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# Maintenance and Champerty in Western Australia

Project 110: Final Report



THE LAW REFORM COMMISSION *of* WESTERN AUSTRALIA

## THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

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## LIST OF RECOMMENDATIONS

### *Recommendation 1*

That Western Australia legislate to abolish the torts of maintenance and champerty and to preserve any rule of law under which a contract is to be treated as contrary to public policy or as otherwise illegal.

### *Recommendation 3*

That the Western Australian Government recommend to the heads of all Western Australian court jurisdictions that they consider amendments to court rules to require a plaintiff's lawyers to provide a court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary.

### *Recommendation 2*

In the event that the Civil Procedure (Representative Proceedings) Bill 2019 is passed, that the Western Australian Government recommend that the Supreme Court consider:

- implementing a requirement that litigation funding agreements be disclosed to the Supreme Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's Class Actions Practice Note;
- implementing notification requirements for representative proceedings in similar terms to paragraphs 5.3-5.5 of the Federal Court of Australia's Class Actions Practice Note; and
- providing guidance for the appointment of an independent costs expert by the Supreme Court to assist in the assessment of legal costs and litigation funding fees in representative proceedings.

## LIST OF OPTIONS FOR CONSIDERATION BY GOVERNMENT

### *Option 1*

That Western Australia legislate to give the Supreme Court the power to make common fund orders in representative proceedings.

### *Option 2*

That Western Australia legislate to provide a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form enforceable in Australia.

### *Option 3*

That Western Australia legislate to expressly provide that courts can award costs against parties and third-party litigation funders and insurers who do not assist in achieving the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible.

### *Option 4*

That Western Australia legislate to provide that:

- third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Supreme Court;
- the Supreme Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
- Western Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Supreme Court.

## CHAPTER 1. INTRODUCTION

### 1.1 Terms of Reference

On 16 July 2018, the Attorney General made the following reference:

‘The Law Reform Commission of Western Australia is to provide advice and make recommendations for consideration by the Government as to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia and any consequential amendments, including:

1. whether a statutory provision is required to preserve the rule that contracts giving effect to arrangements for maintenance and champerty are void and/or illegal as being contrary to public policy;
2. strategies for mitigating the adverse impacts, if any, of abolishing the torts; and
3. any other related matter’.

The Attorney General also observed that the Final Report on the present reference would operate as a supplementary report to the *Representative Proceedings* Report (Project 103) completed by the Law Reform Commission of Western Australia (**Commission**) in 2015.

### 1.2 Background to Reference – *Representative Proceedings* Report

In its 2015 *Representative Proceedings* report, the Commission made seven recommendations regarding representative proceedings, also known as group proceedings or class actions.<sup>1</sup>

Most of these related to the establishment of a legislative representative proceedings regime in Western Australia and the form that such a regime ought to take. The Commission ultimately recommended that Western Australia legislate in similar terms to Part IVA of the *Federal Court of Australia Act 1976* (Cth), with several modifications.<sup>2</sup> The seventh recommendation was: ‘that, in conjunction with any implementation of the above recommendations, consideration be given by government to whether the torts of maintenance and champerty should be abolished or whether the law in relation to their operation should be otherwise modified in Western Australia’.<sup>3</sup> The present reference is therefore an addendum to the previous reference and considers one discrete issue which was previously left undecided.

The Civil Procedure (Representative Proceedings) Bill 2019 (**Representative Proceedings Bill**), which adopts the Commission’s other recommendations, was introduced in the Western Australian Parliament on 26 June 2019, was debated and passed by the

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<sup>1</sup> The terms ‘representative proceedings’ and ‘class actions’ are used interchangeably in this Report as jurisdictions have adopted different terminology.

<sup>2</sup> The Commission recommended that: (1) Western Australia enact legislation to create a scheme in relation to the conduct of representative actions; (2) the legislative scheme be based on Part IVA of the *Federal Court of Australia Act 1976* (Cth); (3) Order 18 Rule 12 of the *Rules of the Supreme Court 1971* (WA) be retained; (4) the legislative scheme include a provision based on s 33T of Part IVA of the *Federal Court of Australia Act 1976*

(Cth) but that it be expanded so that a Court may remove and substitute a representative party where it is in the interests of justice to do so; (5) a provision equivalent to s 158(2) of the *Civil Procedure Act 2005* (NSW) be included in the legislative scheme; and (6) a provision equivalent to s 166(2) of the *Civil Procedure Act 2005* (NSW) not be included in the legislative scheme. See Commission, *Project 103: Representative Proceedings*, Final Report, October 2015, p. 12.

<sup>3</sup> Commission, *Project 103: Representative Proceedings*, p. 12.

Legislative Assembly with bipartisan support, and awaits debate in the Legislative Council.<sup>4</sup>

### 1.3 Scope of Reference

The reference's definitional scope is fully set out in the Discussion Paper.<sup>5</sup> For present purposes it is sufficient to note that maintenance is defined as 'assistance or encouragement, by a person who has neither an interest in the litigation nor any other motive recognised as justifying the interference, to a party to litigation' and champerty as 'a particular form of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action'.<sup>6</sup> That is, maintenance takes place where a person finances litigation undertaken by another party, and champertous arrangements are those in which the maintainer is to receive a share of any damages ultimately awarded by the court.<sup>7</sup>

The Terms of Reference did not explicitly require the Commission to provide advice or make recommendations regarding litigation funding, but issues relating to funding were canvassed in the Discussion Paper<sup>8</sup> given their obvious relevance to the torts of maintenance and champerty.<sup>9</sup>

However, the Commission is conscious that it was not invited to undertake a full policy analysis of the role played by litigation funding and has examined the issue in light of its relevance to the torts of maintenance and champerty only. The recommendations and advice in this Report are made in the context of this more limited focus.

### 1.4 Methodology

#### Pre-Discussion Paper

During the early stages of this reference, the Commission considered case law, commentary and reports in order to determine, to the extent possible, the impact of the torts of maintenance and champerty in contemporary Western Australia and the policy options open to government in relation to these torts.

In particular, in considering strategies to mitigate any impacts of abolishing the torts of maintenance and champerty, the Commission referred to recent proposals made by law reform commissions in other Australian jurisdictions in the interests of ensuring a consistent approach. Accordingly the Commission examined the:

- Victorian Law Reform Commission's report on *Access to Justice – Litigation*

<sup>4</sup> See the Civil Procedure (Representative Proceedings) Bill 2019, which can be accessed at <http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=53A69D743089CB82482584250017E4EE>

<sup>5</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110: Discussion Paper, September 2019, pp. 6-9

<sup>6</sup> *Halsbury's Laws of Australia*, Vol. 6, para. 110-7135 and 110-7140, cited in *In the matter of Movitor Pty Ltd (Receiver and Manager Appointed) (in liquidation) Sims, A M (Applicant)* (1996) 64 FCR 380 per Drummond J at [11].

<sup>7</sup> The degree of involvement of the maintainer in the litigation is also a relevant consideration. The Supreme Court of Queensland observed recently that 'in order for there to be a consideration of a finding of champerty then it must be not only a provision of funds in return for a

percentage interest in the proceeds of the main litigation, but also an entitlement to become "involved" in the conduct of the litigation in the sense of having a degree of control in the litigation'; see *Murphy & Ors v Gladstone Ports Corporation Ltd* [2019] QSC 12 per Crow J at [28].

<sup>8</sup> Other issues relating to contemporary trends in litigation, such as the use of crowdfunding, are beyond the scope of this reference. See for instance A. Moses, 'Crowdfunding litigation: a problem or a solution?' *Australasian Lawyer*, 17 July 2019, accessed at <https://www.australasianlawyer.com.au/news/crowdfunding-litigation-a-problem-or-a-solution-264516.aspx>.

<sup>9</sup> By virtue of the torts of maintenance and champerty, the kinds of services provided by litigation funders were unlawful for many centuries; see VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 16.



*Funding and Group Proceedings* (March 2018) (**VLRC Report**); and

- Australian Law Reform Commission's report on *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (January 2019) (**ALRC Report**).

The VLRC and ALRC Reports are lengthy, detailed and cover considerable ground. Their scope is considerably broader than the Commission's current reference,<sup>10</sup> and the recommendations made in those Reports reflect these wide-ranging enquiries. The Reports make, respectively, 31 and 24 recommendations. There are inherent risks in selecting one or two such recommendations and implementing them in Western Australia in isolation from this broader, interrelated context. This Report therefore treads cautiously in considering the appropriateness of adopting VLRC and ALRC recommendations, particularly where these would require legislative change.

During the preparation of the Discussion Paper, the Commission also consulted with IMF Bentham Limited's Executive Director, Hugh McLernon, in order to gain a perspective on the impact of the torts of maintenance and champerty on the work done by litigation funders in Western Australia.

## Post-Discussion Paper – Analysis of Submissions

Both prior to and following the release of its Discussion Paper, the Commission availed itself of advice from Professor Vincent Morabito on the basis of his extensive research on representative proceedings and litigation funding in Australia. The Commission is grateful for Professor Morabito's insights and research, and for his feedback on drafts of the Discussion Paper and Final Report.

The Commission received submissions from the following stakeholders:

- The Australian Lawyers' Alliance;<sup>11</sup>
- IMF Bentham Limited (**IMF**);<sup>12</sup>
- Justin McDonnell, a Partner at King & Wood Mallesons, whose submission represents the views of the author and does not seek to represent the house view of the firm;
- The Law Society of Western Australia (**Law Society**); and
- Maurice Blackburn Lawyers (**Maurice Blackburn**).<sup>13</sup>

Although a limited number of submissions were received, they represent a useful cross-section of perspectives on the issues covered in the present reference. The submissions were detailed and

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<sup>10</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110: Discussion Paper, September 2019, pp. 40-41.

<sup>11</sup> The Australian Lawyers' Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

<sup>12</sup> IMF's submission notes its status as 'Australia's largest and most experienced litigation funder' and outlines its experience in the industry, including its 89% success

rate over 192 completed investments; see IMF, Submission, 1 November 2019, p. 2.

<sup>13</sup> Maurice Blackburn has considerable experience in class actions, including funded actions. It notes that since the establishment of its class actions practice in 1998 it has acted in more class actions than any other plaintiff law firm, and that it acted for representative plaintiffs in the earliest class actions that involved third party litigation funders; see Maurice Blackburn, Submission, 31 October 2019, p. 2.

substantive and the Commission is grateful for the time taken by stakeholders to compile them.

Major themes in the submissions included the importance of access to justice,<sup>14</sup> the impact of the torts of maintenance and champerty on representative proceedings;<sup>15</sup> the role of litigation in assisting with enforcement of laws;<sup>16</sup> the relevance and meaning of the decision in *Campbells Cash and Carry Pty Ltd v Fostif* (2006) 229 CLR 386 (*Fostif*), and the extent to which litigation funders assume control of the claims that they fund.<sup>17</sup>

In its Discussion Paper, the Commission expressed the view that it would be 'counterproductive...to focus too narrowly on litigation funding itself, as the torts of maintenance and champerty have wider relevance: they capture litigation which has been funded in order to inconvenience or oppress another person or to provide an indirect benefit for a third party'.<sup>18</sup>

However, due perhaps to the paucity of instances in which these torts have been invoked in other circumstances, substantial portions of the submissions received were devoted to litigation funding in the context of representative proceedings.

## 1.5 Relevant Considerations – Common Fund Orders and Group Costs Orders

In framing this Final Report the Commission has had regard to legal developments elsewhere in Australia.

In particular, the High Court's recent decision in *BMW Australia Ltd v Brewster & Anor; Westpac Banking Corporation & Anor v Lenthall & Ors*<sup>19</sup> (*Takata Airbag*) relates to courts' powers in relation to litigation funders. In this case, a 5-2 majority found that section 33ZF of the *Federal Court of Australia Act 1976* (Cth) and section 183 of the *Civil Procedure Act 2005* (NSW) do not empower the Federal Court and Supreme Court of New South Wales to make a 'common fund order'. Both of these sections provide that in any representative proceeding, including an appeal, the Court may make any order that the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

Common fund orders require all group members in a class action or representative proceeding to pay a proportionate share of a litigation funder's commission from the proceeds of a judgment or settlement, whether or not they have entered into a funding agreement directly with the funder.<sup>20</sup> They therefore address the 'free rider' problem in open class representative proceedings, where all group members have the benefit of a settlement or determination but only those who have signed a funding agreement must contribute to the

<sup>14</sup> IMF, Submission, 1 November 2019, p. 4; Maurice Blackburn, Submission, 31 October 2019, pp. 4 and 6.

<sup>15</sup> Australian Lawyers Alliance, Submission, 8 November 2019, p. 5.

<sup>16</sup> IMF, Submission, 1 November 2019, pp. 4 and 5. See also V. Morabito, 'An Evidence-Based Approach to Class Action Based Reform in Australia: Shareholder Class Actions in Australia – Myths v Facts', November 2019, p. 10, accessed at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3484660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660).

<sup>17</sup> J. McDonnell, Submission, 30 October 2019, 1-4.

<sup>18</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110, Discussion Paper, p. 18.

<sup>19</sup> [2019] HCA 45.

<sup>20</sup> See V. Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments', January 2019.

funder's fee.<sup>21</sup> The concept of a common fund order was first approved at the commencement of proceedings (as distinct from fund equalisation orders made at settlement)<sup>22</sup> in the 2016 Full Federal Court decision of *Money Max Int Pty Ltd v QBE (Money Max)*.<sup>23</sup> The Court observed that courts 'have routinely ordered all class members to pay a proportionate contribution to the legal costs incurred in producing a settlement, whether or not they retained the applicant's solicitors' and that '[i]n circumstances where...litigation funding charges have become a standard cost in shareholder class actions, we can discern no reason in principle for treating litigation funding costs incurred to achieve a settlement differently from legal costs incurred to achieve the settlement'.<sup>24</sup>

*Takata Airbag* has decisively overruled *Money Max*.<sup>25</sup> Kiefel CJ, Bell and Keane JJ observed that section 33ZF of the *Federal Court of Australia Act 1976* (Cth) and section 183 of the *Civil Procedure Act 2005* (NSW) 'empower the making of orders as to how an action should proceed in order to do justice', concluding that they 'are not concerned with the radically different question as to whether an action can proceed at all'.<sup>26</sup> The High Court did not narrowly construe the relevant sections as being concerned only with the resolution of the issues pleaded before the Court,<sup>27</sup> and recognised the wide range of

procedural orders that may be supported by these sections. However, the High Court concluded that section 33ZF of the *Federal Court of Australia Act 1976* (Cth) and section 183 of the *Civil Procedure Act 2005* (NSW) were supplementary in nature<sup>28</sup> and could not extend to the making of a common fund order. In particular, the judges making up the majority found that the representative proceedings schemes under consideration contemplated that funds would be distributed as between group members at the end of a proceeding, leaving no 'gap' for sections 33ZF and 183 to fill.<sup>29</sup>

One of the arguments advanced by the appellants was that section 33ZF of the *Federal Court of Australia Act 1976* (Cth) could not encompass the making of a common fund order because when Part IVA of the Act was enacted in 1991, litigation funding was proscribed by the torts of maintenance and champerty.<sup>30</sup> This argument was not successful. Kiefel CJ, Bell and Keane JJ agreed that:

when Pt IVA of the FCA was enacted, the Parliament could not have been understood to contemplate that s 33ZF might be invoked to support a [common fund order]. That must be so because, at that time, an agreement to maintain legal proceedings by another in return for a piece of the action was unlawful

<sup>21</sup> As the Full Court has observed: 'The effect of each Funding Agreement is that funded class members are collectively bearing the cost of the action...as they have agreed to pay a funding commission and to reimburse the legal costs paid by the Funder out of any settlement or judgment. Unfunded class members who do not opt out benefit from the commercial arrangements under which the Funder pays the legal costs, takes on the burden of adverse costs and provides security for costs, even though they are not presently required to pay the Funder a percentage funding commission or a proportionate share of legal costs'; see *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 per Murphy, Gleeson and Beach JJ at [2].

<sup>22</sup> See for example *Pathways Investments v National Australia Bank* [2012] VSC 625.

<sup>23</sup> [2016] FCAFC 148.

<sup>24</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 per Murphy, Gleeson and Beach JJ at [71].

<sup>25</sup> See for instance *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Kiefel CJ, Bell and Keane JJ at [56]-[59].

<sup>26</sup> *Ibid* at [3]. See also [47].

<sup>27</sup> *Ibid* per Kiefel CJ, Bell and Keane JJ at [21].

<sup>28</sup> *Ibid* at [45] and [46]. See also [48]. See also Nettle J at [124] and Gordon J at [147].

<sup>29</sup> *Ibid* per Kiefel CJ, Bell and Keane JJ at [59] and [68] – [70].

<sup>30</sup> *Ibid* per Edelman J at [203].

under the laws against champerty in States other than Victoria. But the question here is not about the intention with which these sections were originally enacted; rather, the question is whether, given the breadth and generality of their language, and the absence now of any objection on the ground of champerty, the making of a [common fund order] falls, on a fair construction, within their terms.<sup>31</sup>

Ultimately, the plurality answered this question in the negative. Although the case did not turn on the torts of maintenance and champerty, echoes of traditional concerns about champertous arrangements may be discerned among the judges' reasoning. For instance, Kiefel CJ, Bell and Keane JJ concluded that '[w]hether or not a potential funder of the claimants may be given sufficient financial inducement to support the proceeding is outside the concern to which the text is addressed'.<sup>32</sup> It was also observed that common fund orders obviate the need for an expensive 'book building' process on the part of litigation funders to identify group members and enter into funding agreements with them.<sup>33</sup> Other judges among the plurality similarly characterised common fund orders as operating for the benefit of litigation funders, rather than group members. In particular, and relevantly to the present reference, Nettle J quoted the dissenting judges in *Fostif* in contending:

whatever Parliament may have foreseen to be the consequences of its enactment of Pt IVA of the FCA Act, what Parliament could not, and therefore most certainly did not, foresee was that a majority of this Court would later give its imprimatur to the maintenance of group proceedings that are dependent "on a harnessing of the alleged wrongs of the plaintiffs and of the curial processes established to remedy alleged wrongs for the primary purpose of generating profits" for entrepreneurial litigation funders.<sup>34</sup> It is one thing to hold, as this Court did in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,<sup>35</sup> that representative proceedings involving a litigation funder are no longer considered invariably to be an abuse of process and contrary to public policy. It is, however, quite another thing to accept that the commercial interests of those funders formed part of the mischief that the introduction of Pt IVA was intended to confront.<sup>36</sup>

This characterisation of common fund orders has been the subject of some critical commentary following the decision.<sup>37</sup> The dissenting judgments did not directly contradict this viewpoint but emphasised the benefit that common fund orders may provide to group members.<sup>38</sup> Edelman J noted that the other mechanism which has been used to address the 'free rider' problem – a fund equalisation order made at the point of settlement – is less equitable than a common fund order from the point of view

<sup>31</sup> Ibid per Kiefel CJ, Bell and Keane JJ at [44]. See also Edelman J at [204]-[205].

<sup>32</sup> Ibid at [50]. See also [83] and [94].

<sup>33</sup> Ibid per Kiefel CJ, Bell and Keane JJ at [91].

<sup>34</sup> *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 per Callinan and Heydon JJ at 496 [287].

<sup>35</sup> (2006) 229 CLR 386.

<sup>36</sup> *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Nettle J at [126]. Nettle J stated, further, that there was 'no reason to suppose that the Parliament of New South Wales intended the scope of operation of s 183 to extend to the making of orders to facilitate entrepreneurial litigation funders to generate profits by fomenting disputes which,

but for the making of such orders, might never flare into controversy'; see Ibid at [127].

<sup>37</sup> See for instance V. Morabito, 'No joy for consumers in class action decision', *Australian Financial Review*, 6 December 2019, p. 33 and M. Legg in M. Pelly, 'High Court torpedoes class actions', *Australian Financial Review* 4 December 2019.

<sup>38</sup> On the general topic of common fund orders, see also V. Morabito, 'An Evidence-Based Approach to Class Action Based Reform in Australia: Shareholder Class Actions in Australia – Myths v Facts', November 2019, p. 10, accessed at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3484660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660).

of group members. This is because a fund equalisation order ‘involves no necessary assessment by the court of the reasonableness of the remuneration costs incurred by the group members who enter into contracts with a litigation funder’.<sup>39</sup> Similarly, Gageler J observed that the ‘commercial interest that the litigation funder has in securing a return on the funder’s investment gives no reason for the Court to be squeamish’ and that this commercial interest ‘gives reason for the Court to scrutinise the terms of the proposed undertaking and the rate and structure of the proposed remuneration with particular care for the protection and advancement of the interests of group members’.<sup>40</sup>

Commentary on the decision has noted that it is possible that the making of common fund orders at the end of a proceeding may be supported by sections 33V(2) and 33Z(1)(g) of the *Federal Court of Australia Act 1976* (Cth) and their equivalents in other legislation.<sup>41</sup> However, there is not clarity on this point as yet and such orders would not assist claims that have difficulty in proceeding without the benefit of such an order from the outset.

Following the decision, the Federal Court of Australia’s Class Actions Practice Note, the GPN-CA, which is discussed in Chapter 3 below, was amended to address the High Court’s findings. The amendments include the removal of references to common fund orders and a requirement that at the first case management hearing the parties should be in a position to

advise as to ‘the financial basis upon which the class action is to be conducted and/or funded by the applicant and what, if any, orders are likely to be sought relating to these matters, which would impose any obligation on class members’.<sup>42</sup> The GPN-CA also now provides that, in the context of settlement approval:

Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the Court will, if application is made and if in all the circumstances it is fair, just, equitable, and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, amongst all persons who have benefited from the action. The notices provided to class members should bring this to their attention as early in the proceeding as practicable.<sup>43</sup>

This final amendment seems to address the possibility, discussed above, that common fund orders may be made at the end of a proceeding.

The High Court’s decision will have ramifications for each Australian jurisdiction with a legislative representative proceedings scheme given the degree of uniformity between these regimes. Possible outcomes of the decision which have been put forward include: a return to the days when significant numbers of representative proceedings were brought on a ‘closed class’

<sup>39</sup> Ibid per Edelman J at [185].

<sup>40</sup> *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Gageler J at [114].

<sup>41</sup> D. Meyerowitz-Katz, ‘The end of common fund orders... or is it? The High Court’s decision explained’, 5 December 2019, accessed at <https://www.dmkbarrister.com/post/the-end-of->

[common-fund-orders-or-is-it-the-high-court-s-decision-explained](https://www.dmkbarrister.com/post/the-end-of-common-fund-orders-or-is-it-the-high-court-s-decision-explained).

<sup>42</sup> J. L. B. Allsop, Chief Justice, Class Actions Practice Note (GPN-CA), 20 December 2019, paragraphs 7(8)(e), 7.10, and 15.2(h), accessed at <https://www.fedCourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca>.

<sup>43</sup> Ibid, paragraph 15.4.



basis on behalf of only those group members who entered into funding agreements,<sup>44</sup> leading to a possible increase in competing claims;<sup>45</sup> an inability to bring an action in situations where insufficient numbers of group members ‘sign up’ to make proceedings commercially viable;<sup>46</sup> and increasing challenges for smaller funders.<sup>47</sup>

Another possible consequences of the decision is, simply, that fewer representative proceedings will successfully be brought.<sup>48</sup> This possibility appears to have been explicitly contemplated by the High Court, and the distinctions between the majority and minority decisions on this point demonstrate longstanding tensions as to whether litigation is generally viewed as a means of accessing justice or as a necessary evil best avoided.<sup>49</sup> For instance, Gageler J in dissent contended that:

...the power [in section 33ZF] cannot be divorced from the principal object of Pt IVA of enhancing group members' access to justice. The power is sufficient to enable the Court to fashion such orders as it thinks appropriate or necessary to ensure that such arrangements for the funding of the proceeding as are

sought to be put in place by the representative party are adequate to protect the interests that group members have in the timely and efficient realisation of their claims. To my mind, it introduces an unrealistic dichotomy to postulate that an order that serves to shore up the commercial viability of the proceeding from the perspective of the litigation funder can have nothing to do with enhancing the interests of justice in the conduct of the representative proceeding.<sup>50</sup>

By contrast, Kiefel CJ, Bell and Keane JJ considered that ‘Court approval of arrangements with a non-party in order to enable a proceeding to be pursued at all could only be said to be appropriate or necessary to ensure that justice is done between the parties to the proceeding *if one were to assume that maintaining litigation, whatever its ultimate merit or lack thereof, is itself doing justice to the parties*’<sup>51</sup> [emphasis added]. Their Honours also cited provisions which allow the Court to stay a proceeding or order that it no longer proceed as a representative proceeding,<sup>52</sup> concluding that such provisions were ‘legislative recognition that, at some point, the cost of identifying group members may simply be too

<sup>44</sup> Morabito, ‘No joy for consumers in class action decision’, *Australian Financial Review*, 6 December 2019, p. 33.

<sup>45</sup> J. Doraisamy, ‘“Wide-ranging implications” expected after High Court decision on class actions’, *Lawyers Weekly*, 4 December 2019, accessed at <https://www.lawyersweekly.com.au/biglaw/27062-wide-ranging-implications-expected-after-high-court-decision-on-class-actions>.

<sup>46</sup> Morabito, ‘No joy for consumers in class action decision’, *Australian Financial Review*, 6 December 2019, p. 33.

<sup>47</sup> Doraisamy, ‘“Wide-ranging implications” expected after High Court decision on class actions’, *Lawyers Weekly*, 4 December 2019.

<sup>48</sup> Morabito, ‘No joy for consumers in class action decision’, *Australian Financial Review*, 6 December 2019, p. 33.

<sup>49</sup> These tensions were considered briefly in the Discussion Paper; see Commission, *Maintenance and Champerty in Western Australia*, Project 110, Discussion Paper, pp. 35–36.

<sup>50</sup> *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Gageler J at [110].

<sup>51</sup> *Ibid* per Kiefel CJ, Bell and Keane JJ at [52]. See also [84].

<sup>52</sup> Section 33M(b) of the *Federal Court of Australia Act 1976* (Cth) and section 165(b) of the *Civil Procedure Act 2005* (NSW) provide that the Court may, on application by the respondent, stay a proceeding or direct that it no longer continue as a representative proceeding if the Court concludes that it is likely that, if judgment were to be given in favour of the representative party, the cost to the respondent of identifying the group members and distributing to them the amounts ordered to be paid to them would be excessive having regard to the likely total of those amounts. See also ss 33N(1)(c) and (d) of the *Federal Court of Australia Act 1976* (Cth) and ss 166(1)(c) and (e) of the *Civil Procedure Act 2005* (NSW), which provide that the Court may, on application by the respondent or of its own motion, order that the proceeding no longer continue as a representative proceeding if it is satisfied that it is in the interests of justice to do so because, among other things, ‘the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members’ or ‘it is otherwise inappropriate that the claims be pursued by means of a representative proceeding’.

high or too difficult compared to the value of the claims. If that is the case, the solution contemplated by the legislation is to halt the representative proceeding, not to make a [common fund order] because the process of book building is proving too expensive or too difficult'.<sup>53</sup>

In Western Australia, the Representative Proceedings Bill 2019 currently before Parliament also contains a clause empowering the Supreme Court to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding',<sup>54</sup> which must now be read in the light of the High Court's decision as not authorising the making of common fund orders. Therefore, in the event that the Bill is passed, fewer representative proceedings may be commenced under its regime than may have been envisaged.

If it is sought to provide potential representative parties and group members with as wide an opportunity as possible to bring a representative proceeding, the Government may wish to consider amending the Bill to insert a power to make common fund orders. The question whether to amend the Bill in this fashion clearly extends beyond the scope of the present reference and therefore no recommendation is made on it. In addition, common fund orders raise other issues, such as the extent to which it is appropriate for group members who have not 'signed up' to be bound by other obligations contained in funding agreements.<sup>55</sup> However, the Commission notes the deficiencies of fund

equalisation orders in providing for equity as between group members; the role of litigation funding in facilitating access to justice, which is discussed in Chapter 2 below; the uncertainty surrounding the possibility of making common fund orders at the end of proceedings under other provisions; and the benefits of having such orders made at the beginning of proceedings.

The question of equity is also relevant. In research released in January 2019, Professor Morabito analysed common fund orders made in federal actions, which tended to result in group members paying lower fees, concluding that 'the continued employment of the common fund doctrine will most likely result in class members receiving a greater share of settlement proceeds in the future'.<sup>56</sup> It is also noteworthy that even prior to *Takata Airbag*, the ALRC and VLRC recommended that the *Federal Court of Australia Act 1976* (Cth) and *Supreme Court Act 1986* (Vic) respectively be amended to include an explicit power to make common fund orders,<sup>57</sup> reflecting the role played by such orders in facilitating large-scale open class actions. In view of the above, the Commission has identified amending the Representative Proceedings Bill to provide a specific power to make common fund orders as one option available to the Government.

*Takata Airbag* should also be borne in mind when assessing the courts' powers regarding litigation funders more generally. Given that section 33ZF of the *Federal Court of Australia Act 1976* (Cth) and its equivalents are more limited in scope than had been thought, courts may require additional,

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<sup>53</sup> *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Kiefel CJ, Bell and Keane JJ at [65]. See also [84], and Gordon J at [138]-[141].

<sup>54</sup> See clause 34 of the Civil Procedure (Representative Proceedings) Bill 2019 (WA).

<sup>55</sup> See *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Edelman J at [180].

<sup>56</sup> V. Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia: Common Fund Orders, Funding Fees and Reimbursement Payments', January 2019, p. 15.

<sup>57</sup> See Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, January 2019, pp. 96-99, and Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, March 2018, pp. 67-68.

explicit powers to supervise litigation funders, if such an outcome is sought.<sup>58</sup> These issues are considered further at Chapter 3 below and the Commission has put forward a set of options for consideration by Government as regards litigation funding.

It should also be noted that a new Bill before the Victorian Parliament seeks to introduce contingency fees for lawyers in representative proceedings, in an exception to the general prohibition against such arrangements, with fees paid by way of 'group costs orders' made by the court<sup>59</sup> in similar fashion to common fund orders.<sup>60</sup> These proposed amendments, which in light of *Takata Airbag* have been predicted to make Victoria a significantly more attractive destination for representative proceedings,<sup>61</sup> are briefly considered at Chapter 4 below.

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<sup>58</sup> Members of the plurality commented, for instance, that an application for a common fund order 'invites the court to order the establishment of a relationship between group members and a litigation funder with whom the group members would otherwise have no relationship at all'; see *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Kiefel CJ, Bell and Keane JJ at [66]. See also Gordon J at [149]-[152].

<sup>59</sup> See Justice Legislation Miscellaneous Amendments Bill 2019 (Vic), Part 2.

<sup>60</sup> The possibility that such orders could be made was raised, and left open, in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107 at [22], [135]-[139].

<sup>61</sup> M. Pelly, 'High Court torpedoes class actions', *Australian Financial Review* 4 December 2019; D. Meyerowitz-Katz, 'The end of common fund orders...or is it? The High Court's decision explained', 5 December 2019, accessed at <https://www.dmkbarrister.com/post/the-end-of-common-fund-orders-or-is-it-the-high-court-s-decision-explained>.



## CHAPTER 2. SHOULD WESTERN AUSTRALIA ABOLISH MAINTENANCE AND CHAMPERTY?

The major question that the Commission must answer is whether maintenance and champerty remain necessary or are, in the words used in the *Law Reform Commission Act 1972* (WA) ‘obsolete, unnecessary, incomplete or otherwise defective’.<sup>62</sup> A corollary is whether injustices would take place in Western Australia absent these torts.

On the basis of its research and analysis, and after careful consideration of the submissions before it, the Commission recommends that the torts of maintenance and champerty be abolished.

The Commission appreciates the historical rationale for these torts within the common law system, and agrees that members of society ought to be protected from malicious legal action. However, it also notes shifting public policy considerations and the importance of access to justice.<sup>63</sup> The potential for the torts’ ongoing operation in Western Australia to cause

confusion about a plaintiff’s entitlement to avail themselves of funding to enable them to bring their action is of concern.<sup>64</sup> Rather than protecting citizens from injustice, the torts risk creating injustice themselves.

Litigation funding has come to play a significant role in representative proceedings in Australia, for reasons including the ‘opt-out’ model employed in representative proceedings;<sup>65</sup> the high costs of conducting large-scale representative proceedings; the cost shifting rule; the lack of a public fund or other mechanism to finance these proceedings,<sup>66</sup> and the prohibition on lawyers charging contingency fees.<sup>67</sup> It is acknowledged that litigation funding necessarily provides only limited access to justice.<sup>68</sup> The contrasting views that may be taken of the industry were considered in the Discussion Paper<sup>69</sup> and are also demonstrated in the various characterisations of the industry in the *Takata Airbag* decision discussed above at [1.5]. For present purposes it is neither necessary nor appropriate to express a view on the merits of third party funding of litigation, however it is important to understand the critical part that such funding plays in representative proceedings in Australia.

<sup>62</sup> *Law Reform Commission Act 1972* (WA), s 11(4)(a).

<sup>63</sup> See generally the Law Council of Australia, *The Justice Project*, Report, August 2018, accessed at <https://www.lawcouncil.asn.au/justice-project/final-report> and the Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014. The increasing emphasis on access to justice is also discussed in Commission, *Maintenance and Champerty in Western Australia*, Project 110: Discussion Paper, September 2019, pp. 11-18.

<sup>64</sup> Maurice Blackburn, Submission, 31 October 2019, p. 4.

<sup>65</sup> Under the ‘opt-out’ model in Part IVA of the *Federal Court of Australia Act 1976* (Cth) group members are ‘in’ a representative action unless they take the step of opting out of the proceedings. Sections 33E (1) (Consent), 33J (Opt-out) and 33ZB (Effect of judgement) of the *Federal Court of Australia Act 1976* (Cth) create what is known as an opt-out scheme. These are mirrored in the Civil Procedure (Representative Proceedings) Bill 2019 (WA) in clauses 8(1), 12, and 29. The practical effect of a default opt-out framework is that all plaintiffs who have

a common interest in the litigation remain in the representative action unless they make a deliberate decision to leave the group. However, actions may also be brought on a ‘closed-class’ basis; see *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

<sup>66</sup> Such a fund was originally proposed by the Australian Law Reform Commission; see ALRC, ‘Grouped Proceedings in the Federal Court, Report 46’ (December 1988) rec 3.09, discussed in ALRC, *Integrity, Fairness and Efficiency*, p. 49.

<sup>67</sup> Justice S. Derrington, ‘Litigation Funding: Access and Ethics’, Australian Academy of Law Lecture, 4 October 2018, Brisbane, accessed at <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20181004>

<sup>68</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110, Discussion Paper, pp. 14-15.

<sup>69</sup> *Ibid*, pp. 11-18.

Professor Morabito's extensive research in this area indicates that a total of 196 or 31% of the 614 class actions filed throughout Australian jurisdictions during the period 4 March 1992 to 3 March 2019 received the support of litigation funders.<sup>70</sup> It is notable that during the last three years of this period, that is, from 4 March 2016 to 3 March 2019, there were 143 class actions filed, 101 or 70.6% of which were believed to have been funded.<sup>71</sup> That is, the involvement of litigation funders in representative proceedings is increasing. The extent to which such proceedings are funded varies greatly between jurisdictions,<sup>72</sup> but it is nevertheless clear that the operation of representative proceedings regimes in Australia is to a certain extent dependent on the ability to access third party funding.<sup>73</sup>

The Commission is also mindful that its present reference is an offshoot from its 2015 *Representative Proceedings* report, and considers it appropriate that this Report support recommendations made previously as to the

establishment of a workable representative proceedings scheme that enhances access to justice. It is considered that abolishing the torts of maintenance and champerty would remove any lingering doubt as to a representative party's<sup>74</sup> ability to access funding to support them in bringing a representative proceeding.<sup>75</sup> Abolition would also remove confusion that exists as to the torts' operation, as well as neutering their ability to cause disputation.

The Commission explored other possibilities, such as legislating to clarify that the mere existence of a funding agreement does not constitute an abuse of process, while otherwise leaving the torts of champerty and maintenance in place.<sup>76</sup> Such an approach would be similar to that taken in the legislation containing Queensland's representative proceedings regime. Section 103K(2)(b) of the *Civil Proceedings Act 2011* (Qld) provides that it is not inappropriate for claims to be pursued as a representative proceeding merely because the persons

<sup>70</sup> The breakdown of the four relevant jurisdictions is as follows: Federal: 150 out of 463 (32.3%); Victoria: 10 out of 91 (10.9%); NSW: 31 out of 53 (58.4%); QLD = 5 out of 7 (71.4%). See V. Morabito, Monash Business School, 'Empirical Perspectives on 27 Years of Class Actions in Australia', July 2019, Melbourne University Presentation (Unpublished).

<sup>71</sup> In this instance, the breakdown is as follows: Federal: 72 out of 93 (77%); Victoria: 1 out of 13 (7.6%); NSW: 23 out of 30 (76.6%); QLD = 5 out of 7 (71.4%); in V. Morabito, Monash Business School, 'Empirical Perspectives on 27 Years of Class Actions in Australia', July 2019, Melbourne University Presentation (Unpublished).

<sup>72</sup> The Victorian Law Reform Commission noted recently that: 'While litigation funders are actively involved in class actions in the Federal Court, they have been involved in only 10 of the 85 class actions filed in the Supreme Court of Victoria since their institution in Victoria on 1 January 2000. While mass tort claims, with their onerous logistical requirements and profound human impacts, have been a significant part of the civil jurisdiction in Victoria, the Federal Court receives a preponderance of shareholder class actions'; see VLRC, *Access to Justice*, p. vi. For a discussion of shareholder claims, see V. Morabito, 'An Evidence-Based Approach to Class Action Based Reform in Australia: Shareholder Class Actions in Australia – Myths v Facts', November 2019, p. 10, accessed at

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3484660](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484660).

<sup>73</sup> It is important to note, however, that litigation funding is also used for other actions. In its submission, IMF notes that it funds 'a wide range of claims' including single party disputes such as general commercial disputes, claims against estates and trustees, building and construction disputes, patents, professional indemnity claims, contract disputes, family law claims and claims against insurers; class actions; insolvency proceedings; international commercial arbitration and investment treaty claims; and enforcement proceedings; IMF, Submission, 1 November, p. 3.

<sup>74</sup> The person bringing a representative proceeding is the 'representative party', sometimes also referred to as the 'representative plaintiff'. The Bill currently before the Western Australian parliament adopts the former terminology and describes the class of persons on whose behalf the proceeding is brought as the 'group members'; see cl. 3 Civil Procedure (Representative Proceedings) Bill 2019 (WA).

<sup>75</sup> Australian Lawyers Alliance, Submission, 8 November 2019, p. 5.

<sup>76</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110: Discussion Paper, September 2019, pp. 33-34.

identified as group members 'are aggregated together for a particular purpose including, for example, a litigation funding arrangement'.

This provision has been the subject of recent litigation in *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd* (No. 4).<sup>77</sup> In this case the Supreme Court of Queensland found that section 103K(2)(b) did *not* abolish the torts of maintenance and champerty and that this section, together with the balance of Part 13A of the *Civil Proceedings Act 2011* (Qld) authorised commercial litigation funding agreements in respect of representative proceedings in Queensland.<sup>78</sup> The case includes a lengthy discussion of the evolution of the torts of maintenance and champerty which is of great interest in a legal history context.<sup>79</sup> However, the existence of such litigation as to the meaning and purpose of section 103K(2)(b) suggests that it may cause confusion to retain the torts while specifically allowing litigation funding in a representative proceedings context. Ultimately, the Commission considers that it is preferable to abolish the torts rather than taking Queensland's approach on this issue.<sup>80</sup>

The Commission observes that there is an inherent virtue in consistency of the law as between Australian jurisdictions, particularly given the steady movement towards a more uniform legal profession. The merits of consistency are enhanced in the context of representative proceedings, given the system

proposed for Western Australia largely reflects that adopted by the Commonwealth, Victoria, New South Wales, Queensland and Tasmania. Abolishing the torts of maintenance and champerty, as all of these jurisdictions bar Queensland have done, will improve certainty, reduce the potential for 'forum-shopping',<sup>81</sup> and assist in the further development of an Australian jurisprudence on representative proceedings.

The Commission has explored the possibility that abolishing the torts will leave citizens vulnerable to injustice. However, it does not consider that abolition would leave a gap in the legal landscape. The courts' existing powers, including as to abuse of process, were surveyed in the Discussion Paper,<sup>82</sup> which noted:

A concern with the above possibilities...is the difficulty of securing a remedy for a defendant who suffers damage as the result of conduct that would amount to maintenance or champerty. Taking the...example of lawyers' ethical obligations, a subsequent finding that a lawyer had breached their duties under the *Legal Profession Act 2008* (WA) may offer minimal comfort to a party who has been caused damage as a result of malicious litigation. Similarly, a stay of proceedings would also not address any special damages caused by the intermeddling third party.<sup>83</sup>

In framing this Report and its recommendations, the Commission has had regard to the concerns of defendants. However, the question whether a

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<sup>77</sup> [2019] QSC 12.

<sup>78</sup> *Murphy Operator Pty Ltd v Gladstone Ports Corporation Ltd* (No 4) [2019] QSC 228 per Crow J at [183].

<sup>79</sup> *Ibid* at [72]-[183].

<sup>80</sup> In addition, no stakeholders supported this proposal. See Maurice Blackburn, Submission, 31 October 2019, p. 4; IMF, Submission, 1 November 2019, p. 7; McDonnell, Submission, 30 October 2019, p. 7.

<sup>81</sup> *Ibid*, p. 6; Law Society of Western Australia, Submission, 'Representative Proceedings', Commission Discussion Paper 103, February 2013, p. 8. Accessed at

<https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/submission-law-reform-commission-representative-proceedings-may-2013.pdf>.

<sup>82</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110, Discussion Paper, pp. 36-38. See also Maurice Blackburn, Submission, 31 October 2019, p. 4.

<sup>83</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110, Discussion Paper, p. 38.

remedy is *required* for the torts of maintenance and champerty specifically is open to debate. The prospect of litigation being funded and instigated by a third party purely to inconvenience a defendant is concerning. However, if an action amounts to an abuse of process or vexatious litigation then it can be addressed as such.<sup>84</sup> Although a defendant would not be awarded special damages, the court would be able to stay an action and award costs accordingly.<sup>85</sup> If an action itself is legitimate, and a plaintiff (whatever the source of their funds) has a meritorious case, it is difficult to see why obstacles should be placed in the plaintiff's path purely on the basis of the source of its funding or the potential motivations of the funder.<sup>86</sup> This is particularly the case given the well-documented difficulties many Australians have in accessing the court system.<sup>87</sup>

The need for abolition was also a consistent theme throughout the submissions received by the Commission.

Only one submission that addressed this issue did *not* favour abolition of the torts of maintenance and champerty. It is worth considering this submission individually, because it is alone in mounting a case for the torts' continued

usefulness and does so eloquently and in some detail.<sup>88</sup> The submission objects to 'claims that [the torts] are medieval and outdated', suggesting that maintenance and champerty 'can act as a brake on funders by controlling what they do'.<sup>89</sup> It expresses particular concern about litigation funding and the degree to which a funder might assume control over an action, contending that a 'funder who has control under the terms of the funding agreement can conduct a case differently to how the plaintiff would have conducted it'.<sup>90</sup> It refers to the voluntary code of conduct adopted by litigation funders in the United Kingdom,<sup>91</sup> which provides among other things that a funder will 'not seek to influence the Funded party's solicitor or barrister to cede control or conduct of the dispute to the Funder' and observes that Hong Kong has legislated to allow litigation funding where the funder cedes control to the plaintiff and their lawyers.<sup>92</sup> The submission suggests that, in Western Australia, the torts of maintenance and champerty are 'an effective method to seek to address the issue of control in a similar manner to the embargo on control as done in...England and Hong Kong'.<sup>93</sup>

The Commission takes concerns about control of litigation by external third parties seriously, although it should be noted that the extent to

<sup>84</sup> Ibid, pp. 36-37.

<sup>85</sup> For a case relating to abuse of process within a representative proceedings context, see *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2016] FCA 787.

<sup>86</sup> Ibid, p. 19; Maurice Blackburn, Submission, 31 October 2019, p. 5.

<sup>87</sup> It has often been observed that the Australian justice system is a "Rolls Royce system"; that is, of high quality but inaccessible to the vast majority of people. See for instance Hon Wayne Martin AC, 'Creating a Just Future by Improving Access to Justice', Speech, Community Legal Centres Association WA Annual Conference 2012, pp. 2-3 and The Hon Michael Kirby, 'Alternative Dispute Resolution – a Hard-Nosed View of its Strengths and Limitations', Speech, The Institute of Arbitrators & Mediators Australia South Australian Chapter AGM – 29 July 2009, p. 3.

<sup>88</sup> McDonnell, Submission, 30 October 2019, pp. 1-2.

<sup>89</sup> Ibid, pp. 1 and 4.

<sup>90</sup> Ibid. The submission notes that the torts are designed to protect against risks to the administration of justice or the distortion of the curial process and provides examples including 'the inflaming of the damages sought, prejudicing a proper settlement, supporting speculative claims and the bringing of large and expensive claims with a view to inducing defendants to settle', Ibid, p. 2.

<sup>91</sup> This Code of Conduct was briefly considered in the Discussion Paper; see Commission, *Maintenance and Champerty in Western Australia*, Project 110, Discussion Paper, p. 25.

<sup>92</sup> McDonnell, Submission, 30 October 2019, p. 3. See *The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017* and [2.9] of the *Hong Kong Code of Practice for Third Party Funding in Arbitration*.

<sup>93</sup> McDonnell, Submission, 30 October 2019, p. 7.

which such control is assumed by funders is itself disputed.<sup>94</sup> Therefore, although the courts have wide powers to address the risks of third party interference in litigation, this Report considers strategies to further buttress these powers to address the possibility of inappropriate conduct by litigation funders, and puts forward Recommendations and Options on this basis. It is suggested that measures to provide increased court supervision of funders will be better adapted to addressing the risks of ‘meddling’ in or control of litigation than the little-known and rarely-invoked torts of maintenance and champerty.

Having recommended abolishing these torts, it was then necessary for the Commission to determine whether to also recommend that legislation be enacted to preserve ‘any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal’.

This approach has been taken in other Australian jurisdictions. For instance, the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), which was at issue in *Fostif*, provides at section 4 that ‘An action in tort no longer lies on account of conduct known as maintenance (including champerty)’.<sup>95</sup> Section 6 provides: ‘This Act does not affect any rule of law as to the

cases in which a contract is to be treated as contrary to public policy or as otherwise illegal, whether the contract was made before, or is made after, the commencement of this Act’.<sup>96</sup>

This option leaves open the possibility of contracts to fund another’s legal action being found to be invalid as an abuse of process while ensuring that having a third party funding the action will not be invalid *per se*.

Consistency between Australian jurisdictions on points of law is generally seen as beneficial, and in particular as a way to increase the efficiency of the practice of law. One of the arguments for abolishing the torts of maintenance and champerty is based on this very premise. It would therefore seem appropriate for Western Australia to legislate, as most other Australian jurisdictions have done,<sup>97</sup> to preserve ‘any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal’. With one exception,<sup>98</sup> though, this proposal is not supported by stakeholders, who advocate either total abolition of the torts and any associated rule of law, or their complete retention.<sup>99</sup>

Ultimately, however, the Commission sees merit in legislating to preserve any rule of law under which a contract is to be treated as contrary to

<sup>94</sup> In its submission, IMF sets out the services it provides to its clients, noting among other things that it ‘manages the litigation, negotiates litigation budgets with the claimants’ lawyers, ensures so far as possible that the legal costs and strategies are proportionate to the sums at stake, and gives instructions to lawyers on a day-to-day basis (*subject always to the claimants’ right to override IMF’s instructions and the lawyers’ paramount professional duties to the claimants*)’; IMF, Submission, 1 November 2019, p. 3 [emphasis added].

<sup>95</sup> *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), s. 4.

<sup>96</sup> *Ibid*, s. 6. This Act was subsequently repealed and the relevant provisions are now contained in the *Crimes Act 1900* (NSW) cl 5, Schedule 3 and the *Civil Liability Act 2002* (NSW) cl 2, Schedule 2.

<sup>97</sup> See the *Crimes Act 1958* (Vic) s 322A; *Wrongs Act 1958* (Vic) s 32(2); the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), subsequently repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW). The abolition of the tort is preserved by Sch 2 of the *Civil Liability Act 2002* (NSW) and of the crime by Sch 3 to the *Crimes Act 1900* (NSW); the *Civil Wrongs Act 2002* (ACT) s 221; *Criminal Law Consolidation Act 1935* (SA) sch 11; and the *Civil Liability Act 2002* (Tas) s 28E. The torts have not been abolished in Queensland or the Northern Territory.

<sup>98</sup> Submission, Law Society of Western Australia, 28 November 2019, p. 1.

<sup>99</sup> Maurice Blackburn, Submission, 31 October 2019, p. 4; IMF, Submission, 1 November 2019, p. 6; McDonnell, Submission, 30 October 2019, p. 7.



public policy or as otherwise illegal. First, such a provision underscores the legitimacy of the court's role in scrutinising funding agreements, providing a safeguard to balance the torts' abolition and addressing concerns about control of an action by a third party funder.<sup>100</sup> Second, on the basis of the experience of other Australian jurisdictions, legislating in this fashion will not prevent plaintiffs from accessing litigation funding to support them. Third, this course of action will ensure that Western Australia is consistent with other Australian jurisdictions. If in future it is determined that the preservation is no longer necessary, then it can be removed.

#### ***Recommendation 1***

That Western Australia legislate to abolish the torts of maintenance and champerty and to preserve any rule of law under which a contract is to be treated as contrary to public policy or as otherwise illegal.

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<sup>100</sup> The ALRC has observed that '[s]tatutory intervention in litigation funding agreements is...consistent with the unique protective jurisdiction that the courts have with respect to class actions, the historic limitations on third-party litigation funding, and the residual limits of funding arrangements that could be considered contrary to

public policy or otherwise illegal within the meaning of s 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) and its equivalent provisions in other states and territories'. See ALRC, *Integrity, Fairness and Efficiency*, pp. 171-172.

## CHAPTER 3. STRATEGIES TO MITIGATE THE IMPACTS OF ABOLITION

### Part I. Licensing?

The question whether litigation funders ought to be subject to a licensing regime has been discussed in Australia for many years<sup>101</sup> and has attracted considerable support. Notably, in 2014 the Productivity Commission recommended that the Australian Government ‘should establish a licence for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest’.<sup>102</sup> More recently the VLRC, while noting that there was ‘broad support for the courts continuing to be able to exercise broad discretion in managing class action proceedings’, emphasised the need for ‘industry-wide regulation’.<sup>103</sup> The VLRC noted that the ‘courts can supervise the involvement of litigation funders in legal proceedings only on a case-by-case basis’ and suggested that ‘legislation – rather than court procedure – is the appropriate vehicle for reform where policy issues are involved’.<sup>104</sup> As discussed further below, the ALRC took a different view, concluding that a licensing regime would be unnecessary and counterproductive.<sup>105</sup>

Debates as to whether funders require further regulation are reflected in the distinct arguments put forward within the submissions received by the Commission. Participants in and observers of representative proceedings regimes differ as to whether litigation funding is lightly regulated<sup>106</sup> or closely monitored;<sup>107</sup> whether the industry requires barriers to entry;<sup>108</sup> and, ultimately, whether a licensing regime is required.

The question of licensing is particularly apposite to the torts of maintenance and champerty: if the torts *do* act as a useful restraint on possible excesses in the funding industry, then a licensing requirement could theoretically act as a modern replacement in the event of their abolition. Accordingly, the Discussion Paper asked whether Western Australia should advocate through the Council of Australian Governments for stronger national regulation and supervision of the litigation funding industry.

In exploring this possibility, it is necessary to consider the purpose and operation of the existing financial services licensing regime. In this regard, the submission made by the Australian Securities and Investments Commission (ASIC) to the ALRC’s recent inquiry into class action proceedings and third party funders is instructive. In its submission, ASIC questioned ‘whether regulation of litigation funders under ASIC’s Australian Financial Services (AFS) licensing regime would address

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<sup>101</sup> See for instance ‘Litigation funding in Australia’, Discussion Paper, Standing Committee of Attorneys-General, May 2006, accessed at [http://www.lawlink.nsw.gov.au/lawlink/legislation\\_polICY/ll\\_lpd.nsf/pages/lp\\_dp](http://www.lawlink.nsw.gov.au/lawlink/legislation_polICY/ll_lpd.nsf/pages/lp_dp).

<sup>102</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No. 72, 5 September 2014, Vol 2, Recommendation 18.2, p. 633.

<sup>103</sup> VLRC, *Access to Justice*, p. 17.

<sup>104</sup> Ibid.

<sup>105</sup> ALRC, *Integrity, Fairness and Efficiency*, pp. 30 and 162.

<sup>106</sup> McDonnell, Submission, 30 October 2019, pp. 1 and 4.

<sup>107</sup> Maurice Blackburn, Submission, 31 October 2019, p. 5; Australian Lawyers Alliance, Submission, 8 November 2019, p. 6.

<sup>108</sup> In support of a licensing scheme, IMF observed that the ‘regulatory model which has emerged since 2010 places a light compliance burden on litigation funders and poses minimal regulatory barriers to entry’; IMF, Submission, 1 November 2019, p. 8. By contrast Maurice Blackburn noted: ‘One drawback of imposing licensing requirements on litigation funders is that it will increase the cost of funding and, by imposing barriers to entry into the market, reduce its availability’; Maurice Blackburn, Submission, 31 October 2019, p. 6.

the regulatory risks perceived to be associated with litigation funders'. It stated its view that 'such risks as may exist in relation to litigation funders are better addressed through other mechanisms — for example, court-ordered security for costs'.<sup>109</sup> It also recommended that litigation funding should be viewed (and regulated) as a legal service rather than a financial service.<sup>110</sup>

In particular, ASIC suggested that a licensing regime administered by it 'would not adequately address the risk that funders will be unable to meet their liabilities when due'.<sup>111</sup> This was because the AFS licensing regime is not adapted to the specific work of litigation funders and existing licence requirements are not directed to ensuring that licensees meet their financial obligations to clients. In particular, the licence requirements are 'not intended to address the risk of an adverse costs order in legal proceedings'.<sup>112</sup> Ultimately ASIC noted that, absent significant changes to other aspects of the

*Corporations Act 2001* (Cth), a licensing requirement will not 'necessarily mean that the litigation funder will be adequately capitalised to ensure it can meet adverse costs orders, continue to fund litigation or distribute funds to shareholders'.<sup>113</sup> This is of concern, as one of the major reasons a licensing regime is advocated is precisely to ensure that funders meet their financial obligations<sup>114</sup> – in particular, that representative parties are not left exposed to adverse costs orders.<sup>115</sup>

In addition, in determining *not* to recommend a national licensing scheme, the ALRC observed that following the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry,<sup>116</sup> a recommendation for licensing of litigation funders would be made 'in circumstances where the existing licensing regime has been revealed to have manifest limitations and is likely to be subject to a protracted process of reform'.<sup>117</sup> The ALRC also

<sup>109</sup> Australian Law Reform Commission Inquiry into class action proceedings and third-party litigation funders, Submission by the Australian Securities and Investments Commission, September 2018, p. 4, accessed at [https://www.alrc.gov.au/wp-content/uploads/2019/08/72\\_australian\\_securities\\_and\\_investments\\_commission.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/72_australian_securities_and_investments_commission.pdf).

<sup>110</sup> Ibid. This argument has also been made elsewhere; see the Office of the Legal Services Commissioner, *The Regulation of Third Party Litigation Funding in Australia*, Discussion Paper, March 2012, pp. 4-6, accessed at [http://www.olsc.nsw.gov.au/Documents/regulation\\_of\\_third\\_party\\_litigation\\_funding\\_march2012\\_part1.pdf](http://www.olsc.nsw.gov.au/Documents/regulation_of_third_party_litigation_funding_march2012_part1.pdf).

<sup>111</sup> ASIC, Submission, September 2018, p. 14.

<sup>112</sup> Ibid, p. 15. ASIC's submission noted that 'Currently, all AFS licensees not regulated by the Australian Prudential Regulation Authority (APRA) are required to have adequate financial resources to provide the financial services covered by their AFS licence: see s912A(1)(d) of the Corporations Act Regulatory Guide 166 *Licensing: Financial requirements* (RG 166). Entities that are regulated by APRA, those subject to an alternative form of foreign prudential regulation, and market and clearing participants are generally exempted from the financial requirements in s912A(1)(d)...The purpose of these financial requirements is to ensure that non-APRA regulated AFS licensees have: sufficient financial resources to conduct their financial services business in compliance with the Corporations Act; a financial buffer

that decreases the risk of disorderly or non-compliant wind-up if the business fails; and incentives to comply with the Corporations Act through the risk of financial loss...These AFS licensee requirements are not focused on ensuring that licensees meet their financial obligations to clients. They also do not seek to manage the credit risk of licensees, prevent businesses from failing due to poor business models or cash flow problems, or aim to provide compensation to consumers who suffer a loss, for whatever reason. They are not intended to address the risk of an adverse costs order in legal proceedings'.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid, pp. 7 and 8.

<sup>115</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110: Discussion Paper, September 2019, pp. 13-14.

<sup>116</sup> The Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has since been released; it was submitted to the Governor-General on 1 February 2019, tabled in Parliament on 4 February 2019 and can be accessed at <https://financialservices.royalcommission.gov.au/Pages/reports.aspx#final>.

<sup>117</sup> ALRC, *Integrity, Fairness and Efficiency*, p. 162.



noted the tension ‘between the perceived need for a licensing regime to ensure that litigation funders have the ability to meet their financial obligations (to indemnify the plaintiff in the event of an adverse costs order and to meet their commitment to fund the plaintiff’s lawyer) and manage the conflicts that are inherent in any funding agreement, and the risk that a licensing regime may unnecessarily stifle competition amongst funders and thus artificially inflate the cost of funding’.<sup>118</sup>

In the circumstances, there is doubt as to the entity that would administer a licence<sup>119</sup> and whether a licensing regime would in fact provide greater protection to consumers.

As noted previously, litigation funding is considered in this Report only insofar as it relates to the torts of maintenance and champerty. The Commission has not undertaken a full review of the role played by funders in contemporary litigation. Ultimately, therefore, the question as to licensing raises issues which extend beyond the scope of the present reference. This Report therefore makes no recommendation on this question and suggests that it is for Government to determine whether it sees a benefit in advocating for a licensing scheme.

This Report also sets out possible strategies that could be undertaken in Western Australia in order to address the concerns that appear to underlie proposals for a licensing regime for litigation funders. In particular, and as discussed at [3.6] below, it is open to the Government to legislate to enshrine a requirement that third-party litigation funding agreements with respect to representative proceedings must provide

expressly for a complete indemnity in favour of the representative party against an adverse costs order. Such a proposal may provide more immediate benefit for representative parties (and for defendants) than advocacy for a licensing scheme.

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<sup>118</sup> Ibid, p. 30.

<sup>119</sup> ASIC notes: ‘It appears that the absence of a federal regulator for legal services (apart from the Federal Court) may have led to the suggestion that ASIC become the principal regulator for litigation funders. We

consider the courts are better placed to regulate litigation funders, through court rules and procedure, oversight and security for costs’; see ASIC, Submission, September 2018, p. 16.

## Part II. The Role of the Court

The Discussion Paper to the present reference canvassed the existing resources available to mitigate any impacts of abolishing the torts of maintenance and champerty, noting the width of the courts' powers to control their own processes and the ethical obligations imposed on legal practitioners.<sup>120</sup> This section of the Report considers additional powers and processes that could assist the courts in scrutinising and regulating the conduct of third party funders.

### 3.1 Disclosure of Funding Agreements

The Discussion Paper asked whether the Supreme Court should consider implementing a requirement that litigation funding agreements be disclosed to the Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's Class Actions Practice Note, the GPN-CA (VLRC Recommendation 3).

Paragraph [6] of the GPN-CA reads:

#### Confidential Disclosure to the Court

6.1 Subject to any objection, prior to the first case management hearing the applicant's lawyers shall, on a confidential basis, email the costs agreement and any litigation funding agreement to the associate of the judge presiding over the first case management hearing with both the email and the agreements clearly marked "Confidential for the Court only (per Class Action Practice Note, paragraph 6.1)".

6.2 The provision of such agreements to the Court may be limited to an example of the

standard form of each agreement, and need not include individual variations to the standard forms that might be negotiated with different class members.

6.3 Subject to any objection, the applicant's lawyers shall email to chambers any updated costs agreement and/or litigation funding agreement on the same confidential basis as soon as practicable after the applicant's lawyer become aware that:

- a) there is a change to the standard form of litigation funding agreement or costs agreement which significantly alters the agreement;
- b) a proceeding not previously subject to a litigation funding agreement becomes subject to such an agreement;
- c) there is a change of the litigation funder funding the proceeding; or
- d) the litigation funder becomes insolvent or otherwise unable or unwilling to continue to provide funding for the proceeding.

#### Disclosure of Litigation Funding Agreements to Other Parties

6.4 Subject to any objection, no later than 7 days prior to the first case management hearing, the applicant's lawyers shall file and serve a notice in accordance with the "Notice of Disclosure - Litigation Funding Agreements" together with a copy of the litigation funding agreement. Such disclosure may:

- a) be limited to an example of the standard form of the agreement, and need not include individual variations to the standard form that might be negotiated with different class members;

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<sup>120</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110: Discussion Paper, September 2019, pp. 36-38.

- b) be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding including, without limitation, information:
  - i. as to the budget or estimate of costs for the litigation or the funds available to the applicants, in total or for any step or stage in the proceeding;
  - ii. which might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.

6.5 Subject to any objection, the applicant's lawyers shall file and serve an updated Notice of Disclosure (with any appropriate redactions), in the event that the lawyer becomes aware of any of the circumstances set out in paragraph 6.3 above.<sup>121</sup>

The Practice Note is detailed and comprehensive. The Commission notes that paragraph [6] has many useful features. Paragraph 6.3 aims to ensure that the Federal Court is aware of the existence of a funding arrangement, including one entered into after proceedings have already commenced, and provides for notification of any significant change to the agreement, or change to the identity of the funder. Importantly, the Federal Court must also be informed if the litigation funder 'becomes insolvent or otherwise

unable or unwilling to continue to provide funding for the proceeding'.

It is also critical that funding agreements be provided to courts on a confidential basis, and that they be made available to a respondent only in redacted form in order to avoid unintentionally conferring an advantage on them.<sup>122</sup> This requirement appears to be met by paragraph [6.4(b)] of the GPN-CA.

The proposal to recommend adoption of paragraph [6] of the GPN-CA was also supported by all stakeholders who made submissions on it.<sup>123</sup>

In view of the above, it is appropriate to recommend that the Supreme Court of Western Australia consider implementing a requirement that litigation funding agreements be disclosed to the Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's Class Actions Practice Note.

The Commission has also had regard to a suggestion that defendants should be subject to the same disclosure obligations as plaintiffs in situations where any form of external funding is involved for either party.<sup>124</sup> Such funding could include financial support from an employer or union, after the event insurance or insurance under a directors and officers policy or professional indemnity policy.<sup>125</sup>

<sup>121</sup> J. L. B. Allsop, Chief Justice, Class Actions Practice Note (GPN-CA), 20 December 2019, accessed at <https://www.fedCourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca>.

<sup>122</sup> Maurice Blackburn, Submission, 31 October 2019, p. 7. See also IMF, Submission, 1 November 2019, p. 8.

<sup>123</sup> McDonnell, Submission, 30 October 2019, p. 7; Maurice Blackburn, Submission, 31 October 2019, p. 7; IMF, Submission, 1 November 2019, p. 8.

<sup>124</sup> IMF, Submission, 1 November 2019, p. 8.

<sup>125</sup> Ibid. See also J. Walker, 'The changing funding environment in class actions', Presentation to Maurice Blackburn's International Class Action Conference, 24 October 2007, pp. 11-12, accessed at <https://imf.com.au/docs/default-source/site-documents/thechangingenvironmentinclassactions>.

Part of the rationale for the disclosure obligations that are imposed with respect to funded representative proceedings is the courts' supervisory and protective role in such proceedings,<sup>126</sup> given the vulnerability of group members as persons who will be bound by the court's determination but are not parties before the court. It seems unlikely that a single defendant, as opposed to a group of persons on whose behalf representative proceedings are brought, will require an equivalent degree of supervision or protection. In addition, defendants are in a different position from plaintiffs: they have not instigated an action but are simply responding to it and have no choice as to their participation. However, if there are concerns about the potential or perceived impact of third party funds on court processes, it is difficult to see why such concerns should focus only on the funding of plaintiffs and not of defendants, and why both parties ought not to be treated equally before the court. It is also notable that concerns about the litigation funding provided to plaintiffs is seldom matched by interest in the sources of funding relied upon by defendants.<sup>127</sup>

The Commission makes no recommendation on this point, noting that it was raised in only one submission and extends beyond the scope of the current reference. However, given the potential for litigation funding to be available to

defendants, the question whether to expand disclosure requirements will need to be borne in mind in the coming years.

The Discussion Paper also asked whether the Supreme Court should consider requiring the plaintiff's lawyers to provide the Court with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary (VLRC Recommendation 4).

A requirement for disclosure of funding agreements reflects the court's uniquely protective role in representative proceedings; a role that it does not generally possess in other proceedings.<sup>128</sup> Further, in non-representative funded proceedings the terms of a funding agreement will only apply to participants in the proceedings and a plaintiff will have entered the agreement on their lawyer's advice.<sup>129</sup> It is therefore arguable that it is unnecessary to require disclosure in proceedings other than representative proceedings.<sup>130</sup> Certainly, in making Recommendation 4, the VLRC did not consider that disclosure of the funding agreement was necessary in every instance where a funder is involved.<sup>131</sup> However, it *did* see disclosure as appropriate in cases in which the outcome and costs affect the interests of persons who do not directly participate in the proceedings. The VLRC

<sup>126</sup> ALRC, *Integrity, Fairness and Efficiency*, p. 169. As to the Court's protective role in approving settlements under s33V of the *Federal Court of Australia Act 1976* (Cth), see *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457 per Bongiorno J at [4]; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 per Jacobson, Middleton and Gordon JJ at [8] and *Hodges v Waters (No 7)* (2015) 232 FCR 97 per Perram J at [70].

<sup>127</sup> Maurice Blackburn, Submission, 31 October 2019, p. 5.

<sup>128</sup> There are other circumstances in which courts assume a protective role. The role of the Federal Court or State Supreme Court in a representative proceedings context has been compared to a court's role in requiring compromises on behalf of infants or persons under disability to be approved; see *Tasfast Air Freight Pty Ltd*

*v Mobil Oil Australia Ltd* [2002] VSC 457 per Bongiorno J at [4] and *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 per Jacobson, Middleton and Gordon JJ at [8], cited in Hon Justice M Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (Speech, 1 June 2017), accessed at <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-lee/lee-j-20170601>.

<sup>129</sup> VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 43.

<sup>130</sup> Maurice Blackburn, Submission, 31 October 2019, p. 7.

<sup>131</sup> *Ibid.*

cited the case of *Fitzgerald & Anor v CBL Insurance Ltd (No. 2)* [2015] VSC 176 (**Huon Corporation**).

*Huon Corporation* was not a representative proceeding but an action brought by trustees of certain former employees of Huon Corporation. Although the Supreme Court of Victoria found in favour of the former employees, all of the estimated \$5 million that was awarded was paid to settle solicitors' fees, fees paid to senior legal counsel and other professional fees. The largest payment, totalling almost \$1.85 million, was made to a litigation funder.<sup>132</sup> The VLRC noted that it was 'concerned to ensure that, in funded cases such as *Huon Corporation*, where the outcome and costs affect the interests of persons who do not directly participate in proceedings, the Court is made aware that a litigation funder is involved and the nature of its involvement. These persons are not clients of the lawyer and have not signed the funding agreement. They may well be aware of the terms of the agreement and able to protect their interests, but it is possible that they are not. The Court should be able to dispense with the requirement to disclose, if appropriate, such as when the disputants are knowledgeable and experienced in litigation of that type'.<sup>133</sup>

This proposal would not compel courts to require disclosure in every case. Instead, courts would be empowered to require disclosure where it may assist in protecting the interests of non-participants who will be affected by any determination or settlement.

It should also be noted that this proposal is relevant to all Western Australian courts rather than the Supreme Court alone, as by its nature it is not only concerned with representative proceedings.

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<sup>132</sup> See L. Wood, 'Bringing litigation funders out from the background', 24 October 2017, accessed at <https://www2.monash.edu/impact/articles/litigation-funding-vince-morabito/>.

## 3.2 Notification

The Discussion Paper asked whether the Western Australian Government should recommend that the Supreme Court consider requiring that, where a representative proceeding is funded by a litigation funder:

- the representative party's lawyers should notify group members (whether they are actual or potential clients), in clear terms and as soon as practicable, of any applicable litigation funding charges and any material changes to those charges; and
- the obligation to notify is satisfied if group members have been provided with a document that properly discloses those charges; and
- failure to meet the obligation to notify may be taken into account by the Court in relation to settlement approval (VLRC Recommendation 5).

Given the vulnerability of group members in a representative proceeding, it is critical that they be informed of any liabilities they bear and any changes to those liabilities.

Were it to be implemented, however, the above approach may not operate effectively in practice. Its wording differs from that used in the Federal Court of Australia's Class Actions Practice Note, which provides that lawyers for representative parties must communicate information in a particular way '*in circumstances where the applicants' lawyers notify class members (who are clients or potential clients of the applicants'*

<sup>133</sup> VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 43.

lawyers) of any applicable legal costs or litigation funding charges' (emphasis added).<sup>134</sup> The current proposal as put by the VLRC would oblige lawyers to notify *all* group members (who are clients or potential clients), which may not be possible in an open (opt-out) class action. In such actions, the identity of all group members may not be known until class closure is ordered or distribution of a settlement of judgment sum is effected.<sup>135</sup>

Accordingly, submissions focused on the practical difficulty inherent in compliance. There was broad agreement that group members should be notified of proposed litigation funding charges prior to settlement approval and that failure to do so may be taken into consideration by the court at settlement approval.<sup>136</sup> However it was suggested that notifying group members who were not already clients of the representative party's lawyers was unlikely to be practicable.<sup>137</sup>

There are several ways in which this difficulty could be addressed, including:

- framing the obligation to notify in a manner which is consistent with the Federal Court of Australia's Class Actions Practice Note;<sup>138</sup>
- including a requirement that respondents provide any data they hold on the identities of potential class members to the applicant's solicitor and funder;<sup>139</sup> or
- limiting the notification requirement to group members whose identity and contact details are known.<sup>140</sup>

It is suggested that the proposal be altered to reflect the approach taken in the Federal Court of Australia's Class Actions Practice Note. Adoption of this approach would be consistent with the recommended implementation of a requirement that litigation funding agreements be disclosed to the Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's Class Actions Practice Note. As to notification, the Practice Note provides:

5.3 In circumstances where the applicants' lawyers notify class members (who are clients or potential clients of the applicants' lawyers) of any applicable legal costs or litigation funding charges the applicant's lawyers should ensure that the notification is:

- (a) in clear terms; and
- (b) is provided as soon as practicable.

This is an ongoing obligation and applies to any material changes to the legal costs or litigation funding charges.

5.4 Failure to do so may be taken into account by the Court in relation to settlement approval under s 33V of the *Federal Court Act*...

5.5 The obligation on the part of the applicant's lawyers to notify class members of any applicable litigation funding charges is satisfied if class members have been provided

<sup>134</sup> J. L. B. Allsop, Chief Justice, Class Actions Practice Note (GPN-CA), 20 December 2019, accessed at <https://www.fedCourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca>.

<sup>135</sup> Maurice Blackburn, Submission, 31 October 2019, p. 8.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid. See also IMF, Submission, 1 November 2019, pp. 9-10.

<sup>138</sup> Maurice Blackburn, Submission, 31 October 2019, p. 8.

<sup>139</sup> IMF, Submission, 1 November 2019, p. 10.

<sup>140</sup> Ibid.



a document that properly discloses those charges.<sup>141</sup>

This approach would balance the goals of keeping group members informed of the costs they may bear while also ensuring that requirements set by the Court are capable of being complied with as a practical matter.

### 3.3 Independent Costs Expert

The Discussion Paper asked whether the Supreme Court should consider providing guidance for the appointment of an independent costs expert by the Court to assist in the assessment of legal costs and litigation funding fees (VLRC Recommendation 25).

This proposal will tend to divide opinion, and will be opposed by those who view court intervention in contractual arrangements as inappropriate.<sup>142</sup> It should also be noted that the principles applicable to assessing legal costs differ from those applicable to assessing the reasonableness of litigation funding fees, such that a person could feasibly be an expert in the former but not the latter.<sup>143</sup> It is therefore important to avoid being overly prescriptive given that the appropriateness of appointing a costs referee and the scope of their task will vary from one matter to another.<sup>144</sup> Concerns have been expressed about burdening courts with mandatory requirements to appoint costs experts in cases which do not warrant it.<sup>145</sup>

However, VLRC Recommendation 25 does not appear overly prescriptive or onerous. Indeed, in making this recommendation the VLRC expressed a desire to *avoid* being prescriptive. The VLRC noted that the Federal Court Practice Note includes guidance for the use of costs experts in class actions in reviewing legal costs and litigation funding fees, and suggested that similar guidance should be provided in the Supreme Court Practice Note. However, it considered that the latter Practice Note should not follow the example in the former of specifying the methodology to be used.<sup>146</sup> The VLRC observed that ‘methodologies used by costs experts develop and change over time’ and that ‘it is important that experts have the flexibility to adopt the most appropriate methodology in assessing legal costs’.<sup>147</sup> The VLRC also noted that the Federal Court Practice Note does not (as its proposal does) specify that the costs expert should be appointed by the court rather than by the representative plaintiff’s lawyers.<sup>148</sup>

Ultimately, the present proposal is simply that the Supreme Court consider providing flexible guidance to assist the Court and on this basis it is supported. The Commission takes the view that it is for the Supreme Court to determine how it will manage its new representative regime<sup>149</sup> and how it will supervise and regulate litigation funding arrangements in the cases that come before it.

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<sup>141</sup> J. L. B. Allsop, Chief Justice, Class Actions Practice Note (GPN-CA), 20 December 2019, accessed at <https://www.fedCourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ca>.

<sup>142</sup> IMF, Submission, 1 November 2019, p. 10.

<sup>143</sup> Maurice Blackburn, Submission, 31 October 2019, p. 10.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid, p. 12.

<sup>146</sup> VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, p. 125.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid, p. 126.

<sup>149</sup> Subject to the passage of the Civil Procedure (Representative Proceedings) Bill 2019 (WA).

### ***Recommendation 2***

In the event that the Civil Procedure (Representative Proceedings) Bill 2019 is passed, that the Western Australian Government recommend that the Supreme Court consider:

- implementing a requirement that litigation funding agreements be disclosed to the Supreme Court and other parties to representative proceedings in similar terms to paragraph [6] of the Federal Court of Australia's Class Actions Practice Note;
- implementing notification requirements for representative proceedings in similar terms to paragraphs 5.3-5.5 of the Federal Court of Australia's Class Actions Practice Note; and
- providing guidance for the appointment of an independent costs expert by the Supreme Court to assist in the assessment of legal costs and litigation funding fees in representative proceedings.

### ***Recommendation 3***

That the Western Australian Government recommend to the heads of all Western Australian court jurisdictions that they consider amendments to court rules to require a plaintiff's lawyers to provide courts with a copy of the litigation funding agreement whenever a litigation funder is involved in a proceeding where a number of disputants are represented by an intermediary.



## Part III. Legislative Change

As noted above at [1.1], the present Terms of Reference require the Commission to ‘provide advice and make recommendations for consideration by the Government’ on the questions raised by this reference.

In fulfilment of these Terms of Reference, the Commission has recommended abolishing the torts of maintenance and champerty while preserving ‘any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal’, as several other Australian jurisdictions have done.<sup>150</sup> The Commission has also recommended that the Government put forward suggestions to the courts as to particular practice directions they may choose to implement by way of strategies to mitigate any adverse impacts of abolishing the torts.

However, the Commission is unable to make recommendations as to broader legislative change to address concerns about litigation funding. This is because the present reference is not a comprehensive study of contemporary litigation funding arrangements but an addendum to the 2015 *Representative Proceedings* report which examines one discrete area only. Accordingly, the issue of litigation funding has only been examined in the context of the torts of maintenance and champerty.

In lieu of specific recommendations as to litigation funding, the Commission elects to fulfil the remainder of its Terms of Reference by ‘providing advice’ as to strategies for mitigating

any impacts of abolition. It does so by considering and setting out legislative options open to Government as regards litigation funding arrangements, primarily but not exclusively in the realm of representative proceedings. These options are set out below.

### 3.4 Security for Costs

The Discussion Paper asked whether Western Australia should legislate to provide a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form enforceable in Australia. (ALRC Recommendation 12).

Given the scope of the courts’ powers and the common law requirement that security be provided in a form adequate to protect the opposing party, a legislative presumption in the above terms may be seen as unnecessary and apt to invite disputation.<sup>151</sup>

However, in making its Recommendation 12, the ALRC was responding to concerns from its stakeholders regarding forms of security provided by funders that are ‘less secure than a bank guarantee’ and which ‘would put the respondent to considerable costs if they were to seek to call on the security’.<sup>152</sup> As an example, the ALRC cited a case in which the Federal Court approved security for costs being provided in the form of a deed of indemnity from an after-the-event insurer in the United Kingdom, together with payment of \$20,000 into Court to cover the enforcement costs of the deed in the United

<sup>150</sup> See the *Crimes Act 1958* (Vic) s 322A; *Wrongs Act 1958* (Vic) s 32(2); the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW), subsequently repealed by the *Statute Law (Miscellaneous Provisions) Act 2011* (NSW). The abolition of the tort is preserved by Sch 2 of the *Civil Liability Act 2002* (NSW) and of the crime by Sch 3 to the *Crimes Act 1900* (NSW); the *Civil Wrongs Act 2002* (ACT) s 221; *Criminal Law Consolidation Act 1935* (SA) sch 11;

and the *Civil Liability Act 2002* (Tas) s 28E. The torts have not been abolished in Queensland or the Northern Territory.

<sup>151</sup> Maurice Blackburn, Submission, 31 October 2019, pp. 10 and 11.

<sup>152</sup> ALRC, *Integrity, Fairness, and Efficiency*, pp. 164-165.

Kingdom.<sup>153</sup> The ALRC did not ‘consider it reasonable, as a matter of public policy, that a respondent may be required to litigate in a foreign jurisdiction in order to recover against the security for costs provided’.<sup>154</sup>

Security for costs, while not necessarily being a ‘panacea’,<sup>155</sup> is directly connected to some of the public policy concerns that underlie the torts of maintenance and champerty: it relates to the interests of a defendant who may suffer adverse actions due to an action against them which has been funded by an unrelated third party. The provision of security for costs by third-party funders also protects representative parties’ rights as consumers, ensuring that they are not left exposed if their claim is unsuccessful. Accordingly, the ASIC submission considered in Part I above emphasised the role security for costs can play in addressing the concerns often raised about funded proceedings.<sup>156</sup>

The proposal is worthy of consideration by Government, and it is suggested that the precise nature of the security deemed acceptable should be for the Supreme Court to determine.

### 3.5 Power to Award Costs against Third Parties

The Discussion Paper asked whether Western Australia should legislate to provide courts with an express power to award costs against third-party litigation funders and insurers who fail to comply with the courts’ overarching purpose of facilitating the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible. (ALRC Recommendation 13).

It was not intended that an ‘overarching purpose’ in the above terms be applied to litigation funders and insurers only. As noted in the Discussion Paper:

There is no equivalent of section 37M [of the *Federal Court of Australia Act 1976* (Cth)] in the *Supreme Court Act 1935* (WA). However, there would seem to be merit in clarifying that the Court is able to award costs against *parties or funders* who frustrate the Court’s ability to achieve the above objectives. Provisions of this nature would complement the Court’s ability to guard against abuse of its processes [emphasis added].<sup>157</sup>

However, the ultimate question posed to stakeholders only sought their views on the application of an ‘overarching purposes’

<sup>153</sup> Ibid, p. 165, citing *Capic v Ford Motor Company of Australia Ltd* NSD724/2016.

<sup>154</sup> Ibid.

<sup>155</sup> It has been observed that the ‘availability of security for costs where a funder is involved... may not be a panacea for the reasons given by Heydon J in the following warning on its efficacy: “Judges are reluctant to order security for costs in large amounts, perhaps fearing that this will simply prolong the litigation in an ill-disciplined way...The lack of judicial generosity is one of several signs that applications seeking security for costs have little attraction for judges. In part that is because they are interlocutory, satellite and hypothetical. Their interlocutory character is repellent to courts eager to deal with trials but hard pressed to do so. They are satellite in character because they often involve spending significant time examining complex questions

of solvency which are irrelevant to the main proceedings. They are hypothetical in character because their point depends on the hypothesis, which may or may not be realised, that the defendant will succeed, so that through them stalks the fear in many instances that they are a waste of time. They generate additional costs of their own.” *Jeffery & Katauskas Pty Limited v SST Consulting Pty Ltd* (2009) 239 CLR 75 at [93], cited in M. Legg, L. Travers, E. Park and N. Turner, ‘Litigation Funding in Australia’ [2010] UNSWLRS 12, p. 24, accessed at <http://classic.austlii.edu.au/au/journals/UNSWLRS/2010/12.html>.

<sup>156</sup> ASIC, Submission, September 2018, pp. 4, 15-16.

<sup>157</sup> Commission, *Maintenance and Champerty in Western Australia*, Project 110 Discussion Paper, September 2019, p. 48.

requirement on litigation funders and insurers. This gave the impression that the Commission intended to impose an obligation on litigation funders and insurers which would not be borne by the parties before the court.<sup>158</sup>

It was suggested, in response, that it would be 'inappropriate to impose asymmetrical obligations on litigation funders which go beyond those imposed on the often well-resourced defendants to class actions' who may themselves 'use the Court's processes in order to delay and frustrate the conduct of litigation'.<sup>159</sup> This may be disputed: it is at least arguable that a litigation funder's obligations *should* differ from those of parties before a court, simply because it is not a party and its interest in a proceeding is financial in nature. This outcome was, however, not the Commission's intent. Ultimately the Commission considers that it would be helpful to clarify that courts may award costs against all parties, and third-party funders,<sup>160</sup> which act in a manner that impedes the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible.

Most of the strategies considered by the Commission to mitigate any adverse consequences of abolishing the torts relate specifically to representative proceedings. Such strategies are therefore relevant only to the Supreme Court as the court designated to administer the scheme contained in the Representative Proceedings Bill 2019. However, this proposal has a broader relevance, given that third party funding may also be used in other proceedings.

In crafting any legislation, care would have to be taken not to cut across or create inconsistencies with the courts' existing case management approaches. For instance, the Supreme Court's approach already incorporates considerations as to efficiency and the just determination of litigation.<sup>161</sup> The *Rules of the Supreme Court 1971* (WA) also require parties to notify the Principal Registrar and other parties of the identity of any 'interested non-party',<sup>162</sup> and provide among other things that interested non-parties have a duty not to engage in conduct which is misleading or deceptive, or to aid, abet or induce such conduct, in connection with the conduct of the case.<sup>163</sup>

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<sup>158</sup> Maurice Blackburn, Submission, 31 October 2019, p. 11.

<sup>159</sup> Ibid.

<sup>160</sup> For a brief discussion of the circumstances in which the Court may award costs against third parties, see Commission, *Maintenance and Champerty in Western Australia*, Project 110 Discussion Paper, September 2019, p. 38.

<sup>161</sup> Order 1, rule 4B of the *Rules of the Supreme Court 1971* (WA) provides that:

- (1) Actions, causes and matters in the Court will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive case flow management with the objects of —
  - (a) promoting the just determination of litigation; and
  - (b) disposing efficiently of the business of the Court; and
  - (c) maximising the efficient use of available judicial and administrative resources; and
  - (d) facilitating the timely disposal of business; and
  - (e) ensuring the procedure applicable, and the costs of the procedure to the parties and the State, are

proportionate to the value, importance and complexity of the subject matter in dispute; and

- (f) that the procedure applicable, and the costs of the procedure to the parties, are proportionate to the financial position of each party.

- (2) These rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the objects referred to in subrule (1).

<sup>162</sup> Order 9A r 2(1) of the *Rules of the Supreme Court 1971* (WA). This term is defined to include a person who provides funding or other financial assistance to the party for the purposes of conducting the case, and exercises direct or indirect control of influence over the way in which the party conducts the case; see Order 9A r 1 of the *Rules of the Supreme Court 1971* (WA).

<sup>163</sup> Interested non-parties also have a duty to cooperate with the parties and the Court in connection with the conduct of the case; and to use reasonable endeavours to ensure that the goal in Order 1 rule 4A and the objects in Order 1 rule 4B are attained. See Order 9A r 3 of the *Rules of the Supreme Court 1971* (WA). Order 1 rule 4A provides: 'The practice, procedure and interlocutory processes of the

With these dimensions in mind, this proposal is worthy of some consideration.

### 3.6 Funding Agreements

The Discussion Paper asked whether Western Australia should legislate to provide that:

- (1) third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Supreme Court;
- (2) the Supreme Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
- (3) third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
- (4) Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Supreme Court? (ALRC Recommendation 14).

The Discussion Paper also asked whether Western Australia should legislate to provide the Supreme Court with specific power to review and

vary all legal costs, litigation funding fees and charges, and settlement distribution costs to be deducted from settlement amounts to ensure they are fair and reasonable (VLRC Recommendation 24).

Due to the significant degree of overlap of the first two limbs of ALRC Recommendation 14 and VLRC Recommendation 24, these proposals are considered here together. It should however be noted that the former extends further than the latter: the VLRC's recommendation would limit the Supreme Court of Victoria to varying a funder's fees while the ALRC would enable the Federal Court to change any aspect of the agreement. This distinction may reflect the fact that the ALRC saw its recommendations as replacing the need for a licensing scheme for litigation funders, whereas the VLRC considered that a licensing scheme was still required. VLRC Recommendation 24 also proposes that the Supreme Court of Victoria be given 'specific power to review and vary all legal costs'. Such a power may not be necessary in Western Australia<sup>164</sup> given that the *Legal Profession Act 2008* (WA) provides that the Supreme Court may, on application by a client, order that a costs agreement be set aside if satisfied that the agreement is not fair or reasonable.<sup>165</sup>

Putting this aspect of the recommendations to one side, the essential question they raise is whether courts hearing a representative proceeding should have the power to vary funding agreements. The proposition that courts already have such a power received some judicial support<sup>166</sup> but has also been doubted,<sup>167</sup> and now

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Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial. As to Order 1 rule 4B, see n127 above.

<sup>164</sup> Maurice Blackburn, Submission, 31 October 2019, p. 9.

<sup>165</sup> *Legal Profession Act 2008* (WA) s288(2).

<sup>166</sup> *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [148]-[157] and *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (in liq)* (No 3) [2017] FCA 330 at [101].

<sup>167</sup> *Liverpool City Council v McGraw-Hill Financial* [2018] FCA 1289 at [37]-[51] and *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719 at [33].

appears to have been answered in the negative by a majority of the High Court.<sup>168</sup> If it is desired that courts review and vary funding agreements, then, specific legislation will be required to empower them to do so.

Proposals for such legislation raise philosophical and practical questions as to the appropriateness of court intervention into private contracts. Some will consider that group members merit the court's protection and that their relative vulnerability is such as to require the court to scrutinise the terms of their funding agreements.<sup>169</sup> For others, such an argument is paternalistic and undermines freedom of contract.<sup>170</sup> In considering ALRC Recommendation 14 and VLRC Recommendation 24 regard has been had to both of these perspectives, and also to litigation funders' need for sufficient certainty as to the content and enforceability of their contractual agreements.<sup>171</sup>

Consideration has also been given to the theoretical possibility for variations to be made that would result in a funder no longer considering a contract as commercially viable. In addition, there is a risk that legislating to

implement either of these proposals would render Western Australia a less attractive jurisdiction for litigation funders, thus encouraging 'forum shopping' and undermining the Commission's recommendation to abolish the torts of maintenance and champerty. It would be perverse if legislation designed to enhance the protection of consumers of litigation funding had the effect of making such funding less accessible to them.

However, it is worth emphasising the context in which such recommendations are put forward. Courts already have a role in approving settlement of a representative proceeding.<sup>172</sup> In particular, it should be noted that although the *Federal Court of Australia Act 1976* (Cth) does not set out criteria, the principles of settlement approval are well-settled and the 'fundamental question that arises on an application [for settlement approval] is whether the settlement is "a fair and reasonable compromise of the claims made on behalf of the Group Members"'.<sup>173</sup>

These proposals would be consistent with courts' protective role in this context.<sup>174</sup> In particular, the ALRC observed that its Recommendation 14

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<sup>168</sup> Whether sections 33ZF of the *Federal Court of Australia Act 1976* (Cth) and 183 of the *Civil Procedure Act 2005* (NSW) permit the relevant courts to vary funding agreements between group members and a third party funder was not directly in issue in *Takata Airbag*. However, the reasons of the plurality indicate that these sections do not permit the court to vary funding agreements. See *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Kiefel CJ, Bell and Keane JJ at [67] and Gordon J at [149]. For discussion on this point, see D. Meyerowitz-Katz, 'The end of common fund orders... or is it? The High Court's decision explained', 5 December 2019, accessed at <https://www.dmkbarrister.com/post/the-end-of-common-fund-orders-or-is-it-the-high-court-s-decision-explained>.

<sup>169</sup> See ALRC, *Integrity, Fairness and Efficiency*, pp. 170-171.

<sup>170</sup> IMF, Submission, 1 November 2019, p. 13. IMF considers that '[w]here a "common fund" order is not being sought and a funding agreement has been entered into with a group member who has had the opportunity to seek independent legal advice, and there is no challenge to the agreement on traditional grounds such as unfair

terms, then Court intervention in a commercial contractual arrangement is not appropriate'; *Ibid*, p. 10.

<sup>171</sup> *Ibid*.

<sup>172</sup> Section 33V of the *Federal Court of Australia Act 1976* (Cth) provides that (1) A representative proceeding may not be settled or discontinued without the approval of the Court and (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court. The Civil Procedure (Representative Proceedings) Bill 2019 (WA) contains an equivalent provision in clause 23.

<sup>173</sup> Hon Justice M Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (Speech, 1 June 2017). His Honour noted that this formulation derives from the judgment of Finkelstein J in *Lopez v Star World Enterprises* (1999) ATPR 41-678; [1999] FCA 104 at [15] and what has recently been described by Beach J (in *Foley v Gay* [2016] FCA 273 at [7]) as the "foundational analysis" of Goldberg J in *Williams v FAI Home Security Pty Ltd* (No 4) (2000) 180 ALR 459.

<sup>174</sup> VLRC, *Access to Justice*, p. 122.



would allow the Federal Court to take fairness to group members into consideration at an earlier stage of proceedings, expanding its role 'from approving the distribution of settlements to ensuring the proceeding is advanced upon fair and reasonable terms'.<sup>175</sup>

The Federal Court would then be able to 'consider the terms of the agreement as a whole including...the scope and extent of the indemnity offered to the representative plaintiff, the degree of control sought by the funder, the funder's ability to unilaterally instruct a different plaintiff law firm, and the appropriateness of any dispute resolution mechanism'.<sup>176</sup> In setting out its proposal, the ALRC also cited concerns that have been raised about the manner of group members' entry into a funding agreement 'quite likely by clicking on a button on their screen which encourages them to do so while saying that terms and conditions apply'.<sup>177</sup>

The ALRC's proposal would thus expand on the Federal Court's existing jurisdiction in representative proceedings as well as addressing concerns about the potential for third party funders to effectively control proceedings.<sup>178</sup> The contractual arrangements proposed to be subject to court intervention are also highly specific in nature: these are contracts that are embedded in

the justice system and are entered into for the precise purpose of enabling legal action.<sup>179</sup>

Intervention in private commercial contracts is not done lightly. In a 2017 speech on varying funding agreements, the Hon Justice Lee cited the High Court decision of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,<sup>180</sup> in which the majority said:

... where a man signs a document knowing that it is a legal document relating to an interest in property, he is in general bound by the act of signature. Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution. It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief.

In most common law jurisdictions, and throughout Australia, legislation has been enacted in recent years to confer on courts a capacity to ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations. As a result, there is no reason to depart from principle, and every reason to adhere to it, in

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<sup>175</sup> ALRC, *Integrity, Fairness and Efficiency*, pp. 169-170.

<sup>176</sup> *Ibid*, p. 170.

<sup>177</sup> J. Kirk SC, *The Case for Contradictors in Approving Class Actions Settlements*, (Seminar, NSW Bar Association, 14 June 2018), cited in ALRC, *Integrity, Fairness and Efficiency*, p. 170.

<sup>178</sup> McDonnell, Submission, 30 October 2019, 1-4. It must however be noted that the extent which litigation funders control the proceedings they fund is disputed. In its submission, IMF notes that it 'gives instructions to lawyers on a day-to-day basis (*subject always to the claimants' right to override IMF's instructions and the lawyers' paramount professional duties to the claimants*)'; IMF, Submission, 1 November 2019, p. 3 [emphasis added].

<sup>179</sup> As Edelman J noted in his dissenting judgment in *Takata Airbag*, 'A court with inherent jurisdiction can examine the fairness and reasonableness of costs agreements between solicitor and client, including reducing the amount if it is "exorbitant". Although costs agreements between a solicitor and a client were treated by courts with "great jealousy" due to the potential for undue influence, it is hard to see why a power to ensure "that justice is done in the proceeding" should not also permit an assessment of the fairness and reasonableness of remuneration in an agreement that provides access to justice'; see *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 at [202].

<sup>180</sup> (2004) 219 CLR 165 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at 182-3, cited in Hon Justice M Lee, 'Varying Funding Agreements and Freedom of Contract: Some Observations' (Speech, 1 June 2017).

cases where such legislation does not apply, or is not invoked.

Justice Lee also observed that variation of litigation funding agreements is a complex topic which raises multiple policy issues. He concluded that the ‘right of a person of legal capacity to contract with whomever they choose and the right to hold another party to their bargain are bedrock to a modern society governed by the rule of law’ and that ‘anything which can be seen as a departure from the free exercise of those rights, *in the absence of some form of catching bargain or other vitiating conduct*, in the broad, and by reference to a highly subjective evaluative standard, raises interesting questions and issues that merit reflection’.<sup>181</sup>

Doubts have also been raised elsewhere about the viability of having the court determine the fairness or otherwise of a litigation funding agreement. Notably, the majority in *Fostif* observed that ‘to ask whether the bargain struck between a funder and intended litigant is “fair” assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise

some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity’ and concluded that ‘[n]either assumption is well founded’.<sup>182</sup> This observation was cited favourably in *Takata Airbag* by Kiefel CJ, Bell and Keane JJ.<sup>183</sup>

The Commission suggests that it is difficult to determine a bright line between acceptable protectiveness and unacceptable paternalism; answers will depend on a party’s own ideology, standpoint and experience. It is, however, pertinent to note that the parties entering into funding arrangements will not necessarily do so on equal terms. While some group members may be sophisticated parties with experience in entering into contractual arrangements relating to substantial sums of money,<sup>184</sup> others will not.

Inevitably, some funding agreements will be made as between a highly experienced and well-resourced litigation funder on the one side and, on the other, a potential group member who has limited options in pursuing redress for a wrongdoing and may not be able to afford legal advice.<sup>185</sup> Although the finding in *Money Max* as to

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<sup>181</sup> Hon Justice M Lee, ‘Varying Funding Agreements and Freedom of Contract: Some Observations’ (Speech, 1 June 2017).

<sup>182</sup> *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* (2006) 229 CLR 386 per Gummow, Hayne and Crennan JJ at [92]. See also VLRC, *Access to Justice – Litigation Funding and Group Proceedings*, pp. 17-18.

<sup>183</sup> *BMW Australia Ltd v Brewster Westpac Banking Corporation v Lenthall* [2019] HCA 45 per Kiefel CJ, Bell and Keane JJ at [67].

<sup>184</sup> See *Pathways Investments v National Australia Bank* [2012] VSC 625, in which the Supreme Court of Victoria approved a class action settlement that required all group members to pay a portion of their distribution to the litigation funder ranging from 30 to 40%. Pagone J observed at [20] that the ‘original group members had each entered into agreements with the litigation funder agreeing to pay to the litigation funder a certain percentage of any distribution by reference to the number of the bank shares which they held: 40 per cent if less than 1 million shares; 35 per cent if between 1 million shares and 10 million shares; and 30 per cent if more than 10 million shares. One of the orders made on

24 August 2012 provided for payments of comparable amounts by the registered group members (as defined). Group members potentially affected by this order have been on notice of its terms and none has objected. It is not for the Court to express a view about the commercial desirability of the quantum paid to the litigation funder under these arrangements, and there is no reason shown to withhold approval of the settlement because of the proportion of the settlement amount to be received by the litigation funder rather than by the group members themselves. In other cases it might be necessary for separate justification of the amounts paid to a litigation funder before the Court approves a settlement but that does not appear necessary in this instance. The amounts payable from the distribution to the original group members appear to have been agreed to between sophisticated parties with substantial means and neither they, nor the registered group members, have raised objection’.

<sup>185</sup> The ALRC noted that during consultation, group members ‘expressed uncertainty as to the nature of the litigation funding agreement and uncertainty as to whether the funding commission was reasonable or competitive’, that ‘many only agreed to join a class action

the *power* to make a common funding order has been overturned, it is worth reconsidering the reasons given in that case as to the *appropriateness* of court supervision of the funding fee. In that case, the Full Court noted that:

- (a) 'the largest single deduction from the recoveries of class members in funded class actions is usually the funding commission (or an equivalent amount under a funding equalisation order);
- (b) there is often a significant information asymmetry between the funder and the class members in relation to the costs and risks associated with the action;
- (c) at least for some claimants the only opportunity they have to recover losses suffered through alleged breaches of the law is through the funded class action; and
- (d) for small shareholders the opportunity for negotiation of the funding commission is limited or non-existent'.<sup>186</sup>

In making its Recommendation 14, the ALRC concluded that '[s]tatutory intervention in litigation funding agreements is...consistent with the unique protective jurisdiction that the courts have with respect to class actions, the historic limitations on third-party litigation funding, and the residual limits of funding arrangements that could be considered contrary to public policy or otherwise illegal within the meaning of s 6 of the *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) and its equivalent provisions in other states and territories'.<sup>187</sup>

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as they had explored all other options for redress and been unsuccessful' and some were 'unaware that any settlement sum would be reduced not just by the funder's commission but also by the legal fees incurred by the plaintiff law firm'; see ALRC, *Integrity, Fairness and Efficiency*, pp. 170-171.

It is also acknowledged that VLRC Recommendation 24, and the first and second limbs of ALRC Recommendation 14, represent an intrusion into private contractual arrangements, and come with a risk of discouraging litigation funders from providing funding. However, should courts be given explicit powers to intervene in funding contracts, there is no reason to suppose that they would exercise them in a heavy-handed fashion. The Commission anticipates that courts would move cautiously and a body of case law around the use of these powers and the reasonable terms of funding agreements would gradually develop. In addition, it appears likely that litigation funders which have operated successfully for a number of years will have standard agreements in place that would comfortably withstand increased scrutiny.

Ultimately, these proposals are worthy of consideration by Government.

The third and fourth limbs of ALRC Recommendation 14, relating to an indemnity for adverse costs orders and the subservience of funding agreements to Australian law, are markedly less controversial. On the indemnity, the Commission notes comments by stakeholders that:

- where funding is effectively jointly provided (such as by a combination of a contingency fee arrangement and indirect funding by a commercial litigation funder) it would be unnecessary for both the law firm and funder to provide a complete indemnity.<sup>188</sup> This eventuality

<sup>186</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 per Murphy, Gleeson and Beach JJ at [72].

<sup>187</sup> ALRC, *Integrity, Fairness and Efficiency*, pp. 171-172.

<sup>188</sup> Maurice Blackburn referred to its submission made to the ALRC, in which it contended that, although it is appropriate that a class action funded through a contingency fee arrangement should not also be directly



would require the lifting of the prohibition on contingency fees for lawyers, which is discussed below at Chapter 4; and

- an indemnity should reflect the period in which the case is funded or the funder has agreed to cover the adverse costs risk. This period may not encompass the entire time span during which costs were incurred: a case may be funded after proceedings have already commenced, or shortly before trial.<sup>189</sup>

Again, the Commission takes the view that these proposals merit consideration by Government and suggests that as part of this process regard be had to the two dot points above.

Following its consideration of the VLRC and ALRC recommendations put forward in its Discussion Paper, and the submissions received from stakeholders, the Commission puts forward the following options for consideration by Government:

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funded by a third party litigation funder, ‘any law reforms in relation to contingency fees should clearly permit two law firms to work together cooperatively in prosecuting a class action, for example after consolidation orders are made in relation to overlapping class actions or as a result of other collaborative arrangements. The two law firms should be able to be remunerated by sharing a contingency fee. Such a circumstance would not be appropriate in every case, however it should not be precluded by the limitations on contingency fee arrangements. It would also be subject to approval or leave of the Court, and would not be intended to increase the overall contingency fee percentage that is appropriate in any given case’. The submission continued: ‘this limitation should not preclude a law firm (acting on a contingency fee basis) from assigning a portion of its contingency fee to a

litigation funder in return for the funder assuming some of the risk that would otherwise be borne by the lawyer, for example in relation to adverse costs, or for providing cash flow to the plaintiff law firm in order to cover disbursements or for its conduct of the claim generally. In our submission this type of indirect funding by a third party litigation funder, which are akin to insurance or lending arrangements, should be permissible under any legal reforms relating to contingency fees’; see Maurice Blackburn Lawyers, Submission No. 37 to Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, July 2018, p. 32.

<sup>189</sup> IMF, Submission, 1 November 2019, p. 14.

#### ***Option 1***

That Western Australia legislate to give the Supreme Court the power to make common fund orders in representative proceedings.

#### ***Option 2***

That Western Australia legislate to provide a statutory presumption that third-party litigation funders who fund representative proceedings will provide security for costs in any such proceedings in a form enforceable in Australia.

#### ***Option 3***

That Western Australia legislate to expressly provide that courts can award costs against parties and third-party litigation funders and insurers who do not assist in achieving the just resolution of disputes according to law and as quickly, inexpensively, and efficiently as possible.

#### ***Option 4***

That Western Australia legislate to provide that:

- third-party litigation funding agreements with respect to representative proceedings are enforceable only with the approval of the Supreme Court;
- the Supreme Court has an express statutory power to reject, vary, or amend the terms of such third-party litigation funding agreements;
- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order; and
- Western Australian law governs any such third-party litigation funding agreement, and the funder submits irrevocably to the jurisdiction of the Supreme Court.

## CHAPTER 4. ANY OTHER RELATED MATTER

The Terms of Reference also required the Commission to provide advice and make recommendations as to any other matter related to the torts of champerty and maintenance.

One such matter is the prohibition on lawyers charging contingency fees, which both the ALRC and VLRC recommended should be lifted.<sup>190</sup> These recommendations were not addressed in the Commission's Discussion Paper, but one stakeholder has suggested that they require consideration. Maurice Blackburn suggests that the ability to charge contingency fees on a lawyer's part would enable access to justice for claims which are not perceived as having sufficient commercial viability to attract litigation funders, as well as providing better outcomes for class members. Notably, it has calculated that over the sixteen funded actions concluded by the firm between 2006 and 2018, class members would have been \$169 million better off if a 25% contingency fee arrangement had applied instead of traditional third-party funding.<sup>191</sup>

Maurice Blackburn concluded that to 'implement recommendations modelled on those of the Victorian and Australian Law Reform Commissions without giving thought to others would risk decontextualizing them and throwing the proposed regulatory regime out of balance'.<sup>192</sup> The Commission appreciates this point but considers that removal of the prohibition on contingency fees extends beyond the parameters of the current reference.

If the Western Australian Government wished to remove the prohibition on contingency fees for legal practitioners, it could not do so unilaterally. Such a course of action would require consultation with New South Wales and Victoria, with whom Western Australia has signed an Intergovernmental Agreement on a Legal Profession Uniform Law Scheme.<sup>193</sup> Within the State, consultation with bodies such as the Legal Practice Board and the Law Society would also be necessary.

However, the Victorian Government has recently put forward a Bill which seeks to introduce contingency fees for lawyers in representative proceedings only<sup>194</sup> – a course of action which could also be taken in Western Australia if desired. The arrangement in Victoria is proposed to be effected by way of 'group costs orders' made by the Supreme Court and, as with common fund orders, the contingency fee would be shared between the plaintiff and the group members.<sup>195</sup>

In addition, where a law firm charges a contingency fee in this manner, it will be 'liable to pay any costs payable to the defendant in the proceeding' and must also 'give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give'.<sup>196</sup> This proposed amendment implements the following recommendation made by the VLRC in its recent report:

Part 4A of the *Supreme Court Act 1986* (Vic) should be amended to provide the Court with the power to order a common fund for a litigation services fee, on application by a representative plaintiff, whereby the fee is

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<sup>190</sup> See ALRC, *Integrity, Fairness and Efficiency*, p. 205; VLRC, *Access to Justice*, pp. 52-68.

<sup>191</sup> Maurice Blackburn, Submission, 31 October 2019, p. 6.

<sup>192</sup> Ibid.

<sup>193</sup> Western Australia signed the intergovernmental agreement in February 2019.

<sup>194</sup> See Justice Legislation Miscellaneous Amendments Bill 2019 (Vic), Part 2.

<sup>195</sup> Ibid, clause 5.

<sup>196</sup> Ibid.

calculated as a percentage of any recovered amount and liability for payment is shared by all class members if the litigation is successful.

Approval of a common fund of this type should be subject to the following conditions, set out in legislation or the Supreme Court's practice note on class actions, as appropriate:

- (a) An application for the order would be sought from the Court at the commencement of proceedings.
- (b) The percentage allocated for the fee would be indicated when the application is made but approved by the Court at an appropriate time, most likely at settlement approval.
- (c) The litigation services for which the fee is charged should include: all services provided by the law firm; provision for security for costs if required; disbursements; and an indemnity for adverse costs.<sup>197</sup>

Victoria's Attorney-General the Hon Jill Hennessy MLA advised Parliament that these proposed amendments sought 'to improve access to justice by reducing barriers to commencing class actions in the Supreme Court'.<sup>198</sup>

The Commission does not consider it appropriate to recommend that the prohibition on contingency fees for lawyers be removed, whether in the context of representative proceedings or more broadly. This is because such a proposal was not ventilated in the

Discussion Paper and submissions were not sought on it. However, this is clearly a live issue of relevance to the legal profession as well as to the broader public.

Accordingly, the Western Australian Government may wish to turn its mind to the desirability or otherwise of removing the prohibition on contingency fees for lawyers, in the context of the proposed move towards a more uniform legal profession.

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<sup>197</sup> VLRC, *Access to Justice*, p. 68.

<sup>198</sup> Justice Legislation Miscellaneous Amendments Bill 2019 (Vic), Statement of Compatibility, 27 November 2019. The Attorney-General also stated: 'Currently, unless a law practice is willing to act on a 'no win, no fee' basis or appropriate insurance can be obtained, if a class action is unsuccessful, the lead plaintiff risks being personally liable for meeting the defendant's costs...The new group costs order will allow plaintiff lawyers in class actions to receive a percentage (as set by the Court) of any amount recovered in the proceedings as payment for legal costs, and require them to indemnify the lead plaintiff for any adverse costs orders, or orders to give security for costs.'

The group costs order will also require all class members to share liability for the payment of legal costs if the litigation is successful. The amendments give the Court power to vary the percentage amount set at any stage in the proceedings, thereby ensuring fairness to class members. With the introduction of the group costs order, the Bill seeks to improve all group members' right to a fair hearing and access to justice by removing the costs risk for the lead plaintiff. The group costs order regime also has potential to reduce the overall costs to group members in class actions, as a single fee will be payable to the plaintiff lawyers rather than a funding fee plus legal costs (as is payable to a litigation funder)'.

## CONCLUSION

Having considered the submissions made to it, in the context of case law and commentary, the Commission is persuaded in the present instance that reform of the law is merited. Accordingly, it has recommended that the torts of maintenance and champerty be abolished, but that statutory provision be made to preserve any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as otherwise illegal. The Commission has also set out possible strategies that may be taken in order to mitigate the impacts, if any, of abolishing the torts. It is intended that the recommendations made here facilitate access to justice; support the development of the proposed legislative representative proceedings scheme contained in the Civil Procedure (Representative Proceedings) Bill 2019 (WA); and provide options for protecting defendants, representative parties and group members in funded representative proceedings.



**THE LAW REFORM COMMISSION**  
*of*  
**WESTERN AUSTRALIA**