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**The Rise and Regulation of  
Litigation Funding in Australian  
Class Actions**

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# The Rise and Regulation of Litigation Funding in Australian Class Actions

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Michael Legg\*

## Abstract

Litigation funding has become synonymous with class action litigation in Australia with third party funders being a key source of financing. This article addresses the rise and regulation of litigation funding in Australia through three pathways: judicial oversight of litigation funding, government regulation of litigation funding and competition from lawyers. Initially litigation funding was subject to minimal regulation in an effort to promote access to justice. However, concerns about the size of profits made by funders which in turn impacted Australian businesses and reduced the compensation available for group members saw the adoption of a more detailed and restrictive regulatory approach. Further regulation has been proposed and criticised for hampering funding of class actions. This article concludes with a middle or compromise position that recommends a base level of regulation and empowers the courts to act as a check on excessive fees.

## Introduction

Litigation funding has become synonymous with class action litigation in Australia<sup>1</sup> with third party funders being a major source of financing.<sup>2</sup> As of 2018, there were some 25 funders active in Australia.<sup>3</sup> In 2020 there were said to be 33 funders operating in Australia.<sup>4</sup> The interaction of litigation funding and class actions has been described as a story ‘of adoption, testing, evaluation and modification of a range of innovative procedures’.<sup>5</sup> Litigation funders sought to adopt or adapt class action procedures to support their business model. Equally, courts sought to develop procedures to protect both the administration of justice and group members. The Australian government initially adopted a laissez-faire or ‘light touch’ approach to regulation of funders to promote access to justice. This was then replaced by a detailed regulatory regime as Australian government became concerned at the size of profits made by funders and the impact of class actions on business. Concerns were

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<sup>1</sup> Australia is a federal system with six states and two main territories: New South Wales, Queensland, Western Australia, South Australia, Victoria, Tasmania, the Australian Capital Territory and Northern Territory. There is a federal court system and each state and territory have their own court system. However the peak court in Australia, the High Court of Australia, is the final court of appeal for the federal, state and territory systems.

<sup>2</sup> Australian Law Reform Commission, *Integrity, Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Report No. 134 (December 2018) (**ALRC 2018 Report**) [2.66] (‘In the period from September 2013–September 2016, approximately 49% of all class actions filed in the Federal Court were funded by third-party litigation funders. From 2013 to 2018, the percentage of funded class actions proceedings grew to 64%, with funded class action proceedings filed in the final year of that period constituting 78% of all filed class actions.’), [3.1] (‘From 2013, all shareholder claims in the Federal Court were funded by third-party litigation funders.’).

<sup>3</sup> *Ibid* [1.39].

<sup>4</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) (**PJC Report**), [4.25].

<sup>5</sup> *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574, [102] (Gageler J).

also raised as to funders' fees reducing the compensation paid to group members who had suffered loss.

This article addresses the rise and regulation of litigation funding in Australia through three pathways: judicial oversight of litigation funding, government regulation of litigation funding and competition from lawyers. The article proceeds by providing an overview of the regimes governing class actions, litigation costs and lawyer's fees in Australia as they created the need, or opportunity, for funding from third parties. The operation of litigation funding, its legitimisation in Australia and the advent of concerns around the operation of funding is explained. The article then sets out both the judicial and government response to litigation funding from a regulation perspective. The article draws on law reform and parliamentary reviews into class actions and litigation funding which explained the concerns and proffered various responses.<sup>6</sup> The article then comes full circle by looking at attempts to respond to concerns about litigation funding by altering the class action and lawyers' fee regimes in one of Australia's states, Victoria.

The regulation of litigation funding in Australia tends to attract strong opinions which has led to extreme positions aimed at liberating or restraining litigation funding with the result that under or over regulation is promoted. This article concludes with a middle or compromise position that recommends a base level of regulation and empowers the courts to act as a check on excessive fees.

## **Background - Class Actions, Litigation Costs and Lawyers' Fees**

### The Australian Class Action

A class action is 'a generic term for a procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative'.<sup>7</sup> Class actions are provided for by statute that specify the terms on which the claims of numerous persons or entities may be aggregated and a representative applicant or plaintiff is permitted to litigate those claims on behalf of the group. Several Australian jurisdictions have class action regimes, the focus in this article will mainly be on the Federal regime, Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**),<sup>8</sup> although reference will also be made to Victoria due to its innovative reform to lawyer's fees.<sup>9</sup> All regimes are very similar as the FCA Act has been the model for the other jurisdictions.<sup>10</sup>

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<sup>6</sup> Productivity Commission, *Access to Justice Arrangements, Inquiry Report No 72* (2014) vol 2, 607 ('**Productivity Commission 2014 Report**'), Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings Report* (2018) ('**VLRC 2018 Report**'); ALRC 2018 Report; PJC Report.

<sup>7</sup> Australian Law Reform Commission, *Grouped Proceedings in the Federal Court, Report No 46* (1988) [1].

<sup>8</sup> Class actions have existed in Australia since the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth) which provided for 'representative proceedings' through inserting Part IVA into the *Federal Court of Australia Act 1976* (Cth). Part IVA commenced on 4 March 1992.

<sup>9</sup> *Supreme Court Act 1986* (Vic), Part 4A which commenced on 1 January 2000.

<sup>10</sup> The other state based regimes are *Civil Procedure Act 2005* (NSW), Part 10; *Civil Proceedings Act 2011* (Qld), Part 13A; *Supreme Court Civil Procedure Act 1932* (Tas) Pt VII.

The Federal Court class action procedure requires that there be seven or more persons with claims against the same person<sup>11</sup> and those claims are ‘in respect of, or arise out of, the same, similar or related circumstances.’<sup>12</sup> Each of the claims must ‘give rise to a substantial common issue of law or fact.’<sup>13</sup> The representative applicant must be a person who has a sufficient interest in the matter to support their own action against the respondent.<sup>14</sup>

Australia adopts an opt out class actions model. A group member's consent to being a group member is usually not required,<sup>15</sup> but they must receive an opportunity to opt out of the proceedings.<sup>16</sup> If a group member falling within the defined class does not opt-out then they are bound by the outcome of the proceedings.<sup>17</sup> The opt-out model is however augmented through the judicial recognition of the ‘closed class’ - a representative party may commence a proceeding on behalf of some, but not all, of the potential members of the group.<sup>18</sup>

The regime also provides for court oversight, especially in relation to ordering discontinuance of proceedings as a class action,<sup>19</sup> notices,<sup>20</sup> approval of settlement<sup>21</sup> and a general power to ‘make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding’.<sup>22</sup>

Class actions promote access to justice because they allow for the sharing of costs, economies of scale and can overcome the collective action problem. The ability to aggregate claims and obtain economies of scale is also important because it attracts lawyers and litigation funders who are prepared to provide their labour, knowledge and/or capital in return for a profit.<sup>23</sup>

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<sup>11</sup> *Federal Court of Australia Act 1976* (Cth) s 33C(1)(a).

<sup>12</sup> *Federal Court of Australia Act 1976* (Cth) s 33C(1) (b), *Zhang v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 45 FCR 384, 404 and *Guglielmin v Trescowthick (No 2)* (2005) 220 ALR 515, [48].

<sup>13</sup> *Federal Court of Australia Act 1976* (Cth) s 33C(1)(c); *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255, 267.

<sup>14</sup> *Federal Court of Australia Act 1976* (Cth) s 33D; *Symington v Hoechst Schering Agrevo Pty Limited* (1997) 78 FCR 164, 167. See also *Federal Court of Australia Act 1976* (Cth) s 33T which provides that a representative party may be substituted if they are not able to adequately represent the interests of the group members.

<sup>15</sup> *Federal Court of Australia Act 1976* (Cth) s 33E(1) but with exceptions to the requirement, such as government bodies, set out in s 33E(2).

<sup>16</sup> *Federal Court of Australia Act 1976* (Cth) s 33J.

<sup>17</sup> *Federal Court of Australia Act 1976* (Cth) s 33ZB; *Timbercorp Finance Pty Ltd (in liquidation) v Collins* [2016] HCA 44.

<sup>18</sup> *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, [111].

<sup>19</sup> *Federal Court of Australia Act 1976* (Cth) s 33N.

<sup>20</sup> *Federal Court of Australia Act 1976* (Cth) ss 33X, 33Y.

<sup>21</sup> *Federal Court of Australia Act 1976* (Cth) s 33V.

<sup>22</sup> *Federal Court of Australia Act 1976* (Cth) s 33ZF.

<sup>23</sup> Michael Legg, ‘Shareholder Class Actions in Australia - The Perfect Storm?’ (2008) 31(3) *UNSW Law Journal* 669.

## The Australian Approach to Costs and Legal Fees

To understand the rise of litigation funding in class actions it is first necessary to outline the law and practice surrounding the costs of litigation and the payment of lawyer's fees generally. All Australian jurisdictions operate within the confines of the traditional English method of 'cost-shifting', whereby 'the successful party is generally entitled to his or her costs by way of indemnity against the expense of litigation that should not, in justice, have been visited upon that party'.<sup>24</sup> This approach to costs is referred to as 'costs follow the event' or 'loser pays' for shorthand. Shifting the burden of legal costs from winner to loser is done to discourage the filing of cases without merit or that are merely speculative.<sup>25</sup>

The rule is modified in relation to class actions. The representative party, as well as subgroup representatives, are liable for the legal costs borne by a successful respondent, consistent with the usual loser pay's approach.<sup>26</sup> However, group members are not obliged to pay for the respondent's legal costs should the class action be unsuccessful, unless they take on a representative role, or agitate individual claims.<sup>27</sup>

This approach to costs has been raised as a disincentive to the commencement of litigation as the plaintiff, or representative party in a class action, is liable for the costs of their opponent if they are unsuccessful.<sup>28</sup> Moreover, to protect against a plaintiff or representative party avoiding liability to pay costs in the event they are unsuccessful, courts may also require the plaintiff to provide security for their opponent's costs.<sup>29</sup> Security may also be required in a class action, and group members (although not liable for costs) may be required to contribute to the security.<sup>30</sup>

Lawyers and legal fees are primarily regulated at the state level. Each of the Australian states does not permit lawyers to charge by reference to the amount of any award or settlement or the value of any property that may be recovered in any legal proceedings, ie contingency fees are illegal.<sup>31</sup> However, lawyers may take cases on a conditional or 'no win no fee' basis and, if they are successful, charge their base rate multiplied by some factor or a specified

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<sup>24</sup> *Northern Territory v Sangare* [2019] HCA 25; 265 CLR 164, [25]. See also *Oshlack v Richmond River Council* (1998) 193 CLR 72, [67].

<sup>25</sup> VLRC 2018 Report, 116.

<sup>26</sup> *Federal Court of Australia Act 1976* (Cth) s 33Q.

<sup>27</sup> *Federal Court of Australia Act 1976* (Cth) ss 33R, 43(1A).

<sup>28</sup> Michael Legg and Louisa Travers, 'Necessity is the Mother of Invention: The Adoption of Third Party Litigation Funding and the Closed Class in Australian Class Actions' (2009) 38 *Common Law World Review* 245, 252-253.

<sup>29</sup> *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1, [6]; *Etyre v Australian Broadcasting Corporation* [2021] FCA 610.

<sup>30</sup> *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1 (held that an order for security for costs was appropriate, and that it was fair that the group members who stood to benefit from the proceeding make a real but not oppressive contribution to a pool of funds for security); *Capic v Ford Motor Company (No 2)* [2016] FCA 1178.

<sup>31</sup> *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law 2015* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3 s 27; *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law 2015* (Vic) s 183; *Legal Profession Act 2008* (WA) s 285.

additional amount.<sup>32</sup> This provides a mechanism to address the disincentive to commencing legal proceedings because a plaintiff cannot afford to pay their own legal costs. The availability of a conditional fee arrangement will depend on a lawyer's assessment of the risk of the proceedings and ability to bare non-payment for the period of the litigation. It does not address the disincentive associated with an adverse costs order.<sup>33</sup>

The Productivity Commission, Victorian Law Reform Commission (**VLRC**) and Australian Law Reform Commission (**ALRC**) have recommended lifting the prohibition on lawyers charging contingency fees in class actions.<sup>34</sup> In Victoria the legislature has acted on the recommendation through the adoption of a 'group costs order' in the class actions regime which is discussed below.

### **The Rise of Litigation Funding**

Litigation funding became an important component of a class action as it overcame the disincentives created by the costs rules described above. The litigation funding agreement typically provides for the costs of the litigation, including the lawyer's fees to be paid by the funder and for the funder to indemnify the representative party and group members against the risk of paying the other party's costs in the event that the claim fails. In return, if the claim is successful, the funder, who is not prohibited from charging a contingency fee, will receive a percentage of any funds recovered by the litigants either by way of settlement or judgment. The litigants will also assign the funder the benefit of any costs order they receive. The percentage paid to the funder is in the range of 20-30% typically (usually after reimbursement of costs).<sup>35</sup>

For the litigation funder to recover a fee from each group member in a class action it needed to contract with each of those group members. This necessity gave rise to the concept of book building which is a process that seeks to generate, capture and record interest in a specific class action. In this process, the representative party's solicitor and the litigation funder undertake active efforts to persuade group members to enter into retainers with the law firm and funding agreements with the litigation funder.<sup>36</sup>

The litigation funders' strategy for being paid developed over time, moving from book building to, in addition, seeking to limit the class action's membership to those who had

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<sup>32</sup> Conditional fee agreements are dealt with by *Legal Profession Act 2006* (ACT) s 283(3); *Legal Profession Uniform Law 2015* (NSW) s 181; *Legal Profession Act* (NT) s 318(3); *Legal Profession Act 2007* (Qld) s 323(3); *Legal Practitioners Act 1981* (SA) sch 3 s 25; *Legal Profession Act 2007* (Tas) s 307(3); *Legal Profession Uniform Law 2015* (Vic) s 181; *Legal Profession Act 2008* (WA) s 283.

<sup>33</sup> *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd* [2020] QCA 250; 384 ALR 725, [91].

<sup>34</sup> Productivity Commission 2014 Report, 601; ALRC 2018 Report, 9-12, 185-217; VLRC 2018 Report, 63-68. See also Michael Legg, 'Contingency fees - antidote or poison' (2015) 29 *Australian Bar Review* 244 (recommending a common fund for class action lawyers).

<sup>35</sup> Michael Legg, Shareholder Class Actions in Australia - The Perfect Storm? (2008) 31(3) *UNSW Law Journal* 669, 703; Productivity Commission 2014 Report, 607; The Association of Litigation Funders of Australia, Best Practice Guidelines (January 2019).

<sup>36</sup> *BMW Australia Ltd v Brewster* [2019] HCA 45; 269 CLR 574, [91] (Kiefel CJ, Bell and Keane JJ), [133] (Gordon J).

contracted so as to avoid free-riding (the closed class as referred to above),<sup>37</sup> to then including all potential group members (an open class) and seeking orders from the Court that those group members who had not contracted with the funder, nonetheless be required to contribute to the cost of litigation funding.<sup>38</sup> This latter development is discussed further below.

Litigation funding does not just make available the financing needed for identifying and prosecuting potential lawsuits. The funder in Australia will often take on a broader role as the entity to identify the potential lawsuit, undertake the due diligence to determine the feasibility of litigation, organise a representative party and group members, and co-ordinate the resources needed to achieve a favourable settlement or judgment. The litigation funder performs this role in conjunction with the lawyers for the representative party.<sup>39</sup>

### Legitimising Litigation Funding

Historically improperly encouraging litigation (referred to as ‘maintenance’) and funding another person’s litigation for profit (referred to as ‘champerty’) were torts and/or crimes in all Australian jurisdictions. The common law prohibition of litigation funding was justified in part by a doctrinal concern, namely that the judicial system should not be the site of speculative business ventures. However, the primary aim was to prevent abuses of court process (vexatious or oppressive litigation, elevated damages, suppressed evidence, suborned witnesses) for personal gain. Today, the prohibitions have been removed through legislation expressly abolishing maintenance and champerty as a crime and as a tort<sup>40</sup> and through court decisions<sup>41</sup> so that they no longer stand in the way of litigation funding. Rather, the court addresses the above concerns through its accepted power to control its own processes against abuse.

The key decision legitimising litigation funding in Australia was *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*.<sup>42</sup> Australia's highest court considered the legality of litigation

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<sup>37</sup> *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200; 164 FCR 275. The closed class was initially held to be contrary to the opt out requirement of the Australian class action: *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394; *Rod Investments (Vic) Pty Ltd v Clark* [2005] VSC 449. See also Vince Morabito, ‘Class actions instituted only for the benefit of the clients of the class representative’s solicitors’ (2007) 29 *Sydney Law Review* 5; Michael Legg, ‘Funding a Class Action through Limiting the Group: What does Pt IVA of the Federal Court of Australia Act 1976 (Cth) Permit?’ (2010) 33 *Australian Bar Review* 17.

<sup>38</sup> *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029; *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191. See also Michael Legg, ‘Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal’ (2017) 91 *Australian Law Journal* 655.

<sup>39</sup> Michael Legg, ‘Shareholder Class Actions in Australia - The Perfect Storm?’ (2008) 31(3) *UNSW Law Journal* 669, 707.

<sup>40</sup> See eg *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) ss 3, 4; *Wrongs Act 1958* (Vic) s 32; *Crimes Act 1958* (Vic) s 322A.

<sup>41</sup> See *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 203; *Brew v Whitlock* [1967] VR 449 at 450; *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd* [2020] QCA 250; 384 ALR 725, [76], [80]-[105].

<sup>42</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. For more detailed discussions of the case see Michael Duffy, ‘Two's Company, Three's a Crowd? Regulating Third-Party

funding for the first time and held by majority that litigation funding was not an abuse of process or contrary to public policy.<sup>43</sup> The plurality judgment of Gummow, Hayne and Crennan JJ indicated that existing doctrines of abuse of process and the courts' ability to protect their processes would be sufficient to deal with a funder conducting themselves in a manner 'inimical to the due administration of justice'.<sup>44</sup> The joint judgment endorsed Mason P's statement in the Court of Appeal below that '[t]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled'.<sup>45</sup>

The plurality accepted that there are two kinds of consideration put forward as founding a rule of public policy against litigation funding – 'fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant'.<sup>46</sup> However, the plurality reasoned that an overarching rule of public policy that would bar:

the prosecution of an action where any agreement has been made to provide money to a party to institute or prosecute the litigation in return for a share of the proceeds of the litigation, or would bar the prosecution of some actions according to whether the funding agreement met some standards fixing the nature or degree of control or reward the funder may have under the agreement ... would take too broad an axe to the problems that may be seen to lie behind the fears.<sup>47</sup>

The issue was again raised in *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd*. The Queensland Court of Appeal observed that one of the purposes of the class action was 'to serve bona fide claimants who are unable to fund an action and who are unwilling to expose themselves to vast liabilities for adverse costs orders to try to get a relatively modest sum'.<sup>48</sup> Litigation funding was a legitimate way in which to give effect to that purpose.<sup>49</sup>

Litigation funding is not per se an abuse of process, but in a particular funding arrangement there may be features that give rise to an abuse of process. Australian courts' willingness to guard against an abuse of process in class actions has been demonstrated through a series of judgments where a corporate entity, Melbourne City Investments Pty Ltd, was created to

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Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39(1) *UNSW Law Journal* 165, 174-177.

<sup>43</sup> The proceedings were a representative action pursuant to court rules that gave effect to the former Chancery practice from England, not a class action pursuant to the FCA Act: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [41]-[42]. The proceeding was not permitted to proceed because it used an opt in model and pleaded a case on behalf of the plaintiff only so that at the time the proceedings were commenced there were not 'numerous persons [having] the same interest' in the proceedings as required by the rule: [51]-[60].

<sup>44</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [93]. See also *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75, [26], [29]-[30].

<sup>45</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [65] citing *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, 227 [105].

<sup>46</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [90].

<sup>47</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, [91].

<sup>48</sup> *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd* [2020] QCA 250; 384 ALR 725, [92].

<sup>49</sup> *Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd* [2020] QCA 250; 384 ALR 725, [104].



purchase small parcels of shares in numerous listed corporations to permit the entity to then be the representative party with a view to generating profits for the people behind the corporate entity rather than to vindicate group member's rights. The courts permanently stayed the class action proceedings.<sup>50</sup>

### Concerns about Litigation Funding

In 2014 the Productivity Commission completed an inquiry into access to justice which included an examination of litigation funding. The Commission reported concerns about litigation funding encouraging unmeritorious claims; taking advantage of plaintiffs for their own gain, mainly through high fees; and that the market was not adequately regulated.<sup>51</sup> The Commission stated that it had not received evidence that supported the concerns and that largely they appeared to emanate from corporate defendants who were facing litigation (and accountability) where previously they had not.<sup>52</sup> However, while the Commission gave support to litigation funding, it recognised that 'consumers need to be adequately protected'<sup>53</sup> and regulatory reforms such as licensing were recommended.<sup>54</sup>

On 16 December 2016 the Victorian Law Reform Commission (VLRC), and then on 11 December 2017, the Australian Law Reform Commission (ALRC) received references to review litigation funding and class actions in their respective jurisdictions.<sup>55</sup>

The VLRC in its 2018 report stated that:

The Commission has not been asked to investigate whether litigants are being treated unfairly or charged excessively; rather, the report focuses on how to prevent this happening.<sup>56</sup>

The VLRC terms of reference and approach appear to stem from litigation funders having only been involved in 10 out of 85 class actions so that major problems had not been experienced, but also that state regulation of litigation funding was not a viable option because a national response was required. Consequently, the VLRC focussed on court oversight of funders in a particular class action and guidelines for lawyers as to their duties and responsibilities in class actions, including the recognition, avoidance and management of conflicts of interest.<sup>57</sup>

The reference to the ALRC was a response to concerns that the social utility and legitimacy of the class action regime was being undermined because the interests of claimants, and society more generally, was taking a backseat to profit generation for lawyers and funders.<sup>58</sup>

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<sup>50</sup> *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351; *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187; *Walsh v WorleyParsons Limited (No. 4)* [2017] VSC 292.

<sup>51</sup> Productivity Commission 2014 Report, 617.

<sup>52</sup> Productivity Commission 2014 Report, 617-624.

<sup>53</sup> Productivity Commission 2014 Report, 601.

<sup>54</sup> Productivity Commission 2014 Report, 633 Recommendation 18.2.

<sup>55</sup> VLRC 2018 Report, viii; ALRC 2018 Report,

<sup>56</sup> VLRC 2018 Report, xiv.

<sup>57</sup> VLRC 2018 Report, xiii-xxiii.

<sup>58</sup> ALRC 2018 Report, [1.7]-[1.13], [1.49].

The concern is illustrated by the ALRC’s finding that the median return to group members in funded matters was 51%, whereas in unfunded proceedings the median return was 85% of the settlement award.<sup>59</sup> Further, for all finalized shareholder class actions between 2013–2018, the median percentage of the settlement used to pay (a) legal fees was 26% and (b) litigation funding fees was 23%, with the result that the median percentage of settlement paid to group members was 51%.<sup>60</sup>

The ALRC accepted the important role that litigation funders play in providing access to justice for group members, but also pointed to a number of inherent risks associated with litigation funders. The ALRC noted the high level of control that litigation funders in Australian class actions have – ‘They fund litigation and can give directions to the plaintiff’s solicitors, but they are not the client’.<sup>61</sup> The ALRC also identified the need to ensure that litigation funders meet their obligations under funding agreements, properly address conflicts of interest, and do not act in a manner that is detrimental to group members.<sup>62</sup>

On 13 May 2020, the Commonwealth Attorney-General referred to the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) an inquiry into litigation funding and the regulation of the class action industry. The PJC delivered its report on 21 December 2020.<sup>63</sup> The PJC’s view of litigation funding was set out in the executive summary to the report as follows:

Australia’s highly unique and favourably regulated litigation funding market has become a global hotspot for international investors, including many based in tax havens and with dubious corporate histories, to generate investment returns unheard of in any other jurisdiction – in some cases of more than 500 per cent. This is directly the result of a regulatory regime described by the Australian Securities and Investments Commission (ASIC) as ‘light touch’ and under which no successful action by a regulator has ever been taken against a funder. Participants in class actions are the biggest losers in this deal. When they finally get their day in court, it is the genuinely wronged class action members who are getting the raw deal of significantly diminished compensation for their loss, as bigger and bigger cuts are awarded to generously paid lawyers and funders.<sup>64</sup>

The PJC’s general view was that ‘the class action system needs to be reformed to reflect the underlying tenets of its original intent: that is, to deliver reasonable, proportionate and fair access to justice in the best interests of class members’.<sup>65</sup>

The Australian Government issued a response to the ALRC 2018 Report and PJC Report which recognised the importance of class actions, when working as originally intended,

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<sup>59</sup> ALRC 2018 Report, [3.49].

<sup>60</sup> ALRC 2018 Report, [3.53].

<sup>61</sup> ALRC 2018 Report, [6.94]. See also [6.59].

<sup>62</sup> ALRC 2018 Report, [1.43], [1.49], [6.1].

<sup>63</sup> PJC Report, 125.

<sup>64</sup> PJC Report xiii.

<sup>65</sup> PJC Report xvi.

echoed concerns about litigation funder's profits and the impact on group member's compensation which it saw as creating the need for 'systemic regulation' of litigation funders, but it also added that it was important 'to ensure that economically inefficient class action do not have a detrimental effect on business'.<sup>66</sup>

The above summary demonstrates a consistent concern for consumers of litigation funding services, namely group members. However, since the PJC inquiry it has been argued that this concern has been used as 'cover' for attempts to stifle class actions and protect corporate interests.<sup>67</sup>

## **Judicial Oversight of Litigation Funding**

The regulation of litigation funder-group member relations, especially in relation to protecting the representative party and group members from adverse costs and providing oversight of the fee charged by the funder, has fallen chiefly to the courts. Litigation funding fees were not initially subject to review or oversight.<sup>68</sup> They were seen as private arrangements taking place outside the actual litigation. However, over time the idea of the court supervising funder's fees grew as the funder sought payment beyond its contractual entitlements. However, the power of the court's to alter a funder's fee has been controversial.

### Disclosure of Funding Terms and Security for Costs

Practice Note CM 17 of the Federal Court of Australia came into effect on 5 July 2010 to supplement the provisions within Part IVA of the FCA Act.<sup>69</sup> Practice Note CM 17 stated:

At or prior to the initial case management conference each party will be expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceeding, any security for costs or any adverse costs order.<sup>70</sup>

This clause also permitted the redaction of any funding agreement 'to conceal information which might reasonably be expected to confer a tactical advantage on the other party'. The practice note has since been updated.<sup>71</sup> The current practice note provides for the litigation funding agreement to be provided to the court in unredacted form and to be served on the other parties to the litigation with redactions to conceal information which might reasonably be expected to confer a tactical advantage on another party. Examples of such information

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<sup>66</sup> Australian Government, Response to the Parliamentary Joint Committee on Corporations and Financial Services report Litigation Funding and the Regulation of the Class Action Industry, and the Australian Law Reform Commission report Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, 19 October 2021, 2-4

<sup>67</sup> See Parliamentary Joint Committee on Corporations and Financial Services, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (November 2021) 41 (dissenting report by Labor members).

<sup>68</sup> *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [28].

<sup>69</sup> The Supreme Court of Victoria also published 'Practice Note No 9 of 2010 – Conduct of Group Proceedings' which commenced on 1 January 2011 and was in substance the same as the Federal Court's Practice Note CM 17.

<sup>70</sup> Federal Court of Australia, Class Actions Practice Note CM 17, cl 3.6. See *Coffs Harbour City Council v Australian and New Zealand Banking Group Limited* [2016] FCA 306.

<sup>71</sup> Federal Court of Australia, Class Actions Practice Note (GPN-CA), 20 December 2019. See also Supreme Court of Victoria, Practice Note SC Gen 10 – Conduct of Group Proceedings (Class Actions), 12 October 2020.

include the budget or estimate of costs for the litigation or the funds available to the applicants, or information about the risks or merits of the proceeding or claims. Both obligations are subject to objection where a question of legal professional privilege, prejudice or other significant detriment arises in making the disclosure. These objections may be dealt with through further redactions or a court ruling.<sup>72</sup>

The Court does not scrutinise the funding agreement in detail. Rather, the requirement for disclosure provides greater transparency and certainty for a defendant/respondent in what is typically complex and expensive litigation<sup>73</sup> with the result that they will almost always seek an order for security for costs. The disclosure removes the need for correspondence about the financial state of affairs of the plaintiff/applicant and the identity of the litigation funder so that the focus shifts to the manner in which security will be involved and the quantum of security. It has become routine in class actions for the courts to require a litigation funder to provide security for costs.<sup>74</sup> The provision of security protects a defendant/respondent from a pyrrhic victory, but also provides assurance to a representative party that the indemnity for costs has some substance. The difficulty is that the security required is typically not of an amount that provides complete coverage for a defendant/respondent's reasonable costs.<sup>75</sup> Security provides some protection against a funder that is unable or unwilling to pay because of insolvency (including where the funding entity is deliberately structured to protect investors or be a separate legal entity from a solvent parent company) or the off-shore location of its assets makes enforcement difficult.

The Practice Note also requires that litigation funding agreements should include provisions for managing conflicts of interest between any of the applicant(s), the group members, the applicant's legal representatives and any litigation funder.<sup>76</sup> The practice note reflects the position taken in the regulation of litigation funding which is discussed below. Conflicts of interest and the need for the litigation funder to avoid or manage them may also arise from the nature of the funder's relationship with group members which may be considered fiduciary in some contexts.<sup>77</sup>

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<sup>72</sup> Federal Court of Australia, Class Actions Practice Note (GPN-CA), 20 December 2019 cl 6.

<sup>73</sup> *Coffs Harbour City Council v Australian and New Zealand Banking Group Limited* [2016] FCA 306, [20]; *Allen v G8 Education Ltd* [2021] VSC 173, [7]-[8].

<sup>74</sup> *Perera v Getswift Limited* [2018] FCA 732, [192] where the Court observed that, 'it is accepted that in the event that funders are using the processes of the court to procure a commercial benefit, a sine qua non of this is the provision of adequate security.' The form of the security has typically been a bank guarantee or an undertaking from the litigation funder. Attempts have also been made to rely on an After-The-Event (ATE) insurance policy. See *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd* [2017] FCA 699 (declining to order security be provided by ATE insurance policy based on the specific circumstances of the case and instead ordering that security be provided by payment into court or by providing an appropriately worded bank guarantee from an Australian trading bank); Daniel Meyerowitz-Katz, 'After-the-event insurance and security for costs: inconsistency in the Australian approach' (2021) 9 *Journal of Civil Litigation and Practice* 122.

<sup>75</sup> ALRC 2018 Report, [6.31]. [6.33]. Complete coverage is rarely provide because 'All applications for security for costs involve a balancing of interests between protecting the respondent against liability for costs on the one hand, with the prospect of stultifying or impeding a legitimate claim on the other': *Perera v Getswift Limited* [2018] FCA 732, [193]; *Trailer Trash Franchise Systems Pty Ltd v GM Fascia & Gutter Pty Ltd* [2017] VSCA 293, [65].

<sup>76</sup> Federal Court of Australia, Class Actions Practice Note (GPN-CA), 20 December 2019 cl 5.9.

<sup>77</sup> Simone Degeling and Michael Legg, 'Fiduciaries and funders: litigation funders in Australian class actions' (2017) 36(2) *Civil Justice Quarterly* 244.

## Court Orders for Funder's Fees

The litigation funders' strategy for being paid was explained above, including seeking orders from the Court that those group members who had not contracted with the funder nonetheless be required to contribute to the cost of litigation funding.

One set of court orders that was sought were referred to as "funding equalisation orders" (FEO). An FEO provides that unfunded group members have their recovery reduced by the amount the funded group members agreed to pay to a litigation funder. This amount is then redistributed across all group members.<sup>78</sup> The FEO ensures equality amongst group members but without a direct payment to the funder. However, the funder may have relied on the funding agreement to obtain an indirect payment by taking a percentage of the amount redistributed to funded group members.<sup>79</sup>

Another form of order drew on the concept of the common fund. A common fund in generic terms, is where one person (eg a litigant or a lawyer) who recovers a fund for the benefit of persons other than himself or his client, is entitled to a reasonable fee from the fund.<sup>80</sup> This generic approach was adapted for litigation funding. A common fund order (CFO) in the context of litigation funders and Australian class actions requires that all group members, even those who have not entered into a funding agreement with the litigation funder, contribute to the funder's commission from the proceeds of a judgment or settlement. In return the funder agrees to Court determination of the funder's fee.<sup>81</sup>

In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited (Money Max)*, a shareholder class action against QBE, the Full Court saw the scrutiny of the Funder's fee and the likely reduction in that fee from what was proposed under the funding agreement as supporting the making of the common fund orders.<sup>82</sup> The Full Court indicated that it was 'highly likely' that the funding commission of 32.5% or 35% contained in the funding agreement applicable to the QBE shareholder class action would be reduced.<sup>83</sup> This did indeed transpire with the Court approving a payment of 23.208% of the settlement sum of \$132.5 million (being \$30.75 million) to the funder.<sup>84</sup>

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<sup>78</sup> *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [14]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [26]–[28]; *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [55]–[60].

<sup>79</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [99] (Beach J noted that when courts had made this type of equalisation order the judge may not have been made aware of this outcome); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [21].

<sup>80</sup> Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52, 63–64.

<sup>81</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; 245 FCR 191.

<sup>82</sup> *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191, [167].

<sup>83</sup> *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191, [85].

<sup>84</sup> *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030.

However, in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall (Brewster)*, a majority of the High Court found that s 33ZF of the FCA Act, and the New South Wales equivalent, did not provide power to make a CFO at the beginning of a class action.<sup>85</sup>

In the Bellamy's shareholder class action, where a CFO had been made but which the applicant did not seek to enforce as a result of Brewster, Beach J lamented the loss of the CFO as a tool for the court to control commission rates to the benefit of group members and place downward pressure on commission rates more generally.<sup>86</sup>

Nonetheless, Brewster gave rise to other questions: could a CFO be made at the end of the proceeding? Could a CFO be made relying on other powers of the court? These questions were addressed by two intermediate appellate court decisions.<sup>87</sup> Both held that Brewster had not addressed the operation of other legislative provisions, such as s 33V(2) (if the Court makes an order approving a settlement 'it may make such orders as are just with respect to the distribution of any money paid under a settlement'), or the making of CFOs at settlement or after judgment.

The courts have made a number of CFOs at settlement. For example, in *Court v Spotless Group Holdings Limited*, Murphy J reviewed the above decisions and indicated that they 'confirmed that [Brewster] is not authority for the proposition that there is no power under s 33V of the FCA ... to make a common fund order at the point of settlement approval'.<sup>88</sup> Consequently, his Honour went on to find that he was satisfied that it was just pursuant to s 33V to make a CFO at the rate of 22.5% of the net settlement, being a funding commission of \$19,500,324.<sup>89</sup>

Similarly in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* the funder of the litigation sought to be paid by way of a CFO at settlement being 25% of the gross settlement sum of \$138 million, namely \$34.5 million relying s 33V(1) of the FCA Act, or s 33V(2) or in equity.<sup>90</sup> Lee J cited to the two intermediate appellate court judgments referred to above as giving rise to "the prevailing orthodoxy ... that the Court has power to make a Settlement CFO" relying on s 33V.<sup>91</sup> Lee J would also have been prepared to make a Settlement CFO

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<sup>85</sup> *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45; 269 CLR 574. For a discussion and critique of the court's reasoning see Michael Legg, 'Litigation Funding of Australian Class Actions after the High Court Rejection of Common Fund Orders: *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45' (2020) 39 (4) *Civil Justice Quarterly* 305

<sup>86</sup> *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [28]. The median rate paid pursuant to a common fund orders in class actions during the period October 2016 to December 2019 was 21.9 per cent: Professor Vince Morabito, Submission to the Parliamentary Joint Committee on Corporations and Financial Services on Litigation Funding and Regulation of the Class Action Industry, 10 June 2020.

<sup>87</sup> *Brewster v BMW Australia Ltd* [2020] NSWCA 272, addressing the *Civil Procedure Act 2005* (NSW), and *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 addressing the FCA Act. An application for special leave to appeal to the High Court in *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* was denied: *7-Eleven Stores Pty Ltd v Davaria Pty Limited & Ors* [2021] HCATrans 113 (25 June 2021).

<sup>88</sup> *Court v Spotless Group Holdings Limited* [2020] FCA 1730, [79].

<sup>89</sup> *Court v Spotless Group Holdings Limited* [2020] FCA 1730, [101].

<sup>90</sup> *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [1], [12].

<sup>91</sup> *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [15].

based on equitable principles, such as restitution, or that a person who benefits from another's efforts in producing a fund is obliged to provide appropriate value in return, as it would be inequitable for the person who has created or realised a valuable asset, in which others claim an interest, not to have their costs or fee incurred in producing the asset paid out of the fund.<sup>92</sup>

Each of the VLRC, ALRC and PJC have recommended that the Court be given the power by statute to make a common fund order.<sup>93</sup> The VLRC and ALRC reported prior to the Brewster decision. The PJC reported after the Brewster decision and recommended that the Australian Government legislate to address uncertainty in relation to CFOs, in accordance with the Brewster decision.<sup>94</sup> The recommendation puts forward a legislative solution, but the terms of that solution are not clear. It may mean allowing for CFO only at the completion of a class action, and not at commencement.<sup>95</sup>

#### Power to Review Funder's Fees

A number of Federal Court judgments have addressed the issue of whether litigation funding fees can be altered by the court (without a CFO), with reliance being placed on s 33V(2) and s 33ZF of the FCA Act.<sup>96</sup> Moreover the Full Court of the Federal Court observed that 'the Court has a supervisory or protective role ... in relation to litigation funding charges'.<sup>97</sup>

In *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)*, Murphy J considered an application for settlement approval and expressed concern that the settlement terms proposed by class counsel and the litigation funder offered such little benefit to class members that the terms could be said to undermine both the access to justice underpinnings of Part IVA and the judicial process itself (the class in that case stood only to take 2% of the settlement proceeds).<sup>98</sup> His Honour approved the settlement but disallowed a substantial amount of the proposed litigation and funding costs (after making these deductions, the class received 33% of the settlement sum).<sup>99</sup>

However, in *Liverpool City Council v McGraw-Hill Financial, Inc*, Lee J accepted that in an appropriate case the Court may refuse to approve a settlement because a funding commission is excessive or disproportionate.<sup>100</sup> However, after reviewing the heads of power, his Honour doubted that power existed for the Court to interfere and vary funding agreements in the

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<sup>92</sup> *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [34]-[40].

<sup>93</sup> VLRC 2018 Report, Recommendation 27; ALRC 2018 Report, Recommendation 3; PJC Report, Recommendation 7.

<sup>94</sup> PJC Report, 125.

<sup>95</sup> PJC Report, 125.

<sup>96</sup> See *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433; *Blairgowrie Trading Ltd v Allico Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [101]; *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409, [26]-[32].

<sup>97</sup> *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2017] FCAFC 98, [90].

<sup>98</sup> *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, [5].

<sup>99</sup> *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, [6]-[16].

<sup>100</sup> *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [22].

context of a settlement by altering the contractual promises of group members to pay commission.<sup>101</sup>

The ALRC's 2018 report was cognisant of the divergence in judicial opinion as to whether the court could unilaterally alter terms of a funding agreement, mainly the fee to be charged. The ALRC addressed this issue through two recommendations: first, that third-party litigation funding agreements for class actions only be enforceable with the approval of the Court; and second, that the Court be given an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements.<sup>102</sup> The VLRC Report's recommendation was to similar effect.<sup>103</sup>

The PJC opined that the 'Federal Court's supervisory and protective role in class actions is vital' but that its current implementation was 'weak and appears to be favouring the provision of windfall profits to litigation funders'.<sup>104</sup> The PJC echoed the ALRC recommendations above, namely a requirement for a litigation funding agreement to obtain approval of the Federal Court of Australia to be enforceable; and a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.<sup>105</sup>

If the relevant Parliament adopted these recommendations then the quantum of litigation funding fees would clearly be subject to judicial oversight. However, if Parliament does not legislate then the courts will need to interpret the scope of the key provisions, ss 33V and 33ZF, to determine whether the courts may rewrite contractual bargains to achieve justice.

#### Criteria for Reviewing and Setting Funder's Fees

Assuming that the courts have or receive power to set or vary a litigation funding fee, there remains an issue as to how such a fee should be set. Indeed the Brewster decision observed that there was 'an absence of criteria to guide the exercise of discretion by the court'.<sup>106</sup>

However, the Full Court in *Money Max* provided guidance in the context of a CFO that could be refashioned for use in setting or revising a litigation funder's fee:

the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.<sup>107</sup>

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<sup>101</sup> *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [47].

<sup>102</sup> ALRC 2018 Report, Recommendation 14.

<sup>103</sup> VLRC 2018 Report, Recommendation 24.

<sup>104</sup> PJC Report, [11.53].

<sup>105</sup> PJC Report, Recommendation 11.

<sup>106</sup> *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45; 269 CLR 574, [59].

<sup>107</sup> *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191, [82].



The Full Court set out the following factors as relevant to the determination of the funder's fee:<sup>108</sup>

- (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. That can be said to show acceptance of a particular rate by astute class members;
- (b) the information provided to class members as to the funding commission. That may be important to understand the extent to which class members were informed when agreeing to the funding commission rate;
- (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. It will be relevant to know the broad parameters of the funding commission rates available in the market;
- (d) the litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding;
- (e) the quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding;
- (f) the legal costs expended and to be expended, and the security for costs provided, by the funder;
- (g) the amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;
- (h) any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court; and
- (i) class members' likely recovery "in hand" under any pre-existing funding arrangements.

### Tools to Assess Funders' Fees

The Australian courts have inherent power to regulate costs agreements between a solicitor and a client.<sup>109</sup> In the class action context lawyer's fees have been subject to review from an early stage. The courts adopted a number of mechanisms to assist them to evaluate the reasonableness of costs. This included courts appointing a referee to inquire as to the reasonableness of the legal fees and provide a report to the court.<sup>110</sup> In addition courts have

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<sup>108</sup> *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; 245 FCR 191, [80]; *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [21]-[22]; *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [55]. See also Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 *Australian Law Journal* 655, 667-669 discussing other criteria that could be employed.

<sup>109</sup> *Woolf v Snipe* (1933) 48 CLR 677, 678. In the class action context the courts have also relied on *Federal Court of Australia Act 1976* (Cth) s 33ZF: *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, [35]-[37].

<sup>110</sup> *Lifepan Australia Friendly Society Limited v S&P Global Inc* [2018] FCA 379, [41]; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, [91]; *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030, [156]; *Caason Investments Pty Limited v*

appointed a contradictor, or litigation guardian, to represent group members' interest.<sup>111</sup> The contradictor can be appointed with a broad or narrow remit, ie they can be tasked with making submissions on legal costs or they can be asked to address whether an entire settlement should be approved.<sup>112</sup>

The courts can employ the same procedures used to review legal costs, namely, referees and contradictors, in relation to the fee claimed by the litigation funder.<sup>113</sup> However, the focus is not simply costs incurred but also, and primarily, the risks the funder accepts in exchange for its fee.<sup>114</sup> The VLRC observed that if courts 'begin to use a risk/reward calculus when assessing funding fees and rely less on the fees charged in previous cases, the demand for funding costs experts is likely to grow'.<sup>115</sup> The PJC was of the view that it was 'critical that an independent litigation funding fees assessor with relevant expertise assist and inform the Federal Court's assessment of litigation funding agreements'.<sup>116</sup> The PJC also recommended that the assessor be a professional with market capital or finance expertise.<sup>117</sup>

However, for a referee or contradictor to be able to assess costs or risk they need access to information. As Beach J identified in the Allco shareholder class action: 'Whether a Court should set a commission rate and the rate to be used is largely a forensic question depending upon the material available to the judge at the time the order is sought'.<sup>118</sup> In Allco Beach J referred to market rates and the risks faced by litigation funders in investing in litigation generally.<sup>119</sup> However, it must fall to the funder in seeking to justify their fee to provide the necessary evidence.<sup>120</sup> This should include explaining what the return on investment in the context of the particular risks of the litigation being funded and why it is reasonable, not simply a comparison with funding fees in the market generally. Otherwise, if the market in

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*Cao (No 2)* [2018] FCA 527, [122]-[123]; *Prygodicz v Commonwealth of Australia (No 2)* [2021] FCA 634, [338].

<sup>111</sup> See *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653, [86]-[123]. See also Jeremy Kirk SC, 'The Case for Contradictors in Approving Class Action Settlements' (2018) 92 *Australian Law Journal* 716, 726-728.

<sup>112</sup> VLRC 2018 Report, [4.178]. See eg *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, [124].

<sup>113</sup> PJC Report, [11.61] citing Professor Michael Legg, Submission 30, p. 4.

<sup>114</sup> See *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277, [42]; *City of Swan v McGraw-Hill Companies, Inc* [2016] FCA 343, [30]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [122].

<sup>115</sup> VLRC 2018 Report, [5.52].

<sup>116</sup> PJC Report, [11.81], Recommendation 13.

<sup>117</sup> PJC Report, Recommendation 14.

<sup>118</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330, [122].

<sup>119</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs and mgrs apptd) (in liq) (No 3)* [2017] FCA 330, [122]. See also *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885, [25] ('expert material has been adduced showing that the amount of remuneration sought by [the funder] (25% of the gross settlement sum) is towards the middle of the range of rates offered or accepted by funders for class actions in Australia').

<sup>120</sup> See eg *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511.

general, including in past cases where there was less competition in the market, is resulting in above normal returns then this is perpetuated.<sup>121</sup>

## Regulation of Litigation Funding

After the High Court of Australia decision in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* that legitimised third party funding agreements in class actions the focus turned to regulation.

### 'Light Touch' Regulation

The Australian Government initially allowed litigation funding to mature in a relatively unregulated market so that there would not be barriers to entry which would hinder the advancement of access to justice.<sup>122</sup> Indeed litigation funders were left to determine for themselves what laws and regulations they should comply with. Australia's first stock exchange listed funder, IMF Bentham Limited, obtained an Australian Financial Services Licence (AFSL) on its own initiative.<sup>123</sup>

The first significant instance of mandated regulation occurred in 2009, when the Full Court of the Federal Court of Australia found that funding arrangements met the definition of a 'managed investment scheme' or MIS for the purposes of the *Corporations Act 2001* (Cth), which in turn required funders to register funding arrangements with corporate regulators.<sup>124</sup>

However, the impact of the Full Court's decision was immediately undone through ASIC granting transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions commenced before 4 November 2009.<sup>125</sup> This was followed by a series of interim class orders granting relief from regulation for all funded class actions.<sup>126</sup>

Subsequent court decisions found that litigation funding should be regulated under existing legislation dealing with financial products and a credit facility.<sup>127</sup> ASIC's relief was then

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<sup>121</sup> Michael Legg, 'A Critical Assessment of Shareholder Class Action Settlements - the Allco Class Action' (2018) 46 *Australian Business Law Review* 54, 64.

<sup>122</sup> See The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, "Government Acts to Ensure Access to Justice for Class Action Member" (speech delivered at IMF (Australia) Ltd Shareholder Class Action Conference, Quay Grand Suites, Sydney, 4 May 2010).

<sup>123</sup> IMF Bentham Limited, Submission to ALRC Inquiry into Class Action Proceedings and Third-Party Litigation Funders, 6 August 2018, 12 (IMF Bentham applied for and held an AFSL in the period July 2005 to April 2013. IMF Bentham gave up its AFSL after the introduction of ASIC Regulatory Guide 248.).

<sup>124</sup> *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; 180 FCR 11. For a critique of the decision see *Stanwell Corporation Limited v LCM Funding Pty Ltd* [2021] FCA 1430, [161]-[214].

<sup>125</sup> ASIC, 'ASIC grants transitional relief from regulation for funded class actions', Media Release 09-218MR, 4 November 2009.

<sup>126</sup> ASIC Class Order [CO 10/333] Funded representative proceedings and funded proof of debt arrangements commenced on 5 May 2010 and was extended seven times.

<sup>127</sup> *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138; *International Litigation Partners Pte Ltd v Chameleon Mining NL (rec and mgr apptd)* (2012) 246 CLR 455. For more detailed discussion see Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party

formalised and extended through regulations made pursuant to the *Corporations Act 2001* (Cth).<sup>128</sup> The regulations provided that litigation funders were not required to comply with the above regulatory requirements, including to hold an AFSL, provided they had adequate practices in place to manage conflicts of interest. Failure to have such practices in place and follow certain procedures for managing conflicts was an offence.<sup>129</sup>

In 2014 the Productivity Commission concluded that the potential barriers to entry created through licensing requirements were justified in order to ensure that only ‘reputable and capable funders enter the market’.<sup>130</sup> It recommended that:

The Australian Government should establish a license for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest.<sup>131</sup>

However, a role for the courts in regulating the conduct of litigation funders was also thought necessary.<sup>132</sup>

In April 2018, the Association of Litigation Funders of Australia was established with six founding members. It effectively sought to promote a self-regulatory model similar to that accepted in the United Kingdom through the Association of Litigation Funders.<sup>133</sup>

The VLRC in its 2018 report discussed the arguments for an against further regulation before recommending that the Victorian Government should advocate for stronger national regulation and supervision of the litigation funding industry.<sup>134</sup>

The ALRC discussion paper issued prior to its 2018 report initially addressed concerns over litigation funding through recommending that funders must obtain a licence which would include conditions such as character, capital adequacy and managing conflicts of interest.<sup>135</sup> The ALRC final report in 2018 abandoned this approach in favour of giving greater powers and responsibility for the supervision of litigation funding to the Federal Court. As a result the regulatory regime described above ie no need to hold an AFSL provided there were

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Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory’ (2016) 39(1) *UNSW Law Journal* 165, 177-181.

<sup>128</sup> Corporations Amendment Regulation 2012 (No 6) (Cth).

<sup>129</sup> Corporations Regulations 2001 (Cth) reg 5C.11.01, 7.1.04N, 7.6.01(1)(x), 7.6.01(1)(y), 7.6.01AB. See also Australian Securities and Investments Commission, *Regulatory Guide 248—Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (April 2013). The need to manage conflicts of interest is reinforced by Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 20 December 2019 cl 5.9 discussed above.

<sup>130</sup> Productivity Commission 2014 Report, 632.

<sup>131</sup> Productivity Commission 2014 Report, 633; Recommendation 18.2.

<sup>132</sup> Productivity Commission 2014 Report, 633 (‘Regulation of the ethical conduct of litigation funders should remain a function of the courts.’).

<sup>133</sup> ALRC 2018 Report, [2.61]-[2.62]. See also The Association of Litigation Funders of Australia, *Best Practice Guidelines* (January 2019). The UK position is summarized in *Paccar Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299, [5].

<sup>134</sup> VLRC 2018 Report, 18-20, Recommendation 2.

<sup>135</sup> Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, (Discussion Paper No 85, June 2018), proposals 3-1, 3-2.

adequate practices in place to manage conflicts of interest remained. Concerns over capital adequacy and insolvent funders initiating litigation but then being unable to honour indemnities to the representative party (and group members) were to be dealt with through recommending a statutory presumption that third-party litigation funders provide security for costs.<sup>136</sup>

### Regulation Redux

On 22 May 2020, the Federal Treasurer announced that litigation funders would be required to hold an AFSL from 22 August 2020, which would mean they were regulated by ASIC.<sup>137</sup> Litigation funders were also required to comply with the requirements of the MIS regime.<sup>138</sup>

AFSL holders are obliged to:

- act honestly, efficiently and fairly in providing financial services;
- ensure the applicant is a fit and proper person (which allows for regard to be had to criminal convictions and insolvency);
- maintain an appropriate level of competence to provide financial services;
- have adequate financial, technical and human resources to provide the financial services covered by the licence;
- have appropriate arrangements for managing conflicts of interests;
- comply with licence conditions and financial service laws;
- ensure representatives are adequately trained and competent;
- have adequate risk management systems;
- be a member of the Australian Financial Complaints Authority;
- maintain an internal dispute resolution procedure;
- hold adequate coverage of professional indemnity insurance; and
- notify ASIC of licensee breaches.<sup>139</sup>

MISs traditionally provided a mechanism for investors to pool their funds or use them in a common enterprise to create an investment scheme from which they acquire rights to benefits.<sup>140</sup> Examples include raising funds for primary production (such as forestry, food and flower plantations and animal breeding), film production and collective investment in land, company securities and other securities.<sup>141</sup> The MIS regime seeks to protect investors by requiring that there be a responsible entity that is a public company and holds an AFSL.<sup>142</sup> The responsible entity also has particular obligations, such as a duties to act honestly, with care and diligence and to act in the best interests of the scheme's members. Further, if there is a conflict between the members' interests and the responsible entity's interests, the members'

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<sup>136</sup> ALRC 2018 Report, Recommendation 12; [6.48]–[6.53].

<sup>137</sup> The Hon Josh Frydenberg, Treasurer, 'Litigation funders to be regulated under the Corporations Act' (Media Release, 22 May 2020); *Corporations Amendment (Litigation Funding) Regulations 2020* (Cth).

<sup>138</sup> *Corporations Act 2001* (Cth) Ch 5C.

<sup>139</sup> *Corporations Act 2001* (Cth) ss 912A, 912D, 913B, 913BA, 913BB.

<sup>140</sup> *Corporations Act 2001* (Cth) s 9.

<sup>141</sup> Robert Austin and Ian Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Online 2018) [22.470.3].

<sup>142</sup> *Corporations Act 2001* (Cth) s 601FA.

interests take priority.<sup>143</sup> MISs must be registered if they have more than 20 members or are promoted by a person in the business of promoting MISs.<sup>144</sup> A registered MIS has a constitution which must make adequate provision for:

- the consideration to be paid to acquire an interest in the scheme;
- the powers of the responsible entity to make investments of, or otherwise dealing with, scheme property, including powers to borrow or raise money for the scheme;
- the method for dealing with member complaints;
- any rights of members to withdraw from the scheme;
- rights of the responsible entity to any fees, remuneration, expenses or indemnity; and
- winding up of the scheme.<sup>145</sup>

There are also requirements for a compliance plan, compliance committee, auditing of the compliance plan and rights of withdrawal for members.<sup>146</sup> An interest in a MIS is also a financial product which must be accompanied by a Product Disclosure Statement (PDS).<sup>147</sup>

While the need for licensing of a litigation funder has been accepted, the application of the MIS regime has attracted criticism as the requirements were not designed for a class action or litigation more generally.<sup>148</sup> Consequently ASIC granted relief from some obligations, such as the need to give a PDS to some members, some content requirements of a PDS; modification of the withdrawal procedures for scheme members; and obligations for the valuation of scheme property.<sup>149</sup>

The PJC reviewed the change to litigation funding regulation discussed above and noted the various concerns about whether the MIS regime was fit for purpose. The PJC recommended that the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders.<sup>150</sup>

The short term impact of the regulations was a decline in all class action filings. In the five months since the litigation funding regulations came into effect, six class actions were commenced in the Federal Court of Australia, while 32 class actions were commenced in the proceeding eight months. Indeed with the new requirements commencing on 22 August 2020, three claims were filed on 20 August and 8 claims on 21 August.<sup>151</sup>

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<sup>143</sup> *Corporations Act 2001* (Cth) s 601FC. The obligations also apply to officers of a responsible entity: s 601FD.

<sup>144</sup> *Corporations Act 2001* (Cth) s 601ED.

<sup>145</sup> *Corporations Act 2001* (Cth) s 601GA.

<sup>146</sup> *Corporations Act 2001* (Cth) ss 601HA, 601HG, 601JA, 601KA.

<sup>147</sup> *Corporations Act 2001* (Cth) s 1012B; *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA.

<sup>148</sup> Parliamentary Joint Committee on Corporations and Financial Services, Litigation funding and the regulation of the class action industry hearing, *Hansard*, 13 July 2020, 34 (Professor Michael Legg), 50 (Andrew Saker, Omni Bridgeway Limited); Ronald Mizen, 'New rules could see funded class actions grind to halt' *The Australian Financial Review*, 29 July 2020.

<sup>149</sup> ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787, 21 August 2020; Australian Securities and Investments Commission Corporations (Litigation Funding Schemes) Instrument 2020/787, *Explanatory Statement*, 21 August 2020.

<sup>150</sup> PJC Report, 312, Recommendation 28.

<sup>151</sup> Michael Pelly, 'Pandemic surge in class action' *The Australian Financial Review*, 21 May 2021, 17.

In December 2020, the Australian Labor Party unsuccessfully moved to disallow the funding regulations on the basis that they were not ‘fit for purpose’ and ‘will only make it more difficult for ordinary Australians to access justice against deep-pocketed corporates’.<sup>152</sup> The motion was narrowly defeated in the Senate with a 32-vote tie (a clear majority is required to pass a motion in the Senate).<sup>153</sup>

The Federal Government has continued to develop regulation for litigation funding. The *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* amends the *Corporations Act 2001* (Cth) to make clear that ‘a class action litigation funding scheme’ is an MIS so that reliance on the 2009 Full Court of the Federal Court of Australia decision<sup>154</sup> is no longer needed.<sup>155</sup> The Bill also adds requirements for a class action litigation funding scheme’s constitution, including

- Each funding agreement for the scheme must include the same method (a claim proceeds distribution method<sup>156</sup>) for determining the amount of any claim proceeds for the scheme that is to be paid or distributed to any entity that is not a member of the scheme;
- Non members of the scheme who are to receive a payment from claim proceeds must be party to a funding agreement under the scheme;
- Claims proceeds for the scheme must not be distributed until the claim proceeds distribution method has been approved by a court as fair and reasonable;
- The funding agreement is subject to Australian law and can only be enforced in an Australian court;
- The funder must pay for any court-appointed referee who examines the reasonableness of the funders fee and/or any contradictor as to whether to make any order to approve or vary the agreement’s claim proceeds distribution method<sup>157</sup>

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<sup>152</sup> Deborah O’Neill (NSW, Australian Labor Party), Senate debates, 2 December 2020.

<sup>153</sup> Ronald Mizen, ‘Litigation funding rules survive after 11th-hour One Nation backdown’ *The Australian Financial Review*, 4 December 2020.

<sup>154</sup> *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; 180 FCR 11.

<sup>155</sup> *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* Sch 1, cl 2 amending *Corporations Act 2001* (Cth) s 9; Explanatory Memorandum, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* [1.16], [1.30]-[1.31].

<sup>156</sup> Explanatory Memorandum, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* [1.47]-[1.48] elaborates as follows: ‘The claim proceeds distribution method is intended to perform two functions. First, the claim proceeds distribution method is intended to determine what amount of the claim proceeds should, in aggregate, be paid or distributed to the entities that are not members of the scheme and are party to the funding agreement, to reimburse them for their costs and determine any fee or commission. Second, it is intended to determine the amount of the claim proceeds that is to be paid or distributed to those entities. A key intention of the Bill is that those entities receive no more than what is fair and reasonable, thereby maximising the claim proceeds that can be paid or distributed to members. The total amount of claim proceeds that remain, after working out the amount for the entities that are not members of the scheme and are parties to the agreement, must be paid or distributed to the scheme’s members. The claim proceeds distribution method is not intended to, and should not, outline how the claim proceeds are to be distributed among the members of the scheme (how each member’s individual claim is worked out)..’

<sup>157</sup> *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* Sch 1 cl 6 amending *Corporations Act 2001* (Cth) s 601GA; Explanatory Memorandum, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* [1.42].

The Bill's proposed s 601LF(1) and (2) provide that funding agreements that are part of a class action litigation funding scheme are not enforceable and have no effect in relation to the scheme's claim proceeds distribution method unless:

- (a) the Court is a federal court;<sup>158</sup> and
- (b) in the proceedings, the Court approves or varies the scheme's claim proceeds distribution method; and
- (c) in, or in relation to, the proceedings, the Court does not make an order (a common fund order) for the purposes of: (i) fixing the remuneration (however described) of the funder for the scheme; and (ii) requiring one or more persons who are group members, but who are not members of the scheme, to contribute to the funder's remuneration.<sup>159</sup>

In relation to (b), the court may approve or vary the claim proceeds distribution method provided, or to ensure, that the method is fair and reasonable in relation to the interests of the scheme's general members as a whole. The Bill sets out a range of factors that the court 'must only have regard to':

- (a) in relation to the proceedings, the following:
  - (i) the amount, or expected amount, of claim proceeds for the scheme;
  - (ii) whether the proceedings have been managed in the best interests of the members to minimise the costs for the proceedings incurred by, or on behalf of, the members;
  - (iii) the complexity and duration of the proceedings;
  - (iv) the legal costs for the proceedings incurred by, or on behalf of, the members, and the extent to which those legal costs are reasonable;
  - (v) the costs (other than legal costs) for the proceedings incurred by the funder for the scheme, and the extent to which those costs are reasonable;
  - (vi) the costs (other than legal costs) for the proceedings incurred by the parties to each of the funding agreements (other than the funder for the scheme), and the extent to which those costs are reasonable;
  - (vii) the extent of the commercial return to the funder for the scheme in comparison to the reasonable costs for the proceedings incurred by the funder;
- (b) the costs for the scheme incurred by the responsible entity of the scheme, and the extent to which those costs are reasonable;
- (c) the risks accepted by the parties to each of the funding agreements for the scheme by becoming parties to the funding agreement;
- (d) any other compensation or remedies obtained by any of the members in relation to the transactions or circumstances referred to paragraph 9AAA(1)(a);
- (e) any amounts that the members have contributed towards paying the costs for the scheme incurred by the parties to any of the funding agreements for the scheme;

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<sup>158</sup> Similar provisions exist in relation to state or territory courts that are or are not exercising federal jurisdiction. However, there may be a lack of power in relation to non-federal jurisdiction being exercised by state courts due to the doctrine of inter-governmental immunities: Federal legislative power does not permit legislation that significantly impairs, curtails or weakens the capacity of states or state courts to exercise their constitutional powers or functions. See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Spence v Queensland* [2019] HCA 15, [100].

<sup>159</sup> *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* Sch 1 cl 7 inserting *Corporations Act 2001* (Cth) s 601LF.



(f) any other factors prescribed by regulations made for the purposes of this paragraph.<sup>160</sup>

The court must also receive and consider the reports of the referee and contradictor referred to above ‘unless it is not in the interests of justice to do so’. The draft legislation would also establish a rebuttable presumption that the scheme’s claim proceeds distribution method is not fair and reasonable if more than 30% of the claim proceeds for the scheme is to be paid or distributed to entities who are not members of the scheme, considering those entities as a whole.<sup>161</sup>

The 30% rebuttable presumption has been of great concern to litigation funders. According to a report by PwC, commissioned by Australia’s largest litigation funder Omni Bridgeway, a 30 per cent cap on gross recoveries would have resulted in 36% fewer class actions being brought historically as the cap would not have covered litigation costs, let alone provided a return for the funder.<sup>162</sup> If the funder was able to reduce those costs, such as legal fees, to a lower amount then some of those class actions would have been able to proceed. Nonetheless, the returns for litigation funders would remain significantly impacted. However, as the presumption is rebuttable, a litigation funder that proceeds in an efficient manner could seek to convince a court that a higher recovery is warranted through addressing the above factors that the court must consider.<sup>163</sup>

In relation to CFOs the ramifications of the Bill are less certain. The Bill is clear that for a funding agreement to be enforceable the Court must not make a CFO for fixing the funder’s remuneration. The scheme’s claim proceeds distribution method cannot be enforced against claimants who have not signed up to be members of the scheme. The Bill may therefore incentivise book-building so that the funder can recover a fee. It may also mean that class actions with litigation funding would be brought using a closed class definition to incentivise claimants to be part of the scheme. This would undermine the opt out approach and reduce access to justice by potentially excluding those group members who cannot be identified at the outset or who are unable to affirmatively participate due to social or economic barriers.<sup>164</sup> It may also foster multiple class actions in relation to the same alleged misconduct. However, an open class action is still permissible and it may be possible to obtain orders for unfunded group members to contribute to the legal costs of bringing the class action, but not the funder’s remuneration. Proposed s 601LF(6) states that in relation to the ban on CFOs

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<sup>160</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* (November 2021) [2.155] recommended the removal of the word ‘only’ from s 601LG(3).

<sup>161</sup> *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021* cl 7 adding *Corporations Act 2001* (Cth) s 601LG.

<sup>162</sup> PriceWaterhouseCoopers, *Models for the Regulation of Returns Litigation Funders*, 16 March 2021, 16. The report also states that a 30% cap would have had implications for 91% of class action settlements as the gross returns approved by the courts were above 30%.

<sup>163</sup> See eg *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [18]-[19]; *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [68]-[71] (discussing scenarios where group members should recover less than 70% of gross recoveries).

<sup>164</sup> ALRC, *Grouped Proceedings in the Federal Court*, Report No. 46 (1988) [106]; Benjamin Kaplan, ‘Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)’ (1967) 81 *Harvard Law Review* 356, 397-398 (‘requiring the individuals to affirmatively request inclusion in the lawsuit would result in freezing out the claims of people - especially small claims held by small people - who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.’).

under s 601LF(2)(c) the remuneration of the funder does not include reimbursement for the payment of legal costs for the proceedings.

The Bill addresses the uncertainty over courts being able to review and set litigation funding fees to ensure they are fair and reasonable, does not clearly address CFOs, and persists with the use of the MIS regime for regulating litigation funding, albeit with some provisions more tailored to the class action context than previously existed. The Second Reading Speech focussed on the reforms reducing funding fees so that more of any recovery went to group members.<sup>165</sup> In response one plaintiff's law firm stated that to present this reform as a consumer protection measure was 'Orwellian gaslighting'.<sup>166</sup> The concern being that the 30% rebuttable presumption and greater costs imposed on litigation funder's operations would reduce consumer's access to justice as less class actions would be funded.

Whether the Bill will be passed by the Australian Parliament is an open question as an imminent election will mean the Bill will lapse. The enactment of the Bill will depend on the outcome of the election. Nonetheless, the Bill demonstrates a range of mechanisms for regulating litigation funding if desired.

### **Competition from Lawyers**

The Productivity Commission, VLRC and ALRC all recommended lifting the prohibition on contingency fees in relation to class actions subject to effective consumer protections.<sup>167</sup> A key reason for supporting the introduction of some form of contingency fee that could be charged by lawyers was to create competition for litigation funders, with a view to decreasing the fees paid by group members.<sup>168</sup>

On 30 June 2020, the *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) commenced. This introduced a new section 33ZDA to the class actions regime in the State of Victoria which provided for 'group costs orders' (GCO). Section 33ZDA permits a plaintiff in a class action to apply to the court to make an order that:

- (a) the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding; and
- (b) liability for payment of the legal costs must be shared among the plaintiff and all group members.

The Court may make such an order if satisfied that 'it is appropriate or necessary to ensure that justice is done in the proceeding'. The Court may also amend a GCO, including, but not limited to, amendment of any percentage ordered, during the course of the proceeding.

If a GCO is made:

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<sup>165</sup> Second Reading Speech, Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Senator Stoker, Assistant Minister to the Attorney-General), 25 November 2021.

<sup>166</sup> Adele Ferguson, 'Class action law reform rushed and seen as Orwellian gaslighting' *The Australian Financial Review*, 22 November 2021.

<sup>167</sup> Productivity Commission 2014 Report, 601; ALRC 2018 Report, 9-12, 185-217; VLRC 2018 Report, 63-68.

<sup>168</sup> Productivity Commission 2014 Report, 634-636.

- (a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and
- (b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

The media has referred to GCOs as giving rise to the legalisation of contingency fees in Australia.<sup>169</sup> However, the amendment is much more similar to a common fund order.<sup>170</sup> Contingency fees are typically contractual – the client agrees that the lawyer can take a percentage of the recovery if the claim is successful. That is not the case here – the court makes an order that binds all group members regardless of any contract, including setting the amount of the percentage to be charged. Further, the court can only make the order if it is satisfied that it is ‘appropriate or necessary to ensure justice is done’. The GCO is therefore closer to the US common fund order for legal fees in American class actions which were adopted because the lawyers could not contract with all group members in an opt-out class action.<sup>171</sup> Further as a condition of a GCO the plaintiff law firm must not only take on the risk of the plaintiff’s costs of the class action if unsuccessful, but also accept liability for any costs payable to the defendant, and any security for costs order made in the defendant’s favour if the claim fails.

The Supreme Court of Victoria in its first decision on s 33ZDA, *Fox v Westpac Banking Corporation*, appears to agree that the provision is akin to a common fund rather than a contingency fee due to the court being required to make an order that a particular percentage is to be paid by all group members.<sup>172</sup> However, the court was not persuaded to make a GCO at the proposed rate and adjourned the application to permit the plaintiffs to further consider their position, and specifically whether a reformulated application should be pressed at a later time.

The plaintiff argued that fixing a GCO at 25% of the recovered amount would cause the group to be ‘better off’ than under alternative funding arrangements. In particular, expert evidence was led that historically, third party funding had delivered returns to group members in the range of about 45-64%. The proposed GCO would, by comparison, guarantee to group members a 75% return of recovered funds.<sup>173</sup> The court found that if a ‘better off’ comparison was to be the measure for making a GCO then the comparison was not with some hypothetical third party funding arrangement but instead with the initial fee arrangement<sup>174</sup>

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<sup>169</sup> Jennifer Hewett, ‘Legal bid for bigger slice of class actions’ *The Australian Financial Review*, 17 June 2020, 2 (referring to the bill for ‘the right to charge contingency fees in the booming and lucrative arena of class actions’); Chris Merritt, ‘Contingency fee shift courts conflict’ *The Australian*, 20 June 2020, 15.

<sup>170</sup> Michael Legg, ‘Class Actions Fee Shakeup’ Jan/Feb 2020 *Law Institute Journal* 68.

<sup>171</sup> Michael Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach’ (2011) 30 *Civil Justice Quarterly* 52, 63-64.

<sup>172</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [12] (‘s 33ZDA facilitates the funding of group proceedings by introducing what might be described as a statutory common fund’), [17].

<sup>173</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [8]

<sup>174</sup> The structure of s 33ZDA is that a group costs order can only be applied for once a class action proceeding has been initiated. However, a class action cannot be commenced without a representative party who must have entered into a retainer and some form of fee agreement with the lawyer. Further if a group costs order was not made there needs to be a fall-back fee arrangement. Consequently, the legislation creates a

entered into between the lawyer and the representative party. The initial fee arrangement was a conditional fee (no win no fee) with 25% uplift and with the lawyers providing an indemnity against an adverse costs order. The court accepted that:

there are realistic scenarios where the group will be worse off under a GCO and you cannot say with any certainty that they will be better off. The evidence was simply too uncertain to discharge the legislative onus of proving that the order sought satisfied the statutory condition for the exercise of the discretion.<sup>175</sup>

In the Supreme Court's second judgment on s 33ZDA, *Allen v G8 Education Ltd*, the court made a GCO at a maximum of 27.5%, but potentially subject to adjustment downward in the event that a very positive outcome made the fee disproportionate to the law firm's risk or work performed.<sup>176</sup> The court pointed out that the lawyers would need to assist the Court in the future when the occasion arises for scrutinising the appropriateness of the rate.<sup>177</sup>

The plaintiff submitted that the initial retainer was structured so that the lawyers agreed to conduct the litigation on a 'no win no fee' (NWNF) basis but this was a fall-back arrangement subject to rights of termination, and contemplated by both the plaintiff and lawyer as a third alternative, ranked behind obtaining a GCO, which if it was refused, would be followed by seeking third party litigation funding.<sup>178</sup> Emphasis was placed on the lawyers rights of seeking litigation funding if a GCO was not ordered and termination so as to characterise the agreement to act on a NWNF basis as an interim and uncertain funding arrangement, presumably to avoid the fate of the application in *Fox v Westpac Banking Corporation* where the existing NWNF funding model was the relevant comparator and preferable to a GCO.<sup>179</sup>

The court identified the following key advantages from the proposed GCO:

- the certainty as to the maximum fee that would be charged, compared to a litigation funding arrangement where the maximum funder's fee may be certain but the funder would also seek reimbursement of the legal fees it had paid which were not certain;
- the alignment of the lawyers and group member's interests by incentivising the efficient conduct of the litigation;
- its ease of comprehension, transparency and equitable sharing of costs between all group members; and
- in principle the proposed GCO would be likely to provide a better return to group members than third party litigation funding, which invariably involves a funding commission to be paid on top of the law practice's professional fees. This view is supported by analysis of historical funding rates.<sup>180</sup>

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scenario where there will be two fee arrangements: the non-GCO from commencement and the proposed GCO that the court is asked to endorse.

<sup>175</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [115]. See also [117]

<sup>176</sup> *Allen v G8 Education Ltd* [2022] VSC 32.

<sup>177</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [90]-[92].

<sup>178</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [10].

<sup>179</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [43] (summarising the terms of the retainer), [49], [58].

<sup>180</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [93].

The Contradictor, consistent with *Fox v Westpac Banking Corporation*, submitted that the GCO was not appropriate or necessary because there were plausible outcomes in which the NWNF model provided a greater return to group members. Evaluating the evidence as a whole, the court found that it was more likely that should the GCO be refused, the lawyers would seek, and likely obtain, third party funding. However, third party funding would be more expensive to the group than the GCO.<sup>181</sup>

Of concern here is the impact of GCOs on the future of litigation funding. As explained above, litigation funding was a response to lawyers being unable to charge a fee by reference to a percentage of the recovery achieved, but also the Australian costs rule that the loser pays the winner's costs. Section 33ZDA allows lawyers to charge by reference to a percentage of the recovery and its requirements include that the lawyer bear the risk of the case failing, and provide any security for costs. As such, this would seem to make funding unnecessary or uncompetitive. Indeed, when the fees put forward for a GCO – 25% and 27.5% – are compared with historical returns to group members as well as the modelling of the impact of a 30% cap on litigation funding under the *Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021*, lawyer only funding is cheaper and more attractive for consumers.

However, the end of third party litigation funding may not occur for at least three reasons: (1) the complexity and uncertainty around proving that a GCO 'is appropriate or necessary to ensure that justice is done in the proceeding'; (2) the lawyers cannot meet the requirements for a GCO; and (3) a continuing role for litigation funders as financiers for the lawyers, but not the group members.

A key reason behind a GCO being denied in *Fox v Westpac Banking Corporation* was the uncertainty inherent in modelling outcomes for the proceeding.<sup>182</sup> The plaintiffs adduced confidential evidence of predictive modelling that sought to explain the outcomes that the group may receive depending on a number of assumptions, including group members' prospective damages entitlements and prospects of success. The court explained that '[i]t will be immediately apparent that an assessment of that kind will commonly (and does in this case) entail significant uncertainty if made at an early stage in the proceedings'.<sup>183</sup> The existence of uncertainty was again acknowledged in *Allen v G8 Education Ltd*.<sup>184</sup> However, the court also observed that comparative outcomes modelling must not be permitted to subsume the place of the evaluative inquiry required by s 33ZDA. Fee comparisons, while relevant, were not determinative.<sup>185</sup> This suggests that uncertainty may be less of a constraint on a GCO being ordered than first indicated. Nonetheless, litigation funding has the advantage that it does not require a court order to be put in place for it to operate. As a result the above uncertainties, and the costs associated in preparing evidence to address those uncertainties, are avoided or at least deferred. Issues about the size of the fee and the factors impacting the size of the fee, such as risk and outcome, may still arise if a funder seeks a CFO or if the fee is subject to approval by the court as part of settlement approval.

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<sup>181</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [84].

<sup>182</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [113].

<sup>183</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [100].

<sup>184</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [83], [93].

<sup>185</sup> *Allen v G8 Education Ltd* [2022] VSC 32, [24], [93].

The application for a GCO is not compulsory. Litigation funding arrangements are still permitted. For some cases, lawyers may not be able to bear the risk of having to pay the defendant's costs or they may have insufficient capital or cash flow to utilise a GCO where they are only paid at the conclusion of proceedings, or they may prefer to be paid an hourly rate.<sup>186</sup> Litigation funding will be the solution.

An alternative role for the funder where a GCO is made is that they finance the lawyers rather than the group members. The lawyer needs to be able to continue their operations while awaiting the outcome of the litigation and may need some form of insurance to be able to meet the adverse costs order requirements. The legislation does not specify or proscribe the role funders may play here. In *Fox v Westpac Banking Corporation* the lawyers seeking the GCO had entered into a costs sharing agreement with Vannin Capital Operations Ltd which provided:

- they would share equally project and investigation costs (these terms are not defined in the judgment but project costs appears to include legal fees);
- the lawyers would pay to Vannin half of the amount of any GCO awarded to the lawyers;
- to the extent that the lawyers must provide security for costs, Vannin would provide half of the total amount of security ordered;
- Vannin would pay to the lawyers half of the amount of any adverse costs that the lawyers were required to pay;
- if a costs order was made in favour of the representative party those funds will be distributed between Vannin and the lawyers.<sup>187</sup>

The Court noted that there was force in the submission made by the court appointed contradictor that a side agreement between a lawyer and a litigation funder for the sharing of the costs awarded pursuant to a GCO did not depend on an order of the Court and did not prevent the making of a GCO.<sup>188</sup> However, the Court further observed that the existence and terms of such a side agreement might inform the exercise of the discretion whether to make a GCO and what percentage to fix, but 'where the law practice is acting as a "mere front" for a third party funder' that may be a reason for declining to make a GCO.<sup>189</sup>

The GCO will undoubtedly impact the operation of litigation funding in Australian class actions. The traditional litigation funding model of a funder's fee plus reimbursement for legal fees paid for the funder appears to be uncompetitive. However, litigation funders can develop different funding approaches. The funder financing the lawyers is one such model. Others may include significant lower funding fees, which have been seen in competing class actions,<sup>190</sup> or a single fee being charged by the funder with no additional charge for legal fees (provided this can be done without giving rise to an abuse of process or creating conflicts of interest). Although the GCO is currently only available in Victoria, Australian jurisdictions have a history of learning and borrowing from each other – class actions being a clear

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<sup>186</sup> See ALRC 2018 Report, [7.102].

<sup>187</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [75].

<sup>188</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [81].

<sup>189</sup> *Fox v Westpac Banking Corporation* [2021] VSC 573, [83].

<sup>190</sup> See eg Ilana Gottlieb and Michael Legg, 'The AMP Competing Class Actions: From Five to One' (2019) 93 *Australian Law Journal* 817 discussing *Wigmans v AMP Ltd* [2019] NSWSC 603 where funding fees of 8% and 10% were put forward but with additional charges and greater complexity in their operation.

example – suggesting that similar common fund mechanisms for lawyer’s fees may be enacted elsewhere. Even if that does not come to pass, it is to be expected that the court’s in other Australian jurisdictions will cast a more critical eye on the funding fees sought in the class actions before them through an awareness of the fees charged in Victoria.

## Conclusion

In 2021 it was 15 years since the High Court of Australia decision in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* that legitimised litigation funding and set the stage for a new industry.<sup>191</sup> Litigation funders have since become major players in the Australian legal market, especially in relation to class actions where they have facilitated major compensation payments to group members but also significant returns on investment for themselves.

The success of litigation funding in generating both litigation and profits saw it be regulated through three pathways: judicial oversight of litigation funding, government regulation of litigation funding and the promotion of competition from lawyers.

However, continued additions to government regulation now raises for discussion whether the correct balance between protecting group members while enabling sufficient financing to permit class actions to be brought will be achieved. The over-regulation of litigation funding runs the risk that class actions suits will be unviable investments for funders which in turn may prevent group members seeking compensation for alleged harms. Discouraging litigation funders may hinder access to justice, unless another source of financing for both legal costs and the risk of an adverse costs order can be found. The GCO regime, although somewhat inelegant in its operation due to only being available after a class action is on foot, offers such an alternative.

A middle ground is needed. Litigation funders must be licenced to be able to operate in Australia. Moreover the licence conditions must include a requirement that the entity providing the funding for a class action has sufficient assets, or unconditional access to such assets, to be able to meet the costs of the litigation, in particular, the payment of the legal fees incurred in running the class action and any costs owed to the respondent if the class action is unsuccessful. The litigation funding agreement and the litigation funder must be subject to the laws of Australia and the jurisdiction of Australian courts. As persons who facilitate litigation purely for commercial profit, litigation funders should not avoid responsibility for costs if the litigation fails. To achieve a return through creating litigation they must bear the associated risk. The application of the MIS regime to litigation funded class actions should be abandoned as both unnecessary and ill-fitting.

The fees charged by litigation funders and the returns generated should be subject to oversight but in a manner that takes account of the risks and costs associated with the specific class action. The court with jurisdiction over the class action is best placed to perform this role, but with the assistance of court-appointed referees and contradictors so as to preserve the adversarial context even when a settlement is achieved, but also to provide the necessary expertise. Legislative reform should make clear that a court may vary or set the fee payable to a litigation funder. Further that the court may order who is liable for that fee, including group members who have not previously agreed to pay such a fee, so that a CFO is permitted. The amount of any fee and the persons liable to pay the fee must be based on a finding of

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<sup>191</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

what is fair, reasonable and proportionate. If judicial oversight fails to ensure a fair division of class action recoveries between group members, lawyers and litigation funders then further steps may be needed.