An aerial photograph of a coastline, likely in Australia, showing a mix of brownish-orange land and turquoise water. A large, white, stylized arrow points from the left side of the image towards the right, partially obscuring the landscape.

Submission to the Victorian
Law Reform Commission

**Access to Justice —
Litigation Funding
and Group
Proceedings**

SEPTEMBER 2017

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1 INTRODUCTION

- 1.1 Allens is grateful for this opportunity to comment in response to the Victorian Law Reform Commission's (the *Commission*) consultation paper 'Access to Justice—Litigation Funding and Group Proceedings' dated July 2017 (the *Consultation Paper*).¹
- 1.2 The Commission's review is important and timely given the significant developments in the class action landscape since the introduction of the group proceeding regime in Victoria in 2000.²
- 1.3 We provide our Submission in response to the questions raised in the Consultation Paper to which the firm's experience is directly relevant. Our Submission has five parts:
- (a) First, we provide an overview of the key trends that we see as being important in the current class action landscape.
 - (b) Second, we examine the current regulation of litigation funders and lawyers in proceedings which involve litigation funders (responding to questions 1 to 6, 8 to 10, 12 and 16 of the Consultation Paper). This includes a consideration of the disclosure of litigation funding agreements, the role of the Supreme Court of Victoria (the *Court*) in supervising and managing class actions, the need for guidelines for lawyers on their responsibilities to multiple group members, and a lawyer's obligation to communicate with group members. We recommend mandatory disclosure requirements for litigation funders, and clearer guidance to lawyers as to extent of their obligations to group members.
 - (c) Third, we consider the issues associated with lawyers charging contingency fees, and the capacity for funding arrangements to improve access to justice (responding to questions 26 to 28 of the Consultation Paper). We conclude that permitting lawyers to charge contingency fees would not increase access to justice or address the issues third party litigation funders often pose. If the ban on contingency fees is lifted, it should be accompanied by appropriate regulation. Furthermore, we propose improving access to justice by reforming after the event insurance and considering the establishment of a justice fund.
 - (d) Fourth, we consider the adequacy of the existing commencement criteria for class actions and the problems created by competing proceedings (responding to questions 13 to 15 of the Consultation Paper). Although we do not press for a certification regime, we consider greater upfront scrutiny of the appropriateness of particular claims commenced as a class action is necessary. We also suggest legislative reform to provide greater certainty for defendants faced with competing class actions.
 - (e) Finally, we address proposed reforms to class actions settlement (responding to questions 17, 19, 21, 23 and 24 of the Consultation Paper). We recommend that guidance be developed to assist the Court in the settlement approval process, in particular with regard to the appointment of third-party representation for unrepresented group members and the factors impacting on the reasonableness of funding fees in the context of a settlement. We also recommend improvements to the management of settlement distribution schemes and notification to group members.
- 1.4 We consider that any reform to the Victorian regime should be in consultation with the other state based and federal jurisdictions—consistency on a national level will provide greater certainty, of benefit to all class action stakeholders.

¹ Victorian Law Reform Commission, *Access to Justice — Litigation Funding and Group Proceedings*, Consultation Paper (2017).

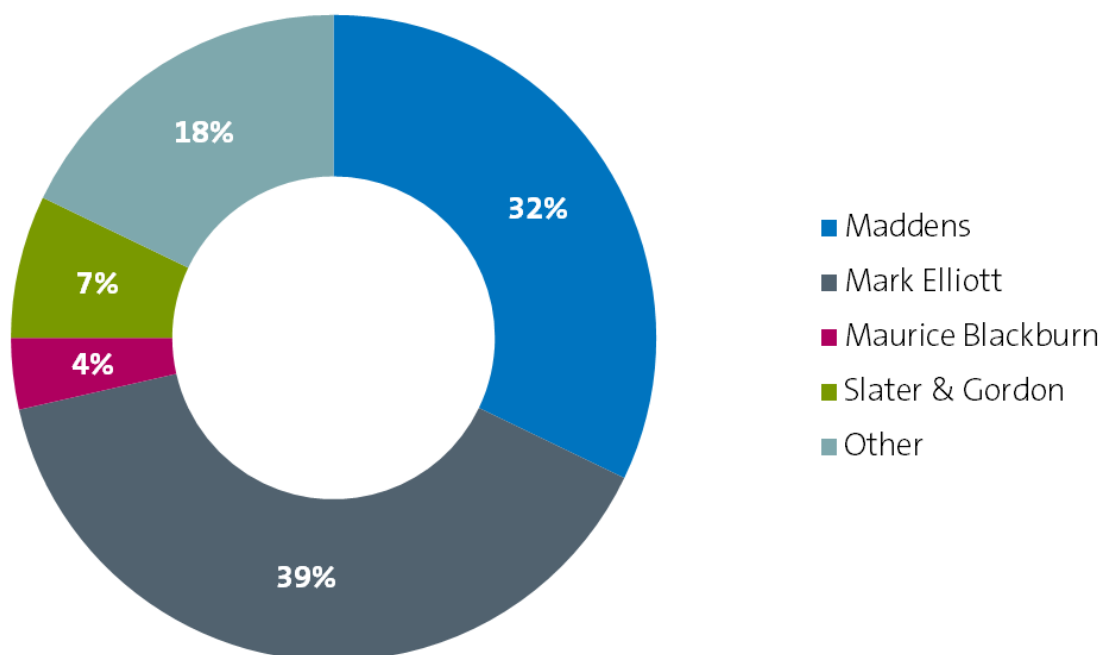
² We note that although in Victoria a class action is known as a group proceeding, for ease of reference we adopt the term 'class action' in this Submission.

2 THE CLASS ACTION LANDSCAPE

- 2.1 The class action landscape has changed significantly since the commencement of the regime. There has been an upward trend in the number of class actions filed, a rise in different types of claims commenced (including the prominence of shareholder class actions and financial services claims), a trend towards greater entrepreneurialism in the promotion of class actions by law firms and a change to the way in which class actions are funded.³ We describe this overall trend as class action entrepreneurialism. These dynamics could not have been predicted at the outset of the regime.
- 2.2 While lawyers and litigation funders undoubtedly play a role in facilitating access to justice, there is a growing risk that the different interests of lawyers, funders, representative plaintiffs and group members in class actions may give rise to unfair outcomes if not appropriately managed. In particular, we are seeing examples of:
- (a) the rising 'costs' of running class actions, with the litigation funders and the lawyers becoming greater beneficiaries of settlement awards;
 - (b) changes to the essential nature of class actions, with the advent of litigation funders leading to 'closed class' actions, the seeking of common fund orders and the 'competing claims' phenomena—which can lead to overlapping classes;
 - (c) 'lawyer-driven' litigation, and, in more extreme circumstances, claims being brought for an illegitimate or collateral purpose of generating revenue for a third party; and
 - (d) strategic decisions made on behalf of the representative plaintiff, or classes of group members, which are not necessarily in the best interests of other group members.
- 2.3 In recent years Allens has conducted research to paint a picture of the changing class action landscape. Our research is broadly consistent with Vince Morabito's data which is cited in the Consultation Paper. However, our research shows one additional trend that has not been highlighted by the Commission as emerging from the Morabito data—that is the increasing number of new law firms bringing class actions.
- 2.4 In our 2016 Class Action Risk report, we reported on this trend at a national level and found that 26 per cent of filings between 2013 and June 2016 can be attributed to 15 law firms that have filed either one or two claims.⁴
- 2.5 Similar to these findings, our analysis of the more recent Victorian filings shows that claims brought by long term players Maurice Blackburn and Slater & Gordon no longer account for the majority of claims brought in the jurisdiction.
- 2.6 The data at the Victorian level is heavily skewed by the number of natural disaster claims filed in the jurisdiction, as well as the shareholder claims brought by Mark Elliott. As can be seen from Figure 1, approximately 39 per cent of filings since 2013 can be attributed to Mark Elliott and 32 per cent of filings can be attributed to Maddens. Roughly 18 per cent of the remaining filings is attributable to 5 firms, bringing their first class action.

³ Allens, *25 Years of Class Actions: Where Are We Up To and Where Are We Headed?* (2017) 2–3 (*Allens 25 Years of Class Actions*); Allens, *Class Action Risk 2016* (2016) <<https://www.allens.com.au/general/forms/pdf/ClassActionRisk2016.pdf?sku=classactionrisk>> (*Allens 2016 Class Action Risk Report*).

⁴ Allens 2016 Class Action Risk Report, 5.

FIGURE 1: WHO IS BRINGING CLASS ACTIONS? (2013 TO 2017*)

*up to 1 July 2017, including proceedings that have been cross vested to other jurisdictions

- 2.7 In our view the emergence of new players is a key contributor to the type of risks that are discussed at section 5 of our Submission, being the risk of competing, speculative or reverse engineered claims. It remains to be seen how this trend may be affected if the law is changed to allow lawyers to charge contingency fees (this is discussed in further detail at section 4 of our Submission below). As we have commented previously,⁵ it is clear that allowing lawyers to be remunerated by reference to a percentage of the outcome of class action litigation is unlikely to reduce the number of firms looking to bring class actions.

SCOPE OF OUR RESEARCH

Our research is based on publicly available information in relation to class action filings between 2005 and 1 July 2017 in the Federal Court of Australia, and Supreme Court of Victoria and Supreme Court of New South Wales. It is the result of extensive searches of publicly available sources, including interlocutory and final judgments, the Federal Court's online search facility, class action publications, press reports and the websites of courts, law firms and litigation funders (and, of course, our own knowledge).

⁵ Allens 2016 Class Action Risk Report, 5.

3 LITIGATION FUNDING

CURRENT REGULATION OF LITIGATION FUNDERS AND LAWYERS

- 3.1 The Commission has highlighted two key risks faced by litigants in proceedings which involve a litigation funder:
- (a) conflicts of interest may arise between the interests of litigation funders, plaintiff lawyers, the representative plaintiff and group members; and
 - (b) exposure to disproportionate costs.
- 3.2 We agree with the Commission's observation that the litigation funding agreement, as executed by the litigation funder and the representative plaintiff, is central to the issues described above, as it sets out the framework for the tripartite relationship. Currently, there is no requirement that the Court approve the form of funding agreement entered into by the parties. Further, and in contrast to the requirements imposed by the Federal Court, there is no obligation imposed on lawyers by the Court to disclose the funding agreement to the Court or to the other parties in the proceeding, although the Court can require the disclosure of funding agreements on an ad hoc basis.
- 3.3 As noted by the Commission in its Consultation Paper, often the terms of the funding agreement are negotiated between the funder and the lawyer with limited or no input from the representative plaintiff. The interests of the funder and the lawyer are not usually aligned with the interests of the representative plaintiff and group members at the time of negotiating the funding agreement. The litigation funder has an interest in maximising its potential return on investment. The lawyer has an interest in securing funding for the claim so that the proceeding may commence and the funder may start paying its legal fees. It therefore follows that the terms of the funding agreement may not adequately represent the best interests of the representative plaintiff and group members, particularly insofar as it relates to managing conflicts of interests and exposure to costs.
- 3.4 In funded proceedings, it is typically the litigation funding commission that represents the largest single amount deducted from the settlement or judgment, averaging between 20 – 45 per cent of the recovery sum. A litigation or project management fee, or other similar impost, may be sought to be imposed in addition to the funding commission. If left unchecked, such costs are at risk of being excessive and disproportionate when compared to the risks taken on by the funder or lawyer and the ultimate sum recovered by the group members. Further, the funding commission may differ in the funding agreements offered to different categories of group members, which may result in potential unfairness or conflicts as between group members who may have a more, or less, favourable 'deal'. It is appropriate for these matters to be considered at the commencement of class action proceedings, rather than at the end.
- 3.5 We consider that greater regulation is required to manage and counter these risks in funded class actions. In particular, we endorse the view of the Productivity Commission that federal regulation should be applied to the litigation funding industry, including in relation to matters such as capital adequacy requirements and licensing which are not the subject of the Commission's terms of reference.⁶
- 3.6 While funders are currently required to disclose conflicts and maintain internal processes to manage conflicts, we consider that the regulation should be more prescriptive as to the form of disclosure to the Court, group members and defendants, the conflict of interest provisions that need to be included in funding agreements, and the processes that should be maintained by funders to avoid those conflicts undermining the interests of group members.

⁶ Productivity Commission, Access to Justice Arrangements, Report No 72 (2014)

3.7 We recommend that the following regulatory responses be adopted:

- (a) All litigation funding agreements should meet minimum content standards mandated by legislation. These minimum content requirements should address:
 - (i) the degree of control that the funder will have over the conduct of the litigation—such control should be managed to ensure that, ultimately, the best interests of the client supersede the commercial interests of the funder;
 - (ii) the process for managing conflicts of interest which may arise as between the litigation funder, the lawyer and the group members;
 - (iii) the total commission and fees (including estimated legal fees paid by the funder) that may be payable to the litigation funder, including worked examples;
 - (iv) any risks to the representative plaintiff or group members in entering into the agreement; and
 - (v) information as to the creditworthiness of the litigation funder.

In our view, the preferred course is for these matters to be regulated at a national level. However, in the absence of a Federal regime, regulation (via legislation or practice notes) at the state level may be necessary.

- (b) A cap on the total commission and fees to which a litigation funder may be entitled in relation to class action proceedings. Justice Wigney, in *Tamaya Resources*, commented on the 'exorbitant, if not extortionate' commission rate charged by the litigation funder, who received a project management fee equating to 12.5 per cent of the total legal fees, in addition to a 42.5 per cent commission.⁷ A cap will go some way to mitigating group members' exposure to disproportionate fees and commissions. Whilst we acknowledge that in some cases the risk taken by the funder in funding the proceedings may justify a higher commission rate than otherwise may be the case, we consider a cap on commission and funders' fees of 40 per cent of the total value of sums recovered to be a sensible maximum, particularly having regard to the obligations imposed on lawyers to not assert claims without a proper foundation.
- (c) Funding agreements should be filed with the Court at the commencement of proceedings, with an obligation on the Court to review the agreement at the first case management hearing. The ability of the Court to oversee funding arrangements at an early stage of the proceeding might enable courts to better protect the interests of group members through all stages of the proceeding. 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. This requirement is discussed in further detail below, at paragraphs 6.20 to 6.21.
- (d) Litigation funding agreements should also be disclosed at the commencement of proceedings to the opposing party or parties, with redactions only made to commercial terms and terms conferring a clear strategic advantage if disclosed.
- (e) Given the ambiguity concerning fiduciary obligations arising between funder and group members, funders should be subject to mandatory plain English disclosure requirements which require:
 - (i) prior to signing the funding agreement:
 - (A) disclosure of the arrangements between the funder and the plaintiff lawyers;
 - (B) disclosure of the financial risks and other obligations imposed on the representative plaintiff;
 - (C) disclosure of the estimated costs of the proceeding, and that these costs will be recovered from any settlement or judgment sum; and

⁷ *HFPD Pty Ltd v Tamaya Resources Ltd (in liq) (No 3)* [2017] FCA 650 (13 June 2017) [92].

- (D) clear disclosure of the total commission and fees (including management fees) that may be payable to the litigation funder.
- (f) Ongoing disclosure regarding the costs of the proceeding as costs accrue and change, which is often the case in class actions.

ROLE OF THE COURT IN SUPERVISING AND MANAGING CLASS ACTIONS

- 3.8 We accept that the courts have the power to intervene to prevent an abuse of process, (e.g., 'the exploitation of vulnerable litigants [or]... the creation of unacceptable conflicts of interest').⁸ The opportunity to exercise this power, however, most commonly arises in the context of assessing the appropriateness of proposed settlement terms in class actions (largely due to the majority of class actions settling). On a number of occasions, the courts have expressed discomfort with the terms of a settlement agreement, however may be reluctant to intervene in a settlement agreement reached (subject to court approval) after substantial effort by both parties. For example, Justice Jessup in the *Vioxx* class action, after rejecting a previous settlement proposal, expressed disappointment with a number of aspects of the revised settlement offer noting that it had a 'whiff of expediency to it'.⁹ His Honour ultimately approved the settlement, recognising that there was no better 'possible default position' for group members if the proceedings were not settled.¹⁰
- 3.9 The reform options identified in paragraphs 3.5 to 3.7 above will assist the Court to exercise its supervisory role by:
- (a) establishing minimum content requirements for funding agreements by which the Court can assess the appropriateness of any third party funding arrangements early in the proceedings;
 - (b) enabling early scrutiny by the Court of the funding agreements, including provisions regarding the funder's ultimate fees and commission; and
 - (c) arming the Court with enough information at the commencement of the proceeding to enable the Court to better assess the interests of group members on an ongoing basis as the litigation progresses.

GUIDELINES FOR LAWYERS ON THEIR RESPONSIBILITIES TO MULTIPLE GROUP MEMBERS

- 3.10 Courts have recognised that, in addition to the duties owed to their clients, the lawyer for the representative plaintiff is also under a duty to the entire class.¹¹ This is the case even in open class actions, where the group members can number in the thousands and many may remain unidentified.¹²
- 3.11 Perhaps inevitably, given the complexity and size of class actions, this can give rise to a conflict between the duties owed by a plaintiff lawyer to their client and to the rest of the group, or between different categories of group members. At different stages of the proceeding, individual group members may have differing claims of varying strengths, and differing interests. It may be difficult for plaintiff lawyers to act in the best interests of all group members when these interests may not necessarily align, and may in fact compete, with each other.
- 3.12 The case law indicates that such conflict of duties situations are most prevalent at settlement.¹³ However lawyers must be mindful of the possibility of such a conflict arising at any stage of the proceeding.¹⁴ 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 decisions about whether to amend applications, and about which claims to pursue or abandon.¹⁵

⁸ John Walker, 'Policy and Regulatory Issues in Litigation Funding Revisited' (2014) 55 *Canadian Business Law Journal* 85, 90, quoted in Consultation Paper, 40.

⁹ *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd (No 7)* [2015] FCA 123 (26 February 2015) [9].

¹⁰ *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd (No 7)* [2015] FCA 123 (26 February 2015) [12].

¹¹ *King v AG Australia Holdings* (2002) 121 FCE 480 at [27].

¹² See, e.g., *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439.

¹³ See, e.g., *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd* [2013] FCA 447 (17 May 2013).

¹⁴ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 541–6.

¹⁵ See, e.g., *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 (19 December 2003).

- 3.13 While the courts have a supervisory role and, at least in the context of settlement, have the capacity to ensure that the interests of all group members are fairly and adequately represented, we submit that this is not sufficient to ensure that such conflict of duties situations are identified promptly and managed appropriately. As the Federal Court recognised in *Lopez v Star World Enterprises Ltd*, in seeking to execute this supervisory role, the courts 'rely heavily on the solicitor retained by and counsel who appears for, the applicant to put before it all matters relevant to the court's consideration of the matter'.¹⁶ Therefore, this supervisory role is premised on the assumption that plaintiff lawyers act in accordance with the duty they owe to all group members.
- 3.14 There is currently no formal recognition of the lawyer's dual role as advocate for client and class; nor is there any practical guidance on how to best manage the conflicts inherent within these duties. In effect, there appears to be a lack of clarity as to the limits of this duty to act in the interests of all group members.
- 3.15 In light of these issues, we submit that an appropriate response would involve court-endorsed guidelines for lawyers on their responsibilities to group members in class actions. Given that the legal profession is governed by the Uniform Law, we believe that these guidelines should be included in an amended Group Proceedings Practice Note (the **Practice Note**).
- 3.16 The Practice Note should:
- (a) recognise that plaintiff lawyers owe a duty to *all* group members, not just those members who have contractually retained the plaintiff lawyer;
 - (b) set out the obligations of lawyers to the representative plaintiff and each group member, particularly with respect to competing or differential interests of group members, including in respect of such matters as class closure and settlement arrangements; and
 - (c) provide guidance on the steps lawyers should take to manage conflicts of interest, including ongoing disclosure obligations and the circumstances in which a contradictor ought to be appointed to represent the interests of some or all group members.

COMMUNICATIONS WITH GROUP MEMBERS

- 3.17 We agree with the Commission's proposal that the obligations of a lawyer should extend to informing group members about litigation funding fees and commissions, ongoing costs and associated risks. Whilst we understand that a large proportion of plaintiff lawyers already have processes in place for communicating with group members in relation to the proceeding, an express requirement to this effect in the Practice Note or regulations would complement the fiduciary duties owed by lawyers to clients, and the overarching obligations set out in the *Civil Procedure Act 2010* (Vic).
- 3.18 Plaintiff lawyers should ensure that timely disclosures are made at key stages of the proceeding in relation to the current status of the proceeding, the merits of the claim, the costs and risks associated with the proceeding and next steps in the proceeding. Disclosures must be made in a form that can be easily understood. This is particularly important in the context of class actions, where there may be a substantial variation in the level of sophistication as between group members.
- 3.19 We consider, for instance, that when disclosing the terms of the funding arrangements, the group 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. The rationale for more comprehensible notices is discussed in further detail at paragraphs 6.35 to 6.38 below.

¹⁶ *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104 (28 January 1999) [16].

- 3.20 While we agree with the Commission's proposal that lawyers would benefit from the provision of standardised examples in respect of notices, the Consultation Paper also notes that there is research indicating that some group members have had difficulty in comprehending court-approved notices.¹⁷ Accordingly, we suggest that in circumstances where a particularly complex conflict of interest needs to be disclosed to group members, it may be appropriate for the Court to require the plaintiff lawyer to appoint an independent party specialising in communications to draft the form of the notice to group members. This is especially important in the context of a settlement where, for instance, group members may be giving up certain rights if they elect not to opt-out.

¹⁷ Consultation Paper, 53 n 3.

4 CONTINGENCY FEES

LIFTING THE BAN ON CONTINGENCY FEES

- 4.1 Contingency fees have long been proposed as a means to improve access to justice. In our view however, lifting the prohibition on contingency fees is unlikely to achieve this objective or to mitigate the issues associated with litigation funding, having regard to the issues of case selection, costs and client conflicts.

CASE SELECTION

- 4.2 Permitting lawyers to charge contingency fees would not broaden the types of class actions currently funded. As shown by the data set out in Chapter 2 of the Consultation Paper, only 10 out of the 80 class actions filed in Victoria between 1 January 2000 and 3 March 2017 were funded by third party litigation funders. Of what we know about these funded claims, they are predominantly high value shareholder and financial services claims.
- 4.3 This data makes plain that third party litigation funding is a commercial enterprise, where only claims that are expected to compensate funders adequately (or at least present an acceptable risk/reward ratio) are funded. Third party litigation funding therefore services a narrow range of class actions that present a potentially high reward and low commercial risk to funders.
- 4.4 We have previously submitted that 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.¹⁸ 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.
- 4.5 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.

COSTS

- 4.6 Funders undertake rigorous case selection assessments to minimise their risk exposure and will only fund claims that generate the greatest return on investment as compared to risks absorbed. For example, IMF Bentham Ltd funds fewer than 5 per cent of claims that have applied for litigation funding.¹⁹ We consider that the return secured by third party litigation funders is excessive having regard to the risks assumed and the amount of time and money invested by the funders. The significant costs of litigation is therefore burdensome to funded litigants and impedes access to justice.
- 4.7 Lifting the ban on contingency fees is unlikely to address this issue for the following reasons.
- (a) Absent legislative reform preventing it, third party litigation funders may still seek to involve themselves in class actions where contingency fees are charged, for example, through the provision of project management services.²⁰
 - (b) Increased competition may drive down the contingency fee charged, but this is likely to be in respect of the high value/lower risk claims already well-served by litigation funders or lawyers charging on a conditional fee basis. Lower value, or non-damages based claims are unlikely to reap the benefits of such competition.
 - (c) While lawyers charging contingency fees may lead to an increase in litigation, we agree with Michael Legg, John Emmerig and Mark Fisher that this may result in unmeritorious claims being brought.²¹

¹⁸ Allens, Submission No 111 to Productivity Commission, *Access to Justice Arrangements*, 22 November 2013, 16.

¹⁹ Consultation Paper, 28 [2.88], citing Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) vol 2, 619.

²⁰ Consultation Paper, 52 [4.4].

- (d) In the absence of reform, representative plaintiffs may be exposed to adverse costs and security for costs orders that would ordinarily be borne by third party litigation funders.
- (e) Reducing the cost of litigation may be outweighed by the serious issues of conflicts of interest that threaten to undermine lawyers' duties to their clients and to the courts when lawyers charge on a contingency fee basis (as to which, see below).

CONFLICTS OF INTEREST

- 4.8 Lifting the ban on contingency fees gives rise to potential conflicts of interest between the lawyer and the client that threatens the balance the High Court sought to achieve in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* when it allowed third party litigation funding in Australia.²² In that case, the Court found third party litigation funding permissible because of the independent role of the lawyer as a bulwark for the client against the commercial interests of the third party litigation funder.
- 4.9 It also threatens to undermine the position held by the Court that a lawyer's financial interest in litigation may constitute an abuse of process.
- (a) In *Bolitho v Banksia Securities Ltd (No 4)*,²³ the Court held that it would affect the proper administration of justice, including the appearance of justice, for a barrister and a solicitor to continue acting for the representative plaintiff because they had financial interests in the litigation funder involved in the class action.²⁴
 - (b) In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 3)*,²⁵ the Court ordered that Mark Elliott be restrained from acting in the proceedings for Melbourne City Investments (*MCI*) while he was also the sole director and shareholder of that company and stayed the proceedings pending this outcome. On appeal, the Court held that the proceedings had been commenced for the illegitimate purpose of generating revenue for Mark Elliott and were permanently stayed as an abuse of process.²⁶
 - (c) Similarly, in *Melbourne City Investments Pty Ltd v Myer Holdings Ltd (No 2)*,²⁷ Justice Sifris ordered a permanent stay of proceedings brought by Mark Elliott acting for MCI on the basis that they were commenced for the 'illegitimate or collateral purpose' of generating revenue for Mark Elliott, and held to be an abuse of process.²⁸
- 4.10 The conflicts of interest presented by lawyers charging contingency fees, where lawyers are incentivised to act for their own financial gain rather than in the best interest of their clients, may impede access to justice and undermine public confidence in the administration of justice more generally.

MEASURES TO BE ADOPTED IF BAN LIFTED

- 4.11 Lifting the ban on contingency fees should only occur in conjunction with appropriate regulation and the existing prohibitions for criminal and family law matters should remain.

²¹ Consultation Paper, 116 [8.30], citing Michael Legg, John Emmerig and Mark Fisher, *New Funders and Law Firms Drive Shareholder Class Actions* (7 August 2014) Centre for Law Markets and Regulation <<https://clmr.unsw.edu.au/article/market-conduct-regulation/new-funders-and-law-firms-drive-shareholder-class-actions>>.

²² (2006) 229 CLR 386.

²³ [2014] VSC 582.

²⁴ See especially [2014] VSC 582, [5], [51]–[54], [62], [64], [67].

²⁵ [2014] VSC 340.

²⁶ *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585. See also *Melbourne City Investments Pty Ltd v Myer Holdings Ltd (No 2)* [2016] VSC 655; Allens 25 Years of Class Actions, 5.

²⁷ [2016] VSC 655.

²⁸ [2016] VSC 655, [129], [137]–[138].

4.12 Regulation should address the following matters.²⁹

- (a) Whether the costs agreement should be in a prescribed standard form. Regardless, regulation should ensure that:
 - (i) clients have measures of control over the costs agreement, possibly by a cooling off period and the right to terminate in appropriate circumstances;
 - (ii) cost agreements contain comprehensive disclosure requirements, including specifying the contingency fee, defining "success", disclosing all potential costs and the right to seek independent advice before an agreement is finalised, and that the agreement and any variations to it be made in writing;
 - (iii) security for costs and adverse costs orders may be enforced directly against lawyers charging contingency fees, but that this liability be borne, potentially jointly and severally with the funded plaintiff, with appropriate regulation about how this occurs. This would be justified on the basis that parties with financial interests in the litigation should bear the financial risks associated with it;
 - (iv) restrictions are put in place as to the fee charged, including caps and sliding scales of percentages charged, particularly with respect to retail clients and clients in special need of protection; and
 - (v) fees charged in one class action are consistent for all group members and this be disclosed to all group members.
- (b) The disclosure of the costs agreement to the Court at the commencement of proceedings, as well as to group members and the defendant's representatives.
- (c) Ensuring the Court has jurisdiction over the costs agreement by being able to set aside an unfair costs agreement, approve costs agreements at the commencement of class actions and legal fees (including those of a litigation guardian) at the conclusion of class actions.
- (d) Ensuring the Court retains jurisdiction to oversee and manage the conduct of lawyers as officers of the Court, particularly in respect of conflicts of interest, the bringing of unmeritorious claims and the potential for excessive profits to be made by lawyers charging contingency fees.
- (e) Amending the rules of the Court so that the discretionary power to award costs against non-parties in the interests of justice also applies to lawyers charging contingency fees.
- (f) Ensuring that any costs awarded in favour of the client are applied in favour of the contingency fee.
- (g) How the regulation of contingency fees would interact with the regulation of financial services (i.e., whether law firms charging contingency fees should be required to hold Australian Financial Services Licences, register as managed investment schemes or maintain minimum capital reserves). At a minimum, prudential requirements requiring lawyers to hold sufficient capital reserves to meet adverse costs or security for costs orders is required.
- (h) Whether contingency fees should only be allowed to be used on their own in a class action or whether a hybrid fee model should be accommodated. For example:
 - (i) whether the use of contingency fee and conditional fee arrangements in the same class action should be mutually exclusive; and
 - (ii) whether solicitors and barristers should be able to charge contingency fees in the same class action, or whether a hybrid fee model (e.g., a combination of contingency fees and conditional fee arrangements) should be permitted.

²⁹ We submit that this regulation should apply in the class action and non-class action context.

OTHER WAYS TO IMPROVE ACCESS TO JUSTICE

- 4.13 Two further ways in which access to justice through funding arrangements may be improved is through justice funds and reform of after the event insurance.

JUSTICE FUNDS

- 4.14 The concept of a justice fund was first considered by the Law Reform Committee of South Australia in 1977,³⁰ and then by the Commission in 2008.³¹ The purpose of the fund is to provide a source of public funding for meritorious civil claims that, without the funding, may otherwise not be brought.
- 4.15 We suggest that funds could be sourced through a levy imposed on litigation funders (lawyers or third party funders charging contingency fees) from the fee received through a successful claim. This promotes a 'user pays' model for contingent billing by appropriately transferring some of the cost of access to the judicial system onto funders.

AFTER THE EVENT INSURANCE

- 4.16 Legislative reform of after the event insurance to allow the recovery of reasonable premiums against an unsuccessful party may encourage the use of such insurance in class actions. This insurance may assist in reducing the financial risks borne by litigation funders, which in turn may be reflected in lower commissions. Further, lowering the financial risk borne by funders may increase access to justice in respect of certain types of claims where the risk/reward ratio is more balanced. Moreover, increased demand for after the event insurance may drive down the cost of premiums, making them more accessible to litigants.

³⁰ Law Reform Committee of South Australia, *Thirty-Sixth Report of the Law Reform Committee of South Australia to the Attorney-General Relating to Class Actions*, Report No 36 (1977).

³¹ Victorian Law Reform Commission, *Civil Justice Review: Report*, Report (2008) 614–22.

5 CERTIFICATION AND COMPETING CLASS ACTIONS

DEFINING THE PROBLEM: THE IMPACT OF CLASS ACTION ENTREPRENEURIALISM

- 5.1 The designers of our class action regime made a conscious decision to omit a certification device from our regime's threshold requirements. They did so to avoid the costs and delays which had developed under the United States (*US*) process and because a view was formed that in the Australian context, other "de-certification" safeguards were in place to ensure that the mechanism not abused, or used inappropriately or inefficiently.
- 5.2 Our regime's designers could not have predicted the ways in which the class action landscape would develop. As we set out in section 2 of this Submission, we have seen a significant amount of change since the regime's introduction and an increasing trend of class action entrepreneurialism.
- 5.3 Class action entrepreneurialism is not problematic in and of itself. It is well recognised that it plays an important role in achieving access to justice. However, we are concerned that we have reached a tipping point where its impacts raise serious questions about whose interests the regime is serving. The key risk is class actions being pursued other than for the primary purpose of securing a remedy for group members. With this comes an increased likelihood of the commencement of speculative or reverse engineered claims and/or that plaintiff lawyers may not be giving proper consideration as to the best and most efficient way to advance group members' interests.
- 5.4 As the Chief Justice of the Federal Court emphasised in a speech to the Law Council of Australia, it is central to the successful working of our class action system that there is a recognition that the process should be about a vindication of just claims, with lawyers on both sides making *every* (this was the Chief Justice's emphasis) decision in connection with the litigation in the interests of the litigants.³² We consider that more could and should be done to ensure that this objective is achieved.
- 5.5 In particular, while the existing safeguards were designed at the outset of the regime to strike the appropriate balance, we consider that this has not proved to be the case in practice. In particular:
 - (a) the judicial interpretation of the factors in s 33C of the *Supreme Court Act 1986* (Vic) (the *Supreme Court Act*) has meant that s 33C imposes a low threshold for the commencement of a class action;³³
 - (b) although s 33N of the *Supreme Court Act* was designed to counterbalance s 33C, in practice courts have been wary of intervening at early stages of proceedings to make s 33N orders. As a result, there is a risk that more speculative and inefficiently constituted claims are allowed to roll on, increasing the costs for defendants and in some cases raising real questions about whether the class action is truly representing group member interests; and
 - (c) the current s 33T mechanism has limited utility. Section 33T of the *Supreme Court Act* gives the Court the power to substitute the representative plaintiff if it is determined that the plaintiff cannot adequately represent the interests of the group. The Court cannot use this machinery of its own initiative—an application must be brought by group members. Despite this limitation, courts have variously described s 33T as a 'legislative safeguard' and 'remedy for group members'. However, we are not aware of any instances of the s 33T mechanism being used by dissatisfied group members to effect the substitution of the representative plaintiff.

³² Chief Justice James Allsop, 'Class Actions' (Speech delivered at the Law Council of Australia Forum on Class Actions, 13 October 2016) <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161013>>.

³³ See, eg, the interpretation of 'claim' in *Allphones Retail Pty Ltd v Weimann* [2009] FCAFC 135; *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, [113]; the interpretation of 'claims against the same person' in *Cash Converters International Ltd v Gray* (2014) 223 FCR 139; *Bray v F Hoffman-La Roche Ltd* (2013) 130 FCR 317; and the interpretation of 'related circumstances' in *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209; *Connell v Nevada Financial Group Pty Ltd* (1996) 139 ALR 723, 728; *Guglielmin v Trescowthick* (No 2) (2005) 220 ALR 515, 526 [49].

THE NEED FOR GREATER UPFRONT SCRUTINY

5.6 Some of the impacts of class actions entrepreneurialism and the ineffectiveness of our existing safeguards are highlighted by the following aspects of class actions conducted in recent times under the Victorian and Federal Court regimes.

5.7 In our view, such examples make the case for the Court to exercise a greater supervisory role in the early stages of class actions, rather than placing the burden on defendants to make applications questioning the appropriateness of a proceeding. In particular, the managed investment scheme cases, *Vioxx* and *Pampered Paws* proceedings clearly illustrate that had there been proper scrutiny of the claims up front, focusing on core issues, time and resources may have been spared and group members' interests properly protected.

- (a) **Managed investment scheme class actions:** in the *Great Southern*³⁴ and *Timbercorp* class actions, after trials that were immense in scope, consumed an enormous amount of the Court's resources and were conducted at great expense to all parties, the Court ultimately found in both cases that the representative plaintiffs failed on all of their claims. In doing so, the Court was critical of the manner in which the representative plaintiffs conducted their cases.

In his judgment in the *Timbercorp* class action, Justice Judd observed that:

*In [the plaintiff's] attempt to cover every possible combination or permutation of fact and law, attributing principal liability to Timbercorp Securities and accessorial liability to Timbercorp Finance and the directors, the plaintiff constructed an elaborate and sometimes illusive web of allegations. The complexity was compounded by the failure of the statement of claim to record a coherent narrative....*³⁵

Justice Judd also expressed concern as to the plaintiff's "ex-post facto protestations" of reliance on alleged misleading statements.³⁶

Similarly, in the *Great Southern* class actions, the Court found that the representative plaintiffs' claims completely and comprehensively failed — in all 16 proceedings and with respect to all managed investment schemes. In particular, the Court found that none of the 10 representative plaintiffs that proceeded to trial relied on the alleged misleading statements and that their evidence was infected by hindsight bias.

In his trial reasons, Justice Croft foreshadowed the possibility of costs being ordered against the plaintiffs on a non-standard basis and a consideration of whether there had been compliance with the "overarching obligations" provisions of the *Civil Procedure Act 2010* (Vic).³⁷ His Honour also appeared to question whether the manner in which the plaintiffs conducted their case reflected the real underlying complaint of investors.³⁸

- (b) **The *Matthews* bush fire class action:** Within 10 days of the Black Saturday bushfires (and a week before the appointment of the associated Royal Commission), a class action was issued against two power companies without proper instructions or authority from the representative plaintiff. Despite asking for his name to be removed, the representative plaintiff remained for over two years until this was brought to the Court's attention. The result of such a 'patent and egregious abuse of process' was that, while the action was allowed to proceed under a different representative plaintiff, the entitlement to interest by group members was restricted and the law firm responsible was liable for relevant costs.³⁹

³⁴ Allens acted for the Bendigo and Adelaide Bank Parties in the *Great Southern* proceedings.

³⁵ *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240, 246 [22].

³⁶ *Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240, 315 [567].

³⁷ *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation)* [2014] VSC 516 V [6].

³⁸ *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation)* [2014] VSC 516, III [5] (Synopsis [5]).

³⁹ *Matthews v SPI Electricity Pty Ltd* (2011) 34 VR 560, 562 [4].

- (c) **The *MCI* class actions:** In 2014, claims were brought by MCI (controlled by Mark Elliott) against Treasury Wines Estate Pty Ltd, Worley Parsons Ltd and Leighton Holdings Ltd⁴⁰. MCI had a 'business model' of purchasing small shareholdings in listed companies with the objective of subsequently commencing class actions against some of them for breaches of continuous disclosure obligations. At first instance, although the primary judge was not satisfied that there was anything irregular about the proceedings themselves justifying a s 33N order, orders were proposed that the proceedings not continue as class actions while MCI was the representative plaintiff and Mr Elliott acted for MCI. On appeal, the proceedings were held to be an abuse of process and were permanently stayed. As discussed, in section 4.9(b) above MCI later brought similar shareholder class actions against Myer which was also stayed because the claims were found to be brought for an illegitimate or collateral purpose of generating income or revenue for a third party.
 - (d) **The *Vioxx* class action:** In this case, the Full Court of the Federal Court found that the personal circumstances of the lead applicant stood him 'apart from the ordinary case' because he had issues in establishing causation.⁴¹ The Full Court identified that there may be other group members who, unlike the lead applicant, could in fact succeed in establishing causation in their individual claims. Justice Jessup approved a revised settlement, after refusing to approve the initial settlement that had been proposed. However, in his judgment, his Honour expressed concern because the settlement offered little benefit to group members with stronger claims who would now be prevented from pursuing them.⁴²
 - (e) **The *Pampered Paws* class action:** In this case, the Federal Court ruled, after four-and-a-half years of litigation and two trials, that only one of the declarations sought by the plaintiff was of assistance to group members. Accordingly, orders were made that the proceeding no longer continue as a class action. Section 33C and 33N applications had been made at earlier stages in the proceeding but were rejected on the basis that, with amended pleadings, the action should be permitted to continue at least to the end of the plaintiff's case, limited to the issues that were common to the plaintiff and the group members.
- 5.8 While there would certainly be some benefit to a formal certification regime in the current class action environment, we do not recommend adopting a US-style certification process because:
- (a) that type of mechanism risks undermining the efficiency objective, and may not be warranted by the circumstances of the particular case; and
 - (b) certain features of the US class action regime which justify its certification mechanism are not present in Australia.⁴³
- 5.9 Instead, we consider that the objectives of efficiency and access to justice can be better pursued, by requiring greater scrutiny of the core issues of a class action, at its early stages. In our view, the Court should take a more proactive approach to dealing with such issues, rather than relying on defendants to bring issues to the Court's attention.
- 5.10 Accordingly, we support the following three reform options proposed in the Consultation Paper:
- (a) amendment of the Practice Note so that the Court is given a platform to proactively use its supervisory powers to scrutinise the core issues of a class action, at an early stage;
 - (b) amending s 33N to ensure the class action regime's efficiency objective is met; and
 - (c) further legislative amendments to ss 33D and 33T to bolster the adequacy of representation requirement.

⁴⁰ Allens acted for Leighton Holdings Ltd in this proceeding.

⁴¹ *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145, 174 [113].

⁴² *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd (No 7)* [2015] FCA 123 (26 February 2015) [6]–[7].

⁴³ For the key differences between the two regimes, see our paper: Allens, 'Class Actions in Australia' (February 2017) <<https://www.allens.com.au/pubs/pdf/class/papclassfeb17-01.pdf>>.

AMENDMENT TO THE PRACTICE NOTE

- 5.11 In contrast to the current matters that must be addressed at the first case management conference (the majority of which have a procedural focus), we suggest that the Practice Note also list a number of considerations designed to test the appropriateness of the pleaded claim to the class action mechanism. Examples of considerations to be addressed include:
- (a) whether the underlying complaint is actually best addressed through the class action mechanism, and to that end, whether:
 - (i) individual issues are likely to predominate over common issues; or
 - (ii) there is another forum in which group members could obtain a remedy (for example, a compensation scheme or a low / no cost tribunal assessment);
 - (b) the nature of the questions of law or fact common to the group; and
 - (c) the adequacy of the representative plaintiff, including whether:
 - (i) there are likely to be potential sources of conflict between the representative plaintiff and group members; and
 - (ii) determination of their claim will adequately address the interests of the group members and resolve the group members' common issues.
- 5.12 The representative plaintiff and its lawyers could each be required to file affidavit evidence to assist the Court with its consideration of these matters. The lawyer affidavit could address the following matters:
- (a) that consideration has been given to the claims brought by the representative plaintiff for and on behalf of group members and that such claims have a proper basis and disclose a reasonable cause of action;
 - (b) whether the class action, as constituted, is the best and most efficient way to advance group members' claims, including by having regard to the availability of other fora for group members to obtain a remedy and whether the appropriate representative plaintiff/s have been identified;
 - (c) an explanation as to why there are no conflicts of interest between the representative plaintiff and group members;
 - (d) the number of group members who have registered to join the class action and how many are retained by the plaintiff lawyers as clients;
 - (e) the nature of the funding arrangements in the class action; and
 - (f) an identification of the extent to which the common questions advance the claims of the group members and an explanation as to how the trial of the representative plaintiff's claim will determine those common questions.
- 5.13 In addition, the affidavit of the representative plaintiff could outline the key factual circumstances relied upon in support of the claim, including any key documents in the possession of the representative plaintiff that are relied on in support of the claim. This will assist the Court to assess the suitability and adequacy of the representative plaintiff to act on behalf of group members.
- 5.14 Such evidence does not need to be overly complicated or technical. Nor should it place an additional burden on the representative plaintiff. Rather, consideration of the matters outlined above, in our view, is what is necessary to fulfil a representative plaintiff's (and their lawyer's) overarching obligations to the Court—in particular, considering whether the class action has a proper basis and assisting to minimise delay by addressing these issues at the outset.⁴⁴
- 5.15 Unlike under a certification mechanism, the Court need not declass the proceeding if it is not satisfied with the representative plaintiff's evidence. Rather, the Court could use its general case management and supervisory powers to address concerns, for example by requiring the plaintiff to submit further evidence or to re-plead the claim.

⁴⁴ *Civil Procedure Act 2010* (Vic) ss18,25.

5.16 We see a number of benefits to this type of approach, including:

- (a) striking a balance between the competing interests at play by avoiding creating a roadblock to access to justice, but giving the regime's efficiency objective greater focus;
- (b) providing the Court and the defendant with information that will facilitate a meaningful assessment of the representative plaintiff's prima facie case and the nature of the common issues at an earlier stage in the proceedings;
- (c) providing the Court with the authority and flexibility necessary to ensure that compliance with the class action regime is a matter of substance, not form;
- (d) ensuring the burden is shared between both parties to identify issues and bring them to the Court's attention; and
- (e) providing a road map for newer plaintiff lawyer entrants as to what is required in class actions.

LEGISLATIVE AMENDMENTS TO BOLSTER THE ADEQUACY OF REPRESENTATION REQUIREMENT AND THE REGIME'S EFFICIENCY OBJECTIVE

5.17 We recommend that legislative amendments also be made to:

- (a) ensure a greater focus on the regime's efficiency objective by:
 - (i) **amending s 33N of the Supreme Court Act.** 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. Further, an action may be allowed to continue in circumstances where the claim of the representative plaintiff may not determine a number of the common questions relevant to group members. Section 33N should be amended to require a class action to be the most efficient means of dealing with group members' claims; and
- (b) bolster the adequacy of representation requirement by:
 - (i) **amending s 33D of the Supreme Court Act.** Some commentators have suggested that the standing requirement of the representative plaintiff be amended to include an affirmative requirement that the representative plaintiff is able to adequately represent the group members in the conduct of the class action.⁴⁵ We consider this to be a sensible suggestion; and
 - (ii) **amending s 33T of the Supreme Court Act.** Other commentators have suggested that amendments be made to s 33T.⁴⁶ In our view, it is appropriate to amend s 33T to give the Court the express power to substitute the representative plaintiff in a proceeding, of its own motion. Such an amendment would be consistent with the equivalent provision in NSW⁴⁷ and in keeping with the Court's supervisory role in class actions. The Court is likely to be better placed to conduct this assessment than group members (particularly unrepresented ones), who may have limited information about the nature of the claim being brought, making it difficult to effectively scrutinise the claim being pursued on their behalf.

COMPETING CLASS ACTIONS

5.18 In our view, the phenomenon of competing class actions is a systemic issue requiring reform. Competing class actions arise where there are two class actions brought against the same defendant with:

- (a) an overlap in the group definition of the claim; or

⁴⁵ John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions — Time for Reform' (2017) 36 *Civil Justice Quarterly* 164.

⁴⁶ Vincent Morabito, 'Replacing Inadequate Class Representatives in Federal Class Actions: Quo Vadis?' (2015) 38 *University of New South Wales Law Journal* 146.

⁴⁷ *Civil Procedure Act 2005* (NSW) s 166(1)(d).

- (b) same or substantially similar subject matter, but no overlap of group membership.
- 5.19 Both of these scenarios challenge the class action regime's costs and efficiency objectives, by:
- (a) placing additional burdens on the defendant and the Court, as they are required to deal with two sets of plaintiff lawyers adopting potentially different approaches on the factual and legal questions that arise throughout the course of the proceedings. Inevitably, this leads to a duplication of costs for the defendant; and
 - (b) having the potential to impact on:
 - (i) the efficiency of any settlement process by introducing additional complexity and cost because of the need to reach agreement with multiple parties (likely at the same time) with potentially different funding mechanisms;⁴⁸ and
 - (ii) the interests of shareholders in shareholder class actions 'by increasing the legal fees and funding costs of shareholder class actions, thereby reducing potential shareholder recoveries'.⁴⁹
- 5.20 Although competing class actions are not a new development, our experience suggests that they are increasing in frequency in the current entrepreneurial environment. Looking at the trend nationally, the increase in the number of new class action players has been a key contributing factor to the competing class action problem.⁵⁰
- 5.21 The acceptance of the common fund approach is likely to further cement the entrepreneurial dynamic. Although the Full Federal Court suggested that the making of common fund orders could assist in resolving the competing class actions problem,⁵¹ we suspect that the acceptance of such orders is likely to encourage multiple law firms to bring competing open class actions in which they each would apply for a common fund order. Indeed, his Honour Justice Beach indicated that this was the precise scenario he was to be confronted with in the *Bellamy* class action proceedings, as the applicant in both competing proceedings was proposing to seek a common fund order.⁵²
- 5.22 The Court should be required to take a proactive approach in dealing with competing class actions. The onus should not be on defendants to bring an application relying on abuse of process or vexatious litigant provisions, for the consolidation of proceedings or permanent stay of one action.
- 5.23 All stakeholders would benefit from greater certainty in the Court's approach on this issue. Accordingly, we support the following two reform options outlined in the Consultation Paper:
- (a) legislative amendment to create a specific power for the Court to address competing class actions, including to cross vest matters between jurisdictions of its own motion; and
 - (b) amendment of the Practice Note to set out how and when competing class actions are to be addressed by the Court during proceedings.

THE CREATION OF A SPECIFIC LEGISLATIVE POWER

- 5.24 Courts have on multiple occasions stated that the Court has the requisite power to deal with competing class actions.⁵³ However, uncertainty will remain until an appellate Court has to consider this issue.
- 5.25 To remove this uncertainty, the Court should be given a specific legislative power to address competing class actions, when it is in the interests of justice to do so. This power should allow the Court to proactively address the following type of scenarios:

⁴⁸ See *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17 (5 February 2017) [25].

⁴⁹ Jenny Campbell and Jerome Entwistle, 'The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?' (2017) 36 *Civil Justice Quarterly* 178, 193.

⁵⁰ Allens 25 Years of Class Actions.

⁵¹ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 196–7 [14].

⁵² See *McKay Super Solutions Pty Ltd v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [8].

⁵³ See, eg, *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 71 [26].

- (a) **Two class actions commenced in different jurisdictions:** Although the *Jurisdiction of Courts (Cross Vesting) Act 1987* (Vic) gives the Court the framework for dealing with actions filed in more than one jurisdiction, in practice, our experience suggests that this issue is usually addressed on the application of defendants. If competing class actions are commenced in more than one jurisdiction, the Court should be required to proactively consider and determine which action should be transferred to the other court for, at the very least, case management of the two proceedings by the same judge. As set out in sub-paragraph (b) below, if the two proceedings are commenced on an open class basis then only one should be allowed to continue.
 - (b) **Two competing open class actions:** If two class actions are commenced on an open class basis then the Court should be required to determine which proceeding is allowed to continue. This proposal means that the Court will need to grapple with the question of which proceeding is a more suitable vehicle to pursue the action—a question that, to date, courts have found difficult to resolve.
- 5.26 Consistent with the jurisprudence to date,⁵⁴ we do not think that it is appropriate that the concept of 'first in, best dressed' be determinative of this question. Class action promoters should not be discouraged from properly scoping and investigating a potential class action claim. To do otherwise risks exacerbating the problems and risks we have explored at paragraphs 5.1 to 5.5 above.
- 5.27 Instead, the Court should be required to consider a range of different factors—these factors could be included in an amended Practice Note. In a similar vein to the type of considerations we recommended at paragraph 5.11 above, the type of factors that a Court should consider include:⁵⁵
- (a) the date at which each proceeding was commenced, vis-à-vis:
 - (i) the number of group members signed up to each proceeding; and
 - (ii) the time and resources already invested by the plaintiff lawyers in investigating and preparing the claim;
 - (b) the resources made available by the plaintiff lawyers bringing the class action and their ability to efficiently conduct the proceeding;
 - (c) the experience of the plaintiff lawyers bringing the class action and their ability to adequately represent the interests of the group members;
 - (d) the likely costs to be incurred by the plaintiff lawyers;
 - (e) the content of the respective plaintiff lawyers' litigation plans, which may include:⁵⁶
 - (i) the steps to be taken to identify witnesses and gather their evidence;
 - (ii) how documents will be managed;
 - (iii) the use of experts (if any);
 - (iv) the feasibility of any proposal to deal with individual issues; and
 - (v) how any applicable limitation periods will be addressed;
 - (f) the presence of any conflicts of interest;
 - (g) the number, size and extent of involvement of the representative plaintiffs in each proceeding;
 - (h) if the proceeding is funded:
 - (i) the terms for funding the class action;
 - (ii) whether each proceeding would continue without a common fund order, and the terms of any common fund order that might be sought; and
 - (iii) the position adopted by each funder on the question of security for costs; and

⁵⁴ *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 72 [29]; *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17 (5 February 2017) [42]; *McKay Super Solutions Pty Ltd v Bellamys Australia Ltd* [2017] FCA 947 (18 August 2017) [71].

⁵⁵ This list draws from the factors considered by the court in *McKay Super Solutions Pty Ltd v Bellamys Australia Ltd* [2017] FCA 947 (18 August 2017) [71]; *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 72 [32]; *Smith v Australian Executor Trustees Ltd* [2016] NSWSC 17 (5 February 2017) [20].

⁵⁶ See generally McCarthy Tétrault, *Defending Class Actions in Canada* (CCH Canadian, 2nd ed, 2007) 173–5.

- (i) the representative plaintiff's ability (whether through a funder, an after the event insurance policy or otherwise) to meet an adverse costs order.

AMENDMENTS TO THE PRACTICE NOTE

- 5.28 It is desirable from an efficiency and costs perspective that only one class action be allowed to continue. If, however, multiple class actions are allowed to continue, an amended Practice Note should require that the proceedings be case managed and heard together in a joint trial. The Practice Note should also:⁵⁷
- (a) require the plaintiff law firms to negotiate as one with the defendant on the discovery categories and electronic discovery protocol;
 - (b) require the plaintiff lawyers to use reasonable endeavours to:
 - (i) agree on proposed expert evidence, and consult before preparing, filing and serving any evidence;
 - (ii) progress each proceeding in a similar manner;
 - (iii) co-operate in the conduct of any interlocutory application; and
 - (iv) confer about court timetabling; and
 - (c) make it clear that:
 - (i) costs of double handling is disallowed; and
 - (ii) the Court may make orders to ultimately ensure that the defendant is only exposed to one set of legal costs vis-à-vis the representative plaintiffs as if there had been only one set of proceedings.

⁵⁷ his list draws on the case management options considered by the court in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [112]–[118].

6 SETTLEMENT OF CLASS ACTIONS

- 6.1 Settlement is a common but complex aspect of the class actions regime. A strong settlement regime is essential for the purposes of providing the parties, including unrepresented group members, with access to justice in the context of a particular case. Of the Victorian class actions that were resolved between 2000 and 1 June 2017, approximately 65 per cent were settled.⁵⁸
- 6.2 We consider that there is scope to strengthen the class action settlement regime, in order to enhance the legitimacy of the process and assist parties in achieving finality and resolution. However, given the complexity of class actions and the bespoke nature of the settlement process, we also consider that it is important for the Court to maintain a broad discretion over whether to approve a settlement, so that all circumstances of each case can be appropriately considered in the context of the dispute as a whole.

PROTECTING THE INTERESTS OF UNREPRESENTED GROUP MEMBERS

- 6.3 In considering whether to approve a settlement, the Court plays an important role in ensuring that the interests of unrepresented group members are not unduly or unfairly compromised. In this section, we address the two proposed reforms that the Commission has put forward for the purposes of assisting the Court in ensuring that the interests of unrepresented group members are protected:
- (a) the appointment of a third-party guardian or contradictor; and
 - (b) the increased involvement of defendants in the settlement hearing.

THE APPOINTMENT OF A THIRD-PARTY GUARDIAN OR CONTRADICTOR

- 6.4 Courts have found it within their general powers to appoint third-party guardians or contradictors in order to assist in determining the impact of a proposed settlement on unrepresented group members.⁵⁹ While such appointments have the potential to provide valuable assistance to the Court, the practical difficulties in appointing third-party guardians or contradictors weigh against the suggestion that appointments should be mandated in every case.
- 6.5 First, in circumstances where administration, legal fees and funding fees are already material considerations in the context of a settlement, mandatory third-party guardians or contradictors add another significant cost. This cost, in addition to the other practical considerations raised in the Consultation Paper,⁶⁰ may outweigh the potential benefits of the appointment—particularly where the costs are to be recovered from the settlement fund.
- 6.6 Second, the appointment should be viewed in light of the practical realities of the settlement approval process, and the extent to which the advocacy of a third-party guardian or contradictor can adequately protect group members' interests. This is because, by the time a commercial settlement has been reached, it is often too late for the court to ensure that group members are adequately represented as the parties are invested in the proposed settlement being approved.⁶¹ While a third-party guardian or a contradictor can advocate on behalf of group members and highlight weaknesses in the settlement, the courts are generally reluctant to concretely intervene in an agreement reached by the parties unless there are serious deficiencies and it is practical to do so.

⁵⁸ Consultation Paper, 23 Figure 3.

⁵⁹ See *King v AG Australia Holdings Ltd* [2003] FCA 1420; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2008) 67 ACSR 569; *Kelly v Willmott Forests Ltd (in liq)* (No 4) (2016) 335 ALR 439.

⁶⁰ See Consultation Paper, 93, querying 'who pays for the guardian, who instructs the guardian, and how confidential information is made available to the guardian'.

⁶¹ This is acknowledged in the Consultation Paper, 91: 'By the time that court approval is sought, the representative plaintiff and defendant have generally negotiated and consented to the terms of the settlement'.

- 6.7 The practical difficulties faced by courts when seeking to intervene at the settlement stage of the proceedings are well illustrated by the *Vioxx* class action settlement. As discussed above at paragraph 5.7(d), settlement approval was refused at first instance on the basis that it was neither fair and reasonable nor in the interests of group members.⁶² Justice Jessup subsequently approved a modified settlement agreement two years later in 2015, despite expressing his dissatisfaction with the adequacy of the settlement sum, which remained unchanged from the 2013 agreement.⁶³ His Honour's observations demonstrate how a court's options in approving a settlement are limited, as alternatives to settlement approval may result in an even less favourable outcome for unrepresented group members.
- 6.8 In order to guide the exercise of the Court's discretion, we suggest that the development of a Practice Note might assist the Court in deciding whether to appoint a third party-guardian or contradictor depending on the circumstances of a particular case. The guidance could set the circumstances to be taken into account by the Court, including matters such as:
- (a) the desirability of the appointment in light of the complexity of the settlement and potential impact on group members;
 - (b) the time and costs involved in bringing the third party appointee up-to-speed;
 - (c) the level of unrepresented objections received, or likely to be received, and whether the Court would benefit from the assistance of a third party appointee in distilling the nature of objections raised;
 - (d) the relative proportion of fees to proposed compensation for each group member; and
 - (e) any other matter the Court considers relevant in the circumstances of the case.

THE INCREASED INVOLVEMENT OF DEFENDANT LAWYERS IN SETTLEMENT HEARINGS

- 6.9 Under the current regime, defendant lawyers have the ability to make submissions as to the adequacy of the proposed settlement if desired. However, as Michael Legg observes, 'anecdotal evidence suggests that respondents rarely actively gather evidence or make submissions in relation to a settlement, but rather, simply express their support'.⁶⁴ This may be due to the fact that, as discussed above, both the representative plaintiff and the defendant are seeking the Court's approval of a settlement that they have negotiated and agreed upon.
- 6.10 We submit that requiring defendant lawyers to submit evidence relating to the strengths and weaknesses of the terms of a settlement is unlikely to provide additional meaningful protection for the interests of unrepresented group members. Instead, we consider that group member objections can provide valuable information to the Court as to the strengths and weaknesses of the terms of the settlement and are a much more effective means of representing the interests of unrepresented group members. However, there are often substantial barriers that may hinder, or prevent, legitimate objections from being made.⁶⁵ Therefore, we suggest that the Commission consider how to alleviate the obstacles to group member participation in objections to settlement approval, such as cost, available information and legal advice, in order to assist the Court in its assessment of the fairness and reasonableness of a proposed settlement.

⁶² *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd (No 6)* [2013] FCA 447 (17 May 2013).

⁶³ *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd (No 7)* [2015] FCA 123 (26 February 2015) [6]–[7].

⁶⁴ Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 598.

⁶⁵ Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 598–9.

ASSESSMENT OF FUNDING FEES

- 6.11 As discussed above at paragraph 3.4, the litigation funders' commission typically represents the largest single deduction from a settlement amount.⁶⁶ Due to the relatively large size of the funder's commissions, the fact that many group members do not have the opportunity to negotiate the fee payable to litigation,⁶⁷ and evidence suggesting that the vast majority of funded proceedings settle,⁶⁸ it is clear that oversight of these fees is necessary. The Consultation Paper suggests that oversight may be exercised by the Court under its powers arising from ss 33V and 33ZF of the Supreme Court Act.⁶⁹ The Federal Court has previously accepted that the setting of funding fees is an appropriate exercise of power under ss 23, 33V and 33ZF of the *Federal Court of Australia Act 1976* (Cth).⁷⁰
- 6.12 While we acknowledge that oversight over funding fees at the settlement stage is appropriate, as discussed above in section 3, we submit that the settlement approval process should not be the first time that such a fee is scrutinised:
- (a) We consider that the oversight of the Court in assessing the reasonableness of a funding fee should be ancillary to the federal regulation of the litigation funding industry at large, and act as a check upon the reasonableness and fairness of any settlement amount. As discussed at section 3 above, we suggest that all litigation funding agreements should be in a standard form, mandated by legislation, including a cap on funding fees.⁷¹
 - (b) Second, in the absence of any regulation, we consider generally that courts should not be constrained in their assessment of funding fees by specific criteria set out in legislation when assessing the reasonableness of funding fees, or the manner in which to assess funding fees. While guidelines may provide the Court with suggested criteria for consideration, our view is that the jurisprudence in this area to date provides sufficient and developing guidance for courts in approaching the assessment of funding fees. An exception to this is with respect to the imposition of a cap on the total amount recoverable by a funder, as discussed in paragraphs 3.6 above and 6.18 below.
- 6.13 With regard to the suitability of common funds in the settlement context, we note that the common fund mechanism represents a departure from freedom of contract, in that it creates a binding arrangement between persons who have not expressly agreed to be bound. To the extent it is accepted that the Court has the power to approve a common fund arrangement, we recommend that strong scrutiny and caution should be exercised by the Court, and that any proposed settlement involving a common fund be justified by clear evidence in support of the application.

⁶⁶ See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72].

⁶⁷ *Ibid.*

⁶⁸ Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Fourth Report — Facts and Figures on Twenty-Four Years of Class Actions in Australia' (August 2016) 3, 8–9.

⁶⁹ Consultation Paper, 30.

⁷⁰ See *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec apptd) (mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [119]; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [168].

⁷¹ This was also suggested in Allens' Submission to the Productivity Commission - Submission No 111 to Productivity Commission, *Access to Justice Arrangements*, 22 November 2013, 18.

ASSESSING THE REASONABLENESS OF FUNDING FEES

- 6.14 Courts are increasingly exercising their power to refuse settlement approval where settlements are not considered to be fair and reasonable in the interests of group members, including with regard to the treatment of funding fees.⁷² 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.⁷³ 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 when determining the appropriate funding fee payable upon settlement.⁷⁴
- 6.15 The Federal Court in *Money Max* sets out guidance in relation to how funding fees should be considered in the context of settlement approval. While declining to predetermine a list of relevant considerations for the approval of a reasonable funding fee that would be applicable in every case, the Court listed a range of factors for consideration, including the information provided to group members regarding the funding fee, the risks taken on by the litigation funder, and the total amount of settlement or judgment.⁷⁵ Where relevant, these guidelines should be read in light of the 'safeguards' put forward by the Court with respect to the imposition of a common fund order.⁷⁶
- 6.16 We suggest that judicial guidance such as that set out in *Money Max* provides sufficient direction to the courts in determining the reasonableness of funding fees, without constraining courts to certain criteria. However, in the event that further guidance is considered necessary, we would support the development of an amended Practice Note, setting out guidance based on the relevant case law as well as the requirements for the evidence to be adduced in support of a common fund arrangement.

USE OF SLIDING SCALES AND CAPS

- 6.17 As discussed at paragraph 3.7(b), we consider that implementing a cap on the total amount recoverable by a litigation funder would go some way to mitigating group members' exposure to disproportionate fees and commissions. However, the Court should retain its discretion to determine the appropriate funding fee in light of the circumstances of the case at settlement, including the level of risk undertaken by the litigation funder in participating in the proceedings. As such, funding fees would not be automatically approved where the fee falls under the cap. Instead, the Court should continue its practice of assessing the reasonableness of the fee at the time of settlement, in keeping with the approach currently suggested by the case law.

STAGE OF PROCEEDINGS AT WHICH FUNDING FEE IS ASSESSED

- 6.18 Because funding fees are generally the largest single deduction from the settlement amount,⁷⁷ and due to the asymmetry of power often existing between funders and individual group members,⁷⁸ we recommend that funding fee arrangements be scrutinised early in proceedings, as well as at the settlement stage. Leaving the funding fee to be assessed until the end of proceedings creates uncertainty and a reluctance to intervene as may be properly be required in the interests of group members. Judicial supervision of funding fees from an early stage is crucial for ensuring that the ultimate distribution of settlement funds is fair and reasonable, taking into account the proportion of risk entered into by the litigation funder. In this regard, as discussed above at paragraph 3.7(c)-(d), we suggest that funding agreements, including details of funding fees, should be filed with the Court at the commencement of proceedings.

⁷² See, e.g., *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [134].

⁷³ This has been recognised by the Federal Court in *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208; *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [134]; *Blairgowrie Trading Ltd v Allico Finance Group Ltd (rec apptd) (mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [142].

⁷⁴ See comments in *HFPS Pty Ltd v Tamaya Resources Ltd (in liq) (No 3)* [2017] FCA 650 (13 June 2017) [93] (Wigney J), citing *Blairgowrie Trading Ltd v Allico Finance Group Ltd (rec apptd) (mgr apptd) (in liq) (No 3)* [2017] FCA 330 (31 March 2017) [156].

⁷⁵ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209–10 [80].

⁷⁶ The safeguards discussed in *Money Max* at [11]–[13] are that no class member can be worse off under a settlement order than he or she would be if the orders were not made, that class members be informed of proposed orders before being required to choose whether or not to opt out of proceedings and that the Court's approval of a reasonable funding fee is to be left to a later stage of proceedings. For further discussion of this last point, please see below at paragraphs 6.18 to 6.19.

⁷⁷ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [72].

⁷⁸ As was observed by the Federal Court in *Money Max*, many class members will not have had 'any real opportunity' to negotiate the rate of funding, with their choices being to accept the terms of the funding agreement, or decline to participate in the class action (and potentially lose their only real opportunity to pursue their legal claim): see *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210 [84].

- 6.19 In order to ensure that the funding fee ultimately awarded is proportionate to the settlement or judgment and is commensurate with the level of risk the litigation funder was exposed to in funding the proceedings, courts should, where necessary, have the ability to review funding fees as proceedings progress and more information becomes available.

RATIONALE FOR ASSESSING FUNDING FEES AT THE COMMENCEMENT OF PROCEEDINGS

- 6.20 The Federal Court Practice Note requires disclosure of litigation funding agreements to the courts and other parties.⁷⁹ As recommended in section 3 above, we would encourage the adoption of a similar requirement under the Practice Note, which would require disclosure of agreed funding fees at the outset of proceedings.
- 6.21 Scrutiny of funding fees from the outset of proceedings would provide clarity to litigation funders, alleviating concerns of the kind referenced in *Money Max* that litigation funders be obliged to fund proceedings where the funding fee is uncertain.⁸⁰ At the point of deciding to move forward with proceedings, funders have generally already undertaken an extensive risk analysis exercise, and are well informed of their prospects at litigation.⁸¹ In the context of settlements, this is borne out of the relatively high rates of settlement associated with funded class actions as opposed to unfunded class actions,⁸² which Morabito has credited to commercial litigation funders' 'impressive ability to secure settlements'.⁸³

REASSESSING FUNDING FEES AT THE TIME OF SETTLEMENT

- 6.22 We note that one of the 'safeguards' referred to by the Federal Court in *Money Max* when choosing to impose a common fund order was to defer determination of the appropriate amount of the funding fee until the end of the proceeding, when the Court considered that 'more probative and more complete information will be made available'.⁸⁴ However, the Court also considered accepting the funding commission rate proposed by the applicants with a view to reviewing it at settlement where necessary, noting:

*We saw some force in the applicant's submission that the Funding Terms should set the funding commission rate at 30% but allow the Court to revisit that rate at the point of settlement approval. We have not taken that course but we do not suggest that it will always be necessary or appropriate to decline to set the funding commission rate until settlement approval. It will depend upon the circumstances.*⁸⁵

- 6.23 In our view, the Court should be able to review and make orders with regard to the funding commission rate at the point of settlement approval when considered necessary in order to ensure that justice is done. This would be in keeping with the broad powers provided under section 33ZF of the Supreme Court Act.

⁷⁹ Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 25 October 2016, pt 6.

⁸⁰ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 210 [81].

⁸¹ Productivity Commission, *Access to Justice Arrangements*, Report No 72 (2014) 619.

⁸² Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Fourth Report — Facts and Figures on Twenty-Four Years of Class Actions in Australia' (August 2016) 3, 8–9. Morabito's research indicates that over 92 per cent of funded actions settled, versus 42.7 per cent of unfunded actions.

⁸³ *Ibid* 10.

⁸⁴ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 195 [11].

⁸⁵ *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 221 [148].

MANAGEMENT OF SETTLEMENT DISTRIBUTION SCHEMES

6.24 Developing a successful settlement distribution scheme requires the careful balancing of two key objectives:

- (a) that the individual compensation reflects the merits of each individual claim; and
- (b) that the distribution process is completed in a manner that minimises costs and delays.⁸⁶

6.25 The challenge for the courts is that there is an inherent tension between these objectives. As Michael Legg observes:

*a distribution scheme that seeks to take account of more individual factors, which are relevant to the quantum of recovery so as to reflect the merits of the claim, will be more costly and time consuming, especially when the class action includes both strong and weak claims.*⁸⁷

6.26 Nonetheless, although more time consuming, a settlement distribution scheme that applies a broad-brush approach and does not take into account material differences in group members' claims could potentially result in compensation that is unfair and/or unreasonable.⁸⁸

6.27 Striking the balance between the two overriding objectives of settlement distribution is challenging, and is an element of the class actions regime that could benefit from improvements. We submit that greater court supervision, the appointment of an independent administrator, and a settlement distribution reporting requirement may assist in the more effective management of settlement distribution. However, each of these recommendations should be considered on case-by-case basis, with the added time and cost of each recommendation weighed against the potential benefits.

GREATER COURT SUPERVISION

6.28 While we consider level of court supervision of settlement distribution schemes should remain discretionary,⁸⁹ we support a more structured level of court oversight tailored to what is appropriate in each case. This could include the publication of settlement scheme rulings and other key information to ensure that settlement is a transparent process. Transparency and oversight of settlement protects plaintiffs, as well as defendants, and minimises the chance of disputes over expectations and processes.

6.29 One method by which greater scrutiny may also be achieved in some circumstances a court-appointed special referee to assist in differentiating the strengths of individual claims and coordinating the process to ensure oversight. The cost associated with such an appointment may need to be considered in the context of the settlement as a whole, however in cases involving varied strength of group member claims, it is likely that some additional oversight of this nature would be beneficial.

INDEPENDENT ADMINISTRATOR

6.30 In certain cases, the Court may consider whether it would be of benefit for the administrator to be an independent third party with relevant experience, such as an insolvency practitioner, as opposed to the current practice of appointing the representative plaintiff's lawyers. This is because an independent third party may be able to provide more objective and targeted assistance to the court, balancing fairness and cost in the settlement distribution process. However, whether this is necessary or desirable will depend on the nature of the settlement in the particular case, including the level of complexity involved in any distribution.

⁸⁶ Consultation Paper, 106.

⁸⁷ Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89, 89.

⁸⁸ See, e.g., *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd* (No 6) [2013] FCA 447 (17 May 2013) [20] (Jessup J).

⁸⁹ For details of the current approach taken by the Court, see Jack Forrest, 'Issues in Case Management of Class Actions and Administration Settlements — Kilmore East/Kinglake Bushfire Trial' in Damian Grove 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.

SETTLEMENT DISTRIBUTION REPORTING REQUIREMENT

- 6.31 A requirement for an administrator of a settlement scheme to report to the Court on the settlement process and distribution would enhance transparency. For instance, there could be a requirement to report on the range of distributions that were made to group members, and the time and cost involved in the scheme administration. This would provide an additional transparency to the settlement process, and would also enable the Court to receive valuable data on the effectiveness of the settlement distribution process generally.

NOTIFICATION OF SETTLEMENT AND REGISTRATION

- 6.32 Notification of settlement is a further mechanism by which the interests of unrepresented group members are protected, enabling group members to participate in the settlement process or opt out from a settlement that may adversely or unfairly become binding on them once approved.
- 6.33 In order to make the notification process clearer and more comprehensible for group members, the Court should provide plain English template opt out forms and settlement notices, clearly setting out the impact of the proposed settlement on a group member's legal rights. These templates should be for guidance purposes, rather than as a mandatory requirement, with the overriding consideration being clear and effective communication to group member.
- 6.34 In addition, the Court should encourage the use of modern ways of communication, such as social media, as a way of increasing the likelihood of notifying group members of settlement.

RATIONALE FOR MORE COMPREHENSIBLE NOTICES

- 6.35 As noted above at paragraph 3.20, it is important that group members understand the impact of settlement, including being adequately informed of the distribution of settlement funds. Courts have acknowledged the importance of notices being accurate to ensure that group members understand the impact on their legal rights.⁹⁰ Notices should be 'readily comprehensible by non-lawyers' and 'written in plain English'.⁹¹
- 6.36 The explanatory introduction section attached to the template opt out notice provided by the Federal Court provides a good starting position.⁹² We recommend that the Court provide a similar template opt out notice, drafted in plain English, setting out the contents recommended in the Practice Note. As with the Federal Court's template opt out notice, it should be easily accessible online.
- 6.37 However, we consider that there is room for improvement on the Federal Court's model. Indeed, Morabito's research in the Federal Court suggests that many group members who have chosen to opt out may have had a 'total misunderstanding' of the nature of the opt out device, and of class actions litigation as a whole.⁹³ The explanation included with the Federal Court's template is quite lengthy, and may be confusing to some group members. Although it is important that parties be aware of all of the implications of their choice to opt out, we suggest that a diagram or flowchart explaining the opt out process at a high level be included alongside the explanation and the template.
- 6.38 Courts have also noted the propensity for lawyers and judges to 'underestimate the impact that publication or service of a Court ordered notice may have on members of the represented group', recommending that notices be framed in a manner that does not cause unnecessary alarm or distress to group members.⁹⁴ For this reason also, it is important that notices are drafted in an easy-to-comprehend manner, which effectively distils the legal rights of the group members. Notices should not necessarily be drafted by lawyers – the overriding aim being that the key messages are clearly understood by ordinary members of the public. For example, as discussed at paragraph 3.20, it may be appropriate for the Court to require the representative plaintiff to seek drafting input from communications experts at this stage of the settlement process.

⁹⁰ *Williams v FAI Home Security Pty Ltd (No 3)* [2000] FCA 1438, [24].

⁹¹ *McMullin v ICI Australia Operations Pty Ltd* (1998) 156 ALR 257, 260.

⁹² Federal Court of Australia, *Sample Opt Out Notice* <<http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca/sample-opt-out-notice>>.

⁹³ 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, 66.

⁹⁴ *Courtney v Medtel Pty Ltd* [2001] FCA 1037, [11].

USE OF MODERN COMMUNICATION METHODS TO PUBLICISE NOTICES

- 6.39 Further to making template opt out forms available online, we recommend that the Court encourage the use of modern means of communication to publicise notices.
- 6.40 In general, over the last decade, the use of technology by courts has increased considerably, with useful forms, instructions and practice notes now available online. Under s 33Y(2) of the Supreme Court Act, the Court must specify the manner in which an opt-out or settlement notice is to be given, which may require that notice be given by means of press advertisement, radio or television broadcast, or other means.⁹⁵ It is likely that the Court is already empowered to order the publication of notices via social media pursuant to this provision. In our view, publicising notices via social media would increase the likelihood of reaching as many group members as possible. The Court should also consider requiring that any press advertisements be publicised on the online version of newspapers, with a view to reaching those members of the public who read news online rather than in hardcopy.

⁹⁵ *Supreme Court Act 1986* (Vic) s 33Y(3).

7 NEXT STEPS

- 7.1 Allens welcomes the opportunity to answer any queries the Commission may have in relation to our Submission. For further information, please contact:



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