WOODSFORD
LITIGATION FUNDING

Response to Australian Law Reform Commission (ALRC) Inquiry into Class Action Proceedings and Third-Party Litigation Funders

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1. Woodsford Litigation Funding Limited (Woodsford) welcomes the opportunity to comment on the Proposals and Questions included in ALRC's Inquiry into Class Action Proceedings and Third-Party Litigation Funders. Woodsford's Response to the Proposals and Questions, together with some background information about Woodsford, is set out below.

Woodsford

2. Since its foundation in London in 2010, Woodsford has developed a reputation as a leading litigation and arbitration funder. Woodsford is a founder member of the Association of Litigation Funders of England & Wales (the ALF), an independent body that has been charged by the UK Ministry of Justice with delivering self-regulation of litigation funding in England and Wales. Woodsford's Chief Operating Officer, Jonathan Barnes, is a member of the board of the ALF. Woodsford has offices in London, the United States and Singapore. Woodsford has funded cases in Australia previously and continues to consider numerous funding opportunities there. Woodsford also supports the Public Interest Advocacy Centre in Australia as part of its worldwide commitment to promoting access to justice for those that lack the means to achieve it.

3. Woodsford's executive team blends extensive business experience with legal expertise, and includes lawyers admitted to practise in England & Wales, the United States, Ireland and New Zealand, and accountants admitted into the Chartered Institute of Management Accountants and the Institute of Chartered Accountants of England & Wales. Woodsford's Chairman, Yves Bonavero, has a track record of success at the highest level of international commerce. Yves was Group Chief Executive Officer at ED&F Man, after which he held key positions in a number of successful businesses, including hedge fund managers in Asia, commercial property investors in the UK, a start-up mortgage bank, which was successfully floated on the LSE in November 2000 and two major businesses in Poland. Yves is also a keen philanthropist and, through his charitable trust, has endowed the Bonavero Institute of Human Rights at Oxford University. Woodsford's Chief Executive Officer, Steven Friel, is a solicitor and formerly partner at two major international law firms. Steven has been recognized by every annual edition of the *Legal 500* published in the last eight years. For commercial litigation work, he is praised as having *"the sort of knowledge that one only gets with years of accumulated experience in heavy or complex litigation"* and a *"strong commercial grip on the relevant legal provisions and financial aspects of cases."* For his work in international arbitration, the *Legal 500* ranked Steven as *"outstanding"*.

Steven has also been recognised as one of the top 100 leading legal consultants and strategists of 2018. Woodsford's Managing Director for the Asia Pacific region, which covers Woodsford's operations in Australia, Charlie Morris, is a senior lawyer formerly of leading UK disputes boutique law firm Enyo Law and international law firm Addleshaw Goddard.

4. Woodsford has an Investment Advisory Panel (IAP) that brings together senior figures from the world of both litigation and international arbitration, with direct experience spanning many areas of law. Our IAP includes John Beechey, a past President of the International Court of Arbitration of the ICC, Fidelma Macken, the first female judge to be appointed to the Court of Justice of the European Union and Shira A. Scheindlin, a former United States District Court Judge.

5. Our in-house team of legal specialists reviews many hundreds of cases every year coming from all parts of the globe, including Australia.

Woodsford's Response to the Proposals and Questions in the ALRC Inquiry

Proposal 1–1

"*The Australian Government should commission a review of the legal and economic impact of the continuous disclosure obligations of entities listed on public stock exchanges and those relating to misleading and deceptive conduct contained in the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth) with regards to:*

- *the propensity for corporate entities to be the target of funded shareholder class actions in Australia;*
- *the value of the investments of shareholders of the corporate entity at the time when that entity is the target of the class action; and*
- *the availability and cost of directors and officers liability cover within the Australian market.*"

Response to Proposal 1-1

6. Shareholder class actions play an important role both in regulating the conduct of big corporates and compensating those that suffer loss when those big corporates fail in their duties (for example, by failing to comply with disclosure obligations). Such actions promote ethical behaviour by listed companies and ethical investing by shareholders.

7. Shareholders who are affected by corporate misconduct, and who benefit from class actions, include many 'mum and dad' investors. Third party litigation funding for class actions enables such investors, as well as institutional investors who often manage pensioners' funds, to achieve recompense for the losses they have suffered at the hands of the corporates of which they are shareholders. Any change to the prevailing legislation which governs shareholder actions in Australia, which reduces the obligations on corporates, for example in relation to their disclosure obligations, risks stymying the ability of shareholders to access justice and seek redress.

8. Accordingly, any review commissioned by the Australian Government should examine the benefits to investors, as well as the potential burdens on corporates, of class actions supported by litigation funders.

Proposal 3–1

"*The Corporations Act (2001) (Cth) should be amended to require third-party litigation funders to obtain and maintain a 'litigation funding licence' to operate in Australia.*"

Response to Proposal 3-1

9. As a founding member of the ALF, and therefore with direct experience of the third party funding industry being self-regulated in England and Wales, we do not consider that any kind of government-led regulation of litigation funders, whether through a licensing system or otherwise, is warranted or necessary. It is important to note that Woodsford, and our peers in the professional litigation funding community, including our fellow members of the ALF, are often staffed by lawyers and accountants, who themselves are the subject of professional obligations. Such funders are in the business of funding commercial, high-value disputes, in which the parties are sophisticated users of legal services, employ expert legal counsel (who have their own professional obligations), and which take place in a highly scrutinised environment (i.e. before judges or arbitral tribunals). The public policy considerations that might apply to low value dispute resolution for unsophisticated consumers, who may not have access to expert legal advice, including whether there is a need for regulation, should not, in our view, apply to the sophisticated commercial market.

10. Further, despite third-party funding of litigation and arbitration now being a well-established industry, there have been remarkably few disputes (for example, between funders and their funded counterparts) or reported problems when compared to other financial industries. We would therefore urge caution when deciding whether or not to regulate an industry which has demonstrated no need for regulation.

11. Various jurisdictions that have actively considered the question of how much (if any) state-controlled regulation of third party litigation funding is necessary have invariably concluded not to implement such regulation. By way of example, in January 2017, Lord Keen of Elie, speaking on behalf of the UK government, stated that "*the market for third party litigation funding remains at a relatively early stage in its development in this jurisdiction and we are not aware of specific concerns about the activities of litigation funders*" and "*the last Government gave Parliament an assurance that it will keep third party litigation funding under review and this Government is ready to investigate matters further should the need arise.*" Since then, the UK government has not proposed or introduced any government-led regulatory regime in relation to third party litigation funding, which implies that the UK government considers, quite rightly in our view, that the "need" has not arisen. Similarly, Singapore and Hong Kong recently introduced new legislation, following considerable consultation, to permit litigation funding in respect of arbitration proceedings. As part of that process, the need (or otherwise) for government-led regulation was considered, but not adopted as part of the new regime in each of those

jurisdictions. If Australia were to introduce a licensing regime for litigation funders, it would be the first jurisdiction in the world, of which we are aware, to do so and such a regime may encourage parties, when deciding where to agree to have their disputes heard, to choose another jurisdiction where their funding options may be more numerous than they would be in Australia.

12. Instead of introducing a licensing regime for litigation funders, we believe the focus should be on ensuring that the professionals who advise the users of third party litigation funding. For example, we consider that lawyers should be professionally obliged to advise their clients on the various funding options available (including third party funding, but also other options such as after the event insurance) and assist them by engaging with only the most reputable funders in the market. In England and Wales, inadequate advice by a party's solicitors about litigation funding will not only be a breach of the SRA Code of Professional Conduct, but may also be grounds for a claim in professional negligence. Clients must be provided with the information they need to make informed decisions about financing their litigation. Whilst the client is free to decline the advice and not to proceed with litigation funding options, the solicitor is obligated to advise fully on them. In addition, once a funding agreement is entered into, its implications must be explained to the Client. We believe that similar professional obligations, if introduced in Australia, would serve to ensure that only reputable funders could operate effectively in the Australian market.

13. If, notwithstanding the cogent arguments against government-led regulation of the third-party funding industry, the ALRC is minded to recommend introducing a licensing regime for third-party funders, we would suggest that such regime should be very 'light-touch' to ensure that any steps taken do not have a 'chilling effect' on litigation funders' desire to fund cases in Australia, as that may in turn result in litigants' access to justice in Australia being fettered and/or Australia becoming a less attractive venue for disputes than it is currently.

Proposal 3–2

"*A litigation funding licence should require third-party litigation funders to:*

- *do all things necessary to ensure that their services are provided efficiently, honestly and fairly;*
- *ensure all communications with class members and potential class members are clear, honest and accurate;*
- *have adequate arrangements for managing conflicts of interest;*
- *have sufficient resources (including financial, technological and human resources);*
- *have adequate risk management systems;*
- *have a compliant dispute resolution system; and*
- *be audited annually.*"

Response to Proposal 3-2

14. We believe and agree that litigation funders should be held to these standards. However, we do not believe that a licensing regime is the best way to ensure that they are. There are several

'checks and balances' already inherent in the litigation process, as outlined above, including the professionalism and ethical obligations of solicitors and counsel on claimant side and the scrutiny of claimant-side arrangements by defendants, their legal and other professional advisers, the Courts, and the press.

Question 3–1

"*What should be the minimum requirements for obtaining a litigation funding licence, in terms of the character and qualifications of responsible officers?*"

Response to Question 3-1

15. Woodsford's team includes solicitors, barristers and other lawyers admitted in a number of jurisdictions, and other professionals (e.g. accountants) who are regulated by leading professional bodies. We are already held to the highest standards of professional conduct.

16. We would have no objection to a requirement that all litigation funders must have officers who are similarly regulated by a recognized professional body.

Question 3–2

"*What ongoing financial standards should apply to third-party litigation funders? For example, standards could be set in relation to capital adequacy and adequate buffers for cash flow.*"

17. As a member of the ALF, Woodsford is required, under the Code of Conduct for litigation funders in England & Wales to maintain access to a minimum of £5 million of capital or such other amount as stipulated by the ALF. We think this is a sensible provision to have in place to prevent entities without sufficient capital from becoming involved in the industry, as it can cause funded parties significant problems if a funder runs out of money before a case is complete. However, this is ordinarily a significant part of a funded party's (and/or their advisers') due diligence before entering into a litigation funding agreement and should not in our view, in and of itself, cause the introduction of a licensing regime for funders.

Question 3–3

"*Should third-party litigation funders be required to join the Australian Financial Complaints Authority scheme?*"

18. No. The ALF has established and maintains a complaints procedure which a funded party can invoke if it feels sufficiently aggrieved by a funder's conduct. Since the introduction of such procedure, however, there have been few (if any) significant complaints against ALF members, which we believe lends weight to the argument that there is no need for external regulation of litigation funding. However, if the ALRC nonetheless considers it necessary to introduce an independent complaints mechanism, we believe requiring funders to join the Australian Financial Complaints Authority would be one option. In any event, we believe that, if

considered necessary, an independent complaints mechanism could be introduced without also introducing a licensing regime for litigation funders.

Proposal 4–1

"*If the licensing regime proposed by Proposal 3–1 is not adopted, third-party litigation funders operating in Australia should remain subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248 and should be required to report annually to the regulator on their compliance with the requirement to implement adequate practices and procedures to manage conflicts of interest.*"

19. It is reasonable to expect that funders should be subject to the requirements of Australian Securities Investments Commission Regulatory Guide 248. However, we see no advantage to annual reporting.

Proposal 4–2

"*If the licensing regime proposed by Proposal 3–1 is not adopted, 'law firm financing' and 'portfolio funding' should be included in the definition of a 'litigation scheme' in the Corporations Regulations 2001 (Cth).*"

20. We consider this proposal to be reasonable and acceptable.

Proposal 4–3

"*The Law Council of Australia should oversee the development of specialist accreditation for solicitors in class action law and practice. Accreditation should require ongoing education in relation to identifying and managing actual or perceived conflicts of interests and duties in class action proceedings.*"

21. No comment.

Proposal 4–4

"*The Australian Solicitors' Conduct Rules should be amended to prohibit solicitors and law firms from having financial and other interests in a third-party litigation funder that is funding the same matters in which the solicitor or law firm is acting.*"

22. We agree with this. When advising their clients on funding arrangements (in particular when providing advice on different offers received from different funders), we consider that solicitors and law firms would be better placed to protect the best interest of their clients if the lawyers' own financial interests were not impacted by the clients' decision (for example as to which third party funder to contract with).

Proposal 4–5

"*The Australian Solicitors' Conduct Rules should be amended to require disclosure of third-party funding in any dispute resolution proceedings, including arbitral proceedings.*"

23. We do not believe that disclosure of litigation funding should be mandatory. How a party to litigation finances itself is a private matter which the litigant ought not, in our view, be obliged to share with its opponent. If a corporate claimant were to take a recourse loan from a bank in order to assist its cashflow (including by assisting with the funding of its disputes), it would not be required to disclose that loan to its opponent so why should non-recourse finance from a third-party funder be treated differently?

24. Mandatory disclosure may also give rise to unnecessary satellite disputes (and attempts by parties, e.g. defendants, to defeat litigation through the tactic of attacking the funding arrangement rather than focusing on the dispute in hand. Such satellite disputes would likely drive up the costs of litigation and distract from the core dispute between the parties.

25. If the disclosure of 'litigation funding' does become mandatory, it should in any event be limited, in our view, to (a) the fact that the party to the litigation is funded and, if considered necessary by the relevant tribunal, (b) the identity and contact details of the funder. Under no circumstances should the details of the terms of the particular funding arrangement be disclosable, as they may reveal privileged information, such as the lawyers' or the funder's assessment of the merits, and likelihood of success, of the claim.

26. Disclosure of the information in paragraph 25 may be more merited in arbitration than in litigation, as there is the potential for conflicts between the funder and the arbitrator, which may if not identified in early course jeopardise the validity of any award. However, even in arbitration, a funder would likely (and should) decline to fund any arbitration where such a conflict is likely to arise. For example, Woodsford would not fund an arbitration in which John Beechey, a member of Woodsford's IAP, was an arbitrator if there was a risk of conflict, as it would be contrary to our interests to do so. Similarly, arbitrators are also capable of identifying (and are likely to identify) any potential conflicts of this kind and can decline to act as arbitrator where appropriate to do so.

<u>*Proposal 4–6*</u>

"*The Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended so that the first notices provided to potential class members by legal representatives are required to clearly describe the obligation of legal representatives and litigation funders to avoid and manage conflicts of interest, and to outline the details of any conflicts in that particular case.*"

27. No comment.

<u>*Proposal 5–1*</u>

"*Confined to solicitors acting for the representative plaintiff in class action proceedings, statutes regulating the legal profession should permit solicitors to enter into contingency fee agreements. This would allow class action solicitors to receive a proportion of the sum recovered at settlement or after trial to cover fees and disbursements, and to reward risk. The following limitations should apply:*

- *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;*
- *a contingency fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis; and*
- *under a contingency fee agreement, solicitors must advance the cost of disbursements and indemnify the representative class member against an adverse costs order.*"

28. Woodsford is agnostic regarding the introduction of contingency fees in Australia. Such arrangements in the UK, known as Damages Based Agreements, have been permissible since 1 April 2013. However, to date there has been a relatively low take up rate by lawyers, potentially because a so-called 'hybrid DBA', whereby the lawyers are paid some element of their fees as the matter progresses, are not permitted under the relevant regulations. Accordingly, if contingency fees are to be permitted in Australia in relation to class actions, and to encourage their adoption by lawyers, we would suggest that 'hybrid DBAs' be expressly permitted. That would allow a lawyer to act for the client in return for a proportion of the damages, whilst also receiving some element of its fees, for example from a litigation funder, on an upfront basis (perhaps up to a limit of 50% of the lawyers' hourly rates to ensure that the lawyers are still taking a significant proportion of the risk).

29. We would also stress the importance of the word "directly" in Proposal 5-1. The introduction of contingency fees (whether full or 'hybrid') should not, in any event, fetter a law firm's ability to take 'law firm finance' from a litigation funder (i.e. where the third-party funder funds the law firm and the law firm has a 'direct' contingency arrangement with the litigant). In this manner, the funder would not have a direct relationship with the litigant, but may be considered to be <u>indirectly</u> funding the litigant's proceeding. This type of arrangement should, in our view, be expressly permitted.

<u>*Proposal 5–2*</u>

"*Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended to provide that contingency fee agreements in class action proceedings are permitted only with leave of the Court.*"

30. If a funder's fee or commission in a class action proceeding requires the leave of the Court, we can see no reason why a lawyer's contingency fee arrangement shouldn't also require leave of the Court, particularly in an open class action where the claimant group has not necessarily had the benefit of negotiating the level of the lawyer's contingency fee.

Question 5–1

"*Should the prohibition on contingency fees remain with respect to some types of class actions, such as personal injury matters where damages and fees for legal services are regulated?*"

31. No comment.

Proposal 5–3

"*The Federal Court should be given an express statutory power in Part IVA of the Federal Court of Australia Act 1976 (Cth) to reject, vary or set the commission rate in third-party litigation funding agreements. If Proposal 5–2 is adopted, this power should also apply to contingency fee agreements.*"

32. We do not consider that the Court should have an express statutory power to reject, vary or set the commission rate in third party funding agreements. That is ultimately a commercial matter between the funder and the funded party (particularly where the proceeding is not a representative action). However, the Court should retain the discretion and/or power to select whether or not a particular class action should be allowed to proceed, as that will incentivise funders and lawyers alike to ensure that their financial proposition is competitive and likely to result in a reasonable return to the claimants.

Question 5–2

"*In addition to Proposals 5–1 and 5–2, should there be statutory limitations on contingency fee arrangements and commission rates, for example:*

- *Should contingency fee arrangements and commission rates also be subject to statutory caps that limit the proportion of income derived from settlement or judgment sums on a sliding scale, so that the larger the settlement or judgment sum the lower the fee or rate? or*
- *Should there be a statutory provision that provides, unless the Court otherwise orders, that the maximum proportion of fees and commissions paid from any one settlement or judgment sum is 49.9%?*"

33. We consider that statutory limits on funders' commission rates are not necessary. Funder's commissions in Australia have been on a downwards trend of late as a result of market competition between funders. We believe such market forces are sufficient to ensure that a funder's commission remains competitive and not excessive.

34. We believe the same theory applies to solicitors, i.e. that there is sufficient competition in the legal market to ensure that the rates in lawyers' contingency fee agreements are competitive and not excessive. However, in England and Wales, statutory caps on DBA returns do exist (although 'expenses' as defined in the DBA Regulations can be payable in addition to the DBA percentage) and we have no objection to their introduction in respect of contingency fee agreements.

Question 5–3

"*Should any statutory cap for third-party litigation funders be set at the same proportional rate as for solicitors operating on a contingency fee basis, or would parity affect the viability of the third-party litigation funding model?*"

35. In putting their fees at risk, solicitors are not taking the same level of risk as a third party funder. Whilst the solicitor agrees to forgo payment for a period of time, a funder is required to pay funds out externally. As a solicitor's level of risk is different from a funder's level of risk, it would in our view be inappropriate to limit litigation funders at the same proportional rate as solicitors.

36. As above, we consider that market forces, coupled with Court supervision, are sufficient to ensure that Funder's commission rates remain competitive and not excessive.

Question 5–4

"*What other funding options are there for meritorious claims that are unable to attract third-party litigation funding? For example, would a 'class action reinvestment fund' be a viable option?*"

37. No comment.

Proposal 6–1

"*Part IVA of the Federal Court of Australia Act 1976 (Cth) should be amended so that:*

- *all class actions are initiated as open class actions;*
- *where there are two or more competing class actions, the Court must determine which one of those proceedings will progress and must stay the competing proceeding(s), unless the Court is satisfied that it would be inefficient or otherwise antithetical to the interest of justice to do so;*
- *litigation funding agreements with respect to a class action are enforceable only with the approval of the Court; and*
- *any approval of a litigation funding agreement and solicitors' costs agreement for a class action is granted on the basis of a common fund order.*"

38. We support the proposal that all class actions should be initiated (and maintained) as open class actions. As matters currently stand, there is confusion as to whether a closed class action (where a significant book of claimants has been built) should prevail over a competing open class action application or vice versa and/or be allowed to run alongside one another. Different results have occurred in the *Bellamy* and *GetSwift* cases and we believe that the market would benefit from more certainty in this regard.

39. We support the proposal that the Court should determine which proceeding should progress in a competing class action situation and that only one (whether open or closed) should be allowed to proceed.

40. We also support the latter two proposals in Proposal 6-1.

Proposal 6–2

"*In order to implement Proposal 6-1, the Federal Court of Australia's Class Action Practice Note (GPN-CA) should be amended to provide a further case management procedure for competing class actions.*"

41. We support this proposal, as we believe it will help to bring clarity to the current class action regime.

Question 6–1

"*Should Part 9.6A of the Corporations Act 2001 (Cth) and s 12GJ of the Australian Securities and Investments Commission Act 2001 (Cth) be amended to confer exclusive jurisdiction on the Federal Court of Australia with respect to civil matters, commenced as representative proceedings, arising under this legislation?*"

42. Yes. The current dispute in the proceedings against *AMP* regarding which Court (State or Federal) has jurisdiction, in our view, highlights the need for such a provision.

Proposal 7–1

"*Part 15 of the Federal Court of Australia's Class Action Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.*"

43. We support this proposal.

Question 7–1

"*Should settlement administration be the subject of a tender process? If so:*

- *How would a tender process be implemented?*
- *Who would decide the outcome of the tender process?*"

44. No comment.

Question 7–2

"*In the interests of transparency and open justice, should the terms of class action settlements be made public? If so, what, if any, limits on the disclosure should be permitted to protect the interests of the parties?*"

45. We consider that settlements should remain confidential to the parties involved. To remove such confidentiality may encourage certain parties, particularly defendants, not to settle.

Proposal 8–1

"The Australian Government should consider establishing a federal collective redress scheme that would enable corporations to provide appropriate redress to those who may be entitled to a remedy, whether under the general law or pursuant to statute, by reason of the conduct of the corporation. Such a scheme should permit an individual person or business to remain outside the scheme and to litigate the claim should they so choose."

46. No comment.

Question 8–1

"What principles should guide the design of a federal collective redress scheme?"

47. No comment.

3 August 2018