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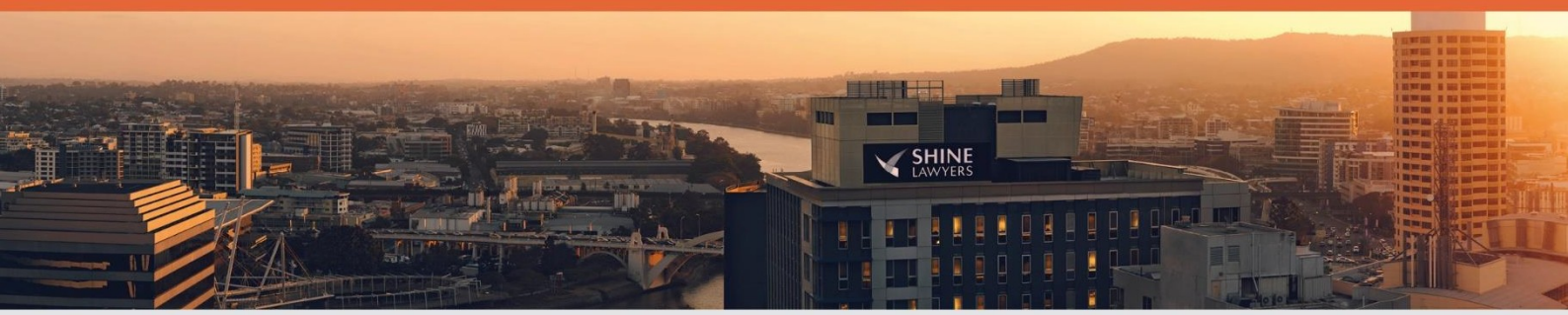


Submission to Treasury and Attorney-General's Department

Guaranteeing a minimum return of class action proceeds to class members

05 July 2021

SHINE LAWYERS
RIGHT WRONG.

Privileged and confidential

Consultation Paper – Guaranteeing a minimum return of class action proceeds to class members

Email MCDLitigationFunding@treasury.gov.au

Mail Manager
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

Introduction

Shine Lawyers appreciates the opportunity to provide comments and feedback to the Treasury and Attorney-General's Department, following a recommendation by the Parliamentary Joint Committee on Corporations and Financial Services (the **PJC**)[1] to consult in regard to '*reasonable, proportionate and fair litigation funding fees*'.

[1] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry*.

Executive Summary

It is Shine Lawyers' position that the issue of fair, reasonable and proportionate returns to group members in funded class action litigation is already dealt with appropriately by the Courts.

We are of the view that the federal recognition of percentage-based fee arrangements (often referred to as 'contingency fees') would be an immediate improvement on the present class action regime, as the resulting increased competition in the class action industry will result in naturally greater returns to group members from resolution sums through market pressure.

An alternative or additional measure that would also improve competition and group member returns is to provide the Court with the power to make common fund orders at any stage of litigation by amending Part IVA of the *Federal Court of Australia Act 1976* (Cth). Such amendments will promote 'open class actions' and return stronger supervisory powers to the Court over litigation funding commission rates.

It is Shine Lawyers' overarching position that any statutory reform ought to empower the Court to ensure fair, reasonable and proportionate rates of return to group members, rather than imposing a 'hard and fast' cap. The risk with a hard and fast cap is that stakeholders will just work to that cap rather than working to maximise returns to group members. Shine Lawyers approach is aimed at encouraging a system of factorial and forensic analysis of fair and reasonable returns to group members.

In response to the PJC's Recommendation 20 and specifically the proposal of a 70% statutory minimum rate of return to group members, it is Shine Lawyers' strong position that such a consideration is '*not based on a consideration of economic returns or economic efficiency in a conventional regulatory sense,*'[2] and is liable to:

a) reduce competition in the litigation funding market;
b) affect the commerciality of claims valued at less than $50 million;
c) introduce ulterior factors into the processes of litigation, such as strategic interlocutory disputes designed to force parties into unfavourable settlements when approaching the 30% cap on returns; and
d) ultimately impede Australians' access to justice.

Instead, Shine Lawyers proposes that, if Government is to enforce a statutory minimum rate of return to group members, it ought to be no higher than 51%, limited to shareholder class actions only, and should be enacted as a rebuttable presumption presided over by the Court.

Shine Lawyers does not consider a graduated approach will encourage greater minimum returns to group members, as the negative effects identified above are likely to be exacerbated by broad brush attempts to predict commission rates and group member returns upon factors such as length or complexity.

Whatever statutory reform may be enacted, it should be grandfathered otherwise existing class actions before the Courts will likely come to a grinding halt, unduly prejudicing applicants and group members.

Ultimately, it is our position that appropriate and effective statutory reforms seeking to 'soften the curve' of excessive funding commissions are not those that bluntly and arbitrarily introduce hard limits, but rather those that facilitate competition, promote transparency, and empower the Court's oversight. In other words, 'a market-based solution'[3], facilitated and managed by increased Court powers and control.

[2] PriceWaterhouseCoopers Report, *Models for the regulation of returns to litigation funders*, 16 March 2021, 4.

[3] Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements* (13 November 2013) 30.

Factors leading to Recommendation 20 of the PJC Report

Recommendation 20

'The committee recommends the Australian Government consult on:

- *the best way to guarantee a statutory minimum return of the gross proceeds of a class action (including settlements);*
- *whether a minimum gross return of 70 per cent to class members, as endorsed by some class action law firms and litigation funders, is the most appropriate floor;*
- *whether a graduated approach taking into consideration the risk, complexity, length and likely proceeds of the case is appropriate to ensure even higher returns are guaranteed for class members in more straightforward cases*.'[4]

Before addressing the Consultation Questions, we wish to address the apparent origins of Recommendation 20, namely the PJC's desire for an alternative regime to the current '*percentage-based fess that contribute significantly to the windfall returns achieved by litigation funders*.' [5]

As was made clear in the PJC's report into the 'Litigation funding and the regulation of the class action industry' Report[6] (**PJC Report**), the Committee is of the view that, '*the difference between the capital a litigation funder has put at stake and the profit made is often unreasonable, disproportionate and unfair*.'[7] The PJC Report outlined the possible remedies to this concern, as read from the 101 submissions received by the PJC, as well as those elaborated upon by the speakers at the Committee's public hearings on 13, 24, 27 and 29 July, and 3 August 2020, namely:

1) The argument that '*it is better for class members to get 50 per cent of something with the involvement of a litigation funder, as opposed to 100 per cent of nothing without the involvement of a litigation funder;*'[8]
2) The use of *'empirical analysis of past cases…related suggestions that estimating a litigation funder's returns should consider the returns and success rate of the funder's portfolio of cases;*'[9]
3) The proposal for a *'cap on the percentage of the settlement available to litigation funders;*'[10]
4) The alternative of a *'sliding scale… [*where*] the percentage limit reduces as the size of the class action increases;*'[11] and
5) Finally, the adoption of *'investment and insurance risk-return … and net present value methods … intend for a litigation funder's return to be commensurate with the risk taken.'*[12]

However, the PJC Report expressed reservations in respect of each of the above proposed alternatives to percentage-based commissions,

1) Concerning an argument for the status quo, '*the committee considers that such arguments ignore the possibility that class members could receive substantially more than 50 per cent of something, with litigation funders still receiving a return that is reasonable, proportionate and fair for the risks they have taken*;'[13]

[4] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* [13.62].
[5] Ibid [13.53].
[6] Ibid.
[7] Ibid.
[8] Ibid [13.54].
[9] Ibid [13.56].
[10] Ibid [13.57].
[11] Ibid [13.58].
[12] Ibid [13.59-60].
[13] Ibid [13.54].

2) Concerning the argument that the Courts consider empirical analysis of past cases in determining fair returns to funders, *'it is useful to have such aggregate empirical information available. The committee considers that such empirical aggregate information should not override the merits of an individual case and fair outcomes for class members and defendants*;'[14]
3) Concerning the implementation of a cap on percentage-based fees*, 'small-dollar value class actions would be uneconomic for litigation funders, while funders may still make windfall profits on large class actions*;'[15]
4) Concerning the use of the alternative 'sliding scale' fees*, 'the committee notes that the Productivity Commission did not recommend a sliding scale for litigation funders because the types of services provided are different to those provided by law firms*;'[16] and
5) Concerning the adoption of actuarial principles used in investment and insurance risk-return, *'the committee has not received sufficient evidence to quantify what an appropriate risk-based premium should be in order to achieve outcomes for both class members and litigation funding returns that are reasonable, proportionate and fair. The committee notes that the implementation of such an approach would be complex and demanding for the Federal Court.'*[17]

We note the above so as to highlight what was submitted to the PJC by many organisations, firms (both plaintiff and defendant) and individuals, that there is no 'one-size fits all' approach to ensuring fair and reasonable group member returns in Federal Court class actions. Instead, the multiple alternative measures to reform funder commissions considered and subsequently dismissed by the PJC are emblematic of the difficulties of attempting to regulate the entire litigation funding industry in a field of law that is inherently nuanced and individualised on a case by case basis.

It is within this context that the PJC Report considered the belated proposal for a '*guarantee that class action members receive a statutory minimum percentage of the gross litigation funding proceeds*,'[18] from which it is inferred that Recommendation 20 arose.

We now address the Treasury and Attorney-General's Department's Consultation Questions.

[14] Ibid [13.56].
[15] Ibid [13.57].
[16] Ibid [13.58].
[17] Ibid [13.59-60].
[18] Ronald Mizen, *Litigation funding rules on the brink as dissent grows*, in Australian Financial Review, 11 November 2020.

Responses to the Consultation Questions

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

Shine Lawyers responds to Consultation Questions 1 and 2 together for efficiency.

A case for the Status Quo

It is Shine Lawyers' position that the present administration and determination of returns to group members in funded class action litigation is adequately and appropriately handled by the Courts.

Due to their size and complexity, class actions are generally more nuanced than traditional litigation. The administration and settlement of class actions is necessarily more complicated and often requires a bespoke approach from parties and the Court in resolving group members' claims fairly, reasonably, and proportionally,[19] particularly in matters involving third party funding.

Currently, the Court's powers afford it the ability to '*address the duplication of class actions; to stay proceedings; to declass a class action; to grant a respondent a summary judgement or strike out if the case is without merit; to order costs directly against the funder; to order security for costs; and to appoint an amicus or contradictor for the group members' benefit*.'[20] Most importantly, any class action settlement sum will only be approved by the Court in circumstances where the proposed settlement is fair and reasonable, and in the interests of group members. To that end, the Federal Court Practice Note stipulates,

> *"Where a proposed settlement contemplates that any part of the payments to be made to class members will be applied toward reimbursement of the unrecovered legal costs of the proceeding, or toward payment of litigation funding charges, the Court will usually require that the material filed in support of the application should demonstrate that reasonable steps were taken to alert class members to the likelihood of such deductions as soon as practicable after that became apparent, so that class members were, at the relevant time, able to take such steps as may have been practicably available to them to negotiate as to legal costs or as to litigation funding charges as applicable, or to remove themselves from the class action."*[21]

The submissions of Omni Bridgeway to the PJC also draw attention to clause 16.4 of the Federal Court Practice Note, [22] noting that, '*more extensive examination of the litigation funder's records may be required where:*

> *(a) the class members include persons who are not clients of the applicant's lawyers or of the litigation funder;*
>
> *(b) the deduction per class member constitutes a significant proportion of the settlement amount otherwise payable to each class member; or*

[19] See Murphy J's comments at [11] of *Petersen Super Fund Pty Ltd v Bank of Qld Ltd (No 3) [2018] FCA 1842, 23/11/2018.*

[20] Omni Bridgeway Limited, Submission No 73, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) p 13.

[21] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (20 December 2019) [16.1].

[22] Omni Bridgeway Limited, Submission No 73, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) p 14.

> *(c) the litigation funder imposes charges beyond the percentage commission set out in the litigation funding agreement…*'[23]

However, despite these powers and obligations of the Court in settlement approval, the PJC Report draws the conclusion that funders have enjoyed '*unreasonable*' windfall returns due in large part to percentage-based commissions. While the Law Council of Australia's submissions to the PJC identify that the average commission awarded to litigation funders in gross settlement sums from 2001-2020 was 26.9%,[24] scrutiny of select examples of high proportional rates of return have drawn criticism in the PJC Report. In particular, the PJC Report identified 5 example settlements, provided in the Attorney-General's Department PJC submissions, wherein funders received either large proportional returns on their investment (460%[25] and 390%)[26], significant proportions of gross settlements (40%)[27] or were roundly criticised by the Court.[28]

However, it is our view that those highlighted examples are equally emblematic of the Court's readiness to reject settlement proposals where it is not satisfied that it is fair, reasonable, or 'proportionate'[29] to group members. Indeed, the Attorney-General Department's submissions relied upon Justice Murphy's comments in one of the examples, '*[T]he Part IVA regime is intended to provide access to justice to the applicant and class members and it is not intended solely for the benefit of service providers such as lawyers and funders. The legitimate use of the Court's processes should not be undermined by proceedings that disproportionately benefit the funder and/or solicitor rather than the litigants*.'[30] This position could be inferred as being widely held by the legal industry given no notable submissions to the Committee levelled criticism at the Court itself in the course of their determining what is fair and reasonable to group members in settlement approval.

Shine Lawyers Recommendation: No statutory reform be enacted, noting that the Court's current powers provide adequate 'checks and balances' on commissions sought by litigation funders in class actions, or legal fees charged by lawyers, in the course of settlement approval, regardless of outlying matters in which case-specific circumstances lead to disappointing returns.

Following the above recommendation, Shine Lawyers alternatively proposes the following three statutory reforms by way of response to the Consultation Questions:

1) Introduction of Contingency Fees and Group Costs Orders into the Federal Court system

Shine Lawyers reiterates the position advanced in our submissions to the PJC, namely, the introduction of a statutory basis for percentage-based fee arrangements, nationally. As we provided in our submissions:

> *Contingency fees have been recommended by the Productivity Commission and both the Victorian and Australian Law Reform Commissions. These arrangements offer persons with legitimate claims a source of funding regardless of their financial situation. In the context of*

[23] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (20 December 2019) [16.4].
[24] Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) 8.
[25] *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289.
[26] *Endeavour River Pty Ltd v MG Responsible Entity Limited* [2019] FCA 1719.
[27] *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Limited* [2020] FCA 510; *Petersen Super Fund Pty Ltd v Bank of Qld Ltd (No 3)* [2018] FCA 1842.
[28] *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No 3)* [2019] NSWSC 871.
[29] See Murphy J's comments at [11] of *Petersen Super Fund Pty Ltd v Bank of Qld Ltd (No 3)* [2018] FCA 1842.
[30] Ibid [5].

class actions, group members, who may not be able to individually afford legal representation, will have an additional source of access to Australia's justice system.[31]

This position was equally adopted by the ALRC, advocating that '*statutes regulating the legal profession should permit solicitors to enter into 'percentage-based' fee agreements*' when acting for the representative plaintiff in representative proceedings.[32]

We acknowledge that the case for the recognition of contingency fees in the class action regime is well-worn, and for that reason provide the following arguments in favour of their introduction briefly:

a. Access to Justice: contingency fees promote access to justice for Australians by incentivising law firms to pursue prospective small to medium-sized actions.[33] Presently, litigation funding is not readily accessible for small to medium-sized actions. While lawyers may take on such claims using no-win-no-fee arrangements, the threat of disbursements and adverse costs orders inevitably stifles regular litigation of small-medium actions.[34] This failure to attract litigation funders or lawyers on no-win-no-fee arrangements '*creates a gap in services and is a key limitation of the current class action system*.'[35] By introducing contingency fee arrangements, the risks of adverse costs orders and disbursement costs may be offset by the potential compensation of percentage-based fees, '*enabling these smaller matters to proceed*.'[36]

b. Promote market competition: The present litigation funding market is '*characterised by low competition*'.[37] A 2018 IBISWorld report on the litigation funding market in Australia noted that the recognition of contingency fee arrangements would have '*dramatic effects on the industry*', opening up existing third-party litigation funders to '*immense competition*', which would put '*pressure on profitability*'.[38] Simply, introducing contingency fees into the litigation funding market will have a corresponding market effect of introducing more avenues for class actions to be funded, driving down the level of commissions sought in the course of litigation, promoting greater returns to group members.[39]

c. Increase the rate of Group Member returns: Following the above, percentage-based fee agreements will likely increase returns for group members. Besides this being achieved through increased market competition, it will also occur naturally through the reduction in the amount of fees deducted from resolution sums to group members. Presently, funders' commissions are deducted from resolutions sums alongside professional fees and disbursements incurred in the course of the representative proceedings. Under a contingency

[31] Law Council of Australia, Submission No 35 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) 9.
[32] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) Recommendation 17.
[33] Contingency Fee Working Group, Law Council of Australia, 'Percentage Based Contingency Fee Agreements' (May 2014) 20, 21; Productivity Commission 2014, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2) 625–626; Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2017) [8.15]; Vince Morabito, '*Submission 35* to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (29 November 2017) 25.
[34] Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (2017) [8.33].
[35] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [7.56].
[36] Ibid.
[37] Ibid.
[38] Kim Do, 'IBISWorld Industry Report OD5446: Litigation Funding in Australia' (February 2018) 8.
[39] Contingency Fee Working Group, Law Council of Australia 20; Vicki Waye, 'Submission 2 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (18 July 2017) 6; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [7.59].

> fee arrangement, only one fee would be deducted from the resolution sum and '*drive down the cost of claim funding' by reducing the number of entities paid by reference to a percentage of the recovered amount*.'[40]

However, in recommending the introduction of contingency fees nationally, Shine Lawyers acknowledges the obvious need for strict limitations on such percentage-based fee arrangements. The PJC Report identified the following safeguards:

> a. '*the law firm operating on a contingency fee basis must indemnify the representative plaintiff for any adverse costs order and provide security for costs if ordered;*
> b. *an action that is funded through a contingency fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;*
> c. *a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and*
> d. *a law firm who enters into a contingency fee agreement must advance the cost of disbursements, and account for such costs within the contingency fee; and*
> e. *a law firm who enters into a contingency fee agreement must hold an AFSL and have their operations regulated by the Australian Securities and Investment Commission*,'[41]

Shine Lawyers agrees with and adopts recommendations a. to d. above, however Shine Lawyers does not agree with e., insofar as the PJC Report recommends law firms entering into contingency fee arrangements ought to hold an AFSL and be regulated by the Australian Securities and Investment Commission. We also note the extensive safeguards proposed by the ALRC in their own analysis of contingency fees and adopt the recommendation of said safeguards.[42]

Additionally, Shine Lawyers proposes that the Court be given the ability to intervene at the earliest and every opportunity, where it considers it necessary.

Practically, the means of implementing contingency fee arrangements was articulated appropriately by the ALRC in recommendations 17, 18 and 19,

> ***Recommendation 17*** *Confined to solicitors acting for the representative plaintiff in representative proceedings, statutes regulating the legal profession should permit solicitors to enter into 'percentage-based fee agreements'.*
>
> *The following limitations should apply:*
>
> - *an action that is funded through a percentage-based fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis;*
> - *a percentage-based fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and*
> - *a solicitor who enters into a percentage-based fee agreement must advance the cost of disbursements, and account for such costs within the percentage-based fee.*
>
> ***Recommendation 18*** *Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that solicitors who fund representative proceedings on the basis of*

[40] Vicki Waye, 'Submission 2 to the Victorian Law Reform Commission, *Litigation Funding and Group Proceedings*' (18 July 2017) 6; Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [7.16].
[41] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* [14.181].
[42] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 205.

percentage-based fee agreements should be subject to a statutory presumption that they will be required to provide security for costs in any such representative proceeding.

Recommendation 19 *Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that:*

- *percentage-based fee agreements in representative proceedings are permitted only with leave of the Court; and*
- *the Court has an express statutory power to reject, vary, or amend the terms of such percentage-based fee agreements.*[43]

Shine Lawyers Recommendation: Amendment of the legal professional rules and Part IVA of the *Federal Court of Australia Act 1976* (Cth) to allow for solicitors in representative proceedings to enter into contingency fee arrangements.

2) Introduction of a Statutory Basis for Common Fund Orders

Shine Lawyers reiterates the position advanced in our submissions to the PJC, namely advocating for the legislation of an express statutory power for the Court to make common fund orders. As we provided in those submissions,

'Shine Lawyers believes that the provision for common fund orders in "open class" proceedings is important to ensure the interests of all class members is protected and to ensure that meritorious class actions that might be otherwise impractical to prosecute are able to be pursued[44]*…*

By initiating proceedings as an "open class" and ensuring a common fund, the risk to the funder is reduced, which may serve to encourage funding of those matters that would otherwise not attract funding… Healthy competition within the third party litigation funding space will only prove to place downward pressure on funding commissions resulting in better outcomes for group members…

We must continue to ensure all Australians are able to access justice regardless of their financial circumstances, their level of education, where they live or other factors that result in them being practically denied these rights. This can be achieved by the continued promotion of open class actions in combination with statutory common fund orders that are appropriately supervised by the Court.[45]

The proposal to legislate an express statutory power to the Court was similarly adopted by the ALRC, (prior to the High Court's decision *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall (***Lenthall** decision*)*[46] noting that common fund orders were consistent with, and supportive of, other submissions and recommendations, namely *'that class actions be initiated as open class, that the court have an express statutory power to reject, vary, or amend the terms of a third-party litigation funding agreement, and that the Court have the power to deal with competing class actions*.'[47]

However, in the context of Consultation questions 1 & 2, and noting the desire to avoid 'rehashing' other submissions to the PJC, Shine Lawyers only makes comments in respect to common fund orders'

[43] Ibid.
[44] Law Council of Australia, Submission No 35 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) [52]-[55].
[45] Ibid [59].
[46] *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall [2019] HCA 45.*
[47] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [4.35].

influence on the effectiveness of the Court's oversight of ligation funding agreements and the flow on effect to group member returns in resolution sums.

Safeguard against onerous commission rates: As was identified in the PJC Report, the Federal Court's ability to make common fund orders is arguably a '*safeguard to class members from onerous litigation funding commissions*.'[48] This safeguard is achieved through a combination of '*efficiencies and enhanced competition*,'[49] that serve to reduce funding commission rates, as noted by Beach J in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* (emphasis added),

> *'First, one advantage of early common fund orders was that it assisted to resolve the problem of competing class actions … If one action was to be the winner, the associated funder had to accept the rate to be ultimately struck by the Court under a common fund order …* ***Control of the commission rate was ceded to the Court as the price of success****.'*[50]

However, this safeguard has been curtailed by the Lenthall decision and the limitation placed on Courts in making common fund orders early in a proceeding, as further noted by Beach J in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)*,

> *'Second, and flowing from BMW Australia Ltd v Brewster, I now have less flexibility to deal with commission rates. In my respectful view, this is something that the legislature should address sooner rather than later, informed by Professor Vince Morabito's impressive empirical research. Trial judges need flexible tools to regulate these funding arrangements and to tailor solutions to each individual case. And preferably that regulation should take place closer to the outset of proceedings rather than at the other end, particularly where competing class actions are in play.'*[51]

While common fund orders may still, arguably, be made at settlement or judgment of a representative proceeding, litigation funders are not incentivised '*to invest considerable sums (usually in excess of $5 million) into a class action without also undertaking a book build in order to guarantee a minimum return*.'[52] Without a guaranteed return and the costs of book building still in play, the downward pressure on commission rates in the litigation funding market is absent.

Additionally, the market's uncertainty around the import of common fund orders made at the conclusion of proceedings is compounded by the Court's own uncertainty as to its powers to vary litigation funding, as articulated by Lee J in *Liverpool City Council v McGraw-Hill*,

> *'If the legislature, cognisant of the developments in Part IVA proceedings following the rise of a sophisticated market for litigation funding, wishes the Court to have an express power to vary funding agreements to prevent excessive returns and abuses, then express statutory power should be provided and detailed criteria should be set out which identifies the basis or bases upon which that power should be exercised.'*[53]

[48] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* [9.69].
[49] Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) [92].
[50] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461, [33]-[34].
[51] Ibid.
[52] Law Council of Australia, Submission No 23 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) 25.
[53] *Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc)* [2018] FCA 1289 at [54].

While the PJC Report's Recommendation 7 called for the Government to '*address uncertainty*' in accordance with the Lenthall decision, such a position is, in Shine Lawyers' view, only half the problem and the Government ought to legislate an express power to make common fund orders available at any stage of a representative proceedings so as to reduce uncertainty and to reinforce their market effect on funding commission rates.

Common Fund orders as a 'check and balance': An express statutory power to make orders at any stage of a proceeding would provide the Court a natural 'check and balance' in circumstances where a litigation funder is perceived to be advancing their '*own commercial interests to the detriment of class members*.'[54] Under the current class action regime, the Court's ability to exercise '*oversight and control of funding fees is limited*,'[55] and only comes into play at the end of proceedings. While class actions are subject to the Court's scrutiny by way of settlement approval, where an application to approve a proposed settlement is rejected and a litigation funder does not renegotiate its commission fee, it is entitled to push a funded claim to judgment in order '*to claim its contractual entitlement.*'[56] However, pursuant to a statutory power, particularly at the outset of proceedings, '*Judges* [may] *make a common fund order early in the proceedings with the idea that they are likely to approve a settlement or a judgment with the terms of that common fund order being complied with, but they don't fully promise it*,'[57] imposing a trade-off in litigation funding where commerciality overcomes the fidelity of the contractual commission sought. In the context of concerns over 'windfall profits' achieved by litigation funders in percentage based commissions, common fund orders are a common sense power to provide the Court to manage such circumstances.

The Court's comments concerning common fund orders: Finally, the effect of having the power to make common fund orders in representative proceedings has been well documented by the Court itself, noting the above extracts relied upon and the following extracts provided below,

Per the Full Federal Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited,*

> *In our view the proposed orders have the additional benefit that they will enhance access to justice by encouraging open class representative proceedings. If litigation funders are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class it is less likely that funders will seek to bring class actions limited to those persons who have signed a funding agreement. The encouragement of open class representative proceedings should reduce the potential for conflicts of interest between funded registered class members and unfunded class members and between the solicitors for the applicant and unfunded non-client class members. Open class proceedings will also act to inhibit competing class actions and avoid the multiplicity of actions which they represent. Competing class actions can cause significant delay, increased costs and wastage of the resources of the parties and the courts. As we have said, this is not a factor in the present case but it may be in other cases*.'[58]

Per Justice Lee in *Lenthall v Westpac Life Insurance Services Ltd,*

> '*Any interested observer of the market for litigation funding in Australia, would be aware that the market is in a state of flux and is dynamic. This dynamism has two facets. The first is the*

[54] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* [9.71].
[55] Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) [90].
[56] Ibid.
[57] Professor Peta Spender, *Committee Hansard*, 24 July 2020, p. 22.
[58] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 at 205.

increasing number of funders coming into the litigation funding market. The second, which no doubt is related to the first, is the apparent downward pressure on funding rates.'[59]

Simply put, common fund orders '*reduce barriers to entry to the funding market (by eliminating the need to engage in costly book build processes before commencing proceedings), increase competition, increase transparency and reduce funding costs,*'[60] and as such, ought to be available to the Court to make at any point in a class action so as to maximise fair, reasonable and proportionate returns to group members.

Shine Lawyers Recommendation: 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.

3) Statutory powers be given to the Court

If, notwithstanding our recommendation above, there is to be reform, it is our view that any reform be confined to an expansion of the Court's present powers, namely, '*a statutory power to vary the terms of a litigation funding agreement should be coupled with a requirement that funding agreements with respect to a class action require court approval to be enforceable,*' as recommended by the ALRC.[61]

While Shine Lawyers does not expressly endorse such a reform, if statutory reform is to occur, it would be preferable that it provide a legislative basis for the Court to, '*reject, vary or set the commission rate in litigation funding agreements.*'[62] Under such a statutory power, fair, reasonable and proportionate rates of group member returns in funded class action litigation would be further protected by the Court's capacity to regulate the terms and commissions in funding arrangements.[63]

The proposed statutory powers of the Court would readily intersect with the Court's present processes as the powers would be informed by existing and developing jurisprudence[64] and would be exercised in a limited '*supervisory role when necessary to protect group members*.'[65] This narrow construction of the statutory power to vary, reject or set funder commission rates was equally contemplated by Lee J in *Liverpool City Council*, who expressed that such a statutory power should serve to prevent '*excessive returns and abuses*.'[66]

Concerning the impact on the litigation funding regime, Maurice Blackburn considered in their submissions to the PJC the introduction of such a statutory power to likely have little effect on the business of litigation funding, at least in the long term, '*as the practical application of this type of provision evolves and the principles become settled*.'[67] Shine Lawyers agrees with that view.

Shine Lawyers Recommendation: Where statutory reform is considered necessary, a statutory basis should be given for the Court's power to vary the terms of litigation funding agreements, coupled with a

[59] *Lenthall v Westpac Life Insurance Services Ltd [2018] FCA 1422 at [18].*
[60] Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) [96].
[61] Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) [6.84].
[62] Ibid [6.90].
[63] Ibid [6.90].
[64] Ibid [6.93].
[65] Ibid [6.92].
[66] *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S & P Global Inc)* [2018] FCA 1289.
[67] Maurice Blackburn, Submission No 37 to Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders,* [5.56].

requirement that funding agreements with respect to a class action require court approval to be enforceable, as recommended by the ALRC.[68]

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

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?

As recommended in response to Questions 1 and 2 above, Shine Lawyers does not support the introduction of a statutory minimum rate of return to group members, particularly a statutory minimum of 70%. It is our position that such a percentage is liable to negatively affect the litigation funding regime, class actions system and most importantly, group members, by:

a) reducing competition in the litigation funding market;
b) affecting the commerciality of claim valued at less than $50 million;
c) introducing ulterior factors into the processes of litigation, such as strategic interlocutory disputes designed to force parties into unfavourable settlements when approaching the 30% cap on returns; and
d) ultimately impeding Australians' access to justice.

Firstly, in answer to the proposal of a statutory minimum return of 70%, we submit the following concerns:

1) No submissions considered in the PJC Report recommended a minimum return of 70%. The figure was proposed by Senator Pauline Hanson in the course of '*seeking to balance concerns that litigation funders were gouging vulnerable litigants by charging fees of up to 50 per cent of damages awards*.'[69] Lacking any research, evidence or analysis, no proper consideration has been given to the implications of a 70% statutory minimum return, save for the simple idea of higher gross returns to group members.

   A report provided by PwC to Omni Bridgeway, 'Models for the regulation of returns to litigation funders' in respect of the PJC Report's 'Recommendation 20' (the **PwC Report**) expressed a similar reservation,

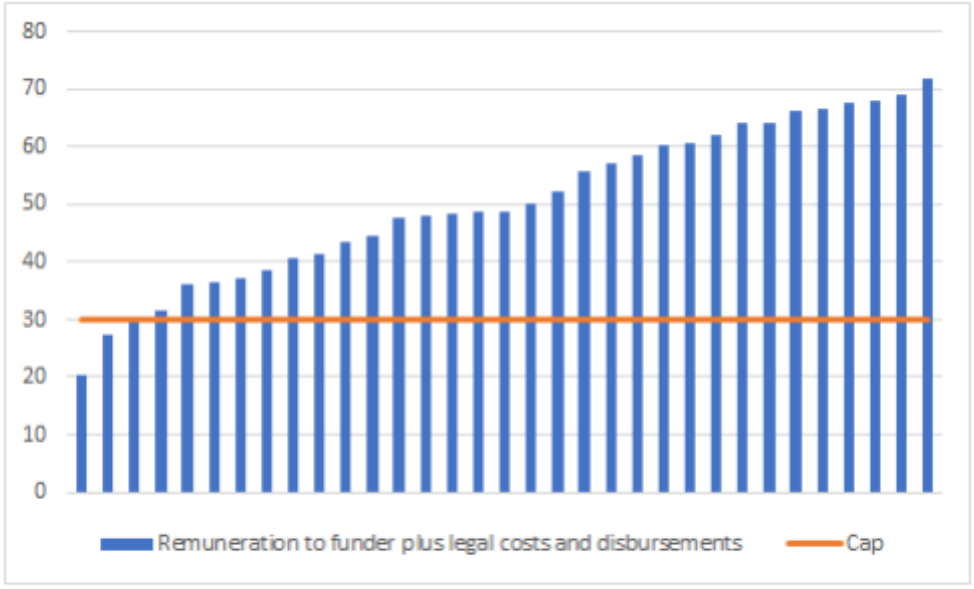
   > *'[T]he proposals mooted in Recommendation 20 are not based on a consideration of economic returns or economic efficiency in a conventional regulatory sense, but are instead directly based on considerations of proportionality and allocation. Indeed, this approach is not consistent with regulatory theory and does not provide a balanced economic basis for the form of price regulation proposed in the report*.'[70]

   The Government must not enact statutory reforms that have the potential to re-define third party litigation funding in Australia on the basis of unsubstantiated proposals.

2) Access to Justice and Reducing competition in the Market: Observing further results from the PwC Report, in a review of the 33 settlements achieved in class actions to date, a '*cap of 30% would have had implications for 91% of publicly available settlements funded under Part IVA proceedings (see Figure 1). That is, 9% of cases would unambiguously proceed as the gross returns (i.e. legal fees and funder returns) would fall below the 30% caps*.[71] See below the figure provided in the PwC Report,

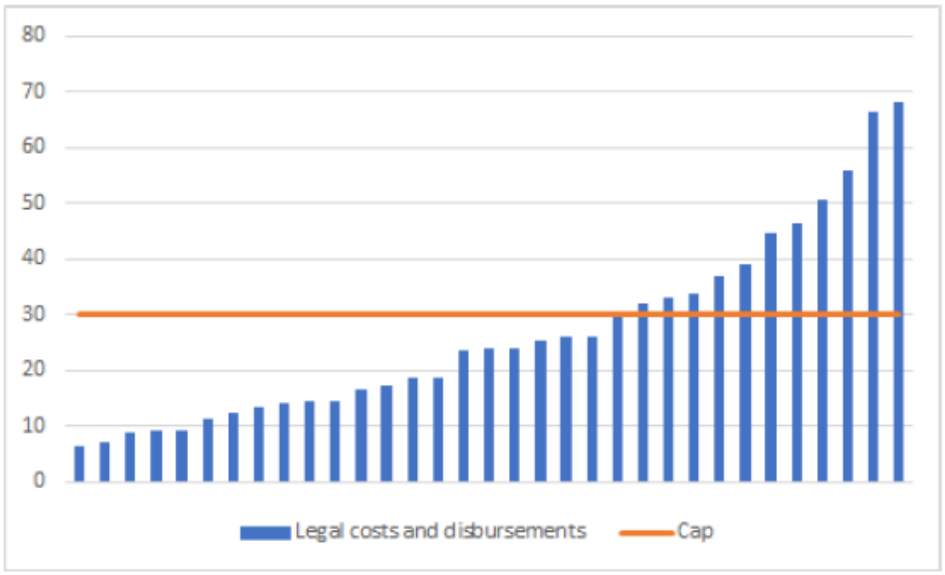
[69] Ronald Mizen, *Litigation funding rules on the brink as dissent grows*, in Australian Financial Review, 11 November 2020.
[70] PriceWaterhouseCoopers Report, *Models for the regulation of returns to litigation funders*, 16 March 2021, 4.
[71] Ibid 14.

Figure 1: Gross returns to the funder as a percentage of the gross settlement fund – public data[72]



Source: PwC and Morabito (2020)

Figure 2: Litigation costs as a percentage of the gross settlement fund – public data[73]



Source: PwC & Morabito (2020)

On the basis of the above graphs, where there had been a 70% statutory minimum return, 12 class actions would not have been filed with third party funding as they '*would not have been commercially viable for the funders (i.e. cases where the litigation costs alone would not have come within the proposed 30% cap, meaning the funder would have made a loss or been in a break scenario and made no profit at all*).'[74]

These figures go to justifying the view that it is better for class members to get 50 per cent of something with the involvement of a litigation funder, as opposed to 100 per cent of nothing without

[72] Ibid 15.
[73] Ibid 16.
[74] Ibid.

the involvement of a litigation funder.[75] Despite the PJC Report considering that '*such arguments ignore the possibility that class members could receive substantially more than 50 per cent of something, with litigation funders still receiving a return that is reasonable, proportionate and fair for the risks they have taken*,'[76] a 30% cap will have the effect of reducing the number of claims that are approved for third party funding. This likelihood that funders will simply reject funding proposals for expensive or small matters over the threat of smaller commissions is not a surprise, as the motivations of funders are well summarised by the following:

> *'While litigation funding serves a valuable social purpose when it finances meritorious cases that otherwise would not be pursued,'*[77] *… 'Firms fund cases where the risk is small and where they estimate the probability of winning a successful judgment or settlement to be large…Firms prefer cases that are likely to settle quickly, because the longer and more complex a matter is, the greater the firm's risk.'*[78]

Despite the PJC Report's willingness to assume that the third party funding market in Australia will simply adapt to a statutory minimum and accept smaller returns, what we will see is a trade-off, *'by providing higher returns to some plaintiffs, there will be fewer supported actions, and hence zero returns to other potential plaintiffs*.'[79] It is therefore Shine Lawyers' position to recommend against the proposal for a 70% minimum return.

3) Imbalanced effect on different types of Class Actions and Claims of different complexities: The introduction of a 'hard-and-fast' 70% minimum return applying to all Part IVA class actions ignores the legal distinctions between class actions and will create imbalanced effects across the class action system.

An example of these legal distinctions is the comparison between shareholder class actions and employee entitlement class actions. Where a shareholder class action will likely rely upon the costly exercise of preparing, filing and cross-examining extensive expert evidence to prove misleading and deceptive conduct or breaches of continuous disclosure obligations under provisions of the Corporations Act, an employee entitlement claim will likely forgo any expert evidence and will instead focus on the language used in a contract of employment, which may require a labour intensive document audit of its class members. These two approaches in the class actions are fundamentally distinct from one another and, most importantly, the legal costs and disbursements in pursuing each class action are incurred in the course of entirely different legal arguments.

To enact a blunt, statutory minimum on both forms of class actions belies a lack of understanding of the origins and reasons for costs in class actions, as well as ignoring the different risks assumed in funding each class action.

This observation also goes to a 70% statutory minimum ignoring the fact that class actions have varying degrees of complexity. A 70% minimum return would still allow for 'windfall' profits in circumstances where matters are swiftly litigated and mediated, such as in matters where the respondent has admitted wrong-doing to a corporate regulator and a law firm files a shareholder claim on the basis of that concession. Conversely, where matters are factually complex and require

[75] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* [13.54].
[76] Ibid.
[77] J.B. Heaton (2019), *The Siren Song of Litigation Fundin*g, 9 Michigan Business & Entrepreneurial Law Review, 139.
[78] David S Abrams & Daniel L Chen (2013), *A market for justice: A first empirical look at third party litigation funding*, 15(4) University of Pennsylvania Journal of Business Law, 1088.
[79] PriceWaterhouseCoopers Report, *Models for the regulation of returns to litigation funders*, 16 March 2021, 16.

significant legal resources to pursue the claim, a 70% minimum return would discourage any funder from the threat of significant legal costs encroaching upon its 30% commission cap.

It is Shine Lawyers' position that the use of a blunt instrument, in the form of a 70% minimum return to group members, has the potential to dramatically and erratically affect the class action regime as the nuances of each class action are ignored by a blanket proposal. Such a reform has a likelihood of effecting Australian's access to justice as it is foreseeable that only obvious 'wins' would be funded and filed, whereas any 'fights' would simply be too much of a risk for third party funders to back.

4) Strategic Litigation: Similar to the effects that a 70% statutory minimum return may have on the capacity of class actions with inherent legal or factual complexities to receive funding, there is a potential flow-on effect of a 30% commission arising from the affected legal costs and disbursements incurred in a matter. Where a class action is funded and the legal costs and disbursements incurred begin to encroach upon the funder's commission, there is a risk that the funder will pressure the lawyers to either reduce their fees or to commit less resources to the matter generally, which '*may have a deleterious impact on the likelihood of success. Thus, while getting under the cap might be achieved in some instances, this may reduce the likelihood of any return (and the quantum of that return)*.'[80]

There is also the risk that under a 70% minimum return, defendants/respondents will be encouraged to litigate strategically and place pressure on funded parties by 'whittling-away' at the funder's commission through interlocutory stoushes and/or excessive discovery reviews. Such a tactic, which defendants/respondents are entitled to pursue, could lead to funders themselves pressuring plaintiffs into unfavourable settlements due to the threat of funding being exhausted or withdrawn, similar to the matter of *Bywater v Appco Australia Pty Ltd*, wherein Lee J stated, '*[I]n this case, the Court is effectively presented with an ultimatum: approve this settlement, or funding will be withdrawn and the solicitors will not continue to act for the applicants and the group members because, it is said, they cannot "fund" the proceeding by running it on a speculative basis. If that happens, the claims of group members will simply not be agitated.*'[81]

We raise this observation as another example of the wide-ranging effect that a blanket statutory minimum could have on the class action system and litigation funding regime.

5) Commerciality of claims under $50 million: As is apparent from the above observations, a 70% statutory minimum return will have greater negative effects on claims with smaller values. The PJC Report makes it clear that the Government has a concern over claims in which windfall profits in the tens of millions are achieved by funders by way of percentage-based commissions in claims with value in the hundreds of millions. However, it is our strong position that little regard has been given by the Committee to claims with overall value below $50 million that are equally important for Australians to bring with third party funding.

Each of the observations we have made in response to Consultation Question 3 are applicable to claims valued at under $50 million and are exacerbated by the smaller margins within which funders, lawyers and group members are expected to pursue litigation. Due to the smaller value, the margins for error in assumptions or reasoning are smaller and the effect of unforeseen costs are larger, making these claims immediately less attractive to third-party funding. Interlocutory disputes are exponentially more likely to pressure funders to unfavourable settlements and legal or factual complexities in matters will be of even more concern when funding approval is sought.

[80] Ibid.
[81] *Bywater v Appco Group Australia Pty Ltd* [2020] FCA 1537.

In an industry where,

> '*the real problem is that the investment class is a poor one. First, high-stakes civil litigation is far more complex and random than most investors understand. There are an overwhelming number of ways that litigants can lose and far fewer paths to significant victories. Second, few good cases—from an investment perspective—are likely to find their way to funders. Third, litigation funding is probably prone to optimism bias, causing litigation funders to overestimate the probability of victory in their cases. Finally, litigation funding is fungible with little value added by the funder, suggesting that competition will drive down any significant previously-existing profits. While litigation funding serves a valuable social purpose when it finances meritorious cases that otherwise would not be pursued, we can expect investor success in the field to be rare and likely limited to those funders with the most litigation savvy and the best luck. Nevertheless, investors are unlikely to give up on the space despite the large prospect of poor returns,*'[82]

litigation funders are liable to simply avoid funding small value claims of under $50 million due to the inherent risk of the investment being compounded by the introduction of a 70% statutory minimum return to group members.

Shine Lawyers Recommendation: On the basis of the above observations, Shine Lawyers hold significant reservations as to the implications of a statutory minimum rate of return to group members of any resolution sums in class actions to the litigation funding regime and class actions system. It is our position that any statutory minimum will place an unyielding impediment to the ability to obtain funding for class actions and is likely to have a negative effect on access to justice and competition in the litigation funding market.

Q: If not, what would be the appropriate minimum and its impact on stakeholders, the class action system and the litigation funding industry?

If a statutory minimum rate of return of the gross proceeds of a class action is to be introduced, it is Shine Lawyers' position that the statutory minimum be no higher than 51% of any settlement or judgment sum, and that that 51% be legislated as a rebuttable presumption within the existing Part IVA framework of the *Federal Court of Australia Act 1976,* wherein the Court would retain a discretion to approve a different amount.[83] The Court's discretion could be guided and determined by a non-exhaustive list of factors, providing for consideration of the reasonableness and proportionality in a proposed resolution sum, for example:

a) '*the resolution sum itself;*
b) *the aggregate amount in dispute, if it is able to be reliably estimated or determined;*
c) *the risks of establishing liability, loss or damage.*
d) *any significant procedural risks, such as the likelihood of an order under section 33N of the Federal Court of Australia Act;*
e) *the duration of the litigation and the stage at which it was resolved as well as the defendant's conduct of the litigation;*
f) *the amount (if any) advanced by way of security for costs*.'[84]

[82] J.B. Heaton (2019), *The Siren Song of Litigation Fundin*g, 9 Michigan Business & Entrepreneurial Law Review, 139.
[83] Maurice Blackburn, Submission No 37 to Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* [5.66].
[84] Ibid [5.65].

The proposal of a minimum rate of return of 51% is not novel and has been recommended by both funders[85] and plaintiff law firms[86] previously as a way of satisfying the Australian Government, intent on enacting safeguards for group members in the litigation funding regime. Omni Bridgeway noted from the ALRC's Final Report that from a review of a sample size of 30 class actions between 2013-2018, '*approximately two-thirds of all funded cases settled during the review period, more than 51% of the settlement proceeds were left for distribution to class members.*'[87] Indeed, Omni Bridgeway declared in its submissions to the PJC that in matters where claimants are to receive less than 51% of the resolution sum, '*the funder should be required to carry that burden*.'[88]

By enacting a statutory presumption of a minimum 51% rate of return to group members from resolution sums, and a discretion for the Court to award higher funding commission rates in circumstances where it is deemed reasonable and proportionate, the risk of affecting seismic shifts to the litigation funding regime are reduced. Additionally, such a presumption would intersect with further recommendations we outline below in response to Consultation Question 6, namely that the Court ought to be provided further resources, where it deems it necessary, to appoint an assessor to assist in determining questions of parties' costs, commissions and generally those matters concerning the fair and reasonable resolution of class actions.

Further and in conjunction with a 51% minimum return to group members, it is also Shine Lawyers' position that an accompanying 'cap' on commissions claimed by way of a multiple of deployed capital could be considered. Based on Shine Lawyers' experience in funded class actions, we would propose a cap on funder commissions of three times the amount of deployed capital. So if, for example, a funder paid $5 million towards the costs of a class action, it would be not be entitled to recover any more than $15 million from any proceeds from the class action.

The proposed cap would operate in the same form as the 51% minimum return, in that it would be introduced as a statutory rebuttable presumption to be applied by the Court in tests of fair, reasonable and proportionate returns to group members, with a discretion to award commissions in excess of the 150% where it is deemed 'necessary or appropriate'. The cap would seek to prevent 'windfalls' in the same manner as the minimum return of 51% while also ensuring that in the event a 51% minimum is enacted, it does not encourage funders to move from percentage-based commissions to multiples on deployed capital as a means of having more control over the day-to-day expenses of class action litigation.

Shine Lawyers Recommendation: Shine Lawyers reiterates that it does not support the introduction of any statutory minimum rate of return to group members in resolution sums. However, where the Government insists on implementing one, we recommend a minimum return to group members of 51% of proceeds, and a maximum return to funders of three times the amount of deployed capital, as rebuttable presumptions wherein the Court retains the discretion to approve different amounts.

[85] Omni Bridgeway Limited, Submission No 73, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) p 8.
[86] Ibid [5.65].
[87] Omni Bridgeway Limited, Submission No 73, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) p 8.
[88] Ibid 9.

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?
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.

Shine Lawyers responds to Consultation Questions 4 and 5 together for efficiency.

We do not support the introduction of a graduated approach in large part due to the factors discussed above in response to Consultation Question 3, that statutory reform of the class action industry without consideration given to the legal and practical distinctions between the various forms of claims is liable to cause erratic and unintended effects. Under a graduated approach, the distinctions between claims would be even more pronounced.

For example, a class action's length or duration gives an inadequate indication of the likely costs of reasonable return in that action. Group claims may indeed be prolonged due to discovery processes or expert witness evidence, which in turn may be correlative of higher costs incurred. However, the duration of a claim may also be extended dramatically simply by the constraints of the docket Judge's list, or reserved judgments on an interlocutory dispute. Quite simply, length is correlative, not causative, of costs in litigation.

Further, any attempt to factor into a graduated approach the 'likely proceeds' of a claim's value at any point of a class action prior to preparation for mediation is liable to be inaccurate, particularly at the commencement of a claim. To again use the example of shareholder actions, an estimated claim value is, generally, derived from a drop in share price by the number of shares affected. While indicative, the claim value is liable to change at each point of the class action, be it following discovery and the need to re-plead the applicant's claim, or conflicting expert witness evidence that reduces the margins of recovery. Neither does estimated claim value provide any indication of the claim's complexity, where egregious contraventions causing hundreds of millions of dollars may be readily admitted by the respondent.

As a final observation, we note the difficulty and potential for inaccuracy in applying economic modelling to the litigation industry in aid of regulating the rate of third party funding returns. This is in part due to an '*immaturity of the market*' that has '*no structural issues – i.e. barriers to entry – that make litigation funding a natural monopoly*.'[89] Given the reasonably young age of the litigation funding industry and the limited amount of statistical data we are able to consider (noting that a data set of 33 settled funded class actions is relatively paltry) it suggests that the '*problem of excess returns is prima facie not as real as is as claimed*' and that '*as the number of litigation funders increases, the number of actions supported will increase (i.e. providing increased access to justice) and returns to litigants will increase as litigation funders compete for cases in which to invest.'*[90] Further, the nature of litigation funding, as a form of investment, is difficult to reduce to an economic formula. We provided above, under our response to Question 3, a significant extract from J. B. Heaton that notes '*high-stakes civil litigation is far more complex and random than most investors understand*,'[91] and also draw attention to PwC report's Chapter 4 section analysing submissions 100 and 101 to the Committee, being Professor Officer's

[89] PriceWaterhouseCoopers Report, *Models for the regulation of returns to litigation funders*, 16 March 2021, 8 & 9.
[90] Ibid 10.
[91] J.B. Heaton (2019), *The Siren Song of Litigation Fundin*g, 9 Michigan Business & Entrepreneurial Law Review, 139.

discounted cashflow model and Mr McGing's actuarial/insurance approach.[92] In short, '*there has not been a definite formula to calculate the cost of capital or required return of third party litigation funding that considers all of the risk factors*.'[93] The Government should take note of this difficulty in understanding the economics of the litigation funding market before enacting regulatory reform based on perceived inequality and 'gouging' of group members.

For this reason, Shine Lawyers maintains that the Court itself is best placed to determine the appropriate returns to group members and funders in any given class action.

[92] PriceWaterhouseCoopers Report, *Models for the regulation of returns to litigation funders*, 16 March 2021, 18-25.

[93] Charles Smith & J Johns (2018), 'Examining *the minimum cost of capital for litigation funding; i.e., constructing the required rate of return to attract capital*' 9(9) International Research Journal of Applied Finance 414 at 415.

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

Further to the submissions above, Shine Lawyers refers to a submission by the Law Council of Australia to the Productivity Commission in 2013, namely '*promoting the wider use of powers to appoint amici curiae to provide a contradictor at the hearing of applications for class action settlements. This could most appropriately be achieved through a practice note or guidelines issued on a court-by-court basis*.'[94]

We make this observation, not specifically as a recommendation, but as a comment in keeping with submissions we have made in this response, generally, to expand the Court's powers and resources in being able to consider and determine as effectively as possible what return is fair, reasonable and proportionate to group members in class actions. While the Court has shown it is comfortable to assess the reasonableness and appropriateness of funders' commissions from resolution sums,[95] we consider it a herculean task to be undertaken by a single justice and his or her chambers, for several reasons also outlined by PwC:

- '*it is difficult to see that they could alone bring to bear the investigative and analytical skills necessary. This can be addressed by seeking appropriate expert advice*
- *data required to support the analysis should:*
    - *be on an industry-wide basis over an extended period of time, rather than just focusing on a specific individual matter at hand and the specific parties involved*
    - *also reflect the costs associated with researching potential matters, and unsuccessful and successful matters pursued.*[96]'[97]

Otherwise, if the Australian Government decides to introduce statutory minimum rates of return to group members in class actions, we recommend that where regulation is imposed, it should be grandfathered to prevent existing class actions before the Courts from coming to a grinding halt and unduly prejudicing applicants and group members in those class actions.

[94] Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements* (13 November 2013) 128.
[95] *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 3)* [2020] FCA 1885.
[96] *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374.
[97] PriceWaterhouseCoopers Report, *Models for the regulation of returns to litigation funders*, 16 March 2021, 27.

Conclusion:

Shine Lawyers acknowledges that there is room for reform in the litigation funding regime.

However, it is our position that the statutory reforms that will 'soften the curve' of example excessive funding commissions are found not in bluntly and arbitrarily introducing revenue caps, but in facilitating competition, promoting transparency, and empowering court oversight. In other words, 'a market-based solution'[98], facilitated and managed by increased Court powers and control.

Shine Lawyers welcomes the opportunity to answer any queries the Treasury and Attorney-General's Department may have in relation to our responses.

[98] Law Council of Australia, Submission No 96 to Productivity Commission, *Access to Justice Arrangements* (13 November 2013) 30.