ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders

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The Australian Law Reform Commission

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The NSW Young Lawyers Civil Litigation Committee (Committee) makes the following submission in response to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

Civil Litigation Committee

The Civil Litigation Committee (**Committee**) promotes understanding of civil litigation and dispute resolution in the profession, offering a support base and information resource for our members.

The Committee covers all aspects of civil litigation with a focus on advocacy, evidence and procedure in all jurisdictions. Our activities, direction and focus are very much driven by our members, which include barristers, solicitors and law students. Our Committee is a collegiate body which acts as a peer support network and a useful pool of expertise for people taking on matters outside their comfort zone.

The Committee welcomes the opportunity to make a submission in response to the Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third-Party Litigation Funders Discussion Paper (DP 85).

Summary of Recommendations

1 In summary, the Committee makes the following recommendations:

(a) That no licensing scheme for litigation funders be introduced at this time, there being insufficient evidence to support its introduction;

(b) The Australian Solicitors' Conduct Rules should not prohibit solicitors or law firms from holding interests in a third-party litigation funder;

(c) The ban on contingency fee arrangements in class actions should be lifted;

(d) Statutory caps on litigation funder commissions should not be introduced; and

(e) That the courts should have flexibility in dealing with competing class actions.

Proposals 3-1 and 3-2: licensing regime

2 The Commission proposes that litigation funders should obtain licences through a scheme regulated by ASIC, similar to the Australian Financial Services Licence (**AFSL**) scheme applicable to the finance industry.

3 It is not clear whether the proposal is intended to apply only to litigation funders who fund class action proceedings, or to the litigation funding industry more broadly. If the latter, the Committee submits that this is not appropriate. As the Commission notes in the discussion paper at [1.8], litigation funding originally arose in Australia in the context of funding actions run by insolvency practitioners, and litigation funding remains an important means of facilitating claims to be brought on behalf of insolvent companies that otherwise would not have sufficient capital to fund the proceedings. Litigation funding has equal importance in enabling commercial claims and public interest litigation to be brought by parties which otherwise would struggle to find the resources to conduct the litigation. The Committee submits that there is no need to regulate the provision of litigation funding in an insolvency or general commercial context. Alternatively, any licensing regime should not apply to funders who fund commercially sophisticated litigants.

4 The Commission has identified three policy bases for imposing a licensing regime at [3.23]:

(a) first, reducing the risk of financial loss to plaintiffs and defendants by reducing the risk that funders will be able to meet their liabilities when due;

(b) second, encouraging compliance by litigation funders with their obligations by imposing a risk that non-compliance would result in losing the right to participate in the market; and

(c) third, enhancing the reputation of litigation funders and protecting the integrity of the class action system by reducing disreputable conduct.

5 The Committee submits that these policy bases are not sufficient to support the imposition of a licensing regime as proposed.

6 In relation to the first basis, the Commission has identified one instance of a litigation funder failing to meet its obligations in the history of litigation funding in Australia, being the failure of Argentum Capital Ltd in the equine influenza class action: *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119. Argentum was a listed entity with a reputable board, comprised of a retired UK Court of Appeal judge and several experienced fund managers. It was audited annually and held millions of pounds in cash reserves. Its failure would not have been detected or prevented by the proposed licensing regime.

7 As the sole identified instance of a funder failing to meet its obligations would not have been alleviated by the proposed regime, and there is no other evidence of a serious risk that this will occur, the Committee submits that there is not a sufficient basis to impose a licensing regime on this policy ground.

8 As to the second basis, there is no evidence of which the Committee is aware, or identified in the Discussion Paper, of any systemic failures by litigation funders to comply with their obligations. Therefore, the Committee submits there is no basis to conclude that the existing regulatory regime is insufficient. Further, the Committee submits that a mandatory disclosure regime ought to be sufficient to ensure compliance, without the need for the other more onerous requirements associated with a licensing regime, such as "fit and proper person" tests and capital adequacy requirements.

9 As to the third policy basis, the Committee submits that the reputation of the litigation funding industry and the integrity of the class action system in Australia are under no identifiable threat which would be addressed by the proposed regime.

10 In summary, in relation to all three policy bases, the Committee submits that unless there is evidence of specific risks that the licensing regime is designed to address, and a clear explanation of how the proposed regime will address those risks, the Commission should be circumspect in recommending a regime that poses a very real risk of reducing access to justice in Australia.

11 Further, the litigation funding industry can be distinguished from the financial services industry on a number of grounds.

12 First, while there is an unfortunate history of members of the financial services industry taking advantage of consumers through conduct such as unscrupulous lending, unconscionable security arrangements, the provision of misleading advice, and placing consumers into risky investment positions in order to gain larger commissions, this is not the case for litigation funders.

13 Second, unlike most financial services, there are very few circumstances in which a person who uses litigation funding would be in a worse position than if they had not chosen to do so (or in other words, there is very little downside risk, so long as the funder agrees and is in a position to pay any adverse costs orders). A plaintiff who

could afford to fund litigation without a third-party funder may choose to do so and reap the entirety of a settlement or judgment sum, or may pay a litigation funder a commission from a settlement or judgment sum to avoid the risk of an adverse costs order and payment of legal costs to run the case. In most cases, the claims which are funded by third parties would not be brought if such funding was not available.

14 Third, perhaps most importantly, litigation funding already has a very effective monitoring system that does not apply to financial services providers—that is, litigation funders fund solicitors and clients represented by those solicitors. Solicitors are sophisticated participants in the market who are well equipped to determine whether a litigation funder is able to meet its obligations, and who have a clear interest in ensuring that it does so, as their fees would not be paid otherwise. The Committee submits that solicitors are sufficiently able to monitor and assess litigation funders.

15 If a licensing regime is imposed, the Committee submits that ASIC may not be the regulator best equipped to administer such a regime. The risks associated with litigation funding are mostly related to questions such as conflicts of interest in the conduct of litigation, and not to corporate governance or the provision of finance. The Committee submits that the regime would require a bespoke regulatory body for the litigation funding industry. Alternatively, the most suitable regulatory bodies may be the state Offices of the Legal Services Commissioner.

Question 3-2: minimum financial resources

16 The Commission queries whether ongoing financial standards should apply to third party litigation funders. The Committee submits that they should not.

17 In order to meet funding obligations, a funder must have *access* to sufficient funds. It does not necessarily need to *hold* those funds at all times. Requiring a minimum amount of capital or buffers for cash flow arbitrarily restricts the means by which funding can be accessed. For example, a funder may choose to fund actions through:

(a) periodic capital raisings as and when required;

(b) debt facilities; or

(c) ongoing cashflow from another source.

18 The status quo facilitates a greater number of funders in the market, which puts downward pressure on funding commissions (as evidenced in Lee J's decision on the competing *GetSwift* class actions).[1] This has flow-on effects by increasing access to justice and increasing the amount paid to litigants and group members.

19 Further, security for costs can be provided by way of insurance policy or bank guarantee, rather than cash deposit. Again, this does not require substantial cash holdings.

[1] *Perera v GetSwift Limited* [2018] FCA 732.

20 In conclusion, capital holdings and cash flow buffers are two of a number of ways by which a funder can access sufficient funds to meet its obligations, and could be a more expensive option than the other alternatives. The Committee submits that it would be arbitrary and unnecessary to prohibit other legitimate funding models by imposing onerous requirements to hold large amounts of cash.

Question 3-3: financial complaints authority

21 The Commission asks whether third party litigation funders should be required to join the Australian Financial Complaints Authority (**AFCA**) scheme. The Committee submits that it would be appropriate to impose a mandatory scheme by which complaints can be resolved. However, the Committee submits that the AFCA may not be the appropriate forum for this to occur.

22 The issues that are likely to arise in relation to litigation funding disputes are not of the same nature as those which the AFCA currently addresses. Litigation funders do not provide financial advice, credit facilities, or investment management services. They provide funding for legal disputes. It is more likely that complaints regarding litigation funders will relate to the conduct of proceedings than to more common financial services issues.

23 In circumstances where the responsibility for conduct of proceedings will invariably lie with the funded clients' legal representatives, any complaints regarding the conduct of those proceedings can be adequately dealt with through the existing state-based regimes for the regulation of legal practitioners. A further regime through another body would increase complexity without sufficient benefit.

Proposal 4-1: annual reporting requirements

24 The Commission proposes that litigation funders should be required to report annually to ASIC on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest. The Committee submits that this proposal should be adopted, save that, for the reasons identified above, the Committee submits that ASIC may not be the most appropriate regulator of the litigation funding industry in relation to matters concerning conflicts of interest, and it may be preferable to require litigation funders to report to state Offices of the Legal Services Commissioner on such issues.

25 However, the Committee considers that ASIC would be the appropriate entity to monitor issues such as corporate governance and accounting. It may be appropriate to require litigation funders to file annual financial statements and director reports with ASIC, similar to the requirements for large proprietary companies or unlisted public companies. This may be a more appropriate means of addressing the associated risks than the Commission's proposed licensing regime.

26 Further, the Committee recommends that all annual reports filed by a litigation funder should be provided to any person who has a current funding agreement with the funder or, alternatively, should be stored on a publicly accessible register.

Proposal 4-2: ensuring that new funding arrangements are subject to Regulatory Guide 248

27 The Commission proposes that "law firm financing" and "portfolio funding" should be included in the definition of a "litigation scheme" in regulation 5C.11.01 of the *Corporations Regulations 2001* (Cth).

28 The Committee submits that the existing definition sufficiently captures such arrangements, and does not oppose the Commission's proposed amendment for the sake of clarity. However, the Committee recommends that the definition should also be amended to include "conditional cost litigation schemes" as currently regulated by ASIC Class Order [CO 13/898], save that the requirement for such schemes to be subject to conditional costs agreements should be omitted, such that conventional costs agreements are also permissible.

Proposal 4-3: accreditation for solicitors

29 The Commission proposes that the Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. The Committee supports the development of such accreditation but notes that specialist accreditation schemes are largely a matter for the constituent bodies of the Law Council, rather than the Law Council itself.

Proposal 4-4: prohibit financial interests in litigation funders who are funding proceedings

30 The Commission proposes that the Australian Solicitors' Conduct Rules (**Solicitors' Rules**) should be amended to prohibit solicitors or law firms from holding interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.

31 The Committee submits that such a ban would be incongruous with the Commission's Proposal 5-1 to lift the ban on contingency fees, a proposal which the Committee supports (see below). There is no effective difference between a solicitor having an interest in a third party that is funding the proceeding in exchange for a commission, and the solicitor being entitled to charge a commission. If the latter is permissible, so too should be the former, provided that there are adequate safeguards and it is clear that the solicitor's duty to their client is not affected by the arrangement.

32 The Commission correctly identifies *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 as authority for the proposition that it is improper for a solicitor to have an interest in a third party that is funding the proceedings. However, the Committee notes that Ferguson JA's decision in that case was substantially influenced by the existing ban on contingency fees, and the fact that the arrangement was effectively a means of circumventing that ban: at [48]-[52] and [61]. The Committee submits that the outcome is likely to have been different had that consideration not applied.

33 The Committee submits that solicitors that have any interest in a third party funding the same matter in which the solicitor is acting should be required to disclose this

interest upfront to the lead applicant and group members. Similarly, solicitors that have ongoing relationships or partnerships with third party funders should disclose to the lead applicant and group members (a) the fact of that ongoing relationship or partnership, and (b) a summary of the relationship or partnership.

34 Further, given that solicitors holding an interest in litigation funders that fund their cases is substantially equivalent to their charging contingency fees, the Committee submits that any conditions imposed on the latter should also apply *mutandis mutatis* to the former.

Proposal 4-5: require disclosure of funding in arbitration

35 The Commission proposes that the Solicitors' Rules should be amended to require disclosure of third party funding in any dispute resolution proceedings, including arbitral proceedings. The Committee submits that the proposal should not be adopted.

36 The Commission states at [4.66] of the Discussion Paper that "The Federal Court of Australia's Practice Note requires disclosure of litigation funding agreements to the Court and other parties". The Committee respectfully submits that this is not an accurate statement of the Court's position. The reference in support of that proposition in the Discussion Paper is to the *Class Actions Practice Note (GPN-CA),* which applies to representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***). That requirement exists because of the unique supervisory role that the Court plays in class action litigation. There is no corresponding requirement in non-class action proceedings.

37 The Committee submits that disclosure requirements in relation to litigation funding are not properly the domain of the Solicitors' Rules. If courts consider that disclosure requirements are necessary, then it is open to include such requirements in applicable rules or practice notes, as the Federal Court has done in relation to class actions. The Committee submits that such matters should be left to the Court's discretion.

38 The same reasoning applies with even more force to arbitral tribunals such as ACICA, which exist to provide a forum in which disputes can be resolved according to whatever rules are agreed between the parties. It may be the case that, as the Commission states at [4.66], the international trend is to require disclosure of third party funding in arbitrations; however, it would be inappropriate to impose a requirement for such disclosure in solicitors' professional obligations. Whether the ACICA Rules include a requirement for disclosure of third party funding should be a matter for ACICA.

Proposal 4-6: inform class members at the earliest opportunity

39 The Commission proposes that the Federal Court's Class Actions Practice Note should be amended so that the first notices provided to potential class members by legal representatives are required to include disclosures in relation to conflicts of interest. The Committee submits that this may be appropriate, subject to the resolution of the following issue.

40 The Victorian Law Reform Commission (**VLRC**) recently considered the issue of notices to class members in its report on *Access to Justice — Litigation Funding and Group Proceedings*. The issues that the VLRC identified in relation to notice to class members at [4.233] included: "the lengthy, dense and legalistic information sent by law firms and litigation funders at the start of and during proceedings" and "the complexity of formal notice, when used". Similarly, at [4.255] the Commission stated that "[t]here was consensus during the Commission's roundtable discussions that formal notices, including both opt-out and settlement notices, are opaque and do not promote understanding by class members."

41 The Committee submits that the notices required to be provided to class members are already unduly legalistic and complex, and that there is a real risk that this would only be exacerbated by the Commission's proposal to include disclosure of conflicts of interests and the associated obligations on lawyers and funders. The existing opt-out notice is already required to explain how a class action works, what the particular case concerns, who is a class member, and the nature of the right to opt out of the proceeding. It also often includes a variety of other information, such as funding arrangements and registration requirements. The inclusion of too much complex and legalistic information could render the notice exercise meaningless to most group members.

42 Accordingly, the Committee recommends that a standard form notice should be developed which is as brief and in as plain English as possible, so as to be of use to the unsophisticated class members who need it most.

Proposal 5-1: lift the ban on contingency fee arrangements

43 The Commission proposes that the existing ban on contingency fee arrangements should be lifted in relation to solicitors acting for representative plaintiffs in class action proceedings, subject to the conditions that:

(a) an action funded by a contingency fee agreement cannot also be funded by a third party which is also charging on a commission basis;

(b) a contingency fee cannot be recovered in addition to professional fees charged on a time-cost basis; and

(c) solicitors acting under a contingency fee arrangement should advance the costs of disbursements and indemnify the representative class member against an adverse costs order.

44 The Committee recommends that the proposal to lift the ban should be adopted; however the Commission's proposed conditions may not be appropriate or desirable. In making this submission, the Committee recognises that the purpose of the proposal is to encourage access to justice by encouraging solicitors to take on cases which would not attract commercial funding, either because the estimated damages are too low or because the risk is too great.

45 In relation to the proposal that an action that is funded through contingency fees should not also be permitted to be funded by a commercial litigation funder charging on a contingency basis, the rationale for this is to prevent the clients from having to pay commission to both the solicitor and the funder, and adopting the principle that the contingency fee or funder's commission represents the risk of the litigation. The Committee submits that, while it can be accepted that the contingency fee or commission reflects the risk of the litigation, it should be permitted for solicitors and funders to share that risk, in return for a share of the reward.

46 Under the present arrangements, a funder will pay solicitors' fees and disbursements, and provide security for costs. If the solicitor is acting on a contingency basis, presumably the funder will not be paying the solicitors' fees, and will only be paying for disbursements and/or providing security for costs. It therefore could make sense to adopt an arrangement where, for example, rather than the funder receiving 35% of the proceeds of the litigation plus reimbursement of the solicitor's fees and of all disbursements, the funder receives 20% of the proceeds and reimbursement of all disbursements, and the solicitor receives 15% of the proceeds plus professional fees. So long as the total amount deducted from the proceeds does not increase, the Committee submits that such arrangements are legitimate and should not be prohibited.

47 In relation to the proposal that contingency fees should not be recovered in addition to fees charged on a time-cost basis, this effectively prevents solicitors from charging any upfront or ongoing fees if charging on a contingent basis. In other words, it prevents solicitors from accepting *some* payment for fees, while deferring the balance of the payment to the conclusion of the matter if it is successful, and it means that the solicitor must be in an "all or nothing" position, whereby no fees will be paid unless the outcome is successful. The Committee submits that solicitors should be permitted to blend time-based and contingency fees in order to mitigate the risk of receiving no fees if the matter is unsuccessful. This should, of course, be reflected by the rate of commission being adjusted in order to reflect the reduced risk. However, solicitors that have charged time-based fees and taken a commission from a judgment or settlement sum should be required to reduce the amount of the commission by the amount charged as time-based fees.

48 Finally, in relation to the proposal that solicitors must advance the costs of disbursements and indemnify the opposing party to the litigation, the Committee submits that this ought not be required. The Commission raises the concern (DP 5.39) that without the requirement for solicitors to indemnify against adverse costs orders, solicitors may abuse the process by running unmeritorious claims. However, the Committee submits that there are already mechanisms for deterring against unmeritorious claims. It is unlikely that solicitors would pursue an unmeritorious claim and in doing so expend the significant resources required by a class action matter, with no fee being paid, on a matter that is doomed to fail from the beginning.

49 Further, there is common law precedent as well as legislation allowing courts to make costs orders against legal practitioners, where the legal practitioner has pursued an unmeritorious claim.

50 As discussed further below, the Court has powers to make orders with respect to class action fee arrangements for the protection of class members. The court can also make an order for security for costs early on in litigation.

51 Particularly when combined with the proposed prohibition on time-based charging, the effect of the proposal that solicitors advance disbursements and provide an indemnity for the other party's costs is to place a solicitor acting on a contingent basis subject to exactly the same risks as a third party funder, without being entitled to the same benefits. For the following reasons, the Committee submits that this would be inconsistent with the policy goals of lifting the ban on contingency fees.

52 First, with the exception of large law firms, most solicitors would not have the capacity to provide adequate security for the costs of a contested class action. The Commission's proposal therefore risks restricting the ability to charge on a contingent basis to the large plaintiff law firms.

53 Second, the proposal artificially conflates the role of solicitors and the role of third party funders. Solicitors are officers of the court with professional duties to the court and to their clients. The fees charged by solicitors are for services rendered in that capacity, and the commission charged by a solicitor acting on a contingent basis is the fee for the provision of those services. It should not be treated the same as the fee for standing behind the proceedings.

54 Third, the conflation referred to in the second point leads to an undesirable commercial outcome. It should be accepted that the cost to a solicitor of foregoing the fees ordinarily charged for work performed is effectively the same as the cost to a funder of paying those same fees for the same work, as the solicitor ends up similarly out-of-pocket. It therefore follows that if a solicitor not only foregoes professional fees but also pays disbursements and provides an indemnity for costs, the solicitor is effectively providing not only its normal legal services on a contingent basis, but *also* all of the services provided by a third party funder, and is taking exactly the same financial risk as a funder is required to take.

55 However, while a funder would be entitled to be reimbursed for the cost of the solicitor's fees in addition to receiving a commission, the proposal is that a solicitor would only be entitled to receive the commission—which is to say, the solicitor is being subjected to the same costs as a funder and accepting the same risks, but is entitled to a smaller reward. If that proposal is implemented, it would therefore make little commercial sense for a solicitor to take on matters that are smaller or riskier than the matters that a funder would take on. The result is that the proposal would not achieve the aims of access to justice that it seeks to deliver.

56 In view of the above, the Committee submits that if solicitors are to be required to provide the same services as a third party funder, they should be entitled to the same

reward. However, it would be preferable to characterise a contingent fee as an alternative means of charging for the same service already provided by solicitors to their clients, taking into account the risk of not being paid ongoing fees for that service, and not to impose the more onerous requirements imposed on a third party that is standing behind the litigation.

Proposal 5-2: contingent fee arrangements should require court approval

57 The Commission proposes that Part IVA of the *FCA Act* provide that all contingent fee arrangements should require leave of the Court. The Committee recommends that this proposal should not be adopted.

58 The Court already has broad powers under the existing provisions of Part IVA of the *FCA Act* to protect the interests of group members, particularly ss 33V and 33ZF, and the *Class Actions Practice Note (GPN-CA)* already requires the disclosure to the Court of the terms on which the representative applicant's solicitors are acting in the proceeding. The Committee submits that the Court is therefore already sufficiently equipped to protect the interests of group members in relation to contingent fee arrangements, and requiring leave would only have the effect of imposing unnecessary costs on the parties as a result of approval applications having to be brought and determined. Moreover, an approval of a settlement of Part IVA proceedings is subject to the Court's approval of legal costs. Contingency fee arrangements in Part IVA proceedings would similarly require approval on settlement. By analogy to setting a funder's commission rate in a common fund application, the Court retains broad powers under s 33ZF to alter contingency fee arrangements.

Proposal 5-3: statutory power for Court to set commission rates

59 The Commission proposes that Part IVA of the *Federal Court Act 1976* (Cth) be amended to provide for an express power for the Court to set commission rates in third party funding agreements or in contingency fee agreements. The Committee submits that allowing the Court to set the commission rate would intrude on the parties' freedom of contract to an undesirable extent. Accordingly, the Committee submits that it would be preferable for such a power to be limited to the approval or disallowance of a particular rate, rather than the setting of the rate. This would preserve the freedom of the parties to reach a commercial bargain, while also providing sufficient protection to group members against any unjust or unduly onerous funding terms.

60 The outcome for group members that can most be criticised is probably *Fitzgerald & Anor v CBL Insurance Ltd (No. 2)* [2015] VSC 176 (the "Huon employees class action"), in which the group members were successful at trial, but received nothing after the costs and the funding commission. In that case, there was no settlement to be approved by the Court. Rather, the matter went to trial and the plaintiffs won a judgment for $4,132,232.70. As a result of the way the proceedings were conducted, the plaintiffs only won 70% of their costs, subject to an adverse costs order in relation to a particular matter.

61 The Committee submits that the Court has sufficient oversight of proceedings in its existing discretion to supervise Part IVA proceedings, approve legal costs and approve a proposed commission rate on application for a common fund order. In the event that the prohibition on contingency fee arrangements is lifted, the commission rate would require approval on settlement and any application for a common fund order would enliven the Court's ability to approve the appropriate commission rate for the entire class.

Questions 5-2 and 5-3: imposition of statutory caps on commission

62 The Commission asks whether statutory caps should be introduced in relation to funding commissions or contingent fee rates, or whether there should be a presumption against any commission above a certain rate unless the Court orders otherwise. The Committee submits that any such caps or presumptions would necessarily be arbitrary and could have the potential to lead to unjust outcomes. Rather, the Court's existing powers to make orders in the interest of justice are sufficient to regulate these issues, while also assessing different disputes on a case-by-case basis.

63 The sufficiency of the current regime is demonstrated by the cases cited by the Commission of *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 and *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511, in both of which the Court saw the settlement as "borderline", but ultimately approved them in the interests of justice. The Committee submits that, in those cases, the proposed statutory cap would either not have achieved anything in relation to either case or would have been detrimental. If there was a rebuttable presumption, then it would have been rebutted for the same reasons as the Court ultimately approved the settlement. If there had been a fixed cap, the matters may not have settled and the parties would have been forced to continue litigating the matter, with all of the costs and risks that this would have entailed. A similar outcome was reached in *Wepar Nominees Pty Ltd v Schofield (No 2)* [2014] FCA 225 in which the group members received only 35% of the settlement sum after funding commission, however the settlement avoided the need for a three-week hearing and the real risk that group members might recover nothing should the outcome have been unsuccessful.

64 Further, in some cases, such as *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors* [2014] VSC 516; and *Simonetta v Spotless Group Holdings Limited* [2017] FCA 1071, the return to the group members after costs has been negligible, however this was an appropriate reflection of the group members' prospects of succeeding in their claims.

65 The Committee notes the recent surge of competition between consortia of funders and law firms (for example, in the *GetSwift* class action awarded to Phi Finney McDonald, and the AMP class action currently before the NSW Supreme Court and the Federal Court) has put downward pressure on rates and resulted in alternative funding arrangements that ostensibly provide a greater portion of a settlement or

judgment sum to the class. In the *GetSwift* class action, Phi Finney McDonald and its funder Therium outbid two other firms with a funding arrangement that saw the funder's commission paid as a multiple of the legal costs. The Committee notes that this arrangement creates perverse incentives for a funder to encourage an increase in legal costs. By contrast, Phi Finney McDonald's proposed class action against BHP proposes an 18% commission, inclusive of legal costs, thereby encouraging the funder to put downward pressure on legal costs.[2]

66 The Committee submits that in determining reasonable legal costs, an appropriate funding commission on a common fund application, and the choice of representatives in the case of competing class actions, the Court should look to innovative arrangements in the market that maximise the return to the class.

Question 5-4: alternative funding options

67 The Commission asks what other funding options are available for meritorious claims that cannot obtain third party funding. The Committee recommends that the following are appropriate:

(a) funding by regulatory bodies, such as ASIC, the Australian Competition and Consumer Commission, and the Australian Human Rights Commission, for class actions in relation to matters that fall under their legislated mandate but where they are otherwise unable or unwilling to act on the claim themselves; and

(b) the establishment of not-for-profit litigation funds with tax deductible status, for the purpose of funding matters of public interest.

68 The Committee submits the present Australian framework does not provide adequate access to justice for meritorious claims that are unable to attract third-party litigation funding.

69 Two options to address this lacuna are discussed below. Whilst the detail may vary within the proposed categories, any alternative funding conceptually falls within either a centralised, single-source funding category or a mixed funding category.

Single Source: Regulator-Driven Common Fund

70 Alternative funding may be bankrolled by government or, more specifically, by a particular regulator. This would be akin to the present test-case funding available, for instance, by the Australian Tax Office.[3]

71 Litigants could apply for funding for their particular case or a matter may be identified by the regulator as being a meritorious matter addressing a funding or policy criterion.

[2] Christine Caulfield, 'Phi Finney McDonald teams up with most feared US plaintiffs firm in BHP class action' *Lawyerley* (24 July 2018).

[3] Note that the ATO provided funding for the recent unsuccessful class action brought by Pizza Hut franchisees against the master franchisor: see, *Virk Pty Ltd (in liq) v YUM! Restaurants Australia Pty Ltd* [2017] FCAFC 190.

Merit determinations would be made by a panel consisting of a mixture of stakeholders to ensure fairness of assessment.

72 Unlike test-case funding, which applies only to reasonable legal costs, in order for regulator funding to be truly effective, funding must extend to full indemnity costs. This may make it a less attractive option from a government policy perspective and is likely to result in only a small number of cases being approved.

73 Further, consideration would be required as to how funds would be provided – by unfettered access to a pre-defined fund or by payment of (approved) costs at certain stages of litigation. The latter raises the possibility that class action participants may be faced with payment of costs incurred but not approved by the funder (if costs are retrospectively assessed for approval) or else imposes an administrative burden on both funder and participants/their counsel to continuously approve/submit (respectively) costs quotes for progressing with the action.

74 As an alternative to Court approval of payment to the regulator of a commission or form of levy on any successful outcome, the legislature may prescribe a rate of payment in a similar vein to the sliding scale of legal costs under the *Legal Profession Uniform Law 2015* or the *Federal Court Rules 2011* (Cth), with approval of any deviation from that scale to be sought from the Court.

Hybrid Funding Agreements

75 Funding may also be provided by hybrid agreements, allowing class action participants to utilise a range of funding sources to obtain access to justice.

76 The Committee submits that the Court should encourage funding arrangements that allow group members to co-invest in the litigation funding entity and earn a commission on any judgment or settlement sum. The Court can encourage this model in two ways:

(a) in determining competing class actions, by indicating a preference for this model in advance of the deadline for the parties to submit funding terms; and

(b) in determining the commission rate on a common fund application, by awarding a higher commission rate than ordinarily would be awarded when this model is adopted. As outlined above, such arrangements would be illegal managed investments schemes if they were not exempted under ASIC Class Order [CO 13/898].

The Committee submits that legislation should be enacted to expressly permit such arrangements, and also to remove the requirement that the costs agreements be conditional. These arrangements have the advantage of increasing the proportion of judgment or settlement sums that ultimately flow to group members, and tend to align funded litigation with traditional litigation.

77 Another option is for group members of plaintiffs to agree to fund the action in exchange for a larger share of any compensation awarded and/or on the basis that security is granted by members (e.g. mortgage over real property, charge or

guarantee) to be called upon in the event of an unsuccessful outcome.[4] Such a privatised model should nevertheless be subject to judicial approval in each case to ensure fairness to security-providing members.

78 Pitfalls include the unfortunate reality that many class action participants may not be in a position to provide valuable security in addition to contributing money for legal fees, often as a result of the very cause of the class action, and the interaction with consumer law protection and regulation. This was an issue in *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1. The Full Court ordered the group members to provide security for costs, and many did so, but the result was that instead of paying for the costs of the proceeding, the group members paid for the security, meaning the applicants' lawyers did not have enough money to run the case. Ultimately it settled on relatively unfavourable terms: *Kelly v Willmott Forests Ltd (in liquidation) (No 2)* [2013] FCA 732; *Kelly v Willmott Forests Ltd (in liquidation) (No 3)* [2014] FCA 78; *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689. For these reasons such a privatised model may not be an attractive alternative to funding in the present climate.

79 Alternatively, a hybrid model may be adopted whereby a contingency fee is payable and some (reduced) hourly counsel rates are also paid throughout the course of the matter from a common reinvestment fund. The common fund itself may be comprised initially from contributions made by class action members or a mixture of individual contributions and a form of grant or government-based deposit, with the profits of the fund attributable to grants being reinvested in future actions. The terms of the fund including reinvestment and access to it would require agreement by members and oversight either by ASIC to ensure its effective and proper management in each case.

80 To the extent multiple investment funds are established, common investment or interest-bearing arrangements such as those seen in funds held by Court could be utilised to maximise each individual fund.

Proposal 6–1: *FCA Act* amendments for competing class actions

81 The Committee notes an increase in shareholder class actions. As at June 2018, there were at least five law firms in New South Wales which were pursuing similar shareholder class actions against AMP over scandals revealed at the Banking Royal Commission and the resulting damage to the embattled financial giant's market value.[5]

82 There are many factors that are contributing to the rise of representative proceedings, including the growing awareness of the increased importance of a consumer's access to justice, the increasing presence of litigation funders in Australia (which in turn is providing easier access to litigation funding), and the increased scrutiny by ASIC and

[4] This approach has apparently been disapproved by the Full Court in *ASIC v Richards* [2013] FCAFC 89 (see at [46]-[57]), and therefore would require legislative change in order to be encouraged.

[5] Anna Prytz, 'AMP class action battle opens with jurisdiction stoush', *The Sydney Morning Herald* (Sydney), 8 June 2018.

APRA of non-compliance by financial institutions in carrying out duties ofdue diligence and to act in good faith, leading to causes of action on misleading conduct or non-disclosure.

83 One of the difficulties faced by consumers is to determine which plaintiff law firm best aligns with their interests. Whilst there are advantages for providing an extensive forum of plaintiff law firms to consumers to commence class action proceedings such as creating a competitive market and providing different levels of technical expertise across different subject matters, it can also add to the costs, delay and increased confusion experienced by the group members of running competing class actions. When faced with this legal and ethical dilemma, it is essential for the legal representative to be aware of any competing class action and effectively communicate with the group member of same including how (if so) it affects the group member.

84 The engagement of the procedural vehicle of commencing a representative proceeding (including competing class actions) can be unwieldy and lengthy, giving rise to substantial costs.[6] An example is in the recent case of *Wileypark Pty Ltd v AMP Limited*[7] handed down by the Federal Court, in which five class actions were commenced against AMP, four in the Federal Court, and one in the Supreme Court of New South Wales. The Honourable Justice Lee made some important remarks at [12]:

> *"The promoters of class actions can, at least initially, exercise a choice of forum and it should come as no surprise that the response to one court taking active steps to exercise discipline and control over securities class actions (and competing class actions in particular), may be for decisions to be made which represent an attempt to obtain an advantage by commencing securities class actions in the same matter in different courts. One result of this would be to increase overall costs and make case management and a speedy comparative analysis to be undertaking, more problematical. For a variety of reasons, such a development would be highly undesirable and, like in the past, remedial responses will not doubt have to be fashioned consistent with the provisions of the cross-vesting legislation, considerations as to comity and the need to avoid multiplicity…"*

85 The regime must not unnecessarily disadvantage parties through the substantially increased costs which result from competing class actions. In addition to providing claimants with access to justice and an available pool of funds for the claimants in the event of success, the court must also consider the interests of the respondents as part of its consideration of the most suitable and practical resolution to address competing

[6] See Milton Handler, 'The Shift from Substantive to Procedural Innovations in Anti-trust Suits – The Twenty-Third Annual Anti-trust Review' (1971) 71 *Columbia Law Review* 1; see Michael J Legg, 'Shareholder Class Actions in Australia – The Perfect Storm?' (2008) 31(3) *UNSW Law Journal* 669 at [700].

[7] [2018] FCA 1052.

class actions, which arguably does occur under the tools utilised by judges under the current system.[8]

86 The Committee agrees in principle that it is desirable to reduce the costs and the complexity associated with competing class actions. Nevertheless, not only does proposal 6-1 remove the choice afforded to parties (and to the Court), it appears to undermine the Court's ability to exercise the broad power granted to it in *FCA Act*, s 33ZF, which provides:

> **"33ZF General power of Court to make orders**
>
> (1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding."

87 The Federal Court of Australia has warned against the imposition of a "one size fits all" approach,[9] which is the essence of Proposal 6-1. The Court's current powers allow the Court to deal with proceedings in a nuanced way, and they allow it to adopt the appropriate approach in the relevant circumstances. There is no guarantee legislative intervention to impose a blanket approach will be beneficial. It is also unclear at present how the proposed legislative reform in Proposal 6-1 would affect and/or impede upon the Court's power under section 33ZF, and respectfully, the relative success of approaches ordered under section 33ZF, the remainder of Part IVA of the *FCA Act*, and stays imposed (as appropriate) by the Court[10] on a case-by-case basis should be analysed in detail along with the impact of common fund orders before any process is mandated in legislation.

88 Furthermore, the Committee notes that competing class actions tend to be largely limited to the class actions involving securities relating to ASX-listed companies, and accordingly submits that legislators should be hesitant to adopt blanket legislative reform which would also have an impact on all class actions (i.e. those outside securities class actions also), where competing class actions are arguably less of a concern.

89 Observations have been made that the increase of common fund orders, particularly since the Court permitted them in the decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 (***Money Max***) may cause more "open"

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[8] See, for example: *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [40] (Beach J).

[9] Victorian Law Reform Commission *Access to Justice – Litigation Funding and Group Proceedings* (Report 2018), [4.85], cited in Vince Morabito, *An Evidence-based Approach to Class Action Reform in Australia: Competing class actions and comparative perspectives on the volume of class action litigation in Australia* (Monash University, 11 July 2018), 18.

[10] See, for example, *Perera v GetSwift Limited* [2018] FCA 732.

(as opposed to “closed”) class actions to be commenced.[11] The Full Court of the Federal Court stated in *Money Max*: “Open class proceedings will also act to inhibit competing class actions and avoid the multiplicity of actions which they represent”.[12] As the Discussion Paper acknowledges, in practice, it appears more open class proceedings have commenced since *Money Max*.[13] Further to this, it has been predicted that common fund orders are likely to also reduce the number of competing class actions and accordingly, increase access to justice by improving efficiency.[14] This could occur without the need for the proposed legislative intervention in Proposal 6-1, which mandates a process for a stay to be considered without the Court apparently being able to consider the nuances of any particular case and make any order the Court thinks appropriate or necessary (such as the consolidation of proceedings, or having evidence in one proceeding be evidence in another, etc., where appropriate) to ensure that justice is done in the proceeding, as it currently does under section 33ZF (if the section is applicable).

90 One matter that may require legislative intervention is the clarification of the Court’s power in relation to funding agreements, particularly as it is not presently clear whether judicial powers such as that granted under s 33ZF can be engaged in the context of competing class actions, allowing the courts to do justice *between* proceedings.[15] For example, an issue that may need to be addressed is the power to set aside funding agreements which have already been entered into in competing class actions when a stay is ordered, particularly where a funder may nevertheless seek to enforce the terms of the agreement.**[16]** The Committee submits that it would be appropriate for the Court to have an express power to set aside funding agreements if it is in the interests of justice to do so. However, the Committee submits that it would be inappropriate for the Court to have a power to alter the terms of funding agreements, as this would be incongruous with the judicial function.

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[11] Damian Grave and Helen Mould (eds.), ‘25 Years of Class Action in Australia’ (*University of Sydney Ross Parsons Centre of Commercial, Corporate and Taxation Law,* 2017*)*, 127 citing *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 at [14]; *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 at [205].

[12] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148 at [205].

[13] Vince Morabito, ‘*Lessons from Australia on Class Action Reform in New Zealand*’, (Paper presented at the *Future of Class Actions Symposium*, University of Auckland, March 2018) 29 cited in Australian Law Reform Commission *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Discussion Paper No 85 (2018), [6.18].

[14] Damian Grave and Helen Mould (eds.), ‘25 Years of Class Action in Australia’ (*University of Sydney Ross Parsons Centre of Commercial, Corporate and Taxation Law,* 2017*)*, 127.

[15] This was issue discussed by Justice Lee in *Perera v GetSwift Limited* [2018] FCA 732.

[16] See, for example, *GetSwift* at [365]-[367], where Lee J notes that such issues "may need to be addressed in due course”.

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.

91 The Committee is not opposed in principle to amendments being made to the Federal Court of Australia's Class Action Practice Note (GPN-CA) to deal with competing class actions for improved efficiency, provided it grants flexibility. The criteria applied in Canada to determine who will have carriage appears to be a reasonable approach provided it fits within the existing Part IVA of the *FCA Act* regime, but in our submission, it is too early for any such approach to be implemented to give effect to new legislation as proposed, for the reasons outlined in response to Proposal 6-1 above.

92 The Committee is strongly opposed to the proposal that additional timelines be imposed on top of existing timeframes, such as a requirement that a class action concerning the same subject matter as one that has already been filed must be filed within a particular period after the first action. The Committee recommends that the regime should allow flexibility in timing, depending on the circumstances in any given case. By avoiding the imposition of additional timelines, the Committee submits that access to justice for claimants is more readily realised. Further, such requirements risk encouraging a "race to the registry", and reward the claimant who is ready to file first rather than the claimant best able to run the action.

93 The Committee is also strongly opposed to the proposal contained in the second point of [6.46] of the Discussion Paper, that "any individual actions [be] stayed until the class action is resolved". Class actions are either "opt in", in which the individual may do nothing and will not benefit from findings on common questions, or they are "opt out", in which the individual may take positive steps to avoid the application of common questions. If an individual ran a separate action and opted in or failed to opt out, on application from a respondent, the Court may consider whether the commonality of questions between the proceedings merits an order that the proceedings be stayed or joined.

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?

94 The Committee recommends that the proposed legislative amendments in Question 6-1 should not be introduced. Such amendments would remove the rights of relevant claimants to commence class actions in state Supreme Courts, and such significant changes should only be contemplated when they can be supported by data which suggests that the number of competing class actions across jurisdictions are a cause for serious concern and cases which suggest they cannot be sufficiently managed by alternative means.

95 Recent data suggests that there have been 11 instances involving overlapping class actions filed in different jurisdictions over the past 18 and a half years.[17] Professor Vince Morabito opines that this "does not come even close to providing adequate evidence to support the removal, from claimants in securities class actions, for the right to bring their class actions in state Supreme Courts".[18]

96 The Committee respectfully agrees with the concerns raised with Professor Morabito in this regard. More evidence is required to demonstrate that the area of competing class actions in multiple jurisdictions is inherently problematic despite the current approaches by judges across those jurisdictions under current cross-vesting legislation, and if so, the specific concerns in this area must be identified to determine alternative options to address those concerns, as an initial step before legislative reform is pursued.

97 The Committee recommends that an appropriate solution for this issue, consistent with judicial comity, would be for the chief justices of the courts with jurisdiction to hear claims of this type to agree on an appropriate protocol for resolving the issue of competing class actions in multiple jurisdictions.

[17] Vince Morabito, *An Evidence-based Approach to Class Action Reform in Australia: Competing class actions and comparative perspectives on the volume of class action litigation in Australia* (Monash University, 11 July 2018), 15.

[18] Ibid, 22.

Proposal 7-1: Amend the Class Actions Practice Note to include a provision that the Court can appoint a referee to assess the reasonableness of the costs charged in a class action

98 In relation to this proposal, the Committee notes that the Court has a broad power under s 54A of the *FCA Act* to appoint a referee where appropriate, and the Court has exercised this power in a number of class actions in order to appoint a referee to assess the reasonableness of the costs charged in the settlement of a number of class actions: eg *Kadam v MiiResorts Group 1 Pty Ltd (No 4)* [2017] FCA 1139 at [35]-[62] (Lee J); *Lifeplan Australia Friendly Society Limited v S&P Global Inc* [2018] FCA 379 at [40]-[41] (Lee J); *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [119]-[124] (Murphy J); *Wotton v State of Queensland (No 10)* [2018] FCA 915.

99 Accordingly, the Committee submits that the proposed amendment to the Practice Note is not necessary in order to empower the Court to take this course, but may be appropriate in order to put parties who do not have experience in class actions on notice that this may be the Court's practice.

100 The Committee further submits that it may be appropriate in some instances for a contradictor to be appointed in lieu of or in addition to a referee.

Question 7-1: Should settlement administration be the subject of a tender process?

101 The Committee submits that, at least in some cases, it would not be appropriate for settlement administration to be the subject of a tender process. The solicitors who run a case through to settlement have a significant advantage in relation to the administration of the settlement, as a result of their relationship with the group members and their knowledge of the case. Further, those solicitors will inevitably be the architects of the settlement scheme, and so will have a nuanced understanding of what is required in the administration.

102 A competing tenderer's offer might appear compelling on paper, there is no substitute for this experience, and the process of the tenderer getting "up to speed" on what is required in the administration would inevitably create substantial costs and delay.

103 There may however be cases where a tender process is suitable such as shareholder class actions. The Committee notes the comments of Murphy J on this suggestion, ultimately preferring the efficiency resulting from the experience of the applicant's solicitors in conducting the proceeding.[19]

Question 7–2: Should the terms of class action settlements be made public?

104 The Committee notes that terms of most class action settlements are already made public, save where the parties have specifically sought and obtained an order suppressing those terms. There are legitimate reasons why parties might seek to do this, including to protect commercially or personally sensitive information or to avoid setting a "benchmark" that future settlements of similar cases will be expected to meet.

19 *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [157]-[158].

105 Accordingly, the Committee submits that it is desirable for the terms of class action settlements to be made public unless the Court determines that it is fit to grant a suppression order over all or part of those terms – as is already the case. Whether it is appropriate to grant such an order should be a matter for judicial discretion in the particular circumstances of the case.[20]

Proposal 8–1: The Australian Government should consider establishing a federal collective redress scheme

106 The Committee notes the existence of voluntary redress schemes in the *United Kingdom under the Consumer Rights Act 2015* (UK). The Committee submits that the establishment of a similar federal collective redress scheme in Australia, in accordance with the Commission's Proposal 8-1, is desirable for the following reasons.

107 As Rares J stated in *Australian Executor Trustee Ltd v Provident Capital Ltd* [2018] FCA 439; 125 ACSR 133 at [23]-[27], a significant factor leading to the incurring of unnecessary costs in litigation, including the use of litigation funders, is the refusal of respondents to settle meritorious claims before forcing the applicants to commence and conduct litigious proceedings.

108 A federal collective redress scheme could help to resolve this issue by enabling defendants and claimants to address disputes without resort to litigation, and also by providing access to remedies unavailable under the civil justice system such as adoption of policies by a corporation or business outside of a court order. This may also have the added benefit of reducing the current strain on the judicial system.

109 Another potential benefit of a redress scheme is to allow respondents to avoid the adverse media attention associated with class actions. This may have the effect of encouraging industry groups and companies to cooperate with the scheme.

110 The Committee notes concerns that a federal collective redress scheme may reduce potential claims brought which may be novel and thereby curb the development of common law. However, in practice there is doubt that collective redress would properly stifle the development of common law given class actions are few, rarely proceed to final judgment and the Commission's proposals do not appear to extinguish the private rights to pursue litigation, class action or otherwise.

111 The Committee also cites concerns that the establishment of a federal collective redress scheme would detract from enforcement proceedings by diverting the resources of regulators.

112 The Committee recommends that the establishment and transition to a federal collective redress scheme must be measured to reduce the exposure of risks to defendants, regulators, and claimants. A method of reducing risks would include promoting incremental adoption throughout industries and a requirement for schemes

[20] Cf *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, where the parties had sought confidentiality orders which were denied by the Court.

proposed by industries to be approved by the relevant regulator. The Committee notes that ASIC can currently accept enforceable undertakings from individual companies,[21] however it is our view that this form of dispute resolution could have a broader application than present and should be adopted across different industries.

113 Further, the approval process for redress schemes should be open to community consultation. This has several benefits. First, it provides a forum for community, legal, and industry bodies to develop policies and processes which may be more suitable to particular industries, regions, or communities, particularly rural, regional, and remote communities as well as ethnically-diverse communities or ATSI communities. This enables a collective redress scheme to target particular demographics which may be more vulnerable and less likely to access relief in the civil justice system (e.g. migrant workers through the provision of translations or translators for future policies in a particular region for a particular industry or specific consultations with tribal elders from ATSI communities in order to determine suitable locations to offer services). Second, the input from community and legal bodies would also inform local government bodies on the needs of their relevant communities and may encourage development of initiatives in conjunction with industry-led policies and processes aimed at reducing the disadvantage of certain demographics in a local area.

114 Any redress scheme should have appropriate safeguards to ensure that people who agree to settlements under the scheme are aware of their rights and are not agreeing to a release of their claims in return for inadequate redress. The Committee recommends that the following safeguards would be appropriate. First, the company offering the redress should be required to pay for independent legal advice for scheme participants. To ensure the independence of the advice, this should not be limited to a panel of law firms approved by the company that is offering the scheme. Second, there should be a "cooling off" period, in which a person who agrees to a settlement under the scheme can withdraw from the settlement. Third, there should be a further requirement that the redressing body disclose all relevant information to the claimant before an agreement is reached, to ensure that claimants are fully informed of their entitlements.

115 Finally, it may be appropriate for the redress scheme to be administered by an independent external body, such as the AFCA, which is not beholden to the organisation that offers the scheme.

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

116 Certain principles that may be considered to guide the design of a federal collective redress scheme include:

[21] See, ss 93AA, 93A of the *Australian Securities and Investments Commission Act* 2001 (ASIC Act) and s 322 of the *National Consumer Credit Protection Act* 2009 (National Credit Code).

(a) The inclusion of redress schemes for publication on the Federal Register of Legislation and a statutory requirement of a scheme's publication and imposition of a consultation period prior to adopting a redress scheme.

(b) The imposition of reporting and accountability mechanisms for companies which have adopted a redress scheme ensuring transparency in its process. It would also be sensible to require companies to adopt policies and processes as a means of preventing future conduct which is unlawful and report successful implementation of these to the relevant industry body and/or regulator. It might be beneficial to require ongoing reporting on a yearly basis to regulators of their compliance with policies and processes adopted as part of a collective redress scheme. This would also facilitate a greater culture of compliance from businesses.

(c) A requirement that companies offering a redress scheme provide funding to allow participants to obtain independent legal advice before agreeing to waive or release any claims they might otherwise have against the company, and that the independent legal advice cannot be limited to a set of law firms approved by the company offering the redress.

(d) A requirement that, in any redress scheme, there is a "cooling off period" of 4 weeks in which participants are permitted to withdraw from any such waivers or releases.

(e) A requirement that all relevant information is provided by the body offering the scheme to the claimant before any offer of redress is made. Penalties should apply where this is not complied with, including the invalidation of any settlement that has been reached, and pecuniary penalties imposed on the defaulting organisation.

(f) A provision to the effect that all communications in relation to a redress scheme are without prejudice and confidential, but that adverse costs consequences may follow where an offer of redress is unreasonably rejected.

(g) A requirement that, where a redress scheme exists, redress must be attempted through the scheme before any application is filed with a court. If such a requirement is implemented, the lodgement of a claim with the redress scheme should have the effect of suspending any applicable limitation period – in order to prevent respondents from dragging out the redress scheme process until after the limitation has expired.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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