GUARANTEEING A MINIMUM RETURN OF CLASS ACTION PROCEEDS TO CLASS MEMBERS

Submission of Johnson & Johnson Family of Companies

Manager, Market Conduct Division Treasury

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Submitted via email: MCDLitigationFunding@treasury.gov.au

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Dear Manager

Response to Recommendation 20 - *Parliamentary Joint Committee on Corporations and Financial Services report, Litigation Funding and the regulation of the class action industry*

Thank you for the opportunity to provide a submission to the Consultation Paper on the proposal to guarantee a minimum return of class action proceeds to class members.

This submission has been prepared by the Johnson & Johnson Family of Companies. The Johnson & Johnson Family of Companies comprises Johnson & Johnson Medical, a medical devices and diagnostics business; Janssen, a leading researched based pharmaceutical company; and Johnson & Johnson Pacific, known for its portfolio of leading consumer health brands. We have (as this group and as part of a larger group including other healthcare companies), made submissions to the Productivity Commission's Inquiry into Access to Justice Arrangements in 2014, the Victorian Law Reform Commission's Inquiry into Litigation Funding and Group Proceedings in 2017, the Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third-Party Litigation Funders in 2018, the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding and the Regulation of the Class Action Industry in 2020 and the Law Commission of New Zealand in respect of its review of Class Actions and Litigation Funding in 2021.

Summary

1. We have previously submitted that the fees charged and returns earned by third party litigation funders are concerning.[1] Such fees are often out of proportion against the risk and work required to run relevant matters and involve fee structures with such complex

[1] Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation Funding and the Regulation of the Class Action Industry, June 2020. Submission made by a group of Australian healthcare companies including the Johnson & Johnson Family of Companies. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Submissions

implications that plaintiffs may have an extremely limited understanding of what they may receive, depending on outcome and cost scenarios.

2. Litigation inherently involves risk, and it is reasonable that there be some return to litigation funders for taking on such risk. However, in the absence of proper regulation of the litigation funding industry it is clear the return to funders in Australia is currently not commensurate with the risk. We recognise that class actions can provide important access to justice for groups of plaintiffs who otherwise may be unable to commence proceedings. If litigation funding is intended to assist plaintiffs to meet the costs of such actions and thereby access justice, that end is not being served by a system (or lack thereof) that allows windfall profits to funders at the expense of class members.

3. We are supportive of an approach that transparently, properly and fairly facilitates access to justice. Such an approach would see class members (in cases where they are successful or negotiate a settlement) receiving a sum that reflects the loss they have suffered and those parties that have provided professional services (including finance services) remunerated fairly and reasonably. We are concerned that the current consultation is using the class members' loss (and recovery) as a reference point for calculating remuneration of litigation funders. We would submit that the correct reference point is the *actual amount of capital that is loaned to the class members to bring the proceedings*. In this way, an interest rate, which could still have a maximum percentage set, could be applied to reasonably and fairly remunerate the funder for what they have contributed.

4. Nevertheless, in responding to the Consultation Paper's question, allocating an arbitrary minimum return risks that minimum becoming the 'norm' and funders defining risk and cost to fit a 30% return regardless of the financial realities of a particular matter.

5. We also consider that abandoning the current default position where lawyers for the lead applicant in a class action assume the role of settlement administrator is likely to substantially reduce the costs of class action settlement administration and thereby increase the proportion of settlement funds returned to group members.

Consultation question 3: Is a minimum 70% return appropriate?

6. We are supportive of consultation on these questions and the effort to investigate and analyse all options. However, in our view, one of the key issues with the litigation funding system (and by extension, contingency fees being charged by lawyers) is that the litigation funder seeks a reward that is not tied to their actual contribution. If a litigation funder is seen as providing a service, remuneration could more reasonably be tied to that service.

7. Fundamentally a litigation funder provides capital and carries risk. We do not conduct our business within financial services however, some simple examples of capital risk and reward are worth considering within our existing financial system. First, when borrowing to fund a home purchase, the interest rate is charged on amount which is borrowed and not the amount at which the property is eventually sold. The risk of default is secured by the property, which facilitates a low interest rate. The funder undertakes due diligence to

ensure that the property is properly valued. Second, current credit rates range in the order of 9-20%. This credit is unsecured financing with relatively little due diligence. Interest is charged on the outstanding amount borrowed. These two examples highlight: (1) that a minimum 70% return/maximum 30% funding charge is not being calculated on the actual amount borrowed; (2) a maximum 30% return will likely be far more than even the highest rates of unsecured credit; (3) litigation funders state that they undertake significant due diligence before funding litigation, and in that light can manage their risk to capital appropriately [2] [3].

8. Rather than setting an arbitrary minimum return for class members, we suggest a preferable approach is to charge an interest rate on the capital loaned together with a charge for services provided similar to the model of how a law firm charges. Work is charged at an hourly rate plus disbursements and an uplift may be charged on that fee. Litigation funders could reasonably charge in a similar way provided that their "litigation management" is not also sought to be charged by the law firm managing the matter.

9. The *Legal Profession Uniform Law* (NSW) states that a law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are —
    a. proportionately and reasonably incurred; and
    b. proportionate and reasonable in amount.[4]

    There are also provisions dealing with uplift fees and requirements of disclosure, provision of detailed information and progress reports.

10. While litigation funders are not law practices, they are now a significant part of the Australian class action landscape and, given their self-stated role in advancing access to justice, such requirements or a similar standard should apply. An uplift on fees measured against a reasonable benchmark, would provide a transparent fee structure compared to the current complex schemes run on behalf of often unsophisticated class members.

11. Any component of fees allocated for risk (whether litigation funding or contingency fees), must reflect an appropriate return on investment which is in line with community expectation. The legal fee component must be in line with legal professional requirements and the litigation funding component must be proportionate to the risk and in any event not exceed community expectations. Even with a minimum 70% return to plaintiffs there is potential for litigation funders to benefit from 'windfall' profits in the event of significant damages awards. A windfall is inappropriate in any litigation and particularly in class action litigation.

12. As a hypothetical example, at the start of representative proceedings, the number of group members may be estimated to be 100. The costs of the litigation will be $1,000,000, the damages awarded per group member is $30,000 and a costs order is secured against the

[2] Woodsford Litigation Funding Insight (https://woodsfordlitigationfunding.com/wp-content/uploads/2019/01/A-Practical-Guide-to-Litigation-Funding_ROW.pdf)
[3] IMF (Australia) Ltd, 2009 Annual Report (2009), p 18 'Risk Management' (https://omnibridgeway.com/docs/default-source/investors/reports/annualreport2009)
[4] *Legal Profession Uniform Law* (NSW), s172

defendant. The total damages therefore are $3,000,000 and the litigation funder would receive $900,000 and their capital is returned. Now, assume that during the course of the proceeding it is determined that there are actually 300 group members. The total damages are now $9,000,000 and the amount recovered by the litigation funder would be $2,700,000. So, with no additional risk, time or work and solely because the minimum return/maximum fee is capped, the litigation funder would recover an additional $1,800,000.

Consultation question 4: A graduated approach

13. While we do not agree that a minimum return to class members is the best approach, we do support an analysis of the contributions made by respective parties, the benefits each takes away and at whose expense. If a minimum return to class members is ultimately the approach taken it must always be exactly that: a base from which all efforts are made to pay as much of the damages award as possible to class members.

14. A minimum return to class members must not be interpreted as a maximum return to funders. The assessment of any return to litigation funders must be reflected in a proper regulatory framework and include a graduated approach taking into consideration the actual legal costs, risk and complexity of the case, alongside likely length of litigation and any ultimate award that may be made in favour of the class members. We adopt the submission to this Consultation Paper of the US Chamber of Commerce – Institute for Legal Reform on proposed requirements for a graduated approach. In particular, the need for an independent cost assessor and a contradictor for more complex cases. In our view the Court cannot form a view on financial structure and costs when their sole source of information is the party looking to justifying such costs.

15. It cannot be left to the funders to provide a frank and ongoing assessment of costs in respect of litigation. This is particularly the case where the litigation funder is the firm representing the class members, or where the funders stand to benefit from higher costs, as a conflict arises. Such conflicts can only be addressed with transparency and the operation of a third party to ensure all interests and views are considered. An example of this type of conflict is addressed in response to consultation question 6 below.

Consultation question 6: What other implementation considerations are relevant?

Settlement administration

16. In addition to the issues involving funding of the litigation itself, it is our view that there is substantial scope to increase funds returned to class members by decreasing proportions of class action settlement funds which are spent on administration of the settlement in distributing funds amongst class members.

17. In brief, while holding no particular view as to the nature of any tendering or appointment process, our position is that the current default position where the lawyers for the lead applicant in a class action automatically assume the role of settlement administrator following settlement is unsatisfactory and should be abandoned.

Our experience with settlement schemes

18. The Johnson & Johnson Family of Companies has direct experience as a defendant in a number of product liability class actions which have given rise to settlement schemes over the last decade.[5] As a member of global organisations, we also have insight into resolution schemes arising from mass tort actions in other countries.

19. In addition, we have experience in establishing our own schemes for reimbursement and compensation to patients in circumstances where products distributed have been withdrawn from the market. [6] [7]

20. Based on that experience and insight, our position is that a process where an entity other than the lawyers for the lead applicant in the class action assumes the role of class action settlement administrator would result in considerable improvements, efficiencies and costs savings which will ultimately increase the returns to class members by reducing post-settlement administration costs which invariably are paid from the settlement funds.

Lower costs

21. Our experience is that when lawyers for the lead applicant in a class action assume the role of settlement administrator following a class action settlement, the lawyers will base their fees on the same rates used by them in the litigation. We are aware of an instance where one firm in fact ***increased*** its rates significantly for the settlement administration from the rates charged by that firm in the litigation itself. [8]

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[5] Examples include *Casey v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (ACD 10 of 2010) and *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011)

[6] In 2010 following the withdrawal from the market of the ASR hip replacement DePuy (a Johnson & Johnson company) established a Reimbursement Programme to reimburse patients costs and losses realted to revision surgery.

[7] In November 2012 DePuy established a Compensation Programme which allowed eligible ASR hip patients to receive compensation directly from DePuy for pain and suffering, future costs, out of pocket expenses and loss of earnings related to their ASR hip following revision surgery.

[8] The Amended Settlement Scheme for *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011) can be found at https://www.depuyclassaction.com.au/sites/default/files/2019-07/Amended%20settlement%20scheme.pdf

The joint administrators of the scheme are Maurice Blackburn and Shine Lawyers. Maurice Blackburn and Shine Lawyers had also been the solicitors for the applicants in the litigation. The rates charged by Maurice Blackburn and Shine Lawyers as administrators for the scheme are at clause 13 of the scheme document. The hourly rates of the administrators were approximate to the rates charged by Maurice Blackburn in the litigation detailed in a costs consultant report relied on by the applicants at the settlement approval hearing. However, the rates charged by Shine Lawyers as administrator are significantly higher than the rates which Shine Lawyers had charged as solicitors for the second applicant over the course of the litigation as evidenced in the same costs consultant's report. A comparison is below:

Rank	Shine ASR hip litigation hourly rate	Shine ASR hip settlement scheme administration hourly rate
Principal or Partner	$510 to $650	$790

22. We are also aware from establishment of our own compensation and reimbursement schemes that it is possible to engage specialist claims management firms to perform similar work at rates three to four times lower than rates commonly charged by plaintiff class action firms.[9] In short, there is a significantly less expensive alternative option.

Claims administration firms are more suited to the role

23. We consider that this significantly less expensive alternative option is also a better option to plaintiff class action law firms, even leaving aside the substantial costs savings. In particular, we contend that:
    a. claims administration firms are set up to resolve claims efficiently – it is their core business, unlike plaintiff class action firms, whose core business is running litigation;
    b. resolution of claims within a settlement scheme requires a different skill set to the conduct of litigation – it involves processing a large amount of claims (often in the hundreds or thousands) quickly and efficiently rather than presenting detailed evidence of one or two plaintiff's claims to the exacting standards of proof required by the court system;
    c. class action plaintiff law firms will generally need to establish "from scratch" staffing, processes, systems and technology for the purpose of a settlement administration.10 Claims administration companies can provide such products and services "off the shelf";
    d. lawyers involved in settlement administration work at class action plaintiff firms are not necessarily involved in the litigation – accordingly any advantage derived from the firm's involvement in the litigation is generally minimal.

Special Counsel	Not applicable	$720
Senior Solicitor/Senior Associate	$460 to $550	$610
Associate/Solicitor	$350 to $500	$540
Lawyer/Solicitor	$350 to $500	$440
Graduate Lawyer / Trainee Lawyer / Articled Clerk	$290 - $345	$350
Paralegal	$240 - $290	$320
Litigation Technology Consultant	Not applicable	$240

[9] For the ASR Compensation Programme DePuy engaged Crawford & Company to administer the programme. The rates charged by Crawford & Company were as follows: (a) Team Leader: $140 per hour; (b) Senior Claim Handler: $110 per hour; (c) Claim handler: $90 per hour; (d) Treasury administrator: $80 per hour (e) Claims Manager $260 per hour.

[10] For example an affidavit from the administrators in *Stanford v DePuy International Limited and Johnson & Johnson Medical Pty Limited* (NSD 213 of 2011) detailing the establishment processes for the settlement scheme of that class action can be found at: https://www.mauriceblackburn.com.au/media/3758/affidavit-of-julian-schimmel-dated-8-june-2017.pdf