Australian Government

Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services report:

Litigation Funding and the Regulation of the Class Action Industry

and

The Australian Law Reform Commission report:

Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders

Foreword

The Australian Government welcomes both the reports of the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS), and the Australian Law Reform Commission (ALRC), on class actions and litigation funding. The Government is committed to ensuring that class members receive a fair and equitable outcomes from class actions, including those supported by a litigation funder.

The ALRC's report, *Integrity, Fairness, and Efficiency: An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders*, was tabled in Parliament in January 2019. Its terms of reference required the ALRC to consider whether, and to what extent, class action proceedings and third party litigation funders should be subject to Commonwealth regulation. In particular, the ALRC was directed to consider key issues going to the fairness and efficacy of Australia's class actions and third party litigation funding regimes, including costs, conflicts of interests, the distribution of proceeds and prudential requirements.

The report highlighted the need for a range of changes to the class action framework to keep pace with evolutionary developments in this legal market. The Government carefully considered the complex issues raised in the ALRC report, and considered the best way to ensure that Government reforms account for continuing developments in the commercial and legal environment following the release of the ALRC report.

The Government subsequently moved to refer an inquiry to the PJCCFS to further scrutinise the class action regime and the litigation funding industry. The Committee's report, *Litigation funding and the regulation of the class action industry*, was tabled in December 2020. The Government considered that the inquiry would provide an avenue to further test and refine the ALRC's recommendations, while providing an additional evidence base for legislative changes. In particular, the Government recognised the need for greater scrutiny of the impact that litigation funders' business models have on justice outcomes for class members, as well as on the Australian economy in the context of the COVID-19 pandemic. This included consideration of:

- the reasons for the unprecedented growth in the number of class actions in Australia, including to what extent this owed to the increasing presence of litigation funders
- the rates of return to litigation funders and whether their significant profits were coming unjustly at the expense of the ordinary Australians, who join class actions seeking fair compensation for an injury or loss
- whether the regulatory framework for litigation funding remained fit-for-purpose.

Both the PJCCFS and the ALRC have affirmed the importance and value of class actions. The class action regime, when working as originally intended, enables groups of people to pursue redress more cheaply and efficiently than would otherwise be the case, and helps discourage wrongdoing. Additionally class actions promote the efficient and effective use of court resources.

However, the reports also highlight a number of reform priorities to ensure that class actions continue to operate in the best interests of Australians. These will form the building blocks of the Government's reform package for class actions and the litigation funding industry.

The Government has also had regard to matters before the courts that clearly highlight many of the issues addressed by the PJCCFS and ALRC reports about litigation funding practices. Notably, this

includes the class action against Banksia Securities Limited (Banksia) brought by Laurence John Bolitho on behalf of Banksia Debenture holders.

The Government notes the recent decision of the Honourable Justice John Dixon in the *Banksia* case and considers it to be a 'wake-up' call for the litigation funding industry and legal profession. The Government notes, in particular, the findings that:

- a litigation funder and five lawyers ('contraveners') engaged in "egregious conduct" in connection with a "fraudulent scheme", intending to claim more than $19 million in purported legal costs and funding commission from the settlement sum in a group proceeding
- the contravener's conduct had "shattered...confidence" in "expectations of lawyers as an honourable profession", and "corrupted the proper administration of justice"
- the contraveners' actions constituted "appalling" breaches of their respective duties to the court, particularly the paramount duty to the court and overarching obligations imposed on them by the *Civil Procedure Act 2010* (Vic)
- the contraveners should pay damages of $11,700,128 to approximately 16,000 group members, plus the costs of the remitter on an indemnity basis.[1]

The Government has already taken action, and will continue to take action, to address these concerning litigation funding practices.

By bringing litigation funders within the scope of the Corporations Act, the Government's amendment of the Corporations Regulations in 2020 enhanced the oversight and enforcement powers available to ASIC with respect to litigation funding schemes. The amendments also imposed fiduciary and statutory duties on the Responsible Entity of litigation funding schemes which fall under the definition of MISs in the Corporations Act. The Government has also consulted through exposure draft legislation, on changes which would further constrain litigation funder impropriety in class actions, and enhance protections against the circumstances arising in the Banksia class action.

If progressed, the reform package under consideration by the Government could achieve a number of key objectives. First, the Government will consider reforms to ensure that Australians get a fair and proportionate share of any judgment or settlement sum resulting from class actions. A critical finding of the PJCCFS majority report was that the return to litigation funders from supporting a class action is often disproportionate to their costs and risks. In particular, the majority report highlighted that the practice of percentage-based billing enables windfall profits to be obtained. Similarly, the ALRC's report found that when litigation funders were involved in a class action, the median return to class members was just 51 per cent, compared to 85 per cent when a funder was not involved. These findings are consistent with the judgments of the courts that have drawn attention to the fact that class members can receive unreasonably low proportions of judgment or settlement sums once litigation funding commissions and legal costs are deducted. It is reasonable that litigation funders and lawyers make a profit to ensure the sustainability of their businesses (which in turn safeguards access to justice). However, such a state of affairs runs counter to the compensatory nature of the class actions system, which is primarily designed to vindicate the rights of class members.

The Government therefore conducted further consultation on how best to guarantee a statutory minimum return of the gross proceeds of a class action, as recommended by the PJCCFS. This consultation occurred between 1 and 28 June 2021 and received 23 submissions.

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[1] *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666

Having regard to the outcomes of the consultation, the Government is considering a reform to ensure that class members who are members of a class action litigation funding scheme will receive a fair and reasonable proportion of the gross proceeds of a class action. It has consulted on this measure through exposure draft legislation. Notably, the exposure draft legislation included a proposed rebuttable presumption that the return to members of the litigation funding scheme must be 70 per cent of the gross proceeds in order for the distribution of proceeds to meet this threshold. This would provide a clear signal that the community expects that the primary purpose of the class action regime is to vindicate the rights of ordinary Australians. At the same time, the flexibility of the Court to do justice in a particular matter would be preserved.

This exposure draft legislation also sought views on how Government could best enhance court oversight and ability to intervene in the terms of a litigation funding agreement, to ensure that justice can be done in a particular matter. This could include enhancing the role of referees and contradictors in testing the reasonableness of legal costs and litigation funding fees.

Second, the Government will consider opportunities to further enhance the systemic regulation of litigation funders. The Government welcomes the endorsement by the majority report of the PJFCCFS of the Government's decision to require litigation funders to hold an Australian Financial Service Licence (AFSL) and comply with the managed investment scheme (MIS) regime. Litigation funders had been exempted from these requirements by the previous Government. The Government removed these exemptions, which had the effect of:

- requiring litigation funders to act honestly, efficiently and fairly
- requiring litigation funders to have the necessary competence and organisational resources to provide financial services
- providing transparency around the operations of litigation funders.

As the PJCCFS majority report noted, the action taken by the Government has aligned the regulation of litigation funding in class actions with that which applies to other financial services. The Government is committed to continuously ensuring that regulation is fit-for-purpose. The Government also notes the concerns identified by the majority report in circumstances where lawyers conduct class actions on a contingency fee basis.

Third, the Government recognises that class action and litigation funding policy must have due regard to the imperatives of Australia's economic recovery from the COVID-19 pandemic. As noted earlier, class actions rightfully play an important role in deterring corporate wrongdoing and providing a remedy where such wrongdoing has occurred. However, it is also important to ensure that economically inefficient class actions do not have a detrimental effect on business.

The Government therefore temporarily amended the *Corporations Act 2001* (Corporations Act), in the early days of the COVID-19 pandemic, so that companies and officers would only be liable for a breach of continuous disclosure obligations, if there is "knowledge, recklessness or negligence". Following the PJCCFS majority report endorsing this change, the Parliament permanently legislated this reform, which came into effect on 22 August 2021. The Government recognises that in a COVID-19 context, the challenges of determining whether a given piece of information will have a material effect on the price or value of securities may increase the risk of opportunistic class actions. This change has provided companies and officers with greater confidence to provide guidance to the market at a time when such disclosures are even more important for investors and other stakeholders.

Fourth, the Government will introduce legislative changes to enhance the protective and supervisory role of the Federal Court. Both the PJCCFS majority report and the ALRC made several recommendations to that end. The Government recognises that these proposals will bolster the protection of class members, enhance judicial economy, and better align the Court's ability to regulate litigation funders with the significant impact that funders can have on matters before it. These enhancements to the Federal Court's powers are timely given that the growth in the involvement of litigation funders would not have been foreseen when the federal class action regime was enacted in 1992.

To strengthen the effectiveness of these recommendations, the Government is considering whether to progress a number of legislative changes through the Corporations Act. This will ensure that class members are protected, irrespective of which jurisdiction a matter is filed in, and prevent forum shopping to avoid these important protections for consumers. Fragmentation in class action regimes also poses a risk of competing class actions and impedes the development of a national class action jurisprudence.

Finally, as part of the Government's commitment to drive harmonisation in the class action regime, the Government will give further consideration to the majority report's recommendation that the Federal Court be conferred with exclusive jurisdiction for class action proceedings arising under the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

The Government will continue to consult with stakeholders prior to implementing its reforms. It will also ensure that all necessary Regulatory Impact Analysis requirements are completed prior to the introduction of legislation or other implementation of its commitments in this Response.

The Government extends its thanks to the Committee, and in particular to the Chair, Senator James Paterson, for ably leading the PJCCFS inquiry. Likewise, the Government thanks the ALRC, under the leadership of the ALRC President and Commissioner in Charge, the Hon Justice Sarah Derrington, for its report.

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Theme 1: Returns to class members

PJCCFS and ALRC inquiries

The PJCCFS and ALRC both made recommendations directed towards ensuring that class members receive a fair and proportionate share of proceedings arising from a class action, whether resolved by judgment or settlement.

Evidence provided to the PJCCFS and ALRC highlighted clearly that there were many instances of this not occurring. Data cited by the PJCCFS indicated that 41.4 per cent of the gross settlement of funded class actions went to lawyers and litigation funders, across the period 2001 to 2020.[2] The PJCCFS concluded that in many cases, litigation funders were obtaining windfall profits well in excess of the risks they were taking, at the expense of the class members' share of the proceeds. The PJCCFS noted that the incidence of such windfall profits were not restricted to isolated instances of illegal or egregious behaviour. Rather, there appeared to be a "systemic and inappropriate skewing of the proceeds of a successful class action".[3] Even now, this problem remains prevalent, for example, in *Whittenbury v Vocation Limited (in liquidation)*[4], a decision handed down in 2021, the lawyers and funders together received nearly 50% of the settlement sum.

Data obtained by the ALRC indicated that, between 2013 and 2018, the median settlement amount returned to class members in cases involving litigation funders was 51 per cent, compared to an 85 per cent return in unfunded maters.[5] The ALRC also found that the proportion these costs deducted varied significantly. In data provided to the ALRC, in the period 2013-2018:

- legal fees ranged from 2 per cent of a $250 million settlement, to 50 per cent of a $6.75 million settlement and a $4 million settlement
- funding commissions ranged from 17 per cent of a $6.75 million settlement and a $3 million settlement, to 62 per cent of a $6.6 million settlement.[6]

Both the PJCCFS and ALRC agreed that greater oversight of the litigation funding industry was required. Fees and charges of litigation funders and lawyers remain largely unregulated and supervised only by the courts. The PJCCFS cited various examples where the Federal Court has intervened in class actions where it has deemed a funding commission to be excessive. This includes a matter where the Court reduced a funder's commission from 32 per cent to 25 per cent[7] and another where the commission was reduced from 25 per cent to 8.3 per cent.[8]

In light of this data, both the PJCCFS and ALRC concluded that greater judicial control of class actions and litigation funders were required to achieve the following objectives.

- Protect class action members from excessive fees.
- Provide fairer outcomes for business, corporations, shareholders and governments that defend funded class actions.

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[2] *Parliamentary Joint Committee on Corporations and Financial Services – Litigation funding and the regulation of the class action industry,* Final Report, December 2020 , p. 36
[3] PJCCFS, p. 41
[4] [2021] FCA 829
[5] *Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, Final Report, December 2018, p. 70
[6] ALRC p. 84
[7] *Endeavour River Pty Ltd v MG Responsible Entity Limited [2019] FCA 1719*
[8] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) [2018] FCA 1842*

- Ensure the more appropriate use of scarce judicial resources.

The PJCCFS considered that the use of percentage-based fees appeared to contribute significantly to the windfall returns achieved by litigation funders. It therefore recommended consideration be given to a range of alternative approaches including empirical analysis of past cases, percentage limits, sliding scales, investment and insurance risks-return principles, net present value estimates, and a guaranteed statutory minimum return of the gross proceeds of a class action.

The ALRC did not make similar recommendations specifically targeting the commissions of litigation funders. However, it did recommend that the Federal Court be given broad power to approve, vary or amend litigation funding agreements when the interests of justice require. This would enable the Federal Court to take an active role in the construction of the legal costs agreement and ensure proceedings advance upon fair and reasonable terms. It did not seek to prescribe statutory criteria to define the 'interests of justice'. Instead it recommended reliance on the Federal Court's existing and developing jurisprudence. The ALRC further recommended two particular aspects of any litigation funding agreement be prescribed in statute, that:

- the funding agreement must include an indemnity in favour of the representative plaintiff for adverse costs
- the funding agreement is governed by the law of Australia and subject to the jurisdiction of Australian courts.

The PJCCFS agreed with these recommendations by the ALRC. It noted that increasing the Federal Court's supervisory and protective role in class actions would complement the recommendations for litigation funders to be managed under the AFSL and MIS regimes. The PJCCFS made further recommendations to bolster the use of referees as litigation funding fee assessors, with the possibility of costs being imposed on the ligation funder where their conduct justified this.

Government response

The Government is considering a suite of reforms to ensure that class members receive a fair and proportionate share of the proceeds of a class action supported by a litigation funding scheme. The Government recognises the role played by litigation funders, among others, in ensuring access to justice, particularly in the class action system. At the same time, the evidence provided to the PJCCFS and ALRC highlight that far too often litigation funders are making profits that are disproportionate, when regard is had to the costs and risk they have undertaken. These undue profits come at the expense of class members whose legal rights a class action is meant to vindicate.

The Government has consulted, through exposure draft legislation, on potential reforms to address this issue. Such reforms might, among other things:

- require that a member of a MIS that is a class action litigation funding scheme must agree to be a member of the scheme
- require the constitution of a MIS that is a class action litigation funding scheme to require the funder to specify in a litigation funding agreement a method for distribution of gross proceeds to members of the scheme
- allow the Court to determine whether this proposed distribution is fair and reasonable, having regard to specified factors that the court must and/or must not consider
- establish a rebuttable presumption that a return to members of the class action litigation funding scheme that is less than 70 per cent of the gross proceeds is not fair and reasonable

- enable the Court to approve and vary the proposed share of the gross proceeds that scheme members will receive under a litigation funding agreement to ensure the distribution is fair and reasonable
- require the Court, in making a fair and reasonable determination, to consider the report of a fees assessor and a contradictor appointed to assist the court in making the determination
- prevent third party funding of, or the distribution of proceeds to a funder in, a class action in which a legal representative for a party has a personal financial interest in the funder.

Such reforms, if progressed, would establish clear legislative parameters and processes to ensure that class members receive a fair and reasonable share of the proceeds of a class action. Critically, by setting a specific benchmark in legislation, there would be an important signal to the Court, litigation funders and the legal profession that the community expects that the justice system must serve the interests of ordinary Australians. The Court's flexibility to do justice in the circumstances of a particular case would be preserved by framing this benchmark as a rebuttable presumption.

Such an approach is consistent with the feedback received through a consultation process conducted by Government, as recommended by the PJFCCFS, in relation to potential design elements of a statutory minimum return.[9] The majority of submissions indicated a preference for Court discretion to determine an appropriate distribution of settlement proceeds amongst class members, litigation funders and legal representation.

Parliamentary Joint Committee – Recommendation 11
The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce: • a requirement for a litigation funding agreement to obtain approval of the Federal Court of Australia to be enforceable; and • a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.
Australian Law Reform Commission – Recommendation 14
Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that: • third-party litigation funding agreements with respect to representative proceedings could only be enforceable with the approval of the Court; • the Court has an express statutory power to reject, vary or amend the terms of a funding agreement;

The Government **notes** these recommendations.

The Government is open to supporting measures which would enhance the Court's supervisory and protective role with respect to class members, and help ensure that the class action regime delivers fair and equitable outcomes for class members.

[9] Recommendation 20 of the PJCCFS report was that the Government consult on the best way of guarantee a statutory minimum return, whether such a return should be set at 70 per cent, and whether a graduated approach was appropriate. Consequently, the Treasurer and Attorney-General conducted a joint consultation process from 1 June to 28 June 2021. Twenty-three submissions were received from litigation funders, law firms, industry bodies and academics.

As both the PJCCFS and ALRC have noted, such measures would enable the Court to properly interrogate a litigation funding agreement. This recognises the significant impact that funders have on the conduct of a class action and ensures that the terms of an agreement are not unduly weighed in favour of the litigation funder, at the expense of the class. The Government considers that litigation funding agreements should only be approved by the Court if they are fair and reasonable.

The Government is considering reforms under which courts would approve, or vary, the proposed distribution of gross proceeds among members of a class action litigation funding scheme, on the basis that such a distribution is fair and reasonable. It has consulted on this measure through exposure draft legislation.

Parliamentary Joint Committee – Recommendation 12
The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to require that any litigation funding agreement in a class action in the Federal Court of Australia is governed by Australian law and the Federal Court of Australia approves a litigation funding agreement only if the agreement provides that the litigation funder submit irrevocably to the jurisdiction of the Federal Court of Australia.
Australian Law Reform Commission – Recommendation 14 (cont.)
Amend the Federal Court Act to provide that: • Australian law governs litigation funding agreements and funders submit irrevocably to the jurisdiction of the Court.

The Government **notes** these recommendations.

The Government is open to supporting measures which would enhance the Court's supervisory and protective role with respect to class members, and help ensure that the class action regime delivers fair and equitable outcomes for class members.

The Government is considering reforms whereby a constitution of a MIS that is a class action litigation funding scheme must require that any funding agreement under the scheme submit to the law of an Australian jurisdiction as well as Australian courts. It has consulted on this measure through exposure draft legislation.

If such legislation was progressed, it would prevent legal challenges to litigation funding arrangements being forced offshore where the arrangements concern Australian claimants and claims arising under Australian law. Restricting choice of law and jurisdiction in this manner may be appropriate. As a matter of public policy, funding agreements to support litigation in Australia should be subject to, and in accordance with Australian law. The Court should be able to adjudicate and resolve any issues arising to a litigation funding agreement relating to a matter before it.

Parliamentary Joint Committee – Recommendation 13

The committee recommends the Australian Government amend the Federal Court of Australia's Class Actions Practice Note to the effect that, pursuant to section 54A of the *Federal Court of Australia Act 1976*, at any point in a proceeding, the Federal Court of Australia may appoint a referee to act as a litigation funding fees assessor.

The Government **notes** this recommendation.

The Government is open to supporting measures that seek to ensure that litigation funding fees are fair and reasonable, so that the class action regime delivers fair and equitable outcomes for class members. Independent third parties such as litigation funding fee assessors provide impartial and expert advice to enable the Court to determine the appropriateness of litigation funder fees.

The Government is considering reforms that would require courts to consider the report of a litigation funding fees assessor, appointed as a referee in class actions, prior to making an order about the distribution of proceeds under a class action litigation funding scheme. Such an approach would go beyond the PJCCFS recommendation in this respect, given the important role that referees play. The Government has consulted on this measure through exposure draft legislation.

Parliamentary Joint Committee - Recommendation 14

The committee recommends a litigation funding fees assessor appointed by the Federal Court of Australia be a professional with market capital or finance expertise.

The Government **agrees-in-principle** to this recommendation.

The Government notes that this recommendation relates to matters falling within the responsibility of the Federal Court of Australia. The Government is supportive of measures that seek to ensure that litigation funding fees are fair and reasonable, so that the class action regime delivers fair and equitable outcomes for class members.

The Government will engage with the Federal Court on this recommendation.

Parliamentary Joint Committee - Recommendation 16

The committee recommends the Federal Court of Australia's Class Actions Practice Note state the Federal Court of Australia may order the costs of the work undertaken by a referee appointed by the Federal Court of Australia as a litigation funding fees assessor be paid by a litigation funder, in circumstances where the conduct of a litigation funder justifies such an order being made.

The Government **notes** this recommendation.

The Government is supportive of measures that seek to ensure that litigation funding fees are fair and reasonable, so that the class action regime delivers fair and equitable outcomes for class members. This includes encouraging the use of litigation funding fee assessors as referees.

The Government is considering reforms that would require that the expense of a litigation funding fee assessor to be borne by the litigation funder. Such an approach would go beyond the PJCCFS in this respect, so that the funder would bear responsibility for demonstrating to the Court that a proposed distribution of the proceeds of a class action is fair and reasonable. The Government has consulted on this measure through exposure draft legislation.

Parliamentary Joint Committee - Recommendation 20

The committee recommends the Australian Government consult on:

- the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);
- whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor; and
- whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.

The Government **agrees** to this recommendation.

The Government notes the PJCCFS finding that litigation funders appear to be making windfall profits from Australia's class action system at the expense of class members and defendants. Critically, the PJCCFS highlighted that incidence of such windfall profits is not restricted to isolated instances of illegal or egregious behaviour. Rather it found that there appeared to be a systemic and inappropriate skewing of the proceeds of a successful of class action. The Government subsequently consulted on this issue in June 2021, as the PJCCFS recommended.

The Government is committed to ensuring that Australians get their fair share of judgment or settlement sums, as the class action regime should provide fair and equitable outcomes for class members. The class action regime exists primarily to vindicate the legal rights of class members.

The Government is thus considering reforms to require that the constitution of a MIS that is a class action litigation funding scheme is to specify a method for the distribution of gross proceeds in a litigation funding agreement. The Court would be empowered to determine whether this proposed distribution is fair and reasonable.

Critically, the Government is considering as part of this approach, legislating a rebuttable presumption that a return to the members of the relevant class action litigation funding scheme must be 70 per cent or higher to meet this threshold.

The Government has consulted on this approach through exposure draft legislation.

Theme 2: Regulation of Litigation Funders

PJCCFS and ALRC inquiries

The PJCCFS and ALRC both recommended measures to improve systemic regulation of litigation funders operating in Australia, beyond the exercise of court powers in a particular class action.

In 2009 the Full Court of the Federal Court of Australia held that litigation funding schemes fit the definition of MIS and were subject to the regulatory framework in Chapter 5C of the Corporations Act. Following that decision, the then Government legislated to exempt litigation funding schemes from the MIS regulatory framework.

In 2012, the High Court of Australia held that litigation funding schemes and arrangements were a credit facility and that litigation funders did not need to hold an AFSL.[10] Following this decision, the then Government expressly excluded litigation funding schemes and arrangements from being credit facilities and made such schemes and arrangements financial products. It also explicitly exempted litigation funders from the requirement to hold an AFSL. To be exempt from holding an AFSL, the litigation funder had to maintain and follow practices for managing conflicts of interest that may arise during the duration of the litigation funding scheme.

Following this exemption, a broader range of litigation funding models emerged. These include: finance structured around a law firm, or department within a law firm, where the claimants are clients of the firm, as well as finance structured around a corporation claim holder or other entity which is likely to be involved in multiple legal disputes over a defined period of time.

The ALRC identified that not all of these arrangements fell within the definition of a litigation funding scheme as set out under Regulation 5C.11.01 of the *Corporations Regulations 2001* (Corporations Regulations) at the time of the report. This led to a lack of clarity as to whether evolving forms of litigation funding are exempt from the definition of a MIS. In an effort to address this, the ALRC recommended that Regulation 5C.11.01 of the Corporations Regulations be amended to include 'law firm financing' and 'portfolio funding' within the definition of a 'litigation funding scheme'.

In May 2020, the Treasurer announced that class action litigation funding schemes would be subject to further regulatory oversight and that their exemption from the MIS and AFSL schemes would be removed. On 22 August 2020, regulations came into effect removing the exemption for third party class action litigation funders from compliance with the AFSL and MIS regimes under the Corporations Act if they intended to provide litigation funding in class actions in Australia.

The PJCCFS supported this measure. It identified that the aforementioned exemption meant that litigation funders and litigation funding schemes were insufficiently regulated, and subject to less oversight, when compared to other entities that sell financial products.

When considering the regulation of litigation funders in Australia, the PJCCFS identified that likely risks to customers stem from:

- The increasing diversity and size of the domestic and international market of litigation funders, where there is a lack of transparency and accountability regarding their business models, competence and finances.

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[10] *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* (2012) 246 CLR 455.

- The inadequate product disclosure to class actions members of the risks of adverse cost orders and litigation funder capital holdings.
- Misaligned interests leading to claimants being encouraged to settle a dispute before trial, even if doing so is not in their best interests.

In an effort to address these issues, and in addition to the removal of the exemption, the PJCCFS has recommended that the Government legislate a fit-for-purpose MIS regime tailored for litigation funders. Furthermore, the PJCCFS recommended that the Government consult on the best way to exempt not-for-profit litigation funders who hold charitable status, noting that some funders exist solely to support and protect the members of the associated charitable entity.

Government response

In May 2020, the Treasurer announced that litigation funders in class actions would be subject to further regulatory oversight. Accordingly, from 22 August 2020, litigation funders were required to hold an AFSL and registered litigation funding schemes must comply with the requirements of the MIS regime under the Corporations Act.

As part of holding an AFSL, in line with other entities dealing in financial products and services, litigation funders are obligated to:

- act honestly, efficiently and fairly
- maintain an appropriate level of competence to provide financial services
- have adequate organisational resources to provide the financial services covered by the licence.

Parliamentary Joint Committee - Recommendation 28

The committee supports the regulations issued by the Treasurer which clarify that litigation funders require an Australian Financial Service License and that they be regulated as Managed Investment Schemes. Noting that ASIC has provided relief from a number of MIS requirements, the committee recommends the Australian Government legislate a fit-for-purpose MIS regime tailored for litigation funders. However, the committee recommends that the Australian Government consult on the best way to exempt not-for-profit litigation funders who held charitable status at the time the regulations were issued, have run no more than three class actions in the last five years, and exist solely to support and protect the members of the associated charitable entity.

The Government **notes** this recommendation.

The Government fundamentally supports a MIS regime that covers litigation funders and accepts that litigation funders should be subject to robust oversight, which may be done through further refinement of the MIS regime. The Government will continue to consider opportunities to ensure regulation remains fit-for-purpose.

Australian Law Reform Commission - Recommendation 16

Regulation 5C.11.01 of the *Corporations Regulations 2001* (Cth) should be amended to include 'law firm financing' and 'portfolio funding' within the definition of a '*litigation funding scheme*'.

The Government **notes** this recommendation.

As a result of the Government's changes implemented in the Corporations Amendment (Litigation Funding) Regulations 2020, the definition of litigation funding scheme was removed from Regulation 5C.11.01.

A definition of a litigation funding scheme is included in Regulation 7.1.04N(3) of the Corporations Regulations, which declares such schemes to be financial products. The Government will consult on whether this definition adequately captures the various models of third-party litigation funding.

Theme 3: Common Fund Orders

PJCCFS and ALRC inquiries

Both the PJCCFS and ALRC made recommendations to provide a clearer legislative basis for Common Fund Orders (CFOs), given the role they can play in supporting open class actions.

A CFO is an order made by the Court that requires all class members to equally contribute from their share of the settlement to the litigation funding costs. It permits a litigation funder to collect their commission from all class members in an open class, rather than just from those who had entered into a litigation funding agreement directly with the funder.

The PJCCFS noted the uncertainty that currently exists regarding the legislative basis for a CFO. CFOs became a standard feature of the Australian class action regime following a 2016 decision in which the Full Court of the Federal Court held that it had the power to make a CFO at an early stage of a proceeding, under section 33ZF of the *Federal Court of Australia Act 1976* (Federal Court Act).[11] However, in 2019, the High Court of Australia held in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall*[12] (*Brewster*) that the Federal Court was not authorised to make such an order, under section 33ZF of the Federal Court Act, at an early stage of the proceeding.

The PJCCFS noted that this decision has resulted in widespread confusion surrounding the Federal Court's ability to make a CFO, including at the settlement stage or following a judgment. It observed that such an order has been made under section 33V of the Federal Court Act in some matters. It also noted that the Federal Court had amended its Class Action Practice Note to provide that the parties may expect that a judge would, unless indicated to the contrary, make an appropriately framed order to equitably and fairly distribute the burden of reasonable legal costs, fees and other expenses, among all persons who have benefited from the action, where such an application is made and is fair, just, equitable and in accordance with principle. This would be particularly the case in an open class action.

The PJCCFS recommended that the Government legislate to address any uncertainty, in accordance with the High Court's decision in *Brewster*.[13] In doing so, it pointed to the impacts of the current uncertainty surrounding the availability of CFOs. It noted that this uncertainty can lead to increased costs. The PJCCFS identified that a lack of predictability of outcomes may deter litigation funders from funding class actions. It also observed that this may impact on competition in the Australian market and less beneficial funding terms for consumers. Further, the PJCCFS noted that this uncertainty may lead to procedural contests by either party to the litigation, leading to unnecessarily delayed proceedings and greater costs for class members.

Both the PJCCFS and ALRC canvassed the merits of CFOs.

The reports found that CFOs encourage class actions to operate as open class actions. Open classes enable a common binding decision to apply to all with common claims without needing individuals to actively participate in the action. This promotes certainty and finality for defendants who are subject to common claims, unless a claimant has actively opted out of the class. The reports also pointed to arguments that CFOs can also enhance access to justice, especially for more vulnerable

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[11] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191.
[12] [2019] HCA 45.
[13] *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; *Brewster v BMW Australia Ltd* [2020] NSWCA 272

litigants who may be less likely to take steps to register, or face barriers, to register, as a class member.

In the context of open class actions, both reports found that CFOs avoid a "free-rider" problem. They do so by requiring *all* class members who subsequently receive a benefit from any settlement of award in the action, to contribute to the expenses of a class action, including the litigation funder's commission. Both the PJCCFS and ALRC recognised that class members who have signed a funding agreement with the litigation funder should not be unfairly burdened with the cost of the litigation from which others benefit. Additionally, permitting the Federal Court to make CFOs was considered to have improved the Court's ability to amend and restrain funding commissions sought by funders.

However, a number of issues with CFOs were also identified. Notably, the availability of CFOs may promote a "race to the courts". Funders may commence an action prior to undertaking the necessary and appropriate investigation into a potential claim. Further, CFOs impose a litigation funding commission on class members who have not signed a litigation funding agreement. This is at odds generally with ensuring informed consent to fees and commissions, as well as the fundamental common law doctrine of 'privity of contract', where the rights and obligations of a contract are only extended to those who are party to it.

Ultimately the ALRC supported providing the Courts an express statutory power to make CFOs noting that the availability of CFOs is consistent with a number of the other recommendations in its report, including: that class actions be initiated as 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. It pointed to its recommendation for the Court to have an express power to deal with competing class actions as a way of mitigating concerns about the impact that CFOs may have on a propensity towards competing class actions.

The PJCCFS concluded that while the availability of CFOs at the end of a proceeding promoted outcomes which are reasonable, proportionate and fair for all class members, the power to make CFOs at any point throughout the proceedings would encourage speculative and less considered class action litigation. This would be because a litigation funder would need to undertake a book build; a process that involves identifying, communicating with, and enrolling class members in the action and by signing the litigation funding agreement. The PJCCFS noted arguments that book building facilitates an assessment of the merits and viability of a claim in a class action.

The PJCCFS also considered the impact of CFOs on limiting windfall profits for litigation funders. It concluded that while CFOs were one way the Federal Court could adjust litigation funding fees, "codified requirements on what is considered a fair and reasonable return to litigation funders is a more robust and effective way of addressing the high cost of litigation funding".[14] The PJCCFS also highlighted that making a CFO at the end of a proceeding would enable it to be made when there was greater certainty about the class action profile and transaction costs incurred.

Government response

The Government recognises the need to ensure that all class members who benefit from a judgment or settlement contribute to its costs. At the same time, the Government questions whether a funder should be able to impose its commission on class members who have not agreed to be part of a class action litigation funding scheme. Further, any reforms in this space must necessarily align with the

[14] PJCCFS, 124

broader range of measures that the Government is progressing to ensure that class members receive fair and proportionate proceeds of a class action.

The Government has therefore consulted on exposure draft legislation that would provide that a litigation funding agreement is unenforceable when a CFO is made. The Government notes that the Courts have already developed a range of mechanisms to enable the Court to ensure that the burden of costs associated with class action litigation are equitably shared amongst those who gain a financial benefit from the action, thus addressing 'free-rider' and privity of contract concerns.

Funders may decide to undertake a book build to inform their decision to support a class action; that is identifying, communicating with and enrolling class members in the action and getting them to sign a litigation funding agreement. The PJCCFS has noted that this could lead to a greater level of investigation of the level of interest among class members. The Government also considers that book building can ensure that the merits and viability of a claim is assessed more thoroughly before a class action is commenced.

Parliamentary Joint Committee - Recommendation 7
The committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45.
Australian Law Reform Commission - Recommendation 3
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.

The Government **notes** these recommendations.

The Government recognises that it would be desirable to ensure that the Court is properly empowered to make sure that all beneficiaries of a judgment or settlement contribute to the costs of the class action. This avoids the 'free-rider' problem and upholds the privity of contract doctrine by ensuring that litigation funders cannot impose obligations on a class member to contribute to the funder's commission where they are not party to a litigation funding agreement. As the PJCCFS has highlighted, the High Court's decision in *Brewster* has highlighted that there are doubts about whether, and on what basis, such an order can be made.

The Government questions as a matter of principle whether the terms of a litigation funding agreement should apply to class members who are not members of a class action litigation funding scheme. This includes the commission that the funder would impose on members of the funding scheme. Therefore, the Government is considering reforms under which a litigation funding agreement would be unenforceable if a CFO is made during class action proceedings. The Government released exposure draft legislation to consult on this approach.

The Government notes that the Court has developed other mechanisms that avoid the free-rider problem. Such mechanisms are more clearly aligned with the principle of sharing costs incurred for the benefit of the entire class. Additionally, these mechanisms may place a greater onus on funders to undertake book building to manage their commercial risk. This will enable the interest of the class, and the merits and viability of a claim, to be more thoroughly assessed.

Theme 4: Powers of the Federal Court – Case Management

PJCCFS and ALRC inquiries

Both the PJCCFS and ALRC made recommendations targeting various aspects of the Federal Court's case management powers over class actions. These include powers relating to: ensuring procedural proportionality; open and closed class actions; competing class actions; the obligations of litigation funders in relation to certain costs orders; and imposing standards of conduct on litigation funders.

Procedural Proportionality

The PJCCFS recommended that procedural proportionality in class actions should be improved. This would mean that the length of proceedings and costs associated with a class action should be proportionate to what is at stake. It considered that the proportionality of a claim should be considered at the commencement of a proceedings. The PJCCFS affirmed though that this should not amount to a summary judgment which touches on the merits of a claim.

Open and closed class actions

The ALRC recommended that the Government amend the Federal Court Act so that all representative proceedings are initiated as open class actions.

The ALRC noted that open class actions are the most efficient way of securing a single decision on issues common to all and reducing the costs of determining all related issued arising from a wrongdoing. The ALRC further observed that open class actions protect vulnerable groups who may be less likely or less able to take positive steps to join a class action themselves.

The PJCFFS recommended that the Government legislate to provide the Federal Court with an express statutory power to close a class. It noted that the Federal Court had made such orders under section 33ZF of the Federal Court Act, but that its ability to do so had been cast into doubt by various court decisions. The PJCFFS noted that the Federal Court's ability to close the class in a representative proceeding is essential to the objective of the class action regime to provide finality for respondents at the centre of a dispute. It cited submissions that highlighted two key benefits. First, that a class closure order enabled the identity and number of class members entitled to share in any settlement to be determined. Second, that it promoted finality because unregistered members of the class are bound by the settlement and cannot litigate the common claims which were the subject of the class action. The PJCCFS cited section 33ZG of the *Supreme Court of Victoria Act 1986* (Vic) as a model for legislating an express power to close a class.

Both the PJCCFS, and ALRC, also considered that a class closure order, once made, should be considered final unless the re-opening of the class is in the interest of justice. As such, the PJCCFS and ALRC considered that the Federal Court's Class Actions Practice Note should include criteria for the Court to apply when exercising its discretion to close or re-open a class.

Competing class actions

Both the PJCCFS and ALRC recommended that the Government legislate an express statutory power for the Federal Court to resolve competing class actions, as a mechanism to promote efficiency of the class actions regime. The PJCCFS and ALRC noted that competing class actions impede the objectives of Australia's class action regime to increase the efficiency and reduce the cost of the administration of justice. Competing and multiple class actions add unnecessary cost, delay and complexity for plaintiffs and defendants, as the same claim may be unnecessarily litigated several times.

The reports also recommended that the Federal Court's Practice Note be amended to include further case management procedures for competing class actions. The PJCCFS and ALRC identified that there is currently no guidance in the Federal Court's Class Actions Practice Note in determining how to resolve competing class actions or how to determine which action has the most merit to proceed (as opposed to setting out a process for considering these issues).

Requirements for Third Party Litigation Funders: Costs

Both the PJCCFS and ALRC recommended that the Federal Court Act be amended so that litigation funding agreements expressly provide a complete indemnity in favour of the representative plaintiff against an adverse costs order. The reports considered that as a matter of principle, litigation funders should indemnify a representative plaintiff from adverse costs in every class action. This indemnity protects the representative plaintiff, and class members, and ensures that funders assume the risk of a class action when they potentially stand to gain significantly from the action.

Whilst the PJCCFS noted that most litigation funding agreements already include this term of indemnity, it considered that further measures are needed to mandate this practice. As such, the both the PJCCFS and ALRC recommended that the Federal Court Act be amended so that litigation funding agreements expressly provide a complete indemnity in favour of the representative plaintiff against an adverse costs order. Further, the PJCCFS recommended that the Federal Court should not approve a litigation funding agreement unless this indemnity has been included.

Both the PJCCFS and the ALRC recommended that the government legislate a statutory presumption that the litigation funder in a class action provide security for costs. If this presumption were legislated, security for costs would be required in every class action proceeding unless the litigation funder could establish why they should not be ordered. The ALRC considered that a presumption is more appropriate than a mandatory requirement as it retains the Court's discretion.

Presently, litigation funders are not required to provide security for costs unless the defendant to the proceedings makes an application for an order for security for costs. Furthermore, the burden currently rests with the defendant to prove why the funders should provide security for costs. The PJCCFS considered that security for costs is a necessary protection for defendants to a class actions, as these orders are an effective means of ensuring litigation funders meet their obligations to a defendant.

The PJCCFS also noted that the AFSL does not require litigation funders to have adequate financial resources or hold security for costs for litigation purposes. AFSL requirements also do not seek to prevent an AFSL holder from falling insolvent, or failing due to poor business models or cash flow problems. As such, it considered that the requirement to hold an AFSL is not a sufficient mechanism to ensure that a litigation funder has the necessary funds, should an adverse costs order be made.

Costs against litigation funders

The PJCCFS recommended that section 43 of the Federal Court Act be amended to enable the Court to make a costs order against a litigation funder. The Committee recommended this in the context of a suite of measures to deter litigation funders from charging higher than accepted costs, including the use of litigation funding fee assessors and enabling the costs of recourse to such assessors to be recovered from a funder where their conduct justified this.

Standards of Conduct

Both the PJCCFS and ALRC recommended that the Federal Court Act be amended to confer an express power to impose standards of conduct on litigation funder and to award costs for failure to comply with these standards.

The PJCCFS recommended that the Government amend the Federal Court Act to confer a power to the Federal Court to hold parties, their lawyers, and litigation funders to the same standards of conduct in class actions. The recommended standards include the overarching purpose under section 37M of the Federal Court Act as well those statutory standards of conduct captured in sections 16 to 26 of the *Civil Procedure Act 2010* (Vic) (Victorian Civil Procedure Act).

Section 37M(2) provides a non-exhaustive list of objectives that help to define the overarching purpose of the civil practice and procedure provisions. These are: the just determination of all proceedings before the Court; the efficient use of the judicial and administrative resources available for the purposes of the Court; the efficient disposal of the Court's overall caseload; the disposal of all proceedings in a timely manner; the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute. Section 37N requires parties to act consistently with the overarching purpose and indicates that failure to comply with this overarching purpose must be taken into account when the Court exercises its discretion to award costs under section 43 of the Act.

The PJCCFS affirmed that litigation funders should be held to the same standard as parties and lawyers to the litigation, given the level of control they can exert over proceedings. It recommended that the framework in the Federal Court currently (under sections 37M and 43) be extended to funders. The PJCCFS also noted that some obligations enshrined in the Victorian Civil Procedure Act's standards of conduct reflect obligations already placed on litigation funders through the AFSL and MIS regimes, such as the duty to act honestly. Whilst ASIC's regulatory powers are targeted at the regulation of funders based on their provision of a financial product, the PJCCFS observed that the Victorian statutory standards of conduct are focused on the obligation of a litigation funder to facilitate a fair, efficient and affordable civil law system through their conduct in a proceeding.[15]

Similarly, the ALRC identified that an express power to permit the Court to make costs orders against funders (or insurers) who do not comply with this overarching purpose would enhance the Courts ability to supervise third party litigation funders during proceedings. It suggested that this power would provide a more targeted regulatory intervention than a licensing regime administered by ASIC.[16]

Government response

The Government agrees with most of these recommendations. The Government will progress legislation to bolster the protective and supervisory role of the Court with respect to class members, and uphold the judicial economy that the class action mechanism brings. This will codify key protections that litigation funders do, and should, offer class members in exchange for a share of any proceeds.

The Government disagrees, however, with the recommendation to legislate that all class actions should be open as a default. As noted earlier, the Government is committed to creating a class action regime founded on 'book-building' to ensure that the interest of class members, and the merits and viability of a claim, are thoroughly assessed. Further, it should remain open to class members to determine how they wish their claim to be progressed.

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[15] PJCCFS [15.129]
[16] ALRC [6.54]

The Government will undertake further investigation of legislative change which would promote procedural proportionality in class actions. This includes by considering the practice of overseas jurisdictions.

Some of these recommendations relate to matters falling within the responsibility of the Federal Court of Australia. The Government will engage with the Court on these undertakes to engage with the Federal Court on these recommendations.

Parliamentary Joint Committee - Recommendation 1

The committee recommends the Australian Government investigate legislative change which promotes procedural proportionality in class actions, with the objective of facilitating the pursuit of class actions where the potential costs and drawbacks are balanced against the potential benefits for the parties to litigation, the class members, as well as the impacts on court resources, regulatory outcomes and the public interest.

The Government **agrees** to this recommendation.

The Government supports this recommendation to undertake further investigation into legislative change. Such changes, alongside other recommendations made by the PJCCFS and ALRC report, would help uphold the principles that recourse to litigation, including class actions, should occur where genuinely warranted in the circumstances, and that litigation should be conducted in a manner that is proportionate to what is at stake in the proceedings.

The Government will investigate how procedural proportionality may be promoted through legislative change, including by considering the practice of overseas jurisdictions such as Canada and the United Kingdom. The Government's aim will be to ensure proportionality in the management of class action litigation and notes it is not seeking to implement a certification process prior to commending a representative proceedings.

The Government will also consult with the Federal Court of Australia on this recommendation.

Australian Law Reform Commission - Recommendation 1

Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended so that all representative proceedings are initiated as open class.

The Government **does not agree** to this recommendation.

The Government does not support this recommendation. The Government recognises that open class actions can be beneficial in certain circumstances. However, currently representative plaintiffs can determine whether to commence their class action as an open or closed action. This preserves the ability of a group to control the size and scope of the class actions. Additionally, class members, or a subset of them, are able to choose whether to participate in a matter, and which lawyer (and funder) would represent (and fund) them. Further, the Government is committed to a class action regime founded on 'book-building' which requires a funder to individually identify members of a class to sign a litigation funding agreement. Such a process ensures that there is genuine interest among class members, and that the merits and viability of a claim are thoroughly assessed.

The Government will investigate the merits of legislative reforms to provide that certain types of class actions (eg employment claims) may be conducted with a closed class by default, with the ability to opt for an open class action upon a decision of the Court. There are a number of existing

low cost pathways for such claims to be progressed including recourse to the Fair Work Ombudsman for assistance with underpayment claims or the Fair Work Commission to resolve disputes brought to it under certain dispute resolution procedures. This reduces the access to justice imperative for open class actions in this context.

Parliamentary Joint Committee - Recommendation 5

The committee recommends Part IVA of the Federal Court of Australia Act 1976 be amended to introduce an express power to order class closure orders, modelled on, or similar to, section 33ZG of the Supreme Court Act 1986 (Vic).

The Government **agrees** to this recommendation.

The Government supports this recommendation. Class closures can facilitate the resolution of disputes, conducted via open class actions, through mediation. Class closure orders also uphold a key objective of the class action regime through providing respondents with the benefit of finality with respect to the dispute.

The Government will have due regard to the approach reflected in section 33ZG of the *Supreme Court Act 1986* (Vic) in considering what form an express power should take.

Parliamentary Joint Committee - Recommendation 6

The committee recommends the criteria for the Federal Court of Australia to apply in determining whether to close the class or re-open the class should be set out in the Federal Court of Australia's Class Actions Practice Note. The committee also recommends that if an order to close the class is made, it should be final unless the Federal Court of Australia finds that it is in the interests of justice to re-open the class.

Australian Law Reform Commission – Recommendation 2

Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide criteria for when it is appropriate to order class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.

The Government **agrees-in-principle to** these recommendations.

The Government notes that these recommendations relate to matters falling within the responsibility of the Federal Court of Australia.

The Government is supportive of criteria that would assist in identifying when it is appropriate for a class action to be closed to facilitate the resolution of the dispute through mediation and reopened in the interests of justice. Class closure orders also upholds a key objective of the class action regime through providing respondents with the benefit of finality with respect to the dispute.

The Government will engage with the Federal Court on these recommendations.

Parliamentary Joint Committee - Recommendation 2

The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to introduce an express power for the Federal Court of Australia to resolve competing and multiple class actions. The power should maintain the Federal Court of Australia's discretion to allow more than one class action with respect to the same dispute to continue.

Australian Law Reform Commission – Recommendation 4

Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to give the Court an express statutory power to resolve competing representative proceedings.

The Government **agrees** to these recommendations.

The Government supports these recommendations which would allow the substantive merits of each matter to be litigated in a single proceeding. This benefits both class members and defendants through the efficient resolution of similar claims. It also supports judicial economy, enhancing the integrity and efficiency of the judicial system.

Parliamentary Joint Committee - Recommendation 3

The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to include:

- a requirement that the Federal Court of Australia holds a selection hearing to determine which of the competing or multiple class actions should proceed, the Federal Court of Australia should select a class action which advances the claims and interests of class members in an efficient and cost-effective manner, with regard to the stated preferences of the class members; and
- a requirement that on the filing of a class action, the Federal Court of Australia orders a standstill in that proceeding for 90 days, so that any other competing or multiple class actions can be appropriately considered and filed, and that any book building that occurs during the standstill period should be given no weight by the Federal Court of Australia.

Australian Law Reform Commission – Recommendation 5

In order to implement Recommendation 4, the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.

The Government **agrees-in-principle to** these recommendations.

The Government notes that these recommendations relate to matters falling within the responsibility of the Federal Court of Australia.

The Government is supportive of case management procedures that facilitate efficient and effective management of competing and multiple class actions.

The Government will engage with the Federal Court on these recommendations.

Parliamentary Joint Committee - Recommendation 8

The committee recommends Part IVA of the Federal Court of Australia Act 1976 be amended so that litigation funding agreements with respect to class actions must expressly provide a complete indemnity in favour of the representative plaintiff against an adverse costs order.

Parliamentary Joint Committee - Recommendation 9

The committee recommends the Federal Court of Australia not approve a litigation funding agreement unless the agreement provides a complete indemnity for adverse costs.

Australian Law Reform Commission – Recommendation 14 (cont.)

Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- third-party litigation funding agreements of representative proceedings must expressly provide for a complete indemnity in favour of the representative plaintiff against any adverse costs order awarded against the representative plaintiff; and

The Government **agrees** to these recommendations.

The Government supports these recommendations. The essential rationale for litigation funders receiving a commission from any judgment or settlement is that they assume the risk of adverse costs, thus protecting representative plaintiffs and class members.

Parliamentary Joint Committee - Recommendation 10

The committee recommends Part IVA of the *Federal Court of Australia Act 1976* be amended to include a statutory presumption that a litigation funder in a class action provide security for costs.

Australian Law Reform Commission – Recommendation 12

Part IVA of the *Federal Court of Australia Act 1976* should be amended to include a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form that is enforceable in Australia.

The Government **agrees** to these recommendations.

The Government supports these recommendations which would provide a greater level of protection to respondents that their costs will be met in the event that they successfully defend a class action. A statutory presumption would shift the burden from the respondent, who is ordinarily required to satisfy the court that security for costs should be provided, to the representative plaintiff and ultimately the funder. This approach would also maintain the Court's discretion and allow the presumption to be rebutted in suitable cases.

The Government considers that such a security for costs should be in a form enforceable in Australia and in Australian courts. It is unreasonable to expect a respondent to litigate in a foreign jurisdiction in order to recover against the security for costs provided.

Parliamentary Joint Committee - Recommendation 15

The committee recommends section 43 of the *Federal Court Act 1976* be amended to expressly state that the Federal Court of Australia can make a costs order against a litigation funder.

The Government **agrees** to this recommendation.

The Government supports this recommendation. It would enhance the Court's oversight of litigation funders, legal representatives and insurers to ensure they act in a manner that facilitates the just resolution of proceedings according to law and as quickly, inexpensively and efficiently as possible. This is important given the significant impact that litigation funders and insurers can have on the conduct of class action proceedings.

The Government notes that this recommendation would provide a clearer legislative basis for the Court to order that the costs of a litigation funding fee assessor be paid by the litigation funder in circumstances where this is justified, as recommended by the Committee at recommendation 16.

Parliamentary Joint Committee - Recommendation 27

The committee recommends the Australian Government consider options for the Federal Court of Australia to have the power to hold parties, their lawyers, and litigation funders to the same standards of conduct in class actions, including:

- sections 37N and 43 of the *Federal Court of Australia Act 1976* be amended so as to impose on litigation funders the obligation to act consistently with the overarching purpose in section 37M of the *Federal Court of Australia Act 1976* and to permit the Federal Court of Australia to order costs against litigation funders for failure to act consistently with the overarching purpose; and
- the *Federal Court of Australia Act 1976* be amended to reflect the statutory standards of conduct in sections 16 to 26 of the *Civil Procedure Act 2010* (Vic), including requirements such as:
    - the statutory standards apply to conduct in court, to interlocutory or appeal stages, and in respect of dispute resolution processes; and
    - the Federal Court have the express power to order costs against litigation funders for non-compliance with the overarching purpose of section 37N, as well as the power to order other disciplinary sanctions such as remedying the contravention or preventing a specific step or action being taken.

Australian Law Reform Commission – Recommendation 13

Section 37N and s 43 of the *Federal Court of Australia Act 1976* (Cth) should be amended to expressly empower the Court to award costs against third party litigation funders and insurers who fail to comply with the overarching purposes of the Act prescribed by s 37M.

The Government **agrees** to these recommendations.

The Government supports these recommendations which would enhance the Court's oversight of litigation funders to ensure they act in a manner that facilitates the just resolution of proceedings according to law and as quickly, inexpensively and efficiently as possible. This is important given the significant impact that litigation funders can have on the conduct of class action proceedings.

The Government will have due regard to the Committee's recommendation that the *Civil Procedure Act 2010* (Vic) provides a standard of conduct that should be applied to litigation funders, and other participants in a class actions proceeding heard in the Federal Court.

Theme 5: Powers of the Federal Court – Settlement Approval

PJCCFS and ALRC inquiries

The PJCCFS and the ALRC recommended a number of legislative amendments to the Federal Court's powers and procedure during the settlement approval stage of proceedings. This includes: requiring certain information as part of an application for settlement approval; powers to make costs orders against parties in certain circumstances; and powers to appoint individuals to assist in the determination of reasonable costs.

Provision of information prior to settlement

The PJCCFS recommended that the Federal Court require the provision of a certain types of information accompany an application for approval of a class action settlement. In making this recommendation, the PJCCFS cited the current lack of transparency of current litigation funding in the class actions regime and the lack of transparency of settlement agreements (notwithstanding the importance of confidentiality orders in facilitating settlements). The PJCCFS raised concerns about the number of class actions for which there is limited or no information publicly available relating to the costs associated with litigation funding. The PJCCFS noted that increased transparency surrounding the circumstances of litigation funding in a case leads to increased accountability, as a funder's actions are subject to increased scrutiny. This increased scrutiny in turn protects class members. The PJCCFS envisioned that information provided to the court under this recommendation should be published once the settlement is approved.

Further, the ALRC explored issues related to confidentiality orders made at judgment or settlement approval. The Commission concluded that the current discretion of the Federal Court to make confidentiality orders was sufficient and should not be fettered. The ALRC noted that there were other ways by which data could be captured and group members and the public could be informed, including through settlement administrators as discussed below.

Contradictors

The PJCFFS recommended that the Federal Court amend its Class Actions Practice Note to introduce a presumption that the Federal Court is to appoint a contradictor in instances where there is the potential for significant conflicts of interest, or where complex issues are likely to arise at a settlement approval application. This presumption is to sit alongside guidance on scenarios in which this conflict of interest is likely to arise. The PJFCCFS considered that a presumption would ensure that the Federal Court retains discretion and the presumption can be rebutted in appropriate cases.

The PJCCFS had regard to the *Bolitho v Banksia Securities Limited (No. 4)*[17] class action where the extensive work of a contradictor uncovered allegations of serious misconduct by the lawyers and litigation funders. The PJCCFS noted that contradictors are an effective tool that can be used by the Federal Court to protect class members against excessive legal costs and litigation funding fees.[18] It characterised contradictors as an effective check and balance on the litigation funding industry, as and when required. The Federal Court currently has the power to appoint a contradictor. However the PJCCFS noted that it did not have sufficient information to determine how commonly this power was utilised. The PJCFFS noted that the improved outcomes for class member when a contradictor is engaged emphasises the need for contradictors to be used more widely in class actions.

[17] [2014] VSC 582.
[18] PJCCFS [12.57]

Further, the PJCCFS recommended that the Government implement a procedure to facilitate communication of the class member's concerns about settlement to a contradictor, when a contradictor is appointed. Additionally, it recommended class members should be informed of the questions to be determined by the contradictor in an effort to increase transparency.

Referees for legal costs

The ALRC recommended that the Federal Court's Class Actions Practice Note be amended to provide that the Court may appoint a referee to assess the reasonableness of legal costs charged in a class action, prior to settlement approval. In making this recommendation, the ALRC highlighted the benefits of using an independent referee, who is not tied in any way to the law firm in question, to determine reasonableness of costs.[19] The ALRC noted that whilst the Federal Court already has the power to appoint a referee to review legal costs and disbursements, under section 54A of the Federal Court Act, it did not commonly do so in practice.[20] Hence the ALRC sought to embed the practice of appointing a referee by including it in the Practice Note.

The ALRC noted that the appointment of a referee will not always be appropriate. It considered that it is important for the Court to ensure to that the cost of appointing a referee is proportionate to the costs being claimed and the potential savings in the matter.[21]

Settlement administration

The ALRC made two recommendations to make amendments to the Class Actions Practice Note relating to the administration of a settlement in a class action. First, that the Court may tender settlement administration. Second, that the settlement administrator be required to provide a report to group members and the Court upon completion of the settlement sum.

Following settlement approval, the award to a class needs to be administered and distributed amongst the class members – a process which is commonly conducted by the plaintiff law firm. According to the ALRC, settlement administration is often complex and time consuming, and as such can lead to sizeable administration fees that are taken out of the award prior to distribution. Hence it considered that a formalised tender process may assist in reducing the costs charged in the settlement administration process and may improve the overall efficiency of administration processes into the future, as firms interested in tendering for such work refine their practices in response to a competitive tendering system.[22] In saying this, the ALRC identified the potential risk that the Court would be required to involve itself in the assessment of the tenders, which would lead to an increased workload.

Furthermore, noting the current difficulties in obtaining accurate settlement data in class actions proceedings, the ALRC recommended that the final report of the settlement administrator be published in a national representative proceedings database to be maintained by the Court. This recommendation would allow the Court to stay informed of progress and costs of settlement administration. Furthermore, by having this information available in the public domain, the Court, class members, policy makers and industry participants will be provided with a greater understanding of how class actions proceedings resolve.

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[19] ALRC [5.28]
[20] ALRC [5.29]
[21] ALRC [5.32]
[22] ALRC [5.43]

Government response

The Government aims to enhance transparency and operation of settlement approvals in class action proceedings, and as such supports measures that enhance transparency and provide clarity around how class actions proceedings resolve, and work to ensure proposed settlements are in the interests of class members. The Government notes the four case studies in the PJCCFS report where the work by the contradictor led the Federal Court to approve settlements with reduced legal costs and litigation funding fees than the amounts proposed in the agreements.[23]

Many of these recommendation relate to matters falling within the responsibility of the Federal Court of Australia. The Government will engage with the Federal Court on these recommendations.

The Government is considering reforms related to contradictors and released exposure draft legislation that if progressed would introduce a requirement that a contradictor be appointed during class action proceedings. The Government is considering going beyond the recommendations of the PJCCFS in this respect, in recognition of the important role that contradictors can play in ensuring that the interests of class members are properly represented, especially during settlement approval.

Parliamentary Joint Committee - Recommendation 17

The committee recommends that the Federal Court of Australia should require the following information to accompany an application for approval of a class action settlement. The information below should be published following the judgment approving a settlement:

- the date the proceeding commenced;
- the estimated number of class members before opt out;
- the number of people who have opted out;
- the number of registered class members;
- the number of funded and unfunded class members;
- the identity and location of the litigation funder;
- the amount of security for costs paid;
- the estimated value of the claims at the outset and at the time of settlement;
- the settlement sum and any non-monetary relief;
- the funding commissions payable under litigation funding agreements;
- the total amount of the funding commission (and per cent of the gross settlement sum) that the litigation funder would be paid, as the case may be:
    - pursuant to its contractual entitlements under the litigation funding agreements;
    - following a funding equalisation order (if one is sought);
    - following a common fund order (if one is sought); and
    - following any other order to share costs across class members.
- the total costs broken down into legal fees, counsel's fees, expert fees and their disbursements;
- any costs orders paid in the proceedings;
- payments to representative plaintiffs (their claims and recognition payments);
- other reimbursements and payments, including pursuant to cy-près orders;
- the average payment to all class members, funded class members and unfunded class members (and the per cent of the gross settlement sum);

[23] PJCCFS [12.26]

- the number of class 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); and
- the amount of corporate tax paid in Australia by the litigation funder in the three previous financial years.

The Government **notes** this recommendation.

The Government is supportive of measures that seek to enhance transparency of the operation of the class action system and litigation funding industry, noting the significant impact that litigation funders have on Australia's legal system.

The Government will engage with the Federal Court on this recommendation.

Parliamentary Joint Committee - Recommendation 18

The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to:

- introduce a presumption that the Federal Court of Australia is to appoint a contradictor in instances where there is the potential for significant conflicts of interest to arise, or complex issues are likely to arise at the settlement approval application;
- include guidance on scenarios in which a conflict of interest is likely to arise, including:
    - where there is a material conflict between the interests of the representative plaintiff and those of some sub-groups of class members, including between those with different sorts of interests or claims, and between those who have signed up with the litigation funder and/or the representative plaintiff's solicitor and those who have not;
    - where the proposed return to the class members does not appear to be in accordance with the possible prospects of success;
    - where an issue arises as to whether some class members should be included or excluded from claiming settlement proceeds where they did not register in time pursuant to some registration process ordered by the Federal Court of Australia to identify the number, identity and claims of class members;
    - where there is an application, or an order has been made, for a common fund order or a funding equalisation order, or an equivalent order; and
    - where it is proposed that the solicitors for the representative plaintiff are to be appointed as the administrator of the settlement and where there may be other means available to administer the scheme more cheaply, efficiently or quickly;
- ensure the Federal Court of Australia retains discretion to appoint a contradictor and provide non-exhaustive guidance for the Federal Court of Australia as to the factors to which it should have regard when considering whether to exercise its discretion to appoint a contradictor; and
- ensure the Federal Court of Australia may order the costs arising from the work undertaken by a contradictor be paid by the plaintiff law firm, or the litigation funder, in circumstances where the conduct on the part of the lawyer or the litigation funder justifies such an order being made.

The Government **notes** this recommendation.

The Government is open to supporting measures that help ensure proposed settlements are in the interests of class members, especially where there might be significant conflicts of interest or complex issues at hand. Contradictors may also help safeguard against excessive legal costs and litigation funding commissions, so that class actions provide fair and equitable outcomes to class members. [24]

The Government is considering reforms that would strengthen the role of contradictors in assisting the Court to approve or vary the distribution of the gross proceeds of a class action among members of the class action litigation funding scheme. Additionally, the Government is considering reforms that would require that the expense of a contradictor should be borne by the litigation funder. Such an approach would go beyond the PJCCFS report, in light of the important role that contradictors play. It would also reflect a principle that the funder should bear responsibility for demonstrating to the Court that a proposed distribution of the proceeds of a class action is fair and reasonable.

The Government has consulted on this measure through exposure draft legislation.

Parliamentary Joint Committee - Recommendation 19

The committee recommends the Australian Government implement a procedure to facilitate communication of class members' concerns and objections to the settlement to a contradictor, when appointed. Class members should be informed of the contradictor's appointment in the class action and the questions to be determined by the contradictor. One option which should be considered is the introduction of such a power in the notice provisions in Division 3 of Part IVA of Federal Court of Australia Act 1976 and supplemented by processes described in the Federal Court of Australia's Class Actions Practice Note.

The Government **agrees-in-principle** to this recommendation.

The Government is committed to ensuring that class members are efficiently and effectively informed of events during the course of a class action proceeding, and can practically raise their objections and concerns during a settlement process. Contradictors, while representing the interests of the class, having regard to such communications, would not take instructions from class members.

The Government will investigate this recommendation further. This will include consideration of the Committee's suggestion that legislative change might be supplemented by changes to the Federal Court of Australia's Class Actions Practice Note. The Government will engage with the Federal Court on this recommendation, noting that changes to Practice Notes are a matter for the Court.

Australian Law Reform Commission - Recommendation 8

Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval.

[24] *Endeavour River Pty Ltd v MG Responsible Entity Limited (No 2)* [2020] FCA 968; *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 [68]–[69]; *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited* (No 4) [2020] FCA 1053 [165].

The Government **agrees-in-principle** to this recommendation.

The Government notes that this recommendation relates to matters falling within the responsibility of the Federal Court of Australia. The Government will engage with the Federal Court on this recommendation.

The Government is supportive of measures that seek to ensure that the legal fees incurred by class members are fair and reasonable, so that the class action regime delivers fair and equitable outcomes for class members. The Government notes that additional costs such as those associated with appointing a referee should not be unnecessarily or unduly incurred by class members, especially where the need to incur these costs are attributable to conduct of litigation funders.

The Government will engage with the Federal Court on this recommendation.

Australian Law Reform Commission - Recommendation 9

Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should include a clause that the Court may tender settlement administration, and include processes that the Court may adopt when tendering settlement administration.

The Government **agrees-in-principle** to this recommendation.

The Government notes that this recommendation relates to matters falling within the responsibility of the Federal Court of Australia.

The Government is supportive of measures that ensure group members receive the maximum share of an award to which they are entitled. However, it is noted that implementation of this recommendation may increase costs associated with the class action.

The Government will engage with the Federal Court on this recommendation

Australian Law Reform Commission - Recommendation 10

Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended to require settlement administrators to provide a report to the class on completion of the distribution of the settlement sum. The report should be published on a national representative proceedings data base to be maintained by the Court.

The Government **notes** this recommendation.

The Government notes that this recommendation relates to matters falling within the responsibility of the Federal Court of Australia.

The Government is supportive of measures that provide clarity about how class action proceedings resolve and how funds were distributed, and in furtherance of this aim is progressing recommendations for litigation funding fees assessors, referees and contradictors.

The Government will engage with the Federal Court on this recommendation.

Theme 6: Contingency and Uplift Fees

PJCCFS and ALRC inquiries

The PJCCFS and ALRC adopted different positions with respect to the merits of contingency fees, and the desirability of legislating to permit such arrangements in class actions before the Federal Court.

Lawyers can currently take on matters on a conditional fee or uplift basis. A conditional fee is the payment of legal costs from a client to a lawyer where, subject to a 'no win, no fee' arrangement, payment is conditional on a successful outcome in the case. An uplift fee is an additional fee that is usually included in conditional funding agreements, intended to compensate solicitors for carrying the risk of the litigation. An uplift fee is calculated as a percentage of the billed amount, and considered as a form of interest for the deferred payment of fees over the course of the proceedings.

Ostensibly these options provide an alternative to requiring plaintiffs or litigation funders to fund lawyer fees, by the lawyers taking on some measure of risk themselves. This represents a shift from the 'tripartite' arrangement that typifies class actions (constituting the representative plaintiff, lawyer and funder).

Contingency fees, on the other hand, are prohibited except in Victoria. A contingency fee arrangement is one where legal costs are calculated as a percentage of any recovered award in a class action proceeding (i.e. compensation to lawyers is directly tied to the quantum recovered through proceedings). Proponents argue that contingency fee arrangements enable law firms to compete with litigation funders, thereby placing downward pressure on litigation funding commission rates.

The ALRC report recommended the limited introduction of contingency fees. It considered that this would provide a greater return to group members and further enable medium-sized class action matters to proceed. The ALRC also considered that because class actions are strictly supervised by the Court, contingency fees would provide protection for representative plaintiffs and group members against paying a single yet disproportionate or unreasonable fee.

Conversely, the PJCCFS raised concerns about conflicts of interest (lawyers having a direct financial interest in a matter) that may arise if contingency fees were permitted. It also observed that the impact on access to justice was potentially overstated because only a select few law firms would have access to sufficient capital to be able to undertake the risk required to compete for class actions that are typically funded by litigation funders. The PJCCFS therefore refrained from recommending that contingency fees be permitted in the Federal Court. It also made recommendations relating to the regulation of lawyers operating on a contingency fee arrangements or uplift fee arrangements in actions involving a litigation funder.

Government response

The Government agrees with the PJCCFS that allowing contingency fees creates a significant risk of conflicts of interest. The Government notes that while the ALRC report recommended the introduction of contingency fee agreements in limited conditions, the PJCCFS concluded that the potential for lawyers to enter into contingency fee arrangements was not outweighed by the public interest outcomes potentially achieved with the availability of this charging structure.

The findings of the PJCCFS highlight the issues caused by the decision of the Victorian Government to progress legislation through the Victorian Parliament to allow contingency fees in class action

proceedings before the Supreme Court of Victoria. The Victorian Government did so unilaterally, without consulting other jurisdictions. This has led to an undesirable fragmentation in the approach to this matter across Australian jurisdictions.

The Government supports recommendations to review the feasibility of applying the AFSL and MIS regimes to contingency fee arrangements. This is consistent with the Government's aim to ensure that class members receive fair and proportionate returns, and to prevent lawyers gaining unreasonable profits at the expense of the class.

Parliamentary Joint Committee - Recommendation 21

The committee recommends the Australian Government review the feasibility of applying the Australian Financial Services Licence and the Managed Investment Scheme regimes to lawyers operating on a contingency fee arrangement in class actions.

The Government **agrees** to this recommendation.

The PJCCFS report discussed similarities between contingency fee arrangements and litigation funding, including that fees are calculated as a percentage of the money recovered in a case, and that they can be used as a way to finance a case with less upfront payment required from the plaintiffs. As recommended, the Government will undertake a review of the feasibility of applying the AFSL and MIS regimes to contingency arrangements.

Parliamentary Joint Committee - Recommendation 22

The committee recommends the Australian Government consider options to establish rules that govern the ability of lawyers to charge an uplift fee on the total amount of legal costs in class action proceedings, with particular reference to:

- uplift fees which are conditional on a successful outcome; and
- the potential appropriateness of capped uplift fees of less than 25 per cent on the total costs.

The Government **agrees-in-principle** to this recommendation.

The Government notes that the states and territories are responsible for regulating the legal profession.

The Government is supportive of measures that ensure that the fees received by lawyers in the conduct of class actions are truly reflective of their effort and risks that they may incur depending on the terms of their retainer.

Australian Law Reform Commission - Recommendation 17

Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based' fee agreements (only when acting for the representative plaintiff in representative proceedings). The following limitations would apply:

- an action funded through a percentage-based fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis
- a percentage-based fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis, and
- solicitors who enter into a percentage-based fee agreement must advance the costs of disbursements, and account for such costs within the percentage-based fee.

The Government **does not agree** to this recommendation.

To the extent to which this recommendation relates to regulation of the legal profession, the Government notes that it is a matter falling within the responsibility of the states and territories.

However, the Government notes that allowing contingency fees creates a risk of conflicts of interest. These include the fundamental duty that solicitors owe to the courts, as well as to their clients. Such conflicts may, or may be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters. The Government notes that the majority report of the PJCCFS concluded that it was not persuaded that allowing contingency fee arrangements in class actions would lead to reasonable, proportionate and fair outcomes. In addition to concerns about conflicts of interest, the Committee also found that the alleged potential of contingency fees to positively impact access to justice outcomes may be overstated.

Australian Law Reform Commission - Recommendation 18

Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to include a statutory presumption that solicitors who fund representative proceedings on the basis of percentage-based fee agreements will provide security for costs in any such proceedings in a form that is enforceable in Australia.

The Government does **not agree** to this recommendation.

The Government will not pursue legislative change to permit the use of contingency fee arrangements because of the potential unmanageable conflicts of interest that such arrangements can create. Lawyers owe a fundamental duty to the courts, as well as to their clients. Introducing a direct financial interest in the outcome creates a conflict of interest and such conflicts may, or be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters.

The Government notes that the majority report of the Parliamentary Joint Committee on Corporations and Financial Corporations concluded that it was not persuaded that allowing contingency fee arrangements in class actions would lead to reasonable, proportionate and fair outcomes. In addition to concerns about conflicts of interest, the majority report also found that the alleged potential of contingency fees to positively impact access to justice outcomes may be overstated.

Australian Law Reform Commission - Recommendation 19

Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to provide that:

- percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and
- the Court has an express statutory power to reject, vary or amend the terms of such percentage-based fee agreements.

The Government **does not agree** to this recommendation.

The Government will not pursue legislative change to permit the use of contingency fee arrangements because of the potential unmanageable conflicts of interest that such arrangements can create. Lawyers owe a fundamental duty to the courts, as well as to their clients. Introducing a direct financial interest in the outcome creates a conflict of interest and such conflicts may, or be perceived to, influence recommendations made by solicitors or their manner in which they conduct matters.

The Government notes that the majority report Parliamentary Joint Committee on Corporations and Financial Corporations concluded that it was not persuaded that allowing contingency fee arrangements in class actions would lead to reasonable, proportionate and fair outcomes. In addition to concerns about conflicts of interest, the majority report also found that the potential of contingency fees to positively impact access to justice outcomes may be overstated.

Theme 7: Legal Representatives and Litigation Funders – Conflicts of Interest and Standards of Conduct

PJCCFS and ALRC inquiries

Both the PJCCFS and ALRC inquiries made recommendations to address the risk that class action proceedings, especially those that are funded by third-party litigation funders, give rise to particular circumstances likely to result in actual or perceived conflicts of interest. While conflicts are inherent in some aspects of the Australian class action regime, if not adequately addressed, they can lead to detrimental outcomes for some or all class members. A proper framework for managing conflicts of interest is particularly important given the high degree of control and influence a litigation funder has, and the significant financial stakes that may be at play in class actions.

The PJCCFS highlighted the case of *Bolitho v Banksia Securities Limited (No. 4)*[25] as a key example of such challenges. In this case, the plaintiff's lawyers held significant financial interests in a company incorporated to fund the class action. Following a decision by the Supreme Court of Victoria that the lawyers should not continue to act in the matter whilst holding an interest in the litigation funder, it was alleged that the legal representatives continued to maintain interests as both funder and lawyer in the case. It was further alleged that they advanced their own interest at the expense and detriment of the interests of class members. These allegations are still awaiting determination by the Supreme Court of Victoria. The PJCCFS acknowledged that this case may be atypical in the class action and litigation funding industry. However, in its view, the case demonstrated the need for a strict separation between the litigation funder and representative plaintiff's lawyers as a conflict arising between the two would be unmanageable.

The PJCCFS emphasised that concerns about conflicts of interest are particularly acute when the interests of litigation funders are prioritised over the interests of class members. The PJCCFS report recommended that standards should be set that both lawyers and funders have an obligation to avoid conflicts of interest. Where such conflicts do arise, the PJCCFS affirmed the need for robust and appropriate disclosure and management processes, requirements and mechanisms, to protect the interests of class members.

The ALRC also found that while funding agreements generally make clear that solicitors and funders must act in the interest of class members, funders are often intimately involved in proceedings. The ALRC highlighted the conflicts of interest that may arise for solicitors who may be influenced by the commercial needs of funders with whom they have established a relationship, or when there are multiple classes within the one action. The ALRC recommended increased education for solicitors, primarily through a voluntary class action accreditation scheme, and increased guidance to provide a common set of professional and ethical principles for Australian solicitors in managing conflicts of interest. Additionally, like the PJCCFS, the ALRC emphasised the importance of early communication of conflicts of interest to group members. Both reports provided guidance on how disclosures are best managed and recommended the disclosure of potential or actual conflicts of interest at the earliest possible opportunity.

Government response

The Government agrees that unmanaged conflicts of interests have the ability to undermine the integrity of class actions and the civil justice system. The Government supports enhancing the accountability of the legal profession and litigation funders in relation to conflicts of interests and

[25] [2014] VSC 582.

standards of conduct to avoid unfair outcomes for class members, maintain the integrity and professional independence of lawyers, and to draw attention to protections afforded to class members.

The Government will progress legislation to prohibit a solicitor acting for the representative plaintiff in a litigation funded matter from seeking to recover unpaid legal fees from the representative plaintiff or group members. This will provide protection for the representative plaintiff and group members from any liability to pay costs if the funder fails to do so.

The Government notes that certain recommendations are directed to the legal profession. The Government encourages the profession to adopt such measures to avoid clear conflicts of interest. The profession would desirably ensure that lawyers involved in class action proceedings are able to discharge their legal duties, and uphold confidence in the profession and the legal system more generally.

Parliamentary Joint Committee - Recommendation 23
The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to require that the first notices provided to potential class members by legal representatives clearly describe: • the obligation of legal representatives to avoid and manage conflicts of interest; and • the detail of any conflicts in that particular case.
Australian Law Reform Commission - Recommendation 22
Part 15 of the Federal Court of Australia's Class Actions Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives to avoid and manage conflicts of interest, and to outline the detail of any conflicts in that particular case.

The Government **agrees-in-principle** to these recommendations.

The Government notes that amendments to the Federal Court of Australia's Class Actions Practice Note are a matter for the court.

The Government is supportive of enhancing the accountability of the legal profession and litigation funders in relation to conflicts of interests. This is important to help ensure that such conflicts of interest do not result in unfair outcomes for class members. However, the Government is mindful of the need to ensure that notices efficiently and effectively communicate necessary information to all potential class members, including those with low levels of literacy or limited knowledge of financial and legal matters.

The Government notes that the Federal Court is well-placed to determine what information is necessary, and how best to communicate this information to potential class members in each particular case. The Government will engage with the Federal Court on this recommendation.

Parliamentary Joint Committee - Recommendation 24

The committee recommends the Federal Court of Australia's Class Actions Practice Note be amended to require that, in a litigation funded class action, the first notices provided to potential class members by legal representatives clearly describe:

- the obligation on litigation funders to avoid conflicts of interest;
- the obligation as a holder of an Australian Financial Services Licence to have arrangements to manage conflicts of interest;
- if the litigation funder is the responsible entity of a registered Managed Investment Scheme, to place the interest of members above their own in the instance of a conflict; and
- the detail of any conflicts in that particular case.

The Government **agrees-in-principle** to this recommendation.

The Government notes that this recommendation relates to matters falling within the responsibility of the Federal Court of Australia.

The Government is supportive of measures that enhance the accountability of litigation funders, with respect to conflicts of interest, and draw attention to protections afforded to class members such as those under the *Corporations Act 2001*. Such measures are important to help ensure that conflicts of interest do not result in unfair outcomes for class members.

The Government will engage with the Federal Court on this recommendation.

Parliamentary Joint Committee - Recommendation 25

The committee recommends the representative plaintiff's lawyers and litigation funders be required to disclose the following to the Federal Court of Australia:

- any potential conflicts of interest;
- any new conflicts or potential conflicts which arise after the first case management conference; and
- the conflict management policy when applying to the Federal Court of Australia for approval of a litigation funding agreement.

The Government **notes** this recommendation.

The Government notes that this recommendation relates to matters falling within the responsibility of the Federal Court of Australia.

The Government is supportive of measures that enhance the accountability of the legal profession and litigation funders with respect to conflicts of interest. Such measures are important to help ensure that conflicts of interest do not result in unfair outcomes for class members. However, the Government notes that while this recommendation may be appropriate as it relates to representative plaintiff's lawyers, it is considering further whether litigation funders may be better regulated through the AFSL and MIS arrangements.

The Government will engage with the Federal Court on this recommendation.

Parliamentary Joint Committee - Recommendation 26

The committee recommends the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and the Legal Profession Uniform Conduct (Barristers) Rules 2015 be amended to prohibit solicitors, law firms and barristers from having a financial or other interest in a third-party litigation funder that is funding the same matters in which the solicitor, law firm or barrister is acting.

'Other interest' should encompasses other arrangements that do not necessarily amount to a pecuniary interest in the litigation funder, but which nonetheless may give rise to the likelihood that the interests of the litigation funder may be prioritised over the interests of the representative plaintiff or class members, including common directorships, family ties and ongoing and/or reciprocal commercial arrangements.

Australian Law Reform Commission - Recommendation 21

The *Australian Solicitors' Conduct Rules* should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matter in which the solicitor or law firm is acting.

The Government **agrees-in-principle** to these recommendations.

The Government notes that that amendments to the Australian Solicitors' Conduct Rules 2015, and the Legal Profession Uniform Conduct (Barristers) Rules 2015, are a matter for the Law Council of Australia, and the Australian Bar Association, respectively.

The Government welcomes initiatives to ensure the avoidance of clear conflicts of interest and ensure that lawyers avoid any compromise to their integrity and professional independence.

Australian Law Reform Commission - Recommendation 11

Part IVA of the *Federal Court of Australia Act 1976* (Cth) should be amended to prohibit a solicitor acting for the representative plaintiff in a litigation funded matter from seeking to recover unpaid legal fees from the representative plaintiff or group members.

The Government **agrees** to this recommendation.

The Government supports this recommendation. It would provide appropriate protection for the representative plaintiff and group members from any liability to pay costs if the funder fails to do so.

Prohibiting solicitors from recovering unpaid legal fees from the representative plaintiff of group members, where there is a Court approved third-party litigation funding agreement, will ensure that the solicitor for the representative plaintiff bears the onus of assessing a funder's *bona fides* and assuring themselves that the funder will be able to meet the solicitor's costs and disbursements throughout the conduct of the litigation. Solicitors are better placed than class members to assess the financial viability of a funder. This is because they are repeat users of litigation funding, and understand the intricacies of class action litigation and its costs.

Australian Law Reform Commission - Recommendation 15

The Australian Securities Investments Commission *Regulatory Guide 248* should be amended to require that third-party litigation funders that fund representative proceedings report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.

The Government **notes** this recommendation.

ASIC issues regulatory guidance to regulated entities about its approach to relevant laws.

The removal of the exemption for litigation funders from having to obtain an Australian Financial Service (AFS) Licence and comply with the Managed Investment Schemes (MIS) regime means that there is greater assurance that funders will appropriately manage any conflicts of interest. Holders of an AFS Licence must ensure they have risk management processes in place to identify, evaluate and manage conflicts of interest. The MIS regime requires the responsible entity for the MIS to act in the best interests of scheme members.

Australian Law Reform Commission - Recommendation 20

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

The Government **agrees-in principle** to this recommendation.

The Government notes that this recommendation relates to the activities of the Law Council of Australia.

The Government welcomes measures that would ensure lawyers involved in class action proceedings are able to competently and professionally discharge their legal duties, and measures that would assist prospective litigants to identify experienced and capable practitioners.

Theme 8: Conduct of certain matters through Class Actions – including exclusive jurisdiction for the Federal Court for securities actions

PJCCFS and ALRC inquiries

While the PJCCFS and ALRC have affirmed the benefits of class actions generally, there have been concerns about the merits of class actions in the securities context. Concerns were raised around the growth of an 'entrepreneurial' approach to the commencement of shareholder claims and the increase in the number of 'competing' shareholder claims. The PJCCFS also found that shareholder class actions typically disproportionally benefited litigation funders rather than plaintiffs with large percentages of the settlement being allocated to legal cost and litigation funder commissions. The inquiries also noted a greater propensity for Australian corporate entities to be the target of funded shareholder class actions and a diminution in the value of the investments of those shareholders during the period of the class action. Some stakeholders submitted to the PJCCFS that securities class actions unduly impede businesses, especially in a COVID-19 recovery context, and may be of questionable economic utility (as essentially one group of shareholders is diminishing the value of shares held by another).

Both the PJCCFS and ALRC found that claims for a breach of continuous disclosure laws underpinned many shareholder class action. The ALRC recommended the laws around continuous disclosure be reviewed, considering the legal, and economic impact of these obligations under the *Australian Securities and Investments Commission Act 2001* and *Corporations Act 2001*. The PJCCFS, which conducted its inquiry after the Government introduced temporary COVID-19 measures to address this issue, recommended that these measures be made permanent. It noted that a balance needed to be struck between market transparency and integrity, and reducing economically inefficient shareholder class actions. The PJCCFS and ALRC also recommended limiting class actions with claims in corporations law to the Federal Court so as to address the issue of competing shareholder class actions being filed in different jurisdictions.

Government response

On 10 August 2021, the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* was passed by the Parliament, making permanent the temporary changes to Australia's continuous disclosure laws that were made as part of the Government's response to COVID-19. Under these changes, companies and officers will only be liable for civil penalty proceedings where they have acted with "knowledge, recklessness or negligence" in failing to disclose price sensitive information to the market.

The Act also amends the misleading and deceptive conduct provisions so that companies are not liable in circumstances where the continuous disclosure obligations have been contravened unless this fault element is proven.

Furthermore, in accordance with the Government's aim to provide consistency in the administration of justice, the Government will further consider the merit of conferring exclusive jurisdiction on the Federal Court of Australia for securities class actions and class actions involving financial services and products.

Parliamentary Joint Committee - Recommendation 30

The committee recommends the Australian Government amend Part 9.6A of the Corporations Act 2001 and section 12GJ of the Australian Securities and Investments Commission Act 2001 so that exclusive jurisdiction is conferred on the Federal Court of Australia with respect to civil matters, commenced as class actions, arising under that legislation.

Australian Law Reform Commission - Recommendation 7

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

The Government **notes** these recommendations.

The Government notes that there may be merit in conferring exclusive jurisdiction on the Federal Court of Australia for securities class actions and class actions involving financial services and products to provide greater consistency in the administration of justice in these complex cases and to prevent the risk of forum-shopping. The majority of these cases are already initiated in the Federal Court.

The Government notes that conferring exclusive jurisdiction on the Federal Court would have a resourcing impact on the Court, which will need to be carefully considered.

Parliamentary Joint Committee - Recommendation 29

The committee recommends that the Australian Government permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

The Government **agrees** to this recommendation.

Securities class actions rightfully play an important role in deterring corporate wrongdoing and providing a remedy where such wrongdoing has occurred. However, it is also important to ensure that opportunistic class actions do not have a detrimental effect on business.

The Government therefore temporarily amended the *Corporations Act 2001* on 25 May 2020 to introduce a fault element so that companies and officers would only be liable for a breach of continuous disclosure obligations if they acted with "knowledge, recklessness or negligence". This was extended on 23 September 2020 for a further six months. On 10 August 2021, the Parliament passed the *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021*, which makes these changes permanent.

These changes strike the right balance between ensuring shareholders and the market are appropriately informed while also allowing companies to more confidently make forecasts of future earnings or provide guidance updates without facing the undue risk of class actions.

Australian Law Reform Commission - Recommendation 23

The Australian Government should review the enforcement tools available to regulators of products and services used by consumers and small businesses (including financial and credit products and services), to provide for a consistent framework of regulatory redress.

The Government **agrees-in-principle** to this recommendation.

The Government has already taken significant action to increase the tools available to regulators to provide redress for consumers and businesses using financial and credit products and services.

As noted in the report, the Government established the Australian Financial Complaints Authority (AFCA) — a one-stop shop for external dispute resolution to enable more consumers and small businesses to access fast and free dispute resolution including for banking, insurance, superannuation and financial advice. ASIC was also provided with additional powers to allow it to set standards in relation to financial entities' internal dispute resolution practices and to collect data from entities on these activities.

The effectiveness of redress mechanisms for financial and credit products and services was examined by the Financial Services Royal Commission. As part of implementing the Government's response to the Royal Commission's recommendations, action has been taken to further improve access to redress, including:

- establishing for the first time an industry-funded and forward looking compensation scheme of last resort to be administered by AFCA;
- placing an obligation on all financial services and credit licensees to take reasonable steps to co-operate with AFCA in the resolution of disputes; and
- providing a positive obligation for financial advisers and mortgage brokers to investigate potential and actual misconduct and inform and remediate affected customers under the new breach reporting obligations.

Australian Law Reform Commission – Recommendation 24

The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations, and those related to misleading and deceptive conduct, contained in the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* (Cth).

The Government does **not agree** to this recommendation.

The Government has passed legislation for permanent changes to Australia's continuous disclosure rules in responding to Recommendation 29 of the PJCCFS Report.

Since the release of the ALRC report, further examination of Australia's continuous disclosure regime has taken place, including the issuance of two legislative instruments in response to the COVID-19 crisis that temporarily amended the continuous disclosure law as well as consideration by the Senate Economics Legislation Committee and the Senate Economics References Committee.

The Government reviewed the effect of the temporary instruments and the continuous disclosure law was further examined by the PJCCFS Report. These instruments and the PJCCFS report's analysis informed the decision to permanently legislate changes to continuous disclosure laws in the Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

The *Treasury Laws Amendment (2021 Measures No. 1) Bill 2021,* which makes these laws permanent, includes a condition to review the operation of the reform within 6 months of the second anniversary of the commencement of the Bill, being 14 August 2021.

Theme 9: Engagement with States and Territories (beyond exclusive jurisdiction for the Federal Court for securities actions)

PJCCFS and ALRC inquiries

While the PJCCFS and ALRC inquiries focused recommendations on the class action regime in the Federal Court, they highlighted the benefits of consistency across the class action regimes operating at the federal and state level.

The PJCCFS noted that a failure to mirror its proposed reforms to the Federal Court's powers, practice and procedure, in states and territories, may impact on parties' choice of forum to litigate a class action. The PJCCFS made a specific recommendation that, where feasible, consistency be maintained, or sought to be achieved, as it provides certainty for court users and stakeholders and encourages the development of nationally applicable principles and jurisprudence.

The ALRC specifically highlighted the need for consistency across jurisdictions in effectively responding to competing class actions filed in multiple jurisdictions, and recommended that state and territory supreme courts become parties to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings.* This recommendation was supported by the PJCCFS.

Government response

The Government notes that a nationally consistent approach is desirable and will engage with other jurisdictions as appropriate to ensure that courts across jurisdictions work cooperatively.

Fragmentation in class action regimes create risks of forum shopping and competing class actions, and impedes the development of a national class action jurisprudence. The Victorian Government's decision to unilaterally legislate to permit contingency fee arrangements in class actions illustrates that fragmentation in Australia's class action regimes is a clear risk.

Parliamentary Joint Committee - Recommendation 4
The committee recommends the Australian Government seek to ensure that state and territory Supreme Courts with class action procedures adopt a protocol with the Federal Court of Australia similar to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings* and the *Protocol for Communication and Cooperation Between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings.*
Australian Law Reform Commission - Recommendation 6
The Supreme Courts of states and territories with representative action procedures, should consider becoming parties to the *Protocol for Communication and Cooperation Between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings.*

The Government **agrees-in principle** to these recommendations.

The Government notes that these recommendations relate to matters falling within the responsibility of the Federal Court of Australia, and the Supreme Courts of states and territories.

The Government is supportive of courts across the federal, state and territory jurisdictions working cooperatively to ensure the efficient and effective resolution of competing class actions that are initiated in different jurisdictions.

Parliamentary Joint Committee – Recommendation 31

The committee recommends that, irrespective of whether none, some, or all of the committee's recommendations regarding the Federal Court of Australia's class action regime are adopted and implemented, the federal, state and territory governments work towards achieving consistency in class action regimes across jurisdictions.

The Government **agrees-in-principle** to this recommendation.

The Government notes that a nationally consistent approach is desirable to ensure that all Australians benefit from the additional protections that the PJCCFS and the Australian Law Reform Commission have recommended, and to foster a common jurisprudence.

The Attorney-General will engage with her counterparts as appropriate on matters related to class actions.

Annex: Response to Minority Report of the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Litigation funding and the regulation of the class action industry

Parliamentary Joint Committee (Minority Report) – Recommendation 1

Labor members recommend that the Government formally respond to the Australian Law Reform Commission's 2018 report entitled *Integrity, Fairness and Efficiency – An inquiry into Class Actions Proceedings and Third-Party Litigation Funders*. Labor members note that, in doing so, the Government would also be providing a response to most of the recommendations in the majority report.

The Government **agrees** to this recommendation.

The Government's response to the Australian Law Reform Commission's (ALRC) 2018 Report, *Integrity, Fairness and Efficiency – An inquiry into Class Actions Proceedings and Third-Party Litigation Funders* is included in this document. The Government considered it prudent to have regard to the PJCCFS's findings prior to responding to the ALRC's Report.

The PJCCFS's inquiry delivered on the Government's undertaking that it would give stakeholders the chance to make a case for a recommendation or an alternative recommendation. The Government notes that the majority report has endorsed or built on a number of the recommendations made by the ALRC but also that it has gone beyond the ALRC report in its recommendations and findings. These recommendations and findings will enable the Government to enhance the protections for class members and Australian businesses, while increasing accountability and transparency in relation to the role of litigation funders through a coherent package.

Parliamentary Joint Committee – Minority Report Recommendation 2

Labor members recommend that the Government urgently repeal the measures introduced by the Corporations Amendment (Litigation Funding) Regulations 2020.

The Government **does not agree** to this recommendation.

The Corporations Amendment (Litigation Funding) Regulations 2020 removed the exemption for third party class action litigation funders from compliance with the AFSL and MIS regimes if they intended to provide litigation funding in class actions in Australia.

The PJCCFS report supported this measure, having identified that exempting litigation funders meant that litigation funding schemes were insufficiently regulated, and subject to less oversight, when compared to other entities that sell financial products.

Parliamentary Joint Committee (Minority Report) – Recommendation 3

Labor members recommend that the Government implement Recommendation 24 of the Australian Law Reform Commission's report by commissioning a comprehensive review of the legal and economic impact of the operation, enforcement and effects of continuous disclosure obligations and those relating to misleading and deceptive conduct contained in the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001.*

The Government **does not agree** to this recommendation.

The Government has passed legislation for permanent changes to Australia's continuous disclosure rules in responding to Recommendation 29 of the PJCCFS Report.

Since the release of the ALRC report, further examination of Australia's continuous disclosure regime has taken place, including the issuance of two legislative instruments in response to the COVID-19 crisis that temporarily amended the continuous disclosure law as well as consideration by the Senate Economics Legislation Committee and the Senate Economics References Committee.