ASSOCIATION OF LITIGATION FUNDERS OF AUSTRALIA
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Association of Litigation Funders of Australia

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

Inquiry into Class Action Proceedings and Third-Party Litigation Funders

August 2018

The Association of Litigation Funders of Australia was formed this year[1] with the primary objective of facilitating the enhancement of the Australian litigation funding market (the '**Market'**) by:

(a) providing education, training and information concerning litigation funding and the Market to its Members and the Market's stakeholders and prospective plaintiffs;
(b) actively lobbying the government and legislators, and engaging with other regulators and policy makers to help shape the legal and regulatory framework of litigation funding in Australia; and
(c) promoting best practice and ethical behaviour amongst litigation funders in Australia.

The Association:

(a) is a professional body which, unlike the Association of Litigation Funders in the United Kingdom, does not propose to be directly involved in regulation of participants in the Market; and
(b) is thankful for the opportunity to provide submissions in response to the Australian Law Reform Commission's discussion paper Inquiry into Class Action Proceedings and Third-Party Litigation Funders dated June 2018.

These submissions represent the collective views of the members of the Association, but do not necessarily represent the views of each individual member firm.

1. Introduction to the Inquiry

Proposal 1–1 The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) with regards to:

- The propensity for corporate entities to be the target of funded shareholder class actions in Australia;
- The value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and
- The availability and cost of director and officers liability cover within the Australian market.

1.1. An inquiry into the legal and economic impact of the market protection legislation referred to above is not opposed by the Association, although the proposed terms of reference are:
(a) biased; and
(b) insufficient.

[1] The founding members are Augusta Ventures, Balance Legal Capital, DFK Richard Hill, Investor Claim Partner, Litigation Lending Services and Vannin Capital.

1.2. The first proposed term of reference concerns the propensity for companies to be the 'target' of funded shareholder class actions in Australia.

1.3. This language is inflammatory. It suggests:
(a) the companies are the victims rather that the companies' shareholders; and
(b) the cause of the issues to be the subject of the inquiry is the funded shareholder class actions rather than the conduct of the companies and the damage caused by that conduct.

1.4. The second proposed term of reference focuses upon the capitalisation of the 'target' company, presumably to enable an inquiry into the issues from the shareholders' perspective that own shares after full and accurate disclosure. Surely the interests of the shareholders who allegedly suffered damage resulting from the alleged breach ought also be the subject of the inquiry, particularly where these interests are the interests sought to be protected by the market protection legislation that is proposed to be reviewed.

1.5. The third proposed term of reference focuses on the availability and cost of Australian D&O cover without any reference to the effect breaches of the market protection legislation have on not only the cost and availability of capital in Australia, but also the diminished returns on investment caused by misallocation of capital resulting from the market misbehaviour.

1.6. If the review takes place based on insufficient and biased terms of reference, it may have the debate focusing on the public spectre of actions, rather than relevant evidence. The Productivity Commission raised this concern in 2014[1]. The ALRC, whilst agreeing that public debate about the underlying laws is more appropriate than changing the mechanism by which class actions are prosecuted, acknowledges this evidence-based inquiry is beyond the scope of its current terms of reference[1].

Without an understanding, for example, of the cost to the ASX and market participants of breaches of the continuous disclosure provisions of the *Corporations Act 2001* (Cth) and the deterrent effect of class actions, the ALRC is not only unable to focus on the primary issues but may detrimentally affect the enforceability of our laws; a risk with potentially far greater unintended negative consequences than the potential intended gains that may flow from the current inquiry.

1.7. The Association considers the proposed review's terms of reference to be too narrow in their focus and, in particular, fail to address:
(a) the cost to the ASX and its participants, for example, that currently exists when the market protection laws are not enforced;
(b) the current limitations on the enforceability of the laws; and
(c) the potential detrimental effect any changes the ALRC propose may make to enforceability.

1.8. There are approximately 39 completed ASX shareholder claims that can now provide some indication of the potential cost to the ASX and its participants from misallocation of capital caused by alleged breaches of continuous disclosure provisions.

In these cases alone, the companies shed about $36.5billion in market capitalisation when the correcting disclosures were made. A list is attached.

The cost to the ASX and its participants when ASX protection laws are breached far exceed the cost of enforcement, with lawyers' and funders' fees on these 39 cases representing about 40% of the $1.7bn recovered, which in turn represents less than 2% of the potential cost to the market caused by breaches of the continuous disclosure provisions that have been the subject of a concluded claim.

Any limitations placed on enforcement mechanisms must have due regard to the potential effects on the ASX by reference to its capacity to maximise available capital at reasonable cost and its capacity to allocate that capital efficiently.

1.9. Another factor any review should consider is the potential additional costs involved in ASIC enforcing the continuous disclosure obligations if less ASX shareholder claims were to be brought.

1.10. Any review of the legal and economic impact of particular legislation should also consider the extent of legal fees and disbursements required to bring claims under these regimes, the role of defence costs and the impact of insurers.

Looking at only some factors in isolation, and without reference to the current operation of the civil justice system (including the time it takes to resolve claims), will likely skew the results of any review or render any resulting recommendations inappropriate.

1.11. There is also limited focus on potential ways to decrease lawyers' fees and disbursements and the time claims take to resolve. Our adversarial civil justice system is the Rolls Royce of Justice Systems[1] that comes at a Rolls Royce price. Strong demand for funding obtained by parties in litigation is a symptom of the current cost of justice, not the root cause. A focus on how our courts could more efficiently resolve disputes, rather than by preparation for trials that are unlikely to occur, would have been fertile ground for identifying relevant productive reform measures.

1.12. Despite almost all of the defence costs arising from funded class actions being funded under pre-existing insurance policies, the ALRC has decided not to inquire into the impact of insurers in our civil justice system. This is remarkable given equality of arms in our adversarial processes is a pre-

requisite in the attainment of justice. The quantum of funding defences dwarfs the funding of claims and accordingly has a far greater capacity to adversely affect our courts' capacity to achieve their objectives[1].

2. Incidence

This chapter of the Discussion Paper does not pose any questions or offer any proposals for reform.

3. Regulating Litigation Funders

Proposal 3–1 The *Corporations Act 2001* (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.

3.1. It is the view of the Association that there is no basis founded in evidence, either locally or overseas, to require third- party litigation funders to support.

3.2. That said, the Association is unlikely to oppose a licensing regime where the terms of the regime:
(a) have regard to the potential it may not add any meaningful value in consumer protection;
(b) do not restrict competition that is emerging in the market;
(c) do not cost more than their likely benefit; and
(d) are the subject of further consultation.

3.3. In designing a licensing regime, the relevant Authority should identify the risks it seeks to mitigate to protect the interests of (at least) retail clients. The types of risks highlighted by the ALRC Review relate principally to issues such as capital inadequacy and where funders would not meet a 'fit and proper' test.

It is relevant to note that would not have been prevented through a licensing regime.

3.4. The Market existed before litigation funding in any other jurisdiction globally. With the longest history to interrogate, the Association is not aware of any instances of failure on the part of a litigation funder with reference to the types of risks above that has caused detriment to a consumer. There is no basis therefore in history that supports the introduction of a licensing regime to manage consumer risk.

3.5 The Market is anecdotally operating at its most efficient and effective level since its inception with 25 local and overseas funders reportedly active. This brings dynamic market forces leading to a wide choice for clients and law firms to select a litigation funder that demonstrates the highest level of corporate governance whilst prosecuting the claim. This is strengthened further by the existing powers of the Courts to address any abuse of process.

3.5. The establishment of the Association further demonstrates a market-driven approach, rather than a legislative approach, to continuous improvement in governance standards.

3.6. It is reasonable to conclude through the interface with sophisticated buyers of funding service and the Court, that only those litigation funders that meet the highest standards of governance will prevail.

3.7. It is therefore counter-intuitive to introduce a licensing regime for litigation funders where the types of licensing conditions being contemplated address a problem that does not exist historically, presently, and is in not likely to emerge in the medium term.

3.8. For the above reasons, the Association does not support a licensing regime.

3.9. Where specific risks are identified and supported by evidence, an alternate approach to a licensing regime may be through introducing ASIC Regulations like RG 248-Managing Conflicts of Interest, that can be tailored to address a specific risk. This may be a more cost- effective and efficient mechanism to target a specific risk or risks, rather than introducing a breadth of regulation that will inevitably create unintended consequences.

3.10. In response to other Proposals or Questions in this submission relating to licensing, the Association's position is that whilst there is no evidence to support the need for a licensing regime for third-party litigation funders, the Association does not oppose its introduction.

Answers to other Proposals or Questions in this submission addressing licensing ought not be construed in a manner to suggest that the Association currently supports licensing.

If a licensing regime is ultimately to be introduced, the Association seeks the opportunity to provide submissions in relation to the form and content of the licensing regime.

Proposal 3–2 A litigation funding licence should require third-party litigation funders to:

- do all things necessary to ensure that their services are provided efficiently, honestly and fairly;
- ensure all communications with class members and potential class members are clear, honest and accurate;
- have adequate arrangements for managing conflicts of interest;
- have sufficient resources (including financial, technological and human resources);
- have adequate risk management systems;
- have a complaint dispute resolution system; and
- be audited annually.

3.11. The Association agrees the above represents good business practice which a business would seek to implement as a matter of course, regardless of whether or not a licence was mandatory.

Question 3–1 What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?

3.12. The minimum character requirement for responsible officers ought to be 'good fame and character', with ASIC being required to consider:

(a) any convictions a person may have had in the previous 10 years for serious fraud;

(b) whether a person has previously had an AFSL (or any other occupation licence) suspended or cancelled; and

(c) whether a person has previously been banned or disqualified from serving as a director[1].

Question 3–2 What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.

3.13. It should be noted that there are few, if any, examples where the lack of capital adequacy of a funder has led to financial loss by claimants either in Australia or the UK in the last 20 years. There are market forces in place to help regulate and/or mitigate this risk. For instance, law firms are unlikely to work with funders where they are concerned about a funder's solvency.

3.14. If the funding of a meritorious claim is put into question due to capital inadequacy of the funder, the Australian market is sufficiently mature and deep for substitute funding to be obtained at no additional cost to consumers.

3.15. Capital adequacy requirements are proposed to be similar to that required by the Association of Litigation Funders in the UK, being:

(a) to maintain at all times access to adequate financial resources to meet the financial obligations of the funder and in particular to ensure that it maintains the capacity:

(i) to pay all debts as and when they become due and payable; and

(ii) to have access to capital to meet its aggregate funding liabilities under all of its litigation funding agreements;

(b) to maintain access within 4 weeks to a minimum of $1million in capital or such other amount as is stipulated by regulation from time to time;

(c) to have a continuous disclosure obligation in respect of its capital adequacy, including a specific obligation to notify promptly ASIC if it reasonably believes it is in breach of its capital adequacy obligations;

(d) to be required to submit an annual audit report by an independent audit firm containing an audit opinion:

(i) on the funder's most recent annual financial statements prepared in accordance with the requirements of the jurisdiction where the company is incorporated (but not the underlying financial statements) within one month of receipt of the opinion and in any case within six months of each fiscal year end. If the audit opinion provided is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the firm to continue as a going concern, the funder will respond fully to any ASIC queries;

(ii) on whether the funder satisfies the minimum capital requirement prevailing as at the relevant date; and

(iii) to comply with any capital adequacy requirements stipulated by regulation from time to time.

3.16. These capital requirements ought only be relevant to consumer funding and class actions where group members include retail consumers.

Question 3–3 Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?

3.17. No, although it ought to be seen as best practice, with the funders disclosing whether or not they have joined the scheme when seeking to fund clients, as part of their disclosure duties.

3.18. Whilst there is insufficient evidence of complaints to date to require joinder of the scheme, if a licensing regime is introduced, it ought to require disclosure by the funder to ASIC of all complaints made and evidence of their processing and resolution.

4. Conflicts of Interest

Proposal 4–1 If the licensing regime proposed by Proposal 3–1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248 and should be required to report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

4.1. The Association agrees.

Proposal 4–2 If the licensing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the *Corporations Regulations 2001* (Cth).

4.2. The Association agrees.

Proposal 4–3 The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.

4.3. The Association considers that this is a matter more properly debated by the legal profession.

4.4. Specialist accreditation may stymie competition amongst solicitors. The Association notes that the professional responsibility rules for solicitors contain obligations regarding conflicts and duties to clients which cover the issues likely to arise in class action proceedings.

Proposal 4–4 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 matters in which the solicitor or law firm is acting.

4.5. The Association agrees.

Proposal 4–5 The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.

4.6. The Association does not agree.

4.7. Disclosure of third-party funding should not be required as a matter of course as it is not relevant to the substantive merits of the case (although strong merits should attract third-party funding).

4.8. Disclosure is a tactical decision for the claimant and its legal advisers which should not be prescribed by rules. Skirmishes over disclosure of the presence of funding is also prone to waste costs and distract from the substantive merits of the case.

4.9. If the amendment is made, the definition of third-party funding ought to include all sources of third-party finance being used by litigants including insurer funding of defence costs (for the reasons noted in response to Proposal 1-1), funding provided by parent companies or affiliated entities, and finance from other financial institutions including recourse debt.

Proposal 4–6 The Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.

4.10. The Association agrees.

5. Commission Rates and Legal Fees

Proposal 5–1 Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements.

This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:

- an action that is funded through a contingency fee arrangement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;
- a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and
- under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against any adverse costs order.

5.1. The Association interprets 'contingency fees' as being akin to the Damages-Based Agreement regime applied in the UK. On that basis, the Association considers that the current tripartite relationship between solicitors, litigation funders and clients structurally supports the unfettered fiduciary duties which solicitors owe to their clients.

5.2. Whilst the Association does not oppose in principle the introduction of contingency fees, if they are introduced there needs to be sufficient safeguards to ensure that solicitors' existing fiduciary duties are not fettered as a result.

5.3. The Association does not consider that the first stated dot point restriction has any foundation in policy and in fact could cause the cost of funding to be greater than it would be without the restriction.

5.4. It is assumed that the restriction is focused on there not being funding by lawyers and a third-party funder *directly*, with lawyers not proposed to be restricted from laying off some risks provided there is full disclosure to the clients and oversight by the Courts.

5.5. Read in this way, the restriction is simply anti-competitive. If the addition of the two success fees are greater than market rates, then other than in respect of small claims that have limited competitive tensions, the market rather than regulation ought to produce the outcome, with the market providing alternate cheaper options.

5.6. There may well be economic and practical benefits to the client to have the claim part-funded through a contingency fee with their lawyer, and concurrently part-funded by a funder (for example, to meet disbursements or other costs that are not solicitor fees). It would also broaden

the contingency fee market for law firms that cannot or will not assume the full risk of the litigation.

We see no reason why regulation should block this option which in some cases may affect the economic viability of the claim and therefore reduce access to justice.

5.7. A capital adequacy requirement or any other regulation imposed on funders should also be applied to law firms.

Proposal 5–2 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.

5.8. If contingency fees are permitted, then court oversight of fee agreements charged by officers of the court is appropriate.

Question 5–1 Should the prohibition on contingency fees remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated?

5.9. The Association does not respond to this request.

Proposal 5–3 The Federal Court should be given an express statutory power in Part IVA of the *Federal Court of Australia Act 1976* (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements.

5.10. The Association does not consider the Federal Court ought to have the power to alter contractual arrangements.

5.11. The Courts' current powers in respect of approval of settlements are sufficient to protect class members. Funding fees need to adequately compensate for risk at the time the funding agreement is entered into and should not be set retrospectively by the Federal Court when the outcome of the case is known.

5.12. Competition now evident in the market is the best mechanism to set fees rather than assuming that the judiciary is better placed to assess in hindsight what a fair balance of risk and return is for a given case.

If Proposal 5-2 is adopted this power should also apply to contingency fee agreements.

5.13. The Association agrees.

5.14. Whilst the Association disagrees with pricing regulation, prima facie, regulatory intervention ought not discriminate between service providers, except where it is appropriate on policy grounds. One such policy ground may be the fact that lawyers owe fiduciary duties to their clients and are officers of the Court, which necessarily involves the fiduciary in effect, seeking to purchase a share of their clients' assets from their clients.

5.15. This may necessitate Court oversight of contingency fees to ensure fiduciary duties are not being breached by the relevant officers of the Court whereas contracts entered into by arms-length funders who are not required to place the claimants' interests above their own do not require this oversight.

Question 5–2 In addition to Proposals 5–1 and 5–2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:

- Should contingency fee arrangements and commission rates also be subject to statutory caps that limit the proportion of income derived from settlement or judgment sums on a sliding scale, so that the larger the settlement or judgment sum the lower the fee or rate? or
- Should there be a statutory provision that provides, unless the Court otherwise orders, that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%?

5.16. The Association does not agree.

5.17. Statutory provisions regarding caps or maximums are likely to reduce access to justice and create conflicts rather than protect class members.

5.18. The Federal Court already considers the proportionality of a commission rate to a settlement when determining whether to approve a settlement. If contingency fees are permitted, it can be assumed the Federal Court will conduct a similar exercise.

5.19. Introducing statutory caps or maximums will stymie competition (which as discussed below has increased in recent times) and may create a tendency for funders to charge fees at the caps and assumes the legislature is better placed than the market to determine a reasonable risk/return rate.

5.20. Another unintended consequence of introducing statutory caps is the potential conflict it may create regarding settlement of a claim.

5.21. If a funder is faced with a statutory cap, it may be placed in a position where it cannot commercially propose or agree to an early settlement offer (which the class members may wish to accept) because its returns will make the outcome commercially unattractive/unviable.

5.22. The existing pricing policy of funders referring to a percentage of the recovery minimises any potential conflicts.

5.23. The Australian litigation funding market was, until the last three years or so, heavily centralised. The initial structure of the market, which could almost have been considered a monopoly, enabled returns that are no longer available given current market forces.

5.24. There are now approximately 25 funders operating in the Australian market which is encouraging competition and materially reducing prices.

5.25. Economic theory is borne out by the recent experience in the *GetSwift* class action. This outcome has clearly demonstrated the effect of competition, so that regulating pricing is no longer necessary, if it ever was.

5.26. In competitive financial markets, pricing is a function of risk and competition.

5.27. Any regulation of pricing is also likely to have the unintended consequence of encouraging funding for only the strongest cases. This is likely to reduce the number of claims funded and therefore deny access to justice.

5.28. As to the second part of the question, the answer is no for the reasons described above.

5.29. In addition, the smaller cases where the ratio of damages to costs is tight may not be funded if there is a hard limit on commissions.

5.30. For instance, the actual recovery may be lower than anticipated (which frequently occurs when parties take into account litigation risk in settlement offers) and the imposed reduction of commissions will not allow adequate reward for risk. The end result would be such cases would simply not be funded, thereby limiting access to justice.

Question 5–3 Should any statutory cap for third-party litigation funders be set at the same proportional rate as for solicitors operating on a contingency fee basis, or would parity affect the viability of the third-party litigation funding model?

5.31. Whilst the Association does not agree that there should be any such cap on third-party litigation funders' fees or solicitors' contingency fees for the reasons given above, if such a cap is introduced, a distinction should be made as between non-recourse capital invested into a case and a law firm's WIP contribution, a substantial part of which is generated by associates that are fixed or semi-fixed costs for the firm.

5.32. Non-recourse cash investments are a riskier layer of the investment and thus should also be allowed to attract a higher fee than solicitors' WIP.

Question 5–4 What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a 'class action reinvestment fund' be a viable option?

5.33. If claims cannot attract third party funding, it is unlikely that any other option will realistically be found without legislative amendment to enable an effective redress mechanism to facilitate just, quick and cheap resolution of claims (refer to section 8).

5.34. Class members who have successfully prosecuted their claims should not be required to fund other claimants, noting that in many cases group members do not recover all of their losses.

5.35. If a claim is unable to attract funding, it is likely to be because it is not commercially viable or because whilst it has merit there are risks associated with liability, causation, damages or recoverability which make it an unattractive proposition. The diversion of claim proceeds to fund such matters may not result in a successful outcome, which would not justify the imposition of a 'tax' on successful class members in other claims.

5.36. The Association also considers that there are likely to be inherent difficulties administering a fund such as the one described. Specifically, determining which claims are sufficiently meritorious would be very difficult given the subjective nature of such an inquiry.

6. Competing Class Actions

Proposal 6–1 Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended so that:

- All class actions are initiated as open class actions

6.1. The Association does not agree with this proposal for all class actions principally because it assumes a 'one size fits all' approach to class actions is appropriate.

6.2. There a number of instances where closed class actions may be more appropriate than open class actions, including but not limited to where:

(a) a smaller group of class members exists who are willing to enter into agreements with solicitors and/or a funder rendering the need for an open class redundant;

(b) the costs of a common fund application and contentious opt out process outweigh the costs of signing up class members to a funding regime; and

(c) the approach being taken in one claim, such as the proposed cause of action or claim period, differs to an approach taken in an open class action.

6.3. The breadth of the powers available to the Federal Court to case manage representative proceedings empowers the Federal Court to take steps regarding closing and opening classes where appropriate. Adopting a prescriptive approach is likely to cause more issues than it resolves.

6.4. The impetus for all class actions to be filed on an open basis principally commenced with the QBE decision. Since that time almost all, and possibly all, claims have been filed on an open basis by promoters hoping that the Courts will grant common fund orders in a manner that will not be detrimental to access to Justice.

6.5. This move to open classes has caused the current phenomena of competing open classes. Now the arguments against competing open classes is being used, ironically, to prohibit closed classes.

6.6. Rather than prohibiting closed classes, it is appropriate:

(a) for closed classes to be required to apply for opening and closing of the class for settlements (this ensures all claimants obtain access to justice, with the settlements being final and determinative for the benefit of defendants);

(b) claims filed on an open basis after the filing of a closed class run the appropriate risk of:

(i) the claim being unviable due to the size of the closed class;

(ii) the Court staying the proceeding;

(iii) the closed class being opened and closed for settlement and that claim settling; and

(iv) the permanent closure of its class if the other claim doesn't settle and continues on an open basis; and

(c) closed claims filed after the filing of an open class proceeding running the appropriate risk of being limited to settlements or judgments restricted to the claims of the closed class claimants (with appropriate Court orders to ensure the two claims run concurrently in a cooperative, efficient manner).

6.7. These current risks/circumstances have predominantly delivered access to justice to all potential claimants and rarely caused two claims to proceed to trial. The closed class system is working. There is not sufficient empirical evidence to justify a change to the current law. Closed classes

have proven to enable enforcement and delivered materiel benefits to the relevant markets and their participants, and also to the civil justice system itself.

6.8. The only potential justification for limiting class actions to open classes are concerns around competing classes. These arise in one of two ways:
(a) an initial closed class followed by an open class; and
(b) competing open classes.

6.9. The first form does not involve competing classes as the open class proceeding usually carves out the members of the closed class from its class definition. Given the magnitude of the benefits derived from cases such as Aristocrat and Centro, which were commenced as closed classes, any restriction on their commencement or conduct, let alone their prohibition, will come with material risks[2] to the enforceability of the law and ought only be considered with the benefit of clear empirical supportive evidence.

6.10. The Association considers that if a closed class has funding and is commercially viable without the benefit of any common fund order, it ought to be permitted to commence on the basis that the class will be sought to be opened for settlement purposes, if the opportunity for settlement arises.

6.11. If there is no other open class proceeding filed at the time the closed class is sought to be opened, there is no reason for there to be any restriction on the filing or processing of the claim in this way.

6.12. If there is an open class filed when the closed class is sought to be opened, then the Court may determine at that time, whether to permit the closed class to open.

6.13. It may do so, for example, if the closed class proceeding is well progressed or likely to better serve the interests of all potential claimants.

6.14. This procedure reflects the status quo. It has served the development of the class action regime well.

6.15. It acknowledges that if a managed investment scheme achieves the support of sufficient claimants without the needs to apply for a common fund order, then it ought to be entitled to proceed, on the basis that all claimants pay diminished fees if the class is opened, thereby benefitting the claimants and not the funder.

[2] Including, for example, the potential increase in the minimum size of claimable loss that enables enforcement to proceed.

6.16. The effect of a prohibition on the filing of closed classes has not been researched, let alone identified, understood and considered. A prohibition ought not be considered at least until common fund orders are being granted to make otherwise commercially unviable claims viable on a systemic and sustainable basis.

6.17. To do so would put at risk a viable system relying upon the possibility that the Courts may be able to develop a replacement common fund system in circumstances where:

(a) they have been attempting to do so since the judgment in the QBE claim handed down 2 years ago without evidence of any otherwise unviable claim being proven viable as a result of any common fund order; and

(b) the risk of adverse cost orders creating material differences to the system in the USA where the Courts have been able to prove the viability of common fund orders.

- where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;

6.18. There may be circumstances where it is appropriate for all but one of the competing class actions to be stayed. In other circumstances, it may be more appropriate for the Court to determine if consolidation, joint hearing or other steps are necessary. The Association does not agree that in all circumstances where there are competing class actions all but one of the proceedings must be stayed.

6.19. Where there are two or more competing open securities class actions requiring common fund orders for their commercial viability which contain substantially similar claims, the Association considers the Court ought to determine whether one or more of those proceedings ought to be stayed or other orders made which have the effect that only one proceeding continue as a class action.

6.20. The ALRC proposal, however, is not framed in an empowering way to create an unfettered discretion to be exercised by the Court as it sees fit but rather proposes the Court 'must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so' without specifying the type of class action or the extent to which they compete.

6.21. A discretionary power, as is currently provided for in the relevant legislation and inherent powers of the Court, could equally be used to ensure efficiency and that the interests of justice are served.

6.22. Whilst it is appropriate for the Court to be empowered to stay competing proceeding(s) and for its exercise to be limited to two discretionary factors (efficiency and the interests of justice), the proposed obligation:

(a) overreaches in its stipulated direction to achieve efficiency and the interests of justice when a more discretionary power could achieve the stated objectives; and

(b) would create uncertainties that in turn could limit access to justice for no or limited reward.

6.23. The Association proposes that where there are two or more competing open class actions, the Court **may** determine which one or more of the proceedings will progress and **may** stay the competing proceeding(s) having regard to the objectives of efficiency and the interests of justice.

- litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and

6.24. The Association does not agree.

6.25. The Court's power to approve settlements is sufficient to protect the interests of class members in relation to funding terms.

6.26. Funding agreements reflect the terms on which a funder is prepared to assume the risks of funding a claim.

6.27. If the funder could not enforce the terms without Court approval, the funder is disproportionately assuming the risk with no certainty as to the reward or its ability to manage or oversee the investment.

6.28. The lack of certainty may act as a disincentive to fund claims where the merits are less strong or the damages pool is not substantial.

6.29. The Association is not aware of any other example in the financial services industry where a funder's contractual terms, agreed at the outset with regard to known or foreseeable risk, are varied at the completion of the contract based on what transpires.

- any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.

6.30. Common fund orders are not the appropriate means to determine terms of all agreements, especially when the effect of some of the terms may be varied as part of any settlement approval

process. Having to go through this process twice introduces unnecessary work duplication and increased costs.

6.31. Solicitors are required to enter into costs agreements with all clients under the terms of various state or territory legislation. Those statutes and regulations contain sufficient protections for clients.

6.32. Funding agreements are necessarily more detailed than the terms of any common fund order. It is impractical for a common fund order to contain all the detail.

6.33. Some common fund orders are sought on the basis of funding commission and solicitor uplift terms to be set during any settlement approval process. Others set commission and uplift terms and are the subject of lengthy and costly contested applications, which is undesirable from the perspective of class members, funders and the Court. Approvals ought to be in respect of settlements; not in respect of agreements.

Proposal 6–2 In order to implement Proposal 6-1, the Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

6.34. If the answer to Proposal 6-1 is yes, then the answer to Proposal 6-2 is also yes.

6.35. The procedure should clearly identify the matters the Court will take into account in case managing the competing claims, including an indicative timetable for the filing of evidence and submissions, the form information should take to assist in comparing the claims, the need to look at an overall funding package and procedures to make the process in an efficient and cost effective.

Question 6–1 Should Part 9.6A of the *Corporations Act 2001* (Cth) and s 12GJ of the *Australian Securities and Investments Commission Act 2001* (Cth) be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under this legislation?

6.36. The Association does not agree.

6.37. It is inappropriate to confer exclusive jurisdiction on the Federal Court of Australia for the following reasons:

(a) There is not a sufficiently significant reason to change the status quo and take away the right of choice. The case law is developing in a consistent way among the State and

Federal Courts and the State legislative regimes are also virtually identical to that of the Federal Court.

(b) State Courts, especially in Victoria and NSW, are developing their own jurisprudence around class actions. State Court judges are equally as capable of case managing class actions and in performing their protective function.

(c) The NSW Supreme Court manages its class actions predominantly through the Commercial List, which is a specialized, highly efficient court designed for dealing with commercial disputes. Some plaintiffs will prefer the Commercial List over the docket system in the Federal Court and see advantages in proceeding in State Courts rather than the Federal Court. This is obvious from the fact that many large-scale class actions have been commenced in State Courts.

(d) Conferring exclusive jurisdiction on the Federal Court may overburden the Court, which already has a significant workload.

(e) There is a degree of competition among the Federal Court and State Supreme Courts to demonstrate their ability to provide efficient access to justice. The ability of litigants to choose in which court to file is central to that competitive tension.

(f) Finally, State Courts would continue to hear cases outside of the *Corporations Act* and *ASIC Act* (such as ACL claims or product liability claims). It is hard to see the justification for removing from State Courts one particular kind of class action.

6.38. Whilst the Association does not support a proposal to confer exclusive jurisdiction on the Federal Court for the reasons articulated above, it acknowledges that the recent AMP class action gives rise to a need for the Courts to develop a solution to the issue of competing actions filed in different jurisdictions.

6.39. The Association notes that the VLRC has proposed one potential means of addressing the issue, being the establishment of a cross-vesting judicial panel.

7. Settlement Approval and Distribution

Proposal 7–1 Part 15 of the Federal Court of Australia's Class Action Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.

7.1. Whilst the Association agrees a referee may serve a useful purpose, it is unclear what impact the outcome of the referee's findings would have on a funders and lawyers, respectively. A funder is required to pay reasonable invoiced legal costs and disbursements. If a funder has paid these

costs and the referee was to later determine not all of the costs were reasonable, the funder ought to be reimbursed those costs by the lawyers rather than from any claim proceeds.

7.2. This will further provide motivation for lawyers to seek to resolve claims efficiently and cost effectively.

7.3. The cost of a referee may outweigh any perceived savings. Competition is also likely to drive down legal fees as it is doing with funder commissions.

7.4. In conclusion the Court already has the power to appoint a referee and so regulatory intervention is unnecessary.

Question 7–1 Should settlement administration be the subject of a tender process? If so:

- How would a tender process be implemented?
- Who would decide the outcome of the tender process?

7.5. Settlement funds of greater than $10m ought to be the subject of a tender process.

7.6. Any tender process ought to be conducted by a Court referee, who would also decide the outcome.

Question 7–2 In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?

7.7. All parties receive the benefit of the class action process, with the civil justice system being publicly funded.

7.8. The information could be collected and made available to form the basis for public debate and policy changes in the future.

8. Regulatory redress

Proposal 8–1 The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose.

8.1. The Association is presently unable to voice an opinion, which it hopes to be able to do in due course.

Question 8–1 What principles should guide the design of a federal collective redress scheme?

8.2. The Association is presently unable to voice an opinion, which it hopes to be able to do in due course.