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RESEARCH PAPERS #1 AND #2: CLASS ACTIONS AND LITIGATION FUNDING REFORM: THE RHETORIC AND THE REALITY

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Class actions and litigation funding reform: the rhetoric and the reality

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There appears to be near universal support for the retention of class actions as a mechanism to increase 'access to justice'. Behind this broad consensus, however, lies significant controversy over the meaning of 'access to justice' and divergent views of how the class actions regime can promote access to justice in the most effective way. Concerns are frequently expressed in the media by legislators, stakeholders and commentators about the exorbitant transaction costs, intractable delays, and difficult ethical problems which can arise in class actions. The regime has been the subject of numerous law reform inquiries and reports in recent decades as well as a creeping, and regrettable, politicisation.

On 13 May 2020, the House of Representatives referred to the Parliamentary Joint Committee on Corporations and Financial Services (the Joint Committee) an inquiry into litigation funding and the regulation of the class action industry. The Joint Committee held public hearings from 13 July to 3 August 2020. Over 100 written submissions were made to the Joint Committee and over 70 witnesses provided oral submissions over five days of hearings. These submissions were supplemented with written replies to questions on notice.

The hearings before the Joint Committee proved to be polarised and, at times, hostile and adversarial in tone. Participants described the questioning style on occasions as, variously, hectoring, badgering, and lacking in common courtesy. On one view, this may not be conducive to an objective and informed discussion on the best ways to reform the class action regime.

However, the 'inquisitorial' style adopted by a number of members of the Committee, coupled with legal obligations requiring witnesses to provide answers to questions asked,[3] have served to elicit important information during the course of the hearing. Many witnesses have been given questions on notice, with an opportunity to provide answers at a later date after further consideration. The answers provided to date are illuminating.

Furthermore, the transparency of the process is to be commended. The proceedings may be watched live by video stream on the Parliament's website. Witness statements, transcripts of hearings and answers to questions on notice are available to anyone interested on the Committee's website, free of charge. Submissions were received from a number of class members and this provided a valuable opportunity for the experience and opinions of those whose interests are most at issue to be heard.

[3] Information sought is required to be provided unless it can be established that it falls within the parameters of public interest privilege. Mere claims to confidentiality do not suffice. Witnesses are protected by Parliamentary Privilege in giving evidence to the Committee under the *Parliamentary Privileges Act 1987* (Cth). It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt.

Notwithstanding their departure from the norm of traditional fact-finding methodologies deployed by both courts and law reform bodies, on one view the procedures and processes adopted by the Committee have much to recommend them. It has meant that relevant information has been elicited in a relatively prompt and efficient manner. On a number of occasions witnesses were confronted with information or research data obtained in advance by members of the Committee or their research staff.

The terms of reference of the inquiry are wide ranging and encompass not only factual and empirical questions (for example, the quantum of fees and costs and commissions earned by litigation funders) but also complex causal issues (for example, what factors are driving the increased prevalence of class actions in Australia); controversial policy matters (for example, the Australian financial services regulatory regime and its application to litigation funding) and inherently problematic questions (for example, the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court making a costs order based on the percentage of any judgment or settlement).

In this Research Paper, we will provide an overview of recent law reform inquiries and reports on class actions and litigation funding in Australia and in North American jurisdictions. We will then summarise and examine the written and oral submissions to the most recent inquiry into class actions and litigation funding.[4]

1. Australian law reform inquiries and recent reforms

There have been nine concluded inquiries encompassing class actions in Australia: three reports following separate inquiries by the Australian Law Reform Commission, two reports following separate inquiries by the Victorian Law Reform Commission, one report by the Productivity Commission, one report by the South Australia Law Reform Committee, one report by the Law Reform Commission of Western Australia and one report by the Access to Justice Taskforce of the federal Attorney-General's Department.[5]

1.1 *1977: Law Reform Committee of South Australia Report on Class Actions*

In 1977, the South Australian Law Reform Committee produced a report on class actions.[6] In its draft form, the Bill for class actions legislation made provision for the establishment of a *Class Action Indemnity Fund.* The Fund would consist of a legal aid scheme, limited to class actions, for proposed representative plaintiffs unable to obtain legal representation to institute and maintain a class action; for the payment of the costs of defendants[7]; and the alleviation of any hardship caused by the defaults or defalcations by a representative or his or her agents.

[4] This Research Paper is a revised and combined version of two Research Papers, provided in the form of supplementary submissions to the Joint Committee: 'Class actions and litigation funding reform: the rhetoric and the reality' Research Paper #1 (16 July 2020) and 'Class actions and litigation funding reform: proceedings before the Joint Committee' Research Paper #2 (14 August 2020).

[5] There have also been additional Parliamentary or internal governmental inquiries that have considered aspects of class actions which are not covered in this Research Paper.

[6] Law Reform Committee of South Australia, *Report Relating to Class Actions*, Report No 36 (1977).

[7] Clause 11(2) of the draft Bill included a proposed statutory prohibition on costs being awarded to defendants, except in limited circumstances.

1.2 *1988: ALRC Report on grouped proceedings in the Federal Court*[8]

After an inquiry lasting eleven years, in 1988 the ALRC produced its report on class actions, which led to the introduction of Part IVA of the *Federal Court of Australia Act 1976* (Cth) which commenced operation in March 1992.[9]

The Commission considered costs alternatives including public funding, contingency fees and immunity from costs orders for class members. However, the ALRC concluded that 'none offer a complete solution to the problem of costs disincentives in grouped proceedings which is fair to all parties.'[10]

The abolition of the tort and crime of 'maintenance' was recommended.[11] While private financing arrangements by community organisations, such as consumer and environmental groups, were recognised as a legitimate means of ensuring greater access to justice, third-party litigation funding in consideration of a share of the compensation obtained was opposed.[12] Contingency fees based on percentages of compensation obtained were opposed.[13] However, speculative cost arrangements calculated according to lump-sum increases on party-party costs or by reference to a multiple or fraction of scale costs were recommended, subject to Court approval.[14]

The ALRC proposed the establishment of a special fund to provide funding for grouped actions, subject to an assessment of the merits of the proposed action.[15] Statutory and trust funds were compared, and it was suggested that a statutory fund would provide for greater flexibility.[16] It was anticipated that the fund would be partly self-financing, but require additional appropriations from Parliament.[17] The ALRC recommended that lead applicants should be indemnified for adverse cost orders from the special fund, to cover the entirety of costs awarded if sufficient funds were available.[18] The ALRC indicated that legal fees for publicly funded matters might be set at a lower level than those obtainable 'in the market place'.[19]

The ALRC concluded that there should be no change to the party-party costs rule, in the absence of 'entirely satisfactory alternatives' and to avoid the proliferation of unmeritorious claims.[20]

The Commission recommended that group members could be required to contribute to solicitor-client costs under a fee agreement, in the event that the litigation is successful.[21] It recommended that courts have express powers to approve costs agreements with plaintiff law firms at any stage prior to the conclusion of the proceedings.[22] Such approval would require that the court be satisfied that the method of calculating amounts in excess of scale were fair and reasonable, according to

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[8] In its final stages the first author was Commissioner jointly in charge of the ALRC reference on class actions, along with Justice John Basten.
[9] Australian Law Reform Commission*, Grouped Proceedings in the Federal Court* (Report No 46, October 1988)
[10] Ibid [253].
[11] Ibid [317]-[318].
[12] Ibid [318].
[13] Ibid [296]-[297].
[14] Ibid [297].
[15] Ibid [309]-[310]. The assessment would not include a means test except in special circumstances.
[16] Ibid [311].
[17] Ibid [312].
[18] Ibid [313].
[19] Ibid [314].
[20] Ibid [271].
[21] Ibid [290].
[22] Ibid [293], [300].

factors such as the nature and complexity of the proceedings, the nature of the work, expenditure and time required to run the proceedings, and the financial risks involved. Further, the ALRC proposed that group members should be given notice of proposed costs agreements and an opportunity to contest the agreement's approval or seek its variation with court approval.

In addition, it was proposed that court-approved fee agreements should include arrangements for disbursements, for which the solicitor or principal applicant could be liable in the event that the litigation is unsuccessful.[23] It was contemplated that the treatment of counsel fees should be up to the parties to the fee agreement and could be treated as a disbursement paid by the litigant in the event of unsuccessful litigation. The ALRC recommended that solicitors should have the option of negotiating with counsel to include their fees as part of any costs agreement.[24]

1.3 *2000: ALRC Further Report on the Federal Civil Justice System*

In a later report on the federal civil justice system, the Australian Law Reform Commission concluded that class action procedures appeared to be 'working well'.[25] The ALRC highlighted the 'unsatisfactory' nature of overlapping claims,[26] issues with settlement,[27] applicant liability for adverse costs orders,[28] and ethical issues arising in the context of opt-out classes where members may have competing interests or be unidentified.[29] The ALRC recommended that a review of Part IVA be undertaken.[30]

The ALRC made a number of recommendations including the development of guidelines or a practice note for legal practitioners involved in class actions. It was suggested that the guidelines should address practices relating to the choice of representative litigant, procedures to bring about fair costs agreements, practitioner obligations with regards to competing interests of group members, arrangements for settlement, procedures for class closure, and the respondent's representative's communication with class members.[31]

In addition, the ALRC recommended the elaboration of elaborate procedures for resolving overlapping claims and obligations of lawyers in representative proceedings around notice requirements and settlements in Federal Court rules.[32]

The Report also recommended the amendment of Part IVA to provide for express court powers for the approval of costs agreements before opt-out dates and to require the closure of classes at a certain point before judgment.[33] More generally, 'an extension of litigation lending and contingency schemes' was supported, subject to strict controls to protect the integrity of the legal system and

[23] Ibid [298].
[24] Ibid [299].
[25] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No. 89, December 2000) [7.92].
[26] Ibid [7.96].
[27] Ibid [7.105].
[28] Ibid [7.110].
[29] Ibid [7.113]- [7.116].
[30] Ibid [7.99], [7.126].
[31] Ibid [7.127].
[32] Ibid [7.96]-[7.99].
[33] Ibid [7.116], [7.122], [7.126].

consumers.[34] However, contingency fees derived from a percentage of compensation obtained were opposed.[35]

1.4 *2008: VLRC Civil Justice Inquiry Report*

Following the Civil Justice Inquiry in 2008,[36] the Victorian Law Reform Commission (VLRC) made recommendations on a number of aspects of class action law and practice in Victoria. For example, the VLRC recommended court approval of fee agreements where they applied to class members who had not signed up to them, legislative clarification of then controversial issues in relation to limited 'opt in' classes and cases where not all class members had claims against all defendants. It was suggested that 'limited classes should be permissible and that all class members should not be required to have claims against all defendants, provided that all class members have a claim against at least one defendant.'[37] Additionally, the VLRC recommended that the court should be empowered to grant '*cy-près* type remedies' in the context of class actions where damages have not been claimed by class members and all of those who have suffered a loss cannot be readily identified.[38]

One of the main recommendations made in the Report was the establishment of a statutory funding body (provisionally entitled 'the *Justice Fund'*) to provide financial assistance to litigants with meritorious claims and provide indemnities against adverse costs orders.[39] It was proposed that funding decisions be based on consideration of independent legal advice on the merit and viability of applications.[40] The VLRC recommended that the *Justice Fund* obtain a percentage of the proceeds of successful litigation, subject to court approval, such that it would become self-funding.[41] To ensure its financial viability, restrictions on adverse costs recovery were proposed for the first five years of its existence.[42]

In addition, the VLRC referred to the need for an ongoing civil justice review and research body and recommended the establishment of a *Civil Justice Council*, modelled on developments in the United Kingdom.

The VLRC considered that the fund should be able to enter into joint ventures or partnerships with commercial third-party funders.[43] Where the *Justice Fund* supported class action litigation, members

[34] Ibid [5.26].
[35] Ibid [5.26].
[36] The first author was the Commissioner in charge of the Civil Justice Inquiry.
[37] Victorian Law Reform Commission, *Civil Justice Review,* (Report No 14, March 2008) 523, 559, 688-9.
[38] Ibid 523, 551, 559-60. The VLRC proposed that the courts should have powers to direct distributions under *cy-près* schemes to the proposed statutory funding body; courts should have discretion as to the distribution of money or the implementation of relief; orders under *cy-près* schemes should require notice to the public; third parties should be permitted to appear and make submissions in relation to the *cy-près* remedies with leave of the court; and there should be a limited right of appeal against the exercise of the court's discretion regarding these remedies.
[39] Ibid 614-17, 623. It was proposed that lawyers acting for the funded party receive remuneration and reimbursement of expenses from the Fund once proceedings had concluded. In addition, the VLRC recommended that the *Justice Fund* or funded litigant could apply for court orders limiting adverse costs that the litigant could be required to pay.
[40] Ibid 617.
[41] Ibid 614-6.
[42] Ibid 622.
[43] Ibid 618.

would receive notice of the terms of the funding agreement and be able to opt-out of the proceeding.[44] It was suggested that the fund should be subject to auditing and monitoring.[45]

In contrast to the ALRC, the VLRC recommended the introduction of percentage contingency fees for the purposes of civil litigation more generally, subject to adequate consumer safeguards and a determination of a proposed Costs Council.[46]

The Commission also recommended a number of other changes including the adoption of statutory standards to apply to the conduct of participants in civil litigation generally.[47]

The VLRC noted that, in response to concerns about costs and delays, provisions had been introduced in a number of jurisdictions into statutes and rules of court to impose certain obligations on courts in the management of civil litigation. The VLRC further noted that, in some instances, obligations have also been imposed on litigants and lawyers to assist the court in achieving the overriding objectives. These procedural reforms are the focus of an analysis by Olijnyk.[48]

Although the VLRC considered that these are important initiatives, which the Commission had in large measure drawn on, it concluded that given constraints on the judicial control of litigation, a primary focus should be on a more direct method of seeking to improve the conduct of all *participants* in civil litigation. Such *participants* are the parties, their lawyers and others who exercise commercial or other influence or control over the conduct of proceedings, including litigation funders and insurers.

The VLRC recommended 'a new set of statutory provisions to expand the overriding obligations and duties (the 'overriding obligations') to be imposed on all key participants in civil proceedings before Victorian courts, and to define more clearly the 'overriding purpose' sought to be achieved by the courts in civil proceedings.[49] These provisions sought to address one of the key policy objectives of the review; namely, 'improving the standards of conduct of participants in the civil justice system to facilitate early dispute resolution, to narrow the issues in dispute and to reduce costs and delay'.[50]

The overriding obligations comprised a set of positive obligations and duties. 'These commence with a statement of a paramount duty to the court to further the administration of justice' (consistent with procedural reforms in other Australian jurisdictions and in England and Wales). However, in a somewhat radical departure from other procedural reforms, the VLRC also proposed ten more specific obligations and duties to be imposed by statute.[51] The rationale for this proposal partly arose out of the view that what has been traditionally regarded as 'proper' or normal professional conduct, and in particular the adversarial approach to litigation and the primacy often given to the partisan interests of clients, has not always been conducive to the quick, efficient or economical resolution of disputes.[52]

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[44] Ibid 617.
[45] Ibid 623.
[46] Ibid 687. The appropriateness of contingency fees and potential consumer safeguards for grouped proceedings was to be subject to separate consideration by the Costs Council.
[47] The following is adapted from Peter Cashman, The Role of Judges in Managing Complex Civil Litigation, 42(1) *Sydney Law Review*, March 2020 pp 151-153.
[48] Anna Olijnyk *Justice and Efficiency in Mega-Litigation* (2019), Hart Publishing.
[49] *Civil Justice Review Report* 149 [1.1]. See generally ch 3 ('Improving the Standards of Conduct of Participants in Civil Litigation').
[50] Ibid 149 [1].
[51] Ibid 150.
[52] Ibid 153–4.

In summary, the VLRC proposed that each of the persons to whom the overriding obligations are applicable:

- shall at all times act honestly
- shall refrain from making or responding to any claim in the proceeding, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or does not have merit
- shall not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding
- has a duty to cooperate with the parties and the court in connection with the conduct of the proceeding
- shall not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce such conduct
- shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution (ADR) processes
- where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute
- shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
- shall use reasonable endeavours to act promptly and to minimise delay
- has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.[53]

Importantly, and as noted above, the overriding obligations were proposed to apply not only to litigants and lawyers (as is the case with other civil procedure reforms), *but also to litigation funders* and insurers (to the extent that such entities or persons exercise any direct or indirect control or influence over the conduct of any party in a civil proceeding),[54] and (in a limited respect) to expert witnesses.[55] They were also applicable to not only the conduct of proceedings in court, but to ancillary processes, such as mediation.[56] In addition, onerous certification provisions were proposed in relation to both parties and legal practitioners.[57]

The proposed provisions were accompanied by a broad range of *sanctions* and *remedies* available to the court to deal with nonconforming behaviour. Some of these are compensatory as well as punitive. They included payment of legal costs, expenses or compensation, requiring that steps be taken to remedy the breach and precluding a party from taking certain steps in the proceeding.[58]

The rationale for the recommendations was to *impose affirmative statutory obligations* on participants in the civil justice system, and those funding and influencing their conduct, with serious consequences for non-compliance, so as to improve the standards of forensic behaviour in a manner

[53] Ibid.
[54] Ibid 181–2 [3.7].
[55] Ibid 172–81 [3.5].
[56] Ibid 191 [5.1].
[57] Ibid 153–4.
[58] Ibid 151.

analogous to that sought to be achieved by model litigant guidelines adopted by various governments and agencies.[59] They were accompanied by a range of other recommendations designed to address the problems of cost and delay in civil proceedings.

Many of the VLRC recommendations, including most of the abovementioned proposals in respect of overriding obligations, were adopted and incorporated, with some modifications, in the *Civil Procedure Act 2010* (Vic).

Section 7 set out that the overarching purpose or the Act and Court rules is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.'[60] The Court was made subject to a duty to give effect to this overarching purpose and the objects in furtherance of the overarching purpose were elaborated.[61] Overarching obligations apply to parties and their legal representatives, and any person providing financial assistance, in so far as that person exercises any control or influence over a party or the proceedings, including insurers and *litigation funders*.[62] They operate in respect of the conduct of any aspect of the proceedings, including at interlocutory or appeal stages, and in respect of dispute resolution.[63] The ten specific overarching obligations are set out in ss 17-27 and largely correspond to those recommended by the VLRC.[64] Under Part 2.3, each person to whom the overarching obligations apply are subject to a paramount duty to the court in furtherance of the administration of justice, and sanctions for noncompliant behaviour are set out in Part 2.4.[65]

Parties or their legal representatives are required to certify that there is a proper basis for all allegations or denials of fact, in accordance with court rules.[66] The Act also provided for the regulation of discovery, pre-trial procedures, and procedures for summary judgment, as well as dispute resolution and case management powers of the Court.

1.5 *2009: Access to Justice Taskforce of the federal Attorney-General's Department*

The 2009 Report of the Access to Justice Taskforce of the Commonwealth Attorney-General's Department made a number of recommendations in respect of many wide ranging issues, including costs in public interest cases.[67] The Taskforce proposed a review of Part IVA of the *Federal Court of Australia Act 1976* (Cth), including limiting interlocutory disputes, the ability of the Federal Court to

[59] Ibid 152–5.
[60] *Civil Procedure Act 2010* (Vic) s 7.
[61] *Civil Procedure Act 2010* (Vic) ss 8-9.
[62] *Civil Procedure Act 2010* (Vic) s 10(1). Sections 18, 19, 22 and 26 did not have application to expert witnesses, per s 10(3).
[63] *Civil Procedure Act 2010* (Vic) s 11.
[64] Noting, however, that s 21 does not comprehend an obligation not to engage in knowingly aiding, abetting or inducing misleading or deceptive conduct; the inclusion of the concept of reasonable costs in s 2; the addition of a duty of disclosure of documents at the direction of the court in s 26; the enlargement of the duty of disclosure in s 26 to include information or documents that have previously been in a person's custody or control; and the clarification in s 27 that disclosed documents or information is not to be used for a purpose other than in connection with proceedings, except with the written agreement of the person who disclosed the information or by court leave.
[65] *Civil Procedure Act 2010* (Vic) s 16. Powers of the Court included a broad discretion to make any other order that the court viewed as in the interests of any person prejudicially affected by the contravention of the overarching obligations; s 29(1)(f).
[66] *Civil Procedure Act 2010* (Vic) ss 41-2.
[67] Australian Government, Attorney General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, Recommendation 8.10.

dispose of or discontinue class action proceedings, and the appropriateness of the then current *opt-in* arrangements in funded class actions.[68]

1.6 *2014: Productivity Commission Report on access to justice arrangements*

In its 2014 report on access to justice arrangements, the Productivity Commission supported third-party litigation funding, subject to consumer safeguards such as a licensing regime.[69] The Commission advocated conditions as capital adequacy requirements; disclosure obligations; and procedures to manage conflicts of interest and risks; and an obligation to join the Financial Ombudsman Scheme.[70] The Commission considered that the regulation of funders should remain with the courts and emphasised that concerns relating to particular areas of representative proceedings, such as securities class actions, are best addressed through review and amendment of underlying laws.

The Commission also supported the introduction of contingency fees,[71] subject to comprehensive disclosure obligations regarding liability for disbursements and adverse costs and relevant percentages claimed.[72] The Commission considered that percentage contingency fees should be capped on a sliding scale for unsophisticated retail litigants and should not be charged alongside other fees, such as time-cost legal fees.

1.7 *2015: Law Reform Commission of Western Australia Report on Representative Proceedings*

In June 2015 the Law Reform Commission of Western Australia published its final report on representative proceedings after a four year period of investigation.[73] The Commission recommended the introduction of legislation in Western Australia, modelled on Part IVA of the *Federal Court of Australia Act 1976* (Cth), with some modifications.[74]

1.8 *2018: VLRC Report on litigation funding and group proceedings*

In 2018, the VLRC Report on *Litigation Funding and Group Proceedings*[75] made 31 recommendations for reform.

The VLRC advocated for harmonisation of class action regulation across Australia and suggested that the Victorian Government promote increased regulation and scrutiny of third-party funders in the

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[68] Ibid Recommendation 8.11.
[69] Productivity Commission*, Access to Justice Arrangements* (Inquiry Report No 72, September 2014) 601, 624.
[70] Ibid Recommendation 18.2, 629-31.
[71] Except in relation to criminal and family law matters; ibid Recommendation 18.1, 625-9.
[72] Ibid.
[73] Law Reform Commission of Western Australia (LRCWA Project 103) *Representative Proceedings: Project 103-Final Report* (June 2015). In an earlier discussion paper, the Commission dealt with a wide range of issues, including litigation funding and *cy-près* remedies, although these did not fall directly within the terms of reference of the inquiry. Because the question of litigation funding was considered to raise matters of some complexity, it was not considered in the final report.
[74] The ongoing failure of the WA legislature to implement this recommendation was criticised by practitioners interviewed by the authors in July and August 2020; Peter Cashman & Amelia Simpson, 'Class actions and litigation funding reform: the views of class action practitioners' Research Paper #3 (1 December 2020).
[75] Victorian Law Reform Commission (VLRC), *Access to Justice: Litigation Funding and Group Proceedings* (March 2018) <http://lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Report_forweb.pdf>.

Council of Australian Governments. Further, the VLRC recommended that the Victorian Attorney-General should propose to the Council of Attorneys-General the introduction of contingency fees across Australian jurisdictions and the development of a reform strategy to ensure national consistency, as well as a cross-vesting judicial panel for class actions. It was also suggested that the Attorney-General should take steps to develop consistent guidelines relating to duties and responsibilities of plaintiff lawyers in class actions and conflicts of interest.

The VLRC supported requirements for the disclosure of litigation funding agreements to the court and other parties; the notification of charges under funding agreements to group members; and requirements for plaintiff lawyers to provide a brief, simplified information statement concerning any applicable funding agreement at the start of proceedings. The imposition of certification requirements was opposed.

The Commission proposed the amendment of Part 4A to provide the Supreme Court with express powers to grant Common Fund Orders, subject to conditions prescribed by legislation or a practice note, which could provide for costs to be shared by all class members if the action succeeded. In addition, the VLRC recommended that the Court have express powers to order that a proceeding no longer continue under Part 4A of its own motion; to substitute another class member as representative plaintiff; and to review and vary all legal costs, litigation funding fees and settlement distribution costs according to criteria of fairness and reasonableness. In addition, the Commission recommended that the legislation be amended to clarify that the Court has discretion to make any orders regarding money left over after settlement distribution; that the Court may not order a class member to provide security for costs; and to clarify factors the Court may take into account in making adverse costs orders or security for costs orders, including public interest, access to justice, and test case considerations. It was also recommended that the principles governing settlement be included in Part 4A, rather than in the Supreme Court practice note.

The VLRC suggested consideration of amendment of the Supreme Court Practice Note, including the development of guidelines for the flexible resolution of overlapping claims; guidance on the appointment of contradictors; requirements for additional information in affidavits in support of settlement approval; requirements for settlement scheme administrators to report to the Court regarding distributions; clarification and guidelines for opt-out notices consistent with those in the Federal Court practice note; requirements for the representative plaintiff's lawyers to provide to the Court, and make available to class members, a summary statement at the start of proceedings for online publication; guidance on the appointment of independent cost assessors; and a statement that the Court may ask the representative plaintiff's lawyers to provide an estimate of legal costs and disbursements.

The VLRC proposed that the Supreme Court should consider the revision of its website to provide clear, up-to-date information on class action proceedings and links to further resources; the publication of clear, plain English standard form op-out and settlement notices on its website; the expansion of the class action user group to include representative plaintiffs or class members; and the provision of additional staff to support the role of Class Actions Coordinator.

1.9 *2019: ALRC Report on Class Action Proceedings and Third-Party Litigation Funders*

On 24 January 2019, the Commonwealth Attorney-General tabled in Parliament the ALRC Report on class action proceedings and third-party litigation funders, containing 24 recommendations for reform of class action practice and procedure.[76]

[76] Australian Law Reform Commission (ALRC), *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders,* Final Report 134 (Commonwealth of Australia 2018)

The ALRC recommended the amendment of Part IVA to provide that all representative proceedings should be initiated as open class proceedings, and to include express powers to make Common Fund Orders and resolve overlapping claims.

Additionally, the ALRC recommended that the Federal Court Class Actions Practice Note provide circumstances in which to order class closure or re-open classes; additional case management procedures for competing actions; provision for the appointment of a costs referee; tendering procedures for settlement administration; and requirements for administrators to provide the Court with a report on the distribution of the settlement for online publication.

The ALRC urged state and territory supreme courts to consider joining up to the *Protocol for Communication and Cooperation Between the Supreme Court of New South Wales and the Federal Court of Australia in Class Action Proceedings*.

Proposals for the regulation of litigation funders centred on improvement of judicial oversight, rather than the introduction of a licencing regime such as the Australian Financial Services Licence and Managed Investment Scheme provisions.[77] Proposed amendments of Part IVA included a prohibition on solicitors for funded representative plaintiffs from seeking to recover unpaid legal fees from the plaintiffs or group members; a presumption that funders will provide security for costs; powers for the Court to award costs against insurers and funders who fail to comply with the overarching purposes in s 37M; requirements for the court to approve the enforcement of agreements and express powers to reject, vary or amend agreements; and provisions requiring funding agreements to indemnify the representative plaintiff against an order for adverse costs, to be governed by Australian law and to include an irrevocable submission of the funder to the court's jurisdiction. In addition, the ALRC recommended the amendment of ASIC Regulatory Guide 248 to require annual reporting on conflict management, and the amendment of the *Corporations Regulations 2001* (Cth) to encompass 'law firm financing' and 'portfolio funding' within the term 'litigation funding scheme'.

The Commission considered that legal professional standards should be maintained through accreditation and ongoing education specific to the conduct of representative proceedings, and a prohibition in the *Australian Solicitors' Conduct Rules* from practitioners having an interest in a funder that is involved in a matter in which they are acting. It was also suggested that the Federal Court Practice Note should require lawyers to provide potential class members with notices describing solicitors' obligations with regard to conflicts of interest and disclosing conflicts arising in their case.

The ALRC supported percentage-based contingency fee agreements for plaintiff law firms, subject to the court giving leave and being empowered to vary, reject or amend those agreements. It was further stipulated that contingency fees should be mutually exclusive with contingent third-party litigation funding and traditional time-based legal fees. It was suggested that lawyers be required to advance disbursement costs and include them in the contingent fee and that there should be a presumption that solicitors working under a contingency arrangement will provide security for costs.

Further, the ALRC proposed that exclusive jurisdiction for representative proceedings arising under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) should be conferred on the Federal Court. In addition, the ALRC suggested a review of

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<http://www.alrc.gov.au/inquiry-categories/class-action-proceedings-and-third-party-litigation-funders> (hereafter Australian Law Reform Commission (ALRC), *Integrity, Fairness and Efficiency*.

[77] Ibid [6.37]-[6.42].

regulatory redress powers. Criticisms of class actions are often clustered around securities class actions. The Commission noted that such criticism may pertain to the substantive law underlying those actions, rather than to Part IVA. Consequently, the ALRC proposed a review of the substantive law around continuous disclosure obligations and misleading and deceptive conduct.

1.10 *2020: Federal Parliamentary Inquiry into class actions & litigation funding*

In 2020, the Australian Government announced a further inquiry into litigation funding and the regulation of the class actions industry to be conducted by the Parliamentary Joint Committee on Corporations and Financial Services. The Joint Committee received over 100 written submissions and public hearings were held from 13 July to 3 August 2020. The Committee is to report by 7 December 2020

1.11 *2020: Modification of corporate continuous disclosure laws*

Issues being considered by the Parliamentary Joint Committee include '*the factors driving the increased prevalence of class action proceedings in Australia'*. Factors said to be driving the prevalence of class actions include the increasing number of *shareholder* class actions which are alleged to be encouraged by Australia's strict liability continuous disclosure regime and facilitated by commercial litigation funders.[78] The Committee heard divergent views in respect of the magnitude and causes of such '*increased prevalence'* and conflicting opinions as to whether changes to the substantive law are necessary or appropriate.

The history and present state of the law has been conveniently summarised by Thompson and Oliver.[79] As they note, when the continuous disclosure provisions were originally introduced into the *Corporations Law* in 1992, listed entities were prohibited from 'intentionally, recklessly or negligently' failing to comply with continuous disclosure obligations in the *ASX Listing Rules*. Intentional or reckless breaches were *criminal* offences, but civil penalties were not available. In 2002, the *Financial Services Reform Act 2001* (Cth) introduced amendments whereby the fault element for *criminal* conduct was relocated to the *Criminal Code* and the requirement to prove intent or fault in connection with civil contraventions was removed. The amended continuous disclosure provisions became part of the *civil* penalty regime. This removed any requirement to prove *fault* in respect of *civil* contraventions.

This is said to have set a '*low evidentiary bar.'* The civil penalty provisions in the *Corporations Act* (ss 674(2), 674(2A),675(2) and 675(2A)) imposed liability for failure to disclose non-public information that a reasonable person would expect to have a material effect on the price or value of the entity's securities. Claimants were not required to prove that a company had an intent to mislead or defraud shareholders when it made, or failed to make, a disclosure.

The availability of this strict liability regime, coupled with the contention that it was not necessary for each individual claimant to prove individual 'reliance' at the relevant time is said to have '*increased class action risk for corporate Australia'*.[80]

This removal of the requirement to prove 'fault' is said to be contemporaneously associated with the increase in the number of shareholder class actions.[81] According to Thompson and Oliver: '*It is clear from the statistics that shareholder claims are attractive to plaintiff litigators. A common practice is*

[78] Belinda Thompson and Natalie Oliver, 'Expert Insights' *Lawyerly* (online, 6 August 2020).
[79] Ibid.
[80] Ibid.
[81] Ibid.

that when there is a significant stock price drop, a plaintiff firm will immediately issue a media release advising that it is investigating a potential claim and is taking registrations. The mere announcement of a potential class action itself has an impact on a company'.[82] No doubt in some instances it may result in a further decrease in the price of the stock in question, thus somewhat perversely causing further loss.

What is characterised as '*aggressive market activity*' is said to suggest that the continuous disclosure provisions have resulted in an '*unbalanced outcome for companies and directors'*, resulting in more frequent settlements (compared with other types of class actions); rapidly escalating premiums for D & O insurance; insurers leaving the market and company boards spending an excessive amount of time on disclosure and compliance issues which is said to be an '*excessive distraction'*.[83]

During the course of the current Parliamentary Inquiry, the Commonwealth passed legislation in May 2020 to introduce a 'temporary' six-month modification of corporate continuous disclosure laws during the COVID-19 crisis. Under the changes the relatively broad continuous disclosure obligations have been modified so that liability of companies and their officers under the *Corporations Act 2001* (Cth) will only arise (in respect of continuous disclosure requirements) where there was relevant 'knowledge, recklessness or negligence' in respect of the disclosure or non-disclosure of price sensitive information.[84]

Although said to be only temporary, for a period of six months during the COVID-19 pandemic, particularly given the inherent uncertainty in providing corporate forward-looking guidance, there is ongoing controversy as to whether the change in the law will become permanent.

It should of course be borne in mind that other unamended provisions in the law also impose strict liability in connection with corporate conduct which may be misleading or deceptive or likely to mislead or deceive.

The question of whether the current temporary (and possibly permanent) change to continuous disclosure requirements, requiring proof of knowledge, intention or recklessness, will have implications for the indemnification provisions in corporate insurance policies (allowing insurers to avoid liability) does not appear to have been considered to date in the course of the current Parliamentary Inquiry.

1.12 *2020: Regulatory requirements imposed on litigation funders*

On 22 May 2020, the Commonwealth Treasurer announced that the Australian Government would introduce regulations that would require third-party litigation funders to obtain an Australian Financial Services License and treat funded class actions as managed investment schemes. The regulations came into force in August 2020.

2. Recent reforms and developments in North America

2.1 *Canada*[85]

[82] Ibid.

[83] Ibid.

[84] For the views of class action practitioners on this change see Cashman and Simpson, (n 74).

[85] This section has been adapted from Deborah Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel Gomez, Axel Halfmeier and Ianika Tzankova, *The Globalisation of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case*, Rand Institute for Civil Justice (forthcoming).

Class actions were first introduced in Canada in 1978, when the province of Quebec (a mixed common law and civil law jurisdiction) amended its *Code of Civil Procedure* to allow for representative claims.[86] It was not until the enactment of the *Class Proceedings Act, 1992* in Ontario that class actions became more widely available.[87] To date, all but one of the remaining eight provinces has passed class action legislation, as has the Federal Court, which has subject-matter jurisdiction over matters within the powers of the federal government.

Like the United States' federal Rule 23, which inspired both the Australian and Canadian regimes, class actions in Canada must be certified by a judge according to a set of criteria that focus on the commonality of legal and factual issues among class members, the suitability of the proposed representative, and the manageability of the action, including by comparison to alternatives.[88] The certification tests in each Canadian province vary, but are universally considered to be less onerous than current judicial approaches in the United States to Rule 23 certification.[89]

Canadian class actions are available in respect of any available cause of action within the jurisdiction of the relevant court. Like Australia and the United States, the various regimes are 'opt-out' and subject to close judicial supervision. They allow representative plaintiffs to sue for damages on behalf of the class, in addition to non-monetary relief, but unlike U.S. Rule 23(b)(3), there is no special treatment for 'damages' class actions. As in Australia and the United States, Canadian courts acknowledge that class members are largely absent in representative proceedings but permit class members to participate by objecting to proposed settlements. There is no culture of 'professional' objectors or of a specialized bar to represent objecting class members, as there is said to be in the United States.

The financing of class actions in Canada is a unique mix of lawyers working on contingency fees, commercial litigation funding and, in the two most active Canadian jurisdictions, not-for-profit litigation funding through funds established by statute.[91]

The *Class Proceedings Fund* in Ontario was created by statute at the same time that the class proceedings legislation was passed. A five-member Committee selected by the Attorney-General and Law Foundation of Ontario is required[92] to consider applications to the Fund and make a determination whether to fund a class action on the basis of three primary considerations: the extent to which the issues in the proceeding affect the public interest; the likelihood that the action will be certified; and the financial status of the Fund. In return for funding disbursements and an indemnity against adverse costs awards, the Fund receives a 10% levy on successful applicants' settlement or judgment awards.

In recent years, commercial litigation funding has become more common, though still not nearly as popular as it is in Australia.[93] Half of the Canadian provinces have cost-shifting rules for class actions,

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[86] *Code of Civil Procedure*, RSQ c C-25.01, Book VI, art. 571-604.
[87] *Class Proceedings Act, 1992*, SO 1992, c-6 [CPA].
[88] CPA, s 5(1).
[89] It should be noted, however, that the law. in Ontario was recently amended to include quite rigorous certification requirements. The changes are expected to make certification of class actions in that province more difficult than in the rest of the country.
[91] For a description of the Class Proceedings Fund, see <https://lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/>. For a description of the comparable Quebec fund, *les Fonds d'aide aux actions collectives*, see <http://www.faac.justice.gouv.qc.ca/>.
[92] Pursuant to s 5 of *Ontario Regulation* 771/92.
[93] For a comparative discussion of litigation funding of class actions in Canada and Australia, see Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' (2013) 61(2) *American Journal of Comparative Law* 93.

as is universally the case in all civil litigation in Canada, while the other half uniquely employ the American costs rule in class actions only. The question of costs has become controversial, especially in Ontario where adverse costs awards in the hundreds of thousands of dollars have become the norm.

The Law Commission of Ontario concluded a two-year study of class actions in July 2019 and recommended that the province adopt a no-costs rule for the certification motion, on the basis that the risk of adverse costs had become a barrier to justice for public interest litigants.[94]

Like Australia, Canada does not have a procedure similar to the U.S. multi-district litigation procedure (referred to below).

If multiple class action complaints are filed arising out of the same matter, counsel may move the court to appoint a single firm to 'carry' the litigation (hence the term 'carriage motion'). Nation-wide classes may be certified in a single class action in one province, or several class actions proposing to represent only the residents of their respective provinces can proceed in parallel, with or without the cooperation of counsel.

2.2 *The United States*

In the United States, federal Rule 23, and its state counterparts, provide for courts to certify 'opt-out' class actions, including for damages. However, the certification requirements are more onerous than the threshold criteria for the commencement of class actions in Australia. In particular, in damages actions, the requirement that the common issues predominate over individual issues and the requirement that the class action must provide a 'superior' means of resolving similar claims usually preclude certification of product liability and personal injury claims.

Moreover, recent class action decisions of the United States Supreme Court have significantly raised the bar for class certification. Available data indicate that in recent years in the federal courts, many complaints filed in the form of a class action never reached a certification decision; of those that did, about half were denied certification. Virtually all the remainder were certified for settlement purposes only, with the support of both class claimants and the defendant. [95]

In civil litigation in the United States, each side bears its own costs, win or lose. Most civil cases are tried with juries. Private class actions are typically funded by plaintiff class counsel. Rule 23 requires that the judges presiding over the case appoint class counsel and award fees and expenses if the class action is successful, at the end of the proceeding. If defendants prevail, plaintiff counsel do not recover fees and must bear any out-of-pocket losses incurred by them, which can be substantial. Proposed settlements must be approved by the judge after notice to class members and a public hearing on the fairness, reasonableness and adequacy of the settlement. In Rule 23(b)(3) damage class actions, class members who wish to pursue their claims individually must be given an opportunity to opt-out; those who choose to remain within the class may object to the terms of the

[94] Law Commission of Ontario, *Class Actions Report* (July 2019) <https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf>. The Attorney General of Ontario did not accept this recommendation and no changes to the costs rule were included in Bill 131.
[95] See Deborah Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel Gomez, Axel Halfmeier and Ianika Tzankova, *The Globalisation of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case*, Rand Institute for Civil Justice (forthcoming).

settlement, including proposed attorneys' fees, and after the case is finally disposed of, they may appeal judicial decisions, including certification and settlement approval.[96]

In view of the constraints on certification of class actions, it is not unusual for large numbers of individual actions (and often putative class actions) to be filed in different United States courts. To promote more efficient case management and resolution, the federal multidistrict litigation ("MDL") statute[97] authorizes a special panel of the federal judiciary appointed by the Chief Justice of the Supreme Court to centralize similar lawsuits filed in different federal courts (including putative class actions) in a single court and to appoint a single judge to coordinate *pretrial* proceedings in these cases. Plaintiffs or defendants may ask the panel to centralize the cases or the panel may decide to do so of its own motion. In 2018, about half of all civil claims pending in federal courts were associated with multi-district litigation proceedings.[98] Several states now also provide for such multi-district coordination within their state court systems. It is common for cases, particularly 'mega mass torts' to be resolved by settlement during this MDL process.

In order to overcome what were considered to be earlier abuses, in shareholder or 'securities' class actions, additional legislation was passed. This includes, at a federal level, the *Private Securities Litigation Reform Act 1995* (PSLRA) and the *Securities Litigation Uniform Standards Act 1998* (SLUSA). The former introduced various reforms, including a requirement that in deciding the most adequate plaintiff in class actions, preference was to be given to institutional investors with large amounts at stake. The latter seeks to prevent plaintiffs bringing class actions asserting state law claims that could have been brought as federal securities fraud claims under the *Securities Act 1933* or the *Securities Exchange Act 1934.*

In 2005, Congress passed the *Class Action Fairness Act* (CAFA). [99] This was intended to expand federal jurisdiction over class actions, reduce inconsistency among class actions litigated in the individual states, and provide for greater scrutiny of class action settlements and the payment of attorneys' fees.

In many consumer contracts the adoption of arbitration provisions with class action waivers appears to be increasing, no doubt fortified by United States Supreme Court jurisprudence.[100]

There appears to be increasing scrutiny of class action settlements and judicial refusal to approve them where the class is considered to have received inadequate benefits, including in cases involving 'coupons' for goods or services from the corporate wrongdoer. Many courts also now

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[96] This has been adapted from Deborah Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel Gomez, Axel Halfmeier and Ianika Tzankova, *The Globalisation of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case*, Rand Institute for Civil Justice (forthcoming). For an accessible presentation of the complex law of American class actions, see Robert Klonoff, *Class Actions and Other Multiparty Litigation in a Nutshell* (West Academic, 5th ed, 2017).

[97] 28 U.S.C. §1407.

[98] Duke Law Center for Judicial Studies, *Guidelines and Best Practices for Large and Mass Tort MDLS*, September 2018, at 8. About 15 percent of all MDLs pending from 2005-2012 were associated with one or more class actions. Jonah Gelbach & Deborah Hensler, "Beyond Alternative Facts: Preliminary Descriptive Analysis of Federal Putative Class Actions, 2005-2012," Fordham Law Conference, February 2018, referred to in Deborah Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel Gomez, Axel Halfmeier and Ianika Tzankova, *The Globalisation of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case*, Rand Institute for Civil Justice (forthcoming).

[99] 28 USC § 1332(d).

[100] See e.g. *Epic Systems Corp v Lewis,* 138 S Ct 1612 (2018). In the Australian context: see Charles Noonan, 'Closing the Courthouse Door? Avoiding Class Actions Through Arbitration Clauses in Australia' (2020) 44(1) *Melbourne University Law Review*

require the tracking and reporting back to the court in relation to settlements after granting final approval. Controversy also continues over *cy-près* payments.

The drafting and amendment of United States Federal Rules of Civil Procedure, including those relating to class actions, is carried out by the *US Judicial Conference Advisory Committee on Civil Procedure* (Advisory Committee) which is a standing body constituted not only by judges, but also with reporters who are practitioners and academics with specialist experience and expertise. Several amendments to Rule 23 took effect in December 2018, after more than four years of deliberation by the Advisory Committee.

Not long after President Trump took office the House of Representatives passed the *Fairness in Class Action Litigation Act* of 2017. The legislation was supported by the US Chamber of Commerce but opposed by consumer and civil rights groups.[101] It failed to make progress in the Senate.

3. Submissions to the Joint Committee inquiry into class actions & litigation funding 2020

In considering the advantages and disadvantages of existing class action laws and procedures and litigation funding arrangements in Australia, the views of various *stakeholders* are important. While such views arise out of considerable experience and specialist expertise, they often reflect the interests of those expressing views and, not infrequently, the constituencies that they represent or on behalf of whom they act. Nevertheless, the submissions and oral hearings before the Joint Committee represent the most up-to-date assessment of the operation of the class action regime and the scope for its reform by stakeholders.

Submissions were made by a diverse range of entities and individuals, including class members and representative applicants; defendants to class actions; solicitors and barristers; plaintiff and defendant law firms; legal profession bodies; third-party litigation funders; representatives of insurers; representatives of businesses, industry groups and a financial industry group; investment managers and organisations involved in the recovery of investment losses; academics; research institutes; superannuation entities; accountants and accountancy bodies; insolvency bodies; regulatory bodies; the Attorney-General's Department; union and other interest groups; as well as public interest, not-for-profit and consumer organisations.

In the following section, we summarise and examine written and oral submissions to the Joint Committee.[102]

Relevant parts of submissions have been categorised into those relating to (1) Australian class action practice generally and (2) litigation funding arrangements in particular. Within each of these general categories, there is a further categorisation into those which (a) support existing arrangements; (b) criticise existing arrangements and (c) suggest or comment on proposed reforms.

[101] See Howard M Erichson, 'Civil Litigation Reform in the Trump Era: Threats and Opportunities; Searching for Salvageable Ideas in FICALA' (2018) 87 *Fordham Law Review* 19.

[102] In a supplementary submission provided to the Joint Committee we set out, at length, the content of submissions published on the Parliamentary website as at 13 July 2020: Peter Cashman and Amelia Simpson, Research Paper #1 'Class actions and litigation funding reform: the rhetoric and the reality' (16 July 2020). A list of written submissions to the inquiry is provided at Annexure 1. A second Research Paper addressed the hearings before the Joint Committee: 'Class actions and litigation funding reform: proceedings before the Joint Committee' (14 August 2020). These submissions were revised for inclusion in the present Research Paper.

We begin, however, by considering the adversarial debate which played out in the written submissions to the Joint Committee and the politicisation evident in the hearings before the Committee.

3.1 *Adversarialism and politicisation*

Not surprisingly, a number of submissions reflected an adversarial debate between opponents of class actions and litigation funding and supporters. This adversarialism is exemplified by a series of claims made in the submission of the Menzies Research Centre (MRC) [Submission No. 66], the responses of litigation funder *Omni Bridgeway Limited* (OB) [Submission No. 73.1] to the submission and subsequent replies of MRC [Submission No. 66.1].

MRC Claim #1: *'Over the last ten years alone, 355 class actions were filed in Australia. This represents 56% of the total number of class actions filed in the regime's 28-year history'* [Submission No. 66: p. 6].

OB Response: Litigation funding only became fully permitted in 2006 following the High Court decision in *Fostif*.[103] A significant number of the 355 cases were in respect of the same cause of action [Submission No. 73.1: p. 2].

MRC Reply: Litigation funding has increased the incidence of class actions in Australia [Submission No. 66.1: p. 2].

MRC Claim #2: *'In FY19, some 59 class actions were commenced. In the period from 1 July 2019 to 31 January 2020, at least 30 class actions have been filed'* [Submission No. 66: p 6].

OB Response: In FY 19 there were 19 shareholder class actions[104] and in the period to 31 January 2020 3 are shareholder class actions.[105]A number of the class actions are in respect of the same causes of action [Submission No. 73.1: p. 2].

MRC Reply: The number of class actions continues to grow. The mix is irrelevant [Submission No. 66.1: p. 2].

MRC Claim #3: *Chart (Figure 2) showing the change in five categories of class action over the first 13.5 years of the period in which class actions have been permitted in Australia versus the second 13.5-year period* [Submission No. 66: p. 8].

OB Response: This is statistically unremarkable (see response to Claim #1 above). After *Fostif* shareholders were able to more easily access funding to pursue their rights. There has been a growing awareness of consumer rights as well as corporate misbehaviour [Submission No. 73.1: p. 2].

MRC Reply: In *Fostif* the High Court did not permit litigation funding for 'access to justice reasons'- it held that litigation funding by non-lawyers was not unlawful nor contrary to public policy [Submission No. 66.1: p. 2].

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[103] *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA 41.
[104] Citing Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Shareholder class actions in Australia – myths v facts' (November 2019).
[105] Commonwealth, *Parliamentary debates*, House of Representatives, 13 May 2020, p. 3344.

MRC Claim #4: '*…courts have held that litigation funding should be regulated variously as a managed investment scheme or financial product', reflecting on the subsequent decision by the then Government to exempt litigation funders to hold an Australian Financial Services Licence (AFSL)* [Submission No. 66: p. 3].

OB Response: Two of the four judges who considered the matter in *Multiplex* held that the litigation funding scheme was a MIS, but there were reasons it may be exempted. They didn't comment on how litigation funders should be regulated. The High Court in *Chameleon*[106] found that litigation funding agreements were not financial products. The grant of the exemption to hold an AFSL and register class actions as a MIS was in response to the decision in *Multiplex*. Prior to Multiplex, litigation funders were required to comply with their contractual obligations to clients and to the courts. After *Multiplex*, litigation funders had additional obligations with the Conflict of Interest regulations[107] [Submission No. 73.1: p. 3].

MRC Reply: The statement in the MRC submission is correct. Funders do not have contractual obligations to the courts [Submission No. 66.1: p. 2].

MRC Claim #5: *'These developments [court approval of litigation funding and exempting litigation funding from the requirement to hold an AFSL] have effectively converted what was intended to be a mechanism to allow groups of people to resolve their legal claims efficiently and cost effectively into an industry which is focused on delivering financial returns to investors in litigation'* [Submission No. 66: p. 9].

OB Response: litigation is highly expensive, and groups can't afford to finance the pursuit of their rights. The class action mechanism is neutered if the action cannot be funded. Litigation funding solves that problem and, in Omni Bridgeway's case, has assisted over 300,000 people. The alternative is that people can't pursue their rights, and the parties that break the law get away with causing them damage. The various protections built into the court process ensure that the focus remains on achieving a fair and reasonable outcome for the group members [Submission No. 73.1: p. 3].

MRC Reply: OB is wrong. Claimants can assert their rights without funding- solicitors act in a 'no win no fee' basis. Without funding they retain a greater proportion of their compensation [Submission No. 66.1: p. 2].

MRC Claim #6: *'An investor presentation by Omni Bridgeway from May 2020 reveals that, as of 30 April 2020, 'multi-party' matters comprise 27% of its global litigation portfolio. However, the same presentation also reveals that multi-party matters comprise 70% of its Australian investment portfolio'* [Submission No. 66: p. 10]

OB Response: US investments represent 50% of Omni Bridgeway's portfolio, but we do not fund class actions in the US. No class actions are funded in Asia. There is also a broader range of case types in which funders are able to invest in other countries but not currently in Australia, for example, Qui tam/whistle-blower cases and portfolios of contingency cases for law firms. Overall, the company's class action involvement is reducing [Submission No. 73.1: p. 3].

[106] *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed*) [2012] HCA 45.
[107] Reg 7.6.01AB(4) *Corporations Amendment Regulations 2001.*

MRC Reply: It is irrelevant the OB is funding other litigation: class actions comprise 70% of its Australian investment portfolio [Submission No. 66.1: p. 3].

MRC Claim #7: *Purported analysis sourced from Herbert Smith Freehills (HSF) claiming that from 2016 to 2019 the average percentage of settlement proceeds going to class members decreased from 59 to 39 per cent, with corresponding increases in the proportions received by funders and plaintiff lawyers* [Submission No. 66: pp. 12-13].

OB Response: Our request for the source data have not been successful[108] and the data are inconsistent with the empirical research by Professor Morabito, the ALRC, our experience and data from Maurice Blackburn [Submission No. 73.1: p. 4]

MRC Reply: The statement in our submission is correct; OB has contributed to the funding of Professor Morabito's work [Submission No. 66.1: p. 3].

MRC Claim #8: *'The ALRC….reported that in actions settled between 2013 and 2018 class members in actions without a third-party litigation funder received a median return of 85%. When a funder was involved that amount fell to just 51%*' [Submission No. 66: p. 13]

OB Response: When any asset is funded, the financier needs to be paid. The key question is could the action have been commenced at all without funding? The answer in most cases will be 'no'. The 'unfunded' matters cited by the ALRC were undertaken on a 'no win no fee' basis. This means that if the case is lost, the applicant is liable to be declared bankrupt and the defendant would not be able recover adverse costs. [Submission No. 73.1: p. 4]

MRC Reply: OB's response is internally inconsistent as to whether unfunded cases would not be commenced, or would be conducted on a no win no fee basis. The MRC Is not aware of any case in which an unfunded applicant has been bankrupted by a defendant. This is because class actions likely to lose almost invariably settle; applicants are generally men or women 'of straw' and without assets bankruptcy is pointless; corporate defendants rarely if ever bankrupt individuals for failure to pay costs orders as adverse publicity is counterproductive [Submission No. 66.1: p 3.]

MRC Claim #9: 'If class members are forced to surrender fifty per cent or more of the compensation they receive to litigation funders and lawyers, any success they may achieve is illusory. Class members cannot begin to replace a home or business lost in a fire or flood if they receive half or less of the replacement cost' [Submission No. 66: p 13].

OB Response: The key question is could the action have been commenced at all without funding? The alternative for the vast majority of claimants is to receive nothing in recompense. Very few complaints are made by claimants about litigation funding, the majority of whom recognise that they would have no redress without funding. [Submission No. 73.1: p.4].

MRC Reply: Few claimants have the resources and ability to take on the lawyers and funders who are supposedly acting on their behalf. Those who do find their own team using all of their resources to

[108] It is noted that this data (from an internal CLE presentation/PowerPoint) now appears to have been provided and was the subject of evidence before the Joint Parliamentary Committee at the hearing on 13 July 2020.

dismiss the complaints. Those who do pursue complaints have exposed very serious concerns.[109] [Submission No. 66.1 p. 4].

MRC Claim #10: *'….litigation funders in Australia are generating ROIC returns seventeen (17) times more than investors in ASX 200 stocks and more than ten (10) times the average global hedge fund and private equity performance'* [Submission No. 66: p. 14].

OB Response: There is simply no comparison between a ROIC and net returns from various indexes. Among the many problems with this comparison include:

- *Duration* – a litigation investment average three years but may be many more years in duration (the *Wivenhoe* matter being funded by Omni Bridgeway is eight years and counting), whereas returns are annual.
- *ROIC* is calculated before costs of running a business; Omni Bridgeway's net return after overheads is 9%.
- *Liquidity* – litigation investments are highly illiquid; this is completely different to investment in ASX stocks or in private equity investments.
- *Loss ris*k – the loss risk on the ASX 200 index is negligible, whereas litigation funding loss risk is 170% (i.e. the quantum of case funding plus adverse costs, assuming only one represented defendant).
- *Investment quantum* – the size of the investment at the outset is uncertain as litigation investments are uncapped and open-ended and adverse cost exposure is uncapped.
- *Control* – litigation investments provide limited control to the funder (i.e. the claimant controls the case), in contrast to securities and private equity investing.

MRC Reply: Although some cases do run for years, others don't and the ROIC is still extraordinary.

- In relation to *ROIC*: many of the costs incurred are recovered as 'project costs'; the impact of overheads on returns is minimal; the returns after capitalised overheads are still extraordinary when compared with any other asset class; the relevant vehicle in which to measure profits is in the fund vehicles used to fund the litigation.
- In relation to *liquidity*: while ASX stocks are generally liquid, many private equity investments are not;
- In relation to *loss risk*: the vetting process significantly reduces the risk of failures and OB claims to have an 87% success rate in its FY2019 Annual Report and an examination of corporate filings with the ASX reveals that failures are rare; in any event the risk of loss is mitigated by ATE insurance policies[110]
- In relation to *investment quantum*: with sophisticated budgeting and control of costs OB knows the costs that it is likely to incur;
- In relation to *control*: litigation funders drive the litigation and play a pivotal role in determining strategy and tactics.[111] Funding agreements customarily provide for the right of a funder to cease funding the case at any time at their sole discretion [Submission No. 66.1: p 4].

MRC Claim #11: *'The high returns and low risk of litigation funding make this a tantalising investment class…the litigation funding industry seeks to justify these returns by arguing they are*

[109] Referring to the *Banksia* and *MH17* cases.
[110] The reply submission cites statements from OB ASX announcements outlining insurance arrangements.
[111] Citing an IMF investor presentation in February 2020.

necessary given the risks associated with funding…However…the success rate for third-party funded class actions in Australia is between 87% and 94%' [Submission No. 66: p. 15].

OB Response: Litigation is not a 'low risk' investment activity. The funder makes its assessment before a class action is commenced, defence filed or interlocutory processes, with no expert evidence and lay witnesses untested – in other words, when the risk is highest. It is completely invalid to assess the prospects of success from a position of hindsight. For instance, Justice Murphy in *Murray Goulburn* when discussing the considerations for assessing the reasonableness of a funding commission stated: "The litigation risks of providing funding in the proceeding … is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding". The returns cannot be viewed in isolation and need to take into account losses on matters and the costs of running the business [Submission No. 73.1: p. 5].

MRC Reply: OB stated in an investor presentation in January 2020 that it has successfully resolved 89% of 192 completed cases since 2001. Therefore: does an 11% loss risk factor over 19 years justify taking such a large percentage of damages awarded to victims? [Submission No. 66.1: p. 6].

MRC Claim #12: '*The litigation funding industry is unregulated and there are no statutory or other criteria for determining how litigation funding agreements operates or a funders remuneration should be determined*' [Submission No. 66: p. 18].

OB Response: The litigation funding industry is currently regulated and operates by reference to:

- ASIC Class Order 248 – Conflicts of Interest
- Oversight by court and legal practitioners
- Federal Court Class Action Practice Note (and practice notes in other courts)
- Overarching obligations to the Federal and various State Courts
- Common law obligations
- Contractual obligations to clients.

These various forms of oversight set criteria for how litigations funders communicate with group members, can become involved with the litigation, deal with evidence and other information before the Court (*Harman* undertakings) and are remunerated, as well as the reasonableness of the legal costs [Submission No. 73.1: pp. 5-6].

*MRC Rep*ly: OB mischaracterises the concepts of 'regulation' and 'oversight'. Many mechanisms have been debunked in earlier inquiries. In any event OB supports further regulation [Submission No. 66.1: p. 6].

MRC Claim #13: '*As a result, the approach taken by the court in relation to the funders remuneration is haphazard and undertaken without regard to principles of corporate finance or benchmarks for risk adjusted rates of return'* [Submission No. 66: p. 18].

OB Response: In assessing the reasonableness of a proposed settlement which involves a commission payment to a litigation funder, the courts take into account the specific risks and costs associated with the particular case, informed by a confidential merits assessment made by the plaintiff's counsel, with the use of a barrister contradictor (independent party to the funder) if deemed necessary. It is done by specialist judges with extensive class action experience, with the acknowledgement that hindsight assessment of risk is inappropriate, as the decision to accept the risk is made the time the investment is made. A court's assessment is multi-factored and informed.

This is abundantly clear from the empirical research undertaken by Professor Morabito [Submission No. 73.1: p. 6].

MRC Reply: It is clear that the courts have failed to properly protect consumers from the excesses of the litigation funding industry. There is rarely any independent evidence to assist the court. The appointment of contradictors has generally been opposed by funders.[112] The courts have been asked to make common fund orders in circumstances where OB has declined to disclose funding arrangements to the court or to class members. According to media reports, rather than allow a contradictor, the application was withdrawn. In the *Banksia* saga, the funder and lawyers have fought to limit the scope and ability of the contradictor to investigate serious allegations as to their conduct [Submission No. 66.1: p. 7].

MRC Claim #14: *'For their part, both the litigation funder and the plaintiffs' lawyer representing the class is hopelessly conflicted and unlikely to do anything to jeopardise the approval or delay receiving their often significant remuneration. Unless a class member is willing to appear at the approval hearing with independent lawyers at their own expense to oppose or question the settlement costs or remuneration, nobody will be independently representing class members'* [Submission No. 66: p. 18].

OB Response: Errors and a lack of understanding, include the following:

- Litigation funders and lawyers are bound to address any conflicts and ultimately the focus of the approval hearing is on what is in the best interests of the group members.
- Plaintiff lawyers have been paid by the funder throughout the litigation and as such do not have a significant financial interest in the outcome.
- There is a split profession in Australia where the senior counsel is at the independent bar and they represent the class. No in-principle settlement will be reached without the senior counsel being prepared to sign off on it as being fair and reasonable in their opinion.
- The judge will decide whether the fees and commission are "fair and reasonable" based on the evidence presented.
- The judge will hear from class members without representation and can appoint counsel to assist and act in the best interests of group members at the cost of the funder.
- The funder's commission is set out in the Litigation Funding Agreement signed by class members before they become a class member (or in the case of common fund orders as ordered by the court with prior notice to group members) and the budget for legal fees and disbursements will be provided by the lawyers.
- Class members have the right to opt-out of a class action if they consider their interests are best served in their own proceedings [Submission No. 73.1: pp. 6-7].

MRC Reply: There is a vast difference between theory and practice. Academic literature suggests the need for reform.[113]

MRC Claim #15: *Description and analysis of Murray Goulburn, a class action funded by Omni Bridgeway* [Submission No. 66: p. 19].

OB Response: As Justice Murphy stated in *Murray Goulburn* when discussing the considerations for assessing the reasonableness of a funding commission: "The litigation risks of providing funding in

[112] Reference is made to the opposition of OB to the appointment of a contradictor to consider the fairness and reasonableness of the funding arrangement in the PFAS class actions.
[113] For example, the work of Professor Legg.

the proceeding…..is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding".

Murray Goulburn demonstrates the role the judge plays, assisted with the benefit of case-specific confidential material, in assessing the reasonableness of the funder's fee.

This is cherry picking. Any balanced consideration of returns needs to be done on a portfolio basis (as Justice Beach noted in *Sirtex*), after taking into account the overheads of running a business. In the bank fees case funded by Omni Bridgeway, our loss was around $25 million.

MRC Response: In *Murray Goulburn* OB originally claimed a commission of 30% or 35%, depending on the class member. The Court indicated that this was excessive, proposed a contradictor, and suggested a rate of 25%. OB opposed the Court's approach and challenged its power. OB then withdrew this contention and intervened to oppose the appointment of a contradictor and sought to frustrate the contradictor by opposing access to documents and information and contending that he should not be allowed to put on evidence. OB then agreed to a compromise of 28%. After this was effectively rejected by the contradictor OB agreed to accept 25%.

OB resisted disclosure of much of the data about its returns but in his judgment approving the settlement Justice Murphy disclosed that the receipt by OB of 25% meant that it received a return of 502% on its investment over a period of 1.2 years.

Murphy J's judgment[114] is wrong and certainly not in accord with community expectations. The judgment also fails to provide any detailed reasoning to explain the basis upon which a return of 502% over 1.2 years could be considered to be fair and reasonable.

This demonstrates that funder resistance to contradictors and the disclosure of information is not appropriate. It also demolishes the position of funders that they act in the best interests of class members and that lawyers will stand up to the funder. Lawyers are dependent on the funder to pay their claims for remuneration and are dependent on the funder for future retainers in lucrative class actions. [Submission No. 66.1: p. 8].

MRC Claim #16: *Description and analysis of the Per-and-Poly-Fluoroalkyl Substances (PFAS) cases, class actions funded by Omni Bridgeway* [Submission No. 66 pp. 20-21].

OB Response: The 'large number' of claimant objections were in fact less than 3% of group members, who objected to various issues including the settlement amount, legal fees and the commission.

The MRC again seeks to benchmark the ROIC against other asset classes, but ignores that:

- The investment by Omni Bridgeway was for 4.5 years, but the matter could have gone on for years more.
- The investment was illiquid, as compared to the range of other investment classes.
- Omni Bridgeway's ultimate commitment of around $30 million was more than originally estimated, as was the potential adverse costs exposure of around another $25 million.
- This was a risky investment, involving untested areas of the law and complex scientific evidence. There was significant uncertainty around the quantum of damages until just

[114] The submission uses the ambiguous words 'assessment is wrong' but it does not appear to be the case that the arithmetical calculations are incorrect.

before trial and the assessed quantum following receipt of expert evidence was lower than Omni Bridgeway's initial estimate.
- Returns need to be considered on a portfolio basis, or after overheads of running the business.
- Omni Bridgeway's return on at risk capital was 0.4x.

MRC refers to the return to class members being less than the loss of the value of their properties as a consequence of the contamination. This is wrong. Experts gave opinions on loss, and applying these opinions, the settlements were 97%, 103% and 109% for Williamtown, Oakey and Katherine of the likely claimable diminution in the group members' property value. Consequently, the Judge noted that the settlements achieved "can fairly be described as excellent."[115] [Submission No. 73.1: pp. 7-8].

MRC Reply: The fact that only 3% objected does not mean that the balance were happy with what occurred. Even applying OB's suggested approach the returns in the PFAS litigation cannot be justified [Submission No. 66.1: p. 10].

MRC Claim #17: *Common Fund Orders (CFOs) are magnifying claim sizes* [Submission No. 66: pp. 22-23]

OB Response: This conflates CFOs with the growth in Omni Bridgeway's estimated portfolio value (EPV) as stated in our ASX announcements.

CFOs in Australia were first permitted by the *Money Max* decision in October 2016. Omni Bridgeway has funded five Australian class actions utilising a CFO with a total EPV of $173 million. Of these five cases, the CFO has been withdrawn in three of them.

The actual reasons for the growth in Omni Bridgeway's EPV relate to the launch of third-party funds in 2017, the expansion of geographic footprint to Canada in 2016, Asia in 2017 and UK in 2018 and growth in investments in the US and other overseas jurisdictions. Relevantly to the MRC's assertion, Omni Bridgeway has not actually funded a shareholder class action in Australia in over 16 months [Submission No. 73.1: p. 8].

MRC Reply: Rather than address the issue, OB seeks to engage in debate about the effects of CFOs on its EPV and, in any event, OB has called for the prohibition of CFOs [Submission No. 66.1: p. 8].

MRC Claim #18: *Omni Bridgeway's Funds 2 and 3 which invest in 'Australia and the region'* [66: p. 24]

OB Response: This Fund is not predominantly an Australian fund. This Fund invests into Australia, Canada, Asia and EMEA (Europe, Middle East and Africa) with the geographic split of investments being, 37%, 17%, 20% and 26%, respectively[116] [Submission No. 73.1: p. 8].

MRC Reply: OB's most recent Annual Report (FY2019) states that 54% of expected portfolio value (EPV) by geography is based in Australia and that 61% of EPV by investment type was in 'multi-party' matters. Thus, on this information released to shareholders, Australian class actions comprise in excess of a majority of investment in these funds [Submission No. 66.1: p. 9].

[115] *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 [68].
[116] Based on Estimated Portfolio Value.

MRC Claim #19: *Judges do not have the experience and training in corporate finance to properly assess risks and returns, and the settlement process more broadly. '…courts are left as unwitting accomplices in what is unconscionable conduct on the part of the litigation funding industry'* [Submission No. 66: p. 28].

OB Response: Response as per claim #13.

MRC Reply: A return of 502% to a litigation funder for a 1.2 year investment cannot be justified on any basis [Submission No. 66.1: p. 10]

MRC Claim #20: '*The vices that attend the litigation funding industry……are well documented'. This includes a further claim that 'the litigation funder controls the proceedings….'* [Submission No. 66: pp. 28-29].

OB Response: This ignores the more balanced findings of previous inquiries and reviews undertaken by the Productivity Commission, Treasury, Australian Law Reform Commission and Victorian Law Reform Commission.

On the issue of *control*, the suggestion is wrongheaded. It is incorrect to suggest that funders control proceedings. Lead plaintiffs in class actions have ultimate say and instruct their own lawyers. On settlement, the court has the ultimate say [Submission No. 73.1: p. 9].

MRC Reply: The vices that attend the litigation funding industry have been extensively documented by earlier enquiries and in the media. OB's denial that funders exert any control over class actions is best answered by reference to OB's own statements made for the benefit of its investors[117] [Submission No. 66.1: p. 10].

Leaving aside the 'adversarial' exchange between the funder, Omni Bridgeway, and the Menzies Research Centre, polarisation and politicisation of the current debate was apparent in the hearings before the Joint Committee, including in respect of the empirical data on class actions and litigation funding.

Criticisms and accusations of 'unfounded allegations' or attacks on individuals and organisations were made by representatives of both main political parties. Objections were made to characterisations of the nature of questions by members of opposing political parties, and Joint Committee members were accused of, inter alia, deliberately misleading the committee or playing a game.[118]

The divided views of Committee members paralleled the polarised position of many witnesses.

On both sides of the debate, witnesses and organisations submitting evidence were alleged to be associated with political parties or involved in political and public relations campaigns in respect of class actions and litigation funding reform. As the Chair of the Committee noted: 'A number of witnesses before this inquiry have been asked about their affiliations and connections with political parties. Those questions have been asked by committee members from all perspectives to witnesses from all perspectives…'[119] Many questions sought to elicit information about lobbying activities.

[117] A detailed extract is quoted, which focuses on budgets and risks 'controlled' by IMF; strategic management services and advice and the fact that most cases settle with IMF involvement in mediations.
[118] See, e.g., 24 July 2020, pp. 44, 51, 58; 27 July 2020, pp. 30, 34-5, 55-6.
[119] 3 August 2020, p. 18.

For example, an organisation and individuals associated with the American Chamber of Commerce were said to be engaged in lobbying to achieve reforms in the interests of the corporate community. On the other side: plaintiff law firms and litigation funders were questioned on the transparency of the funding of a public and media campaign to oppose certain proposed reforms and to 'keep corporations honest'.

Some of the interactions in which this apparent adversarialism manifested itself are summarised below.

- Senator O'Neill described the Menzies Research Centre (MRC) submission as an undergraduate essay that would fail on plagiarism grounds.[120] She revealed that the MRC submission inaccurately quoted Justice Lee in the PFAS settlement approval judgment, to suggest his disapproval of litigation funding. The Senator suggested that this inaccurate quotation was obtained from an article which presented a diametrically opposed view by Justice Lee, and that Mr Mathias had further misrepresented the judgment in the hearing.[121] Figures utilised in the MRC submission were said to be incorrect or based on incomplete data for the purposes of an inhouse continuing legal education session, inconsistent with empirical data accepted by the courts and the ALRC.[122] Mr Falinksi MP later suggested that Senator O'Neill was peddling 'conspiracy theories' in relation to the submissions before the inquiry.[123]
- Mr Mathias responded to allegations that he was advocating for the interests of big businesses by implying that large plaintiff law firms such as Maurice Blackburn and Slater and Gordon are aligned with the Labor Party.[124]
- Stuart Clark faced questions on his work for the US Chamber of Commerce's Institute for Legal Reform, and whether he was conducting lobbying work for that organisation, the amount he is paid for this work, and the extent of his involvement in writing submissions.[125] Mr Clark cited legal professional privilege in his refusal to answer questions about remuneration received and stated that complaints made about the involvement of the US Chamber of Commerce were xenophobic.[126] In relation to the recent ALRC inquiry, Senator

[120] Senator O'Neill, 13 July 2020, p. 10.
[121] Senator O'Neill, 13 July 2020, pp. 4-5. The Menzies Research Centre addressed the comments of Senator O'Neill in its Response to Questions on Notice labelled 'QON 1'. The MRC provided that the quote was obtained from *Lawyerly* and based off the decision of Lee J in *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 at [81]. That paragraph is set out in full, along with further judicial and extra-judicial comments on funding commissions which suggest that returns are excessive in some instances.
[122] Andrew Saker, 13 July 2020, p. 52. The 39% figure was addressed by the MRC in its Response to Questions on Notice labelled 'QON 3'. Senator O'Neill requested that the Powerpoint presentation be provided to the Joint Committee. In its response, the MRC provided the title of the presentation and details of the date it was presented at Herbert Smith Freehills, but did not provide a copy of the presentation. Instead, the MRC stated that '[a]ny questions about their data or analysis should be directed to' Herbert Smith Freehills.
[123] 13 July 2020, p. 46.
[124] James Mathias, 13 July 2020, p. 7.
[125] 13 July 2020, p. 20. In a letter dated 18 August, Stuart Clark stated that, in his decades of experience in as a legal practitioner, author of academic works on class actions, and contributor to debates both in Australia and abroad, '[w]hile debate has been vigorous, as one would expect, it has always been respectful of the views expressed by others and the issues discussed on their merits.' He was highly critical of the tenor of the Joint Committee hearings, specifically the questions of Senator O'Neill, which he described as 'an ad hominem attack that was intended to embarrass and humiliate [him] for the purposes of questioning [his] credibility and integrity.' As a result, Mr Clark declined to participate further in the inquiry.
[126] 13 July 2020, p. 21.

O'Neill questioned Mr Clark's role with respect to the US Chamber of Commerce and whether he is considered a lobbyist.[127]

- Questions to Stuart Clark covered his career at Clayton Utz and the role of that firm in the case of *McCabe v British American Tobacco Australia Services Ltd,* which was said to go to the credibility of his evidence. Mr Clark clarified that he was not involved in that case, providing corrections on the facts of the case and emphasising that the decision of the trial judge was overturned on appeal.[128]
- Andrew Saker from Omni Bridgeway raised his suspicion that the involvement of the Institute of Legal Reform was aimed at making class actions 'uneconomic' in Australia, leading to decreased access to justice.[129]
- Attention was drawn by Mr Falinski to the pre-judicial professional career of Justice Murphy in connection to his recent decision in the *Murray Goulburn* class action. It was questioned whether the return in that case to funders was 'conscionable'.[130] He suggested that the return to the funder in that case indicated that the judiciary are not best placed to make decisions on litigation funding.[131] However, it should be noted that the lead plaintiff was strongly supportive of both the outcome and Justice Murphy's decision in that case.[132]
- Mr Mathias questioned the objectivity of the interpretation and analysis of statistics by Professor Vince Morabito, because of the sources of funding for some of his academic research.[133]
- Joint Committee members requested information on the collection of data by Professor Morabito and the confidentiality agreements to which his data was subject, and queried the extent to which his work was subject to robust peer review, given his unique access to the raw data.[134]
- Mr Falinski suggested that Professor Morabito's use of percentages was 'misleading' and stated that his work is not subject to peer review.[135] Professor Vince Morabito was accused of 'cherry-picking data' by Mr Falinski in work funded by litigation funders.[136] Senator O'Neill contended that this was a 'thinly veiled attack on a particular individual'.[137] Senator Paterson suggested that this was 'hypocrisy' on the part of Senator O'Neill, stating that she had attacked an individual through the forum in a similar way.[138]
- Senator O'Neill accused Mr Mathias of slandering Professor Morabito and lying to the Australian public.[139] Professor Morabito clarified details of his funding and his practice of disclosing all funding sources, as well as university procedures which ensure that academics can only access funding for research purposes.[140] He stated that he did not believe that his data was misleading, nor that it had been cherry-picked.[141]
- Senator Paterson observed that the involvement of law firms and funders in the 'Keep Corporations Honest' campaign did not appear to be disclosed on the campaign website or

[127] 29 July 2020, p. 5.
[128] 13 July 2020, pp. 25, 31.
[129] 13 July 2020, p. 59.
[130] 13 July 2020, p. 47; 24 July 2020, pp. 23-4.
[131] 27 July 2020, p. 73.
[132] Rod Gibson, 3 August 2020, p. 5.
[133] James Mathias, 13 July 2020, p. 9.
[134] 24 July 2020, p. 7.
[135] 24 July 2020, p. 6; 29 July 2020, p. 25.
[136] 24 July 2020, p. 2; 27 July 2020, p. 54.
[137] 27 July 2020, p. 54.
[138] 27 July 2020, p. 54.
[139] Senator O'Neill, 13 July 2020, p. 10.
[140] 24 July 2020 pp. 5, 8.
[141] 24 July 2020, pp. 3, 17.

advertising. He suggested this was not an 'ethical way to participate in public debate'.[142] When Mr Hardwick summarised the stated aim of the campaign to keep Australian corporations honest, Mr Falinski responded: 'it doesn't seem to be keeping you honest though'.[143] Mr Hardwick said that there were 'absolutely no secrets behind this campaign' and all entities which had provided funding were disclosed on the Commonwealth register of lobbyists.[144] Mr Falinski stated that the advertisements are political and not authorised as required by law, questioned the links of the campaign to the CFMEU, and accused them of secrecy as to their membership and contributions.[145]

- Mr Hardwick stated that the Treasurer met with an affiliate of the American Chamber of Commerce shortly before the new funding regulations were announced.[146] Mr Falinski requested proof of the occurrence of this meeting and later said they were indulging in slander and misleading a parliamentary committee.[147]
- Mr Falinski questioned Andrew Watson regarding a meeting between directors from Maurice Blackburn and the Victorian Attorney-General. He asked who attended the meeting and whether the Victorian Government announced support for contingency fees on the same day as a donation of $100,000 was alleged to have been made to the Labor Party.[148] This may raise a 'perception of conflict'.[149] Ms Hammond MP requested that witnesses from Maurice Blackburn, Slater and Gordon and Shine Lawyers provide to the Committee information on their donations to political parties and advocacy bodies over the past decade, information on whether they engage in discussions with politicians, advisers or lobbyists, and information on their turnover, charging rates, salaries and partner remuneration.[150] A question was raised as to whether similar information should be sought from commercial law firms acting for the business community.
- Senator O'Neill remarked that, given the extent to which continuous disclosure was discussed, an inquiry into continuous disclosure might be more appropriate. She described the Joint Committee inquiry as a 'sham inquiry, going through the back door, cutting down access to class actions as a substitute for people who want to change the continuous disclosure laws'.[151] It is noted that she subsequently withdrew her reference to a 'sham inquiry'.
- Witnesses from HESTA were asked about links with the Labor Party, political donations made and financial support for entities associated with the Labor Party.[152]

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[142] 24 July 2020, p. 45. Details of membership and contributions to the campaign were subsequently provided in writing. See Slater and Gordon, 'Response to Question on Notice No. 2' and 'Response to Questions on Notice Nos. 5 and 6'; Maurice Blackburn, 'Response to Questions on Notice, Part Two'; Shine Lawyers, 'Response to Question on Notice No. 2'.

[143] 27 July 2020, p. 23.

[144] 27 July 2020, p. 23.

[145] 27 July 2020, pp. 24, 55.

[146] 27 July 2020, p. 30. In a written response to questions on notice, the Treasury stated that the Treasurer and the Treasurer's office had not met with the US Chamber of Commerce or its Institute for Legal Reform from 1 January 2020 to present. However, the Treasurer conferred with an affiliate of the US Chamber of Commerce, the American Chamber of Commerce in Australia, by video conference on 14 May 2020.

[147] 27 July 2020, pp. 32, 47.

[148] 27 July 2020, p. 33-4. Questions on notice concerning political donations were invariably answered by referring the Committee to the Australian Electoral Commission's Transparency Register. This serves to illustrate that there are meaningful safeguards in place concerning political donations.

[149] 27 July 2020, p. 34.

[150] 27 July 2020, p. 35.

[151] 29 July 2020, p. 58.

[152] 3 August 2020, pp. 17-18.

3.2 *An 'explosion' in class actions?*

The polarisation and division of opinion in the written submissions to the Joint Committee was reflected in the oral submissions from witnesses on the question of whether there has been a significant increase in the number of class actions and, if so, whether this is a matter of concern. The work of Professor Morabito was cited in support of both potential answers to the question.

It was alleged by some that there has been an explosion in the number of class actions, attributed to the increased number of litigation funders, their exemption from compliance with the MIS regime and 'turbocharged' by *Fostif.*[153] Australia was described as the second biggest funding market, based on an assessment of statistics provided by insurers.[154] It was said to be undeniable that 'there was a significant expansion in the number of securities class actions between the period before 2010 and the present' but that 'the expansion has plateaued'.[155]

Other witnesses rejected the contention that there has been a flood of class actions, particularly in comparison to other jurisdictions and when multiplicity is taken into account.[156] Andrew Saker of Omni Bridgeway stated that 'after eliminating the many instances of duplicate cases, there were ten shareholder class actions in FY 2018, seven in 2019 and three in 2020 through to 31 January. These numbers don't support the hyperbole of an explosion'.[157] The utility of counting competing claims separately was contested, with some arguing that the resources expended on competing claims merit their separate consideration.[158]

The contention that there has been an explosion in class actions was roundly rejected in a number of written submissions.[159] It was suggested that any increase in the number of actions, or increase in insurance premiums related to the defence of class actions, should be viewed in the context of the

[153] See, e.g., James Mathias, 13 July 2020, p. 3. This was also stated in a number of written submissions, e.g., RIMS Australasia Chapter, Submission No. 12, June 2020, p. 1; Submission No. 66 pp. 5, 9; Yarra Capital Management, Submission No. 71, 16 June 2020, p. 1; National Council of Women Australia, Submission No. 77, June 2020, p. 3; Business Council of Australia, Submission No. 86, June 2020, p. 4; AI Group, Submission No. 92, 15 June 2020 p. 21. Menzies Research Centre, Submission No. 66, 14 June 2020, p. 7; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 4.3. In one submission, it was suggested that securities class actions data should be considered separately to other forms of class actions and this should involve an evaluation of their size and impact on the economy, rather than merely count the number of actions filed each year MinterEllison, Submission No. 25, 11 June 2020, 4.12.

[154] Ewen McKay, 27 July 2020, p. 51. In response to a question on notice requesting further information on the claim of the rapid growth of class actions in Australia, Associate Professor Sulette Lombard referred to the ALRC Report 134, as well as citing the estimated value of AU$3 billion in 2015.

[155] Alexander Morris, 13 July 2020, p. 36.

[156] See, e.g., Vince Morabito, 24 July 2020, p. 5; Ben Phi, 27 July 2020, p. 37.

[157] 13 July 2020, p. 49.

[158] See, e.g., Louise Petschler, 29 July 2020, p. 3.

[159] See, for example, Law Institute of Victoria, Submission No. 3, 9 June 2020, pp. 13-14; Professor Vince Morabito, Submission No. 6, 10 June 2020, p. 4; Harbour Litigation Funding, Submission No. 11, June 2020, p. 8; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 23; Slater and Gordon, Submission No. 18, June 2020, 8.2-8.4; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, pp. 6-7; Public Interest Advocacy Centre, Submission No. 27, 11 June 2020, p. 7; HESTA, Submission No. 28, June 2020, p. 3; Augusta Ventures, Submission No. 31, 11 June 2020, 14; Shine Lawyers, Submission No. 35, 11 June 2020, 8-9; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 4.2; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 1.16; ISS Securities Class Actions Services LLC, Submission No. 62, 11 June 2020, p. 3; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 2, 27-29; Phi Finney McDonald, Submission No. 87, June 2020, 1.14, 8.1-8.4; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 8.5, 8.7-8.8, 8.11; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 4.

maturation of the regime, as well as greater awareness of widespread corporate, or other, misconduct.[160]

Concerns were raised about the possibility that the data are being misused or mischaracterised.[161] The 325% increase in class actions was considered not to be 'particularly relevant' when they relate to very small numbers of actions.[162] Professor Morabito stated that the 325% figure involved a comparison on the 8 class actions filed in the 2008-09 financial year with the 34 class actions filed in the 2018-19 financial year.[163]

Pauline Wright for the Law Council contended that, while there has been an increase, it is not remarkable and the growth itself should not be a matter of alarm or concern.[164] Dr Mundy suggested that any increase can be attributed to growth in economic activity, the maturation of the litigation funding market and increasing awareness among the community about matters of personal investment and corporate behaviour.[165] Professor Morabito was of the view that increases can be 'attributable to an increase in the instances of identified alleged activity undertaken by the defendants or respondents', such as were identified by the Banking Royal Commission.[166]

This lack of clarity and consensus on the empirical data is unfortunate but perhaps not surprising. The misguided or intentional misuse of statistics for policy or political purposes is, of course, not confined to the debate about class actions and litigation funding.[167]

Notwithstanding this adversarial and politicised dimension of the inquiry, many of the submissions to the inquiry set out various proposals for reform of the class action system and litigation funding arrangements. These are summarised below under various headings.

3.3 *Views on present class actions practice or arrangements*

3.3.1 *Support for present class actions practice or arrangements*

A large number of participants evinced support for the present class action arrangements as a way for 'ordinary' people, including those experiencing disadvantage, to obtain redress.[168] Many of those

[160] See, for example, Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 6; Shine Lawyers, Submission No. 35, 11 June 2020, 10-14, 16, 23; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 1.1-1.3, 1.18; Stewart Levitt, Submission No. 52, 11 June 2020, p. 5; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 51, 55-58; Operation Redress Pty Ltd, Submission No. 64, June 2020, p. 3; Phi Finney McDonald, Submission No. 87, June 2020, 8.5-8.7.
[161] Andrew Saker, 13 July 2020, p. 49.
[162] Warren Mundy, 13 July 2020, p. 17.
[163] 24 July 2020, p. 3.
[164] 29 July 2020, p. 18.
[165] Warren Mundy, 13 July 2020, p. 18.
[166] 24 July 2020, p. 9.
[167] On the intentional and 'political' misuse of statistics generally, see Sanne Blauw, *The Number Bias: How Numbers Lead and Mislead Us* (Hodder and Stoughton Ltd, 2020).
[168] See, for example, Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 8.1; Australian Lawyers Alliance, Submission No. 2, 8 June 2020, 3-7, 14-17; Law Institute of Victoria, Submission No. 3, 9 June 2020, pp. 14-15; Balance Legal Capital, Submission No. 13, 10 June 2020, p. 3; ACCC, Submission No. 15, 10 June 2020, p. 1; Slater and Gordon, Submission No. 18, June 2020, 8.7; Public Interest Advocacy Centre, Submission No. 27, 11 June 2020, pp. 6-7; Augusta Ventures, Submission No. 31, 11 June 2020, 12; Shine Lawyers, Submission No. 35, 11 June 2020, 31; Consumer Action Law Centre, Submission No. 43, 11 June 2020, p. 1; Michael Duffy, Submission No. 47, June 2020, p. 3; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 5; Transport Alliance Australia, Submission No. 63, 11 June 2020, pp. 1-2; Law Council of Australia, Submission No. 67, 16 June 2020, 144; Goal Group, Submission No. 80, 18 June 2020, pp. 1-2; Nicos Andrianakis, Submission No. 82,

involved in the hearings were supportive of current class action and litigation funding procedures and practices, stressing that while there may be areas in need of reform or greater certainty and clarity, the regime is important for ensuring access to justice. It was suggested that existing court review mechanisms and regulatory structures are adequate to ensure the effective operation of the regime and the fairness and reasonableness of proposed class action settlements.[169] An American academic considered that the Australian system has already achieved an appropriate balance in its class action system, and that this is a 'model' system for the rest of the world.[170] It was asserted that class actions lead to efficiencies which reduce burdens on the courts.[171] Submissions claimed that the class actions market is increasingly competitive meaning that class members are receiving greater proportions of settlements.[172]

Class actions were said to relieve the burden on regulatory bodies as a mechanism for private enforcement with a deterrent effect on corporate misconduct and ultimate benefits to the economy and community.[173] It was submitted that class actions are crucial for public interest litigation to achieve systemic change, developing the law and providing impetus for reform.[174] Class actions were described as an important tool to provide compensation and redress in diverse areas, including product liability, human rights, employment, shareholder and franchise actions.[175] Even amongst those critical of shareholder class actions, there is recognition of 'the critical role that class actions play in facilitating access to justice in other areas of the law, such as product liability and environment cases'.[176] It was suggested that an undue focus on shareholder class actions ignores the

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11 June 2020, pp. 1-2; Phi Finney McDonald, Submission No. 87, June 2020, 1.8-1.9. In addition, it was submitted that class actions help litigants to feel empowered and heard, and that this is particularly meaningful for those experiencing disadvantage and marginalisation: Paola Balla, Submission No. 10, June 2020, p. 2. This view was expressed by various witnesses during the hearings, e.g., Peta Spender, 24 July 2020, p. 26; Andrew Watson, 27 July 2020, p. 17; Ben Hardwick, 27 July 2020, p. 18; Janice Saddler, 27 July 2020, p. 18; Andrew Paull, 27 July 2020, p. 21; Stewart Levitt, 27 July 2020, p. 38; Iain Anderson, 29 July 2020, p. 47.

[169] See, for example, Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 18; Harbour Litigation Funding, Submission No. 11, June 2020, pp. 2-3; Balance Legal Capital, Submission No. 13, 10 June 2020, p. 1; ACCC, Submission No. 15, 10 June 2020, p. 4; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 23; Slater and Gordon, Submission No. 18, June 2020, 13.5; Shine Lawyers, Submission No. 35, 11 June 2020, 40-41; Queensland Law Society, Submission No. 46, 11 June 2020, p. 4; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, pp. 1-2.

[170] Professor Brian Fitzpatrick, Submission No. 84, 18 June 2020, p.1.

[171] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 7.27; Consumer Action Law Centre, Submission No. 43, 11 June 2020, p. 1.

[172] Phi Finney McDonald, Submission No. 87, June 2020, 2.3.

[173] See, for example, Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 1.9, 12.1; ACCC, Submission No. 15, 10 June 2020, p. 2; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 25; Dr Warren Mundy, Submission No. 17, June 2020, p. 3; Slater and Gordon, Submission No. 18, June 2020, 9.3; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, pp. 7, 9; HESTA, Submission No. 28, June 2020, pp. 2-3; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, pp. 6, 8; Shine Lawyers, Submission No. 35, 11 June 2020, 16, 19-20, 24-5. Shine Lawyers, Submission No. 35, 11 June 2020, 24-25; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 7.18, 7.22; Michael Duffy, Submission No. 47, June 2020, p. 4; AustralianSuper, Submission No. 48, 11 June 2020, p. 1; Stewart Levitt, Submission No. 52, 11 June 2020, p. 4; Australian Council of Superannuation Investors, Submission No. 61, 11 June 2020, pp. 1-2; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, p. 3; Phi Finney McDonald, Submission No. 87, June 2020, 1.1, 1.6; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 9.1; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 1. See also Warren Mundy, 13 July 2020, pp. 26-7; Stewart Levitt, 27 July 2020, p. 45.

[174] Public Interest Advocacy Centre, Submission No. 27, 11 June 2020, pp. 3-4; Grata Fund, Submission No. 76, 19 June 2020, p. 1.

[175] Professor Kevin Davis, Submission No. 79, 16 June 2020, p. 1; Communication Workers Union Victoria, Submission No. 83, June 2020, pp. 1-5.

[176] Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 1.

benefits of class actions for 'victims of natural disasters, defective medical products, environmental contamination, and wage theft.'[177]

There were various statements in support of securities class actions and their role in ensuring the integrity of the market.[178] The link between securities class actions and directors and officers liability (D & O) insurance premiums were described as overstated or 'not made out'.[179] Furthermore, it was suggested that there is an increasing emphasis on litigation by regulators following the Hayne Royal Commission and the existence of Side C coverage suggests that class actions may be separately priced by insurers.[180]

Concerns raised in the Terms of Reference for the Inquiry about the potential impact of class actions on the economy during the COVID-19 pandemic were given short shrift by a number of stakeholders; described as speculative and not supported 'on any sound factual basis'.[181] It was suggested that the due diligence of funders to ensure recoverability in the event of a successful outcome means that actions are unlikely to be brought against 'vulnerable' defendants who are able to satisfy judgments or pay settlements.[182] Moreover, there may be an increase in misconduct by companies or employers during the pandemic which will mean that there will be a greater need for remedies obtainable through class action mechanisms and so the regime should not be weakened.[183]

More generally, notions that speculative or unmeritorious actions are brought in Australia were rejected.[184] Submissions emphasised that class actions against businesses are brought following a finding of liability, disclosure of some breach of their obligations or where businesses have allegedly broken the law and caused harm to multiple individuals, and that this is where the focus of legislators should be placed.[185]

It was said that defendants often settle class actions after receiving specialised legal advice and undergoing sophisticated cost and benefit analyses.[186] Moreover, defendants would make

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[177] Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 1.11. It was also noted that less than half of litigation funded matters were shareholder class actions in the 2018-2019 financial year Professor Vince Morabito, Submission No. 6, 10 June 2020, pp. 3-5.

[178] The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 28; ISS Securities Class Actions Services LLC, Submission No. 62, 11 June 2020, pp. 2-3.

[179] The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 60; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 29-31; Phi Finney McDonald, Submission No. 87, June 2020, 9.9.

[180] The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 36.

[181] See, for example, Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.12; Andrew Roman, Submission No. 8, 10 June 2020, p. 5; Slater and Gordon, Submission No. 18, June 2020, 12.1, 12.5; Shine Lawyers, Submission No. 35, 11 June 2020, 27; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 7.29, 7.34; Adero Law, Submission No. 38, 11 June 2020, 1.10-1.17; Stewart Levitt, Submission No. 52, 11 June 2020, p. 6; Australian Council of Superannuation Investors, Submission No. 61, 11 June 2020, p. 2; Law Council of Australia, Submission No. 67, 16 June 2020, 133; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 5.

[182] Harbour Litigation Funding, Submission No. 11, June 2020, p. 8; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 8; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 3.9.

[183] Phi Finney McDonald, Submission No. 87, June 2020, 8.10-8.13; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 12.2.

[184] See, e.g., Patrick Moloney, 24 July 2020, p. 45; Goal Group, Submission No. 80, 18 June 2020, pp. 1-2.

[185] See, for example, Rod Barton, Submission No. 9, 10 June 2020, p. 5; Balance Legal Capital, Submission No. 13, 10 June 2020, p. 1; ISS Securities Class Actions Services LLC, Submission No. 62, 11 June 2020, p. 2.

[186] See, for example, Balance Legal Capital, Submission No. 13, 10 June 2020, p. 4; Dr Warren Mundy, Submission No. 17, June 2020, p. 5; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 6; Stewart Levitt, Submission No. 52, 11 June 2020, p. 3; Law Council of Australia, Submission No.

applications to strike out allegedly frivolous or unmeritorious class actions if they genuinely believed that this was possible.[187] Submissions noted that the adverse costs rule in Australia militates against the pursuit of meritless claims.[188] High settlement rates were described as a common feature across civil litigation, which is encouraged by the justice system.[189]

The notion that class actions have a negative impact on the economy was not accepted in a number of submissions.[190] It was suggested that profitable security class actions may allow firms to subsidise meritorious cases which are less financially viable.[191] Submissions expressed support for open class actions.[192]

On the need for consistency across jurisdictions, it was suggested that national uniformity is valuable where it is appropriate, but in the federal system this is not necessarily required, and it has not led to significant problems in class actions.[193]

Submissions included support for market disclosure requirements and criticism of any change to continuous disclosure laws.[194] This criticism extended to the Federal Government[195] and alleged lobbying by business and insurance interests, such as the US Chamber of Commerce.[196] It was suggested that media coverage of class actions is littered with 'egregious misconceptions' such as the proliferation of baseless, opportunistic claims.[197]

More generally, the rationale behind the Joint Committee inquiry was questioned, given the extensive reviews recently undertaken by the VLRC and ALRC, and the terms of reference were criticised as inflammatory and not supported by evidence.[198] The inquiry was labelled 'an unfortunate distraction, and likely counterproductive'.[199]

However, it was also suggested by some submission authors who were broadly supportive of the regime that 'there is opportunity for improvement.'[200]

67, 16 June 2020, 116, Attachment A; Phi Finney McDonald, Submission No. 87, June 2020, 9.8; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 3.

[187] Andrew Saker, 13 July 2020, p. 56.

[188] See, for example, Slater and Gordon, Submission No. 18, June 2020, 8.8; Shine Lawyers, Submission No. 35, 11 June 2020, 67; ISS Securities Class Actions Services LLC, Submission No. 62, 11 June 2020, p. 3; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, p. 4.

[189] Andrew Paull, 27 July 2020, p. 28.

[190] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 7.28; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 29.

[191] Michael Duffy, Submission No. 47, June 2020, p. 4.

[192] Consumer Action Law Centre, Submission No. 43, 11 June 2020, p. 2; Phi Finney McDonald, Submission No. 87, June 2020, 2.13.

[193] Slater and Gordon, Submission No. 18, June 2020, 10.3; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 10.1.

[194] HESTA, Submission No. 28, June 2020, p. 4; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 1.11; AustralianSuper, Submission No. 48, 11 June 2020, p. 4; ISS Securities Class Actions Services LLC, Submission No. 62, 11 June 2020, pp. 2-3; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, p. 1; Phi Finney McDonald, Submission No. 87, June 2020, 1.16.

[195] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 7.11.

[196] Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 6; Phi Finney McDonald, Submission No. 87, June 2020, 1.12.

[197] The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 19, 61.

[198] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 1.21-1.24; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 10-11.

[199] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 1.24.

[200] Law Council of Australia, Submission No. 67, 16 June 2020, 2, 10.

3.3.2 *Criticism of present class action practices and arrangements*

The submissions to the Joint Committee contained a number of criticisms of present practices and arrangements. It was suggested that class actions are sometimes 'opportunistic' in nature.[201] It was also claimed that there is a problem of claims lacking merit being brought in Australia.[202] It was submitted that the threshold requirements to bring class actions are too low.[203] In addition, submissions included assertions that class actions benefit funders and lawyers at the expense of class members,[204] that the regime is insufficiently regulated in this regard,[205] is beset by difficult issues of conflict,[206] and that the regime is in need of reform.[207]

Particular problems were identified, such as costs and delay associated with multiplicity and uncertainty and inefficiency around class closure.[208] There was criticism of the ability for corporations to claim legal expenses as a tax deduction, which is described as using taxpayer money to cover litigation funding for the defendant.[209] Concerns included inefficiency, delays and costs incurred in class actions, which may occur where pleadings lack clarity or specificity.[210] The quantification of losses at late stages after filing of expert evidence was also criticised.[211]

The high transaction costs associated with litigation funding, legal fees, expert witnesses and settlement administration were criticised.[212] There were anecdotal reports of 'lawyers on all sides [who] felt secure that their costs would be covered by insurance or the inevitable settlement. In contrast to all the other parties, there was no apparent pressure on the lawyers to drive the case with any sense of urgency.'[213] The conduct of some respondents, such as taking every point, was criticised for being inconsistent with the party and lawyer's duties to the court to conduct litigation

[201] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 1; Michael Quinn, Submission No. 24, 11 June 2020, p. 3; River Capital, Submission No. 32, 9 June 2020, p. 2; Stewart Levitt, Submission No. 52, 11 June 2020, p. 7; King & Wood Mallesons, Submission No. 53, 11 June 2020, 6; AI Group, Submission No. 92, 15 June 2020 pp. 17-19.
[202] Michael Quinn, Submission No. 24, 11 June 2020, p. 4; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 4.6.
[203] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 2-3; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, pp. 1, 5; Yarra Capital Management, Submission No. 71, 16 June 2020, p. 1.
[204] Donaldson Law, Submission No. 65, 12 June 2020, p. 1; Menzies Research Centre, Submission No. 66, 14 June 2020, pp. 3-4; Allens, Submission No. 69, June 2020, pp. 3, 10; Yarra Capital Management, Submission No. 71, 16 June 2020, p. 1; Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, p. 6; Submission No. 95: p. 2.
[205] AI Group, Submission No. 92, 15 June 2020 p. 2.
[206] Allens, Submission No. 69, June 2020, p. 11.
[207] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 1.
[208] Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 15; Norton Rose Fulbright, Submission No. 45, June 2020, 3.2; AustralianSuper, Submission No. 48, 11 June 2020, p. 1; Herbert Smith Freehills, Submission No. 51, 11 June 2020, pp. 2-3, 5-6; Insurance Council of Australia, Submission No. 68, 10 June 2020, p. 2; Allens, Submission No. 69, June 2020, p. 17; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 13.2.
[209] Phi Finney McDonald, Submission No. 87, June 2020, 3.10-3.12.
[210] PwC, Submission No. 85, 19 June 2020, pp. 1-2.
[211] PwC, Submission No. 85, 19 June 2020, p. 2.
[212] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 2; Professor Michael Legg, Submission No. 30, 11 June 2020, p. 2; Australian Council of Superannuation Investors, Submission No. 61, 11 June 2020, p. 2; Donaldson Law, Submission No. 65, 12 June 2020, pp. 2-3; Menzies Research Centre, Submission No. 66, 14 June 2020, pp. 4-5; The Rule of Law Institute, Submission No. 99, pp. 2-3; Andrew Watson, 27 July 2020, p. 20.
[213] Michael Quinn, Submission No. 24, 11 June 2020, p. 3.

in line with the overarching purposes of civil litigation or causing unnecessary costs and delay.[214] The judgment of Justice Katzmann in the pelvic mesh case was discussed by Senator O'Neill and Ms Saddler. In relation to that case, it was suggested that the defendants should have made admissions or appropriate concessions at an earlier stage.[215]

As noted by Professor Legg, the quantum of legal fees is:

> 'not necessarily linked to what is at stake or the amount of the claim. …To illustrate, in *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511, a financial product class action settled for $16.85 million with legal costs of $5 million (30%) and a litigation funding fee of $5.055 million (30%). The funder provided an affidavit which explained its costs and risk: the funder paid $2,073,933.69 in costs during the proceeding and estimated a potential adverse costs liability of $3.36 million if the matter was unsuccessful. In the QBE shareholder class action, *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030, a $132.5 million settlement had $21.8 million (16.5%) deducted for legal costs and $30.75 million (23.2%) deducted as the funders fee. The litigation funder had incurred costs of $19.82 million ($14,821,214 for the applicant's costs and $5 million in security for costs) excluding the costs of trial. The Funder also took on the risk that it would be required to pay an adverse costs order if the case was unsuccessful at trial, which Murphy J estimated at approximately $12-$15 million.'[216]

It was suggested that commercial fee levels are inappropriate to assess whether legal fees in class actions are fair and reasonable because class members are less able than commercial clients to negotiate on fees.[217] It was also submitted that there is insufficient scrutiny of the quality of work undertaken by lawyers and the efficient progress of class actions.[218]

Court supervision of settlement agreements was said to be inadequate.[219] The *PFAS* class action, the *MH17* class action and the *Banksia* case were cited to support assertions of consumer dissatisfaction with the way that the regime is currently operating.[220] Mr Falinksi MP contended that *Banksia* is an example of failure of judicial oversight, as a settlement agreement initially received judicial approval despite the misconduct which was alleged to have occurred on the part of the funder and lawyers involved.[221] However, *Banksia* was also viewed as an instance in which the role of the court is working properly. The appointment of an independent contradictor has led to a thorough investigation into the costs accrued and the portions sought to be obtained by the lawyers and funder will ultimately be determined by the Supreme Court.[222] Subsequent to the hearings before the Committee, in the present judicial proceedings in Victoria both junior and senior counsel previously acting in the *Banksia* case have admitted to serious wrongdoing and accepted that they should no longer be permitted to practise.

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[214] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.9; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 8.13-8.14; Damian Scattini, 27 July 2020, p. 8.
[215] 27 July 2020, pp. 26-7.
[216] Professor Michael Legg, Submission No. 30, 11 June 2020, p. 3.
[217] Ibid p. 4.
[218] Donaldson Law, Submission No. 65, 12 June 2020, p. 3.
[219] Queensland Law Society, Submission No. 46, 11 June 2020, p. 2.
[220] Stuart Clark, 13 July 2020, p. 16. This can be contrasted to the case studies reporting consumer satisfaction with the work of litigation funder Omni Bridgeway, provided as an annexure to Omni Bridgeway's Responses to Questions on Notice, including by a claimant in the *PFAS* class action.
[221] 27 July 2020, p. 72.
[222] Peter Cashman, 24 July 2020, p. 31.

Yet, it was submitted that contradictors frequently are either not appointed or limited in their role, and their costs are borne by the class.[223] Delays in resolutions of class actions were also criticised.[224] It was suggested that court discretion to consolidate overlapping claims is inadequate, inefficient, and often increases costs borne by the parties.[225]

Settlement rates were not considered to be reflective of the merits of claims as many are settled without an admission of liability on the part of the respondent.[226] It was suggested that company boards settle because of factors such as the costs, and time and uncertainty involved in defending actions.[227] It was suggested that public disclosure of settlements would ensure class members understand why settlements are reached.[228] Individuals who had experience defending class actions wrote of the incalculable 'stress, cost, damage to reputation, destruction of health, loss of a business, loss of capital and damage to lives.'[229]

It was submitted that class actions may not be an appropriate vehicle for claims which involve minimal commonality; they are not a 'panacea' for bringing claims which would be uneconomical to bring individually.[230] It was suggested that the fact that s 33N procedures are at the respondents' application or courts' own motion involves burdens on respondents in terms of onus of proof and risks of an adverse costs order.[231]

There was some criticism of the substantive law in automobile class actions, regarding the allegation of loss after a car is recalled, without regard to factors such as general depreciation over time, individualised damages, and how difficult this loss is to establish.[232] Greg Williams suggested that the question of loss in this area is a 'live one' because of recall procedures.[233] Class actions may be settled by defendants because, even though a claimant's 'chances of success in the claim are very low, you multiply a very low chance of success by a very high number of people, and the sort of risk that you start talking about is a very, very serious risk'.[234] Further, alternate procedures exist for consumers in these matters, such as tribunals, which were said to offer quicker and more efficient resolutions.[235] Senator O'Neill disputed the characterisation of these claims as being either speculative or idiosyncratic, and emphasised their deterrent effect, insofar as they related to illegal conduct for which a company was subject to significant civil penalties or where the defect in the product had led to deaths.[236]

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[223] Queensland Law Society, Submission No. 46, 11 June 2020, p. 2.
[224] Michael Quinn, Submission No. 24, 11 June 2020, p. 2; ASX, Submission No. 72, 17 June 2020, p. 2; National Council of Women Australia, Submission No. 77, June 2020, p. 3.
[225] Clayton Utz, Submission No. 26, 11 June 2020, 38.
[226] PwC, Submission No. 85, 19 June 2020, p. 1.
[227] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 2; US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 15-16; Michael Quinn, Submission No. 24, 11 June 2020, p. 3; Business Council of Australia, Submission No. 86, June 2020, p. 4; Alexander Morris, 13 July 2020, pp. 40-1; Justin McDonnell, 13 July 2020, p. 41; Ewen McKay, 27 July 2020, p. 50; Craig Claughton, 27 July 2020, p. 64; Louise Petschler, 29 July 2020, pp. 1, 4.
[228] Michael Quinn, Submission No. 24, 11 June 2020, p. 4.
[229] Mark Morris, Submission No. 75, 1 June 2020, 6.
[230] King & Wood Mallesons, Submission No. 53, 11 June 2020, 8; PwC, Submission No. 85, 19 June 2020, p. 2.
[231] King & Wood Mallesons, Submission No. 53, 11 June 2020, 3.
[232] Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, pp. 7-9.
[233] 24 July 2020, p. 49.
[234] Ibid.
[235] Tony Grasso, 24 July 2020, p. 52.
[236] 24 July 2020, pp. 51-2.

In pharmaceutical actions, it is alleged that causality arguments by plaintiffs involve statistical manipulation.[237]

There are allegations that funders or law firms have breached the *Australian Consumer Law* by engaging in misleading or deceptive conduct, or unconscionable conduct, in obtaining signatures for class action agreements, where fee structures are inadequately explained, and clients may not understand the ramifications of funding agreements.[238] One submission alleged that information on costs agreements in a matter was presented in a way which was confusing or difficult for class members to understand, members expressed concern that they did not have control over the process, and plaintiffs obtained a 'paltry' amount of the settlement proceeds.[239] Concerns were expressed about how informed class members are about the merits of the class action, particularly where they are required to opt-in to actions.[240]

3.3.3 *Securities class actions*

A number of criticisms focused on securities class actions and the impact of class actions on businesses.[241] It was suggested that class actions are harmful to the economy, causing businesses and insurers to carry unnecessary burdens.[242] Moreover, it was said that class actions bring about substantial reputational damage and large costs to businesses which do not correspond to their level of culpability and even where the claim is not made out.[243] Settlements in shareholder class actions were said to occur when it is in the interest of plaintiff law firms and funders, rather than because of any investigation of the reliance and loss of individual class members.[244]

It was claimed that class actions have led to D & O insurance premium increases which will make them too expensive and unobtainable for many companies.[245] Class actions are said to be a reason

[237] Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 4.5.
[238] ACCC, Submission No. 15, 10 June 2020, p. 4.
[239] Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, p. 2. Allegations made in that submission were denied by the plaintiff law firm acting in that matter: Quinn Emanuel response to SCSG submission, Submission No. 90.1, 25 June 2020, p. 4. Quinn Emanuel submitted that the firm served a notice of intention to cease to act because it perceived itself to be in a position of conflict in those proceedings. In a subsequent submission on behalf of Vannin, the funder drew the Joint Committee's attention to Murphy J's description of Quinn Emanuel's notice as 'ill-conceived and unnecessary' at [123]: Supplementary Submission No. 90.4, 22 July 2020, p.2.
[240] Consumer Action Law Centre, Submission No. 43, 11 June 2020, p. 2; AustralianSuper, Submission No. 48, 11 June 2020, p. 1.
[241] Michael Quinn, Submission No. 24, 11 June 2020, p. 3; River Capital, Submission No. 32, 9 June 2020, p. 3; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 1, 10; Kenneth Menz, Submission No. 59, June 2020, p. 1; Allens, Submission No. 69, June 2020, pp. 6-7; ASX, Submission No. 72, 17 June 2020, p. 3; Professor Kevin Davis, Submission No. 79, 16 June 2020, pp. 1-2; AI Group, Submission No. 92, 15 June 2020 p. 2; Group of 100, Submission No. 95, 8 July 2020.
[242] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 1; Ashurst, Submission No. 41, 11 June 2020, 4.
[243] Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 1; The Rule of Law Institute, Submission No. 99, pp. 3-4.
[244] Robert Johanson, 29 July 2020, p. 11.
[245] See, e.g., Craig Claughton, 27 July 2020, p. 62; Robert Johanson, 29 July 2020, p. 2; Christian Gergis, Louise Peschler, Stephen Smith, 29 July 2020, pp. 7-8, 10; Daniel Moran, 29 July 2020, p. 29; RIMS Australasia Chapter, Submission No. 12, June 2020, p. 2; Marsh Pty Ltd, Submission No. 14, 11 June 2020, pp. 1-2; Michael Quinn, Submission No. 24, 11 June 2020, p. 4; MinterEllison, Submission No. 25, 11 June 2020, 4.22-4.23; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, pp. 8-9; Ashurst, Submission No. 41, 11 June 2020, 2; Blue Energy Limited, Submission No. 42, 11 June 2020, p. 2; 68: pp. 2-3; ASX, Submission No. 72, 17 June 2020, pp. 1-2; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 5.2; Business Council of Australia, Submission No. 86, June 2020, pp. 1-2; AI Group, Submission No. 92, 15 June

for the increase in D & O insurance premiums in 2018 by an average of 88% and by at least 75% in 2019.[246] Securities class actions and high premiums were also said to dissuade high-calibre candidates from working on company boards.[247] Submissions warned of the particular damage of unmeritorious actions on Australian businesses during the pandemic.[248] Notable increases were dated from approximately three years ago, with 'the most dramatic change' recorded over the past 18-24 months.[249] The increase in insurance costs was also said to be affecting small to medium-sized businesses and not-for-profit organisations, making boards risk-averse and causing insurers to leave the D & O insurance market.[250]

During the hearings, Senator O'Neill disputed the correlation between the number of class actions and insurance premiums.[251] Mr Georganas MP asked whether the numbers of class actions and the increase in premiums are, instead, attributable to misconduct revealed through the Hayne Royal Commission.[252] He noted that insurers may have an interest in the deterrence of misconduct through private enforcement mechanisms such as class actions.[253] Ewen McKay acknowledged that premiums were probably under-priced 'for a number of years', as Norton Rose Fulbright stated in their submission.[254]

Class actions concerning alleged breaches of continuous disclosure obligations and misleading and deceptive conduct were said to be particularly and unreasonably burdensome.[255] It was said to decrease transparency on future earnings guidance, prevent boards from devoting attention to other 'broader strategic considerations', and have a chilling effect on investment, innovation and

2020 p. 2; Group of 100, Submission No. 95, 8 July 2020, pp. 1-2; The Rule of Law Institute, Submission No. 99, p. 3.

[246] Tom Lunn, 27 July 2020, p. 48. Marsh provided the Joint Committee with a useful overview of directors and officers liability policies and product liability insurance in its Responses to Questions on Notice labelled 'QoN012-01' and 'QoN012-02'. In 'QoN014-01', Marsh set out the data on the number of ASX200 listed companies it provided from 2011 (23) to 2017 (43), and its current number of 73, following the acquisition of JLT. Marsh claimed that there was an increase in premiums for the ASX200 in 2019 of an average of 118% and extreme cases of 600% (At page 2, paragraph 6 of Marsh's written submission to the Joint Committee). Marsh was requested to provide source data verifying the claim. In response, Marsh stated that the claims are based on records of Marsh 'client renewals and their renewal outcomes' but did not provide the source data for the claim (Marsh, Response to Question on Notice labelled 'QoN014-02'). The same response was provided in relation to the request for source data verifying the stated premium increases in the first Quarter of 2020 (Marsh, Response to Question on Notice labelled 'QoN014-03').

[247] Robert Johanson, 29 July 2020, p. 2; Blue Energy Limited, Submission No. 42, 11 June 2020, pp. 1-2; Yarra Capital Management, Submission No. 71, 16 June 2020, p. 1; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 1; PwC, Submission No. 85, 19 June 2020, p. 1; Business Council of Australia, Submission No. 86, June 2020, p. 2; Group of 100, Submission No. 95, 8 July 2020, p. 2.

[248] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 5; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, p. 13; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 7.1-2; Attorney-General's Department, Submission No. 93, June 2020, p. 20.

[249] Marsh, Response to Question on Notice labelled 'QoN014-04'.

[250] Scott Leney, 27 July 2020, p. 49.

[251] 27 July 2020, p. 53.

[252] Ibid, p. 57.

[253] Ibid, p. 57.

[254] Ibid, p. 59.

[255] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 3; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p.10; Business Council of Australia, Submission No. 86, June 2020, pp. 1, 3; Group of 100, Submission No. 95, 8 July 2020, p. 3.

risk taking.[256] It was suggested that there is insufficient empirical research on the impact of these laws on Australian businesses.[257]

It was suggested that public enforcement of continuous disclosure obligations through ASIC should be preferred over private enforcement.[258] Yet, it was also noted in the submissions that class actions are often brought in circumstances where regulators are unable or unwilling to act, and attention should be paid to the resources and procedures of public regulators.[259]

3.3.4 *An important dimension of securities class actions*

In their evidence to the inquiry, representatives of Hesta focused on a number of important issues in relation to shareholder class actions, apart from providing compensation to class members. As a superannuation fund, Hesta has $53 billion invested on behalf of its 860,000 members and is presently involved in or has an interest in 21 securities class actions.[260] According to the evidence of Ms Debbie Blakey, CEO at Hesta Superannuation, as an institutional investor Hesta not only has an interest in the *outcome* of securities litigation on behalf of its members, but actively engages with corporations, as a complement to litigation, with a view to bringing about improvements in *corporate governance* and conduct. This was said to be through active engagement with companies at the Board level, through voting and the use of proxies and through litigation.

According to Ms Blakey:

> 'The first two are critically important. Litigation is really for where you have a failure. Litigation is where we have losses as a result of poor behaviour or corporate governance failures. And, when we have litigation, it doesn't mean that we no longer engage and vote. Engagement and voting are absolutes for us, and we will continue to do those. That, in fact, is one of the reasons why we believe that, when there has been a failure at a company, there's such a strong opportunity to step up your engagement. Engagement goes alongside litigation and very much complements it.'[261]

In a number of Australian and United States investor class actions, changes or improvements in corporate governance have been included as part of the terms of settlement. However, at least in the United States context, some commentators have described such changes as merely 'cosmetic'.[262]

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[256] Australian Institute of Company Directors, Submission No. 40, 11 June 2020, pp. 5-7; Allens, Submission No. 69, June 2020, p. 4; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, pp. 7-8; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 5.3; Australian Finance Industry Association, Submission No. 81, 18 June 2020, p. 2.

[257] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 3; MinterEllison, Submission No. 25, 11 June 2020, 4.7, 4.20.

[258] It was also suggested that private enforcement rights should be removed, as in Hong Kong. ASX, Submission No. 72, 17 June 2020, p. 3; Professor Kevin Davis, Submission No. 79, 16 June 2020, p. 2; Business Council of Australia, Submission No. 86, June 2020, p. 8; Group of 100, Submission No. 95, 8 July 2020, p. 3; The Rule of Law Institute, Submission No. 99, pp. 8-10; Louise Petschler, 29 July 2020, p. 1; see also Christian Gergis, 29 July 2020, pp. 6-7.

[259] Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, p. 5.

[260] 3 August 2020, p. 12.

[261] Ibid, p. 14.

[262] Professor Coffee notes that in the area of *derivative actions* empirical research has found that a substantial percentage of United States cases in the Federal Court were dismissed with financial recoveries being rare. The most common form of settlement was said to be '*cosmetic corporate governance reforms*'. John Coffee, *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press, 2015) 42, referring to the

3.4 *Proposals and suggestions for reform*

3.4.1 *General suggestions and proposals*

A number of submissions suggested reform to bring about uniformity of legislation.[263] According to one submission, this should be achieved by states through the Council of Australian Governments, only if a consensus can be reached.[264] It was suggested that Commonwealth and state governments should legislate for anti-avoidance provisions.[265]

Consultation with stakeholders before the implementation of changes was suggested[266] with greater attention paid to non-legal stakeholder perspectives on the class action regime.[267] It was emphasised that any reform must be for the benefit of applicants and group members,[268] ensure flexibility,[269] and should be grandfathered.[270] On one view, heavy-handed regulation is inappropriate, as a 'range of experts are unable to identify any significant evidence of issues warranting heavy-handed regulation, and indeed heavy-handed regulation would likely have the perverse outcome of reducing access to affordable justice by stifling the current competition that is driving lower costs'.[271]

A number of submissions urged that any reform should draw upon the recent, comprehensive and evidence-based research of the ALRC, VLRC and Productivity Commission.[272]

General proposals for the reform of class actions included court powers to oblige parties to identify the claim value early in proceedings, including orders to share information and provide cost estimates; court rule changes to allow information sharing on issues such as insurance and budgets; amending the powers of the court to allow for aggregate damages awards, or requiring courts to set funding commissions.[273]

It was also suggested that the *Federal Court of Australia Act 1976* (Cth) should be amended to include statutory standards of conduct and wide powers to impose sanctions in relation to 'inappropriate forensic conduct' by funders, insurers, parties and lawyers, modelled on the Victorian

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research by Jessica Erickson, 'Corporate Governance in the Courtroom: An Empirical Analysis' (2010) 51 *Wm & Mary L Rev*, 1749.

[263] Clayton Utz, Submission No. 26, 11 June 2020, 51; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 32; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 6.1; Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, p. 7; NSW Bar Association, Submission No. 96, 27 July 2020, 12.

[264] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020,10.3.

[265] Clayton Utz, Submission No. 26, 11 June 2020, 52.

[266] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 14.

[267] Peta Spender, 24 July 2020, p. 27.

[268] Shine Lawyers, Submission No. 35, 11 June 2020, 39; Transport Alliance Australia, Submission No. 63, 11 June 2020, p. 2; Law Council of Australia, Submission No. 67, 16 June 2020, 143.

[269] Adero Law, Submission No. 38, 11 June 2020, 1.4. One specific submission stated that any change must not impact upon the charitable work of the SA LAF Law Council of Australia, Submission No. 67, 16 June 2020, 147.

[270] Shine Lawyers, Submission No. 35, 11 June 2020, 51.

[271] Phi Finney McDonald, Submission No. 87, June 2020, 5.2.

[272] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 3; Shine Lawyers, Submission No. 35, 11 June 2020, 4; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 1.7; CPA Australia, Submission No. 44, 11 June 2020, p. 1; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 9; Australian Council of Superannuation Investors, Submission No. 61, 11 June 2020, p. 1, 3; ISS Securities Class Actions Services LLC, Submission No. 62, 11 June 2020, p. 1; Phi Finney McDonald, Submission No. 87, June 2020, 5.1; Group of 100, Submission No. 95, 8 July 2020, p. 3; Andrew Watson, 27 July 2020, p. 17.

[273] Law Council of Australia, Submission No. 67, 16 June 2020, 21, 100-105.

standards.[274] Participants also proposed the imposition of greater sanctions for defendants and their lawyers for 'obstructive and time-wasting approaches to defence'.[275]

A number of submissions suggested increasing threshold requirements for the commencement of class actions,[276] such as through a certification procedure.[277] For example, the procedure could require specificity in pleadings and an outline of evidence that the class expect to file, quantification of the loss and information on how this was calculated, and estimate of costs, and a certification from counsel that the matter has reasonable prospects for success.[278] Alexander Morris supported the adoption of procedures of judicial scrutiny, or a form of certification, early in the course of litigation such as those utilised in the commercial list of the New South Wales Supreme Court.[279] The insurance Council supported the introduction of a 'more robust certification process'.[280] The Australian Institute of Company Directors (AICD) suggested a certification procedure for securities class actions in particular.[281]

Certification was opposed by other witnesses on the grounds that it increases costs which would ultimately be passed on to class members in the event of a successful outcome and would cause delay in the resolution of the claim.[282]

One submission proposed a requirement for court leave where certain public regulatory investigations are on foot or have concluded, with a presumption against granting leave.[283] Another suggested mandatory consideration of whether an order under s 33N is appropriate at an early stage in proceedings.[284]

Participants considered proposals for the complete removal of, or changes to, limitation periods.[285]

There were differing approaches to the resolution of multiplicity disputes, such as through a statutory certification process, or through a revised Federal Court Practice Note.[286] Submissions noted a need for uniformity and certainty in how multiplicity is resolved.[287] It was suggested that the order in which actions are filed should not be determinative.[288]

[274] Peter Cashman, Submission No. 55, 12 June 2020, p. 1; Peter Cashman, 24 July 2020, pp. 19-21.
[275] Andrew Watson, 27 July 2020, p. 17.
[276] Michael Quinn, Submission No. 24, 11 June 2020, p. 3.
[277] Ashurst, Submission No. 41, 11 June 2020, 21; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 5; Insurance Council of Australia, Submission No. 68, 10 June 2020, p. 2.
[278] PwC, Submission No. 85, 19 June 2020, pp. 2-3.
[279] 13 July 2020, pp. 39-40.
[280] Tom Lunn, 27 July 2020, p. 48.
[281] Louise Petschler, 29 July 2020, p. 1.
[282] Andrew Saker, 13 July 2020, p. 58; John Walker, 24 July 2020, p. 44; Patrick Moloney, 24 July 2020, p. 45; Matt Corrigan, 27 July 2020, p. 73; Daniel Meyerowitz-Katz, Submission No. 1.1, 7 July 2020, 1.5.
[283] Norton Rose Fulbright, Submission No. 45, June 2020, 3.3.
[284] King & Wood Mallesons, Submission No. 53, 11 June 2020, 10-11.
[285] Nigel Jeffares, 24 July 2020, p. 58. See also the discussion between Damian Scattini and Senator Pratt, 27 July 2020, p. 12.
[286] Clayton Utz, Submission No. 26, 11 June 2020, 26; Herbert Smith Freehills, Submission No. 51, 11 June 2020, pp. 3-4; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 16; Norton Rose Fulbright, Submission No. 45, June 2020, 3.2.
[287] Herbert Smith Freehills, Submission No. 51, 11 June 2020, p. 4.
[288] New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 13.1-13.4.

Proposals included express court powers to order class closure,[289] such as are available under s 33ZG of the Victorian legislation,[290] and a suggestion that outcomes should only bind class members who have registered their interest by lodgement of a form with the court by an advertised date.[291]

One submission proposed a panel, external to the Court system, in a form such as the Takeovers Panel, to address matters such as multiplicity, funding agreements, common fund orders and costs, so that the courts can focus on the legal dispute.[292] Another suggested an expert panel, referee or registrar (akin to the Takeovers Panel), to which court should be able to refer matters while retaining control over the outcome of proceedings.[293]

Concerning settlement, there were suggestions that distribution schemes should remain open for longer periods of time and that applications to administer schemes should include publicly accessible information on elements such as costs.[294] It was proposed that settlement administrators should be required to report to class members and the Federal Court.[295]

One reform suggested was the conferral of exclusive jurisdiction over class actions based on Commonwealth laws on the Federal Court.[296] However, it was also noted that any conferral of exclusive jurisdiction over class actions should also examine unintended consequences on issues such as costs payable following settlement approval.[297] On costs, it was noted that lawyers and funders should comply with strict cost disclosure obligations and cost disclosure notices should be provided to class members.[298] Moreover, one submission proposed that costs assessors be appointed for each class action to provide an overview of the costs in the matter and audit accounts paid by the funder, presenting a report to the trial judge.[299] Another submission suggested changes to adverse costs exposure to encourage meritorious public interest litigation.[300]

In response to the inquiry as to the impact of class actions during the pandemic, it was suggested that there should be a six-month moratorium on new class actions related to COVID-19 disclosures.[301]

According to one submission, regulatory redress powers should not be viewed as are often an alternative to class actions, because their exercise can create de facto regulation which may be harmful to small businesses.[302] It was suggested in another submission that class members in actions

[289] Clayton Utz, Submission No. 26, 11 June 2020, 49; Norton Rose Fulbright, Submission No. 45, June 2020, 4.6], Allens, Submission No. 69, June 2020, pp. 20-1.
[290] Herbert Smith Freehills, Submission No. 51, 11 June 2020, p. 6.
[291] Stewart Levitt, Submission No. 52, 11 June 2020, p. 7.
[292] Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 26.
[293] Queensland Law Society, Submission No. 46, 11 June 2020, p. 2.
[294] New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 14.2-14.3.
[295] National Council of Women Australia, Submission No. 77, June 2020, p. 3.
[296] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 32. It was suggested that the commencement of most class actions in the Federal Court would be beneficial because there would prevent forum shopping: James Mathias, 13 July 2020, p. 13. Cf Law Council of Australia, Submission No. 67, 16 June 2020, 122-9 which provides cogent arguments against such a conferral.
[297] Queensland Law Society, Submission No. 46, 11 June 2020, p. 4.
[298] Donaldson Law, Submission No. 65, 12 June 2020, p. 4.
[299] Donaldson Law, Submission No. 65, 12 June 2020, p. 3.
[300] Grata Fund, Submission No. 76, 19 June 2020, pp 7-8. It was also noted in another submission that the adverse costs rule acts as a barrier to public interest litigation which is currently partly remedied by third-party litigation funding Public Interest Advocacy Centre, Submission No. 27, 11 June 2020, p. 4.
[301] Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 32-3.
[302] Prospa, Submission No. 56, 11 June 2020, pp. 3-4.

against regulated firms, whose rights have been extinguished without compensation, should be able to continue to seek compensation through 'external dispute resolution schemes'.[303]

It was suggested that sweeping unilateral changes to Part IVA, such as replacing the opt-out structure for an opt-in structure are 'precipitous' and likely to cause uncertainty and negative consequences.[304] Other submissions advocated for an end to open class actions,[305] or suggested that closed classes should be preferred.[306]

Submissions noted potential reform to communications with class members including the involvement of consumer advocates, financial counsellors and community groups,[307] an online guide to class actions authored by the Government, and class member access to evidence at no cost, without the application of the Harman principle.[308]

A member of the class in the *Bank of Queensland* case proposed that there should be better communication by lawyers with the class, and within the class. He spoke positively about lawyers involved in the matter while expressing dissatisfaction with how the mediation was conducted and the delays in the legal proceedings.[309] He also proposed that there should be procedures for class members to obtain new representation in the event that there is a perceived or actual conflict which prevents law firms from acting, suggesting that this should be overseen by an entity responsible for maintaining standards of conduct within the profession.[310]

It was also suggested that professional legal duties should be enforced more rigorously and that lawyers and law firms in certain contexts should be subject to various regulations on the provision of financial product advice.[311]

Other suggestions included the involvement of all directors in applicable class actions, except where particular directors have personal responsibility for a loss[312] and a levy on all damages and settlement amounts of 1.5% for a D & O fidelity fund, to cover uninsured portions of damages awarded in other cases.[313]

3.4.2 *Reform to the substantive law in securities class actions*

Reflecting the comments of the ALRC, participants noted that class action procedural rules should not be conflated with the substantive law around continuous disclosure.[314] Matt Corrigan of the ALRC emphasised the finding of the Commission's recent report that particular issues with securities class actions 'should be dealt with specifically and not addressed by changes to the class action

[303] Consumer Action Law Centre, Submission No. 43, 11 June 2020, p. 3.
[304] The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 79-85.
[305] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 31; AI Group, Submission No. 92, 15 June 2020 pp. 3, 13.
[306] Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 25; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 26.
[307] Consumer Action Law Centre, Submission No. 43, 11 June 2020, p. 3]
[308] Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, p. 7.
[309] Nigel Jeffares, 24 July 2020, pp. 54-6.
[310] 24 July 2020, p. 62.
[311] Donaldson Law, Submission No. 65, 12 June 2020, pp. 4-6.
[312] Michael Quinn, Submission No. 24, 11 June 2020, p. 3.
[313] Stewart Levitt, Submission No. 52, 11 June 2020, p. 7.
[314] Australian Council of Superannuation Investors, Submission No. 61, 11 June 2020, pp. 1, 3.

procedures or litigation funding more generally'.[315] However, this substantive law was addressed in numerous submissions. There was support for the separate review of the law in this area, as had previously been suggested by the ALRC.[316]

There was vehement support expressed in a number of submissions for existing continuous disclosure and misleading and deceptive conduct obligations and opposition to the temporary changes which had been announced by the Federal Government.[317] It was suggested that any change should be made with caution.[318]

The temporary reforms were also criticised for having an uncertain operation or minimal impact, because of the mixed 'issues of objective materiality with corporate knowledge or negligent behaviour'[319] and continued operation of misleading and deceptive conduct provisions which are commonly pleaded in continuous disclosure actions.[320]

A number of submissions recommended that temporary changes to the disclosure obligations in the Corporations Act in the context of Covid-19 be made permanent.[321] Proposed reforms included a move to periodic disclosure; a change to the interpretation of immediate disclosure to allow for practical and necessary delays involved in decision making; director protections for forward-looking statements; the introduction of good faith, due diligence and safe harbour defences in relation to continuous disclosure and misleading and deceptive conduct; and the inclusion of a fault-based element for those provisions.[322] It was also suggested that private enforcement of continuous disclosure and misleading and deceptive conduct should be stopped,[323] a 'reasonable steps' defence

[315] 27 July 2020, p. 66. In a response to a question on notice, the ALRC provided an estimate of the cost of the litigation funding inquiry and report of in the order of $343,326.
[316] Clayton Utz, Submission No. 26, 11 June 2020, 53-57; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 3.6-3.7; Insurance Council of Australia, Submission No. 68, 10 June 2020, p. 2; Tom Lunn, 27 July 2020, p. 48. During the hearings, Ewen McKay clarified that the submission from Chartered Accountants supporting the review was not necessarily supportive of watering down continuous disclosure obligations (27 July 2020, p. 52.)
[317] See also Daniel Meyerowitz-Katz , Submission No. 1.1, 7 July 2020; Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 16; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 3.7; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 8.10-8.12; AustralianSuper, Submission No. 48, 11 June 2020, p. 2; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 4-5; Australian Council of Superannuation Investors, Submission No. 61, 11 June 2020, p. 2; Law Council of Australia, Submission No. 67, 16 June 2020, 137-8; Yarra Capital Management, Submission No. 71, 16 June 2020, pp. 1-2; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 1; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, p. 2; Phi Finney McDonald, Submission No. 87, June 2020, 9.2-9.6.
[318] Shine Lawyers, Submission No. 35, 11 June 2020, 20-21.
[319] Michael Duffy, Submission No. 47, June 2020, p. 5.
[320] Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 7.3; See also Daniel Meyerowitz-Katz , Submission No. 1.1, 7 July 2020, 2.2-2.4.
[321] See, e.g., Robert Johanson, 29 July 2020, p. 2; RIMS Australasia Chapter, Submission No. 12, June 2020, p. 3; River Capital, Submission No. 32, 9 June 2020, p. 4; Norton Rose Fulbright, Submission No. 45, June 2020, 5.3; Business Council of Australia, Submission No. 86, June 2020, pp. 6-7.
[322] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 3; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, pp. 2, 10-14; Ashurst, Submission No. 41, 11 June 2020, 19; King & Wood Mallesons, Submission No. 53, 11 June 2020, 3; Allens, Submission No. 69, June 2020, pp. 7-8; Yarra Capital Management, Submission No. 71, 16 June 2020, pp. 1-2; PwC, Submission No. 85, 19 June 2020, p. 3.
[323] Australian Institute of Company Directors, Submission No. 40, 11 June 2020, pp. 2, 10-14.

should be available for breach of directors duties under s 180 of the *Corporations Act,*[324] and damages caps could be imposed in securities class actions.[325]

It was suggested that the introduction of a fault element into the continuous disclosure and misleading and deceptive conduct provisions did not constitute 'watering down of continuous disclosure laws' and was not inconsistent with the maintenance of effective continuous disclosure rules.[326] The AICD disagreed with the submission of Professor Spender that the temporary changes are inconsistent with the ASX Listing Rules.[327] Alexander Morris criticised the operation of the class action regime combined with 'strictures of substantive Australian law concerning continuous disclosure and misleading conduct' which threaten the competitiveness of Australian capital markets.[328]

Professor Davis was critical of outcomes in shareholder class actions, while acknowledging the importance of strong disclosure laws and his impression that class actions have a deterrent effect.[329] Professor Spender disagreed with Professor Davis, considering that deterrence is a 'critical factor'.[330] The continuous disclosure regime, and the deterrent effect of private enforcement through class actions, are crucial to ensuring the 'integrity of the market', and any amendments should be subject to sufficient parliamentary scrutiny.[331] Professor Spender warned against changes such as the inclusion of an intentionality or recklessness component.[332] Mr Watson argued that the change to continuous disclosure laws was not 'informed by evidence', will lessen transparency and will lead to worse outcomes for shareholders.[333] In a response to a question on notice, ASIC noted that the continuous disclosure laws keep people informed and are 'particularly important during times of market uncertainty and volatility.'[334]

Whether or not substantive laws in general, or shareholder class actions in particular, serve as an effective deterrent to unlawful corporate conduct is a vexed question on which there appears to be little if any empirical research in Australia. There has, however, been some interesting empirical research in other jurisdictions, including on the relationship between insurance and corporate (mis)conduct.[335]

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[324] Business Council of Australia, Submission No. 86, June 2020, p. 8.
[325] Business Council of Australia, Submission No. 86, June 2020, pp. 9-10.
[326] Louise Petschler, 29 July 2020, p. 1; Daniel Moran, 29 July 2020, p. 29.
[327] Christian Gergis, 29 July 2020, p. 9. See also Daniel Meyerowitz-Katz , Submission No. 1.1, 7 July 2020, 2.2-2.4.
[328] 13 July 2020, pp. 35, 37, 41-3.
[329] 24 July 2020, p. 11.
[330] Ibid p. 26.
[331] Ibid p. 18.
[332] Ibid p. 26.
[333] 27 July 2020, p. 17.
[334] See also Daniel Crennan QC, ASIC Opening Statement to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class action industry, 29 July 2020, p. 2.
[335] In a recent analysis of the empirical evidence from other jurisdictions as to whether *tort law* serves as a deterrent Van Rooij and Brownlee concluded that the studies showed that in all but one domain (corporate director liability towards shareholders), the empirical studies do not offer conclusive evidence that tort deters or that it does not deter: Benjamin Van Rooij and Megan Brownlee, 'Does Tort Deter? Inconclusive empirical evidence about the effect of liability in preventing harmful behaviour' in B. Van Rooij & D. D. Sokol (Eds.), *Cambridge Handbook on Compliance* (Cambridge University Press, 2021 (Forthcoming)).
Their analysis of corporate and officers' liability in respect of shareholders is based primarily on a review by Boyer and Tennyson. Martin Boyer and Sharon Tennyson, 'Directors' and Officers' Liability Insurance,

3.4.3 *Other reforms to substantive laws*

Submissions also included a proposal that private rights of action should be amended to require plaintiffs to have truly suffered loss;[336] suggested changes to evidence legislation to clarify that 'statements proven by way of agreed facts in penalty proceedings may not be used to prove the facts they are agreed to establish, or in cross-examination, in subsequent proceedings';[337] requirements for fault in civil compensation claims;[338] changes to product and personal injury law to prioritise the interests of the consumer or patient, as occurs in New Zealand;[339] and suggested reform of the substantive law around casual workers.[340]

3.5 *Support for present litigation funding practice or arrangements*

3.5.1 *The role and conduct of litigation funders*

A number of submissions expressed support for the role played by commercial funders in class actions, noting that class members would be worse off if there were no funder and the litigation was not viable as a result.[341] Witnesses stated that it was not possible for even the largest law firms to conduct all of their cases on a no-win no-fee basis, and smaller firms do not have this capacity at all.[342] It was speculated that, without funding, around eighty percent of class actions would not

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Corporate Risk and Risk Taking: New Panel Data Evidence on the Role of Directors' and Officers' Liability Insurance' (2015) 82(4) *Journal of Risk and Insurance* 753. They analysed the relationship between corporate risk taking and liability insurance. A number of studies were said to have found 'significant morel hazards effects' in companies whose directors and officers had liability insurance. In one study it was deduced that managers in companies with insurance were more likely to act opportunistically. Another found that companies were more likely to overpay for companies they acquired when they had insurance. Several studies concluded that companies with insurance for officers and directors were more likely to restate their earnings. According to Van Rooij and Brownlee: '*this body of work finds that when there is more insurance for directors and officers to protect them from lawsuits from shareholders, they will be more likely to engage in risky behaviour for the corporation. In other words, when they face less liability, corporate executives will take more risk-prone decisions. In sum, this body of work finds that in contrast to the research about medical malpractice, there is support for the tort deterrence thesis in that lower liability can result in more risky and potentially damaging behaviour.'* Another six studies examined by Boyer and Tennyson apparently did not reveal that *moral hazard* was mitigated by the existence of insurance cover for conduct. According to Van Rooij and Brownlee the research by Boyer and Tennyson found that that although the premiums do seem to respond to the risk of directors getting sued by shareholders, it is not clear that such higher premiums reduce risky corporate decisions by directors or officers. A further study found that insurers who provide corporate executives with insurance against shareholder liability do not monitor corporate behaviour. See generally: https://ssrn.com/abstract=3563452. The relevance of such empirical research to insurance arrangements and shareholder litigation in Australia is problematic.

[336] Allens, Submission No. 69, June 2020, p. 9.

[337] Norton Rose Fulbright, Submission No. 45, June 2020, 3.3.

[338] King & Wood Mallesons, Submission No. 53, 11 June 2020, 25.

[339] Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 8.1.

[340] AI Group, Submission No. 92, 15 June 2020 pp. 17-19.

[341] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 2.2; Rod Barton, Submission No. 9, 10 June 2020, p. 2. Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 15; Slater and Gordon, Submission No. 18, June 2020, 2.6; Rod Gibson, Submission No. 19, 11 June 2020, pp. 2-3; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 4; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 2.13-2.15, 2.19, 2.23; Queensland Law Society, Submission No. 46, 11 June 2020, p. 4; Vannin Capital response to SCSG submission, Submission No. 90.3, 26 June 2020, pp. 3-4; Lindsay Clout, Submission No. 94, 2020; Name withheld, Submission No. 98.

[342] Andrew Watson, 27 July 2020, p. 27; Matt Corrigan, 27 July 2020, p. 66. In response to a question on notice from Mr Falinksi MP, Matt Corrigan clarified: 'Comparisons between funded and unfunded class actions are not necessarily an 'apples and apples' comparison. There is empirical evidence that a number of successful class actions would not have run absent the funding provided by litigation funders. Accordingly, there are

proceed.[343] The comparison between class member returns of 85% in matters without a funder, and 51% where a funder is involved was viewed as a false equivalency, as in many of those matters, the absence of funding would mean that there was no compensation achieved.[344] Those actions which do not involve funders may involve lower costs or risks, such that they can be funded by law firms.[345]

Actions such as the stolen wages settlement in Queensland, which was brought by a small firm with litigation funding, were said to have resulted in 'fantastic' outcomes which could otherwise not have been achieved.[346] The profit motive of funders should perhaps not be criticised when it leads to positive outcomes.[347] Rory Markham clarified the historical role of the 25% uplift for solicitors acting on a 'no win no fee' basis and observed that it is not used as a proxy for funding.[348]

It was further suggested that 'close to almost all cases' Omni Bridgeway has funded were not viable under other financing arrangements and were 'beyond the reach of most individuals and SMEs'.[349] This assertion was also made by Patrick Moloney for LCM.[350] It was emphasised that 60% of the amount recovered is preferred by the overwhelming majority of group members to receiving no redress at all, and that those who sign up to Omni Bridgeway funding agreements are asked to avail themselves of independent legal advice, paid for by the funder.[351] This view was supported by the lead plaintiff in the *Murray Goulburn* class action run by Slater and Gordon, who noted that none of the other class members complained either.[352] As a result of competition it was contended that in some class actions class members are guaranteed to receive more than 90% of the returns.[353]

representative plaintiffs and group members who have received damages as a result of successful funded class actions that would have otherwise not received any compensation.' It was further noted that 'there have been a plethora of studies and analyses commissioned by the Government in recent years that have highlighted that access to justice for many individuals remains elusive.' In response to a question on possible measures to reduce payments to lawyers and returns to funders, there is further information provided on the benefits of a public standing redress scheme, as recommended by the ALRC in Chapter 8 of Report 134.

[343] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.2.

[344] Litigation Capital Management, Submission No. 23, June 2020, 58; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 14-17. The Law Council noted in 'Response to Question on Notice No. 2' that some examples of class actions which would not have proceeded without funding are: *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in Liq)* [2012] FCA 1028; *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)*[2018] FCA 1289; *Pearson v State of Queensland (No 2)* [2020] FCA 619; *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837; and *Clasul Pty Ltd v Commonwealth* [2016] FCA 1119.

[345] Andrew Roman, Submission No. 8, 10 June 2020, p. 4]

[346] 27 July 2020, pp. 27-8.

[347] 27 July 2020, p. 28.

[348] 27 July 2020, p. 41.

[349] 13 July 2020, p. 53.

[350] 24 July 2020, p. 35.

[351] Andrew Saker, 13 July 2020, p. 55.

[352] Rod Gibson, 3 August 2020, p. 3. Omni Bridgeway clarified that the objection processes in class actions are 'as simple as completing and returning a short form to the court, and does not require the claimant to be represented by a lawyer or even appear in person for their objection to be considered, although they may have appeared if they wished to do so': Response to Question on Notice 05-08, 6.

[353] Ben Phi, 27 July 2020, p. 42.

Funders were said to be vital for increasing access to justice.[354] In particular, funders were viewed as crucial to certain forms of proceedings, such as many industrial relations class actions,[355] franchisee class actions,[356] corporate litigation[357] and insolvency proceedings.[358]

It was noted that failed litigation can result in significant losses for funders, such as the $30 million lost by Omni Bridgeway in the bank fees case.[359] Funding was necessary for that case to be brought, however, and it was 'a very critical and important case that had to be run on behalf of consumers [that] established very important points of principle for all Australian banking consumers.'[360]

In the words of one class member in a *PFAS* class action:[361]

> The credibility of a class action to a community call for justice cannot be underestimated and is more often than not lost in the debate surrounding funders costs. As we said publicly when the Federal Court approved the Williamtown settlement – had it not been for access to a committed legal funder then our community would have been left to rot.

It was suggested that there does not appear to be a substantial problem in respect of litigation funding entities failing, abandoning jurisdictions or otherwise failing to meet their obligations and that, when this had occurred it had not led to adverse outcomes for class members.[362] It was submitted that formal regulation was not necessary, this had been the conclusion of previous enquiries and ASIC had 'shown no interest in regulating Funders.'[363]

It was noted that the involvement of funders can increase efficiencies in the resolution of class actions, as defendants are cognisant of the fact that the other side is unlikely to run out of money and drawing out the litigation is an ineffective tactic.[364] It was also submitted that funders are

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[354] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.16, 3.20; Paola Balla, Submission No. 10, June 2020, p. 2; Harbour Litigation Funding, Submission No. 11, June 2020, p. 4; Dr Warren Mundy, Submission No. 17, June 2020, p. 4; Slater and Gordon, Submission No. 18, June 2020, p. 1; Stewart Levitt, Submission No. 52, 11 June 2020, p. 3; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 38-46; Operation Redress Pty Ltd, Submission No. 64, June 2020, p. 2; Law Council of Australia, Submission No. 67, 16 June 2020, 26-27; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 1; Grata Fund, Submission No. 76, 19 June 2020, p. 10; Nicos Andrianakis, Submission No. 82, 11 June 2020, p. 2; Business Council of Australia, Submission No. 86, June 2020, p. 9; Phi Finney McDonald, Submission No. 87, June 2020, 3.1; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 7.14, 8.1; Augusta response to AI Group submission, Submission No. 92.2, 26 June 2020, 18; Name withheld, Submission No. 98. It was noted in one submission that a number of funders support public interest litigation through donations to PIAC's ACO fund, and suggested that additional burdens on funders may impact this fund and the conduct of public interest litigation Public Interest Advocacy Centre, Submission No. 27, 11 June 2020, p. 6.

[355] Communication Workers Union Victoria, Submission No. 83, June 2020, p. 3; Rory Markham, 27 July 2020, p. 38.

[356] Operation Redress Pty Ltd, Submission No. 64, June 2020, p. 1.

[357] Patrick Moloney, 24 July 2020, p. 33.

[358] Australian Restructuring Insolvency & Turnaround Association (ARITA), Submission No. 34, 11 June 2020, p. 1; Stewart Levitt, Submission No. 52, 11 June 2020, p. 5; Professor Lombard, 24 July 2020, p. 15.

[359] John Walker, 24 July 2020, p. 35.

[360] Andrew Watson, 27 July 2020, p. 22.

[361] Lindsay Clout, Submission No. 94, 2020, p. 1.

[362] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 3; Professor Vince Morabito, Submission No. 6, 10 June 2020, p. 1; Stewart Levitt, Submission No. 52, 11 June 2020, p. 5.

[363] Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 19-20; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 5; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 7.

[364] Andrew Roman, Submission No. 8, 10 June 2020, pp. 5-6.

sophisticated and are better able to intervene to ensure the efficient progress of the litigation than many plaintiffs.[365]

Despite this, they were not viewed as exercising excessive control.[366] It was submitted that any potential or actual conflicts arising in funded litigation are managed by lawyers, who are conscious of their ethical and fiduciary obligations.[367] It was noted that recently, a UK court held that a lawyer is not in a fiduciary relationship with a litigation funder and the client of the lawyer is the plaintiff, not the funder.[368] Omni Bridgeway stated that it 'negotiates litigation budgets with the claimants' lawyers, ensures so far as possible that the legal costs and strategies are proportionate to the potential recoveries, liaises with the lawyers on a day-to-day basis, provides strategic advice and often participates in mediations and settlement discussions'.[369] However, Omni Bridgeway argued that this level of input into the litigation is acceptable and essential, as the NSW Court of Appeal stated in *Clairs Keeley (No 2)* at [124].[370] It is, moreover, subject to the plaintiff's right to override any instructions or input from the funder, the lawyers' fiduciary duties to the client, and court approval of all settlements.[371]

John Walker of the Association of Litigation Funders of Australia stated that sophisticated funders have a capacity to provide valuable assistance in the development of the litigation, but that the preeminent role of clients is ensured by funding agreement contracts.[372] Celia Hammond MP queried whether there was sufficient transparency around the contracts used in Australia to support this claim, given that some are made confidential as part of settlements.[373] She suggested that confidential data which was not available for the preparation of the ALRC report impeded the capacity of the Commission to obtain a 'true and accurate' position.[374] However, as noted by Professor Spender:[375]

> Previously confidentiality orders have stifled the scrutiny of class action settlements by academics and commentators, but the courts are recognising this and have required parties to frame their evidence to allow it to be publicly available.

In addition, it was noted that litigation funding may allow law firms to subsidise meritorious actions which are less profitable for disadvantaged clients on a 'no win no fee' basis.[376]

Some submissions were to the effect that litigation funding fees are reasonable or are becoming increasingly competitive.[377] Ben Phi highlighted the importance of competition to bring about

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[365] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 4.1, 4.2], Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 3; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 4.2.
[366] The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 46; Andrew Saker, 13 July 2020, p. 61; Ben Hardwick, 27 July 2020, p. 21.
[367] Ben Hardwick, 27 July 2020, p. 21.
[368] In response to a question on notice, Mr McDonnell provided details of the case: *Hall v Saunders Law Ltd & Ors* [2020] EWHC 404.
[369] Omni Bridgeway, Response to Question on Notice 05-09, 1.
[370] Ibid 2.
[371] Ibid.
[372] 24 July 2020, p. 33.
[373] 24 July 2020, pp. 33-4.
[374] 27 July 2020, p. 67.
[375] 'Response to Question on Notice No 19-06b'.
[376] Australian Lawyers Alliance, Submission No. 2, 8 June 2020,10.
[377] Professor Vince Morabito, Submission No. 6, 10 June 2020, pp. 1-2; Harbour Litigation Funding, Submission No. 11, June 2020, p. 4; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 12; Dr

funding models which provide benefits to class members, such as the selection of the lower of a multiple or percentage amount in the *GetSwift* class action and all-in figures inclusive of legal costs incurred during the course of the action.[378]

It was argued that returns for funders are proportionate to the risks and costs involved in class action litigation and that judges provide independent and proactive scrutiny of costs.[379] It was highlighted that courts approved funding costs as part of settlement agreements in 92.8% of Part IVA settlement approval applications.[380] High percentages obtained by funders and lawyers might give rise to concern 'on the face of it' but be reasonable in terms of the work undertaken.[381] Submissions asserted that class members often achieve large amounts of compensation from funded actions.[382] Fees were said to correspond to the risks of litigation[383] and returns were viewed as moderate or, at any rate, not excessive.[384]

In response to a question on notice, Omni Bridgeway stated that none of the 28 completed shareholder class actions it had funded from 2001 had resulted in a judgment in favour of the defendant. However, 'there have been varying degrees of "success" with some actions settling better than others.'[385] The funder had lost three non-shareholder class actions, including *Allstate*

Warren Mundy, Submission No. 17, June 2020, p. 6; Slater and Gordon, Submission No. 18, June 2020, 1.3; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, pp. 3-4; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 33; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 8-9, 11; Phi Finney McDonald, Submission No. 87, June 2020, 2.7-2.11, 2.15; Augusta response to AI Group submission, Submission No. 92.2, 26 June 2020, 2. On one view, this was because of the availability of common fund orders: Law Council of Australia, Submission No. 67, 16 June 2020, 14.

[378] 27 July 2020, p. 43.

[379] Andrew Saker, 13 July 2020, p. 49.

[380] Litigation Capital Management, Submission No. 23, June 2020, 34] citing; Vince Morabito, 'Looking into the Fishbowl – Open Justice and Federal Class Action Settlements' (2019) 93 ALJ 446 at 446.

[381] Pauline Wright, 29 July 2020, p. 24.

[382] For example, In *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* Submission No. 2020] FCA 579, the claimants obtained approximately 80% of the settlement sum, while only 11% was paid to the funder as commission: Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 11. Anecdotally, funders reported that their current Australian class action commissions ranged between 25% and 20%: Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 1. One submission stated that 'At least $888,605,232 has been paid to at least 96,217 shareholders, as a result of settled shareholder class actions. At least $400,754,310 has been received by 11,686 class members as a result of successful product liability class actions. In the federal class actions filed with respect to the VW global emissions scandal, it is estimated that $120.7 million will be received by the owners of 42,500 vehicles. It is also estimated that in the hip implants class actions approximately $80 million will soon be distributed to class members… just over one billion dollars had been received by 28,300 class members in Victorian class actions.' Professor Vince Morabito, Submission No. 6, 10 June 2020, pp. 4-5]

[383] Andrew Roman, Submission No. 8, 10 June 2020, p. 1; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 3; Litigation Capital Management, Submission No. 23, June 2020, 48; Augusta Ventures, Submission No. 31, 11 June 2020, 12; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 4.8; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 1, 5, 7, 10. It was also suggested that risks in securities class actions had increased as a result of recent court decisions such as *Myer* Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 18. Professor R Officer outlined a model to calculate a rate of return for funders which would justify the investment made in a particular class action: Submission No. 100, 15 September 2020. Sean McGing provided a detailed submission on the principles involved in a calculation of a reasonable return for funders, following his involvement as an expert witness in the Banksia class action: submission No. 1010, 2 October 2020.

[384] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 2.4, 2.6.

[385] Omni Bridgeway, 'Response to Question on Notice 05-02: Number of shareholders lost', 1.

Explorations, the *Bank Fees* class action and the *Bank of Queensland* franchise case.[386] Omni Bridgeway stated that significant losses were sustained through due diligence conducted on shareholder matters which ultimately did not proceed.[387] Of the 28 actions, Omni Bridgeway discontinued funding for six actions for reasons including where the pre-conditions for funding were not met, or where it became apparent in the course of the action that the defendant did not have the capacity to pay any judgment or there were insufficient prospects of success.[388] Resources expended on those 6 shareholder actions represented losses for the funder. Risks exist because the funder will usually have very little information at the outset and there are many complex legal issues in shareholder class actions which are unresolved.[389] The landscape is said to be changing, as more securities class actions are going to trial and being appealed to the High Court, leading to delays and changes in the law.[390]

In response to concerns about a high rate of return to funders in some individual cases it was contended that funder returns should be viewed 'on a portfolio basis, without hindsight bias, and on a net basis, not by cherry-picking individual case returns after the event on a gross basis'.[391] In his appearance before the inquiry, Andrew Saker of Omni Bridgeway suggested that the return on invested capital (ROIC) analysis on the basis of one return, rather than over the life of an investment, was 'misleading'. The risks involved include liability for costs which may exceed the insurance cap of the funder and enforcement risks against insurers.[392]

Omni Bridgeway provided the Joint Committee with data on internal rates of return for class actions in comparison with their rates in other jurisdictions from 1 July 2011.[393] While the rate of return excluding capitalised internal costs was higher for Australia than outside Australia (80% over 72 completions compared with 65% and 44 completions), the rates were lower for Australia when capitalised internal costs were taken into account and when viewed on an at-risk capital basis (12% compared to 40%), because of the adverse costs risk in Australia.[394] Risks for funders are categorised according to uncertainty as to cost, time, quantum, and recoverability. It was said to be 'intellectually dishonest' to view a return on a matter in which costs were lower and resolution was reached at an earlier stage in a vacuum, with the benefit of hindsight and without reference to other matters in which resolution required greater costs and delay.[395]

[386] Ibid. Omni Bridgeway stated that the total losses for those actions was $43.4 million, consisting of $22.1 million of lost invested capital, $4.5 million of capitalised internal costs, and $16.8 million in adverse costs. Across its global portfolio, the funder had lost 24 cases, of which 12 were in Australia. Omni Bridgeway responded to a request for information memoranda or prospectuses provided to potential investors that there 'are no such documents in relation to these funds because there is no legal requirement or investor request for them to be provided': Response to question on notice 05-11, 1.

[387] Ibid.

[388] Ibid.

[389] Ibid.

[390] Ibid.

[391] Andrew Saker, 13 July 2020, p. 49; see also Janice Saddler, 27 July 2020, p. 25.

[392] 13 July 2020, pp. 58, 60. Further information on the returns of the various funds of Omni Bridgeway are provided in its response to Question on Notice 05-05, 05-07, and 05-08, including a more detailed explanation of the inadequacy of ROIC calculations in this context.

[393] Omni Bridgeway, Response to Question on Notice 05-04, 1-2.

[394] Ibid.

[395] Omni Bridgeway, Response to Question on Notice 05-08, 3-4.

It was suggested that court oversight, such as was demonstrated in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3*),[396] offers sufficient protection for class members.[397] The frustration of the claimants in the *Bank of Queensland* class action was said to be 'absolutely understandable and regrettable'.[398] However, it was suggested that this instance might be explained as the promises and hopes raised by the action not being fulfilled, rather than as a result of any misconduct.[399] Damian Scattini pointed out that, in his three decades as a solicitor, he had only one negative relationship with a litigation funder, which was in respect of Vannin in the *Bank of Queensland* action.[400]

In that case, the settlement was not unreasonable given the actual content of the claim and the likelihood that it would have failed had it proceeded to trial.[401] The decision of Justice Murphy reflected the 'wisdom of Solomon', according to one member of the class.[402] The reduction in fees in that case reflected judicial consideration of proportionality.[403] The final settlement amount was attributable to a change in the view of the prospects for the action. More knowledge was gained through the process of scrutinising the documents involved, which apparently did not support earlier statements made by ASIC to the law firm representing the applicant and class members.[404]

Furthermore, submissions noted that courts increasingly bring in independent experts to assist in decision making processes and judges receive further assistance from counsel.[405] In matters where the interests of the group members are separately represented, the law firm takes on a quasi-contradictor role to assist the Court in determinations of the reasonableness of costs.[406]

Funders interests were said to be largely aligned with those of class members and the courts.[407] Conflict was not viewed as a significant problem and existing incentives and measures, such as Reg 248 and conflict management systems were considered adequate to protect the interests of class members.[408] Submissions referred to existing safeguards in funding agreements which are provided to defendants and the court, including cooling-off periods, support to encourage class members to obtain independent legal advice, and standard terms on conflict management.[409] Security for costs applications were described as an effective mechanism for ensuring transparency.[410] It was argued

[396] Submission No. 2018] FCA 1842.
[397] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 4.3, 5.4; Balance Legal Capital, Submission No. 13, 10 June 2020, p. 5; Stewart Levitt, Submission No. 52, 11 June 2020, p. 4; Quinn Emanuel response to SCSG submission, Submission No. 90.1, 25 June 2020, p. 4; Peter Cashman, 24 July 2020, pp. 20-1; Patrick Moloney, 24 July 2020, p. 37; Janice Saddler, 27 July 2020, p. 19; John Emmerig, 29 July 2020, pp. 20-1; Pauline Wright, 29 July 2020, p. 30.
[398] Pip Murphy, 24 July 2020, p. 42.
[399] 24 July 2020, p. 14.
[400] 27 July 2020, pp. 9-10.
[401] Peter Cashman, 24 July 2020, p. 34; Crispian Lynch, 27 July 2020, p. 11.
[402] Nigel Jeffares, 24 July 2020, p. 58.
[403] Damian Scattini, 27 July 2020, p. 12.
[404] Ibid.
[405] Peter Cashman, 24 July 2020, p. 25.
[406] Crispian Lynch, 27 July 2020, p. 11.
[407] Balance Legal Capital, Submission No. 13, June 2020, p. 2.
[408] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.14; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 17; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 3; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 4.3; Stewart Levitt, Submission No. 52, 11 June 2020, p. 6; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 21; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 4.
[409] Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 12-13.
[410] Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 5.

that 'regulation for regulation's sake which imposes strict compliance conditions on Funders is neither necessary nor productive.'[411]

There was a rejection of the idea that there has been an increased pursuit of meritless claims because of the increased availability of litigation funding.[412] It was stated that every two out of three litigation funded class actions in Australia, and over 72% of federal funded class actions, were resolved through court-approved settlement agreements.[413] This was said to result from due diligence undertaken by funders; funders would not engage in unmeritorious or opportunistic actions, as this would be against their commercial interests.[414] Adverse costs orders were viewed as an effective mechanism to prevent speculative actions.[415] It was noted that there was only one instance of funders failing to meet their obligations with respect of adverse costs orders recorded in ALRC Report No. 134.[416]

Submissions queried the notion that there has been a sharp increase in funded actions.[417] It was suggested that fears over litigation funding are 'confected',[418] disingenuous[419] or based on misconceptions.[420] It was suggested that litigation funding is not a threat to business and, indeed, provides finance to business actions.[421] Moreover, it was described as 'perverse' for groups which represent defendants claim that funding is prejudicial to plaintiffs while failing to properly acknowledge the misconduct of defendants which give rise to causes of action.[422] Ben Phi expressed a concern that the arguments against litigation funding and class actions are untrue and contrary to the empirical evidence.[423]

Concern was expressed in one submission that it would be 'very difficult, if not impossible' to respond adequately to the request for evidence on the quantum of fees, costs and commissions earned by funders and how the income is treated within set timeframes for the inquiry, and information provided could 'only be based on isolated anecdotes and speculation'.[424] It is regrettable that the Federal Government has sought to implement unilateral changes to funding that pre-empted the outcome of the Joint Committee's inquiry which did not draw upon, and indeed were contrary to, the *evidence-based* reforms proposed by numerous law reform bodies.

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[411] Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 4.
[412] Augusta Ventures, Submission No. 31, 11 June 2020, 14; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 17.
[413] Professor Vince Morabito, Submission No. 6, 10 June 2020, p. 1. See also Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments', Monash University, January, cited by Murphy J in *Rushleigh Services Pty Ltd v Forge Group Limited (in liquidation) (Receivers and Managers appointed)* [2019] FCA 2113 [54].
[414] Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 6; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 20-21, 61; Communication Workers Union Victoria, Submission No. 83, June 2020, pp. 3-4.
[415] Phi Finney McDonald, Submission No. 87, June 2020, 3.3.
[416] New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 6.2.
[417] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.8.
[418] Harbour Litigation Funding, Submission No. 11, June 2020, p. 2.
[419] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 1.15.
[420] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.1, 2.3; Slater and Gordon, Submission No. 18, June 2020, p. 2; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, 17.
[421] Balance Legal Capital, Submission No. 13, 10 June 2020, p. 3.
[422] Augusta response to AI Group submission, Submission No. 92.2, 26 June 2020, 17.
[423] 27 July 2020, p. 47.
[424] Andrew Roman, Submission No. 8, 10 June 2020, pp. 3-4.

3.5.2 *Common fund orders*

A number of submissions expressed support for common fund orders (CFOs) which were said to incentivise open class actions, render class actions viable where a book build would be difficult, give the courts greater oversight over transaction costs, and contribute to lower funding commission rates through greater competition.[425] CFOs were preferred to book building.[426] In particular, CFOs were considered a way to obtain funding for industrial relations class actions, where funders are less likely to provide funds otherwise.[427] CFOs were also said to be beneficial for defendants as they ensure finality.[428] They were also said to help to solve problems of multiplicity.[429]

It was suggested that the outcome in *BMW v Brewster* will lead to worse outcomes for class members, including fewer actions being funded and greater proportions of proceeds going to funders.[430] Action to provide clarity on CFOs was requested in a number of submissions.[431] This need for clarity through legislation, whether to allow or prohibit CFOs, was shared in submissions which did not express a preference either way.[432] Several submissions proposed an express power to make CFOs on the plaintiff's application or the court's own motion.[433] One submission took a different view, suggesting that CFOs should be allowed, but not through an express court power as this merely increases the regulatory burden on the courts.[434]

3.5.3 *Role and conduct of lawyers*

A number of stakeholders submitted that plaintiff lawyers play a positive role in ensuring funding agreements are in the best interest of the claimants and place paramount importance on their

[425] See, e.g., Michael Legg, 13 July 2020, pp. 29-30; Peta Spender; 24 July 2020, p. 18; Peter Cashman, 24 July 2020, p. 19; John Walker, 24 July 2020, p. 32; Andrew Watson, 27 July 2020, p. 17; Pauline Wright, 29 July 2020, p. 16; Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 7.1; Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 3; Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.11; Harbour Litigation Funding, Submission No. 11, June 2020, p. 7; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 21; Slater and Gordon, Submission No. 18, June 2020, 7; Litigation Capital Management, Submission No. 23, June 2020, p.5; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, pp. 2, 5; Augusta Ventures, Submission No. 31, 11 June 2020, 18; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 4.

[426] Shine Lawyers, Submission No. 35, 11 June 2020, 52-55, 58; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 4.11. This can be contrasted to the support for bookbuilding for ensuring that class members are interested in the action, encouraging due diligence and avoiding a rush to court: Allens, Submission No. 69, June 2020, p. 18.

[427] Adero Law, Submission No. 38, 11 June 2020, 1.21.

[428] Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 6; Stewart Levitt, Submission No. 52, 11 June 2020, p. 6.

[429] Norton Rose Fulbright, Submission No. 45, June 2020, 2.8-2.9.

[430] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 1.3, 1.5; Professor Vince Morabito, Submission No. 6, 10 June 2020, p. 2.

[431] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 11; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 6.29.

[432] See NSW Bar Association, Submission No. 96, 27 July 2020, 45.

[433] Professor Vicki Waye, Submission No. 5, June 2020, p. 5; Submission No. 16 : 22; Litigation Capital Management, Submission No. 23, June 2020, 97-99; Clayton Utz, Submission No. 26, 11 June 2020, 43; Shine Lawyers, Submission No. 35, 11 June 2020, 37; AustralianSuper, Submission No. 48, 11 June 2020, p. 2; Peter Cashman, Submission No. 55, 12 June 2020, p. 1; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 87; Law Council of Australia, Submission No. 67, 16 June 2020, 6, 96-105; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 7.6, 7.15; Vince Morabito, 24 July 2020, p. 10; Peta Spender, 24 July 2020, p. 22.

[434] Professor Peta Spender, Submission No. 49, 11 June 2020, p. 4.

fiduciary duties to clients.[435] Allegations made in other submissions to the Joint Committee concerning 'introducer fees' or other misconduct were denied.[436] According to one submission, solicitors 'are well equipped to determine whether a funder is sufficiently resourced to meet its obligations, and have a clear interest in doing so to ensure their fees are paid.'[437] It was submitted that lawyers are subject to sufficient regulation.[438]

3.5.4 *Role and conduct of judges*

It was submitted that scrutiny by the court is the most appropriate and effective mechanism to prevent the proliferation of unmeritorious claims, and to ensure that legal fees and funding commissions are fair and reasonable.[439] The courts were described as best placed to judge the reasonableness of settlements and to balance the interests of the parties in a flexible way according to the circumstances of the matter before them.[440] It was suggested that if 'the Parliamentary Committee has faith in Australia's judges, who have had extensive experience in class actions, there is no case for any new government intervention.'[441]

3.6 *Criticism of present litigation funding practice or arrangements*

3.6.1 *The role and conduct of litigation funders*

In other submissions, the role of litigation funders were criticised. Litigation financing arrangements were criticised as flying in the face of justice.[442] Funders were described as duplicitous, 'with gluttonous financial appetites and rapacious conduct putting clients last'.[443] Funders were said to convert the purpose of proceedings to achieving financial profit rather than the pursuit of justice.[444] The class action regime was described as 'corrupted'.[445]

One submission argued that funding does not improve access to justice among middle class Australians, because there is little funding for lower-value claims.[446] Mr Falinski suggested that

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[435] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.6; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p.5; Adero Law response to AI Group submission, Submission No. 92.1, 26 June 2020 1.12.

[436] Adero Law response to AI Group submission, Submission No. 92.1, 26 June 2020 1.4-1.7, 1.17.

[437] New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 6.3.

[438] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 4.4-4.5, 4.12; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 12]

[439] Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 13, 16; Dr Warren Mundy, Submission No. 17, June 2020, p. 5; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 5; Litigation Capital Management, Submission No. 23, June 2020, 18.3; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 2; Shine Lawyers, Submission No. 35, 11 June 2020, 50; Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 2.2; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 2.24, 4.12; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 1, 5, 13; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 4.3-4.4.

[440] Shine Lawyers, Submission No. 35, 11 June 2020, 38; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 4.23-4.24; John Walker, 24 July 2020, p. 32; Ben Hardwick, 27 July 2020, p. 18; Rod Gibson, 3 August 2020, pp. 2, 7.

[441] Andrew Roman, Submission No. 8, 10 June 2020, p. 2. See also CPA Australia, Submission No. 44, 11 June 2020, p. 2-3; Stewart Levitt, Submission No. 52, 11 June 2020, p. 4.

[442] James Mathias, 13 July 2020, p. 1.

[443] Mark Morris, Submission No. 75, 1 June 2020, 7, 23.

[444] Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 1; Group of 100, Submission No. 95, 8 July 2020, p. 3; Stuart Clark, 13 July 2020, p. 16; Kristen Wydell, 27 July 2020, p. 50; Louise Petschler, 29 July 2020, p. 1.

[445] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 13.

[446] Professor Peta Spender, Submission No. 49, 11 June 2020, p. 1.

access to justice arguments in support of litigation funding are narrowly focused on areas where profits are largest and that it is objectionable for litigation funders to seek profits, rather than being primarily motivated by facilitating access to justice.[447] Witnesses from litigation funding entities contended that there is no conflict between these motivations.[448] Ms Hammond MP suggested that this is stretching credulity.[449] However, this emphasis on profit and the selection of cases to fund based on their high likelihood of success suggests that funders are providing funds for meritorious claims which might not otherwise have been viable.[450]

The explanation Andrew Saker of Omni Bridgeway provided for declining to fund personal injury and product liability claims, such as the pelvic mesh case, is that the funder was not comfortable with 'taking commission from women who needed to have medical procedures to repair the damage that had been suffered', in circumstances where taking a commission would mean that those who have suffered are unable to afford that medical treatment.[451]

It was suggested that the availability of litigation funding has a negative impact on Australian businesses and the Australian economy.[452] The market for litigation funding was described as one of the most active and profitable in the world.[453] It was argued that percentage commissions for funders cannot be justified according to the risks undertaken, given the high success rates for class actions and the way that this risk may be offset by insurance.[454] Alleged success rates of between 87 to 94% were said to indicate that funding commissions are not justified by the levels of risk in the Australian litigation funding market.[455]

Concerns were expressed over the structures that may enable funders to derive profits from Australian class action litigation without paying Australian income or company tax.[456] Funders were described as offshore vehicles, with money often invested through tax havens and countries with advantageous tax laws.[457] In response, it was argued that this claim 'is not supported by any empirical data and is wholly speculative and emotive.'[458]

Opt-out class actions were said to lead to situations in which claimants have a minimal interest in the case.[459] Automobile recall actions were described as opportunistic and speculative.[460] It was suggested that those left outside the class in funded actions are left without redress.[461] Submissions

[447] 13 July 2020, pp. 19, 33.
[448] Andrew Saker, 13 July 2020, p. 61; John Walker, 24 July 2020, p. 32.
[449] 13 July 2020, p. 61.
[450] Warren Mundy, 13 July 2020, pp. 33-4.
[451] 13 July 2020, pp. 59, 63. Whilst we have endeavoured to avoid expressing our own views on the evidence of witnesses, this is troubling logic, given that the lack of availability of funding may mean that those who have been injured obtain no redress or compensation at all.
[452] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 1.
[453] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 2; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 4. Cf Stewart Levitt, Supplementary Submission No. 52.1, 2020.
[454] Ibid, pp. 1, 3, 8, 13.
[455] Menzies Research Centre, Submission No. 66, 14 June 2020, pp. 15-16.
[456] Alexander Morris, 13 July 2020, p. 45; Peter Cashman, 24 July 2020, p. 21; Mr Falinksi MP, 24 July 2020, p. 38; Senator Paterson, 24 July 2020, p. 59.
[457] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 11; AI Group, Submission No. 92, 15 June 2020 p. 4.
[458] Augusta response to AI Group submission, Submission No. 92.2, 26 June 2020, 4.
[459] Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 25.
[460] Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, p. 1.
[461] Australian Lawyers Alliance, Submission No. 2, 8 June 2020,20.

included claims that funders exercise excessive control over the litigation, particularly at settlement stages.[462]

Concerns were raised about unreasonable returns made by funders in some cases.[463] Submissions referred to the outcome in *Murray Goulburn*.[464] Returns such as the funder obtained in that class action were characterised as ridiculous.[465] The outcome was also cited by Mr McDonnell in support of the position that funding commissions of 25% are to be considered excessive when viewed in terms of the rate of return on capital, which was stated to be 502%.[466]

The proportions of settlements going to funders were said to be excessive.[467] One class member expressed dissatisfaction at the levels of compensation obtained by funders, as there is a sentiment that this takes away from the share of plaintiffs in an unacceptable way.[468] One submission referred to a matter in which group members received as little as 29% of the settlement amount, while the funder received 62%.[469] A number of submissions referred to ALRC ratios of 51% to 85% median

[462] MinterEllison, Submission No. 25, 11 June 2020, 3.32; Clayton Utz, Submission No. 26, 11 June 2020, 6; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 29; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, p. 6; National Council of Women Australia, Submission No. 77, June 2020, p. 3; Business Council of Australia, Submission No. 86, June 2020, p. 9.

[463] Stuart Clark, Submission No. 22, June 2020, p. 6; Ashurst, Submission No. 41, 11 June 2020, 5; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 3; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, p. 2; National Council of Women Australia, Submission No. 77, June 2020, p. 3; Attorney-General's Department, Submission No. 93, June 2020, p. 20. For example, in one submission it was claimed that Omni Bridgeway had returns of around 157% 21: p. 4 and Annexure 1. A concept of return on invested capital (ROIC) was utilised by those critical of funding commissions Menzies Research Centre, Submission No. 66, 14 June 2020, p. 20. Submission No. 97, authored by an equities analyst who did not provide their name, contended that ROIC analyses were misleading and that the aggregate returns are much lower and risks are much higher than investment in equities, pp. 1-2. On p. 4, it was stated that 'litigation funding is an extremely speculative asset class in isolation and requires a requisite return to compensate for these risks.'

[464] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 4; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 9. This can be contrasted with Submission No. 19 from a director whose company formed part of the class in that matter.

[465] Stuart Clark, 13 July 2020, p. 16; Jason Falinksi MP, 27 July 2020, p. 46.

[466] 13 July 2020, pp. 38-9. In its 'Response to Question on Notice 05-08', Omni Bridgeway provided that the 502% figure was incorrect, as it failed to take into account costs incurred after the evidence was filed in the proceeding. The more accurate figure is said to be a return of 3.43 on its investment, reduced to 3.28 when capitalised overheads are included. Omni Bridgeway emphasised the significant variation in returns across cases, global approaches to calculation of risks by funders, and the need to include all costs incurred when the returns are calculated. It is stated that 'Omni Bridgeway has generated an all-in ROIC, before tax, of about 17% in the period from 2001 to 30 June 2020', excluding at-risk capital.

[467] Business Council of Australia, Submission No. 86, June 2020, p. 9; AI Group, Submission No. 92, 15 June 2020 p. 11. That returns were excessive and needing regulation was said to be acknowledged by some litigation funders Menzies Research Centre, Submission No. 66, 14 June 2020, 12.

[468] However, it should be noted that this submission presented contingency fees as an alternative funding mechanism to funders, rather than the regulation of funders: Transport Alliance Australia, Submission No. 63, 11 June 2020, p. 2.

[469] AI Group, Submission No. 92, 15 June 2020 p. 9, referring to *Farey v National Australia Bank Ltd* [2016] FCA 340. Another submission stated that in one industrial class action in 2014, former employees of the Huon Corporation who sued for unpaid employee entitlements were left with no compensation following distribution to funders, lawyers and administrators: National Council of Women Australia, Submission No. 77, June 2020, p. 3.

returns to the class from 2013 to 2018, depending on whether or not the action was funded.[470] It was also suggested that the emphasis on percentages of settlement at the settlement approval is misplaced, as the funder's focus is often on percentage return on their investment, and once the percentage return is considered, it was said to be evident that funders are obtaining excessive amounts.[471]

Allegations of unconscionable behaviour by funders and lawyers were made,[472] for example that funders had prioritised profit over the interests of claimants and seeking to 'bail out' as soon as cases were no longer considered profitable.[473]

Court criticism of particular funding agreements was highlighted in submissions.[474] It was suggested that costs agreements are of such length and complexity that class members are not fully informed when they agree to the cost levels.[475] Class members stated that costs agreements were difficult to understand and that there was a role for a free and independent service to explain these agreements, either to individuals or to groups.[476] However, in the experience of Janice Saddler, clients generally 'have a very clear understanding of what the arrangement is designed to achieve'.[477] They are provided with materials setting out the costs involved in the litigation and they are able to request further clarification from the law firm where this is needed.[478] Stewart Markham clarified that class members are informed of the indicative costs of the action and the value of the funders return and the litigation budget prepared by the firm is disclosed to the court. It was stated that the budget should not 'be disclosed to a respondent who might game theory what is to be spent'.[479]

In response to the assertion of Mr Falinski that Omni Bridgeway had opposed a contradictor being given access to documents and putting on evidence in one matter, Omni Bridgeway stated that it had not opposed the appointment of the contradictor.[480] It provided access to the documents that were required to be filed in the proceedings and the contradictor was given access to confidential information. The funder successfully obtained confidentiality orders to protect the confidential information. However, the funder opposed the contradictor putting on evidence which was said to be irrelevant and that would lead to disproportionate costs being incurred. Omni Bridgeway

[470] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 13; National Council of Women Australia, Submission No. 77, June 2020, p. 2; AI Group, Submission No. 92, 15 June 2020 p. 4; Attorney-General's Department, Submission No. 93, June 2020, p. 12.
[471] Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 22.
[472] AI Group, Submission No. 92, 15 June 2020 pp. 4, 6-7. ASIC subsequently addressed the regulator response to allegations of funder misconduct: see, e.g., ASIC, 'Response to Question on Notice QoN0020-02, Action against litigation funders'.
[473] Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, pp. 3-4. The lawyers to whom those allegations pertained denied the allegations in a supplementary submission no. 90.1: pp. 2-5. In one submission, a member of the public expressed dissatisfaction with the lack of availability of third-party funding more generally in instances where recovery of funds was viewed as unlikely, and frustration at reasons given for declining to fund actions: John Telford, Submission No. 60, 3 June 2020.
[474] Submission No. 92 pp. 9-10.
[475] Donaldson Law, Submission No. 65, 12 June 2020, p. 2; Adair Donaldson, 27 July 2020, p. 3; Stephen Smith, 29 July 2020, p. 8.
[476] Superannuation Crisis Support Group 'Response to Question on Notice: Superannuation Crisis Support Group - Senator O'Neill - The costs agreement'.
[477] 27 July 2020, p. 22.
[478] 27 July 2020, p. 22.
[479] 27 July 2020, p. 39.
[480] Omni Bridgeway assumes that the assertion related to *Endeavour River Pty Ltd v MG Responsible Entity Limited & Anor* (VID1010/2018) ("the MG proceeding").

provided an excerpt of a transcript, in which Justice Murphy said '[a]n assessment by an expert as to whether a rate of return is sufficient or insufficient, in this area, must in a large part turn upon assessment [of] litigation risk. I can't think of an expert who's going to be able to do that in a sensible way.'[481]

Mr Falinski raised an allegation of circumstances in which an individual was running a litigation funding entity, despite not being considered a fit and proper person to be registered as an auditor. He referred to a recent decision of the AAT to uphold the termination of his registration as a tax agent for, inter alia, failing to pay tax and not being a fit and proper person.[482] This was provided as an example of a member of the ALFA not meeting the minimum character requirements for officers of funders supported in the ALFA submission.[483] Senator Paterson also criticised links of a litigation funder to a shell company 'owned by a formally bankrupt dot com company that owned chromite mines in Zimbabwe which were later found to be dealing in business activities described in the media as looting, and that they had dealings with Robert Mugabe'. [484] It was implied that the links may be for the purposes of tax avoidance.[485] It was also noted that the former managing director and executive chairperson of that company had filed for bankruptcy and was suing the funder for part of the commission in a settled class action.[486] Janice Saddler clarified that the organisation funding a class action conducted by her firm continues to meet its funding obligations, had not engaged and does not engage in the historical conduct described by Senator Paterson, and 'conducts itself in an entirely appropriate way in its dealings with' her.[487]

Senator Paterson suggested that the conduct of Grosvenor, the funder in two of the Volkswagen diesel emissions class actions, did not constitute acceptable, ethical behaviour.[488] The role of the funder in securing access to justice in that litigation was questioned given that parallel actions run by Maurice Blackburn were not funded.[489] Others contended, however, that the judgment to which Senator Paterson had referred showed the system of judicial oversight 'working in the way it should work'.[490]

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[481] Transcript of Proceedings, *Endeavour River Pty Ltd v MG Responsible Entity Limited & Anor* (Federal Court of Australia, VID1010/2018, Justice Murphy, 6 December 2019), T13.5, in Omni Bridgeway,' Response to Question on Notice 05-01', 1.

[482] 24 July 2020, p. 39. See also ASIC, 'Response to Question on Notice No. 1, Mr Richard Langley Stewart Hill'. On Mr Falinski's suggestion that Bernie Madoff could work in litigation funding under the current law, see ASIC, 'Response to Question on Notice No. 2, Who may 'run' a litigation funder in Australia'.

[483] 24 July 2020, p. 39.

[484] 27 July 2020, p. 29.

[485] 27 July 2020, p. 29.

[486] 27 July 2020, p. 29.

[487] 27 July 2020, pp. 29-30.

[488] 24 July 2020, p. 42.

[489] Greg Williams, 24 July 2020, p. 48. It is noted that the two funded actions were limited to strict liability causes of action against the Australian company, whereas the Maurice Blackburn actions joined both Australian and European corporate entities and pleaded additional causes of action. The two funded actions were intended to limit costs and delay in obtaining redress for consumers. This did not occur for a variety of reasons, including because all five class actions proceeded concurrently, together with the regulatory proceedings seeking civil penalties commenced by the ACCC. As noted in Research Paper #5, the costs incurred in the funded actions were considerably less than those incurred in the other actions conducted on a 'no win no fee' basis.

[490] Patrick Moloney, 24 July 2020, p. 42.

Mark Morris, appearing in a private capacity, alleged that Omni Bridgeway had destroyed his professional career through 'fabricated' and 'fraudulent' claims in an action brought against him and his company.[491]

Mr Falinski asked witnesses appearing for litigation funders to comment on 'introducer fees' that may be used by Augusta. The use of such a 'finder's fee' was considered a conflict by one witness.[492] However, witness testimony and a response to a question on notice indicate that this fee is not applicable to the Australian funding market and that the allegation was incorrect.[493]

It was suggested that foreign litigation funders pose issues in terms of enforcement and security for costs, where those funders have 'after the event' (ATE) insurance policies issued by foreign insurers. However, there was said to be no example of where a problem has occurred in Australia.[494] Further, it was claimed that a lot of defendants settle because ATE policies or deeds of indemnity given by UK or Irish insurers, provided by funders as security for costs, are a 'hassle' to pursue.[495] Quinn Emanuel submitted that security was given in the form of cash in the current funded matters in which the law firm was acting.[496]

On one view, judicial scrutiny is reasonably effective but results in inconsistent approaches and there is a need for regulation to supplement the role of the courts.[497] Other submissions stated that the role of the court in exercising oversight at settlement approval was not working.[498] It was also suggested that there is inadequate transparency in the industry in published judgments.[499] It was noted that the scope of this supervision by the court is limited in its remit and knowledge to the matter and evidence before them.[500] Courts may also be 'reticent' to extend their power.[501]

Litigation funding was repeatedly criticised for being insufficiently regulated.[502] The case for formal regulation was said to be 'overwhelming'.[503] Funding was also described as 'completely unregulated'.[504] Reg 248 was said to impose only 'illusory' obligations without meaningful enforcement mechanisms or regular reporting requirements.[505] The imposition of stringent prudential requirements was supported.[506]

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[491] 3 August 2020, pp. 19-22.
[492] Damian Scattini, 27 July 2020, p. 15.
[493] 27 July 2020, p. 39; ALFA, 'Response to Question on Notice No. 3'.
[494] Alexander Morris, 13 July 2020, pp. 44-5.
[495] Justin McDonnell, 13 July 2020, p. 45.
[496] Damian Scattini, 27 July 2020, p. 10.
[497] Associate Professor Lombard and Professor Symes, Submission No. 4, 9 June 2020, p.4.
[498] Stuart Clark, Submission No. 22, June 2020, p. 6.
[499] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 5-6.
[500] MinterEllison, Submission No. 25, 11 June 2020, 3.8; Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 22-23. Justin McDonnell stated that there are aspects of the litigation that are not aired before the court and the defendant's reasons for settling are not taken into account: 13 July 2020, p. 41.
[501] Professor Peta Spender, Submission No. 49, 11 June 2020, p. 3.
[502] See, e.g., Stuart Clark, 13 July 2020, p. 22; Sulette Lombard, 24 July 2020, p. 12. In a response to a question on notice provided by Mr Falinski to Mr Corrigan on the existing regulatory requirements for funders, Mr Corrigan referred the Joint Committee to paragraphs 6.7-6.16 of ALRC Report 134, pp. 154-7.
[503] Stuart Clark, Submission No. 22, June 2020, p. 2. See also National Council of Women Australia, Submission No. 77, June 2020, p. 2.
[504] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 2.
[505] US Chamber Institute for Legal Reform, Submission No. 21; pp. 7-8; James Mathias, 13 July 2020, p. 3; Professor Spender, 24 July 2020, pp. 18-9. Further detail on the current regulations which apply to funders was provided by Karen Chester of ASIC and Marcus Bezzi of the ACCC: 29 July 2020, pp. 32-3, 43.
[506] Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, p. 4.

Risks of conflicts of interests between lawyers and funders were matters of concern noted in the submissions.[507] This area was described as insufficiently regulated[508] and lacking in transparency.[509] ASIC was criticised for failing to investigate misconduct or conflicts of interest.[510]

3.6.2 *Common fund orders*

Some submissions were made suggesting that the court should be prevented from making CFOs by statute so that funders are required to bookbuild.[511] CFOs were said to encourage speculative litigation,[512] not to improve access to justice, to require courts to engage in speculation as to the returns of litigation, and to be perhaps impermissible under the Constitution where they do not apply to actions under federal legislation or in the federal courts.[513] CFOs were criticised for contributing to problems of multiplicity.[514] Their availability was said to lead to a race to the court in which detailed consideration of who wants to be involved in the action and its aims can get lost.[515]

Opposition to CFOs was expressed by Andrew Saker from Omni Bridgeway, who suggested that the alternative opt-in system allows funders 'to ascertain the degree of interest in proceeding with the claim, entering into an agreement with group members to ensure that they're familiar with their obligations and what the fees are likely to be'.[516] The argument that CFOs avoid the costs of book building suffers from a 'fundamental flaw', in that applicants must undertake an advertising campaign at later stages to ascertain eligible group members.[517]

Moreover, it was suggested that, if CFOs led to lower commission rates, they would not be supported by litigation funders with a commercial interest in profiting from high rates.[518] Submissions also noted the need to consider the continued existence of the torts of champerty and maintenance in some jurisdictions.[519]

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[507] Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 17; Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 1-13; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 2; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 29; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 3.1; AI Group, Submission No. 92, 15 June 2020 p. 17.
[508] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 4; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 1; National Council of Women Australia, Submission No. 77, June 2020, p. 3.
[509] Professor Peta Spender, Submission No. 49, 11 June 2020, p. 2.
[510] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 8-9; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 3.3; Mark Morris, Submission No. 75, 1 June 2020, 17.
[511] See, e.g., James Mathias, 13 July 2020, p. 11; Kristen Wydell, 27 July 2020, p. 58; Stephen Smith, 29 July 2020, p. 14; King & Wood Mallesons, Submission No. 53, 11 June 2020, 16-17; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 4; Allens, Submission No. 69, June 2020, p. 14, 19; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, p. 11; Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 25-6.
[512] AI Group, Submission No. 92, 15 June 2020 p. 12.
[513] Allens, Submission No. 69, June 2020, p. 14-15; Alexander Morris, 13 July 2020, p. 36.
[514] Allens, Submission No. 69, June 2020, p. 16.
[515] Michael Legg 13 July 2020, p. 29.
[516] 13 July 2020, pp. 49-50.
[517] Submission No. 69 p. 18.
[518] Allens, Submission No. 69, June 2020, p. 17. On the contrasting argument that CFOs result in more beneficial returns to class members, see Law Council of Australia, 'Response to Question on Notice No. 3'.
[519] Queensland Law Society, Submission No. 46, 11 June 2020, p. 4; Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 14-18. In one hearing, Iain Anderson from the Attorney-General's Department noted Professor Morabito's conclusion that CFOs appeared to result in greater median returns to class members in funded actions: 29 July 2020, p. 52.

3.6.3 *Role and conduct of lawyers*

There were a number of criticisms made of plaintiff lawyers and law firms in one submission including the promotion of funding agreements which benefit funders so as to secure repeat business with funders and the misleading presentation of information about the merits of pursuing litigation.[520] Law firms were accused of unscrupulous and 'predatory' behaviour by misleading the public by presenting potential actions without sufficient evidential bases for alleged wrongdoing; providing 'payment or incentives' to class members; providing 'assistance' to 'grass-roots' groups to advertise their action, without being transparent about the links between the law firm and the group; charging high fees that do not correspond to the work completed; dragging out cases to earn more fees, while being subject to minimal scrutiny.[521] It was suggested that publicly listed class action law firms are impacted by pressure to announce new actions, projected revenue and settlements, which could cause potential conflicts with the interests of class members, and potential breaches of the *Australian Solicitors' Conduct Rules*.[522] Another submission stated that incorrect legal opinions may lead to cases being pursued and supported by funders which do not have merit, and this leads to poor outcomes.[523]

3.6.4 *Role and conduct of judges*

The submission was made that Judges were not able to scrutinise properly funding rates, because they are insufficiently trained in corporate finance[524] and 'their role is largely limited to the cases before them at particular points in time, and it is difficult for the court to benchmark funding rates internationally and assess what level of return is appropriate.'[525] Settlement approval based on the commission as a percentage of the compensation awarded to class members, rather than measures such as return on invested capital was described as 'haphazard and undertaken without regard to principles of corporate finance or benchmarks for risk adjusted rates of return In most cases, the judge will take a fairly arbitrary view as to an appropriate percentage which is at least in part informed by the overall quantum of the settlement. In other words, the larger the settlement the more likely the court will balk at approving a high percentage.'[526] It was also noted that the prior experience of many judges as barristers might indicate that they have not had significant exposure to law firm costing methods and are not best placed to determine whether a costs agreement is reasonable.[527] Court oversight of funder behaviour was also criticised for using up scarce court resources and time.[528]

[520] Donaldson Law, Submission No. 65, 12 June 2020, pp. 3-6.
[521] Donaldson Law, Submission No. 65, 12 June 2020, p. 5.
[522] Donaldson Law, Submission No. 65, 12 June 2020, p. 4.
[523] Superannuation Crisis Support Group, Submission No. 90, 9 June 2020, pp. 3-4.
[524] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 28.
[525] Ashurst, Submission No. 41, 11 June 2020, 7. See also AI Group, Submission No. 92, 15 June 2020 p. 4.
[526] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 18.
[527] Donaldson Law, Submission No. 65, 12 June 2020, p. 3.
[528] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 5.

3.7 *Suggestions and proposals for litigation funding reform*

3.7.1 *Judicial oversight*

Some submissions indicated a preference for court oversight of funding agreements.[529] A number of witnesses proposed increasing the powers of the courts to control class actions and litigation funding arrangements.[530] Professor Legg recommended that Federal Court judges should be expressly empowered to review, alter or set litigation funding commissions rates and lawyers' fees. He suggested that judges are best able to fulfil this role because of requirements for procedural fairness and open justice.[531] It was contended that the legislation should provide guidance to judges on determinations on fees, according to what is fair and reasonable and proportionate to the outcome and risks involved in the action.[532] However, Professor Spender emphasised that judges can only deal with matters that are before them and are unable to interfere with contractual relationships outside of the proceedings.[533]

It was suggested that binding contractual agreements with funders 'should not be allowed to be authorised and enforceable until they have the imprimatur of the court, and that would be a fundamental change in the relationship between the group members and the funder'.[534]

3.7.2 *Security for costs*

There was support expressed for a statutory presumption in favour of orders for security for costs.[535] However, it was also described as an inadequate and unsatisfactory mechanism to ensure the capital adequacy of litigation funders.[536]

3.7.3 *Common fund orders*

As noted above, there were submissions both in favour and in opposition to a court power to make common fund orders. One reform proposed in submissions included the introduction of fixed levels at which common fund orders can be made which comprehend the risks and benefits for funders and include costs and disbursements.[537] Another was that the Court should be able to order CFOs at any stage of proceedings with safeguards providing that the funder is not to be 'better off' than class members after settlement and deducting legal costs and disbursements from the funder's proportion of the settlement proceeds to encourage the funder to scrutinise costs and keep them down.[538] In contrast, it was submitted that CFOs should only be authorised towards the end of proceedings and there be no guarantee that an order will be made to discourage the proliferation of speculative actions.[539] In addition, a submission urged the review of notice requirements to

[529] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 4; Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.9, 2.13, 4.5, 4.7; Professor Michael Legg, Submission No. 30, 11 June 2020, p. 4; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 2.23; Australian Finance Industry Association, Submission No. 81, 18 June 2020, p. 2.
[530] See, e.g., Matt Corrigan, 27 July 2020, pp. 66, 71-2; Pauline Wright, 29 July 2020, p. 16.
[531] 13 July 2020, p. 22; see also, e.g., Warren Mundy, p. 28; Andrew Watson, 27 July 2020, p. 17.
[532] 13 July 2020, pp. 22-23.
[533] 24 July 2020, p. 22.
[534] Matt Corrigan, 27 July 2020, p. 72.
[535] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 4.
[536] MinterEllison, Submission No. 25, 11 June 2020, 3.25; Clayton Utz, Submission No. 26, 11 June 2020, 12.
[537] Stewart Levitt, Submission No. 52, 11 June 2020, p. 6.
[538] New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 7.6, 7.15-7.16.
[539] Clayton Utz, Submission No. 26, 11 June 2020, 43.

unrepresented class members regarding CFOs before an express power was introduced.[540] It was also suggested that law firms should be able to claim a share of common fund order without requirements for each class member to enter into separate contractual arrangements with funders.[541]

3.7.4 *Legal fees generally*

Suggested reform to legal fees included the disclosure of respondents' costs at the end of actions or case management techniques to incentivise contest of issues that are actually in dispute.[542]

Justin McDonnell proposed the establishment of panel to deal with issues of the fairness of legal fees, costs and premiums.[543]

Professor Spender suggested that greater transparency could be ensured through reporting to ASIC, or the provision of greater clarity around reporting by ASIC.[544] However, it was contended that ASIC may not have the regulatory interest, resources, knowledge or inclination to perform this role.[545]

It was also proposed that the courts have a duty to appoint a contradictor when assessing the fairness of legal fees at settlement.[546] Adair Donaldson proposed the appointment of an independent costs assessor in relation to every class action commenced and that the review of costs should occur earlier in proceedings.[547] However, the costs related to the assessment procedure may mean that the appointment of an assessor or contradictor is not appropriate for all actions.[548]

It was submitted that when fees are capped at 25% of total recoveries there are greater returns for consumers, greater clarity, and greater certainty.[549] One submission stated that the imposition of a minimum percentage of claim proceeds which had to go to class members 'irrespective of the size of the recovery or the cost of securing the proceeds … will cause only the larger claims to be funded, deny access to claimants with smaller collective claim size and permit illegal conduct to go unanswered'.[550]

According to one submission, there should be a minimum return of 50% of the gross proceeds for litigants.[551] Another submission proposed that settlement proceeds should be 'distributed 50/50 between the class members and the lawyers and funders until such time as the lawyers and funders are paid their contracted amounts. Such a requirement will incentivise those driving the case to have a genuine regard for the class members and take a sensible approach to not prolonging the case. This would also remove the requirement for the settlement to be approved by a judge as being fair to class members, which unnecessarily prolongs finalisation of the case.'[552]

[540] Michael Duffy, Submission No. 47, June 2020, p. 3.
[541] Australian Lawyers Alliance, Submission No. 2, 8 June 2020, 21.
[542] Professor Michael Legg, Submission No. 30, 11 June 2020, p. 4.
[543] 13 July 2020, p. 35.
[544] 24 July 2020, p. 27.
[545] Peter Cashman, 24 July 2020, p. 31.
[546] Business Council of Australia, Submission No. 86, June 2020, p. 9.
[547] 27 July 2020, p. 3.
[548] 27 July 2020, p. 4; Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 4.3.
[549] Slater and Gordon, Submission No. 18, June 2020, 3.5, 11.2-11.5 and Annexure B.
[550] Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.6.
[551] Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 2, 14.
[552] Michael Quinn, Submission No. 24, 11 June 2020, p. 3.

3.7.5 *Contingency fees*

Submissions included support for the introduction of contingency fee arrangements in Victoria and their extension into other jurisdictions.

Contingency fees were linked to greater access to justice,[553] efficiencies and lower costs,[554] greater returns and more choices for consumers.[555] It was suggested that their relative simplicity would engender consumer confidence in the justice system.[556] Stakeholders submitted that contingency fee structures would increase the likelihood of the litigation of some meritorious claims which were unlikely to gain commercial third-party funding, such as smaller consumer and product liability.[557] Dr Mundy highlighted the findings of the Productivity Commission in 2014 that continency fees subject to caps on a sliding scale may lead to greater competition and downward pressure on fees.[558] Contingency fees were supported by Professor Spender, as they would lead to the liberalisation or democratisation of cases.[559] Andrew Watson considered that contingency fees would 'reward people for outcomes rather than time spent'.[560]

The prohibition on contingency fees on public policy grounds was viewed as anachronistic.[561] It was stated that contingency fees would not lead to the proliferation of meritless claims.[562] In particular, the adverse costs risks in Australia were identified as a reason that meritless claims will not proliferate.[563] Concerns that the structure may give rise to conflicts of interest were not accepted in a number of submissions.[564] The structure was said to align plaintiff and lawyer interests appropriately.[565] It was suggested that any conflict could be managed through adequate safeguards.[566] Conflicts of interest arising from contingency fees were considered 'not unique' to this form of fee arrangement.[567] Risks from percentage fees were considered to be similar to existing 'no win no fee' arrangements.[568] Mr Watson stated that contingency fees would not provide a windfall for large plaintiff law firms like Maurice Blackburn because of court supervision over returns to

[553] Law Institute of Victoria, Submission No. 3, 9 June 2020, pp. 4-5; Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.3; Rod Barton, Submission No. 9, 10 June 2020, p. 2; Shine Lawyers, Submission No. 35, 11 June 2020, 60-62; Adero Law, Submission No. 38, 11 June 2020, 1.21; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 1; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, pp. 4-5; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 3.1-3.27.
[554] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 3.5; Law Institute of Victoria, Submission No. 3, 9 June 2020, pp. 4-5, 8; Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 2.8; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 1.4, 2.26, 3.2, 3.16-3.34.
[555] Law Institute of Victoria, Submission No. 3, 9 June 2020, pp. 4-5; National Council of Women Australia, Submission No. 77, June 2020, p. 4.
[556] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 7.
[557] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 6; Shine Lawyers, Submission No. 35, 11 June 2020, 65; Transport Alliance Australia, Submission No. 63, 11 June 2020, p. 2.
[558] Warren Mundy, 13 July 2020, pp. 17, 30.
[559] 24 July 2020, pp. 18, 26.
[560] 27 July 2020, p. 20.
[561] Shine Lawyers, Submission No. 35, 11 June 2020, 64.
[562] Shine Lawyers, Submission No. 35, 11 June 2020, 63.
[563] Harbour Litigation Funding, Submission No. 11, June 2020, p. 5.
[564] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 3.1; Shine Lawyers, Submission No. 35, 11 June 2020, 69; Sean Foley and Angelo Aspris, Submission No. 78, 11 June 2020, pp. 4-5.
[565] Shine Lawyers, Submission No. 35, 11 June 2020, 60-62; Michael Duffy, Submission No. 47, June 2020, p. 2; Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 pp. 3, 5.
[566] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 3.6, 3.9; New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 3.1-3.27.
[567] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 9.
[568] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 3.5.

lawyers, lawyers assuming responsibilities for disbursements and security for costs, as well as lawyers assuming liability for adverse costs.[569]

There was support for extrinsic guidance or standards for the courts in relation to contingency fees[570]; a 35% cap on contingency fees for personal injury matters[571]; and a percentage cap on a sliding scale, as recommended by the ALRC.[572] It was suggested that damages, interest and standard party/party costs should be included in assessing the percentage amount recovered, while medical costs, amounts the client must pay the Health Services Commission or Centrelink, or monies not actually recovered should be excluded.[573]

Other submissions noted that contingency fees would not be a panacea for litigation funding problems[574]; that there may be benefits and possible downsides of the availability of contingency fees such as added incentives for both social justice class actions and actions against listed companies[575]; that important matters, such as liability for adverse costs, whether hybrid billing practices are allowable, and conflict issues, which require further consideration.[576] From the perspective outlined in one submission there is a need for careful review before any change is made regarding the availability of contingency fees, as 'ill-considered reform hastily implemented may also have an adverse impact on public confidence in the legal system and produce logistical issues'.[577] One submission stated that safeguards do not adequately protect against the ethical risks of contingency fees.[578] The Victorian Bill was criticised for providing insufficient safeguards.[579]

There was some explicit opposition to contingency fees.[580] Their impact on competitiveness and returns to the class were questioned.[581] They were not considered to be a means of improving access to justice[582] and could lead to less investment and innovation.[583] It was speculated that they may merely lead to large law firms competing with funders for high-value actions, rather than increase funding options for low-value claims ignored by funders.[584] Contingency fees were said to have led to less favourable returns for class members in America compared with litigation funding.[585] Contingency fees were said to mean the end of 'no win, no fee' arrangements[586] and it was

[569] 27 July 2020, p. 26.
[570] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 7.
[571] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 6.
[572] Dr Warren Mundy, Submission No. 17, June 2020, pp. 10-12.
[573] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 6.
[574] Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 3.
[575] Yarra Capital Management, Submission No. 71, 16 June 2020, p. 2.
[576] Attorney-General's Department, Submission No. 93, June 2020, pp. 15-16.
[577] Queensland Law Society, Submission No. 46, 11 June 2020, pp. 2-3.
[578] Law Council of Australia, Submission No. 67, 16 June 2020, 55.
[579] Allens, Submission No. 69, June 2020, pp. 24-5.
[580] Premier Litigation Funding Management, Submission No. 20, 10 June 2020, pp. 4, 8; US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 11-13; Herbert Smith Freehills, Submission No. 51, 11 June 2020, pp. 7-8; Law Council of Australia, Submission No. 67, 16 June 2020, 4, 37, 46, 50; AI Group, Submission No. 92, 15 June 2020 pp. 4, 13-15; NSW Bar Association, Submission No. 96, 27 July 2020, 13-37.
[581] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 11-13; Litigation Capital Management, Submission No. 23, June 2020, 64; NSW Bar Association, Submission No. 96, 27 July 2020, 33-4.
[582] Allens, Submission No. 69, June 2020, pp. 22-24.
[583] Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 2.45-2.48.
[584] Herbert Smith Freehills, Submission No. 51, 11 June 2020, pp. 7-8.
[585] Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 4.
[586] Litigation Capital Management, Submission No. 23, June 2020, 69; Allens, Submission No. 69, June 2020, pp. 22-24.

suggested that a comparison of returns under these arrangements indicated that class members would likely receive less compensation under a contingency fee arrangements.[587]

Moreover, it was suggested that contingency fees risked an increase in speculative actions being brought and would not necessarily lead to more claims related to social justice being pursued.[588] The submission went on to argued that '[i]t is also unclear why, as a matter of public policy, plaintiff law firms should determine which causes should be seen as a social justice issue and thus cross-subsidised by others chosen by those law firms.'[589] According to another submission, occasional 'efforts have been directed by lawyers and funders to act on 'social justice' class actions on a pro bono basis, but this is rare.'[590]

Stakeholders also noted a risk of forum shopping because of the introduction of contingency fees in Victoria.[591] Mr Barton, a member of the Victorian State legislature who supported the new legislation in Victoria, rejected the argument that it would lead to the state becoming a hotspot for class actions, instead submitting that the change in Victoria would eventually be replicated by other states.[592]
The value of uniformity was emphasised.[593] One submission recommended that uniformity should be attained across jurisdictions and that the Commonwealth Government amend the federal statute and statutes conferring federal jurisdiction on state courts to confirm that contingency fees are not permitted.[594] Another stated that, should contingency fees be allowed in one jurisdiction, this should be replicated, and the laws harmonised across Australia, to prevent forum shopping.[595] However, the notion that the Commonwealth Government might use s 109 of the Constitution to have the Victorian legislation declared unconstitutional was characterised as 'grossly unsatisfactory'.[596]

Problems identified for the Victorian law included possible conflict with s 183 of the *LPUL*, the impact on the costs indemnity rule and the lack of appropriate safeguards.[597]

Contingency fees were said to risk 'the creation of unmanageable conflicts of interest' and double dipping, where both funders and solicitors take a commission.[598] Contingency fees may create 'a serious risk of compromising the practitioner's fundamental duty to the court, the overriding duty of candour and possibly the lawyer's multiple duties to clients.'[599] For instance, they may incentivise lawyers to increase the damages pool or settle early and create conflicts with lawyers' obligations to clients.[600] The regulation of conflicts was viewed as a difficult task in one submission.[601] One

[587] Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 2.41-2.44]
[588] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 14-15. This view can be contrasted with the position of Submission No. 27 by PIAC.
[589] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 14.
[590] Herbert Smith Freehills, Submission No. 51, 11 June 2020, p. 8.
[591] Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 2, 18-20; 13 July 2020, pp. 49-50.
[592] 24 July 2020, pp. 60-1.
[593] Attorney-General's Department, Submission No. 93, June 2020, pp. 15-16; NSW Bar Association, Submission No. 96, 27 July 2020, 28.
[594] King & Wood Mallesons, Submission No. 53, 11 June 2020, 20.
[595] Allens, Submission No. 69, June 2020, p. 25.
[596] Professor Vince Morabito, Submission No. 6, 10 June 2020, p. 5.
[597] NSW Bar Association, Submission No. 96, 27 July 2020, 21, 25-26.
[598] Stuart Clark, 13 July 2020, pp. 16, 26. See also Allens, Submission No. 69, June 2020, pp. 22-24.
[599] NSW Bar Association, Submission No. 96, 27 July 2020, 4.
[600] See, e.g., James Mathias, 13 July 2020, p. 12; Stephen Smith, 29 July 2020, p. 2; Pauline Wright, 29 July 2020, pp. 16-17.
[601] Litigation Capital Management, Submission No. 23, June 2020, 78.

submission stated that contingency fees would damage the fiduciary relationship.[602] However, it was said to be 'a deeply problematic form of cultural cringe' to suggest fiduciary issues will arise in Australia when they have not in other common law countries which allow contingency fees.[603]

Contingency fees were viewed as requiring careful regulation and the imposition of protections for the integrity of the legal system and clients.[604] A number of submissions considered safeguards which might operate in jurisdictions which permitted contingency fee arrangements. For example, submissions proposed requirements for court leave, and court powers to vary, reject or amend contingent fee arrangements.[605] One submission suggested statutory caps and early court intervention procedures.[606] Others proposed amendment of the *Australian Solicitors' Conduct Rules 2015* to include additional safeguards.[607] The amendment of Federal Court practice notes to provide for early disclosure of obligations around conflict and the identification of conflicts of interest was also proposed.[608] It was suggested that the appropriateness of contingency fee agreements in any particular matter could be referred to an expert panel set up for the purpose of scrutinising funding agreements.[609] Submissions expressed agreement with the recommended safeguards proposed by the ALRC.[610] It was suggested that lawyers acting on a contingency basis should be required to comply with similar obligations to those proposed for funders.[611]

It was suggested that, should contingency fees be introduced, 'it would seem reasonable' that lawyers share in liability for adverse costs.[612] This could take the form of either an obligation to indemnify plaintiffs for adverse costs or to insure the risk of costs, or the court rules could be amended to allow costs to be awarded against lawyers charging contingency fees.[613] However, the model adopted in Victoria, where lawyers are required to indemnify plaintiffs for adverse costs, was subject to criticism from Omni Bridgeway.[614]

There was support for a presumption in favour of security for costs for lawyers acting on a contingency basis.[615] It was also suggested that lawyers could be prohibited from charging an uplift for risk where funders are also involved in the matter and assuming most risk.[616]

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[602] Premier Litigation Funding Management, Submission No. 20, 10 June 2020, pp. 4, 8; US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 18-19; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 18; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 4; Health Industry Companies - Joint Submission, Submission No. 74, 17 June 2020, 2.1-2.39.
[603] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 3.41.
[604] Ashurst, Submission No. 41, 11 June 2020, 12-16; Michael Duffy, Submission No. 47, June 2020, p. 2; AustralianSuper, Submission No. 48, 11 June 2020, p. 3.
[605] MinterEllison, Submission No. 25, 11 June 2020, 2.8, 2.12-2.16; AustralianSuper, Submission No. 48, 11 June 2020, p. 3; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 92-94.
[606] Shine Lawyers, Submission No. 35, 11 June 2020, 66.
[607] MinterEllison, Submission No. 25, 11 June 2020, 2.20; Queensland Law Society, Submission No. 46, 11 June 2020, p. 3.
[608] MinterEllison, Submission No. 25, 11 June 2020, 2.21.
[609] Queensland Law Society, Submission No. 46, 11 June 2020, pp. 2-3.
[610] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 3.9; Law Firms Australia, Submission No. 54, 12 June 2020, 1.6.
[611] Clayton Utz, Submission No. 26, 11 June 2020, 21.
[612] Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 4. See also US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, pp. 11-13.
[613] Law Firms Australia, Submission No. 54, 12 June 2020, 1.7.
[614] Andrew Saker, 13 July 2020, p. 53.
[615] Law Firms Australia, Submission No. 54, 12 June 2020, 1.8-1.9.
[616] Donaldson Law, Submission No. 65, 12 June 2020, p. 4.

3.7.6 *Regulation of funders*

Unsurprisingly, the imposition of AFSL and MIS[617] regimes on litigation funders attracted comment from a large number of stakeholders.

A lot of this commentary was highly critical of the imposition of additional regulation. The reforms were described as 'rushed, ill- considered, and liable to have unintended consequences … a roughshod approach to regulatory reform'.[618] Andrew Watson was critical of the 'unnecessary and counterproductive' imposition of 'ill-adapted forms of regulation on litigation funders'.[619] Ben Hardwick stated that the imposition of the regimes would cause chaos for the class action industry and this would ultimately be of detriment to consumers who will be unable to access the justice system.[620] Submissions warned against '[i]nconsistent and precipitous change'.[621]

The regimes were considered to be inappropriate for litigation funding arrangements.[622] There was a concern that the changes would reduce competition and lead to worse outcomes for consumers including higher transaction costs, less available capital, and increased burdens on regulators.[623] In respect of multinational claims, defendants may be unable to compensate claimants in all jurisdictions and, if there are greater barriers to funding in Australia, 'the losers will be the Australian class members who suffer uncompensated injury or loss'.[624] It was argued that any reform that would restrict access to funded class actions 'would be a retrograde step and ought not to be considered. It would cause great disadvantage to many individuals with a legitimate legal grievance but who are unable to get access to justice through any other means, and where regulatory regimes have clearly failed them.'[625] It was also noted that regulations may have unintended consequences for litigation funding in its use in insolvency and company financing contexts.[626] There were also concerns that the regulatory changes may catch the fighting funds of many community groups and philanthropic funds, which are not seeking profit.[627]

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[617] Ch 5C and 7 of the *Corporations Act 2001* (Cth).
[618] Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 2.4-2.5.
[619] 27 July 2020, p. 17.
[620] 27 July 2020, p. 30.
[621] NSW Bar Association, Submission No. 96, 27 July 2020, 57.
[622] See, e.g., Michael Legg, 13 July 2020, p. 34; Sulette Lombard 24 July 2020, p. 8; Vince Morabito 24 July 2020, pp. 10, 13-14; John Walker, 24 July 2020, p. 32; Professor Vicki Waye, Submission No. 5, June 2020, p. 5; Woodsford Litigation Funding Limited, Submission No. 16, 11 June 2020, 18; Slater and Gordon, Submission No. 18, June 2020, 6.3-6.7; Litigation Capital Management, Submission No. 23, June 2020, 18.5; Australian Restructuring Insolvency & Turnaround Association (ARITA), Submission No. 34, 11 June 2020, p. 2; CPA Australia, Submission No. 44, 11 June 2020, pp. 2-3; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 5; The Association of Litigation Funders of Australia, Submission No. 57, 11 June 2020, 14, 67-78; Goal Group, Submission No. 80, 18 June 2020, p. 2; Phi Finney McDonald, Submission No. 87, June 2020, 6.1-6.19. According to one submission, the effect on competition was clear, 'with two Australian-based funders having made public statements to the effect that the regime will provide them with a competitive advantage': Harbour Litigation Funding, Submission No. 11, June 2020, p. 3.
[623] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 5.1, 5.4; Professor Vince Morabito, Submission No. 6, 10 June 2020, p. 1; Investor Claim Partner Pty Ltd, Submission No. 7, 10 June 2020, 4.1; Slater and Gordon, Submission No. 18, June 2020, p. 2; Premier Litigation Funding Management, Submission No. 20, 10 June 2020, p. 5; Therium Capital Management (Australia) Pty Ltd, Submission No. 29, 11 June 2020, p. 4; Shine Lawyers, Submission No. 35, 11 June 2020, 42; Stewart Levitt, Submission No. 52, 11 June 2020, p. 3; Phi Finney McDonald, Submission No. 87, June 2020, 1.13, 6.1-6.19; Ben Phi, 27 July 2020, p. 37.
[624] Andrew Roman, Submission No. 8, 10 June 2020, p. 3.
[625] Communication Workers Union Victoria, Submission No. 83, June 2020, p. 5.
[626] Litigation Capital Management, Submission No. 23, June 2020, 5, 8.
[627] Ben Hardwick, 27 July 2020, p. 31.

The costs of the change were said to outweigh any potential benefits of the regulation.[628] The additional regulation was not considered necessary and potential benefits were considered to be scant.[629] For example, it was suggested that additional disclosure obligations were of dubious benefit, as 'it's difficult to pinpoint any actual added information that a funder could disclose beyond the terms of its funding agreement that would be palpably relevant to a class member's decision to enter into such an agreement.'[630]

There are issues with funding which the regimes cannot resolve. The regimes do not cover price or prudential regulation and certain exemptions and modifications will be required.[631] It was noted that AFSL obligations would not prevent licence holders from becoming insolvent or failing and do not necessarily require funders to hold adequate capital to comply with security for costs orders.[632] It was argued that AFSL requirements are not necessarily going to be effective in protecting class members.[633] This was said to be demonstrated by the possession of a license by Storm Financial.[634]

Concerns were also raised about the uncertainty and lack of clarity around which requirements of the regimes will apply and how they could be adapted to the litigation funding market.[635] The interaction of the regime with court oversight and the capacity of the Australian Financial Complaints Authority (AFCA) to deal with collective disputes was said to be unclear.[636] Further, it was suggested that AFCA is an inappropriate forum for the resolution of consumer complaints about funders, as it may impeded the efficient resolution of the litigation by the court, questions arise regarding confidentiality in the litigation context, and risks that this will 'fetter or usurp' court supervisory functions.[637] In addition, any AFCA determination would be 'sub-judicial' as class members would have already passed through the court approval process and would likely operate on a different schedule from court proceedings.[638]

Submissions noted that the change was contrary to the recommendations of ASIC and law reform bodies.[639] It was suggested that ASIC is not competent to decide on the merits of investments of

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[628] Harbour Litigation Funding, Submission No. 11, June 2020, p. 3; CPA Australia, Submission No. 44, 11 June 2020, p. 2-3. On the costs of holding an AFSL, see ASIC, 'Response to Question on Notice QoN 038-02'.
[629] Balance Legal Capital, Submission No. 13, 10 June 2020, p. 6.
[630] Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 2.6.
[631] Daniel Crennan, 29 July 2020, p. 28.
[632] ASIC, Submission No. 39, June 2020, 103, 106; Ben Hardwick, 27 July 2020, p. 31.
[633] In response to a question on notice, the ALRC provided that court oversight and approval of binding contractual entitlements in relation to funding would involve 'significant regulatory oversight when compared to the general obligations under an AFSL. The AFSL regime cannot and does not in its current form regulate the fees chargeable for particular financial products and services. Under the ALRC's recommended reforms a litigation funder would be required to go to court and argue why in the interests of justice in a particular case their proposed funding arrangements should be approved. This expands the court's supervisory role in class action proceedings and removes any notion of a right to fund class actions as an ordinary commercial transaction. It also recognises that litigation funders in Australia do more than fund a particular action — they are intimately involved in the management of the plaintiff law firm, not just in terms of costs, but the broader litigation strategy.'
[634] Damian Scattini, 27 July 2020, p. 12.
[635] Professor Vicki Waye, Submission No. 5, June 2020, pp. 2-3.
[636] Professor Vicki Waye, Submission No. 5, June 2020, p. 5.
[637] Litigation Capital Management, Submission No. 23, June 2020, 25-30. AFCA complaints resolution processes were also supported in Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 17-18.
[638] Slater and Gordon, Submission No. 18, June 2020, 6.9]
[639] Harbour Litigation Funding, Submission No. 11, June 2020, p. 3; Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 5.4-5.20.

litigation funders.[640] It may also be unwilling to do so.[641] Moreover, it was noted that the 'ASX and ASIC, just like a police force, are not immune to shortcomings in performance. It would seem odd therefore that Class Action / Litigation Funders could find themselves suing a regulator for non-performance, yet also find themselves policed by the defendant aided by significant laws'.[642]

Furthermore, it was suggested that increased oversight by ASIC of funders is a misallocation of resources, as ASIC should focus on the misconduct of companies that are the subject of class actions.[643] Mr Gorman expressed a concern that the reforms will limit the resources that ASIC will be able to devote to investigations of offences under the *Corporations Act*.[644] As noted in another submission, one 'by-product of an onerous system of regulation is that public funds which could be spent by ASIC investigating and prosecuting corporate misconduct, will be instead diverted to policing a system that consists of less than 50 participants.'[645]

Opposition to the introduction of the MIS regime was more pronounced than to the AFSL regime. MIS provisions drew strong opposition. The MIS regime was described as 'inherently ill-adapted',[646] not 'fit-for-purpose' and 'poorly suited' leading to additional costs without addressing the issues raised to criticise current litigation funding arrangements.[647] MIS provisions were considered to be 'unsuitable', as class actions are 'not an investment product'.[648] Applying MIS provisions was compared to trying to fit 'a square peg in a round hole'.[649] In particular, MIS requirements could prevent opt-out arrangements and open classes, interfere with Court supervision, signify increased costs and have minimal effectiveness.[650] For Professor Spender, the many issues in connection with the implementation of the MIS regime for funders demonstrate that it will not work at all.[651]

It was emphasised that *Multiplex* was a two-two split and there is a real question as to whether litigation funding structures are managed investment schemes.[652] It was also argued that the decision to apply the MIS regime was 'inherently unsound' and derived from arguments by a defendant in a class action to prevent the litigation from proceeding.[653]

Stakeholders held concerns about the uncertain application of the AFSL and MIS regimes and noted possible short term difficulties arising from their implementation.[654] Litigation funding may be structured in different ways and there is a lack of clarity on how the MIS regime will apply.[655] It was suggested that any changes to the regimes should 'be fully and clearly set out in regulations, to give effect to desired policy outcomes and to avoid legal disputes at a later stage'.[656]

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[640] Balance Legal Capital, Submission No. 13, June 2020, p. 5.
[641] CPA Australia, Submission No. 44, 11 June 2020, pp. 2-3.
[642] Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 p. 4.
[643] Herbert Smith Freehills, Submission No. 51, 11 June 2020, p. 5.
[644] 27 July 2020, p. 44.
[645] Shine Lawyers, Submission No. 35, 11 June 2020, 42.
[646] Ben Hardwick, 27 July 2020, p. 32.
[647] Slater and Gordon, Submission No. 18, June 2020, 6.3-6.7.
[648] Shine Lawyers, Submission No. 35, 11 June 2020, 44-45, 47-48.
[649] Augusta Ventures, Submission No. 31, 11 June 2020, 16.
[650] Litigation Capital Management, Submission No. 23, June 2020, 23-24.
[651] 24 July 2020, p. 22.
[652] Peter Cashman, 24 July 2020, p. 21.
[653] Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 2.5.
[654] MinterEllison, Submission No. 25, 11 June 2020, 3.15-3.17; ASIC, Submission No. 39, June 2020, 15; Patrick Moloney, 24 July 2020, p. 40; Damian Scattini, 27 July 2020, p. 12.
[655] Michael Legg, 13 July 2020, p. 34.
[656] ASIC, Submission No. 39, June 2020, 15.

At the hearings, the Joint Committee were informed that the adaptation necessary for funding arrangements to comply with the MIS regime might not occur before 22 August 2020 and, therefore, there would be a 'regulatory vacuum' after that date.[657] This could have the consequence that there would be impediments to the filing of class actions. There are additional problems regarding the establishment of responsible entities, as required by the regime.[658] Compliance may take six to twelve months for funders to achieve, and in this period, 'it is possible that class members will lose their rights' because of the expiry of limitation periods.[659] ASIC stated that the regulator was working through transitional issues and that they would 'be ready to deal with most of these by 22 August'.[660]

One submission set out a number of uncertain aspects of the application of AFSL obligations. For example, disclosure requirements may confuse in the litigation funding context;[661] there is a need for further consideration of whether the Reg 248 requirements should continue to apply, as the AFSL conflict of interest regime is not tailored to funders;[662] it is not clear how the dispute resolution framework of the AFSL regime would apply to funders, and whether courts are the more appropriate forum for the resolution of disputes;[663] it is not clear whether AFSL requirements for insurance can be met, as the requisite insurance may not exist in the current market;[664] it is not clear how the design and distribution obligations will usefully apply to the funder context;[665] further consideration is needed of the requirements around financial product advice and situations where legal professionals provide advice in relation to funding schemes.[666]

The application of the licensing regime would appear to entail a broad license to cover a range of class actions that the funder wished to fund in the future, rather than an individual license being required for each action funded. It was noted that the responsible entity requirements may be outsourced by funders and each class action would need its own Product Disclosure Statement (PDS) document.[667] At the time of the hearings, Deputy Chair Karen Chester stated that ASIC was undertaking consultation with stakeholders in relation to implementation issues identified and transitional measures required on issues such as 'PDSs, the content requirements, the member register and permitting withdrawal'.[668]

It was argued that Managed Investment Scheme regulations may conflict with s 258 of the *LUPL*.[669] When MIS requirements are in effect, 'issues may arise about what rights belong to the various

[657] John Walker, 24 July 2020, pp. 40, 44.
[658] John Walker, 24 July 2020, p. 41.
[659] Susanna Taylor, 24 July 2020, p. 41.
[660] 29 July 2020, p. 42. In a written response to a question on notice from Mr Georganas MP, ASIC stated that the regulator was first made aware of the decision of the Treasurer to implement the regulations by a telephone call from the Treasurer to ASIC's chair on 21 May, before his announcement on 22 May 2020. ASIC was not provided with any written explanation of these policies and was not asked to provide any advice in relation to these policies. For an updated overview of the regulatory changes, see Dr Peter Cashman and Amelia Simpson, 'Class actions: commercial funding, regulation and conflicts of interest' Research Paper #7 (1 December 2020).
[661] ASIC, Submission No. 39, June 2020, 84-85.
[662] ASIC, Submission No. 39, June 2020, 113.
[663] ASIC, Submission No. 39, June 2020, 118.
[664] ASIC, Submission No. 39, June 2020, 123.
[665] ASIC, Submission No. 39, June 2020, 151.
[666] ASIC, Submission No. 39, June 2020, 139-142.
[667] Karen Chester, 29 July 2020, pp. 41-2.
[668] 29 July 2020, pp. 42, 45.
[669] Professor Vicki Waye, Submission No. 5, June 2020, p. 4. See also 29 July 2020, p. 62.

parties to the scheme throughout the life of the litigation proceedings,' due to complexity in distinguishing property belonging to members from property belonging to the scheme.[670] It was also stated that MIS requirements for a comprehensive register of members will be difficult to apply to open or indeterminate classes, and issues arise in the calling of meetings and how to discern who has rights under the constitution of the scheme, such as voting rights.[671] Moreover, submissions noted that MIS registration applications do not involve an assessment of the fairness or merits of the scheme[672] and the regime may also transfer the problem of overlapping claims from the courts to ASIC.[673]

As noted during the hearings, unresolved issues include:[674]

> [T]he definition of "scheme property"; how does a chose in action fit within the definition of an investment or a contingent asset; the valuation of scheme property; how to wind up a scheme at the conclusion of the investment; the utility of a scheme constitution and whether that will assist the participants in understanding what their rights actually are; the voting regime, given disparate interests with the group; compliance requirements so that they're not confusing; and, perhaps more significantly, the potential conflict between the role of AFCA and court supervision.

A number of submissions queried whether the removal of the 'represents a missed opportunity to introduce more measured reforms that would be simpler and easier for a regulator to implement and enforce.'[675] A bespoke or tailored regime was preferred.[676] It was suggested that, should a bespoke licensing regime be imposed on funders, ASIC is not an appropriate entity to oversee the regime.[677] Alternatively, there was some suggestion that regulation through AFSL requirements could be tailored to the litigation funding industry.[678]

Notwithstanding opposition to the regulatory changes, some submissions suggested ways in which unintended negative consequences could be minimised.[679] For example, it was proposed that the changes should be phased in gradually[680] and should not apply retrospectively.[681] One submission argued that the licensing regime should not overlap with the primary supervisory role of the

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[670] ASIC, Submission No. 39, June 2020, 32.
[671] ASIC, Submission No. 39, June 2020, 61.
[672] ASIC, Submission No. 39, June 2020, 47.
[673] Michael Duffy, Submission No. 47, June 2020, p. 4.
[674] See also 13 July 2020, p. 50.
[675] Litigation Lending Services Ltd, Submission No. 36, 11 June 2020, 2.3.
[676] Harbour Litigation Funding, Submission No. 11, June 2020, p. 7; RIMS Australasia Chapter, Submission No. 12, June 2020, p. 4; Ashurst, Submission No. 41, 11 June 2020, 8-10. See also 29 July 2020, pp. 13-14 and Professor Legg, 13 July 2020, p. 34.
[677] New South Wales Young Lawyers, Submission No. 89, 25 June 2020, 6.4.
[678] Litigation Capital Management, Submission No. 23, June 2020, 17; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 3; Allens, Submission No. 69, June 2020, pp. 10-12.
[679] The Association of Litigation Funders of Australia, Submission No. 57.1, 2020, 2.2. The Treasury responded to these suggestions in Supplementary Submission 57.2, 20 July 2020. The Treasury stated that the MIS regime has a 'broad net' and includes numerous protections for consumers. AFSL conditions were stated to be appropriate to address the risks of the growing and increasingly diverse funders market and that AFCA offers accessible dispute resolution processes with existing guidance and flexibility to consider whether to hear a dispute, including whether court proceedings have been brought or a court would be a more appropriate forum for the dispute.
[680] Balance Legal Capital, Submission No. 13, 10 June 2020, p. 6.
[681] Phi Finney McDonald, Submission No. 87, June 2020, 6.20.

Courts.[682] Another indicated that the AFSL regime would not be opposed if this was subject to an assessment of the costs and benefits of the change, adequate consultation, grandfathering and gradual implementation of the reforms.[683]

It was suggested that 'publicly listed entities with market capitalisation of over $50million should be deemed to satisfy the financial resource and reporting requirements for an AFSL'.[684] In addition, should the AFSL and MIS regimes be applied to funders, one submission recommended that responsible officers who hold practicing certificates should not have to meet further character requirements.[685] Another proposed an exemption for not-for-profit funders, or a reduction in the costs and burden of maintaining licenses, so as not to discourage the funding of public interest litigation.[686] It was recommended that definitions of funders should be precise so as not to capture private philanthropy which covers litigation.[687] In addition, it was suggested that licenses for funders should authorise all litigation by that entity and there should be no requirement to apply for separate licences for each matter.[688]

There were also a significant number of submissions in support of the application of AFSL and/or MIS regimes to litigation funding.[689] It was argued in one submission that there is no need for a tailored regime because the AFSL framework provides the requisite clarity and certainty and is tested and used across a range of financial products.[690] It was suggested that AFSL requirements may constitute a 'sensible and a one-off, relatively low-cost system of regulating those wishing to provide litigation funding services in the Australian market.'[691] In some instances, the adoption of the AFSL regime was supported while the MIS regime was not.[692] However, there was also a view that the MIS regime 'has broad application and is capable of, and has been, modified to suit different activities with necessary tailoring of regulatory requirements being applied.'[693] Professor Spender was of the opinion that the AFSL regime is 'a reasonably versatile regime which is set up for very sophisticated financial products'.[694] Licencing regimes will also entail conflict management obligations, subject to oversight and structure rather than the 'ad hoc' supervision of the courts.[695] There was support for the introduction of the AFSL regime from plaintiff law firms and the Law Council.[696]

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[682] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 11.
[683] The Association of Litigation Funders of Australia, Submission No. 57.1, 2020, 2.1.
[684] Litigation Capital Management, Submission No. 23, June 2020, 18.6.
[685] Grata Fund, Submission No. 76, 19 June 2020, p. 5.
[686] Grata Fund, Submission No. 76, 19 June 2020, pp. 5-6.
[687] Grata Fund, Submission No. 76, 19 June 2020, pp. 5-6.
[688] Litigation Capital Management, Submission No. 23, June 2020, 18.1.
[689] See, e.g., See, e.g., James Mathias, 13 July 2020, p. 3; Tom Lunn, 27 July 2020, p. 48; Greg Golding, 29 July 2020, p. 19; Jillian Craven, 29 July 2020, p. 56; MinterEllison, Submission No. 25, 11 June 2020, 3.8; Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 17; King & Wood Mallesons, Submission No. 53, 11 June 2020, 18; Insurance Council of Australia, Submission No. 68, 10 June 2020, p. 2; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, pp. 1, 11; Yarra Capital Management, Submission No. 71, 16 June 2020, p. 2; Business Council of Australia, Submission No. 86, June 2020, p. 9.
[690] Norton Rose Fulbright, Submission No. 45, June 2020, 1.2.
[691] Shine Lawyers, Submission No. 35, 11 June 2020, 43.
[692] HESTA, Submission No. 28, June 2020, p. 6; Professor Michael Legg, Submission No. 30, 11 June 2020, p. 1; Law Council of Australia, Submission No. 67, 16 June 2020, 5, 75.
[693] AICD, 'Response to Question on Notice from Mr Georganas MP, 19 August 2020'.
[694] 24 July 2020, p. 18.
[695] Alexander Morris, 13 July 2020, p. 47.
[696] Janice Saddler, 27 July 2020, p. 19; Pauline Wright, 29 July 2020, p. 16.

For those who supported the reforms, it was suggested that 'there is nothing to suggest the litigation funding industry in Australia will not remain highly competitive.'[697] Indeed, it was argued that, while the AFSL requirements are 'obviously reasonable and important', they do not go far enough.[698] Another submission suggested consideration of more comprehensive regulation, including the introduction of a model funding agreement or guidance on obligations under agreements.[699] The AFSL requirements were viewed as insufficient, as the scheme was not designed for the litigation funding context, it does not address some concerns specific to this area and it raises concerns about stifling competition.[700] It was suggested that the regimes should be supplemented by the implementations of ALRC recommendations 11 to 14 in Report No. 134.[701]

The MIS provisions were supported for reasons of product risk disclosures and residency requirements.[702] Christine Barron stated that the MIS regime is broad and is able to be applied to a wide range of financial services.[703] The details of how the MIS requirements would apply in practice and their long-term appropriateness were, however, not clear to other witnesses.[704] Greg Golding suggested that the MIS provisions could be tailored to the regime by the regulator and that this is not unusual. However, the MIS provisions were not supported to the same extent as the application of the AFSL regime.[705]

AFSL requirements were acceptable to one funder as long as insolvency funding agreements are not interfered with and new regulation does not impose overly burdensome costs affecting the viability of small claims.[706] One of the most prominent funders supports additional regulation to ensure transparency and confidence in the system.[707] However, it was noted that licensing requirements may place some funders who already maintain licences in an advantageous position in the funding market.[708]

One submission stated that the Australian Government should 'ensure that an effective and pro-active regulator is tasked with the oversight and enforcement of the regulatory regime.'[709] The role of ASIC as a regulator was supported by some submissions.[710] It was also suggested that the regulator given oversight over litigation funders should provide guidance on 'the discharge of

[697] Omni Bridgeway Limited, Submission No. 73, 17 June 2020, pp. 2, 21-22.
[698] Dr Makepeace, Dr Walsh and Dr Camacho, Submission No. 91, 11 June 2020 pp. 3, 5.
[699] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 6.
[700] Associate Professor Lombard and Professor Symes, Submission No. 4, 9 June 2020, p. 4; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 4.
[701] Namely to '[p]rohibit a solicitor acting for a representative plaintiff(s) from seeking to recover any unpaid legal fees from the representative plaintiff(s); Include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia; Expressly empower the Court to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Act; and Empower the Court to review and make amendments to litigation funding agreements prior to the commencement of proceedings' Australian Finance Industry Association, Submission No. 81, 18 June 2020, pp. 5-6.
[702] Stuart Clark, 13 July 2020, p. 25.
[703] 29 July 2020, p. 56.
[704] Robert Johanson, 29 July 2020, p. 14.
[705] 29 July 2020, pp. 19, 22.
[706] Southern Cross Litigation Finance, Submission No. 33, 11 June 2020, p. 2.
[707] Omni Bridgeway Limited, Submission No. 73, 17 June 2020, p. 1.
[708] 24 July 2020, pp. 39-40, 29 July 2020, pp. 54-5.
[709] US Chamber Institute for Legal Reform, Submission No. 21, 10 June 2020, p. 10.
[710] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 4; Stuart Clark, Submission No. 22, June 2020, p. 5; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 31; National Council of Women Australia, Submission No. 77, June 2020, p. 3.

funders' duties to act honestly, fairly and efficiently, or in utmost good faith, could include indicative ranges for fair commissions, and the factors which could justify commissions in the higher end of that range (for example the nature of the claim, or the time at which it resolves).'[711]

Recommended licence conditions were specified in some submissions. For example, conditions were proposed requiring knowledge of the licence obligations, financial and legal skills and capital adequacy thresholds;[712] imposing a prohibition on control of matters by funders;[713] obliging funders to notify the regulator of any possible breaches of licences;[714] requiring risk management systems;[715] requiring funders to act in the interest of group members;[716] requiring dispute resolution procedures;[717] and requiring honest and accurate communication with class members and other disclosure obligations such as provision of a disclosure statement to which class members must give written consent.[718]

The imposition of statutory duties on funders, through licences or other structures, were also proposed in a number of submissions.[719] Alternatively, it was suggested that funders and insurers could be subject to obligations to comply with the overarching purposes of civil litigation legislation[720] and risk exposure to costs where this obligation is breached.[721] Capital adequacy requirements were recommended in many submissions.[722]

Other suggestions included a requirement that every litigation funder gives a full indemnity to the plaintiffs or class members where clients are consumers;[723] a requirement for transparency in the fees charged under litigation funding agreements, to prevent the inclusion of hidden management fees and administration fees in addition to the "headline" commission rate;[724] a regular character test for funders, their directors and management;[725] an obligation on funders to act in the best interests of the class;[726] the provision of signed disclosure statements to litigants before they enter into funding agreements;[727] the adoption of a self-regulating association for litigation funders which

[711] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 5]
[712] Slater and Gordon, Submission No. 18, June 2020, 18.4; Litigation Capital Management, Submission No. 23, June 2020, 18. 4; MinterEllison, Submission No. 25, 11 June 2020, 3.21, 3.28.
[713] Rebecca LeBherz and Justin McDonnell, Submission No. 49, 10 June 2020, 1-13, 19; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 32.
[714] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 5.
[715] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 5.
[716] Clayton Utz, Submission No. 26, 11 June 2020, 7-9.
[717] Clayton Utz, Submission No. 26, 11 June 2020, 18.
[718] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 31; AustralianSuper, Submission No. 48, 11 June 2020, pp. 4-5.
[719] Stuart Clark, Submission No. 22, June 2020, pp. 2-5; Ashurst, Submission No. 41, 11 June 2020, 11; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, pp. 6, 12.
[720] Norton Rose Fulbright, Submission No. 45, June 2020, 1.2.
[721] Law Council of Australia, Submission No. 67, 16 June 2020, 21.
[722] RIMS Australasia Chapter, Submission No. 12, June 2020, p. 4; Clayton Utz, Submission No. 26, 11 June 2020, 10; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 32.
[723] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 6.3.
[724] Daniel Meyerowitz-Katz, Submission No. 1, 3 June 2020, 6.3. For example, it was suggested that funders could be required regularly to lodge audited financial statements and to make these available to the parties and public Litigation Capital Management, Submission No. 23, June 2020, 18.2.
[725] AI Group, Submission No. 92, 15 June 2020 p. 3. Support for a 'fit and proper person' test was reiterated by witnesses from the AI Group, AICD and the Business Council of Australia (BCA): 29 July 2020, pp. 2, 8, 15.
[726] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 32; National Council of Women Australia, Submission No. 77, June 2020, p. 3; AI Group, Submission No. 92, 15 June 2020 p. 3.
[727] National Council of Women Australia, Submission No. 77, June 2020, p. 3.

could enforce a code of conduct covering capital adequacy, termination of funding arrangements, ADR, and ethical responsibilities;[728] and prohibitions on law firms and lawyers having interests in funders involved in matters in which they are acting.[729]

In addition, it was suggested that s 570 of the *Fair Work Act 2009* (Cth) should be amended 'to exclude non-party funders of class actions from the operation of the 'no costs' jurisdiction';[730] funders should be under a statutory obligation to avoid conflicts, rather than just manage them, and a paramount duty to the court and administration of justice;[731] funding arrangements should be subject to disclosure rules in line with ASIC guidelines;[732] that funders should submit irrevocably to the jurisdiction of Australian courts;[733] and that funders should be under a 'duty of good faith' analogous to that of insurers.[734]

One proposed change to litigation funding was the imposition of a cap on the proportion funders obtain from settlements.[735] This was tentatively supported by one submission if supported by the results of a comparative review of procedures in other jurisdictions.[736] It was proposed that caps should be measured against the net-returns, accounting for costs, rather than gross returns.[737] Additionally, it was suggested that funder returns should be assessed or limited according to the return on invested capital and compared to other investments with similar risks.[738]

However, others contended that any cap on funders' returns would be arbitrary and 'would deprive potential class members of any recovery where the evidence was contentious, or the defendant was a deep-pocketed corporation or government. Such a law would facilitate the continued infliction of the injury or loss.'[739] Caps were said to interfere with the discretion of the court, fetter freedom to contract, and not comprehend risks and costs involved in particular cases.[740] It was also speculated that the cap may become a default rate, raising levels in matters which would otherwise have lower rates, and it may impede settlement negotiations.[741] Dr Mundy stated that any framework which sets the amount of litigation funding fees would need much more detailed analysis and greater access to data than is currently available.[742]

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[728] Harbour Litigation Funding, Submission No. 11, June 2020, pp. 5-6.
[729] MinterEllison, Submission No. 25, 11 June 2020, 3.23; National Council of Women Australia, Submission No. 77, June 2020, p. 4; AI Group, Submission No. 92, 15 June 2020 p. 5. It was also suggested that this prohibition should extend to funder interests in law firms and to indirect relationships or interests, such as common directorships, family ties and ongoing commercial relations: Professor Vicki Waye, Submission No. 5, June 2020, p. 5. It was suggested that the prohibition on lawyers could be achieved through amendment of the ASCR: Allens, Submission No. 69, June 2020, p. 13.
[730] AI Group, Submission No. 92, 15 June 2020 p. 20.
[731] MinterEllison, Submission No. 25, 11 June 2020, 3.20.
[732] AI Group, Submission No. 92, 15 June 2020 p. 3.
[733] Professor Vicki Waye, Submission No. 5, June 2020, p. 5; Menzies Research Centre, Submission No. 66, 14 June 2020, p. 31.
[734] RIMS Australasia Chapter, Submission No. 12, June 2020, pp. 4-5.
[735] Stuart Clark, Submission No. 22, June 2020, p. 6; Chartered Accountants ANZ, Submission No. 58, 11 June 2020, p. 3. This could also take the form of a minimum return to class members: Australian Institute of Company Directors, Submission No. 40, 11 June 2020, p. 17. See also Andrew Saker, 13 July 2020, p. 49.
[736] Ashurst, Submission No. 41, 11 June 2020, 11.
[737] Litigation Capital Management, Submission No. 23, June 2020, 55.
[738] Menzies Research Centre, Submission No. 66, 14 June 2020, p. 31; AI Group, Submission No. 92, 15 June 2020 p. 3; Stuart Clark, 13 July 2020, p. 22; Stephen Smith, 29 July 2020, p. 2.
[739] Andrew Roman, Submission No. 8, 10 June 2020, p. 5.
[740] Litigation Capital Management, Submission No. 23, June 2020, 41, 51-53.
[741] Allens, Submission No. 69, June 2020, pp. 16-18; 13 July 2020, p. 23.
[742] 13 July 2020, p. 27.

Recommendations included obligations of early disclosure of conflicts of interest in the Federal Court practice note,[743] and the use of a flexible, though voluntary, code of conduct like that followed in the UK.[744] It was pointed out that the ALFA does not have the resources to police a set of professional standards of funders but it can exclude funders from the Association when issues arise and promote best practice in the market in general.[745] It was hoped that this relatively young entity will develop to the stage of being a professional body with time.[746]

In the event that licencing is not introduced, it was recommended that funders should be subject to ASIC Regulatory Guide 248 and annual compliance reporting regarding practices and procedures to manage conflicts of interest.[747] It was also recommended that Reg 248 should be retained and strengthened even if funders are required to hold AFSLs.[748] The public availability of reports on compliance with Reg 248 was proposed to promote transparency.[749] It was proposed that annual reporting on compliance with Reg 248 should be required but be waived in any year where funders do not seek financial returns on their investment and it should be amended to clarify its application to funders seeking a 'social return'.[750]

Submissions emphasised the benefits of uniformity in funding regulation across federal and state courts and oversight by a national entity.[751] Yet, it was also noted that uniformity is 'rarely the reality and it does and should yield to ongoing proper policy initiatives from State legislatures and common law developments'.[752]

The exact number of funders operating in Australia is not known although a number of witnesses suggested that this is around 33.[753] Submissions noted the disparities in empirical data and the need for more ongoing research.[754] Empirical data from Professor Morabito is utilised both for and against the proposition that there has been an increasing prevalence in class actions, with the former stating that all overlapping actions are nevertheless separate court proceedings which must be addressed separately by businesses.[755]

[743] Allens, Submission No. 69, June 2020, p. 13.
[744] Associate Professor Lombard and Professor Symes, Submission No. 4, 9 June 2020, p. 4. Lombard and Symes noted noting that there can be a nuanced approach to self-regulation with some external, public intervention: 'Response to Question on Notice 19-01 – 19-03' p. 3. In contrast, Professor Spender argued that a voluntary code would be insufficient by itself to regulate funders but that it could be a 'useful adjunct' to more proactive regulation by other means: 'Response to Questions on Notice 19-01 – 19-03'.
[745] John Walker, 24 July 2020, pp. 42, 44.
[746] John Walker, 24 July 2020, pp. 42, 44.
[747] Law Institute of Victoria, Submission No. 3, 9 June 2020, p. 11.
[748] MinterEllison, Submission No. 25, 11 June 2020, 3.34.
[749] Professor Peta Spender, Submission No. 49, 11 June 2020, p. 2.
[750] Grata Fund, Submission No. 76, 19 June 2020, p. 4.
[751] Law Council of Australia, Submission No. 67, 16 June 2020, 88; Federal Chamber of Automotive Industries, Submission No. 70, 17 June 2020, p. 7.
[752] Maurice Blackburn Lawyers, Submission No. 37, 11 June 2020, 3.42.
[753] 24 July 2020, p. 33.
[754] Queensland Law Society, Submission No. 46, 11 June 2020, p. 1; Professor Peta Spender, Submission No. 49, 11 June 2020, p. 4.
[755] Australian Institute of Company Directors, Submission No. 40, 11 June 2020, pp. 1-2.

Previous recommendations of law reform bodies for the establishment of a state-operated 'Justice Fund' were restated.[756] Reform to the adverse costs system for public interest actions were also recommended alongside a justice fund.[757]

4. Commentary

Whilst largely reflecting the views of witnesses in their written submissions to the Committee, the oral evidence amplified and clarified various contentions concerning the operation of the existing class actions system and its commercial funding infrastructure.

In the course of the oral evidence and questioning by members of the Joint Committee, the views and polarised positions of a number of members of the Committee have been readily apparent.

It could be contended that such transparency in relation to political or ideological positions on matters of public policy is to be commended. On the other hand, what appear to be, in a number of respects, preconceived views raise questions about the utility of the Inquiry and the objectiveness of the manner in which members of the Committee are carrying out their functions. If this was a judicial inquiry there would no doubt be applications for the removal of various members on the grounds of reasonable apprehension of bias.

Moreover, a number of important policy matters that fall within the terms of reference of the Committee have been pre-empted by legislative and regulatory reforms introduced by the Government whilst the current Inquiry has been in progress.

Notwithstanding such reservations, the Inquiry has proven to be a useful and insightful process. Questioning by the Committee, and questions on notice, have served to unearth not only relevant factual information and important empirical data but have also touched on the commercial and financial interests of those on both sides of the debate.[758] Much of the inquisitorial focus has been on the strengths and limitations of the positions advocated by adversaries on both sides. As with many adversarial processes, including court proceedings, the truth usually lies somewhere between the extremes.

Witnesses and organisations on opposing sides each purport to express concern for access to justice in general and the interests of class members in particular. However, as the proceedings to date make clear, this rhetoric sometimes serves to camouflage the reality in which economic interest looms large on both sides.

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[756] Australian Lawyers Alliance, Submission No. 2, 8 June 2020, 21; Peter Cashman, Submission No. 55, 12 June 2020, p. 1; Law Council of Australia, Submission No. 67, 16 June 2020, 7, 110; Grata Fund, Submission No. 76, 19 June 2020, p. 9.

[757] Grata Fund, Submission No. 76, 19 June 2020, p. 9.

[758] For example, in the response of Omni Bridgeway to a Question on Notice labelled 05-03, the Joint Committee was provided with a redacted copy of the document referenced by Murphy J in the *Murray Goulburn* proceedings which set out estimated returns according to different funding rates. Omni Bridgeway also provided information on which matters are currently backed by particular funds and information on returns obtained by Funds 2&3 (Responses to Questions on Notice 05-05 and 05-07). In addition, Slater and Gordon provided median charge out rates for employees across 4 class actions: 'Response to Question on Notice No. 4', Annexure Two. Shine Lawyers listed fees, disbursements and funding commissions for a number of class actions: 'Response to Question on Notice No. 1'. Another example of useful information obtained as a result of the inquiry is the example litigation funding agreements from Augusta Venture, ICP and Vannin Capital provided by AFLA: 'Response to Question on Notice 1: Precedent Class Action LFAs'.

Annexure 1

Submissions to the Joint Committee Inquiry as at 4 November 2020.

No.	Submission author	Date
1	Mr Daniel Meyerowitz-Katz (PDF 459 KB)	3 June 2020
	1.1 Supplementary submission (PDF 126 KB)	7 July 2020
2	Australian Lawyers Alliance (PDF 333 KB)	8 June 2020
3	Law Institute of Victoria (PDF 494 KB)	9 June 2020
4	Associate Professor Lombard and Professor Symes (PDF 305 KB)	9 June 2020
5	Professor Vicki Waye (PDF 215 KB)	2020
6	Professor Vince Morabito (PDF 249 KB)	10 June 2020
7	Investor Claim Partner Pty Ltd (PDF 502 KB)	10 June 2020
8	Mr Andrew Roman (PDF 83 KB)	10 June 2020
9	Mr Rod Barton, MP (PDF 808 KB)	10 June 2020
10	Ms Paola Balla (PDF 269 KB)	2020
11	Harbour Litigation Funding (PDF 869 KB)	June 2020
12	RIMS Australasia Chapter (PDF 101 KB)	2020
13	Balance Legal Capital (PDF 161 KB)	10 June 2020
14	Marsh Pty Ltd (PDF 938 KB)	11 June 2020
15	ACCC (PDF 444 KB)	10 June 2020
16	Woodsford Litigation Funding Limited (PDF 349 KB)	11 June 2020
17	Dr Warren Mundy (PDF 209 KB)	2020
18	Slater and Gordon (PDF 393 KB)	June 2020
19	Mr Rod Gibson (PDF 120 KB)	11 June 2020
20	Premier Litigation Funding Management (PDF 384 KB)	10 June 2020
21	US Chamber Institute for Legal Reform (PDF 851 KB)	10 June 2020
22	S Stuart Clark AM FAICD (PDF 212 KB)	11 June 2020
23	Litigation Capital Management (PDF 1153 KB)	June 2020
24	Mr Michael Quinn (PDF 106 KB)	11 June 2020
25	MinterEllison (PDF 253 KB)	11 June 2020
26	Clayton Utz (PDF 678 KB)	11 June 2020
27	Public Interest Advocacy Centre (PDF 321 KB)	11 June 2020
28	HESTA (PDF 1579 KB)	June 2020
29	Therium Capital Management (Australia) Pty Ltd (PDF 760 KB)	11 June 2020
30	Professor Michael Legg (PDF 243 KB)	2020
31	Augusta Ventures (Australia) Pty Ltd (PDF 183 KB)	11 June 2020
32	River Capital (PDF 152 KB)	9 June 2020
33	Southern Cross Litigation Finance (PDF 577 KB)	11 June 2020
34	Australian Restructuring Insolvency & Turnaround Association (ARITA) (PDF 182 KB)	11 June 2020
35	Shine Lawyers (PDF 570 KB)	11 June 2020
36	Litigation Lending Services Ltd (PDF 385 KB)	11 June 2020
37	Maurice Blackburn Lawyers (PDF 1114 KB)	11 June 2020
38	Adero Law (PDF 399 KB)	11 June 2020
39	ASIC (PDF 286 KB)	June 2020
40	Australian Institute of Company Directors (PDF 1300 KB)	11 June 2020
41	Ashurst (PDF 125 KB)	11 June 2020
42	Blue Energy Limited (PDF 285 KB)	11 June 2020

43	Consumer Action Law Centre (PDF 227 KB)[759]	11 June 2020
44	CPA Australia (PDF 531 KB)	11 June 2020
45	Norton Rose Fulbright (PDF 9507 KB)	June 2020
46	Queensland Law Society (PDF 4428 KB)	11 June 2020
47	Dr Michael Duffy (PDF 234 KB)	2020
48	AustralianSuper (PDF 321 KB)	11 June 2020
49	Rebecca LeBherz and Justin McDonnell (PDF 320 KB)	10 June 2020
50	Professor Peta Spender (PDF 182 KB)	11 June 2020
51	Herbert Smith Freehills (PDF 1077 KB)	11 June 2020
52	Mr Stewart Levitt (PDF 532 KB)	11 June 2020
	52.1 Supplementary submission (PDF 577 KB)	2020
53	King & Wood Mallesons (PDF 135 KB)	11 June 2020
54	Law Firms Australia (PDF 153 KB)	12 June 2020
55	Dr Peter Cashman (PDF 137 KB)	12 June 2020
	55.1 Supplementary submission on the Joint Committee[760]	16 July 2020
	55.2 Supplementary submission on delay	9 October 2020
56	Prospa (PDF 142 KB)	11 June 2020
57	The Association of Litigation Funders of Australia (PDF 941 KB)	11 June 2020
	57.1 Supplementary submission (PDF 229 KB)	2020
	57.2 Response to Submission 57.1 by the Treasury (PDF 6512 KB)	20 July 2020
58	Chartered Accountants ANZ (PDF 12022 KB)	11 June 2020
59	Dr Kenneth Menz (PDF 63 KB)	2020
60	Mr John Telford (PDF 54 KB)	3 June 2020
61	Australian Council of Superannuation Investors (PDF 107 KB)	11 June 2020
62	ISS Securities Class Actions Services LLC (PDF 230 KB)	11 June 2020
63	Transport Alliance Australia (PDF 147 KB)	11 June 2020
64	Operation Redress Pty Ltd (PDF 70 KB)	2020
65	Donaldson Law (PDF 219 KB)	12 June 2020
66	Menzies Research Centre (PDF 931 KB)	14 June 2020
	66.1 Response to supplementary submission 73.1	10 July 2020
67	Law Council of Australia (PDF 1267 KB)	16 June 2020
68	Insurance Council of Australia (PDF 503 KB)	10 June 2020
69	Allens (PDF 3234 KB)	June 2020
70	Federal Chamber of Automotive Industries (PDF 336 KB)	17 June 2020
71	Yarra Capital Management (PDF 188 KB)	16 June 2020
72	ASX (PDF 357 KB)	17 June 2020
73	Omni Bridgeway Limited (PDF 1152 KB) [761]	17 June 2020
	73.1 Supplementary submission	8 July 2020
74	Health Industry Companies - Joint Submission (PDF 14 KB)	17 June 2020
75	Mr Mark Morris (PDF 300 KB)	1 June 2020
76	Grata Fund (PDF 193 KB)	19 June 2020
77	National Council of Women Australia (PDF 7500 KB)	2020
78	Associate Professor Sean Foley and Dr Angelo Aspris (PDF 231 KB)	11 June 2020

[759] Attached to the submission are the earlier submissions to the ALRC and VLRC inquiries, which we have not sought to summarise.

[760] Supplementary submissions 55.1 and 55.2 are previous iterations of Research Papers 1 and 3, respectively; not summarised.

[761] Omni Bridgeway filed a supplementary submission [73.1], in response to the Menzies Research Centre submission [66] and the Menzies Research Centre submitted a reply [which we have referred to as 66.1].

79	Professor Kevin Davis (PDF 134 KB)	16 June 2020
80	Goal Group (PDF 159 KB)	18 June 2020
81	Australian Finance Industry Association (PDF 171 KB)	18 June 2020
82	Mr Nicos Andrianakis (PDF 65 KB)	11 June 2020
83	Communication Workers Union Victoria (PDF 152 KB)	2020
84	Professor Brian Fitzpatrick (PDF 1440 KB)[762]	18 June 2020
85	PwC (PDF 71 KB)	19 June 2020
86	Business Council of Australia (PDF 158 KB)	June 2020
87	Phi Finney McDonald (PDF 360 KB)	2020
88	Examples of Form Letters[763]	
89	New South Wales Young Lawyers (PDF 863 KB)	25 June 2020
90	Superannuation Crisis Support Group (PDF 121 KB) (PDF 561 KB) [764]	9 June 2020
	90.1 Quinn Emanuel response to Submission No. 90 (PDF 598 KB)	25 June 2020
	90.2 Gilbert and Tobin response to Submission No. 90 (PDF 2973 KB) [765]	22 June 2020
	90.3 Vannin Capital response to Submission No. 90 (PDF 1265 KB)	26 June 2020
	90.4 Vannin Capital response to Submission No 90.1 (PDF 378 KB)	22 July 2020
91	Dr Makepeace, Dr Walsh, Dr Camacho (PDF 1620 KB)	11 June 2020
92	AI Group (PDF 3764 KB)[766]	15 June 2020
	92.1 Adero Law response to AI Group submission (PDF 263 KB)	26 June 2020
	92.2 Augusta response to AI Group submission (PDF 163 KB)	26 June 2020
93	Attorney-General's Department (PDF 358 KB)	June 2020
94	Mr Lindsay Clout (PDF 77 KB)	2020
95	Group of 100 (PDF 335 KB)	8 July 2020
96	NSW Bar Association (PDF 3547 KB)	27 July 2020
97	Name Withheld (PDF 76 KB)	2020
98	Name Withheld (PDF 59 KB)	9 July 2020
99	The Rule of Law Institute of Australia (PDF 857 KB)	September 2020
100	Professor R.R. Officer AM (PDF 281 KB)	15 September 2020
101	Mr Sean McGing (PDF 298 KB)	2 October 2020

[762] The submission attaches a 2018 article by the author in the *New Zealand Business Law Quarterly*, which we have not summarised.

[763] Not summarised.

[764] This submission is authored by a group supporting class members in the case P*etersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842.A copy of this judgment is attached to submission No. 90.

[765] This submission cites aspects of the judgment in P*etersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 (Murphy J).

[766] This submission contains approx. 70 pages of annexures relating to their complaint to the ACCC and ASIC; we have not referred to these annexures in the summary.