THE TREASURY AND ATTORNEY-GENERAL'S DEPARTMENT CONSULTATON PAPER "GUARANTEEING A MINIMUM RETURN OF CLASS ACTION PROCEEDS TO CLASS MEMBERS"

SUBMISSION OF LITIGATION CAPITAL MANAGEMENT LIMITED
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PART A: LITIGATION CAPITAL MANAGEMENT LTD

1. Litigation Capital Management Limited and its subsidiaries ("LCM") is a provider of litigation finance products and from that perspective makes the following submission in response to the Treasury and Attorney-General's Department Consultation Paper "Guaranteeing a minimum return of class action proceeds to class members" ("Consultation Paper"), relating to a recommendation of the Parliamentary Joint Committee on Corporations and Financial Services ("PJC") in its December 2020 Report "Litigation funding and the regulation of the class action industry" ("PJC Report").

2. Founded in 1998, LCM was one of the first professional litigation funders in Australia, and it is one of the longest-standing litigation funders globally. LCM holds an Australian Financial Services Licence and is a publicly listed Australian company, headquartered in Sydney and with offices in Melbourne, Brisbane, Singapore and London.

3. Since its inception, LCM has continued to assist claimants to pursue meritorious claims and recover funds from the legal avenues and actions available to them. LCM funds commercial, insolvency and arbitral proceedings, as well as representative actions.

PART B: OPENING REMARKS

4. LCM provides its response to the specific questions posed by the Consultation Paper in Part C of this submission.

5. In addition, in this Part B LCM provides its comments on certain broader issues raised by the Consultation Paper. These comments draw on LCM's extensive experience in litigation funding and class actions, and are provided in an effort to assist with shaping an appropriate context for this consultation process.

Impetus for guaranteed returns to group members

6. The Consultation Paper seeks to "consult on the best way to guarantee a statutory minimum return of gross proceeds of a class action to class members".

7. In seeking to identify the 'best way' to guarantee minimum returns, the Consultation Paper appears to proceed from a foundation that the Australian legal system 'should' provide such a guarantee, with the only remaining question being 'how' to do so.

8. This foundation is presumed to be supported by the PJC Report. However, this presumption calls for closer scrutiny. In considering the concept of guaranteed minimum returns, the PJC stated (at [13.61] of the PJC Report):

   "An alternative suggestion that has arisen late in the inquiry is for a guarantee that class action members receive a statutory minimum percentage of the gross litigation funding proceeds."

9. The only consideration or analysis that this late 'suggestion' then receives is the PJC's sole comment that "the committee notes that this proposal focuses on protecting the class action members and maintaining access to justice". However, this comment is not considered in any further detail, not supported by any evidence, not reviewed by

any relevant experts, not compared with any alternative options, nor scrutinised in any way whatsoever.

10. There is no review of whether this suggestion is appropriate, fit for purpose or actually "protecting the class action members and maintaining access to justice" as asserted. No consideration is given to whether it would assist in striving for the objective fixed by the PJC for class actions, being to "deliver reasonable, proportionate and fair access to justice in the best interests of class members" [1].

11. Further, the genesis of the 'alternative suggestion' is not a submission that was made to the PJC, nor a testimony that was heard by it. It is a newspaper article[2].

12. The only source for anything like the 'alternative suggestion' in the referenced article is the following:

"One Nation Leader Pauline Hanson has proposed a compromise that would see class actions exempted from the MIS regime if the funder committed to give at least 70 per cent of any damages award to class members"

13. However, the above compromise is not what is now being considered by the Consultation Paper. The Consultation Paper does not refer to any exemption from the MIS regime. It is asking how to guarantee a statutory minimum return of gross proceeds to <u>all</u> class members.

14. In light of the above:

    14.1. LCM submits that no cogent, evidence-based consideration has been given (at least not publicly) to the question of 'whether' guaranteed minimum returns are, on the whole, going to protect or benefit current and potential future class action group members, or maintain access to justice;

    14.2. As discussed below, it is LCM's submission that if a disciplined analysis were undertaken, it would make clear that such a change, if effected, <u>will undoubtedly</u> prevent hundreds of thousands of Australians from seeking redress for wrongs that have affected them; and

    14.3. Consequently, LCM submits that the consultation process commenced by the Consultation Paper cannot, and ought not, proceed as a blinkered review of 'how' minimum returns ought to be implemented. Rather, the consultation process must first genuinely engage with the question of 'whether' such a guarantee is necessary and appropriate.

Are guaranteed minimum returns to class members necessary and appropriate?

15. The PJC Report notes that (at [5.4]-[5.5]):

"… in evidence to the inquiry, no one disputed the important role of class actions in Australia's civil justice system… the committee concurs with the findings of numerous previous reviews: namely, that class actions, when working as originally intended,

[1] PJC Report at [5.7]

[2] See footnote 65, Chapter 13 of PJC Report; Ronald Mizen, *Litigation funding rules on the brink as dissent grows*, 11 November 2020.

should facilitate access to justice, discourage wrongdoing, and promote the efficient and effective use of court resources.

… litigation funders enable individuals to pay for the high costs of accessing the civil justice system in Australia. In particular, the nature of Australia's adverse costs regime means that the unsuccessful party to civil proceedings pays for their own legal costs as well as those of the successful party. Therefore, as evidence to the inquiry demonstrated, litigation funders play a vital role in effectively filling the funding gap that would otherwise exist because no ordinary Australian or group of Australians could afford to be exposed to the risk of an adverse costs order in the event that a class action did not succeed. As litigation funders effectively cover that risk, the committee recognises that, in many instances, a class action could not proceed in Australia without a litigation funder."

16. By reference to Professor Morabito's "*An Evidence-Based Approach to Class Action Reform in Australia*", LCM notes that before the end of 2018, gross recoveries in funded class actions exceeded $2.1billion. Since that time, this figure has considerably increased.

17. There is no doubt that, on the whole, litigation funders have greatly assisted class members to achieve redress and recoveries through funded class actions.

18. So, is there a need for change?

Class members

19. The critics of class action returns to class members almost exclusively focus on how successful recoveries have been distributed. Criticism is levelled at funders (and lawyers) for taking too big a piece of the pie in certain well-worn examples.

20. However, these criticisms rarely pause to consider how the pie was created in the first place.

21. It is trite to say that class actions are pieces of litigation, but this simple point is consistently overlooked. Class actions are large-scale complex litigation, and this litigation is adversarial, it is risky and it is expensive. LCM submits that it cannot be forgotten that by participating in a class action, this is the process that class members are embarking upon. They are not simply applying for compensation through a scheme whereby the payment of such compensation is a certainty, far from it.

22. Litigation is inherently unpredictable – an action is commenced with imperfect information, progressed through an adversarial process and adjudicated by a member of the judiciary. The risk of a complete loss or an unsatisfactory outcome is an unfortunate aspect of litigation reality, and the cost of advancing a claim, particularly against a combative defendant, can have a very significant impact on an action's ultimate proceeds. This is true of both funded and unfunded proceedings, both commercial claims and class actions.

23. Further, the concept of a guaranteed minimum return for class members effectively assumes that a class action can only have two outcomes: total success or total loss, and that if total success is achieved, the guaranteed minimum share of that success should be reserved for class members. This does not reflect the reality of the litigation process. For example, a class action which at the outset appears to have good prospects of success, may see those prospects deteriorate once evidence is exchanged; a class action which appears to be targeting a corporate with significant

funds, may ultimately find that the defendant has little capacity to pay the amount being sought. In such circumstances, it is in the interests of the class to avoid total loss by a compromised outcome that reflects the change in the risk profile of the action. Such compromised outcomes are a feature of all litigation. However, these scenarios are not properly accounted for in the consideration of guaranteed returns.

24. Never in the history of litigation have lawyers, barristers, experts, legislators or Courts guaranteed to any plaintiff that they will receive a particular minimum return from pursuing their claim. LCM submits that there is no clear basis for proposing to treat plaintiffs differently now, solely because they are in a funded class.

25. LCM further notes that due to the Court's supervisory role in all class actions, before the Court approves any settlement or distribution in a claim, it first conducts a detailed review of all the circumstances, including objections from any class members dissatisfied with the resolution, advice from senior counsel as to why the settlement is fair and reasonable and, increasingly, reports from costs assessors (often Court appointed) as to whether the legal costs incurred were appropriate. Courts also often offer class members an opportunity to opt out of the settlement if they were not satisfied with it, and Courts do decline to approve settlements if not satisfied that they are reasonable[3].

26. Therefore, in respect of each past class action settlement approval and distribution, a Court was satisfied that a) the resolution amount was reasonable in light of the claim's prospects and risks, b) the payable costs were reasonable, c) the payable funding commission was reasonable, and d) the settlement distribution scheme was fair and reasonable as between the group members.

27. In light of the above, the only sensible inference that can be drawn from all concluded cases is that the participating class members incurred reasonable costs in progressing their class action, achieved a reasonable outcome in the circumstances, and were more satisfied with accepting that outcome than not accepting it (i.e. they did not opt out).

28. The above inference, in LCM's submission, ought to alone be enough to give this consultation process pause to consider whether any change is actually justifiable in the name of group members.

29. It is further important to note that class members are not entirely passive action participants. Class members are often required to register their interest in joining the claim and, importantly, many of them take the positive step of entering into a written funding agreement with the funder. LCM submits that this segment of class members (which often includes sophisticated investors, institutional investors, Councils, businesses etc) cannot be overlooked in the consideration of the proposed guarantee. The right of these parties to freely enter into a commercial arrangement to finance the pursuit of their legal claim cannot be restricted and the effect of such contracts should not be overridden by statute. This is particularly so following the introduction of AFSL and MIS requirements into class actions, which ensure that detailed disclosure is given to class members. A statutory minimum guarantee sits uncomfortably with the MIS regime as it has the potential to result in a departure from the terms of the investment which class members have chosen to participate in.

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[3] See for example *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719; *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1537

Funders

30. As noted above, the critics of class action returns to class members often overlook the multifaceted process by which the recovery was realised. This includes a failure to appreciate the process by which funders select and approve claims for funding.

31. At the outset, LCM does not suggest that the funder's perspective is important because the consultation process ought to protect funding businesses or their profits. Rather, LCM seeks to stress that funders are selective about the claims that they fund and funders' appetites for supporting class actions are not inelastic. Funders do not have to fund class actions, and if class action regulation is changed in a way that shifts the balance between risk and return beyond acceptable limits, funders simply will not continue to fund these claims and will instead continue to increase their investments in other claim types such as insolvency, arbitration and commercial litigation (for which there is a developed litigation funding market in both Australia and globally).

32. Below, LCM seeks to demonstrate the dramatic effect that any guaranteed minimum return to class members will have on a funder's ability to fund future actions, particularly if that guaranteed threshold is fixed at 70%.

33. To do so, LCM first reiterates that the risk profile of funded class action claims is unlike that of any other investment class:

    33.1. Before any recovery can be generated, every action is investigated, prepared, commenced, tenaciously prosecuted for many years, and consistently funded despite relentless parry tactics of well-funded defendants and skilled defendant legal teams. The cost of doing so is not often less than $5million. It is often more than $10million;

    33.2. It is the funder who outlays all costs and carries the risk that they will not be reimbursed (and, worse, that adverse costs will also need to be met) for the entire life of the action; and

    33.3. There is no certainty of a return until a claim is finally resolved. There is no guarantee of a settlement and class actions do lose[4].

34. Funding class action litigation is a highly specialised, costly, high risk and almost entirely illiquid endeavour. It is in this context that funders make decisions as to whether to agree to fund a proceeding.

Funding decisions

35. Funders do not fund every claim. By way of example, LCM provides funding to only between 3% and 7% of the applications it receives.

36. LCM, and most other reputable funders, have fixed criteria when deciding whether the claim is suitable for funding. LCM's criteria can be found at https://www.lcmfinance.com/working-with-lcm/lcms-funding-criteria/.

37. When considering a claim, one of the key matters that funders carefully review is the 'proportionality' between the budgeted investment sum and the likely recovery. Reputable funders do not accept matters for funding if it is not clear that the size of the

[4] For example, *Crowley v Worley Limited* [2020] FCA 1522; *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

claim is sufficient to allow for a) the legal spend anticipated, b) the funding commission, c) the bulk of the recovery being paid to the claimants and d) a "buffer" to allow for settlement discounts, increases in costs and potential reductions in claim value as the claim develops.

38. In light of the above, the use of a predetermined minimum for class member returns has a direct impact on the size of the claim that the funder is able to accept as sufficiently 'proportionate' to meet its funding criteria.

39. The following is a reverse-engineered demonstration of a 'proportionality' analysis in the context of a guaranteed 70% return to class members:

    39.1. By way of example, the costs of a class action are estimated to be $1million;

    39.2. Due to the risk profile set out at paragraph 33 above, common pricing structures would see funders aiming for a return on invested capital ("ROIC") of 3x. The funder would therefore seek to allow for a $3million commission in its calculations;

    39.3. In order for class members to recover the guaranteed minimum of 70% in this claim, the aggregate of the above costs and commission would need to represent no more than 30% of the claim's recovery. The total minimum recovery would therefore need to be more than $13.3million:

    [($1m costs + $3m commission) / 30% x 100%] = $13.3m]

    39.4. However, claims do not usually resolve for 100% of their formulated claim value. Therefore, the funder may allow for a settlement/litigation risk discount. Depending on the claim, a prudent and conservative funder approaching the claim in its infancy could estimate this to be up to 50%. Therefore, in order to achieve a recovery of $13.3million, the claim size would need to be over $25million:

    [$13.3m / 50% x 100% = $26.6m]

    39.5. The above analysis shows that with a budget of $1million and a guaranteed minimum return to class members of 70%, claims with a quantum below $25million would not meet reputable funders' 'proportionality' criteria and would not be funded.

40. Applying the same analysis to more realistic class action budget figures arrives at the following claim size parameters:

Budget	Minimum claim size
$4,000,000	$100,000,000
$5,000,000	$125,000,000
$10,000,000	$250,000,000
$15,000,000	$375,000,000

41. The above shows how two integers, being a) the budget, and b) a guaranteed minimum percentage return to group members (neither of which a funder has control over), can directly fix significant barriers to the size of claim that can be funded.

42. Since costs are relatively inflexible for class actions, the above is a clear indication of the class action sizes that the proposed guarantee of minimum returns will render 'un-fundable'. Put another way, if the guarantee were to be introduced, class actions that are smaller than the minimums noted above simply will not be able to obtain funding from reputable funders.

43. Conversely, in the event that the class members seek to limit the budget in order to retain sufficient 'proportionality' to obtain funding, they place themselves at a great tactical disadvantage against well-heeled defendants represented by top-tier legal teams.

44. To further clarify:

    44.1. Reputable funders do aim for the bulk of a recovery to be paid to class members. Claims are not funded if this criterion is not met, not only because of funders' policy views, but also because the failure to deliver the bulk of a settlement to class members creates a genuine risk that a proposed settlement or distribution will not be Court approved.

    44.2. However, a statutory guarantee of minimum returns to class members creates a fixed risk that the funder will not achieve a sufficient return in the claim, regardless of the circumstances. If the funder is unable to price for this additional risk, it creates a widening of the 'proportionality' analysis and a real disincentive for funding that claim.

Evidence

45. By reference to Professor Vince Morabito's data helpfully assembled in "*Post-Money Max Settlements in Funded Part IVA Proceedings*" (December 2020), LCM has prepared Annexure A to this submission, being an analysis of settlements in recent funded class actions and how those claims would be approached by funders if a 70% group member return guarantee were applied to them.

46. Annexure A shows that:

    46.1. For the actual concluded class action settlements:

        46.1.1. Funders' commissions have averaged 24% of gross recoveries.

        46.1.2. Funder ROIC[5] has averaged in the order of 1.39x. It is important to note that this ROIC of 1.39x is what has been achieved on successful claims, and is not inclusive of losses (it is also far lower than the 3x which funders may aim for at the outset of an investment).

        46.1.3. Conservatively assuming that an average class action takes three years to resolve, the above ROIC translates to average annual returns of 46%.

[5]Calculated by dividing the funder's commission by the sum of costs for that claim (assuming that the funder has invested this amount into the action)

46.2. In the event that the same class actions were to guarantee a minimum 70% return to class members:

46.2.1. Funders' average commissions would decrease to 8% of gross recoveries.

46.2.2. Funders' average ROIC would decrease to 0.72.

46.2.3. Average annual returns would decrease to 24%.

46.2.4. Out of the 35 class action settlements considered, the funder would have achieved a ROIC of over 3x in one claim (2.85%) and a ROIC of over 2x in four claims (11.4%).

47. Further, as summarised by PWC in their "*Models for the Regulation of Returns to Litigation Funders*" Report (p 14):

"The foreshadowed cap of 30% [in funder commissions] *would have had implications for 91% of publicly available settlements funded under Part IVA proceedings".*

48. LCM reiterates that the above analysis is not provided in an effort to elicit tears for funder profits. Rather, it serves to clearly highlight the economic reality that guaranteed minimum returns to group members, particularly at 70%, will simply make the funding of most class actions uncommercial. And actions that are uncommercial to fund will not receive funding from reputable funders.

Summary

49. LCM does not doubt that if guaranteed minimum returns to group members were introduced, in some of the class actions that nevertheless receive funding, the returns to group members may be higher than those they would have otherwise achieved. However, LCM stresses that the number of such class actions, i.e. class actions that nevertheless receive funding, will dramatically decrease.

50. Importantly, if meritorious actions are not funded, it does not mean that they will progress as unfunded claims. LCM submits that a very small percentage of 'fundable' claims would be commenced and progress to a resolution unfunded. That small percentage would also be likely to be progressed by plaintiff firms on a contingency basis in the Supreme Court of Victoria, where the commissions such firms can charge are not capped.

51. Advocates for change refer to the (obvious) fact that group members receive a greater proportion of the settlement award in unfunded matters, comparing a 51% median in funded against an 85% median in unfunded claims[6]. LCM submits that this is not an accurate comparison. If future actions are not funded and therefore do not proceed, the comparison is not between 85% and 51% of a settlement, it is between 51% of a settlement and 100% of nothing.

[6] PJC Report at 13.8; Australian Law Reform Commission, *Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Actions Proceedings and Third-Party Litigation Funders,* Final Report, December 2018, p. 70.

52. As noted in the PJC Report (at 5.5):

"…the committee recognises that, in many instances, a class action could not proceed in Australia without a litigation funder."

53. In short, LCM submits that guaranteed minimum returns for class members are a wolf in sheep's clothing. On their face, they appear to offer a group member added protection, while in reality they remove that group member's very ability to seek redress for the wrong that they have suffered.

PART C: CONSULTATION PAPER QUESTIONS

Question 1: what is the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements)?
Question 2: how would the suggested mechanism interact with the class action system (including court processes) and the litigation funding regime?

54. LCM refers to its comments in Part B above and reiterates that there is no evidence that presently supports the introduction of statutory minimum returns to group members. LCM reiterates its submission that this consultation process should engage in a disciplined consideration of 'whether' such a change is necessary and appropriate, before embarking on a review of 'how' to achieve it.

55. If contrary to LCM's submission, but following a comprehensive review, the consultation process concludes that minimum returns to class members should be guaranteed, LCM submits that the best way to do so is:

    55.1. By way of amendment to the *Federal Court of Australia Act* 1976 (Cth);

    55.2. Granting the Federal Court explicit powers to make common fund orders in class actions ("common fund orders" in this submission mean orders that require all members of an open class to contribute equally to the legal and litigation funding costs of the proceedings regardless of whether the class member signed a funding agreement); and

    55.3. Specifying that, unless it is in the interests of justice to do otherwise, the Court must not make a common fund order that does not provide the open class a specified minimum percentage of gross recovery;

    55.4. Thereby ensuring that any funder returns from class action recoveries are:

        55.4.1. Subject to Court supervision; and

        55.4.2. Otherwise subject to informed written instructions or agreement of class members.

56. In support of the above proposal, LCM highlights that:

    56.1. The Consultation Paper acknowledges that "the Federal Court of Australia exercises a supervisory role over litigation funding that supports matters brought under the class action regime in Part IVA of the *Federal Court of Australia Act 1976* (Cth). This supervisory role enables the Federal Court to protect class members, including through an ability to approve class action settlements";

56.2. The PJC concluded that:

56.2.1. "*With the aim of optimising clarity and certainty about the availability and application of common fund orders in the Federal Court, the committee recommends the Australian Government legislate to address uncertainty in relation to common fund orders, in accordance with the High Court's decision in* Brewster" (Recommendation 7 and [9.123]); and

56.3. *"The ability of the Federal Court to have an active role in constructing litigation funding arrangements and resolving litigation funding issues in class actions on a case-by-case basis would complement the robust oversight that the Australian Investment and Securities Commission now places on litigation funders under the application of the Managed Investment Scheme regime and the AFSL regime*" (at [11.52]).

56.4. The PJC made further recommendations that would go hand-in-hand with the statutory affirmation of common fund orders. For example, by its Recommendation 11, the PJC proposed that the Federal Court approve all litigation funding agreements and reject, vary or amend the terms of any litigation funding agreement when the interests of justice require;

56.5. The Australian Law Reform Commission[7] also recommended that "Part IVA of the *Federal Court of Australia Act* 1976 (Cth) should be amended to provide the Court with an express statutory power to make common fund orders on the application of the plaintiff or the Court's own motion";

56.6. If the proposed changes were made in any way other than by way of added Court powers, the changes would fetter the Court's discretion in exercising their supervisory role in class action proceedings[8];

56.7. There is well-developed jurisprudence in relation to the Court's exercise of its supervisory power in the context of class action settlement approvals and distributions. The Courts have been active in considering and developing criteria for approving, and ultimately modifying and setting, funding commissions in class actions. They have repeatedly confirmed that commissions ought to be fair and reasonable, and proportionate in terms of the sums invested and the risk undertaken by the funder; and

56.8. Finally, if the proposed changes were, as passingly suggested by the Consultation Paper, inserted into the *Corporations Act* 2001 (Cth) provisions relating to the AFLS and MIS regimes, it would put litigation funding into stark contrast with every other financial product and managed investment scheme in Australia, none of which have ever been placed in the untenable position of having to guarantee a return to its stakeholders regardless of the circumstances of the underlying investment.

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[7]"Australian Law Reform Commission report, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (ALRC Report 134), Recommendation 3

[8]By analogy, in *Nicholas v The Queen* (1998) 193 CLR 173 at 188 Brennan CJ found that *"A law that purports to direct the manner in which the judicial power should be exercised is constitutionally invalid."*

57. LCM further notes that an express statutory power to make common fund orders would both directly and indirectly improve outcomes for claimants. In particular, LCM notes that that the competition naturally arising in the context of common fund orders has placed downward pressure on litigation funding commissions[9]. LCM submits that this is particularly important for class members now, when:

    57.1. The introduction of the AFSL and MIS regimes into litigation funding has limited the number of funders that are able to assist with the funding of class actions and has fixed barriers to entry for fresh competitors; and

    57.2. Basic economic theory would suggest that this forced constriction of the market will place upward pressure on pricing.

58. LCM further submits that an express statutory power to make common fund orders would also indirectly improve outcomes for defendants. In this regard:

    58.1. As the PJC noted at [9.34], "until common fund orders were endorsed in 2016, Australia's class action regime featured a larger number of closed class actions …";

    58.2. Without certainty around the availability of common fund orders, the move towards closed class claims increases the risk of multiple class actions being run in one court or across different courts against the same defendant. This may have the effect of increasing defendant costs, as they may need to face multiple closed claims/different MISs instead of one open claim. Defendants will also never have certainty nor finality in resolving any one closed class action, as that resolution would not prevent another closed claim being commenced in relation to the same set of facts;

    58.3. The granting of statutory power to make common fund orders would offer "fair and equitable outcomes" for both plaintiffs and defendants by ensuring every claim is only litigated once, and that the costs of that litigation are borne evenly by all persons that benefit from its resolution;

    58.4. As noted by the PJC (at 9.111]):

    > *"… the availability of a common fund order encourages class actions to operate with an open class. Open class actions are a key tenet of the federal class action system that enables a common binding decision for all with common claims without a requirement to take positive steps for participation, thereby increasing the efficiency of the administration of justice. In this regard, open class actions promote certainty and finality of outcome for defendants from a settlement or judgment as all common claims are resolved, subject to those of individuals who have actively taken the step to opt out".*

59. Finally, LCM refers to the recent changes that permit lawyers to charge contingency fees in class actions pursued in the Supreme Court of Victoria. There is no statutory limit on the percentage that a plaintiff firm can recover, with a proposed amendment to the bill to introduce a 35% cap defeated in Parliament.

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[9]For example, Justice Murphy remarked that the tender process in *GetSwift* resulted in a significant reduction in the funding rates offered to class members. See speech delivered at the ALDA Class Action Litigation Funding Reform Conference, 26 October 2016, www.fedcourt.gov.au/digital-law-library/judges-speeches/justicemurphy/20181026#_ednref34, quoted by the PJC at footnote 33.

60. As noted by the PJC (at [18.9]):

"Another adverse impact of this change in Victoria is the potential for 'forum shopping', where law firms seeking to use contingency fees may commence class actions in the Supreme Court of Victoria to take advantage of the regime. A related concern is that other jurisdictions may make changes to permit contingency fees, an outcome which concerned submitters as it would add further inconsistency and confusion to the class action system."

61. Consistent with the above concern, in their "Class Action Risk 2021" Report[10], Allens have found that (at page 8):

"While the percentage of filings in the Federal Court and Queensland have remained steady, there was a sharp increase in the percentage of filings in the Victorian Supreme Court in 2020 and a corresponding sharp decrease in the NSW Supreme Court. …Having represented between 7% and 9% of filings in 2016–2019, the Supreme Court of Victoria received 31% of filings in 2020"

62. LCM submits that added certainty on the availability of common fund orders within the Federal Court would assist with correcting the present imbalance between State and Federal Court cost regimes.

Question 3: is a minimum gross return of 70 per cent to class members the most appropriate floor for any statutory minimum return? If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?

63. LCM refers to Part B of this submission.

64. LCM reiterates that 70% is not an appropriate "floor" for a statutory minimum return to class members. LCM has seen no evidence or analysis that offers support for this arbitrary figure.

65. In addition to the comments provided above, LCM also notes that the structure of the proposal needs careful attention. It is important to note that a "guaranteed minimum return to group members" is not the same as "capped returns for funders", nor is it the same as "minimum returns to group members in priority to funder".

66. LCM submits that if, contrary to its submission, the move is made to introduce a requirement for minimum returns to class members, then:

    66.1. This change ought not be shaped as:

    "Group members are guaranteed a minimum return of X% of all gross recoveries"

    66.2. Rather, the change ought to be to the effect that:

    "Subject to express written agreement to the contrary, the funder's entitlement to receive a commission from a class action recovery is subject to the group members receiving X% of that gross recovery"

[10] https://www.allens.com.au/globalassets/pdfs/campaigns/allens_report_class-action_risk_2021.pdf

67. The above wording draws out two key issues, namely:

67.1. The right to contract:

67.1.1. LCM submits that it is critical that group members must retain their freedom to contract as they see fit. Particularly with the introduction of AFSL and MIS requirements into class actions, class members (which often include sophisticated investors, institutional investors, Councils, businesses etc) are well informed about the structure of the funding product. There is no basis to restrict such parties from their ability to willing engage in a commercial arrangement to finance the pursuit of their legal claims.

67.2. The structure of the guarantee:

67.2.1. LCM submits that it is unreasonable for the portion of a recovery that relates to a reimbursement of costs to be paid to class members as part of any guaranteed minimum. Class members did not meet that cost, and it defies logic for them to benefit from its reimbursement.

67.2.2. By way of an example:

67.2.2.1. A funder incurs costs of $5 over the life of an action;

67.2.2.2. The ultimate recovery is $10, including a reimbursement of the $5 in costs;

67.2.2.3. LCM submits that it is unreasonable to guarantee the class members a fixed 70% of the $10 total without reference to the fact that $5 of that settlement are a cost repayment;

67.2.2.4. If class members do receive $7 in this scenario, the funder would not only make no return on its $5 investment, but would make a loss of $2, despite a) funding ongoing costs, b) which the Court concluded were reasonable (as would be required in order for the settlement to be approved), and c) achieving a recovery of $10 for the class members to share in.

Question 4: is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?
Question 5: how would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.

68. LCM refers to Part B of this submission and to the above responses to other Questions.

69. LCM agrees that it is critical that the “risk, complexity, length and likely proceeds of the case” must be appropriately considered. However, LCM submits that this is precisely what fixed pre-determined minimum return guarantees do not do.

Question 6: what other implementation considerations would be relevant to the issues raised in this consultation paper? Please provide examples.

70. LCM refers to Part B of this submission.

PART D: CONSULTATION PROCESS

71. LCM reiterates that any further changes to Australia's litigation funding industry and class actions regime must be carefully considered and structured, with the benefit of genuine industry consultation. As one of the Australia's most experienced funders, LCM believes it is well placed to assist and would appreciate the opportunity to work with the Government to successfully achieve the stated objective of "delivering reasonable, proportionate and fair access to justice in the best interests of class members".
