

# **ALFA's consensus position on the 24 recommendations for reform in ALRC report: *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders***

A few months into the Labor Federal Government's term, there is renewed debate on the 24 reforms recommended by the Australian Law Reform Commission (ALRC) in its report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, tabled on 24 January 2019 (the ALRC Report). The ALRC Report can be accessed [here](#).

ALFA has re-considered ALRC's 24 recommendations for reform against the myriad of legislative, regulatory and judicial developments impacting class actions and litigation funding since the ALRC Report was issued. ALFA's consensus position on each of the recommendations is set out here.

The table below is issued on behalf of the members of the Association and represents their collective views, but does not necessarily represent the individual views of each member.

ALRC Recommendation <sup>1</sup>	ALFA's consensus position
<b>Case Management</b>	
The Federal Court of Australia Act 1976 (Cth) ( <b>the Act</b> ) should be amended so that all representative proceedings are initiated as an open class [1]	ALFA supports access to justice. This recommendation may operate to limit access/options for class members seeking redress
The Federal Court of Australia's Class Actions Practice Note ( <b>PN</b> ) should be amended to provide criteria for ordering class closure and re-opening a class [2]	ALFA supports these recommendations
The Act should be amended to provide the Court with an express statutory power to: (a) make common fund orders on the application of the plaintiff or the Court's own motion (b) resolve representative proceedings. The PN should be amended to provide a further case management procedure for competing class actions [3, 4 and 5]	
The Supreme Courts of States and Territories with representative action procedures should consider becoming parties to the Protocol for Communication and Cooperation between the Supreme Court of NSW and the Federal Court of Australia in class action proceedings [6]	ALFA considers that relevant State and Territory Courts should be consulted on these recommendations
The Federal Court of Australia should have exclusive jurisdiction for civil matters commenced as class actions under part 9.6A of the Corporations Act 2001 (Cth) ( <b>Corporations Act</b> ) and s12G of the Australian Securities and Investments Commission Act 2001 (Cth) ( <b>ASIC Act</b> ) [7]	
<b>Settlement approval</b>	
The PN should be amended to include a clause that: (a) the Court may appoint a referee to assess the reasonableness of legal costs charged prior to settlement approval (b) the Court may tender settlement administration (c) requires settlement administrators to provide a report to the class on completion of settlement distribution, to be published on a database maintained by the Court [8, 9, 10]	ALFA supports these recommendations
<b>Regulation of litigation funders</b>	
The Act should be amended to prohibit a solicitor acting for the representative plaintiff from seeking to recover any unpaid legal fees from the representative plaintiff or group members (where there is third-party litigation funding) [11]	ALFA supports this recommendation
The Act should be amended to include a statutory presumption that third-party litigation funder will provide security for costs in class actions in a form that is enforceable in Australia [12]	ALFA is unable to support this recommendation until this type of security is readily available from the insurance market
The Act should be amended to 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 [13]	ALFA supports this recommendation

<sup>1</sup> ALRC Recommendation number is referenced in square brackets

<b>ALRC Recommendation<sup>1</sup></b>	<b>ALFA's consensus position</b>
The Act should be amended to provide that third-party litigation funding agreements with respect to class actions are enforceable only with the approval of the Court and that the Court has an express statutory power to reject, vary or amend the terms of third-party funding agreements (which must be governed by Australian law and must expressly provide for a complete indemnity in favour of the representative plaintiff against an adverse costs order) [14]	ALFA supports these recommendations
Third-party litigation funders that fund class actions should be required to report annually to ASIC on their conflicts of interests compliance [15]	
The definition of a 'litigation funding scheme' in 5C.11.01 of the Corporations Regulations 2001 (Cth) should be amended to include 'law firm financing' and 'portfolio funding' [16]	ALFA supports this recommendation (noting the impact of <i>Stanwell</i> [2022] FCAFC 103)
<b>Solicitors' fees and conflicts of interest</b>	
Statutes regulating the legal profession should permit solicitors acting for representative plaintiffs in class actions to enter into percentage-based fee arrangements, with certain limitations to apply [17]	ALFA supports this recommendation
The Act should be amended to include a statutory presumption that solicitors who fund class actions on the basis of percentage-based fee arrangements will provide security for costs in a form that is enforceable in Australia [18]	ALFA is unable to support this recommendation until this type of security is readily available from the insurance market
The Act should be amended to provide that percentage-based fee arrangements in class actions are permitted only with leave of the Court, and to give the Court express statutory power to reject, vary or amend the terms of such agreements [19]	ALFA supports these recommendations
The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class actions practice [20]	
The Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matter in which the solicitor or law firm is acting [21]	
The PN should be amended, so that first notices provided to potential class members are required to clearly describe the obligation of legal representatives to avoid and manage conflicts of interest and to outline the detail of any conflicts in that particular case [22]	
<b>Regulatory redress</b>	
The Australian Government should review the enforcement tools available to regulators of products and services used by consumers and small businesses to provide for a consistent framework of regulatory redress [23]	ALFA supports this recommendation
<b>Review of substantive law</b>	
The Australian Government should commission a review of the legal and economic impact of the operation, enforcement and effects of continuous disclosure obligations and misleading and deceptive conduct provisions in the Corporations Act and ASIC Act [24]	ALFA supports this recommendation