LAW INSTITUTE VICTORIA

9 June 2020

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO BOX 6100
Parliament House
Canberra ACT 2600

By email: and

Dear Committee Secretary,

RE: Inquiry into litigation funding and the regulation of the class action industry

The Law Institute of Victoria ('LIV') welcomes the opportunity to provide these submissions, which are made in contemplation of its ongoing commitment to improve the efficient administration of, and equitable access to, justice in the State of Victoria and nationally. This submission is informed by the views of members of the LIV's Litigation Lawyers Section.

The LIV's responses are substantively informed by the findings and recommendations of recent state and federal Law Reform Commission inquiries into the Australian class actions regime, and previous research and submissions prepared by the LIV and its various working groups.

1. Context - Related Inquiries and Findings

In responding to the Inquiry, the LIV acknowledges the work done in recent State and Federal Inquiries into the ongoing operation and efficiency of the class actions regime.

In particular, we note both the Victorian Law Reform Commission ('VLRC') Inquiry's Final Report, "Access to Justice: Litigation Funding and Group Proceedings", and the Australian Law Reform Commission's Final Report ('ALRC' and 'ALRC Report') tabled in Parliament in January 2019, "Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders".[1]

The substance of the current Parliamentary Committee Inquiry mirrors the key issues very recently examined in the ALRC Inquiry which was finalised and tabled in Parliament in January last year.

[1] ALRC Final Report, Report 134, released December 2018.

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The Terms of Reference of that Inquiry required the ALRC to examine in broad terms:

a) Whether and to what extent class action proceedings and third-party litigation funders should be subject to Commonwealth regulation and whether there is adequate regulation of conflicts of interest between third-party litigation funders, lawyers and class members;

b) Prudential requirements and character requirements of funders; and

c) The proportion of settlement available to be retained by lawyers and litigation funders in class action proceedings.

In short, the Terms of Reference required the ALRC to consider two overarching issues in the class action regime: the integrity of third-party funded class actions and the efficacy of the class action system.

In the course of that inquiry, the ALRC conducted over 60 consultations and received more than 75 detailed submissions from a broad cross-section of the legal profession including plaintiff and defendant law firms, litigation funders, academics, shareholder and chartered accountant associations, fund managers, the Australian Bar Association, the AICD, the ALA, ASIC, superannuation funds, Choice Australia, the Consumer Action Law Centre, insurers, specialist costs consultants, Legal Aid, courts, the US Chamber Institute for Legal Reform, and the VLSB+C to name a few.

It is clear that the ALRC Inquiry, which was conducted over a twelve month period and independently overseen by ALRC President and current Federal Court Judge, the Hon. Justice Derrington, and a team of dedicated researchers, was not only necessarily costly and resource-intensive, but also highly comprehensive in both engagement and input from a broad church of stakeholders, industry leaders and academia.

It is in this context that the LIV believes that the current Inquiry should take an evidence-based approach to any contemplated legislative or regulatory reform, and to meaningfully engage with and make use of the ALRC and VLRC's existing body of extensive research and recommendations. To do otherwise would be duplicative, wasteful and a discredit to the significant contribution to recent inquiries of users of the class actions regime and the broader justice system.

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Given the substantial crossover between the current Inquiry and the nature and scope of the recent ALRC Inquiry, the LIV provides below an overview of its position in respect of a number, but not all, of the Terms of Reference of the present Inquiry.

2. Regulation of Third Party Litigation Funding

The LIV again refers to the extensive highly detailed examination of these issues in recent Inquiries. In particular, we emphasise the importance of adopting an evidence-based approach to the examination of these questions. The volume of empirical research conducted in recent years in respect of returns to third party litigation funders in class action litigation, as well as the numerous submissions by academics to those inquiries will be of great value in informing the position formed by the current Inquiry.

On review of the findings of recent Inquiries and available empirical evidence, there does not appear to be a substantial problem in respect of litigation funding entities failing, abandoning the jurisdiction, or otherwise failing to meet their obligations. Equally, Australian courts have also clearly demonstrated that they are well equipped to regulate funders within the context of proceedings before them. Accordingly, the precise nature of the problems in this area that the current Inquiry intends to address are unclear, particularly given the Australian Securities and Investments Commission's attitude towards regulation, which the LIV considers must be given some weight.

The LIV is of the view that third party funding models are an essential part of the class action regime in Australia and indeed comparable class action jurisdictions worldwide. The Australian class actions regime provides an avenue for individuals to seek collective redress in circumstances where individualised private enforcement is often uneconomical or where the barriers to individual vindication of rights face significant cost or resourcing barriers. The economy of scale afforded by representative proceedings means that individuals can access justice in circumstances where the cost of pursuing individual action would often otherwise outweigh any potential return.

We understand from our ongoing engagement with participants in the class actions industry that it is simply not possible for all class action proceedings to be conducted on an unfunded "no win, no fee" basis. Without the availability of third party funding, countless Australians would not have the resources or financial capacity to be able to vindicate their rights through the justice system.

There is a high degree of scrutiny applied by courts in the course of all class action litigation. The courts' protective jurisdiction is particularly enlivened at the stage in which settlements must be

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approved. Courts must assess whether a proposed settlement can be approved on the basis that the proposed settlement scheme is fair and reasonable and in the interests of group members, and that the quantum of all costs, fees or commission deductions sought are reasonably incurred and proportionate in the circumstances of the case.

The LIV is in favour of the ALRC's recommendation to decrease the risk of litigation funders failing to meet their obligations or exercising improper influence through a statutory presumption in favour of securities for cost, and greater Court oversight of funding agreements which must indemnify the lead plaintiff against an adverse costs order.

3. Proposed Introduction of Group Costs Orders or 'Contingency Fees'

Removal of the prohibition on contingency fees has been recommended by both the Australian Law Reform Commission (ALRC) and the Victorian Law Reform Commission (VLRC) in recent years following comprehensive review and consultation, and submissions received from a cross-section of the broader legal community.

The VLRC concluded that:

> *"As a matter of principle, the Commission considers that lawyers should be able to charge contingency fees, as it provides another avenue of funding for clients who may be otherwise unable to pursue proceedings due to the cost. While their use should be subject to certain conditions, the need for regulatory controls is not sufficient reason to prevent the ban being lifted. The matter requires national consideration, and the Commission recommends that this be pursued.*
>
> *Notwithstanding the need for national consideration of the issue, the Commission believes there is scope for lawyers to be paid a percentage of the recovered amount in Victorian class actions, where costs are already borne, and paid, in a different manner to other litigation. This would increase competition with litigation funders, which may reduce costs in some cases, and enable claims that are not financially viable investments for litigation funders to be pursued."*

Similarly, the ALRC recommended:

> *"The ALRC recommends the limited introduction of percentage-based fees (commonly called 'contingency fees')—a method of billing for legal services through a percentage of the amount*

recovered by the litigation rather than through time-based or cost scale billing. The recommended percentage-based billing model aims to provide a greater return to group members, further enable medium-sized class action matters to proceed, and, as class actions are strictly supervised by the Court, provide protection for representative plaintiffs and group members against paying a single yet disproportionate or unreasonable fee."

The LIV is of the view that a competitive and progressive legal environment is enhanced when consumers of legal services are provided with a choice of legal cost options which best suit their particular circumstances. Having access to a range of legal cost alternatives enables consumers to make more informed assessments as to whether or not engaging those legal services will benefit them. Removing the prohibition on law practices charging contingency fees would facilitate access to justice by providing another method by which legal costs can be agreed upon, thus enabling some claims to be brought which would otherwise not be brought due to lack of funding. It can also be expected to provide greater returns to group members than current funding models, since there is not the recovery of *both* legal fees and a funding commission.

The LIV has long advocated for removal of the prohibition on contingency fees. The cost of accessing justice within Australia has reached the level where many middle-income earning Australians, individual traders, partnerships and small and medium enterprises cannot afford to pay up front or at all to litigate matters. Legal aid resources are limited, and face record levels of demand. Legal aid is rarely available in civil proceedings. The LIV contends that alternative billing methods are required so clients who do not qualify for legal aid can access the services of private law practices.

The LIV restates its long-held view that contingency fees should be one method of billing available to law practices and clients as it:

a) shares the risk of litigation between the law practice and the client in matters involving disputes or litigation;
b) facilitates access to justice, enabling meritorious matters that are not able to be funded by the client alone to be funded under a contingency fee arrangement;
c) provides value - based billing to clients, as costs are aligned to outcomes rather than hours spent working on the matter (as occurs in the hourly rate billing method);
d) provides clarity to clients about the legal costs which they will be liable to pay;
e) provides an incentive to law practices to resolve matters efficiently; and
f) is already being used by litigation funders who do not have the same ethical and professional obligations as Australian legal practitioners.

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The LIV further restates its previously articulated recommendations that:

a) The prohibition on contingency fees be removed to allow law practices to charge legal fees on the basis of an agreed percentage of what is recovered by the client in the matter (award of damages or settlement monies), or on the basis of some other outcome specified in the contingency fee agreement. In assessing the amount recovered by the client:
    i. Damages, interest and standard party/party costs would be included;
    ii. Medical costs (past or future), amounts the client is required to pay to the Health Services Commission or Centrelink, or amounts awarded but not actually recovered would be excluded;
b) There be a cap of 35% on contingency fees for personal injury matters, i.e. law practices should not be permitted to charge contingency fees at a rate higher than 35% of damages or settlement monies received in personal injury matters;
c) In matters that do not involve a dispute or litigation, the prohibition on contingency fees be removed to allow law practices to charge legal fees on the basis of a percentage of an agreed factor (such as the value of the property in a joint venture agreement) upon a specified outcome occurring or being achieved in the matter;
d) In matters where a law practice charges contingency fees, they should not be permitted to also charge hourly rates for work done on that matter; and
e) Contingency fee agreements should not be permitted in family law, criminal law or migration law matters.

Numerous independent Inquiries (including the ALRC, VLRC and the Productivity Commission dating back to 2014) have formed the view that the availability of contingency fee arrangements in class action litigation would enhance access to justice and have the effect of directing greater proportions of class action settlements to group members. Contingency fees are likely to enable some claims to be pursued that would not otherwise have been possible, particularly in the context of smaller or moderately-sized claims that would typically be unattractive to a third-party funder, and would maintain safeguards against the risks of unmeritorious claims being pursued, since lawyers' and clients' financial interests continue to be aligned.

The ALRC recommended a limited percentage-based fee model for class action proceedings, which aims to provide for a greater return to group members. In its view, percentage-based fee arrangements in class action proceedings may further enable medium-sized class action matters to proceed and, as class actions are strictly supervised by the Federal and Supreme Courts,

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representative plaintiffs and group members will remain protected from paying a disproportionate or unreasonable fee.

As noted in the ALRC Final Report, it is critical that removal of the prohibition on contingency fee arrangements, and the ongoing provision of funding through litigation funders, does not damage the integrity of, and confidence in, the civil justice system. The Commission has proposed that *"the Court should be required to approve contingency fee agreements at the earliest opportunity, and that the Court be given specific statutory powers to reject, set or amend contingency fees and commission rates of litigation funding agreements".*

The Commission also queried whether *"further statutory interventions, in the form of statutory caps or statutory maximums, are necessary and appropriate".* There is merit in having some form of extrinsic guidance or standards in place in this regard, although as a general proposition the LIV believes the courts will be best placed to set those standards and make decisions about whether any particular contingency fee arrangements should be approved.

The LIV contends that removing the prohibition on contingency fees will go some way to addressing unmet legal need and will not act as an incentive to initiate unmeritorious lawsuits. Addressing unmet legal need through contingency fee agreements has the potential for flow-on benefits to the state and federal economy. The Productivity Commission has observed that a well-functioning system gives people the confidence to enter into personal and business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia's economic performance. Removing the prohibition on contingency fees has the potential to benefit the economy by encouraging confidence and investment in business development opportunities supported by a robust and affordable legal system.

Contingency fee agreements are likely to contain terms that are less complex than those found in standard legal retainer agreements, particularly those premised on time-based billing. Understanding of billing arrangements is an essential factor in increasing consumer confidence in the justice system, avoiding client dissatisfaction and in enabling clients to make informed decisions about their legal affairs. A further advantage of a simplified form of costs agreement is that clients will be better placed to compare billing arrangements being offered by more than one law practice, and it may encourage healthy competition within the market for legal services.

Removing the prohibition on law practices charging contingency fees would facilitate a more level playing field by enabling law practices to offer their clients costs terms that are competitive with those offered by litigation funders. The present prohibition on contingency fees precludes clients from

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engaging law practices on a basis comparable to that on which they can engage litigation funders. In the case of class actions, removing the prohibition on law practices charging contingency fees could lead to significant reductions in costs to clients.

The LIV has previously prepared modelling illustrating the difference between distribution of settlement funds in matters funded by third party litigation funders, and the breakdown of the settlement distribution had a contingency fee arrangement been in place between the claimants and a law practice. As is evidenced in this modelling, consumers would have received almost $90m more under contingency fee arrangements based on a 25% contingency fee. These calculations are based on 10 litigation funded cases using data provided by a law practice specialising in class actions:

Table 1

Actual		**25% contingency fee**		**35% contingency fee**	
Settlement sums ($m)	737.2	Settlement sums ($m)	737.2	Settlement sums ($m)	737.2
Funder Revenue ($m)	256.2	Contingency fee ($m)	184.3	Contingency fee ($m)	258
Paid to Claimants ($m)	464.6	Paid to Claimants ($m)	552.9	Paid to Claimants ($m)	479.2
% to Claimants	63%	% to Claimants	75%	% to Claimants	65%
Funder Profit ($m)	168.9	**Benefit to Claimants ($m)**	**88.3**	**Benefit to Claimants ($m)**	**14.6**

Conflicts of Interest

The LIV restates its position regarding the suggestion that allowing law practices to charge contingency fees will intensify conflicts of interest in comparison to situations where other billing arrangements are used. There is a concern that, under a contingency fee agreement, law practices may be encouraged to advise their clients to accept low settlement offers to ensure that the law practice receives its fee, including in instances where the client wants to reject a settlement offer and proceed to determination. There is also a concern that, under contingency fee agreements, some plaintiff law practices may be more willing to accept instructions to commence speculative legal

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proceedings with the intention of settling quickly and receiving the agreed percentage of fees. The Productivity Commission noted that such conflicts of interest are not unique to contingency fee arrangements, and require management across the board.

For example, under existing conditional fee agreement arrangements, law practices have a financial interest in the outcome of the litigation. As Chief Justice Martin noted in his submission to the Productivity Commission, on a day-to-day basis any potential conflicts arising from that interest are well managed.

The Productivity Commission has suggested that the conflict arising from a lawyer having an economic interest in a matter under contingency fee arrangements provides a benefit to consumers. The Productivity Commission observed that contingency fee arrangements "mitigate poor incentives under time-based billing by encouraging lawyers to weigh up actions against their costs." Enabling law practices to charge contingency fees would also discourage the "settle at the door of the Court" mentality. By the time a matter is due to be heard, most of the legal work has been done and many resources of the Court have been used. If contingency fee arrangements were in place, there would be an economic incentive for law practices to minimise costs and achieve the highest return for the client at an early opportunity. The Productivity Commission concluded that "damages-based billing is unlikely to promote unmeritorious claims or create insurmountable conflicts of interest compared with permitted forms of billing." There is no evidence to suggest that lawyers and law practices will not continue to manage potential conflicts of interest well if contingency fee arrangements are permitted.

Unmeritorious Claims

It has been suggested that allowing law practices to charge contingency fees will "open the floodgates" to US style litigation.

On one view, permitting law practices to charge contingency fees could play a role in enhancing the civil justice system by encouraging law practices to be more selective about the cases that they take on and to be more efficient in the way they handle those cases. Law practices which act on a contingency fee basis would assume considerable financial risk, which would act as a deterrent to them accepting instructions to commence frivolous, unmeritorious or speculative cases.

Multiple Inquiries have noted that, in jurisdictions which retain the adverse costs rule (Canada and the UK, for instance), the introduction of damages - based billing has not led to an explosion of frivolous claims. Many commentators have noted that Australia's cost-shifting rule should act as a similarly

effective deterrent to frivolous litigation if damages-based billing were introduced. Evidence from Australia suggests that allowing third party litigation funders to charge a proportion of damages has not led to an increase in unmeritorious litigation.

4. The relationship between lawyers and funders and the potential impact on lawyers' duties to their clients

The LIV is of the view that lawyers and litigation funders involved in class action litigation take their obligations under the relevant legislative frameworks, including compliance with disclosure requirements, professional obligations, and statutory overarching obligations, very seriously.

Third party litigation funding has long been a feature of the Australian class actions regime. Further, it seems that there is little by way of empirical evidence in respect of conflicts causing detriment to consumers of litigation funding. Participants in the sector have observed that while risks of conflict in funded class actions are possible, they are likely overstated as a practical matter for the following reasons:[2]

a. Group members are always represented by a lawyer who is obligated to act in their best interests;
b. Pursuant to s 33V of the Federal Court Act 1976 (Cth), any settlement must be approved by the Court;
c. There are very limited instances where a settlement has been rejected by group members on the ground of substantive unfairness that could be reasonably linked with any perceived conflict of interest between the funder and group members;
d. Similarly, there is limited empirical evidence as to the performance or position of conflict of their funders; and
e. Under existing regulations, all funders are required to maintain a 'management of conflicts' policy.

The Federal Court's *Class Actions Practice Note* (GPN-CA) requires that costs agreements include provisions for managing conflicts of interest between the applicant(s), class members, lawyers and litigation funders. This would seem an appropriate mechanism by which to set the standard for conflict identification and management.

[2] Wayne Attrill, 'The Regulation of Conflicts of Interest in Australian Litigation Funding' (Paper prepared for the UNSW Class Actions: Securities and Investor Cases Seminar, Sydney, 29 August 2013) 2.

The ALRC acknowledged in its Final Report the critical role of third-party litigation funders in providing access to justice for group members, while also recognising some of the possible risks associated with litigation funders in funded class actions.[3] Some of these risks may include the risk that third-party litigation funders may fail to meet their obligations under funding agreements; use the Federal Court of Australia for improper purposes; or exercise influence over the conduct of proceedings to the detriment of group members.

A suite of recommendations to improve the regulation of litigation funders and to support the unique role of the Federal Court in protecting the interests of all group members was recommended by the ALRC in lieu of a licensing regime for litigation funders. The recommendations provide for greater Court oversight of the litigation funding agreement; require that the funder indemnifies the lead plaintiff against an adverse costs order; and create a presumption in favour of security for costs.

The LIV is of the view that, in the event litigation funder licencing requirements are recommended, careful consideration should be given to whether any licensing regime *"complements and does not overlap with the primary role of the Courts in supervising the class action regime".*[4]

The LIV notes the courts' fundamental role in the administration of justice and the class action-specific tests designed to ensure that settlements are fair and reasonable and in the interests of group members and not just the named litigants. The courts' role in the management of class actions is unique. The close oversight, regular case management intervention, and careful scrutiny by the courts, particularly at the settlement approval stage but also over the course of proceedings, renders courts best placed to determine the majority of intra-litigation disputes between group members and funders.

If such a licencing scheme is not implemented, litigation funding entities should remain subject to existing ASIC Regulatory Guide 248 requirements, and annual compliance reporting in respect of the implementation of practices and procedures to manage conflicts of interest should persist.

The LIV does not consider such requirements to be overly onerous or oppressive for litigation funding entities which operate in Australia given the current compliance requirements already in place, and

[3] ALRC Final Report, page 18.
[4] ALRC, *Inquiry into Class Action Proceedings and Third Party Litigation Funders*, Discussion Paper 85 (2018), page 61.

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they would serve to increase confidence in the role of third-party funding entities in the class actions regime.

5. The application of common fund orders and similar arrangements in class actions

Since at least 2016,[5] common fund orders (a mechanism by which litigation funding costs may be shared among all class members, including those who have not entered into a funding agreement) have been a common feature of Australian class action litigation.

The High Court of Australia recently held on a 5:2 majority in *BMW Australia Ltd v Brewster & Anor* and *Westpac Banking Corporation & Anor v Lenthall & Ors* that courts do not have the power under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) to make such orders.

The Federal Court of Australia, in light of this decision, later amended its practice note, stating:

> *"Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the* ***Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding*** *charges or commission, amongst all persons who have benefited from the action. The notices provided to class members should bring this to their attention as early in the proceeding as practicable."*[6]

The LIV is of the view that given the recent developments in the jurisprudence, the position taken by the Federal Court of Australia, and the increasing uncertainty in extant proceedings in which common fund orders were previously sought by the parties or approved by the Court, further clarity in respect of the availability of common fund orders would benefit the efficient and transparent operation of the class actions regime.

It remains open to state and federal legislatures to expressly empower courts to consider making such orders other than at the settlement distribution stage.

[5] Following the Full Federal Court's 2016 decision in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.
[6] Class Actions Practice Note (GPN-CA) https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca

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

The ALRC Final Report noted that "Over the course of the two and a half decades since the introduction of the class action regime in Australia, the number of class actions has grown steadily, but not exponentially."[7]

Indeed, the available empirical evidence suggests that the number of class actions filed since the inception of the class actions regime represent, on average, only 23 class actions being filed each year.[8]

This issue has become a common talking point in debates on class actions, yet it appears to mislead as to the real issues that should be the subject of debate: it is not the number of proceedings of itself that should inform debate; it is the number of unmeritorious proceedings. If proceedings are settling (typically on advice from experienced class action-specialist law firms) or running to judgment and receiving court approval, this would seem to be an indication that the regime is operating as intended, and any debate should really focus on the substantive laws that are contravened.

If there are large numbers of 'failing' claims, then there is likely to be a valid debate regarding whether there are perverse incentives to generate claims inherent in the class actions regime. The evidence indicates this is simply not the case. Suggestions of 'greenmail' settlements and similar problems do not stand up to scrutiny given the sophistication of the advice most large class action defendants receive, and the court's role in approving settlements. If there are concerns about the rates or numbers of claims, focus should be directed to the substantive causes of action and laws being pleaded, not the procedural mechanism involved.

There is a raft of empirical evidence which strongly indicates that, to the contrary, the Australian class action regime is substantially under-utilised relative to comparable jurisdictions.

In Quebec and Ontario, an average of 104 class actions are filed each year. This is more than four times the average annual filings in all Australian courts and relates to only two of the fourteen Canadian jurisdictions.[9]

[7] ALRC Final Report, page 15.
[8] Morabito, "Shareholder Class Actions in Australia – Myths v Facts" (November 2019): SSRN: *https://ssrn.com/abstract=3484660* or *http://dx.doi.org/10.2139/ssrn.3484660*.
[9] Ibid.

In Israel, more than 1,200 class actions were filed in each calendar year between 2017 and 2019.[10] This amounts to an average of 3.3 class actions being filed per day, compared to Australia's average of just 2 per month, despite Israel's population being only a third of Australia's.

The LIV again refers to comments and findings of the previous ALRC and VLRC Inquiries, and believes that there should be careful consideration by the current Inquiry of the available evidence in this regard.

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

The LIV strongly urges the current Inquiry to engage in consultation with key stakeholders prior to implementing unilateral legislative or regulatory change. Such reforms could have unintended consequences for the efficient and fair operation of the class actions regime unless those who regularly operate within the regime are consulted to provide input and guidance as to the real-world impacts of any proposed reform.

The LIV would be pleased to engage in this process prior to and following the finalisation of any recommendations flowing from this inquiry, and well in advance of the implementation of any substantive class action reform.

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

The LIV acknowledges the unprecedented uncertainty and strain on Australian businesses and the broader national economy emerging from the ongoing COVID-19 pandemic globally, and notes the serious and ongoing impact on its members, the legal profession, and the justice system more broadly.

This is an economic environment that poses substantial challenges for individuals and families, and indeed all economic actors, not just businesses. Any consideration of how the COVID-19 situation and class actions interact must consider the importance of consumer protection and providing viable

[10] See *http://www.inhouselawyer.co.uk/legal-briefing/class-actions-in-israel-a-cautionary-tale-for-international-corporations/?pdf=22621*; and: *https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/israel*.

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avenues of redress for people who suffer loss as a result of contraventions or breaches by defendants. The converse is that problems created by this situation may be worsened for those with the least ability to withstand them, or left unable to be remedied by individuals. There are many facets to this complex issue, and the issue of access to justice is increasingly important in times of economic difficulty. It is imperative, therefore, that the unintended consequences or incentives that may be created by any "safe harbour" provisions or restrictions on pursuing legal remedies be very carefully considered.

At the outset, it is critical to note the statutory threshold requirement that all allegations pleaded in class action proceedings have a reasonable basis. Before any form of representative proceeding is commenced, law firms and litigation funders embark on a program of intensive due diligence to satisfy themselves, and ultimately the court, that a contemplated claim has merit. There is no indication that unmeritorious claims, particularly in respect of shareholder or securities class actions, are being commenced on a widespread basis.

It is important to note that the *Corporations Act 2001* (Cth) currently contains a number of "safe harbour" provisions which operate on the basis that where directors' conduct is reasonably likely to result in a better outcome for a company at risk of actual or potential insolvency (for instance, an improved financial position), those directors may be protected from personal liability. These provisions are designed to encourage company directors to take reasonable risks with the aim of turning their company around, without feeling pressure to immediately commence administration or liquidation processes. Whilst directors are still required to comply with all other duties owed to the corporation, the "safe harbour" provisions purpose is to encourage honest, diligent and competent directors to retain control of their companies and to be innovative in their recovery efforts.

The continuous disclosure regime and ASX Listing Rules also contain a number of exceptions to disclosure obligations for corporations, many of which remain readily available in the current pandemic context. Companies may be exempt from the requirements to advise the ASX of material information of which they are aware which may have a material effect on the price or value of its securities in the following circumstances:

a) Where it would constitute a breach of a law to disclose the information;
b) Where the information concerns an incomplete proposal or negotiation;
c) Where the information comprises matters of supposition or is insufficiently definite to warrant disclosure;

d) Where the information is generated for internal management purposes of the entity, or the information is a trade secret;
and

the information is confidential and the ASX has not formed the view that the information has ceased to be confidential, and a reasonable person would not expect the information to be disclosed.[11]

In the current context, corporations that are concerned about continuous disclosure liability as a direct result of uncertainty surrounding the impact of the global pandemic on their business may rely on one or more of the above exemptions.

The ALRC concurred with the view that was expressed by the Productivity Commission in 2014 when it noted that, 'public debate about the underlying law is clearly more appropriate than attempting to stifle a mechanism...' by which class actions were prosecuted.[12]

In the context of regulators remaining chronically under-resourced, it is simply not possible for regulatory agencies to conduct enforcement litigation for the protection of consumer and investor rights, and individual consumers have very few other avenues for seeking recourse.

Indeed, this is not the time to dilute established Corporations Act provisions which seek to protect the integrity and efficiency of the market. The Corporations Act and Listing Rules provide a fair and proven framework that has historically ensured that investors in securities traded on the ASX can have confidence that they are participating in a market unaffected by material omission or deception. This is a positive feature of the open market system that should be protected rather than 'watered down'.

9. Other concerns raised by LIV members

In addition to the above observations, the LIV's call for input into this inquiry also generated a small number of concerns relating to the operation of the class actions regime more broadly, which are canvassed for completeness below. Given the diversity of views of its members, the LIV takes no particular position on each of the below issues, but where appropriate does clarify how the operation of the regime or the relevant and/or enabling legislation works in practice.

[11] ASX Listing Rule 3.1 and 3.1A; ASX Continuous Disclosure; An Abridged Guide.
[12] Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 621. The then Presiding Commissioner has not resiled from that view; ALRC Final Report, page 264.

Concerns that settlement monies are not fairly distributed to plaintiffs, or that settlement distribution should not be administered by plaintiff lawyers

The LIV understands settlement distribution processes in Australian class actions are overseen from start to finish by the courts, and that 'Settlement Distribution Schemes', which generally govern the process, timing, and mechanisms by which settlement distributions can be made, are also closely scrutinised and approved by the Court before any settlement payments can be made. Settlements will only be approved by the courts if they are assessed as being in the interests of group members and proportionate.

Further, it is important to note that the lawyers representing the plaintiff in the proceedings are not, as a matter of course or without careful consideration of the court, appointed to administer the settlement. In fact, there must be good reason for the courts to appoint the lawyers that ran the case to administer the settlement. A court-appointed administrator can be (and has been in some cases) an appointed third party rather than the solicitor on record or a law practice. Once all monies flowing from the settlement have been distributed, the court-approved settlement administrator must generally file affidavit evidence advising the Court of the completion of the settlement distribution, and the matter is concluded only once the court is satisfied that the proceeding has resolved in full, and all settlement monies have been appropriately distributed.

The court continues to manage and oversee the distribution of settlement funds to finality even after the proposed settlement is granted court approval. The LIV notes the findings of the ALRC and VLRC Final Reports, and understands that neither Inquiry recommended the overhaul of the current system of the administration or court oversight of settlement procedures.

Concerns that settlements are approved without group member consultation

The LIV notes that in all Australian class action jurisdictions, group members are given the opportunity to object to a proposed settlement well in advance of it being brought before the court for approval. In fact, in all class action proceedings, the courts generally require that a detailed notice of proposed settlement be sent out to all group members well prior to the proposed settlement coming before the court for approval. The court mandates this notification regime, and requires that an objections process take place in all class action settlements prior to the court determining whether to approve the proposed settlement.

Concerns regarding law practices establishing their own litigation funding entities

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While this issue does not fall directly within the scope of the current Inquiry, the LIV has some concerns regarding related law practices and litigation funding entities that have a financial interest in the outcome of litigation that is not properly disclosed, regulated, and operating at arms-length. Existing class action funding models such as 'no win, no fee' arrangements and third party litigation funding are subject to ongoing court oversight, strict regulation and disclosure obligations throughout the course of the proceeding. The proposed group costs order model contemplated for introduction in Victoria would also be subject to the same strict and ongoing judicial oversight, disclosure obligations and regulation, and indeed, the rate itself would ultimately be set by the court rather than the plaintiff lawyers conducting the litigation that seek such orders.

In any funding model in which a law practice is to have a financial interest in the litigation, the approaches most beneficial to class members are the 'no win, no fee' or a legislated contingency-fee model, as both do not involve the charging of a commission in addition to the law practice's legal costs.

In circumstances where a law practice and litigation funding entity are related, and the funding entity provides funding for a proceeding conducted by the law practice, courts have long exercised, and will continue to exercise, their existing powers to intervene as and when appropriate to prevent any possible abuse of process.

The only beneficiaries of class actions are the litigation funders and law practices

The LIV notes that Australian courts are obliged under the relevant class action legislation to ensure that proposed class action settlements are proportionate in terms of the returns to group members and the quantum of all disbursements, legal or funding fees that are proposed to be deducted from the settlement sum. Where the court determines in the circumstances of the case that the proportionality test is not satisfied in favour of group members, it will decline to approve the proposed settlement. Further, the findings of the ALRC and VLRC Final Reports do not support this contention.

Concerns regarding individual proceedings being better vehicles for litigating than representative proceedings

The LIV notes that individual claimants have the ability to pursue their own individual proceeding by, at any time, applying to opt out of any class action proceeding in order to commence their own individual claim. There are no barriers to individuals choosing to commence their own litigation, even in circumstances where a class action is already on foot.

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The LIV acknowledges that there is often a serious resource imbalance between individuals and corporations. The costs involved in pursuing individual litigation, in the vast majority of cases, often outweighs any compensation derived from that litigation. The cost of conducting the individual proceedings as well as significant disbursements such as expert evidence required to conduct these claims, particularly on an individual basis, would likely severely diminish any potential returns to the claimant, rendering the litigation commercially unviable.

The LIV understands that the reason why certain types of claims that involve common issues and/or common questions of fact or law among more than seven claimants are conducted on a representative basis is due to the economy of scale afforded by the court hearing the same or similar issues and questions together. This reduces the cost of litigation; means that those who have suffered a small or moderate loss can receive some return from the litigation; and also means that the court's resources are used efficiently and applied uniformly.

That any contingency fee should be fixed by a Court (preferably ranging from 10% to 30%) depending on the difficulty of the proceedings

The LIV understands after significant consultation with industry, regulators and government that this is precisely what the proposed Group Costs Order (GCO) Bill in Victoria (the *Justice Legislation Miscellaneous Amendments Bill 2019* (Vic)) envisages – that is, that the court will only allow a GCO to be made at a rate the court deems appropriate given the circumstances and complexity of the case, and will not necessarily approve the rate sought by the lawyers conducting the litigation.

That class action settlements should take the form of Structured Settlements

The LIV notes that no law reform commission or independent inquiry to date has previously recommended this approach for broad implementation in class action litigation. The LIV understands that it may be open to parties to propose such a settlement structure if that is the nature of the settlement agreed between the parties, however it would ultimately be up to the courts to approve or decline to approve such a settlement distribution mechanism.

Conclusion

The LIV again emphasises the importance and value of the current Inquiry taking an evidence-based approach to any contemplated legislative or regulatory reform, and encourages the Inquiry to adopt this approach and to meaningfully engage with the ALRC and VLRC's existing body of extensive research and recommendations in the conduct of this Inquiry.

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The LIV hopes that this Inquiry results in meaningful engagement with industry, key stakeholders, and those who regularly participate in the national and state class actions schemes, as well as a balanced assessment and consideration of available empirical evidence in respect of the current operation of the regime.

The fundamental principles of enhancing fairness, efficiency, and equitable access to justice through the vehicle of class action proceedings, and safeguarding the integrity of the civil justice system, must underpin any findings or recommendations made by the current Inquiry.

Should you have any queries about this memo, please contact Irene Chrisafis, Senior Lawyer and Privacy Officer to the Litigation Lawyers Committee (03 9607 9386 or IChrisafis@liv.asn.au).

Yours sincerely,

Sam Pandya
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