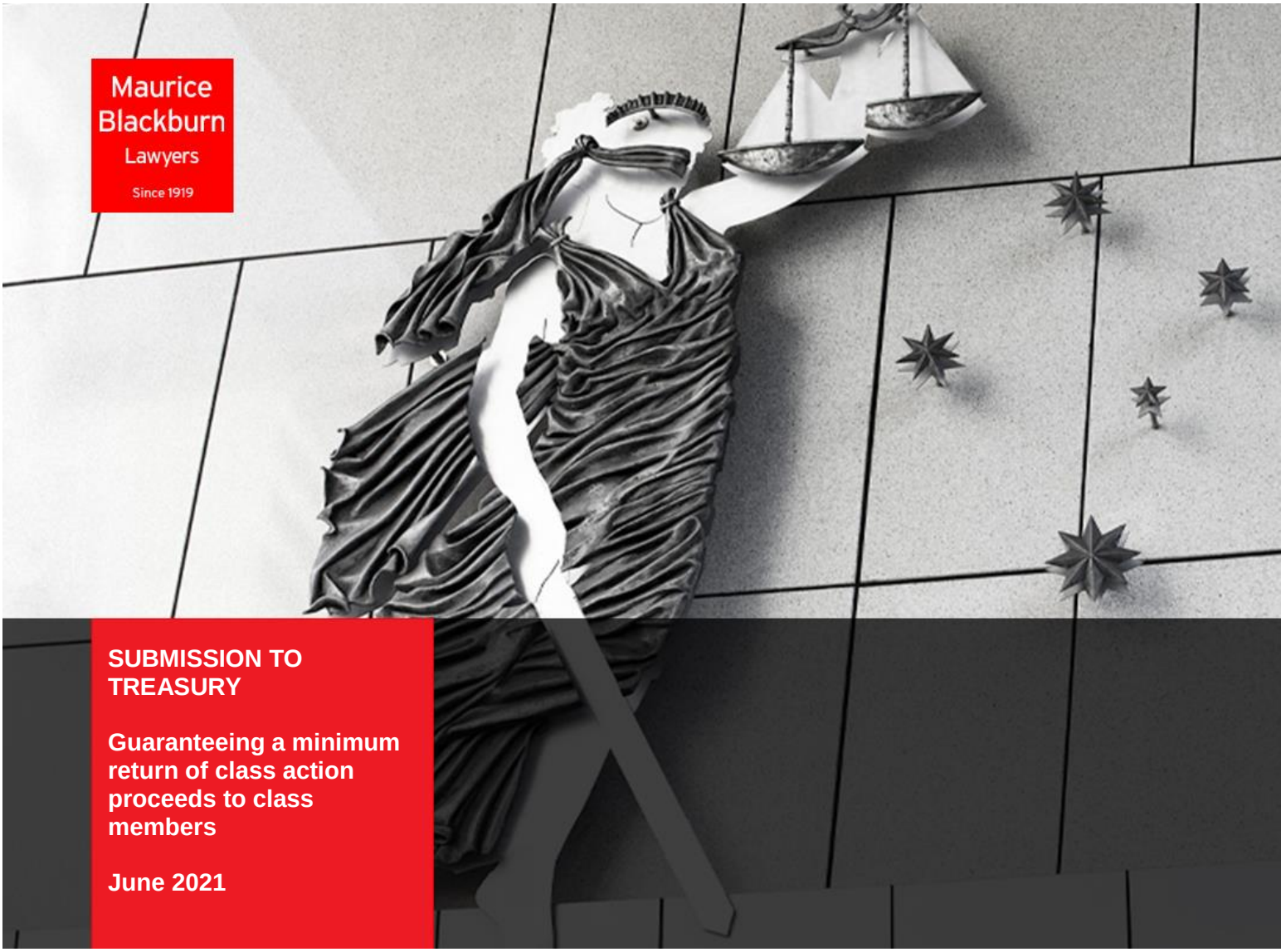

SUBMISSION TO TREASURY

Guaranteeing a minimum return of class action proceeds to class members

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Maurice Blackburn Lawyers Since 1919

INTRODUCTION

The best way of achieving balance and fairness in the distribution of class action proceeds is to encourage competition in relation to the funding of class actions and to give the Federal Court complete control over the deductions to be made from resolution sums, whether as a result of legal fees or funding costs, and whether in the context of settlement or otherwise. Taking this approach will enable market forces to work effectively to reduce costs and enable the Federal Court to ensure that class members' returns are reasonable and equitable in the circumstances of the particular case of which they are a member., while at the same time empowering the Court to ensure that the distribution of proceeds is not unprincipled. The introduction of a statutory minimum return to class members is neither warranted nor justified and is ill-adapted for the ultimate goal of increasing returns to class members. Indeed its overall impact will likely be to reduce the total amount paid to class members because it reduces the number of class actions which will proceed.

This submission has been prepared by Maurice Blackburn, which has Australia's largest and most successful class actions practice, having obtained more than $3.6 billion in compensation for class members across a range of different types of class actions. More information about Maurice Blackburn's history and experience in class actions is set out in Appendix A. In summary Maurice Blackburn's submissions are as follows.

First, a statutory guarantee regarding minimum returns should not be introduced for the reasons that:

1. A better and surer way to reduce costs for group members (as in any market) is to encourage competition in relation to the funding of class actions. This can effectively be done by:

   (a) introducing contingency fees as recommended by the Productivity Commission, the Victorian Law Reform Commission and the Australian Law Reform Commission; and

   (b) providing the Federal Court with clear statutory power to make common fund orders as recommended by the ALRC.

2. There is no evidence of widespread market failure which would warrant the introduction of price caps. The evidence suggests that on average class members receive more than 70% of settlement proceeds with greater or lesser returns dependent on the circumstances of the settlement of any particular case that is the subject of court approval. A very small number of notorious cases with particularly poor outcomes do not warrant wholesale regulatory intervention in the form of a blunt and arbitrary price cap.

3. The selection of 70% as the minimum level of return to class members is arbitrary and has not been explained or justified.

4. The use of the gross resolution sum as the comparator for evaluating the fairness of class members' returns is inapt – rather, the reasonableness of class members' returns should be considered against their likely recovery, and whether the extent of

the compromise relative to their likely recovery was reasonable in light of the risks faced by class members.

5. Not all settlements are structured as global "all in" settlements where an agreed financial sum is to include payment to class members as well as payment of all legal costs and funding charges – in alternative settlement structures it is unclear how a statutory guarantee would actually operate.

6. If a statutory guarantee is introduced in the federal class actions jurisdiction there may be inconsistent results in comparison to cases being conducted in the four state courts[1] where class actions can also be initiated.

Secondly, the government should instead implement reforms, as recommended by the Australian Law Reform Commission, to legislate to allow common fund orders and contingency fees because both of these initiatives will further increase competition in the financing of class actions and put downward pressure on funding and legal costs.

We now address each of the six consultation questions.

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1. CONSULTATION QUESTION 1: What is the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements)?

1.1 The Consultation begins with the wrong question. The question should be what is the best way to optimise returns to class members. The best way to optimise those returns is to encourage competition in the funding of class actions and to ensure and enhance the flexibility of Court supervision of settlement outcomes – the introduction of a statutory minimum does neither. In asking about the best way to guarantee minimum returns to class members, this question presupposes that it is necessary and appropriate for a statutory guarantee to be enacted. However there is an antecedent question as to whether a statutory guarantee should be introduced at all.

Returns to class members – unpacking the facts

1.2 The percentage of any settlement sum returned to class members is a blunt and sometimes misleading measure of the reasonableness of a settlement. We develop and expand this issue below but at the outset we note the following:

(a) a settlement may result in a relatively low proportion of the settlement sum being class members but nonetheless compensate class members for a very high percentage of their losses. For example in *Evans v Davantage Group Pty Ltd (No 3)*[2] group members received 37.4% of the settlement sum but were likely to get close to 100% of their losses.[3] In those circumstances paying 70% of the

[1] Noting that although it lapsed due to the proroguing of Parliament before the last state election, a bill had also been introduced in the WA Parliament which would mean five states have a class actions regime that is substantially the same as Part IVA.
[2] [2021] FCA 70.
[3] Ibid at [64] and [65].

settlement sum to group members would have overcompensated them and left either the funder or lawyers out of pocket for no good purpose; and

(b) a settlement may result in a relatively low proportion of the settlement sum being paid to group members but nonetheless represent a fair outcome if a proper analysis shows their claims are in fact close to worthless. As Beach J said in *Kuterba v Sirtex Medical Limited (No 3)*:[4]

> [A]ssume that after extensive discovery and expensive expert reports …. it is apparent that the group members have no cause of action for damages. Let it also be assumed that nevertheless the respondent is prepared to pay a modest amount to settle the matter, and let it also be assumed that legal expenses and the funding commission would soak up 90% of that modest settlement sum. Is it seriously suggested that the group members should receive at least 50% of the settlement sum for what, after forensic investigation that group members did not have to pay for and where the risk for this on their behalf was taken on and funded by others, are shown to be likely valueless claims? One can multiply such examples.

1.3 For present purposes it may be accepted that the percentage of settlements which class members receive may provide a useful partial indicator of the level of transaction costs in the class actions system, however acceptance of that proposition does not justify the proposed regulatory intervention.

1.4 Reducing transaction costs is a desirable goal but it is not an end in itself. If the consequence of reducing transaction costs is a reduction in the amount paid to class members overall because less class actions are run, class members will be worse off and corporate wrongdoers better off – a perverse policy outcome.

1.5 Any examination of transaction costs in class actions needs to focus not just on litigation funders and plaintiff lawyers but also on the approach of defendants and their lawyers whose approach to the defence of class actions is often to run up as much costs as they can in order to exhaust the financial resources of those making claims.

1.6 The available datasets suggest that on average the returns to class members are more than 70% of settlement sums, with greater or lesser returns depending on the circumstances. Returns will tend to be lower (expressed as a percentage of settlement sums) in cases with third party litigation funders (where both funder and lawyer receive a return) and in smaller settlements (because legal costs charged on an hourly basis tend to be higher as a percentage of smaller settlements). Contingency fees remove both factors associated with higher costs – it removes funders from the equation and ensures that legal costs are calculated as a proportion of settlement amounts. Maurice Blackburn has long advocated the benefits of being able to charge a 25% contingency fee, or in other words a guaranteed return to group members of 75%. If the government were serious about reducing transaction costs it would legislate for contingency fees.

1.7 In cases with litigation funders, Professor Morabito has observed that the utilisation of common fund orders has had a significant impact on funding commissions with a

[4] [2019] FCA 1374 at [18].

median of approximately 22% for common fund orders[5] compared to median funding commissions prior to common fund orders of closer to 27%.[6] If the government were serious about reducing transaction costs for class members it would adopt legislative amendments proposed by the ALRC to ensure the Federal Court's statutory powers to make common fund orders.

1.8 There have been a number of well publicised cases where returns to class members have been below those that would reasonably be expected from a class action.[7] Some of these cases featured prominently in a number of public inquiries, including those by the Australian Law Reform Commission and the Parliamentary Joint Committee, in illustrating how the class action regime can lead to disappointing or dysfunctional outcomes for class members.

1.9 Any proper consideration of a policy response to these kinds of cases needs to consider first their prevalence (and the evidence is they are still relatively rare) and second the best means of reducing their incidence. The recommendation for a guaranteed minimum payment in the report of the Parliamentary Joint Committee is devoid of consideration of either.

1.10 When poor outcomes come to light, the desire to improve returns to class members is understandable. After all, the fundamental purpose of the class action regime is to recover compensation for the "genuinely wronged class action members" (to use the Parliamentary Joint Committee's words[8]) who have suffered real and tangible losses, whether they be pure financial losses or personal injury or property damage, as a result of illegal conduct.

1.11 On the other hand, access to justice rarely comes at no cost. The reality is that in almost all cases class members are not required to risk any of their own funds in order to advance their claims - this is done by lawyers and funders. Experience shows that plaintiffs' legal costs in class actions are substantial, typically amounting to several million dollars, for the most part due to the complexity of the issues in dispute as well as the scale of the amounts at stake and the vigorous manner in which class actions are therefore defended, as defendants seek to create litigation risks that can be leveraged to minimise their ultimate financial liability.

1.12 In some cases plaintiffs with their lawyers also seek the support of third party litigation funders, whose importance in class actions was recognised by the Parliamentary Joint Committee:

> Litigation funding too, provides a way for representative plaintiffs and class members to meet the costs of litigation. These costs include their own legal costs and, in the event of an unsuccessful outcome, the defendant's legal costs. When litigation funders pay lawyer's [sic] fees and indemnify representative plaintiffs for adverse costs, it significantly changes the viability of class actions under Australia's 'loser pays' approach to civil litigation. Litigation funders also potentially close the considerable gap in financial resources between the two sides of a class action,

[5] Morabito, *Submission to Parliamentary Joint Committee* (2020), page 2.
[6] Morabito, *An Evidence-Based Approach to Class Actions Reform in Australia* (2019), *page 11.*
[7] See for example *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842
[8] At page xiii.

> reducing the defendant's ability to defeat the case through superior economic power. Therefore the committee recognises that, in many instances, a class action in Australia may not proceed without a litigation funder [emphasis added].

1.13 There is no doubt about the social utility of litigation funding in facilitating access to justice in many instances. It follows that there is nothing intrinsically objectionable about litigation funders being remunerated for the services they provide and the risks they underwrite in order to facilitate the pursuit of class actions.

1.14 In those circumstances, the real question is how to achieve an overall improvement in the returns to class members, while at the same time balancing the objective of fairly remunerating those who make it possible for class actions to be pursued at all. In our submission that question needs to be considered not only by reference to the infamous and exceptional cases in which there were particularly poor outcomes for class members, but by reference to a consideration of the performance of the class action system overall and with adoption of measures which will improve that system.

1.15 Our primary concern regarding any statutory guarantee of minimum returns to class members is its apparent inflexibility, and the potential for that inflexibility to produce unprincipled, unfair and counterproductive outcomes.

The 70% figure is arbitrary and there is no basis for the selection of that particular percentage

1.16 Unfortunately the Parliamentary Joint Committee's report contains no discussion of how the committee decided upon 70%, as opposed to some other percentage, as being the appropriate level to mandate as a minimum return to class members. The committee itself acknowledged that the proposal for a statutory guarantee "has arisen late in the inquiry", and the only material cited in support of it is an op-ed published in the *Australian Financial Review*.[9] As an apparent afterthought in the committee's inquiry, the policy basis for the proposed statutory guarantee and the selection of the percentage are not explained.

1.17 As noted in the minority report of the Parliamentary Joint Committee:

> Some of the statements in the report are just factually wrong. For example, Liberal members of the Committee have repeatedly cited a supposed proposal 'by some class action law firms and litigation funders to guarantee a minimum return of at least 70 per cent of the gross proceeds to class action members, and recommends the government investigate the best way to implement this floor'. To our knowledge, no law firm or funder has proposed a 70 per cent 'floor'. Rather, in the spirit of compromise, at least one law firm has proposed amendments to the Corporations Amendment (Litigation Funding) Regulations 2020 so that a litigation funder that guarantees a 70 per cent minimum return to plaintiffs would not have to comply with the managed investment scheme rules. If implemented, that proposal would arguably create an incentive for litigation funders to guarantee a 70 per cent minimum return to plaintiffs – but it would not mandate it (contrary to the suggestion by Liberal members).

[9] At [13.61].

1.18 In those circumstances it is perhaps unsurprising that the proposal for a guaranteed minimum 70% return is devoid of substantive analysis or justification.

1.19 The justification for the proposed guaranteed minimum return is the conclusion that current returns to litigation funders are "excessive". That conclusion rests in part on the circumstances of five cases of the many hundreds of class actions which have been settled. Of those five cases, one involved deductions to settlements of less than the proposed cap (and so whatever windfall gain the litigation funder is said to have obtained would be untouched by the proposal) and in one case it is not clear what deductions were ultimately allowed from the settlement. In other words the conclusions of the Parliamentary Joint Committee appear largely to rest on the distribution outcomes of three settlements.

1.20 In reaching its conclusions regarding the "excessive" returns to litigation funders, the Parliamentary Joint Committee also seems to have placed considerable emphasis on the submission of an actuary, Sean McGing who advocated the application of investment and insurance principles in determining the fair and reasonable returns that ought to be paid to a litigation funder.[10]

1.21 Mr McGing stated that "the fair and reasonable returns for a litigation funder should be linked strongly to the level of funding it provides, together with the time horizon and level of risk undertaken".[11] In discussing investment decisions, Mr McGing goes on to state that the "risk-return trade-off states that the potential return rises with an increase in risk. Using this principle, investors associate low levels of risk with low potential investment returns, and high levels of risk with high potential investment returns".[12] A similar statement is made regarding the correlation between levels of risk and the cost of insurance, with insurers associating higher levels of risk with higher insurance costs (that is, higher premiums).[13]

1.22 Mr McGing's theoretical framework lacks any practical application to the circumstances of any actual case involving litigation funding or even application to a worked hypothetical example. What we therefore do not know is the type or range of returns that would actually be justified by the application of investment and insurance principles of risk-reward to a range of different circumstances involving litigation funding. For example, in the hypothetical below, presumably in Case 1 the fair and reasonable returns to a funder would be significantly higher than in Case 2, both in absolute dollar terms and also when expressed as a percentage return on investment.

[10] Sean McGing, *Submission 101* to the Parliamentary Joint Committee.
[11] Ibid, p.3 (section 1.2).
[12] Ibid, p.5 (section 2.2).
[13] Ibid, p.6 (section 2.3).

Hypothetical example 1

	Case 1	Case 2
Investment	$20 million for the plaintiff's legal costs	$5 million for the plaintiff's legal costs
Time horizon	4 years	3 years
Downside risks	$30 million in adverse costs, plus loss of $20 million investment	$6 million in adverse costs, plus loss of $5 million investment
Level of risk	High due to risks and uncertainties in establishing liability and the potential insolvency of the defendant	Low due to strength of liability case and minimal procedural risks

1.23 Further it is plain that the application of Mr McGing's theoretical framework provides no support for the proposed 70% statutory minimum calculated by reference to a percentage of settlement outcomes. His entire approach is to eschew the calculation of an appropriate return by reference to the settlement outcome and focus instead entirely on input costs. In practice such an approach would often lead to returns to class members much less than the proposed 70% of settlement proceeds - indeed *Petersen* one of the cases on which the Parliamentary Joint Committee report relies is just such a case.

1.24 In discussing the possible operation of a mandatory sliding scale[14] for the evaluation of legal costs and funding charges in comparison to the resolution sum, the ALRC considered that it may be "too blunt an approach that does not allow for differences of risk in individual cases".[15] We agree with that assessment and consider that the same comment can be made about the proposed statutory guarantee. One of the main reasons why the approach is too blunt is that it is not possible to predetermine or predefine what may be fair and reasonable in the wide-ranging circumstances of different cases.

1.25 Judges supervising class actions and considering whether to approve settlements are best placed to form judgments about what is fair and reasonable in these wide-ranging circumstances. Far from simply rubber-stamping the distribution of settlement proceeds put forward by the parties in class actions, it is abundantly clear that judges give real and serious consideration to the fairness of proposed distributions. Increasingly this occurs with the assistance of independent contradictors[16] whose role it is to advocate the interests of class members. In some cases this has resulted in judges disapproving settlements or encouraging the parties to put forward an alternative allocation of settlement funds. In other cases, judges have refused to

[14] A sliding scale is similar to the proposed statutory guarantee of minimum returns, except that the sliding scale provides for a range of minimum returns depending on the size of the resolution sum.
[15] ALRC Discussion Paper, [5.70].
[16] Even in cases where it was apparent that the plaintiff's lawyer and funder misled the Court, an independent contradictor has assisted the Court to uncover and where possible remediate the consequences of unlawful or improper conduct: see for example the Banksia Securities fiasco in the Supreme Court of Victoria.

make common fund orders, particularly where it was not in the interests of justice to do so – for example in the Volkswagen class actions (also discussed below).[17]

The wrong denominator is being used to evaluate returns to class members

1.26 In Recommendation 20 the proposed guaranteed return to class members is expressed as a percentage of the gross settlement sum. In other words, the numerator in the equation is the dollar amount that will flow to class members, and the denominator is the dollar amount of the gross settlement sum, and the product is a percentage return. For the reasons discussed below, this is another reason why the proposed minimum guarantee is arbitrary and is likely to lead to unprincipled outcomes.

1.27 Instead the denominator in the equation should be the likely estimate of class members' aggregate losses, or in other words their likely recovery. That is the appropriate benchmark against which the reasonableness and fairness of the amount flowing to class members should be assessed. Again this was addressed by Beach J said in the decision cited above in *Evans v Davantage Group Pty Ltd (No 3)*:[18]

> It is important not to confuse two types of percentages. Let me illustrate by the present case. A fund of 37.4% of the gross settlement sum of $9.5 million is to be set aside for group members. But we know that only 1,244 group members, including 97 who registered after the registration deadline, have registered to participate in the settlement. And on the current arithmetic they are likely to get close to 100% of their claims. Indeed, on one view the current form of the SDS allows them to get more. And it is for that reason that I will discuss later the potential application of the cy-prés doctrine. So the present case is a good example of the fallacious reasoning of those who take headline percentages of gross recoveries from settlement sums and seek to transmute them into the real returns of group members who have taken proper steps to protect their interests by registering their participation in any settlement. Such a class in the case before me are likely to receive close to 100% of their claims plus interest. On any view they will receive much more than 37.4% of their claims plus interest. So, you are dealing with different percentages [emphasis added].

1.28 In order to illustrate the point made by Beach J regarding the inappropriateness of the gross resolution sum being used as the benchmark to evaluate reasonableness of the amounts flowing to class members, contrast the following hypothetical involving two different settlements, assuming that in both cases:

(a) class members receive 100% of their best case damages; and

(b) the Federal Court considers the same dollar amount of legal costs ($10 million) to be reasonable in the circumstances.

1.29 The percentages in brackets in this table are the percentages of the gross settlement sum.

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[17] *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [472]; see generally [280]-[476] for the Court's consideration of the applications made in relation to litigation funding. Maurice Blackburn had conducted three of the five class actions, with the two other class actions being conducted by Bannister Law with a litigation funder (Grosvenor) who sought a common fund order.

[18] [2021] FCA 70 at [65].

Hypothetical example 2A

	Case A	Case B
100% of class members' losses	$15 million (60%)	$30 million (75%)
Legal costs	$10 million (40%)	$10 million (25%)
Gross settlement sum	$25 million (100%)	$40 million (100%)

1.30 Both of these cases ought to be regarded as fair and reasonable even though there are differences in the percentage returns to class members when expressed as a percentage of the resolution sum. Despite class members in both Case A and Case B receiving 100% of their losses, the settlement in Case A would fall foul of the statutory guarantee simply because the percentage of class members' returns in comparison to the resolution sum is 60% instead of 70% or more. In Case B the same amount of legal costs would be acceptable under the statutory guarantee only because of the fortuity that the dollar amount of class members' claims is greater than in Case A.

1.31 If the statutory guarantee were introduced, in Case A presumably it would require a reallocation of funds such that:

(a) class members receive $17.5 million (70% of $25 million) instead of $15 million, with the result that they would receive an arbitrary uplift such that their compensation equals 117% of their actual losses; and

(b) the lawyers would arbitrarily be divested of part of their reasonably incurred costs, such that they receive 75% ($7.5 million) of the costs actually incurred in achieving a settlement for class members.

1.32 As can be seen, unprincipled and unfair outcomes are likely to be produced by the combination of (1) the arbitrary adoption of 70% rather than some other percentage and (2) the use of the gross resolution sum as the benchmark against which the percentage returns to class members are compared. This potential for illogical outcomes is also illustrated by the real world example of the Volkswagen class actions which is discussed at paragraph 1.57 and following below.

1.33 As discussed in this next section, the inappropriate use of the gross settlement sum as the denominator also obscures the reasonableness of the compromises that will inevitably (but often justifiably and reasonably) be made in relation to class members' claims as a result of the risks and uncertainties that confront them.

Class actions are risky and unpredictable, and compromises in settlements are routine

1.34 Compromise occurs in the settlement of almost all litigation, and class actions are no exception. This is of course because litigation is not devoid of risk, and compromises in resolving litigation typically recognise or reflect the fact that the parties face an uncertain outcome to some degree or another and for one reason or another. More

specifically, agreement on financial amounts payable to the aggrieved party is usually influenced by assessments of risk and uncertainty in the litigation. Again, class actions are no exception, and indeed it may be said that class actions carry additional and/or more acute risks in comparison with general commercial litigation.

1.35 The types of risks in class actions can be categorised as follows:

(a) **Liability risks** – in other words, there is a risk that the plaintiff may not be able to establish all matters that need to be proven in order for the defendant to be found liable. These risks are usually amplified in cases involving complex scientific or technical issues, as is often in the case in class actions.

Although a relatively extreme illustration of this issue, one example is the Vioxx class action where the plaintiff established at trial that the Vioxx medication had an increased propensity to cause heart attacks. However on appeal the Full Federal Court found that the plaintiff did not establish that his heart attack had in fact been caused by this increased propensity. The risk that similar findings would be made in respect of many or even most class members appears to have been one of the central reasons why a heavily discounted settlement was later agreed.[19]

(b) **Damages risks** – this is the risk that the plaintiff will fail to prove the extent of the loss and damage that was caused by the contravening conduct, or where different formulations of loss and damage are put forward, that the plaintiff will only succeed on a relatively unfavourable formulation. For example, despite some recent judgments of the Federal Court,[20] the validity of the "event study" methodology for proving loss in shareholder class actions might be said to remain uncertain because it has not yet been considered by an appellate court.

(c) **Procedural risks** – in addition to the types of procedural risks that exist in litigation generally, there are also risks that are unique to class actions; for example the prospect that a "de-classing" order is made pursuant to section 33N of the Federal Court Act, which would bring an end to the pursuit of class members' claims in the aggregated form of a class action.

(d) **Recovery risks** – these relate to the capacity of the defendant to pay any settlement or judgment amount, and include the risk of insolvency and the availability of responsive insurance. In class actions this risk may be amplified due to the quantum of amounts that are normally at stake.

1.36 These types of risks all inform the question of whether a compromise of class members' claims was reasonable in the circumstances of a particular case. Indeed this is why the Federal Court's *Class Actions Practice Note (GPN-CA)* already expressly requires the following factors (among others) to be addressed in any application for settlement approval:

[19] *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447; *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015] FCA 123.
[20] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

(a) the complexity and likely duration of the litigation;

(b) the stage of the proceedings;

(c) the risks of establishing liability;

(d) the risks of establishing loss or damage;

(e) the risks of maintaining a class action;

(f) the ability of the respondent to withstand a greater judgment;

(g) the range of reasonableness of the settlement in light of the best recovery;

(h) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

1.37 It is entirely appropriate for all of these considerations to be taken into account in evaluating whether a settlement, including the amount to be paid to class members, is fair and reasonable in the circumstances. However the Court's ability to do so will be constrained by the introduction of a statutory guarantee of 70%. This is another reason why the denominator in the equation should be the estimate of class members' likely losses, and not the resolution sum. It enables the returns to class members to be evaluated against their likely result, but taking into account the risks confronted by class members and therefore whether the compromise of class members' claims was reasonable in the circumstances.

1.38 In order to illustrate this issue, we develop Hypothetical 2A discussed in the preceding section above – instead of assuming that class members receive 100% of their compensation, we now assume that they receive 70% of their likely recovery. In each case this is due to a variety of risks they respectively face in the pursuit of their claims. In Hypothetical 2A recall that the 100% recovery for Case A was $15 million, while in Case B it was $30 million, so the payments to class members in Hypothetical 2B are 70% of those amounts. Again we also assume that in each case the Court considers that the same amount ($10 million) in legal costs were reasonably incurred.

Hypothetical example 2B

	Case A	Case B
70% of class members' losses	$10.5 million (51%)	$21 million (67%)
Legal costs	$10 million (49%)	$10 million (33%)
Gross settlement sum	$20.5 million (100%)	$31 million (100%)

1.39 While in each of these two cases class members would receive 70% of their actual losses due to reasonable compromises that were made as a result of risks faced by class members, now both cases would fail to comply with the proposed statutory guarantee simply because the amount of reasonable legal costs mean that class

members' returns are less than an arbitrarily defined percentage of the gross resolution sum.

1.40 We also illustrate this problem with a more detailed description of circumstances in the following hypothetical. Whereas the hypotheticals discussed above involved legal costs but no litigation funding costs, this hypothetical also introduces litigation funding into the scenario.

Hypothetical example 3

A mass tort class action arising from mismanagement of a dam in a Tasmanian city settles for $100 million inclusive of legal costs and funding fees.

The class action was brought on behalf of residents and businesses in two separate geographical areas (Area A and Area B) that experienced major flooding as a result of the alleged mismanagement of the dam. At the time the class action was commenced, the plaintiffs' lawyers estimated that the loss and damage suffered by class members in Areas A and B was in each case $75 million, with a combined total of $150 million.

Shortly before trial, the defendants served an expert report which convincingly demonstrated that Area A did not experience flooding as a consequence of the negligent operation of the dam, but instead due to unusually heavy rainfall in that area which would have resulted in flooding regardless of the manner in which the dam was operated. As a result, the plaintiffs were only able to establish that Area B was affected by the mismanagement of the dam, and soon after service of the defendants' expert evidence a settlement was agreed on the basis that residents and businesses in Area B (but not Area A) will receive compensation.

Legal costs up to the point of settlement were $20 million, while a litigation funder sought payment of 15% of the gross proceeds.

Under the terms of the settlement, it was proposed that those in Area A receive $0 compensation (consistently with the facts established by the expert evidence), with the entirety of the net settlement funds ($65 million) to be paid to residents and businesses in Area B, who would therefore receive 87% of their estimated $75 million losses.[21] The 87% return to class members was considered to be a reasonable compromise in light of the overall litigation risks faced by class members in Area A, including the prospect of a lengthy trial and all of the attendant risks and uncertainties.

The following table shows how the gross settlement sum is to be allocated among class members, the lawyers and funder, contrasting the actual scenario at the time of settlement with the scenario predicted by the lawyers and funder at the time the class action was commenced.

[21] Net proceeds of $60 million equal 80% of the $75 million in loss suffered by residents and business in Area B.

	Predicted at commencement	Actual settlement
Resolution sum	$200 million	$100 million
Legal costs	$20 million	$20 million
Funding costs (15% of gross)	$30 million	$15 million
Net funds to class members	$150 million	$65 million
Percentage return to class members	75%	65%

1.41 As in Hypotheticals 2A and 2B above and also in the *Evans v Davantage* decision discussed above, presumably in this situation there would be some type of reallocation of the settlement funds if a statutory guarantee were applicable. However the practical operation of the guarantee is unclear. Should the $5 million in funds be reallocated from the lawyers or from the funder, or both? Should the reallocated funds flow to residents and businesses only in Area B, thereby boosting their returns from 87% to 93% of their actual losses? Or should the $5 million be allocated to those in Area A, giving them 7% of their actual losses[22] even though the expert evidence established that they suffered no loss as a result of the allegations in the class action?

1.42 As an aside, it can also be seen that in the initial predicted outcome, the litigation funder would have received a funding commission that is twice as much as the actual commission upon settlement ($30 million compared to $15 million). Ironically if the predicted outcome had in fact occurred, the statutory guarantee would have allowed the funder to receive $30 million, whereas in the actual outcome the statutory guarantee would not allow the funder to receive $15 million despite the funder's investment being the same in the predicted and actual scenarios. This also illustrates how the proposed statutory guarantee would misfire in achieving its aim of promoting greater proportionality in the manner contemplated by the Parliamentary Joint Committee.

Unprincipled outcomes if there is an inflexible statutory guarantee

1.43 The apparent justification for the statutory guarantee in Recommendation 20 is the claim that litigation funders are charging excessive fees for the services they provide. As noted above this claim is made without anything approaching proper analysis. Notwithstanding, self-evidently the statutory guarantee would also apply in cases that do not involve a litigation funder. That is, the statutory guarantee would also apply in cases being conducted by the lawyers on a conditional fee basis.

1.44 There is a perversity in this outcome in circumstances where the Parliamentary Joint Committee report rejects the implementation of contingency fees for lawyers, which would allow them to charge a percentage of the settlement outcome.

[22] 7% equals $5 million compared to $75 million.

1.45 Unlike funding costs, currently in Federal Court class actions there is only one way that legal costs can be calculated; that is, on the basis of hourly rates (plus disbursements such as barrister and expert fees), with the result that the legal costs incurred are a direct product of (and are therefore reflective of) the amount of work that needs to be done in order to conduct the class action in class members' interests. If costs are only permitted to be charged on an hourly basis, then imposing a cap on the basis of a proportion of settlement amounts makes no sense.

1.46 In a number of judgments in which the proportionality of legal costs was considered, the Federal Court has also recognised that the concept of proportionality involves more than simply comparing the amount payable to lawyers (or funders) with the overall resolution sum: *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 at [99] and *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [148]. In *Blairgowrie Trading Ltd v Allco Finance Group Ltd* [2017] FCA 330, Beach J said at [181]:

> But what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending $0.50 to recover an expected $1.00 may be proportionate if it is necessary to spend the $0.50. In the former case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved. Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not sufficiently answer that question [emphasis added].

1.47 Instead of mandating a statutory guarantee that would require the Federal Court to function on such a "simplistic basis" in some circumstances, in evaluating the reasonableness and proportionality of legal costs (and funding commissions) the Court should be able to take account of other relevant factors that inform a wholistic and case-specific assessment of what is reasonable and proportionate. In considering the reasonableness of legal costs, these factors would include:

(a) the manner in which the case was defended and the procedural history of the class action – for example, a relatively high degree of interlocutory disputation is likely to increase legal costs, and even more so if there are interlocutory appeals;

(b) the stage the proceeding reached before it was resolved – in particular a settlement that is agreed five years after commencement of a class action and

only after a lengthy trial would, logically and all else being equal, justify higher legal fees than a case that resolved after two years and before trial;

(c) the complexity of the issues in dispute, including the extent to which there is a need for technical / expert evidence;

(d) the nature of the dispute – for example a case involving numerous unrelated defendants is likely to increase legal costs.

1.48 The concept of proportionality therefore requires broader consideration of the reasonableness of legal costs than a simplistic comparison of the numerical proportion of those costs relative to the gross resolution sum. The Federal Court's *Class Actions Practice Note (GPN-CA)* already requires these factors to be considered in the context of settlement approval, however the statutory guarantee would restrict the Court's capacity to give effect to them in deciding whether a settlement is fair and reasonable and ought to be approved.

Proportionality is a two-way street

1.49 One of the Parliamentary Joint Committee's principal criticisms of litigation funding costs was that these costs were said to be at odds with the risk-reward principles used in corporate finance and insurance.[23] Relying heavily on the submission of an actuary, Sean McGing as noted above, the overall tenor of the committee's conclusion was that litigation funding charges need to be principled in the way they are calculated and proportionate to the investment made: by contrast, the committee considered that litigation funders receive remuneration that may be unprincipled because the most common practice historically has been to calculate funding costs as a percentage of the resolution sum, with the result that funding costs have been disproportionately high in comparison to the returns that would reflect the types of financial risks assumed by funders.

1.50 However if the impetus for change is that funding costs should reflect principles of risk-reward and thereby result in funding costs that are proportionate to the risks actually undertaken by the funder, then in the interests of fairness and reasonableness this must be a two-way street.

1.51 Not all litigation carries the same level of risk to a funder when analysed through the type of prism put forward by Mr McGing. The difficulty with a statutory guarantee of minimum returns is that it could operate arbitrarily to restrict returns to litigation funders that in fact reflect the risks they took. This is because it is conceivable that a reasonable risk-based return to a litigation funder, when taken together with reasonable legal costs, could result in an overall deduction that is greater than 30% of the gross resolution sum. In this regard we note again the observation made above to the effect that Mr McGing's theoretical framework has not been applied to the circumstances of any actual case involving litigation funding or to a worked example, so we do not know the range of amounts that might ordinarily be considered to be reasonable deductions for payment of a litigation funder.

[23] Parliamentary Joint Committee at [13.41]-[13.49].

1.52 The potential for unfair and unprincipled outcomes is illustrated by the following hypothetical scenario.

Hypothetical example 4

After revelations at the banking royal commission, a class action against a major domestic financial services company is initiated in relation to fraudulent fees and commissions. The class members are thousands of Australians whose investments are held in funds managed by the company.

Despite the illegalities exposed in detail by the royal commission, the financial services company mounts a vigorous defence of the class action, pursuing interlocutory appeals and using tactics of delay and attrition. Without litigation funding, the law firm would not have had the capital and would not have been able to take on the risk of running the case on a no-win-no-fee basis.

During the course of the litigation, the company enters voluntary administration due mainly to its mounting revenue problems resulting from reputational damage at the royal commission, and soon after it is placed into liquidation. Despite a clause in the funding agreement which entitles the funder to cease funding the action upon the defendant entering external administration, the funder elects to continue its funding for the benefit of class members.

After a protracted legal battle involving a trenchant defence over the course of four years, during mediation it emerges that a responsive insurance policy provides cover of only $60 million, and that no other funds would be available to meet any judgment or settlement. The case is settled for that amount, and by that stage the plaintiff's legal costs are $16 million, 75% of which ($12 million) had been paid by the litigation funder.

At the settlement approval hearing the litigation funder seeks approval of funding charges. In hearing that application the court engages an independent referee to provide expert actuarial evidence which analyses the risk-reward calculus faced by the funder. The referee concludes that a $12 million return on investment was appropriate in light of the investment made and risks undertaken, plus reimbursement of the amount invested.

The total deductions in this instance would be $28 million, resulting in net returns to class members of 53.3%, or $32 million. Without the class action, investors are likely to have received nothing from the liquidation of the company due to the priority of payments to other creditors.

The application of a minimum guarantee of 70% would result in $10 million being arbitrarily reallocated from the lawyers and/or funder to class members, even though an actuarial expert considered the funding deduction to be a fair reflection of the funder's investment and risks and the lawyers' fees were reasonably incurred in pursuing the claim.

1.53 The adoption of a statutory guarantee would result in the same vice that Mr McGing argues against, namely that the returns to funders are, at least at one end of the spectrum, defined by reference to a percentage of the resolution sum, and are therefore not reflective of the risk-reward principles that he espouses.

Unintended consequences may harm class members' interests

1.54 Another problem with the proposed statutory guarantee is that it may have unintended consequences that undermine the interests of class members. The most obvious of these counterproductive consequences is that the statutory guarantee could have the effect of imposing a cap on a plaintiff's "war chest", thereby restricting the capacity of lawyers to act effectively in class members' interests. There is of course also the likelihood that defendants will seek to exploit this limitation. This is illustrated by the following hypothetical.

> **Hypothetical example 5**
>
> A class action is brought by members of a managed investment scheme in relation to misleading statements made in the prospectus.
>
> Members of the MIS invested a total of $30 million, and the total estimate of class members' losses is therefore $30 million. This would obviously be known by the defendant.
>
> The operation of the 70% statutory guarantee would mean that legal and funding costs must be $9 million (that is, 30% of $30 million) or less. This would obviously also be known by the defendant.
>
> The defendant engages in tactics of delay and attrition, including multiple interlocutory disputes and appeals from interlocutory decisions, as well as unsuccessful and unmeritorious "satellite litigation" brought against the plaintiff's lawyers as a result of alleged misuse of confidential information. As a result, shortly before the commencement of the trial and without yet having been able to secure a result for the plaintiff and class members, the plaintiff has already incurred $9 million in legal costs.

1.55 The question that arises in this situation is what the plaintiff and lawyers are supposed to do as a result of their war chest having been exhausted. Could the plaintiff's lawyers be forced to continue providing legal services on a gratuitous basis? Or would it have the practical effect that the plaintiff and class members abandon their claim because the lawyers will no longer act without being remunerated? The potential for conflicts of interest between lawyers and class members in this situation is also self-evident.

Not all settlements involve an "all in" gross resolution sum

1.56 The most common type of class action settlement is an "all in" settlement involving payment of a global resolution sum that includes legal costs and, if applicable, funding charges. However not all settlements are structured in this way, and it is unclear how a statutory guarantee of a 70% return to class members would operate in the context of different settlement structures. Here we provide two examples of alternative settlement structures among our recent cases.

Volkswagen diesel emissions class actions

1.57 This group of class actions was settled on the basis of a "plus costs" structure as follows:[24]

(a) Payment to class members: the defendants agreed to pay between $89 million and $127.1 million solely for class members, with the final amount within that range to be calculated by reference to the number of vehicles in respect of which class members registered claims and were found to be eligible according to specified criteria in the settlement scheme. In discussing the entitlements of class members to share in the final sum, the Federal Court noted that:[25]

> The applicants were genuinely at risk of coming up short and failing to prove any loss. Furthermore, there was considerable force in the proposition that, ultimately, such loss as could be proven was no more than about 10% of the market value of the affected vehicles as at September/October 2015. If that were to be the result of this very serious and expensive forensic contest, then the settlement which has been agreed compares very favourably indeed with that postulated result [that is, 10% of the market value of the vehicles in late 2015].
>
> In the end, I had no difficulty at all in accepting that the financial terms of the settlement were fair and reasonable having regard to the interests of the class members as a whole. In addition, given the care with which the comparative merits of individual claims have been considered and resolved in the methodology ultimately agreed upon, I was also firmly of the view that the settlement was reasonable as between individual group members.

(b) Payment of costs: on top of whatever amount was finally determined to be payable to class members, the defendants additionally agreed to pay the plaintiffs' legal costs as well as settlement administration costs, with the amount of those costs to be determined by the Court, informed by evidence from an independent costs expert. In discussing the reasonableness of financial aspects of the settlement, the Federal Court noted that:[26]

> Given that the respondents have agreed to pay the applicants' legal costs and certain other expenses in addition to the Aggregate Settlement Sum [which is defined as being *exclusive* of legal costs], the individual group members' entitlements will not be reduced by the deduction of any amount to cover those costs and disbursements.

1.58 In circumstances where the amount for class members and the amount for legal costs were separated and there were therefore no deductions from the sum payable to class members, it is unclear how a minimum return to class members would operate. Would the statutory guarantee operate to require the two amounts be added together to make a "total resolution sum" simply in order to assess whether class members were to receive more than 70% of that total resolution sum, regardless of the settlement structure and other circumstances and features of the case? Although the settlement administration is ongoing and therefore at the present time there remain some

[24] *Cantor v Audi Australia Pty Ltd and Others (No 5)* [2020] FCA 637.
[25] *Casey v DePuy International Ltd* [2012] FCA 1370 at [231]-[232].
[26] At [208].

uncertainties about final figures, it appears likely that the total costs would be slightly more than 30% of the reverse-engineered total resolution sum.

1.59 In light of the comments of the Federal Court to the effect that (1) class members' entitlements compared "very favourably indeed" to such losses as they might (despite significant risks) be able to prove and (2) individual class members' entitlements would not be eroded by any deductions for legal or other costs, would the minimum guarantee nevertheless have mandated that there be some sort of reallocation of funds, such that class members' already favourable entitlements be boosted at the expense of the lawyers recovering their reasonable legal costs, simply due to the operation of an arbitrary 70% rule?

DePuy knee implants class action

1.60 This case settled on the basis of a "process settlement" that did not involve payment of any global resolution sum. Rather, the case was settled by the parties agreeing on the process by which class members' injuries and compensation entitlements would be individually assessed, and with class members then receiving whatever amount they were individually assessed as being entitled to receive.

1.61 Legal costs were to be paid partly by the defendants directly, with the balance being paid by individual class members. Some of those legal costs related to work done for the benefit of the class as a whole, while other costs were referable to the work done to prepare individual claims.

1.62 It is unclear how any statutory guarantee would operate in this circumstance, particularly given that:

(a) the settlement was approved by the Federal Court in December 2012;

(b) although many individual class members' claims have been assessed and finally paid by the defendants, the court-approved settlement protocols allow for claims to be made up to eight years after implementation of the knee implant in question, with the result that some claims are still ongoing for this and other reasons.

1.63 In other words, some 9.5 years after the settlement was approved, we still do not have final figures relating to the aggregate quantum paid / payable to class members or the total amount of legal costs. As such, it is still not possible to determine the final percentage returns that will have been or are to be paid in aggregate to class members, nor do we have final figures for total legal costs. There is also the added complication that individual class members can choose their own lawyer to prepare their individual claim in the settlement, so a number of different law firms have acted on behalf of class members. If a statutory guarantee were to be introduced, in those circumstances would it be necessary to hold back compensation payments of all class members for ten or more years until these final amounts are known, such that any necessary reallocation or adjustment of payment proportions can be undertaken at a later time in order to ensure compliance with the statutory guarantee?

Non-uniformity across class action jurisdictions

1.64 Representative proceedings can now be brought not only in the Federal Court pursuant to Part IVA of the Federal Court Act, but also in four of the six state Supreme Courts:

(a) Part 4A of the *Supreme Court of Victoria Act 1986* (Vic), which came into operation in January 2000;

(b) Part 10 of the *Civil Procedure Act 2005* (NSW), which came into operation in March 2011;

(c) Part 13A of the *Civil Proceedings Act 2011* (Qld), which came into operation in March 2017;

(d) Part VII of the *Supreme Court Civil Procedure Act 1932* (Tas), which came into operation in September 2019.

1.65 In addition, the *Civil Procedure (Representative Proceedings) Bill 2019* (WA) was introduced into the WA Parliament on 26 June 2019 – although this bill lapsed due to the proroguing of Parliament before the last state election, it evinces an intention to enact a class actions procedure in that state's Supreme Court. South Australia and the two territories are therefore the only Australian jurisdictions that are yet to enact (or pursue the enactment) of a class actions regime. All of the four existing state regimes as well as the proposed WA regime were substantially modelled on Part IVA of the Federal Court Act. With only relatively minor modification, they therefore replicate almost all of Part IVA. And with occasional exceptions, class actions jurisprudence has developed in a largely consistent manner across all of the Australian class action regimes including the federal regime. Assuming the relevant state court has jurisdiction to hear a matter, from a procedural perspective there are therefore no real drawbacks in commencing a class action in a state court in preference to the Federal Court.

1.66 While the Part IVA regime is the oldest of all of the representative proceeding jurisdictions and, principally for this reason, has been the most frequently used among all of the Australian class action regimes, more recently the state-based analogues of the federal regime have increasingly been accessed by claimants seeking mass redress. Importantly in this regard, the state courts have jurisdiction to hear many of the types of cases that have (historically) tended to be pursued under the federal regime.

1.67 In our submission if a statutory guarantee were to be introduced in the federal regime, there is an obvious potential for there to be inconsistent outcomes in the federal and the various state class action regimes.

The proposed cap will reduce access to justice

1.68 Although the evidence suggests that the class action regimes have resulted in average returns to class members of around 70%, it is also the case that a not insignificant proportion of class actions have resulted in returns to group members of

less than 70%. As the above analysis demonstrates this is generally not to do with "windfall" profits of litigation funders but the function of a range of matters including:

(a) the complexity of class action litigation;

(b) the approach of defendants and defendant lawyers in running up costs;

(c) the inability of lawyers to charge fees on a percentage basis;

(d) the fact that funded cases involve a litigation funder and a lawyer who must both receive a return;

(e) the fact that 50% of cases settle for $36 million or less.[27]

1.69 If the proposed minimum guarantee is introduced the inevitable consequence will be a substantial reduction in the number of cases brought by claimants and a likely overall reduction in amounts payable to class members. A case which might settle for less than $36 million will generally be uneconomic for a third party litigation funder to fund in circumstances where defendants will ensure costs eat up most if not all of the 30% cap. Only a few law firms will have the capacity or risk appetite to take on such cases on a conditional fee basis and so those cases will often simply not proceed. Importantly the effect on cases will not be limited to those that do settle for less than $36 million but for those cases which might. The upshot being fewer cases and a likely reduction in overall compensation to class members (because those cases which settle for higher amounts are much less likely to bring the proposed statutory guarantee into effect in any event).

1.70 Indeed given the genesis of the Parliamentary Inquiry in a sustained campaign by business interests to restrict and reduce the incidence of class actions, it is likely this was the real motivation for the proposed recommendation rather than any genuine concern for the interests of class members.

Conclusion and alternative proposal

1.71 A 70% statutory guarantee should not be introduced in its current form. Instead the government should take steps to implement various of the ALRC's recommendations that are either directly or indirectly aimed at improving returns to class members. These include:

(a) **Recommendation 3** – expressly empowering the Federal Court to make common fund orders

(b) **Recommendation 8** – enabling the Federal Court to appoint a referee to assess the reasonableness of legal costs

(c) **Recommendation 14** – expressly empowering the Federal Court to reject, vary or amend the terms of litigation funding agreements

[27] Morabito, *An Evidence-Based Approach to Class Actions Reform in Australia* (2019), page 10.

(d) **Recommendation 17** – enabling lawyers in class actions to enter into percentage-based fee agreements

(e) **Recommendation 19** – expressly empowering the Federal Court to reject, vary or amend the terms of any percentage-based fee agreements

1.72 The policy rationale for these recommendations was discussed in detail in the ALRC's report and we therefore do not intend to summarise or repeat the issues in detail. However we reiterate our view that the best way to improve returns to class members is to promote competition among funders and lawyers. In the three years between the Full Federal Court's decision in *Money Max Int Pty Ltd v QBE Ltd* in 2016 and the High Court's decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall*[28] in December 2019, common fund orders had the effect of putting downward pressure on litigation funding charges largely as a result of the increased competition in the funding market. The availability of percentage-based fee agreements (as recommended by the ALRC for the Federal Court, and as is now already the case in the Victorian Supreme Court[29]) will operate to increase competition in litigation funding even further, principally because it will enable law firms to compete with third party litigation funders. These measures will improve outcomes for class members far more effectively than the proposed statutory guarantee. The introduction of common fund orders and percentage-based fee agreements will of course also give the Federal Court direct control over the deductions to be made from any settlement sum.

1.73 Regardless of whether common fund orders again become permissible and regardless of whether percentage-based fees become allowable in the Federal Court, we also note the obvious point that expressly empowering the Federal Court to reject, vary or amend the terms of litigation funding agreements will enable the Court to ensure that any deductions for litigation funding costs are proportionate (in the sense contemplated by the Parliamentary Joint Committee). If introduced, such an express power would enable the Federal Court to consider the types of matters raised at a theoretical level by Mr McGing, and thereby ensure that returns to class members are fair and reasonable in light of all of the circumstances of a case, including:

(a) the resolution sum itself, and the circumstances that led to that resolution sum as well as the percentage returns to class members when weighed against their likely recovery;

(b) the investment made by litigation funders and the risks they underwrote; and

(c) the legal services provided by lawyers and the circumstances in which those services were provided.

[28] [2019] HCA 45; (2019) 374 ALR 627.
[29] Section 33ZDA of the *Supreme Court of Victoria Act 1986* (Vic) provides for the Court to make a "group costs order".

2. CONSULTATION QUESTION 2: How would the suggested mechanism interact with the class action system (including court processes) and the litigation funding regime?

2.1 Although settlement is the most common means of resolving a class action in favour of class members and very few cases have proceeded to judicial determination of class members claims or aggregate damages, the mechanism will need to be able to be applied regardless of how a class action is resolved.

2.2 If a new provision were to be introduced, in our view it should operate at the time that the Court is making orders for the resolution of a class action. This would mean that the Court is able to be appraised of all relevant matters and specifically the issues listed in paragraph 1.73 above.

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

3.1 As we noted above in response to Consultation Question 1, the 70% figure is arbitrary and the selection of that percentage is not discussed, explained or justified in any way in the Parliamentary Joint Committee's report.

3.2 There should be reticence to adopt any particular percentage (whether 70% or some other percentage) in the absence of rigorous economic analysis establishing the appropriateness of the percentage. This is particularly the case because the proposed guarantee would be uniformly applied in all class actions, not only shareholder class actions, and as noted above there is a wide array of circumstances that impact on the reasonableness of deductions from the gross settlement sum. The percentage that is selected needs to be suitable across a range of different cases and unlikely to cause unprincipled and unfair outcomes in the overwhelming majority of cases.

3.3 In the absence of any economic justification for the 70% level and despite our observations above to the effect that the resolution sum is the wrong denominator, in our submission if the returns to class members are to be expressed as a percentage of the resolution sum then the percentage should be set significantly lower than 70%. If the percentage were fixed at 51% it would have the effect that class members receive a majority of any gross resolution sum while at the same time being more likely to avoid unprincipled outcomes in a greater number of cases.

4. CONSULTATION QUESTION 4: Is a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases?

4.1 Despite initially putting it forward as a proposal in its Discussion Paper, the ALRC did not recommend any sliding scale for returns to class members. As noted above the ALRC considered that this would be "too blunt an approach".

4.2 The difficulties with a graduated approach are that:

(a) a straightforward case is not necessarily a small case, and vice versa, so it is inappropriate to use a graduated approach where the percentage returns increase or decrease in proportion to the amount of the resolution sum;

(b) it is almost impossible to define what may be considered to be a straightforward case, and in any it is rarely the case that class actions are straightforward.

5. CONSULTATION QUESTION 5: How would a graduated approach to guaranteed returns for class members be implemented? This can include how a decision is made that a particular case is straightforward, how cases could best be classified to determine the minimum return applicable to a particular case and at what stage of an action such a determination should be made.

5.1 The best way to ensure a truly graduated approach is not to predefine a particular percentage that would be applicable in particular circumstances, but rather to give the Court express power to fix a funding commission rate and approve legal costs that are appropriate to the circumstances of the case in question.

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

6.1 The proposal for a guaranteed minimum percentage returnable to class members is bad economics and bad law. Bad economics because it represents a blunt intervention into a market where there is no widespread evidence of market failure and, beyond mere assertion, no evidence of widespread “windfall profits’’. Bad law because it restricts access to justice and leads to perverse and capricious outcomes. An approach which fosters competition, as it does in most markets, is the surest and most economically rational way to drive down prices. An approach which introduces contingency fees and provides statutory certainty for common fund orders is the surest way to increase access to justice whilst guaranteeing court supervision in the interests of class members.

APPENDIX A

Maurice Blackburn is a plaintiff litigation firm established in 1919 which now has more than 1,000 staff who provide advice and legal assistance to thousands of clients in all mainland states and territories each year.

In addition to specialised practice areas in various areas of personal injury law as well as employment and industrial law and superannuation and financial advice disputes, Maurice Blackburn has the largest and most experienced class actions practice in Australia. We currently act in around 20 class actions that are active and ongoing at various procedural stages (including settlement administration) in various Australian jurisdictions including the Federal Court of Australia.

Since the establishment of our class actions practice, we have acted in more class actions than any other plaintiff law firm,[30] and we have obtained more than $3.6 billion in compensation for class members in a range of different class actions including shareholder and investor cases, product liability claims, consumer actions, cartel cases and mass tort claims. Our cases have included:

1. two class actions arising from the Black Saturday bushfires in Victoria, which settled for $494.6 million and $300 million respectively;

2. the class action arising from the Queensland floods, one half of which settled for $440 million;

3. a class action relating to the DePuy hip implants which settled for $250.8 million plus interest;

4. numerous shareholder and investor class actions, including the first ever shareholder class action in Australia as well as the first shareholder action that was conducted with support of a litigation funder. Seven of our shareholder / investor class actions have settled for more than $100 million, and we are the only firm to have achieved settlements of shareholder class actions of more than $100 million;

5. the class action against Amcor / Visy arising from the alleged cartel in the cardboard box industry, which settled for $120 million.

Our track record in achieving compensation was estimated in 2017 to account for approximately 70% of all monetary compensation that has been achieved in class actions in Australia.

We have observed and been active participants in the development of class actions practice and jurisprudence since Part IVA of the *Federal Court of Australia Act 1976* (Cth) was enacted more than 29 years ago. We acted for the representative plaintiffs in the earliest class actions that involved third party litigation funders and since then we have worked with numerous domestic and international litigation funders as the funding industry and funding practices developed over time, while also conducting many cases on a conditional fee basis.

[30] V Morabito, "The First Twenty-Five Years of Class Actions in Australia" *Fifth Report: An Empirical Study of Australia"s Class Action Regimes* (2017), page 35.