THE LAW SOCIETY OF NEW SOUTH WALES
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Submission to the Parliamentary Joint Committee on Corporations and Financial Services – *Inquiry into Litigation Funding and the Regulation of the Class Action Industry*

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Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

By email:

Contact: **David Edney**
President, NSW Young Lawyers

Jade Tyrrell
Chair, NSW Young Lawyers Civil Litigation Committee

Contributors: Svetlana Collantes, Andrew Hack, Jem Punthakey, Jade Tyrrell, Sophia Urlich, Michael Tangonan, Lewis Hamilton, Amanda Hoole and Daniel Meyerowitz-Katz

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The NSW Young Lawyers Civil Litigation Committee makes the following submission in response to the Terms of Reference of the Parliamentary Inquiry by the Joint Committee on Corporations and Financial Services into Litigation Funding and the Regulation of the Class Action Industry

NSW Young Lawyers

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

Civil Litigation Committee

The NSW Young Lawyers Civil Litigation Committee comprises of a group of over 1800 members and covers all aspects of civil litigation with a focus on advocacy, evidence and procedure in all jurisdictions. Our activities, direction and focus are very much driven by our members, which include barristers, solicitors and law students. The Committee seeks to improve the administration of justice, with an emphasis on advocacy, evidence and procedure.

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Summary of Recommendations

In summary, NSW Young Lawyers (**NSWYL**) makes the following recommendations:

1. The ban on contingency fees in class actions should be lifted as contingency fee class actions:
   (a) increase access to justice by providing a further avenue for clients and greater flexibility for law firms;
   (b) are likely to increase returns to group members; and
   (c) are subject to conflicts of interest already inherent in no-win, no-fee class actions, which may be addressed by the requirement for Court approval of the contingency fee at settlement or judgment.
2. The litigation funding exemption to the managed investment scheme regime should not be repealed. Accordingly, the Australian Financial Services Licence (**AFSL**) licencing scheme should not apply to litigation funders, nor should the legislature impose a new licencing regime specific to litigation funders.
3. Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**) should be amended to provide express statutory authority for the Court to grant a common fund order (**CFO**) at any stage of a class action proceeding, provided the litigation funder is no better off than group members after settlement or judgment. The ideal form of CFO is where expenses (including legal costs) are paid by the funder out of its share, so as to encourage funders to keep costs down and guarantee that the majority of a settlement or judgment sum falls in the hands of group members.
4. When deciding between competing class actions, the Court should not favour the first proceeding filed simply on that basis.
5. Save for exceptional circumstances, the Court should require the following information to accompany an application for approval of a settlement:
   (a) the date the proceeding commenced;
   (b) the estimated number of group members before opt out;
   (c) the number of valid opt outs;
   (d) the number of registered group members;
   (e) the number of funded and unfunded group members;
   (f) the identity and location of the funder;
   (g) the amount of security for costs paid;
   (h) the estimated value of the claims at the outset and at the time of settlement;
   (i) the settlement sum and any non-monetary relief;
   (j) the funding commissions payable under funding agreements (%);

(k) the total amount of the funding commission (and % of the gross settlement sum) that the funder would be paid:

  (i) pursuant to its contractual entitlements under the funding agreements,

  (ii) following a funding equalisation order (if one is sought), and

  (iii) following a common fund order (if one is sought),

  as the case may be;

(l) total costs broken down into legal fees, counsel's fees, expert fees and other disbursements;

(m) any costs orders paid in the proceedings;

(n) payments to lead applicants (their claims and recognition payments);

(o) other reimbursements and payments, including pursuant to cy-près orders;

(p) the average payment to all group members, funded group members and unfunded group members (and the % of the gross settlement sum); and

(q) the number of group members who reached compromises, executed releases or covenanted not to sue during the class action, the estimated value of their claims and the value of such releases (aggregated and anonymised).

On approval of the settlement, or where the class action proceeds to judgment, corresponding information should be set out in the judgment.

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Submissions upon Terms of Reference

1. What evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income

1.1. NSWYL refers to the extensive empirical research on class action settlements or judgments published by Professor Vince Morabito, one of the most widely cited and highly regarded academics in the field of class actions.[1] NSWYL considers that Morabito's opus of research is the most accurate source of evidence with respect to the quantum of fees, costs and commissions earned by litigation funders, and does not seek to add to it.

2. The impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders

2.1. NSWYL refers to [1.1].

3. The potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs

3.1. While NSWYL recognises there to be reasonable arguments both for and against contingency fees, and a significant difference of opinion within the profession, on balance NSWYL submits that lifting the ban on contingency fees for class actions is likely to: (a) increase access to justice by allowing plaintiffs and represented group members to commence class actions that litigation funders are not inclined to fund and law firms are not willing to conduct on a no-win, no-fee basis; and (b) increase the returns to plaintiffs and group members, when compared to funded litigation or litigation conducted on a no-win, no-fee basis. In lifting the ban on contingency fees, NSWYL submits that the amending legislation should confer on the Court power to regulate, review and approve the award of a contingency fee at the point of settlement or judgment.

Increased access to justice

3.2. One of the paramount objectives underlying the introduction of the class actions regimes in Part IVA of the FCAA and its cognates in NSW, Victoria, Queensland and Western Australia was to increase access to justice by reducing costs to group members.[2] Representative proceedings have long been part of Australian law, via equitable principles that date back to an 1805 decision of the UK Court of Chancery[3]

[1] NSWYL supports the examination of class action settlements 'which have been of very real concern' to the Court: *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; (2019) 369 ALR 583, [139] (Lee J).
[2] The Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988), 8-9.
[3] *Adair v The New River Company* (1805) 11 Ves 429; (1805) 32 ER 1153; also *Cockburn v Thompson* (1809) 16 Ves 321; (1809) 33 ER 1005; *Meax v Maltby* (1818) 2 Sw 277; (1818) 36 ER 621; *Taylor v Salmon* (1838) 4 My & Cr 134;

and, later, formal rules of Court.[4] The commencement of Part IVA of the FCAA on 4 March 1992 marked the first of several milestones on the path to greater access to justice. Those milestones include:

- In 1993, the torts of champerty and maintenance, which forbade litigation funding, were abolished in NSW.[5]
- On 1 January 2000, Victoria introduced a class actions regime, modelled off Part IVA of the FCAA.[6]
- On 30 August 2006, the High Court of Australia, by a 5-2 majority, ruled that litigation funding of class actions did not constitute an abuse of process.[7]
- On 21 January 2009, the first reported funding equalisation order was made in a class action.[8]
- On 7 December 2010, NSW introduced a class actions regime.[9]
- On 26 October 2016, following the decision in *Pathway Investments v National Australia Bank Ltd* [2012] VSC 625, the Full Court of the Federal Court of Australia ruled that the Court had the power to make a CFO.[10]
- On 1 March 2017, Queensland introduced a class actions regime;[11] and
- On 4 December 2019, in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall*, the High Court ruled, by a 5-2 majority, that the Court did not have power to make CFOs in advance of a settlement or judgment.[12]

3.3. NSWYL submits that, apart from *Brewster*, each of these milestones had the effect of increasing the prevalence of class actions, and accordingly, increasing access to justice for group members who would otherwise have had to abandon their claims or bring individual proceedings (at a higher cost). NSWYL submits that lifting the ban on contingency fees will similarly increase the prevalence of class actions, by opening up another avenue to finance class action proceedings.

Calvert on Parties (1847, 2nd ed) cited in *P Dawson Nominees Pty Ltd v Multiplex Limited* [2007] FCA 1061; (2007) 242 ALR 111; (2007) 25 ACLC 1192, [13] (Finkelstein J).

[4] *Rules of the Supreme Court 1883* (UK), ord 16 r 9; *Supreme Court Rules 1957* (Vic), ord 16 r 9; *Federal Court Rules 1979* (Cth) ord 6, r 13 cited in Justice Bernard Murphy, 'The Operation of the Australian Class Action Regime' (Speech, Bar Association of Queensland, 10 March 2013) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/murphy-j-20130309#_ftn1>.

[5] *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), ss 3-4A. Victoria abolished these torts in 1969 by the insertion of s 32 into the *Wrongs Act 1958* (Vic) pursuant to s 4 of the *Abolition of Obsolete Offences Act 1969* (Vic).

[6] *Supreme Court Act 1986* (Vic), Part 4A.

[7] *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 CLR 386; (2006) 229 ALR 58; (2006) 80 ALJR 1441 ('***Fostif***').

[8] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [14], [17] (Stone J).

[9] *Civil Procedure Act 2005* (NSW), Part 10

[10] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 245 FCR 191; (2016) 338 ALR 188 ('***Money Max***').

[11] *Civil Proceedings Act 2011* (Qld), Part 13A.

[12] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45; (2019) 374 ALR 627; (2019) 94 ALJR 51 ('***Brewster***').

3.4. Someone has to bear the costs of conducting a class action, and at present, there are five ways to finance a class action:

(a) **Wealthy lead applicant**: in the rarest of cases, the lead applicant may have enough funds to cover the costs of conducting a class action by paying invoices on a fixed-fee or time-costed basis. It is likely that this kind of lead applicant would also be required to pay security for costs. An example is the Pizza Hut Class Action, conducted by Jim Kartsounis & Co (case dismissed at trial, dismissal upheld on appeal).[13]

(b) **Open funded**: a third-party litigation funder covers the costs of conducting the case, pays security for costs, takes responsibility for adverse costs orders and, in exchange, takes a percentage of the amount recovered in a settlement or judgment paid to those group members that have signed funding agreements. The funder also has its reasonable legal costs and disbursements reimbursed out of such settlement or judgment. These class actions are 'open', which means that a group member need not sign a funding agreement in order to benefit from a settlement or judgment. Funders typically conduct a 'bookbuild' to sign up group members to the funding agreement, and at the conclusion of the proceedings, the applicant/funder may apply for a funding equalisation order or a CFO to deal with 'free riders' that benefited from the class action but did not sign a funding agreement.

(c) **Closed funded**: all of the above at [3.4(b)] applies to a closed funded class action, save that group members are defined as those who have signed a funding agreement on or before the commencement of the class action. Prior to *Money Max* (26 October 2016), anecdotal evidence suggested that, 'litigation funders are generally unwilling to agree to fund large representative proceedings unless one of the criteria defining the group members is that the person has entered into a funding agreement with the litigation funder'.[14] Courts have encouraged open class actions over closed class actions, as open class actions meet 'the access to justice aims of the Part IVA regime'.[15] It is possible for a closed class to be opened, as it is for an open class to be closed.[16] Funding equalisation orders and CFOs are not applicable to closed

[13] *Diab Pty Ltd v YUM! Restaurants Australia Pty Ltd* [2016] FCA 43; Adele Ferguson, *'Pizza Hut set for the courts over cut-price pizzas'*, *The Sydney Morning Herald* (online, 28 April 2017) <https://www.smh.com.au/business/companies/pizza-hut-set-for-the-courts-over-cutprice-pizzas-20170428-gvurlt.html>.
[14] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811; (2015) 325 ALR 539; (2015) 108 ACSR 1, [23]-[24], [86] (Wigney J). See also *Money Max,* (n 10) [185]-[188] (Murphy, Beach, Gleeson JJ).
[15] *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200, [117], [198] (Jacobson J, French and Lindgren JJ agreeing); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811; (2015) 325 ALR 539; (2015) 108 ACSR 1, [225] (Wigney J); *Money Max,* (n 10) [14], [177]-[179], [192]-[205] (Murphy, Beach, Gleeson JJ); *Pearson v State of Queensland* [2017] FCA 1096, [14] (Murphy J); *Perera v GetSwift Limited* [2018] FCAFC 202; (2018) 263 FCR 92; (2018) 363 ALR 394, [166] (Middleton, Murphy, Beach JJ) ('***Perera***').
[16] *Federal Court of Australia Act 1976* (Cth), ss 33C, 33K, 33ZF ('***FCAA***'); *Federal Court Rules 2011* (Cth), rr 1.40, 1.41, 16.53 (party must apply for leave to amend pleadings); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811; (2015) 325 ALR 539; (2015) 108 ACSR 1, [50], [171], [175]-[177] (Wigney

funded class actions as there are no 'free riders'.

(d) **Levies**: also known as 'self-funded', the group members are invited to become clients of the law firm conducting the class action and contribute funds towards the class action. This method has been described as, 'an important alternative to commercial litigation funders and should, to the extent possible, be encouraged'.[17] Group members who have contributed levies are typically reimbursed in priority, with interest.[18] However, as with ordinary litigation, group members who have suffered losses may be exposing themselves to increased loss by contributing to the upfront costs of the class action.[19] Notable examples include Macpherson Kelley's Timbercorp, Great Southern, and Willmott Forests Class Actions (Timbercorp was dismissed at trial, while the settlements in Great Southern and Willmott Forests only partially reimbursed group members for the levies they had contributed);[20] and Levitt Robinson's Storm Financial Class Actions (settlements totalling $143 million).[21]

(e) **No-win, no-fee**: also known as 'conditional' or 'on spec',[22] the law firm bills the lead applicant on a time-costed or fixed-fee basis, but does not require payment unless and until there is a successful outcome (conditional fee basis). The Court approves the reasonable legal fees and disbursements, which are deducted from the settlement or judgment sum. The law firm is responsible for all disbursements, including barristers', experts' and Court fees. It is possible to run such class actions in a 'lean' fashion, maximising the returns to group members.[23] Typically, there is no security for costs order (although there are instances where the law firm has volunteered to pay security for costs,[24] and the Court has the power to require group

J); *Pearson v State of Queensland* [2017] FCA 1096; *Ethicon Sàrl v Gill* [2018] FCAFC 137; (2018) 264 FCR 394, [7], [14]-[17] (Allsop CJ, Murphy, Lee JJ); *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66, [17] (Bell P, Macfarlan, Leeming, Payne JJA agreeing).

[17] *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [53] (Jacobson, Middleton, Gordon JJ); *Abbott v Zoetis Australia Pty Ltd (No 2)* [2019] FCA 462; (2019) 369 ALR 512, [40] (Lee J)).

[18] *Richards v Macquarie Bank Limited (No 5)* [2013] FCA 1442, [28]-[29] (Logan J), whereby interest was awarded at rates no higher than that provided for in the then practice note, '*CM16*', that is, 'a rate which is regarded as generally appropriate in litigation' in the Federal Court and which would 'also have a wider approval amongst other courts in this country'.

[19] See, eg *Woodcroft-Brown v Timbercorp Securities Ltd & Ors (No 2)* [2011] VSC 526; (2011) 253 FLR 240; (2011) 85 ACSR 354; The Senate Economics References Committee, *Agribusiness managed investment schemes: Bitter harvest* (11 March 2016), Chapter 12.

[20] *Woodcroft-Brown v Timbercorp Securities Ltd & Ors (No 2)* [2011] VSC 526; (2011) 253 FLR 240; (2011) 85 ACSR 354; *Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation)* [2014] VSC 516; *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689.

[21] *Richards v Macquarie Bank Limited (No 5)* [2013] FCA 1442; *Lee v Bank of Queensland Limited* [2014] FCA 1376; [2014] 103 ACSR 436; *Sherwood v Commonwealth Bank of Australia (No 5)* [2015] FCA 688; *Lee v Westpac Banking Corporation* [2017] FCA 1553.

[22] Although the terms 'speculative' and 'no-win, no-fee' are frequently used to refer to arrangements billed on a time-costed or fixed-fee basis where payment is collected at the point of settlement or judgment, technically, these terms also describe contingency fee arrangements, which are also speculative, with a fee only charged on a 'win'.

[23] In Slater & Gordon's NAB Junk Insurance Class Action, the costs amounted to only $3.8 million, or 7.7%, of the $49.5 million settlement: *Clark v National Australia Bank Limited (No 2)* [2020] FCA 652, [29]-[30], ord 5 (Lee J).

[24] *Wigmans v AMP Ltd; Fernbrook (Aust) Investments Pty Ltd v AMP; Wileypark Pty Ltd v AMP Ltd; Georgiou v AMP Ltd; Komlotex Pty Ltd v AMP Ltd* [2019] NSWSC 603, [41], [219], [354], [357] (Ward CJ in Eq) ('***Wigmans 2019 SC Judgment***'); affirmed by *Wigmans v AMP Ltd* [2019] NSWCA 243 (per Bell P; Macfarlan, Meagher, Payne and White JJA agreeing); special leave to appeal to the High Court granted in Transcript of Proceedings, *Wigmans v AMP Limited*

members to pay security for costs).[25] Notable examples of large class actions conducted on a no-win, no-fee basis include Maurice Blackburn's Black Saturday Bushfire Class Actions (settlements totalling $794 million);[26] Slater & Gordon's Manus Island Class Action ($90 million settlement);[27] and Levitt Robinson's Palm Island Class Action ($30 million settlement after winning $3.5 million at trial).[28]

3.5. Class actions run on a no-win, no-fee basis are often the last hope for group members, as illustrated in the comments of Lee J:

> 'The only practical and realistic way in which the applicant and group members can run the class action is obtaining legal representatives who are prepared to act on a speculative basis in the time honoured tradition of the common law bar.'[29]

3.6. Lifting the ban on contingency fees in class actions will provide a sixth avenue for clients who are unable or unwilling to shoulder the risks attendant on large-scale litigation and unable to convince a funder or corral group members into paying levies. Law firms approached by such clients would have three options: (a) the traditional approach of bringing the class actions on a no-win, no-fee basis, (b) obtaining a commission of the total paid at the point of a settlement or judgment, (c) blending time-based and contingency fees in order to mitigate the risk of receiving no fees if the matter is unsuccessful, or (d) searching for a funder that would contribute to the costs and share the commission.

3.7. NSWYL submits that more flexibility for law firms provides more opportunities for lead applicants and group members. NSWYL submits that more flexibility also means more competition, which will have the effect of lower commissions and increased returns.

[2020] HCATrans 052. Unless a firm volunteers up security for costs, Courts will not order security for costs from a law firm acting on a no-win, no-fee basis: *Madgwick v Kelly* [2013] FCAFC 61; 212 FCR 1; (2013) 299 ALR 188, [43]-[47] (Allsop CJ, Middleton J), agreeing with *Kelly v Willmott Forests Ltd (in liquidation)* [2012] FCA 1446; (2012) 300 ALR 675, [101]-[103] (Murphy J).

[25] *Abbott v Zoetis Australia Pty Ltd (No 2)* [2019] FCA 462; 369 ALR 512, [15], (Lee J).

[26] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663; *Rowe v AusNet Electricity Services Pty Ltd & Ors* [2015] VSC 232; Jennifer Patterson, 'What makes a class action worth fighting?', *Maurice Blackburn Lawyers* (Blog Post, 10 June 2020) <https://www.mauriceblackburn.com.au/blog/2016/january/04/what-makes-a-class-action-worth-fighting/>.

[27] *Kamasaee v Commonwealth of Australia & Ors (Approval of settlement)* [2017] VSC 537.

[28] $3.5 million was inclusive of costs: *Wotton v State of Queensland (No 10)* [2018] FCA 915.

[29] *Abbott v Zoetis Australia Pty Ltd (No 2)* [2019] FCA 462; (2019) 369 ALR 512, [25]-[26] (Lee J); cf *Wigmans 2019 SC Judgment,* (n 24); *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; (2019) 369 ALR 583.

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Increased returns to group members

3.8. NSWYL submits that lifting the ban on contingency fees will likely lead to increased returns to group members in contingency fee class actions, when compared with litigation financed using methods 3.4(b) (open funded), (c) (closed funded) and (d) (levies) above.

3.9. Open funded litigation results in two major deductions from a settlement or judgment: legal costs and disbursements and the funding commission payable by group members who have signed the funding agreement.[30]

Funding equalisation order

3.10. Where a funding equalisation order is sought, the funder receives its contractually-entitled commissions from group members that have signed the funding agreement (**funded group members**). This may include a further commission on the amount redistributed from those group members who have not signed a funding agreement (**unfunded group members**).[31] Typically, the funder will conduct a bookbuild (increasing the number of funded group members) to ensure a return on its investment.

3.11. For illustration, we have set out five recent open funded class action settlements and the commission paid after funding equalisation orders were made:

Class action	Settlement sum	Funding commission	% of settlement
PFAS[32]	$92.5 million	$23,125,000	25%
Vocus[33]	$35 million	$3,897,735	11%
Bellamy's[34]	$30 million	$8,697,000	29%

[30] *McKenzie v Cash Converters International Ltd (No 4)* [2019] FCA 166; 134 ACSR 327, [14] (Lee J). Of course, a judgment in favour of the lead applicant would typically lead to a costs order in favour of the lead applicant, payable forthwith: *Searle v Commonwealth of Australia* [2020] NSWSC 665, [29]-[35] (Garling J).
[31] *Money Max,* (n 10) [56]-[57] (Murphy, Beach, Gleeson JJ); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [21] (Beach J); *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579, [67] (Moshinksy J), referred to as a 'grossing up' mechanism. NSWYL strongly opposes the deduction of funding commissions from payments to funded group members made under a funding equalisation order, in circumstances where this is not drawn to the Court's attention.
[32] *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837; orders of Lee J in Gavin Smith v Commonwealth of Australia (Federal Court of Australia, NSD1908/2016, 6 April 2020), Bradley James Hudson v Commonwealth of Australia (Federal Court of Australia, NSD1155/2017, 6 April 2020) and Kirsty Jane Bartlett v Commonwealth of Australia (Federal Court of Australia, NSD1388/2018, 6 April 2020). The Katherine PFAS class action was open funded ($92.5 million), while the Williamtown ($86 million) and Oakey ($34 million) PFAS class actions were closed funded.
[33] *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579, [74] (Moshinsky J).
[34] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [2]-[3] (Beach J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [2]-[3] (Beach J). For the settlement sum of

Murray Goulburn[35]	$42 million	$10.5 million	25%
UGL[36]	$18 million	$4,065,054	23%

3.12. Of course, these settlements are subject to further deductions, principally legal costs and disbursements.

3.13. A contingency fee class action, by comparison, results in only one payment to cover legal costs and disbursements, approved by the Court. NSWYL submits that such a payment, with only a "single mouth to feed", is likely to be, and should be, lower than the amounts paid under the current regime where it is necessary to pay both (a) the law firm in respect of their time-costed legal fees and disbursements and (b) the litigation funder in respect of their funding commission pursuant to a typical bookbuild and the application of a funding equalisation order.

Common fund order

3.14. Where a CFO is sought, the funder receives an amount that the Court considers fair and reasonable. There are several differences between a common fund order and a funding equalisation order. When compared to funding equalisation orders, CFOs:

(a) are generally calculated by taking a percentage of the entire settlement sum;

(b) are calculated by the Court taking into account a range of factors;

(c) empower the Court with more control over the proceeding if made at an earlier stage;

(d) can result in much more or much less being paid to the funder, depending on the Court's view of the conduct of the class action and the outcome reached;

(e) were used to determine which class action should proceed when there are multiple class actions;

(f) do not require a bookbuild of group members; and

$30 million, see paragraph 11(a) of Annexure A to the orders of Beach J in *McKay Super Solutions Pty Limited (ACN 110 853 024) (as Trustee for The McKay Super Solutions Fund) v Bellamy's Australia Limited (ACN 124 272 108)* (Federal Court of Australia, VID163/2017, 18 December 2019), 10 <https://www.comcourts.gov.au/file/Federal/P/VID163/2017/3781527/event/30144827/document/1527823>. *McKay v Bellamy's* (VID163/2017) was an open funded class action, while *Basil v Bellamy's* (VID213/2017) was a closed funded class action.

[35] *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719, [2] (Murphy J); see order 6(a) of the orders of Murphy J in *Endeavour River Pty Ltd v MG Responsible Entity Limited* (Federal Court of Australia, VID1010/2018, 20 December 2019) <https://www.comcourts.gov.au/file/Federal/P/VID1010/2018/3832048/event/30145224/document/1534007>.

[36] *Clime Capital Limited v UGL Pty Limited* [2020] FCA 66, [1]-[3], [39] (Anastassiou J).

(g) are much simpler and less time-consuming to calculate, as there is no need to separately calculate the quantum of funded group members of which the funder is entitled to a commission.

3.15. For illustration, we have set out five recent open funded class action settlements and the funding commissions paid under CFOs:

Class action	Settlement sum	Funding commission	% of settlement
RMBL[37]	$3 million	$750,000	25%
Stolen wages[38]	$190 million	$38 million	20%
Sirtex Medical[39]	$40 million	$10 million	25%
Slater & Gordon[40]	$36.5 million	$8 million	22%
Sherwin Ponzi scheme[41]	$12 million	$1 million	8%

3.16. As noted above, these settlements are subject to further deductions, principally legal costs and disbursements.

3.17. NSWYL submits that a Court-approved contingency fee is likely to be, and should be, lower than the sum of (a) the time-costed legal fees and disbursements and (b) the funding commission paid pursuant to a CFO.

3.18. Closed funded litigation also results in the deduction of legal costs and disbursements and the funding commission payable by all group members. The market rate for

[37] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [48] (Murphy J).
[38] *Pearson v State of Queensland (No 2)* [2020] FCA 619, [22], [109], [268]-[275] (Murphy J).
[39] *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [1], [6]-[7] (Beach J).
[40] *Hall v Slater and Gordon Limited* [2018] FCA 2071, [35], [95] (Middleton J). The more recent settlement in Piper Alderman's 'Discovery Metals Class Action', was approved on 12 September 2019: Order of Parker J in *Edgar Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd* (Supreme Court of New South Wales, 2017/234966, 12 September 2019) <http://www.supremecourt.justice.nsw.gov.au/Documents/Class%20Actions/Discovery%20Metals%20Limited/14.%2017_234966%20-%202019.09.12%20-%20Order.pdf>, but the settlement amount and the final determination of the funder's application for a CFO was not publicly disclosed: Cat Fredenburgh, 'After questioning funder's cut, judge quietly approves KPMG class action settlement scheme', *Lawyerly* (Article, 19 September 2019) <https://www.lawyerly.com.au/after-questioning-funders-cut-judge-quietly-approves-kpmg-class-action-settlement-scheme>.
[41] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842, [1], [5], [11], [14] (Murphy J).

litigation funders is a 35% commission, although institutional investors in shareholder class actions are occasionally offered a more competitive rate, e.g. 30%.[42]

3.19. For illustration, we have set out five recent closed funded class action settlements and the funding commissions paid:

Class action	Settlement sum	Funding commission	% of settlement
PFAS[43]	$120 million	$30 million	25%
Bellamy's[44]	$19.7 million	$5,711,030	29%
Forge[45]	$16.5 million	$3,950,000	24%
Provident[46]	$15.75 million	$4,252,500	27%
Kagara[47]	$3 million	$500,000	17%

3.20. All of the closed funded settlements listed above involved the funder volunteering to take a commission lower than the rate provided for in the funding agreement (which, as noted above, is typically 30%-35%), in order to improve the prospect of the settlement being approved by the Court. As noted above, these settlements are subject to further deductions, principally legal costs and disbursements.

3.21. NSWYL submits that a Court-approved contingency fee is likely to be, and should be, lower than the standard 35% commission paid to a litigation funder in closed funded

[42] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476, [126], [132] (Beach J). In *Money Max*, (n 10) [2], [11], [23], [84]-[85], [90]-[91], [95] (Murphy, Beach, Gleeson JJ), institutional investors were offered a funding commission of 32.5%, while retail investors were offered 35%. In *Hall v Slater and Gordon Limited* [2018] FCA 2071, [81]-[83] (Middleton J), the funding commission was tiered according to the number of shares acquired in the relevant period, ranging from 28.5% to 35%.

[43] *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837; Orders of Lee J in Gavin Smith v Commonwealth of Australia (Federal Court of Australia, NSD1908/2016, made 6 April 2020), Bradley James Hudson v Commonwealth of Australia in NSD1908/2016, (Federal Court of Australia, NSD1155/2017, 6 April 2020) and Kirsty Jane Bartlett v Commonwealth of Australia (Federal Court of Australia, NSD1388/2018, 6 April 2020).. The Katherine PFAS class action was open funded ($92.5 million), while the Williamtown ($86 million) and Oakey ($34 million) PFAS class actions were closed funded.

[44] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [2]-[3] (Beach J); *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [2]-[3] (Beach J); orders of Beach J in *McKay Super Solutions Pty Limited (ACN 110 853 024) (as Trustee for The McKay Super Solutions Fund) v Bellamy's Australia Limited (ACN 124 272 108)* (Federal Court of Australia, VID163/2017, 18 December 2019) in VID163/2017, 10 <https://www.comcourts.gov.au/file/Federal/P/VID163/2017/3781527/event/30144827/document/1527823>.

[45] *Rushleigh Services Pty Ltd v Forge Group Limited (in liquidation) (Receivers and Managers appointed)* [2019] FCA 2113, [1], [11], [48] (Murphy J).

[46] *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No. 4)* [2018] NSWSC 1584, [7], [21] (Ball J). *Smith* was a closed funded class action; *Creighton* was a no-win, no-fee class action.

[47] *Santa Trade Concerns Pty Limited v Robinson (No 2)* [2018] FCA 1491, [4]-[5] (Lee J).

class actions, and certainly lower than the sum of said funding commission and time-costed legal fees and disbursements.

3.22. Class actions funded by levies can result in disproportionate returns to solicitors. For example, the Great Southern Class Action was settled for $20.5 million, of which $20 million was used to reimburse a portion of the levies paid by clients of the law firm, Macpherson Kelly, to fund the case. The trial judge had already drafted lengthy reasons dismissing the class action when the parties announced that they had reached a settlement. When the trial judge approved the settlement, his Honour annexed his reasons and concluded that the settlement, which returned a modicum of relief to group members, was a better alternative than the group members receiving nothing.[48] NSWYL submits that a Court would be unlikely to approve a contingency fee which devoured the majority of a settlement or judgment sum; instead, it is likely the law firm would be expected to wear some of the loss.

3.23. Contingency fee class actions and no-win, no-fee class actions (method 3.4(e) above) both require the law firm to bear the risk of legal fees and disbursements, rather than the lead applicant and group members. NSWYL submits that contingency fee class actions may result in a greater proportion of a settlement or judgment sum paid to group members, when compared with no-win, no-fee class actions, as group members are guaranteed a majority of the settlement (unless the Court orders otherwise). NSWYL submits that, depending on the circumstances of the case, a contingency fee approved in a class action may result in a lesser proportion paid to group members. This may include class actions which are settled for large sums. Similarly, Courts have made common fund orders paying low commissions[49] and high commissions[50] to funders, according to what the Court considered the funder deserved. NSWYL submits that the Court is well-equipped to make these determinations, as the circumstances of the case require.[51] Contingency fee class actions may also result in a security for costs order payable by the law firm, which would serve to protect the interests of respondents to such class actions.[52]

[48] *Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation)* [2014] VSC 516, [16]-[154] (Croft J).
[49] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842; (2018) 132 ACSR 258, [5], [11], [14] (Murphy J).
[50] *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [6], [164]-[165] (Murphy J). See generally, Vince Morabito, *Common Fund Orders, Funding Fees and Reimbursement Payments* (31 January 2019), 17, 20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326303>.
[51] Such determinations are routinely made in funded class actions, for example *Rushleigh Services Pty Ltd v Forge Group Limited (in liquidation) (Receivers and Managers appointed)* [2019] FCA 2113, [59]-[61] (Murphy J). See also *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [12], [15], [18]-[19] (Beach J).
[52] Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) s 5, inserting s 33ZDA(2). As at 19 June 2020, the bill awaits the Governor's assent.

Conflicts of interest

3.24. NSWYL submits that the risk of conflicts of interest eventuating in contingency fee class actions is already apparent in no-win, no-fee class actions. The profession and the Court must be alert to ensure that a practitioner's fundamental duty to the Court is not compromised.[53] Potential conflicts which may arise in circumstances where:

(a) vulnerable claimants enter into contingency fee arrangements which are not in their best interests and a better alternative is available;

(b) a practitioner may advise in favour of settlement at a stage more advantageous to the law firm, rather than a claimant; and

(c) resolution of disputes are focussed on monetary outcomes, where non-monetary outcomes may be appropriate or preference.

3.25. In *Fostif*, a majority of the High Court accepted that in order to facilitate access to justice, third parties should be permitted to provide funding to ensure that those involved in litigation have the benefit of legal representation. However, the minority noted that it is important to ensure that solicitors remain independent of the funder, including to reduce the control of the litigation by the funder.[54]

3.26. NSWYL repeats its submission to the Australian Law Reform Commission (**ALRC**) Inquiry into Class Action Proceedings and Third-Party Litigation Funders (**ALRC Inquiry**), that there are already mechanisms for deterring unmeritorious claims; it is unlikely that solicitors would pursue an unmeritorious claim and in doing so expend the significant resources required by a class action matter, with no fee being paid, on a matter that is doomed to fail. Further, there is common law precedent, as well as legislation, allowing courts to make costs orders against legal practitioners where the legal practitioner has pursued an unmeritorious claim.[55]

Conclusion

3.27. There is already commentary that on approval of a settlement, the Court has power to make a CFO payable to the solicitors acting on a no-win, no-fee basis.[56] This means that the Court would order a commission of the settlement or judgment sum to the law firm. In addition to the benefits outlined above, NSWYL submits that lifting the ban on contingency fees will provide certainty on this question, without the need for parties

[53] See eg *Bolitho v Banksia Securities Limited (No 9)* [2020] VSC 309.
[54] See *Fostif,* (n 7) [282].
[55] See, in particular, *West v Rane (No 2)* [2020] FCA 616, where Lee J made costs orders against the law firm that commenced a number of individual proceedings which overlap with existing class actions.
[56] *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; (2019) 369 ALR 583, [134]-[143] (Lee J); cf *Impiombato v BHP Billiton Limited (No 2)* [2018] FCA 2045; (2018) 364 ALR 162, [133]-[134] (Moshinsky J).

to navigate competing and cogent views of the Court. NSWYL submits that the amending legislation should confer on the Court power to regulate, review and approve the award of a contingency fee at the point of settlement or judgment, so as to curtail excesses and undue windfalls.

4. The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients

4.1. The relationship between litigation funders and plaintiff lawyers could have both positive and negative impacts on compliance by plaintiff lawyers with their duties to their clients.

4.2. The potential positive impacts include the oversight funders can provide over lawyers' activities. If the lawyers are charging by the hour (as tends to be the case), they have a financial incentive to maximise their fees.[57] Funders are sophisticated litigants and are thus better placed than most plaintiffs or group members to guard against overcharging or to question the advice they receive. Likewise they are much better placed than most plaintiffs or group members to monitor the lawyers' performance.

4.3. On the other hand, this may create an incentive for lawyers to prefer the interests of the funder, who pays the lawyers' bills and with whom the lawyers have an ongoing relationship outside of the one case, over those of the plaintiffs and group members. This potential conflict arises most acutely in relation to the distribution of funds after a settlement or judgment has been obtained, in that there is then a finite pool of funds which must be divided between the funder and the group members. The lawyers may in that circumstance have an incentive to maximise the return to the funder rather than the group members.

4.4. NSWYL's view is that the best way to manage this potential conflict is through Court oversight of the commissions awarded to funders. In that respect, NSWYL respectfully adopts the recommendation of the ALRC that all such commissions should be approved by the court.[58]

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[57] See generally, Charles N Geilich, 'Rich Man, Poor Man, Beggar Man, Thief: A History and Critique of the Attorney Billable Hour' (2011) 5 *Charleston Law Review* 173; Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problems and Pressure Point' (2005) XXXIII *Fordham Urban Law Journal* 171 <https://ir.lawnet.fordham.edu/ulj/vol33/iss1/3>; Nuno Garoupa and Fernando Gomez-Pomar, *Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees Over Contingent Fees* (UPF Working Paper No 639, July 2002) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=394305>.

[58] ALRC Final Report, (n 69) [6.64]-[6.93]. See also *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277, [42] (Flick J); *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [113]-[158] (Murphy J); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476; (2017) 118 ACSR 614, [101] (Beach J); *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409, [27]-

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5. The Australian financial services regulatory regime and its application to litigation funding

5.1. NSWYL submits that the current financial services regulatory regime was not designed to apply to litigation funding, notwithstanding that litigation funding of class actions has been found to be a 'managed investment scheme', as defined in s 9 of the *Corporations Act 2001* (Cth).[59] A managed investment scheme is a statutory trust that is required to have a responsible entity as trustee.[60] Most of the regulations regarding managed investment schemes concern the powers and duties of the responsible entity.

5.2. NSWYL submits that this model is plainly unsuited to a class action funded by a litigation funder. In such a context, there is no scheme property of which the responsible entity would be trustee. While the group members in a sense contribute 'money or money's worth', in that they effectively assign a portion of a valuable chose in action (claim) that they own, the funder does not in any sense manage the property contributed by the group members. A funded class action is not a 'managed investment scheme' as that term is conventionally understood. The fact that it meets the statutory definition of one is more a reflection of the overbroad definition than of the nature of the scheme.[61] As has been recognised, the definition is cast deliberately broad, which is the reason for the retention of the power to expressly exempt schemes which are unintentionally captured by it.[62]

5.3. Further, NSWYL notes that in its submission to the ALRC Inquiry the Australian Securities and Investments Commission (**ASIC**) resisted the proposal that the current AFSL regime should be applied to litigation funding, because the regime has not been designed to cater for the risks posed by litigation funding and, further, ASIC questions whether the risks posed by litigation funding warrant the regulation proposed.[63] ASIC indicated that it considered that litigation funding did not pose much risk and accordingly would be low on ASIC's list of regulatory priorities.[64] NSWYL respectfully adopts the points made by ASIC in its submission to the ALRC in that respect, and

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[31] (Middleton J); *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719, [33]-[34] (Murphy J); cf *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [47]-[51] (Lee J).
[59] *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; (2009) 180 FCR 11; (2009) 260 ALR 643; (2009) 74 ACSR 447; 27 ACLC 1.
[60] *Corporations Act 2001* (Cth), ss 601FB, 601FC(2).
[61] See *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147; (2009) 180 FCR 11; (2009) 260 ALR 643; (2009) 74 ACSR 447; 27 ACLC 1, [207]-[297] (Jacobson J, in dissent).
[62] *Australian Softwood Forests Pty Ltd v A-G (NSW) (Ex rel Corporate Affairs Commission)* (1981) 148 CLR 121 at 130 (Mason J); *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd & Anor* [2001] WASC 339, [38]-[49] (Pullin J).
[63] Australian Securities and Investments Commission, submission No 72 to the Australian Law Reform Commission, *Inquiry into class action proceedings and third-party litigation funders* (September 2018), [60]-[90].
[64] Ibid, [86].

accordingly submits that the financial services regulatory regime should not be extended to litigation funders.

6. The regulation and oversight of the litigation funding industry and litigation funding agreements

6.1. NSWYL's view is that the existing regulatory regime is sufficient. NSWYL submits that there is no evidence of any systemic failures by litigation funders to comply with their obligations that warrant the imposition of a licencing regime.

6.2. In the course of the ALRC Inquiry, a concern arose with respect to whether litigation funders have sufficient resources to meet adverse costs orders. However, as NSWYL pointed out in its submission to the ALRC[65], the ALRC had only identified one instance of a litigation funder failing to meet its obligations in its Discussion Paper, being Argentum Capital Ltd.[66] NSWYL reiterates its submission to the ALRC that the failure of that funder would not have been detected by the licencing regime now proposed.[67]

6.3. NSWYL also submitted to the ALRC that litigation funding already has a very effective monitoring system in place - that is, litigation funders fund solicitors and clients represented by those solicitors.[68] Solicitors are sophisticated participants in the market who are well equipped to determine whether a funder is sufficiently resourced to meet its obligations, and have a clear interest in doing so to ensure their fees are paid. NSWYL supports the ALRC's recommendation that Part IVA of the FCAA should be amended to prohibit solicitors from seeking costs directly from a representative plaintiff or group members.[69]

6.4. In the event that a licensing scheme is contemplated by Parliament, NSWYL repeats its position that a bespoke regulatory body would be required to oversee such a regime, or alternatively the State Offices of Legal Services Commissioner may be the appropriate body to provide oversight,[70] particularly given ASIC views itself as an inappropriate body to manage conflicts of interest and the conduct of litigation. NSWYL also submits any licensing scheme should not apply to funders who fund only sophisticated litigants, such as insolvency practitioners or litigants in other similar

[65] NSW Young Lawyers, submission No 68 to the Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (19 August 2018), [6] ('**NSWYL ALRC Submission**').
[66] Australian Law Reform Commission, 'Inquiry into Class Action Proceedings and Third-Party Litigation Funders', Discussion Paper No 85 (DP 85) (June 2018). A potential solution is to require that funders undertake to be bound by orders made by the Court before class proceedings are permitted to continue.
[67] NSWYL ALRC Submission, (n 65) [6].
[68] NSWYL ALRC Submission, (n 65) [14].
[69] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third Party Litigation Funders* (Final Report, ALRC Report No 134, December 2018), [6.43]-[6.47] ('**ALRC Final Report**').
[70] NSWYL ALRC Submission, (n 65) [15].

commercial contexts.

7. The application of Common Fund Orders and similar arrangements in class actions

Common Fund Orders

7.1. A CFO is an order made by the Court which typically specifies that a percentage of any settlement or judgment sum received by group members may be paid to the third-party litigation funder of the class action, at an equal rate across all group members, regardless of whether the group members have entered into an agreement with the funder to pay such a commission.[71] The rate payable to the funder is approved by the Court, which is empowered to disapprove or lower the percentage rate that is agreed between the funder and group member.[72] CFOs are granted on the basis that all group members who would benefit from the class action should contribute equally to the funding commission costs.[73]

7.2. The source of power to grant a CFO was thought to be in s 33ZF of the FCAA,[74] which provides the Court with a general power '*make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding*.'[75] There is no express statutory power which allows for the Court to order a CFO on the application of a party to the proceeding (nor of its own motion). NSWYL discusses the effect of recent decisions concerning CFOs at paragraphs 7.4 –7.12 below.

7.3. NSWYL considers the application of CFOs in class action proceedings to be one of the more important developments since the ALRC Final Report (**ALRC Final Report**) was delivered.[76]

NSWYL's Position on Common Fund Orders

7.4. NSWYL has previously made submissions in support of minimal statutory intervention in the courts' discretionary powers to set or approve commissions in a class action proceeding.[77] This was in a context where CFOs were assumed to be applicable at all stages of a proceeding, prior to the recent decision in *Brewster* (discussed below)

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[71] *Money Max*, (n 10) [8] (Murphy, Beach, Gleeson JJ). The CFOs made by Lee J in *Perera v GetSwift Limited* [2018] FCA 732; (2018) 263 FCR 1; (2018) 357 ALR 586; (2018) 127 ACSR 1 and *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422; (2018) 363 ALR 698; (2018) 130 ACSR 456 were for the lesser of a percentage of the settlement sum and a multiple of legal costs and disbursements. The latter judgment was ultimately overturned by the High Court in *Brewster* (n 12).
[72] *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [133]-[134] (Murphy J).
[73] *Money Max*, (n 10) [8] (Murphy, Beach, Gleeson JJ).
[74] Ibid, [168] (Murphy, Beach, Gleeson JJ).
[75] FCAA, (n 16) s 33ZF(1).
[76] ALRC Final Report, (n 69).
[77] NSWYL ALRC Submission, (n 65) [59]-[66].

which prohibited the early ordering of a CFO and cast uncertainty over CFOs at other stages of a proceeding.

7.5. NSWYL was in favour of minimal intervention in the courts' discretion to order CFOs at the time because regulation of such arrangements could lead to unintended consequences and potentially unjust outcomes.[78] NSWYL also acknowledged that CFOs had potential to lead to more 'open class actions',[79] and in those circumstances, could assist the class action regime with meeting its stated purpose of increasing access to justice and improving efficiency in the courts.[80]

7.6. For the reasons addressed below, NSWYL considers that CFOs are beneficial to the operation of the regime, and submits that statutory intervention is required to respond to *Brewster* and confer the Court with power to make a CFO at any stage of the proceeding.

ALRC Final Report and Common Fund Orders

7.7. The ALRC Final Report recommended the following in relation to CFOs:

> 'Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion.'[81]

7.8. The express statutory power to grant a CFO was said to be consistent with other recommendations in the ALRC Final Report, 'including that class actions be initiated as an open class, that the Court have an express statutory power to reject, vary, or amend the terms of a third-party litigation funding agreement, and that the Court have the power to deal with competing class actions'.[82]

The effect of Brewster on Common Fund Orders

7.9. Since the ALRC Final Report was published, a majority of the High Court in *Brewster* held that the Court does not have the power under s 33ZF of the FCAA to grant a CFO at an early stage of the proceedings[83] because to do so would be inconsistent

[78] Ibid, [62].
[79] See [3.4] above. Where group membership is not limited to persons who sign litigation funding agreements but includes all persons who were subject to the alleged wrongful conduct.
[80] NSWYL ALRC Submission, (n 65) [89].
[81] ALRC Final Report, (n 69) 96.
[82] ALRC Final Report, (n 69) 99 [4.35].
[83] *Brewster*, (n 12) [87] (Kiefel CJ, Bell and Keane JJ).

with the text, context and purpose of the legislative scheme of Part IVA of the FCAA.[84] The ALRC's recommendation to provide the Court with express statutory power to grant CFOs predates and presages this decision.

7.10. However, the High Court has left open the question of whether a CFO (or any similar order) could be granted at settlement or judgment, potentially relying on the Court's express powers to make just orders at settlement[85] or in equity.[86]

Developments since Brewster

7.11. The decision in *Brewster* effectively prohibits an application for a CFO early in a class action proceeding, and accordingly increases the funder's risk until the point of settlement or judgment. However, there is conflicting authority and uncertainty on the question of whether the Court has power to order a CFO at the point of settlement or judgment. Since *Brewster*, the Federal Court has considered the application of CFOs at settlement on several occasions including:

(a) On 17 January 2020, Murphy J approved the settlement in *Pearson v State of Queensland*, in which his Honour held that a CFO made early in the proceeding could continue in operation on the grounds that the order was valid 'until and unless' set aside.[87]

(b) On 5 February 2020, Anastassiou J, approving a settlement in *Clime Capital Limited v UGL Pty Limited*[88] noted that the High Court in *Brewster* had not considered whether a CFO could be ordered at the point of settlement approval under s 33V of the FCAA.

(c) On 2 April 2020, in *Lenthall (No 2)*, Lee J considered *Brewster* and concluded that it did not stand for the proposition that the Court did not have power to make a common fund order at settlement.[89]

(d) On 8 April 2020, in *McKay (No 3)*, Beach J concluded that *Brewster* did not consider the Court's power to make a common fund order at settlement.[90] His Honour lamented that, as a result of the decision in *Brewster*, the Court had lost control of funding commissions in choosing a winner among competing class actions, and delivered a clarion call to the legislature to address this issue.[91] Lee J similarly outlined the benefits of CFOs in 2019:

[84] Ibid, [48] (Kiefel CJ, Bell and Keane JJ).
[85] FCAA, (n 16) s 33V(2); see discussion at [7.8] below.
[86] *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423, [12] (Lee J); see also Federal Court of Australia, *General Practice Note GPN-CA*: *Class Actions Practice Note*, 20 December 2019, [15.14].
[87] *Pearson v State of Queensland (No 2)* [2020] FCA 619, [262]-[264] (Murphy J), reasons published 8 May 2020.
[88] *Clime Capital Limited v UGL Pty Limited* [2020] FCA 66.
[89] *Lenthall v Westpac Banking Corporation (No 2)* [2020] FCA 423, [6]-[12] (Lee J).
[90] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [31] (Beach J).
[91] Ibid, [33]-[34] (Beach J).

> 'the practical benefit of CFOs has been to maintain control over disproportionate deductions from modest settlements, prevent windfalls, and ensure the court's protective and supervisory role in relation to group members is given effect.'[92]

(e) On 4 May 2020, in *Fisher (No 2*), Moshinsky J considered an application for Court-approval of a settlement under which the applicant sought a CFO under s 33V. His Honour held that while *Brewster* did not express a 'clear majority view' on whether a CFO could be ordered under s 33V, the majority did 'express strong reasons favouring the making of a funding equalisation order over a [CFO]'.[93] His Honour concluded that the applicant's alternative order for a funding equalisation order was appropriate in the circumstances.[94]

(f) On 13 May 2020, in *Uren (No 2)*, Murphy J approved a $3 million settlement and made a CFO of 25%, concluding that *Brewster* did not 'stand for the proposition that the Court has no power to make a common fund order upon court approval of a settlement under s 33V(2) of the FCA'.[95]

(g) On 13 May 2020, in *Cantor (No 5)*, Foster J considered *Brewster* and the decisions summarised above, save for *Uren (No 2)*.[96] His Honour concluded that the Court 'probably' does not have power to make a common fund order at the stage of settlement.[97]

The current position

7.12. In summary, the current position in relation to CFOs is as follows:

(a) the Court can no longer order a CFO at an early stage of a proceeding pursuant to its discretionary powers under s 33ZF of the FCAA;

(b) there is conflicting authority on whether CFOs can be ordered under s 33V of the FCAA at the point of settlement approval and no authority on whether it can be ordered at judgment under ss 33Z and 33ZA; and

(c) the majority view of the High Court favours the ordering of a funding equalisation order over a CFO.[98]

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[92] *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107; (2019) 369 ALR 583, [140] (Lee J).
[93] [2020] FCA 579, [72]-[73] (Moshinksy J).
[94] Ibid, [74] (Moshinksy J). The Applicants and Vocus settled the class action for $35 million. The proposed CFO sought a commission of $6.2 million (17.7% of the settlement), while the funding commission payable following a funding equalisation order was $3.9 million (11.1% of the settlement): ibid, [66]-[67] (Moshinsky J).
[95] *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647, [50] (Murphy J).
[96] *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637, [321]-[421] (Foster J).
[97] Ibid, [405]-[421] (Foster J).
[98] *Brewster*, (n 12) (Kiefel CJ, Bell and Keane JJ). A funding equalisation order is an order of the Court which spreads a litigation funder's commission across all group members in the proceeding, such that 'funded group members' are no worse off than 'unfunded group members'. First, the litigation funder receives the commissions payable under funding

NSWYL's recommendation

7.13. The above judgments in the Federal Court demonstrate that, post-*Brewster*, there is considerable uncertainty in Australia over the application of CFOs in class action litigation. Despite this, NSWYL maintains its view that, on balance, CFOs are beneficial to group members and in the spirit of Part IVA of the FCAA by encouraging proceedings to be brought as an open class, reducing the possibility of competing class actions,[99] and by providing important judicial oversight that can ensure the ultimate commission rate that is approved by the Court is just and equitably distributed amongst group members.

7.14. Litigation funding is a vital component of the modern class actions regime and, for the claims of many group members, a *sine qua non*. NSWYL notes the recent comments in the judgment approving the settlement of the PFAS class actions against the Commonwealth:

> 'Without litigation funding, the claims of these group members would not have been litigated in an adversarial way but, rather, they would likely have been placed in the position of being supplicants requesting compensation, in circumstances where they would have been the subject of a significant inequality of arms. ...it strains credulity to think that claims of this complexity and attended by such potential expense could have been litigated to a conclusion without third party funding of some sort. It seems to me a testament to the practical benefits of litigation funding, that these complex and costly claims have been able to be litigated in an efficient and effective way and have procured a proposed settlement. It must be recalled that an acceptable settlement was only forthcoming after a vast outlay of resources, and the assumption of risk of a third party funder for potential adverse costs.'[100]

7.15. NSWYL therefore recommends that Part IVA of the FCAA be amended to provide express statutory authority for the Court to grant a CFO at any stage of a class action proceeding, provided the litigation funder is no better off than group members after settlement or judgment.[101]

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agreements signed by the funded group members. Second, the commission payable by unfunded group members, if they had signed the funding agreement, is calculated and totalled. Third, that total commission is shared equally among all group members. An alternative method of calculation is to divide the funding commission (paid by funded group members) by the total settlement or judgment sum. That percentage is the proportion to be deducted from the unfunded group member pool of funds and added to the funded group member pool of funds. The purpose is to avoid a 'free rider' problem whereby unfunded group members claim the benefits of a settlement or judgment sum, without contributing to the funding costs.

[99] *Money Max*, (n 10) [14] (Murphy, Beach, Gleeson JJ).

[100] *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837, [82] (Lee J).

[101] Noting the caution against applying such rules to claims that appear valuable, but turn out to be valueless, NSWYL submits that a funder must bear this risk: *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374, [18]-[19] (Beach J):

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7.16. NSWYL submits that the ideal form of CFO is that used in Phi Finney McDonald's BHP Class Action, namely a percentage of the gross settlement is paid to the funder, out of which 'expenses paid by the Funder in the course of funding the litigation, including legal costs, disbursement and any premium paid in relation to the provision of security for costs' must be deducted.[102] Orders so formulated encourage funders to keep costs down and guarantee that the majority of a settlement or judgment sum falls in the hands of group members.

8. Factors driving the increasing prevalence of class action proceedings in Australia

Developments in Litigation Funding

8.1. NSWYL submits the rise in third-party litigation funding in Australia is arguably one of the most significant factors behind any growth in the prevalence of class action proceedings. Since it was first pioneered in Australia,[103] litigation funding has been an important avenue through which group members can obtain access to justice in circumstances where they may not otherwise have an opportunity to bring a claim.[104] Between 2010 and 2016, almost half of the class action claims filed in the Federal Court of Australia were funded.[105] In addition to this, Professor Morabito suggests the majority (82.8%) of shareholder class actions filed in Australia between 4 March 1992 and 30 June 2019 were funded by third-party litigation funders.[106] It has been noted that the growth in funded class actions over the past decade or so may in part be attributable to common law developments, some of which have enabled funders to more fully realise the investment opportunity shareholder claims in particular may provide.[107] The number of litigation funders operating in Australia has also grown

'No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery.' See also *Carpenders Park Pty Ltd (as trustee of the Carpenders Park Pty Ltd Staff Superannuation Fund) v Sims Metal Management Limited* [2019] FCA 1040, [17]-[18] (Rares ACJ); *Santa Trade Concerns Pty Limited v Robinson (No 2)* [2018] FCA 1491, [7]-[13] (Lee J).

[102] *Impiombato v BHP Billiton Limited* [2018] FCA 1272, [15] (Moshinsky J).

[103] In class action claims, in particular, following the decision of *Fostif* (n 7).

[104] ALRC Final Report, (n 69) 27, [1.29]-[1.30].

[105] 49.5% of Part IVA proceedings filed between 2010-2016 were supported by commercial litigation funders: Vince Morabito, *An Empirical Study of Australia's Class Action Regimes Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia* (29 July 2016), 8 <https://ssrn.com/abstract=2815777>; Chief Justice Allsop, 'Class Action Key Topics' (Keynote Address, *Law Council of Australian Forum*, 13 October 2016), < http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20161013> ; see also Jason Betts and Christine Tran, 'The rise of class actions and litigation funding in Australia', *International Bar Association* (Article, 17 May 2017) <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=8753FF59-A0DA-4D85-AF20-BAF5A8C80FBC>.

[106] Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia*: *Shareholder Class Actions in Australia – Myths v Facts* (11 November 2019), 20 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660> ('**Myths v Facts**').

[107] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave, Helen Mould (eds), *25 Years of Class Action in Australia* (University of Sydney Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017), 205 [10.2.1]-[10.2.2]. At [10.2.2], the authors discuss the impact of *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200; (2007) 164 FCR 275 and the Court's endorsement of 'closed class' actions, in particular.

steadily over the last decade or so.[108] Ultimately, NSWYL submits that the growth in funded class actions is likely to have contributed to any identified increase in the prevalence of class actions overall, and that any such growth (if it has occurred) should be considered a positive outcome as it has facilitated access to justice for group members.

Media coverage

8.2. NSWYL is concerned about the misapprehension inherent in the 8th term of reference. There is potential for the media to significantly influence public perceptions of class action litigation and the litigation funding industry. Importantly, the media can create misconceptions about the nature of any increasing prevalence of class action proceedings in Australia. For example, in October 2019 *The Australian* reported that there had been an '*explosion*' of class action claims in the last financial year.[109]

8.3. In 2015, an article in the *Australasian Lawyer* predicted that the then increasing trend of class action claims being made in the United States was likely to have a '*domino effect*' in Australia.[110] However, Morabito concluded from his research that, 'no balanced or objective assessment of Australia's class action landscape could possibly lead to the conclusion that there has been an explosion of class actions in recent years' (emphasis added).[111] Morabito reported that 634 class actions were filed in NSW, Victoria, Queensland and the Federal jurisdictions in the 27-year period between 4 March 1992 to 30 June 2019,[112] and given that some of those class actions were competing class actions, the total number actually concerned only 420 distinct legal disputes.[113] This amounts to an annual average of 23 class actions filed over 27 years and an average of 47 class actions were filed annually over the preceding five-year period.[114] Further, while the volume of class action filings in Australia is steadily increasing, that increase is decidedly negligible from year to year.[115] Australian class action litigation activity remains comparatively low against other jurisdictions. For example, 5,687 class actions were filed in Israel in the period 2007-2015 and 1,306 class actions were filed in the only class action court in Quebec in the period 1993-2017.[116]

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[108] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave, Helen Mould (eds), *25 Years of Class Action in Australia* (University of Sydney Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017), 205 [10.3].
[109] Geoff Chambers, 'Surge in class action lawfare hits economy', *The Australian*, (online, 29 October 2019) <https://www.theaustralian.com.au/business/legal-affairs/surge-in-class-action-lawfare-hits-economy/news-story/ecc8d4d91e87b5f270aa54f490a62e1b>
[110] Samantha Woodhill, 'Looming class action boom threatens business', *Australasian Lawyer,* (online, 21 May 2015) <https://www.thelawyermag.com/au/news/general/looming-class-action-boom-threatens-business/198243>
[111] Myths v Facts, (n 106), 14
[112] Ibid, 12.
[113] Ibid, 13.
[114] Ibid, 12-13.
[115] Ibid, 12.
[116] Ibid, 13.

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8.4. In Morabito's view, neither of these statistics supported a conclusion that there had been any form of explosion in class actions.[117] NSWYL agrees with Morabito's views and submits that any discussion regarding the prominence of class actions should duly consider Morabito's data.

8.5. NSWYL suggests that selective media coverage may also create the impression that there has been a dramatic increase in the number of class actions commenced outside the realm of shareholder class actions. This may give rise to the misconception that there is more non-shareholder class action activity as compared to shareholder class action activity, and that corporations and governments should be bracing themselves for an ever-increasing variety of claims to be brought against them.[118]

8.6. A recent example of such news coverage was an opinion article in the *Australian Financial Review,* which speculated that the COVID-19 pandemic could 'spark a surge in class action lawsuits'.[119] However, even if non-shareholder class actions are on the rise, shareholder class actions have continued to be the predominant type of claim to date, and the majority of these claims are supported by litigation funding.[120] According to Morabito's report referred to at [8.1] above, shareholder class actions were the most popular category of class actions in Australia in the period 4 March 1992 to 30 June 2019 (with 122 shareholder class actions filed in that period).[121] According to Betts and Tran:

> 'since 2010, there has been a notable increase in the number of shareholder/investor and consumer protection class actions, and a notable decrease in the number of product liability and mass tort class actions', and this 'may be explained by the fact that product liability and mass tort claims on average take up to twice as long to resolve compared with shareholder and

[117] Ibid, 12-13.
[118] Such a misconception could, for example, arise from media coverage of looming class actions in novel areas, such as the looming class action involving Queensland's new *Human Rights Act 2019*, in which the construction of a coal mine is to be challenged on the basis of human rights as they apply to climate change. See, for example,: ABC, 'Youth activists claim Clive Palmer's proposed coal mine could breach their human rights', *7.30,* 13 May 2020 (Peter McCutcheon). <https://www.abc.net.au/7.30/youth-activists-claim-clive-palmers-proposed-coal/12245602>
[119] Jennifer Hewett, 'Business needs reprieve from COVID-19 class actions', *Financial Review* (online, 7 May 2020) <https://www.afr.com/companies/professional-services/business-needs-reprieve-from-covid-19-class-actions-20200507-p54quq>
[120] Ashurst, 'Quickguide: Class Actions in Australia', (Web Page, 21 October 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide-class-actions-in-australia/>.
[121] Myths v Facts, (n 106) 16.

consumer protection claims, and are therefore less economically attractive to funders given the longer time required to realise a return on capital.'[122]

Introduction of new class action regimes in state jurisdictions

8.7. The introduction of class action regimes in further Australian state jurisdictions could be driving an increase in the prevalence of class action proceedings in Australia, to the extent that there has been any increase overall. The most recent Queensland regime came into operation on 1 March 2017.[123] According to Morabito's report referred to at [8.1] above, a total of nine class actions were commenced under this regime from its commencement to 30 June 2019, with two class actions filed in financial year 2016-2017, two filed in 2017-2018 and five filed in 2018-2019.[124] NSWYL suggests that, in many cases, the commencement of class action regimes in new jurisdictions simply means that litigants have additional venue choices.

8.8. The Western Australian regime has not yet come into operation as the Civil Procedure (Representative Proceedings) Bill 2019 (WA), which was introduced into the Western Australian Parliament on 26 June 2019, is yet to be passed by the Legislative Council.[125] Some commentators have suggested that, if passed, the new regime in Western Australia will '*create a pathway for more class actions to be initiated in Western Australia', and, 'almost certainly see an increased uptake of representative proceedings for State-based causes of action, such as contract and tort… which* [while] *previously not viable to run, will now be more economical for plaintiffs to establish and pursue as a class action'*.[126] In light of this, NSWYL considers it likely that the commencement of new state-based regimes may have contributed to a steady increase in the number of class actions filed at a state level, and that this trend will continue as further new regimes commence. This does not, however, equate to an undesirable growth in the prominence of class action claims in Australia.

The Impact of the Banking Royal Commission

8.9. The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Banking Royal Commission**) is another factor which has

[122] Jason Betts and Christine Tran, 'The rise of class actions and litigation funding in Australia', *International Bar Association* (Article, 17 May 2017) <https://www.ibanet.org/Article/Detail.aspx?ArticleUid=8753FF59-A0DA-4D85-AF20-BAF5A8C80FBC>
[123] The Queensland regime came into operation with the commencement of Part 13A of the *Civil Procedure Act 2011* (Qld), and Chapter 3 Part 1 Division 5 of the *Uniform Civil Procedure Rules 1999* (Qld), allowing class action proceedings to be commenced in the Supreme Court of Queensland. The Queensland regime generally adopts the procedures set out in the existing Federal Court, New South Wales and Victorian Supreme Courts.
[124] Myths v Facts, (n 106) 12.
[125] Parliament of Western Australia, Civil Procedure (Representative Proceedings) Bill 2019 (Web Page) <https://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=53A69D743089CB82482584250017E4EE>
[126] Jones Day, 'Commentaries: Class Action Reform Imminent in Western Australia', *Insights* (Blog Post, July 2019) <https://www.jonesday.com/en/insights/2019/07/class-action-reform-imminent?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration>

contributed to new class actions being filed in recent years. Following the release of the Final Report issued by the Honourable Commissioner Hayne on 1 February 2019,[127] there has been a rise in regulatory prosecutions and class actions concerning issues exposed by the Banking Royal Commission.[128] The Final Report, in part, outlined circumstances where the conduct of certain financial services entities amounted to misconduct which fell below community standards and expectations.[129] The Commissioner stated that if an entity breaks the law and causes damage, there is an expectation within the Australian community that the entity will compensate those affected.[130] NSWYL submits that, consistent with the findings of the Banking Royal Commission, corporate entities must not be permitted to act with impunity, and class actions provide one mechanism to hold such entities accountable. It is expected that class action claims relating to financial products and services or consumer protection are likely to continue as a result of the Banking Royal Commission.[131]

8.10. The class action filed against IAG after its subsidiary, Swann Insurance (Aust) Pty Ltd (the **Swann case**) in April 2019 is one such example. The Banking Royal Commission heard that Swann sold 850,000 policies for more than $1 billion over the last decade, in which only one tenth of claims had been paid out.[132] This sale of so-called 'junk insurance' or add-on insurance products for cars and motorbikes was alleged to be of little or no financial value to customers, but of high value to dealers that collected commissions.[133] The Commissioner recommended a deferred sales model for add-on insurance and a cap on commissions.[134] Mr James Shipton, Chair of ASIC, stated in his evidence to the Banking Royal Commission that add-on insurance was an industry-wide issue which affected many thousands of consumers.[135]

The claimed impact of 'group costs orders' on the prevalence of class actions

8.11. At the time of writing, both houses in the Parliament of Victoria have now passed the Justice Legislation Miscellaneous Amendments Bill 2019 (Vic) (the **Bill**). The stated purpose of the proposed amendments to the *Supreme Court Act 1986* (Vic) in the Bill includes the introduction of a new provision, 33ZDA (Group costs orders), to provide the Victorian Supreme Court with certain powers to allow contingency fees in class actions under part 4A of the *Supreme Court Act 1986*, to improve access to justice

[127] *Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1.
[128] See for example: Ibid,114.
[129] Ibid, 1.
[130] Ibid, 3.
[131] Ashurst, 'Quickguide: Class Actions in Australia', (Web Page, 21 October 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide-class-actions-in-australia/>
[132] Mina Martin, 'Junk insurance class action against IAG could be worth $1 billion – report', *Insurance Business Australia* (online, 17 September 2019) <https://www.insurancebusinessmag.com/au/news/breaking-news/junk-insurance-class-action-against-iag-could-be-worth-1-billion--reports-177968.aspx>
[133] *Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 291.
[134] Ibid.
[135] Transcript, James Shipton, 22 November 2018, 6930, cited in *Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 427.

for class action plaintiffs.[136] The Bill was introduced following a March 2018 report by the Victorian Law Reform Commission, which recommended that law firms be permitted to charge contingency fees to allow them to recover a percentage of amounts recovered in successful Victorian class actions, to provide financial assistance to clients who may otherwise be unable to bring proceedings.[137] It has been suggested that the passage of the Bill (which has only occurred recently) may result in a wave of new class actions commenced in Victoria.[138] Nevertheless, it is unclear whether the introduction of the possibility of lawyers being able to charge contingency fees in Victoria would increase the prevalence of class actions overall or whether it would simply make Victoria a preferred jurisdiction. NSWYL submits this development should not be used as a tool to feed the myth discussed above concerning an 'explosion' in class actions.

9. What evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy

9.1. Both ASIC[139] and the Australian Competition and Consumer Commission[140] have emphasised the importance of class actions as a private enforcement mechanism which takes pressure away from the regulators and allows them to allocate their resources to other priorities. Class actions are thus a valuable addition to Australia's regulatory toolset and ultimately save taxpayers from bearing the additional costs of public enforcement that would be necessary absent the availability of class actions. This can be seen as a benefit to the economy by reason of the deterrence of unlawful behaviour; the savings to the public purse; and the distribution of compensation to the plaintiffs and group members who have been wronged by unlawful conduct. However, the precise value of this is extremely difficult to quantify, and NSWYL is not aware of any attempts at quantification to date.

10. The effect of unilateral legislative and regulatory changes to class action procedure and litigation funding

[136] Victoria, *Parliamentary Debates*, Legislative Council, 27 November 2019, 4589 <https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2019/Legislative_Assembly_2019-11-27.pdf>.
[137] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, (Report, March 2018), [3.63].
[138] Michael Pelly, 'Victoria passes law slammed as promoting class action forum shopping', *Australian Financial Review* (online, 27 February 2020) <https://www.afr.com/companies/professional-services/victoria-shows-no-class-in-contingency-fees-push-20200226-p544h0>.
[139] Australian Securities and Investments Commission, Submission No 72 to the Australian Law Reform Commission, *Inquiry into class action proceedings and third-party litigation funders* (September 2018), [46]-[50].
[140] Australian Competition & Consumer Commission, Submission No 15 to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding* (10 June 2020).

10.1. NSWYL recognises the value in national uniformity where appropriate, but also notes that Australia's federal system has served the nation well over the past 120 years by allowing states and territories to act in what they perceive to be their best interests and not compelling them to conform to a centralised norm. NSWYL supports efforts for uniformity in class action legislation and practice, but expresses concern for the paucity of reform at the Commonwealth level since the introduction of Part IVA of the FCAA (especially when compared with the amendments in Victoria to Part 4A of the *Supreme Court Act 1986* (Vic)). The absence of reform has necessarily led to limited and gradual judicial interventions to ensure justice is done in the conduct of representative proceedings.

11. The consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement

11.1. NSWYL refers to [3.6]-[3.17] and [8.6] above.

12. The potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic

12.1. After the Global Financial Crisis, there were a number of class actions brought on behalf of the victims of predatory investment schemes who had lost everything as a result of the crisis. Many of these class actions resulted in the recovery of at least some of the lost investments.[141] Most of those benefiting from the actions were consumers or small businesses. Vulnerable Australian businesses can take comfort that if the COVID-19 crisis causes them to suffer losses of this type, Australia's class action regime may help them find a remedy.

12.2. There has recently been a case filed by an employee who alleges that his employer took advantage of the COVID-19 situation in order to make him conduct the same amount of work for a fraction of the pay.[142] Class actions will permit large groups of employees to hold employers to account for this kind of misconduct.

[141] See, eg, *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511; *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689; *O'Dea & Anor v Westpac Banking Corporation* [2019] NSWSC 1078; *Perazzoli v Bank SA, a division of Westpac Banking Corporation Limited* [2019] FCA 1707; *Smith v Australian Executor Trustees Limited; Creighton v Australian Executor Trustees Limited (No. 4)* [2018] NSWSC 1584; *Sherwood v Commonwealth Bank of Australia (No 5)* [2015] FCA 688; *Richards v Macquarie Bank Limited (No 5)* [2013] FCA 1442.

[142] 'Manager takes his company to court after his salary was slashed 80 per cent during the coronavirus crisis', *Daily Mail, Australian Associated Press*, (online, 12 June 2020) <https://www.msn.com/en-au/news/melbourne/manager-takes-his-company-to-court-after-his-salary-was-slashed-80-per-cent-during-the-coronavirus-crisis/ar-BB15kOYK>.

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13. Evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders

13.1. The ALRC Inquiry considered how courts should resolve competing, duplicative class actions.[143] In particular, the ALRC noted the problems which arose when five separate class actions were filed against AMP following the Banking Royal Commission; four of which had been filed in the Federal Court of Australia, and one which was filed in the Supreme Court of NSW.[144] The Full Court of the Federal Court of Australia ultimately agreed to transfer the proceedings to the Supreme Court of NSW.[145]

13.2. NSWYL submits that the maintenance of multiple competing proceedings is problematic for three key reasons:

(a) The duplication of work is likely to increase costs, which compromises the just, quick, and cheap resolution of the real issues in dispute,[146] and is therefore likely to impact on fair and equitable outcomes for both plaintiffs and defendants.

(b) The existence of multiple competing duplicative proceedings in different Australian jurisdictions may require complex considerations including comity, and judges are very concerned not to interfere with the processes of other courts or veer into territory which may resemble a breach of comity.[147] In the process of consolidating the five proceedings commenced against AMP Limited, multiple judges emphasised that comity was of utmost importance.[148]

(c) Resolving the competition between proceedings requires a difficult assessment of the most suitable way in which to address issues of multiplicity. In the past, courts have chosen to not prioritise a claim on the basis that it was the first claim to be filed.[149] NSWYL endorses this approach as the alternative would encourage a 'race to the registry'. The first proceeding filed may not offer the best terms for group members, nor the most comprehensive claims.[150]

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[143] See generally, ALRC Final Report, (n 69) Chapter 4.
[144] ALRC Final Report, (n 69) 122 [4.126]-[4.128].
[145] *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143, [25] (Allsop CJ).
[146] *Civil Procedure Act 2005* (NSW) s 56; *FCAA,* (n 16) s 37M.
[147] *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143, [10]-[11]; *Wigmans 2019 SC Judgment,* (n 24) [15], [18] (Ward CJ in Eq).
[148] *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143, [11].
[149] See, eg, *Wileypark Pty Ltd v AMP Ltd* [2018] FCAFC 143, [18] (Allsop CJ); *Perera*, (n 15) [279] (Middleton, Murphy and Beach JJ); *Wigmans 2019 SC Judgment*, [104]–[105] (Ward CJ in Eq).
[150] During the special leave application to the High Court, even counsel for one of the proceedings stayed in the AMP class action conceded that being the first mover would not be determinative of which proceeding should be allowed to proceed*:* Transcript of Proceedings, *Wigmans v AMP Limited* [2020] HCATrans 052.

13.3. NSWYL notes that Bathurst CJ and Allsop CJ entered into a *Protocol for Communication and Cooperation Between the Supreme Court of New South Wales and the Federal Court of Australia in Class Action Proceedings*.[151] The ALRC concluded that other Supreme Courts with representative action regimes should consider becoming parties to this Protocol.[152] In April 2020, the New South Wales Supreme Court and the Federal Court of Australia sat jointly in an historic first, hearing *Westpac v Lenthall* [2019] FCAFC 34 and *Brewster v BMW* [2019] NSWCA 35.

13.4. Since the ALRC Inquiry, the Victorian Supreme Court has entered into a similar Protocol with the Federal Court.[153] NSWYL submits that the effectiveness of these protocols should be monitored, and they should especially be considered once the High Court has delivered its judgment in *Wigmans v AMP Limited*. NSWYL further submits that the Queensland and Western Australian Supreme Courts should consider entering into a similar arrangement with the Federal Court of Australia.

14. Any other matters related to these terms of reference

14.1. NSWYL considers the scrutiny of class actions by the legislature, judiciary, academia, legal practitioners, media and the public to be beneficial to the development of jurisprudence and accessibility of legal procedures to the general public (and therefore, group members).[154]

14.2. NSWYL submits that, unless the Court determines it is appropriate to make a confidentiality order (only in exceptional circumstances), the Court should require the following information to accompany an application for approval of a settlement and publish the following information in the judgment approving a settlement:

(a) the date the proceeding commenced;

(b) the estimated number of group members before opt out;

(c) the number of valid opt outs;

[151] *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings* (1 November 2018).
[152] ALRC Final Report, (n 69) 124.
[153] *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings* (5 June 2019).
[154] *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527, [8]-[9] (Murphy J); *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, [102]-[111] (Lee J); Michael Legg, 'Class Action Settlements in Australia - The Need for Greater Scrutiny' [2014] *MelbULawRw* 23; (2014) 38(2) *Melbourne University Law Review* 590.

(d) the number of registered group members;

(e) the number of funded and unfunded group members;

(f) the identity and location of the funder;

(g) the amount of security for costs paid;

(h) the estimated value of the claims at the outset and at the time of settlement;

(i) the settlement sum and any non-monetary relief;

(j) the funding commissions payable under funding agreements (%);

(k) the total amount of the funding commission (and % of the gross settlement sum) that the funder would be paid:

(i) pursuant to its contractual entitlements under the funding agreements,

(ii) following a funding equalisation order (if one is sought), and

(iii) following a common fund order (if one is sought),

as the case may be;

(l) total costs broken down into legal fees, counsel's fees, expert fees and other disbursements;

(m) any costs orders paid in the proceedings;

(n) payments to lead applicants (their claims and recognition payments);

(o) other reimbursements and payments, including pursuant to cy-près orders;

(p) the average payment to all group members, funded group members and unfunded group members (and the % of the gross settlement sum); and

(q) the number of group members who reached compromises, executed releases or covenanted not to sue during the class action, the estimated value of their claims and the value of such releases (aggregated and anonymised).

On approval of the settlement, or where the class action proceeds to judgment, corresponding information should be set out in the judgment.

14.3. NSWYL submits that this information increases transparency, accountability and accessibility for group members and the public.

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Concluding Comments

NSW Young Lawyers and the NSWYL Civil Litigation Committee are grateful for the opportunity to make this submission.

Please note that the views and opinions expressed in this submission are on behalf of the Civil Litigation Committee and its contributors and do not reflect the views or opinions of any employer, company, or professional body related to the contributors. We also acknowledge the diversity of opinions within the profession regarding the issues canvassed in this submission, such that the views expressed in this submission are not necessarily unanimously held by all members of NSWYL.

If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:

David Edney
President
NSW Young Lawyers

Alternate Contact:

Jade Tyrrell
Chair
NSW Young Lawyers Civil Litigation Committee