

## Submission to Productivity Commission, Access to Justice Arrangements Issues Paper

### A. INTRODUCTION

Jones Day welcomes the opportunity to respond to the Productivity Commission's inquiry into Australia's system of civil dispute resolution with a focus on constraining costs and promoting access to justice and equality before the law. Jones Day's lawyers have extensive experience in class actions and include some of Australia's leading litigation lawyers. Our areas of expertise include shareholder/securities, financial products, mass tort and product liability class actions. In this submission, we address class action procedures and practice in relation to the provision of access to justice.

The class actions regime in Australia has as its objective to enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources.<sup>1</sup> Since its introduction at the federal level in 1992,<sup>2</sup> class actions have evolved significantly and have become an established part of the litigation landscape in this country. The growth in the utilisation of permissible third-party litigation funding arrangements, particularly since 2006<sup>3</sup>, has been linked with improving access to justice by providing financing and removing key disincentives for the representative party: the risk of paying the legal costs to bring the proceedings and being liable for any adverse costs order.<sup>4</sup> However, it has also raised a number of issues in class actions which limits or hampers access to justice which should be addressed.

### B. CLASS ACTION REGIMES IN EACH AUSTRALIAN JURISDICTION

Class actions have existed in Australia since the addition in 1992 of Part IVA to the *Federal Court of Australia Act 1976* (Cth) (the "FCA Act") which provided for "representative proceedings" at the Federal level.<sup>5</sup> In Australia's six states, only two have modern class action regimes. In Victoria, a procedure for "group proceedings" was inserted in Part 4A of the *Supreme Court Act 1986* (Vic) with

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<sup>1</sup> Federal Court of Australia Amendment Bill 1991 (Cth) - Second Reading Speech by the Attorney General, Australia, House of Representatives, *Hansard*, November 14, 1991 p.3176.

<sup>2</sup> See Pt IVA of the *Federal Court of Australia Act 1976* (Cth) ("FCA Act").

<sup>3</sup> The High Court of Australia addressed and legitimised third-party litigation funding in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; 229 ALR 58; [2006] HCA 41.

<sup>4</sup> Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions – The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52, 58.

<sup>5</sup> *Federal Court of Australia Amendment Act 1991* (Cth) which commenced on 4 March 1992.

effect from 1 January 2000.<sup>6</sup> The Victorian provisions are almost identical to the *FCA Act*, including adopting the same numbering of most sections. In New South Wales Part 10 was inserted into the *Civil Procedure Act 2005* (NSW) so as to make “representative proceedings” available in NSW courts.<sup>7</sup> Part 10 commenced on 4 March 2011. The NSW procedures are similar to the *FCA Act* but some changes were introduced in response to case law developments in the Federal Court.<sup>8</sup> In jurisdictions other than the Federal Court, Victoria and NSW there is no comprehensive modern class action procedure. However, representative actions based on the former practices of the Court of Chancery are available in these jurisdictions to run pseudo-class actions.<sup>9</sup> The representative action also remains in the Federal Court and Victoria, but not NSW.<sup>10</sup>

Examples of the types of class actions that have been pursued, their recoveries and costs are set out in annexure 1.

### C. REGULATION OF LITIGATION FUNDERS AND ACCESS TO JUSTICE

Notwithstanding the recent introduction of requirements on funders to manage conflicts of interest that may arise between the funder, lawyers and group members,<sup>11</sup> litigation funding is relatively unregulated. The government’s light-touch regulation of funders appears to be an attempt to keep barriers to entry to the litigation funding market low so as to attract greater funding which provides a means for consumers to access justice, hopefully at lower cost.<sup>12</sup> However, there remains cause for concern as there is no licensing regime nor a requirement for a specified level of capital adequacy to ensure the funder can meet its financial obligations.

The lack of a licensing regime means anyone or any entity can fund litigation in Australia (except for lawyers). A licence permits a person or firm to operate in a market provided they have obtained the

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<sup>6</sup> *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic).

<sup>7</sup> *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

<sup>8</sup> See Dorne Boniface, Miiko Kumar and Michael Legg, *Principles of Civil Procedure in New South Wales* (2d ed, Thomson Reuters, 2012) [7.180], [7.250], [7.470], [7.660].

<sup>9</sup> See *Uniform Civil Procedure Rules 1999* (Qld), Chapter 3 Division 4 rules 75-77, *Supreme Court Rules 1987* (SA), r 34 (applies to actions commenced before 4 September 2006) and *Supreme Court Civil Rules 2006* (SA), Chapter 5 Part 1 Division 3, rules 80-84 (applies to actions commenced on or after 4 September 2006), *Supreme Court Rules 2000* (Tas), Part 10 Division 5, rules 335-336 and *Rules of the Supreme Court 1971* (WA), Order 18, rule 12. South Australia’s model varies considerably from the Court of Chancery model but is neither a detailed class action regime.

<sup>10</sup> Federal Court Rules 2011 (Cth) r 9.21, Supreme Court (General Civil Procedure) Rules 2005 (Vic) Order 8 r 2. The NSW representative action was contained in Uniform Civil Procedure Rules 2005 (NSW) r 7.4 and 7.5 that were repealed by *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) Schedule 6.4.

<sup>11</sup> See *Corporations Amendment Regulation 2012 (No. 6)* (Cth) as amended by the *Corporations Amendment Regulation 2012 (No. 6) Amendment Regulation 2012 (No. 1)* (Cth). Funders must have “adequate practices for managing” any conflict of interest that may arise in litigation they fund.

<sup>12</sup> Michael Legg, ‘Case Study – Regulation of Litigation Funding’, UNSW Regulation, Litigation and Enforcement Seminar, 24 September 2013.

requisite permission and comply with the conditions of the licence. The conditions of the licence can include specified levels of competency (such as education) and restrictions based on status or background (such as criminal record, bankruptcy or a previous licence was cancelled). None of this is required to fund litigation in Australia. Without a capital adequacy requirement there is no protection for claimants to ensure the funder has sufficient resources to be able to pay legal fees and meet any adverse costs order.<sup>13</sup>

The lack of regulation may attract inadequately resourced subsidiaries of funders or overseas based funders who are beyond the reach of Australian courts because they can litigate for profit but avoid the costs if unsuccessful. Ultimately, the representative party in a class action may be liable for those costs if the litigation funder is insolvent and where those people have inadequate resources, they may become bankrupt. Litigating funding of proceedings may be a poisoned chalice for the representative party.

There is also some concern that the funding agreements may be struck unfairly.<sup>14</sup> There are only a small number of litigation funding companies in Australia. In an industry with such few competitors, it has been suggested that plaintiffs are unable to negotiate freely on terms and conditions.<sup>15</sup> Litigation funders command a sizeable portion of the compensation awarded<sup>16</sup> and have been known to be as high as 75 per cent.<sup>17</sup>

A policy question that requires examination is whether access to justice is being achieved if the persons who have suffered loss have to pay 30-40% of their recovery to a litigation funder. Examples are provided in annexure 1. Two potential responses arise. First, the amount the funder can charge could be regulated. A regulatory approach would mean specifying upper limits or ranges that could be charged by litigation funders for particular types of case. In the US some states take this approach in relation to contingency fees.<sup>18</sup> Second the funder's fee could be subject to court oversight. A court oversight approach would involve an approach similar to the common fund

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<sup>13</sup> Nicholas Mavrikis, Ross McInnes, Michael Legg, 'Litigation funding now (lightly) regulated' (2012) 50 *Law Society Journal* 34.

<sup>14</sup> Michael Legg and Louisa Travers, 'Necessity is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions' (2009) 38 *Common Law World Review* 245, 256.

<sup>15</sup> Lang Thai, 'Commercial Litigation Funding: the Need to Impose Regulations to Improve the Outcome of the Shareholder Class Actions' (2011) 4 *Journal of the Australasian Law Teachers Association* 1, 12.

<sup>16</sup> The percentage is typically between 30-40 per cent of the proceeds: see Standing Committee of Attorneys General, *Litigation Funding in Australia* (May 2006) pp.4 and 7 and Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes' (Second Report, Australian Research Council, September 2010) 41.

<sup>17</sup> Stuart Clark and Christina Harris, 'The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?' (2008) 32 *Melbourne University Law Review* 775, 789.

<sup>18</sup> Lester Brickman, *Lawyers Barons: What Their Contingency Fees Really Cost America* (Cambridge University Press, 2011) 89.

approach discussed above, or the oversight of court fees that currently takes place in Australian class actions.<sup>19</sup>

#### D. COSTS DISCLOSURE

A law practice is required to disclose details regarding legal costs to their client before being retained or as soon as practicable after being retained. The purpose of costs disclosure is to protect the client by ensuring that the client has the opportunity to make an informed choice whether or not to retain the law practice or for the law practice to continue with the representation with respect to legal costs incurred.<sup>20</sup> This regime works relatively well in litigation where there is one lawyer or legal practice acting for one or more clients. However, in the context of representative proceedings disclosure may not fulfil the policy ideal due to inherent conflicts of interest. Group members may also lack the resources, experience or understanding to scrutinise the legal costs incurred.

##### *The Costs Disclosure Regime*

A law practice must give disclosure to a client<sup>21</sup> and, to the extent relevant, “associated third party payers”.<sup>22</sup> A client is defined as “a person to or for whom legal services are provided”.<sup>23</sup> This is a broad definition which provides for disclosure to a broader class of person than simply those with whom the law practice has entered into a costs agreement or retainer. The natural and ordinary meaning of the words would appear to include group members of a representative proceeding because the legal practice provides legal services “for” their benefit. However, such an interpretation is not without practical problems. For instance, how is a law practice to give the requisite mandatory disclosure to group members if those members are unknown to the legal practice? It may be the case that the reality of representative proceedings would dictate that disclosure is limited to those members with whom the legal practice has a costs agreement or retainer.<sup>24</sup>

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<sup>19</sup> *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [26]-[27].

<sup>20</sup> G Dal Pont, *Law of Costs* (2013, 3<sup>rd</sup> ed) at [2.20].

<sup>21</sup> *Legal Profession Act 2004* (NSW), s 309(1); *Legal Profession Act 2004* (Vic), s 3.4.9(1); *Legal Profession Act 2006* (ACT), s 269(1); *Legal Profession Act* (NT), s 303(1); *Legal Profession Act* (QLD), s 308(1); *Legal Profession Act* (TAS), s 291(1); *Legal Profession Act 2008* (WA), s 260(1). We have limited our consideration to those jurisdictions which have enacted the Model Laws. That is, all jurisdictions except South Australia. Hereafter the relevant legislation is referred to by State or territory.

<sup>22</sup> NSW s 318A(1); Vic s 3.4.18A(1); ACT s 281A(1); NT s 313(1); Qld s 318(1); Tas s 302(1); WA s 270(1).

<sup>23</sup> NSW s 4(1); Vic s 1.2.1; ACT s 3; NT s 4; Qld s 334; Tas s 318; WA s 3.

<sup>24</sup> The timing of the requisite disclosure, set out below, is circumscribed by the time at the law practice is “retained” in the matter (NSW s 311; Vic s 3.4.11; ACT s 271; NT s 305; Qld s 310; Tas s 294; WA s 262), which suggests that disclosure is only to be made to those with whom the legal practice has a costs agreement.

In certain circumstances,<sup>25</sup> disclosure must also be made to “associated third party payers”. A third party payer is defined as a person who “is under a legal obligation to pay all or any part of the legal costs for the legal services provided to a client.”<sup>26</sup> The obligation may arise from contract, legislation or “otherwise”<sup>27</sup> (perhaps, we suggest, by way of court order). A third party payer is “associated” if the legal obligation is owed to the legal practice.<sup>28</sup> That is, third party payers are those who owe the obligation to pay the legal practice’s fees directly to the legal practice, as opposed to owing an obligation to the client to indemnify the client for the client’s liability to the legal practice.<sup>29</sup> In the context of representative proceedings, a litigation funder, pursuant to a contract with the law practice, would ordinarily satisfy the definition of an associated third party payer and thus be entitled to costs disclosure.

As to what must be disclosed, among other things, a law practice must disclose.<sup>30</sup>

- (a) the client’s right, among other things, to be notified of any substantial change to the matters required to be disclosed (see further below);
- (b) the basis on which legal costs will be calculated;
- (c) if reasonably practicable an estimate of the total legal costs or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs;
- (d) an estimate of the range of costs that may be recovered if the client proves successful in the litigation, and that the client may be ordered to pay if unsuccessful;
- (e) the client’s right to progress reports (see further below);
- (f) the avenues (and their limits) open to the client in the event of a dispute in relation to legal costs; and

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<sup>25</sup> That is, a law practice that is required to make disclosure to a client must also make that same disclosure to any associated third party payer, albeit only to the extent that the details or matters disclosed are relevant to the associated third party payer and relate to costs that are payable by the associated third party payer in respect of legal services provided to the client: NSW s 318A(1); Vic s 3.4.18A(1); ACT s 281A(1); NT s 313(1); Qld s 318(1); Tas s 302(1); WA s 270(1).

<sup>26</sup> NSW s 302A(1)(a); Vic s 3.4.2A(1)(a); ACT s 261A(1)(a); NT s 296 (1)(a); Qld s 301(1); Tas s 284(1)(a); WA s 253(1)(a).

<sup>27</sup> NSW s 302A(2); Vic s 3.4.2A(2); NT s 296(2); Qld s 301(4); Tas s 284(2); WA s 253(2).

<sup>28</sup> NSW s 302A(1)(b); Vic s 3.4.2A(1)(b); ACT s 261A (1)(b); NT s 296(1)(b); Qld s 301(2); Tas s 284(1)(b); WA s 253(1)(b).

<sup>29</sup> Definition of a “non-associated third party payer”: NSW s 302A(1)(c); Vic s 3.4.2A(1)(c); ACT s 261A(1)(c); NT s 296(1)(c); Qld s 301(3); Tas s 284(1)(c); WA s 253(1)(c).

<sup>30</sup> NSW s 309; Vic s 3.4.9; ACT s 269; NT s 303; Qld s 308; Tas s 291; WA s 260.

- (g) if the costs agreement involves an uplift fee, the law practice's usual fees, the uplift fee (expressed as a percentage of those fees) and the reasons why the uplift fee is warranted.

The disclosure must be in writing and in clear plain language,<sup>31</sup> which is aimed at preventing disclosure expressed in terms more familiar to lawyers than lay persons.<sup>32</sup> The disclosure must be made before, or as soon as practicably after, the law practice is retained in the matter.<sup>33</sup> The disclosure obligation is ongoing; the legal practice must notify the client in writing of any "substantial change" to anything that has been the subject of a disclosure requirement as soon as reasonably practicable after becoming aware of that change.<sup>34</sup> For example, if there is a substantial change to a cost estimate, the law practice must disclose that change to the client as soon as reasonably practicable. Further, the client is entitled to a written progress report of the matter and a written report of the costs incurred to date or since the last bill.<sup>35</sup>

The disclosure regime thus ensures that clients are protected *vis-à-vis* the legal practice retained. In the context of a representative proceeding, disclosure must be made to, at least, those with whom the law practice has a retainer and the litigation funder.

Notwithstanding this regime, there are examples where it seems that the disclosure regime has not been adhered to in the context of representative proceedings. This most recent example of this is Gordan J's decision in *Modtech Engineering Pty Limited v GPT Management Holdings Limited*.<sup>36</sup>

#### *Modtech*

*Modtech* involved an application for approval of a settlement of a representative proceeding commenced by Modtech Engineering Pty Limited against GPT Management Holdings Limited. Her Honour delivered a judgment indicating that the Court would approve:

- (a) the settlement sum of \$75 million as fair and reasonable for all group members; and
- (b) the distribution scheme, subject to an amendment to eliminate any premium to be paid to the litigation funder in respect of settlement amounts to be recovered by group members who had not entered into funding agreements with the funder.<sup>37</sup>

<sup>31</sup> NSW s 315; Vic s 3.4.15; ACT s 275; NT s 309; Qld s 314; Tas s 298; WA s 266.

<sup>32</sup> G Dal Pont, *Law of Costs* (2013, 3<sup>rd</sup> ed) at [2.24], citing *Smirnios v Byrne (No 2)* [2009] VSC 86; BC200901551 at [45] per Lasry J.

<sup>33</sup> NSW s 311(1); Vic s 3.4.11(1); ACT s 271(1); NT s 305(1); Qld s 310(1); Tas s 294(1); WA s 262(1).

<sup>34</sup> NSW s 316; Vic s 3.4.16; ACT s 276; NT s 310; Qld s 315; Tas s 299; WA s 267.

<sup>35</sup> NSW s 318(1); Vic s 3.4.18(1); ACT s 278(1); NT s 312(1); Qld s 317(1); Tas s 301(1); WA s 269(1).

<sup>36</sup> [2013] FCA 626.

However, her Honour did not approve and set aside:

- (a) the sum of \$9,338,865 claimed in respect of the law practice's, Slater & Gordon, fees and disbursements; and
- (b) the sum of \$53,530.85 claimed in respect of Modtech's expenses in prosecuting the claim on its own behalf and that of group members.<sup>38</sup>

With respect to Slater & Gordon's costs, Gordon J was critical of the fact that the amount claimed was three times the original estimate of \$3,500,000, that Slater & Gordon had increased their fees by 5% without notice to group members and that the costs for discovery appeared unreasonable. As to Modtech's claim for expenses, Gordon J stated that the claims were difficult to assess and, on their face, seemed "excessive".<sup>39</sup>

Her Honour noted that the difficulty in approving such sums was that there was no contradictor before the Court. The law practice "was acting for *itself* – it seeks an order that *its* costs be approved by the Court and paid to *it*".<sup>40</sup> The group members, who were to share the liability for the law practice's fees and disbursements, were unable to oppose the application because, despite signing a costs agreement with the law practice,<sup>41</sup> had not received disclosure of the fees and disbursements the subject of the approval application or how the sums were quantified.<sup>42</sup>

Similarly, with respect to Modtech's claim, there was no contradictor.<sup>43</sup> The Court only had the say-so of Modtech as to the reasonableness of the claim<sup>44</sup> and the law practice was in no position to certify Modtech's claims.<sup>45</sup>

In light of the above, her Honour referred the claims to a registrar of the Court for assessment.

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<sup>37</sup> Her Honour found that the litigation funder, Comprehensive Legal Funding LLC, was not contractually entitled to such a payment: [2013] FCA 626 at [55]-[61].

<sup>38</sup> In some representative proceedings, a representative party has sought to be reimbursed for out-of-pocket expenses incurred in connection with prosecuting the claim on behalf of group members. This is an exception to the usual situation in which a party to litigation cannot recover such costs (save, in certain circumstances, where a witness can recover their expenses incurred in attending a hearing).

<sup>39</sup> [2013] FCA 626 at [66].

<sup>40</sup> [2013] FCA 626 at [27].

<sup>41</sup> Approximately 92% of the group members (including Modtech) executed a litigation funding agreement with the litigation funder (Comprehensive Legal Funding LLC) and a legal costs agreement with the law practice (Slater & Gordon): [2013] FCA 626 at [20]-[21].

<sup>42</sup> [2013] FCA 626 at [27].

<sup>43</sup> [2013] FCA [69], quoting with approval *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited (No 2)* (2006) 236 ALR 322 at [75].

<sup>44</sup> [2013] FCA [69] and [70], quoting with approval *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited (No 2)* (2006) 236 ALR 322 at [75] and [80]-[81].

<sup>45</sup> [2013] FCA [70], quoting with approval *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited (No 2)* (2006) 236 ALR 322 at [80]-[81].

## E. CONFLICT OF INTEREST

The problems identified by her Honour are not problems with the disclosure regime per se. The problems are problems of conflict of interest. Each of the parties involved in a representative proceeding have divergent incentives and those incentives may operate in such a way that does not ensure that group members receive access to justice in the form of receiving a fair and reasonable settlement.

The law practice has an interest in receiving fees and costs associated with the provision of their legal services.<sup>46</sup> In *Modtech*, the distribution scheme provided that the law practice's fees and disbursements were to be the first item deducted from the settlement sum prior to individual group members' entitlements being calculated.<sup>47</sup> There is thus a conflict of interest between the law practice and those of the group members as the greater the law practice's fees and disbursements the less that is available for individual group members.

The representative party, Modtech Engineering Pty Limited, as with the other group members have an interest in minimising the legal and administrative costs, minimising the premium paid to the litigation funder and maximising the amount recovered from the respondent.<sup>48</sup> However, in *Modtech*, Modtech's own expense claims, along with the law practice's fees and disbursements, were to be deducted from the settlement sum prior to individual group members' entitlements being calculated.<sup>49</sup> Such an arrangement creates a divergence of interest between the representative party and the group members as the representative party may have a greater interest in securing or maximising the return of their own expense claim over that of ensuring that other costs are reduced.

Even in circumstances where the representative party does not make a claim for its expenses, one queries what incentive there is for the representative party to adopt the responsibility for scrutinising the legal and administrative costs on behalf of all group members when those benefits are shared equally amongst group members and the representative party.

The group members may not have the ability, experience or resources to scrutinise and make informed decisions regarding the legal costs incurred by the law practice. The group members could seek the independent counsel of another law practice or costs consultant. However, instructing yet

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<sup>46</sup> ASIC Regulatory Guide 248, *Litigation schemes and proof of debt schemes: Managing conflicts of interest*, April 2013 at RG 248.11.

<sup>47</sup> [2013] FCA [70] at [22].

<sup>48</sup> ASIC Regulatory Guide 248, *Litigation schemes and proof of debt schemes: Managing conflicts of interest*, April 2013 at RG 248.11.

<sup>49</sup> [2013] FCA [70] at [22].



another practitioner goes against the premise of representative proceedings. That is, to ensure the efficient use of judicial resources.

The litigation funder has an interest in minimising the legal and administrative costs and maximising their return on investment.<sup>50</sup> However, in *Modtech*, the funder allowed the law practice's fees and disbursements to increase threefold. There was no evidence put before the Court,<sup>51</sup> and it would appear no disclosure to the group members, as to why this occurred.

In the Australian market, many law practices have pre-existing commercial relationships with litigation funders. For example, it has been reported that in the majority of representative proceedings in which Maurice Blackburn has acted for the applicant(s), IMF (Australia) Ltd funded the action.<sup>52</sup> Further, Maurice Blackburn has established its own litigation funder, Claims Funding Australia Pty Ltd ("CFA") that funds actions in which a principal of Maurice Blackburn is the solicitor on the record.<sup>53</sup> Such a structure creates a conflict of interest as any profit made by CFA is effectively made on behalf of the solicitor on the record. It also means that there is little incentive for the funder to monitor the costs incurred by the law practice.

With respect to *Modtech*, the litigation was funded by Comprehensive Legal Funding LLC and the legal services provided by Slater & Gordon. A former principal of Slater & Gordon, now with his own law practice, has an interest in CFL and CFL is that law practice's principal client.<sup>54</sup> The Court did not comment on the nature of this arrangement and we do not suggest that there was any impropriety. However, the nature of the arrangement creates the appearance of a conflict of interest.

## F. SOLUTIONS

The disclosure regime is largely an effective regime for ensuring that the imbalance between client and legal practice is addressed. There is scope, we suggest, for an examination of how it is being adhered to in the context of representative proceedings. Clarity may need to be provided as to who exactly must receive the requisite disclosure.

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<sup>50</sup> ASIC Regulatory Guide 248, *Litigation schemes and proof of debt schemes: Managing conflicts of interest*, April 2013 at RG 248.11.

<sup>51</sup> [2013] FCA [70] at [42].

<sup>52</sup> US Chamber Institute for Legal Reform, *Third Party Litigation Financing in Australia: Class Actions, Conflicts and Controversy*, October 2013, p. 16.

<sup>53</sup> *Ibid.*

<sup>54</sup> Slater & Gordon ASX Announcement dated 16 April 2010.

More relevantly, is the need to address the conflicts of interest discussed above. ASIC has produced a regulatory guide regarding the management of conflicts of interest. One of ASIC's expectations is that conflicts be disclosed to group members.<sup>55</sup> We suggest that while managing conflicts of interest is part of the solution, investigation is required into addressing root cause of the disparate incentives that each party has in a representative proceeding.

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<sup>55</sup> ASIC Regulatory Guide 248, *Litigation schemes and proof of debt schemes: Managing conflicts of interest*, April 2013, pp. 20-24.

## Annexure 1

### Sample Federal Court of Australia Settlements<sup>56</sup>

<b>Case Name</b>	<b>Settlement Amount (inclusive of lawyers' and litigation funders' fees)</b>	<b>Lawyer Fees</b>	<b>Litigation Funder Fees</b>	<b>Comments</b>
Lopez v Star World Enterprises Pty Ltd (Product liability – food poisoning)	\$1.45m	\$700,000	No funder	Respondent insolvent
Williams v FAI Home Security Pty Ltd (Product liability - home alarm systems)	\$910,000	\$415,000	No funder	Legal fees agreement included a 25% uplift but this was not charged.
GIO shareholder class action re misleading statements in a takeover	\$112m	\$15m	No funder	Legal fees included a 25% uplift
Courtney v Medtel Pty Limited (Product liability – pacemakers)	\$4.7m (estimated)	\$2.3m	No funder	Legal fees included a 25% uplift
Harris Scarfe shareholder class action re disclosure to market and in a prospectus	\$3m	\$1.55m	No funder	Respondent's insurance was limited and would be exhausted by defence costs.
Vitamins cartel class action	\$41m	\$10.5m	No funder	
Telstra shareholder class action re disclosure to market	\$5m	\$1.25m	No funder	
Aristocrat Leisure shareholder class action re disclosure to market	\$144.5m	\$8.5m	\$35m	Settlement occurred after trial.

<sup>56</sup> Annexure 1 is based on Michael Legg, 'Mass Settlements in Australia' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes*, Edward Elgar (2013) Table 8.1.

Multiplex shareholder class action re disclosure to market	\$110m	\$11m	Not disclosed as litigation funder was based offshore	
Pharm-a-Care Laboratories Pty Ltd v Commonwealth (Misfeasance in public office and negligence)	\$67.5m	\$5m	\$24m	
Corrugated Cardboard cartel class action	\$120m	\$25m	No funder	Largest cartel class action settlement in Australia.
Rubber Chemicals cartel class action	\$1.5m	\$1.1m	No funder	Second respondent was bankrupt. Part of settlement was in common stock that had to be sold.
Oz Minerals shareholder class actions re disclosure to market	\$60m (\$39m and \$21m)	\$3.1m and \$1.8m	\$15m and another amount not disclosed by the funder.	Two shareholder class actions
Centro shareholder class action re disclosure to market with additional claims against directors and the auditor	\$200m (\$150m for two class actions and \$50m for the other)	\$21.1m for two class actions and \$10.06m for the other	\$60m for two class actions and another not disclosed by the funder.	Three shareholder class actions. Largest shareholder class action settlement in Australia.