differences between the interests of the representative plaintiff when compared to class members, as well as between the class members themselves. These differences may arise due to the different nature of the claim or the harm suffered; from the different categories of class members (for example, whether funded or unfunded);¹²⁰ or from the structure of the class action mechanism, in which the representative plaintiff has responsibilities that class members do not share.
- 4.127 Views differ about the extent and significance of the conflict. Simone Degeling and Michael Legg have argued that there is a 'real or substantial' possibility that lawyers conducting the class action will be exposed to conflicts of interest between the competing needs of the different class members.¹²¹ Phi Finney McDonald put forward the opposite view, suggesting that it is highly unusual for lawyers acting for several class members to find that their obligations to those class members conflict because 'group members will, in most cases and on most issues, have the same or similar interests given the nature of a properly constituted Part 4A proceeding'.¹²²
- 4.128 There was agreement that some aspects of proceedings are more prone to conflict than others. For example, where settlement distribution involves class members with different claims, conflicts of interest might be expected to arise.¹²³ Allens observed that less obvious conflicts can arise throughout proceedings, not just at settlement distribution:
- For instance, conflicts may arise at the start of proceedings, when plaintiff lawyers frame the issues in dispute in the statement of claim, and during the course of proceedings, when the representative plaintiff's lawyers may have to make a decision about whether to amend application, and about which claims to pursue or abandon.¹²⁴
- 4.129 In addition, there is conflict between the law firm's commercial interests and the interests of all class members at the settlement of a class action. Like other forms of litigation, while the lawyers have a justified financial interest in receiving payment from any settlement amount, the legal costs will necessarily reduce the amount available for class members. If acting on a 'no win, no fee' basis, the law firm stands to lose a significant amount if the class action is unsuccessful, and conflict may arise in determining when, and for how much, class actions settle. Conflict of this nature is inherent in the provision

119 *Civil Procedure Act 2010 (Vic)* ss 10, 17–26.

120 Conflicts of interest arising due to the classification of class members as funded/unfunded can be reduced by making a common fund order: *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 225 (Murphy, Gleeson and Beach JJ).

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

122 Submission 15 (Phi Finney McDonald).

123 Ibid.

124 Submission 12 (Allens).

of legal services and routinely managed. The court’s role in reviewing legal costs, and approving settlement, in class actions is a significant safeguard.

- 4.130 Conflicts may be exacerbated in funded class actions, where a tripartite relationship is created between the lawyer, funder and representative plaintiff (or other class member who signs the funding agreement). Although funding agreements will generally reiterate that the lawyers’ duties to their clients prevail over those to the funder, in practice the funder can have a great deal of control over the day-to-day conduct of proceedings.
- 4.131 Without obtaining the client’s full and informed consent, a lawyer cannot continue to act for clients where these, or other, conflicts of interest arise, or where there is a real or substantial possibility of a conflict of interest. Unlike single client litigation, obtaining full and informed consent from class members to continue acting in this capacity is virtually impossible in a class action.

Guidance for lawyers

- 4.132 Submissions expressed divided opinions as to whether guidance for lawyers to address these conflicts of interest, either in legislation or Court guidelines, is necessary. Many suggested that prescriptive rules are unnecessary in view of the Court’s inherent jurisdiction and powers under the Civil Procedure Act to respond to issues as they arise, and lawyers’ existing professional obligations. In addition, the Australian Securities and Investments Commission’s regulatory guide on managing conflicts of interest in funded proceedings, and the Victorian Legal Services Commissioner’s powers (which provide for disciplinary intervention where necessary), were identified as adequate regulatory controls.¹²⁵ It was observed that introducing additional guidelines in Victoria could result in lawyers being obliged to meet two sets of applicable standards, with confusing or overlapping obligations.¹²⁶
- 4.133 Other submissions indicated that further guidance could be useful because of the complexity of acting for multiple class members and as the limits of existing obligations are unclear.¹²⁷ Simone Degeling, Michael Legg and James Metzger proposed that, as a minimum, lawyers should be educated about the fiduciary duties that may be owed to the entire class, and how these duties arise. This education could include guidance from professional bodies or the courts.¹²⁸
- 4.134 The Victorian Legal Services Board and Commissioner suggested that the legal profession consider introducing specialist accreditation in class action litigation. As well as assisting in quality assurance and expertise development, accreditation would help raise awareness among newer, inexperienced law firms of the complexities involved in class action litigation. As accreditation provides a clear way for consumers to readily identify expert lawyers, it may also help class members choose between different law firms where competing class actions arise.¹²⁹
- 4.135 Allens, the Law Council of Australia, Maurice Blackburn and Phi Finney McDonald proposed looking to the courts for guidance.¹³⁰ It was suggested that the Supreme Court Practice Note incorporate the conflict of interest guidelines for lawyers that are set out in the Federal Court Practice Note. These guidelines state that:
- Legal costs agreements should include provision for managing conflicts of interest between the applicant(s), the class members, the applicant’s lawyers, and any litigation funder.

125 Submissions 10 (Victorian Legal Services Board and Commissioner), 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers).
126 Submission 15 (Phi Finney McDonald).
127 Submissions 12 (Allens), 22 (Dr Michael Duffy).
128 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).
129 Submission 10 (Victorian Legal Services Board and Commissioner).
130 Submissions 12 (Allens), 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia).

- Lawyers have a continuing obligation to recognise and properly manage any such conflicts throughout proceedings.¹³¹
- 4.136 Other ideas put forward were to expand the Law Institute of Victoria’s guidelines on conflicts of interest (to include guidance for lawyers acting in class actions) or the commentary for the conduct rules under the Legal Profession Uniform Law (to specifically mention potential conflicts of interest in class actions).¹³²
- 4.137 The Commission considers that formal, and specific, guidance for lawyers acting in class actions is desirable. Measures should be put in place to ensure lawyers do not run class actions in a manner that adversely affects the interests of class members. The need for guidance has long been recognised. In its 2000 report on managing justice, the ALRC recommended that the legal profession develop professional practice rules governing lawyers’ responsibilities to multiple claimants and in class actions.¹³³ It is just as important today, in view of increasing legal entrepreneurialism and the entrance of new and inexperienced law firms into class action litigation.¹³⁴
- 4.138 Although there are intricacies involved in producing conduct guidelines under the Legal Profession Uniform Law, the Commission considers that the complexity of issues involved in class actions and the real lack of guidance for lawyers acting in this capacity render formal guidance necessary. As New South Wales also has a class action regime, it is appropriate, for reasons of consistency, that the guidelines be applicable to all lawyers to whom the Legal Profession Uniform Law applies: namely, lawyers in New South Wales and Victoria. Under the Legal Profession Uniform Law, the Standing Committee, comprising the Attorneys-General of Victoria and New South Wales, can request the Legal Services Council to produce the guidance. The Legal Services Council makes Uniform Rules and can issue guidelines or directions to local authorities (state-based Legal Services Commissioners and professional bodies).
- 4.139 While the Commission’s recommendation is directed to ensuring that conduct guidelines are produced by the Legal Services Council, the local authorities in Victoria may consider it desirable in the meantime to produce conflict of interest guidelines for Victorian lawyers acting in class actions.

Recommendation

- 13** The Attorney-General of Victoria should seek the agreement of the Attorney-General of New South Wales that:
- (a) guidelines should be issued to legal practitioners on their duties and responsibilities to all class members in class actions, providing specific direction on the recognition, avoidance and management of conflicts of interest
 - (b) the Standing Committee under the Legal Profession Uniform Law should ask the Legal Services Council to ensure that such guidelines are produced and promulgated.

131 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, [5.9]–[5.10].

132 Submission 10 (Victorian Legal Services Board and Commissioner). The Commission notes that the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (and equivalent conduct rules in other jurisdictions) are currently being reviewed by the Law Council of Australia, with submissions invited by 31 May 2018: Law Council of Australia, *Review of the Australian Solicitors’ Conduct Rules*, Consultation Discussion Paper (2018).

133 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 553; Recommendation 82.

134 Submission 10 (Victorian Legal Services Board and Commissioner) referred to two examples of lawyers with insufficient experience in class actions commencing proceedings. In both cases, disciplinary action was taken.

Litigation funders' obligations to class members

- 4.140 Litigation funders involved in class actions are likely to have little, if any, direct engagement with class members. Some class members may choose, or be required, to execute a funding agreement when participating in a class action, although the increased use of a common fund for the payment of funding fees will make this less likely.
- 4.141 As discussed in Chapter 2, litigation funders are required to have processes in place to manage conflicts of interest. Otherwise, the Commission considers that the lawyers acting for the representative plaintiff are best placed to ensure that class members and the courts are aware of the involvement of a litigation funder in proceedings, including the impact of any fees or charges on amounts. Recommendations to improve the transparency of litigation funding arrangements in class actions are contained in Chapter 2.

Representative plaintiff's obligations to class members

Adequacy of representation

- 4.142 In the absence of a certification requirement, the representative plaintiff need not demonstrate that they are able to adequately represent class members, or that their personal claim is reflective of the common questions to be determined in the class action.¹³⁵
- 4.143 However, as recognised in many submissions, the Court has powers under part 4A of the Supreme Court Act which allow it to address issues relating to the adequacy of the representative plaintiff, where required.¹³⁶ These powers include:
- section 33N, which allows a proceeding to be discontinued as a class action if it is inappropriate that it continue
 - section 33T, which enables class members to apply for the substitution of an inadequate representative plaintiff
 - sections 33Q and 33R, which provide for sub-groups and individual questions, to ensure that all class members' claims are addressed in proceedings
 - section 33ZF, which gives the Court the broad power to make any order to ensure that justice is done in proceedings.¹³⁷
- 4.144 The Commission's consultations suggested that adequacy of representation is not a systemic issue in Victorian class actions.¹³⁸ This suggestion is reinforced by empirical data collected by Vince Morabito. His submission referred to two class actions commenced in the Supreme Court: *Cohen v The State of Victoria (No 2)* and *Matthews v SPI Electricity Pty Ltd (Ruling No 1)* in which the representative plaintiffs had not provided their consent to act in that role.¹³⁹ He argued that two instances does not constitute sufficient evidence of a systemic problem.¹⁴⁰

135 Part 4A of the *Supreme Court Act 1986* (Vic) contains little specific guidance as to what an 'adequate' representative plaintiff looks like. The representative plaintiff must have a sufficient interest to be able to commence the proceedings on their own behalf: s 33D. While the representative plaintiff is not required to prove that their personal claim is reflective of the common questions to be determined in the class action, the statement of claim should be drawn so that their personal claim can be used as a vehicle for determining the common questions in the action: Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [4.2].

136 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria), Submission 35 (Professor Vince Morabito).

137 *Supreme Court Act 1986* (Vic) ss 33N, 33Q, 33R, 33T, 33ZF.

138 Roundtables 1, 2 (professional stakeholders).

139 [2011] VSC 165 (13 May 2011); (2011) 34 VR 560.

140 Submission 35. Previous research indicating that a high proportion of professionals and managers have been appointed as representative plaintiffs in Federal Court class actions also casts doubt on the assertion that representative plaintiffs are commonly appointed as 'persons of straw': Jane Caruana and Vince Morabito, 'Turning the Spotlight on Class Representatives: Empirical Insights from Down Under' (2012) 30(2) *Windsor Yearbook of Access to Justice* 1.

- 4.145 Not all submissions considered adequacy of representation to be sufficiently addressed under part 4A of the Supreme Court Act.¹⁴¹ Simone Degeling, Michael Legg and James Metzger argued that introducing an adequacy requirement would reduce the risk of conflicts of interest between the representative plaintiff and class members, while Allens submitted that it would ensure that the common issues addressed by the representative plaintiff's claim resolve all class members' claims.¹⁴² Recommendations to introduce an adequacy requirement were generally made in conjunction with calls to introduce certification.¹⁴³ As outlined above, the Commission does not support the introduction of certification in Victoria.
- 4.146 Requiring a representative plaintiff to prove they adequately represent the class would create further scope for interlocutory disputes and the associated costs and delay. It could also increase the disincentives for class members to take on this role, which are already significant.¹⁴⁴ The Commission does not support additional burdens, or disincentives, being placed on the role of representative plaintiff.

Own motion power for the Court to replace a representative plaintiff

- 4.147 Currently, the Court has power to substitute a representative plaintiff under section 33T of the Supreme Court Act when a class member applies for this to happen. The Commission considers that the Court should have the express power to remove an inadequate representative plaintiff of its own motion. The following reasons in support of the idea were highlighted in submissions:
- The utility of the existing power is doubtful. Allens stated that it is unaware of any instances of section 33T being used.¹⁴⁵
 - An own motion power would be in keeping with the Court's supervisory role in class actions.¹⁴⁶ Although the Court already has broad powers under sections 33N and 33ZF of the Supreme Court Act, an own motion power would allow a representative plaintiff and their lawyers to be replaced, without discontinuing proceedings, where deemed appropriate by the Court.
 - It would be consistent with the recommendations of the ALRC in its 1988 report on grouped proceedings. The ALRC observed that, in order to manage a class action properly, the Court should have the power to replace the representative plaintiff of its own motion.¹⁴⁷
 - It would recognise the important role of the representative plaintiff in ensuring class members' interests are protected, without placing additional burdens or disincentives upon the representative plaintiff. The importance of this role has been recognised in the New South Wales and Queensland class action regimes. These regimes give the courts the power, upon application of the defendant or of its own motion, to discontinue a class action where the representative plaintiff does not adequately represent the class members.¹⁴⁸
- 4.148 For these reasons, the Commission is of the view that section 33T of the Supreme Court Act should be amended to give the Court the power to replace a representative plaintiff of its own motion, where necessary.

141 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 12 (Allens), 19 (US Chamber Institute for Legal Reform), 27 (Ashurst), 29 (Insurance Council of Australia).

142 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 12 (Allens).

143 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 19 (US Chamber Institute for Legal Reform), 27 (Ashurst), 29 (Insurance Council of Australia).

144 Roundtables 1, 2 (professional stakeholders); Submission 35 (Professor Vince Morabito).

145 Submissions 12 (Allens), 33 (Victorian Bar).

146 Submission 12 (Allens).

147 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 78.

148 *Civil Procedure Act 2005* (NSW) s 166(1)(d); *Civil Proceedings Act 2011* (Qld) s 103K(1)(d).

Recommendation

- 14** Section 33T of the *Supreme Court Act 1986 (Vic)* should be amended to empower the Court, of its own motion, to substitute another class member as representative plaintiff, and make other such orders as it thinks fit, if it appears that the representative plaintiff is unable to adequately represent the interests of class members.

Onerous role of representative plaintiff

- 4.149 The role of the representative plaintiff in a class action is a demanding one. As discussed in Chapter 5, class members are able to enjoy immunity from costs orders because this burden is placed solely on the representative plaintiff. In a large class action, these costs orders will run into the millions of dollars.
- 4.150 Although the representative plaintiff is not appointed by class members, and is not their agent or intermediary, they have responsibility for the conduct of proceedings on behalf of class members. The ALRC, in its 1988 report suggested that there is a fiduciary element to the role of the representative plaintiff which requires them to act in the interests of class members.¹⁴⁹
- 4.151 A representative plaintiff may face intense pressure from class members, and the general public, about the progress and outcomes of a class action. The Commission was told there can be a misapprehension about the role of the representative plaintiff in a class action. Class members may believe that the representative plaintiff is being paid by the law firm, or that their role is to make submissions on behalf of individual class members to the law firm or scheme administrators about the conduct of the proceedings.¹⁵⁰ The public forum of class actions means that intense media scrutiny of proceedings, and the representative plaintiff, is common.
- 4.152 These obligations—combined with the significant investment of emotion and time that is required—mean that the appointment of a representative plaintiff who adequately represents the class members can be a difficult task. The Commission was told that, due to the significant financial risks involved, corporate entities are reluctant to be appointed as representative plaintiff in Australian class actions.¹⁵¹
- 4.153 Some of the disincentives to acting in the role of representative plaintiff can be mitigated by altering the cost burdens and risks involved in this role. This is discussed in Chapter 5.
- 4.154 Other disincentives can be mitigated by ensuring that the representative plaintiff, and other class members, are adequately informed about the role. Providing standardised and clear information to all class members about the requirements and responsibilities of the representative plaintiff would assist class members who are considering whether to accept the role of representative plaintiff. With a clearer understanding that the representative plaintiff is not their agent, class members would also be less likely to place undue pressure on the person who takes on the role.
- 4.155 The Commission considers that the law firm acting for the representative plaintiff is best placed to provide this information to class members. It recommends that the representative plaintiff's lawyers provide this and other key information to them, and the Court, at the start of proceedings (Recommendation 23).

Court approval of settlement

- 4.156 Court supervision is essential to safeguard participants in class actions from unfair risks and disproportionate cost burdens. Part 4A of the Supreme Court Act mandates Court supervision at various points of proceedings, one of which is settlement.¹⁵² In order to have legal effect, a class action settlement must be approved by the Court.¹⁵³
- 4.157 Because of the representative nature of class actions, where class members do not appear before the court, the Court's supervisory role at settlement approval is a particularly onerous one. This was observed by the Federal Court in *Australian Securities and Investments Commission v Richards*:
- The role of the court [at settlement approval] is important and onerous. It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises. In the current context, the Court's role is to protect those group members who are not represented by [the representative plaintiff's lawyers] and whose interests may be prejudiced by their absence.¹⁵⁴
- 4.158 Not only is the Court's role at settlement approval onerous, it is also regularly called upon in class actions. Like many other forms of civil litigation, settlement is the most common means of resolving a class action, especially in Victoria,¹⁵⁵ and is encouraged by the Court.¹⁵⁶
- 4.159 The Court's principal task is to assess whether the settlement is a fair and reasonable outcome for class members considered as a whole, not just for the representative plaintiff and the defendant. The ALRC recommended in its 1988 report on grouped proceedings that factors for the Federal Court to consider when approving a settlement should be set out in legislation.¹⁵⁷ However, the recommendation has not been implemented in any class action jurisdiction in Australia, including Victoria.
- 4.160 On the one hand, the absence of statutory guidance enables the courts to exercise discretion in an innovative and appropriate manner according to the peculiar challenges of each settlement approval. On the other, it increases the risk that case law will be applied in a piecemeal or inconsistent fashion, and that parties will be unsure about the requirements of settlement. As directed by the terms of reference, the Commission has examined whether there should be specified criteria for the Court's approval of a settlement under section 33V of the Supreme Court Act. Its recommendations are set out in the following section.
- 4.161 The role of the Court at settlement approval is particularly difficult due to the adversarial void that exists when both sides have become 'friends of the deal'.¹⁵⁸ The appointment of a contradictor, and a greater role for parties and class members were raised during consultations and in submissions as means of assisting the Court in this context. They are discussed in turn below.
- 4.162 Settlement approval is only the first phase of settlement. The second phase, settlement distribution, is discussed at [4.191]–[4.217].

152 The Court must also fix the opt-out date and approve the formal notices sent to class members: *Supreme Court Act 1986* (Vic) ss 33J, 33Y.
 153 Ibid s 33V.
 154 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 (12 August 2013) [8] (Jacobson, Middleton and Gordon JJ) (citations omitted). See also *Lopez v Star World Enterprises Pty Ltd* (1999) ATPR ¶141-678, 42 670 (Finkelstein J).
 155 Submission 35 (Professor Vince Morabito).
 156 See, eg, *Civil Procedure Act 2010* (Vic) s 22.
 157 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 163.
 158 *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, 454 (Murphy J).

Settlement approval under section 33V

4.163 As recognised by the Supreme Court, the process of settlement under section 33V has evolved over time, and ‘has grown in sophistication due to the need to adapt to complex scenarios’.¹⁵⁹ The principles guiding settlement approval, and criteria relevant to the Court’s decision, are discussed below.

Settlement approval principles

4.164 The principles that govern the exercise of the Court’s power to approve a proposed settlement have developed through case law and are now well established. They were recently set out by Justice Emerton in *Williams v Ausnet Electricity Services Pty Ltd*,¹⁶⁰ and are also included in the Supreme Court Practice Note. They require the Court to consider whether the proposed settlement is both:

- fair and reasonable as between the parties having regard to the claims of the class members
- in the interests of class members as a whole and not just in the interests of the representative plaintiff and the defendant.¹⁶¹

4.165 The courts have indicated that these principles must be applied in a flexible manner. There will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the defendants or in relation to sharing the recovered amounts between class members. Reasonableness is a range, and the relevant question is whether the proposed settlement sum, and the proposed distribution of that sum between class members, falls within that range.¹⁶²

4.166 Further, this assessment does not involve guessing or interpreting the tactical decisions made by the representative plaintiff’s lawyers. Rather, the Court’s role is to satisfy itself that the decisions are within the reasonable range of decisions, having regard to the known, and reasonably knowable, risks and circumstances.¹⁶³

Settlement approval criteria

4.167 In assessing whether the proposed settlement falls within the range of fair and reasonable outcomes, the Court will consider a number of criteria which have also developed through case law. They are now set out, on a non-exhaustive basis, in the Supreme Court Practice Note.¹⁶⁴ These criteria include:

- the complexity and likely duration of the litigation
- the reaction of the group to the settlement
- the stage of the proceedings
- the likelihood of establishing liability
- the likelihood of establishing loss or damage
- the risks of maintaining a class action
- the ability of the defendant to withstand a greater judgment
- the range of reasonableness of the settlement in light of the best recovery
- the range of reasonableness of the settlement in light of all the attendant risks of litigation

159 Submission 30 (Supreme Court of Victoria).

160 [2017] VSC 474 (28 August 2017) [31].

161 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.1].

162 See, eg, *Newstart 123 Pty Ltd v Billabong International Ltd* (2016) 343 ALR 662, 664 (Beach J); *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [5] (Moshinsky J); *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 (20 May 2011) [13] (Gordon J); *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, 339 (Jessup J).

163 *Ibid.*

164 See, eg, *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459, 465–6 (Goldberg J); Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.3].

- the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.¹⁶⁵

Legislative guidance

4.168 The Court’s flexibility is a particular strength of Victoria’s class action regime. It is important that this flexibility is maintained when the Court is evaluating the fairness and reasonableness of a settlement, and that it uses this flexibility in an appropriate manner.¹⁶⁶

4.169 Allens commented on the demonstrated ability of the Supreme Court to assess settlements in the interests of class members, and the importance of not limiting its ability to consider circumstantial factors:

In our view, given the preparedness of courts to scrutinise settlement terms in the class actions context, the Court should not be constrained in the criteria relevant to evaluating the reasonableness of a class action settlement. In particular, it is important that the Court is able to take into account the facts of the case, the circumstances of the group members and the nature of the funding arrangement.¹⁶⁷

4.170 The Supreme Court stated that the criteria for settlement approval do not require a formulaic recitation in legislation.¹⁶⁸ A similar view has been expressed in case law, where the courts have reiterated that the settlement approval criteria, while providing a useful guide, are neither mandatory or exhaustive, nor do they supplant a detailed analysis of the particular facts in each proceeding.¹⁶⁹

4.171 It is expected that new matters which are relevant to the approval of a settlement will continue to arise in response to developments in class action practice, as well as broader developments in the legal and litigation funding industries. As Slater and Gordon stated, it is important that courts have scope to consider emerging factors when approving a settlement:

In this way, as new factors which are relevant to the court’s assessments arise – for example, the advent of litigation funding... – courts in future decisions can adopt an approach to considering whether to approve a settlement which reflect such changes in the class action landscape.¹⁷⁰

4.172 An example is the issue of costs. The settlement approval criteria listed above do not refer to legal costs, or any litigation funding costs. As discussed in Chapter 5, court scrutiny of costs is an important part of settlement approval and, in relation to litigation funding costs, is a rapidly developing one. Retaining flexibility in the settlement approval criteria has enabled the courts to recognise that, if applicable, the court should consider the legal costs and any litigation funder’s fee in its analysis of whether settlement is fair and reasonable.¹⁷¹

4.173 Given the continually evolving nature of settlement approval jurisprudence, particularly on the matter of costs, the Commission considers that there are more effective mechanisms to strengthen the Court’s role at settlement approval than legislative recitation of settlement approval criteria. These mechanisms are discussed throughout the report, and include:

- introducing guidance for the appointment of contradictors at settlement approval and in settlement distribution
- improving the ability of class members to object to settlement approval

165 Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.3].

166 Submissions 14 (LCM), 15 (Phi Finney McDonald), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers).

167 Submission 12 (Allens).

168 Submission 30 (Supreme Court of Victoria).

169 See, eg, *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [11] (Middleton J).

170 Submission 28 (Slater and Gordon Lawyers).

171 See, eg, *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [11] (Middleton J) citing *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [91], [99], [140] (Murphy J).

- increasing the accountability of the scheme administrator to the Court
 - introducing a legislative power for the Court to review and vary all costs of proceedings.
- 4.174 These reforms avoid the risk that the Court will be constrained in considering the unique circumstances of each proposed settlement, or in adopting case law developments to the process of settlement approval. At the same time, they strengthen the ability of the Court to ensure that settlement is fair and reasonable, and in the interests of class members as a whole.
- 4.175 While there was little support for recognising the settlement approval criteria in legislation, and cogent reasons to avoid this, there are more compelling reasons to include the broader settlement approval principles in legislation. Simone Degeling, Michael Legg and James Metzger submitted that legislative guidance would ensure that the well-established principles from case law are given due consideration by the Court in every case.¹⁷² It could also play an important educative role for the public generally, and in particular for class members, as to how the Court will approach settlement.¹⁷³
- 4.176 For this reason, the Commission recommends including the settlement approval principles in legislation, while retaining the settlement criteria in the practice note. This will underpin the Court’s supervisory role at settlement approval, while also allowing factors relevant to this discretion to evolve and adapt with developments in case law.

Recommendation

- 15** Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to include the principles that govern the exercise of the Court’s power to approve a proposed settlement, currently contained in paragraph [13.1] of the Supreme Court’s practice note on class actions.

Appointing a contradictor for settlement approval

- 4.177 In recent years, the Supreme Court has changed its view about using contradictors at settlement approval. While not previously the case, the appointment of a contradictor for settlement approval is now the ‘default’ position in Common Law Division class actions,¹⁷⁴ and it appears to be an increasing trend in other Australian courts.¹⁷⁵
- 4.178 A contradictor, appointed to represent the interests of class members, is likely to be appointed where the Court has concerns with some aspects of settlement, or is not well placed to review a particular aspect of it. Appointment may be necessary for an isolated element of settlement approval, such as the costs of settlement distribution, or it may be necessary to review the settlement as a whole.¹⁷⁶ This will depend on the facts of the individual case.

172 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).

173 Michael Legg, ‘Class Actions, Litigation Funding and Access to Justice’ [2017] 57 *University of New South Wales Law Research Series* 1, 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035096>.

174 Consultation 4 (Judges of the Supreme Court of Victoria).

175 Justice Bernard Murphy and Vince Morabito, ‘The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 38.

176 Submission 30 (Supreme Court of Victoria).

- 4.179 There was strong support in submissions for the use of a contradictor during settlement approval, where deemed appropriate by the Court.¹⁷⁷ Although the assistance provided by a contradictor was recognised to be valuable, most submissions did not support appointment being made mandatory due to the significant costs involved, which reduce the amounts available for class members.¹⁷⁸ Phi Finney McDonald considered these costs to be so significant that they would be likely to outweigh the benefits of a contradictor in all but ‘the most flagrant of cases’.¹⁷⁹
- 4.180 Whether a contradictor is necessary may also depend upon the type of case. For example, Slater and Gordon suggested that class members in shareholder class actions are unlikely to need the assistance of a contradictor. It was submitted they generally have a good level of understanding of the legal system, and are either able to resolve their questions about the settlement by contacting the lawyers, or by lodging an objection with the court.¹⁸⁰
- 4.181 Allens submitted that the practical realities of settlement approval diminish the utility of a contradictor, as courts are generally reluctant to significantly intervene in an agreement reached by the parties unless there are serious deficiencies and it is practical to do so.¹⁸¹ The limited impact of a contradictor on a court’s decision was also raised during consultations with class members. Class members who had experience of a contradictor being used in proceedings suggested that, if appointed for only a small number of objecting class members, a contradictor can cause delays and cost burdens for the entire class, yet will be unlikely to have any real impact on the ultimate approval of settlement.¹⁸²
- 4.182 In light of these considerations, the Commission endorses the following approach to the use of contradictors in Victorian class actions:
- Contradictors should be readily available in class actions involving complex settlements. While appointment should not be mandatory, there should be a presumption that in Common Law Division class actions, or class actions with complex settlement distribution schemes, a contradictor will be appointed at settlement approval. Reflecting this in the Supreme Court Practice Note would convey the changed attitude of the Court to using contradictors at settlement approval.
 - Increased guidance for the Court, when exercising its discretion to appoint a contradictor. The Commission agrees with the Supreme Court that guidance for the appointment of a contradictor could be usefully set out in the Supreme Court Practice Note.¹⁸³ In order to promote flexibility, the guidance should be non-exhaustive. Allens suggested that it could include factors such as: the desirability of the appointment in light of the complexity of the settlement and potential impact on class members; the time and costs involved in bringing the contradictor up to speed; the level of unrepresented objections received; the relative proportion of fees to proposed compensation for each class member; any other matter the Court deems appropriate.¹⁸⁴
 - Greater use of Funds in Court. Funds in Court has significant expertise in negotiating legal costs, and acting on behalf of persons with a disability, due to minority, or an intellectual or physical disability, or both. The Court has used Funds in Court in class action settlements where there are class members with a disability. For example, during the settlement of the Kilmore East/Kinglake and Murrindindi/Marysville

177 Submissions 3 (Professor Julie-Anne Tarr), 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 11 (Litigation Funding Solutions), 12 (Allens), 13 (Maurice Blackburn Lawyers), 18 (Adley Burstyner), 19 (US Chamber Institute for Legal Reform), 21 (Law Council of Australia), 22 (Dr Michael Duffy), 24 (Consumer Action Law Centre), 27 (Ashurst), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria), 35 (Professor Vince Morabito).

178 Submissions 12 (Allens), 13 (Maurice Blackburn Lawyers), 21 (Law Council of Australia), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria), 35 (Professor Vince Morabito). Submission 27 (Ashurst) submitted that a third-party contradictor should generally be appointed, except where the costs would not warrant the appointment. Submission 19 (US Chamber Institute for Reform) stated that part 4A should be amended to provide for this appointment at any settlement approval.

179 Submission 15 (Phi Finney McDonald).

180 Submission 28 (Slater and Gordon Lawyers).

181 Submission 12 (Allens).

182 Roundtable 5 (clients and consumers).

183 Submission 30 (Supreme Court of Victoria).

184 Submission 12 (Allens).

Bushfires class actions, staff from Funds in Court collated the necessary information, prepared orders approving compromise and identified any issues of concern in relation to claimants with a disability.¹⁸⁵ The Commission supports the continued use of Funds in Court during settlement approval, and, subject to resourcing issues, encourages investigation of its use as contradictor more broadly in class actions.

Recommendation

- 16** The Supreme Court should consider amending its practice note on class actions to include guidance for the appointment of an independent representative (commonly known as a contradictor) to assess the terms of settlement, or the terms of the settlement distribution scheme, on behalf of class members.

Class member objections to settlement approval

- 4.183 One way for the courts to assess the desirability of settlement for all class members is to consider both the rate of objection to settlement and the opt-out rate. If a number of class members object to, or opt out of, settlement, it may be an indication that it is not fair or reasonable for all class members.
- 4.184 A lack of objection or a low opt-out rate, however, does not necessarily represent class members' assent and may carry little weight.¹⁸⁶ Whether it is a relevant indicator will depend, among other factors, on whether timely and clear notice has been given to class members, and whether there is evidence that they actually understand the notice. In reiterating its protective role at settlement approval, irrespective of the rate of objections, the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* observed:
- It may be the case, as the applicant contends, that the absence of objection is 'no small thing', but care should be taken before approaching an application on the basis that class members' silence is equivalent to their assent. It is the Court's responsibility to protect class members' interests and the absence of objections or a low level of objections does not relieve it of that task.¹⁸⁷
- 4.185 Allens suggested that reforms which aim to improve the settlement approval process should focus on alleviating the obstacles to class members' participation in settlement approval.¹⁸⁸ The appointment of a contradictor to coordinate and present class members' objections is one way this can be achieved, and Recommendation 16 seeks to encourage the use of contradictors in appropriate class actions.
- 4.186 As class members bear their own costs in objecting to a settlement, reducing the costs of objecting is another way of alleviating obstacles to participation. While stakeholders indicated it is advantageous to have some cost obstacles in place to prevent the filing of 'unlimited' objections to settlement approval,¹⁸⁹ the courts are increasingly willing to allow objecting class members to recoup some of these costs, if the objections assist the court.¹⁹⁰ The Commission supports the continued exercise of discretion in this manner.

185 Supreme Court of Victoria, *Annual Report 2016–17* (2017) 57.

186 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 204–5 (Murphy, Gleeson and Beach JJ); *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, 454 (Murphy J); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* (2015) 325 ALR 539, 573 (Wigney J); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029 (21 September 2010) [23] (Finkelstein J).

187 (2016) 245 FCR 191, 204–5 (Murphy, Gleeson and Beach JJ).

188 Submission 12 (Allens).

189 Roundtable 3 (professional stakeholders).

190 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 38.

- 4.187 The Commission also observes the importance of clear and concise notice, and other communication, in increasing class members' awareness of settlement, and ability to object, if appropriate. Recommendations to improve notice and other communication are discussed at [4.218]–[4.246].

Involvement of parties at settlement approval

- 4.188 The Supreme Court Practice Note sets out the range of matters that the parties seeking settlement are usually required to address at settlement approval.¹⁹¹ They include how the settlement complies with the criteria for settlement approval, why the proceedings have settled on particular terms, and the effect of the terms on group members. They are set out in full in Chapter 7 of the consultation paper.
- 4.189 The representative plaintiff is largely responsible for providing the relevant information to the court (in affidavit form). In the Federal Court, the affidavit must also address, where relevant, the terms of any funding agreement and its application to the settlement, if approved.¹⁹² This requirement underpins the judicial trend toward greater scrutiny of funding fees in the Federal Court. This provision could be usefully included in the Supreme Court Practice Note, and the Commission makes a recommendation to this effect.
- 4.190 The defendant, having already agreed to the terms of settlement, is unlikely to play an active role in settlement approval. The consultation paper suggested that greater involvement of the defendant at settlement approval could provide a cross-check for the 'untested and uncontradicted'¹⁹³ evidence provided by the representative plaintiff's lawyers. Submissions did not consider that this would better protect the interests of class members.¹⁹⁴

Accountability during settlement distribution

- 4.191 Settlement of a class action has two phases. The first phase, settlement approval, is subject to mandated Court supervision under part 4A. There is no legislative provision for ongoing judicial supervision of settlement distribution, which is the second phase.
- 4.192 The Supreme Court Practice Note states that, at settlement approval, the Court will generally approve the settlement distribution scheme and make orders disposing of the proceeding.¹⁹⁵ Accordingly, the accountability of the scheme administrator to the Court is largely dependent upon the terms of the settlement distribution scheme. If it gives the Court a limited supervisory role in the distribution process or in resolving any issues, the Court's ability to rectify problems arising during the distribution process will be limited.¹⁹⁶
- 4.193 While the majority of submissions did not consider mandatory Court supervision of settlement distribution necessary, there was strong support for increased accountability through the use of a contradictor, increased reporting requirements, and increased Court review of disputed assessments. These matters are discussed in turn below. The Commission's recommendations to enhance accountability of scheme administrators to the Court are included at the conclusion of the section.

¹⁹¹ Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13].

¹⁹² Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, [14.5].

¹⁹³ Michael Legg, 'Class Action Settlements in Australia—The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 597–8.

¹⁹⁴ Submissions 12 (Allens), 13 (Maurice Blackburn Lawyers), 28 (Slater and Gordon Lawyers).

¹⁹⁵ Supreme Court of Victoria, *Practice Note SC Gen 10—Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.4].

¹⁹⁶ Submission 30 (Supreme Court of Victoria).

Extent of Court supervision at settlement distribution

- 4.194 The necessity of Court supervision of settlement distribution depends on the circumstances, and type, of proceedings. In large mass tort class actions, settlement distribution will require highly individualised loss assessments to be carried out for each class member, which will be both lengthy and costly. It may be appropriate for the Court to maintain close supervision of the progress of the distribution to ensure that class members are kept informed and that issues are resolved expeditiously.
- 4.195 For example, in the Kilmore East/Kinglake bushfires class action, the Supreme Court had a heightened supervisory role during settlement distribution. Regular case management conferences were held to address the progress of the assessment process, Court direction or approval of particular matters, communication with class members, interim payments of the scheme administrator's costs and other issues.¹⁹⁷
- 4.196 On the other hand, some Commercial Court settlement distribution schemes can be very straightforward.¹⁹⁸ In shareholder or investor class actions, settlement distribution tends to be completed within three to six months.¹⁹⁹ The Commission's consultations indicated that intensive Court supervision in these class actions would result in increased costs and delays to class members, with few tangible benefits in terms of distribution time.²⁰⁰
- 4.197 Stakeholders agreed that the degree of Court oversight should remain discretionary, depending on the circumstances of the case. Maurice Blackburn indicated that the appropriate level of supervision will depend on a range of factors which may include:
- the size of the settlement sum
 - the types of losses claimed and the processes for assessing compensation entitlements
 - the timeframe required to assess individual claims
 - the complexity of the settlement distribution scheme
 - the need (or otherwise) for close Court scrutiny.²⁰¹
- 4.198 Given the individualised nature of settlement distribution schemes, and the demonstrated capabilities of the Court to oversee settlement distribution where necessary, the Commission does not consider prescriptive guidelines about supervision of settlement distribution are necessary.

Use of contradictor during settlement distribution

- 4.199 The Supreme Court submitted that the complexity of some settlement distributions may justify the appointment of a contradictor to identify issues only in settlement distribution, as opposed to considering the merits of the overall settlement more broadly.²⁰²
- 4.200 Justice Forrest has observed, extra-judicially, that any such appointment will depend on the size of the asset pool and the issues arising from settlement. Where there is no differentiation between class members' claims or where the cost is disproportionate to the benefit to the class, it will not be necessary. While Justice Forrest did not consider that the appointment of a contradictor would have made any discernible difference to the approval of the settlement distribution in the Kilmore East/Kinglake bushfires class action, he envisaged that some parts of the scheme that caused problems might have been identified by a contradictor at settlement approval, and possibly set up differently.²⁰³

197 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71, 93–4.

198 Submission 30 (Supreme Court of Victoria).

199 Submissions 13 (Maurice Blackburn Lawyers), 28 (Slater and Gordon Lawyers).

200 Roundtable 3 (professional stakeholders).

201 Submission 13. See also Submissions 15 (Phi Finney McDonald), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria).

202 Submission 30 (Supreme Court of Victoria).

203 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71, 93.

- 4.201 The Commission considers that guidance for the appointment of a contradictor, whether for settlement approval as a whole or only for settlement distribution, should be included in the Supreme Court Practice Note, and makes a recommendation to this effect (Recommendation 16).

Court review of disputed assessments

- 4.202 Where a settlement distribution scheme involves complex individual assessments, the Supreme Court submitted that it may be desirable to have a mechanism which enables it to review some disputed assessments. It indicated that this review should be confined to exceptional circumstances, and only be available if the internal review process provided for in a settlement distribution scheme has already been followed.²⁰⁴
- 4.203 Justice Forrest has observed, extra-judicially, that a similar mechanism may have been useful during the settlement distribution of the Kilmore East/Kinglake bushfires. While he noted that the Court did not want to be involved in individual assessments, he considered that the settlement distribution scheme could have provided for the Court to play a limited role in reviewing certain decisions of the administrator, such as:
- late registration
 - final assessment where the result was legally wrong
 - where necessary, in considering an interim distribution of funds.²⁰⁵
- 4.204 The Supreme Court observed that any review mechanism would need to be included in the settlement scheme put forward at settlement approval, as options for further modification of this are limited once a scheme is approved.²⁰⁶ The Commission makes a recommendation to this effect (Recommendation 17).

Regularity of settlement distribution reporting

- 4.205 As a matter of practice, the Supreme Court requires scheme administrators to report every six months regarding the progress of the settlement distribution and the costs involved.²⁰⁷ There is no formal recognition of this requirement in the legislation or Court guidelines.
- 4.206 In comparison, the Federal Court Practice Note states that the affidavit in support of settlement should set out the frequency of any reporting during settlement distribution, as well as the time at which it is anticipated class members will receive settlement funds.²⁰⁸
- 4.207 Maurice Blackburn and Slater and Gordon submitted that there may be value in requiring scheme administrators to provide this type of information to the Court at settlement approval.²⁰⁹ Provision of this information may, of itself, be relevant to the approval of the proposed settlement.
- 4.208 The Commission agrees, and recommends that reporting requirements for scheme administrators be included in the Supreme Court Practice Note.

204 Submission 30.
205 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71, 94.

206 Submission 30.
207 Submission 30 (Supreme Court of Victoria).
208 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, [14.5].
209 Submission 13 (Maurice Blackburn Lawyers), 28 (Slater and Gordon Lawyers). While Maurice Blackburn indicated there may be value in requiring scheme administrators to provide information about the time at which class members receive settlement sums, the difficulty of giving precise estimates at an early stage was also noted: Submission 13.

Final reporting

- 4.209 At the conclusion of the settlement distribution scheme, a scheme administrator is required to file a final report with the Court.²¹⁰ As with other reporting during settlement distribution, this is not recognised in legislation or the Supreme Court Practice Note.
- 4.210 The Commission considers that practice note guidance, setting out the matters to be addressed in the final report, would be useful in providing certainty for the scheme administrators. It would also encourage consistency in reporting requirements between different settlement distribution schemes, and may give scheme administrators an incentive to improve practices where they form part of the reporting criteria.
- 4.211 Healthcare companies and businesses submitted that relevant factors for a final report might include: information on the distributions made to class members; the time taken for such distributions; and the amounts charged for distributing. It was also recommended that compulsory publication of final reports be considered, to allow a transparent means of comparing law firms involved in class actions.²¹¹ While publication may be advantageous for data collection purposes, the Commission considers this should be subject to confidentiality considerations.
- 4.212 The Commission recommends recognition of the requirement to file a final report at the conclusion of settlement distribution in the Supreme Court Practice Note. In the interests of confidentiality, the publication of these reports should be left to the discretion of the Court.

Accountability for undistributed settlement amounts

- 4.213 In class actions involving a large undefined class, and where damage to each class member is very small, it is unlikely that all class members will register to share in any recovered amounts. Accordingly, not all the money paid by a defendant pursuant to the settlement agreement will be claimed by those who have suffered damage. Similarly, in a large class action where the settlement is significant, it is likely that there will be amounts remaining after all class members' claims have been assessed and distributed.
- 4.214 In Victoria, it is common practice that if a large amount of money remains undistributed after settlement distribution, the Court will generally redistribute it among registered class members.²¹²
- 4.215 Redistribution of a small sum, however, will not be economical. In such cases, the money will generally revert to a charitable trust or body, as provided for in the settlement distribution scheme. In the Kilmore East/Kinglake bushfires class action, for example, the settlement distribution scheme contained a provision that any undistributed amounts of money (below a certain amount) would be provided to bushfire relief funds.²¹³
- 4.216 Data collected by Vince Morabito suggests that the Victorian practice is consistent with the approach of the courts in other jurisdictions.²¹⁴ Judges consulted from the Supreme Court indicated that it would be useful for the Court to have an express discretion to determine how undistributed settlement money is allocated, where this is not provided for in a settlement distribution scheme.²¹⁵

210 Submission 30 (Supreme Court of Victoria).

211 Submission 20 (Healthcare companies and businesses).

212 Consultation 4 (Judges of the Supreme Court of Victoria). If an award of damages is made, part 4A provides that the defendant may apply for the payment of undistributed funds: *Supreme Court Act 1986 (Vic)* s 33ZA(5).

213 Consultation 4 (Judges of the Supreme Court of Victoria).

214 Although only in the early stages of an empirical study, Vince Morabito has found that in at least 18% of all settled class actions, the settlement distribution schemes or orders made after settlement approval envisaged the payment of undistributed settlement amounts to persons or entities other than the defendant, including the class members: Vince Morabito, *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 13–14.

215 Consultation 4 (Judges of the Supreme Court of Victoria).

- 4.217 As discussed in Chapter 6, technological advances mean that class actions where the damage to individual class members is very small may be filed more regularly in the future. The Commission considers it prudent for the Court to have the express discretion to order how any undistributed money is allocated, and for the scheme administrator to be required to report on the distribution of any unclaimed settlement amounts at the conclusion of the process.

Recommendations

- 17** The Supreme Court should consider amending paragraph [13.5] of its practice note on class actions to require the affidavit(s) in support of settlement approval to include the following additional matters:
- (a) the time at which settlement funds will be received by class members
 - (b) a mechanism for Court review of disputed decisions of the scheme administrator where the settlement involves complex individual assessments
 - (c) the application of the terms of any litigation funding agreement to the settlement, if approved
 - (d) how class members will be kept informed of the settlement distribution scheme, including measures to ensure the ease of accessibility of these communications for class members
 - (e) the proposed measures that are being taken, in the settlement distribution scheme, to ensure a just, efficient, timely and cost-effective outcome for class members.
- 18** The Supreme Court should consider specifying in its practice note on class actions that scheme administrators report to the Court:
- (a) on a six-monthly basis, or other period as determined by the Court, regarding the performance of the settlement distribution scheme, including the costs involved and the distributions made
 - (b) at the completion of the settlement distribution scheme, outlining the distributions made to class members, the time taken for such distributions, the amounts charged each class member for distribution, and any outstanding amounts that were unclaimed by class members, including what was done with these outstanding amounts.
- 19** Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court has the discretion to make any orders in relation to the distribution of money remaining after settlement distribution.

Notice and communication with class members

- 4.218 Ensuring that class members are informed about proceedings and understand the consequences of participation is an important way to reduce the risk that they may be exposed to unfair costs or disproportionate cost burdens in class actions.²¹⁶
- 4.219 The Commission recognises this can be a difficult task. There may be thousands of potential class members involved in proceedings, some of whom may remain unidentifiable. Class members may be geographically dispersed; they may not speak English as a first language; they may come from a range of socio-economic backgrounds, and a class may include both institutional and individual participants. Some class members may have signed contracts with litigation funders and/or lawyers, while others have not. Each type of class member may need to receive different information, communicated in diverse ways.
- 4.220 Although the Court publishes information about class actions, including court documents, on its website, class members are most likely to rely on the lawyers acting for the representative plaintiff to inform them about the proceeding. They may be contacted directly, if the law firm has their details, or they may seek information on the firm's website.
- 4.221 The information that is made available is of two main types: formal notices approved by the Court; and other information provided by the lawyers, ranging from legal documents to general progress reports. Part 4A of the Supreme Court Act mandates that formal, Court-approved notice must be provided to class members at certain points during proceedings, including prior to opt-out and settlement.²¹⁷
- 4.222 The content and style of most other communication with class members will be determined by the lawyers. Law firms experienced in running class actions have developed innovative methods for communicating effectively with large classes of persons, including through class action websites, social media platforms, and other digital media.²¹⁸
- 4.223 Comments were made throughout the Commission's consultations about the potential for class members to be confused or misguided about the nature of the class action, the costs involved, and individual obligations and rights. The reasons suggested as to why class members have difficulty in understanding these things included:
- the lengthy, dense and legalistic information sent by law firms and litigation funders at the start of and during proceedings²¹⁹
 - the rare use of formal notice at the commencement of proceedings due to cost considerations²²⁰
 - the possible distortion or minimisation of risks communicated during book build, when lawyers and litigation funders have an incentive to sign contracts with class members²²¹
 - the complexity of formal notice, when used.²²²
- 4.224 The Commission was told that a more comprehensive approach to communication must be adopted in class actions, for both formal notice and other communications with class members.²²³ These are discussed in turn below, with the Commission's recommendations included at the conclusion of the chapter.

216 Providing proper notice and an opportunity to object may permit a representative plaintiff to take steps that are contrary to class members' interests. The Federal Court has accepted in numerous cases that, with proper notice and an opportunity to object, subject to the leave of the Court, the representative plaintiff may take steps that are contrary to unidentified class members' interests: *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 216 (Murphy, Gleeson and Beach JJ).

217 *Supreme Court Act 1986* (Vic) ss 33X, 33Y.

218 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 28 (Slater and Gordon Lawyers).

219 Roundtables 1 (professional stakeholders), 5 (clients and consumers).

220 Roundtable 3 (professional stakeholders).

221 Ibid.

222 Roundtables 1, 3 (professional stakeholders).

223 Roundtables 3 (professional stakeholders), 5 (clients and consumers).

Formal notice

- 4.225 There was consensus during the Commission’s roundtable discussions that formal notices, including both opt-out and settlement notices, are opaque and do not promote understanding by class members.²²⁴ Stakeholders agreed that the clarity and accessibility of formal notice could be enhanced through using modern methods of communication for disseminating notice, and by engaging communications experts to draft the content.
- 4.226 The Commission considers that the Court’s website can be more effectively used than at present to convey information about class actions, and notes that it is being upgraded as part of the Court’s Digital Strategy, with a view to providing a clear and accessible channel for class members to obtain information about proceedings. The Commission’s recommendations that the Court consider drafting standard form notices (Recommendation 21), and that the representative plaintiff’s lawyers be required to produce a class action summary statement (Recommendation 23), complement this development. The notices and summary statements should be published by the Court on its updated website.
- 4.227 Stakeholders indicated that there was a lack of independent, accessible information about class action proceedings more generally.²²⁵ The Commission is of the view that the Court is best placed to provide an independent source of information for class members who are deciding whether to participate in a class action. Such information could usefully be included on the updated Court website.
- 4.228 There was strong support expressed for formal notice being drafted by communications experts rather than lawyers, and that it should omit jargon, references to legislative provisions and any details of court proceedings.²²⁶ Instead, notice should:
- be drafted by Plain English experts, and should incorporate a greater use of graphics and pictures.²²⁷ The Commission considers that in Victoria, a body with significant expertise in the use of plain language, such as the Victoria Law Foundation, would be well placed to provide expertise on the drafting of formal notice.
 - be designed and tested by media, communications and design experts to ensure it is truly effective.²²⁸
 - be provided in short form where possible, using a dot point summary of key matters.²²⁹
 - include the option for a phone call or meeting with the law firm running proceedings to ensure class members can obtain further information.²³⁰
- 4.229 The Commission endorses these suggestions being adopted in all formal notice, particularly in class actions involving vulnerable class members, and recommends that they also be incorporated in standard form notices drafted by the Supreme Court.²³¹ Standard form notice is discussed below.

224 Roundtable 1 (professional stakeholders).

225 Roundtable 1 (professional stakeholders).

226 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 27 (Ashurst), 35 (Professor Vince Morabito); Roundtable 1 (professional stakeholders).

227 Submissions 10 (Victorian Legal Services Board and Commissioner), 28 (Slater and Gordon Lawyers); Roundtable 1 (professional stakeholders).

228 Submissions 2 (Professor Vicki Waye), 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 12 (Allens). Submission 24 (Consumer Action Law Centre) suggested that insights could also be obtained from the field of behavioural economics.

229 Submission 15 (Phi Finney McDonald).

230 Submissions 10 (Victorian Legal Services Board and Commissioner), 11 (Litigation Funding Solutions); Roundtable 1 (professional stakeholders).

231 There is some evidence that these methods are being adopted in the Federal Court class actions: a professional designer and a sociolinguistic expert were recently used, reportedly for the first time, in drafting a notice in a Federal Court class action: Vince Morabito, *An Empirical Study of Australia’s Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) 21.

Standard form notice

- 4.230 The form of opt-out notice in Victorian class actions is prescribed by the Supreme Court Rules,²³² and the Court will approve the form, content and manner of distribution of the notice in each class action. There is no prescribed form for settlement notice, but the Supreme Court Practice Note contains a comprehensive list of matters that should be included.²³³
- 4.231 Some submissions supported the idea that the Court should draft an opt-out notice in a standard form and Plain English, and publish this on its website for use by parties in proceedings.²³⁴ This practice has been adopted in the Federal Court since 2010, although stakeholders held differing views about its success in promoting class members' understanding of opt-out.²³⁵
- 4.232 The Federal Court Practice Note provides additional guidance for parties drafting opt-out notices. This includes that notice should:
- use plain language and give a balanced, succinct description of the claims and defences
 - clearly describe the consequences of remaining a class member or opting out
 - alert class members to the fact and consequences of costs agreements or litigation funding agreements
 - be disseminated in an effective and cost-effective manner.²³⁶
- 4.233 The utility of standard form notice depends on its ability to capture the complexities of class action procedure, while remaining adaptable to a range of proceedings and comprehensible to class members. As observed by Vince Morabito, since the introduction of the Federal Court's standard opt-out notice, the complexity of information that must be included in this notice has significantly increased.²³⁷ If a standard form notice does not include this information, and communicate it in a clear and comprehensible manner, it will be of little use to lawyers and will not improve class members' understanding of proceedings.
- 4.234 The Commission considers that the complexities of opt-out and settlement, and the need for more clarity in formal notice that was expressed during its consultations, necessitates the drafting of Plain English standard form notices by the Supreme Court. These standard form notices should incorporate the suggestions for improving clarity and accessibility included at [4.228]. These notices should be published on the Court's website for use by parties in proceedings, as part of the Court's Digital Strategy.

232 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 18A.04.

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

234 Submissions 10 (Victorian Legal Services Board and Commissioner), 12 (Allens), 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 25 (IMF Bentham Ltd), 28 (Slater and Gordon Lawyers), 30 (Supreme Court of Victoria). These submissions recognised that, given the varied nature of class actions, standard form notice will not be suitable for use in every proceeding, and must be tailored to the circumstances of the individual case.

235 Roundtable 1 (professional stakeholders).

236 Federal Court of Australia, *Class Actions Practice Note (GPN-CA)—General Practice Note*, 25 October 2016, [11.2].

237 Opt-out notices may now be required to address, inter alia, registration requirements, applications for common fund orders or other orders relating to the payment of a funding fee, security for costs orders, or choice of class action where competing proceedings arise: Submission 35 (Professor Vince Morabito).

Recommendations

- 20** In revising the pages on its website about class actions, the Supreme Court should consider ensuring that they contain the following:
- (a) current and clear information on class actions generally as well as on proceedings before the Court
 - (b) links to the Class Action Summary Statement (Recommendation 23) and, if applicable, the Funding Information Summary Statement (Recommendation 6) for each class action
 - (c) standard form opt-out and settlement notices (Recommendation 21).
- 21** The Supreme Court should consider drafting Plain English standard form opt-out and settlement notices, in consultation with the Victoria Law Foundation, and publish these on the Court website.
- 22** The Supreme Court should consider amending its practice note on class actions to:
- (a) specify that opt-out notices and settlement notices should, where possible, follow the standard form notices published on the Supreme Court's website
 - (b) incorporate guidelines for preparing opt-out notices consistently with those contained in the Federal Court practice note on class actions.

Other communication with class members

Communication during proceedings

- 4.235 Maurice Blackburn and Slater and Gordon submitted that the methods used to communicate with class members during proceedings are both adequate and appropriate. Use of electronic communication was highlighted as an important means of increasing the reach and accessibility of this communication.²³⁸
- 4.236 The Commission's roundtable discussion with class members, however, indicated that important information is not necessarily presented or explained in an accessible or clear way by the lawyers. The volume of information was found to be excessive and difficult to understand, making it overwhelming.²³⁹
- 4.237 Communication guidelines for lawyers are of limited use, because class actions vary so much. However, class members in all class actions do need to have basic information communicated to them clearly and succinctly. This includes information about:
- the law firm acting for the representative plaintiff
 - the role of the representative plaintiff in proceedings, including their responsibilities
 - the identity of any litigation funder involved, and where to obtain further information about the funder and the terms of any finance being offered
 - whether any other class actions have been filed (or are likely to be filed) on the same subject matter

- how legal fees and disbursements will be charged, including the impact of any funding equalisation order or common fund order
 - who to contact for further information (noting that there is no charge for this).
- 4.238 Chapter 2 discusses the use of a standard form disclosure document in funded class actions. The Commission considers that a similar disclosure document should be adopted in all class actions, not just those involving a litigation funder.
- 4.239 This document (a class action summary statement) would require the representative plaintiff's lawyers to provide standard information to class members in every proceeding. In doing so, it would ensure that regardless of the book building process, or the experience of the law firm involved, class members receive the same information in every proceeding.
- 4.240 In order to be most effective, the Commission considers the class action summary statement should:
- be drafted in Plain English
 - be no more than one to two pages long, and be broken down into bullet points where possible
 - be disseminated to all potential class members at the start of proceedings, and provided to the Supreme Court for publication on its website
 - contain, as a minimum, the information set out at [4.237].
- 4.241 The Commission recognises that the content of the class action summary statement may change over time, as class action practice and funding frameworks change. The required content should be determined, from time to time, by the Principal Judges of the Commercial Court and Common Law Division.

Recommendation

- 23** The Supreme Court should consider amending its practice note on class actions to require the representative plaintiff's lawyers:
- (a) to provide the Court, when the writ for the proceeding is filed, with a brief Class Action Summary Statement for publication on its website
 - (b) at the same time, or before, make the Class Action Summary Statement available to class members (whether they are actual or potential clients) through, for example, publication on the representative plaintiff's lawyers website.

Communication during settlement distribution

- 4.242 It is important to ensure that class members are informed of the mechanics and expected timing of the settlement distribution scheme. It provides certainty, avoids unrealistic expectations, and enables class members to elect alternative payment mechanisms, such as fast-track payments or interim payments, if available.²⁴⁰
- 4.243 Roundtable discussions with class members indicated that information sent by the scheme administrator about settlement distribution is often lengthy and complex. Where information about probable compensation amounts, or the expected timeframe for distribution was provided, class members found this information useful.²⁴¹

- 4.244 Although submissions recognised the importance of keeping class members informed during settlement distribution, they did not generally recommend that guidelines be drafted for lawyers on how and what they communicate with class members during this time.²⁴²
- 4.245 The significant variability of settlement distribution schemes was the primary reason against guidelines. As submitted by Maurice Blackburn, communication during settlement distribution will vary significantly, depending upon the type of class action. For example, the need and scope for disclosure of progress, costs and possible outcomes of the settlement distribution scheme in a shareholder class action will be very different to the disclosure that may be warranted in a distribution process that occurs over several years.²⁴³
- 4.246 While acknowledging the variability in settlement distribution schemes, the Commission considers it would be useful for the scheme administrator, at settlement approval, to be required to inform the Court how class members will be kept informed during settlement distribution. The Commission recommends that this should be included in the Supreme Court Practice Note (Recommendation 17).

242 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia). This view was not held by all stakeholders: for example, Submission 11 (Litigation Funding Solutions). Submission 22 (Dr Michael Duffy) stated that, as not all class members are clients of the law firm, some mandating of progress reports would be reasonable.

243 Submission 13 (Maurice Blackburn Lawyers).

Risks and cost burdens in class actions

- 116** Introduction
- 117** The risks of losing
- 118** The costs of winning
- 119** The role of the Court
- 126** Costs budgets in class actions
- 127** Control of funding fees in class actions
- 132** Other means of reducing risk

5. Risks and cost burdens in class actions

Introduction

- 5.1 Class actions impose inherently disproportionate risks and cost burdens on the representative plaintiff. If the class action fails, the representative plaintiff is solely responsible for the costs of bringing the proceedings and any adverse costs orders. If the class action succeeds, the class members will share the costs of bringing the proceedings.
- 5.2 Generally, class members are under no obligation to contribute to costs unless or until a successful outcome is known; and in Victoria, the Supreme Court has found that security for costs cannot be ordered against them.¹
- 5.3 The practice of costs shifting is an essential feature of Australia’s legal system because it discourages legal action that has no merit or is speculative. However, the barrier it creates in class actions is likely to be insurmountable unless the representative plaintiff can reduce or remove the substantial costs of bringing the proceedings and the financial risk of losing.
- 5.4 Accordingly, law firms acting on a ‘no win, no fee’ basis, and litigation funders, have a crucial role in bearing risks in class actions and removing or reducing the cost burden. Their involvement, of course, will increase the costs of winning, as they are entitled to a commercially realistic return if the class action is successful.
- 5.5 While the legal retainer, legal costs agreement and funding agreement explain the costs that will be charged, not all class members will necessarily have seen or signed them. Those who have signed them are unlikely to have negotiated the terms. It is therefore important that the court has the power and capacity, when approving settlement, to ensure that the costs are fair and reasonable. The supervisory role of the Supreme Court of Victoria, and recommendations to strengthen it, are discussed in this chapter.
- 5.6 The Commission also recommends that the Court’s discretionary power to reduce the representative plaintiff’s exposure to adverse costs orders and security for costs orders in certain circumstances be recognised in legislation.
- 5.7 Although not a direct method of reducing risks and cost burdens, it is important that class members are made aware of the costs and risks of proceedings and their ability to object to the costs or opt out of the class action. In Chapter 4, the Commission recommends improvements to the information provided to, and communication with, class members. Recommendations to improve disclosures about litigation funding are discussed in Chapter 2.

The risks of losing

- 5.8 The financial risks that the representative plaintiff takes on are disproportionate not only to the risks borne by other class members, but also to the value of their own claim. In a large class action, the adverse costs risk and the costs of bringing proceedings will be millions of dollars, while the representative plaintiff's claim will be far less. For example, in *Camping Warehouse v Downer EDI*, the average payout per class member was expected to be \$633.29, whereas the legal fees were \$2.85 million.²
- 5.9 As noted in Chapter 4, this disproportionate risk structure can make the appointment of a suitable representative plaintiff difficult. The Commission has been told that, because of the risk, well-resourced class members will rarely agree to take on the role of representative plaintiff, even where they form a significant percentage of the class (such as superannuation companies in investor class actions) or where they seek a substantial percentage of the compensation (such as insurers in mass tort class actions).³
- 5.10 Like other forms of litigation, the risks of losing that the representative plaintiff bears in a class action can be reduced by shifting them to a third-party. If the class action is one in which a litigation funder is willing to invest, the representative plaintiff may be fully relieved of the risks. While funding agreements vary, the standard practice is for the litigation funder to indemnify the representative plaintiff for the costs of bringing the class action and any adverse costs orders.
- 5.11 If a litigation funder is not involved in the class action, the representative plaintiff's exposure to at least some of the risks may be mitigated by their lawyers, an insurer or another third party. The options available would be improved if, as recommended in Chapter 3, law firms could apply to the Court to be paid a percentage of any recovered amount on the condition that, among other things, they indemnify the plaintiff for adverse costs and do not charge separately for disbursements.

Liability for legal costs and disbursements

- 5.12 If the class action is not funded, the representative plaintiff is likely to enter into a costs agreement with their lawyers to be charged on a 'no win, no fee' basis. Under this arrangement, the representative plaintiff will not pay the professional legal costs incurred in bringing the proceedings if unsuccessful, but will still be liable for any adverse costs orders and possibly disbursements.
- 5.13 If disbursements are not covered by the 'no win, no fee' arrangement, the representative plaintiff's liability can be mitigated by private contractual agreement. For example, in the Kilmore East/Kinglake bushfires class action, some class member insurers partly funded some disbursements.⁴

Liability for adverse costs and security for costs

- 5.14 If the adverse costs risk is not directly covered by a litigation funder, 'after the event' insurance can be purchased once a dispute has arisen or specific proceedings are contemplated. It covers adverse costs orders and disbursements. It is very expensive and tends to be taken out by litigation funders and law firms, which in turn indemnify the plaintiff for any adverse costs risk. The premium is payable only if the class action is successful.

2 *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016) [27], [98] (Digby J).
 3 Roundtable 1 (professional stakeholders).
 4 See, eg, *Matthews v SPI Electricity Pty Ltd (No 9)* [2013] VSC 671 (9 December 2013).

- 5.15 A related risk is that the defendant may obtain a security for costs order. The order is likely to be millions of dollars and well beyond the capacity of the representative plaintiff—unless perhaps it is a corporate entity. If security is ordered, but not provided, the class action will be unable to continue. Litigation funders normally cover this risk when they are involved in a class action. Security for costs in unfunded class actions is discussed at [5.103]–[5.115].
- 5.16 Whether an ‘after the event’ insurance policy will provide sufficient security for costs in a class action will depend on the circumstances of the case and the wording of the policy in question. For example, in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland*, Justice Yates considered that, while an appropriately worded policy might be capable of providing sufficient security, the policy in question did not. Security was instead required by payment into court or a bank guarantee from an Australian bank.⁵

The costs of winning

- 5.17 Unlike the costs of losing, which are solely borne by the representative plaintiff, the costs of winning a class action are shared among the class members. The type and amount of costs depend on how the risks of losing have been covered during proceedings.
- 5.18 Class members receive less money if the representative plaintiff’s risks have been covered by a litigation funder, or a law firm acting on a ‘no win, no fee’ basis during proceedings. This is because the litigation funder, or the law firm, will necessarily be rewarded from any settlement or judgment amounts for taking on this risk.

Litigation funding fee

- 5.19 Litigation funders charge a funding fee if the case is successful, which is typically charged as a percentage of any recovered amount. There may also be other charges, such as a project management fee.⁶
- 5.20 The size of the funding fee, and the responsibility for paying it, is determined by contractual arrangement. Class members who sign a funding agreement agree to pay the funding fee, set at an agreed rate in accordance with an agreed formula, out of any money they receive from settlement or judgment.⁷
- 5.21 Common fund orders remove the need for a contractual arrangement between the litigation funder and class members who pay the fee. All registered class members are required to pay, whether or not they have signed a funding agreement. The size of the funding fee is determined by the court, most likely at settlement approval. Common fund orders are discussed at [5.88]–[5.102].

Legal costs and uplift fee

- 5.22 A law firm that has reduced the financial risk of losing by acting on a ‘no win, no fee’ basis is paid for its legal services, plus an ‘uplift fee’, if the class action is successful. The way that legal costs are charged, including the uplift fee, is regulated in Victoria under the Legal Profession Uniform Law,⁸ and is determined by the legal costs agreement entered into between the client and the lawyers.

5 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 (21 June 2017).

6 The Commission was told anecdotally that although project management fees have been charged in the past, they are less likely to be charged in recent class actions. As discussed in Ch 2, project management fees and other fees charged by litigation funders may not crystallise until certain points in proceedings, or may depend on certain criteria being met.

7 Submission 18 (Adeley Burstyn) suggested that funding fees, as an unavoidable cost of many class actions, should be recoverable under the costs-shifting rule. While this would recognise, in a practical sense, the ubiquity of litigation funding in many class actions, it could lead to distortions in the way that proceedings are filed, or funded. For example, in the United Kingdom, prior to 1 April 2013, success fees under conditional fee arrangements and ‘after the event’ insurance premiums were recoverable under the costs-shifting rule. The review of civil litigation costs undertaken by Lord Justice Jackson in 2009 found that recoverability of these costs imposed disproportionate cost burdens on defendants, while plaintiffs’ were able to litigate essentially ‘risk free’. This led to a reversing of the rule (subject to some exceptions) effective from 1 April 2013: Herbert Smith Freehills, ‘Conditional Fee Agreements (CFAs)/After-The-Event (ATE) Insurance’ on Litigation Notes <<https://hsfnotes.com/litigation/jackson-reforms/conditional-fee-agreements-cfas-after-the-event-ate-insurance/>>. See generally Lord Justice Jackson, *Review of Civil Litigation Costs*, Final Report (The Stationary Office, 2010) 80–93.

8 *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 (Legal Profession Uniform Law).

- 5.23 As set out in Chapter 3, the payment of legal costs in class actions is different to other litigation. If an ‘all in’ settlement is reached, legal costs will generally be deducted from any settlement amount prior to distribution to class members. Each class member effectively contributes part of their settlement amount toward legal costs, even if they have not signed a legal costs agreement.⁹ This is appropriate because all class members enjoy the benefit of the services for which the costs were incurred, as observed by Justice Gordon in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd*:

The legal costs were incurred and achieved a settlement for all group members. The group members who did not sign a LCA [legal costs agreement] with [the representative plaintiff’s lawyers] should not be entitled to receive a windfall by reason of their refusal to sign a LCA. To put the matter another way, the legal costs are fixed. Those legal costs should be borne by those who benefitted from those legal costs being incurred—the group members as a whole.¹⁰

- 5.24 The uplift fee is generally set at the maximum legislative rate of 25 per cent of the legal costs.¹¹ There have been examples of class actions in which other percentage loadings have been charged by the representative plaintiff’s lawyers, in addition to the 25 per cent uplift fee.¹²

‘After the event’ insurance premiums and disbursement funding fees

- 5.25 If the litigation funder or the law firm acting on a ‘no win, no fee’ basis has taken out ‘after the event’ insurance to cover the risk that the representative plaintiff will be ordered to pay adverse costs, the premium will be deducted from any settlement or judgment amounts. The share is generally between 20 and 40 per cent of the policy indemnity limit.¹³
- 5.26 Any disbursements not paid during proceedings are paid at the successful conclusion of the proceedings.¹⁴ If covered by a third party other than a litigation funder during proceedings, a fee may be charged for this.

Settlement distribution costs

- 5.27 The costs of winning a class action also include the costs of settlement distribution, which are incurred after settlement approval. The scheme administrator charges a fee for assessing individual claims and distributing amounts to class members. These costs are generally deducted from settlement amounts paid to class members. However, in large class actions with lengthy settlement distribution schemes, they may be paid from any interest earned on the settlement amount during the distribution period.¹⁵

The role of the Court

Assessing costs

- 5.28 As discussed in Chapter 4, a class action settlement does not have legal effect unless it is approved by the Court under section 33V of the *Supreme Court Act 1986* (Vic). The protective role of the Court at settlement approval extends to approving legal costs and funding fees which reduce the amounts available for class members.

9 Consultation 3 (Judges of the Supreme Court of Victoria).

10 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013) [24].

11 Legal Profession Uniform Law s 182.

12 See, eg, *Williams v AusNet Electricity Services Pty Ltd (Ruling No 3)* [2017] VSC 528 (4 September 2017).

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

14 Counsel engaged by the representative plaintiff’s lawyers may agree to work on a ‘no win, no fee’ basis in a class action. If so, they will be reimbursed upon settlement or judgement (but are not entitled to charge an uplift fee).

15 For example, in the Kilmore East/Kinglake and Murrindindi/Marysville bushfires class actions, the settlement distribution costs were deducted from interest earned on the settlement amount during the distribution period before reducing settlement amounts payable to class members: Submission 13 (Maurice Blackburn Lawyers).

- 5.29 The basis on which the two types of costs are calculated differ, as does the approach of the courts in assessing whether they are fair and reasonable. Legal costs are based on inputs: work done and time expended in pursuing the claim. Funding fees are based on the outcome: a share of the proceeds if successful. Legal costs are routinely reviewed and varied, while funding fees have been subject to less scrutiny. However, recent decisions of the Federal Court in funded class actions convey an increasingly active role in supervising funding fees in that jurisdiction.
- 5.30 This development has lent weight to the argument that courts should have a specific statutory power to review and vary all legal costs, litigation fees and charges, and settlement distribution costs to be deducted from settlement amounts in class actions. Views differ about how prescriptive the legislative provision should be, but unanimous agreement was expressed during the Commission's consultations that the courts are both competent and well positioned to continue to oversee limits or approval processes for legal costs and funding fees in class actions.¹⁶
- 5.31 The Commission agrees that an express power in legislation would be desirable, for reasons discussed below.

Assessing legal costs

- 5.32 In Victoria, where class actions do not typically involve a litigation funder, legal costs are generally the largest deduction from the settlement or judgment amount before the class members receive their share.¹⁷
- 5.33 The Supreme Court's authority to supervise legal costs in class actions is widely accepted in case law and well understood.¹⁸ Apart from the Court's specific role in approving settlements, conveyed by section 33V of the Supreme Court Act, the authority is founded in the inherent jurisdiction of the Court and its power under the *Civil Procedure Act 2010* (Vic) to make any order as to costs that it considers appropriate to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.¹⁹ This power is in addition to any other power it has in relation to costs and can be exercised at any time in a proceeding over any aspect of the proceeding.²⁰
- 5.34 In exercising its authority to supervise legal costs, the Court may assess:
- whether the fees and disbursements are of a reasonable amount having regard to, among other things, the nature of the work performed, the time taken to perform the work, the seniority of the persons undertaking that work and the appropriateness of the charge-out rates for those individuals
 - if the work is unreasonable in the circumstances, whether the class members approved this by entry into the costs agreement.²¹
- 5.35 The Court's authority to intervene and control the legal costs that class members pay after settlement is not always as certain. The legal costs charged by the administrator of the settlement distribution scheme—which is usually the law firm that acted for the representative plaintiff—depend on the terms of the scheme. In its submission, the Supreme Court observed that there are particular aspects of settlement distribution schemes that need not attract fees based on the work of skilled lawyers, such as routine settlement administration, which can be carried out by paralegals. The Court needs to

16 Roundtable 3 (professional stakeholders). Whether court approval should remain the only mechanism available for limiting or approving funding fees, or whether, as suggested by many stakeholders, national regulation of litigation funders should be introduced is discussed in Ch 2.

17 Submission 25 (IMF Bentham Ltd).

18 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 30 (Supreme Court of Victoria).

19 *Civil Procedure Act 2010* (Vic) s 65C(1).

20 Ibid.

21 This approach to assessing legal fees was adopted in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013) [32]. As reiterated by Justice Gordon, it is the judge, and not the independent costs expert, that is required to determine whether the fees and disbursements are reasonable, and the information provided to the judge must be sufficient to enable them to undertake that assessment: [35]–[37]. This approach was approved by the Supreme Court in *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014) [352], [355] (Osbourne JA).

ensure that it is in a position to oversee the minimisation of settlement administration costs while also ensuring the process will be timely and efficient.²²

- 5.36 Introducing an express statutory power to review all legal costs incurred during proceedings and settlement distribution (as well as funding fees and charges) would strengthen the Court's ability to intervene when appropriate. It would also complement the Commission's recommendations in Chapter 4 to strengthen supervision during settlement distribution, and in Chapter 3 to allow a law firm to be paid a percentage of the recovered amount in class actions.

Assessing funding fees

- 5.37 Compared to legal costs, courts have been less involved in assessing litigation funding fees as part of settlement approval. It is uncontroversial that they have the power to refuse a settlement if the funding fee is not fair or reasonable, but they have been reluctant to intervene further and set what a reasonable fee would be in the circumstances.
- 5.38 The reasons for this reluctance are multifaceted. Reviewing a litigation funding fee requires the court to undertake a commercial assessment of the risk borne by the funder—a task it is not comfortable with, or necessarily appropriately placed to make. Litigation funding agreements are private and consensual contracts between two persons. Without strong evidence to the contrary, the courts have traditionally been unwilling to 'relieve persons of full age and capacity from bargains untainted by infirmity'.²³
- 5.39 Judicial support is now apparent for the view that the courts can take a more active role. Recent decisions of the Federal Court suggest that, as part of settlement approval, the Court has the power to vary the amount paid to a litigation funder to ensure that it is fair and reasonable in the interests of class members.²⁴ Reasons why court supervision of the funding fee is appropriate were set out in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*:²⁵
- The funding fee is generally the largest single deduction from class members' recoveries.
 - Information asymmetry exists between the litigation funder and class members in relation to the costs and risks of the action.
 - For some class members, the only chance to obtain legal redress is through a class action.
 - Class members often have a limited or non-existent ability to negotiate the funding fee.
- 5.40 The source of the court's power to set a funding fee at a rate other than that stipulated in the funding agreement, and the circumstances in which it would be appropriate to exercise this power, are unresolved.²⁶ The issue has not been considered in decisions of the Supreme Court and is not addressed in the Supreme Court's practice note on class actions. There is some recognition of the increased supervisory role of the Federal Court in its Practice Note on class actions, but not in the relevant Commonwealth legislation.

22 Submission 30 (Supreme Court of Victoria).

23 *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, 434–5 (Gummow, Hayne and Crennan JJ).

24 See, eg, *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409 (21 April 2017) [26]–[31] (Middleton J); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 504 (Beach J); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [133]–[134], [157] (Murphy J).

25 (2016) 245 FCR 191, 208 (Murphy, Gleeson and Beach JJ).

26 It has been observed that the power of the court to vary a litigation funding fee is likely to be challenged in the future: Ray Finkelstein, 'Class Actions, The Good, The Bad and The Ugly' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 415, 432 n 54.

- 5.41 For this reason, the view was put to the Commission that, if there is any doubt that the Supreme Court has the power to review and vary litigation funding fees as part of settlement approval, it should be expressly provided in an amendment to part 4A of the Supreme Court Act.²⁷
- 5.42 Not all stakeholders agreed that such a power is desirable, or should be codified in legislation. Litigation Capital Management submitted that, by reducing the certainty of litigation funders' contracts, it may increase the risk of financing class actions. Litigation Lending Services suggested that it could lead to a downward shift in funding fees, which may, along with decreased certainty for litigation funders, have an impact on access to justice.²⁸ The Commission considers that these concerns have been adequately recognised by the Federal Court in recent decisions.²⁹

A statutory power to review and vary costs

- 5.43 A legislative power to review and vary legal, funding and settlement distribution costs in part 4A of the Supreme Court Act would underpin and strengthen the Court's existing practice in reviewing costs as part of settlement approval in class actions. The Court is accustomed to assessing legal costs as part of settlement approval, and the Federal Court is taking a greater role in assessing, and in certain circumstances it may modify, litigation funding fees. The Commission endorses the view that this power is appropriately exercised as part of the supervisory function of the courts at settlement approval.
- 5.44 The protective role of the court at settlement approval is well established in case law, and extends to the legal costs and funding fees proposed to be charged to class members.³⁰ A statutory power for the Court to review and vary costs would be consistent with this protective role.
- 5.45 It would also recognise, in a class action context, the Court's broad powers under the Civil Procedure Act which may be applied when costs are unreasonable. The overarching obligations contained in the legislation apply to both lawyers and litigation funders, and include the requirement to ensure that costs are reasonable and proportionate.³¹ Compliance with the obligations is mandatory. If a breach occurs, the Court may make any order it considers appropriate in the interests of justice.³²
- 5.46 Some stakeholders proposed that criteria for the assessment of funding fees should be set out in legislation or the Supreme Court Practice Note.³³ The Commission is not persuaded that this is necessary. The power to review and vary costs should be broadly expressed, so the Court can respond flexibly in approving settlement.
- 5.47 This is not to suggest that guidance for the courts will remain unnecessary in the future. As the jurisprudence on assessing litigation funding fees develops, it may be useful to include guidance in legislation or court guidelines. It may also become desirable to clarify certain aspects of the power. Some aspects which may present difficulties or need further clarification have been set out (extra-judicially) by Justice Lee. They include:
- the difficulty in establishing boundaries for court intervention if funding agreements are altered by the court at settlement approval

27 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 13 (Maurice Blackburn Lawyers).

28 Submissions 7 (Litigation Lending Services), 14 (LCM).

29 See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210, 221 (Murphy, Gleeson and Beach JJ).

30 See, eg, *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98 (20 June 2017) [90] (Jagot, Yates and Murphy JJ).

31 *Civil Procedure Act 2010* (Vic) ss 10, 24.

32 *Ibid* s 29.

33 There was some support from submissions for increased guidance for the Court when assessing the reasonableness of a funding fee, although the importance of avoiding overly prescriptive or exhaustive guidance was noted: 12 (Allens), 13 (Maurice Blackburn Lawyers), 14 (LCM), 15 (Phi Finney McDonald), 18 (Adley Burstyner), 22 (Dr Michael Duffy), 25 (IMF Bentham Ltd). A range of factors relevant to the Court's assessment of a funding fee were set out by the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) FCR 191, which some submissions thought could provide the basis for Supreme Court Practice Note guidance: Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 12 (Allens), 14 (LCM), 15 (Phi Finney McDonald).

- the economic considerations that must be taken into account by a judge when assessing a commercially realistic return
 - the foundational importance of certainty of contract in society.
- 5.48 The Commission agrees with Justice Lee that the courts will work carefully through the complexities posed by this power.³⁴ For this reason, the Commission considers it preferable for guidance on exercising the power to be generated through case law rather than imposed from the outset.
- 5.49 Finally, while the power should be broadly expressed, the Commission is aware that in some settlement agreements, legal costs are negotiated separately to the settlement amount recovered by class members.³⁵ The Commission's recommendation is intended to enable the Court to supervise costs being deducted from the full amount paid by the defendant in resolution of proceedings. This includes supervision of any legal or other costs negotiated separately to the amount paid to class members.

Recommendation

- 24** Part 4A of the *Supreme Court Act 1986 (Vic)* should be amended to provide the Court with specific power to review and vary all legal costs, litigation funding fees and charges, and settlement distribution costs to be deducted from settlement amounts to ensure that they are fair and reasonable.

Costs experts

- 5.50 Costs experts assist the court when assessing whether the costs to be deducted from settlement are fair and reasonable. Their assistance in class actions appears to have been sought exclusively in reviewing legal costs.
- 5.51 In addition, the appointment of a contradictor at settlement approval can be of particular assistance in reviewing the costs arising from the terms of the settlement, or the settlement distribution scheme.³⁶ Contradictors are discussed in Chapter 4.³⁷
- 5.52 There has been no demand for costs experts to assist the court in assessing funding fees in class actions, although this may change.³⁸ Should courts begin to use a risk/reward calculus when assessing funding fees and rely less on the fees charged in previous cases, the demand for funding costs experts is likely to grow.³⁹
- 5.53 The appointment of legal costs experts in large class actions is widely seen as desirable.⁴⁰ While mandatory appointment in all class actions is unnecessary, some support was expressed in submissions for a presumption of appointment to exist in class actions if legal costs are substantial.⁴¹

34 Justice Michael Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (Speech delivered at the IMF Bentham and UNSW Class Action Conference, Sydney, 1 June 2017).

35 See, eg, *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016).

36 Consultation 3 (Judges of the Supreme Court of Victoria).

37 The Commission recommends that the Supreme Court consider including guidance on appointing a contradictor in its Practice Note: see Ch 4.

38 Submissions 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger), 27 (Ashurst).

39 Roundtable 3 (professional stakeholders).

40 Submissions 13 (Maurice Blackburn Lawyers), 15 (Phi Finney McDonald), 21 (Law Council of Australia), 30 (Supreme Court of Victoria); Roundtable 3 (professional stakeholders).

41 Submissions 13 (Maurice Blackburn Lawyers), 27 (Ashurst).

Value to the class members

- 5.54 An important consideration in deciding whether to appoint a costs expert is the cost to the class members. The role of a legal costs expert is time-consuming and complex: large class actions may generate between 10,000 and 65,000 time recording entries. However, the alternatives to appointing the expert could be more expensive.
- 5.55 In the Kilmore East/Kinglake bushfires class action, costs experts supported the sum of \$60 million being paid to the law firm running the case. Justice Forrest observed extrajudicially that the Supreme Court's acceptance of the figure provided by the costs experts avoided the bill being sent to taxation, which in Victoria is another expensive exercise.⁴²
- 5.56 The value to the class members of the appointment of a costs expert was questioned in the submission by Simone Degeling, Michael Legg and James Metzger. They argued that, given the current methodology adopted for assessing legal costs, costs experts are ineffective in providing any real adjustments to legal costs in class actions. As long as there is expert evidence that the legal work was needed, carried out by a lawyer at the appropriate level of seniority and using rates in the retainer, the legal costs will be approved as fair and reasonable.⁴³
- 5.57 It is possible that the question of whether appointing a costs expert represents good value to the class members cannot be determined only by how much the lawyers' bill is reduced, or by any net return to the class members after the expert's fee is paid. Perhaps the prospect that a costs expert will be scrutinising the records helps to prevent unreasonable charges being made.⁴⁴ However, the costs expert's role is not to represent the interests of the class members; their interests are for the court to consider.
- 5.58 The Commission notes that the Federal Court recently observed that, subject to the question of proportionality, the courts will not reject expert evidence, or apply a subjective view of what the legal work is 'really worth' divorced from the commercial context, without very good reason.⁴⁵ Clearly, the courts rely on the expertise of costs experts, which underscores the need for the assessments they give to be accurate and free of bias.

Independence

- 5.59 The costs expert is usually appointed by the law firm whose costs are being assessed, and the pool of experts with appropriate knowledge and skills in class action litigation is small. This can raise questions about whether the experts are free from bias because they are assessing costs for their clients, from whom they may want repeat business.
- 5.60 The independence of the costs expert is essential to their credibility because, as Simone Degeling, Michael Legg and James Metzger have observed, their assessments are largely unchallengeable by class members:

First, no group member has the wherewithal to be able to challenge an independent costs expert. The court will only receive expert reports commissioned by the applicant (really the lawyers) seeking approval of the legal fees. Second even if fees are greater than permitted by the Supreme Court scale, group members may be seen to have agreed to these fees through entering into a retainer with the lawyer. However, in a class action, lawyers set their own fees and group members have little ability to negotiate.⁴⁶

42 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East/Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71, 93.

43 Submission 9. The submission proposed, as a solution, altering the test of proportionality for legal costs. This matter may be relevant to the ALRC's current review of costs charged by solicitors in funded litigation.

44 It was observed that, if the law firm has robust internal processes for reviewing legal costs, unreasonable costs should be avoided regardless of, or prior to, review by an independent costs expert: Submission 13 (Maurice Blackburn Lawyers).

45 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 521 (Beach J).

46 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).

5.61 Costs experts are usually lawyers who have professional obligations to the court. In that capacity, and as expert witnesses, they must also meet the overarching obligations in the Civil Procedure Act.⁴⁷ These obligations apply whether the expert is appointed by the Court or by the law firm running proceedings. The Commission has no reason to conclude that the costs experts who give evidence in class actions do not meet these obligations, a view supported by Maurice Blackburn:

Regardless of these legal and ethical obligations to act with honesty and independence, in our experience we have not observed any costs expert having been influenced by the prospect of repeat work. To the contrary, costs assessors who we have appointed have on occasion reduced our legal costs where they considered those costs to be unreasonably charged or incurred.⁴⁸

5.62 It is, however, crucial that costs experts are not compromised in their ability to act, or to be seen to act, impartially.

5.63 As illustrated in *Williams v AustNet Electricity Services Pty Ltd (No 3)*,⁴⁹ the Court is able to seek assistance from the Costs Court when assessing legal costs. This may be necessary if there is no costs expert appointed, or if the evidence provided by the costs expert is insufficient or requires review. As a demonstrably independent option, the Commission agrees with the Court that use of the Costs Court is an attractive option in ensuring that the costs claimed by the representative plaintiff's lawyers are reasonably incurred, although its use poses some resourcing issues.⁵⁰

5.64 The independence of the costs expert is essential to their credibility and, in turn, a just outcome for the class members. The Commission considers that costs experts should be appointed by the Court to underpin, and demonstrate to class members, the importance of this independence.

Court guidance on use of experts

5.65 The Federal Court Practice Note includes guidance for the use of costs experts in class actions in reviewing both legal costs and litigation funding fees. In relation to legal costs, the expert will assess whether the total legal costs are fair and reasonable (by examining a sample of files or records); in relation to the litigation funding fee, the costs expert will assess whether the charges are appropriate, having regard to the terms of the funding agreement.⁵¹

5.66 More extensive sampling of legal costs, or examination of the litigation funding fee, is suggested where the class members include persons who are not clients of the law firm; where the deduction per class member constitutes a significant proportion of the settlement amount otherwise payable to each class member; or where the funder imposes charges beyond the percentage fee set out in the funding agreement (for example, a project management fee).⁵²

5.67 The Commission considers that similar guidance should be given in the Supreme Court Practice Note. However, unlike the Federal Court Practice Note, the Supreme Court Practice Note should not specify what methodology the legal costs expert should use. The Commission was told that methodologies used by costs experts develop and change over time. In order to provide the most accurate assessment and thereby deliver value to class members, and to ensure best practice, it is important that experts have the flexibility to adopt the most appropriate methodology in assessing legal costs.

47 *Civil Procedure Act 2010* (Vic) s 10.

48 Submission 13 (Maurice Blackburn Lawyers).

49 [2017] VSC 528 (4 September 2017).

50 Submission 30 (Supreme Court of Victoria).

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

52 *Ibid* [15.3].

- 5.68 The Commission is of the view that the costs expert should be appointed by the Court, rather than the representative plaintiff’s lawyers.⁵³ This is not specified in the Federal Court Practice Note.

Recommendation

- 25** The Supreme Court should consider amending its practice note on class actions to provide guidance for the appointment of an independent costs expert by the Court to assist in the assessment of legal costs and litigation funding fees. This should take into account the guidelines contained in the Federal Court practice note on class actions relating to the use of costs experts.

Costs budgets in class actions

- 5.69 Introducing costs budgets in class actions—where parties submit a legal costs estimate to the court at the first case management conference—was suggested as being a useful way of increasing certainty of legal costs in class actions, holding lawyers accountable to a predetermined budget, encouraging settlement, and ensuring control of legal costs from an early stage.⁵⁴ The use of costs budgets may be of some assistance to the court in assessing the reasonableness of legal costs claimed at settlement approval.
- 5.70 Costs budgets are used by courts in England and Wales. In some proceedings, parties are required to submit costs budgets to the court and the other party before the first case management conference. If legal costs subsequently exceed the predicted budgets, parties are required to seek court approval for the increase. The courts have indicated that they will limit parties’ recoverable costs to the estimated amounts, where appropriate.⁵⁵
- 5.71 Although Victoria does not require cost budgets to be submitted in class actions, the Supreme Court has the power, under the Civil Procedure Act, to order lawyers to produce an estimate of costs and disbursements at any point of proceedings. This can also be for the benefit of the defendant or any party.⁵⁶ This power does not appear to be regularly used in a class action context. Although the Commission does not consider there is any need to supplement the provisions of the Civil Procedure Act, guidance about use of this power in class actions may be usefully provided in the Supreme Court Practice Note.
- 5.72 It will not be necessary or appropriate for the Supreme Court to request an estimate of legal costs in all class actions. For example, in shareholder class actions, the likelihood that the case will be settled is exceptionally high (no shareholder class actions have proceeded to judgment). Providing a costs budget in these cases may be difficult, and of limited value, given the uncertainty involved in settlement.⁵⁷

53 Submission 9 (Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger).

54 Submission 25 (IMF Bentham Ltd); Roundtable 2 (professional stakeholders). IMF Bentham supported the use of costs budgets in all proceedings, not just class actions or funded proceedings.

55 CPR 3.12–3.18; CPR PD 3E (costs management); Elizabeth Harris, ‘Let’s Keep it Real: Judicial Management of Civil Costs’ (2013) 87(6) *Law Institute Journal* 45, 46.

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

57 Submission 13 (Maurice Blackburn Lawyers).

Recommendation

- 26** The Supreme Court should consider amending its practice note on class actions to specify that, at the first case management conference, the Court, in exercising its powers under section 65A of the *Civil Procedure Act 2010* (Vic), may ask the representative plaintiff's lawyers to provide a memorandum of estimated legal costs and disbursements of proceedings to the Court.

Control of funding fees in class actions

- 5.73 The terms of reference direct the Commission to examine two specific processes for controlling the fees chargeable by litigation funders:
- 1) that limits be placed on litigation funders' fees
 - 2) that approval processes be put in place in respect of litigation funding fees.
- 5.74 Imposing a cap is one way of limiting the fees charged. The cap could be determined either by legislation, the court or a combination of both.
- 5.75 Approval processes that are already in place can affect the amount which litigation funders receive from class members. The court has the capacity to determine funders' fees when a common fund to pay them has been ordered. Common fund orders require the applicant to seek court approval of a funding fee prior to it being deducted from the recovered amount. As all class members pay the fee, rather than only those who have entered a funding agreement, common fund orders also ensure that the costs of bringing litigation are evenly shared between all class members.
- 5.76 The Federal Court has demonstrated its willingness to use these methods in relation to litigation funding fees; whether they require express legislative provision in Victoria is discussed below.

Cost caps

- 5.77 Stakeholders generally endorsed the use of caps and sliding scales for litigation funding fees in class actions as a means of ensuring proportionality. There was also consensus that the court should determine how much the funder receives in each case.⁵⁸ However, views differed about whether the fees should be subject to statutory limits.
- 5.78 Allens and Ashurst, for example, favoured the introduction of statutory caps and sliding scales. They suggested that caps could apply to both the percentage amount and the total dollar amount recoverable by the litigation funder. In applying these controls, consideration would be given to the net percentage of recovered amounts that class members would receive.⁵⁹ Sliding scales could also be used to reflect the point reached by the proceedings and the expenses incurred by the litigation funder. The Court would retain its discretion to determine the appropriate fee in light of the circumstances of the case at settlement. This would ensure that funding fees below the cap are not automatically approved.⁶⁰
- 5.79 While agreeing that caps and sliding scales for funding fees may be appropriate in certain cases, other stakeholders identified the following reasons why it would be unhelpful to specify them in legislation.

58 Roundtable 3 (professional stakeholders).
 59 Submissions 12 (Allens), 27 (Ashurst). Submission 4 (Chartered Accountants Australia and New Zealand) noted a number of members supported a cap on the proportion of fees that a litigation funder could take. Submission 16 (National Union of Workers) submitted that the court should have some form of discretion through a formula that it can work to, once an order is made.
 60 Submission 12 (Allens).

- 5.80 First, a cap may simply turn into the minimum standard rates.⁶¹ Lawyers routinely charge the 25 per cent maximum uplift fee when acting under a ‘no win, no fee’ arrangement in a class action. It is reasonable to anticipate that a legislative cap for litigation funding fees is likely also to become the standard rate.
- 5.81 Secondly, it was proposed that a mandated cap or sliding scale may reduce access to justice. Funders who invest in high-risk or novel claims require a commensurately higher level of return. Litigation Lending Services and Slater and Gordon observed that, if a percentage amount is not high enough to justify the funding of higher risk or novel claims, there may be limited incentive for a litigation funder to take the case on, thereby reducing access to justice.⁶²
- 5.82 Thirdly, in class actions, the diverse risk profile of proceedings may require a nuanced approach to fees. IMF Bentham submitted that the considerations of the circumstances of the case, and an assessment of the market, is not conducive to fixed or inflexible methods or structures.⁶³ The importance of this flexibility has been recognised by the Federal Court, which observed that, compared with regulation under idiosyncratic state legislation, the Court is well suited to the task of bringing flexibility and nuance to the assessment of the reasonableness of fees in class actions.⁶⁴
- 5.83 Finally, if the trend toward increased judicial scrutiny of litigation funding fees at settlement approval continues, the need for legislative caps and sliding scales—whether desirable or not—is reduced in class actions. As part of this increased scrutiny, the Federal Court has demonstrated that it is prepared to use the necessary mechanism, whether a cap or sliding scale, to ensure that the funding fee is fair, reasonable and proportionate.⁶⁵

Conclusion

- 5.84 For these reasons, and in the interests of ensuring national consistency and avoiding ‘forum shopping’, the Commission considers it appropriate that the Supreme Court continue to develop its expertise in applying caps and sliding scales to funding fees. There is no need for legislative guidance.
- 5.85 The Commission’s recommendation to recognise, in legislation, the Supreme Court’s ability to review and vary all litigation funding fees and charges complements the exercise of this discretion without imposing inflexible parameters.

Common fund orders

- 5.86 Australian courts have developed a range of mechanisms and practices to ensure that the costs of bringing a class action are fairly distributed among class members at settlement:
- Closed class actions, which can limit participation in a class action to those who have signed a funding agreement, ensure that only class members who agree to contribute to the costs share in any settlement or judgment amounts.
 - Class closure orders, which require class members to register by a particular date, allow all class members sharing in settlement to be identified and so help to ensure that costs are allocated fairly.
 - Funding equalisation orders, which deduct an amount equivalent to the funding fee from the settlement payments of class members who have not signed a funding agreement and distribute it back (pro rata) to all class members, ensure equality of treatment between class members. Class members who have not signed a funding agreement do not receive a windfall at the expense of those who have.

61 Submission 25 (IMF Bentham Ltd).

62 Submissions 7 (Litigation Lending Services), 28 (Slater and Gordon Lawyers).

63 Submission 25 (IMF Bentham Ltd). See also Submission 14 (LCM).

64 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 514 (Beach J).

65 See, eg, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 516 (Beach J); *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 221 (Murphy, Gleeson and Beach JJ).

- 5.87 Most recently, the Federal Court has approved the use of a common fund for litigation funding costs in class actions. If the court makes a common fund order, all registered class members are required to contribute part of their settlement amount to the litigation funder, even if they have not signed a funding agreement. This represents a fundamental reform to how the costs of class action litigation are set and approved, and how they are shared among class members.

Common fund orders for litigation funding fees

- 5.88 Unless a funded class action is closed for the duration of the proceedings, it will comprise both members who have signed the funding agreement (funded class members) and those who have not (unfunded class members). If the class action is successful, only the funded class members are required to pay the funding fee, at the rate set in the funding agreement. To avoid this burden being placed only on funded class members, a representative plaintiff can apply for a common fund order, which requires all class members to contribute to paying the funding fee, at a court-approved rate.
- 5.89 A significant advantage of common fund orders is that they spread the cost of litigation funding across a greater number of class members than would be the case under contractual arrangement, and reduce the need for the litigation funder to book build. As a result, an applicant for a common fund order should seek a lower funding fee than would be the case if payment depended on execution of a funding agreement. Class members who have already signed a funding agreement may be better off.⁶⁶
- 5.90 Similarly, a common fund order should not result in class members who have not signed a funding agreement paying a higher rate than those who have. This would effectively penalise class members for failing to sign a funding agreement, and would allow the litigation funder to receive an increased return without a corresponding increase in risk.⁶⁷
- 5.91 Critically, if a common fund order is made, the court has the power to set the size of the funding fee, which may be at a lower rate than would otherwise be payable. Unlike a funding equalisation order, in which the amount payable by unfunded class members will likely be equivalent to the contractually agreed funding fee,⁶⁸ a common fund order clearly provides for court approval of the funding fee. This is likely to occur later in proceedings, such as at settlement approval or distribution of damages.⁶⁹

Common fund orders for legal costs

- 5.92 In Australia, common fund orders have been formally applied only to proceedings involving litigation funders, where the funder's costs are contractually determined and the funding fee is charged as a percentage of the settlement or judgment amount.
- 5.93 In Chapter 3, the Commission recommends that lawyers be able to apply for common fund orders for litigation costs, which include legal costs and disbursements and coverage of the risk that the court will order the representative plaintiff to pay adverse costs or provide security for costs.

66 One of the 'safeguards' referred to by the Federal Court in approving a common fund order in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 was the floor condition that no class member could be worse off under the orders than she or he would be if such orders were not made: 196, 213–15 (Murphy, Gleeson and Beach JJ). This safeguard was applied in the context of a funding equalisation order otherwise being made. While subsequent case law has discussed the importance of not decontextualising the order, the counterfactual of a funding equalisation order need not necessarily always be used: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 504–5 (Beach J).

67 For example, in a class action currently before the Federal Court, the application for a common fund order proposed that upon resolution, class members who had not signed a funding agreement would pay a 30% funding fee. Class members who had executed a funding agreement would pay a 20% funding fee. Both amounts were stated to be subject to determination by the Court: *Capic v Ford Motor Company of Australia*, Federal Court Proceedings NSD 724 of 2016.

68 See, eg, *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 196. If, however, the contractually agreed funding fee is excessive, the deduction of an equivalent amount under a funding equalisation order will not be fair and reasonable. Recent case law indicates that in such circumstances, the court has the power to reduce the funding fee as part of settlement approval: see, eg, *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [7], [137] (Murphy J).

69 A further 'safeguard' referred to by the Federal Court in approving a common fund order in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191 was that the amount of the funding fee should be deferred until the end of the proceeding, when more probative and complete information would be available. However, the Court also considered accepting the funding fee rate proposed by the applicant with a view to reviewing it at settlement approval. It was observed it may not always be necessary or appropriate to decline to set the funding fee until settlement approval, but rather, it would depend upon the circumstances: 195, 221 (Murphy, Gleeson and Beach JJ).

Use of common fund orders

- 5.94 As discussed at the Commission’s roundtables and recognised in submissions, common fund jurisprudence in Australia remains in its infancy.⁷⁰ Approval of common fund orders was given by the Full Federal Court in October 2016,⁷¹ and the source of the power to make common fund orders has not yet been appealed to the High Court.
- 5.95 While applications for common fund orders are now standard practice in Federal Court class actions,⁷² there is limited case law regarding their use. The Supreme Court has not made common fund orders for litigation funding costs in Victorian class actions.⁷³ However, the Commercial Court has made orders, and approved settlements, requiring all class members to contribute to funding costs, including those who have not signed a funding agreement.⁷⁴
- 5.96 Most stakeholders expressed strong support for the continued use of common fund orders for approving and sharing the cost of litigation funding. Reasons cited for this support included:
- Common fund orders encourage the use of open class actions, which are consistent with the opt-out basis of Australia’s class action regimes and promote finality for defendants.⁷⁵ Views differ as to whether they will reduce the number of competing class actions filed.⁷⁶
 - Common fund orders have the effect of spreading the cost of the litigation among a broader group, but with the protective oversight of the court. The court is able to ensure that common fund orders are implemented in a way that is fair and reasonable, given that a larger group of claimants are contributing to the funder’s recovery.⁷⁷
 - Common fund orders provide for increased judicial involvement in the determination of a ‘reasonable’ funding fee, and enable courts to set the funding fee at a different rate to that stipulated in the funding agreement, if appropriate. This is in keeping with the supervisory role of the Court under part 4A of the Supreme Court Act and may result in lower costs for class members over time.⁷⁸
 - Common fund orders avoid the disadvantages associated with a prescriptive regulatory approach to litigation funding fees, and allow courts to react to diverse funding situations.⁷⁹
- 5.97 Not all submissions were in favour of common fund orders. They represent only one means of ensuring that the costs of litigation funding are shared equally between the class; other methods, such as funding equalisation orders, may achieve the same result but produce a better outcome for class members in the circumstances of the case. Allens noted that common fund orders represent a departure from freedom of contract, in that they create a binding arrangement between persons who have not expressly agreed to be bound.⁸⁰ Common fund orders may also result in an adjustment of a funding fee already agreed to under contract. Some litigation funders noted the increased commercial

70 Roundtable 3 (professional stakeholders).

71 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191.

72 Consultation 2 (Judges of the Federal Court of Australia).

73 Consultation 3 (Judges of the Supreme Court of Victoria).

74 See *Re Banksia Securities Ltd (rec and mgr apptd) (in liq) (No 2)* [2018] VSC 47 (16 February 2018) [72]–[95] (Croft J); *Re Banksia Securities Ltd (rec and mgr apptd)* [2017] VSC 148 (31 March 2017) [93]–[114] (Robson J); *Camping Warehouse v Downer EDI* [2016] VSC 784 (21 December 2016) [105]–[155] (Digby J); *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (19 December 2012) [19]–[20] (Pagone J).

75 Roundtable 3 (professional stakeholders).

76 Roundtable 3 (professional stakeholders). Although the Federal Court has suggested that common fund orders could assist in reducing the number of competing class actions, this has not been reflected in practice to date. For example, in the class action brought against Bellamy’s Australia Ltd, competing class actions were filed, both proposing to seek a common fund order: *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 196–7 (Murphy, Gleeson and Beach JJ); *McKay Super Solutions Pty Ltd v Bellamy’s Australia Ltd* [2017] FCA 947 (18 August 2017) [8] (Beach J). See also Jenny Campbell and Jerome Entwisle, ‘The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?’ (2017) 36 *Civil Justice Quarterly* 177, 193.

77 Submission 13 (Maurice Blackburn Lawyers).

78 Roundtable 3 (professional stakeholders).

79 Submission 13 (Maurice Blackburn Lawyers).

80 Submission 12 (Allens).

uncertainty introduced by common fund orders: if a funding fee is subject to court approval at settlement, there is less certainty regarding the rate of return.⁸¹

Express legislative power to make common fund orders

- 5.98 The court's power to make common fund orders arises from its broad discretion to make orders as appropriate or necessary. The basis of the Federal Court's power has been identified in case law as arising variously from sections 23, 33V(2) and 33ZF of the Federal Court Act.⁸² Section 23 is a general power to make orders as the Court thinks appropriate; section 33V(2) empowers the Court to make orders as are just with respect to the distribution of money paid under a settlement or paid into court; and section 33ZF is a power to make any order that is appropriate or necessary to ensure that justice is done in the proceeding.
- 5.99 The Supreme Court's power to make common fund orders has not been judicially considered, but the Supreme Court Act contains equivalent provisions. In the absence of an express power to make a common fund order, the Court's ability to do so may be challenged at a future point in time.
- 5.100 The Commission is of the view that common fund orders are of significant advantage in ensuring that funding fees are subject to court oversight, and that the costs of winning litigation are evenly distributed among class members. In allowing proceedings to be run on an open basis, and removing the need to book build, they offer the advantage of increasing access to justice over other methods of sharing costs between class members, such as funding equalisation orders.⁸³ As set out in Chapter 3, they also provide a framework for allowing lawyers to obtain a percentage share of the recovered amounts in class actions, with appropriate court control. As part of a broader framework of ensuring disproportionate cost burdens for litigants in class actions, their use should be encouraged.
- 5.101 Judges consulted from both the Federal Court and the Supreme Court indicated that an express legislative power to make common fund orders, although unlikely to change practice, may be useful.⁸⁴ The Commission agrees.
- 5.102 A secure legislative basis for common fund orders should not be inflexible or prescriptive.⁸⁵ The legislation should allow for the nuanced and multifaceted nature of common fund orders. As submitted by Maurice Blackburn, a 'one size fits all' solution for common fund orders would inevitably fail to account for the diverse situations in which class actions may require third-party financing, and could risk restricting access to funding.⁸⁶

Recommendation

- 27** Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court has the power to approve a common fund order, on application by a representative plaintiff, whereby all costs of proceedings are shared by all class members if the litigation is successful.

81 Submissions 7 (Litigation Lending Services), 14 (LCM). See also Submission 28 (Slater and Gordon Lawyers). The Commission considers that such uncertainty is ameliorated by the flexible approach to setting a funding fee as part of a common fund order adopted by the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210, 221 (Murphy, Gleeson and Beach JJ).

82 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 507 (Beach J); *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 194, 225 (Murphy, Gleeson and Beach JJ).

83 See, eg, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq) (No 3)* (2017) 343 ALR 476, 505 (Beach J).

84 Consultations 2 (Judges of the Federal Court of Australia), 3 (Judges of the Supreme Court of Victoria). This is consistent with the view expressed in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* (2015) 325 ALR 539, where Justice Wigney, in refusing to make a common fund order, indicated that it would perhaps be preferable for a common fund approach to litigation funding to occur through legislative reform than via the Court's general discretionary powers: 581.

85 Submissions 14 (LCM), 17 (Adley Burstynier), 25 (IMF Bentham Ltd).

86 Submission 13 (Maurice Blackburn Lawyers).

Other means of reducing risk

The Court's discretion in making security for costs and adverse costs orders

Security for costs in unfunded class actions

- 5.103 Security for costs orders provide an important protective mechanism for defendants in proceedings. If a defendant seeks an order for security, the plaintiff is essentially required to show that they will be able to meet any adverse costs order made against them. This is generally achieved by paying an amount of money into court, although it may also be satisfied by a bank guarantee or, in some cases, evidence of a comprehensive insurance policy.
- 5.104 The significant costs involved in class action litigation mean that defendants may be strongly motivated to seek some security at an early stage of proceedings.⁸⁷ In recognition of this, the Australian Law Reform Commission (ALRC) recommended in its 1988 report on grouped proceedings that an order for security should not be made on the basis that the proceedings are brought for the benefit of someone other than the plaintiff.⁸⁸
- 5.105 Although the courts have a largely 'unfettered' discretion to order security for costs in proceedings,⁸⁹ early decisions from the Federal Court indicated a reticence to order security against a representative plaintiff in unfunded class actions for fear it would force class members to contribute to these costs and remove the immunity from costs orders that they enjoy under part IVA of the Federal Court Act. It was also considered that the costs of security could potentially prevent a proceeding from continuing, thereby reducing the public interest purpose of the regime.⁹⁰
- 5.106 Since 2003, however, the Federal Court has been willing to order security for costs in unfunded class actions, requiring contribution from some class members.⁹¹ In doing so, the Court has differentiated contribution to security from other costs orders. Depending on the circumstances, the Federal Court has indicated that ordering security may not be incongruous with class members' immunity from costs orders:
- It is one thing for a group member to be saddled with an order for what might be joint and several liability for a very substantial costs order at the end of the hearing of a representative proceeding, but it is another thing to have the choice of contributing what might be a modest amount to a pool by which the applicant might provide security for costs.⁹²
- 5.107 The impact of such orders on class members' participation in the proceedings can be significant. For example, in *Kelly v Willmott Forests*, class members who did not make a contribution to security—because they did not show an inability or reasonable unwillingness to contribute, they refused to contribute, or did not respond to the request to contribute—were excluded from sharing in the recovered amount (despite being bound by the result of proceedings).⁹³

87 New South Wales Law Reform Commission, *Security for Costs and Associated Orders*, Report No 137 (2012) 68.

88 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 113, 165.

89 G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 3rd ed, 2013) 973.

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

91 See, eg, *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317; *Madgwick v Kelly* (2013) 212 FCR 1.

92 *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, 348 (Carr J).

93 See *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, 448–50 (Murphy J).

- 5.108 It has been observed that the process of requiring class members to contribute to security for costs, and excluding those who do not pay and do not provide a reasonable reason for failing to do so, 'cannot be seen as a positive in terms of access to justice'.⁹⁴ The reasons for this include:
- Individuals without resources are potentially excluded from accessing justice.⁹⁵
 - If class members cannot raise sufficient security for costs, the case may be brought to an end. The claims of interested class members and those with resources are therefore stopped by the other class members' lack of interest or resources.
 - Investigating which class members should contribute to any security for costs is a cumbersome, expensive and time-consuming process.⁹⁶
 - Proceedings are made significantly more expensive initially, thereby discouraging class action litigation.⁹⁷
 - The representative plaintiff may be forced to accept a poor settlement.
 - It provides an incentive for class members to remain unknown in proceedings (and not contribute to security for costs), thereby exacerbating the 'free rider' problem in class actions.⁹⁸
 - It goes against the intention of the ALRC in its 1988 report on grouped proceedings, which stated that security for costs should not be ordered simply on the basis that persons other than the representative plaintiff stand to benefit from the proceeding.
 - It may encourage class actions to be restructured to avoid the need to pay security for costs, thereby increasing costs and delays in class action proceedings.
- 5.109 The Supreme Court's discretion to order security for costs in Victorian class actions appears to be different from that of the Federal Court. Although there is limited authority supporting the power to order security for costs in class actions, the Court has found that section 33ZD of the Supreme Court Act, which allows costs to be ordered against a representative plaintiff, enables security for costs to be ordered in appropriate cases.⁹⁹
- 5.110 However, the Court does not have the power to directly order class members to provide security. While the Federal Court Act provides that, except as otherwise provided by part IVA, nothing in part IVA affects the operation of any law relating to security for costs,¹⁰⁰ there is no equivalent provision in Victoria, New South Wales or Queensland.
- 5.111 In *Matthews v SPI Electricity Pty Ltd (No 9)*, Associate Justice Derham found that the Supreme Court of Victoria is denied the power to order security for costs against class members by section 33ZD(b) of the Supreme Court Act, which provides class members with immunity from costs orders except for individual or sub-group claims.¹⁰¹

94 Justice Bernard Murphy and Vince Morabito, 'The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 13, 31.

95 See, eg, *Capic v Ford Motor Company (No 2)* [2016] FCA 1178 (30 September 2016) [15] (Perram J).

96 See, eg, *Baker v The Partnership of Larter* [2016] NSWSC 1194 (30 August 2016) [21] (Ball J); *Capic v Ford Motor Company (No 2)* [2016] FCA 1178 (30 September 2016) [15] (Perram J).

97 Samuel Isaacharoff and Thad Eagles, 'The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions' (2015) 38 *University of New South Wales Law Journal* 179, 200.

98 *Ibid.*

99 *Matthews v SPI Electricity Pty Ltd (No 9)* [2013] VSC 671 (9 December 2013) [84] (Derham AsJ). The Court's power to order security for costs under part 4A of the *Supreme Court Act 1986* (Vic) operates in conjunction with the provisions of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) o 62.

100 *Federal Court Act 1976* (Cth) s 332G(C)(v).

101 *Matthews v SPI Electricity Pty Ltd (No 9)* [2013] VSC 671 (9 December 2013) [162] (Derham AsJ); see also [54]–[55].

- 5.112 A different approach was taken by the New South Wales Supreme Court in *De Jong v Carnival PLC*.¹⁰² Although Justice Beech-Jones found that the Court is prohibited from ordering security against class members, he indicated that security could be ordered against the representative plaintiff which might require contribution from class members.¹⁰³ As noted by Legg and McInnes, this has the same effect as ordering security against class members.¹⁰⁴
- 5.113 The Commission acknowledges the legitimate policy objective of protecting the interests of defendants in class actions through security for costs orders, and that factors to consider when ordering security are continuing to develop through case law.¹⁰⁵ It considers, however, that security should be ordered only by reference to the resources of the entities and individuals who are contributing to the costs of proceedings, such as a litigation funder, a group of well-resourced class members, or a corporation. In the interests of access to justice, it is not desirable that security be ordered by reference to the resources of class members. They have no obligation to pay adverse costs orders and no control over the litigation.
- 5.114 The Commission's recommendation that security for costs should not be ordered against class members is made in conjunction with other recommendations throughout the report, which include:
- Recommendation 8, which would enable lawyers to be paid a contingency fee in class actions, if, among other conditions, they agree to pay any security for costs order. Allowing lawyers to charge on this basis will reduce the number of proceedings in which the representative plaintiff is exposed to a security for costs order.
 - Recommendation 14, which would enable the Court of its own motion to replace a representative plaintiff. If proceedings are brought in which well-resourced class members are standing behind a 'person of straw', this power would enable the Court to replace the representative plaintiff with the class member(s) who could meet an order for security. This would allow the action to continue—thereby promoting access to justice—while also preventing the undesirable situation in which all class members are exposed to security for costs orders due to the impecuniosity of the representative plaintiff.
 - Recommendation 29, which recognises the Court's discretion to order security for costs in class actions, including those that involve a novel area of law or are in the public interest.
- 5.115 Finally, the Commission acknowledges that there may be proceedings in which class members agree, or volunteer to contribute to the costs of bringing proceedings, including security for costs. The Commission's recommendation does not interfere with the ability of class members to do this; rather it prevents the Court ordering contribution from class members who have not agreed to do so, and are not required to contribute to other costs, with the result that they do not share in any recovered amount.

Recommendation

- 28** Section 33ZD of the *Supreme Court Act 1986* (Vic) should be amended to specify that the Court may not order a class member to provide security for costs.

102 [2016] NSWSC 347 (1 April 2016).

103 Ibid [6].

104 Michael Legg and Ross McInnes, *Australian Annotated Class Action Legislation* (LexisNexis Butterworths, 2nd ed, 2018) 521.

105 See, eg, *De Jong v Carnival PLC* [2016] NSWSC 347 (1 April 2016) [26] (Beech-Jones J); *Madgwick v Kelly* (2013) 212 FCR 1, 19–20 (Allsop CJ and Middleton J); *Kelly v Willmott Forests Ltd (in liq)* (2012) 300 ALR 675, 678–9 (Murphy J).

Adverse costs in unfunded class actions

- 5.116 As discussed in Chapter 2, while litigation funders are frequently involved in class actions in the Federal Court, they are far less prevalent in those brought in the Supreme Court. Most representative plaintiffs in Victorian class actions will not be indemnified for the risk that, if the litigation is unsuccessful, they will be liable to pay adverse costs.
- 5.117 The Commission's recommendation in Chapter 3 that lawyers be able to apply to be paid a percentage of any recovered amount if, among other things, they indemnify the representative plaintiff for adverse costs, will mitigate this risk.
- 5.118 The Commission considers it desirable that further measures be taken to reduce the adverse costs risk for the representative plaintiff in class actions that concern a matter of public interest or a novel area of law. Class actions of this type may not be seeking a monetary award, or may be seeking an amount that is too low to attract the financial support of a litigation funder or lawyer.
- 5.119 When determining whether to make an adverse costs order, and the conditions of the order, the Court has wide discretion. An initiative that could be useful in Victoria would be to introduce a statutory provision that expressly recognises public interest criteria that the Court can take into account. Although it would not remove the risk, it would reduce it, with the possible result that:
- the role of representative plaintiff becomes less daunting, which encourages suitable volunteers to take on the challenge
 - third parties consider providing financial support when they otherwise would not have been prepared to bear the risk.
- 5.120 Such a provision exists in Ontario, where the *Class Proceedings Act, SO 1992* sets out the court's discretion in awarding costs in class actions.¹⁰⁶ When exercising its discretion, the court may consider whether the class action is a test case, raises a novel point of law or involves a matter of public interest. This provision applies in conjunction with the general civil procedure cost rules, which the court will take into account when determining costs.
- 5.121 This legislative discretion has resulted in a very cautious approach to awarding adverse costs in public interest class actions. Where awarded, adverse costs orders have been significantly reduced. The Commission was told that this cautious approach to awarding adverse costs has allowed Ontario's public fund for class actions, the Class Proceedings Fund, to operate successfully in bringing class actions in the public interest.¹⁰⁷
- 5.122 The Commission's proposed statutory provision, which would also apply to orders for security, is discussed in the next section.

Statutory discretion in making these costs orders

- 5.123 To overcome the disincentive caused by costs shifting so that, potentially, a greater number of low-value class actions will be pursued, the costs rules could be amended to specify that the Supreme Court has a discretion when awarding adverse costs and security for costs orders in class actions to take into account factors relating to access to justice and the public interest. These factors would apply in conjunction with those relating to the court's discretion to award costs developed through case law.¹⁰⁸

¹⁰⁶ *Class Proceedings Act, SO 1992*, c 6, s 31(1).

¹⁰⁷ Consultation 5 (Associate Professor Jasminka Kalajdzic). There is some evidence that this may be changing: in two recent class actions, significant adverse costs orders have been made against the representative plaintiff. As a result, defendants have twice been awarded adverse costs in class actions (for \$1 million, and \$2.3 million). These adverse costs orders have not been paid by the representative plaintiff: in one case, they were paid by the lawyers, in the other, the Class Proceedings Fund: Consultation 5 (Associate Professor Jasminka Kalajdzic).

¹⁰⁸ For example, the factors that have developed through case law relating to the courts discretion when ordering security for costs: see, eg, *De Jong v Carnival PLC* [2016] NSWSC 347 (1 April 2016) [26] (Beech-Jones J); *Madgwick v Kelly* (2013) 212 FCR 1, 19–20 (Allsop CJ and Middleton J); *Kelly v Willmott Forests Ltd (in liq)* (2012) 300 ALR 675, 678–9 (Murphy J).

- 5.124 The provision could be drawn from the statutory discretion in the Ontario Class Proceedings Act. The Commission considers that it should specify that it applies to both adverse costs as well as security for costs. This view is consistent with the findings of the New South Wales Law Reform Commission. In its 2012 review of security for costs and associated costs orders, the New South Wales Law Reform Commission recommended that, in considering an application for security for costs in a class action, the court should take into account, among other factors, the immunity from costs orders provided under the legislation and the function of class actions in providing access to justice.¹⁰⁹

Recommendation

- 29** Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to specify that in making an adverse costs order, or a security for costs order in class actions, the Court may take into account, among other factors:
- (a) the function of class actions in providing access to justice
 - (b) whether the case is a ‘test’ case or involves a novel area of law
 - (c) whether the class action involves a matter of public interest.

Public fund for class actions

- 5.125 The extent to which the market can be relied on to facilitate access to justice is necessarily limited by the commercial nature of the financial products and services offered. The Commission sought comments from stakeholders on ways to improve access to justice through funding arrangements, other than by lifting the ban on lawyers being able to charge contingency fees.
- 5.126 Several responses referred to the idea of establishing a public fund, akin to the Ontario Class Proceedings Fund and previous proposals for assistance of this type.¹¹⁰ The notion that public funds should be available to support class actions has been a topic of discussion and debate for many years. In its 1988 report, the ALRC argued that, without public funding, the purpose of the class action regime in providing access to justice would be undermined by the operation of the costs-shifting rule and the burden this places on the representative plaintiff. Public funding was seen as an appropriate acknowledgment of the public purpose of many class actions, the burden of which should not rest with the representative plaintiff.¹¹¹
- 5.127 The ALRC recommended a public fund to address the disproportionate cost burdens faced by the representative plaintiff. The fund was envisaged as self-financing to some extent, although it was also expected to receive any money that remained unclaimed by eligible class members in proceedings.¹¹²
- 5.128 Since then, the need for a public fund for this purpose has been reiterated in commentary from members of the legal profession, the judiciary, and academics. The Commission was among the proponents. In its 2008 review of the Victorian civil justice system, it recommended a self-funding Justice Fund to provide financial assistance to parties with meritorious claims in the public interest, in conjunction with law firms charging on a ‘no win, no fee’ basis.¹¹³

109 New South Wales Law Reform Commission, *Security for Costs and Associated Orders*, Report No 137 (2012) 68–72; Recommendation 3.3.

110 Roundtable 4 (professional stakeholders); Submissions 10 (Victorian Legal Services Board and Commissioner), 12 (Allens), 13 (Maurice Blackburn Lawyers), 19 (US Chamber Institute for Legal Reform), 24 (Consumer Action Law Centre).

111 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 126–8.

112 Ibid.

113 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 614–22; Recommendations 133–40.

- 5.129 A public fund that provides financial assistance to plaintiffs in meeting the costs of litigation already exists in Victoria. Law Aid, which has been operating since 1996, is a charitable trust established under part VIA of the *Legal Aid Act 1978* (Vic) to cover disbursements for meritorious civil claims, where lawyers are acting on a 'no win, no fee' or pro bono basis and the plaintiff would be otherwise unable to afford litigation. It is managed by the Law Institute of Victoria and the Victorian Bar Council. The Commission suggests that there could be scope for it to fund, in part, class actions.
- 5.130 Law Aid commenced with \$1.68 million in seed funding, which has been more than sufficient for its continued existence. In return for covering the cost of disbursements, Law Aid has a statutory entitlement to a fee of 10 per cent in successful cases. However, it has not been necessary for this amount to be charged. It commonly charges 5.5 per cent.¹¹⁴
- 5.131 Law Aid does not appear to be widely used. When it was created, it was expected to handle about 380 applications a year but the most it has received was in 2010, when it received 314 applications for funding.¹¹⁵ The Commission was told that there have been no requests to use Law Aid to fund disbursements in class actions.
- 5.132 In comparison, the Ontario Class Proceedings Fund provides financial support to approved class actions, to cover adverse costs awards as well as disbursements. Cases are selected on the basis of the merits of the claim and the public interest involved.¹¹⁶ In practice, the Class Proceedings Fund has rarely been required to cover adverse costs because the court has exercised its statutory discretion not to order them.
- 5.133 The fund was established in 1992, under the Law Foundation of Ontario, with seed funding of \$500,000 (about a third of the seeding amount that Law Aid received) and has since been self-funded. As at June 2017, it had a balance sheet of around \$19 million.¹¹⁷ After 20 years in operation, the fund had supported over 82 class actions (from a total of 131 applications) representing 10 per cent of all class actions in Ontario. Of the funded matters, 30 per cent went to trial (rather than settling) to serve as test cases, establish novel legal principles in class action case law and address issues of broad public importance.¹¹⁸
- 5.134 The Class Proceedings Fund charges a fee, which is capped at 10 per cent of the settlement amount, for its services in successful litigation. The Fund has had a 2:1 success rate.¹¹⁹

114 Michael J Lombard, *Law Aid, All You Need to Know* (2018) Law Aid <<http://lawaid.com.au/law-aid-all-you-need-to-know/>>.

115 Ibid.

116 Consultation 5 (Associate Professor Jasminka Kalajdzic).

117 Ibid.

118 Class Proceedings Fund, *20 Years in Review* (2012) 1.

119 Consultation 5 (Associate Professor Jasminka Kalajdzic).

Court resources

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6. Court resources

Introduction

- 6.1 The Commission recommends reforms aimed at improving procedural efficiency, strengthening accountability and controlling costs in class action proceedings. In this chapter, the implications of these recommendations for the workload and resource requirements of the Supreme Court are considered, as required by the terms of reference.
- 6.2 Most of the recommendations in this report concern the Court's role and powers, primarily in class actions. Some will have an impact on the level of legal and administrative support needed in managing proceedings of this type; others will directly affect the judge's role. While additional resources will be needed to implement the recommendations, the Commission expects there will also be savings from improvements to procedural efficiency.
- 6.3 The Supreme Court has expressed a commitment to innovation and excellence and is upgrading the technology it uses and streamlining its processes. Changes in technology are improving the efficiency of court proceedings, and are beginning to affect access to the legal system generally and the types of class action that are being instigated. These developments are perhaps most visible in the United States. If they become more prevalent in Australia, they could stimulate new debate about the place of class actions in our legal system. This chapter concludes with an overview of these trends.

Resource implications of the Commission's recommendations

Current allocation of resources

- 6.4 Class actions represent a small fraction of the Supreme Court's workload, with an average of five being filed each year. More than 6000 cases were initiated across the Court in the financial year ending 30 June 2017.¹ However, compared to other cases, class actions are significantly more resource-intensive, and often require extensive judicial case management.
- 6.5 At the heart of the Court's approach to facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute is differential case management. The resources required vary considerably, both between cases and over the course of a proceeding. Accordingly, the Court allocates staff as necessary rather than retaining a permanent support team.
- 6.6 In addition to their other duties, two legally trained members of staff have been allocated ongoing roles as Class Actions and Major Torts Coordinator and Commercial Court Class Actions Coordinator. They assist in the management of class actions in the Common Law Division and the Commercial Court respectively. Their roles are to serve as contact points

for the public and the profession, which saves time for practitioners and facilitates registry processes, and to provide support directly to members of the Court, which allows for the best use to be made of judicial time in managing proceedings.

- 6.7 When a number of class actions are before the Court at the same time, resources are stretched and the level of support suffers. Staff are often removed from other areas of the Court to deliver judgments quickly and ensure the continuing progress of the class action case. While this has been a highly effective measure, it reduces the availability of research and associate support in the areas of the Court from which the staff are drawn.²
- 6.8 In its submission, the Supreme Court identified a need for additional legally qualified staff to support the judiciary and provide better services to the profession. This would reduce the cost of class action litigation overall, and improve access to justice. The Commission considers that, in implementing the recommendations of this report, the Court will require additional staff to work on class actions.
- 6.9 The Supreme Court's submission also identified the benefit of referring discrete issues arising in class actions to specialised areas or offices of the Court, where necessary.³ For example, the expertise of the Costs Court and Funds in Court have been called on to assist judges in some class actions. The Commission encourages continued referral of certain issues to specialised areas of the Court, subject to the availability of resources.

Recommendations that affect the Court

- 6.10 The recommendations in this report that affect the Court fall into three categories:
- procedural changes, to improve efficiency, accountability and national consistency
 - better information for, and communication with, the public
 - legislative changes to clarify and strengthen the Court's powers.
- 6.11 The resource implications for each differ and are discussed below.
- 6.12 All of the changes will benefit from consultation with stakeholders about their introduction. The Commission notes that the Court has established a class action user group drawn from the legal profession; it convenes every 12 to 18 months, and the Court has found the group to be quite constructive.⁴ The user group could be a useful forum for consulting about amendments to the practice note on class actions (Supreme Court Practice Note), or the production of materials for class members, or any other changes that affect the way in which class actions are conducted and managed.
- 6.13 The Commission considers that consultation with the user group about the recommendations would be even more helpful if the membership were expanded to include class members. Clearly, class members can provide advice on recommendations concerning the information provided to the public, and how it is communicated. In addition, as the costs of proceedings are generally paid from the settlement or judgment amount before class members receive their share, class members have an interest in procedural changes that will improve efficiency and transparency.

Recommendation

- 30** The Supreme Court should consider expanding the class action user group to include individuals with experience in class actions, either as a class member or a representative plaintiff, particularly to consult on the implementation of the Commission's recommendations on Court powers, procedures and services.

² Submission 30 (Supreme Court of Victoria).

³ Ibid.

⁴ Consultation 4 (Judges of the Supreme Court of Victoria).

Procedural changes

- 6.14 The Commission recommends that the Supreme Court consider amending the Supreme Court Practice Note.⁵ Some of the changes will clarify the Court's expectations and procedures, providing guidance without reducing the Court's flexibility.⁶
- 6.15 Other changes will introduce new procedural requirements. New disclosure obligations will ensure that the Court, and class members, are routinely informed about funding arrangements or other matters that may affect the way in which the proceedings are conducted or resolved.⁷ The recommendation that the Supreme Court Practice Note should specify additional matters that affidavits in support of settlement approval should address will also improve transparency, as well as efficiency.⁸
- 6.16 While the task of introducing the amendments will require the time and expertise of legally qualified staff, the ongoing resource implications for the Court are not expected to be onerous and may produce savings.

Information for, and communication with, the public

- 6.17 The Court is likely to require additional resources to implement the Commission's recommendations about information that is made available to class members and the community.
- 6.18 Preparation by the Court of standard form opt-out and settlement notices, as recommended, is a discrete task that will require in-house expertise and the resources to engage an appropriately qualified contractor or consultant.⁹ It should not have ongoing resource implications.
- 6.19 In addition, the Commission's recommendations that the lawyers for the representative plaintiff provide a Class Action Summary Statement and, if a litigation funder is involved, a Funding Information Summary Statement,¹⁰ will require the Court to identify what details these statements should contain. Then there will be an ongoing administrative burden in ensuring that the statements are provided.
- 6.20 The Commission proposes that the standard form notices and summary statements be published on the Court's website.¹¹ This will create an ongoing administrative responsibility, to ensure that the information is published. However, this could be incorporated into the existing duties of staff who maintain the information about class actions on the website.¹²
- 6.21 Similarly, with regard to the resource implications of upgrading and managing the Court's website, no additional information technology resources should be necessary. The Commission notes that its recommendation falls within the ambit of technological changes that are currently underway in the Court, which includes a new website that will be delivered in 2018.¹³

Court powers

- 6.22 A number of recommendations concern the Court's role. Some clarify existing powers and may increase efficiency by avoiding the delays and disputes that can arise where there is uncertainty.¹⁴ Efficiencies may also be achieved by the introduction of recommended new own motion powers to order that a proceeding no longer continue

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

6 Recommendations 11, 16, 22, 25, 26.

7 Recommendations 3, 5.

8 Recommendation 17.

9 Recommendation 21.

10 Recommendations 6, 23.

11 Recommendation 21.

12 The Class Actions Coordinators currently update the website with key information about cases and class actions generally: information provided by the Supreme Court, 18 December 2017.

13 Supreme Court of Victoria, *Digital Strategy and Implementation Plan 2015–2020* (2015); Consultation 4 (Judges of the Supreme Court of Victoria).

14 Recommendations 15, 24, 26, 27.

as a class action, and to replace the representative plaintiff with another class member.¹⁵ The other recommendations that affect the Court's role are for incremental changes that do not depart substantially from the powers currently available to courts under other Australian class action regimes. They include recommendations that:

- lawyers be able to apply for a common fund for the payment of costs that they incur for and on behalf of their clients
- the Court have the discretion to make orders about the distribution of money remaining after settlement distribution
- the Court have discretion in making an adverse costs order or security for costs order.¹⁶

6.23 The overall effect of the recommendations reinforces the Court's protective role at settlement approval, which is a role that can be onerous, and may become more so. For example, the greater prevalence of common fund orders will increase the Court's role in reviewing risk-based costs. This trend predated this review and would have continued in its absence.

6.24 It is difficult to predict the impact of these recommended changes on the Court's resources because the features of class actions differ and not all of the changes will be relevant in every case. As so few class actions are filed in the Court, the Commission considers that the workload implications for judges will be manageable, with appropriate research and associate support.

Conclusion

6.25 As noted above, the Court has identified a current need for more legally qualified staff to support the judiciary and provide better services to the legal profession. The Court has also submitted that, with additional resources, it could:

- develop more accessible explanations of the class action process
- develop templates for opt-out notices
- enhance digital communication.¹⁷

6.26 The Commission's recommendations will increase the need for staff to assist members of the Court, initially in developing and introducing the changes, and into the future as the Court's protective role strengthens and it raises its profile as a source of information about class actions generally. The Class Action Coordinators for the Common Law Division and the Commercial Court have responsibilities that are affected by many of the recommendations and may need assistance for their part in responding to them.

6.27 The Commission recommends that additional legally qualified staff be assigned to support members of the Court in managing class actions. They could provide research assistance and case management assistance as required and would otherwise work in conjunction with the Class Action Coordinators in implementing the recommendations and monitoring the progress of cases, responding to enquiries from the public, and liaising with the parties.

6.28 In making this recommendation, the Commission is acknowledging that there is a resource requirement that needs to be met. It notes that the allocation of Court resources is a matter for the Court, which in turn receives funding through Court Services Victoria. The Commission is also aware that any additional allocation of resources to class actions as a result of the Commission's recommendations may be offset by efficiencies that are expected to be achieved through the digital transformation of court processes.

¹⁵ Recommendations 10, 14.

¹⁶ Recommendations 8, 19, 28, 29.

¹⁷ Submission 30 (Supreme Court of Victoria).

Recommendation

- 31** The Supreme Court should consider providing additional legally qualified staff to support the role of Class Actions Coordinator in the Common Law Division and the Commercial Court in implementing the Commission's recommendations and managing the ongoing responsibilities arising from them for the Court.

Technological innovation and the conduct and management of class actions

- 6.29 New technologies are rapidly changing the delivery of traditional legal services. The Law Society of New South Wales has described the pace and extent of change as a 'tidal wave of innovation'.¹⁸ Automation, artificial intelligence, the rise of social media, big data, cloud computing, encrypted digital currency, blockchains and smart contracts are some of the many recent innovations changing the way lawyers work and the delivery of legal services.¹⁹ These innovations are being applied in the delivery of legal services to improve access and efficiency and reduce costs.
- 6.30 Both practitioners and clients are driving the uptake of new technology. Law firms are recognising that it can help in identifying potential clients, and lead to greater efficiencies and productivity. Consumers are demanding greater access to the legal system and the quick resolution of claims. Traditional legal models are increasingly viewed as too slow and too costly.
- 6.31 Across the legal market, lawyers, together with regulators, professional bodies and universities, are moving to meet the demands and challenges that come with such rapid transformation. This change is now affecting the way most court services are delivered. In the next section, the digital transformation of the Supreme Court is discussed.
- 6.32 The application of new technologies to legal processes is changing how class actions are managed and the types of claim that it is cost-effective for legal firms to bring. High-volume/low-value claims that previously would have been too costly to run are being brought within reach. Access to justice by the use of the class action procedure is improved and, in principle, this trend should be welcomed.
- 6.33 Developments in the United States, while not directly applicable to Victoria, suggest the direction in which class actions may evolve. There, reluctance on the part of regulators to pursue low-value compensation for victims of corporate misconduct combined with the ability of law firms to use new technology to quickly aggregate claims on behalf of those victims have led to a growth of high-volume/low-value class actions that was not envisaged 25 years ago.
- 6.34 A concerning trend is that the value of the claims to the class members can become so small that the benefit in providing access to justice is, by any measure, slight. The public interest is served only to the extent that the class action provides a means of regulating corporate activity. This was not the purpose of introducing class actions in Australia and, if the trend strengthens locally, it will raise questions about the most effective use of court resources and the role of the regulator in claims against corporate misconduct. The issue is discussed at the end of this chapter.

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The Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (2017) 2.
Julian Hetyey 'The Way Forward: Placing Innovative Ideas into Practice' Technology, Innovation and Change in the Supreme Court of Victoria' (Paper presented at Law Institute of Victoria Future Focus Forum, Melbourne, 23 November 2017) 1.

Technology upgrades at the Supreme Court of Victoria

6.35 The Supreme Court is undergoing a significant technological transformation that aims to put it at the forefront of technological innovation in the delivery of court services. The Supreme Court’s vision for digital transformation, under an ambitious Digital Strategy, is to design and deliver services that are more effective, less costly and more responsive for court users.

The Digital Strategy is built on the well-founded assumption that targeted investment in a number of key electronic services will improve access to justice. The Strategy is drawn from an internal needs assessment and external best practice, which together present a coherent, measured approach.²⁰

6.36 The Court aims to adapt business processes to meet both the changing expectations of the legal industry and the community and to be ready for future developments.²¹ To promote the effective use of new technologies in the conduct of civil litigation, and specifically to reduce time and costs, the Court has issued a practice note that makes it clear that it expects parties to apply technology to meeting their obligations to ensure their costs are reasonable and proportionate under the *Civil Procedure Act 2010 (Vic)*.²² The practice note acknowledges that different uses of technology are appropriate across the spectrum of court proceedings and will develop over time.²³ However, if technology is available to improve efficiencies and lower costs, parties will be expected to use it.

6.37 The digital transformation of processes in the Commercial Court has begun, and this will improve the efficiency of class action procedures. Indeed, one of the factors driving change in the Commercial Court has been the increase in complex ‘mega litigation’ including class actions and the associated resource demands. Judicial Registrar Julian Hetey recently remarked that the reforms to enhance service delivery and manage commercial matters more effectively and efficiently had become critical:

The Supreme Court of Victoria has an extensive history of accommodating the particular needs of the business community in the management and hearing of commercial cases. This is because the Court has long recognised that certainty, predictability and timeliness are the lifeblood of commerce. And increasingly, commercial litigants and their lawyers have come to demand expedition and commerciality in decision-making.²⁴

6.38 The introduction of e-filing and a new electronic case management system will greatly improve efficiencies in class action processes. Electronic case management will allow faster and more streamlined access to case information for parties. It will also allow the Court to capture more data about matters as they progress through the Court.

6.39 Rebuilding the Court’s network infrastructure and upgrading in-court technology will enable the Court to live-stream cases, video conference and web-cast hearings in all of its 34 courtrooms. The benefits of the Court’s commitment to incorporating the use of new technologies in the context of class actions is already being experienced. The Court has introduced courtroom technology to enhance the in-court experience of the parties and the judge:

The Kinglake-East Kilmore Black Saturday class action was conducted as an electronic trial for the full 208 days of trial. The parties used electronic court books which ultimately saw 23,105 documents (including videos and sound files) in digital form loaded and 10,400 tendered. Any documents not in the e-court book could only be added in digital form. NuLegal managed the process in the courtroom. The documents, when referred to by counsel, were displayed on numerous screens in a purpose-built

20 Supreme Court of Victoria, *Digital Strategy and Implementation Plan 2015–2020* (2015) 4.

21 Supreme Court of Victoria, *Strategic Statement* <<https://www.supremecourt.vic.gov.au/strategic-statement>>.

22 Supreme Court of Victoria, *Practice Note SC Gen 5—Technology in Civil Litigation*, 30 January 2017, [4.1].

23 *Ibid* [4.2].

24 Julian Hetey ‘“The Way Forward: Placing Innovative Ideas into Practice” Technology, Innovation and Change in the Supreme Court of Victoria’ (Paper presented at Law Institute of Victoria Future Focus Forum, Melbourne, 23 November 2017) 3.

court room. The trial was webstreamed live so that group members did not need to travel to Melbourne CBD to observe the trial.²⁵

- 6.40 Class members in roundtable consultations with the Commission strongly supported the use of video links in the bushfires class action. Class members highlighted that live streaming during any court proceedings and/or trial ensured that any class member would be able to observe the progress of the case.²⁶
- 6.41 The Commission was told that the Supreme Court expects that, by upgrading the capabilities of all courts and allowing for digital trials, time savings of between 25 and 33 per cent will be achieved. The Court advised that within a couple of years all class actions will be run as digital trials.²⁷

Innovation in the delivery of legal services

- 6.42 Innovation in the delivery of legal services is helping to improve access to justice. Globally, companies and law firms are using new communications, information and data management and analysis technologies and specialised software to provide legal services differently to traditional legal practices.²⁸ Sometimes referred to as ‘disrupters’ or ‘innovators’, they are not only creating greater efficiencies, they are also extending legal services to people who may not have used legal services in the past.²⁹
- 6.43 Social media and mainstream media are also changing the ways that lawyers promote their services and interact with clients. Law firms are developing online systems that can access millions of clients and need not confine their operations to a geographical location. Global access to legal disputes and clients is creating unprecedented opportunities, as well as global competition.
- 6.44 The following examples of legal services provided through online platforms and specialised software are not only lean and efficient, they are also providing greater transparency and price certainty, with fixed prices for particular services that clients can afford.³⁰
- **Marketplace/Online lawyers.** A range of online platforms, including websites, enable lawyers to market their services to potential clients, and applications connect clients to their lawyers. More complex platforms allow consumers to post a legal issue directly online and, through the use of algorithms, their request is matched with a lawyer who then handles the specific legal work entirely on the online platform.³¹
 - **Document automation.** Companies are providing clients with fixed priced online access to documents that can be customised online. There is also an increasing use of smart contracts that can fully automate transactions.³²
 - **Practice management.** These platforms provide online back office support for law firms. Platforms can provide detailed case management, online communications channels, as well as time and billing management software.³³ There is also software specifically designed for the management of class actions and settlement distribution.

25 Supreme Court of Victoria, *Digital Strategy and Implementation Plan 2015–2020* (2015) 11.

26 The Supreme Court is aiming for all physical courtrooms to have the equipment needed for the electronic trial of any matter by 2020:

Supreme Court of Victoria, *Digital Strategy and Implementation Plan 2015–2020* (2015) 27.

27 Consultation 4 (Judges of the Supreme Court of Victoria).

28 For example, Techindex, hosted by the Stanford Center for Legal Informatics’ website CodeX, provides a curated list of legal technology companies and tech-based law firms: <<https://techindex.law.stanford.edu/CodeX>>.

29 Katie Miller, *Disruption, Innovation and Change: The Future of the Legal Profession* (Law Institute of Victoria, 2015) 6.

30 Ibid 19.

31 For example, there are companies such as UpCounsel that allow clients to collaborate directly with lawyers (online) to resolve complaints (at an estimated 60% reduced costs than through a traditional law firm model): <www.upcounsel.com/howitworks>. There are also market place platforms such as Crowd and Co that allow lawyers to directly tender to potential clients online and engage lawyers for bespoke projects: <www.crowdandco.com>.

32 For example, platforms such as Lawpath, which is currently delivering legal documents to over 40,000 users: <<https://lawpath.com.au>>. International platforms such as Legalzoom claim to have provided legal services directly to over 2 million clients: <www.legalzoom.com/country/au>. Smart contracts are increasingly used in the finance and property sector and they remove the need to draft and exchange paper contracts. In contrast to other online legal documents, the contracts are self-executing, with computer code that records the terms of the agreement on blockchain technology. The smart contract will fully automate the transaction, so that once one contract condition is satisfied, it will automatically trigger performance of another condition.

33 For example, US company Houdini Esq provides legal software for practice management: <www.houdiniesq.com>.

- **Legal research and analytics.** Legal research is increasingly undertaken by artificial intelligence software. Specific legal research software is able to undertake complex legal research in seconds in response to almost any legal question. Software that provides ‘big data’ analytics is also increasingly being used in assessing legal risk management. Such software can research decades of case law and immediately uncover trends and patterns to help consider how a particular case will fare in a particular jurisdiction.³⁴
- **Online dispute resolution.** Platforms manage a range of disputes including divorce and parenting disputes and there are online tribunals dedicated to residential tenancy disputes.³⁵
- **E-discovery.** Digital tools for law firms are enhancing the process of discovery in litigation. De-duplication technology removes duplicated documents from discovery, reducing the number of discoverable documents and saving costs. Similar technology groups e-mail threads and automatically detects documents that might be privileged from production and is now considered a regular part of litigation.³⁶ The Court expects parties with discoverable documents exceeding 500 pages to implement a cost-effective discovery plan incorporating the use of technology.³⁷

6.45 Adapting to automation is quickly becoming a business imperative for legal practice. Law firms that are early adopters of new technology are able to offer profoundly different services to those that rely on traditional processes. Technological innovation presents both opportunities and challenges for the courts, as observed by Justice Michelle Gordon, of the High Court, in a presentation on disruptive technology and rule of law.³⁸ Justice Gordon highlighted in particular the increasing prevalence of online dispute resolution platforms and the emergence of automated decision-making technology, which can improve access to justice and efficiency but may also reduce the transparency of judicial and administrative processes.

Technology has the potential to bring enormous benefits to our legal system. But we need to embrace those benefits with the knowledge and understanding of the effects, risks and challenges that accompany technological change. Failing to consider and, where appropriate, to address the effects, the risks or the challenges is not an option. Pretending that they do not exist is also not an option. Indeed, the sooner we ask, and answer, these fundamental questions, the better it will be for the development of new tools and ideas that utilise technology, as well as for the rule of law.³⁹

6.46 Characteristics of class actions lend themselves to technological innovation. The Commission notes that the ongoing initiatives of the Supreme Court of Victoria to improve efficiency across all of its activities provides the opportunity to deliver more effective, efficient and affordable access to justice through the class action procedure in a considered and planned way.

34 For example, Ravel Law provides free computer assisted legal research: <<http://ravellaw.com>>, and ROSS uses ‘artificial intelligence’ software to provide detailed legal research: <<http://rossintelligence.com>>.

35 For example, the Dutch Legal Aid Board has developed an online interactive dispute resolution support service for family law disputes: <www.hiil.org/project/rechtwijzer-divorce-separation-netherlands>. In Canada, the Civil Resolution Tribunal provides online dispute resolution for small claims: <<https://civilresolutionbc.ca>>.

36 For example, companies such as Law in Order provide software for electronic discovery as well as other online services for online court management: <www.lawinorder.com.au>.

37 Supreme Court of Victoria, *Practice Note SC Gen 5—Technology in Civil Litigation*, 30 January 2017, [8.3].

38 Justice Michelle Gordon, ‘Courts and the Future of the Rule of Law’ (Speech delivered at the Centre for Comparative Constitutional Studies Constitutional Law Conference, Melbourne Law School, 21 July 2017).

39 Ibid 14–15.

Innovation in class actions

- 6.47 Class action regimes in the United States are increasingly supported and managed by independent companies that provide online registration and administration of class actions, using software developed for this purpose. Class members can submit documentation online and ask questions of an online evaluator considering their claim. They can interact with a resolution platform and the software can then facilitate the administration and distribution of the settlement.⁴⁰
- 6.48 Technology is being used in similar ways in Australia. Maurice Blackburn noted in its submission that it is increasingly making use of digital technology in the management of class action awards, implementing cost-effective and efficient settlement administration processes. All of its class action registration processes are online, which removes the risk of misplacing hardcopy materials and increases speed and accuracy in claims management.⁴¹ Innovative software of this type may also be able to provide objective and targeted assistance to the court, balancing fairness and cost in the settlement distribution process.
- 6.49 However, the combination of class action procedures and technological innovation also enables lawyers to be more ‘entrepreneurial’, where they act less as an agent in the claim and more as the initiating party.⁴² Submissions have highlighted the growing risk of the class action system being used for ‘lawyer-driven’ litigation that needs to be appropriately managed.⁴³
- 6.50 Many products and services are mass-produced and mass-marketed; when they cause harm, they do so on a large scale.⁴⁴ Simply being a consumer can also mean being a member of a class action somewhere in the world. However, the potentially large settlements in mass scale class actions may not translate into benefits for the victims of the misconduct, while the actions themselves place a significant burden on the justice system.⁴⁵
- 6.51 With the ability to aggregate mass claims, there has been a significant increase in consumer class action claims in the United States that are high-volume and low-value. They are referred to as ‘negative value’ claims and are discussed below.

Negative value claims

- 6.52 Consumer class actions involving the food and beverages industry in the United States have increased from 20 claims in 2008 to more than 170 new claims filed, or moved to, federal courts in 2016. Commonly referred to as ‘shopping aisle class actions’, they have been brought on behalf of consumers who have been misled by labelling, packaging and advertising. While the potential damages available for individuals in such claims can be as little as a few dollars, once aggregated, these class actions have reached multimillion dollar settlements.⁴⁶

40 For example companies like Epiq provide online class action administration: <www.epiqglobal.com>. Other independent firms that provide a range of specific administration services for class actions include Analytics: <www.analyticsllc.com>; and JND Legal Administration: <www.jndla.com>.

41 Submission 13 (Maurice Blackburn Lawyers).

42 John C. Coffee Jr ‘The Globalization of Entrepreneurial Litigation: Law, Culture and Incentives’ (2017) 165 *University of Pennsylvania Law Review* 1895, 1897.

43 Submissions 12 (Allens), 19 (US Chamber Institute for Legal Reform).

44 Michael Legg, ‘A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers’ (2016) 38 *Sydney Law Review* 311, 311.

45 Cary Silverman and James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* (US Chamber Institute for Legal Reform, 2017) 1–4 <www.instituteforlegalreform.com/research/the-food-court-trends-in-food-and-beverage-class-action-litigation>.

46 Cary Silverman and James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* (US Chamber Institute for Legal Reform, 2017) 4 <www.instituteforlegalreform.com/research/the-food-court-trends-in-food-and-beverage-class-action-litigation>. As an example, in January 2013, an Australian teenager posted a photo on Facebook of a ‘foot-long’ Subway sandwich he had purchased in the US. The sandwich was photographed next to a ruler which showed that the sandwich actually measured an inch short of a foot. The post went viral on the internet and within weeks lawsuits had been filed across the US by people claiming their sandwiches were also less than the advertised size. The parties reached a settlement in 2016, however the US Court of Appeals for the Seventh Circuit recently overturned the decision. See *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, 869 F 3d 551 (7th Cir, 2017).

- 6.53 Research into the outcomes of class actions in the United States found that, although some types of class action provide for the automatic distribution of benefits to class members, this has almost never occurred in consumer class actions. Some consumer class actions were settled without even the potential for a monetary payment to class members.⁴⁷
- 6.54 Although the litigation culture in Australia is more conservative than in the United States, there have been recent examples of low-value consumer class actions. A class action recently brought against the manufacturer of a pain medication produced a settlement scheme providing for consumers to be compensated between \$3.16 and \$5.70 per product purchased.⁴⁸ The loss suffered by one of the representative plaintiffs was valued between \$185.90 and \$363.35.⁴⁹
- 6.55 As noted by the Consumer Action Law Centre, class actions can be important to ensure that the full scope of wrongdoing is assessed and remedied by a court, but they might not always be the most efficient mechanism to deliver compensation.⁵⁰
- 6.56 Allens raised concern that, where class actions are pursued for reasons other than seeking an adequate remedy for class members, there is an increased risk of the system being used for ‘speculative or reverse engineered claims’ rather than proper consideration being given to the best and most efficient way to advance class members interests.⁵¹
- 6.57 Submissions also highlighted that class actions are not the only mechanism to facilitate access to justice for a group of affected consumers. Other mechanisms in relation to consumer claims include public action by regulators and systemic conduct investigations by industry-based ombudsman schemes that may have the ability to deliver more efficient remedies to consumers than the class action regime.⁵²

Class actions as a form of regulation

- 6.58 Class actions have been considered a useful deterrent to corporate misconduct in Australia.⁵³ However, this is not how the Australian Law Reform Commission (ALRC) envisaged class actions would be used. The use of class actions as a form of regulation was specifically rejected in the ALRC’s 1988 report on grouped proceedings. The ALRC clearly specified that the primary goal of the scheme would be to deliver legal remedies to those who have suffered loss or damage.⁵⁴
- 6.59 Currently, regulators’ enforcement actions are guided by the broader public interest of deterring corporate misconduct, while compensation and restitution is left to private litigation. This means that, even where a regulator has taken action in court on a particular matter, individual consumers or businesses are left to seek compensation for particular harm through private litigation or through class actions.⁵⁵

47 Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (US Chamber Institute for Legal Reform, 2013) 2 <<http://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf>>.

48 Less a 20% litigation funding fee. The settlement also provided for the costs of the scheme administrator to be deducted from the settlement distribution fund, and, if the claims of participating group members exceeded the fund, for the amounts payable to class members to be reduced on a pro rata basis. Legal costs were to be paid separately: *Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3)* [2017] FCA 1165 (20 September 2017).

49 *Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3)* [2017] FCA 1165 (20 September 2017). The class action settled for \$3.5 million (excluding legal costs and the ‘after the event’ insurance premium) and followed successful proceedings initiated by the Australian Competition and Consumer Commission: *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25. In this decision, the Full Federal Court ordered Reckitt Benckiser to pay a revised penalty of \$6 million (up from a \$1.7 million penalty imposed by the trial judge) for making misleading representations about its Nurofen-specific pain products.

50 Submission 24 (Consumer Action Law Centre).

51 Submission 12 (Allens).

52 Submissions 24 (Consumer Action Law Centre), 12 (Allens).

53 Submission 23 (Australian Shareholders’ Association); see also Ben Slade and Jarrah Ekstein, ‘Class Actions and Social Justice: Achievements and Barriers’ in Damien Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 281, 283–4.

54 Law Reform Commission (now Australian Law Reform Commission), *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 132.

55 Submission 24 (Consumer Action Law Centre).

- 6.60 However, as ways of providing a remedy to a victim of corporate misconduct, private litigation and class actions continue to be expensive options. The 2017 review of Australian Consumer Law identified court action as a significant barrier to consumers in seeking compensation for loss or damage. Court proceedings are often too costly and difficult for consumers, especially where foreign goods or parties are involved.⁵⁶
- 6.61 The private sector will take on the compensatory role of the regulator only in situations that provide commercial outcomes. For example, noting that individual shareholders are unlikely to be able to take legal action in response to corporate misconduct and that litigation funders invest in only a minority of possible claims, the Australian Shareholders' Association submitted that access to justice is constrained under the class action regime.⁵⁷
- 6.62 Class actions can be extremely complex litigation. They can be long and expensive. If the remedy being sought for each class member is of little value, particularly after the costs of litigation are met, it is appropriate to question whether bringing a class action is the most effective method to achieve a fair outcome for those who have suffered loss or damage, and the most effective use of court resources. With the development of automated and online case management and settlement distribution software, regulators could consider alternative mechanisms to facilitate more effective redress than relying on private litigation and the class action system.⁵⁸
- 6.63 In a recent example, the Australian Consumer and Competition Commission used its power under section 87B of the Competition and Consumer Act 2010 (Cth) to negotiate enforceable undertakings from a group of telecommunication companies that contravened Australian Consumer Law. The regulator was able to negotiate to deliver compensation to the 58,700 affected consumers without the need to commence court proceedings.⁵⁹ However, as the Consumer Action Law Centre pointed out in its submission, many sector-specific regulators do not have powers to obtain compensation for affected consumers, and those that do rarely exercise them.⁶⁰
- 6.64 The Commission notes that this may be a matter that the ALRC might wish to consider in its current review of the Commonwealth's class action regime.

56 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review*, Final Report (2017) 37. <<http://consumerlaw.gov.au/consultations-and-reviews/review-of-the-australian-consumer-law/final-report/>>.

57 Submission 23 (Australian Shareholders' Association).

58 Michael Legg, 'A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers' (2016) 38 *Sydney Law Review* 311, 338.

59 Australian Competition and Consumer Commission, *Public Registers: TPG Internet Pty Ltd, Telstra Corporation Ltd, Optus Internet Pty Ltd* (20 December 2017) <<http://registers.accc.gov.au/content/index.phtml/itemId/1204847>>.

60 Submission 24 (Consumer Action Law Centre).

Conclusion

7. Conclusion

- 7.1 Victoria’s class action regime has improved access to justice. Thousands of Victorians have benefited from the procedures introduced in 2000 by Part 4A of the *Supreme Court Act 1986* (Vic). Combined, they have received more than one billion dollars in compensation that they would have been unable or unwilling to recover in separate claims. Eighty-five class actions have been filed on behalf of a wide variety of claimants, from vulnerable individuals to institutional investors and insurers. Two in every three class actions settled.
- 7.2 Crucially, the regime affirms the Supreme Court’s role in ensuring that the procedures are fair and that the outcome takes into account the interests of all class members.
- 7.3 The recommendations contained in this report aim to further improve access to justice. They build upon changes in how class actions are now being managed—particularly by the Supreme Court of Victoria but also by the Federal Court of Australia and the Supreme Courts of New South Wales and Queensland—in response to the activities of litigation funders and entrepreneurial law firms. This report, and the reference, are directed at Victorian processes. The recommendations relate to the Victorian Supreme Court while advancing a nationally consistent approach.
- 7.4 A number of significant features of class actions today were not envisaged when the regime was first established and have been developed by the courts in exercising broad discretionary powers. For legal certainty and procedural clarity, the Supreme Court of Victoria should be given express powers, or consider providing comprehensive guidance, in support of its responsibility to: ensure that the claim is appropriately brought as a class action; review costs; approve settlement, and supervise the distribution of settlement proceeds. For reasons discussed in Chapter 4, a pre-commencement certification process is not necessary or desirable.
- 7.5 The Commission’s consultations with judges, law firms and litigation funders revealed a marked consensus that class action practices and procedures should be consistent across Australian jurisdictions. Although there is a high degree of commonality, the Victorian Supreme Court’s practice note on class actions is not as prescriptive as the practice note issued by the Federal Court of Australia. It does not refer to litigation funders and provides less guidance to law firms about their obligations to class members.
- 7.6 The differences reflect the limited involvement of litigation funders in class actions in Victoria, and the greater caseload of mass tort proceedings, which often present unique characteristics that are best managed when the Court can respond flexibly. However, to avoid ‘forum shopping’ and other tactics that exploit actual or perceived differences at the expense of efficiency, the Supreme Court Practice Note should align more closely with its Federal Court equivalent.

- 7.7 While the Court has a role in ensuring that class members are not exposed to unfair risks or disproportionate cost burdens, there is an inherent disparity in the class action regime because the representative plaintiff carries the financial risk of losing as well as being liable for the costs of bringing the proceeding. In most class actions it creates an insurmountable barrier or risk unless some or all of the costs are contingent on a successful outcome.
- 7.8 Litigation funders have enabled class actions and other litigation to be pursued by meeting upfront costs and removing or reducing the financial risk of losing. They have become integral to the legal system and increasingly pervasive and should be regulated nationally. The court, the parties, and any persons on whose behalf funded litigation is conducted should be aware that a litigation funder is involved and the nature of its involvement. In addition, the Court should have an express power to review and vary litigation funding charges or costs in class actions.
- 7.9 Within Victoria, the impact of litigation funders in enabling litigation other than class actions to proceed is unknown although, as discussed in Chapter 2, the involvement of a litigation funder in a claim made on behalf of former employees of Huon Corporation Limited attracted controversy.
- 7.10 Litigation funders clearly have had little impact in enabling class actions to be brought in the Supreme Court of Victoria. By far the most prevalent form of financial assistance to representative plaintiffs in Victoria has been the provision of legal services by law firms on a 'no win, no fee' basis. However, charging on a 'no win, no fee' basis usually does not relieve the representative plaintiff of liability for disbursements or reduce their exposure to the risks of being ordered to provide security for costs or pay adverse costs.
- 7.11 There are cogent reasons for permitting lawyers to charge contingency fees in appropriate areas of law. Previous reviews, including the Commission's 2008 Civil Justice Review, have recommended it. There is also persistent concern that lifting the ban would increase the risk or incidence of unethical conduct because of conflicts of interest. However, existing rules and ethical guidelines for the legal profession are comprehensive and more robust than those that apply to litigation funders, and the Commission recommends further guidance on the recognition, avoidance and management of conflicts of interest in class actions.
- 7.12 The Commission has concluded that, in principle, lawyers should be able to charge contingency fees because it would provide another funding option for litigants who are unable to bring proceedings without financial assistance. It would increase competition. It may reduce costs in some cases and enable the pursuit of claims that are not financially viable investment opportunities for litigation funders. The challenge of how to improve access to justice by permitting lawyers to charge contingency fees, with appropriate regulation, should continue to be pursued nationally.
- 7.13 In the meantime, more class actions may be pursued, at lower cost, and at less financial risk to the representative plaintiff, if lawyers could apply to the Court to charge a percentage of any settlement or judgment amount. Concerns that have been raised in the general debate about contingency fees can be controlled and managed within the limits of the class action regime, where the Court has a strong supervisory role in ensuring that costs are fair and reasonable.
- 7.14 While not disturbing the general ban on contingency fees, or changing the common procedural form of class actions in Australia, a percentage of the recovered amount could be sought by lawyers acting for the representative plaintiff in class actions in the Supreme Court of Victoria. As discussed in Chapter 3, an application would need to be made for a common fund order, subject to conditions that address concerns about costs and conflicts of interest.

- 7.15 The conditions would include that the lawyers provide security for costs if ordered, indemnify the representative plaintiff for adverse costs and cover the cost of disbursements, as well as provide legal services. This would overcome the disadvantage of charging on a 'no win, no fee' basis, and be comparable to the services provided by litigation funders. The fee would be decided by the Court when approving settlement, or if awarding compensation or damages at the conclusion of a trial.
- 7.16 The importance of ensuring that the costs of bringing the proceedings, and the financial risk of losing, do not unreasonably prevent meritorious class actions from being pursued was identified in 1988 by the Australian Law Reform Commission when developing the procedural model on which Australia's class action regimes are based.¹ Litigation funders have since provided a means of overcoming the cost barrier, although the extent they do so is necessarily the result of commercial decisions.
- 7.17 With the knowledge gained over the years during which the class action regime has operated, combined with the perspectives of the current era, it is now possible to address the need for a more comprehensive solution to provide better access to justice. The Commission proposes in this report a pathway towards that solution—one that should improve access to justice; provide appropriate regulation of litigation funders; maintain proper ethical conduct by lawyers; and not involve unfair or disproportionate burdens upon litigants.



Appendices

156 **Appendix A: Submissions**

157 **Appendix B: Consultations**

Appendix A: Submissions

1	Ashleigh Leake, Josephine Vernon, Bruce Efron
2	Professor Vicki Waye
3	Professor Julie-Anne Tarr
4	Chartered Accountants Australia and New Zealand
5	Andrew J Roman
6	Confidential
7	Litigation Lending
8	Dr Warren Mundy
9	Professor Simone Degeling, Associate Professor Michael Legg, Dr James Metzger
10	Victorian Legal Services Board and Commissioner
11	Litigation Funding Solutions
12	Allens
13	Maurice Blackburn Lawyers
14	Litigation Capital Management Limited (LCM)
15	Phi Finney McDonald
16	National Union of Workers
17	Adley Burstyner
18	Adley Burstyner (supplementary submission)
19	US Chamber Institute for Legal Reform
20	Johnson and Johnson Family of Companies; Smith and Nephew; Stryker; and Zimmer-Biomet (Healthcare companies and businesses)
21	Law Council of Australia
22	Dr Michael Duffy
23	Australian Shareholders' Association
24	Consumer Action Law Centre
25	IMF Bentham Limited
26	Australian Institute of Company Directors
27	Ashurst
28	Slater and Gordon Lawyers
29	Insurance Council of Australia
30	Supreme Court of Victoria
31	David Kanaley
32	Keith and Mary Stone
33	Victorian Bar
34	Commercial Bar Association of Victoria
35	Professor Vince Morabito
36	Joshua Levenda-Freeman

Appendix B: Consultations

Formal consultations

The following formal consultations were conducted, after the consultation paper was published, to discuss the reform options identified in the paper. Comments from these consultations are cited in the report.

Consultations

1. Professor Vince Morabito, Monash University
2. Judges of the Federal Court of Australia
3. Judges of the Supreme Court of Victoria—first consultation
4. Judges of the Supreme Court of Victoria—second consultation
5. Associate Professor Jasminka Kalajdzic, University of Windsor, Ontario

Roundtables

1. Conflict of interest and disclosure (professional stakeholders)
2. Certification of class actions (professional stakeholders)
3. Settlement of class actions (professional stakeholders)
4. Contingency fees and alternative sources of funding (professional stakeholders)
5. Views and perspectives of consumers and clients (class members of completed class actions; National Union of Workers; Consumer Action Law Centre)

Participants in roundtable consultations

Individuals

Dr Michael Duffy, Monash University

Chris Hobbs, class member, Marysville bushfire class action

David Kanaley, class member, Leighton Holdings class action

Carol Matthews, representative plaintiff, Kilmore East/Kinglake bushfire class action

Dr Warren Mundy, Presiding Commissioner for Productivity Commission's Inquiry into Access to Justice Arrangements (2013–14)

John Watson, representative plaintiff, AWB class action

Professor Vicki Waye, University of South Australia

Organisations

Allens

Ashurst

Clayton Utz

Consumer Action Law Centre

Herbert Smith Freehills

IMF Bentham Limited

King and Wood Mallesons

Litigation Capital Management Limited

Litigation Lending

Maurice Blackburn Lawyers

National Union of Workers

Phi Finney McDonald

Slater and Gordon Lawyers

Victorian Bar

Victorian Legal Services Board and Commissioner

Other contributors

In addition to the above contributors, the following individuals and organisations provided informal comments and information to assist the Commission's research.

Individuals

Professor Peter Cashman, Sydney Law School

Cate Dealehr, Accredited Cost Law Specialist, The Australian Legal Costing Group

Liz Harris, Accredited Cost Law Specialist

Michael Legg, Director, UNSW IMF Bentham Class Actions Research Initiative

Norman O'Bryan, barrister

Organisations

Australian Securities and Investments Commission

Ironbark Funding

Law Aid

Legal Services Council

Victoria Legal Aid



Bibliography

Bibliography

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

Attorney-General (Vic), 'Making Civil Justice Fairer for Victorians' (Media Release, 16 January 2017)

Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009)

Attrill, Wayne, 'The Regulation of Conflicts of Interest in Australian Litigation Funding' (2013) 2 *Journal of Civil Law Procedure* 193

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

Australian Securities and Investments Commission, *Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest*, Regulatory Guide No 248 (April 2013)

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

Butler, Ben, 'Victims Get Nothing as Litigation Funder, Lawyers Share the Spoils', *The Australian*, 22 August 2016

Campbell, Jenny and Jerome Entwisle, 'The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?' (2017) 36 *Civil Justice Quarterly* 177

Caruana, Jane and Vince Morabito, 'Turning the Spotlight on Class Representatives: Empirical Insights from Down Under' (2012) 30 *Windsor Yearbook of Access to Justice* 1

Cashman, Peter, *Class Action Law and Practice* (The Federation Press, 2007)

Coffee Jr, John C,

- *Entrepreneurial Litigation: its Rise, Fall, and Future* (Harvard University Press, 2015)

- 'The Globalization of Entrepreneurial Litigation: Law, Culture and Incentives' (2017) 165 *University of Pennsylvania Law Review* 1895

Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review*, Final Report (2017)

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

Dolor, Sol, 'Vic AG Launches Review of Litigation Funder Rules', *Australasian Lawyer* (online), 17 January 2017 <www.australasianlawyer.com.au/news/vic-ag-launches-review-of-litigation-funder-rules-229698.aspx?m=1>

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

Federal Judicial Center, *Manual for Complex Litigation, Fourth* (2004) <www.fjc.gov/content/manual-complex-litigation-fourth-0>

Forrest, Justice Jack, 'Issues in Case Management of Class Actions and Administration of Settlements—Kilmore East / Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions In Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71

Gilsenan, Rebecca and Michael Legg,

- *Australian Class Action Settlement Distribution Scheme Design*, IMF Bentham Class Action Research Initiative Research Report No 1 (University of New South Wales, 2017)
- 'Settlement Distribution Schemes' (Speech delivered at IMF Bentham and UNSW Class Action Conference, Sydney, 1 June 2017)

Grave, Damian, Ken Adam, Jason Betts, *Class Actions in Australia* (Thompson Reuters, 2nd Ed, 2012)

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

Hetyey, Julian, "'The Way Forward: Placing Innovative Ideas into Practice"—Technology, Innovation and Change in the Supreme Court of Victoria' (Paper presented at Law Institute of Victoria Future Focus Forum, Melbourne, 23 November 2017)

Higgins, Andrew et al (eds), 'Special Issue: 25th Anniversary of Class Actions in Australia' (2017) 36 *Civil Justice Quarterly* 133

IMF Bentham, Class Action Centre, 'Achieving Finality to Class Action Litigation' (Panel discussion at IMF Bentham and UNSW Class Action Conference, Sydney, 1 June 2017) <www.imf.com.au/newsroom/class-action-centre/full-post/class-action-centre/2017/06/24/panel-discussion-achieving-finality-to-class-action-litigation>

International Council for Commercial Arbitration, *Draft Report for Public Discussion of The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* (September 2017)

Isaacharoff, S and T Eagles, 'The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions' (2015) 38 *University of New South Wales Law Journal* 179

Jackson, Lord Justice Rupert,

- *Review of Civil Litigation Costs*, Final Report (The Stationery Office, December 2009)
- *Review of Civil Litigation Costs*, Preliminary Report (The Stationery Office, May 2009) vol 2

Kachor, Kate, 'IMF Voluntarily Cancels AFSL', *Financial Observer* (online), 22 April 2013 <www.financialobserver.com.au/articles/imf-voluntarily-cancels-afsl>

Kalajdzik, Jasminka, *Class Actions in Canada—The Promise and Reality of Access to Justice* (UBC Press, 2018)

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

Krestin, Marc and Rebecca Mulder, 'Third-Party Funding In International Arbitration: To Regulate Or Not To Regulate?' on Kluwer Arbitration Blog, 12 December 2017 <<http://arbitrationblog.kluwerarbitration.com/2017/12/12/third-party-funding-international-arbitration-regulate-not-regulate>>

Law Council of Australia and Federal Court of Australia, *Case Management Handbook* (2014)

Law Council of Australia, *Regulation of Third Party Litigation Funding in Australia*, Position Paper (June 2011)

Law Foundation of Ontario,

- *Class Proceedings Fund 20 Years in Review* (December 2012)
- *Supporting Law Students to Serve the Public, 2016 Annual Report* (2017)

Law Reform Commission of Western Australia, *Representative Proceedings*, Final Report Project No 103 (2015)

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

Law Society of British Columbia, *Part 8—Lawyers’ Fees* (2018) <www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/part-8---lawyers-fees/>

Law Society of England and Wales, ‘Impact of the Jackson Reforms on Costs and Case Management’ (Written submission at the Civil Justice Council Conference, 21 March 2014)

Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (2017)

Law Society of Ontario, *Seventh Report of the Advertising & Fee Arrangements Issues Working Group*, Contingency Fee Recommendation Report (November 2017) <www.lsuc.on.ca/advertising-fee-arrangements>

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

Lee, Justice Michael, ‘Varying Funding Agreements and Freedom of Contract: Some Observations’ (Speech delivered at the IMF Bentham Class Actions Research Initiative, UNSW Law School, Sydney, 1 June 2017)

Legg, Michael,

- ‘A Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers’ (2016) 38 *Sydney Law Review* 311
- ‘Class Actions, Litigation Funding and Access to Justice’ [2017] 57 University of New South Wales Law Research Series 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035096>
- ‘Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?’ (2016) 16 *Macquarie Law Journal* 89
- ‘Class Action Settlements in Australia—The Need for Greater Scrutiny’ (2014) 38 *Melbourne University Law Review* 590
- ‘Contingency Fees—Antidote or Poison for Australian Civil Justice?’ (2015) 39 *Australian Bar Review* 244
- *The Future of Dispute Resolution* (LexisNexis Butterworths, 2012)

Legg, Michael and Ross McInnes, *Australian Annotated Class Action Legislation* (LexisNexis Butterworths, 2nd ed, 2018)

Legg, Michael et al, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 36 *Northern Kentucky Law Review* 625

LexisNexis Legal Newsroom, *Subway Class Action Comes Up Short* (10 February 2017) <www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2017/10/02/subway-class-action-settlement-comes-up-short.aspx>

Litigation Funding Solutions, *Characteristics of a Good Case* (2018) <www.litigationfundingsolutions.com.au/characteristics-of-a-good-case-page/>

Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (US Chamber Institute for Legal Reform, 11 December 2013) <www.instituteforlegalreform.com/research/do-class-actions-benefit-class-members>

Miller, Katie, *Disruption, Innovation and Change: The Future of the Legal Profession* (Law Institute of Victoria, 2015)

Moloney, Patrick, 'One Size Doesn't Fit All' (2016) 26(3) *The Australian Corporate Lawyer* 36

Morabito, V and V Waye, 'Seeing Past the US Bogey—Lessons from Australia on the Funding of Class Actions' (2017) 36 *Civil Justice Quarterly* 213

Morabito, Vince,

- *An Empirical Study of Australia's Class Action Regimes, Fifth Report: The First Twenty-Five Years of Class Actions in Australia* (July 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3005901>
- 'Empirical Perspectives on 25 Years of Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 43

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

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

New South Wales Law Reform Commission, *Security for Costs and Associated Orders*, Report No 137 (2012)

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

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

Silverman, Cary and James Muehlberger, *The Food Court: Trends in Food and Beverage Class Action Litigation* (US Chamber Institute for Legal Reform, February 2017) <www.instituteforlegalreform.com/research/the-food-court-trends-in-food-and-beverage-class-action-litigation>

Slade, Ben and Jarrah Ekstein, 'Class Actions and Social Justice: Achievements and Barriers' in Damien Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 284

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

Supreme Court of Victoria,

- *2016–17 Annual Report* (2017)
- *Digital Strategy and Implementation Plan 2015–2020* (2016)
- Strategic Statement <www.supremecourt.vic.gov.au/strategic-statement>

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

Victorian Attorney-General's Law Reform Advisory Council, *Class Actions in Victoria: Time for a New Approach*, Expert Report 2 (1997)

Victorian Law Reform Commission,

- *Access to Justice—Litigation Funding and Group Proceedings*, Consultation Paper (2017)
- *Civil Justice Review*, Report No 14 (2008)

Wahlquist, Calla, 'Nurofen Class Action Could Yield Very Small Individual Payments' *The Guardian* (online), 3 August 2017 <www.theguardian.com/australia-news/2017/aug/03/nurofen-class-action-could-yield-very-small-individual-payments-lawyer-says>

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

Walker, John, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32(3) *UNSW Law Journal* 1036

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

Waye, Vicki and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Inquiries in Law* 303

White, Emma and Justin McDonnell, 'Developments in Competing Class Actions' on King & Wood Mallesons, *News and Insights* (4 April 2016) <www.kwm.com/en/au/knowledge/insights/developments-competing-class-actions-australia-20160404>

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

Reports published by the Victorian Law Reform Commission

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**Access to Justice —
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REPORT

GPO Box 4637
Melbourne
Victoria 3001
Australia

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone

+61 3 8608 7800

Freecall

1300 666 555 (*within Victoria*)

Fax

+61 3 8608 7888

Email

law.reform@lawreform.vic.gov.au

www.lawreform.vic.gov.au