



**Law Council**  
OF AUSTRALIA

# **Guaranteeing a minimum return of class action proceeds to class members**

**The Treasury and Attorney-General's Department**

**6 July 2021**

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
<b>Circumstances of the proposed reform</b> .....	<b>6</b>
<b>Consideration of the proposed reform</b> .....	<b>8</b>
Risks .....	8
Reduce availability and increased cost of funding.....	8
Floor becomes a ceiling .....	9
Withdrawal of funding or legal support .....	10
Creation of a conflict of interests .....	10
Practical concerns .....	11
Inflexibility and arbitrariness.....	11
Forum shopping.....	11
Alternative Options .....	12
Oversight of the courts.....	12
A ‘Justice Fund’ .....	14
<b>Design of a guaranteed floor for returns</b> .....	<b>15</b>
<b>A graduated approach</b> .....	<b>16</b>
<b>Additional issues</b> .....	<b>17</b>

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful to the following Constituent Bodies and Committees for their assistance with the preparation of this submission:

- Law Society of South Australia;
- Law Institute of Victoria;
- Queensland Law Society;
- Access to Justice Committee; and
- Class Actions Committee of the Federal Litigation and Dispute Resolution Section.

## Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Treasury and the Attorney-General's Department in response to the Consultation Paper entitled 'Guaranteeing a minimum return of class action proceeds to class members' (**Consultation Paper**).
2. The Law Council notes that the Consultation Paper has been drafted following a recommendation of the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) in its report 'Litigation funding and the regulation of the class action industry' (**Report**). The PJC recommended that the Australian Government consult further in relation to a late-raised proposal that there be a statutory minimum return of the gross proceeds of a class action to class members (**the proposed reform**) to clarify issues.<sup>1</sup>
3. Given the circumstances in which the proposed reform was developed, the Law Council considers that the Australian Government should conduct a thorough investigation into the fundamental issues underlying the proposed reform before considering its implementation. Consideration is required as to the risks and practical difficulties of implementing the proposed reform, particularly in comparison to alternative options.
4. The Law Council strongly supports the objectives of enhancing protections for class action members and improving access to justice. However, the Law Council opposes the introduction of a guaranteed statutory minimum return to members of a class, in summary, because it is an inferior means of securing the first objective and would positively undermine the second.
5. The Law Council remains of the view that the approval of all aspects of class action settlements and the distribution of settlement funds under section 33V of the *Federal Court of Australia Act 1976* (Cth) should be for the Court to determine in the best interests of all group members. The Court's discretion should not be limited by a statutory cap. The Law Council therefore recommends that recommendation 11 of the PJC that additional oversight powers be provided to the Federal Court of Australia (**Federal Court**) be implemented by the Australian Government as a matter of priority and in preference to the proposed reform.

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<sup>1</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) xxviii, 204-6, (recommendation 20).

## Circumstances of the proposed reform

6. The Law Council notes that the Consultation Paper has been released in response to recommendation 20 of the PJC:

*The committee recommends the Australian Government consult on:*

- *the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);*
- *whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor; and*
- *whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases.<sup>2</sup>*

7. Recommendation 20 arises from Chapter 13 of the Report, which addressed alternatives to percentage-based fees for litigation funders. The PJC considered a range of alternatives raised during the inquiry but was reluctant to endorse any of the alternatives. The Report then noted that:

*An alternative suggestion that has arisen late in the inquiry is for a guarantee that class action members receive a statutory minimum percentage of the gross litigation funding proceeds. The committee notes that this proposal focusses on protecting the class action members and maintaining access to justice. The committee recommends that the Australian Government should consult further on this proposal, to clarify issues...<sup>3</sup>*

8. The Law Council understands that this proposed reform did not arise in the ordinary process of the PJC's Inquiry, that is, through submissions or Committee hearings. The only citation given for this 'alternative suggestion' in the Report is to an article by Ronald Mizen on 11 November 2020 in the Australian Financial Review.<sup>4</sup> This article refers to a proposal by Senator Pauline Hanson that litigation funders would be exempted from the Managed Investment Scheme regime (litigation funders are now subject to this regime) if they committed to ensure that at least 70 per cent of any damages award or settlement goes to class members.<sup>5</sup> It appears that any support for a guaranteed minimum return was specific to this position, rather than a suggestion that *all* class action recoveries should be subject to a 70 per cent guaranteed minimum return to group members.
9. At paragraphs 9.117, 10.60 and 12.66 of the Report, the PJC notes 'the proposal by some class action law firms and litigation funders to guarantee a minimum return of

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid 205.

<sup>4</sup> Ibid citing Ronald Mizen, 'Litigation funding rules on the brink as dissent grows', *Australian Financial Review* (online, 11 November 2020) <<https://www.afr.com/politics/federal/litigation-funding-rules-on-the-brink-as-dissent-grows-20201111-p56dka>>.

<sup>5</sup> Ronald Mizen, 'Litigation funding rules on the brink as dissent grows', *Australian Financial Review* (online, 11 November 2020) <<https://www.afr.com/politics/federal/litigation-funding-rules-on-the-brink-as-dissent-grows-20201111-p56dka>>.

at least 70 per cent of the gross proceeds to class action members'.<sup>6</sup> However, no citation for this proposition is given in the Report. Recommendation 20 also refers to the endorsement of 'some class action law firms and litigation funders', again without citation.

10. At paragraph 1.54 of the PJC's Minority Report, it was noted:

*To our knowledge, no law firm or funder has proposed a 70 percent 'floor'. Rather, in the spirit of compromise, at least one law firm has proposed amendments to the Corporation Amendment (Litigation Funding) Regulations 2020 so that a litigation funder that guarantees a 70 per cent minimum return to plaintiffs would not have to comply with the managed investment scheme rules. If implemented, that proposal would arguably create an incentive for litigation funders to guarantee a 70 per cent minimum return to plaintiffs – but it would not mandate it (contrary to the suggestion by Liberal members).*<sup>7</sup>

11. As noted in the PJC Report,<sup>8</sup> this proposal arose late in the Inquiry. As a result, the proposal appears not to have received the same scrutiny by the PJC (and stakeholders) as other proposals. Furthermore, this proposed reform has not been recommended in any of the many recent reports into litigation funding and class actions in Australia.<sup>9</sup>
12. The Law Council notes that the consultation questions are focussed on the design of a guaranteed statutory minimum return. However, serious consideration should be given to whether a guaranteed statutory minimum return ought to be implemented. The Law Council is of the view that a thorough investigation of the proposed reform is required before proceeding. Appropriate consideration is needed as to whether:
- (a) the risks outweigh the potential benefits;
  - (b) it is practical and likely to achieve its intended outcomes; and
  - (c) it is the preferable course of action to achieve its intended outcomes when compared with the alternatives.
13. In addition to addressing the consultation questions, the Law Council addresses these fundamental issues below.

**Recommendation:**

- **The Australian Government conduct a thorough investigation into the fundamental issues underlying the proposed reform to guarantee a minimum return of class action proceeds to class members.**

<sup>6</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) 124 [9.117], 143 [10.60], 185 [12.66].

<sup>7</sup> Ibid 368 (Minority Report by Labor Members).

<sup>8</sup> Ibid 205.

<sup>9</sup> See, eg, Productivity Commission, *Access to Justice Arrangements* (Report No 72, 5 September 2014); Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018); Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018).

## Consideration of the proposed reform

14. The Law Council strongly supports the objectives underlying the PJC's recommendation. Namely, 'protecting the class action members and maintaining access to justice'. However, on consideration of the issues discussed at paragraphs 16 to 47 below, the Law Council does not support the introduction of a statutory cap on the transaction costs of a class action or its converse, a statutory guaranteed minimum return to members of a class. Such price control mechanisms are blunt and inflexible instruments incapable of adapting to the complexity of the class actions regime and are therefore unlikely to achieve the stated objectives in practice and may give rise to unintended consequences to the detriment of achieving the stated objectives.
15. The Law Council considers that the introduction of any minimum return will suffer from arbitrariness. Focus should instead be placed on why a low return to members has occurred in particular cases. For example, is the low return due to excessive legal costs or an unreasonable funder's commission or is the low return a result of unforeseen litigation events (excessive discovery, unfavourable evidence etc). Reform initiatives should then seek to identify these root causes.

## Risks

### Reduce availability and increased cost of funding

16. It is a well-accepted principle that the introduction of price controls will, in most circumstances, reduce the supply/availability of the good or service subject to those controls. The proposed guaranteed percentage return to class members is essentially a ceiling on the recoveries for those who conduct and fund cases. A ceiling on recoveries is price control and, as such, there is a significant risk that by introducing a guaranteed percentage return to class members the incentive to supply litigation funding and legal services will be depressed.
17. There is a significant risk that the proposed reform would have a tangible deleterious effect on access to justice by reducing the availability of litigation funding and legal services for meritorious cases. There is particular risk that implementing the proposed reform will disproportionately impact on the availability of litigation funding and legal services for lower value or higher risk actions. These are often based on common law causes of action arising from personal injury or property damage consequent upon environmental disaster, corporate misconduct and institutional abuse. They affect some of the most vulnerable members of the community.<sup>10</sup>
18. The inflexibility of the proposed reform creates an additional layer of uncertainty over the viability of commencing and running such cases to completion. Such an approach precludes adaptation if changing circumstances demand it. This inflexibility significantly increases the risk assessment made by a funder and/or law firm when considering taking on a case as there is potential that circumstances will require a level of service provision (i.e. in the course of adducing complex and broad-ranging lay and expert evidence for instance) that cannot be supported while adhering to the guaranteed minimum return. This is likely to have a chilling effect on the number of meritorious class actions, at the margin. As Beach J said in *Kuterba v Sirtex Medical Limited (No 3)* (***Kuterba***) (addressing a suggested 50% return for members):

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<sup>10</sup> See, eg, *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (No 7)* [2021] FCA 237 (an expensive and high-risk environmental class action); *McAlister v New South Wales (No 2)* [2017] FCA 93 and *McAlister v New South Wales (No 3)* [2018] FCA 636 (a relatively low value institutional abuse class action).



*to so artificially allocate is economically distortive and unnecessarily disincentivises the reasonable investment of time and expense in investigating, funding and prosecuting class actions.<sup>11</sup>*

19. Beach J provided this example:

*Assume that a litigation funder and external lawyers take on a very complex and high risk case (with a commensurably higher commission rate than normal) on behalf of say a large group of persons who have contracted cancer. Say that proving causation by the alleged carcinogen is extremely difficult. Assume that the action has been launched on the basis only of problematic epidemiology showing a heightened risk and some biology that shows only a possible biological pathway. Then assume that after extensive discovery and expensive expert reports it becomes clear that there is no viable biological pathway demonstrated, such that it is apparent that the group members have no cause of action for damages. Let it also be assumed that nevertheless the respondent is prepared to pay a modest amount to settle the matter, and let it also be assumed that legal expenses and the funding commission would soak up 90% of that modest settlement sum. Is it seriously suggested that the group members should receive at least 50% of the settlement sum for what, after forensic investigation that group members did not have to pay for and where the risk for this on their behalf was taken on and funded by others, are shown to be likely valueless claims? One can multiply such examples.*

*No power contained in or philosophy underpinning Part IVA provides a proper basis for giving group members something for what turned out to be nothing or to give them something beyond what the true value of their claims are worth, reflecting the product of the face value times the probability of success times the probability of recovery.<sup>12</sup>*

20. It might be objected that commercial funders can absorb such outcomes because they fund a portfolio not merely an individual case. But that highlights the second risk: that funding costs will rise. To protect against the risk of losses attributable to arbitrary maximum returns, funders will logically seek to spread the cost and the risk across their portfolio. In other words, taking the sort of situation described by Beach J, funding costs may be higher in all class actions in order to pay a disproportionate, perhaps excessive, return to group members in some.
21. The reduced availability of funding was noted by the PJC in considering a similar proposal to cap the return to litigation funders (no reference to similarly capping other transaction costs was made). The PJC noted a concern that as a result of such a cap, 'small-dollar value class actions would be uneconomic for litigation funders'.<sup>13</sup>

### **Floor becomes a ceiling**

22. One possible consequence of the proposed reform may be that the 70 per cent return to class members becomes the standard or maximum return and that few cases result in a return greater than this amount (i.e. the floor becomes the ceiling as well).

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<sup>11</sup> [2019] FCA 1374, [19] (Beach J) ('Kuterba'). See also *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [62]-[73] (Beach J).

<sup>12</sup> *Kuterba* [2019] FCA 1374, [18]-[19].

<sup>13</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) 205 [13.57].

23. The experience of members of the legal profession is that other attempts at price controls have created situations where returns to clients/class members have been inadvertently limited. For example, the 25 per cent uplift permitted under section 182(2)(b) of the *Uniform Legal Profession Law* (NSW) allowed for conditional fees is routinely charged by plaintiff law firms. Additionally, the Law Council understands that the introduction of section 347 of the *Legal Profession Act 2007* (Qld) which contains a guarantee of a 50 per cent return of the settlement sum/damages to claimants, led to a situation where professional fees would routinely approach the 50 per cent limit.
24. The Law Council notes that the PJC and the Consultation Paper refer to the possibility of a sliding scale being introduced to increase the returns above the 70 per cent floor in certain circumstances and thereby limit the potential for these circumstances arising. For the reasons discussed at paragraphs 58 to 62 below in relation to consultation questions 4 and 5, the Law Council does not consider the sliding scale to be a workable solution to this risk.

#### **Withdrawal of funding or legal support**

25. Of its nature, an arbitrary device such as the proposed reform is not flexible to the different and changing circumstances of individual cases. The proposed reform risks the creation of circumstances in which a funder or law firm would seek to withdraw from supporting an action during the conduct of the case when the transaction costs become substantial and potentially non-recoverable due to the guaranteed minimum return. For example, changes in the circumstances of a case such as new expert evidence or increased discovery may drive up the costs of providing legal services to a point where the funder and/or law firm decides that it is no longer viable to continue the case, despite it being in the interests of the clients for the case to continue. The example provided by Beach J in *Kuterba* set out at paragraph 19 above is a graphic but entirely realistic example of the arbitrariness and injustice that can result from fixed limits on distribution to group members.<sup>14</sup>
26. The proposed reform also creates an incentive for respondents to attempt to 'game the system' by seeking to prolong the case or increase transaction costs to the point where it is no longer viable for the other side to continue.
27. These risks are of particular concern in relation to the stated objectives of protecting class members and maintaining access to justice.

#### **Creation of a conflict of interests**

28. Further to the risk of funding or legal support being withdrawn, the proposed reforms create the risk that a conflict of interest will arise between the funder, lawyers and class members. For example, as costs rise to a point where it is no longer viable for the funder or the lawyer to continue, an acute conflict will arise between the interests of funders and lawyers on the one hand and group members on the other, when it comes to settlement negotiations. Normally, their interests are broadly aligned. It may also mean that the respondent is able to negotiate a smaller settlement, knowing that the funder and/or law firm is not able or willing to continue.

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<sup>14</sup> [2019] FCA 1374, [17]-[19]. See also *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [62]-[64].

## Practical concerns

### Inflexibility and arbitrariness

29. An inflexible minimum statutory percentage return to class members does not take account of the complex and dynamic nature of class action litigation. As such, it is likely that one size would not fit all, with rates likely to vary, depending in large part on the size and complexity of the litigation and the risks being assumed by the funder and the competitive environment existing in relation to the matter. Some flexibility for discretion to be exercised by the court is therefore a necessary element of any implementation of the proposed reform (see paragraph 56 below).
30. The proposal also fails to recognise that the structure of class action settlements is not uniform. The proposal appears to assume that once approved, a settlement sum will be held on trust by a court appointed administrator for distribution to class members, funders and the lawyers. The proposal also assumes that the settlement sum will be an amount that is a reasonable compromise of the collective claim value of all class members from which fees payable to funders and lawyers are deducted.
31. Class action settlements are not always so structured. Some settlements sums are agreed before it is known how many class members will participate. In these settlements, if there is less than expected participation by members of the class, those who do opt to receive compensation may receive close to or greater than 100 per cent of their recoverable losses even after funding and legal fees have been deducted.<sup>15</sup> In other settlements, the amount payable to participating class members is separated from the sum paid for costs. In these circumstances, a requirement that 70 per cent of the gross settlement sum be paid to class members could scuttle a settlement that would otherwise be in the interests of class members.<sup>16</sup>

### Forum shopping

32. If the proposed reform is enacted by Federal Parliament and not in other jurisdictions, an obvious impact will be that firms, clients and funders will elect to commence class proceedings in the state courts to avoid the uncertainty created by the 70 per cent cap regime.
33. The Law Council has, for many years, advocated for the need for consistency between jurisdictions. The primary reason is that the resolution of civil disputes by all Australian courts in all Australian jurisdictions should be achieved consistently with the overarching purpose of civil practice and procedure – that is, for the just resolution of disputes according to law as quickly, inexpensively and as efficiently as possible.<sup>17</sup> The purpose is best achieved if the courts in each jurisdiction have similar goals, apply similar laws and the outcomes for disputants are predictably similar in each jurisdiction. This promotes clarity of expectations and avoids forum shopping. The proposal will have a deleterious impact on certainty and it will drive class action litigants away from the Federal Court to the state courts.

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<sup>15</sup> *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70, [65]; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671.

<sup>16</sup> See, e.g. *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637; *McAlister v New South Wales (No 2)* [2017] FCA 93 and *McAlister v New South Wales (No 3)* [2018] FCA 636.

<sup>17</sup> Noting that the overarching purpose provided in *Federal Court of Australia Act 1976* (Cth) s 37M is similar to those which are provided by Civil Procedure Acts in various state jurisdictions.

## Alternative Options

34. As noted above, the Law Council supports the objectives of protecting class action members and maintaining access to justice. However, there are several reforms which are more likely to achieve these objectives without the practical difficulties and risks identified above. In particular, as provided in its submission to the PJC, the Law Council is supportive of greater judicial oversight of funding agreements, fee arrangements and settlements as well as the introduction of a 'Justice Fund' (as discussed at paragraphs 45 to 47 below).<sup>18</sup> In the Law Council's view, the implementation of these reforms should be a priority over and above any consideration of a guaranteed minimum statutory return to class members.
35. The benefits and risks of the proposed reform should be weighed against those of possible alternatives before a decision to proceed is made by the Australian Government.

### Oversight of the courts

36. In its report *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, the Australian Law Reform Commission recommended that 'a statutory power to vary the terms of a litigation funding agreement should be coupled with a requirement that funding agreements with respect to a class action require court approval to be enforceable'.<sup>19</sup> The Law Council suggests that consideration might be given to whether the statutory power ought go even further: that the fee be set by the court, rather than agreed by the parties and approved by the court.
37. To set an appropriate fee, the court should be required to take into account, without limitation, a number of factors to ensure it is fair and reasonable in all the circumstances.<sup>20</sup> Some suggested factors are:<sup>21</sup>
  - (a) the amount likely to be advanced (and then ultimately advanced) by the funder to cover the costs of the claim;
  - (b) the amount, if any, that the funder is required to provide as security for the defendant's costs;
  - (c) whether the funder obtained adverse costs insurance ('after the event' insurance) and whether or not it is intended to recover the premium from the compensation pool;
  - (d) the period of time until recovery;
  - (e) the level of risk that the claim may be unsuccessful;
  - (f) the likelihood of the case settling or going to trial;

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<sup>18</sup> Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into litigation funding and the regulation of the class action industry* (16 June 2020).

<sup>19</sup> Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [6.84].

<sup>20</sup> Part IIIA of the *Competition and Consumer Act 2010* (Cth) provides such guidelines for the Australian Competition Tribunal.

<sup>21</sup> See also Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) *91 Australian Law Journal* 655, 666-669 which sets out the factors that have and could be used to assess the fee that a funder could be permitted to charge.

- (g) whether the funding agreement is non-recourse;
  - (h) whether the fee is over the common fund or only with respect to those who have committed to a funding agreement;
  - (i) whether a funding equalisation formula is to be used;
  - (j) whether the funding agreement allows the funder to discontinue funding at any point;
  - (k) the state of competition in the litigation funding market; and
  - (l) the proportion of the claim recovered by each claimant.<sup>22</sup>
38. These factors suggest that the fee should be set when the litigation is completed. That, however, is undesirable from the perspective of the litigation funder which would need some certainty regarding its fees before it embarks upon expensive litigation. As such, early interlocutory orders should be made soon after pleadings are closed. The nature of such orders, not being final orders, is that they can be revisited at any time before the conclusion of a proceeding. When the litigation is concluded the court can then adjust the fee upwards or downwards, if necessary to produce a fair result.
39. The power granted to the court to set the funder's fee should be accompanied by a power to make a common fund order soon after the close of pleadings for the reasons explained above. The Law Council's views in relation to common fund orders are elaborated in its submission to the PJC.<sup>23</sup>
40. It is considered that to give the courts such a power, appropriately framed, will not offend Constitutional constraints on acquisition of property. With appropriately framed legislation the court would be granting a right, not taking away from a previously formed contractual right, since any litigation funding agreement would necessarily be subject to the power of the court to approve the amount sought by the litigation funder.<sup>24</sup> However, it will need to be appreciated that in the case of a publicly listed litigation funder, providing profit guidance to the market will involve additional complexity for its directors when such an additional variable on profitability can be triggered well after shareholders have invested.
41. As is recognised in the Consultation Paper, the PJC recommended that the oversight powers of the Federal Court be increased. Recommendation 11 of the PJC states:

*The committee recommends Part IVA of the Federal Court of Australia Act 1976 be amended to introduce:*

- *a requirement for a litigation funding agreement to obtain approval of the Federal Court of Australia to be enforceable; and*
- *a power for the Federal Court of Australia to reject, vary or amend the terms of any litigation funding agreement when the interests of justice require.*<sup>25</sup>

<sup>22</sup> This factor can only be considered once the result of the litigation is known. Hence, it would only be a factor to be assessed when the terms of litigation funding are reconsidered later in proceedings.

<sup>23</sup> Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into litigation funding and the regulation of the class action industry* (16 June 2020).

<sup>24</sup> This is to avoid the risk that the grant is in breach of s 51(xxxi) of the *Australian Constitution*.

<sup>25</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry* (December 2020) xxv, 158 (recommendation 11).

42. This recommendation accords with the Law Council's submissions above and is supported. In the Law Council's view, providing the Federal Court with greater oversight power, rather than implementing a minimum guaranteed return to class members, is more likely to achieve the objectives of protecting class members and maintaining access to justice.
43. It is noted that in the United States, in shareholder litigation, § 21D(a)(6) of the *Securities Exchange Act of 1934* (15 USC 78u-4(a)(6)) provides that attorney's fees and expenses in private securities class actions 'shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class'. The assessment of what is a 'reasonable percentage' is left to the court to determine on the facts of the case. In the American system, legal fees are charged on a contingency basis and so encompass what are effectively funder's commissions in Australia.
44. The Law Council remains of the view that the approval of all aspects of class action settlements and the distribution of settlement funds under section 33V of the *Federal Court of Australia Act 1976* (Cth) should be for the Court to determine in the best interests of all group members. The Court's discretion should not be limited by a statutory cap.

**Recommendation:**

- **The Australian Government should implement, as a matter of priority, recommendation 11 of the Parliamentary Joint Committee on Corporations and Financial Services in its report 'Litigation funding and the regulation of the class action industry'.**

**A 'Justice Fund'**

45. In its submission to the PJC, the Law Council suggested that consideration be given to the establishment of a special public fund, which the VLRC's 2008 *Civil Justice Review* called the 'Justice Fund'.<sup>26</sup> Such a fund was first proposed by the ALRC in its 1988 Report, *Group Proceedings in the Federal Court* which preceded the introduction of class action regimes in Australia.<sup>27</sup> The ALRC recommended that a 'special fund should be established to provide for the costs of parties involved in grouped proceedings'.<sup>28</sup> It should be noted that unlike the initial proposal by the ALRC in 1988, the Justice Fund proposed by the VLRC is intended to be self-funded, from recoveries in successful cases, after an initial seeding grant is provided.<sup>29</sup>
46. A fund of this type has been established in Ontario, Canada, under the name of the 'Class Proceedings Fund'.<sup>30</sup> It is understood that the Class Proceedings Fund has introduced a layer of competition into the litigation funding market in that jurisdiction putting downward pressure on commissions charged by private litigation funders.
47. In the event that a similar scheme was to be considered in Australia, the Law Council would participate in any further review or inquiry.

<sup>26</sup> Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 28 May 2008) ch 10.

<sup>27</sup> Australian Law Reform Commission, *Group Proceedings in the Federal Court* (Report 46, 1988).

<sup>28</sup> *Ibid* 309.

<sup>29</sup> Victorian Law Reform Commission, *Civil Justice Review* (Report 14, 28 May 2008) ch 10.

<sup>30</sup> The Class Proceeding Fund was established in 1992 following amendment to the *Law Society Act*, RSO 1990.

## Design of a guaranteed floor for returns

### Consultation Question 1.

**What is the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements)?**

48. The Law Council notes that the primary impediment to many options for implementing the proposed reform is that class actions can be commenced in both the Federal Court, which was the focus of the Report, and the state courts – see the discussion of the ‘forum shopping’ issue at paragraphs 32 and 33 above.
49. Accordingly, any statutory minimum return for all class actions would either require:
- (a) uniform take-up from all states and the Commonwealth if implemented via the respective class action laws in each jurisdiction; or
  - (b) the Commonwealth to impose the minimum return via its overarching regulation of Litigation Funders (for example, a condition of its Australian Financial Services Licence (**AFSL**)), or alternatively, using its corporations’ powers to create a separate regime for the regulation of litigation funders.
50. Unless there is a political willingness to implement such a uniform law, the clearest way to guarantee a statutory minimum return is via the Commonwealth’s regulation of litigation funders.

### Consultation Question 2.

**How would the suggested mechanism interact with the class action system (including court processes) and the litigation funding regime?**

51. The Law Council notes that if the mechanism were implemented through the Commonwealth’s regulation, a range of questions as to how it is enforced arise. Such questions include:
- (a) Would the regulator enforce the minimum return or would it be left to courts to oversee compliance?
  - (b) How would the regulator become involved in, say, a settlement?
  - (c) If the minimum return was simply a condition of an AFSL, what remedies would exist if the funder failed to comply with the minimum return on an individual class action?
  - (d) Would the regulator recover funds and distribute to the class members, or would class members need to bring their own claims against the funder?
52. Given the proximity of the court to each action, the Committee suggested the condition should be enforced (or compliance verified) by the courts. For example, it could be a requirement that a funder obtain approval from the relevant court at the commencement of the action. At the end of the action, it could be a requirement that the funder lodge compliance/verification documents with the court which evidence compliance.

**Consultation Question 3.**

**Is a minimum gross return of 70 per cent to class members the most appropriate floor for any statutory minimum return? If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?**

53. Should the Australian Government proceed with the current reform, the Law Council suggests that a guaranteed return to class members of 70 per cent is too high. This would require the aggregate of legal fees (and expenses) and a litigation funder's fee be less than 30 per cent of the gross proceeds. Given the complexity and risk involved in some class actions, it seems unlikely that many lawyers/funders would bear such a risk when approached to take on certain claims. A floor of 70 per cent would risk depriving potentially viable claims of funding.
54. As noted at paragraphs 6 to 13 above, the proposed reform is yet to receive detailed consideration. As such the 70 per cent requirement is not supported by empirical evidence which should underpin such a reform given the risks and practical difficulties identified earlier in this submission.
55. The Law Council considers that any minimum gross return percentage is flawed for the reasons stated. There is no percentage that would provide the necessary flexibility to adapt to the particular circumstances of each case while preventing cases where class members receive a clearly insufficient return.
56. Notwithstanding the above, in the event that this proposal is to be adopted and codified, it is essential that the courts retain the control and flexibility to manage the application of any such statutory limitation in order for justice to be done in the specific circumstances of each case (including the possibility for the court to approve returns below the minimum threshold where it is justified in the specific circumstances of the case). In order for the proposal not to result in the stifling of meritorious claims, the courts must be provided with the ability to apply reasonable and appropriate exemptions where necessary.<sup>31</sup>
57. The Law Council recognises that a guarantee set at 50 per cent has the support of at least one major funder (Omni Bridgeway). The Law Council does not agree that any minimum should apply, but rather, the court should be explicitly empowered to ensure fair outcomes.

## A graduated approach

**Consultation Question 4.**

**Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?**

58. The Law Council submits that the practical difficulty of implementing such a graduated approach means that it is not appropriate. In fact, the Law Council considers that the

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<sup>31</sup> See discussion of § 21D(a)(6) of the *Securities Exchange Act of 1934* (15 USC 78u-4(a)(6)) at paragraph 43 above. This provision provides that legal fees and expenses 'shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class' but the assessment of what is a 'reasonable percentage' is left to the court to determine on the facts of the case.



introduction of a graduated approach is only likely to multiple the risks of the proposed reform.

59. The innumerable, unique and consistently changing details of each class action makes the determination of 'straightforwardness' highly difficult and risks inconsistent and arbitrary classification of certain cases to the detriment of members of classes determined not to be suitable for a higher guaranteed return.
60. An action may appear straightforward at commencement, however issues may arise that increase the risk or make the action more difficult. While that could be ameliorated by allowing a re-classification of the action once those issues arise, there are various reasons why that might not be sufficient for a funder.<sup>32</sup> Therefore this proposal further increases the possibility that the supply of litigation funding and legal services falls and legitimate claims go unfunded.
61. If a statutory minimum return is implemented, the proposal for a graduated approach should be revisited after 3 to 5 years' experience under the statutory minimum return model.

**Consultation Question 5.**

**How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.**

62. As noted in response to Consultation Question 4, the Law Council considers the practical difficulty of implementing a graduated approach to mean that such an option is unworkable.

## Additional issues

**Consultation Question 6.**

**What other implementation considerations would be relevant to the issues raised in this consultation paper? Please provide examples**

63. The Law Council does not wish to raise further issues for consideration beyond those already set out at paragraphs 6 to 47 of this submission.

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<sup>32</sup> For example, concern that the arbiter of whether a case is straightforward refuses to re-classify despite the change in circumstances; concern that having to seek a re-classification could expose the settlement position of the class; additional costs of having to apply for a re-classification; and additional conflicts of interest between class and funder.