Association of Litigation Funders of Australia

SUBMISSION TO TREASURY: INDEPENDENT REVIEW OF CHANGES MADE BY THE *TREASURY LAWS AMENDMENT (2021 MEASURES NO. 1) ACT 2021*

1 December 2023

Association of Litigation Funders of Australia

Submission to the Independent Review of Changes Made by the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021*

Executive Summary

1. The *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (**2021 Amendments**) amended the continuous disclosure obligations and the misleading and deceptive conduct provisions of the *Corporations Act 2001* (the **Act**) and the *Australian Securities and Investments Commission Act 2001* to remove strict liability for companies and officers that fail to disclose market sensitive information.
2. The 2021 Amendments have weakened Australia's continuous disclosure regime and should be repealed. This is because:
   a. they have introduced significant and unreasonable complexity and confusion to the operation of the regime. This increased complexity and confusion can only lead to a decrease in market efficiency, effectiveness and integrity, and an increase in costs to investors and corporations;
   b. despite being one of the stated reasons for introducing the 2021 Amendments, there is insufficient data to support the proposition that class actions commenced under the previous regime were a significant factor driving up the cost, and decreasing the accessibility, of D&O insurance, or that the 2021 Amendments address these concerns; and
   c. in reducing market integrity and diluting the continuous disclosure regime, the 2021 Amendments have taken Australia out of step with major overseas markets including because they have diminished the Australian Securities and Investments Commission's (**ASIC's**) ability to pursue legitimate enforcement action.

Introduction

3. The Association of Litigation Funders of Australia (**ALFA**) welcomes the opportunity to respond to the questions posed by Treasury's consultation paper on the independent review (**Review**) of changes made by the 2021 Amendments.

4. ALFA is a professional body established in April 2018 to enhance the Australian litigation funding market by:

    a. providing education, training and information about litigation funding and the litigation funding market;

    b. engaging with government, legislators, and other policymakers to help shape the legal and regulatory framework of litigation funding in Australia; and

    c. promoting best practice and ethical behaviour amongst litigation funders in Australia.

5. The Funder Members of ALFA are Balance Legal Capital, CASL, Court House Capital, Fortress Investment Group (Legal Assets), Hartwell Funds, Ironbark Funding, Litigation Lending, Premier Litigation Funding and Southern Cross Litigation Finance.

6. This submission is made on behalf of ALFA's Funder Members and represents their collective views, but it does not necessarily represent the individual views of each member.

Impact on market efficiency and effectiveness

7. In its June 2021 submission to the Senate Economics References Committee on the then-proposed 2021 Amendments (**ASIC Submission**), ASIC explained the importance of robust continuous disclosure obligations as follows (citations omitted):

    "Markets cannot operate with a high degree of integrity unless the information critical to investment decisions is available and accessible to investors on an equal and timely basis. That is why market cleanliness and continuous disclosure are essential to investor confidence. Price discovery in a clean market is efficient. Asset prices react immediately after new information is released through appropriate channels and thereby more closely reflect underlying economic value."[1]

8. At this early stage, ALFA does not hold detailed empirical data about the impact of the 2021 Amendments on the effectiveness or efficiency of the Australian securities market, nor the level of information available to the market. This is particularly because:

[1] ASIC Submission, at p 19.

a. there have been no relevant decisions in respect of any shareholder class actions commenced after the 2021 Amendments; and

b. ASIC's last report on the 'cleanliness' of the Australian financial markets (which is measured by low levels of information asymmetry between participants) was published on 31 July 2019, well before either the 2021 Amendments or the identical but temporary measures that preceded them came into force.[2]

9. Therefore, the following points in support of our view that the 2021 Amendments have resulted in the Australian market being materially less efficient, effective, and well-informed are necessarily made at a high-level, and are based on ALFA's principles-based assessment of the operation of the 2021 Amendments.

10. ALFA disagrees with the former government's position that the previous continuous disclosure regime encouraged *"opportunistic shareholder class actions"*, and the accompanying implication that corporations were being unduly penalised by plaintiff-friendly legislation.[3] To the contrary, the previous regime contained appropriate safeguards against unnecessarily harsh or unreasonable disclosure obligations, while maintaining the central regulatory purpose of ensuring market integrity.

11. Under the previous section 674(2B) of the Act, the continuous disclosure obligations of listed disclosing entities were linked to the ASX listing rules, because they were only engaged when the entity 'had' information that the listing rules obliged it to disclose.[4]

12. As to when an entity will 'have' information, Listing Rule 3.1 states that *"once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information."* Listing Rule 19.12 defines awareness by reference to both actual and constructive awareness, stating that: *"An entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity)*

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[2] See ASIC's Report 623 '*Review of Australian equity market cleanliness*' (https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-623-review-of-australian-equity-market-cleanliness-1-november-2015-to-31-october-2018/).

[3] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, '*Litigation funding and the regulation of the class action industry*' (Report, December 2020) at p 349 (**Joint Committee Report**).

[4] See ss 674(1) and 674A(1).

has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity."[5]

13. Because entities were obliged to disclose information they 'had', meaning information they were aware of, the pre-existing regime already required plaintiffs to prove either actual or constructive knowledge of the relevant information (i.e., a fault element). The materiality of that information would then be objectively ascertained by the Court.[6]

14. Consequently, it has been suggested that the previous regime only took a strict liability approach at the final step, after the plaintiff had established that the entity was actually or constructively aware of information that was objectively material, but nevertheless decided not to disclose that information.[7] In our view, strict liability at this point is entirely appropriate for the purpose of ensuring market integrity and cleanliness, while ensuring that listed entities are not unfairly penalised.

15. On the other hand, the 2021 Amendments deepen the information asymmetries between an entity and its shareholders, such that even legitimate actions may be stymied, if not stifled. This is because shareholders, and especially retail investors, typically have no meaningful engagement with the entity or its internal processes. This puts them at an inherent forensic disadvantage: they have to prove not only that the entity was aware of material information, but also that the entity's state of mind amounted to knowledge, recklessness, or negligence as to the materiality of that information.

16. It must be asked, where is a retail investor to obtain the documents or information that will support such an allegation, even if there is merit to it? By their nature, publicly available documents are unlikely to assist, and discovery processes will not be available if shareholders are unable to commence a claim because they do not have a proper basis for alleging the fault element. Preliminary discovery processes are also unlikely to be available if the shareholders cannot demonstrate, due to this same information

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5 In *ASIC v GetSwift Limited (Liability Hearing)* [2021] FCA 1384 at [1082], Lee J noted that any information which an officer ought to have come into possession of, can constitute information that the entity is 'aware' of. Following the decision of the Full Court of the Federal Court in *Larry Crowley v Worley Limited* [2022] FCAFC 33 (***Crowley v Worley***), the current state of the authorities is that an entity may also be constructively aware of an opinion, whether or not it was in fact formed.

6 *James Hardie Industries NV v ASIC* (2010) 274 ALR 85 at 111 [527] per Spiegelman CJ, Beazley and Giles JJA.

7 Michael J Duffy, "Modifications to continuous disclosure requirements and the role of corporate knowledge, intent, recklessness, and negligence in breaches: a discussion" (2021) 38 CS&SLJ 138 at 142-143.

imbalance, that they hold a reasonable belief that there has been misconduct.[8] In this regard, it is telling that ASIC (which is in a far better position than a retail investor) has *never*[9] instituted a criminal proceeding for breach of the continuous disclosure regime. Like the 2021 Amendments, a criminal prosecution under section 1311 of the Act would also require proof of intention, knowledge, recklessness or negligence.[10]

17. Further, as noted in the submissions by Maurice Blackburn[11] and the Law Council of Australia[12] to the 2021 Inquiry, the 2021 Amendments arguably allow entities to pass responsibility off to their advisers. For example, accounting or legal advice as to materiality that leads to misstatements or material non-disclosures could arguably be used to shield the entity against a claim. And since liability is accessorial, even if the advisor was negligent, shareholders could not proceed against the advisor under section 674A of the Act because there would be no contravention by the entity that could ground a related claim against the advisor. This leaves shareholders without recourse for their losses, no matter their genesis.

18. In addition to watering down the continuous disclosure regime, the 2021 Amendments have also created significant confusion because they still incorporate the objective test of materiality in the Listing Rules, through section 674A(2)(b) of the Act. This appears inconsistent with the subjective fault elements of knowledge, recklessness, or negligence that now overlay the materiality analysis in section 674A(2)(d) of the Act. It is difficult to see in what circumstances an entity can 'have' (in the sense of being aware of, under Listing Rules 3.1 and 19.2) information that is *objectively* material (i.e., any reasonable person considering that information would expect it to be material) but nevertheless go on to form a subjective state of mind about its immateriality that is *not* knowing, reckless or negligent. This adds uncertainty and risk to the regime, for both plaintiffs and defendants. Further, since the company's subjective views on materiality (that were held

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8 See *Bonham v Iluka Resources Limited* [2017] FCAFC 95 at [90].

9 ASIC Submission, at p 15.

10 Albeit to the criminal standard of proof – i.e., beyond reasonable doubt.

11 Submission 11, at [13]-[20] (**Maurice Blackburn Submission**) (https://www.aph.gov.au/DocumentStore.ashx?id=cebf1cad-d40e-4d69-99cb-4fe65fac6f05&subId=703342).

12 Submission 21 (**LCA Submission**), at [94] (https://www.aph.gov.au/DocumentStore.ashx?id=6a626c7b-e849-4718-b161-d3bb21bd9969&subId=703532).

at the relevant time) are part of the factual matrix that Courts will consider under the objective test, it is unclear what the new fault-based test of materiality seeks to cure.[13]

19. We also adopt the comments made by ASIC,[14] the Law Council of Australia,[15] and Maurice Blackburn[16] in their respective submissions to the 2021 Inquiry in relation to the likelihood that the 2021 Amendments will introduce uncertainty as to how to attribute the requisite state of mind to a breaching entity. Under the common law, the attribution of a corporate state of mind is often limited to the corporation's board and senior executives. Therefore, the fault elements in the 2021 Amendments may permit corporations to raise defences, including in relation to misleading and deceptive conduct, that are based on a lack of knowledge where relevant information has not been presented to the board. As noted by ASIC,[17] this does not sit comfortably with the actual and constructive knowledge standard in Listing Rule 19.2, which was recently reinforced by the Full Court of the Federal Court in *Crowley v Worley*. In that case, the Full Court found that even opinions which ought to have been – but were not – formed by an officer of an entity, can be constructively held by that entity.[18] At best, this apparent divergence introduces uncertainty into the regime, and at worst, it permits corporations to rely on their own poor reporting and information management to avoid liability.

20. ALFA also relies on paragraphs 62 – 71 of its submissions to the Senate Economics Legislation Committee Inquiry into the *Treasury Laws Amendment (2021 Measures No.1) Bill 2021* (**2021 Inquiry**), in relation to the amendment of the misleading and deceptive conduct provision in section 1041H of the Act. A copy of these submissions has been annexed as Appendix A. In particular, ALFA reiterates that it is inappropriate to impose a fault element on shareholder claims for misleading and deceptive conduct arising from breaches of the continuous disclosure regime. This aspect of the 2021 Amendments has put the protections in the Act out of step with the general protections in the *Australian Consumer Law*, and has further diminished the integrity of the market.

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[13] Above n. 6.
[14] ASIC Submission, pp 9-10.
[15] LCA Submission, p 24 at [95].
[16] Maurice Blackburn Submission, p 7.
[17] ASIC Submission, p 10 at [27]-[28].
[18] *Crowley v Worley,* at [173], [182].

21. Even if the uncertainty and forensic imbalance created by the 2021 Amendments does not unduly prevent the bringing of shareholder class actions, we expect that it will increase the complexity (and, therefore, costs) of litigation and add uncertainty and risk on both sides. Ironically, this is likely to further incentivise the very high rate of settlement of funded class actions, rather than their final determination by a Court, which was one of the issues raised during the Australian Law Reform Commission's (**ALRC**) inquiry into class action proceedings and third-party litigation funders.

Impact on the nature and quality of disclosures by disclosing entities

22. ALFA is not in a position to obtain detailed data required to provide a specific response to question 2 of the questions in the consultation paper. However, as to question 3, we refer to the matters set out above in support of the broader proposition that the 2021 Amendments negatively impact the level of information available to the market. This must in turn necessarily reduce the ability of investors to make informed investment decisions.

Impact on class actions

23. It has been argued by some commentators that there has been a significant increase in class action filings in Australia in recent years. The perceived increases in the volume of class action proceedings are overstated. It needs to be viewed in an appropriate context, which includes, *inter alia*, litigation concerning the extraordinary findings of the Financial Services Royal Commission. Further, claims may have been double counted where separate proceedings are commenced in respect of the same matter. Having regard to that context, the evidence indicates that the number of class actions in Australia has been relatively stable in recent times. In support of this statement, we refer to submission 3 in ALFA's Submission to the Parliamentary Joint Committee on Corporations and Financial Services (**Parliamentary Inquiry**) which makes it clear that there has not been an explosion of class action claims, but instead a relatively consistent but slow increase in filings. A copy of these submissions has been annexed as Appendix B.

24. As noted above, there have been no relevant determinations in respect of shareholder class actions commenced after the 2021 Amendments came into effect, and limited empirical data is available. Professor Vince Morabito has identified a significant

decrease in the number of shareholder class actions filed in 2019 (the last year before the identical precursor to the 2021 Amendments came into effect)[19]. This decrease continued in 2020 and 2021, but appears to have reversed in 2022, rising from 15% of all class actions filed in 2021 to 24.2% of all class actions filed in 2022.[20]

25. However, the overall number of class actions (regardless of subject matter) filed each year has also declined since 2020, as has the number of funded class actions.[21] In 2022, only 33 class actions were filed, 8 of which were shareholder class actions. This being the case, it is difficult to comment on whether or not the relative decline in shareholder class actions since 2020 can be attributed solely or even predominantly to the 2021 Amendments (and their temporary precursor).

26. There have been a number of significant economic matters that have arisen since the 2021 Amendments which may have had an effect on the number of shareholder class actions. To properly understand the impact of the 2021 Amendments, the Review should analyse the claims that litigation funders and plaintiff law firms chose not to pursue in the courts, and the reasons for that outcome. There are many reasons why a litigation funder and/or plaintiff law firm will not proceed with a claim. Legal liability is just one aspect of the due diligence and overall risk assessment undertaken.

27. In speaking with litigation funders and plaintiff law firms, ALFA is not aware that the enactment of the 2021 Amendments has been the sole cause, or even a significant cause, of any change to the number or type of class actions that have been or will be brought. The more significant issue in recent years has been the spectre of competing class actions and the costly and inefficient process of a "beauty parade".

28. ALFA is of the view that repealing the 2021 Amendments (of themselves) would not materially impact the number or type of class actions against disclosing entities. However, we consider that a repeal would have a materially positive impact on the integrity of the Australian share market. In this regard, we refer to our submission to the 2021 Inquiry, which sets out in detail the reasons why ALFA opposed the proposed

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[19] A drop to 20.3% of all class actions filed in 2019, down from 39.3% the preceding year and 44.8% in 2017. See Vince Morabito, 'Empirical perspectives on twenty-one years of funded class actions in Australia' (April 2023), (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4422278), at 19-20 (**2023 Morabito Report**).

[20] Ibid.

[21] 2023 Morabito Report, at 12.

amendments to the continuous disclosure obligations and the misleading or deceptive conduct provisions.

29. We also note that for the reasons given at paragraphs 11-21 above, a repeal of the 2021 Amendments would promote the bringing of legitimate proceedings where there has been corporate misconduct, and reduce complexity and uncertainty in the continuous disclosure regime, thereby contributing to the overall integrity of the market.

Impact on D&O insurance

30. ALFA is unable to comment with specificity on the impact of the 2021 Amendments on the availability and/or cost of D&O insurance as:

    a. it is not actively involved in the business of providing or obtaining D&O insurance; and

    b. there have been a number of other significant economic matters that have arisen since the 2021 Amendments which may have affected the cost and availability of D&O insurance. These matters make it difficult, without a dedicated inquiry that is outside the scope of this submission, to determine any impact the 2021 Amendments may have had on the cost of D&O insurance.

31. However, at a high level, we note that even if (which is denied) class actions were the sole factor in cost increases and availability difficulties, securities class actions by their nature are not brought without a proper basis. We are unaware of any frivolous or vexatious claims supported by litigation funders, who are subject to careful court oversight and who, for obvious commercial reasons, follow a rigorous investment review process. Against this landscape, any increase in the cost of D&O insurance or decrease in its availability is ultimately caused by corporate misbehaviour. Class actions, together with any attributable rise in insurance premiums, are simply a necessary consequence of that corporate misbehaviour; without corporate wrongdoing, there would be no class actions.

32. Given this, ALFA would welcome a comprehensive review and detailed inquiry that takes into account the following matters which have been cited as making a material contribution to the alleged increase in the cost of D&O insurance premiums and decreased availability of coverage over the last three years:

a. the normal business repositioning of risk and pricing for insurance (arguably, D&O insurance in Australia has been significantly underpriced for many years);[22]

b. an increase in merger activity;

c. the cost of regulatory investigations and the payment of fines and penalties as a result of these investigations (including but not limited to the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry);

d. a significant rise in insolvent trading claims, employment wage underpayment claims and cybersecurity/data breach claims;

e. the economic environment post-pandemic; and

f. securities class action claims.

33. Any review of the legal and economic impact of particular legislation should also consider the extent of legal fees and disbursements required to bring claims under these regimes, the role of defence costs, and the impact of those costs on insurance.

Consistency with other markets

34. The 2021 Amendments have made Australia's continuous disclosure regime more lenient than major overseas markets. Of the five major international jurisdictions considered by the Joint Committee Report,[23] three (Canada, Hong Kong, and South Africa) have adopted a strict liability test for public and private enforcement actions against corporations breaching their continuous disclosure obligations. The specifics of each of these regimes is set out in detail in the attachment to the AICD's submission to the Parliamentary Inquiry.[24]

35. Hong Kong, which has one of the largest securities markets in the world, takes the strictest approach, with no mental elements required to be proven and no defences available to listed companies (although they are available to individual directors). Rather, companies can avail of safe harbour provisions, which appear to be similar to

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[22] XL Catlin/Wotton + Kearney white paper, *"Show me the money"*, September 2017, at page 15 (https://axaxl.com/-/media/axaxl/files/pdfs/insurance/professional-liability/directors-and-officers/white-papers/xlcatlindo-securities-class-actionswp2.pdf).

[23] Joint Committee Report, at p 88 (Table 17.2).

[24] Submission 40 (https://www.aph.gov.au/DocumentStore.ashx?id=2bf0b119-d92d-4507-b518-4b97a383d440&subId=684625), at pp 20 – 55 (Appendix 1).

the circumstances carved out of Australia's Listing Rule 3.1 (for example, where the information is a trade secret or disclosure would amount to a breach of a relevant law).[25] South Africa has also chosen not to provide defences for breaches by listed companies.[26] The Canadian regime includes various defences that go to the corporation or relevant person's state of mind.[27] However, as the corporation typically bears the burden of establishing these defences, they would not unduly stultify an information-poor plaintiff's ability to raise a legitimate claim.

36. Although the United Kingdom (**UK**) and the United States of America (**US**) have incorporated fault elements which must be proven by plaintiffs, there are key distinctions between those regimes and the 2021 Amendments. In this regard, ALFA agrees with ASIC that regulators in the UK and the US have more robust enforcement powers.

37. Under the 2021 Amendments, ASIC can only apply a strict liability threshold when issuing an infringement notice for breach of section 674 of the Act. However, entities do not have to comply with an infringement notice. If the entity does not comply and ASIC wishes to pursue further enforcement action, it must commence either a criminal or civil proceeding. If it pursues a civil penalty, then it must establish fault under section 674A of the Act.

38. In contrast, in the UK, the Financial Conduct Authority (**FCA**) can strictly enforce the obligation to disclose 'inside information'[28] (which is broadly the equivalent of material information under the Australian continuous disclosure regime) under section 123(1)(b) of the *Financial Services and Markets Act 2000* (**FSMA**). All the FCA needs to prove, in relation to the listed entity, is that there has been a contravention of the obligation to disclose inside information.[29] The FCA can also seek restitution for affected investors under section 382 of the FSMA. Similarly, the Joint Committee Report accepted that

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[25] Ibid at pp 12 – 15 of Appendix 1.

[26] Ibid at pp 16 – 19 of Appendix 1.

[27] Ibid at pp 7 - 10 of Appendix 1.

[28] See the definition of 'inside information' in Article 7(1) of Regulation (EU) 596/2014 (**Market Abuse Regulation**): *"information of a precise nature, which has not been made public, relating directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments."*

[29] Contained in Article 17 of the Market Abuse Regulation.

securities regulators in the US are not encumbered by the fault elements investors must establish in private actions.[30]

39. ALFA considers that repealing the 2021 Amendments would have a materially positive impact on the competitiveness of Australia's equity markets. The introduction of a corporate mental element at the stage of the materiality analysis in section 674A of the Act has made the Australian market more lenient than the major overseas markets discussed above. This is compounded by the fact that, unlike in the UK and the US, ASIC's public enforcement powers do not offset the dilution of investors' ability to institute private actions. While repealing the 2021 Amendments may make Australia less attractive to listing entities in the short term, unenforceable breaches of continuous disclosure obligations will undeniably erode investor confidence and reduce the availability of capital. Ultimately, this will have a greater impact on the ability of the Australian market to attract new listings, than any perceived leniency in enforcement.

Compliance and enforcement

40. At this early stage, ALFA is not in a position to comment on changes in the number and/or effectiveness of enforcement actions by ASIC since the 2021 Amendments came into effect.

41. However, as discussed at paragraphs 36-38 above, the operation of the 2021 Amendments pose a legislative barrier to effective enforcement by ASIC. Further, the uncertainty the 2021 Amendments introduce into the regime (discussed above at paragraphs 17-20) also cause practical problems which mean that any investigation and subsequent litigation will be time, cost, and resource-intensive. Given that ASIC has finite resources which it must dedicate to competing enforcement priorities, these practical barriers are also likely to reduce ASIC's capacity to effectively enforce the regime, and ASIC's own submissions to the 2021 Inquiry make this clear.[31] On that basis, ALFA considers that repealing the 2021 Amendments would have a materially positive impact on ASIC's capacity to take effective enforcement action against disclosing entities.

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[30] Joint Committee Report, at p 88 (Table 17.2).

[31] ASIC Submission, pp 9 – 10.

Other matters

42. As noted in ALFA's submission to the 2021 Inquiry (annexed at Appendix A), the 2021 Amendments were made without undertaking any unbiased, evidence-based review of the pre-existing regime, as recommended by the ALRC. In ALFA's view, the 2021 Amendments should be repealed. However, if this Review concludes, as the ALRC did, that there were aspects of the previous regime that warranted amendment, any amending process only be undertaken in accordance with the recommendations of an independent inquiry, which should consider, *inter alia*:

    a. the effect that breaches of market protection legislation have on the cost and availability of capital in Australia;

    b. the diminished returns on investment caused by misallocation of capital resulting from market misbehaviour; and

    c. the additional costs involved in ASIC enforcing the continuous disclosure obligations if fewer ASX shareholder claims were brought.

    In other words, the cost to the ASX and market participants of breaches of the continuous disclosure laws and the deterrent effect of class actions.

Association of Litigation Funders of Australia

1 December 2023

APPENDIX A

Association of Litigation Funders of Australia

**SUBMISSION TO THE
SENATE ECONOMICS LEGISLATION COMMITTEE
INQUIRY INTO TREASURY LAWS AMENDMENT (2021 MEASURES NO.1) BILL 2021**

1 March 2021

Level 13, 333 George Street, Sydney NSW 2000

Association of Litigation Funders of Australia

Submission to the Senate Economics Legislation Committee Inquiry into the Treasury Laws Amendment (2021 Measures No.1) Bill 2021

Executive Summary

1 Schedule 2 of the Treasury Laws Amendment (2021 Measures No.1) Bill 2021 (**TLA Bill**) seeks to amend the continuous disclosure obligations and the misleading or deceptive conduct provisions of the *Corporations Act 2001* (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**) to remove strict liability for companies and officers that fail to disclose market-sensitive information.

2 The proposed amendments would weaken the continuous disclosure regime in the interests of protecting corporate management and insurers, and at the expense of the integrity of Australia's capital markets and the interests of the millions of Australians who invest in shares directly and through their superannuation funds.

3 The current continuous disclosure obligations and misleading or deceptive conduct provisions should be retained, and the proposed amendments contained in Schedule 2 of the TLA Bill should be rejected for the following reasons:

(a) the current continuous disclosure regime is critical for the protection of investors and the integrity and reputation of Australia's capital markets;

(b) investors are best served by a continuous disclosure regime with effective mechanisms for public and private enforcement to punish corporate misconduct and provide deterrence against future contraventions;

(c) the proposed amendments would make it more difficult for investors and the regulator to bring proceedings for material non-disclosure breaches, weakening the protections for investors and undermining the integrity and reputation of the financial markets;

(d) the current continuous disclosure regime performs better in protecting investors from insider trading and other forms of market abuse than comparable jurisdictions;

(e) the need for strong continuous disclosure laws to protect investors is underscored by the fact Australians have one of the highest levels of share ownership in the world;

(f) the arguments advanced by the corporate and insurance lobbies in favour of watering down Australia's continuous disclosure regime are misconceived and do not justify the changes proposed; and

(g) the further amendments proposed to the misleading or deceptive conduct provision are ill-conceived and have been proposed without any proper scrutiny of their consequences for investors or the integrity of Australia's financial markets.

4 The Senate Economics Legislation Committee (**Committee**) should recommend that the TLA Bill be amended to remove Schedule 2, which contains the proposed changes to the continuous disclosure obligations and misleading or deceptive conduct provisions.

Introduction

5 The Association of Litigation Funders of Australia (**ALFA**) welcomes the opportunity to make this submission to the Committee's Inquiry into the Treasury Laws Amendment (2021 Measures No.1) Bill 2021.

6 ALFA confines its comments in this submission to Schedule 2 of the TLA Bill. Schedule 2 seeks to amend the continuous disclosure obligations and the misleading or deceptive conduct provisions of the Corporations Act and ASIC Act.

7 ALFA is a professional body established in April 2018 to enhance the Australian litigation funding market by:

(a) providing education, training and information about litigation funding and the litigation funding market;

(b) engaging with government, legislators and other policymakers to help shape the legal and regulatory framework of litigation funding in Australia; and

(c) promoting best practice and ethical behaviour amongst litigation funders in Australia.

8 The members of ALFA are Investor Claim Partner, Litigation Lending Services, Augusta Ventures, Vannin Capital, Balance Legal Capital, Southern Cross Litigation Finance, Ironbark Funding, CASL, Court House Capital and Premier Litigation Funding.

9 This submission is made on behalf of the Association members and represents their collective views, but it does not necessarily represent the individual views of each member.

Australian share ownership and the current continuous disclosure regime

10 The continuous disclosure regime is critical to protecting the integrity of Australian capital markets and the people who invest in them, including the millions of Australians who invest in shares directly and through their superannuation funds.

11 The regime requires companies to disclose market-sensitive information in a timely manner where that information is not otherwise generally available. Entities that

contravene their continuous disclosure obligations may be subject to enforcement action by the Australian Securities and Investment Commission (**ASIC**) or private claims for loss or damage, including shareholder class actions. Directors and officers may also be liable where they are involved in a contravention by the company. The continuous disclosure obligations are strict in the sense that a company or person may be found liable for a non-disclosure contravention without the need to establish intention or fault.

12 The current continuous disclosure laws are the product of decades of refinement, directed towards the objectives of protecting shareholders and maintaining the integrity and reputation of Australia's financial markets. ASIC recently observed:[1]

> *"In ASIC's experience the provisions are working well and operate to increase the attractiveness of Australian markets for investors. The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages. Continuous disclosure and misleading or deceptive provisions anchor many other elements of the regulatory regime for financial markets, including low document capital raisings."*

13 The importance of robust continuous disclosure laws is underscored by the fact Australian households have one of the highest levels of share ownership in the world.[2] In 2020:

(a) approximately 35% of all Australian adults (around 6.6 million Australians) owned listed investment products;[3]

(b) almost $400 billion in Australian superannuation fund investments (funds with more than 4 members) were held in Australian-listed equities (or 21% of the total $1.9 trillion in investments);[4]

(c) approximately $182.4 billion in self-managed superannuation fund investments are held in Australian-listed equities (or 26% of a total of $698.7 billion in investments).[5]

14 However, corporate management and the insurance lobby have long advocated in favour of watering down Australia's continuous disclosure laws, in particular, to protect themselves from shareholder class actions arising from continuous disclosure contraventions.

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1 ASIC, Submission to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders, *Submission 72*.

2 ASIC, *Assessment of ASX Limited's listing standards for equities* (Report 480, June 2016), at [24].

3 ASX Limited, *ASX Investor Study 2020* (Annual Report, 2020).

4 Australian Prudential Regulations Authority, *Quarterly superannuation performance statistics highlights – September 2020* (Quarterly Report, 24 November 2020), at 4.

5 Australian Taxation Office, *Self-managed super fund statistical report—September 2020* (Quarterly Report, December 2020).

The government's proposed continuous disclosure changes

15 In 2017, the government commissioned the Australian Law Reform Commission (**ALRC**) to conduct an inquiry into class action proceedings and third-party litigation funding (**ALRC Inquiry**).[6]

16 In its final report, the ALRC recommended that the Government commission a review of the legal and economic impact of the operation, enforcement, and effects of the continuous disclosure regime.[7] Although ASIC had rejected the need for any review of Australia's continuous disclosure regime, the ALRC found that there was support for:[8]

> *"a balanced, unbiased legal and economic review and an analysis of whether there is any substance to the unforeseen and potentially adverse consequences that were raised by stakeholders with the ALRC."*

17 The ALRC further recommended that any such review should: undertake wide consultation; collect and draw from an evidence-base; and should be conducted by agencies with sophisticated understandings of the regulatory provisions, class action law and procedure, and the securities market.[9]

18 Despite the ALRC delivering its final report in December 2018, the government has taken no steps to commission such a review and has ignored the ALRC's other recommendations. Instead, it has used the COVID-19 crisis as an opportunity to commence a legislative assault on class actions and third-party litigation funding at the behest of corporate interests.

19 On 5 March 2020, in the midst of the pandemic, the government announced that it would task the Parliamentary Joint Committee on Corporations and Financial Services (**Joint Committee**) to conduct a further inquiry into litigation funding and the regulation of the class action industry (**Joint Committee Inquiry**) covering largely the same subject matter as the 2017 ALRC Inquiry.

20 On 22 March 2020, before the Joint Committee could commence its inquiry, the government announced new regulations requiring litigation funders to hold an Australian Financial Services Licence and comply with the managed investment scheme regime under the Corporations Act. It did so, despite the proposal having

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6 ALFA made written and oral submissions to the ALRC Inquiry. ALFA's written submissions may be accessed via this link: https://www.alrc.gov.au/wp-content/uploads/2019/08/58_association_of_litigation_funders_of_australia.pdf.

7 ALRC, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No 134, December 2018) (**ALRC Final Report**), at 259.

8 ALRC Final Report, at 265 (emphasis added).

9 ALRC Final Report, at 264.

previously been considered and rejected by the ALRC, ASIC and the Treasury Department.[10]

21 Then, on 25 March 2020, the government announced temporary changes to the continuous disclosure regime, made pursuant to emergency powers granted to the Treasurer in response to the COVID-19 pandemic.[11] These amendments removed strict liability for non-disclosure contraventions for a period of six months by introducing a requirement that, to be held liable, the company or individual must have acted with "*knowledge, recklessness or negligence*".

22 The government stated the temporary changes would protect business, under pressure from the COVID-19 crisis, from "*opportunistic*" shareholder class actions. The Treasurer stated that:[12]

> *"The Morrison Government will temporarily amend the continuous disclosure provisions that apply to companies and their officers, to enable them to more confidently provide guidance to the market during the Coronavirus crisis.*
>
> *Given the impact of the Coronavirus crisis and the uncertainty it continues to generate, it has been considerably more difficult for companies to release reliable forward-looking guidance to the market. Therefore, the government will temporarily amend the Corporations Act… so that companies and officers will only be liable if there has been 'knowledge, recklessness or negligence' with respect to updates on price sensitive information to the market."*

23 At the time, many investors expressed their opposition to the changes, concerned that they would instead protect poor quality disclosure practices unrelated to COVID-19 at a time when shareholders most needed reliable and timely information.[13]

24 ALFA and others also raised concerns that the government was using the COVID-19 crisis as cover to introduce changes that had long been advocated for by the corporate and insurance lobbies, removing investor protections that might not easily be regained once the crisis had passed.[14] These concerns now appear to have been justified.

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10 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (Report, December 2020) (**Joint Committee Report**), at p 361.

11 Corporations Act, s 1362A; The Hon Josh Frydenberg MP, "Temporary changes to continuous disclosure provisions for companies and officers" (Media Release, 25 March 2020).

12 The Hon Josh Frydenberg MP, "Temporary changes to continuous disclosure provisions for companies and officers" (Media Release, 25 March 2020).

13 Chanticleer, 'Investors the losers from disclosure changes', *Australian Financial Review* (online), (26 May 2020) <https://www.afr.com/chanticleer/the-costs-and-risks-of-continuous-disclosure-changes-20200526-p54wi0>.

14 ALFA, Submission No. 57 to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into litigation funding and the regulation of the class action industry, Parliament of Australia (11 June 2020), at [98].

25 In September 2020, the temporary amendments were subsequently extended for a further six-months and were due to expire on 23 March 2021.[15]

26 The Joint Committee delivered its report on 7 December 2020, with the majority recommending that the temporary amendments to the continuous disclosure regime be made permanent.[16] Labor members of the Committee delivered a separate report rejecting the recommendation, concluding that the proposal was "*reckless and grossly irresponsible*".[17]

27 On 17 February 2021, the government introduced the TLA Bill now before the Committee. Schedule 2 of the Bill seeks to implement the Joint Committee's recommendation by making permanent the temporary changes to the continuous disclosure regime introduced in March 2020.

28 The TLA Bill goes further, also carving out from the prohibition against misleading or deceptive conduct under the Corporations and ASIC Act any conduct where the continuous disclosure obligations also have been contravened, unless the requisite fault element of "*knowledge, recklessness or negligence*" has also been established. These further amendments to the misleading or deceptive conduct provisions have not been the subject of any proper public consultation or review, even by the Joint Committee Inquiry.

29 It now seems that, contrary to the Treasurer's statements in March 2020 when introducing the temporary amendments to the continuous disclosure obligations, the pandemic has provided cover for a legislative agenda that will have the effect of permanently shifting the balance away from the interests of ordinary investors and well-regulated capital markets, and towards the narrow sectional interests of the corporate and insurance lobbies.

30 Since the TLA Bill was announced, the proposed amendments have been widely criticised by investors groups and other shareholder representatives, with the Australian Council of Superannuation Investors stating:[18]

> *"Continuous disclosure provisions are fundamental to market integrity and should not be diminished. Investor confidence in the Australian market relies on disclosures being accurate. These changes could undermine that confidence by providing protection for companies making poor disclosures."*

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15 Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

16 Joint Committee Report, Recommendation 29, at 351.

17 Joint Committee Report, at 363.

18 Sarah Danckert and Charlotte Grieve, "Investors slam Frydenberg's watering down of company laws", *The Sydney Morning Herald* (online) (18 February 2021) <https://www.smh.com.au/business/markets/investors-slam-frydenberg-s-watering-down-of-company-laws-20210217-p573ag.html>.

31 There are also reports that grassroots shareholder activists are starting to organise against the proposed amendments.[19]

The government's proposed changes to continuous disclosure should be rejected

32 Australia's continuous disclosure regime was developed in response to the 1987 stock market crash and the view that the ensuing financial disaster for Australian investors could have been avoided had they received timely and adequate disclosure of relevant information.[20] Since that time, the continuous disclosure regime has been critical to building and maintaining the integrity and reputation of Australia's capital markets and protecting those who invest in them.

33 Financial markets can only operate fairly where market-sensitive information is accurate, released in a timely manner and freely available to all participants.[21] Where shareholders do not have confidence that markets are operating fairly, because they are not receiving accurate information or because they perceive information is being withheld or selectively disclosed, they tend to withdraw their investments.[22]

34 In its submission to the ALRC Inquiry, ASIC explained the importance for Australia's continued economic prosperity of maintaining confidence in the financial markets and the effectiveness of the current continuous disclosure regime in maintaining that confidence:

> *"Australian markets have a total $1.84 trillion market capitalisation with an average turnover of $5.9 billion a day. Despite being a comparatively small economy, Australia is one of the top 20 global destinations for foreign direct investment. In 2017, Australia saw foreign direct investment inflows double to $48 billion.*
>
> *This is no coincidence. Australia's continuous disclosure regime supports investor participation and confidence in markets which in turn has helped increase market turnover, lower transaction costs and the cost of capital and improve the efficiency of capital allocation within the market."*

35 A strong continuous disclosure regime is of particular importance to the protection of retail investors, who are highly vulnerable to the negative consequences of insider

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19 Sarah Danckert, "'Your rockets are at risk': Reddit traders campaign to save sharemarket disclosure rules", *The Sydney Morning Herald* (online) (26 February 2021) <https://www.smh.com.au/business/markets/your-rockets-are-at-risk-reddit-traders-campaign-to-save-sharemarket-disclosure-rules-20210226-p57646.html>.

20 Meraav Bloch, James Weatherhead and Jon Webster, 'The development and enforcement of Australia's continuous disclosure regime', (2011) 29 *Company and Securities Law Journal* 253, 253; ALRC Final Report, at [9.8].

21 ASIC, Submission 72 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (September 2018) (**ASIC Submission to the ALRC Inquiry**), at [25]-[26].

22 ASIC submission to the ARLC Inquiry, at [25]-[26].

trading and other market abuses arising from the non-disclosure or selective disclosure of price-sensitive information. Australian share markets have one of the highest proportion of retail investors globally, with around 6.6. million Australians holding Australian-listed equities,[23] with a further $600 billion invested in Australian-listed equities through the superannuation system.

36 The strength of the continuous disclosure regime is best served by effective enforcement mechanisms to punish misconduct and provide a deterrence against future contraventions. ASIC has recognised the important and complimentary role that shareholder class actions play, providing an avenue for shareholders to privately enforce their legal rights and obtain redress for corporate misconduct including breaches of continuous disclosure obligations.[24]

37 In light of the vociferous complaints by the corporate lobby about the costs and burdens of shareholder class actions, it would be expected that the continued risk of exposure to such actions might also have a positive influence in encouraging an improved quality of corporate governance, and in particular encourage fulsome and timely market disclosures.[25]

38 Given the importance of the continuous disclosure regime in protecting shareholders and the integrity and reputation of Australia's financial markets, ALFA is concerned by the government's proposal to water down that regime, especially given it has failed to undertake any unbiased, evidence-based review of the proposed changes, as recommended by the ALRC.

39 The stated purpose of the proposed amendments is to prevent shareholders from bringing class actions against listed entities and their directors for failures to disclose material information unless they can establish the mental element of knowledge, recklessness or negligence. However, the amendments will not solely prevent shareholders from recovering loss or damage suffered as a result of 'no-fault' disclosure contraventions.

40 Even where there has been egregious intentional or negligent misconduct by a company or its directors, requiring that be proved in order to establish liability will likely cause forensic difficulties for shareholders seeking redress through private class actions. The information asymmetries between a company and its shareholders mean that shareholders are always at a disadvantage in trying to prove a material non-disclosure. Introducing a further requirement to establish a mental element of intention or negligence is likely to exacerbate that forensic disadvantage.

41 An argument that was advanced in the Joint Committee Inquiry in favour of amending the continuous disclosure regime is to bring it into line with other comparable

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23 Augusta Ventures, Submission No. 70 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (August 2018), at [9].

24 ASIC submission to the ARLC Inquiry, at [47].

25 See, S Foley, Submission No. 8 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (25 July 2018).

jurisdictions.[26] However, of the five comparable jurisdictions considered by the Joint Committee, only two (US and UK) have fault-based liability for private non-disclosure claims; the other three (Canada, Hong Kong and South Africa) have strict liability.[27]

42 Further, the argument that Australia should amend its continuous disclosure regime to bring it into line with the US and UK is not based on any assessment of the relative effectiveness of the regimes in those jurisdictions. In fact, international research into 'information leakage', a measure indicative of insider trading and other forms of market abuse, found that Australia's markets were performing better than those in the US, UK and Canada.[28] The comparatively high proportion of local retail investors in the Australian equities market also justifies stronger protections for shareholders than may exist in other jurisdictions.

43 Finally, while the US and UK have non-strict liability for continuous disclosure contraventions in private litigation, the regulators in those jurisdictions can still take enforcement action without establishing fault. The amendments proposed in the TLA Bill, however, would remove ASIC's ability to seek penalties for strict-liability disclosure contraventions, weakening the deterrent effect of regulatory action and leaving Australia an outlier amongst comparable jurisdictions.

44 The corporate lobby nevertheless argues that the amendments are necessary to address an explosion in the number of "*unmeritorious*" and "*opportunistic"* shareholder class actions.[29] This argument is ill-founded and contains a number of egregious misconceptions.

45 The first is that litigation funders facilitate the prosecution of unmeritorious claims. The financial risks that litigation funders, and law firms acting on a no-win no-fee basis, take when bringing shareholder class actions are significant. Class action proceedings can take years to resolve and the costs can run into many millions of dollars. Litigation funders also take on the risks of an adverse costs order against the plaintiff if the claim is unsuccessful.

46 It would be commercially irrational for litigation funders to take on these risks to prosecute unmeritorious claims. It is the experience of ALFA's members that litigation funders instead adopt rigorous due diligence before determining whether to support any case.

47 The second misconception is that class actions brought to recover loss or damage suffered by shareholders as a result of non-disclosure contraventions are somehow "*opportunistic*". The word implies that corporate managers, who cause shareholders loss or damage by their conduct, are oppressed by being held responsible for their

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26 Joint Committee Report, at [17.130]

27 Joint Committee Report, Table 17.2, at 88.

28 ASIC Submission to the ALRC Inquiry, at [36]-[38].

29 Joint Committee Report, at [17.124]-[17.130].

conduct while the shareholders, who are the real victims, are somehow behaving unconscionably in seeking to recover their losses.

48 The third misconception is that there has been an explosion in the number of shareholder class actions. This is not supported by the empirical evidence. Analysis by Professor Vince Morabito of the number of shareholder class actions commenced in Australia shows a steady increase from 2015 to 2018 but then a decline in 2019.[30] This is in the context of the wide-ranging corporate misconduct revealed during this period by the Royal Commission into Banking and Financial Services and the emergence of an increasing number of competing class actions (class actions brought against the same company by different claimants on behalf of the same or overlapping classes).

49 The raw number of shareholder class actions also needs to be examined. Since 1992, when the class action procedure first became available in the Federal Court of Australia, there have been a total of 122 shareholder class actions commenced. However, only 63 companies or company groups have been the subject of a class action brought by their shareholders over that period, and of these only 23 are ASX 200 companies or company groups.[31]

50 Looking at the five years from 1 July 2014 to 30 July 2019, when the "explosion" in shareholder class actions is said to have occurred, only 34 companies or groups of companies where the subject of class actions filed on behalf of their shareholders.[32] That is an annual average of only 6.8 companies or groups of companies that were subject to shareholder class actions, out of more than 2,000 listed on the ASX.

51 As Professor Morabito concludes, the empirical data does not support the argument that there has been an explosion in shareholder class action litigation. In ALFA's submission, what this data shows is a system that is rightly operating to hold the small numbers of transgressors accountable, for losses caused to their investors.

52 A further argument advanced for amending the continuous disclosure regime is that shareholder class actions simply involve one group of shareholders compensating another for losses caused by the actions of the company's directors and officers. This 'circularity' argument is, on the surface, attractive but it relies on an oversimplification of the economics of shareholder class actions and is ultimately misconceived.

53 Experienced participants in class action litigation know that defence costs and settlements are predominantly paid out of insurance policies held by the respondent companies rather than from companies' own assets.[33] The directors and officers may

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30 Vince Morabito, 'Shareholder class actions in Australia - myths v facts' (November 2019), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660>, at 15.

31 Ibid, at 16-17.

32 Ibid, at 16.

33 Phi Finney McDonald, Submission No. 34 to the Australian Law Reform Commission Inquiry into Class Action Proceedings and Third-Party Litigation Funders (30 July 2018), at [2.5].

also be liable and cross-claims may be brought against companies' auditors or advisors for their involvement in the alleged contraventions.[34]

54 The perceived problem of circularity is further undermined by different behaviours demonstrated by different classes of shareholders. For instance, after revelations of a breach of disclosure, disappointed and distrustful retail shareholders will in many cases sell out of a company to avoid further losses. In such circumstances there is no circularity; instead through a class action those individuals may recoup some of the losses they have suffered as a result of the company's misconduct.

55 Small retail investors typically are not regular traders but rather 'buy and hold' shares in a company for the long term.[35] These investors also stand to benefit the most from the restorative effect on company value that shareholder class actions can bring through changes in governance and personnel,[36] and the specific deterrent effect that class actions have against future disclosure failures.

56 In any event, the proposed amendments to the continuous disclosure laws do not seek to address the purported 'circularity problem' by more efficiently allocating the burden of disclosure breaches to the directors and officers individually responsible. Instead, the amendments give greater protection to those same individuals by making it more difficult for ASIC and shareholders to bring actions against them. Rather than address a perceived inefficiency in the mechanism for compensating shareholders injured, the remedy proposed by the government will have the effect of making it more difficult for injured shareholders to receive any compensation at all.

57 Corporate management and the insurance industry argue that shareholder class actions also need to be curtailed because of the direct upward pressure the risk of class actions is placing on D&O insurance premiums, discouraging managers from taking board appointments.[37]

58 This argument ignores the reality that D&O insurance covers a wide range of potential claims, not simply those associated with shareholder class actions. Rather than blaming class action plaintiffs and those who act for them, the increased cost of D&O insurance might more logically be the predictable result of increased corporate misconduct that has come to light in recent years through, for example, the Royal

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[34] See, for example, the Vocation class action where a settlement of $50 million was reached on behalf of shareholders against the company's former auditors and a number of former directors, as well as the company itself in liquidation, and cross-claims were brought against the company's former legal advisors: Cat Fredenburgh, '$50M settlement resolved class action against Vocation, PwC", *Lawyerly* (online) (30 November 2020) <https://www.lawyerly.com.au/50m-settlement-resolves-class-action-against-vocation-pwc/#:~:text=Lawyerly&text=A%20%2450%20million%20settlement%20has,Winter%20%26%20Slattery%20and%20individual%20directors>.

[35] Michael Legg, 'Shareholder class actions in Australia – the perfect storm?' (2008) 31(3) *University of New South Wales Law Journal* 669, 709.

[36] ASIC Submission to the ALRC Inquiry, at [49].

[37] Joint Committee Report, at [17.13]-[17.16].

Commission into Banking and Financial Services and an increasing number of 'speeding tickets' being issued by the ASX.[38]

59 The amendments to continuous disclosure laws proposed by the TLA Bill do nothing to address this identified increase in corporate misconduct. Instead, the government's solution is to raise the bar against shareholders seeking redress for damages suffered as a result of that misconduct. This is akin to suggesting that the response to an increase in the number of drivers receiving speeding fines should be to remove strict liability for speeding offences and require the police to instead prove the driver was knowingly or negligently travelling over the speed limit.

60 It has been suggested that recent premium rises might also be explained by a historical under-pricing of D&O insurance, leading to price rises to reflect risks that were always present in the market but not previously priced.[39] The ALRC found that there was a lack of verifiable data to establish a link between class actions and increased D&O insurance premiums.[40] Further, the practice of insurers of "bundling" Side C, securities claim cover with D&O insurance, may exacerbate the significance of these arguments.

61 The alternative explanations canvassed above ought to be properly investigated before taking the drastic step of weakening the continuous disclosure regime.

62 The proposed amendments to the continuous disclosure obligations would make permanent the temporary changes introduced by the Government in March 2020, and as such they have received the most attention. However, the new amendments to the misleading or deceptive conduct provisions proposed by the TLA Bill are as ill-conceived as the continuous disclosure changes and potentially introduce a number of additional unforeseen consequences.

63 The TLA Bill proposes to amend the Corporations and ASIC Acts to carve out from the prohibition against misleading or deceptive conduct any conduct that would breach the existing continuous disclosure obligations, unless the requisite fault element of "*knowledge, recklessness or negligence*" can also be established.

64 The Explanatory Memorandum to the Bill explains that, in the recent decisions of the Federal Court in *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited*[41] and *Crowley v Worley Limited*,[42] claims for material non-disclosure and misleading or deceptive conduct were determined on very similar factual bases, and it is common in shareholder class actions for continuous disclosure and misleading or deceptive conduct allegations to be brought together in the same claim.[43]

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38 A Prof Sean Foley and Dr Angelo Aspris, Submissions No. 78 to the Parliamentary Joint Committee on Corporations and Financial Services, Inquiry into litigation funding and the regulation of the class action industry, Parliament of Australia (11 June 2020), at 2.

39 Joint Committee Report, at [17.19].

40 ALRC Final Report, at [9.81].

41 [2019] FCA 1747.

42 [2020] FCA 1522.

43 TLA Bill Explanatory Memorandum, Supplementary Analysis, at 45-46.

65 The purported reasoning for the amendments is therefore to address a concern that that introducing a fault element into the continuous disclosure obligations would be ineffective without also introducing this requirement into the misleading and deceptive conduct provisions, at least in so far as the alleged misleading conduct is said to relate to a failure to update the market with price sensitive information.[44]

66 However, carving out from misleading or deceptive conduct any conduct that would breach the continuous disclosure obligations (unless fault can be established) raises the possibility that fault would need to be established in most shareholder claims for misleading or deceptive conduct.

67 The uncertainty created by these amendments is likely to lead to satellite litigation as to the effect of the amendments and whether the alleged misleading or deceptive conduct also breached the continuous disclosure obligations, even if the latter allegation is not made by the plaintiff in the proceeding. Such uncertainty can only be productive of further expense and delay for all parties involved in shareholder class actions.

68 Perversely, these amendments would also put the protections against misleading or deceptive conduct in relation to financial products and services under the corporation laws out of step with the general protections against misleading or deceptive conduct under s 18 of the *Australian Consumer Law*.[45]

69 As explained above, these newly proposed amendments to the misleading or deceptive conduct provisions of the Corporations and ASIC Acts have not been the subject of any proper review or consideration by the ALRC or Joint Committee. Instead, they appear to have been introduced in response to lobbying of government following the temporary amendments to the continuous disclosure regime.[46]

70 In its submission to the ALRC, ASIC observed the following in respect of the importance of maintaining the current misleading or deceptive conduct provisions under the corporation law:[47]

> *"[The] misleading or deceptive conduct provisions are fundamental to ensuring consumers are adequately protected and market integrity is maintained and apply across financial products and services and trade and commerce generally. We see no justification to amend these provisions. It is fundamental that investors can rely on disclosures to the market, that information provided to them is accurate and investors and the market are not led into error."*

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44 TLA Bill Explanatory Memorandum, Supplementary Analysis, at 45-46.

45 Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

46 Explanatory Memorandum to the Treasury Laws Amendment (2021 Measures No.1) Bill 2021, Supplementary Analysis, at 41.

47 ASIC Submission to the ALRC Inquiry, at [23].

71 ALFA is concerned that the amendments to the misleading or deceptive conduct provisions proposed in the TLA Bill are ill-conceived and have been prepared without any proper consideration given to consequences for the protection of shareholders or the integrity of Australia's financial markets.

Conclusion

72 For the reasons set out in this submission, the Committee should recommend amending the TLA Bill to remove all of Schedule 2, which contains the proposed amendments to the continuous disclosure obligations and misleading or deceptive conduct provisions of the Corporations and ASIC Acts.

73 ALFA is grateful to the Committee for the opportunity to provide this submission. It would welcome the opportunity to present to the Committee, to answer any questions, or to provide any further or other assistance.

Association of Litigation Funders of Australia

1 March 2021

ASSOCIATION OF LITIGATION FUNDERS OF AUSTRALIA

LEVEL 13, 333 GEORGE STREET, SYDNEY NSW 2000

ALFA

APPENDIX B

Association of Litigation Funders of Australia

SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES (PARLIAMENTARY INQUIRY)

Association of Litigation Funders of Australia

Date: 11 June 2020

Introduction

1. The Association of Litigation Funders of Australia (**ALFA**) seeks to make submissions to the Parliamentary Joint Committee on Corporations and Financial Services (**Committee**) on behalf of its Members.

2. ALFA was established in April 2018 by founding members, Investor Claim Partner (**ICP**), Litigation Lending Services (**LLS**), Augusta Ventures (**Augusta**), Vannin Capital (**Vannin**), Balance Legal Capital (**Balance**) and Grosvenor Litigation Services (**Grosvenor**). Since its inception, ALFA has increased its membership base, adding International Litigation Partners (**ILP**) and Southern Cross Litigation Finance (**Southern Cross**) as members in 2019, and Ironbark Funding in 2020 (together, "**Members"**).

3. ALFA's primary purpose is to facilitate the enhancement of the Australian Litigation Funding industry (**Industry**) including, by:

   a. providing education, training and information concerning Litigation Funding and the Industry to its Members and the Industry's stakeholders and prospective plaintiffs;

   b. actively lobbying the government and legislators, and engaging with other regulators and policy makers to help shape the legal and regulatory framework of Litigation Funding in Australia; and

   c. promoting best practice and ethical behaviour amongst litigation funders in Australia.

4. A copy of ALFA's Constitution may be accessed via this link[1].

5. One of ALFA's first tasks was to establish a set of Best Practice Guidelines (which can be accessed via this link[2]) for Members to have regard to when establishing their own policies and procedures.

6. In addition, ALFA:

   a. made oral and written submissions to the Australian Law Reform Commission's inquiry into Class Action Proceedings and Third-Party Litigation Funders (**ALRC Inquiry**) in 2018 and 2019. ALFA's written submissions to the ALRC Inquiry may be accessed via this link[3];

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[1] The Association of Litigation Funders of Australia, *Constitution* <http://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/constitution-_the_association_of_litigation_funders_of_australia_limited-_final.pdf>

[2] The Association of Litigation Funders of Australia, *Best Practice Guidelines* <http://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/alfa_best_practice_guidelines.pdf>

[3] Australian Government Australian Law Reform Commission, *Litigation Funding Inquiry Submissions,* <https://www.alrc.gov.au/wp-content/uploads/2019/08/58_association_of_litigation_funders_of_australia.pdf>

b. held conferences in Sydney and Melbourne in October 2018 and March 2019 in response to the ALRC Inquiry. These conferences attracted lawyers, barristers, insurers, regulators, academics and judges from both the Supreme and Federal Courts;

c. has actively engaged with media on topics relevant to the Industry; and

d. held conferences in Sydney and Melbourne in February 2020 focussing on recent developments in contingency fees, competing Class Actions and Common Fund Orders (**CFOs**).

7. ALFA wishes to engage openly with the Committee and is concerned about the recent announcements by the Federal Government that:

a. it will require litigation funders operating in Australia to hold an Australian Financial Services Licence (**AFSL**) and to conduct Class Actions as a managed investment scheme (**MIS**); and

b. it will temporarily amend the continuous disclosure provisions that apply to companies under the *Corporations Act 2001* (**the Act**).

8. It is inappropriate that these initiatives be pursued precipitously, in light of the final recommendations of the Australian Law Reform Commission (**ALRC**), and the views of the Australian Securities and Investments Commission (**ASIC**). Those bodies have expressed views the courts are best placed to regulate funders and to oversee and manage specific claims and the costs of those claims, and that the government should commission a review of the legal and economic impact of the operation, enforcement, and effects of continuous disclosure obligations.

9. It is beyond doubt that Australia's Class Action system can be improved. To encourage that improvement ALFA supports the implementation of the majority of the recommendations from the ALRC Report 134 on Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (**ALRC Report**).

10. ALFA is grateful for the opportunity to engage fully in this new inquiry, through written and oral submissions and, supports the proper ventilation and debate of the issues that have been referred to the Committee. Such ventilation and debate should not be foreclosed at the behest of entities representing the interests of corporate management and the insurance industry. It begs the question as to why the taxpayer has incurred the costs of the very extensive and comprehensive reviews undertaken by the Productivity Commission (**Productivity Commission**), the Victorian Law Reform Commission (**VLRC**) and the ALRC. ALFA cannot see how there will be any new or ground-breaking submissions or information presented that wasn't previously considered and, it is disappointed that the Federal Government has not responded to the ALRC Report in any meaningful way before embarking on the Parliamentary Inquiry and announcing changes to licensing of funders and continuous disclosure obligations of companies.

11. Further, ALFA is concerned that the Terms of Reference for the Parliamentary Inquiry embed certain factual misconceptions and may lead to error. In particular:

a. Term of Reference 8 refers to the *"…increasing prevalence of class action proceedings in Australia"* - there is no evidence to suggest that there is an inappropriate increasing prevalence of Class Action proceedings in Australia (see further submissions below); and

b. Term of Reference 12 which refers to *"…the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic"* – this language is inflammatory and it implies that the companies are the victims rather than the companies' shareholders and, that the cause of the issues to be the subject of the inquiry is the funded shareholder Class Actions rather than the conduct of the companies and the damage caused by that conduct.

12. In addition to the matters raised above, these submissions seek to address all of the matters raised in the Terms of Reference.

13. These submissions represent the collective views of the Members, but do not necessarily represent the views of each individual member firm.

Executive Summary

14. ALFA's key submissions are as follows:

    (a) Submission 1 - Many misconceptions appear to have influenced discussion of Class Actions and Litigation Funding in recent times. ALFA is concerned to see that these misconceptions do not unduly bear upon the Committee and its report. ALFA considers that the potential influence of these misconceptions is best avoided by a considered study of the ALRC Report (rather than a further enquiry, into ostensibly the same topic, some two years after the ALRC Report).

    (b) Submission 2 - Litigation Funding provides and promotes access to justice which would not otherwise be available. It is difficult to see how Class Actions would remain a functioning part of the Australian civil justice system without ready access to Litigation Funding. ALFA considers that the Committee should be slow to make any recommendations which could have the potential to hamper access to justice.

    (c) Submission 3 - The perceived increases in the volume of Class Action proceedings is being overstated. It needs to be viewed in appropriate context, which includes litigation concerning the extraordinary findings of the Financial Services Royal Commission. Further, claims may be being double-counted (where separate proceedings are commenced in respect of the same matter). Having regard to that context, the evidence indicates that the number of Class Actions in Australia has been relatively stable in recent times.

    (d) Submission 4 - There is no evidence that Litigation Funding leads to the filing of opportunistic or unmeritorious suits. Litigation Funders do not invest in claims which lack merit, because to do so would jeopardise their capital. In practice, substantial due diligence occurs prior to deciding to fund litigation. Seen in that context, the suggestion that Litigation Funding leads to the filing of opportunistic or unmeritorious suits assumes that Members are acting in a way which is commercially irrational. This suggestion should be dismissed by the Committee.

    (e) Submission 5 - ALFA supports the views of ASIC and the ALRC that the existing AFSL and MIS regulatory structures are unsuitable for a Litigation Funding context and that it is inappropriate for Litigation Funders (and Class Actions) to be subject to these regulations. ALFA supports the ALRC's proposal of sensible and measured regulatory changes which balance improving consumer outcomes with that of ensuring a properly functioning market for Litigation Funding.

    (f) Submission 6 - ALFA does not support wholesale changes to Part IVA of the Federal Court of Australia Act, such as converting the current "opt-out" structure (with open classes) to that of an "opt-in" model. This is a highly technical area. The making of precipitous changes could result in prejudice to group members who are unable to prosecute their claims individually, create uncertainty (including for defendants), and perversely may produce more litigation (rather than less).

    (g) Submission 7 - ALFA considers that CFOs should be encouraged, and that Courts should be expressly empowered by legislation to make such orders. CFOs have been

demonstrated in recent times to have generated increased competition in the Litigation Funding market, which has improved consumer outcomes. The Court maintains appropriate supervision of recoveries pursuant to the CFO, such that any prejudice to a stakeholders (including, to the extent relevant, the defendant(s)) would be addressable. ALFA does not object, in principal, to solicitors having the ability to be remunerated by way of contingency fee in Class Action matters, pursuant to a Court order which facilitates that.

15. ALFA's key submissions are developed below.

Submission 1 - Dispelling misconceptions about Class Actions and Litigation Funding

16. Many misconceptions appear to have influenced discussion of Class Actions and Litigation Funding in recent times. ALFA is concerned to see that these misconceptions do not unduly bear upon the Committee and its report. ALFA considers that the potential influence of these misconceptions is best avoided by a considered study of the ALRC Report (rather than a further enquiry, into ostensibly the same topic, some two years after the ALRC Report).

17. ALFA believes that certain key misconceptions have driven certain recent media commentary, which has been misguided and unnecessarily inflammatory. ALFA wishes to comment on what it identifies as the key misconceptions, as ALFA is concerned to see that these misconceptions are dispelled.

18. We consider these key misconceptions to be as follows (and provide our short responses to them):

"Companies are regularly facing baseless, opportunistic and unmeritorious class action suits."

19. The most egregious misconception is that Litigation Funders facilitate the prosecution of unmeritorious claims.

20. The financial risks that Litigation Funders, or law firms in a no win no fee claim, take to bring a claim to the courts can be significant. Class Actions are now costing many millions of dollars to run, in part due to the types of claims, the number of group members impacted and in part due to the vigorous defence of some claims. In a jurisdiction like Australia where a party who is unsuccessful in its claim has to pay not only its own legal costs but those of the successful party, the risks of litigation are significant.

21. It would be commercially irrational for Litigation Funders to prosecute unmeritorious claims. It is the experience of Members that Litigation Funders adopt a rigorous diligence before determining whether to support any case. This should be unsurprising given that if a case is unsuccessful, the Litigation Funder will not only lose all of its funding (which is provided to counterparties on a non-recourse basis) but will have to pay the defendants' costs of the proceeding.

22. ALFA considers that the involvement of Litigation Funders in the Class Action system has decreased, rather than increased, the prospect of unmeritorious claims being brought.

23. Further, ALFA is not aware of any Class Action which has been identified as being an example supporting this contention.

24. There are existing professional obligations which prevent lawyers from filing baseless claims. Those obligations find reflection in rules of conduct precluding legal practitioners from alleging any fact in a court document unless there is a belief on reasonable grounds that the facts known to the practitioner provide a proper basis for making that allegation: r 64 of the Legal Profession Uniform Conduct (Barristers) Rules 2015; r 21.3 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015. For example, a Class Action filed in the Federal Court of Australia

must state the name of the person who prepared the pleading, and include *"a certificate signed by the lawyer that any factual and legal material available to the lawyer provides a proper basis"* for the allegations in the pleading.[4]

25. A defendant to any civil litigation has numerous options when faced with a claim that it considers baseless. These include applying to strike out the Statement of Claim, obtaining Summary Judgment, de-classing the proceeding (in the case of a Class Action) and/or obtaining security for costs. These matters reduce the likelihood of a baseless claim being brought and increase the chance of it being dismissed in short order.

"Companies are being bullied by flimsy suits and often have no practical choice but to settle."

26. This misconception is best encapsulated in the following quote attributed to a Partner of a major International Law Firm[5]:

> "*Because the claims (shareholder class action suits) can be so big, if you have a $1 billion exposure, it's attractive to settle at 5 per cent, $50 million, which is a good deal for funders.*"

27. The "every player wins a prize" assumption underpinning this comment is simplistic and contrary to the facts.

28. It is not the experience of ALFA's Members that Australian companies have no practical choice except to settle "flimsy suits". Securities Class Actions have a vital function in promoting and reinforcing the integrity of share markets by ensuring that companies actually exercise reasonable care in making (or not making) public announcements. Yet in the recent decision of the Federal Court in the failed securities Class Action against Myer Holdings Ltd,[6] Myer Holdings was vindicated in declining to settle a Class Action and the resulting judgment illustrates the limitations on liability for misleading statements and continuous disclosure contraventions. This decision illustrates that the Courts are best able to strike the right balance between the protective function and limiting the principles governing liability.

29. ALFA questions how it could ever be attractive for a company (or its insurer) to pay $50 million to settle a case against it (using the example above), unless the company had received legal advice that there were sufficient prospects of it being unsuccessful in defending the case, to justify such a payment. This is because:

    (a) company directors owe fiduciary duties to act in the best interests of the company, and to act with due care, skill and diligence (eg s 180 of the Act). That is particularly so given that if the company is successful in defending the action, it will be awarded its costs of doing so (*which it would claim as against security already provided*);

    (b) it is highly unlikely that any insurer who may have granted indemnity in respect of the company's liability from the claim, would consent to the settlement of a "flimsy suit". As above (but perhaps more so), insurers are not in the business of paying out very large sums of money, unless it is reasonably clear that their insured will face substantial difficulties in defending the case at trial. $50 million is an extraordinary amount of "nuisance

[4] Rule 16.01(c) of the Federal Court Rules 2011 (Cth).

[5] "Class warfare: the fight over corporate Australia's most reviled legal tactic has begun." Sydney Morning Herald, 30 May 2020.

[6] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

money." In practice, experience suggests that insurers do not settle large claims without first receiving advice from lawyers that they ought do so.

"Funders are misusing the legal system to make extraordinary profits."

30. ALFA is concerned that the relevant "misuse" allegation has never been properly articulated. To the contrary, numerous enquiries and Court decisions have recognised the access to justice provided by Litigation Funding.

31. Without financial support, it is not possible for a lead applicant to prosecute a representative proceeding, given that their individual claim would never justify the expenditure of cost and their personal exposure to adverse costs.

32. That Litigation Funders expect to generate a return on the capital they have provided to the claimant, should be uncontroversial. ALFA does not see how this feature is relevantly abusive. There is no practical difference between this commercial outcome and that of a solicitor, acting in a no win, no fee structure, who has a margin of return above costs in their professional rates (as all professionals do). ALFA considers idiosyncratic notions of acceptable returns on investments are unhelpful, when more sophisticated and market-based indicators are available.

33. Further, as far as Class Action proceedings are concerned, it is difficult to see how a situation where funders are earning "extraordinary profits" can exist, where every settlement of a Class Action matter, requires the approval of the Court that the terms of the settlement (including the amount of any payment to a Litigation Funder), is fair and reasonable.

34. ALFA would be surprised if the Committee recommended legislative intervention in relation to the potential return to Litigation Funders, when it is clear that the development of the Litigation Funding market with increased competition is delivering lower funding premiums. For example, in *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 at [54], Lee J said that *"recent developments suggest that the market for funding has become more mature and competitive"*, and referred to an *"apparent significant downward trend in funding rates"*. A recent publication by commercial law firm Allens entitled *"Class Action Risk 2020"* observed that, in the context of competing Class Actions, the increased scrutiny of the economic merits of various funding proposals *"has led to increased competition and downward pressure on commission rates"*.[7]

"*As a result of large class action payouts, the cost of D&O insurance is becoming unaffordable*"

35. If it is established that the cost of D&O insurance is rising, AFLA would submit that the Committee should not readily assume that this is referrable or solely referrable to Class Actions, noting in particular the significant regulatory action taken by ASIC and others in recent years (following, for example, the Financial Services Royal Commission). For example, the Final Report of the Financial Services Royal Commission indicated that ASIC (for example) must ask itself the question: *"Why not litigate?"*.[8] ALFA expects that D&O insurance will have responded to significant costs associated with these actions and that this will have materially increased payouts. It should not be assumed that any increases are attributable to Class Actions.

36. Further, there is reason to think that Class Actions are separately priced by insurers. Some D&O policies include cover for the company's liability for securities Class Actions. This is known as "Side C" cover and is included as an extension to D&O policies, so claims on this cover are also claims on the D&O cover. It seems to ALFA that if there is a concern about the impact of securities Class Action settlements is having on D&O insurance, insurers may be well advised to offer this

[7] <https://www.allens.com.au/globalassets/pdfs/campaigns/class_action_risk_report_2020.pdf>

[8] *Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 2019* (vol 1), p.427.

cover separately. ALFA is concerned that this misconception has been exaggerated due to the commercial preferences of insurers.

37. ALFA would welcome the opportunity to provide further information about any of the above matters if that would assist the Committee.

Submission 2 - Litigation Funding provides and promotes Access to Justice

38. ALFA submits that Litigation Funding provides and promotes access to justice, which would not otherwise be available. It is difficult to see how Class Actions would remain a functioning part of the Australian civil justice system without ready access to Litigation Funding. ALFA considers that the Committee should be slow to make any recommendations which could have the potential to hamper access to justice.

39. Litigation Funders are commercial entities that contract with one or more prospective or actual litigants in respect of the funding of a legal claim. Although they are not parties to the litigation, they provide the funding (including, importantly, security for costs) that allows claims to proceed where they otherwise might not. As the Hon Mark Dreyfus QC, MP said recently:

> *"[l]itigation funding and class actions provide a vital path to justice for ordinary Australians trying to uphold their rights against wealthy defendants with vastly greater resources".* [9]

40. The Productivity Commission also recognised that Litigation Funding promotes access to justice noting:

> *… the access benefits of litigation funding should not be underplayed, particularly in relation to complex matters where the initial costs of investigation and collecting expert evidence may be substantial and the defendant is well resourced. There may also be an advantage for the opposing party as the litigation funder has better resources to meet an adverse costs order should the case it is funding fail.*[10]
>
> *Overall, litigation funding promotes access to justice, and is particularly important in the context of class actions where, although action could create additional benefits when viewed from a broader or community-wide perspective, (often inexperienced) claimants might not take action given the scale of their personal costs and benefits.*[11]

41. The Productivity Commission also explained that:[12]

> *Litigation funding can promote access to justice by providing finance for the prosecution of genuine claims by plaintiffs who would otherwise lack the resources to proceed. Since funders choose cases based on commercial viability, their involvement favours cases with relatively high costs, large payouts and low risk and is unlikely to improve access in relation to rights-based, non-monetary claims. However, the access benefits of litigation funding should not be underplayed, particularly in relation to complex matters where the initial costs of investigation and collecting expert evidence may be substantial and the defendant is well resourced. There may also be an advantage for the opposing party as the litigation funder has*

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[9] Media Release dated 12 May 2020 by the Hon Mark Dreyfus QC, MP titled "Class Action and Litigation Funding Inquiry"

[10] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2, 607.

[11] Ibid 624.

[12] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014) vol 2, 607.

> *better resources to meet an adverse costs order should the case it is funding fail (SCAG 2006).*

42. The Productivity Commission stated that, along with financial support, Litigation Funders often bring important expertise and experience.[13] They can influence the provision of legal services and ensure that costs are minimised. The Litigation Funder can also assist in developing the case by identifying group members and collecting information to assess the viability of the claim and assisting with the formulation of the claim theory. Many of the professionals working as Litigation Funders are former lawyers (often former partners of large commercial law firms) with extensive experience in running commercial litigation. They bring this experience to bear in assisting with the legal and resolution strategy of funded cases.

43. The Productivity Commission continued:[14]

> *In the case of class actions, litigation funders identify, contact and organise members of the class where it might otherwise be unfeasible for a group of plaintiffs to organise themselves. Moreover, they remove the liability for adverse costs, which is a particularly pronounced disincentive in bringing class actions because non-representative group members are statutorily immune from costs ordered against the representative party (Grave et al. 2012). This means the representative party is normally liable for all adverse costs ordered, but is only entitled to a share of the payout.*

44. In other words, Litigation Funders play a significant role in levelling the playing field in the Australian adversarial justice system.

45. Many examples could be cited of the beneficial impact upon ordinary Australians of the role of Litigation Funding in providing access to justice. AFLA would highlight the following:

    (a) the “Stolen Wages” Class Action against the State of Queensland, for recovery of underpayments for work undertaken by Aboriginal and Torres Strait Islander people in Queensland between 1939 and 1972. The legal costs and disbursements to bring that proceeding exceeded $13.8m, which is beyond the capacity of any one (or, likely, any group) of the plaintiffs to bring, but yielded a settlement of $190m for the benefit of all group members;

    (b) the proceedings against the ratings agency “S&P“, in relation to the ratings given to synthetic collateralised debt obligations prior to the Global Financial Crisis. The legal costs and disbursements to bring that proceeding exceeded $20m, and yielded a settlement of $215m, resulting in a return of significant sums of money to Local Government Authorities, which funds were then able to be applied for the benefit of ratepayers;

    (c) the Class Action brought on behalf of Australian motorists against Volkswagon, Audi and Skoda EA189 diesel vehicles, which was initiated in 2015 and finally resolved for between $87m and $127m (depending on the final size of the claimant group) in late 2019; and

    (d) the “Banksia Financial Group” Class Action in Victoria, which commenced in 2013 and resolved in late 2017 on the basis that the trustee for debenture-holders would pay $64m to investors, most of whom are retirees.

46. Litigation Funders play an important role in the litigation that they fund but they do not control the litigation. They provide the funding to bring a claim, and, importantly, provide the security for costs to allow a claim to proceed where it otherwise might not. They agree to indemnify the claimant

[13] Ibid.
[14] Ibid.

against any adverse costs ordered by the court in the event that the proceedings are unsuccessful. The risk of being left with a substantial adverse costs order can be a significant impediment to a claim proceeding. This is particularly the case where the respondent may be well resourced, and the claimants may be individuals whose individual claims would be dwarfed by any potential adverse costs order.

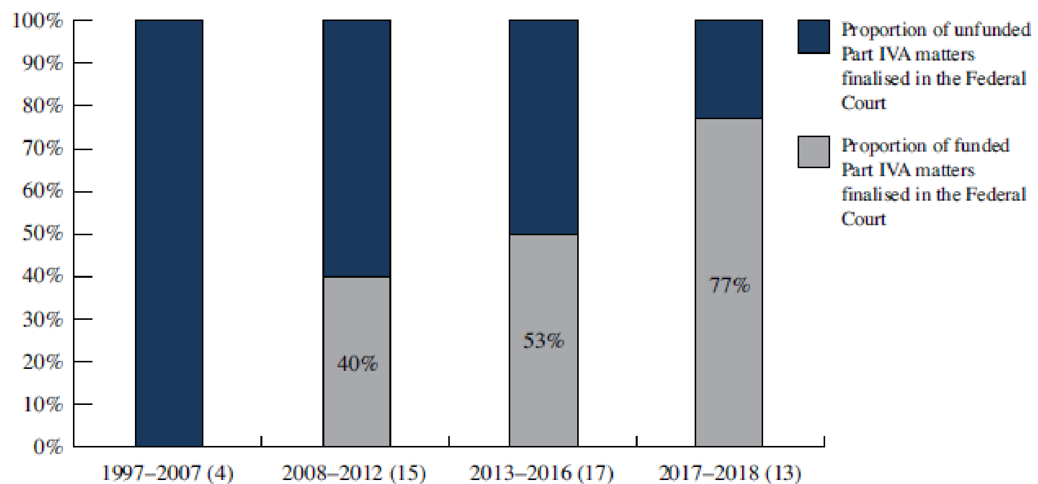
47. In a report provided by Professor Morabito of Monash University entitled Market Shares of Litigation Funders in Australia's Class Action Market (**Morabito ALFA Report**) (enclosed as **Annexure 1**), for calendar years 2014 to 2018, Professor Morabito identified 217 Class Actions which were commenced in the four Class Action jurisdictions (Federal Court of Australia, Supreme Court of New South Wales, Supreme Court of Victoria and Supreme Court of Queensland).[15] Of those 217 Class Actions, 135 (62.2%) of them were supported by Litigation Funding.[16] This can be compared to the ALRC Report 2019 which found that between March 2017 and 2018 (i.e. looking just at the latter half of the four year period reviewed by Professor Morabito):[17]

(a) 78% (21) of filed proceedings were supported by Litigation Funders; and

(b) 77% (10) of finalised proceedings were funded.

48. The ALRC Report illustrated the growth in Litigation Funding for Class Actions in the Federal Court in Figure 3.1 and Table 3.2:[18]

Figure 3.1: Proportion of finalised Part IVA proceedings that received third-party litigation funding (1997–October 2018)



Source: ALRC Snapshot, Appendix F

15 Vince Morabito, *Market Shares of Litigation Funders in Australia's Class Action Market* (Report commissioned by the Association of Litigation Funders of Australia, September 2019).

16 Ibid 3

17 Australian Law Reform Commission, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (Final Report No. 134 December 2018), 74.

18 Ibid 74-75.

Table 3.2: Total number of class action proceedings filed in the Federal Court of Australia and the percentage that were funded (1992–2018)

Time period	Total number of class action proceedings filed in the FC	Total number of filed class action proceedings that were funded	% of filed class action proceedings that were funded
March 1992—March 2013	311	46	15%
March 2013—March 2018	111	71	64%
March 2017—March 2018 (subset of above)	27	21	78%
TOTAL filed on/before March 2018	**422**	**117**	**28%**

Source: Professor Vince Morabito, Private correspondence (13 March 2018)

49. Professor Morabito's study suggested that the results obtained on behalf of plaintiffs in funded litigation is significantly higher than the results obtained in unfunded litigation:[19]

> *… the mean gross settlement fund and the median gross settlement fund in funded Part IVA proceedings – $48,218,333 and $38,500,000, respectively – were substantially greater than corresponding settlement funds for non-funded Part IVA proceedings: $16,987,659 and $3,100,000, respectively…*

50. It is therefore apparent that Litigation Funders are providing and promoting access to justice for ordinary Australians.

Submission 3 - The number of Class Actions in Australia is relatively stable

51. AFLA submits that the perceived increases in the volume of Class Action proceedings is being overstated. It needs to be viewed in appropriate context, which includes litigation concerning the extraordinary findings of the Financial Services Royal Commission. Further, claims may be being double-counted (where separate proceedings are commenced in respect of the same matter). Having regard to that context, the evidence indicates that the number of Class Actions in Australia has been relatively stable in recent times.

52. ALFA acknowledges a frequently voiced concern to the effect that Litigation Funding (along with other market factors) has prompted an influx of Class Action risk which is damaging the ability of businesses to operate in Australia. These arguments have also tended to assert that Class Action risks are affecting the ability of boards to efficiently govern, which is leading to counterproductive risk-adverse decision making, and is increasing the price of certain insurances. These concerns are said to be particularly acute in respect of shareholder Class Actions. See for example:

> "*Australia offers a unique combination of a litigation funding sector that is easy to enter, and very strict continuous disclosure laws for companies listed on share markets. The overlap between the two has produced rich feeding grounds for both law firms and the funders that stand behind a majority of shareholder actions. Requirements to promptly reveal any material changes that might affect shareholders are an important protection against market manipulation, insider trading and in maintaining the integrity of the market. But they also leave lawyers*

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[19] Vince Morabito, 'Lessons from Australia on Class Action Reform in New Zealand' (2018) 24 *New Zealand Business Law Quarterly* 178, 202.

ready to pounce if companies are not quick enough off the mark." - Patrick Durkin and Michael Pelly of the AFR.[20]

"*Insurance fees will continue to skyrocket as class actions grow and settle out of court*."- G199 president Andrew Porter – who is also CFO of listed company AFIC.[21]

"*Every listed company in Australia is now seeing a dramatic increase in D&O* [directors and officers'] *liability cover. We have been told by our insurers that it is a direct result of class actions, so there is a cost to shareholders as well as on the company's and directors' time*" - G100 president Andrew Porter – who is also CFO of listed company AFIC.[22]

"*He noted the total value of* [shareholder] *class-action settlements from 1999 to 2016 had been about $1.6 billion. Insurers contributed $1 billion of that, leaving about $600 million as a direct hit on the bottom line of the companies involved. Premiums can cost about $1 million for full D&O cover*" – According to the Australian Financial Review, referring to statements made by Ewen McKay, a management liability expert at global insurer XL Catlin.[23]

53. Care needs to be taken to ensure that the actual data on Class Action numbers is considered rather than impressionistic views.

54. Professor Morabito's analysis of Class Action demonstrates that when judged objectively and in an international context, the number of Australian Class Action filings is moderate. Professor Morabito's conclusion was that: 'no balanced or objective assessment of Australia's Class Action landscape could possibly lead to the conclusion that there has been an explosion of Class Actions in recent years'.[24]

55. In support of this conclusion, Professor Morabito provides the following:[25]

"In the table below, I set out the data with respect to all the Australian class actions that, to my knowledge, were filed during the review period.

[20] Australian Financial Review, 'It's time to curb the corporate ambulance chasers', *Australian Financial Review* (online, 19 June 2018) <https://www.afr.com/policy/its-time-to-curb-the-corporate-ambulance-chasers-20180619-h11jvb>.

[21] Patrick Durkin and Michael Pelly, 'CFOs back class action review after insurance skyrockets up to 400pc', *The Australian Financial Review* (online, 19 June 2018) <https://www.afr.com/companies/professional-services/cfos-back-class-action-review-after-insurance-skyrockets-up-to-400pc-20180618-h11j29>.

[22] Ibid.

[23] Ibid.

[24] Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Competing Class Actions and Comparative Perspectives on the Volume of Class Action Litigation in Australia' (11 July 2018), 11—14.

[25] Ibid 11—13.

Table 1
The first 27 years and four months of class actions

Financial Year	**Federal, Victorian, NSW & Queensland class actions = total number of class actions**
Year 1 (from 4/3/1992 to 30/6/1992)	**1**
Year 2 (from 1/7/1992 to 30/6/1993)	**12**
Year 3 (from 1/7/1993 to 30/6/1994)	**4**
Year 4 (from 1/7/1994 to 30/6/1995)	**13**
Year 5 (from 1/7/1995 to 30/6/1996)	**7**
Year 6 (from 1/7/1996 to 30/6/1997)	**18**
Year 7 (from 1/7/1997 to 30/6/1998)	**22**
Year 8 (from 1/7/1998 to 30/6/1999)	**30**
Year 9 (from 1/7/1999 to 30/6/2000)[6]	21 + 4 = **25**
Year 10 (from 1/7/2000 to 30/6/2001)	17 + 3 = **20**
Year 11 (from 1/7/2001 to 30/6/2002)	14 + 2 = **16**
Year 12 (from 1/7/2002 to 30/6/2003)	22 + 6 = **28**
Year 13 (from 1/7/2003 to 30/6/2004)	12 + 3 = **15**
Year 14 (from 1/7/2004 to 30/6/2005)	4 + 1 = **5**
Year 15 (from 1/7/2005 to 30/6/2006)	6 + 3 = **9**
Year 16 (from 1/7/2006 to 30/6/2007)	19 + 0 = **19**
Year 17 (from 1/7/2007 to 30/6/2008)	21 + 0 = **21**
Year 18 (from 1/7/2008 to 30/6/2009)	11 + 3 = **14**
Year 19 (from 1/7/2009 to 30/6/2010)	11 + 6 = **17**
Year 20 (from 1/7/2010 to 30/6/2011)[7]	19 + 4 + 3 = **26**
Year 21 (from 1/7/2011 to 30/6/2012)	17 +18 + 0 = **35**
Year 22 (from 1/7/2012 to 30/6/2013)	17 + 4 + 1 = **22**
Year 23 (from 1/7/2013 to 30/6/2014)	15 + 4 + 2 = **21**
Year 24 (from 1/7/2014 to 30/6/2015)	20 + 15 + 9 = **44**
Year 25 (from 1/7/2015 to 30/6/2016)	24 + 3 + 10 = **37**
Year 26 (from 1/7/2016 to 30/6/2017)[8]	29 + 3 + 4 + 2 = **38**
Year 27 (from 1/7/2017 to 30/6/2018)	32 + 7 + 15 + 2 = **56**
Year 28 (from 1/7/2018 to 30/6/2019)	33 + 4 + 17 + 5 = **59**
Totals	**471 + 93 + 61 + 9 = 634**

*Does the filing of **634 class actions** over a period of 27 years and 4 months support the claim that there has been an explosion of class actions? This represents **an annual average of 23 class actions**. No objective or balanced assessment of this figure could lead to the conclusion that over the 27 years in question, the floodgates have opened.*

*What about the last five years? Similarly, an **annual average of 46.8 class actions** does not support the claim that there has been an explosion of class actions. It must not be forgotten that in the last three years, four class action regimes were in operation and three operated in the preceding two years.*

What about 56 class actions in 2017-2018 and 59 class actions in 2018-2019? In dealing with this question I am forced to provide again data which I provided last year and which has been conveniently forgotten or ignored by those who claim that Australian class actions are out of control.

In the nine years from 2007 to 2015, 5,687 class actions were filed in Israel. This is almost nine times more than the total number of class actions that have been filed in Australia over the review period. And this is despite the fact that in Israel class actions may be brought only with respect to certain categories of substantive claims and that Israel has a population of just over 8 million people.

Professor Catherine Piché has recently revealed that she has "identified 1306 cases filed in Quebec since 1993. This number constitutes an average of 50 cases per year".

Quebec has an overall population of just over 8 million people. In the same report mentioned above, Piché has also revealed that over the same period (that is 1993-2017), she identified in the province of Ontario "a total number of 1459 cases filed … for an average of 54 cases per year". Piché has also drawn attention to the fact that in Ontario, "there has been a steady increase in the number of case filings, with the year 2014 toping at 130 cases, the year 2015 at 110 cases and the year 2017 at 108 cases". Ontario has a population of just over 14 million people.

It is crucial to note that these statistics refer to just one class action court for each of Israel, Quebec and Ontario whilst the Australian data refers to class actions in four class action courts. The difference between Australia's population (over 24 million people) and the populations of these three jurisdictions is also striking.

(Footnotes omitted)

56. Professor Morabito's comparative analysis of other jurisdictions is summarised in the table set out below:[26]

Jurisdiction	Period	Class Actions Filed	Approx. Avg. Class Actions Per Year	Approximate Population
Australia	1992-2019	634	23	24 Million
Israel	2007-2015	5,687	632	8 Million
Quebec	1993-2017	1,306	50	8 Million
Ontario	1993-2017	1,459	54	14 Million

57. Professor Morabito also identifies some relevant context for recent Class Action claims, indicating that:[27]

In evaluating the last two years, it is also important to bear in mind the phenomena of related and competing class actions, as a result of which, the mentioned 634 class actions concerned only a total of 420 different legal disputes. Related and competing class actions were even more prevalent in the last two years as highlighted by the seven class actions filed by Quinn Emanuel Urquhart & Sullivan with respect to dangerous airbags and 14 instances of competing class actions. As a result, the 115 class actions filed over the last two financial years concerned a total of 82 different legal disputes.

It is also crucial to note that during the last financial year interim and final reports were issued by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Numerous instances of misconduct were revealed in these reports. A failure to bring class action proceedings on behalf

[26] Ibid 11—14.
[27] Ibid 13—14.

> *at least some of the victims of these identified instances of misconduct would have raised legitimate questions as to the effectiveness of our class action regimes.*

58. More recently, and contrary to Government claims, research by commercial law firm Allens observed a "marked softening in shareholder Class Action filings".[28] Whilst "the number of companies facing a new Class Action in 2019 was on par with recent years",[29] the biggest cause of new cases in 2019 came from consumer actions arising from the Banking Royal Commission. So far in 2020, there are just three new shareholder cases – none of which relate to COVID-19 matters

59. There has been some negative, inflammatory and incorrect press in recent years about Litigation Funders and the Class Action industry. Professor Morabito's report demonstrates that there has not been an explosion in Class Actions or significantly diminishing returns to group members as has often been reported, in fact the independent data clearly shows that this is not the case. On the other hand, there has been no credible independent evidence put forward to demonstrate that Class Actions are having an adverse impact on the Australian economy (and even if they were, what that impact is).

60. The arguments that the increase in Class Actions is having a detrimental impact on the ability to obtain directors and officers liability insurance, or that it is causing an increase in the cost of obtaining cover, have not been established. There may be a variety of other reasons explaining any increase in insurance charges. ALFA submits that the unilateral decisions that insurers make in relation to the structuring of their products and the charges they impose on their customers, should not dictate public policy.

Submission 4 - Concerns regarding opportunistic or unmeritorious suits are unfounded

61. AFLA submits that there is no evidence that Litigation Funding leads to the filing of opportunistic or unmeritorious suits. Litigation Funders do not invest in claims which lack merit, because to do so would jeopardise their capital. In practice, substantial due diligence occurs prior to deciding to fund litigation. The suggestion that Litigation Funding leads to the filing of opportunistic or unmeritorious suits assumes that Members are acting in a way which is commercially irrational. This suggestion should be dismissed by the Committee.

62. It may assist the Commission when considering this submission to understand a little more about the way that Litigation Funding businesses work. In particular:

    (a) Litigation Funders are commercial entities that contract with one or more prospective or actual litigant(s) in respect of the funding of a legal claim;

    (b) although not a party to the litigation, the Litigation Funder agrees to cover the costs of the proceeding (principally legal and expert costs), to meet requirements for security for costs and to pay the costs awarded against the litigant(s) if the claim is unsuccessful. In claims of the kind commonly pursued in funded litigation, the Litigation Funder's risk of adverse costs exposure can be very significant;

    (c) the Litigation Funder only achieves any financial remuneration if the claim is successful. In that event, the Litigation Funder is usually entitled to have its costs of the litigation repaid and to receive a commission from the proceeds of the litigation (either settlement sums or damages awarded). Litigation Funders may also separately charge an administration or

[28] <https://www.allens.com.au/globalassets/pdfs/campaigns/class_action_risk_report_2020.pdf>
[29] <https://www.allens.com.au/globalassets/pdfs/campaigns/class_action_risk_report_2020.pdf>

project management fee, or other discrete fees, depending on the terms of the funding agreement;

(d) there is no standard process by which funding terms are offered or agreements with Litigation Funders are entered into. Each Litigation Funder has its own approach to case due diligence and determining the terms of funding agreements. The determination by a Litigation Funder of the commercial terms of a funding agreement will depend on the risk associated with taking on the case, the expected period that the case will run, the costs involved in litigating the case, and the likely reward on the conclusion of the case;

(e) the commission is typically either a share of the proceeds of the litigation or a multiple of the costs expended on the litigation, or a combination of the two. Although a range of commission and cost structures are possible, it is important to note that Litigation Funding is almost always non-recourse to the litigant, meaning that if the litigation is unsuccessful, then the amounts invested by the Litigation Funder in the claim do not need to be repaid by the litigant.

63. The Commission will appreciate the Litigation Funders are only paid a commission if claims succeed. The greatest financial risk that Litigation Funders face is the investment of substantial funds in an ultimately unsuccessful claim. The downside risk involved in Litigation Funding exceeds 100% of the investment, on account of the exposure to adverse costs. The unique risk profile of Litigation Funding means that it cannot be fairly compared to other types of investment (eg equities). On any view, however, it is contrary to Litigation Funders' commercial interests to fund unmeritorious claims.

64. There is no fixed rate charged by Litigation Funders as the risks, potential investment period and anticipated return for each case is different and this results in different costing. However:

(a) a Working Paper in 2011 found that:[30]

(1) commissions at the time (2011) appeared to range between 20% and 45%;

(2) in 2006 the Law Council was advised that Litigation Funding companies usually charge between 15% and 40% of an award or settlement; and

(3) in 2010 IMF (as it then was), Quantum and Litigation Lending Services all typically charged commissions that ranged between 25% and 40% of net litigation proceeds and another Litigation Funder, CLF, typically charged a commission of between of 25% and 35% of net litigation proceeds; and

(b) the ALRC in its ALRC Report, found that of the 13 matters commenced in the Federal Court of Australia in 2014 and 2015 that had been finalised by judicially approved settlement by 2018, the average funding fee was 28.5%.[31]

65. Commission rates disclosed in recent matters are broadly consistent with these ranges across the market, although increasing competition in the Industry has reduced commission rates for large Class Actions over the last decade and especially in the last 5 years (ranging typically from 10% to 30% of recovery or around 1.8 to 2.5 times the costs).[32]

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[30] George Barker, 'Third Party Litigation Funding in Australia and Europe', (December Working Paper No. 2, Centre for Law and Economics, Australian National University College of Law, December 2011) 29.

[31] Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report No. 134 December 2018), 66.

[32] See for example*: Wigmans v AMP Ltd; Fernbrook (Aust) Investments Pty Ltd v AMP v Wileypark Pty Ltd v AMP Ltd; Georgiou v AMP Ltd; Komlotex Pty Ltd v AMP Ltd* [2019] NSWSC 603; *Perera v GetSwift Limited* [2018] FCA 732; *Impiombato v BHP Billiton Limited (No 2)* [2018] FCA 2045.

66. Any return to Litigation Funders in this context has to take account of these risks and provide a return commensurate with those risks. This business model is not novel in the finance industry and it is well understood by companies and investors.

Submission 5 - The existing AFSL and MIS regulatory structures are unsuitable

67. ALFA supports the views of ASIC and the ALRC that the existing AFSL and MIS regulatory structures are unsuitable for a Litigation Funding context and that it is inappropriate for Litigation Funders (and Class Actions) to be subject to these regulations. ALFA supports the ALRC's proposal of sensible and measured regulatory changes which balance improving consumer outcomes with that of ensuring a properly functioning market for Litigation Funding.

68. Two intermediate appellate court decisions have found that certain Litigation Funding arrangements were MIS for the purposes of the Act,[33] and a "financial product" under s 763A of the Act.[34] In response to these decisions, in 2012, the Commonwealth Government introduced regulations to exempt Litigation Funders from the requirement to hold an AFSL and to be subject to MIS regulations in respect of Class Actions, so long as they maintained policies to manage their conflicts of interest.

69. The Explanatory Statement to the exempting regulation stated:[35]

> *The Federal Court's decision would have imposed a wide range of requirements that apply to MIS, such as registration, licensing, conduct and disclosure requirements on litigation funders and their arrangements with their clients. The Government considers that these requirements are not appropriate for litigation funding schemes. The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. The Government's main objective is therefore to ensure that consumers do not lose this important means of obtaining access to the justice system.*

70. The ALRC, although it initially supported a licence regime (as set out in Discussion Paper 85), after measured consideration of this topic concluded that the best form of regulation involved improved Court oversight of Litigation Funders – an approach supported by ASIC.[36] The ALRC considered that the AFSL regime was unlikely to improve regulatory compliance, and was unlikely to ever receive significant attention from the regulator. ALFA supports this conclusion and encourages the Committee to consider the work of the ALRC in this matter.

71. Therefore, until the announcement by the Federal Government on Friday 21 May 2020, the only industry-specific regulation that Litigation Funders are subject to is limited to ASIC Regulatory Guide 248 in relation to management of conflicts of interest. However, Litigation Funders remain subject to general law requirements such as ASX Listing Rules if they are listed, and the requirements of the Australian Securities and Investments Commission Act 2001 (Cth) in relation to protections for consumers of financial services (which mirror protections found in the Australian Consumer Law).

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[33] See *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.
[34] See *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50.
[35] Explanatory Statement, Select Legislative Instrument 2012 No 172, 1.
[36] ALRC Report, p.161-162 [6.37].

72. The Federal Government has now announced that it will require Litigation Funders operating in Australia to hold an AFSL and to provide funding for Class Actions within the MIS regulatory framework.

73. Having regard to the existing regulatory position and the position of the ALRC, ALFA was surprised by this development.

74. ALFA has said before, and it reiterates again, that it would not oppose a licensing regime although such a regime may not add any meaningful value in consumer protection. However, ALFA would advocate that the terms of the regime:

    (a) should not restrict competition that is emerging in the market;

    (b) should not cost more than its likely benefit; and

    (c) should be the subject of further consultation.

75. ALFA notes the stated objectives of the proposed, new regulatory regime are:

    (a) ensuring that only reputable and capable funders enter the market;

    (b) reducing the risk of financial loss to the parties by reducing the risk that funders will be unable to meet their liabilities;

    (c) encouraging compliance by Litigation Funders with their obligations; and

    (d) potentially enhancing the reputation of Litigation Funders.

76. Having regard to the conclusions reached by ASIC and the ALRC, ALFA does not consider that an AFLS licence and the MIS framework will engender these outcomes. ALFA is yet to see the detail of the proposed changes but it is difficult to see how this will increase protection for consumers in circumstances where the claims, and in particular the costs of litigation and the returns to the group members, are currently closely supervised and controlled by the Supreme and Federal Courts. ALFA is also concerned that the changes have the potential to ultimately increase the cost of funding products provided to consumers.

77. AFLA would suggest with the greatest respect that it does not appear that, in the rush associated with the implementation of these changes, the Federal Government has given sufficient consideration to the potential unintended consequences of implementing these regimes without industry wide consultation. Such consequences include, but are not limited to:

    (a) Whether the licence requirement will impact on current funded Class Actions, including whether existing claims will be stayed while funders and/or law firms obtain an AFSL or decide whether to do so;

    (b) How funders are to obtain an AFSL within a three (3) month time period when we currently understand that 70% of applications for an AFSL are processed by ASIC within 150 days. It is imperative that group members of existing funded Class Actions are not prejudiced by these changes;

    (c) Whether law firms who conduct the Class Action will be in breach of the Legal Profession Act proscriptions against conducting a MIS or whether they will be provided with legislative protection; and

(d) Whether there will now be a race to ASIC for approval to register a MIS rather than a race to the court and how this will be managed.

78. ALFA has sought to engage with the Federal Government to obtain a better understanding of the objectives sought to be achieved by the proposed regulations and to be consulted concerning the regulations' design and implementation to minimise unintended consequences.

Submission 6 - Wholesale changes to Part IVA of the Federal Court of Australia Act would be inappropriate

79. ALFA does not support wholesale changes to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), such as converting the current "opt-out" structure (with open classes) to that of an "opt-in" model. This is a highly technical area. The making of precipitous changes could result in prejudice to group members who are unable to prosecute their claims individually, create uncertainty (including for defendants), and perversely may produce more litigation (rather than less).

80. As the Committee will be aware, Part IVA of the FCA Act was introduced in 1992 as the first comprehensive Class Action regime in Australia. The Commonwealth regime was later followed by Class Action regimes in some States. The Part IVA regime allowed a person to bring an action as the representative of a group of seven or more persons where all have claims which give rise to issues of law or fact which arise out of the same, similar or related circumstances.[37]

81. The intent behind the introduction of Part IVA of the FCA Act was to:

(a) facilitate access to justice by enabling claims to be brought by aggregating people with small claims so that the overall amount may be significant, justifying the costs of the litigation; and

(b) provide for efficiency in dealing with multiple similar claims that might be individually not large enough to justify litigation.

82. To date, the cases that have been brought under Part IVA of the FCA Act include shareholder and investor claims, anti-cartel claims, mass tort claims, consumer protection claims, environmental claims, trade union actions, claims under the *Migration Act 1958* (Cth), and human rights claims.[38]

83. The various Australian jurisdictions which permit representative proceedings all adopt an "open class" or "opt out" structure for those claims – a deliberate choice of the legislature. Open class claims are so called because the group members represented by the claim are all persons who fall within a particular definition, irrespective of whether they have been identified, taken any step to join the class or consented to being represented by the claim or not. This has been alternatively explained as claims where class members are 'defined according to whether they have been affected by harm in a particular way',[39] irrespective of whether they have consented or have been individually identified by the plaintiff lawyers.

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[37] Explanatory Memorandum, *Federal Court of Australia Amendment Bill 1991* (Cth).

[38] See The Hon Justice S C Derrington, 'Litigation Funding: Access and Ethics', (Australian Academy of Law Lecture, Brisbane, 4 October 2018).

[39] Vicki Waye and Vince Morabito, 'When Pragmatism Leads to Unintended Consequences: A Critique of Australia's Unique Closed Class Regime' (2018) 19 *Theoretical Inquiries in Law* 303, 306-7.

84. The ALRC describe the adoption of this structure and the rationale for doing so, as follows, their most recent report:

> "The design of the regime encompassed by Part IVA was a matter of careful consideration by the ALRC. Having considered the ALRC's recommendations, the Government determined that an open class system with an opt-out procedure was preferable on grounds both of equity and efficiency. The then Attorney-General said:
>
>> *It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceeding. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.*[40]

85. The alternative to an "opt-out" procedure is known as an "opt-in" procedure. This would require the consent of all persons affected before proceedings could be commenced. Findings as to liability would be binding only on those people whose consent had been obtained. Because of the difficulty of locating people, and the occasional urgency with which claims must be brought, it may be impossible to locate all persons affected before commencing proceedings. In relation to those persons, who might never be informed of the litigation, settlements would not be final, and findings of liability in the "opt-in" Class Action would not be binding and could be relitigated. This leads to a proliferation of proceedings and costs. Further, where there is a limited fund from which relief can be obtained, those who obtained judgment first in time (ie in an "opt-in" procedure) would deplete the available fund, leaving other group members without proportionate or fair recourse to that fund. These considerations led the ALRC to adopt the regime in Part IVA. These considerations remain as powerful and compelling today as they were when Part IVA was first promulgated. For these reasons, ALFA supports maintenance of the opt-out structure (open classes) coupled with Court powers to impose CFOs which enable the Court to apportion the cost of funded proceedings across all successful group members.

86. The topic of CFOs is developed further in the next section.

Submission 7 – CFOs and Contingency Fees

87. ALFA considers that CFOs should be encouraged, and that Courts should be expressly empowered by legislation to make such orders. CFOs have been demonstrated in recent times to have generated increased competition in the Litigation Funding market, which has improved consumer outcomes. The Court maintains appropriate supervision of recoveries pursuant to the CFO, such that any prejudice to a stakeholders (including, to the extent relevant, the defendant(s)) would be addressable.

88. ALFA does not object, in principal, to Solicitors having the ability to be remunerated by way of contingency fees in Class Action matters, pursuant to a Court order which facilitates that.

89. AFLA supports the recommendation of the ALRC Report, that Part IVA of the FCA Act should be amended to provide the Court with an express statutory power to make CFOs on the application of the plaintiff(s) or on the Court's own motion. This is appropriate on the basis that all group members should have to contribute to the solicitor-client costs when they receive monetary relief as a result of the expenditure of those costs. The Federal Court has observed that CFOs have the benefit of enhancing access to justice by encouraging open Class Action proceedings, because if *"litigation funders are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class it is less likely that funders will seek to bring*

[40] ALRC Report, p.34-35 [1.54].

Class Actions limited to those persons who have signed a funding agreement."[41] As a result of a recent High Court decision, there is considerable doubt as to whether the Federal Court is empowered to make CFOs.[42] AFLA submits that this outcome is not in the interests of access to justice and should be the subject of legislative amendment.

90. In relation to contingency fees, which are presently prohibited, on 27 November 2019 the Parliament of Victoria introduced the Justice Legislation Miscellaneous Amendments Bill 2019 (**the Bill**) which seeks to amend the Supreme Court Act 1986 (Vic). The proposed new section 33ZDA would empower the Court, if satisfied that it is appropriate or necessary to ensure justice be done in a Class Action proceeding, to order that:

    (a) the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage amount of the amount recovered in the proceeding; and

    (b) the liability of such costs be shared by the plaintiff and group members.

91. If passed into law, this will allow solicitors in Victoria to charge on the basis of a percentage of the proceeds of the relevant Class Action proceedings. ALFA anticipates that the number of law firms willing to "fund" claims under a contingency fee model will increase as a result of this amendment, and will expand beyond firms presently engaged in such practices such as Slater & Gordon and Maurice Blackburn.

92. ALFA does not take any issue with the proposal that law firms be entitled to charge contingency fees, provided that this occur in a manner which appropriately accounts for solicitors' fiduciary duties. If such changes are introduced, there needs to be sufficient safeguards to ensure that solicitors' existing fiduciary duties are not fettered as a result. Provided appropriate measures are implemented, ALFA views this change to the Class Action industry as promoting competition and access to justice, which is to be encouraged.

93. ALFA has, however, requested that the Victorian Government consider amending the Bill to provide that the Supreme Court of Victoria, in a representative proceeding, has the power to make a CFO on application by a representative plaintiff at the commencement of proceedings, whereby all costs of the proceedings are shared by all class members if the litigation is successful. To this end we note that this amendment was recommendation 27 of the report issued by the VLRC in March 2018, entitled "Access to Justice – Litigation Funding and Group Proceedings" (**VLRC Report**). This power would be in addition to the proposed grant of power to the Supreme Court of Victoria to order a "Group Cost Order" in favour of a law practice. An alternative would be to simply extend the Court's power to order GCOs to a Litigation Funder (in addition to law practices).

94. ALFA supports the changes to permit contingency fees for Class Actions but, to the extent that CFOs or Group Costs Orders are also permitted these should be extended to plaintiff law firms and Litigation Funders to ensure a level playing field, to enhance access to justice and to encourage competition.

Impact of Class Actions on COVID-19 impacted businesses

95. The Federal Government announced, on 26 May 2020, that it will temporarily amend the continuous disclosure provisions that apply to companies under the Act in an attempt to provide

[41] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 at [205].
[42] *BMW Australia Ltd v Brewster* (2019) 374 ALR 627.

temporary relief to companies and officers for a six-month period commencing immediately. This was stated to have been implemented for the following purpose:

> *The Morrison Government will temporarily amend the continuous disclosure provisions that apply to companies and their officers' to enable them to more confidently provide guidance to the market during the Coronavirus crisis.*
>
> *Given the impact of the Coronavirus crisis and the uncertainty it continues to generate, it has been considerably more difficult for companies to release reliable forward-looking guidance to the market. Therefore, the Government will temporarily amend the* Corporations Act 2001 *(the Act) so that companies and officers' will only be liable if there has been "knowledge, recklessness or negligence" with respect to updates on price sensitive information to the market.* [43]

96. There have been calls from corporate management for changes to be made to the continuous disclosure provisions for a long time. It is noteworthy that ASIC has not supported the need for a review and changes. ASIC provided a submission to the ALRC in September 2018 which included the following statement:

> *"The continuous disclosure obligations are critical to protecting shareholders, promoting market integrity and maintaining the good reputation of Australia's financial markets ($1.8 trillion market capitalisation with an average turnover of $5.9 billion a day). The economic significance of fair and efficient capital markets dwarfs any exposure to class action damages.*
>
> *The regime has provided significant benefits including increased investor participation and investment, higher liquidity, and lower transaction costs. It is also the anchor point for other elements of Australia's regulatory regime (including low document capital raising through rights issues)."*[44]

97. Despite the position taken by ASIC in its submissions, the ALRC did ultimately recommend in its ALRC Report that the Australian Government should commission a 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. Despite this report being delivered over 17 months ago, nothing has been done to undertake this review.

98. AFLA is concerned that the proposed legislative amendments represents an ill-considered change made without proper consultation or a comprehensive review being undertaken, under the guise of it being in response to COVID related business threats. It would be wrong to conflate the challenging economic outlook caused by COVID-19 in recent times with the long-standing desires of corporate Australia to change continuous disclosure laws.

99. In fact, the changes proposed may not have any impact on the issue of Class Actions given that no changes were made to the provisions of the Act dealing with misleading or deceptive conduct, which is commonly pleaded in disclosure-related shareholder Class Actions, and which the ALRC recommended be addressed as well. Companies are being warned by defendant law firms not to place too much weight on the changes made on 26 May 2020 because they may not provide the blanket cover that the government indicated they would.

100. Further work needs to be done, and further consultation needs to take place with all stakeholders before any permanent changes are made, so as to avoid unintended consequences and a negative impact on the Australian economy. These reviews take time and, if the government was

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[43] Media Release issued by The Hon Josh Frydenberg MP titled *"Temporary changes to continuous disclosure provisions for companies and officers"*

[44] ASIC Submission to the ALRC dated September 2018

serious about looking at this issue, it should have taken up this part of the ALRC recommendation or taken any action to implement the review before now.

CONCLUSION

101. ALFA is grateful to the Committee for the opportunity to provide this submission.

102. ALFA would welcome the opportunity to present to the Committee, to answer any questions, or to provide any further or other assistance to the Committee.

ANNEXURE 1 – MORABITO ALFA REPORT

MARKET SHARES OF LITIGATION FUNDERS IN AUSTRALIA'S CLASS ACTION MARKET

By

Professor Vince Morabito

Monash Business School

Monash University

Report commissioned by the Association of Litigation Funders of Australia

SEPTEMBER 2019

I. OVERVIEW

In the five-year period, commencing on 1 January 2014 and ending on 31 December 2018,[1] I identified a total of 217 class actions filed[2] in Australia's (then) four class action courts: the Federal Court; the Supreme Court of Victoria, the Supreme Court of New South Wales and the Supreme Court of Queensland.[3] These 217 class actions were commenced in these four courts as outlined below:

- Federal Court of Australia = 129;
- Supreme Court of NSW = 50;
- Supreme Court of Victoria = 31; and
- Supreme Court of Queensland = 7.

I was able to ascertain how all but 16 (7.3%) of these 217 class actions were funded. But with respect to most of these 16 class actions I was able to discover that they did not enjoy the support of litigation funders.

With respect to an additional two class actions, the use of a closed class - pursuant to which the group of claimants represented in the litigation was limited to the clients of the firm of solicitors running the class action - revealed that the two class actions in question were funded by either the plaintiff lawyers acting pursuant to no win - no fee arrangements or the class members making periodic contributions to the costs of the litigation.

Three other class actions were discontinued, shortly after they were filed. This was because the plaintiff solicitors expected to be able to obtain funding from a litigation funder, but were unable to obtain such funding.

Class members paid the legal fees and disbursements incurred in running the litigation, on a periodic basis, in another four class actions. With respect to nine other class actions, the funding was supported by insurance companies; legal aid commissions; self-represented lead plaintiffs; and associations or entities either associated with the class members or with a special interest in the subject matter of the class actions.

[1] The five-year period chosen for this report ends in December 2018, because essentially during the 12 years or so that I have been undertaking empirical research on class actions and litigation funders I learnt that one needs to wait at least six months, after the end of a given period, to be confident as to the accuracy of the data collected, with respect to many features of the class actions filed in the period in question, including the total volume of class action litigation and the funding models employed. A more recent period was employed with respect to competing class actions in light of the fact that the extensive publicity that such proceedings immediately generate means that it is not generally necessary to wait for six months before feeling confident as to accuracy of one's database on competing class actions.

[2] This report deals with filed class actions only; not with threatened class actions, even where these threatened proceedings eventually lead to a settlement agreement. It is not necessary that the filed proceedings be served on the respondents/defendants. For the purposes of this report, when a class action is transferred to another class action court/jurisdiction, as a result of a court order (including consent orders), the "transfer" of the proceeding is treated as the filing of a new class action in the court where the proceeding has been transferred.

[3] Recently, a legislative class action regime came into operation in Tasmania.

The funding models adopted in the remaining 183 class actions - which represent just over 84% of all the class actions filed during the period in question - are summarised below:

- 135 class actions (62.2%) = supported by litigation funders;
- 44 class actions (20.6%) = no win - no fee arrangements with plaintiff solicitors; and
- 4 class actions (1.8%) = pro bono arrangements with plaintiff solicitors.

Given that the term pro bono, as used with respect to class action proceedings, does envisage solicitors running the litigation being remunerated in some circumstances,[4] following the successful outcome of the litigation, the four class actions funded through this arrangement will be added to the 44 no win - no fee class actions, in the analysis that follows.

In the remainder of this document, I will provide further data, with respect to these two most important funding models used in class actions litigation - litigation funding and no win - no fee arrangements - in relation to, not only the five-year period already mentioned, but also a shorter period of three years: from 1 January 2016 to 31 December 2018.

[4] See V Morabito and J Ekstein, "Class Actions Filed for the Benefit of Vulnerable Persons - An Australian Study" (2016) 35 *Civil Justice Quarterly* 61, 69: "the solicitors and barristers receive their fees only from the defendants".

II. FUNDERS OPERATING IN AUSTRALIA'S CLASS ACTION MARKET FROM 1 JANUARY 2014 TO 31 DECEMBER 2018

In this period I identified a total of 28 litigation funders supporting 135 Australian class actions: 27 companies or groups of companies plus one individual. Where a funder was replaced by another funder during the course of the litigation, the class action was attributed entirely to the latter funder, if they supported the class action right until the end. Where two unrelated funders supported a class action together, they are each attributed half of a class action. The 28 funders are listed below together with the number of class actions that they supported over these five years. In ***square brackets*** is the ***share*** of each funder's ***overall class action market*** (217 class actions) while in ***round brackets*** is their ***share of only funded class actions*** (135 class actions).

Funder	No.	[Overall]	(Funded)
➢ IMF Bentham Limited	29	[13.3%]	(21.4%)
➢ International Litigation Partners Pte Ltd	15	[6.9%]	(11.1%)
➢ Augusta Ventures Limited	10	[4.6%]	(7.4%)
➢ Vannin Capital PCC	8	[3.6%]	(5.9%)
➢ Law Finance Limited[5]	8	[3.6%]	(5.9%)
➢ Regency Funding Pty Ltd	8	[3.6%]	(5.9%)
➢ Australian Funding Partners Limited[6]	8	[3.6%]	(5.9%)
➢ Harbour Litigation Funding Limited	7.5	[3.4%]	(5.5%)
➢ Litigation Capital Management Limited	5	[2.3%]	(3.7%)
➢ Galactic Litigation Partners LLC	5	[2.3%]	(3.7%)
➢ Therium Group Holdings Ltd	5	[2.3%]	(3.7%)
➢ International Litigation Funding Partners Pte Ltd	4	[1.8%]	(2.9%)
➢ Litigation Lending Services Ltd	3	[1.3%]	(2.2%)
➢ Burford Capital UK Ltd	2	[0.9%]	(1.4%)
➢ Comprehensive Legal Funding LLC	2	[0.9%]	(1.4%)
➢ Grosvenor Litigation Services Pty Ltd	2	[0.9%]	(1.4%)
➢ Investor Claim Partner Pty Ltd	2	[0.9%]	(1.4%)
➢ Mr William Crothers	2	[0.9%]	(1.4%)
➢ Balance Legal Capital LLP	1	[0.4%]	(0.7%)
➢ ACN 133 560 086 Pty Ltd[7]	1	[0.4%]	(0.7%)
➢ Legal Justice Pty Ltd	1	[0.4%]	(0.7%)
➢ Claims Funding Australia	1	[0.4%]	(0.7%)
➢ Second Floor Litigation Services Pty Ltd	1	[0.4%]	(0.7%)
➢ Martin Place Litigation Services Pty Ltd	1	[0.4%]	(0.7%)
➢ Ironbark Funding	1	[0.4%]	(0.7%)
➢ G&E KTMC Funding LLC	1	[0.4%]	(0.7%)
➢ Themis 102 Litigation Funding Pty Ltd	1	[0.4%]	(0.7%)
➢ Robbins Geller Rudman & Dowd LLP	0.5	[0.2%]	(0.3%)
	135	62.2%	100%

The dominance of IMF is the first apparent feature of the statistics set out above, as it has supported almost twice as many class actions as the second most active funder. Not surprisingly IMF has a relatively significant share of the overall class action market for the

[5] Formerly JustKapital Limited.
[6] Formerly BSL Litigation Partners Limited.
[7] Formerly Litman Holdings Pty Ltd.

five year period in question: 13.3%. This leads to the next general conclusion that may be arrived at by considering the data set out above: whilst the funded class action space in Australia contains many litigation funders, the vast majority of them each hold a modest share of the overall class action market. I now turn to equivalent data with respect to the last three years only: 2016, 2017 and 2018.

III. FUNDERS OPERATING IN AUSTRALIA'S CLASS ACTION MARKET FROM 1 JANUARY 2016 TO 31 DECEMBER 2018

In the three years outlined above, to my knowledge, a total of 145 class actions were filed in Australia. A total of 23 litigation funders supported a total of 96 (66.2%) class actions. Compared with the previous period covered above, we see an increase in the proportion of funded class actions from 62.2% to 66% and a decrease in the number of funders from 28 to 23. The five funders that had no involvement in the funding of Australian class actions during the three years in question were ACN 133 560 086 Pty Ltd, Legal Justice Pty Ltd, Claims Funding Australia, Grosvenor Litigation Services Pty Ltd and Comprehensive Legal Funding LLC. The 23 funders are listed below together with the number of class actions that they supported over these three years. In ***square brackets*** is the ***share*** of each funder's ***overall class action market*** (145 class actions) while in ***round brackets*** is their ***share of only funded class actions*** (96 class actions).

Funder	No.	Overall share	Funded share
➢ IMF Bentham Limited	20	[13.7%]	(20.8%)
➢ Augusta Ventures Limited	10	[6.8%]	(10.4%)
➢ Vannin Capital PCC	8	[5.5%]	(8.3%)
➢ Regency Funding Pty Ltd	8	[5.5%]	(8.3%)
➢ International Litigation Partners Pte Ltd	6	[4.1%]	(6.2%)
➢ Harbour Litigation Funding Limited	5.5	[3.7%]	(5.7%)
➢ Therium Group Holdings Ltd	5	[3.4%]	(5.2%)
➢ Law Finance Limited[8]	4	[2.7%]	(4.1%)
➢ Australian Funding Partners Limited[9]	4	[2.7%]	(4.1%)
➢ Litigation Capital Management Limited	4	[2.7%]	(4.1%)
➢ Galactic Litigation Partners LLC	4	[2.7%]	(4.1%)
➢ Litigation Lending Services Ltd	3	[2%]	(3.1%)
➢ International Litigation Funding Partners Pte Ltd	2	[1.3%]	(2%)
➢ Burford Capital UK Ltd	2	[1.3%]	(2%)
➢ Investor Claim Partner Pty Ltd	2	[1.3%]	(2%)
➢ Mr William Crothers	2	[1.3%]	(2%)
➢ Balance Legal Capital LLP	1	[0.6%]	(1%)
➢ Second Floor Litigation Services Pty Ltd	1	[0.6%]	(1%)
➢ Martin Place Litigation Services Pty Ltd	1	[0.6%]	(1%)
➢ Ironbark Funding	1	[0.6%]	(1%)
➢ G&E KTMC Funding LLC	1	[0.6%]	(1%)
➢ Themis 102 Litigation Funding Pty Ltd	1	[0.6%]	(1%)
➢ Robbins Geller Rudman & Dowd LLP	0.5	[0.3%]	(0.5%)
	96	66.2%	100%

[8] Formerly JustKapital Limited.
[9] Formerly BSL Litigation Partners Limited.

IV. NO WIN - NO FEE MODELS EMPLOYED IN AUSTRALIA'S CLASS ACTIONS FROM 1 JANUARY 2014 TO 31 DECEMBER 2018

As already noted, I identified a total of 48 class actions, filed during the five years in question, that were funded by the solicitors running the class action litigation through no win - no fee agreements. The 13 firms in question are set out below together with the number of class actions they funded and the percentage of all filed class actions.

Firm	Number	Percentage
Maddens Lawyers	17	(7.8%)
Maurice Blackburn	12	(5.5%)
Slater & Gordon	4	(1.8%)
Shine Lawyers	4	(1.8%)
LHD Lawyers	2	(0.9%)
Gillis Delaney Lawyers	2	(0.9%)
Johnson Winter & Slattery	1	(0.4%)
Novatsis & Alexander	1	(0.4%)
Hincliffe-Princetion Legal	1	(0.4%)
Paramount Compensation Lawyers	1	(0.4%)
Turner Freeman	1	(0.4%)
Centennial Lawyers	1	(0.4%)
Arnold Thomas & Becker	1	(0.4%)
	48	22%

V. NO WIN - NO FEE MODELS EMPLOYED IN AUSTRALIA'S CLASS ACTIONS FROM 1 JANUARY 2016 TO 31 DECEMBER 2018

For this three year period, I identified a total of 30 class actions funded through this model by 12 law firms. This represents 20.6% of all the class actions filed during this period (145). This constitutes a drop of two percentage points when compared with the equivalent figure for the longer period of five years.

Law firm	Number	Percentage
Maddens Lawyers	9	(6.2%)
Maurice Blackburn	7	(4.8%)
Shine Lawyers	3	(2%)
Slater & Gordon	2	(1.3%)
LHD Lawyers	2	(1.3%)
Gillis Delaney Lawyers	1	(0.6%)
Johnson Winter & Slattery	1	(0.6%)
Novatsis & Alexander	1	(0.6%)
Hincliffe-Princetion Legal	1	(0.6%)
Paramount Compensation Lawyers	1	(0.6%)
Turner Freeman	1	(0.6%)
Centennial Lawyers	1	(0.6%)
	30	20.6%

VI. COMPETING CLASS ACTIONS BETWEEN 1 JULY 2017 AND 30 JUNE 2019

I have identified 10 sets of competing class actions where both the first class and the second class action (and subsequent class actions) were filed within the two year period specified above. I have also identified two sets of competing class actions where the first class action was *filed before* July 2017 and one set where the second class action was *filed after* June 2019. I set out these three instances of competing class actions at the end of the list set out below.

With respect to each of these 13 instances of competing class actions I provide the name of the respondent/defendant, the filing date, the court in which the class action was filed, the lead plaintiff's solicitors and the litigation funder behind the litigation.

1. **Quintis Ltd**

(a) 7 September 2017 (Federal Court)
Bannister Law
Law Finance Limited

(b) 9 November 2017 (FC)
Gadens Lawyers
Ironbark Funding

(c) 23 May 2018 (FC)
Piper Alderman
Litigation Capital Management Limited

2. **DSHE Holdings Ltd**

(a) 28 September 2017 (Supreme Court of NSW)
Bannister Law
Vannin Capital PCC

(b) 16 February 2018 (SC NSW)
Johnson Winter & Slattery
Investor Claim Partner Pty Ltd

3. **Commonwealth Bank of Australia**

(a) 9 October 2017 (FC)
Maurice Blackburn
IMF Bentham Limited

(b) 29 June 2018 (FC)
Phi Finney McDonald
Therium Group Holdings Ltd

4. **Pitcher Partners**

(a) 1 November 2017 (FC)
Johnson Winter & Slattery
Vannin Capital PCC

(b) 3 July 2018 (FC)
Maurice Blackburn
International Litigation Partners Pte Ltd

5. GetSwift Ltd

(a) 20 February 2018 (FC)
Squire Patton Boggs
International Litigation Partners Pte Ltd

(b) 26 March 2018 (FC)
Corrs Chambers Westgarth
Vannin Capital PCC

(c) 13 April 2018 (FC)
Phi Finney McDonald
Therium Group Holdings Ltd

6. AMP Ltd

(a) 9 May 2018 (SC NSW)
Quinn Emanuel Urquhart & Sullivan
Burford Capital UK Ltd

(b) 9 May 2018 (FC)
Phi Finney McDonald
IMF Bentham Limited

(c) 25 May 2018 (FC)
Shine Lawyers
Augusta Ventures Ltd

(d) 6 June 2018 (FC)
Slater & Gordon
Therium Group Holdings Ltd

(e) 7 June 2018 (FC)
Maurice Blackburn
No win - no fee arrangement

7. BHP Billiton Ltd

(a) 31 May 2018 (FC)
Phi Finney McDonald
G&E KTMC Funding LLC

(b) 31 August 2018 (FC)
Maurice Blackburn
No win - fee arrangement

(c) 24 September 2018 (FC)
Johnson Winter & Slattery
Harbour Litigation Funding Limited

8. Brambles Ltd

(a) 8 August 2018 (FC)
Slater & Gordon
IMF Bentham Limited

(b) 14 August 2018 (FC)
Maurice Blackburn
Harbour Litigation Funding Limited

9. RCR Tomlinson Ltd

(a) 16 November 2018 (SC NSW)
Quinn Emanuel Urquhart & Sullivan
Vannin Capital PCC

(b) 26 March 2019 (SC NSW)
Shine Lawyers
Investor Claim Partner Pty Ltd

(c) 7 June 2019 (SC NSW)
Piper Alderman
IMF Bentham Limited

10. AMP Superannuation Ltd

(a) 30 May 2019 (FC)
Maurice Blackburn
Harbour Litigation Funding Limited

(b) 26 June 2019 (FC)
Slater & Gordon
Therium Group Holdings Ltd

11. Sirtex Medical Ltd

(a) *9 February 2017* (FC)
Portfolio Law
Australian Funding Partners Limited

(b) 15 December 2017 (FC)

Maurice Blackburn
IMF Bentham Limited

12. SurfStich Group Ltd

(a) *28 June 2017* (SC NSW)
Gadens Lawyers
International Litigation Partners Pte Ltd

(b) 31 October 2017 (SC NSW)
Johnson Winter & Slattery
Vannin Capital PCC

13. Lendlease Corporation Ltd

(a) 18 April 2019 (SC NSW)
Maurice Blackburn
Harbour Litigation Funding Limited

(b) *24 July 2019* (SC NSW)
Phi Finney McDonald
Therium Group Holdings Ltd

VII. SOLICITORS INVOLVED IN COMPETING CLASS ACTIONS BETWEEN 1 JULY 2017 AND 30 JUNE 2019

- Maurice Blackburn = 8 class actions;
- Phi Finney McDonald = 5 class actions;
- Johnson Winter & Slattery = 4 class actions;
- Slater & Gordon = 3 class actions;
- Bannister Law = 2 class actions;
- Gadens Lawyers = 2 class actions;
- Piper Alderman = 2 class actions;
- Shine Lawyers = 2 class actions;
- Quinn Emanuel Urquhart & Sullivan = 2 class actions;
- Squire Patton Boggs = 1 class action;
- Corrs Chambers Westgarth = 1 class action; and
- Portfolio Law = 1 class action.

Total number of competing class actions = 33

VIII. LITIGATION FUNDERS INVOLVED IN COMPETING CLASS ACTIONS BETWEEN 1 JULY 2017 AND 30 JUNE 2019

- Vannin Capital PCC = 5 class actions;
- IMF Bentham Limited = 5 class actions:
- Therium Group Holdings Ltd = 4 class actions;
- International Litigation Partners Pte Ltd = 4 class actions;
- Harbour Litigation Funding Limited = 4 class actions;
- Investor Claim Partner Pty Ltd = 2 class actions;
- Law Finance Limited = 1 class action;
- Ironbark Funding = 1 class action;
- Litigation Capital Management Limited = 1 class action;
- Burford Capital UK Ltd = 1 class action;
- Augusta Ventures Limited = 1 class action;
- G&E KTMC Funding LLC = 1 class action; and
- Australian Funding Partners Limited = 1 class action.

Total number of funded competing class actions = 31 class actions.